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# **Civil Justice & Courts Policy Committee**

**Tuesday, March 16, 2010  
8:00 AM - 10:00 AM  
Reed Hall**

**Meeting Packet**

**Larry Cretul  
Speaker**

**Carl J. Domino  
Chair**

# Committee Meeting Notice

## HOUSE OF REPRESENTATIVES

### Civil Justice & Courts Policy Committee

**Start Date and Time:** Tuesday, March 16, 2010 08:00 am

**End Date and Time:** Tuesday, March 16, 2010 10:00 am

**Location:** Reed Hall (102 HOB)

**Duration:** 2.00 hrs

#### Consideration of the following bill(s):

CS/HB 501 Estates and Trusts by Insurance, Business & Financial Affairs Policy Committee, Hukill

HB 887 Adverse Possession by Schultz

HB 1107 Sovereign Immunity by Nehr

HB 1159 Veterans' Guardianship by Hukill

HB 1179 Electronic Documents Recorded in the Official Records by Grimsley

HB 1237 Probate Procedures by Hukill

HB 1523 Homeowner Relief by Grady

**NOTICE FINALIZED on 03/12/2010 16:19 by Ingram.Michele**



# **The Florida House of Representatives**

**Criminal & Civil Justice Policy Council**

**Civil Justice & Courts Policy Committee**

**Larry Cretul**  
Speaker

**Carl J. Domino**  
Chair

**March 16, 2010**

## **AGENDA**

**8:00 AM – 10:00 AM**

**Reed Hall**

### **I. Call Meeting to Order**

### **II. Consideration of Bills**

**CS/HB 501 Estates and Trusts by Hukill**

**HB 887 Adverse Possession by Schultz**

**HB 1107 Sovereign Immunity by Nehr**

**HB 1159 Veterans' Guardianship by Hukill**

**HB 1179 Electronic Documents Recorded in the Official Records  
by Grimsley**

**HB 1237 Probate Procedures by Hukill**

**HB 1523 Homeowner Relief by Grady**

### **III. Adjourn**



# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 501                      Estates and Trusts  
**SPONSOR(S):** Insurance, Business & Financial Affairs Policy Committee; Hukill  
**TIED BILLS:**                                  **IDEN./SIM. BILLS:** SB 926

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Insurance, Business & Financial Affairs Policy Committee	12 Y, 1 N, As CS	Reilly	Cooper
2)	Civil Justice & Courts Policy Committee		Thomas	De La Paz
3)	General Government Policy Council			
4)				
5)				

## SUMMARY ANALYSIS

An irrevocable life insurance trust (ILIT) is an estate planning tool that is used to exclude a life insurance policy from the insured's estate. With an ILIT, a trust owns the life insurance policy, which is payable to the trust upon the insured's death. The settlor of the trust selects the insurance company, the type of life insurance policy to be purchased, the trustee, the trust beneficiaries, and pays premiums for the policy through the trust.

A trustee's duties are set forth in ch. 736, F.S. A trustee has a duty to administer the trust solely in the interests of the beneficiaries. A trustee is subject to the prudent investor rule, s. 518.11, F.S., and must invest and manage trust assets as a prudent investor would.

The bill creates s. 736.092, F.S., "Nonapplication of prudent investor rule." The section relieves trustees of ILITs from certain duties relating to life insurance policies insuring the life of a "qualified person," and exempts trustees from liability to trust beneficiaries for losses sustained as to these policies. Specifically, absent contrary language in the trust instrument, when the insured or proposed insured or that person's spouse provides the trustee with funds to acquire or pay premiums for life insurance policies insuring such person and/or their spouse, the trustee has no duty to determine whether the life insurance contract is/was procured or effected in compliance with insurable interest law. If the trust instrument, by reference, makes this section applicable to such policies or qualified beneficiaries are given notice of its applicability, the trustee is also relieved of the following duties, unless the trust instrument provides otherwise:

- To determine whether any life insurance contract is or remains a proper investment.
- To investigate the financial strength of the life insurance company.
- To determine whether to exercise any policy option available under the life insurance contract.
- To diversify any life insurance contract or diversify the trust assets with respect to the life insurance contract.
- To inquire about or investigate the health or financial condition of any insured.

When a qualified beneficiary objects in writing within 30 days, the trustee remains responsible for all duties listed in s. 736.092, F.S., except for determining whether the life insurance contract complies with insurable interest requirements, until the objection is withdrawn. The section does not apply to life insurance policies purchased from an affiliate of the trustee or from which the trustee or an affiliate received any commission, unless the trustee's duties have been delegated under s. 518.112, F.S. A trustee remains responsible for determining whether he/she has an insurable interest in a life insurance policy insuring a qualified person if the trustee purchases or accepts ownership of the policy with knowledge that insurable interest standards have been violated.

The bill also expands the list of investment functions that fiduciaries that administer life insurance contracts can delegate under s. 518.112, F.S., to include all duties specified in s. 736.092, F.S., and corrects inconsistencies in the notice provisions of the Prudent Investor Act, the Trust Code, and the Probate Code. The bill is effective upon becoming law and does not appear to have a fiscal impact on state or local governments.

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

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DATE: 3/12/2010

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Trusts**

A trust is generally defined as:

a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it....<sup>1</sup>

A valid trust involves specific property, reflects the settlor's intent, and is created for a lawful purpose.<sup>2</sup> There must be a trustee, a beneficiary, and trust property.<sup>3</sup> The Florida Trust Code, ch. 736, F.S., defines a "settlor" as a person who creates or contributes property to a trust, and includes a testator; a "beneficiary" as a person who has a present or future beneficial interest in a trust or who holds a power of appointment over trust property in a capacity other than trustee; and "trustee" as the original trustee, any additional trustee, any successor trustee, and any cotrustee.

##### **Duties of Trustees**

A trustee has a duty to administer the trust solely in the interests of the beneficiaries.<sup>4</sup> Specific duties include the duty of loyalty; to administer the trust impartially when there are multiple beneficiaries; to administer the trust prudently; to incur only reasonable expenses; and to use special skills.

As fiduciaries,<sup>5</sup> trustees are subject to the prudent investor rule, s. 518.11, F.S., which details a fiduciary's duty to invest and manage investment assets.<sup>6</sup> Briefly, the prudent investor rule requires a fiduciary to:

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<sup>1</sup> 55A Fla. Jur. 2d Trusts s. 1.

<sup>2</sup> Black's Law Dictionary 1647 (9th ed. 2009).

<sup>3</sup> *Id.* at 1648, citing Restatement (Third) of Trusts s. 2 cmt. f (2003).

<sup>4</sup> See generally s. 736.0802(1), F.S.

<sup>5</sup> A fiduciary is defined as a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor. See Black's Law Dictionary, *supra* note 2, at 702.

<sup>6</sup> See generally s. 518.11(1), F.S.

- Invest and manage investment assets as a prudent investor would.
- Diversify investments, unless it is reasonably believed that diversification is not in the beneficiary's interests and does not further the purposes of the trust.
- Review the investment portfolio within a reasonable time after acceptance of the trust, and make and implement decisions concerning preexisting investments.
- Pursue an investment strategy that considers both the reasonable production of income and safety of capital, consistent with the fiduciary's duty of impartiality and the purposes of the trust.

In making investment decisions, fiduciaries may consider factors such as general economic strategies, the role each investment plays within the overall portfolio, the expected total return, and the duty to incur only reasonable and appropriate costs. These decisions are to be judged in terms of the fiduciary's reasonable business judgment concerning the anticipated effect on the investment portfolio as a whole based on prevailing facts and circumstances at the time of the action or decision.

## **Irrevocable Life Insurance Trusts**

An irrevocable life insurance trust (ILIT) is a common estate planning tool that can be used to exclude a life insurance policy from an insured's estate for tax purposes. With an ILIT, a trust, rather than the insured, owns the life insurance policy, which is payable to the trust upon the insured's death.<sup>7</sup> The settlor of the trust selects the insurance company, the specific type of life insurance policy to be purchased, the trustee, the beneficiaries of the trust, and pays premiums for the policy through the trust.<sup>8</sup> An ILIT can be funded by the transfer of existing life insurance policies to the trust<sup>9</sup> or the trustee may apply for the policies as the original owner.<sup>10</sup> When the trustee applies for the policy, premiums are paid through the trust by funds provided by the settlor.

Pursuant to s. 518.112(2)(a), F.S., fiduciaries that administer insurance contracts on the lives of others are authorized to delegate certain investment functions with respect to these insurance contracts to an investment agent and do not have a continuing obligation to review the agent's actions. With respect to trusts, upon providing 30 days' written notice to trust beneficiaries eligible to receive distributions from the trust (or their legal representatives),<sup>11</sup> a trustee may delegate the responsibilities for:

- Determining whether any insurance contract is or remains a proper investment.
- Determining whether or not to exercise available policy options.
- Determining whether or not to diversify such contracts relative to one another or to other assets administered by the fiduciary.
- Inquiring about changes in the health or financial condition of the insured or insureds relative to any such contract.

## **Life Insurance Policies Insuring a Person Other than the Owner**

### Insurable Interest Requirement

A person with legal capacity may insure his/her life for the benefit of any other person. However, when a person seeks to insure the life of another person, benefits under the policy must be payable to the insured, the insured's personal representative, or a person with a sufficient interest, known as an "insurable interest,"<sup>12</sup> in the continued life or health of the insured. The insurable interest must exist at

<sup>7</sup> 13 Brian V. McAvoy et al., *Florida Estate Planning* 463 (2007-08 ed.).

<sup>8</sup> Estate and Trust Tax Committee, Real Property, Probate and Trust Law Section of the Florida Bar, "Fiduciary Duties in Insurance Trusts" (2009). A copy of the white paper is on file with the Insurance, Business & Financial Affairs Policy Committee.

<sup>9</sup> When life insurance policies are transferred to an ILIT, the insured must live for at least three years after the transfer for the proceeds of any transferred policy to be excluded from the insured's estate. See McAvoy et al., *supra* note 7, at 464. See also 26 USC 2035.

<sup>10</sup> See McAvoy et al., *supra* note 7, at 463.

<sup>11</sup> Unless notice is waived by the beneficiaries.

<sup>12</sup> A detailed history of the insurable interest requirement is provided in the Florida Office of Insurance Regulation's report, "Stranger-Originated Life Insurance ('STOLI') and the Use of Fraudulent Activity to Circumvent the Intent of Florida's Insurable Interest Law" (January 2009). Available at: <http://www.flor.com> (last accessed February 8, 2010).

the time the contract is made, but can subsequently cease to exist without affecting the validity of the policy.<sup>13</sup> The insurable interest requirement prevents a person from purchasing a life insurance policy on the life of another when the only effect of the policy would be to enrich a beneficiary who is disinterested in the continued life or health of the insured; thus, creating an incentive for the beneficiary to bring about the demise of the insured. Such transactions are considered “wagering contracts,” and are void as contrary to public policy.<sup>14</sup>

Section 627.404, F.S., lists interests that create an insurable interest for purposes of life, health, and disability insurance policies. These include:

- A trust, or the trustee of a trust, has an insurable interest in the life of an individual insured under a life insurance policy owned by the trust, or the trustee of the trust acting in a fiduciary capacity, if the insured is the grantor<sup>15</sup> of the trust; an individual closely related by blood or law to the grantor; or an individual in whom the grantor otherwise has an insurable interest, if... the life insurance proceeds are primarily for the benefit of trust beneficiaries having an insurable interest in the life of the insured.
- A guardian, trustee, or other fiduciary, acting in a fiduciary capacity, has an insurable interest in the life of any person for whose benefit the fiduciary holds property, and in the life of any other individual in whose life the person has an insurable interest so long as the life insurance proceeds are primarily for the benefit of persons having an insurable interest in the life of the insured.

Individuals also have an insurable interest in themselves; in close family members in whom they have a substantial interest engendered by love and affection; and in another person if there is the expectation of a substantial pecuniary advantage in the continued life, health and safety of that other person or that the individual will have a substantial pecuniary loss upon the death, illness or disability of that other person. Parties to the contract for the purchase or sale of a business entity have an insurable interest in the lives of other parties to the contract solely for purposes of the contract. Charitable organizations have an insurable interest in the life of any person who consents in writing to the organization’s ownership or purchase of insurance on that person, and employee benefit and retirement plans have an insurable interest in the life of any plan participant who consents in writing to issuance of a policy insuring that participant. Business entities have an insurable interest in owners of the business and key employees if the person’s written consent is obtained before the insurance is purchased.

### Stranger-Originated Life Insurance (STOLI) Policies<sup>16</sup>

In a STOLI transaction, a person with no insurable interest in another persuades the other person (generally a senior citizen) to obtain life insurance with the understanding that after a certain time the insured will sell the policy to the stranger. In Florida, STOLI promoters generally wait two years before selling the policy in the secondary market.<sup>17</sup> Typically, STOLI promoters and investors will establish an irrevocable trust to obtain a premium finance loan, obtain an insurance policy on the senior citizen, and pay the life insurance policy premiums for two years. Additionally, the person to be insured may be offered a significant cash payment when they allow the policy to be sold to a viatical settlement provider.

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<sup>13</sup> Accordingly, viatical settlement transactions are permissible. In these transactions, a person who has purchased life insurance in good faith as life insurance, with no prearrangement to sell the policy to another, later decides to sell the policy to another for less than the expected death benefit under the policy.

<sup>14</sup> Florida Office of Insurance Regulation, *supra* note 12, at 7.

<sup>15</sup> Grantor is defined in s. 731.201(19), F.S., as one who creates or adds to a trust, and includes “settlor” or “trustor” and a testator who creates or adds to a trust.

<sup>16</sup> Florida Office of Insurance Regulation, *supra* note 12, at 12.

<sup>17</sup> Section 626.99287, F.S., provides that viatical settlement contracts entered into within two years of when the insurance policy was issued are void and unenforceable by either party (subject to certain exemptions).



The Office of Insurance Regulation (OIR) held a public informational hearing on STOLIs on August 28, 2008 and issued its report in January 2009.<sup>18</sup> Based on the testimony presented at the hearing, the OIR reported that STOLI transactions may involve varying degrees of insurance fraud and the violation of laws that were intended to protect consumers. Further, STOLI transactions were found to harm senior consumers<sup>19</sup> as follows:

- Seniors may exhaust their life insurance purchasing capability.
- The incentives used to lure seniors to participate in STOLI schemes are taxable as ordinary income.
- Seniors may subject themselves or their estates to potential liability if the life insurance policy is rescinded by an insurer who discovers fraud.
- Seniors may encounter unexpected tax liability from the sale of the life insurance policy.
- The premiums paid by the promoters, which may be represented as providing the senior with “free” insurance, may subject the senior to tax based on the economic value of the coverage.
- Seniors must give the purchaser, and subsequent purchasers, access to their medical records when they sell their life insurance policy in the secondary market.
- STOLIs may lead to an increase in insurance rates for the over 65 population.

### **Effect of the Bill**

The bill creates s. 736.092, F.S., of the Florida Trust Code, “Nonapplication of prudent investor rule.” The section relieves trustees of ILITs from certain duties relating to life insurance policies acquired or retained by the trust that insure the life of a “qualified person,”<sup>20</sup> and exempts trustees from liability to trust beneficiaries and others for losses sustained with respect to life insurance policies to which the section applies. Specifically, unless otherwise provided in the trust instrument, when the insured or proposed insured or that person’s spouse has provided the trustee with funds that are used to acquire or pay premiums for life insurance policies that insure such person and/or their spouse, the trustee does not have a duty to determine whether the life insurance contract is/was procured or effected in compliance with insurable interest law.

Further, if the trust instrument, by reference, makes s. 736.092, F.S., applicable to these life insurance contracts or the trustee provides notice to qualified beneficiaries<sup>21</sup> (or their representatives) of the section’s applicability, the trustee may also be relieved of the following duties, unless the trust provides otherwise:

- To determine whether any life insurance contract is or remains a proper investment.
- To investigate the financial strength of the life insurance company.
- To determine whether to exercise any policy option available under the life insurance contract.
- To diversify any such life insurance contract or diversify the trust assets with respect to the life insurance contract.
- To inquire about or investigate the health or financial condition of any insured or insureds.

Notice must be provided pursuant to s. 736.0109, F.S., (which permits notice to be sent by first-class mail, personal delivery, delivery to the person’s last known place of residence or place of business, or a properly directed facsimile or other electronic message, among other means). The bill also creates a

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<sup>18</sup> Florida Office of Insurance Regulation, *supra* note 12.

<sup>19</sup> 17.6% of Floridians are 65 years of age or older. See U.S. Census Bureau, “The 65 Years and Over Population; 2000,” Census 2000 Brief, issued October 2001. Found at: <http://www.census.gov> (last accessed February 11, 2010).

<sup>20</sup> A “qualified person” is a person who is either insured or a proposed insured, or the spouse of that person, who has provided the trustee with funds that are used to acquire or pay premiums with respect to a policy of insurance on the life of that person or the spouse of that person, or on the lives of that person and the spouse of that person.

<sup>21</sup> A “qualified beneficiary” is a living beneficiary who, on the date the beneficiary’s qualification is determined: (a) Is a distributee or permissible distributee of trust income or principal; (b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or (c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date. See s. 736.0103(14), F.S.

rebuttable presumption that notice sent by United States mail is received 3 days after it has been mailed with proper postage.

If a qualified beneficiary (or their representative) objects in writing within 30 days of receiving notice, the trustee remains responsible for all duties listed in s. 736.092, F.S., except for determining whether the life insurance contract is/was procured or effected in compliance with insurable interest law, until the objection is withdrawn.

Section 736.092, F.S., does not apply to any life insurance policy purchased from an affiliate of the trustee<sup>22</sup> or from which the trustee or an affiliate receives any commission, unless the trustee's duties have been delegated to another person in accordance with s. 518.112, F.S. Additionally, a trustee remains responsible for determining whether he/she has an insurable interest in a life insurance policy insuring a qualified person if the trustee purchases or accepts ownership of the policy with knowledge that insurable interest standards have been violated.

The bill also expands the list of investment functions that fiduciaries that administer life insurance contracts on the lives of others are authorized to delegate to an investment agent under s. 518.112, F.S., without a continuing obligation to review the investment agent's actions. The bill includes as delegable investment functions responsibility for determining whether the insurance contract was procured or effected in compliance with s. 627.404, F.S., the insurable interest statute, and for investigating the financial strength of the life insurance company. Thus, all duties from which a trustee may be relieved under s. 736.092, F.S., are also delegable under s. 518.112, F.S. Additionally, the notice provisions of s. 518.112, F.S., have been amended to eliminate inconsistencies in existing law and to require fiduciaries to provide written notice of their intention to begin delegating investment functions as provided in part III of ch. 731, F.S., as to estates and in accordance with s. 736.0109, F.S., and part III of ch. 736, F.S., as to trusts.

**B. SECTION DIRECTORY:**

**Section 1.** Amends s. 518.112, F.S., relating to delegation of investment functions.

**Section 2.** Creates s. 736.092, F.S., relating to "nonapplication of prudent investor rule."

**Section 3.** Provides for the bill to take effect upon becoming law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

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<sup>22</sup> Under the bill, an "affiliate" of the trustee is defined as any person who controls, is controlled by, or is under common control with the trustee.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that the bill encourages the formation of trusts in Florida, it may have a positive financial impact.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

On March 3, 2010, the Insurance, Business & Financial Affairs Policy Committee adopted five amendments, which made the following changes:

- Amends the bill title to read "an act relating to estates and trusts."
- Clarifies the scope of a trustee's authority to delegate responsibility for determining whether a life insurance policy complies with insurable interest requirements by making specific reference to the insurable interest statute, s. 627.404, F.S.
- Clarifies a provision that relieves a trustee of the duty to determine whether he/she has an insurable interest in a life insurance policy insuring a "qualified person" by making specific reference to the insurable interest statute, s. 627.404, F.S.
- Expands the definition of "qualified person" to include a proposed insured.
- Provides that a trustee remains responsible for determining whether he/she has an insurable interest in a life insurance policy insuring a qualified person, if the trustee purchases or accepts ownership of the life insurance policy with knowledge that insurable interest standards have been violated.



29 1. A determination of whether any insurance contract is or  
30 remains a proper investment;

31 2. A determination of whether or not to exercise any  
32 policy option available under any insurance ~~such~~ contracts;

33 3. A determination of whether or not to diversify such  
34 contracts relative to one another or to other assets, if any,  
35 administered by the fiduciary; ~~or~~

36 4. An inquiry about changes in the health or financial  
37 condition of the insured or insureds relative to any such  
38 contract;~~-~~

39 5. A determination of whether the insurance contract was  
40 procured or effected in compliance with s. 627.404; or

41 6. An investigation of the financial strength of the life  
42 insurance company.

43 (3) A fiduciary may delegate investment functions to an  
44 investment agent under subsection (1) or subsection (2), if:

45 (b) In the case of a trust or estate, the fiduciary has  
46 given written notice, of its intention to begin delegating  
47 investment functions under this section, to all beneficiaries,  
48 or their legal representative, eligible to receive distributions  
49 from the trust or estate within 30 days of the delegation unless  
50 such notice is waived by the eligible beneficiaries entitled to  
51 receive such notice. This notice shall thereafter, until or  
52 unless the beneficiaries eligible to receive income from the  
53 trust or distributions from the estate at the time are notified  
54 to the contrary, authorize the trustee or legal representative  
55 to delegate investment functions pursuant to this subsection.  
56 This discretion to revoke the delegation does not imply under

57 subsection (2) any continuing obligation to review the agent's  
58 actions.

59 1. Notice to beneficiaries eligible to receive  
60 distributions from the trust from the estate, or their legal  
61 representatives shall be sufficient notice to all persons who  
62 may join the eligible class of beneficiaries in the future.

63 2. Additionally, as used herein, legal representative  
64 includes one described in s. 731.303, without any requirement of  
65 a court order, an attorney-in-fact under a durable power of  
66 attorney sufficient to grant such authority, a legally appointed  
67 guardian, or equivalent under applicable law, any living,  
68 natural guardian of a minor child, or a guardian ad litem.

69 3. Written notice shall be given as provided in part III  
70 of chapter 731 as to an estate and as provided in s. 736.0109  
71 and part III of chapter 736 as to a trust.+

72 ~~a. By any form of mail or by any commercial delivery~~  
73 ~~service, approved for service of process by the chief judge of~~  
74 ~~the judicial circuit in which the trust has its principal place~~  
75 ~~of business at the date of notice, requiring a signed receipt;~~

76 ~~b. As provided by law for service of process; or~~

77 ~~e. By an elisor as may be provided in the Florida Rules of~~  
78 ~~Civil Procedure.~~

79

80 ~~Notice by mail or by approved commercial delivery service is~~  
81 ~~complete on receipt of notice. Proof of notice must be by~~  
82 ~~verified statement of the person mailing or sending notice, and~~  
83 ~~there must be attached thereto the signed receipt or other~~  
84 ~~satisfactory evidence that delivery was effected on the~~

85 ~~addressee or on the addressee's agent. Proof of notice must be~~  
 86 ~~maintained among the trustee's permanent records.~~

87 Section 2. Section 736.0902, Florida Statutes, is created  
 88 to read:

89 736.0902 Nonapplication of prudent investor rule.-

90 (1) Notwithstanding the provisions of s. 518.11 or s.  
 91 736.0804, with respect to any contract of life insurance  
 92 acquired or retained on the life of a qualified person, a  
 93 trustee has no duty to:

94 (a) Determine whether the contract of life insurance is or  
 95 was procured or effected in compliance with s. 627.404;

96 (b) Determine whether any contract of life insurance is or  
 97 remains a proper investment;

98 (c) Investigate the financial strength of the life  
 99 insurance company;

100 (d) Determine whether to exercise any policy option  
 101 available under the contract of life insurance;

102 (e) Diversify any such contract of life insurance or  
 103 diversify the assets of the trust with respect to the contract  
 104 of life insurance; or

105 (f) Inquire about or investigate the health or financial  
 106 condition of any insured or insureds.

107 (2) As used in this section, the term "qualified person"  
 108 means a person who is insured or is a proposed insured, or the  
 109 spouse of that person, who has provided the trustee with the  
 110 funds that are used to acquire or pay premiums with respect to a  
 111 policy of insurance on the life of that person or the spouse of  
 112 that person, or on the lives of that person and the spouse of

113 | that person.

114 |       (3) In all cases in which this section applies, the  
 115 | trustee is not liable to the beneficiaries of the trust or any  
 116 | other person for any loss sustained with respect to such  
 117 | contract of life insurance.

118 |       (4) Unless otherwise provided in the trust instrument,  
 119 | paragraph (1)(a) applies to any contract of life insurance on  
 120 | the life of a qualified person.

121 |       (5) Unless otherwise provided in the trust instrument,  
 122 | paragraphs (1)(b)-(f) apply if:

123 |       (a) The trust instrument, by reference to this section,  
 124 | makes this section applicable to contracts of life insurance  
 125 | held by the trust; or

126 |       (b) The trustee has provided notice that this section  
 127 | applies to a contract of life insurance held by the trust. For  
 128 | any notice provided under this paragraph:

129 |       1. The notice shall be given to the qualified  
 130 | beneficiaries and shall contain a copy or restatement of this  
 131 | section.

132 |       2. A notice given to a person who represents the interests  
 133 | of any of the persons set forth in subparagraph 1., pursuant to  
 134 | any of the provisions of part III of this chapter, shall be  
 135 | treated as notice to the person so represented.

136 |       3. The notice shall be provided pursuant to s. 736.0109.

137 |       4. If any person notified pursuant to this paragraph  
 138 | objects to the application of this section in a writing  
 139 | delivered to the trustee within 30 days after the date such  
 140 | notice was received, paragraphs (1)(b)-(f) shall not apply until



141 | the objection is withdrawn.

142 |       5. There is a rebuttable presumption that any notice sent  
 143 | by United States mail is received 3 days after placing the  
 144 | notice in the United States mail with proper postage paid.

145 |       (6) This section does not apply to any contract of life  
 146 | insurance purchased from any affiliate of the trustee or with  
 147 | respect to which the trustee or any affiliate of the trustee  
 148 | receives any commission unless the trustee's duties have been  
 149 | delegated to another person in accordance with s. 518.112. For  
 150 | purposes of this subsection, the term "affiliate" of the trustee  
 151 | means any person who controls, is controlled by, or is under  
 152 | common control with the trustee.

153 |       (7) Paragraph (1)(a) shall not apply if the trustee  
 154 | applied for or accepted ownership of a contract of life  
 155 | insurance and the trustee had knowledge that:

156 |       (a) The benefits were not payable to a person specified in  
 157 | s. 627.404 when the contract of life insurance was issued; or

158 |       (b) The contract of life insurance is or was purchased  
 159 | with resources or guarantees directly or indirectly provided by  
 160 | a person who, at the time of the inception of the contract of  
 161 | life insurance, did not have an insurable interest in the  
 162 | insured as defined by s. 627.404, and, at the time of the  
 163 | inception of the contract of life insurance, there is a verbal  
 164 | or written arrangement, agreement, or plan with a third party to  
 165 | transfer ownership of the policy or policy benefits in a manner  
 166 | that would be in violation of the laws of this state.

167 |       Section 3. This act shall take effect upon becoming a law.



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 887

Adverse Possession

SPONSOR(S): Schultz

TIED BILLS: None

IDEN./SIM. BILLS: SB 292; SB 2234

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee		Bond <i>MB</i>	De La Paz <i>[Signature]</i>
2)	Criminal & Civil Justice Policy Council			
3)				
4)				
5)				

SUMMARY ANALYSIS

Adverse possession is a method of acquiring title to real property by possession for a period of time. To acquire title by adverse possession without color of title (without having a deed or other recorded document), a claimant must openly possess the real property, must pay all taxes for a period of seven years, and must have filed a return of the land for taxes during the first year of occupation. Current law does not require any notice to the owner who previously paid the taxes.

This bill adds a requirement related to adverse possession without color of title. The bill requires that a person who files a return for taxes with the intent of claiming the property by adverse possession must give notice to the property owner within 15 days of filing the return.

This bill does not appear to have a fiscal impact on state or local governments.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Adverse possession is a method of acquiring title to real property by possession for a period of time. There are several means by which adverse possession of real property can lead to title to real property. To acquire title by adverse possession without color of title (without having a deed or other recorded document), section 95.18, F.S., provides that a claimant must:

- Show open, continuous, and hostile possession;
- Pay all taxes for a period of seven years; and
- Must file a return of the land for taxes during the first year of occupation.

#### Origins of Adverse Possession

The doctrine of adverse possession "dates back at least to sixteenth century England and has been an element of American law since the country's founding."<sup>1</sup> The first adverse possession statute appeared in the United States in North Carolina in 1715.<sup>2</sup>

Adverse possession is defined as "[a] method of acquisition of title to real property by possession for a statutory period under certain conditions."<sup>3</sup> An adverse possessor must generally establish five elements in relationship to possession. The possession must be:

- Open;
- Continuous for the statutory period;
- For the entirety of the area;
- Adverse to the record owner's interests; and
- Notorious.<sup>4</sup>

In most jurisdictions, state statutory law prescribes the limitations period – the period in which the record owner must act to preserve his or her interests in the property – while the state's body of common law governs the nature of use and possession necessary to trigger the running of the statutory

<sup>1</sup> Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 286 (Spring 2006).

<sup>2</sup> Brian Gardiner, *Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT'L & COMP. L. REV. 119, 129 (1997).

<sup>3</sup> *Id.* at 122 (quoting BLACK'S LAW DICTIONARY 53 (6th ed. 1990)).

