WHITE PAPER

SUPPORT OF
HB 213, AS AMENDED

I. SUMMARY

The public interest is served by maintaining the strong tradition of judicial due process in mortgage foreclosure cases while moving mortgage foreclosure cases to final resolution expeditiously in order to get real property back into the stream of commerce, but to do so consistent with due process and fundamental fairness and without impairing the ability of the courts to manage their dockets and schedules. This act is an effort to provide additional tools to the courts to assist in achieving such a balance and to establish new and modified procedures to solve problems which have arisen in light of current foreclosure procedures.

II. CURRENT SITUATION

The proposed legislation attempts to resolve various issues relating to the current foreclosure process and satisfaction documentation. The bill requires verification of ownership of the note when the action is brought, defines adequate protection for lost notes in foreclosure cases, stabilizes title after a foreclosure case is finalized, lessens the time to seek a deficiency, clarifies the mechanism to expedite a foreclosure, and revises the order to show case statute.

III. SECTION-BY-SECTION ANALYSIS

A. Section 95.11 (5)(h) is created as a new litigation relating to the time to pursue deficiencies. Under current law, a deficiency decree can be pursued up to 5 years after default or notice of default on the underlying note, and well after the completion of the underlying foreclosure. §95.11 Florida Statutes. This creates the potential that the current surge of foreclosures will be followed by another surge of lawsuits seeking to establish deficiency decrees, thus prolonging the economic malaise. Proposed 95.11(5)(h) limits the time for pursuing a deficiency with respect to an owner-occupied one- to four-family dwelling to one year after the completion of foreclosure. In order to protect lenders whose foreclosures may have already been completed, the earliest limiting date is one year after the effective date or October 1, 2013.

B. Current §701.04 requires a lender to provide the mortgagor with an estoppel statement setting forth the unpaid balance of a mortgage in order to facilitate sales and refinancings. The bill modifies and updates this requirement in several key respects:

1. It expands the parties who can request the estoppel statement to include others with an interest in the property (such as the purchaser upon foreclosure of a subordinate lien). Some lenders have refused to provide this information to third parties on privacy grounds. Where a party other than the original mortgagor (or their designee) is making the request, there is no duty to provide an itemization of the unpaid loan balance. Proposed §701.04(5)

2. In order to facilitate uniformity and assure acceptability by closing agents and title insurers, proposed §701.04(1) sets forth the required content of the estoppels statement in detail to include:

(a) Unpaid amounts due as of the requested date certain
(b) At least 20 days of per diem interest after that date
(c) Certification that the party providing the estoppels is either the holder of the original promissory note or entitled to enforce the note under §673.3011, as the case may be.
(d) A commitment that upon receipt of funds, they will return a recorded mortgage satisfaction and the original promissory note marked "paid in full" or a lost note affidavit and adequate protections as required by proposed §702.11.

3. Subsection (2) provides that a lender may not charge a fee for the preparation or delivery of the first two estoppel statements in any calendar month. The lender has a separate obligation to provide certain information free of charge to the borrower (without restriction as to the number of requests) under the Real Estate Settlement Procedures Act, 12 U.S.C. §2605 and the Federal Truth in Lending Act, 15 U.S.C. §1641. However those acts do not require provision of the information to third parties (such as a title agent) set time frames for providing the information.

As the proposed Florida law was an expansion of the obligations under the Federal Act, and subject to enforcement provisions, there was some concern that parties could make an abusive number of requests, which led to the inclusion of the limitation on the number of free requests. Obviously, the Florida statute would not limit a borrower's rights to information under the Federal Acts. §701.04(2)

4. Subsection (3) reiterates the basic concept of an estoppel statement, that third parties relying on it (by purchasing or lending against the property) may rely on and enforce the estoppel statement. The borrower is not a party entitled to rely on the estoppel statement, as it was felt that the borrower should not benefit from an inadvertent error or misstatement by the lender – as there is no detrimental change in position.

5. Current §701.04 requires the holder of a mortgage to execute and record a satisfaction of mortgage. Mortgage holders do not routinely record a continuous chain of assignments in the official records. As a result a satisfaction is rarely given by the owner of record, which creates a title problem affecting the marketability of the property. Subsection (4) adds an additional requirement that if the party giving the satisfaction is not the owner of record, the satisfaction will be supplemented by a sworn certification that the person executing the satisfaction was then in physical possession of the original promissory note or was then a person entitled to enforce the note pursuant to §673.3011, as the case may be.

In drafting, we considered requiring the mortgage holder to record a continuous chain of assignments, but realized that such would be impractical, if not impossible, (absent fraudulent robo-signing) if the assignments of mortgage had not been created at the time of the original transfer. Instead, we are requiring proof of possession of the note which the mortgage follows whether or not assigned, at each stage of the process.

