

**REAL PROPERTY, PROBATE & TRUST LAW SECTION
OF THE FLORIDA BAR**

WHITE PAPER

**PROPOSAL TO CLARIFY THE FINALITY OF
FORECLOSURE JUDGMENTS – REVISING § 702.036**

I. SUMMARY

This proposal would expand the finality of foreclosure judgments provided by § 702.036 beyond mortgages to include other types of liens, such as the liens of community associations and materialmen. The proposal would also make the losing party liable for the prevailing party attorney’s fees in post-foreclosure litigation where a foreclosed party claims that its lien was superior to that of the foreclosing party. The legislation does not have a fiscal impact on state funds.

II. CURRENT SITUATION

The current situation, created by Fla. Stat. § 702.036 and *Wells Fargo Bank, N.A. v. Tan, infra*, is that the holder of junior mortgage can foreclose a senior lien with impunity if can manage to serve the senior lienholder with process and obtain a default against the senior lienholder. This is a dramatic departure from long-standing Florida Supreme Court law, as described below, and creates an incentive for junior lienors to improperly attempt to foreclose senior liens.

For over 80 years prior to *Tan*, Florida law allowed a senior lienholder to ignore, without risk, foreclosure lawsuits initiated by junior lienholders. *Cone Bros. Const., Co., v. Moore*, 141 Fla. 420 (1940). The *Cone Bros.* decision allowed senior lienholders to avoid the expense of foreclosure actions improperly brought against them by, for example, junior home equity lenders, homeowner’s associations and materialmen. If a junior lienholder were to improperly include a senior lienholder as a party to a foreclosure lawsuit and obtain a judgment purporting to extinguish the senior interest, *Cone Bros.* held that such foreclosure would be “wrongful” and void ab initio as to such senior lienholder.

In *Wells Fargo Bank, N.A. v. Tan*, 320 So. 3d 782, (Fla. 4th DCA 2021), the Fourth DCA acknowledged the inability of a junior lienholder to require a senior lienholder to participate in a foreclosure action—consistent with *Cone Bros.* However, the *Tan* Court was the first to apply Fla. Stat. § 702.36 (the “Mortgage Finality Statute”) is such a situation. The *Tan* Court held that under the Mortgage Finality Statute Wells Fargo’s senior mortgage was indeed extinguished, leaving Wells Fargo with only a claim for monetary damages.

Tan’s application of § 702.036 dramatically changed the business expectations of the citizens and lenders in the State of Florida, created a significant risk of senior lienholders being foreclosed in actions improperly brought by junior lienholders, and added unnecessary expense and litigation to Florida’s overburdened court system.

III. EFFECT OF PROPOSED CHANGE

To vindicate legitimate business expectations and reduce litigation, the proposal adds new subsection (4) in § 702.036, which to shift the attorney's fees incurred by an improperly foreclosed senior lienholder onto the junior lienholder who wrongfully foreclosed. The attorney's fee provision is reciprocal, requiring that a party who erroneously claims its foreclosed lien was senior must pay the attorney's fees incurred by an innocent plaintiff responding to the claim.

Proposed changes to subsections (1) and (2) remedy shortfalls in § 702.036 that limit its scope to mortgages alone. Improper foreclosure actions instituted by other junior lienholders are equally harmful and should be included both parts of the statute: (a) the existing finality provisions; and (b) the proposed new fee-shifting provision.

IV. ANALYSIS

The following describes the changes being proposed:

1. Sections 702.036(1)(a) is amended to provide that the statute applies to final judgments of foreclosures of mortgages and other liens, such as community association liens and construction liens.

2. Sections 702.036(2)(a)-(c) are likewise amended to provide that the statute applies to final judgments of foreclosure of mortgages and other liens, such as community association liens and construction liens.

3. Section 702.036(4) is added to provide for attorneys' fees for the prevailing party in litigation over an allegedly improper foreclosure of a senior lien.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal is likely to reduce burdens on the court system arising from litigation over lien priorities occasioned by junior lienholders improperly attempting to foreclose senior lienholders, which they can presently attempt with impunity

VI. DIRECT IMPACT ON PRIVATE SECTOR

The proposal does not have a direct fiscal impact on the private sector, but it may have the indirect impact of avoiding increased borrowing costs by reducing lenders' litigation expenses.