<sup>4</sup> *Id.*

time period.<sup>5</sup> As legal scholars have noted, “[a]dverse possession decisions are inherently fact-specific.”<sup>6</sup> Therefore, an adverse possessor must establish “multiple elements whose tests are elastic and provide the trier of fact with flexibility and discretion.”<sup>7</sup>

## Adverse Possession in Florida

In Florida, there are two ways to acquire land by adverse possession, which are prescribed by statute.<sup>8</sup> First, an individual adversely occupying property may claim property under color of title if he or she can demonstrate that the claim to title is the derivative of a recorded written document and that he or she has been in possession of the property for at least seven years.<sup>9</sup> It is irrelevant whether the recorded document is legally valid or is fraudulent or faulty. To demonstrate possession, the adverse possessor must prove that he or she cultivated or improved the land, or protected the land by a substantial enclosure.<sup>10</sup> Alternatively, in the event a person occupies land continuously without color of title – i.e., without any legal document to support a claim for title – the person may seek title to the property by filing a return with the county property appraiser’s office within one year of entry onto the property, and paying all property taxes and any assessed liens during the possession of the property for seven consecutive years.<sup>11</sup> Similar to claims made with color of title, the adverse possessor may demonstrate possession of the property by showing that he or she:

- Protected the property by a substantial enclosure (typically a fence); or
- Cultivated or improved the property.<sup>12</sup>

Florida courts have noted that “[p]ublic policy and stability of our society . . . requires strict compliance with the appropriate statutes by those seeking ownership through adverse possession.”<sup>13</sup> Adverse possession is not favored, and all doubts relating to the adverse possession claim must be resolved in favor of the property owner of record.<sup>14</sup> The adverse possessor must prove each essential element of an adverse possession claim by clear and convincing evidence.<sup>15</sup> Therefore, the adverse possession claim cannot be “established by loose, uncertain testimony which necessitates resort to mere conjecture.”<sup>16</sup>

## Abuse of the Adverse Possession Process

Despite certain policy considerations supporting the application of adverse possession in Florida,<sup>17</sup> abuse of the statute may be occurring in certain contexts because the adverse possessor may acquire

<sup>5</sup> Klass, *supra* note 1, at 287.

<sup>6</sup> Geoffrey P. Anderson and David M. Pittinos, *Adverse Possession After House Bill 1148*, 37 COLO. LAW 73, 74 (Nov. 2008).

<sup>7</sup> *Id.*

<sup>8</sup> *Candler Holdings Ltd. I v. Watch Omega Holdings, L.P.*, 947 So. 2d 1231, 1234 (Fla. 1st DCA 2007). In addition to adverse possession, a party may gain use of adversely possessed property by acquiring a prescriptive easement upon a showing of 20 years of adverse use.

<sup>9</sup> Section 95.16, F.S. See also *Bonifay v. Dickson*, 459 So. 2d 1089 (Fla. 1st DCA 1984). The Florida Legislature, by acts now embodied in statute, reduced the period of limitations as to adverse possession to seven years but left at 20 years the period for acquisition of easements by prescription. *Crigger v. Florida Power Corp.*, 436 So. 2d 937, 945 (Fla. 5th DCA 1983).

<sup>10</sup> Section 95.16, F.S.

<sup>11</sup> Section 95.18(1), F.S. The 1939 Legislature added to what is now s. 95.18(1), F.S., a provision which required that an adverse possessor without color of title must file a tax return and pay the annual taxes on the property during the term of possession. Chapter 19254, s. 1, Laws of Fla. (1939). A 1974 amendment to the statute eliminated the requirement that taxes be paid annually. Chapter 74-382, s. 1, Laws of Fla.

<sup>12</sup> Section 95.18(2), F.S.

<sup>13</sup> *Candler Holdings Ltd. I*, 947 So. 2d at 1234.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (citing *Bailey v. Hagler*, 575 So. 2d 679, 681 (Fla. 1st DCA 1991)).

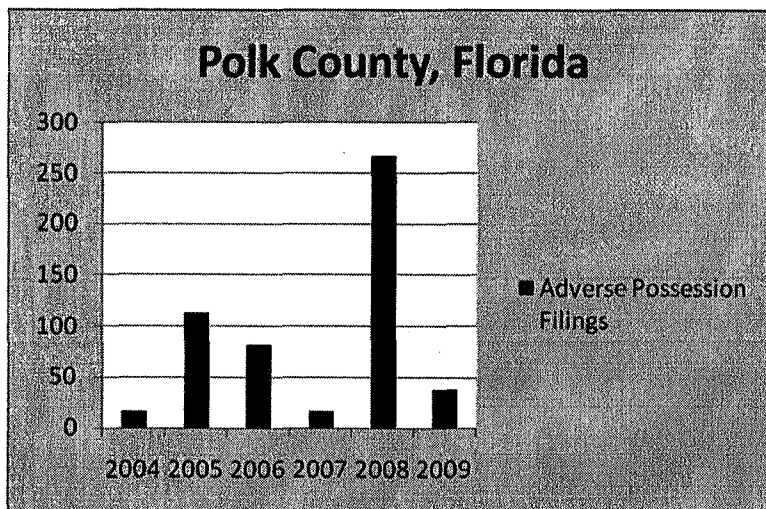
<sup>16</sup> *Id.* (quoting *Grant v. Strickland*, 385 So. 2d 1123, 1125 (Fla. 1st DCA 1980)).

<sup>17</sup> See Comm. on Judiciary, Fla. Senate, *Review of the Requirements for Acquiring Title to Real Property through Adverse Possession* (Interim Report 2010-123) (Oct. 2009), 2, available at [http://www.flsenate.gov/data/Publications/2010/Senate/reports/interim\\_reports/pdf/2010-123ju.pdf](http://www.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-123ju.pdf).

title to property in instances where the record owner attempts to pay taxes and monitors the property. Some landowners in Florida<sup>18</sup> have expressed concern that individuals are capitalizing on the current adverse possession laws to gain title to adjoining properties, and that the burden to overcome these claims unfairly rests with the property owner of record. For example, in some counties, adjoining landowners have filed numerous adverse possession returns on several properties and have paid property taxes on those parcels in an attempt to claim title to the property by adverse possession despite any good faith claim to title. In order to protect the owner's property interests, he or she may be required to initiate litigation to eject the adverse possessor or to receive a judgment declaring his or her rights to the property. Significant legal fees and other costs may be associated with countering adverse possession claims.

### Adverse Possession Trends in Florida

Some counties in Florida have experienced an influx of adverse possession claims, while other counties have received very few filings, or none at all, in recent years. For example, the following figure illustrates the number of adverse possession returns submitted to the Polk County Property Appraiser's Office in recent years:<sup>19</sup>



Currently, Polk County has more than 500 adverse possession returns on record. In Orange County, there are 51 adverse possession returns on record out of 434,940 total parcels. The Brevard County Property Appraiser's Office has between 100 and 150 adverse possession returns on record. Although the incidence of adverse possession claims appears to be more prevalent in rural areas in Florida, urban areas also experience adverse possession claims.

### Effect of Bill

This bill amends s. 95.18, F.S., to require that a person who files a return for taxes with the intent of claiming the property by adverse possession must give notice to the property owner. The claimant must send, by certified mail, a copy of the return for taxes. If the claimant does not file proof of mailing within 15 business days, the property appraiser must cancel the return. This requirement does not apply where the owner of record cannot be determined by reviewing the records of the property appraiser.

### B. SECTION DIRECTORY:

Section 1 amends s. 95.18, F.S., regarding adverse possession.

<sup>18</sup> Senate professional staff interviewed landowners subject to adverse possession claims, as well as real property practitioners, to gauge their experiences with the process. In some instances the record landowner may reside in another state. This absence from Florida may further impair the landowner's ability to oppose an adverse possession claim.

<sup>19</sup> Data provided by the Polk County Property Appraiser's Office.

Section 2 provides an effective date of July 1, 2010.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

None.

## 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.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

n/a

1                                   A bill to be entitled  
 2           An act relating to adverse possession; amending s. 95.18,  
 3           F.S.; requiring a person seeking property by adverse  
 4           possession to send to the property owner of record a copy  
 5           of the return filed with the property appraiser; requiring  
 6           the property appraiser to cancel the return if the person  
 7           does not submit proof of the mailing; providing an  
 8           exception; providing an effective date.

9  
 10   Be It Enacted by the Legislature of the State of Florida:

11  
 12           Section 1.   Section 95.18, Florida Statutes, is amended to  
 13   read:

14           95.18   Real property actions; adverse possession without  
 15   color of title.—

16           (1)   When the occupant or those under whom the occupant  
 17   claims have been in actual continued occupation of real property  
 18   for 7 years under a claim of title exclusive of any other right,  
 19   but not founded on a written instrument, judgment, or decree,  
 20   the property actually occupied shall be held adversely if the  
 21   person claiming adverse possession made a return of the property  
 22   by proper legal description to the property appraiser of the  
 23   county where it is located within 1 year after entering into  
 24   possession and has subsequently paid all taxes and matured  
 25   installments of special improvement liens levied against the  
 26   property by the state, county, and municipality.

27           (2)   For the purpose of this section, property shall be  
 28   deemed to be possessed in the following cases only:



29 (a) When it has been protected by substantial enclosure.  
 30 (b) When it has been usually cultivated or improved.  
 31 (3) A person claiming adverse possession under this  
 32 section must send, via certified mail, to the owner of record of  
 33 the property, as identified by the records of the property  
 34 appraiser, a copy of the return filed with the property  
 35 appraiser and must submit proof of the mailing to the property  
 36 appraiser. If the property appraiser does not receive proof of  
 37 the mailing within 15 business days after the filing of the  
 38 return, the property appraiser shall cancel the return and  
 39 remove the person from the tax roll related to the property that  
 40 is the subject of the return. This section does not apply if an  
 41 owner of record cannot be ascertained in the records of the  
 42 property appraiser and located by reasonable means.  
 43 Section 2. This act shall take effect July 1, 2010.



**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 1107

Sovereign Immunity

**SPONSOR(S):** Nehr

**TIED BILLS:**

**IDEN./SIM. BILLS:** SB 2060

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee		De La Paz	De La Paz
2)	Full Appropriations Council on Education & Economic Development			
3)	Criminal & Civil Justice Policy Council			
4)				
5)				

**SUMMARY ANALYSIS**

Currently, legislative approval is required before subdivisions of the state may settle and pay tort claims in excess of the liability limits provided in statute. The one exception to this requirement is when the subdivision has insurance to cover such claims, in which case the statute authorizes the settlement and payment of claims up to the limits of the policy coverage.

HB 1107, amends section 768.28(5), F.S. effective July 1, 2010, to authorize a subdivision of the state to settle and pay tort claims from insurance proceeds or other available funds without requiring a further act of the Legislature. In effect, the bill would allow local governments to pay claims above the current \$100,000/\$200,000 statutory limit regardless of insurance coverage, insurance policy limits, or the lack of a commercial insurance policy.

Effective July 1, 2011, the bill increases the limits of liability against the state, its agencies and subdivisions from \$100,000 per individual claim and \$200,000 per aggregate claims, to \$250,000 per claim or judgment by any one person. Effective July 1, 2012, and annually on July 1 of each succeeding year, the \$250,000 limit must be adjusted to reflect changes in the Consumer Price Index.

Under the bill, if a subdivision does not agree to pay that portion of a judgment exceeding the statutory limits of liability, in whole or in part, that portion of the excess judgment may be reported to the Legislature, but may be paid only by further act of the Legislature.

The fiscal impact on this bill on state and local governments is indeterminate.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Sovereign immunity**

Sovereign immunity is a doctrine that prohibits suits against the government without the government's consent. The Florida Constitution addresses sovereign immunity in Article X, section 13 as follows:

**Suits Against the State.**—Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

In 1973, the Florida Legislature enacted a limited waiver of sovereign immunity in section 768.28, F.S. This section provides that the state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. Sovereign immunity extends to all state agencies or subdivisions of the state, which by statutory definition includes the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.<sup>1</sup> Liability does not include punitive damages<sup>2</sup> or interest for the period before judgment.<sup>3</sup>

The statute imposes a \$100,000 limit per person, and a \$200,000 limit per incident, on the collectability of any tort judgment based on the government's liability. These limits do not preclude plaintiffs from obtaining judgments in excess of the statutory cap, however, plaintiffs cannot force the government to pay damages that exceed the recovery cap. Florida law requires a claimant to petition the Legislature in accordance with its rules to seek an appropriation from state funds to pay a judgment against the state or a state agency.<sup>4</sup> Subdivisions of the state pay their claims out their own respective budgets and the provisions of section 768.28, F.S., operate to require the Legislature's approval of the expenditure of the subdivision's own funds to pay their claims. In fact, the legislative appropriation (for

<sup>1</sup> Section 768.28(2), F.S.

<sup>2</sup> Punitive damages are distinguished from compensatory damages in that punitive damages are intended to punish the defendant for a wrong aggravated by violence, malice, fraud, or wanton or wicked conduct on the part of the defendant. Black's Law Dictionary (5<sup>th</sup> Edition 1979). In Florida, a non-government defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. Section 768.72, F.S.

<sup>3</sup> Section 768.28(5), F.S.

<sup>4</sup> Section 11.066, F.S.

state claims) or approval (for subdivision claims) is the sole method to compensate a tort claimant in an amount that exceeds the caps, and such act is considered a matter of legislative grace.<sup>5</sup> The means the Legislature has provided to seek such an appropriation is through the filing of claim bills.<sup>6</sup>

Section 768.28(9)(a), F.S., provides that the exclusive remedy for injury or damage suffered by an act, event, or omission of a government employee acting within the course and scope of their employment is by action against the governmental entity, unless such act was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Notwithstanding the limited waiver of sovereign immunity provided by statute, the government may agree, up to the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action of the Legislature, but the government shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of obtaining insurance coverage for tortuous acts in excess of the statutory caps.<sup>7</sup> In this respect, the current law treats the state's ability to pay and settle claims, and a state subdivision's ability to pay and settle claims, in an identical manner.

### **Attorneys Fees in Claims Against Government Entities**

Under section 768.28(8), F.S., an attorney may not charge fees for services rendered which are more than 25% of any judgment or settlement against the state or any subdivision. No provision is made for additional services rendered in connection with appellate proceedings or other actions required subsequent to the entry of the judgment or settlement for recovery of the judgment or settlement.

### **Effect of HB 1107**

HB 1107, amends section 768.28(5), F.S., effective July 1, 2010, to authorize a subdivision of the state to settle and pay claims from insurance proceeds or other available funds without requiring a further act of the Legislature. In effect, the bill would allow local governments to pay claims above the \$100,000/\$200,000 statutory limit regardless of insurance coverage, insurance policy limits, or the lack of a commercial insurance policy.<sup>8</sup>

Under the bill, the fact that a subdivision agreed to settle or pay a judgment exceeding the statutory limits of section 775.028(5), F.S., does not amount to a waiver of any defense of sovereign immunity or to an increase in the limits of its liability.

Under the bill, if a subdivision does not agree to pay that portion of a judgment exceeding the statutory limits of liability, in whole or in part, that portion of the excess judgment may be reported to the Legislature, but may be paid only by further act of the Legislature.

HB 1107, also amends section 768.28(5), F.S., effective July 1, 2011, to increase the limits of liability against the state, its agencies and subdivisions from \$100,000 per individual claim and \$200,000 per aggregate claims, to \$250,000 per claim or judgment by any one person. Effective July 1, 2012, and annually on July 1 of each succeeding year, the \$250,000 limit must be adjusted to reflect the average change in the Consumer Price Index for all urban consumers and to reflect the change in the medical care component of the Consumer Price Index for all urban consumers, issued by the Bureau of Labor Statistics of the U.S. Department of Labor for the preceding calendar year.

HB 1107 also amends section 768.28(8), F.S., to authorize an additional charge for attorney's fees, in an amount of 5 % of any recovery, after an appeal is filed or after postjudgment or postsettlement action is required to recover on the judgment or settlement. With respect to the legislative claims

<sup>5</sup> See, Gamble v. Wells, 450 So.2d 850 (Fla. 1984).

<sup>6</sup> A claim bill is a bill that seeks to compensate a particular individual or entity for injuries or losses occasioned by the negligence or error of a public officer or agency.

<sup>7</sup> Section 768.28(5) F.S.

<sup>8</sup> Some counties and municipalities self-insure against such claims.

process, and the fact that it requires postjudgment or postsettlement action, no statutory change to this section would bind future legislative acts concerning attorney's fees with respect to claims bills passed by the Legislature.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 768.28(5), F.S., effective July 1, 2010, authorizing state subdivisions to settle and pay claims exceeding the statutory liability limits without further legislative act.

Section 2. Amends s. 768.28(5), F.S., to increase the liability limit against the state, its agencies and subdivisions beginning in 2011 and annually thereafter.

Section 3. Providing an effective date.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

Indeterminate. See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

Indeterminate. See Fiscal Comments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

The fiscal impact of this bill with respect to that portion of the bill authorizing subdivisions of the state to settle or pay claims above the liability limits without legislative approval would depend on the number of claim bills filed in which local governments agree to settle and pay such claims. Additionally, it is possible insurance rates for claims coverage will be raised in response to the increased direct control that local governments will have in deciding whether to pay claims in excess of the statutory liability limits.

HB 1107's fiscal impact with respect to that portion of the bill increasing the liability limits of state and local governments from \$100,000/\$200,000 to \$250,000, subject to annual increases thereafter, is indeterminate. The increased cost will depend on the number of claims filed in an amount greater than the current limits but lower than the limits proposed under the bill. From 2009 through 2004 only 2 two claim bills were filed over the amount of the current cap but under the amount of the bill's proposed cap. In 2003, however, there were nine such bills. In 2002, there were six such bills and in 2001, there were seven bills.

### 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 to 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.

##### 3. Other:

None.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill's amendment to subsection (5) of 768.28, F.S., effective July 1, 2010, could be construed to allow stacking of liability limits in cases involving joint claims against the state and a subdivision. The deletion of all references to "subdivision" in the bill's newly created paragraph (5)(a) effectively limits the aggregate amount of multiple claims to only those claims against the state and its agencies to \$200,000. The bill's newly created paragraph (5)(b) addresses only the aggregate limit of multiple claims solely against a single subdivision to \$200,000. Without an express prohibition against the stacking of claims involving joint actions against the state and a subdivision, the bill could in effect double the liability limit of aggregate claims. A single incident resulting in multiple claims against the state and a subdivision would carry an aggregate limit under current law of \$200,000. Under the bill, such a scenario would result in an aggregate limit of \$400,000 - \$200,000 for the state and a separate \$200,000 aggregate limit for the subdivision.

With respect to the changes made to this subsection effective 2011, there is no longer an "aggregate" limit, however, individual claims could be stacked by filing an individual suit against a local government and against the state arising out of the same episode.

### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

HB 1107

2010

1 A bill to be entitled  
 2 An act relating to sovereign immunity; amending s. 768.28,  
 3 F.S.; providing that a subdivision of the state may pay a  
 4 judgment in excess of statutory limits on the waiver of  
 5 sovereign immunity without an act of the Legislature if it  
 6 so chooses; providing that such payment in excess of the  
 7 limits does not waive the subdivision's defense of  
 8 sovereign immunity or increase the limits of its  
 9 liability; providing for an additional attorney fee in  
 10 certain circumstances; amending s. 768.28, F.S., effective  
 11 July 1, 2011; increasing the statutory limits on liability  
 12 and providing for annual indexing of the limits for  
 13 inflation; providing applicability; providing effective  
 14 dates.

15  
 16 Be It Enacted by the Legislature of the State of Florida:

17  
 18 Section 1. Effective July 1, 2010, and applicable to  
 19 claims arising on or after that date, subsections (5) and (8) of  
 20 section 768.28, Florida Statutes, are amended to read:

21 768.28 Waiver of sovereign immunity in tort actions;  
 22 recovery limits; limitation on attorney fees; statute of  
 23 limitations; exclusions; indemnification; risk management  
 24 programs.—

25 (5) (a) The state and its agencies ~~and subdivisions~~ shall  
 26 be liable for tort claims in the same manner and to the same  
 27 extent as a private individual under like circumstances, but  
 28 liability shall not include punitive damages or interest for the



HB 1107

2010

29 period before judgment. Neither the state nor its agencies ~~or~~  
 30 ~~subdivisions~~ shall be liable to pay a claim or a judgment by any  
 31 one person which exceeds the sum of \$100,000 or any claim or  
 32 judgment, or portions thereof, which, when totaled with all  
 33 other claims or judgments paid by the state or its agencies ~~or~~  
 34 ~~subdivisions~~ arising out of the same incident or occurrence,  
 35 exceeds the sum of \$200,000. However, a judgment or judgments  
 36 may be claimed and rendered in excess of these amounts and may  
 37 be settled and paid pursuant to this act up to \$100,000 or  
 38 \$200,000, as the case may be; and that portion of the judgment  
 39 that exceeds these amounts may be reported to the Legislature,  
 40 but may be paid in part or in whole only by further act of the  
 41 Legislature. Notwithstanding the limited waiver of sovereign  
 42 immunity provided in this paragraph herein, the state or an  
 43 agency ~~or subdivision thereof~~ may agree, within the limits of  
 44 insurance coverage provided, to settle a claim made or a  
 45 judgment rendered against it without further action by the  
 46 Legislature, but the state or agency ~~or subdivision thereof~~  
 47 shall not be deemed to have waived any defense of sovereign  
 48 immunity or to have increased the limits of its liability as a  
 49 result of its obtaining insurance coverage for tortious acts in  
 50 excess of the \$100,000 or \$200,000 waiver provided above. The  
 51 limitations of liability set forth in this paragraph subsection  
 52 shall apply to the state and its agencies ~~and subdivisions~~  
 53 whether or not the state or its agencies ~~or subdivisions~~  
 54 possessed sovereign immunity before July 1, 1974.

55 (b) A subdivision of the state shall be liable for tort  
 56 claims in the same manner and to the same extent as a private

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57 | individual under like circumstances, but liability shall not  
58 | include punitive damages or interest for the period before  
59 | judgment. A subdivision of the state shall not be liable to pay  
60 | a claim or a judgment by any one person which exceeds the sum of  
61 | \$100,000 or any claim or judgment, or portions thereof, which,  
62 | when totaled with all other claims or judgments paid by the  
63 | subdivision of the state arising out of the same incident or  
64 | occurrence, exceeds the sum of \$200,000. Notwithstanding the  
65 | limited waiver of sovereign immunity provided in this paragraph,  
66 | a subdivision of the state may agree, within the limits of  
67 | insurance coverage provided or other available funds, to settle  
68 | a claim made or a judgment rendered against it without further  
69 | action by the Legislature. However, if the subdivision does not  
70 | agree to pay that portion of a settlement or a judgment rendered  
71 | against it which is in excess of the limits of liability  
72 | specified in this paragraph, in part or in whole, that portion  
73 | of the settlement or judgment which exceeds those amounts and is  
74 | not agreed to by the subdivision may be reported to the  
75 | Legislature, but may be paid by the subdivision in part or in  
76 | whole only by further act of the Legislature. The subdivision  
77 | shall not be deemed to have waived any defense of sovereign  
78 | immunity or to have increased the limits of its liability as a  
79 | result of its obtaining insurance coverage for tortious acts in  
80 | excess of the \$100,000 or \$200,000 waiver provided above or as a  
81 | result of its having agreed to a settlement or to pay a judgment  
82 | in an amount exceeding the limits of liability set forth in this  
83 | paragraph. The limitations of liability set forth in this  
84 | paragraph shall apply to subdivisions whether or not the

85 subdivision possessed sovereign immunity before July 1, 1974.

86 (8) No attorney may charge, demand, receive, or collect,  
 87 for services rendered, fees in excess of 25 percent of any  
 88 judgment or settlement plus an additional 5 percent of any  
 89 recovery after the institution of any appellate proceeding is  
 90 filed or postjudgment or postsettlement relief or action is  
 91 required for recovery on the judgment or settlement.

92 Section 2. Effective July 1, 2011, and applicable to  
 93 claims arising on or after that date, subsection (5) of section  
 94 768.28, Florida Statutes, as amended by this act, is amended to  
 95 read:

96 768.28 Waiver of sovereign immunity in tort actions;  
 97 recovery limits; limitation on attorney fees; statute of  
 98 limitations; exclusions; indemnification; risk management  
 99 programs.—

100 (5)(a) The state and its agencies shall be liable for tort  
 101 claims in the same manner and to the same extent as a private  
 102 individual under like circumstances, but liability shall not  
 103 include punitive damages or interest for the period before  
 104 judgment. Neither the state nor its agencies shall be liable to  
 105 pay a claim or a judgment by any one person which exceeds the  
 106 sum specified in paragraph (c) of \$100,000 or any claim or  
 107 ~~judgment, or portions thereof, which, when totaled with all~~  
 108 ~~other claims or judgments paid by the state or its agencies~~  
 109 ~~arising out of the same incident or occurrence, exceeds the sum~~  
 110 ~~of \$200,000.~~ However, a judgment or judgments may be claimed and  
 111 rendered in excess of that amount ~~these amounts~~ and may be  
 112 settled and paid pursuant to this act up to the amount specified

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113 | in paragraph (c) \$100,000 or \$200,000, as the case may be; and  
114 | that portion of the judgment that exceeds that amount ~~these~~  
115 | ~~amounts~~ may be reported to the Legislature, but may be paid in  
116 | part or in whole only by further act of the Legislature.  
117 | Notwithstanding the limited waiver of sovereign immunity  
118 | provided in this paragraph, the state or an agency may agree,  
119 | within the limits of insurance coverage provided, to settle a  
120 | claim made or a judgment rendered against it without further  
121 | action by the Legislature, but the state or agency shall not be  
122 | deemed to have waived any defense of sovereign immunity or to  
123 | have increased the limits of its liability as a result of its  
124 | obtaining insurance coverage for tortious acts in excess of the  
125 | amount set forth in paragraph (c) \$100,000 or \$200,000 waiver  
126 | ~~provided above~~. The limitations of liability set forth in this  
127 | paragraph shall apply to the state and its agencies whether or  
128 | not the state or its agencies possessed sovereign immunity  
129 | before July 1, 1974.

130 | (b) A subdivision of the state shall be liable for tort  
131 | claims in the same manner and to the same extent as a private  
132 | individual under like circumstances, but liability shall not  
133 | include punitive damages or interest for the period before  
134 | judgment. A subdivision of the state shall not be liable to pay  
135 | a claim or a judgment by any one person which exceeds the sum  
136 | specified in paragraph (c) of \$100,000 or any claim or judgment,  
137 | ~~or portions thereof, which, when totaled with all other claims~~  
138 | ~~or judgments paid by the subdivision of the state arising out of~~  
139 | ~~the same incident or occurrence, exceeds the sum of \$200,000.~~  
140 | Notwithstanding the limited waiver of sovereign immunity

141 provided in this paragraph, a subdivision of the state may  
 142 agree, within the limits of insurance coverage provided or other  
 143 available funds, to settle a claim made or a judgment rendered  
 144 against it without further action by the Legislature. However,  
 145 if the subdivision does not agree to pay that portion of a  
 146 settlement or a judgment rendered against it which is in excess  
 147 of the amount ~~limits of liability~~ specified in ~~this~~ paragraph  
 148 (c), in part or in whole, that portion of the settlement or  
 149 judgment which exceeds that amount ~~those amounts~~ and is not  
 150 agreed to by the subdivision may be reported to the Legislature,  
 151 but may be paid by the subdivision in part or in whole only by  
 152 further act of the Legislature. The subdivision shall not be  
 153 deemed to have waived any defense of sovereign immunity or to  
 154 have increased the limits of its liability as a result of its  
 155 obtaining insurance coverage for tortious acts in excess of the  
 156 amount set forth in paragraph (c) ~~\$100,000 or \$200,000 waiver~~  
 157 ~~provided above~~ or as a result of its having agreed to a  
 158 settlement or to pay a judgment in an amount exceeding the  
 159 amount ~~limits of liability~~ set forth in ~~this~~ paragraph (c). The  
 160 limitations of liability set forth in this paragraph shall apply  
 161 to subdivisions whether or not the subdivision possessed  
 162 sovereign immunity before July 1, 1974.

163 (c)1. Effective July 1, 2011, and applicable to claims  
 164 made on or after that date, the limitation of liability for  
 165 purposes of this subsection shall be \$250,000 per claim or  
 166 judgment by any one person.

167 2. Effective July 1, 2012, and annually on each July 1  
 168 thereafter, the amount specified in subparagraph 1. shall be

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169 | adjusted to reflect the average of the change in the Consumer  
 170 | Price Index for all urban consumers and the change in the  
 171 | medical care component of the Consumer Price Index for all urban  
 172 | consumers, issued by the Bureau of Labor Statistics of the  
 173 | United States Department of Labor for the United States as a  
 174 | whole for the immediately preceding calendar year.

175 |       Section 3. Except as otherwise expressly provided in this  
 176 | act, this act shall take effect July 1, 2010.

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COUNCIL/COMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Council/Committee hearing bill: Civil Justice & Courts Policy  
2 Committee

3 Representative(s) Nehr offered the following:

4  
5 **Amendment (with title amendment)**

6 Remove everything after the enacting clause and insert:

7 Section 1. Effective October 1, 2010, and applicable to  
8 claims arising on or after that date, subsections (5) and (8) of  
9 section 768.28, Florida Statutes, are amended to read:

10 768.28 Waiver of sovereign immunity in tort actions;  
11 recovery limits; limitation on attorney fees; statute of  
12 limitations; exclusions; indemnification; risk management  
13 programs.—

14 (5) (a) The state and its agencies ~~and subdivisions~~ shall  
15 be liable for tort claims in the same manner and to the same  
16 extent as a private individual under like circumstances, but  
17 liability shall not include punitive damages or interest for the  
18 period before judgment. Neither the state nor its agencies ~~or~~  
19 ~~subdivisions~~ shall be liable to pay a claim or a judgment by any

## COUNCIL/COMMITTEE AMENDMENT

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20 one person which exceeds the sum of \$100,000 or any claim or  
21 judgment, or portions thereof, which, when totaled with all  
22 other claims or judgments paid by the state or its agencies ~~or~~  
23 ~~subdivisions~~ arising out of the same incident or occurrence,  
24 exceeds the sum of \$200,000. However, a judgment or judgments  
25 may be claimed and rendered in excess of these amounts and may  
26 be settled and paid pursuant to this act up to \$100,000 or  
27 \$200,000, as the case may be; and that portion of the judgment  
28 that exceeds these amounts may be reported to the Legislature,  
29 but may be paid in part or in whole only by further act of the  
30 Legislature. Notwithstanding the limited waiver of sovereign  
31 immunity provided in this paragraph herein, the state or an  
32 agency ~~or subdivision thereof~~ may agree, within the limits of  
33 insurance coverage provided, to settle a claim made or a  
34 judgment rendered against it without further action by the  
35 Legislature, but the state or agency ~~or subdivision thereof~~  
36 shall not be deemed to have waived any defense of sovereign  
37 immunity or to have increased the limits of its liability as a  
38 result of its obtaining insurance coverage for tortious acts in  
39 excess of the \$100,000 or \$200,000 waiver provided above. The  
40 limitations of liability set forth in this paragraph subsection  
41 shall apply to the state and its agencies ~~and subdivisions~~  
42 whether or not the state or its agencies ~~or subdivisions~~  
43 possessed sovereign immunity before July 1, 1974.

