

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 471 Mortgage Foreclosures

**SPONSOR(S):** Civil Justice & Claims Subcommittee; Fant and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 660

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	14 Y, 0 N, As CS	Stranburg	Bond
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

A mortgage foreclosure is an action by a lender against a debtor to force the sale of the real property that secures the loan as a means of enforcing the debt. Often, a debtor subject to foreclosure will file for bankruptcy as a means of obtaining an automatic stay of the foreclosure action plus a discharge of the mortgage debt.

In bankruptcy, a debtor must file a statement under penalty of perjury stating his or her intent to retain, redeem or surrender any property securing a debt. The debtor is supposed to act on that decision as a condition of obtaining a discharge of his or her debts. In some cases, debtors have stated an intention to surrender real property in bankruptcy proceedings but then later have actively contested the completion of foreclosure proceedings in state court.

This bill provides that a lender in a mortgage foreclosure case may use any document filed under penalty of perjury in bankruptcy court as an admission by the defendant. The bill provides that surrender in the bankruptcy case creates a rebuttable presumption that the debtor has waived all defenses to the foreclosure action. The bill also allows the court to take judicial notice of the final order in a bankruptcy case. The bill further provides that a debtor who has agreed to surrender the property may still use a defense based on actions of the lienholder that occurred subsequent to the debtor's filing of the statement of intention to surrender the mortgaged property.

The bill applies to any mortgage foreclosure filed on or after October 1, 2017.

The bill does not appear to have a fiscal impact on state or local government.

The bill provides an effective date of October 1, 2017.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### *Mortgage Foreclosure*

The foreclosure procedure is governed by statutory process and the Florida Rules of Civil Procedure. It is initiated by the lender or servicer, known as the mortgagee, when the borrower, or mortgagor, fails to perform the terms of his or her mortgage, usually by defaulting on payments. Most mortgages contain an "acceleration clause," which gives the mortgagee the authority to declare the entire mortgage obligation due and payable immediately upon default. If the borrower is not able to pay the entire mortgage obligation upon proper notice, the holder of the note or its servicing agent may begin the foreclosure process in a court of proper jurisdiction.

The following is a brief outline of the judicial foreclosure process, with the caveat that litigation is driven by the parties, so the process may be slightly different from case to case:

- Upon proper notice of default to the defendant, the mortgage servicer files a foreclosure complaint,<sup>1</sup> which must allege that the plaintiff is the present owner and holder of the note and mortgage,<sup>2</sup> contain a copy of the note and mortgage,<sup>3</sup> and allege a statement of default,<sup>4</sup> along with a filing fee<sup>5</sup> and a *lis pendens*, which serves to cut off the rights of any person whose interest arises after filing.<sup>6</sup>
- Service of process must be made on defendants within 120 days after the filing of the initial pleadings.<sup>7</sup>
- If a defendant has not filed an answer or another paper indicating an intent to respond to the suit, then the plaintiff is entitled to an entry of default against the defendant.<sup>8</sup>
- If an answer is filed (thus negating the possibility of a default judgment), the plaintiff may then file for a motion of summary judgment or proceed to trial, however the vast majority of plaintiffs file a motion for summary judgment.<sup>9</sup>
- Following the proper motions, answers, affidavits, and other evidence being filed with the court, the judge holds a summary judgment hearing and if he or she finds in the favor of the plaintiff, the court renders a final judgment.<sup>10</sup>
- If summary judgment is denied, the foreclosure proceeds to a trial without a jury.<sup>11</sup>
- The court schedules a judicial sale of the property not less than 20 days, but no more than 35 days after the judgment if the plaintiff prevails at summary judgment or trial.<sup>12</sup>
- A notice of sale must be published once a week, for 2 consecutive weeks, in a publication of general circulation, and the second publication must be at least five days prior to the sale.<sup>13</sup>
- The winning bid at a public judicial sale is conclusively presumed to be sufficient consideration for the sale.<sup>14</sup>

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<sup>1</sup> Fla. R. Civ. P. 1.944.

<sup>2</sup> *Edason v. Cent. Farmers Trust Co.*, 129 So. 698, 700 (Fla. 1930).

<sup>3</sup> Fla. R. Civ. P. 1.130(a).

<sup>4</sup> *Siahpoosh v. Nor Props.*, 666 So. 2d 988, 989 (Fla. 4th DCA 1996).

<sup>5</sup> The filing fee for foreclosure actions depends on the value of the claim. When the claim is for \$50,000 or less, the fee is \$395; when the claim is over \$50,000 but less than \$250,000, the fee is \$900; and when the claim is \$250,000 or more, the fee is \$1900, according to s. 28.241(1)(c), F.S.