6. Subsection (6) requires the party receiving payment to return the original promissory note within 60 days of receipt of payment. In lieu of returning the original note, the lender can complete a lost, destroyed or stolen note affidavit and provide adequate protections in accord with current law. Subsection (6) allows the request to designate where the original note should be returned. It is anticipated that after a sale or refinancing, the paid note will be returned to the closing agent, who can then record an affidavit of return of the paid note to supplement the satisfaction from a party who is not the record assignee of the mortgage. While the bill does not require the filing of complete chains of mortgage assignments, such is still the preferred practice and provides the mortgage owner with important protections and the benefit of the limited liability for Condominium and HOA assessments under §718.116 and §720.3085.

7. Subsections (7) and (8) are the enforcement mechanisms for this section. If the party who receives payment does not return the note or comply with the lost note mechanism within 60 days, they are subject to a penalty of $100 per day until delivered up to a total of $5,000. A summary proceeding under §51.011 may be brought to compel compliance and the prevailing party is entitled to recovery attorneys' fees and costs.

Current §701.04 imposes duties on the holders of mortgages, other liens and judgments to satisfy them of record upon payment in full. Because the modifications of proposed §701.04 were so specific to mortgages and notes, the provisions dealing with other liens and judgments were segregated and moved to new §701.045. The new provision also added a cross reference to §55.206 which addresses the termination of liens in the judgment liens on the personal property database.

C. Proposed §702.015 is an attempt to reschedule the timing of certain aspects of the foreclosure process. The customary practice had been to plead in the alternative – both that the plaintiff was the owner and holder of the note, and that the note had been lost and seeking to re-establish the note. At some point later in the process, the plaintiff would locate and file the original note, or proceed to show its entitlement to enforce a lost note. In the meantime, the defendants were devoting resources to defending unnecessary issues and conducting discovery as to potentially irrelevant issues.

This section mandates that the foreclosing lender gather information within its control and elect remedies at the time of initially filing the foreclosure action. It also requires the foreclosing lender to allege with specificity some of the "routine" discovery requests – such as the authority by which an agent has authority to act on behalf of the note holder.

Section 702.015 also requires any complaint which does not include a lost note count to either (a) file the original note or (b) file certification that the plaintiff is in physical possession of the original promissory note, its location, the date and person who verified possession and attach copies of the note and any allonges thereto.

Any complaint which includes a count to enforce a lost, destroyed or stolen promissory note, must be accompanied by a lost note affidavit which details all assignments of the note, set forth facts showing entitlement to enforce the lost note under §673.3091, and exhibits showing entitlement to enforce.

Since §702.015 will require the earlier filing of original promissory notes, the clerk is delegated authority to return the original note where the mortgage is restructured, the case settles or is voluntarily dismissed without completion of the foreclosure.

D. Proposed §702.035 provides enhanced notice to the mortgagor and property owners, and tenants of their rights in the foreclosure process. Only one notice needs to be given to any party defendant in a single case, even if multiple mortgage holders are seeking to foreclose. A substantial amount of time and many comments were received on every aspect of the proposed notice. It is very difficult to provide meaningful and fulsome notice to the lay person. The language has been amended many times to provide the proper notice.

E. Longstanding common law grants a degree of certainty of title to a bona fide purchaser following the foreclosure sale. It is critical to Florida's real estate economy that foreclosed properties be freely marketable and its title insurable after a foreclosure. Yet the nature of certain allegations made regarding "robo-signing," fabrication of assignments of notes and mortgages, and photo-shopped "original" notes create a significant risk that foreclosures tainted by such alleged practices might be set aside even after the property has been conveyed to an arms' length purchaser. The mere prospect of this has created some hesitation to insure properties coming out of a foreclosure. A case or two expressly reaching the conclusion that a sale could be set aside would freeze up the market in previously foreclosed properties because of the unknowability of which properties might have been tainted by bad practices.

Proposed Section 702.036 recognizes that the real estate economy does require some finality in the foreclosure process. It thus backstops the common law with an express statutory limited scope marketable record title act, which legislatively converts any attempt to "unwind" a completed foreclosure (other than based on the failure of service – as such would be a constitutional defect) into a claim for money damages, and prohibits granting relief which adversely impacts the ownership or title to the property.

In the interest of fairness, this protection of the title only becomes effective after:

1. A final judgment of foreclosure has been entered,
2. Any appeals periods have run without an appeal, or the appeal has been finally resolved;
3. There was no lis pendens providing notice of the subsequent challenge and the property was acquired, for value, by a person not affiliated with the foreclosing lender; and
4. The party seeking relief from the judgment was properly served.

Proposed §702.036(3) attempts to provide similar finality where the foreclosure was based on a lost, destroyed or stolen note in those rare circumstances in which the "real" note holder attempts to enforce the note. Under that fact pattern, the "real" note holder must pursue the adequate protections given under §673.3091 (which requires the court to provide adequate protection), new Section 702.11, or the party who wrongly claimed to be the owner of the note, rather than the property in the hands of the unaffiliated bona fide purchaser for value.