44 (b) A subdivision of the state shall be liable for tort  
45 claims in the same manner and to the same extent as a private  
46 individual under like circumstances, but liability shall not  
47 include punitive damages or interest for the period before



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48 judgment. A subdivision of the state shall not be liable to pay  
49 a claim or a judgment by any one person which exceeds the sum of  
50 \$100,000 or any claim or judgment, or portions thereof, which,  
51 when totaled with all other claims or judgments paid by the  
52 subdivision of the state arising out of the same incident or  
53 occurrence, exceeds the sum of \$200,000. Notwithstanding the  
54 limited waiver of sovereign immunity provided in this paragraph,  
55 a subdivision of the state may agree, within the limits of  
56 insurance coverage, self-insurance, or other funds set aside for  
57 the payment of claims, to settle a claim made or a judgment  
58 rendered against it without further action by the Legislature.  
59 However, if the subdivision does not agree to pay that portion  
60 of a settlement or a judgment rendered against it which is in  
61 excess of the limits of liability specified in this paragraph,  
62 in part or in whole, that portion of the settlement or judgment  
63 which exceeds those amounts and is not agreed to by the  
64 subdivision may be reported to the Legislature, but may be paid  
65 by the subdivision in part or in whole only by further act of  
66 the Legislature. The subdivision shall not be deemed to have  
67 waived any defense of sovereign immunity or to have increased  
68 the limits of its liability as a result of its obtaining  
69 insurance coverage for tortious acts in excess of the \$100,000  
70 or \$200,000 waiver provided above or as a result of its having  
71 agreed to a settlement or to pay a judgment in an amount  
72 exceeding the limits of liability set forth in this paragraph.  
73 The limitations of liability set forth in this paragraph shall  
74 apply to subdivisions whether or not the subdivision possessed  
75 sovereign immunity before July 1, 1974.

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76       (c) In any case where any one person seeks or where  
77 multiple claimants seek a judgment or settlement against more  
78 than one subdivision, or against the state and one or more  
79 subdivisions, or against the state's agencies and one or more  
80 subdivisions, or any combination thereof, the liability limits  
81 of this section shall apply so that the combined liability for  
82 all government entities when totaled together shall not exceed  
83 \$100,000 to pay a claim or judgment out of the same incident to  
84 any one person, and shall not exceed \$200,000 to pay multiple  
85 claims against the state or its agencies or subdivisions out of  
86 the same incident.

87       (8) No attorney may charge, demand, receive, or collect,  
88 for services rendered, fees in excess of 25 percent of any  
89 judgment or settlement plus an additional 5 percent of any  
90 recovery after the institution of any appellate proceeding is  
91 filed or postjudgment or postsettlement relief or action is  
92 required for recovery.

93       Section 2. Effective October 1, 2011, and applicable to  
94 claims arising on or after that date, subsection (5) of section  
95 768.28, Florida Statutes, as amended by this act, is amended to  
96 read:

97       768.28 Waiver of sovereign immunity in tort actions;  
98 recovery limits; limitation on attorney fees; statute of  
99 limitations; exclusions; indemnification; risk management  
100 programs.—

101       (5)(a) The state and its agencies shall be liable for tort  
102 claims in the same manner and to the same extent as a private  
103 individual under like circumstances, but liability shall not

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104 include punitive damages or interest for the period before  
105 judgment. Neither the state nor its agencies shall be liable to  
106 pay a claim or a judgment by any one person which exceeds the  
107 sum of \$250,000 ~~\$100,000~~ or any claim or judgment, or portions  
108 thereof, which, when totaled with all other claims or judgments  
109 paid by the state or its agencies arising out of the same  
110 incident or occurrence, exceeds the sum of \$1,000,000 ~~\$200,000~~.  
111 However, a judgment or judgments may be claimed and rendered in  
112 excess of these amounts and may be settled and paid pursuant to  
113 this act up to \$250,000 or \$1,000,000, ~~\$100,000 or \$200,000,~~ as  
114 the case may be; and that portion of the judgment that exceeds  
115 these amounts may be reported to the Legislature, but may be  
116 paid in part or in whole only by further act of the Legislature.  
117 Notwithstanding the limited waiver of sovereign immunity  
118 provided in this paragraph, the state or an agency may agree,  
119 within the limits of insurance coverage provided, to settle a  
120 claim made or a judgment rendered against it without further  
121 action by the Legislature, but the state or agency shall not be  
122 deemed to have waived any defense of sovereign immunity or to  
123 have increased the limits of its liability as a result of its  
124 obtaining insurance coverage for tortious acts in excess of the  
125 \$250,000 or 1,000,000 ~~\$100,000 or \$200,000~~ waiver provided  
126 above. The limitations of liability set forth in this paragraph  
127 shall apply to the state and its agencies whether or not the  
128 state or its agencies possessed sovereign immunity before July  
129 1, 1974.

130 (b) A subdivision of the state shall be liable for tort  
131 claims in the same manner and to the same extent as a private

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132 individual under like circumstances, but liability shall not  
133 include punitive damages or interest for the period before  
134 judgment. A subdivision of the state shall not be liable to pay  
135 a claim or a judgment by any one person which exceeds the sum of  
136 \$250,000 ~~\$100,000~~ or any claim or judgment, or portions thereof,  
137 which, when totaled with all other claims or judgments paid by  
138 the subdivision of the state arising out of the same incident or  
139 occurrence, exceeds the sum of \$1,000,000 ~~\$200,000~~.

140 Notwithstanding the limited waiver of sovereign immunity  
141 provided in this paragraph, a subdivision of the state may  
142 agree, within the limits of insurance coverage, self-insurance,  
143 or other funds set aside for the payment of claims to settle a  
144 claim made or a judgment rendered against it without further  
145 action by the Legislature. However, if the subdivision does not  
146 agree to pay that portion of a settlement or a judgment rendered  
147 against it which is in excess of the limits of liability  
148 specified in this paragraph, in part or in whole, that portion  
149 of the settlement or judgment which exceeds those amounts and is  
150 not agreed to by the subdivision may be reported to the  
151 Legislature, but may be paid by the subdivision in part or in  
152 whole only by further act of the Legislature. The subdivision  
153 shall not be deemed to have waived any defense of sovereign  
154 immunity or to have increased the limits of its liability as a  
155 result of its obtaining insurance coverage for tortious acts in  
156 excess of the \$250,000 ~~\$100,000~~ or 1,000,000 ~~\$200,000~~ waiver  
157 provided above or as a result of its having agreed to a  
158 settlement or to pay a judgment in an amount exceeding the  
159 limits of liability set forth in this paragraph. The limitations

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160 of liability set forth in this paragraph shall apply to  
161 subdivisions whether or not the subdivision possessed sovereign  
162 immunity before July 1, 1974.

163 (c) In any case where any one person seeks or where  
164 multiple claimants seek a judgment or settlement against more  
165 than one subdivision, or against the state and one or more  
166 subdivisions, or against the state's agencies and one or more  
167 subdivisions, or any combination thereof, the liability limits  
168 of this section shall apply so that the combined liability for  
169 all government entities when totaled together shall not exceed  
170 ~~\$100,000~~ \$250,000 to pay a claim or judgment out of the same  
171 incident to any one person, and shall not exceed ~~\$200,000~~  
172 \$1,000,000 to pay multiple claims against the state or its  
173 agencies or subdivisions out of the same incident.

174 Section 3. Except as otherwise expressly provided in this  
175 act, this act shall take effect October 1, 2010.

176

177

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**T I T L E A M E N D M E N T**

178  
179 Remove the entire title and insert:

180 An act relating to sovereign immunity; amending s. 768.28,  
181 F.S.; providing that a subdivision of the state may pay a  
182 judgment in excess of statutory limits on the waiver of  
183 sovereign immunity without an act of the Legislature if it  
184 so chooses; providing that such payment in excess of the  
185 limits does not waive the subdivision's defense of  
186 sovereign immunity or increase the limits of its  
187 liability; providing for an additional attorney fee in

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188 | certain circumstances; amending s. 768.28, F.S., effective  
189 | October 1, 2011; increasing the statutory limits on  
190 | liability; providing applicability; providing effective  
191 | dates.

192



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1159 Veterans' Guardianship  
SPONSOR(S): Hukill  
TIED BILLS: IDEN./SIM. BILLS:

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice & Courts Policy Committee		Mato <i>RAM</i>	De La Paz <i>[Signature]</i>
2) Elder & Family Services Policy Committee			
3) Economic Development & Community Affairs Policy Council			
4)			
5)			

SUMMARY ANALYSIS

The bill amends two definitions within the Veterans' Guardianship Laws. The definitions relate to "benefits" and "income" paid to guardians appointed to represent disabled veterans. The definitions are amended to include "any other moneys due from the United States Government, payable through its agencies or entities," as part of the money from which a guardian's commission could be paid.

The bill appears to have no fiscal impact.

The bill provides an effective date of July 1, 2010.



## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Current Situation:

The Department of Veterans Affairs (DVA) has the statutory power to appoint VA guardians of disabled veterans who the DVA considers incompetent to manage their government benefits. This power results in the appointment by a judge of VA Guardians for incompetent veterans, such guardians reporting to both the Florida court and the DVA.<sup>1</sup>

Some years ago an issue of receipt and management of Social Security benefits by VA Guardians was resolved by adoption of s. 744.622, F.S., which provides that the VA Guardian may claim and manage moneys due from the U.S. Government, *payable through its agencies and entities*" (emphasis supplied). The section was adopted to clarify that the VA Guardian should have priority to receive Social Security funds, which otherwise could be paid directly to the veteran or to another representative payee. The purpose was to assure that such funds would be in the hands of a single responsible party who is accountable to the courts and the DVA, providing additional financial safeguards for the veteran.

Section 744.641, F.S., provides for payment of VA Guardian fees as a commission of 5% on the monthly income received and managed by the VA Guardian for the veteran's benefit. These payments are automatic, in that they may be taken each month without petition to the court having jurisdiction over the guardianship.

In November 2006 the DVA Regional Office in St. Petersburg assumed a limited interpretation of s. 744.641, F.S., which excluded Social Security as commissionable income for which fees may be automatically taken. The DVA's reasoning was that Social Security was not specifically defined as "income" in the definitions section of the statute. S. 744.604 (4) and (7), F.S.

Section 744.604, F.S., provides definitions as used in the Veterans' Guardianship Laws.

Section 744.604(4), F.S., provides the definition of "benefits" meaning arrears of pay, bonus, pension, compensation, insurance, and all other moneys paid or payable by the United States through the United States Department of Veterans Affairs by reason of service in the Armed Forces of the United States.

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<sup>1</sup> S. 744.602, F.S.

Section 744.604(7), F.S., provides the definition of "income" meaning moneys received from the United States Department of Veterans Affairs as benefits, and revenue or profit from any property acquired in whole or in part with such moneys.

Effect of the bill:

The bill amends s. 744.604, F.S., definitions of both "benefits" and "income," to include "any other moneys due from the United States Government, payable through its agencies or entities." The bill renumbers the statutes accordingly.

The bill clarifies within the definition of "income" that revenue or profit from any property acquired in whole or in part with moneys received from the United States Department of Veterans Affairs and any other moneys due from the United States Government, payable through its agencies or entities.

**B. SECTION DIRECTORY:**

Section 1 – amends s. 744.604, F.S., relating to definitions.

Section 2 – Provides an effective date of July 1, 2010.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**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 to 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.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

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1                                   A bill to be entitled  
 2           An act relating to veterans' guardianship; amending s.  
 3           744.604, F.S.; revising the definitions of "benefits" and  
 4           "income" for purposes of pt. VIII of ch. 744, F.S., the  
 5           Veterans' Guardianship Law; providing an effective date.

6

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

8

9           Section 1. Subsections (4) and (7) of section 744.604,  
 10          Florida Statutes, are amended to read:

11           744.604 Definitions.—As used in this part, the term:

12           (4) "Benefits" means:

13           (a) Arrears of pay, bonus, pension, compensation,  
 14          insurance, and all other moneys paid or payable by the United  
 15          States through the United States Department of Veterans Affairs  
 16          by reason of service in the Armed Forces of the United States;  
 17          and

18           (b) Any other moneys due from the United States  
 19          Government, payable through its agencies or entities.

20           (7) "Income" means:

21           (a) Moneys received from the United States Department of  
 22          Veterans Affairs as benefits;  
 23           (b) Any other moneys due from the United States

24          Government, payable through its agencies or entities; and

25           (c) Revenue or profit from any property acquired in whole  
 26          or in part with ~~such~~ moneys received under paragraph (a) or  
 27          paragraph (b).

28           Section 2. This act shall take effect July 1, 2010.



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1179

Electronic Documents Recorded in the Official Records

SPONSOR(S): Grimsley

TIED BILLS:

IDEN./SIM. BILLS: SB 1288

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice & Courts Policy Committee		Mato <i>RAM</i>	De La Paz <i>[Signature]</i>
2) Governmental Affairs Policy Committee			
3) Criminal & Civil Justice Policy Council			
4)			
5)			

SUMMARY ANALYSIS

Several of the state's clerks of the court and county recorders were accepting electronic recordings relating to real property prior to the 2006 adoption of the Uniform Real Property Electronic Recording Act, s. 695.27, F.S., (URPERA) and others began accepting electronic documents for recording before the rules contemplated in the URPERA were formally adopted.

This bill retroactively and prospectively ratifies the validity of all such electronic documents submitted to and accepted by a county recorder for recordation, whether or not the electronic documents were in strict compliance with the statutory or regulatory framework then in effect. The bill provides that all such recorded documents are deemed to provide constructive notice.

The bill appears to have no fiscal impact.

The bill provides that it is effective upon becoming law.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Current Situation:

In 2000, the Florida Legislature adopted the Uniform Electronic Transaction Act, s. 668.50, F.S., (UETA). This Act was based on work by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Many, including NCCUSL, believed that UETA permitted the electronic creation, submission, and recording of electronic documents affecting real property.

Some county recorders began accepting electronic recordings based on the authorities facially granted under UETA and a significant number of electronic documents were filed.

Some legal commentators disagreed, feeling that UETA alone did not authorize the recording of electronic documents affecting title to real property. That disagreement, and the natural conservative nature of most real estate professionals, resulted in a limitation on the use and acceptability of electronic documents in real estate transactions.

To address this problem, NCCUSL promulgated a separate uniform law to address these perceived shortcomings. A variation of the NCCUSL uniform law was adopted by the Florida legislature in 2006 as the Florida "Uniform Real Property Electronic Recording Act, s. 695.27, F.S., (URPERA).

The adoption of URPERA, as a matter of statutory interpretation, called into question the efficacy of electronic documents recorded under UETA.

Subsection (5)(a) of URPERA provided that:

- (a) The Department of State, by rule pursuant to ss. 120.536(1) and 120.54 F.S., shall prescribe standards to implement this section in consultation with the Electronic Recording Advisory Committee ....

Subsection (4)(b) of URPERA directed a county recorder who elected to receive, index, store, archive, and transmit electronic documents do so in compliance with standards established by rule by the Department of State.

Before these rules could be set in place, a significant number of County Recorders began accepting electronic recordings and finding significant cost and labor savings. Today, Rule 1B-31, Florida

Administrative Code, is effective implementing URPERA and there are guidelines to follow when accepting electronic documents.

**Effect of the Bill:**

The bill creates s. 695.28, F.S., to retroactively and prospectively ratify the validity of all electronic documents affecting title to real property submitted to and accepted by a county recorder for recordation, notwithstanding possible technical defects.

The Bill provides that all deeds, mortgages, and other documents, previously or hereafter accepted by a county recorder for recordation, whether under UETA or URPERA, are deemed to be valid electronic documents with valid electronic signatures and provide notice to all persons notwithstanding:

- (a) that such documents may have been recorded before the formal adoption of rules by the Florida Secretary of State or didn't fully comply with the provisions and requirements later imposed by the (then unknown) Rule 1B-31 F.A.C.; or
- (b) Technical deviations from, or the inability to prove compliance with, any rules and procedures for electronically recorded documents which may have been in effect at the time the electronic document was submitted for recording.

The bill amends s. 695.27, F.S., to include s. 695.28, F.S. in its short title and to specify the definitions in s. 695.27, F.S., apply to s. 695.28, F.S.

**B. SECTION DIRECTORY:**

- Section 1 – amends s. 695.27, F.S., relating to Uniform Real Property Recording Act.
- Section 2 – creates s. 695.28, F.S., relating to validity of recorded electronic documents.
- Section 3 – provides this act is intended to clarify existing law and applies prospectively and retroactively.
- Section 4 – provides the bill is effective upon becoming law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

- 1. Revenues:  
None.
- 2. Expenditures:  
None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

- 1. Revenues:  
None.
- 2. Expenditures:  
None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.



### 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 to 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.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

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1                                   A bill to be entitled  
 2           An act relating to electronic documents recorded in the  
 3           official records; amending s. 695.27, F.S.; providing for  
 4           the inclusion of an additional statute in the Uniform Real  
 5           Property Electronic Recording Act; delaying termination of  
 6           the Electronic Recording Advisory Committee; creating s.  
 7           695.28, F.S.; declaring that certain electronic documents  
 8           accepted for recordation are deemed validly recorded;  
 9           providing intent to clarify existing law; providing for  
 10          retroactive application; providing an effective date.

11  
 12 Be It Enacted by the Legislature of the State of Florida:

13  
 14           Section 1. Section 695.27, Florida Statutes, is amended to  
 15          read:

16           695.27 Uniform Real Property Electronic Recording Act.—

17           (1) SHORT TITLE.—This section and s. 695.28 may be cited  
 18          as the "Uniform Real Property Electronic Recording Act."

19           (2) DEFINITIONS.—As used in this section and s. 695.28:

20           (a) "Document" means information that is:

21           1. Inscribed on a tangible medium or that is stored in an  
 22          electronic or other medium and is retrievable in perceivable  
 23          form; and

24           2. Eligible to be recorded in the Official Records, as  
 25          defined in s. 28.222, and maintained by a county recorder.

26           (b) "Electronic" means relating to technology having  
 27          electrical, digital, magnetic, wireless, optical,  
 28          electromagnetic, or similar capabilities.

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29 (c) "Electronic document" means a document that is  
 30 received by a county recorder in an electronic form.

31 (d) "Electronic signature" means an electronic sound,  
 32 symbol, or process that is executed or adopted by a person with  
 33 the intent to sign the document and is attached to or logically  
 34 associated with a document such that, when recorded, it is  
 35 assigned the same document number or a consecutive page number  
 36 immediately following such document.

37 (e) "Person" means an individual, corporation, business  
 38 trust, estate, trust, partnership, limited liability company,  
 39 association, joint venture, public corporation, government or  
 40 governmental subdivision, agency, instrumentality, or any other  
 41 legal or commercial entity.

42 (f) "State" means a state of the United States, the  
 43 District of Columbia, Puerto Rico, the United States Virgin  
 44 Islands, or any territory or insular possession subject to the  
 45 jurisdiction of the United States.

46 (3) VALIDITY OF ELECTRONIC DOCUMENTS.—

47 (a) If a law requires, as a condition for recording, that  
 48 a document be an original, be on paper or another tangible  
 49 medium, or be in writing, the requirement is satisfied by an  
 50 electronic document satisfying the requirements of this section.

51 (b) If a law requires, as a condition for recording, that  
 52 a document be signed, the requirement is satisfied by an  
 53 electronic signature.

54 (c) A requirement that a document or a signature  
 55 associated with a document be notarized, acknowledged, verified,  
 56 witnessed, or made under oath is satisfied if the electronic

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57 signature of the person authorized to perform that act, and all  
 58 other information required to be included, is attached to or  
 59 logically associated with the document or signature. A physical  
 60 or electronic image of a stamp, impression, or seal need not  
 61 accompany an electronic signature.

62 (4) RECORDING OF DOCUMENTS.—

63 (a) In this subsection, the term "paper document" means a  
 64 document that is received by the county recorder in a form that  
 65 is not electronic.

66 (b) A county recorder:

67 1. Who implements any of the functions listed in this  
 68 section shall do so in compliance with standards established by  
 69 rule by the Department of State.

70 2. May receive, index, store, archive, and transmit  
 71 electronic documents.

72 3. May provide for access to, and for search and retrieval  
 73 of, documents and information by electronic means.

74 4. Who accepts electronic documents for recording shall  
 75 continue to accept paper documents as authorized by state law  
 76 and shall place entries for both types of documents in the same  
 77 index.

78 5. May convert paper documents accepted for recording into  
 79 electronic form.

80 6. May convert into electronic form information recorded  
 81 before the county recorder began to record electronic documents.

82 7. May agree with other officials of a state or a  
 83 political subdivision thereof, or of the United States, on  
 84 procedures or processes to facilitate the electronic

85 | satisfaction of prior approvals and conditions precedent to  
 86 | recording.

87 | (5) ADMINISTRATION AND STANDARDS.—

88 | (a) The Department of State, by rule pursuant to ss.  
 89 | 120.536(1) and 120.54, shall prescribe standards to implement  
 90 | this section in consultation with the Electronic Recording  
 91 | Advisory Committee, which is hereby created. The Florida  
 92 | Association of Court Clerks and Comptrollers shall provide  
 93 | administrative support to the committee and technical support to  
 94 | the Department of State and the committee at no charge. The  
 95 | committee shall consist of nine members, as follows:

96 | 1. Five members appointed by the Florida Association of  
 97 | Court Clerks and Comptrollers, one of whom must be an official  
 98 | from a large urban charter county where the duty to maintain  
 99 | official records exists in a county office other than the clerk  
 100 | of court or comptroller.

101 | 2. One attorney appointed by the Real Property, Probate  
 102 | and Trust Law Section of The Florida Bar Association.

103 | 3. Two members appointed by the Florida Land Title  
 104 | Association.

105 | 4. One member appointed by the Florida Bankers  
 106 | Association.

107 | (b) Appointed members shall serve a 1-year term. All  
 108 | initial terms shall commence on the effective date of this act.  
 109 | Members shall serve until their successors are appointed. An  
 110 | appointing authority may reappoint a member for successive  
 111 | terms. A vacancy on the committee shall be filled in the same  
 112 | manner in which the original appointment was made, and the term

113 shall be for the balance of the unexpired term.

114 (c) The first meeting of the committee shall be within 60  
 115 days of the effective date of this act. Thereafter, the  
 116 committee shall meet at the call of the chair, but at least  
 117 annually.

118 (d) The members of the committee shall serve without  
 119 compensation and shall not claim per diem and travel expenses  
 120 from the Secretary of State.

121 (e) To keep the standards and practices of county  
 122 recorders in this state in harmony with the standards and  
 123 practices of recording offices in other jurisdictions that enact  
 124 substantially this section and to keep the technology used by  
 125 county recorders in this state compatible with technology used  
 126 by recording offices in other jurisdictions that enact  
 127 substantially this section, the Department of State, in  
 128 consultation with the committee, so far as is consistent with  
 129 the purposes, policies, and provisions of this section, in  
 130 adopting, amending, and repealing standards, shall consider:

- 131 1. Standards and practices of other jurisdictions.
- 132 2. The most recent standards adopted by national standard-  
 133 setting bodies, such as the Property Records Industry  
 134 Association.
- 135 3. The views of interested persons and governmental  
 136 officials and entities.
- 137 4. The needs of counties of varying size, population, and  
 138 resources.
- 139 5. Standards requiring adequate information security  
 140 protection to ensure that electronic documents are accurate,

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141 | authentic, adequately preserved, and resistant to tampering.

142 |       (f) The committee shall terminate on July 1, 2013 ~~2010~~.

143 |       (6) UNIFORMITY OF APPLICATION AND CONSTRUCTION.—In  
144 | applying and construing this section, consideration must be  
145 | given to the need to promote uniformity of the law with respect  
146 | to its subject matter among states that enact it.

147 |       (7) RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND  
148 | NATIONAL COMMERCE ACT.—This section modifies, limits, and  
149 | supersedes the federal Electronic Signatures in Global and  
150 | National Commerce Act, 15 U.S.C. ss. 7001 et seq., but this  
151 | section does not modify, limit, or supersede s. 101(c) of that  
152 | act, 15 U.S.C. s. 7001(c), or authorize electronic delivery of  
153 | any of the notices described in s. 103(b) of that act, 15 U.S.C.  
154 | s. 7003(b).

155 |       Section 2. Section 695.28, Florida Statutes is created to  
156 | read:

157 |       695.28 Validity of recorded electronic documents.—

158 |       (1) A document that is otherwise entitled to be recorded  
159 | and that was or is submitted to the clerk of the court or county  
160 | recorder by electronic means and accepted for recordation is  
161 | deemed validly recorded and provides notice to all persons  
162 | notwithstanding:

163 |       (a) That the document was received and accepted for  
164 | recordation before the Department of State adopted standards  
165 | implementing s. 695.27; or

166 |       (b) Any defects in, deviations from, or the inability to  
167 | demonstrate strict compliance with any statute, rule, or  
168 | procedure to submit or record an electronic document in effect

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169 | at the time the electronic document was submitted for recording.

170 |       (2) This section does not alter the duty of the clerk or  
171 | recorder to comply with s. 695.27 or rules adopted pursuant to  
172 | that section.

173 |       Section 3. This act is intended to clarify existing law  
174 | and applies prospectively and retroactively.

175 |       Section 4. This act shall take effect upon becoming a law.





**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 1237

Probate Procedures

**SPONSOR(S):** Hukill

**TIED BILLS:** None

**IDEN./SIM. BILLS:** SB 1544

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice & Courts Policy Committee		Bond <i>YB</i>	De La Paz <i>[Signature]</i>
2) Insurance, Business & Financial Affairs Policy Committee			
3) Criminal & Civil Justice Policy Council			
4)			
5)			

**SUMMARY ANALYSIS**

This bill amends probate laws to:

- Require the lessor of a safety-deposit box to copy wills, burial instructions, and other documents removed by a relative after the death of the lessee of the box.
- Allow early filing of a caveat (a document filed with the clerk asking to be notified should a probate case be filed regarding an individual).
- Define formal and informal notice.
- Allow a surviving spouse to elect to take a one-half tenancy in common, rather than a life estate, should the decedent attempt a devise of the homestead property that is prohibited by the constitution.
- Provide that a surviving spouse may disclaim the transfer of homestead property.
- Provide for transfers of homestead property into trusts or other forms of ownership that will not run afoul of the constitutional prohibition on alienation of the homestead.
- Allow a court to set aside a marriage based on fraud, duress or undue influence after the death of one spouse.
- Make technical and clarifying changes to probate laws.

This bill does not appear to have a fiscal impact on state or local governments.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Probate is the process for marshalling of the assets of a deceased person, paying debts, and distributing property to heirs.

#### **Safe-Deposit Boxes**

A safe-deposit box is a safe-deposit box, vault, or other receptacle leased by a financial institution to a person seeking the protection of such a box. Individuals use such boxes to protect valuable items and papers from theft or destruction. Individuals commonly deposit death-related valuable papers such as wills, codicils, burial instructions, powers of attorney, and life insurance policies in such boxes.

It is common to need access to the box before the opening of a probate estate and appointment of a personal representative. If they are in the box, burial instructions are needed immediately, and the will names the personal representative who is generally the person who initiates the probate case. Section 655.935, F.S., provides that, if the lessor of a safe-deposit box is presented with proof of death of the lessee of the box, the lessor must give access to a spouse, parent, adult descendent, or person named in a copy of the will to access the box for the limited purpose looking for a will, deed to a burial plot, burial instructions, or life insurance policy. Current law allows such persons to remove any of those documents.

There is no requirement in s. 655.935, F.S., that the lessor retain an inventory, delivery record, or any other record of documents removed from the safe-deposit box or a record of who removed those items. It is believed that this lack of control may result in no copies of the documents delivered (for example, a burial deed or a life insurance policy) being available to the personal representative on the subsequent opening of the safe-deposit box. When the personal representative accomplishes an "initial opening" (and inventory) he or she may not know an insurance policy was in the safe-deposit box at the decedent's death nor to whom it was delivered. While a record of the entry exists in the entry log, the persons making that entry may not then be found or have any independent recollection, and the entry record would not indicate what, or even if, documents were delivered. This lack of control may also lead to lost or fraudulently destroyed documents.

Section 2 of this bill amends s. 655.935, F.S., to require the lessor to make a complete copy of any document removed from the box, together with a record of who took the document. A lessor may charge reasonable fees for costs involved in the supervision and copying.

## **Caveats**

A caveat is a document filed with the clerk asking the clerk to give notice should a probate estate be filed in the future. Creditors and beneficiaries file caveats in order to protect their interest in an estate. Current law provides that a caveat may not be filed until after death, making a caveat filed prior to death invalid. Current law also requires that a caveat contain certain information. This bill amends s. 731.110, F.S., to amend the law regarding caveats, to:

- Provide that the caveat of an interested person may be filed prior to death. Any such caveat is only effective for 2 years.
- Remove the requirement that a caveat include the decedent's social security number, last known residence address, date of birth, and a statement of the interest of person filing the caveat.