<sup>6</sup> s. 48.23, F.S.

<sup>7</sup> Fla. R. Civ. P. 1.070(j). See also chs. 48 and 49, F.S.

<sup>8</sup> Fla. R. Civ. P. 1.500.

<sup>9</sup> Fla. R. Civ. P. 1.510(a).

<sup>10</sup> s. 45.031, F.S.

<sup>11</sup> s. 702.01, F.S. The summary judgment motion is optional. A plaintiff can elect to go to trial without the filing of a summary judgment motion.

<sup>12</sup> s. 45.031(1)(a), F.S.

<sup>13</sup> s. 45.031(2), F.S.

- Parties have 10 days to file a verified objection to the amount of the bid or the sale procedure.<sup>15</sup>
- After the 10 days has expired with no objection, the sale is confirmed by the clerk's issuance of the certificate of title to the purchaser, sale proceeds are disbursed in accordance with the statutory procedure,<sup>16</sup> and the court may, in its discretion, enter a deficiency decree for the difference between the fair market value of the security received and the amount of the debt.<sup>17</sup>
- Also after the 10 days has expired, the clerk may issue a writ of possession giving possession of the real property to the purchaser and directing the sheriff to assist that purchaser with obtaining possession. Up to the point that a writ of possession is served on the property, the debtor who was foreclosed has the legal right to stay in possession of the real property.

### *Bankruptcy Proceedings*

In general, the two purposes of bankruptcy are to convert the estate of the debtor into cash and distribute it among creditors, and to give the debtor a fresh start with such exemptions and rights as the bankruptcy statute leaves untouched.<sup>18</sup> The filing of a bankruptcy petition operates as an automatic stay on most legal actions against a debtor, including foreclosure.<sup>19</sup> The automatic stay is in effect from the time the petition is filed until discharge of the debtor, unless sooner lifted by the bankruptcy court.

There are two primary forms of bankruptcy an individual may file.<sup>20</sup> A petition filed pursuant to Chapter 7 of the bankruptcy code is used when the rehabilitative chapters of the code would not be applicable, such as a there being no nonexempt property to protect.<sup>21</sup> A Chapter 13 petition allows the debtor to stay creditor actions and propose a plan to pay creditors, rehabilitating the debtor financially.<sup>22</sup>

In Chapter 7 the debtor must express his or her intent regarding secured property. A debtor has three options: surrender the property and be discharged of the debt; reaffirm the debt, meaning the debtor keeps the property but is liable for the debt in the future (the debt is not discharged by bankruptcy); or redeem the property by paying cash to pay off the security interest.

The statement of intent is made under penalty of perjury. It must be filed by the debtor within 30 days of the filing of the Chapter 7 petition or on or before the date of the meeting of the creditors to appoint a trustee for the estate, whichever date is earlier.<sup>23</sup> Within 30 days after the first set date for the meeting of the creditors, the debtor must perform his intention with respect to each piece of secured property.<sup>24</sup>

In Chapter 13 filings, the debtor must create a plan to restructure and repay his debt.<sup>25</sup> For this plan to be confirmed by the court, it must describe how the debtor is responding to each secured claim.<sup>26</sup> The debtor must make a plan for the secured property that the holder of the claim accepts or the debtor surrenders the property securing the claim to the claim holder.<sup>27</sup>

After the debtor has fulfilled his or her duties to the bankruptcy estate, the debtor may receive a discharge.<sup>28</sup> This discharge voids any dischargeable debt of the debtor, including a deficiency judgment that might otherwise be obtained after surrender of secured property to a creditor.<sup>29</sup>

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<sup>14</sup> s. 45.031(8), F.S.

<sup>15</sup> *Id.*

<sup>16</sup> s. 45.031, F.S.

<sup>17</sup> s. 702.06, F.S.

<sup>18</sup> 9 Am Jur 2d Bankruptcy § 5.

<sup>19</sup> 11 U.S.C. 362(a)(4)

<sup>20</sup> An individual can file a petition under Chapter 11, but it is rare.

<sup>21</sup> 9 Am Jur 2d Bankruptcy § 68.

<sup>22</sup> 9 Am Jur 2d Bankruptcy § 72.

<sup>23</sup> *Id.*

<sup>24</sup> 11 U.S.C. 521(a)(2)(B).

<sup>25</sup> 11 U.S.C. 1321 and 1322.

<sup>26</sup> 11 U.S.C. 1325(a)(5).

<sup>27</sup> *Id.*

<sup>28</sup> 11 U.S.C. 727.

<sup>29</sup> 11 U.S.C. 524(a)(1).