F. The changes to §702.04 are technical in nature to eliminate an obsolete reference to the no longer required "decree of confirmation of sale" and the no longer used "foreign judgment book."

G. Current §702.06 included language which could only be understood by looking back to technical distinctions before Florida consolidated legal and equitable jurisdiction. Proposed §702.06(1) is intended to have the same meaning as existing §702.06.

Under current law, a deficiency decree can be pursued up to 5 years after default or notice of default on the underlying note, and well after the completion of the underlying foreclosure. §95.11 Florida Statutes. This creates the potential that the current surge of foreclosures will be followed by another surge of lawsuits seeking to establish deficiency decrees, thus prolonging the economic malaise. Proposed subsections (2) and (3) of §702.06 limit the time for pursuing a deficiency with respect to an owner-occupied one- to four-family dwelling to one year after the completion of foreclosure. In order to protect lender's whose foreclosures may have already been completed, the earliest limiting date is one year after the effective date or October 1, 2013.

H. Proposed Section 702.062 gives the court more tools to keep the foreclosure process moving forward, notwithstanding the cross-incentives of both the homeowner and the lender to move more slowly. Subsection (1) requires any party giving an extension of the time to file a response to a complaint to provide the clerk with notice (usually by a copy of the extension letter). In that manner, the court and other parties are aware of the applicable default deadlines.

Subsections (2) and (3) allows any party to notify the court when defaults are appropriate and to move for entry of defaults. Subsection (3) allows the court to specifically direct the plaintiff to file all affidavits, certifications and proofs necessary for the entry of summary judgment or to show cause why such a filing should not be made, and provides that the filing of these materials shall be construed as a motion for summary judgment. The court may then enter final summary judgment or set the case for trial in accord with its sound judicial discretion. The bill drafters felt that the court had the inherent authority to take these steps, but were advised that certain courts would take comfort in an express statutory provision.

If all parties have been served, forty-eight days after filing, any party may request a case management conference at which the court will set definite timetables for moving the case forward. The bill expressly recognizes that the court may grant extensions and stays when the parties are engaged in good faith negotiations or otherwise as justice may require, but does provide express authority for the court to condition an extension on the borrower or the lender if it so chooses paying condo & HOA assessments going forward.

I. Current §702.065 is amended to lower the amount of permissible attorneys fees before an evidentiary hearing as to reasonableness is required to the greater of 1.5% or $1500, from the current 3% (without limit).

J. Section 702.10 of the current statutes is the "order to show case" procedure. Practioners have complained that the statutory procedure does not achieve its goal of expediting

foreclosure actions in foreclosures under certain circumstances. In 2010 the Section appointed a special committee chaired by Peggy Rolando and comprised of Dan DeCubellis, Jeff Sauer, Willie Kightlinger, Kris Fernandez, Michael Gelfand, George Meyer, Mark Brown, Burt Bruton and Jerry Aron. That committee spent a few months analyzing the order to show case statute and drafted a proposed amendment. That work product was the basis of the language in HB213. Only minor changes have been made to the special committees proposal.

The revised procedure calls for a verified complaint, provides for a specific timetable for a hearing, clarifies various terminology, revises the attorneys fees provision, expands the parties to be served to any defendant, not just the mortgage; and allows for the entry of a final judgment if various events occur the only substantive change to the prior committee's proposal is that the current statute applies to nonresidential real estate. The prior committee did not propose to change the scope of the statute. HB 213 expands the scope of that portion of the bill requiring payments during pendency of the case to residential property except homestead property. The drafters of HB 213 concluded that an overwhelming percentage of residential property that is not homestead is investment property and investment property which is residential should be subject to the expedited order to show case procedure.

K. A new section 702.11 is creating a definition as to "adequate protections" for lost notes. Although the drafters recognized that §673.3091 included a provision that the judge provide adequate protection, may judges were not providing any adequate protection. Therefore, it was thought the need for a more specific requirement should be sought for mortgage foreclosures. Although the proposed list of adequate protections can be debated….

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The fiscal impact on state and local governments is unknown.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

There are economic benefits to lenders, borrowers, homeowners and condominium associations in the proposed bill. Lenders have more certainty as to the foreclosure process avoiding lengthy additional litigation and providing a workable process to expedite certain foreclosures. Borrowers have the benefit of knowing the lender foreclosing is the correct party, if a note is lost adequate security, is provided, satisfactions are expedited and the time to seek a deficiency is reduced. Associations are expressly provided an opportunity to be benefitted.

VI. CONSTITUTIONAL ISSUES

There is the potential of a constitutional issue in connection with a provision in the proposal which is being further explored and will be reported on at the council meeting.

VII. OTHER INTERESTED PARTIES

On two occasions the special committee sought input from a variety of section committees and reviewed each comment and suggested appropriate revisions to Representative Passidomo. She also received comments from the Consumer Protection Law Committee of the Florida Bar and incorporated certain of their requested changes.