## **Notice under Probate Code**

Attorneys practicing in probate law report that there is some confusion as to the form and requirements of notice under the Probate Code. There are two basic forms of notice: formal and informal. Formal notice is defined by Probate Rule 5.040(a)(1). Similar to how a civil summons and complaint is served, formal notice under the Probate Code requires delivery of two separate documents, a copy of the initial pleading seeking relief (analogous to a civil complaint), and a separate form notifying the recipient that he or she has 20 days to reply and may lose by default if no reply is made (analogous to a civil summons). Unlike in civil procedure, formal service under the Probate Code may be made by certified mail, return receipt requested. Informal notice under the Probate Code is defined like informal notice in civil actions, that is, by mail or hand delivery. See Probate Rules 5.040(b) and 5.041(b).

This bill amends the definitions of formal notice and informal notice to specifically refer to the related Probate Rules.

Section 731.301(2), F.S., provides that formal notice is sufficient to acquire jurisdiction over a person to the extent of such person's interest in the estate. However, as written this does not limit jurisdiction to only probate matters. This bill amends s. 731.301(2), F.S., to limit jurisdiction over a person served by formal notice under the Probate Code to only the person's interest in the estate or in the decedent's protected homestead.

This bill also amends references to notice in probate matters in ss. 731.110, 733.2123, 733.608 and 735.203, F.S., to conform.

## **Devise and Descent of Homestead Property**

A "devise" is a testamentary direction to distribute property to an heir. Article X, s. 4(c) of the state constitution protects a surviving spouse from having his or her home devised to someone else. The applicable portion of that subsection reads:

(c) The homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the owner's spouse if there be no minor child.

In most deaths, this provision does not affect the parties because, in most instances, the marital home is held as a tenancy by the entireties, and the surviving spouse takes the property through the tenancy by the entireties<sup>1</sup> without the necessity of a devise of the property.

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<sup>1</sup> A tenancy by the entireties is form of real estate ownership that may only be held by a legally married couple. Upon the death of one spouse, full ownership of the property immediately vests in the other spouse by operation of law. Tenancy by the entireties is presumed if the deed simply identifies the owners as "husband and wife."

The restriction on devise is constitutional, but the constitution does not address who takes title to the property upon the death of the owner of the homestead where the constitutional limitation applies. Current law at s. 732.401(1), F.S., addresses descent (transfer of property to descendants) of homestead property where no devise is allowed by providing that the

homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.

It is reported that current law can create great burdens on the surviving spouse and the lineal descendants regarding the expenses and upkeep of the property which can result in the life estate becoming a burden on the very people the law is designed to protect.<sup>2</sup> A life tenant is required to pay all of the costs of ownership,<sup>3</sup> and a life estate is difficult to sell because its value is dependent on the life expectancy of the individual holding the life estate.

This bill amends s. 732.401, F.S., to provide that a surviving spouse may elect to take an undivided one-half interest as a tenant in common, with the other half being divided among the decedent's children living at the time of the decedent's death, instead of taking a life estate. The election must be made within 6 months after the decedent's death, and is not effective unless the probate court determines that the election is in the best interest of the surviving spouse. The bill provides the form of the election. The bill also provides that expenses of the property are allocated as a life estate until the time of election, and are allocated as a tenant in common after.

The bill does not change or alter current law regarding life estates and tenancy in common. There are differences between life estates and tenancy in common laws that appear important to reviewing this election:

- A life tenant is required to pay all costs of ownership, whereas the costs of ownership are split equally among tenants in common.
- Partition is a legal means by which property may be split between the owners, but where the property cannot be split (and most homes cannot be split), the court may order the property sold at auction and the proceeds split between the owners. A life tenant may not file for partition, whereas any owner of a tenancy in common has the right to file for partition.
- A life tenant has exclusive possession of real property, the remaindermen have no current right to occupy the real property. In a tenancy in common, every joint owner of the real property has the right to occupy the property.

The bill also amends the guardianship law at s. 744.444, F.S., to add that a guardian may make the election to take an interest as a tenant in common without court approval.

### **Disclaimer by Surviving Spouse**

Discussed above is the constitutional limitation on devise of real property owned by the decedent at the time of death. Chapter 739, F.S., provides for disclaimer of property. The concept of disclaimer is simple: no person should be compelled to accept property. In its simplest form, any person who is supposed to inherit property may disclaim it. Upon disclaimer, the person disclaiming is presumed

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<sup>2</sup> Jeffrey A. Baskies, *The New Homestead Trap: Surviving Spouses are Trapped by Life Estates They No Longer Want or Can Afford*, 81 Fla. Bar J. 69 (June 2007).

<sup>3</sup> *Id.* See also ss. 738.701-705 and 738.801, F.S. Costs of ownership are: maintenance and repairs, association fees, property taxes, interest on any mortgage, and insurance. A life tenant may also be liable for a portion of special taxes or assessments.

dead and the property passes to whoever would have inherited the property should the person disclaiming had not survived the decedent.

As a result of the problems related to devise and descent of homestead property addressed in the previous section, some practitioners have attempted to use disclaimers as a way to cure an invalid devise of homestead and avoid the application of s. 732.401, F.S. The courts have reached conflicting results in deciding whether disclaimer may be used to go around the problem of having to take an unwanted life estate. See *In Re: Estate of Joseph T. Ryerson, Jr.*, No. 93-307 (Fla. 15th Cir. Ct., June 17, 1993), *aff'd, per curiam*, No. 93-2074 (Fla. 4th DCA July 20, 1994) and *In re: Estate of Frances N. Janien*, 12 Fla. L. Weekly Supp. 221 (February 28, 2005), Case No. 502004CP000973 (Fla. 15th Cir. Ct.), (December 6, 2004), in which the courts held that where homestead was invalidly devised, a post death disclaimer of the surviving spouse's life estate in homestead did not divest the decedent's descendants of their vested remainder interests. At least one other circuit court has reached an opposite result under similar facts and held that the spouse's disclaimer would divest the decedent's descendants of their interests and give effect to the otherwise invalid devise. See *In Re: Estate of Harry Sudakoff*, No. 91-87 (Fla. 12th Cir. Ct. March 25, 1994), *aff'd, per curiam*, No. 94-02102 (Fla. 2d DCA, March 10, 1995).

This bill amends s. 732.401, F.S., to provide that disclaimer may not be used to divest remaindermen of their right to a remainder estate. This bill also amends s. 732.4015, F.S., to provide that if an interest in homestead property has been properly devised to the surviving spouse, and the surviving spouse disclaims the property, the disclaimed property interest transfers according to the disclaimer statute as ch. 739, F.S.

### **Certain Lifetime Transfers of Homestead Property**

Article X, s. 4(c) of the constitution allows the owner of homestead real estate, joined by the owner's spouse if married, to alienate homestead property by mortgage, sale or gift. The constitution only prohibits devises of homestead property if the owner is survived by a spouse or minor child. The term "devise" is defined in the Florida Probate Code, not in the Florida constitution. Section 732.201(10), F.S., defines a "devise" as a testamentary disposition of real or personal property.

Two Florida appellate cases have invalidated attempted dispositions of homestead property made by lifetime conveyances in which the transferors retained certain rights in the homestead real property either by deed or by trust. *Johns v. Bowden*, 68 Fla. 32, 66 So. 155 (1914) (deed containing terms of trust); *In re Estate of Johnson*, 398 So.2d 970 (Fla. 4th DCA 1981) (quitclaim deed to trustee of revocable trust). Although in each case the trust or deed terms provided for a specific disposition of the homestead property upon the settlor's death, the settlor retained the right during lifetime to direct a conveyance of the title and the entire beneficial interest to other persons (including the settlor) at the settlor's pleasure. Thus the interest in the homestead property that was conveyed was not a vested right in the property to any of the beneficiaries named in the trust instrument, but was a contingent interest subject to the right of the settlor to direct the trustee to convey the property to others during the settlor's lifetime. Because of the retention of the entire beneficial estate in the settlor during life, in each case the trust instrument was in effect an attempted testamentary disposition of homestead property in contravention of the restrictions set forth in the Florida constitution.

Based on these two cases, practitioners in this area, including title companies and attorneys engaged in estate planning, are not certain as to what the courts of this state will hold regarding certain types of lifetime transfers of homestead real property.

This bill creates s. 732.4017, F.S., to address inter vivos (lifetime) transfers of real property. It provides that, so long as the transferor of the property does not retain the power to revoke the transfer or retake title to the property, a transfer of property is not a devise of real property. If the transfer is to a trust, the transfer will not be a devise so long as there is no right of revocation. The bill specifies that a power to alter a trust or its beneficiaries is not a right of revocation.

The bill also provides that a transfer of homestead property will not be considered a devise of the property even if the transferor retains a separate interest in the property, the interest transferred does not become a possessory interest until some date in the future (whether specific or contingent), or the interest transferred may lapse.

### **Spousal Rights Procured by Fraud, Duress or Undue Influence**

A surviving spouse is entitled to significant financial benefits under Florida law, including rights in homestead property, elective share rights, the right to take as a pretermitted spouse, and priority in preference during the selection of decedent's personal representative.

Under current law, a marriage can be set aside by a court if the marriage is either void or voidable. A marriage is void under Florida law if:

- It is a bigamous marriage, s. 826.01, F.S.;
- It is an incestuous marriage, ss. 741.21 and 826.04, F.S.;
- It is a marriage between persons of the same sex, s. 741.212, F.S.
- It is a common-law marriage entered into after January 1, 1968, s. 741.211, F.S.;
- There is a prior existing marriage that is undissolved at the time the parties enter the marriage, see *Smithers v. Smithers*, 765 So. 2d 117 (Fla. 4th DCA 2000); or
- One or both parties lack the requisite mental capacity at the time the marriage is actually contracted, *Kuehmsted v. Turnwall*, 138 So. 775, 778 (Fla. 1932); *Bennett v. Bennett*, 26 So. 2d 650, 651 (Fla. 1946).

A marriage is voidable under Florida law if:

- Consent to the marriage was obtained by undue influence, *Arnelle v. Fisher*, 647 So. 2d 1047, 1048-49 (Fla. 5th DCA 1994);
- Consent to the marriage was obtained by duress, *In re Ruff's Estate*, 32 So. 2d 840, 842 (Fla. 1947) (where party alleged that he was forced to marry under threats of prosecution and violence, the marriage was voidable); *Tyson v. State*, 90 So. 622, 623 (Fla. 1922) (evidence showed that marriage was procured by fraud and effected as a result of coercion); or
- Consent to the marriage was obtained by fraud, *Cooper v. Cooper*, 163 So. 35 (Fla. 1935) (marriage voidable where the marriage ceremony was procured by fraud).

Florida case law has made it clear that an action challenging a marriage can be maintained after the death of the spouse only if the marriage is void. *Kuehmsted v. Turnwall*, 138 So. 775, 777 (Fla. 1932). A voidable marriage, however, may be attacked only in a direct proceeding during the life of the parties. *Arnelle*, 647 So. 2d at 1048 (citing *Kuehmsted*, 138 So. at 777). Upon the death of either party, a voidable marriage is deemed valid from the outset. *Id.* Consequently, a voidable marriage cannot be attacked after the death of either party to the marriage. The result is that a surviving spouse who procured a marriage by undue influence, duress or fraud is still entitled to all of the legal benefits of a surviving spouse, and the surviving family members cannot challenge the marriage after the death of one of the parties to the marriage.

This bill creates s. 732.805, F.S., providing a means for beneficiaries to challenge the decedent's marriage on the grounds of fraud, duress or undue influence. If the court finds that the marriage was procured through fraud, duress or undue influence, the surviving spouse is not entitled to:

- Elective share
- Family allowance
- Preference in appointment as personal representative
- Intestate inheritance
- Homestead property
- Exempt property

- Inheritance as a pretermitted spouse
- Immunity from the presumption of undue influence

Additionally, the surviving spouse is not entitled to any of the following unless such surviving spouse is specifically named in the document:

- Rights or benefits under a bond or life insurance policy
- Rights or benefits under a will, trust or power of appointment

Where the court finds that the marriage was procured by fraud, duress or undue influence, the probate court must distribute the property of the decedent as if the surviving spouse had predeceased the decedent spouse.

The person contesting the marriage has the burden of proof as to fraud, duress or undue influence. The surviving spouse has the burden of proving the defense of ratification, if appropriate. The prevailing party is entitled to attorney's fees.

An insurance company, bank or other obligor is not required to inquire into possible fraud, duress or undue influence. Thus, an insurance company, bank or other obligor may pay claims to the surviving spouse and will not be liable for wrongful payment unless the insurance company, bank or other obligor had actual knowledge of a pending claim for fraud, duress or undue influence.

There is a 4 year statute of limitations, starting from the date of the decedent's death, to file a case alleging fraud, duress or undue influence.

#### **Other**

Section 1 of this bill amends s. 655.934, F.S., to correct the reference to durable power of attorney, which is the correct term as created in s. 709.08, F.S.

Section 6 of this bill amends s. 732.2125, F.S., to clarify that, when an attorney in fact or a guardian makes an elective share election, the court must first approve the election as being in the best interest of the surviving spouse.

Sections 10 and 15 amend ss. 732.608 and 736.1102, F.S., to reference the "laws" related to paternity rather than to the "rules." The term "rules" refers to administrative rules, and is inappropriate for use when a law is referring to other laws.

Section 12 amends s. 733.2123, F.S., to remove the requirement that a copy of the will be attached to the formal notice of petition for administration.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 655.934, F.S., making conforming changes in section relating to the effect of death or incapacity of a lessee of a safety deposit box.

Section 2 amends s. 655.935, F.S., regarding procedures on death of a lessee of a safety deposit box.

Section 3 amends s. 731.110, F.S., regarding caveats.

Section 4 amends s. 731.201, F.S., regarding definitions applicable to the probate laws.

Section 5 amends s. 731.301, F.S., regarding notice provisions applicable to the probate laws.

Section 6 amends s. 732.2125, F.S., regarding rights of election.

Section 7 amends s. 732.401, F.S., regarding descent of homestead property.



Section 8 amends s. 732.4015, F.S., regarding devise of homestead property.

Section 9 creates s. 732.4017, F.S., regarding transfers of homestead real property.

Section 10 amends s. 732.608, F.S., regarding construction of terms applicable to intestate succession.

Section 11 creates s. 732.805, F.S., regarding spousal rights procured by fraud, duress or undue influence.

Section 12 amends s. 733.2123, F.S., removing a requirement to attach a copy of a will to a certain probate notice.

Section 13 amends s. 733.608, F.S., making conforming changes in section on powers of a personal representative.

Section 14 amends s. 735.203, F.S., making conforming changes in section on notice required for summary administration.

Section 15 amends s. 736.1102, F.S., regarding construction of terms applicable to intestate succession.

Section 16 amends s. 744.444, F.S., making conforming changes in section on powers of a guardian.

Section 17 provides an effective date of October 1, 2010.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

Section 1 of this bill will slightly increase the administrative burdens on lessors of safety deposit boxes, which will be passed on as higher fees payable by lessees and their families.

### **D. FISCAL COMMENTS:**

None.

## **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.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

n/a

1                                   A bill to be entitled  
2           An act relating to probate procedures; amending s.  
3           655.934, F.S.; updating terminology relating to a durable  
4           power of attorney; amending s. 655.935, F.S.; imposing  
5           additional duties on the lessor of a safe-deposit box  
6           relating to the contents of the box when the lessee has  
7           died; authorizing the lessor to charge fees for performing  
8           such duties; amending s. 731.110, F.S.; revising  
9           requirements relating to filing a caveat; providing that a  
10          caveat may be filed before or after a person's death;  
11          providing for the expiration of the caveat; amending s.  
12          731.201, F.S.; revising the definitions of "formal notice"  
13          and "informal notice"; amending s. 731.301, F.S.; revising  
14          provisions relating to notice; amending s. 732.2125, F.S.;  
15          revising a provision relating to the right of election;  
16          amending s. 732.401, F.S.; providing that a decedent's  
17          spouse may elect to take an interest in a homestead as a  
18          tenant in common rather than a life estate; providing  
19          procedures and forms for filing notice of such election;  
20          providing that such election is irrevocable; providing for  
21          the allocation of expenses relating to the homestead;  
22          specifying that the interests of the decedent's  
23          descendants in the homestead may not be divested if the  
24          spouse's interest is disclaimed; amending s. 732.4015,  
25          F.S.; providing that if a spouse's interest in a homestead  
26          has been disclaimed, the disclaimed interest passes in  
27          accordance with ch. 739, F.S.; creating s. 732.4017, F.S.;  
28          providing for the inter vivos transfer of homestead

29 property; providing limitations; amending s. 732.608,  
 30 F.S.; revising provisions relating to which laws apply  
 31 when determining intestate succession in certain  
 32 circumstances; creating s. 732.805, F.S.; denying certain  
 33 rights or benefits to a surviving spouse who procured a  
 34 marriage by fraud, duress, or undue influence; providing  
 35 procedures for challenging a surviving spouse; providing  
 36 for the award of costs and fees; providing a time  
 37 limitation on bringing such actions; amending s. 733.2123,  
 38 F.S.; deleting the requirement for attaching a copy of a  
 39 will to a notice of a petition for administration;  
 40 amending s. 733.608, F.S.; specifying the manner for  
 41 serving notice of the personal representative's lien for  
 42 expenditures and obligations incurred; amending s.  
 43 735.203, F.S.; revising provisions relating to providing  
 44 notice for a petition for summary administration; amending  
 45 s. 736.1102, F.S.; clarifying provisions relating to which  
 46 laws apply when determining intestate succession in  
 47 certain circumstances; amending s. 744.444, F.S.;  
 48 conforming provisions to changes made by the act;  
 49 providing an effective date.

50

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

52

53 Section 1. Section 655.934, Florida Statutes, is amended  
 54 to read:

55 655.934 Effect of lessee's death or incapacity.—If a  
 56 lessor without knowledge of the death or ~~of~~ an order determining

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57 | the incapacity of the lessee deals with the lessee's agent in  
 58 | accordance with a written power of attorney or a durable ~~family~~  
 59 | power of attorney signed by such lessee, the transaction binds  
 60 | the lessee's estate and the lessee.

61 | Section 2. Section 655.935, Florida Statutes, is amended  
 62 | to read:

63 | 655.935 Search procedure on death of lessee.—If  
 64 | satisfactory proof of the death of the lessee is presented, a  
 65 | lessor shall permit the person named in a court order for that  
 66 | ~~the~~ purpose, or if no order has been served upon the lessor, the  
 67 | spouse, a parent, an adult descendant, or a person named as a  
 68 | personal representative in a copy of a purported will produced  
 69 | by such person, to open and examine the contents of a safe-  
 70 | deposit box leased or coleased by a decedent, or any documents  
 71 | delivered by a decedent for safekeeping, in the presence of an  
 72 | officer of the lessor, ~~and the lessor,~~

73 | (1) If ~~so~~ requested by such person, the lessor shall  
 74 | remove and deliver only shall deliver:

75 | (a) ~~(1)~~ Any writing purporting to be a will of the  
 76 | decedent, to the court having probate jurisdiction in the county  
 77 | in which the financial institution is located.

78 | (b) ~~(2)~~ Any writing purporting to be a deed to a burial  
 79 | plot or to give burial instructions, to the person making the  
 80 | request for a search.

81 | (c) ~~(3)~~ Any document purporting to be an insurance policy  
 82 | on the life of the decedent, to the beneficiary named therein.

83 | (2) The officer of the lessor shall make a complete copy  
 84 | of any document removed and delivered pursuant to this section

85 and place that copy, together with a memorandum of delivery  
 86 identifying the name of the officer, the person to whom the  
 87 document was delivered, the purported relationship of the person  
 88 to whom the document was delivered, and the date of delivery, in  
 89 the safe-deposit box leased or coleased by the decedent.

90 (3) The lessor may charge reasonable fees to cover costs  
 91 incurred pursuant to this section.

92 ~~(4) No other contents may be removed pursuant to this~~  
 93 ~~section. Access granted pursuant to this section is shall not be~~  
 94 ~~considered the initial opening of the safe-deposit box pursuant~~  
 95 ~~to s. 733.6065 by a personal representative appointed by a court~~  
 96 ~~in this state.~~

97 Section 3. Section 731.110, Florida Statutes, is amended  
 98 to read:

99 731.110 Caveat; proceedings.—

100 (1) Any interested person,~~including a creditor,~~ who is  
 101 apprehensive that an estate, either testate or intestate, will  
 102 be administered or that a will may be admitted to probate  
 103 without that the person's knowledge may file a caveat with the  
 104 court. The caveat of the interested person, other than a  
 105 creditor, may be filed before or after the death of the person  
 106 for whom the estate will be, or is being, administered. The  
 107 caveat of a creditor may be filed only after the person's death.

108 ~~(2) A caveat shall contain the decedent's social security~~  
 109 ~~number, last known residence address, and date of birth, if they~~  
 110 ~~are known, as identification, a statement of the interest of the~~  
 111 ~~caveator in the estate, the name and specific residence address~~  
 112 ~~of the caveator, and, If the caveator, other than a state~~

113 ~~agency,~~ is a nonresident and is not represented by an attorney  
 114 admitted to practice in this state who has signed the caveat  
 115 ~~nonresident of the county,~~ the caveator must designate  
 116 ~~additional name and specific residence address of some person~~  
 117 residing in the county in which the caveat is filed, ~~or office~~  
 118 ~~address of a member of The Florida Bar residing in Florida,~~  
 119 ~~designated~~ as the agent of the caveator, upon whom service may  
 120 be made; however, if the caveator is represented by an attorney  
 121 admitted to practice in this state who has signed the caveat, it  
 122 is not necessary to designate a resident agent.

123 (3) If ~~When~~ a caveat has been filed by an interested  
 124 person other than a creditor, the court may ~~shall~~ not admit a  
 125 will of the decedent to probate or appoint a personal  
 126 representative until formal notice of the petition for  
 127 administration has been served on the caveator or the caveator's  
 128 designated agent ~~by formal notice~~ and the caveator has had the  
 129 opportunity to participate in proceedings on the petition, as  
 130 provided by the Florida Probate Rules.

131 (4) A caveat filed before the death of the person for whom  
 132 the estate will be administered expires 2 years after filing.

133 Section 4. Subsections (18) and (22) of section 731.201,  
 134 Florida Statutes, are amended to read:

135 731.201 General definitions.—Subject to additional  
 136 definitions in subsequent chapters that are applicable to  
 137 specific chapters or parts, and unless the context otherwise  
 138 requires, in this code, in s. 409.9101, and in chapters 736,  
 139 738, 739, and 744, the term:

140 (18) "Formal notice" means a form of ~~formal~~ notice that is

141 described in and served by a method of services provided under  
 142 rule 5.040(a) of the Florida Probate Rules.

143 (22) "Informal notice" or "notice" means a method of  
 144 service for pleadings or papers as provided ~~informal notice~~  
 145 under rule 5.040(b) of the Florida Probate Rules.

146 Section 5. Section 731.301, Florida Statutes, is amended  
 147 to read:

148 731.301 Notice.—

149 (1) If ~~When~~ notice to an interested person of a petition  
 150 or other proceeding is required, the notice shall be given to  
 151 the interested person or that person's attorney as provided in  
 152 the code or the Florida Probate Rules.

153 (2) In a probate proceeding, formal notice is ~~shall be~~  
 154 sufficient to acquire jurisdiction over the person receiving  
 155 formal notice to the extent of the person's interest in the  
 156 estate or in the decedent's protected homestead.

157 (3) Persons given proper notice of a ~~any~~ proceeding are  
 158 ~~shall be~~ bound by all orders entered in that proceeding.

159 Section 6. Subsection (2) of section 732.2125, Florida  
 160 Statutes, is amended to read:

161 732.2125 Right of election; by whom exercisable.—The right  
 162 of election may be exercised:

163 (2) With approval of the court having jurisdiction of the  
 164 probate proceeding by an attorney in fact or a guardian of the  
 165 property of the surviving spouse. Before approving the election,  
 166 the court shall determine that the election is in ~~as~~ the best  
 167 interests of the surviving spouse, ~~during the spouse's probable~~  
 168 ~~lifetime,~~ ~~require.~~



169 Section 7. Section 732.401, Florida Statutes, is amended  
 170 to read:

171 732.401 Descent of homestead.—

172 (1) If not devised as authorized ~~permitted~~ by law and the  
 173 ~~Florida~~ constitution, the homestead shall descend in the same  
 174 manner as other intestate property; but if the decedent is  
 175 survived by a spouse and one or more descendants, the surviving  
 176 spouse shall take a life estate in the homestead, with a vested  
 177 remainder to the descendants in being at the time of the  
 178 decedent's death per stirpes.

179 (2) In lieu of a life estate under subsection (1), the  
 180 surviving spouse may elect to take an undivided one-half  
 181 interest in the homestead as a tenant in common, with the  
 182 remaining undivided one-half interest vesting in the decedent's  
 183 descendants in being at the time of the decedent's death, per  
 184 stirpes.

185 (a) The right of election may be exercised:

186 1. By the surviving spouse; or

187 2. With the approval of a court having jurisdiction of the  
 188 real property, by an attorney in fact or guardian of the  
 189 property of the surviving spouse. Before approving the election,  
 190 the court shall determine that the election is in the best  
 191 interests of the surviving spouse during the spouse's probable  
 192 lifetime.

193 (b) The election must be made within 6 months after the  
 194 decedent's death and during the surviving spouse's lifetime. The  
 195 time for making the election may not be extended except as  
 196 provided in paragraph (c).

197 (c) A petition by an attorney in fact or guardian of the  
198 property for approval to make the election tolls the time for  
199 making the election until 6 months after the decedent's death or  
200 30 days after the rendition of an order authorizing the  
201 election, whichever occurs last.

202 (d) Once made, the election is irrevocable.

203 (e) The election shall be made by filing a notice of  
204 election containing the legal description of the homestead  
205 property for recording in the official record books of the  
206 county or counties where the homestead property is located. The  
207 notice must be in substantially the following form:

208  
209 ELECTION OF SURVIVING SPOUSE  
210 TO TAKE A ONE-HALF INTEREST OF  
211 DECEDENT'S INTEREST IN HOMESTEAD PROPERTY

212  
213 STATE OF.....

214 COUNTY OF.....

215  
216 1. The decedent, \_\_\_\_\_, died on \_\_\_\_\_.  
217 On the date of the decedent's death, The decedent was married to  
218 \_\_\_\_\_, who survived the decedent.

219 2. At the time of the decedent's death, the decedent owned  
220 an interest in real property that the affiant believes to be  
221 homestead property described in s. 14, Article X of the State  
222 Constitution, that real property being in \_\_\_\_\_ County,  
223 Florida, and described as: ...(description of homestead  
224 property)....

225 3. Affiant elects to take one-half of decedent's interest  
226 in the homestead as a tenant in common in lieu of a life estate.

227 4. If affiant is not the surviving spouse, affiant is the  
228 surviving spouse's attorney in fact or guardian of the property  
229 and an order has been rendered by a court having jurisdiction of  
230 the real property authorizing the undersigned to make this  
231 election.

232

233 .....  
234 ...(Affiant)...

235

236 Sworn to (or affirmed) and subscribed before me this .... day of  
237 ...(month)...., ...(year)...., by ...(affiant)...

238

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

240

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

242

243 Personally Known OR Produced Identification

244 ...(Type of Identification Produced)...

245

246 (3) Unless and until an election is made under subsection  
247 (2), expenses relating to the ownership of the homestead shall  
248 be allocated between the surviving spouse, as life tenant, and  
249 the decedent's descendants, as remaindermen, in accordance with  
250 chapter 738. If an election is made, expenses relating to the  
251 ownership of the homestead shall be allocated between the  
252 surviving spouse and the descendants as tenants in common in

253 | proportion to their respective shares, effective as of the date  
 254 | the election is filed for recording.

255 | (4) If the surviving spouse's life estate created in  
 256 | subsection (1) is disclaimed pursuant to chapter 739, the  
 257 | interests of the decedent's descendants may not be divested.

258 | (5)(2) This section does ~~Subsection (1) shall~~ not apply to  
 259 | property that the decedent and the surviving spouse owned in  
 260 | tenancy by the entireties or joint tenancy with rights of  
 261 | survivorship as tenants by the entirety.

262 | Section 8. Subsection (3) is added to section 732.4015,  
 263 | Florida Statutes, to read:

264 | 732.4015 Devise of homestead.—

265 | (3) If an interest in homestead has been devised to the  
 266 | surviving spouse as authorized by law and the constitution, and  
 267 | the surviving spouse's interest is disclaimed, the disclaimed  
 268 | interest shall pass in accordance with chapter 739.

269 | Section 9. Section 732.4017, Florida Statutes, is created  
 270 | to read:

271 | 732.4017 Inter vivos transfer of homestead property.—

272 | (1) If the owner of homestead property transfers an  
 273 | interest in that property, including a transfer in trust, with  
 274 | or without consideration, to one or more persons during the  
 275 | owner's lifetime, the transfer is not a devise for purposes of  
 276 | s. 731.201(10) or s. 732.4015, and the interest transferred does  
 277 | not descend as provided in s. 732.401 if the transferor fails to  
 278 | retain a power, held in any capacity, acting alone or in  
 279 | conjunction with any other person, to revoke or revest that  
 280 | interest in the transferor.

281 (2) As used in this section, the term "transfer in trust"  
 282 refers to a trust under which the transferor of the homestead  
 283 property, alone or in conjunction with another person, does not  
 284 possess a right of revocation as that term is defined in s.  
 285 733.707(3)(e). A power possessed by the transferor which is  
 286 exercisable during the transferor's lifetime to alter the  
 287 beneficial use and enjoyment of the interest within a class of  
 288 beneficiaries identified only in the trust instrument is not a  
 289 right of revocation if the power may not be exercised in favor  
 290 of the transferor, the transferor's creditors, the transferor's  
 291 estate, or the creditors of the transferor's estate or exercised  
 292 to discharge the transferor's legal obligations. This subsection  
 293 does not create an inference that a power not described in this  
 294 subsection is a power to revoke or revest an interest in the  
 295 transferor.

