

## WHITE PAPER

### PROPOSED REVISIONS TO THE NOTICE OF JUDICIAL SALE STATUTES

#### I. SUMMARY

The proposed changes provide for publication of Notices of Judicial Sales on the internet, as an alternative to newspaper publication, in order to (a) provide greater notice of such sales to the public, including potential sale bidders and other interested parties, and (b) reduce the publication costs associated with the Notice of Sale. Additionally, the proposed changes provide for the street address of the property to be included in the Notice to better alert the public to what property is being sold.

#### II. CURRENT SITUATION AND PROPOSED CHANGES

A. Publication of Notice of Sale - Real property is the subject of a variety of judicially-directed sales. The most frequent type is sales resulting from mortgage foreclosure actions. A mortgage foreclosure action concludes with a judgment determining the amount owed to the lender and scheduling a judicial sale of the property pursuant to § 45.031 *Fla. Stat.* Usually the sale is scheduled approximately five weeks after entry of the judgment. Sales also occur as a result of contractor (F.S. Chapter 712), condominium (F.S. Chapter 718), and homeowners' association (F.S. Chapter 720) lien foreclosures.

Notices of sale are published to encourage as large a pool of potential bidders as commercially reasonable. It is believed that the larger the pool of bidders, the more likely the sale price will reach its maximum value. Obtaining the highest bid is important since the owner may be liable to the creditor for the difference between the amount of the debt and the property's value at the time of the sale. The higher the successful bid, the more likely there will be no deficiency. Indeed, if the successful bid exceeds the judgment amount, the excess proceeds may be paid back to the owner.

The current Notice of Judicial Sale Statutes require that the Notice be published in a newspaper, and do not permit internet publication. Under the present form of § 45.031 *Fla. Stat.*, the Notice of Sale ("the Notice") must be published two times, once each in two consecutive weeks, in a newspaper "of general circulation" published in the county where the sale will occur.

While newspapers were the primary source of information for many people in the past, that is no longer the case today. Now the internet is a common source of the public's access to information. The internet is not only being used with greater frequency, it permits the public access to its information around the clock, and it is easily viewed and shared. Changes in communication mediums have been recognized by the large number of business and governmental bodies now providing notices by internet. In fact, §45.031, *Fla. Stat.* recently was amended to permit electronic sales of properties by the clerk of court.

The clerk of court's website is a logical place for people to check if they are looking for legal notices that could affect title to property. Most, if not all, clerks have internet websites. Permitting Notices of Sales to be published on the clerks of courts' websites as an alternative to newspaper publication increases the likelihood that people interested in learning about judicial sales will be able to locate them.

The cost to publish a Notice may vary greatly without regard to the value or size of the property. The Notice must state the caption of the case, including the names of all parties, and "a description of the property to be sold." In a fair number of residential foreclosures and in a greater number of commercial foreclosures, the number of defendants and the legal description of the property can be quite lengthy. Since §50.061 establishes a formula for determining the amount which a newspaper must charge for publication depending on the number of lines in the Notice, the Notice can be expensive to publish.

In some cases homeowners file bankruptcy proceedings which delay the foreclosure process. If the filing occurs after a Notice is published, a new sale date eventually must be obtained and a new Notice published. Repeated bankruptcy filings, or other delays in judicial sales, require repeated re-publications of the Notice, and increase the cost even in the case of a property description that is not lengthy.

The proposed changes to the statutes allowing for publication of the Notice via the Internet would both increase the exposure of the sale to possible bidders and other interested parties, and reduce the cost of publication.

Additionally, the statutes currently do not require that the Notice contain the street address of the property. The proposed changes require that the Notice include the street address to make it easier for the public to know what property is being sold. Because some property has no street address, and errors can be made on street addresses, the proposed changes provide that the Notice remains effectual if the correct address is not provided, and that the legal description in the Notice will control over any conflict with the street address.

B. Due process concerns – The owner of the property which is the subject of the foreclosure action has been notified of the action by some form of service of process at the commencement of the case. Even if the owner has not attempted to defend, a copy of the foreclosure judgment is mailed to the owner so that he or she has notice of (a) the amount owed to the lender, and (b) the date and time of the foreclosure (judicial) sale.

Newspaper publication of the Notice does little, if anything, to inform a property owner of the pendency of the sale. A copy of the Notice is sent by the clerk to the property owner. Thus, allowing alternate publication via the clerk of court's internet website would not make it less likely that a property owner would be informed of a sale date for the property than if the Notice is published in the newspaper.

### III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

It is anticipated that the proposal's fiscal impact on county government would be positive. Any expense to create internet links and postings should be more than adequately covered by the charge that the clerk would levy for the internet posting. Further, internet publication, once automated as part of the clerk's docketing process, should reduce the amount of time-consuming paper documentation. There should be no fiscal impact on state government.

#### IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal will have an overall positive economic impact on the private sector. The increasing high expense for newspaper publication of judicial sale notices will be avoided. It will also have a positive impact on firms who establish the mechanisms for Internet publication and who will be able to charge for such publication, albeit at costs below those presently charged by the print media. The proposal will have a negative economic impact on publications which have recognized a profit center from print publication of Notices.

#### V. CONSTITUTIONAL ISSUES

No constitutional issues are raised by this proposal. Notices of sales are not constitutionally required for due process or other purposes. If there were any constitutional issues, this proposal is expected to expand the audience for notice.

#### VI. OTHER INTERESTED PARTIES

Clerks of Court  
Florida Press Association  
Florida Bankers Association  
Homeowners and Condominium Associations  
Florida Home Builders