VII. CONSTITUTIONAL ISSUES

The proposal does not have any constitutional issues

VIII. OTHER INTERESTED PARTIES

The Business Law Section of The Florida Bar, the Florida Bankers Association.

1 A bill to be entitled
2 An act amending s. 702.036, F.S. and providing an effective date.

3
4 Be It Enacted by the Legislature of the State of Florida:

5
6 Section 1. Section 702.036, Florida Statutes, is amended to
7 read:

8 702.036 Finality of ~~mortgage~~-foreclosure judgment.—

9 (1)

10 (a) In any action or proceeding in which a party seeks to set
11 aside, invalidate, or challenge the validity of a final
12 judgment of foreclosure of a mortgage or other lien or to
13 establish or reestablish a lien or encumbrance on ~~the real~~
14 property in abrogation of the final judgment of foreclosure of
15 a mortgage or other lien, the court shall treat such request
16 solely as a claim for monetary damages and may not grant
17 relief that adversely affects the quality or character of the
18 title to the property, if:

19 1. The party seeking relief from the final judgment of
20 foreclosure of the mortgage or lien was properly served
21 in the foreclosure lawsuit as provided in chapter 48 or
22 chapter 49.

23 2. The final judgment of foreclosure of the mortgage or
24 lien was entered as to the property.

RM:6724080:1

25 3. All applicable appeals periods have run as to the
26 final judgment of foreclosure of the mortgage or lien
27 with no appeals having been taken or any appeals having
28 been finally resolved.

29 4. The property has been acquired for value, by a person
30 not affiliated with the foreclosing ~~lender-mortgage~~
31 holder, the foreclosing lien holder or the foreclosed
32 owner, at a time in which no lis pendens regarding the
33 suit to set aside, invalidate, or challenge the
34 foreclosure appears in the official records of the county
35 where the property was located.

36 (b) This subsection does not limit the right to pursue any
37 other relief to which a person may be entitled, including, but
38 not limited to, compensatory damages, punitive damages,
39 statutory damages, consequential damages, injunctive relief,
40 or fees and costs, which does not adversely affect the
41 ownership of the title to the property as vested in the
42 unaffiliated purchaser for value.

43 (2) For purposes of this section, the following, without
44 limitation, shall be considered persons affiliated with the
45 foreclosing lender:

46 (a) The foreclosing ~~lender-mortgage holder, the foreclosing~~
47 lien holder or any loan servicer for the loan being
48 foreclosed;

49 (b) Any past or present owner or holder of the ~~loan mortgage~~
50 or lien being foreclosed;

51 (c) Any maintenance company, holding company, foreclosure
52 services company, or law firm under contract to any entity
53 listed in paragraph (a), paragraph (b), or this paragraph,
54 with regard to the ~~loan mortgage or lien~~ being foreclosed; or

55 (d) Any parent entity, subsidiary, or other person who
56 directly, or indirectly through one or more intermediaries,
57 controls or is controlled by, or is under common control with,
58 any entity listed in paragraph (a), paragraph (b), or
59 paragraph (c).

60 (3) After foreclosure of a mortgage based upon the enforcement of
61 a lost, destroyed, or stolen note, a person who is not a party to
62 the underlying foreclosure action but who claims to be the person
63 entitled to enforce the promissory note secured by the foreclosed
64 mortgage has no claim against the foreclosed property after it is
65 conveyed for valuable consideration to a person not affiliated
66 with the foreclosing lender or the foreclosed owner. This section
67 does not preclude the person entitled to enforce the promissory
68 note from pursuing recovery from any adequate protection given
69 pursuant to s. 673.3091 or from the party who wrongfully claimed
70 to be the person entitled to enforce the promissory note under s.
71 702.11(2) or otherwise, from the maker of the note, or from any
72 other person against whom it may have a claim relating to the
73 note.

RM:6724080:1

74 (4) When a party seeks relief from a final judgment foreclosing a
75 mortgage or lien, or files a separate action attacking such a
76 final judgment, and claims that it holds or held a lien superior
77 in right, priority or dignity to the mortgage or the lien
78 foreclosed in the judgment, then the court shall award the party
79 prevailing on that claim its reasonable attorney's fees incurred
80 in such litigation. This subsection applies whether the
81 litigation seeking relief from the final judgment occurs in the
82 case in which the judgment was entered or in any separate case or
83 proceeding.

84 (5) As used in this section, the word "property" refers
85 exclusively to real property.

86 Section 2. This act shall take effect July 1, 2022.