296 (3) The transfer of an interest in homestead property  
 297 described in subsection (1) may not be treated as a devise of  
 298 that interest even if:

299 (a) The transferor retains a separate legal or equitable  
 300 interest in the homestead property, directly or indirectly  
 301 through a trust or other arrangement such as a term of years,  
 302 life estate, reversion, possibility of reverter, or fractional  
 303 fee interest;

304 (b) The interest transferred does not become a possessory  
 305 interest until a date certain or upon a specified event, the  
 306 occurrence or nonoccurrence of which does not constitute a power  
 307 held by the transferor to revoke or revest the interest in the  
 308 transferor, including, without limitation, the death of the

309 transferor; or

310 (c) The interest transferred is subject to divestment,  
 311 expiration, or lapse upon a date certain or upon a specified  
 312 event, the occurrence or nonoccurrence of which does not  
 313 constitute a power held by the transferor to revoke or revest  
 314 the interest in the transferor, including, without limitation,  
 315 survival of the transferor.

316 (4) It is the intent of the Legislature that this section  
 317 clarify existing law.

318 Section 10. Section 732.608, Florida Statutes, is amended  
 319 to read:

320 732.608 Construction of ~~generic~~ terms.—The laws used to  
 321 determine paternity and ~~Adopted persons and persons born out of~~  
 322 wedlock are included in class gift terminology and terms of  
 323 relationship, in accordance with rules for determining  
 324 relationships for the purposes of intestate succession apply  
 325 when determining whether class gift terminology and terms of  
 326 relationship include adopted persons and persons born out-of-  
 327 wedlock.

328 Section 11. Section 732.805, Florida Statutes, is created  
 329 to read:

330 732.805 Spousal rights procured by fraud, duress, or undue  
 331 influence.—

332 (1) A surviving spouse who is found to have procured a  
 333 marriage to the decedent by fraud, duress, or undue influence is  
 334 not entitled to any of the following rights or benefits that  
 335 inure solely by virtue of the marriage or the person's status as  
 336 surviving spouse of the decedent unless both spouses

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337 subsequently ratified the marriage:

338 (a) Any rights or benefits under the Florida Probate Code,  
339 including, but not limited to, entitlement to elective share or  
340 family allowance; preference in appointment as personal  
341 representative; inheritance by intestacy, homestead, or exempt  
342 property; or inheritance as a pretermitted spouse.

343 (b) Any rights or benefits under a bond, life insurance  
344 policy, or other contractual arrangement if the decedent is the  
345 principal obligee or the person upon whose life the policy is  
346 issued, unless the surviving spouse is provided for by name,  
347 whether or not designated as the spouse, in the bond, life  
348 insurance policy, or other contractual arrangement.

349 (c) Any rights or benefits under a will, trust, or power  
350 of appointment, unless the surviving spouse is provided for by  
351 name, whether or not designated as the spouse, in the will,  
352 trust, or power of appointment.

353 (d) Any immunity from the presumption of undue influence  
354 that a surviving spouse may have under state law.

355 (2) Any of the rights or benefits listed in paragraphs  
356 (1)(a)-(c) which would have passed solely by virtue of the  
357 marriage to a surviving spouse who is found to have procured the  
358 marriage by fraud, duress, or undue influence shall pass as if  
359 the spouse had predeceased the decedent.

360 (3) A challenge to a surviving spouse's rights under this  
361 section may be maintained as a defense, objection, or cause of  
362 action by any interested person after the death of the decedent  
363 in any proceeding in which the fact of marriage may be directly  
364 or indirectly material.

365       (4) The contestant has the burden of establishing, by a  
 366 preponderance of the evidence, that the marriage was procured by  
 367 fraud, duress, or undue influence. If ratification of the  
 368 marriage is raised as a defense, the surviving spouse has the  
 369 burden of establishing, by a preponderance of the evidence, the  
 370 subsequent ratification by both spouses.

371       (5) In all actions brought under this section, the court  
 372 shall award taxable costs as in chancery actions, including  
 373 attorney's fees. When awarding taxable costs and attorney's  
 374 fees, the court may direct payment from a party's interest, if  
 375 any, in the estate, or enter a judgment that may be satisfied  
 376 from other property of the party, or both.

377       (6) An insurance company, bank, or other obligor making  
 378 payment according to the terms of its policy or obligation is  
 379 not liable by reason of this section unless, before payment, it  
 380 received at its home office or principal address written notice  
 381 of a claim pursuant to this section.

382       (7) The rights and remedies granted in this section are in  
 383 addition to any other rights or remedies a person may have at  
 384 law or equity.

385       (8) Unless sooner barred by adjudication, estoppel, or a  
 386 provision of the Florida Probate Code or Florida Probate Rules,  
 387 an interested person is barred from bringing an action under  
 388 this section unless the action is commenced within 4 years after  
 389 the decedent's date of death. A cause of action under this  
 390 section accrues on the decedent's date of death.

391       Section 12. Section 733.2123, Florida Statutes, is amended  
 392 to read:



393           733.2123 Adjudication before issuance of letters.—A  
 394 petitioner may serve formal notice of the petition for  
 395 administration on interested persons. ~~A copy of the will offered~~  
 396 ~~for probate shall be attached to the notice. A~~ No person who is  
 397 served with such formal notice before ~~of the petition for~~  
 398 ~~administration prior to~~ the issuance of letters or who has  
 399 waived notice may not challenge the validity of the will,  
 400 testacy of the decedent, qualifications of the personal  
 401 representative, venue, or jurisdiction of the court, except in  
 402 the proceedings before issuance of letters.

403           Section 13. Subsection (4) of section 733.608, Florida  
 404 Statutes, is amended to read:

405           733.608 General power of the personal representative.—

406           (4) The personal representative's lien shall attach to the  
 407 property and take priority as of the date and time a notice of  
 408 that lien is recorded in the official records of the county  
 409 where that property is located, and the lien may secure  
 410 expenditures and obligations incurred, including, but not  
 411 limited to, fees and costs made before or after recording the  
 412 notice. The notice of lien may be recorded before adjudicating  
 413 ~~prior to the adjudication of~~ the amount of the debt. The notice  
 414 of lien ~~also~~ shall also be filed in the probate proceeding, but  
 415 failure to do so does ~~shall~~ not affect the validity of the lien.  
 416 A copy of the notice of lien shall be served in the manner  
 417 provided for service of ~~by~~ formal notice upon each person  
 418 appearing to have an interest in the property. The notice of  
 419 lien must ~~shall~~ state:

420           (a) The name and address of the personal representative

421 and the personal representative's attorney;

422 (b) The legal description of the property;

423 (c) The name of the decedent and also, to the extent known  
 424 to the personal representative, the name and address of each  
 425 person appearing to have an interest in the property; and

426 (d) That the personal representative has expended or is  
 427 obligated to expend funds to preserve, maintain, insure, and  
 428 protect the property and that the lien stands as security for  
 429 recovery of those expenditures and obligations incurred,  
 430 including, but not limited to, fees and costs.

431

432 Substantial compliance with the foregoing provisions renders  
 433 ~~shall render~~ the notice in comportment with this section.

434 Section 14. Subsections (1) and (3) of section 735.203,  
 435 Florida Statutes, are amended to read:

436 735.203 Petition for summary administration.—

437 (1) A petition for summary administration may be filed by  
 438 any beneficiary or person nominated as personal representative  
 439 in the decedent's will offered for probate. The petition must be  
 440 signed and verified by the surviving spouse, if any, and any  
 441 beneficiaries except that the joinder in a petition for summary  
 442 administration is not required of a beneficiary who will receive  
 443 a full distributive share under the proposed distribution.

444 However, formal notice of the petition must be served on a ~~Any~~  
 445 beneficiary not joining ~~in shall be served by formal notice with~~  
 446 the petition.

447 (3) If each trustee of a trust that is a beneficiary of  
 448 the estate of the deceased person is also a petitioner, formal

449 notice of the petition for summary administration shall be  
 450 served on each qualified beneficiary of the trust as defined in  
 451 ~~s. 736.0103 shall be served by formal notice with the petition~~  
 452 ~~for summary administration unless joinder in, or consent to, the~~  
 453 petition is obtained from each qualified beneficiary of the  
 454 trust.

455 Section 15. Section 736.1102, Florida Statutes, is amended  
 456 to read:

457 736.1102 Construction of ~~generic~~ terms.—The laws used to  
 458 determine paternity and Adopted persons and persons born out of  
 459 ~~wedlock are included in class gift terminology and terms of~~  
 460 ~~relationship, in accordance with rules for determining~~  
 461 relationships for the purposes of intestate succession apply  
 462 when determining whether class gift terminology and terms of  
 463 relationship include adopted persons and persons born out of  
 464 wedlock.

465 Section 16. Subsection (9) of section 744.444, Florida  
 466 Statutes, is amended to read:

467 744.444 Power of guardian without court approval.—Without  
 468 obtaining court approval, a plenary guardian of the property, or  
 469 a limited guardian of the property within the powers granted by  
 470 the order appointing the guardian or an approved annual or  
 471 amended guardianship report, may:

472 (9) Elect ~~whether~~ to dissent from a will under ~~the~~  
 473 ~~provisions of s. 732.2125(2),~~ seek approval to make an election  
 474 in accordance with s. 732.401, or assert any other right or  
 475 choice available to a surviving spouse in the administration of  
 476 a decedent's estate.

HB 1237

2010

477

Section 17. This act shall take effect October 1, 2010.

Amendment No. 1

COUNCIL/COMMITTEE ACTION

ADOPTED                                   \_\_\_ (Y/N)  
ADOPTED AS AMENDED                   \_\_\_ (Y/N)  
ADOPTED W/O OBJECTION               \_\_\_ (Y/N)  
FAILED TO ADOPT                       \_\_\_ (Y/N)  
WITHDRAWN                              \_\_\_ (Y/N)  
OTHER                                    \_\_\_\_\_

1 Council/Committee hearing bill: Civil Justice & Courts Policy  
2 Committee  
3 Representative(s) Hukill offered the following:  
4

**Amendment (with title amendment)**

6 Remove lines 377-381 and insert:

7 (6) An insurance company, financial institution, or other  
8 obligor making payment according to the terms of its policy or  
9 obligation is not liable by reason of this section unless,  
10 before payment, it received written notice of a claim pursuant  
11 to this section.

12 (a) The notice required by this subsection must be in  
13 writing and must be accomplished in a manner reasonably suitable  
14 under the circumstances and likely to result in receipt of the  
15 notice. Permissible methods of notice include first-class mail,  
16 personal delivery, delivery to the person's last known place of  
17 residence or place of business, or a properly directed facsimile  
18 or other electronic message.

Amendment No. 1

19       (b) To be effective, notice to a financial institution or  
20 insurance company must contain the name, address and the  
21 taxpayer identification number, or the account or policy number,  
22 of the principal obligee or person whose life is insured and  
23 shall be directed to an officer or a manager of the financial  
24 institution or insurance company in Florida. If the financial  
25 institution or insurance company has no offices in Florida, the  
26 notice shall be directed to the principal office of the  
27 financial institution or insurance company.

28       (c) Notice shall be effective when it is given, except that  
29 notice upon a financial institution or insurance company is not  
30 effective until 5 business days after it is given.

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**T I T L E   A M E N D M E N T**

34

Remove line 36 and insert:

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36 for the award of costs and fees; providing a limitation of  
37 liability related to distributions made without notice of a  
38 pending claim; providing for means of notice; providing a time

Amendment No. 2

COUNCIL/COMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

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1 Council/Committee hearing bill: Civil Justice & Courts Policy  
2 Committee

3 Representative(s) Hukill offered the following:  
4

5 **Amendment (with title amendment)**

6 Between lines 390 and 391, insert:

7 Section 12. Subsection (1) of section 733.107, Florida  
8 Statutes, is amended to read:

9 733.107 Burden of proof in contests; presumption of undue  
10 influence.—

11 (1) In all proceedings contesting the validity of a will,  
12 the burden shall be upon the proponent of the will to establish  
13 prima facie its formal execution and attestation. A self-proving  
14 affidavit executed in accordance with s. 732.503 or an oath of  
15 an attesting witness executed as required in s. 733.201(2) is  
16 admissible and establishes prima facie the formal execution and  
17 attestation of the will. Thereafter, the contestant shall have  
18 the burden of establishing the grounds on which the probate of  
19 the will is opposed or revocation is sought.

Amendment No. 2

20 Section 13. Effective upon becoming law, section 733.1051,  
21 Florida Statutes, is created to read:

22 733.1051 Limited judicial construction of will with  
23 federal tax provisions.--

24 (1) Upon the application of a personal representative or a  
25 person who is or may be a beneficiary who is affected by the  
26 outcome of the construction, a court at any time may construe  
27 the terms of a will to define the respective shares or determine  
28 beneficiaries, in accordance with the intention of a testator,  
29 if a disposition occurs during the applicable period and the  
30 will contains a provision that:

31 (a) Includes a formula disposition referring to the  
32 "unified credit", "estate tax exemption," "applicable exemption  
33 amount," "applicable credit amount," "applicable exclusion  
34 amount," "generation-skipping transfer tax exemption," "GST  
35 exemption," "marital deduction," "maximum marital deduction,"  
36 "unlimited marital deduction," or "maximum charitable  
37 deduction;"

38 (b) Measures a share of an estate based on the amount that  
39 can pass free of federal estate tax or the amount that can pass  
40 free of federal generation-skipping transfer tax;

41 (c) Otherwise makes a disposition referring to a  
42 charitable deduction, marital deduction, or another provision of  
43 federal estate tax or generation-skipping transfer tax law; or

44 (d) Appears to be intended to reduce or minimize federal  
45 estate tax or generation-skipping transfer tax.

46 (2) For the purpose of this section:



Amendment No. 2

47 (a) "Applicable period" means a period beginning January  
48 1, 2010 and ending on the end of the day on the earlier of  
49 December 31, 2010, or the day before the date that an act  
50 becomes law that repeals or otherwise modifies or has the effect  
51 of repealing or modifying s. 901 of The Economic Growth and Tax  
52 Relief Reconciliation Act of 2001.

53 (b) A "disposition occurs" when the testator dies.

54 (3) In construing the will, the court shall consider the  
55 terms and purposes of the will, the facts and circumstances  
56 surrounding the creation of the will, and the testator's  
57 probable intent. In determining the testator's probable intent,  
58 the court may consider evidence relevant to the testator's  
59 intent even though the evidence contradicts an apparent plain  
60 meaning of the will.

61 (4) This section does not apply to a disposition that is  
62 specifically conditioned upon no federal estate or generation  
63 skipping transfer tax being imposed.

64 (5) Unless otherwise ordered by the court, during the  
65 applicable period and without court order, the personal  
66 representative administering a will containing one or more  
67 provisions described in subsection (1) may:

68 (a) Delay or refrain from making any distribution;

69 (b) Incur and pay fees and costs reasonably necessary to  
70 determine its duties and obligations, including compliance with  
71 provisions of existing and reasonably anticipated future federal  
72 tax laws; and

73 (c) Establish and maintain reserves for the payment of  
74 these fees and costs and federal taxes.

Amendment No. 2

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The personal representative shall not be liable for its actions as provided in this subsection made or taken in good faith.

(6) The provisions of this section are in addition to, and not in derogation of, rights under the common law to construe a will.

(7) This law is remedial in nature and intended to provide a new or modified legal remedy. This section shall operate retroactively to January 1, 2010.

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**T I T L E   A M E N D M E N T**

Remove line 37 and insert:  
limitation on bringing such actions; amending s. 733.107, F.S.; providing that, in a will contest, certain affidavits and oaths are prima facie evidence regarding attestation of a will; creating s. 733.1051, F.S.; providing authority for court interpretation of certain wills not subject to the federal estate tax; specifying will requirements; providing conditions; providing definitions; providing criteria for court interpretation of a will; providing an exception; authorizing a personal representative to take certain actions pending a determination of estate distribution; limiting personal representative liability; preserving certain rights to construe a will; providing for retroactive operation; amending s. 733.2123,

Amendment No. 3

COUNCIL/COMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

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1 Council/Committee hearing bill: Civil Justice & Courts Policy  
2 Committee

3 Representative(s) Hukill offered the following:  
4

5 **Amendment (with title amendment)**

6 Remove line 477 and insert:

7 Section 17. Except as otherwise provided, this act shall  
8 take effect October 1, 2010.  
9

10  
11 -----  
12 **T I T L E A M E N D M E N T**

13 Remove line 49 and insert:

14 providing effective dates.



**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 1523

Homeowner Relief

**SPONSOR(S):** Grady

**TIED BILLS:** None

**IDEN./SIM. BILLS:** SB 2270

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice & Courts Policy Committee		Bond MB	De La Paz
2) Insurance, Business & Financial Affairs Policy Committee			
3) Criminal & Civil Justice Policy Council			
4)			
5)			

**SUMMARY ANALYSIS**

It is common to borrow money and pledge an asset as security for the loan. If the loan is not timely paid, the creditor may take the property, sell it, and apply the proceeds of sale against the debt. Where personal property is pledged, a creditor has the option of judicial or nonjudicial process for taking the property and selling it. Where real property is pledged, however, current law only allows for judicial process known as foreclosure to take the property and sell it for the benefit of the creditor.

This bill creates an optional nonjudicial foreclosure process modeled on the Uniform Nonjudicial Foreclosure Act. Where current judicial foreclosure only allows for sale by auction, this bill gives the creditor the option of foreclosure by auction, foreclosure by negotiated sale, or foreclosure by appraisal. A creditor may simultaneously pursue auction and sale or auction and appraisal.

The process under this bill requires, at a minimum, that a debtor receive at least 30 days notice of the potential foreclosure, and another notice that the foreclosure will be finalized 90 days or more in the future. A debtor must be given the name and phone number of an individual who will discuss the default. During the process, the creditor must, upon request, meet with the debtor regarding the foreclosure.

As in judicial foreclosure, under this bill debtors maintain their equity of redemption, which is the right to pay off the debt and keep the property, all the way through the process up to the time of auction sale or completion of the process.

Current real estate foreclosure law provides that a court may enter a deficiency judgment, which is the difference between what was owed minus the value of the property foreclosed. Under this bill, a foreclosing creditor may sue for a deficiency, except that a debtor who acts in good faith during the process is not liable for a deficiency judgment.

This bill will only apply to debts where the debtor has agreed that this process may be used.

The Revenue Estimating Conference has not met regarding this bill. It is anticipated that this bill will have a significant negative fiscal impact on the State Courts Revenue Trust Fund. This bill does not appear to have a fiscal impact on local governments.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

It is common to borrow money and pledge an asset as security for the loan. If the loan is not timely paid, the creditor may take the property, sell it, and apply the proceeds of sale against the debt. Where personal property is pledged, a creditor has the option of judicial or nonjudicial process for taking the property and selling it. Where real property is pledged, however, current law only allows for judicial process known as foreclosure to take the property and sell it for the benefit of the creditor.

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

Judicial foreclosures in Florida are clogging the courts. In February, the Florida Supreme Court, in an opinion asking the Legislature to appropriate funds for additional judgeships and additional court resources, said:

Although the dramatic increase in mortgage foreclosure filings is expected to abate at some future date and therefore may not be a part of the long-term sustained net need, there is evidence that a second wave of foreclosures is now entering the court system and that this workload issue will persist. Various media reports note that many of these new foreclosures are fueled by double digit unemployment, declining housing prices, and the lingering recession. Over a 36-month period (Fiscal Year 2005-2006 to Fiscal Year 2007-2008), real property/mortgage foreclosure filings increased by 396 percent in our trial courts. During the same time period, the clearance rate for real property/mortgage foreclosure cases decreased by 52 percent, from 94 percent in Fiscal Year 2005-2006 to 42 percent in Fiscal Year 2007-2008.

According to Realty Trac, Florida has the third highest rate of mortgage foreclosures in the country with one in every 158 housing units in foreclosure.<sup>1</sup>

This bill creates an optional nonjudicial foreclosure process modeled on the Uniform Nonjudicial Foreclosure Act. The bill creates ch. 52, F.S.

### **Application**

This bill authorizes the nonjudicial foreclosure of any security interest in real property provided that the debtor has agreed in substance in the security instrument that foreclosure may be made by nonjudicial process.

Nonjudicial foreclosure may not be used to foreclose statutory liens other than those owed to a common interest community<sup>2</sup>, property in a common interest community where such property is considered personal property, or a security interest in rents or proceeds of real property.

Nonjudicial foreclosure may not be pursued if a judicial foreclosure case is pending, or if a judicial proceeding challenging the note or mortgage is pending.

### **Protection of the Process**

In general, the parties to a contract may vary their legal rights and remedies in the contract. This bill provides that the parties to a mortgage generally may not vary their rights and obligations under ch. 52, F.S. unless the chapter specifically allows variance. For instance, under this bill the parties may agree to longer notice periods, and commercial debtors may agree that a guarantor will not receive notice of a foreclosure.

### **Form of Notice**

Current law does not require a creditor to give any notice to a debtor prior to commencing foreclosure proceedings.<sup>3</sup> Judicial foreclosure is commenced by formal service of process upon every defendant. Formal service is accomplished by hand delivery of a summons and complaint to the person, but may be accomplished by publication where the defendant cannot be found.

As to homestead property, this bill requires that notices of default and notices of foreclosure must be provided to the owner by both regular United States mail and by a commercially reasonable carrier other than the U.S. Postal Service. As to all other property, those notices may be by hand delivery, mail, private carrier, or electronic. The parties may agree to limit the available forms of notice. If a person cannot be found, a person sending notice must make a reasonable effort to find the person; following the requirements under ch. 49, F.S.<sup>4</sup> are deemed sufficient.

### **Notice of Default, Cure**

This bill requires that a notice of default be furnished to a debtor before foreclosure. The notice must contain:

- Facts supporting the claim that the mortgage is in default.
- What the debtor must do to cure the default.
- The name, address and telephone number of an individual who represents the creditor and who can be contacted regarding the default.
- A statement that foreclosure may be started if the default is not timely cured.

<sup>1</sup> *In Re: Certification of Need for Additional Judges*, Supreme Court Case No. 10-320, February 25, 2010.

<sup>2</sup> A common interest community would be condominium association or a homeowners association.

<sup>3</sup> Mortgage lenders commonly communicate with delinquent debtors on numerous occasions prior to filing a foreclosure action.

<sup>4</sup> Chapter 49, F.S., provides for constructive service of process when a person cannot be found.

The creditor must wait at least 30 days after the notice of default was given before giving the notice of foreclosure that commences the foreclosure process. If the default is monetary, the debtor may cure the default within those 30 days. If the default is non-monetary<sup>5</sup>, the debtor must commence the cure within 30 days and must complete it within 90 days in order to avoid foreclosure.

## Notice of Foreclosure

In judicial foreclosure, the formal process is started by filing a complaint with the clerk of court, and serving a summons and a copy of the complaint on each defendant. Under this bill, delivery of a notice of foreclosure starts the formal nonjudicial foreclosure process.

In judicial foreclosure, the plaintiff records a lis pendens in the public records, which gives notice to the general public of the pending judicial foreclosure. Under this bill, the notice of foreclosure is recorded and acts like a lis pendens. Like a lis pendens, there is no requirement to notify persons who may assert an interest in the real property that is recorded in the public records after the recording of the notice of foreclosure, as their interest will be terminated should the foreclosure be completed.

Within 5 days after the filing of a notice of foreclosure in the public records, the creditor is required to furnish a copy (see notice requirements above) to the following persons:

- Any debtor under the mortgage.
- Any person specified in the mortgage to receive notice.
- Any person listed in the public records as an owner of the real property.
- Any other person who may hold a real property interest.
- Any person who has recorded a request for notice.

Under judicial foreclosure, there is no requirement to post notice of the foreclosure on the property.<sup>6</sup> Under this bill, within 10 days after recording the notice of foreclosure, the creditor must attach a copy upon a conspicuous place on the real property.

This bill provides the requirements of a notice of foreclosure. The notice must:

- Have this heading: **NOTICE OF FORECLOSURE. YOU ARE HEREBY NOTIFIED THAT YOU MAY LOSE YOUR RIGHTS TO CERTAIN PROPERTY. READ THIS NOTICE IMMEDIATELY AND CAREFULLY**
- Contain the date, owner name, property description, and a list of personal property secured by the mortgage.
- Contain the date and recording information of the mortgage or other security instrument.
- State that a default exists, with the facts supporting the default.
- State that a foreclosure is being initiated and include a statement of whether the creditor is electing to accelerate the debt.
- Include redemption information.
- State the method of foreclosure elected.
- Include notice that the foreclosure will terminate legal rights.
- Include an explanation of a debtor's right to avoid a deficiency, if applicable.
- Include, if applicable, information regarding objection to negotiated sale or appraisal.
- If homestead, include information on the right to request a meeting with the creditor.
- Include the name, address and phone number of a representative of the creditor.
- Include a statement informing the recipient that he or she can file an objection to the foreclosure in the courts.

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<sup>5</sup> Non-monetary defaults occur significantly less often than monetary defaults. An example of a non-monetary default is a failure to maintain the property where the failure is so significant that it impairs the value of the security interest.

<sup>6</sup> Which is one reason that many tenants fail to learn of a pending foreclosure action.



This bill also provides that any person may record in the public records a request for notice of foreclosure. If a creditor later commences a nonjudicial foreclosure by the filing of a notice of foreclosure, but fails to timely give a notice of foreclosure to someone who has properly recorded a request, the creditor must pay a \$500 penalty to such person. If the recorded request for notice states that the person has a legal interest in the property and that person is not timely given notice, that person's legal interest in the property will not be foreclosed.<sup>7</sup> There is no provision in current law for a person to demand notice should a foreclosure be filed in the future.

### **Meeting Between Creditor and Debtor**

Current statutory judicial foreclosure law does not require a foreclosing creditor to meet with a debtor on the debtor's request, although many local courts have enacted such requirements. Those requirements are usually tied to an expensive requirement that the creditor pay a mediator as much as \$750 a case.<sup>8</sup>

Under this bill, if a person who has received a notice of foreclosure requests a meeting with the creditor within 30 days of receipt of the notice, the creditor must schedule and attend a meeting with that person. The representative who attends the meeting must be given the authority to cancel the foreclosure if the representative determines that there is no legal basis for the foreclosure. The meeting is not required to be in person, it may be conducted over the phone. At the meeting, the representative must have records to show entitlement to the foreclosure. If the debtor wishes to discuss modification, the debtor must bring financial statements to the meeting. Within 10 days after the meeting, the representative must inform the persons who attended the meeting of any decision regarding discontinuation of the foreclosure or modification of the mortgage. Statements made by any person at the meeting are inadmissible in any litigation. The form of this meeting, including the confidentiality, is similar to the mediated meetings required by local court orders, albeit without the presence of a mediator.

### **Foreclosure Time**

A foreclosure under this bill must be completed no less than 90 days after the Notice of Foreclosure, nor more than 1 year after. These time periods are tolled should any court enjoin or stay the foreclosure (including during a bankruptcy stay). There is no time limit for completion of a judicial foreclosure.

### **Judicial Supervision of Nonjudicial Foreclosure**

This bill provides that a creditor may file a court action for violation of ch. 52, F.S. The court may issue any order necessary.

This bill also provides that any person who was required to be given a notice of foreclosure may file an action demanding that the foreclosure proceed through legal process. The complaint must be filed within 20 days of receipt of the Notice of Foreclosure, must state a bona fide defense to the foreclosure, and must include a certificate under oath certifying that the complaint is not being filed for the purpose of delay. If the court finds that the complaint was filed solely for delay, the court must dismiss the action.

This bill also provides a judicial means to set aside a wrongful foreclosure (see below).

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<sup>7</sup> For instance, a tenant could file this request when commencing a tenancy, and thereby guarantee adequate advance notice should a nonjudicial foreclosure be filed against the leased property sometime in the future.

<sup>8</sup> *In Re: Final Report and Recommendations on Residential Mortgage Foreclosure Cases*, Florida Supreme Court Case No. AOSC09-54, December 28, 2009.

## Equity of Redemption

Under current judicial foreclosure law, any person with an interest in the property being foreclosed may redeem the property at any time prior to the auction sale.<sup>9</sup> Redemption is the right to stop the foreclosure by payment of the underlying debt. This bill provides the same right in ch. 52, F.S., namely, that any person with an interest in the property may redeem it at any time prior to the time of foreclosure set in the Notice of Foreclosure. A creditor must cooperate with any request for the redemption amount.

## Creditor Option: Foreclosure by Auction

This bill provides for foreclosure by auction. It is one of the three options available to a creditor. A foreclosing creditor who elects foreclosure by auction must obtain evidence of title and provide a copy of such evidence to any bidder at the sale. The evidence of title must state that the issuer is willing to provide evidence of title to the winning bidder. By contrast, buyers at a judicial foreclosure sale are not given any evidence of title and therefore purchase the property as if receiving a quit claim deed.<sup>10</sup>

Current judicial foreclosure law requires advertisement of the sale. This bill similarly requires the creditor to advertise the foreclosure sale. The creditor must elect one of two methods for advertising the sale:

- The creditor may advertise the sale under s. 45.031, F.S., which is current law providing advertising requirements for judicial sales. Section 45.031(2), F.S., requires that notice of sale must be published once a week for 2 consecutive weeks, published in a newspaper of general circulation in the county in which the property is located, the second of which must be at least 5 days prior to the sale.
- The creditor may advertise the sale once per week for 3 consecutive weeks in a newspaper of general circulation in the county in which the property is located. The 3rd notice must be no fewer than 7 days prior to the auction nor more than 30 days.

Current judicial foreclosure law does not require a creditor to furnish a copy of the advertisement of the sale to the parties, although only defendants who have filed papers in the case will receive a copy of the court order setting the sale date. This bill requires the creditor to furnish a copy of the advertisement to all persons entitled to a notice of foreclosure at least 21 days prior to the sale date.

Current judicial foreclosure law does not address whether a foreclosing creditor may place a sign advertising the auction on the property. This bill allows, but does not require, a creditor to place a sign on the property advertising the sale.

An auction sale under this bill must be conducted at a date, time and place that is authorized for judicial sales.

Where multiple parcels are under one security interest, this bill allows a creditor to sell the parcels separately or together, or both, in order to obtain the highest price. If sold separately, the auctions must stop once the total bids exceed the amount owed.

