

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCS for HB 149 Website Notice of Foreclosure Action

**SPONSOR(S):** Civil Justice Subcommittee

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 230

| REFERENCE                               | ACTION | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|---|--------|---------|--|
| Orig. Comm.: Civil Justice Subcommittee |        | Cary    | Bond                                     |

### SUMMARY ANALYSIS

There are two points in a foreclosure case in which the plaintiff may have to publish legal notice in a local newspaper:

- If any defendant cannot be found for personal service, a "Notice of Action" must be published.
- If the foreclosing plaintiff prevails, notice of the sale must be published.

The bill provides for these legal notices to be published on the internet rather than in a local newspaper. The bill provides for selection of a vendor by each clerk of the court, and includes requirements for the bidding, contract, and operation of the website.

The bill does not appear to have a fiscal impact on state or local governments. The bill limits the cost of placing such legal advertisements at \$100, which represents a substantial savings to foreclosing parties and a substantial loss of revenue to local newspapers.

The bill provides an effective date of July 1, 2012.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

The plaintiff in a foreclosure action, as with any other civil action, must provide notice of the proceeding to each defendant. A plaintiff must first attempt service of original process by personal service or by leaving the initial pleading at the defendant's usual place of abode with any person residing there who is 15 years old or older.<sup>1</sup> Substitute service may be made on the defendant's spouse at any place in the county if they are currently residing together.<sup>2</sup> When the plaintiff attempts to make personal and substitute service but fails, the plaintiff may serve process through constructive notice by publication.<sup>3</sup>

Service by publication in a foreclosure action is governed by a separate statute. In counties with more than 1 million total population as determined by the 2000 official census, any notice of publication must be made in a newspaper that has been entered as a periodical matter at a post office in the county in which the newspaper is published. The paper must be published at least five days per week and must have been in existence for at least one year.<sup>4</sup>

For counties with a population of a million or less, the same constructive service of process rules apply as would apply to any other civil actions: the newspaper must be published at least weekly and must be at least 25% written in English and must contain information of a public character or of interest or of value to the residents or owners of property in the county, or of interest or of value to the general public.<sup>5</sup> The costs of such advertisements vary significantly by market.

Florida is a judicial foreclosure state, meaning that foreclosure actions must be litigated and a judge must approve the sale of foreclosed property. Sections 45.031 and 702.035, F.S., set forth requirements for the judicial sale, including publication requirements.

##### **Effects of the Bill**

The bill creates s. 50.015, F.S., providing for online legal publication, advertisement, notice of sale, and notice of foreclosure in lieu of publication in any other form of media. The online publication must be made on a website and the site must meet certain criteria:

- The website must be publically accessible and approved by the Florida Clerks of Court Operations Corporation for legal publication, advertisement, notice of sale, and notice of foreclosure.
- A legal publication, advertisement, notice of sale, or notice of foreclosure must be posted for 90 days unless otherwise provided by this bill.
- The website must maintain a searchable archive for each legal publication, advertisement, notice of sale, or notice of foreclosure for 10 years following the first day of posting.
- A link to the website must be displayed on the homepage of each clerk of court in a conspicuous location.
- The website must maintain a customer support line with live electronic communication and telephone support, available during normal business hours.
- All information other than the legal publication, advertisement, notice of sale, or notice of foreclosure must be in both the English and Spanish language.
- The website must post online tutorials for users.

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<sup>1</sup> Section 48.031(1)(a), F.S.

<sup>2</sup> Section 48.031(2)(a), F.S.

<sup>3</sup> Section 49.021, F.S.

<sup>4</sup> Section 702.035, F.S.

<sup>5</sup> Section 50.011, F.S.

- The website must be maintained on a data center that is certified compliant with the Statement on Auditing Standards No. 70.
- A user may not be required to register with the website or be charged for access to a legal publication, advertisement, notice of sale, or notice of foreclosure.

Each clerk of court and deputy clerk must be provided 24-hour access at no charge to all records relevant to the legal publication, advertisement, notice of sale, or notice of foreclosure through a fully secure portal accessed by a unique user name and password. Additionally, each circuit and appellate judge and their respective staffs must have access to all documents published or maintained on the website. The website must develop and maintain a disaster recovery plan for the website and provide the plan to each clerk of court and chief judge.

The bill requires the website provider to publish affidavits electronically in substantial conformity with the law as currently provided, and may use an electronic notary seal. Where a legal publication effects constructive service of process, it must be posted within 3 business days, excluding court holidays, and be continued for 90 consecutive days. An advertisement, notice of sale, or notice of foreclosure must be posted within 3 business days after the date the foreclosure sale is set, and continue for 10 days after the foreclosure sale or 90 consecutive days, whichever is longer. If the defendant refuses to accept or evades service or the process server is not able to effect service, the legal publication or advertisement must be posted on the website beginning on the date the affidavit of nonservice is posted. Any legal publication, advertisement, notice of sale, or notice of foreclosure must conform substantially with current law.

Each clerk of court may contract with a single website for a one-year term. The provider will be chosen by competitive sealed bids capped at \$100 per advertisement. The clerk must select the lowest bid. Contracts must provide:

- That the clerk of courts retains title and ownership of all data.
- That the clerk may inspect the physical plant, books and records of the provider at any time without notice.
- That the provider must physically operate within the state, excluding any subcontracts for the purpose of emergency data backup service.
- That the clerk may terminate the contract without notice upon finding a material breach by the provider.
- That the provider is subject to the Florida public records laws.
- That advertisements on the website (other than legal advertisements under ss. 45.031 or 702.035, F.S.) must not exceed 20% of any website and must contain a disclaimer that such advertisements are not endorsed by the clerk of court. Such advertisements must not place a tracking cookie on the computer of the website visitor.

The bill amends s. 702.035, F.S. to conform that section with the provisions of this bill.

The bill provides an effective date of July 1, 2012.

#### B. SECTION DIRECTORY:

Section 1 creates s. 50-015, F.S., relating to legal publication, advertisement, notice of sale, or notice of foreclosure on a publically available website.

Section 2 amends s. 702.035, F.S., relating to legal notice concerning foreclosure proceedings.

Section 3 provides an effective date of July 1, 2012.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

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

The bill appears to cap the cost of a legal publication, advertisement, notice of sale, or notice of foreclosure at \$100. There is currently no such service in place to estimate how low the actual bids may end up being, but even assuming the maximum bid, individuals posting a legal publication, advertisement, notice of sale, or notice of foreclosure would realize significant savings in most jurisdictions. Currently, such postings must be made in periodicals and the cost varies by market, so it is difficult to make a state-wide generalization of how much money might be saved by this bill, but it is expected to be significant.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

The 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:

The bill does not appear to create a need for rulemaking or rulemaking authority.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides that advertisements "shall not exceed 20% of any webpage" but does not clarify that legal advertisements are not included in that calculation. Also, with this language, such advertisements could take up the entire front page until the user scrolls down to find the legal publication, advertisement, notice of sale, or notice of foreclosure section.

The bill appears to require clerks of court to accept the lowest bid, regardless of the reputation of the responsibility of the bidder, unless two or more bids tie for low bid.

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

n/a