

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL: CS/SB 660

INTRODUCER: Banking and Insurance Committee and Senator Passidomo

SUBJECT: Foreclosure Proceedings

DATE: March 6, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	Fav/CS
2.			JU	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 660 allows for the use of certain documents filed in a bankruptcy case in a mortgage foreclosure proceeding. 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 a document evidencing surrender in the bankruptcy case creates a rebuttable presumption that the debtor has agreed to surrender the real property and 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.

II. Present Situation:

Mortgage Foreclosure

The Florida Rules of Civil Procedure and a statutory process govern mortgage foreclosure. Foreclosure 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 general outline of the judicial foreclosure process:

- Upon proper notice of default to the defendant, the mortgage servicer files a foreclosure complaint;¹
- Service of process must be made on defendants within 120 days after the filing of the initial pleadings;²
- 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;³
- If an answer is filed, 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;⁴
- Following the proper motions, answers, affidavits, and other evidence being filed with the court, the judge holds a summary judgment hearing and renders a final judgment if he or she finds in the favor of the plaintiff;⁵
- If summary judgment is denied, the foreclosure proceeds to a trial without a jury;⁶
- If the plaintiff prevails, the court schedules a judicial sale of the property not less than 20 days, but no more than 35 days after the judgment;⁷
- 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 5 days prior to the sale;⁸
- The winning bid at a public judicial sale is conclusively presumed to be sufficient consideration for the sale;⁹
- Parties have 10 days to file a verified objection to the amount of the bid or the sale procedure;¹⁰
- 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, and the court may, in

¹ Fla.R.Civ.P. Form 1.944.

² Fla.R.Civ.P. 1.070(j).

³ Fla.R.Civ.P. 1.500.

⁴ Fla.R.Civ.P. 1.510(a).

⁵ Section 45.031, F.S.

⁶ Section 702.01, F.S.

⁷ Section 45.031(1)(a), F.S.

⁸ Section 45.031(2), F.S.

⁹ Section 45.031(8), F.S.

¹⁰ Section 45.031(8), F.S.

its discretion, enter a deficiency decree for the difference between the fair market value of the security received and the amount of the debt;¹¹ and

- 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.¹² The filing of a bankruptcy petition operates as an automatic stay on most legal actions against a debtor, including foreclosure.¹³ 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.

For individuals, there are two primary forms of bankruptcy. 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 when there is no nonexempt property to protect.¹⁴ A Chapter 13 petition allows the debtor to stay creditor actions and propose a plan to pay creditors, rehabilitating the debtor financially.¹⁵

In a Chapter 7 bankruptcy, the debtor must express his or her intent regarding secured property. A debtor has four options:

- Declare the secured property is exempt;
- 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.¹⁶

The statement of intent must be made under penalty of perjury. The debtor must file the statement of intent 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.¹⁷ 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.¹⁸

In Chapter 13 filings, the debtor must create a plan to restructure and repay his debt.¹⁹ For this plan to be confirmed by the court, it must describe how the debtor is responding to each secured

¹¹ Section 702.06, F.S.

¹² 9 Am Jur 2d Bankruptcy Section 5.

¹³ 11 U.S.C. 362(a)(4).

¹⁴ 9 Am Jur 2d Bankruptcy Section 68.

¹⁵ 9 Am Jur 2d Bankruptcy Section 72.

¹⁶ *In re Failla*, 838 F.3d 1170 (11th Cir. 2016).

¹⁷ 9 AmJur 2d Bankruptcy Section 72.

¹⁸ 11 U.S.C. 521.

¹⁹ 11 U.S.C. 1321 and 1322.

claim.²⁰ 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.²¹

After the debtor has fulfilled his or her duties to the bankruptcy estate, the debtor may receive a discharge.²² 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.

Florida Evidence Code

The Florida Evidence Code governs what evidence may be used in court actions in the state courts.²³ Sections 90.201 and 90.202, F.S., provide that a court may take judicial notice of certain facts. Judicial notice is the authority of a judge to accept as facts certain matters which are of common knowledge from sources which guarantee accuracy or are a matter of official record, without the need for evidence establishing the fact.²⁴ A court may take judicial notice of records of any court of this state or any court of record of the United States.²⁵

The Florida Evidence Code generally prohibits hearsay testimony.²⁶ An exception to the hearsay prohibition is a written admission of an opposing party.²⁷

Recent Cases Regarding Surrender of Real Property in Bankruptcy

There have been cases where a debtor has agreed to surrender the property in a federal bankruptcy proceeding but have continued to fight the foreclosure proceeding in state court.²⁸ In *In re Failla*,²⁹ the debtors filed for bankruptcy in 2011. They admitted that they owned the home, that the home was collateral for the mortgage, and that the mortgage was valid. They filed a statement of their intention to surrender the home in the bankruptcy proceedings. After the filing of their intention to surrender, the debtors continued to live in the home and defend against the creditor's ongoing foreclosure action in state court. The debtors argued that the effect of the surrender was simply to lift the automatic stay and allow the creditor to proceed with a foreclosure action in state court.³⁰ The court held that stating an intention to surrender in bankruptcy court meant that the debtors could not contest the foreclosure action in state court.³¹

III. Effect of Proposed Changes:

The bill allows a lienholder in a foreclosure action to submit as an admission by the defendant any document the defendant filed under penalty of perjury in a bankruptcy case. The bill creates

²⁰ 11 U.S.C. 1325(a)(5).

²¹ 11 U.S.C. 1325(a)(5).

²² 11 U.S.C. 727.

²³ Section 90.103, F.S.

²⁴ See <http://dictionary.law.com/Default.aspx?selected=1065> (last accessed February 23, 2017).

²⁵ Section 90.202(6), F.S.

²⁶ Section 90.802, F.S.

²⁷ Section 90.803(18), F.S.

²⁸ See, e.g., *Green Tree Servicing v. Hardmon*, Case No. 162012-CA-13629-FC-E (Fla. 4th Judicial Circuit November 13, 2015); *In re Guerra*, 544 B.R. 707 (Bankr. M.D. Fla. 2016); *In re Metzler*, 530 B.R. 894 (Bankr. M.D. Fla. 2015).

²⁹ *In re Failla*, 838 F.3d 1170 (11th Cir. 2016).

³⁰ *In re Failla*, 838 F.3d at 1173-1175.

³¹ *In re Failla*, 838 F.3d at 1178.

a rebuttable presumption in favor of the lienholder that the defendant has surrendered his or her interest in the mortgaged property to the lienholder and 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.

The bill 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 takes effect on October 1, 2017, and applies to foreclosure actions filed on or after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may expedite some foreclosure cases.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 702.12 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on March 6, 2017:
The CS makes stylistic changes to improve clarity.

- B. **Amendments:**

None.