Under current judicial foreclosure law, a creditor must obtain court permission to postpone the auction sale. This bill allows the person conducting a nonjudicial auction sale to postpone the sale for any reason. The postponement must be announced at the sale. A postponement may not extend for more than 30 days.

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<sup>9</sup> Section 45.0315, F.S.

<sup>10</sup> Unsophisticated bidders sometimes bid on a buy properties that have title problems, such as a federal tax lien or a superior lien.

Judicial foreclosure auctions are either conducted by a deputy clerk of the court by verbal auction, requiring personal attendance by persons who wish to bid, or conducted by vendors by electronic auction conducted over this internet. This bill provides that a nonjudicial foreclosure sale is generally conducted like a judicial auction by a deputy clerk. In addition, in an auction under this bill:

- The auctioneer may demand that prospective bidders verify that they can make the required deposit before they are allowed to bid
- The auctioneer may enter credit bids for the creditor.
- A bidder not in attendance may submit a fixed written bid in advance.

In a sale under this bill, the winning bidder must immediately deposit 10 percent of the bid amount, unless the creditor agrees to a smaller deposit. The advertisement for the auction must state the required deposit.

In a judicial sale, the winning bidder must pay the full bid on the day of the sale, or lose the deposit. Under this bill, a winning bidder in a nonjudicial sale has 7 days to pay the remainder of the bid price before losing the deposit

In judicial foreclosure, the clerk gives the winning bidder a certificate of title, which is the equivalent of a quitclaim deed. In a sale under this bill, the creditor must record for the winning bidder a warranty deed together with an affidavit certifying that the foreclosure procedure was completed correctly.

### **Creditor Option: Foreclosure by Negotiated Sale**

Foreclosure by negotiated sale is not a remedy available to the court in a judicial foreclosure. It is common for judicial foreclosures to be resolved through a short sale, where the creditor and debtor agree to a sale. However, under current law only debtors initiate short sales because a creditor cannot easily market the property prior to taking title and possession after auction.

Under this bill, the creditor may elect foreclosure by negotiated sale. The creditor may list the property for sale through a broker, and may place a sign on the property. If the creditor receives a contract, the creditor must notify all persons entitled to notice of the foreclosure at least 30 days prior to the closing date of the date of closing and the expected proceeds of the negotiated sale:

At closing, the creditor must give the buyer a warranty deed and an affidavit certifying that the foreclosure procedure was completed correctly. The deed and affidavit must be recorded to transfer title.

Any person who receives the notice of the negotiated sale may object to the sale by giving notice to the creditor at least 7 days prior to closing. Upon receipt of the notice, the creditor must elect one of the following options:

- Discontinue the foreclosure.
- Give notice to the objecting person that the person's interest in the real property will be preserved from termination by the foreclosure.
- Pay the person a liquidated sum for that person's interest.<sup>11</sup>

If a person fails to timely object, the person may not claim that the sale price was inadequate.

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<sup>11</sup> This option is only available to persons whose interests can be resolved by payment of money. For instance, should a second mortgage holder timely object to the sale, the creditor would have to pay the second mortgage in full in order to clear the interest.

## **Creditor Option: Foreclosure by Appraisal**

Foreclosure by appraisal is not a remedy available to the court in a judicial foreclosure. In short, foreclosure by appraisal under this bill is a means by which the creditor takes title to the property at the conclusion of the foreclosure, crediting the debtor's account with the appraised value of the property.<sup>12</sup>

Under this bill, the foreclosing creditor seeking foreclosure by appraisal must obtain an appraisal of the property dated no more than 60 days prior to the date of foreclosure. At least 30 days prior to the date of foreclosure, the creditor must give notice to all persons entitle to notice of the foreclosure by appraisal which includes:

- A copy of the appraisal report.
- The date that the foreclosure by appraisal will be finalized.
- The amount to be credited to the debtor and the amount, if any, to be paid to junior creditors.
- Notice that title will be transferred.
- Notice that any objection must be filed no later than 7 days prior to the date that the foreclosure by appraisal will be finalized.

If there is no timely objection, the foreclosure by appraisal is completed by recording an affidavit of the creditor stating that the process has been properly completed. The bill provides that this affidavit serves to transfer title to the creditor.

Any person who receives the notice of foreclosure by appraisal may object to the foreclosure by appraisal by giving notice to the creditor at least 7 days prior to the date of foreclosure. Upon receipt of the notice, the creditor must elect one of the following options:

- Discontinue the foreclosure.
- Give notice to the objecting person that the person's interest in the real property will be preserved from termination by the foreclosure.
- Pay the person a liquidated sum for that person's interest.

If a person fails to timely object, the person may not claim that the foreclosure amount was inadequate.

## **Application of Proceeds**

In judicial foreclosure, the proceeds of a judicial sale are paid to the clerk, and applied in the following order, until exhausted:

- To clerk's fees that are outstanding.
- To the plaintiff, up to the amount of the final judgment. The final judgment will include costs of the foreclosure and attorney's fees.
- To a surplus trustee, for distribution to junior creditors or the former owner, as their interests appear.

Under this bill, the proceeds of the foreclosure are applied as follows, until exhausted:

- Expenses of the foreclosure.
- The debt owed to the creditor.
- Other liens, in the order of their priority.
- The former owner.

A creditor acting in good faith in making a distribution is not liable for making an erroneous distribution.

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<sup>12</sup> An appraisal determines fair market value of a negotiated sale. In general, property sells at auction for far less than it would at a negotiated sale.

## **Actions Against a Creditor, Setting Aside a Foreclosure**

In judicial foreclosure, a person seeking relief from a wrongful foreclosure has the following remedies:

- A defendant can file an appeal of the final judgment of foreclosure. The appeal must be filed within 30 days of the final judgment of foreclosure.<sup>13</sup>
- A person may challenge the auction itself by motion filed with the trial court within 10 days after the sale.
- A defendant can ask the trial court to set aside the final judgment of foreclosure. An allegation of mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; or fraud, misrepresentation, or other misconduct of an adverse party must be filed within 1 year of the final judgment. If on any other ground, it must be filed within a reasonable period of time.
- Any person may file a new lawsuit to set aside the prior judgment.

Under this bill, a person seeking relief from, or damages related to, a nonjudicial foreclosure has the following remedies (which must be pursued in a civil court action):

- A person has an action for damages against a foreclosing creditor for any violation of ch. 52, F.S., or applicable law or principle of equity. The complaint must be filed within 3 years of the time of foreclosure.
- A person may seek to set aside the foreclosure or correct a violation of ch. 52, F.S. The complaint must be filed within 1 year of the time of foreclosure.

In any action, the recording of the affidavits required at the time of foreclosure conclusively establishes compliance with the requirements of ch. 52, F.S. Accordingly, a person challenging the nonjudicial foreclosure has the burden of proof.

## **Possession of the Foreclosed Real Property**

In judicial foreclosure, the clerk may issue to the winning bidder a writ of possession<sup>14</sup> if more than 10 days has elapsed since the sale and provided that no person has filed a motion challenging the sale. Under this bill, the person who has taken title to the real property may obtain a writ of possession from the clerk or may file an action for ejectment or unlawful detainer.

## **Deficiency Judgment**

In judicial foreclosure, the foreclosing creditor may seek a deficiency judgment against any person who is legally liable for the foreclosed debt. A deficiency judgment is a money judgment that, like any other money judgment, is collectable for up to 20 years.

This bill allows a foreclosing creditor to similarly seek a deficiency judgment in a court action. However, a debtor will not be liable for a deficiency judgment if the debtor acted in good faith in the process. A debtor acted in good faith if the debtor:

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<sup>13</sup> Florida Rules of Appellate Procedure 9.110(b)

<sup>14</sup> A writ of possession is an order to the sheriff directing the sheriff to put a person into possession of real property by removing any other person from the property. Upon service, any person in possession has 24 hours to remove his or her belongings. If the belongings are not timely removed or the other person refuses to leave, the sheriff may, at the conclusion of the 24 hours, forcibly remove such persons and their belongings.

- Peacefully and timely vacated the real property at the conclusion of the process.
- Did not significantly damage the property or significantly contaminate the property with hazardous materials, and leave such damage or contamination.
- Did not commit fraud against the creditor.
- Did not engage in criminal activity on the property that significantly reduced the property value.
- Did not allow significant damage to the property to occur resulting from a failure to take reasonable precautions.
- Allowed reasonable access to the property for inspection and, if the creditor elected foreclosure by negotiated sale, reasonable access to prospective purchasers.

This provision does not prohibit a deficiency judgment that may be owed to someone other than the foreclosing creditor.<sup>15</sup>

In judicial foreclosure, the foreclosing creditor is entitled to a deficiency judgment for the unpaid amount on the mortgage less the fair market value of the property securing the mortgage.<sup>16</sup> Under this bill, where a deficiency may be owed, the deficiency must be determined in a judicial proceeding. The deficiency under foreclosure by negotiated sale or foreclosure by appraisal is calculated by taking the amount owed to the creditor (principal, interest, and costs of foreclosure) and subtracting the net sale proceeds or the appraisal value. Under sale by auction, the deficiency is the amount owed minus the greater of the winning bid or 90 percent of the fair market value of the property.

### **Effect on Credit Rating**

In judicial foreclosure, credit rating agencies usually learn of the foreclosure and reduce any debtor's credit rating as a result of the foreclosure. Credit rating agencies learn of the foreclosure both as a result of reporting by creditors and by examination of the public records. This bill provides that if a debtor acts in good faith as regards the nonjudicial foreclosure (see discussion of good faith above), the debtor is not considered to have been in default and the foreclosing creditor is required to report to such agencies that the debtor is not in default under the obligation.

There are concerns regarding this provision, see DRAFTING ISSUES OR OTHER COMMENTS.

### **Discontinuation of Foreclosure**

In judicial foreclosure, the foreclosing creditor may file a voluntary dismissal of the case at any time, unless a defendant has filed a counterclaim. Court rules require the foreclosing creditor to mail a copy of the notice of dismissal. The notice of dismissal simply states that the case is dismissed.

Under this bill, the foreclosing creditor may discontinue the foreclosure at any time prior to completion of the sale by auction, closing of the negotiated sale, or the time of foreclosure as set in the notice of foreclosure by appraisal. The foreclosing creditor must give notice to every person entitled to a notice of foreclosure that informs such persons that the foreclosing creditor intends to either:

- Pursue a new foreclosure by the same method.

<sup>15</sup> For instance, if the first mortgage is the foreclosing creditor, the holder of a second mortgage could still seek a deficiency judgment.

<sup>16</sup> 37 Fla.Jur.2d Mortgages, s. 373.

- Continue to foreclose by another authorized method and under the notice of foreclosure previously given.
- Commence foreclosure by a different authorized method and under a new notice of foreclosure.
- Commence judicial foreclosure, provided the foreclosing creditor not seek a deficiency.
- Abandon foreclosure.

### **Miscellaneous**

This bill is to be interpreted by the courts in conformity with judicial decisions in other states that have adopted the Uniform Nonjudicial Foreclosure Act.

This bill modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act.

#### **B. SECTION DIRECTORY:**

Section 1 creates Part I of ch. 52, F.S., creating general provisions for nonjudicial foreclosure.

Section 2 creates Part II of ch. 52, F.S., creating procedures that are required prior to foreclosure.

Section 3 creates Part III of ch. 52, F.S., creating procedures for foreclosure by auction.

Section 4 creates Part IV of ch. 52, F.S., creating procedures for foreclosure by negotiated sale.

Section 5 creates Part V of ch. 52, F.S., creating procedures for foreclosure by appraisal.

Section 6 creates Part VI of ch. 52, F.S., setting forth rights of the parties after foreclosure.

Section 7 creates Part VII of ch. 52, F.S., providing for discontinuation of a foreclosure.

Section 8 creates Part VIII of ch. 52, F.S., creating miscellaneous provisions related to nonjudicial foreclosure.

Section 9 provides an effective date of July 1, 2010.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

This bill will likely have a significant negative fiscal impact on state government revenues related to filing fees. The Revenue Estimating Conference has not yet determined the fiscal impact of this bill.

##### **2. Expenditures:**

None.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

##### **1. Revenues:**

None.

##### **2. Expenditures:**

None.

#### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

This bill is likely to have a substantial positive fiscal impact on the private sector. Foreclosure is expensive to creditors. A foreclosing creditor will save court filing fees of as much as \$1900 a case, plus court costs of several hundred dollars a case. Foreclosing creditors under this bill will realize smaller losses from uncollected interest as this process should be significantly faster than judicial foreclosure.

Auction sales of real property commonly have a sale price less than fair market value. 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 don't just benefit the foreclosing creditor, they 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).

Most debtors facing foreclosure of their homestead property will qualify under this bill to avoid a deficiency judgment. These debtors should realize significant financial savings plus a financial fresh start.

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.

#### D. FISCAL COMMENTS:

Foreclosures are clogging the courts, leading to delays not just in foreclosures but in all litigation. One economist estimated in 2009 that such delays cost Florida businesses \$10.1 billion in direct costs and another \$7.3 billion in indirect costs annually. In that this bill may reduce the delays occasioned by foreclosure cases, this bill may have a significant positive fiscal impact on Florida's business climate.

### 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.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

##### Drafting Issues

Lines 84 to 94 define the term "common interest community." The definition specifically includes homeowners associations and condominium associations. It is unclear why this definition does not include cooperative associations.

Lines 995 to 999 gives directions as to conveyance of title to the property at the conclusion of an auction sale. Line 995 requires use of a statutory warranty deed, but Line 998 provides that the deed is given without warranty of title. These two are contradictory and perhaps should be reconciled.



### Other Comments - Real Property Concerns

The provisions for foreclosure by appraisal do not require that a deed be recorded in the public records, only an affidavit. It may not be clear from the affidavit alone that title transfers to the creditor.<sup>17</sup> It may be advisable to require a separate deed.

It may be advisable to provide in this bill for calculation of documentary stamp taxes under the different options.

### Other Comments - Possible Conflict with Federal Credit Reporting Laws

Section 52.607, F.S., created by this bill, requires a foreclosing creditor to report that a debtor who acts in good faith is not in default of the debtor's obligation to pay the debt owed to the creditor. However, such debtor has defaulted, which is why the debtor is in foreclosure. Credit reporting agencies (credit bureaus) and businesses that grant credit are regulated by the federal Fair Credit Reporting Act. 15 U.S.C. s. 1681s-2 requires that any business furnishing information to a credit reporting agency must report accurate information. 15 U.S.C. s. 1681t(b)(1)(F) prohibits states from enacting any law modifying this requirement. Where they are in conflict with one another, federal law controls over state law.<sup>18</sup> It is possible that proposed s. 52.607, F.S. conflicts with federal law.

## **IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

n/a

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<sup>17</sup> Recording clerks are not uniform in how they index affidavits. For instance, it is not unusual for an affidavit to only be indexed under the name of the person who executed the affidavit. It is unclear how the clerk would know to index this particular affidavit under both the creditor and debtor names in order that the property index shows the chain of title.

<sup>18</sup> See art. VI, cl. 2 of the federal constitution.

1                                   A bill to be entitled  
 2           An act relating to homeowner relief; creating parts I, II,  
 3           III, IV, V, VI, VII, and VIII of chapter 52, F.S.;  
 4           providing general provisions for an alternative method of  
 5           foreclosures other than under the judicial system;  
 6           providing a short title; providing for scope of  
 7           applicability; excluding homestead property; providing  
 8           definitions; providing for variation by agreement;  
 9           providing for application of supplemental principles of  
 10          law and equity; providing criteria for notice and  
 11          knowledge; providing for transactions creating a security  
 12          interest; providing for time of foreclosure; providing  
 13          procedures, requirements, and limitations before  
 14          foreclosure; specifying a right to foreclose; requiring a  
 15          notice of default; providing a right to cure; providing  
 16          requirements for a notice of foreclosure; providing for a  
 17          meeting and meeting requirements to object to foreclosure;  
 18          providing a period of limitation for foreclosure;  
 19          providing for judicial supervision of foreclosure;  
 20          providing procedures and limitations for foreclosures  
 21          brought under the judicial system; providing for a right  
 22          to redeem collateral; providing authority, requirements,  
 23          procedures, and limitations on foreclosures by auction,  
 24          foreclosures by negotiated sale, and foreclosures by  
 25          appraisal; providing for rights after foreclosure;  
 26          providing for application of proceeds, transfer of title,  
 27          actions for damages or to set aside a foreclosure,  
 28          possession after foreclosure, judgments for deficiencies,

29 and determinations of amounts of a deficiency; providing  
 30 for effect of good faith by a debtor; providing  
 31 application and construction; providing authority,  
 32 requirements, procedures, and limitations on  
 33 discontinuation of a foreclosure; providing for uniformity  
 34 of application and construction; specifying a relation to  
 35 the Electronic Signatures in Global and National Commerce  
 36 Act; providing an effective date.

37  
 38 WHEREAS, Florida is still recovering from the worst housing  
 39 bubble in memory, and

40 WHEREAS, many Floridians are left unable to pay their  
 41 mortgage debt, taxes, or insurance and fees and face the  
 42 prospect of huge deficiency judgments, that is, they are liable  
 43 for mortgage debt that exceeds the value of their homes, and

44 WHEREAS, many homeowner and condominium associations are  
 45 struggling to maintain common areas because owners are not  
 46 paying dues and assessments, and

47 WHEREAS, municipalities, counties, and school districts are  
 48 struggling to pay for the valuable services they provide because  
 49 so many homeowners are not paying real estate taxes owed, and

50 WHEREAS, Florida's courts are overburdened with foreclosure  
 51 cases, with nearly 500,000 backlogged cases as of December 31,  
 52 2009, and expected delays of 18-24 month periods before  
 53 foreclosure cases are resolved, and

54 WHERE, local community banks are unable to make new loans  
 55 to small businesses to create new jobs because their capital is

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56 tied up in defaulted real estate mortgages that are bogged down  
 57 in the courts, and

58 WHEREAS, Florida's economy will not bottom out, and  
 59 sustained recovery cannot begin, until real estate supply and  
 60 demand balance and homeowner debt issues are resolved, NOW,  
 61 THEREFORE,

62  
 63 Be It Enacted by the Legislature of the State of Florida:

64  
 65 Section 1. Part I of chapter 52, Florida Statutes,  
 66 consisting of sections 52.101, 52.102, 52.103, 52.104, 52.105,  
 67 52.106, 52.107, and 52.108, is created to read:

68 PART I

69 GENERAL PROVISIONS

70 52.101 Short title; scope of applicability.—

71 (1) This chapter may be cited as the "Homeowner Relief and  
 72 Housing Recovery Act."

73 (2) In lieu of any other foreclosure remedy which may be  
 74 available under the laws of this state under the judicial  
 75 system, this chapter may, at the option of the foreclosing  
 76 creditor, be used to effect a foreclosure of a security  
 77 instrument. However, if the foreclosing creditor does not elect  
 78 to use this chapter to effect a foreclosure, nothing in this  
 79 chapter is intended to modify any other foreclosure remedy  
 80 available under the laws of this state.

81 52.102 Definitions.—For purposes of this chapter:

82 (1) "Collateral" means property, real or personal, subject  
 83 to a security interest.

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84       (2) "Common interest community" means real property for  
85 which a person is obligated to pay real property taxes,  
86 insurance premiums, maintenance, or improvement of other real  
87 property described in a declaration or other governing  
88 documents, however denominated, by virtue of the community's or  
89 association's ownership thereof or the holding of a leasehold  
90 interest of at least 20 years, including renewal options  
91 therein. The term "common interest community" includes a  
92 community governed by a homeowners' association as defined in s.  
93 720.301 and a condominium community governed by one or more  
94 condominium associations as defined in s. 718.103.

95       (3) "Day" means a calendar day.

96       (4) "Debtor" means a person that owes payment or other  
97 performance of an obligation, whether absolute or conditional,  
98 primary or secondary, secured under a security instrument,  
99 whether or not the security instrument imposes personal  
100 liability on the debtor. The term does not include a person  
101 whose sole interest in the property is a security interest.

102       (5) "Evidence of title" means a title insurance policy, a  
103 preliminary title report or binder, a title insurance  
104 commitment, an attorney's opinion of title based on an  
105 examination of the public records or an abstract, or any other  
106 means of reporting the state of title to real estate that is  
107 customary in the locality.

108       (6) "Expenses of foreclosure" means the lesser of the  
109 reasonable costs incurred by a secured creditor or the maximum  
110 amounts permitted by any other laws of this state in connection  
111 with a foreclosure for transmission of notices, advertising,

112 evidence of title, inspections and examinations of the  
 113 collateral, management and securing of the collateral, liability  
 114 insurance, filing and recording fees, attorneys' fees and  
 115 litigation expenses incurred pursuant to ss. 52.207 and 52.601  
 116 to the extent provided in the security instrument or authorized  
 117 by law, appraisal fees, the fee of the person conducting the  
 118 sale in the case of a foreclosure by auction, fees of court-  
 119 appointed receivers, and other expenses reasonably necessary to  
 120 the foreclosure.

121 (7) "Foreclosing creditor" means a secured creditor who is  
 122 engaged in a foreclosure under this chapter.

123 (8) "Guarantor" means a person liable for the debt of  
 124 another, and includes a surety and an accommodation party.

125 (9) "Interest holder" means a person who owns a legally  
 126 recognized interest in real or personal property that is  
 127 subordinate in priority to a security interest foreclosed under  
 128 this chapter.

129 (10) "Original notice of foreclosure" means the first  
 130 notice of foreclosure sent pursuant to s. 52.204 instituting a  
 131 foreclosure under this chapter.

132 (11) "Purchase-money obligation" means an obligation  
 133 incurred in order to pay part or all of the purchase price of  
 134 residential real property collateral. An obligation is not a  
 135 purchase-money obligation if any part of the real property  
 136 securing it is not residential real property. A purchase-money  
 137 obligation includes an obligation:

138 (a) Incurred to the vendor of the real property;

139 (b) Owed to a third-party lender to pay a loan made to pay  
 140 part or all of the purchase price of the real property;

141 (c) Incurred to purchase labor and materials for the  
 142 construction of substantial improvements on the real property;  
 143 or

144 (d) To pay a loan all of the proceeds of which were used  
 145 to repay in full an obligation of the type described in  
 146 paragraphs (a)-(c).

147 (12) "Real property" means any estate or interest in,  
 148 over, or under land, including minerals, structures, fixtures,  
 149 and other things that by custom, usage, or law pass with a  
 150 conveyance of land though not described or mentioned in the  
 151 contract of sale or instrument of conveyance. The term includes  
 152 the interest of a landlord or tenant and, unless under the law  
 153 of the state in which the property is located that interest is  
 154 personal property, an interest in a common interest community.

155 (13) "Record" when used as a verb, means to take the  
 156 actions necessary to perfect an interest in real property under  
 157 the laws of this state.

158 (14) "Record" used as a noun, means information that is  
 159 inscribed on a tangible medium or that is stored in an  
 160 electronic or other medium and is retrievable in perceivable  
 161 form.

162 (15) "Residential" means:

163 (a) As applied to an interest holder, an individual who  
 164 holds a possessory interest, other than a leasehold interest  
 165 with a duration of 1 year or less, in residential real property  
 166 in which a security interest exists, and any person that is

167 wholly owned and controlled by such an individual or  
 168 individuals.

169 (b) As applied to a debtor, an individual who is  
 170 obligated, primarily or secondarily, on an obligation secured in  
 171 whole or in part by residential real property, and any person  
 172 that is wholly owned and controlled by such an individual or  
 173 individuals.

174 (16) "Residential real property" means real property that,  
 175 when a security instrument is entered into, is used or is  
 176 intended by its owner to be used primarily for the personal,  
 177 family, or household purposes of its owner and is improved, or  
 178 is intended by its owner to be improved, by one to four dwelling  
 179 units.

180 (17) "Secured creditor" means a creditor that has the  
 181 right to foreclose a security interest in real property under  
 182 this chapter.

183 (18) "Security instrument" means a mortgage, deed of  
 184 trust, security deed, contract for deed, agreement for deed,  
 185 land sale contract, lease creating a security interest, or other  
 186 contract or conveyance that creates or provides for an interest  
 187 in real property to secure payment or performance of an  
 188 obligation, whether by acquisition or retention of a lien, a  
 189 lessor's interest under a lease, or title to the real property.  
 190 A security instrument may also create a security interest in  
 191 personal property. If a security instrument makes a default  
 192 under any other agreement a default under the security  
 193 instrument, the security instrument includes the other  
 194 agreement. The term includes any modification or amendment of a



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195 security instrument, and includes a lien on real property  
196 created by a record to secure an obligation owed by an owner of  
197 the real property to an association in a common interest  
198 community or under covenants running with the real property.

199 (19) "Security interest" means an interest in real or  
200 personal property that secures payment or performance of an  
201 obligation.

202 (20) "Sign" means:

203 (a) Execute or adopt a tangible symbol with the present  
204 intent to authenticate a record; or

205 (b) Attach or logically associate an electronic symbol,  
206 sound, or process to or with a record with the present intent to  
207 authenticate a record.

208 (21) "State" means a state of the United States, the  
209 District of Columbia, Puerto Rico, the United States Virgin  
210 Islands, or any territory or insular possession subject to the  
211 jurisdiction of the United States.

212 (22) "Time of foreclosure" means the time that title to  
213 real property collateral passes to the person acquiring it by  
214 virtue of foreclosure under this chapter.

215 52.103 Application.-

216 (1) Except as otherwise provided in subsection (2), this  
217 chapter authorizes the nonjudicial foreclosure of every form of  
218 security interest in real property located in this state and  
219 related personal property entered into before, on, or after July  
220 1, 2010, if the original notice of foreclosure is given after  
221 July 1, 2010, and if the debtor has agreed in substance in the  
222 security instrument that:

223 (a) The security interest may be foreclosed pursuant to  
 224 this chapter; or

225 (b) The security interest may be foreclosed by nonjudicial  
 226 process.

227 (2) This chapter may not be used to foreclose:

228 (a) A lien created by statute or operation of law, except  
 229 a lien of an owners' association on property in a common  
 230 interest community;

231 (b) A security interest in property in a common interest  
 232 community if under the law of this state that interest is  
 233 personal property; or

234 (c) A security interest in rents or proceeds of real  
 235 property.

236 (3) This chapter does not preclude or govern foreclosure  
 237 or other enforcement of security interests in real property by  
 238 judicial or other action permitted by any other laws of this  
 239 state.

240 (a) A secured creditor may not take action in pursuance of  
 241 foreclosure under this chapter if a judicial proceeding is  
 242 pending in this state to foreclose the security interest or to  
 243 enforce the secured obligation against a person primarily liable  
 244 for the obligation.

245 (b) A secured creditor may not commence or pursue  
 246 foreclosure under this chapter if a judicial proceeding is  
 247 pending in this state to challenge the existence, validity, or  
 248 enforceability of the security interest to be foreclosed.

249 (c) Except as provided in s. 52.208(2), foreclosure under  
 250 this chapter may proceed even if a judicial proceeding is

251 pending or a judicial order has been obtained for appointment or  
 252 supervision of a receiver of the collateral, possession of the  
 253 collateral, enforcement of an assignment of rents or other  
 254 proceeds of the collateral, or collection or sequestration of  
 255 rents or other proceeds of the collateral or to enforce the  
 256 secured obligation against a guarantor.

257 (4) If a security instrument covers both real property and  
 258 personal property, the secured creditor may proceed under this  
 259 chapter as to both the real property and personal property to  
 260 the extent permitted by chapter 679.

261 52.104 Variation by agreement.—

262 (1) Except as otherwise provided in subsections (2)-(4),  
 263 the parties to a security instrument may not vary by agreement  
 264 the effect of a provision of this chapter.

265 (2) The time within which a person must respond to a  
 266 notice sent by a secured creditor may be extended by agreement.

267 (3) The parties to a security instrument may vary the  
 268 effect of any provision of this chapter that by its terms  
 269 permits the parties to do so.

270 (4) The parties by agreement may determine the standards  
 271 by which performance of obligations under this chapter is to be  
 272 measured if those standards are not manifestly unreasonable.

273 (5) If every debtor under a security instrument is not a  
 274 residential debtor, an agreement by a guarantor waiving the  
 275 right to receive notices under this chapter with respect to the  
 276 foreclosure of the property of a debtor who is not a guarantor  
 277 is enforceable unless a waiver is unenforceable under other  
 278 applicable law.

279 52.105 Supplemental principles of law and equity  
 280 applicable.—Unless displaced by a particular provision of this  
 281 chapter, the principles of law and equity affecting security  
 282 interests in real property supplement this chapter.

283 52.106 Notice and knowledge.—For purposes of this section:

284 (1) The following definitions apply:

285 (a) "Address" means a physical or an electronic address,  
 286 or both, as the security instrument requires.

287 (b) "Address for notice" means:

288 1. With respect to a notice given by a secured creditor:

289 a. For a recipient that has given to the secured creditor  
 290 a security instrument or other document in connection with a  
 291 security instrument, the address, if any, specified in the  
 292 security instrument or document.

293 b. For a recipient not described in sub-subparagraph a.  
 294 that is identifiable from examination of the public records of  
 295 the county or counties in which the collateral is located, or,  
 296 if personal property is being foreclosed together with real  
 297 property, the Uniform Commercial Code financing statement  
 298 filings, the address, if any, specified in the recorded or filed  
 299 document.

300 c. For a recipient not described in sub-subparagraph a. or  
 301 sub-subparagraph b. that the secured creditor knows is a tenant,  
 302 subtenant, or leasehold assignee of all or part of the real  
 303 property collateral, the most recent address made known to the  
 304 secured creditor by that person or, if none, the address of the  
 305 real property collateral, including the designation of any  
 306 office, apartment, or other unit that the secured creditor knows

307 is possessed by the recipient, with the notice directed to the  
 308 recipient's name, if known, or otherwise "To Tenant occupying  
 309 property at" the physical address or description of the real  
 310 property collateral.

311 d. For a recipient not described in sub-subparagraphs a.-  
 312 c., the physical address of the real property collateral.

