



The Florida Senate

Issue Brief 2011-201

October 2010

Committee on Banking and Insurance

NON-JUDICIAL FORECLOSURES

Statement of the Issue

Florida has one of the highest foreclosure rates in the country. According to the Mortgage Bankers Association, Florida is ranked second in foreclosure starts in the country.¹ Currently, the judicial foreclosure process is the only means for a mortgage holder to foreclose on a residential property. As a result of the high number of foreclosures, mortgage holders are encountering long delays in finalizing foreclosures through the judicial process. Two bills which directly addressed this situation in the 2010 Regular Legislative Session were CS/CS/HB 1411 (CS/CS/SB 2358)² and SB 2270. CS/CS/HB 1411, which created a non-judicial foreclosure process for *timeshare properties*, was enacted.

Recent federal legislation has developed, however, limiting the use of non-judicial foreclosure for most residential mortgages. Specifically, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), enacted on July 21, 2010, prohibits any contractual requirement that would impose the use of non-judicial foreclosure as the exclusive foreclosure process for mortgages on principal dwellings and for closed-end mortgages on secondary dwellings. Because this prohibition applies to the large majority of residential foreclosures, the primary stakeholders that sought passage of non-judicial foreclosure for residential property in the last session have represented to Senate professional committee staff that they no longer intend to pursue non-judicial foreclosure legislation for residential mortgages.

While the federal legislation applies to most residential mortgages, its limitations do not apply to foreclosures on either timeshare properties or commercial properties. Many market analysts are projecting a new flood of foreclosures deriving from commercial mortgages.³ As a result, there may be future initiatives to reform the process for foreclosing on commercial properties that incorporate some of the non-judicial foreclosure process for timeshare mortgages enacted by CS/CS/HB 1411.

This issue brief will explore the effects of the Dodd-Frank Act on residential non-judicial foreclosures. Additionally, this brief will examine the provisions enacted in Florida’s timeshare trustee foreclosure legislation.

Discussion

Federal Law Preemption of Non-judicial Foreclosures for Residential Properties

On July 21, 2010, the federal government passed the Dodd-Frank Act. The Dodd-Frank Act implements a reform of the lending system in the United States and enhances the rights of borrowers. The primary effects of the Dodd-Frank Act are increasing restrictions on the securitization of mortgages and enlarging lending requirements.⁴

Specifically related to residential foreclosures, Section 1414 of the Dodd-Frank Act limits the use of non-judicial foreclosure for residential properties. Section 1414(e)(1), entitled “Arbitration,” states:

¹ See Briefing Materials on Mortgage Bankers Associations, Second Quarter 2010, National Delinquency Survey Results.

² See ch. 2010-134, L.O.F.

³ See Molony, Walter, “Commercial Real Estate Remains Soft but Favors Business Expansion,” www.realtor.org/press_room/news_releases/2010/08/commercial_soft (Last Visited September 22, 2010).

⁴ See Mayer Brown LLP, “Understanding the New Financial Reform Legislation,” 2010.

No residential mortgage loan and no extension of credit under an open end consumer credit plan⁵ secured by the principal dwelling of the consumer may include terms which require arbitration or any other non-judicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction.

Section 1401 of the Dodd-Frank Act states, in part: “The term ‘residential mortgage loan’ means any consumer credit transaction that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real property that includes a dwelling, other than a consumer credit transaction under an open end credit plan or, for purposes of sections 129B and 129C and section 128(a) (16), (17), (18), and (19), and sections 128(f) and 130(k), and any regulations promulgated thereunder, an extension of credit relating to a plan described in section 101(53D) of title 11, United States Code.” Title 11, U.S.C., section 101(53D), specifically defines timeshare plan. Accordingly, the Dodd-Frank Act does not apply to foreclosures on timeshare properties, but prohibits contractual requirements that would impose the exclusive use of non-judicial foreclosure in a loan agreement for: any mortgage on a principal residential property; and any closed-end consumer credit plans on all other residential property.⁶

Non-judicial Foreclosure for Mortgages on Timeshare Property

Chapter 721, F.S., is titled “The Florida Vacation Plan and Timesharing Act,” and establishes requirements for the creation, sale, exchange, promotion, and operation of timeshare plans, including requirements for full and fair disclosure to purchasers and prospective purchasers. CS/CS/HB 1411 substantially amended ch. 721, F.S., particularly Part III. The bill re-titled Part III as “Foreclosure on Liens of Timeshare Interests,” and created a “trustee foreclosure” or non-judicial foreclosure.

The bill creates a separate but similar trustee procedure for the foreclosure of liens based on unpaid assessments and for mortgage liens. Each procedure gives the timeshare interest owner (obligor) an opportunity to object to the trustee foreclosure process and to contest the foreclosure through a judicial process. If the owner does not object to the use of the trustee foreclosure procedure, he or she will not be subject to a deficiency judgment even if the proceeds from the sale of the timeshare interest are insufficient to offset the amounts secured by the lien.

The trustee foreclosure process for mortgage liens can only be used if the mortgage, or an amendment to a mortgage executed by the obligor before the effective date of the bill, contains a notice that informs the obligor that the mortgagee (the mortgage lender) has the right to elect to use the non-judicial or the judicial foreclosure procedure.

⁵ Open end consumer credit plan, as defined by Black’s Law Dictionary, means a mortgage that allows the obligor to borrow additional funds against the same property from a different lender. Closed end consumer credit plan is defined by Black’s Law Dictionary as a mortgage prohibiting the obligor from borrowing additional funds against the same property.

⁶ See Morrison & Foerster News Bulletin, “Dodd-Frank Wall Street Reform and Consumer Protection Act: Residential Mortgage User Guide,” August 2010, note 6. (“The prohibition applies to both residential mortgage transactions and open-end consumer credit that is secured by the principal dwelling of the consumer. Therefore, this prohibition applies to principal and nonprincipal dwellings for closed-end loans, but only principal dwellings for open-end loans.”).