## Florida Evidence Code

The Florida Evidence Code governs what evidence may be used in court actions in the state courts.<sup>30</sup> The Florida Evidence Code provides that a court may take judicial notice of certain facts.<sup>31</sup> Judicial notice is a tool of evidence that allows a judge to accept a fact without proof because the fact is already known to him or her or is so readily ascertainable that it does not need to be proven.<sup>32</sup> A court may take judicial notice of records of any court of this state or any court of record of the United States.<sup>33</sup>

The Florida Evidence Code generally prohibits hearsay testimony.<sup>34</sup> An exception to the hearsay prohibition is the testimony or written admission of an opposing party.<sup>35</sup> A party to an action may prove the contents of writings of the opposing party by the testimony of that opposing party or that party's written admission.<sup>36</sup>

### *Recent Cases Regarding Surrender of Real Property in Bankruptcy*

Recent federal cases have dealt with the connection between federal bankruptcy law and state foreclosure law regarding surrender of real property. In several cases, debtors have declared an intention to surrender their home to the mortgage servicer, but then later (after discharge and the lifting of the automatic stay) actively contested a foreclosure action regarding that property.<sup>37</sup> In May 2015, the Bankruptcy Court for the Middle District of Florida held that "at a minimum, 'surrender' under the Bankruptcy Code §§ 521 and 1325, means a debtor cannot take an overt act that impedes a secured creditor from foreclosing its interest in secured property."<sup>38</sup> In October 2016, the 11th Circuit Court of Appeals, which covers Georgia, Florida, and Alabama, heard an appeal from another Florida case where the debtors surrendered the home in bankruptcy but contested the subsequent foreclosure by the lender.<sup>39</sup> The panel held that "[i]n bankruptcy, as in life, a person does not get to have his cake and eat it too.... Having chosen to surrender, the debtor must drop his opposition to the creditor's subsequent foreclosure action" or lose the benefit of the discharge.<sup>40</sup>

### **Effect of Proposed Changes**

The bill creates s. 702.12, F.S., relating to mortgage foreclosures. The bill allows a lienholder in a foreclosure action to submit any document the defendant filed under penalty of perjury in a bankruptcy case as an admission by the defendant.

The bill creates a rebuttable presumption in favor of the mortgage holder that the defendant has waived any defense to the foreclosure. The presumption is achieved by submitting a document that evidences the defendant's intention to surrender the foreclosed property and a final order entered in the bankruptcy case that discharged the defendant's debt or confirms the defendant's repayment plan.

The bill also allows the lienholder to request that the court in the foreclosure action take judicial notice of any final order entered in a bankruptcy case.

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<sup>30</sup> s. 90.103, F.S.

<sup>31</sup> ss. 90.201 and 90.202, F.S.

<sup>32</sup> *Mitchum v. State*, 251 So. 2d 298, 300 (1st DCA 1971).

<sup>33</sup> s. 92.202(6), F.S.

<sup>34</sup> s. 90.802, F.S.

<sup>35</sup> s. 90.957, F.S.

<sup>36</sup> *Id.*

<sup>37</sup> *In re Meltzer*, Case No. 8:12-bk-16792-MGW (Bankr. M.D. Fla. 2015); *In re Patel*, 8:13-bk-09736-MGW (Bankr. M.D. Fla. 2015); *In re Failla*, 838 F. 3d 1170 (11th Cir. 2016).

<sup>38</sup> *In re Meltzer*, Case No. 8:12-bk-16792-MGW (Bankr. M.D. Fla. 2015); *In re Patel*, 8:13-bk-09736-MGW (Bankr. M.D. Fla. 2015).

<sup>39</sup> *In re Failla*, 838 F. 3d 1170 (11th Cir. 2016).

<sup>40</sup> *Id.* at 1178.

The bill does not preclude the defendant from raising a defense based on actions taken by the lienholder after the filing of the document that showed the intention to surrender the property to the lienholder.

The bill applies to any mortgage foreclosure filed on or after October 1, 2017.

**B. SECTION DIRECTORY:**

Section 1 creates s. 702.12, F.S., relating to mortgage foreclosures.

Section 2 provides an effective date of October 1, 2017.

**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 creates a way to speed up certain foreclosure cases that may reduce litigation costs for the parties involved in the foreclosure action.

**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 rulemaking authority or a need for rulemaking.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

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

On February 23, 2017, the Civil Justice & Claims Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Clarified that the presumption only means that the defendant has waived defenses to the foreclosure;
- Provided that the bill applies to mortgage foreclosure actions filed on or after October 1, 2017;
- Changed the effective date to October 1, 2017; and
- Made technical and style improvements to the bill.

This analysis is drafted to the committee substitute as passed by the Civil Justice & Claims Subcommittee.