313 2. With respect to notices given by persons other than a  
 314 secured creditor, the most recent address given in a document  
 315 provided by the recipient to the person giving notice.

316 (c) "Electronic" means relating to technology having  
 317 electrical, digital, magnetic, wireless, optical,  
 318 electromagnetic, or similar capabilities.

319 (d) "Electronic notice" means an electronic record signed  
 320 by the person sending the notice.

321 (e) "Electronic record" means a record created, generated,  
 322 sent, communicated, received, or stored by electronic means.

323 (f) "Electronic signature" means an electronic sound,  
 324 symbol, or process attached to or logically associated with a  
 325 record and executed or adopted by a person with intent to  
 326 authenticate the record.

327 (g) "Recipient" means a person to whom a notice is sent.

328 (h) "Written notice" means a written record signed by the  
 329 person giving the notice.

330 (2) A person knows a fact if:

331 (a) The person has actual knowledge of the fact;

332 (b) The person has received a notice or notification of  
 333 the fact; or

334 (c) From all the facts and circumstances known to the  
 335 person at the time in question the person has reason to know the  
 336 fact.

337 (3) Notice is sent or given, or a recipient is notified,  
 338 subject to the limitations of subsection (4):

339 (a) By hand delivering a written notice to the recipient  
 340 or to an individual authorized to receive service of civil  
 341 process under applicable Florida law who is found at the  
 342 recipient's address for notice;

343 (b) By depositing written notice, properly addressed to  
 344 the recipient's address for notice, with cost of delivery paid:

345 1. With the United States Postal Service, registered or  
 346 certified mail, return receipt requested;

347 2. With the United States Postal Service by regular mail;  
 348 or

349 3. With a commercially reasonable carrier other than the  
 350 United States Postal Service; or

351 (c) Subject to subsection (7), by initiating operations  
 352 that in the ordinary course will cause the notice to come into  
 353 existence at the recipient's address for notice in the  
 354 recipient's information processing system in a form capable of  
 355 being processed by the recipient.

356 (4) If the recipient is an individual and the security  
 357 interest covers the recipient's primary residence, use of the  
 358 methods of notice specified in subsection (3) is limited as  
 359 follows:

360 (a) If the notice is a notice of default pursuant to s.  
 361 52.202 or a notice of foreclosure pursuant to s. 52.203, both of

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362 the methods of giving notice specified in subparagraphs (3)(b)2.  
363 and 3. must be used.

364 (b) If the notice is not a notice of default pursuant to  
365 s. 52.202 or a notice of foreclosure pursuant to s. 52.203, a  
366 method of giving notice specified in paragraph (3)(a) or  
367 paragraph (3)(b) must be used.

368 (5) If a person giving a notice pursuant to this chapter  
369 and the recipient have agreed to limit the methods of giving  
370 notice otherwise permitted by subsections (3) and (4), that  
371 limitation is enforceable to the extent that it is consistent  
372 with subsection (4) and is otherwise permitted by law.

373 (6) A person may not give an electronic notice unless the  
374 recipient uses, designates by agreement, or otherwise has  
375 designated or holds out an information processing system or  
376 address within that system as a place for the receipt of  
377 communications of that kind. An electronic notice is not sent if  
378 the sender or its information processing system inhibits the  
379 ability of the recipient to print or store the record.

380 (7) If, at the time of giving a required notice, a person  
381 knows that the recipient's address for notice is incorrect or  
382 that notices cannot be delivered to the recipient at that  
383 address, the person that sent the notice shall make a reasonable  
384 effort to determine a correct address for the recipient and send  
385 the notice to the address so determined. Compliance with the  
386 provisions of chapter 49 satisfies the requirement to make  
387 reasonable effort to locate the party entitled to notice.

388 (8) If, after giving a notice, a person acquires knowledge  
389 that the address of the recipient to which the notice was

390 directed is incorrect or that notices cannot be delivered to the  
 391 recipient at that address, the person that sent the notice shall  
 392 promptly make a reasonable effort to determine a correct address  
 393 for the recipient and send another copy of the notice to the  
 394 address so determined, if any. The first notice, if timely sent  
 395 and properly directed to the recipient's address for notice,  
 396 complies with the time requirements of this chapter.

397 (9) A person may use methods of giving notice in addition  
 398 to, but not in place of, the methods required by subsections (3)  
 399 and (4).

400 (10) A notice is sufficient even if it includes  
 401 information not required by law or contains minor errors that  
 402 are not seriously misleading.

403 (11) Receipt of a notice within the time in which it would  
 404 have been received if properly sent has the effect of a proper  
 405 giving of notice.

406 (12) If the recipient is an individual, a notice is  
 407 received when it comes to the recipient's attention or is  
 408 delivered to and available at the recipient's address for  
 409 notice. If the recipient is not an individual, a notice is  
 410 received when it is brought to the attention of the individual  
 411 conducting the transaction, or in any event when it would have  
 412 been brought to that individual's attention if the recipient had  
 413 exercised due diligence. An organization exercises due diligence  
 414 if it maintains reasonable routines for communicating  
 415 significant information with the person conducting the  
 416 transaction and there is reasonable compliance with the  
 417 routines. Due diligence does not require an individual acting



418 for the organization to communicate information unless such  
 419 communication is part of the individual's regular duties or  
 420 unless the individual has reason to know of the transaction and  
 421 that the transaction would be materially affected by the  
 422 information.

423 (13) Subject to subsection (12), a person that has sent a  
 424 notice may revoke it by a subsequent notice unless the recipient  
 425 has materially changed its position in reliance on the notice  
 426 before receiving the revocation.

427 52.107 Transaction creating security interest.—A  
 428 transaction that is intended to create a security interest does  
 429 so irrespective of the caption of the documents.

430 52.108 Time of foreclosure.—The time of foreclosure is the  
 431 time the affidavit required by:

432 (1) Section 52.312 is recorded, in the case of a  
 433 foreclosure by auction.

434 (2) Section 52.405 is recorded, in the case of a  
 435 foreclosure by negotiated sale.

436 (3) Section 52.505 is recorded, in the case of a  
 437 foreclosure by appraisal.

438 Section 2. Part II of chapter 52, Florida Statutes,  
 439 consisting of sections 52.201, 52.202, 52.203, 52.204, 52.205,  
 440 52.206, 52.207, 52.208, and 52.209, is created to read:

441 PART II

442 PROCEDURES BEFORE FORECLOSURE

443 52.201 Right to foreclose.—

444 (1) A secured creditor has a right to foreclose under this  
 445 chapter if:

446 (a) All conditions that, by law and the terms of the  
 447 security instrument, are prerequisites to foreclosure have been  
 448 satisfied.

449 (b) All notices to the debtor required by the security  
 450 instrument and by this chapter as prerequisites to foreclosure  
 451 have been given.

452 (c) All periods for cure available to the debtor by the  
 453 terms of the security instrument and law as prerequisites to  
 454 foreclosure have elapsed and no cure has been made.

455 (2) A foreclosing creditor may pursue foreclosure  
 456 exclusively by auction, by negotiated sale, or by appraisal, or  
 457 may simultaneously pursue, together with foreclosure by auction,  
 458 either foreclosure by negotiated sale or by appraisal, but not  
 459 both. If the creditor pursues two methods of foreclosure  
 460 simultaneously, the notice of foreclosure must state both  
 461 methods.

462 52.202 Notice of default and right to cure.-

463 (1) Subject to subsection (2) and paragraph (6)(a), a  
 464 notice of default must be given to each debtor and each interest  
 465 holder whose interest gives right of possession of the real  
 466 property collateral, and the cure period provided by this  
 467 section must expire without cure being made, before the original  
 468 notice of foreclosure may be given.

469 (2) Except as provided in the security instrument, notice  
 470 of default need not be given and no cure period is applicable if  
 471 the default cannot be cured.

472 (3) A notice of default must contain:

473 (a) The facts establishing that a default has occurred.

474 (b) The amount to be paid or other performance required to  
 475 cure the default, including the daily rate of accrual for  
 476 amounts accruing over time, and the time within which cure must  
 477 be made.

478 (c) The name, address, and telephone number of an  
 479 individual who is or represents the secured creditor and who can  
 480 be contacted for further information concerning the default.

481 (d) A statement that foreclosure may be initiated if the  
 482 default is not cured in a timely manner.

483 (4) Within 30 days after notice of default is given to the  
 484 last person entitled to such notice, any person may:

485 (a) Cure the default if the default is curable by the  
 486 payment of money; or

487 (b) Commence to cure the default if the default cannot be  
 488 cured by the payment of money, diligently proceed to cure the  
 489 default, and complete the cure of the default within 90 days  
 490 after the notice of default was given.

491 (5) If no person is proceeding diligently to cure a  
 492 default that cannot be cured by the payment of money after 30  
 493 days from the date the notice of default was sent to the last  
 494 person entitled to such notice, the secured creditor may  
 495 immediately terminate the period allowed for cure by  
 496 accelerating payment of the principal amount owing on the  
 497 secured obligation or giving an original notice of foreclosure.

498 (6) If none of the real property to be foreclosed is  
 499 residential real property:

500 (a) If a default cannot be cured by the payment of money  
 501 and a notice of default was given by the secured creditor within

502 1 year before the date of the present default on account of a  
 503 default of the same kind, a notice of default is not required  
 504 and a right to cure does not exist except as agreed by the  
 505 parties.

506 (b) The periods specified in subsection (4) to cure a  
 507 default may be reduced as the parties agree in the security  
 508 instrument.

509 (7) A notice of default may be given notwithstanding that  
 510 a notice of default has previously been given on account of a  
 511 different default and is still pending.

512 (8) The right to cure a default provided in this section  
 513 does not impair or limit any other right to notice of default or  
 514 to cure a default provided to any person by the security  
 515 instrument. The period to cure provided in this section and any  
 516 period to cure provided in the security instrument run  
 517 concurrently unless the security instrument provides otherwise.

518 (9) Unless precluded from doing so by law other than this  
 519 chapter, a secured creditor shall cooperate with any debtor or  
 520 interest holder that attempts to cure a default by promptly  
 521 providing upon request reasonable information concerning the  
 522 amount or other performance due and expenses necessary for cure.

523 (10) If a default is cured within a period allowed by this  
 524 section, or after the expiration of that period but before  
 525 acceleration of the principal amount owing on the secured  
 526 obligation or the giving of an original notice of foreclosure,  
 527 an acceleration by the secured creditor of the principal amount  
 528 owing on the secured obligation on account of that default is  
 529 ineffective.

530 (11) During a period allowed for cure of a default under  
 531 this section, a secured creditor may enforce any remedy other  
 532 than foreclosure provided for by the security instrument and  
 533 enforceable under the laws of this state other than this chapter  
 534 if enforcement does not unreasonably interfere with the ability  
 535 of a debtor to cure a default under this section.

536 52.203 Notice of foreclosure; manner of giving.-

537 (1) If a secured creditor has a right to foreclose under  
 538 s. 52.201, the secured creditor may commence foreclosure by  
 539 giving notice of foreclosure. The notice must comply with  
 540 subsections (2) and (3) and s. 52.204 and is a prerequisite to  
 541 foreclosure.

542 (2) A foreclosing creditor shall record a copy of the  
 543 notice of foreclosure in the public records of each county in  
 544 which the real property collateral is located. A recorded notice  
 545 of foreclosure is notice of its existence and contents to any  
 546 person acquiring an interest in the real property collateral  
 547 after the notice of foreclosure is recorded. In the absence of  
 548 recording of the notice of foreclosure, any purported  
 549 foreclosure under this chapter is void.

550 (3) Except as otherwise provided in subsection (4), a  
 551 foreclosing creditor shall give a notice of foreclosure to the  
 552 following persons no later than 5 days after recording the  
 553 original notice of foreclosure pursuant to subsection (2) if  
 554 such persons can be identified as of the time of recording of  
 555 the notice of foreclosure:

556 (a) A person that the foreclosing creditor knows to be a  
 557 debtor.

558        (b) A person specified by the debtor in the security  
 559 instrument to receive notice on the debtor's behalf.

560        (c) A person that is shown by the public records of each  
 561 county in which any part of the real property collateral is  
 562 located to be an interest holder in the real property  
 563 collateral.

564        (d) If the foreclosing creditor holds and intends to  
 565 foreclose on a security interest in personal property, a person  
 566 who is entitled to notice with respect to the disposition of the  
 567 personal property collateral under chapter 679.

568        (e) A person who the foreclosing creditor knows is an  
 569 interest holder in the real property collateral.

570        (f) A person that has recorded in the public records of a  
 571 county in which any part of the real property collateral is  
 572 located a request for notice of foreclosure satisfying the  
 573 requirements of s. 52.205.

574        (4) After the time of recording of the notice of  
 575 foreclosure, if the foreclosing creditor obtains actual  
 576 knowledge that a person holds an interest in the collateral that  
 577 is subordinate in priority to the security instrument, the  
 578 foreclosing creditor must give a notice of foreclosure to that  
 579 person no later than 5 days after obtaining such knowledge.

580        (5) A foreclosing creditor may give a special notice of  
 581 foreclosure to any person described in subsection (3) or  
 582 subsection (4) to avoid the termination of that person's  
 583 interest in the collateral by the foreclosure. The special  
 584 notice shall give the information required by s. 52.204, but

585 state that the recipient's interest in the collateral will not  
 586 be terminated by the foreclosure.

587 (6) A foreclosing creditor, within 10 days before or after  
 588 recording a notice of foreclosure, shall affix a copy of the  
 589 notice of foreclosure at a conspicuous place on the real  
 590 property collateral.

591 (7) An original notice of foreclosure is ineffective if  
 592 given after the limitation period for foreclosure of a security  
 593 interest in real property by judicial proceeding has expired.

594 52.204 Notice of foreclosure: content.-

595 (1) The heading of a notice of foreclosure must be  
 596 conspicuous and must read as follows:

597 "NOTICE OF FORECLOSURE. YOU ARE HEREBY NOTIFIED THAT YOU  
 598 MAY LOSE YOUR RIGHTS TO CERTAIN PROPERTY. READ THIS  
 599 NOTICE IMMEDIATELY AND CAREFULLY."

600 (2) A notice of foreclosure must contain:

601 (a) The date of the notice, the name of the owner of the  
 602 collateral as identified in the security instrument, a legally  
 603 sufficient description and, at the secured creditor's option,  
 604 the street address, if any, stated in the security instrument of  
 605 the real property collateral or portion thereof being  
 606 foreclosed, and a description of any personal property  
 607 collateral to be included in the foreclosure.

608 (b) Information concerning the recording of the security  
 609 instrument, including the recording date, and the official  
 610 records book and page number or the official recording number  
 611 for the security instrument.

612        (c) A statement that a default exists under the security  
 613 instrument, and the facts establishing the default.

614        (d) A statement that the foreclosing creditor is  
 615 initiating foreclosure.

616        (e) A statement that the foreclosing creditor has  
 617 accelerated or, by virtue of the notice, is accelerating the due  
 618 date of the principal amount owing on the secured obligation or  
 619 a statement that the foreclosing creditor elects not to  
 620 accelerate the due date.

621        (f) A statement that the collateral may be redeemed from  
 622 the security interest by payment in full or performance of the  
 623 secured obligation in full before foreclosure and the amount to  
 624 be paid or other action necessary to redeem, including a per  
 625 diem amount that will allow calculation of the total balance  
 626 owed as of future dates and any further amount the foreclosing  
 627 creditor anticipates expending to protect the collateral.

628        (g) A statement of the method or methods of foreclosure  
 629 the foreclosing creditor elects to use and the earliest date on  
 630 which foreclosure will occur if no redemption is made.

631        (h) A statement that the foreclosure will terminate the  
 632 rights in the collateral of the person receiving the notice of  
 633 foreclosure.

634        (i) If applicable, an explanation of a debtor's right to  
 635 avoid a deficiency claim by compliance with s. 52.605.

636        (j) If the foreclosure is by negotiated sale or by  
 637 appraisal, an explanation of the right of the debtor and holders  
 638 of subordinate interests to object to the foreclosure as  
 639 provided by s. 52.206.



640 (k) If applicable, a statement that, within 15 days after  
 641 the date the notice of foreclosure is given, a debtor or an  
 642 interest holder having a possessory interest in the real  
 643 property collateral may request a meeting with a representative  
 644 of the foreclosing creditor to object to the foreclosure as  
 645 provided by s. 52.206.

646 (l) The name, address, and telephone number of an  
 647 individual who is the foreclosing creditor or a representative  
 648 of the foreclosing creditor and who can be contacted for further  
 649 information concerning the foreclosure.

650 (m) A statement that any person receiving a notice of  
 651 foreclosure may file an action in court objecting to the  
 652 foreclosure, which action must be filed within 20 days after  
 653 receipt of the original notice of foreclosure.

654 52.205 Request for notice of foreclosure.—

655 (1) Any person may record in the public records of any  
 656 county or counties a request for notice of foreclosure of a  
 657 security instrument that has been recorded in such county or  
 658 counties. The request must state:

659 (a) The date of the security interest, the date of its  
 660 recording, and the official records book and page, or official  
 661 recording number of the security instrument's recording.

662 (b) The names of the parties to the security instrument.

663 (c) A legally sufficient description of the real property  
 664 collateral affected by the security instrument.

665 (d) The name and address of the person requesting notice  
 666 of foreclosure.

667 (e) The legal interest, if any, held by the person  
 668 recording the request for notice.

669 (2) A person that records a request under subsection (1)  
 670 prior to the secured party's commencing foreclosure as provided  
 671 in s. 52.203(1) is entitled to be given notice of foreclosure  
 672 under s. 52.203(1). Recording a request does not affect the  
 673 title to the real property collateral and does not constitute  
 674 constructive notice to any person with an interest in the real  
 675 property collateral held or claimed by the person requesting  
 676 notice. A person that records a request for notice under this  
 677 section may subsequently record an amendment supplementing or  
 678 correcting information in the request or record a withdrawing of  
 679 the request.

680 (3) A foreclosing creditor is liable for a penalty of \$500  
 681 to a person that is not given timely notice of foreclosure if  
 682 that person has recorded a request for notice of foreclosure  
 683 meeting the standards of this section. If a recorded request for  
 684 notice states that the person recording the request has an  
 685 interest in the real property collateral and the person is not  
 686 given timely notice of foreclosure, the person's interest in the  
 687 collateral, if any, is preserved from termination by the  
 688 foreclosure.

689 52.206 Meeting to object to foreclosure.-

690 (1) A debtor may request a meeting to object to a  
 691 foreclosure. The request must be made by a notice received by  
 692 the foreclosing creditor within 30 days after the notice of  
 693 foreclosure is given to that debtor. If the foreclosing creditor  
 694 receives a request for a meeting, the foreclosing creditor or a

695 responsible representative of the foreclosing creditor shall  
 696 schedule and attend a meeting with the person requesting it at a  
 697 mutually agreeable time. The representative may be an employee,  
 698 agent, servicer, or attorney of the foreclosing creditor and  
 699 must have authority to terminate the foreclosure if the  
 700 representative determines that there is no legal basis for  
 701 foreclosure. The meeting may be held in person or by telephone,  
 702 video conferencing, or other reasonable means, at the election  
 703 of the foreclosing creditor. If the meeting is held in person,  
 704 it must be held at a location reasonably convenient to a parcel  
 705 of the real property collateral unless the person requesting the  
 706 meeting and the representative mutually agree on a different  
 707 location. If the foreclosing creditor receives requests from  
 708 more than one person, the creditor or representative may attempt  
 709 to arrange a consolidated meeting, and the persons requesting  
 710 meetings must cooperate reasonably with the foreclosing  
 711 creditor's effort to do so.

712 (2) A meeting conducted pursuant to this section is  
 713 informal and the rules of evidence do not apply. The parties may  
 714 be represented by legal counsel. The foreclosing creditor or  
 715 representative must have access to records that provide evidence  
 716 of the grounds for foreclosure. If the debtor desires to  
 717 negotiate a forbearance or modification on the underlying  
 718 obligation, the debtor must provide financial statements and  
 719 other documents sufficient to permit the foreclosing creditor to  
 720 determine the existence, if any, for grounds to negotiate  
 721 alternate terms or obligations. The creditor or representative  
 722 shall consider the objections to foreclosure stated by the

723 person requesting the meeting. Within 10 days after the meeting,  
 724 the creditor or representative attending the meeting shall give  
 725 to each person who requested the meeting a written statement  
 726 indicating whether the foreclosure will be discontinued or will  
 727 proceed and the reasons for the determination. The objections to  
 728 foreclosure stated by the person requesting the meeting and the  
 729 reasons stated by the creditor or representative do not preclude  
 730 any person from raising those or other grounds for objecting to  
 731 or supporting foreclosure in any subsequent judicial proceeding.  
 732 A statement or representation made by a person at the meeting  
 733 may not be introduced as evidence in any judicial proceeding.  
 734 Each party must bear its own expenses in connection with the  
 735 meeting.

736 (3) The foreclosing creditor and the representative do not  
 737 incur any liability for making a determination that is adverse  
 738 to the person who requested the meeting.

739 52.207 Period of limitation for foreclosure.—The time of  
 740 foreclosure may not be less than 90 days nor more than 1 year  
 741 after an original notice of foreclosure is recorded under s.  
 742 52.203 and not less than 30 days after any subsequent notice of  
 743 foreclosure. The 1-year period of limitation may be extended by  
 744 agreement of the foreclosing creditor and all persons to whom  
 745 notice of foreclosure was required to be given, other than  
 746 persons excluded from foreclosure by notice issued under s.  
 747 52.203(5), s. 52.406(1)(b), or s. 52.506(1)(b). The 1-year and  
 748 30-day periods of limitation are tolled during the period that  
 749 any court order temporarily enjoining or staying the foreclosure

750 is in effect and during any stay under the United States  
 751 Bankruptcy Code, 11 U.S.C. ss. 101 et seq.

752 52.208 Judicial supervision of foreclosure.-

753 (1) Before the time of foreclosure, a secured creditor may  
 754 commence a proceeding in a court of competent jurisdiction for  
 755 any violation of this chapter or of other law or principle of  
 756 equity in the conduct of the foreclosure. The court may issue  
 757 any order within the authority of the court in a foreclosure of  
 758 a mortgage by judicial action, including injunction and  
 759 postponement of the foreclosure.

760 (2) Any person required to be notified of the foreclosure  
 761 pursuant to s. 52.203(3) may file an action in the circuit court  
 762 demanding that the foreclosure proceed through the court  
 763 process. The complaint must be filed no later than 20 days after  
 764 receipt of the original notice of foreclosure. The complaint  
 765 must state a bona fide defense to the foreclosure and must  
 766 include a certification of the plaintiff under oath that the  
 767 complaint is not being filed solely for the purpose of delay.  
 768 Unless waived pursuant to s. 57.082, the complaint must be  
 769 accompanied by the appropriate filing fee and any other required  
 770 fees. Unless dismissed by the court, the civil action takes  
 771 precedence over foreclosure under this chapter and the creditor  
 772 must cease further action under this chapter. The court may, at  
 773 any time, examine the pleadings and the parties and shall  
 774 dismiss the case upon a finding that the case was filed  
 775 principally for the purpose of delay. If the court dismisses the  
 776 action, the foreclosure under this chapter shall resume from the

777 point at which it previously stopped, treating the case filing  
 778 as an abatement of the foreclosure under this chapter.

779 52.209 Redemption.—A person who has the right to redeem  
 780 collateral from a security interest under principles of law and  
 781 equity may not redeem after the time of foreclosure. Unless  
 782 precluded from doing so by law other than this chapter, a  
 783 foreclosing creditor shall cooperate with any person who  
 784 attempts to redeem the collateral from the security interest  
 785 before the time of foreclosure by promptly providing upon  
 786 request reasonable information concerning the amount due or  
 787 performance required to redeem.

788 Section 3. Part III of chapter 52, Florida Statutes,  
 789 consisting of sections 52.301, 52.302, 52.303, 52.304, 52.305,  
 790 52.306, 52.307, 52.308, 52.309, 52.310, 52.311, and 52.312, is  
 791 created to read:

792 PART III

793 FORECLOSURE BY AUCTION

794 52.301 Foreclosure by auction.—A secured creditor may  
 795 elect to foreclose by auction. A secured creditor that elects to  
 796 foreclose by auction shall comply with the requirements of this  
 797 part and parts I, II, and VI.

798 52.302 Evidence of title; other information.—

799 (1) If a secured creditor elects to foreclose by auction,  
 800 the foreclosing creditor shall obtain evidence of title and make  
 801 a copy thereof available upon request to any prospective bidder  
 802 at the foreclosure. The evidence of title must have an effective  
 803 date no earlier than the time of recording of the original  
 804 notice of foreclosure and must be issued no later than 30 days

805 after the time of such recording. Unless the evidence of title  
 806 is an attorney's opinion, the evidence of title must state that  
 807 the issuer is willing to provide evidence of title to the real  
 808 property collateral to a person who acquires title by virtue of  
 809 the foreclosure, and the exceptions and exclusions from coverage  
 810 to which the evidence of title issued to that person will be  
 811 subject.

812 (2) The foreclosing creditor may, but is not required to,  
 813 make reports and information concerning the collateral other  
 814 than evidence of title available to prospective bidders at the  
 815 foreclosure.

816 (3) The foreclosing creditor is not liable to any person  
 817 because of error in any information disclosed to prospective  
 818 bidders unless the information was prepared by the foreclosing  
 819 creditor and the foreclosing creditor had actual knowledge of  
 820 the error at the time the information was disclosed.

821 52.303 Advertisement of sale.-

822 (1) After giving notice as required by ss. 52.203 and  
 823 52.204, a foreclosing creditor shall, at the foreclosing  
 824 creditor's option, advertise foreclosure sale under this part  
 825 either:

826 (a) In a manner that complies with the publication  
 827 requirements provided by s. 45.031; or

828 (b) By placing an advertisement in a newspaper having  
 829 general circulation in each county where any part of the real  
 830 property collateral is located. The advertisement must be  
 831 published at least once per week for 3 consecutive weeks, with

832 the last publication not less than 7 nor more than 30 days  
 833 before the advertised date of sale.

834 (2) No later than 21 days before the advertised date of  
 835 sale, the foreclosing creditor shall give a copy of the  
 836 advertisement required by subsection (1) to the persons to whom  
 837 notice of foreclosure was required to be given pursuant to s.  
 838 52.203. The advertisement may be sent with the notice of  
 839 foreclosure or may be sent separately in the manner prescribed  
 840 for notices under s. 52.106. The foreclosing creditor may, but  
 841 is not required to, enter the real property collateral and post  
 842 on it a copy of the advertisement or a sign containing  
 843 information about the sale.

844 (3) An advertisement required by subsection (1) must  
 845 state:

846 (a) The date, time, and location by street address and, if  
 847 applicable, by floor and office number, of the foreclosure sale.

848 (b) That the sale will be made to the highest qualified  
 849 bidder.

850 (c) The amount or percentage of the bid that will be  
 851 required of the successful bidder at the completion of the sale  
 852 as a deposit, and the form in which the deposit may be made if  
 853 payment other than by cash or certified check will be accepted.

854 (d) A legally sufficient description of the real property  
 855 to be sold, and the street address, if any, or the location if  
 856 there is no street address, of the real property.

857 (e) A brief description of any improvements on the real  
 858 property and any personal property collateral to be sold.



859 (f) The name, address, and telephone number of an  
 860 individual who is the foreclosing creditor or a representative  
 861 of the foreclosing creditor, who can provide information  
 862 concerning the collateral and the foreclosure if the foreclosing  
 863 creditor is not an individual.

864 (g) That a copy of the evidence of title, any available  
 865 reports concerning the collateral, which may be listed  
 866 specifically, and additional information are available from the  
 867 person identified pursuant to paragraph (f).

868 (h) Whether access to the collateral for the purpose of  
 869 inspection before foreclosure is available to prospective  
 870 bidders and, if so, how to obtain access.

871 (4) An advertisement required by subsection (1) may also  
 872 state any other information concerning the collateral or the  
 873 foreclosure that the foreclosing creditor elects to include.

874 52.304 Access to collateral.—If a foreclosing creditor has  
 875 authority to grant access to the real property collateral, the  
 876 creditor shall reasonably accommodate a person who contacts the  
 877 creditor, expresses an interest in bidding at the foreclosure  
 878 sale, and requests an opportunity to inspect the collateral.

879 52.305 Location and time of sale.—An auction sale under  
 880 this part must be conducted:

881 (1) At a date and time permitted for a sale under judicial  
 882 foreclosure of a security interest in real property in this  
 883 state.

884 (2) In a county where some of the real property collateral  
 885 is located.

886 (3) At any location where a sale under judicial  
 887 foreclosure of a security interest in real property may be held  
 888 in this state.

889 52.306 Foreclosure of two or more parcels.-

890 (1) Collateral consisting of two or more parcels of real  
 891 property may be foreclosed by auction separately or in  
 892 combination. If the security instrument does not specify the  
 893 manner of sale of two or more parcels, the auction may be  
 894 conducted:

895 (a) By separate sale of each of the parcels; or

896 (b) At the time notice of foreclosure is recorded, if two  
 897 or more parcels are contiguous, are being used in a unitary  
 898 manner, are part of a unitary plan of development, or are  
 899 operated under integrated management:

900 1. By combining the parcels in a single auction; or

901 2. By conditionally offering the parcels both in  
 902 combination and separately, and accepting the higher of the two  
 903 aggregate bids.

904 (2) If the entire real property collateral is not made the  
 905 subject of a single auction, the foreclosing creditor shall  
 906 discontinue sales of parcels or combinations of parcels when the  
 907 total amount of bids received is sufficient to pay the secured  
 908 obligation and the expenses of foreclosure.

909 52.307 Postponement of sale.-

910 (1) An individual conducting an auction under this part  
 911 may postpone the auction for any cause the foreclosing creditor  
 912 considers appropriate. Announcement of the postponement, and the  
 913 time and location of the rescheduled sale, must be given orally

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914 at the place previously scheduled for the sale and within a  
915 reasonable time after the scheduled time for commencement of the  
916 sale. No other advertisement or notice of the postponed time and  
917 place of sale is required. A postponement may not be for a  
918 period of more than 30 days. Subsequent postponements of the  
919 sale may be made in the same manner.

920 (2) If an auction cannot be held at the time stated in the  
921 notice of sale by reason of stay under the United States  
922 Bankruptcy Code, 11 U.S.C. ss. 101 et seq., or a stay order  
923 issued by any court of competent jurisdiction, the foreclosing  
924 creditor may reschedule the auction to occur at a time when the  
925 stay is no longer in effect. The rescheduled sale must be  
926 advertised, and a copy of the advertisement must be sent to the  
927 persons entitled thereto, as provided by s. 52.302.

928 52.308 Conduct of sale.—

929 (1) An auction sale under this part must be conducted by a  
930 person designated by the foreclosing creditor.

931 (2) The person conducting an auction, before commencing  
932 the auction:

933 (a) Must make available to prospective purchasers copies  
934 of the evidence of title.

935 (b) May verify that persons intending to bid have money in  
936 an amount and form necessary to make the deposit stated in the  
937 advertisement, but may not disclose the amount that any bidder  
938 is prepared to deposit.

939 (3) The auction must be conducted, at the foreclosing  
940 creditor's option:

941 (a) By the creditor or the creditor's representative  
 942 following the procedures for sale prescribed by s. 45.031; or

943 (b) In the following manner:

944 1. Any person, including a debtor and the foreclosing  
 945 creditor, may bid at the auction. The individual conducting the  
 946 auction may bid on behalf of the foreclosing creditor or any  
 947 other person by whom he or she is authorized, but may not bid  
 948 for his or her own account. The foreclosing creditor may bid by  
 949 credit up to any amount up to the balance owing on the secured  
 950 obligation, including the expenses of foreclosure.

951 2. A fixed bid of a person not attending the auction may  
 952 be submitted by a writing received at least 24 hours before the  
 953 scheduled time of the auction by the person designated in the  
 954 advertisement of sale to provide information about the property.  
 955 The bid must be accompanied by a deposit satisfying the  
 956 requirements of s. 52.310. The bid must be read aloud by the  
 957 person conducting the auction before the auction is opened to  
 958 oral bids.

959 3. Sale must be made to the person bidding the highest  
 960 amount who complies with this section.

961 4. The auction is completed by the announcement of the  
 962 person conducting the auction that the property is sold.

963 52.309 Deposit by successful bidder.—Immediately after the  
 964 sale is complete, the successful bidder, if other than the  
 965 foreclosing creditor, at an auction under this part must pay a  
 966 deposit to the person conducting the sale. The deposit must be  
 967 at least 10 percent of the amount of the bid or such lower  
 968 amount as the advertisement of sale stated would be accepted.

969 The deposit must be paid in cash, by certified check, or in such  
 970 other form of payment as was stated to be acceptable in the  
 971 advertisement of sale or is acceptable to the person conducting  
 972 the sale.

973 52.310 Payment of remainder of bid.-

974 (1) The successful bidder at an auction under this part  
 975 shall pay the remainder of the bid to the person conducting the  
 976 sale within 7 days after notice is given under s. 52.106(8) of  
 977 the date of the auction.

978 (2) If payment of the remainder of the bid is not timely  
 979 made, the foreclosing creditor may cancel the sale and  
 980 reschedule the auction as provided in s. 52.307(2) or may  
 981 terminate the foreclosure under s. 52.701. In either event the  
 982 deposit of the successful bidder may be forfeited and  
 983 distributed in the same manner as the proceeds of a sale, but no  
 984 person has any other remedy against the defaulting bidder.

985 52.311 Foreclosure amount; distribution of proceeds.-The  
 986 highest amount bid at a sale is the foreclosure amount. The  
 987 foreclosure must be applied by the foreclosing creditor as  
 988 provided in s. 52.601 within 30 days after the time of the  
 989 foreclosure. After receiving but before applying the proceeds of  
 990 sale, the secured creditor may, but is not required to, invest  
 991 them in a reasonable manner.

992 52.312 Deed to successful bidder; affidavit.-

993 (1) Upon payment by the successful bidder of the full  
 994 balance of the bid, the foreclosing creditor shall:

995 (a) Record and deliver a statutory warranty deed, a bill  
 996 of sale with respect to personal property if applicable, and

997 such other documents as may be necessary to record the deed, all  
 998 without warranty of title, conveying the collateral to or as  
 999 directed by the successful bidder.

1000 (b) Execute and record in the public records of each  
 1001 county in which the security instrument being foreclosed was  
 1002 recorded an affidavit containing the following:

1003 1. Identification of the security instrument foreclosed,  
 1004 including the official records book and page number, or official  
 1005 document number at which it was recorded, if any.

1006 2. Identification the debtor.

1007 3. A sufficient description of the collateral and  
 1008 identification of the official records book and page number, or  
 1009 official document number at which the notice of foreclosure was  
 1010 recorded.

1011 4. Identification of persons to whom notice of foreclosure  
 1012 was given and the official records book and page number, or  
 1013 official document number at which documents reflecting their  
 1014 interests in the collateral were recorded, if any.

1015 5. A statement as to which, if any, of the persons  
 1016 identified pursuant to subparagraph 4. were given special notice  
 1017 of foreclosure preserving their interests from termination by  
 1018 the foreclosure.

1019 6. A statement that the foreclosing creditor has complied  
 1020 with all provisions of this chapter for a foreclosure by  
 1021 auction.

1022 7. Identification of the person acquiring title to the  
 1023 collateral by virtue of the foreclosure, and a statement that  
 1024 title has passed to that person.

1025 (2) When recorded, the deed and bill of sale, if any,  
 1026 transfer title to the collateral to or as directed by the  
 1027 successful bidder as provided in s. 52.602.

1028 Section 4. Part IV of chapter 52, Florida Statutes,  
 1029 consisting of sections 52.401, 52.402, 52.403, 52.404, 52.405,  
 1030 and 52.406, is created to read:

1031 PART IV

1032 FORECLOSURE BY NEGOTIATED SALE

1033 52.401 Foreclosure by negotiated sale.—A secured creditor  
 1034 may elect to foreclose by negotiated sale. A secured creditor  
 1035 that elects to foreclose by negotiated sale shall comply with  
 1036 the requirements of this part and parts I, II, and VI.

1037 52.402 Advertisement and contract of sale.—

1038 (1) The foreclosing creditor may advertise the collateral  
 1039 for sale to prospective purchasers by whatever methods the  
 1040 foreclosing creditor considers appropriate and may list the  
 1041 collateral for sale with brokers. The foreclosing creditor may,  
 1042 but is not required to, enter the real property collateral and  
 1043 post on it a sign containing information about the sale.

1044 (2) The foreclosing creditor may enter into a conditional  
 1045 contract of sale with a prospective purchaser or, if the  
 1046 collateral is sold in parcels, with more than one purchaser. The  
 1047 contract shall state the gross amount, before expenses of sale,  
 1048 that the purchaser will pay for the collateral. The foreclosing  
 1049 creditor's obligation to sell under the contract is subject to  
 1050 the following conditions:

1051 (a) That no objection to the foreclosure amount is made  
 1052 under s. 52.404.

1053        (b) That no redemption of the collateral from the security  
 1054 interest is made before the time of foreclosure.

1055        52.403 Notice of proposed negotiated sale.—If a  
 1056 foreclosing creditor enters into a conditional contract of sale  
 1057 as provided in s. 52.402, the foreclosing creditor shall give  
 1058 notice of the proposed sale at least 30 days before the date of  
 1059 the proposed sale to the persons specified in s. 52.203. The  
 1060 notice of proposed sale must state:

1061        (1) The date on or after which the foreclosing creditor  
 1062 proposes to sell the collateral.

1063        (2) The foreclosure amount, net of all expenses of  
 1064 foreclosure and sale, that the foreclosing creditor offers to  
 1065 credit against the secured debt and distribute to other persons  
 1066 entitled thereto, which amount may be greater or less than the  
 1067 selling price stated in the contract.

1068        (3) That if the sale is completed, title to the collateral  
 1069 will be transferred to the purchaser under the contract as of  
 1070 the time of foreclosure and the stated foreclosure amount will  
 1071 be applied as provided in s. 52.601.

1072        (4) That the person receiving the notice may inspect a  
 1073 copy of the contract of sale by communicating with an individual  
 1074 who is or represents the foreclosing creditor and whose name,  
 1075 address, and telephone number are given in the notice.

1076        (5) That if a debtor or any other party whose interest in  
 1077 the collateral is subordinate in priority to the foreclosing  
 1078 creditor's security interest objects to the sale, the debtor or  
 1079 interest holder may give the foreclosing creditor a notice so  
 1080 stating, and if the notice is received by the foreclosing



1081 creditor no later than 7 days before the date of the proposed  
 1082 sale, the foreclosing creditor must discontinue the foreclosure  
 1083 by negotiated sale unless the foreclosing creditor elects to  
 1084 preserve that person's interest from termination by the  
 1085 foreclosure or discharges the person's interest.

1086 52.404 Completion of sale.-

1087 (1) A foreclosing creditor may complete the sale in  
 1088 accordance with the contract of sale, subsection (2), and ss.  
 1089 52.405 and 52.406 unless the creditor receives a notice  
 1090 objecting to the proposed foreclosure by negotiated sale 7 or  
 1091 more days before the proposed date of sale from a person who  
 1092 holds an interest in the real property collateral that is  
 1093 subordinate in priority to the foreclosing creditor's security  
 1094 interest.

1095 (2) Upon compliance by the purchaser with a contract for  
 1096 sale under this part, on or after the proposed date of sale, the  
 1097 foreclosing creditor shall deliver to the purchaser or a nominee  
 1098 designated by the purchaser a statutory warranty deed, a bill of  
 1099 sale if applicable, and other documents necessary to consummate  
 1100 the sale or that the parties agreed the foreclosing creditor  
 1101 would supply. The foreclosing creditor shall also execute an  
 1102 affidavit containing the following:

1103 (a) Identification of the security instrument foreclosed,  
 1104 including the official records book and page number or official  
 1105 document number at which it was recorded, if any.

1106 (b) Identification of the debtor.

1107 (c) A sufficient description of the collateral and  
 1108 identification of the official records book and page number, or

1109 official document number at which the notice of foreclosure was  
 1110 recorded.

1111 (d) Identification of persons to whom notice of  
 1112 foreclosure was given and the official records book and page  
 1113 number, or official document number at which documents  
 1114 reflecting their interests in the collateral are recorded, if  
 1115 any.

1116 (e) A statement as to which, if any, of the persons  
 1117 identified pursuant to paragraph (d) were given notice under s.  
 1118 52.203(5) or s. 52.406(1) (a) preserving their interests from  
 1119 termination by the foreclosure.

1120 (f) A statement that the foreclosing creditor has complied  
 1121 with all provisions of this chapter for a foreclosure by  
 1122 negotiated sale.

1123 (g) Identification of the person acquiring title to the  
 1124 collateral by virtue of the foreclosure, and a statement that  
 1125 title has passed to that person.

1126 52.405 Recording of affidavit and deed; application of  
 1127 foreclosure amount.—On or after the date of delivery of the  
 1128 deed, the affidavit, deed, and bill of sale, if any, required  
 1129 under s. 52.404 must be recorded in public records of the county  
 1130 or counties where the collateral is located. When the affidavit,  
 1131 deed, and bill of sale, if any, are recorded, the deed and bill  
 1132 of sale transfer title to the collateral to the contract  
 1133 purchaser or a nominee designated by the contract purchaser as  
 1134 provided in s. 52.602. The foreclosure amount stated in the  
 1135 notice of proposed negotiated sale pursuant to s. 52.403(2) must

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1136 be applied as provided in s. 52.601 within 30 days after the  
1137 time of foreclosure.

1138 52.406 Notice of objection to sale.—

1139 (1) If, 7 or more days before the proposed date of sale  
1140 under this part, a foreclosing creditor receives notice of  
1141 objection to the sale from any person who holds an interest in  
1142 the real property collateral subordinate in priority to the  
1143 foreclosing creditor's security interest, the foreclosing  
1144 creditor must:

1145 (a) Discontinue the foreclosure pursuant to s. 52.701, in  
1146 which case the notice of objection has no further effect;

1147 (b) Give notice, before the time of foreclosure, to the  
1148 person who made the objection that the person's interest in the  
1149 collateral will be preserved from termination by the  
1150 foreclosure. If the foreclosing creditor gives such notice:

1151 1. The objection of the person to whom such notice is  
1152 given may be disregarded by the foreclosing creditor;

1153 2. The foreclosure by negotiated sale may be completed;

1154 3. The affidavit recorded under s. 52.405 must identify  
1155 that interest in the collateral of the person objecting as not  
1156 being terminated by the foreclosure; and

1157 4. That person is entitled to none of the foreclosure  
1158 amount; or

1159 (c) If the interest of the person who made the objection  
1160 is capable of being discharged for a liquidated sum of money,  
1161 tender that sum, or a lesser sum acceptable to the person whose  
1162 interest is being discharged, to the person and thereby  
1163 discharge the interest.



1191       (2) The appraisal must be made by an independent appraiser  
 1192 certified by the Appraisal Institute who is not an employee or  
 1193 affiliate of the foreclosing creditor.

1194       52.503 Notice of appraisal.—The foreclosing creditor shall  
 1195 give notice of the appraisal at least 30 days before the  
 1196 proposed date of the foreclosure to the persons specified in s.  
 1197 52.203. The notice of appraisal shall be accompanied by a copy  
 1198 of the appraisal report and shall state:

1199       (1) The date on or after which the foreclosing creditor  
 1200 proposes to foreclose by appraisal.

1201       (2) The foreclosure amount, net of all expenses of  
 1202 foreclosure, that the foreclosing creditor offers to credit  
 1203 against the secured obligation and to distribute to other  
 1204 persons entitled thereto, which amount may be greater or less  
 1205 than the appraised value of the collateral.

1206       (3) That if the foreclosure by appraisal is completed,  
 1207 title to the collateral will vest in the foreclosing creditor or  
 1208 its nominee as of the time of foreclosure, and that the stated  
 1209 foreclosure amount will be applied as provided in s. 52.601.

1210       (4) That the person receiving the notice may obtain  
 1211 further information concerning the foreclosure and the appraisal  
 1212 by communicating with an individual who is or represents the  
 1213 foreclosing creditor and whose name, address, and telephone  
 1214 number are given in the notice.

1215       (5) That if a debtor or interest holder whose interest in  
 1216 the collateral is subordinate in priority to the foreclosing  
 1217 creditor's security interest objects to the foreclosure by  
 1218 appraisal, the debtor or interest holder may give the

1219 foreclosing creditor a notice so stating, and if the notice is  
 1220 received by the foreclosing creditor no later than 7 days before  
 1221 the date of the proposed sale, the foreclosing creditor must  
 1222 discontinue the foreclosure by appraisal unless the foreclosing  
 1223 creditor elects to preserve that person's interest from  
 1224 termination by the foreclosure or discharges the person's  
 1225 interest.

1226 52.504 Completion of foreclosure by appraisal.-

1227 (1) A foreclosing creditor may complete the foreclosure as  
 1228 provided in subsection (2) and ss. 52.505 and 52.506 unless the  
 1229 creditor receives a notice objecting to the proposed foreclosure  
 1230 by negotiated sale 7 or more days before the proposed date of  
 1231 sale from a person who holds an interest in the real property  
 1232 collateral that is subordinate in priority to the foreclosing  
 1233 creditor's security interest.

1234 (2) On or after the proposed date of sale, the foreclosing  
 1235 creditor shall also execute an affidavit containing the  
 1236 following:

1237 (a) Identification of the security instrument foreclosed,  
 1238 including the official records book and page number, or official  
 1239 document number at which it was recorded, if any.

1240 (b) Identification of the debtor.

1241 (c) A sufficient description of the collateral and  
 1242 identification of the official records book and page number, or  
 1243 official document number at which the notice of foreclosure was  
 1244 recorded.

1245 (d) Identification of persons to whom notice of  
 1246 foreclosure was given and the official records book and page

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1247 number, or official document number at which documents  
 1248 reflecting their interests in the collateral are recorded, if  
 1249 any.

1250 (e) A statement as to which, if any, of the persons  
 1251 identified pursuant to paragraph (d) were given notice under s.  
 1252 52.203(5) or s. 52.506(1)(a) preserving their interests from  
 1253 termination by the foreclosure.

1254 (f) A statement that the foreclosing creditor has complied  
 1255 with all provisions of this chapter for a foreclosure by  
 1256 appraisal.

1257 (g) Identification of the person acquiring title to the  
 1258 collateral by virtue of the foreclosure, and a statement that  
 1259 title has passed to that person.

1260 52.505 Recording of affidavit; application of foreclosure  
 1261 amount.—On or after the proposed date of foreclosure, the  
 1262 affidavit required by s. 52.504 must be recorded in the public  
 1263 records of the county or counties in which the collateral is  
 1264 located. When recorded, the affidavit transfers title to the  
 1265 collateral to the foreclosing creditor or its nominee as  
 1266 provided in s. 52.602. The foreclosure amount stated in the  
 1267 notice of appraisal pursuant to s. 52.503(2) must be applied as  
 1268 provided in s. 52.601 within 30 days after the time of  
 1269 foreclosure.

1270 52.506 Notice of objection to foreclosure.—

1271 (1) If, 7 or more days before the proposed date of  
 1272 foreclosure under this part, a foreclosing creditor receives  
 1273 notice of objection to the foreclosure from any person who holds  
 1274 an interest in the real property collateral subordinate in

1275 priority to the foreclosing creditor's security interest, the  
 1276 foreclosing creditor must:

1277 (a) Discontinue the foreclosure pursuant to s. 52.701, in  
 1278 which case the notice of objection has no further effect;

1279 (b) Give notice, before the time of foreclosure, to the  
 1280 person who made the objection that the person's interest in the  
 1281 collateral will be preserved from termination by the  
 1282 foreclosure. If the foreclosing creditor gives such notice:

1283 1. The objection of the person to whom such notice is  
 1284 given may be disregarded by the foreclosing creditor;

1285 2. The foreclosure by appraisal maybe completed;

1286 3. The affidavit recorded under s. 52.505 must identify  
 1287 that interest in the collateral of the person objecting as not  
 1288 being terminated by the foreclosure; and

1289 4. That person is entitled to none of the foreclosure  
 1290 amount; or

1291 (c) If the interest of the person who made the objection  
 1292 is capable of being discharged for a liquidated sum of money,  
 1293 tender that sum to the person and thereby discharge the  
 1294 interest.

1295 (2) If the foreclosing creditor makes a tender as provided  
 1296 in subsection (1)(c) and keeps the tender in effect, the person  
 1297 to whom the tender is made must provide the foreclosing creditor  
 1298 with a suitable document in recordable form evidencing that the  
 1299 person's interest has been discharged.

1300 (3) After expiration of the time for objection specified  
 1301 in s. 52.504(1), a person to whom notice of foreclosure under s.



1302 52.203 and notice of appraisal under s. 52.503 were sent may not  
 1303 assert that the foreclosure amount was inadequate.

1304 Section 6. Part VI of chapter 52, Florida Statutes,  
 1305 consisting of sections 52.601, 52.602, 52.603, 52.604, 52.605,  
 1306 52.606, and 52.607, is created to read:

1307 PART VI

1308 RIGHTS AFTER FORECLOSURE

1309 52.601 Application of proceeds of foreclosure.-

1310 (1) The foreclosing creditor shall apply the proceeds of  
 1311 foreclosure and any investment earnings thereon in the following  
 1312 order:

1313 (a) To pay or reimburse the expenses of foreclosure in the  
 1314 case of a foreclosure by auction.

1315 (b) To pay the obligation secured by the foreclosed  
 1316 security instrument.

1317 (c) To pay, in the order of their priority, the amounts of  
 1318 all liens and other interests of record terminated by the  
 1319 foreclosure.

1320 (d) To the interest holder who owned the collateral at the  
 1321 time of foreclosure.

1322 (2) If the foreclosing creditor, in applying the proceeds  
 1323 of the sale, acts in good faith and without actual knowledge of  
 1324 the invalidity or lack of priority of the claim of a person to  
 1325 whom distribution is made, the foreclosing creditor is not  
 1326 liable for an erroneous distribution. The foreclosing creditor  
 1327 may maintain an action in the nature of interpleader, in a court  
 1328 of competent jurisdiction sitting in a county in which some part

1329 of the real estate collateral is located, for an order directing  
 1330 the order of distribution of the proceeds of the sale.

1331 52.602 Title transferred by foreclosure.—A foreclosure  
 1332 under this chapter transfers the debtor's title to the  
 1333 collateral to the successful bidder under part III, the contract  
 1334 purchaser under part IV, or the foreclosing creditor under part  
 1335 V, subject only to interests in the collateral having priority  
 1336 over the security interest foreclosed and the interests of  
 1337 persons entitled to notice under s. 52.202(3) who were not given  
 1338 notice of the foreclosure or whose interests were preserved from  
 1339 foreclosure by notice issued under s. 52.203(5), s.  
 1340 52.406(1)(b), or s. 52.506(1)(b). The interests of all of other  
 1341 persons in the collateral are terminated.

1342 52.603 Action for damages or to set aside foreclosure.—  
 1343 (1) Subject to subsection (3), after the time of  
 1344 foreclosure an aggrieved person may commence a proceeding in a  
 1345 court of competent jurisdiction seeking the following relief:

1346 (a) Damages against a foreclosing creditor for any  
 1347 violation of this chapter or an applicable law or principle of  
 1348 equity in the conduct of the foreclosure; or

1349 (b) That the foreclosure be set aside to correct a  
 1350 violation of this chapter or to satisfy an applicable law or  
 1351 principle of equity.

1352 (2) Recording of the deed and affidavit pursuant to s.  
 1353 52.312, the deed and affidavit pursuant to s. 52.405, or the  
 1354 affidavit pursuant to s. 52.505 conclusively establishes  
 1355 compliance with all applicable notice and procedural  
 1356 requirements of this chapter in favor of good faith purchasers

1357 for value of the collateral. If the title derived from  
 1358 foreclosure is not held by a good faith purchaser for value, a  
 1359 person attacking the foreclosure on grounds of noncompliance  
 1360 with the notice or procedural requirements of this chapter has  
 1361 the burden of production and persuasion.

1362 (3) An action may not be commenced:

1363 (a) For damages for violation of this chapter, more than 3  
 1364 years after the time of foreclosure; or

1365 (b) For an order to set aside a foreclosure conducted  
 1366 under this chapter, more than 1 year after the time of  
 1367 foreclosure.

1368 52.604 Possession after foreclosure.—A person that  
 1369 acquires an interest in real property by foreclosure under this  
 1370 chapter may obtain a writ of possession from the clerk of the  
 1371 court of the county in which any part of the collateral is  
 1372 located, or commence an action for ejectment under chapter 66 or  
 1373 for unlawful detainer under chapter 82 to gain possession of the  
 1374 real property against any person whose interest in the real  
 1375 property was terminated by the foreclosure.

1376 52.605 Judgment for deficiency.—

1377 (1) Except as provided in subsection (2), after the time  
 1378 of foreclosure, the foreclosing creditor and any other person  
 1379 whose security interest in the collateral was terminated by a  
 1380 foreclosure under this chapter is entitled to pursue in court a  
 1381 money judgment against any person liable for a deficiency.

1382 (2) A debtor is not liable to a foreclosing creditor for a  
 1383 deficiency after a foreclosure under this chapter unless the  
 1384 debtor is found by the court not to have acted in good faith.

1385        (3) For purposes of this section, the term "acted in good  
 1386 faith" means the debtor:

1387        (a) Peaceably vacated the real estate collateral and  
 1388 relinquished any personal property collateral within 10 days  
 1389 after the time of foreclosure and the giving of a notice  
 1390 demanding possession by the person entitled to possession by  
 1391 virtue of the foreclosure.

1392        (b) Did not commit significant affirmative waste upon the  
 1393 collateral and leave such waste uncured at the time possession  
 1394 was relinquished to the person entitled to possession by virtue  
 1395 of the foreclosure.

1396        (c) Did not significantly contaminate the collateral with  
 1397 hazardous materials and leave the contamination uncured at the  
 1398 time possession was relinquished to the person entitled to  
 1399 possession by virtue of the foreclosure.

1400        (d) Did not commit fraud against the foreclosing creditor.

1401        (e) Did not engage in criminal activity on the secured  
 1402 real estate collateral that significantly reduced its value at  
 1403 the time possession was relinquished to the person entitled to  
 1404 possession by virtue of the foreclosure.

1405        (f) Did not permit significant uncured damage to be done  
 1406 to the collateral by other persons or natural causes as a result  
 1407 of the debtor's failure to take reasonable precautions against  
 1408 the damage.

1409        (g) Provided reasonable access to the collateral for  
 1410 inspection by the foreclosing creditor and prospective  
 1411 purchasers after the initial notice of foreclosure was sent.

1412 (4) The burden of proof as to the absence of good faith on  
 1413 the part of a debtor is on the person seeking a deficiency  
 1414 judgment against the debtor. The absence of good faith by one  
 1415 debtor does not make any other debtor liable for a deficiency.

1416 (5) If liability of a debtor for a deficiency is barred by  
 1417 paragraph (2), liability of a guarantor of the debtor's  
 1418 obligation is also barred.

1419 (6) This section does not prohibit recovery of a  
 1420 deficiency by a person other than the foreclosing creditor.

1421 52.606 Determining amount of deficiency.—

1422 (1) Subject to subsection (2), the deficiency to which a  
 1423 foreclosing creditor is entitled after a foreclosure under this  
 1424 chapter is the balance remaining, if any, after subtracting the  
 1425 foreclosure amount as determined under s. 52.311, s. 52.403, or  
 1426 s. 52.503, as applicable, from the balance owing on the secured  
 1427 obligation, including principal, interest, legally recoverable  
 1428 fees and charges and, in the case of a foreclosure by auction,  
 1429 the expenses of foreclosure.

1430 (2) In an action for a deficiency brought by the  
 1431 foreclosing creditor following a foreclosure by auction, a  
 1432 person against whom the action is filed may petition a court of  
 1433 competent jurisdiction for a determination of the fair market  
 1434 value of the collateral at the time of foreclosure. After a  
 1435 hearing at which all interested parties may present evidence of  
 1436 fair market value, the court shall determine the fair market  
 1437 value of the collateral as of the time of foreclosure. The  
 1438 determination must be made by the court without a jury. If the  
 1439 court determines that 90 percent of the fair market value of the

1440 collateral was greater than the bid accepted at the foreclosure  
 1441 sale, 90 percent of the fair market value must be substituted  
 1442 for the foreclosure amount in making the calculations required  
 1443 by subsection (1) with respect to all parties against whom a  
 1444 judgment for a deficiency is entered.

1445 52.607 Effect of good faith by debtor.—If a debtor acted  
 1446 in good faith in the foreclosure as provided in s. 52.605(3),  
 1447 the debtor shall not be considered to have been in default under  
 1448 the note or security instrument and the foreclosing creditor  
 1449 shall use its best efforts thereafter to report to credit  
 1450 bureaus the fact that the debtor, having acted in good faith, is  
 1451 deemed not to be in default under Florida Law. This section does  
 1452 not invalidate any foreclosure pursuant to this chapter or any  
 1453 judgment in a case related to this chapter. This section does  
 1454 not affect the title or insurability of title to real property  
 1455 or personal property.

1456 Section 7. Part VII of chapter 52, Florida Statutes,  
 1457 consisting of section 52.701, is created to read:

1458 PART VII

1459 DISCONTINUATION OF FORECLOSURE

1460 52.701 Discontinuation of foreclosure.—

1461 (1) A foreclosing creditor may elect to discontinue  
 1462 foreclosure at any time before:

1463 (a) The completion of the auction in the case of a  
 1464 foreclosure by auction; or

1465 (b) The time of foreclosure, in the case of a foreclosure  
 1466 by negotiated sale or by appraisal.

1467       (2) To discontinue foreclosure, the foreclosing creditor  
 1468 shall give notice to the persons to whom notice of foreclosure  
 1469 was required to be given under s. 52.203(2), advising them that  
 1470 the foreclosure has been discontinued and whether the  
 1471 foreclosing creditor will:

- 1472       (a) Pursue another foreclosure by the same method;
- 1473       (b) Continue to foreclose by another method under this  
 1474 chapter pursuant to a notice of foreclosure previously given;
- 1475       (c) Commence foreclosure by a different method authorized  
 1476 by this chapter pursuant to a new notice of foreclosure;
- 1477       (d) Commence foreclose by judicial proceeding, provided no  
 1478 deficiency judgment may be obtained against any debtor receiving  
 1479 notice of a foreclosing creditor's notice of foreclosure  
 1480 pursuant to this chapter; or
- 1481       (e) Abandon foreclosure.

1482       (3) If a notice sent by a foreclosing creditor under this  
 1483 section includes all elements required for a notice of  
 1484 foreclosure under ss. 52.203 and 52.204, no additional notice of  
 1485 foreclosure is necessary to pursue a further foreclosure under  
 1486 this chapter.

1487       Section 8. Part VIII of chapter 52, Florida Statutes,  
 1488 consisting of sections 52.801 and 52.802, is created to read:

1489                               PART VIII

1490                               MISCELLANEOUS

1491       52.801 Uniformity of application and construction.—In  
 1492 applying and construing this chapter, consideration must be  
 1493 given to the need to promote uniformity of the law with respect  
 1494 to its subject matter among states that enact its provisions.

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1495        52.802 Relation to Electronic Signatures in Global and  
 1496 National Commerce Act.—This chapter modifies, limits, and  
 1497 supersedes the federal Electronic Signatures in Global and  
 1498 National Commerce Act, 15 U.S.C. ss. 7001 et seq., except that  
 1499 nothing in this chapter modifies, limits, or supersedes 15  
 1500 U.S.C. s. 7001(c) or authorizes electronic delivery of any of  
 1501 the notices described in 15 U.S.C. s. 7003(b).

1502            Section 9. This act shall take effect July 1, 2010.