

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: CS/CS/SB 660

INTRODUCER: Judiciary Committee; Banking and Insurance Committee; and Senator Passidomo

SUBJECT: Bankruptcy Matters in Foreclosure Proceedings

DATE: March 23, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/SB 660 allows for documents filed in a bankruptcy case that show a debtor's intention to surrender property to then be filed in a mortgage foreclosure proceeding as admissions against the debtor/mortgagor. A mortgage foreclosure is a legal action by a lender against a debtor to force the sale of real property that secures a defaulted-upon loan. The proceeds of the sale are used to repay the debt. Often, a debtor subject to foreclosure will file for bankruptcy as a means of obtaining an automatic stay of the foreclosure action and 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 later have actively contested the completion of a foreclosure proceeding regarding the property in state court.

This bill provides that a lender may use certain documents filed in a bankruptcy case as an admission by the defendant in a foreclosure case. To qualify, these documents must:

- Evidence intention to surrender to the lienholder the property that is the subject of the foreclosure;
- Not have been withdrawn by the defendant; and
- Be submitted together with a final bankruptcy order that discharges the defendant's debts or confirms the defendant's repayment plan.

Submitting a document meeting these criteria creates a rebuttable presumption that the defendant has waived any defenses to the foreclosure.

The bill also requires a court in foreclosure proceeding, upon the request of a lienholder, to take judicial notice of any order entered in a bankruptcy case. Lastly, regarding the document that evidenced the defendant's intention to surrender the mortgaged property to the lienholder, the defendant is expressly guaranteed the authority to raise a defense in the foreclosure case based upon the lienholders' action or inaction subsequent to the document's filing.

## II. Present Situation:

### Bankruptcy Proceedings

In general, the two purposes of bankruptcy are to convert the debtor's non-exempt assets—his or her "estate"—into cash and distribute it among creditors, and to give the debtor a fresh start with those exemptions and rights as the bankruptcy statute leaves untouched.<sup>1</sup> The filing of a bankruptcy petition operates as an automatic stay on most legal actions against a debtor, including foreclosure.<sup>2</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.

For individuals, there are two primary forms of bankruptcy, often referred to by the respective chapters in the United States Bankruptcy Code that govern them—Chapter 7 and Chapter 13. 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 non-exempt property to protect.<sup>3</sup> A Chapter 13 petition allows the debtor to stay creditor actions and propose a plan to pay creditors, rehabilitating the debtor financially.<sup>4</sup>

In a Chapter 7 bankruptcy, the debtor must express his or her intent regarding secured property. The statement of intention must declare an intent to do one of four things:

- 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.<sup>5</sup>

The statement of intent must be made under penalty of perjury. The debtor must file the statement of intent within 30 days after 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>6</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>7</sup>

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<sup>1</sup> 9 Am Jur 2d Bankruptcy Section 5.

<sup>2</sup> 11 U.S.C. 362(a)(4).

<sup>3</sup> 9 Am Jur 2d Bankruptcy Section 68.

<sup>4</sup> 9 Am Jur 2d Bankruptcy Section 72.

<sup>5</sup> *In re Failla*, 838 F. 3d 1170, 1175 (11th Cir. 2016).

<sup>6</sup> 9 Am Jur 2d Bankruptcy Section 72.

<sup>7</sup> 11 U.S.C. 521(2)(B).

In Chapter 13 filings, the debtor must create a plan to restructure and repay his or her debt.<sup>8</sup> For this plan to be confirmed by the court, it must describe how the debtor is responding to each secured claim.<sup>9</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>10</sup>

After the debtor has fulfilled his or her duties to the bankruptcy estate, the court must grant the debtor a discharge, unless the debtor acts wrongfully in one of the list of ways set forth in statute.<sup>11</sup> As a general matter, this discharge voids any dischargeable debt of the debtor.<sup>12</sup>

### **Mortgage Foreclosure**

A mortgage creates a specific lien, held by the lender or servicer (the “mortgagee”) on the mortgaged property, such as a house.<sup>13</sup> Mortgages commonly include an “acceleration clause,” which gives the mortgagee the authority to declare the entire mortgage obligation due and payable immediately upon default of the borrower, who is called the mortgagor. Thus, when a mortgagor fails to meet the terms of the mortgage, such as by missing a payment, the mortgagee has a right to payment of the entire balance of the loan. The legal action taken to obtain this payment is called a foreclosure. And the primary purpose of a foreclosure action is compel the sale of the property, with the sale proceeds going toward payment of the loan balance.<sup>14</sup>

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;<sup>15</sup>
- Service of process must be made on defendants within 120 days after the filing of the initial pleadings;<sup>16</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>17</sup>
- 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;<sup>18</sup>
- 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;<sup>19</sup>
- If summary judgment is denied, the foreclosure proceeds to a trial without a jury;<sup>20</sup>

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<sup>8</sup> See 11 U.S.C. 1321 and 1322.

<sup>9</sup> 11 U.S.C. 1325(a)(5).

<sup>10</sup> 11 U.S.C. 1325(a)(5).

<sup>11</sup> 11 U.S.C. 727(a).

<sup>12</sup> 11 U.S.C. 727(b).

<sup>13</sup> *Cukierman v. BankAtlantic*, 89 So. 3d 250, 251 (Fla. 3d DCA 2012).

<sup>14</sup> See, *Gonzalez v. Chase Home Fin. LLC*, 37 So. 3d 955, 957 (Fla. 3d DCA 2010).

<sup>15</sup> Fla.R.Civ.P. Form 1.944.

<sup>16</sup> Fla.R.Civ.P. 1.070(j).

<sup>17</sup> Fla.R.Civ.P. 1.500.

<sup>18</sup> Fla.R.Civ.P. 1.510(a).

<sup>19</sup> Section 45.031, F.S.

<sup>20</sup> Section 702.01, F.S.

- 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;<sup>21</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 5 days prior to the sale;<sup>22</sup>
- The winning bid at a public judicial sale is conclusively presumed to be sufficient consideration for the sale;<sup>23</sup>
- Parties have 10 days to file a verified objection to the amount of the bid or the sale procedure;<sup>24</sup>
- After the 10 days have 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 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>25</sup> 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.

### **Florida Evidence Code**

The Florida Evidence Code governs what evidence may be admitted this state's courts.<sup>26</sup> Sections 90.201 and 90.202, F.S., authorize courts to take "judicial notice" of certain facts. Judicial notice is ". . . the cognizance of certain facts which judges and jurors may properly take and act upon without proof, because they already know them."<sup>27</sup> In other words, if the court takes judicial notice of something, a party need not admit evidence to establish that thing as true. Among several other things, a court may take judicial notice of records of any court of this state or any court of record of the United States.<sup>28</sup>

The Florida Evidence Code generally prohibits the admission of hearsay evidence.<sup>29</sup> Hearsay is an out of court statement admitted to prove the truth of the matter asserted in the statement.<sup>30</sup> The general prohibition on the admission of hearsay is subject to many exceptions, including a written admission of an opposing party.<sup>31</sup>

### **Recent Cases Involving the Problem Addressed by the Bill**

In several recent cases, debtors in federal bankruptcy proceedings have agreed to surrender property, and yet continued to fight liquidation of the same property in state foreclosure

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<sup>21</sup> Section 45.031(1)(a), F.S.

<sup>22</sup> Section 45.031(2), F.S.

<sup>23</sup> Section 45.031(8), F.S.

<sup>24</sup> Section 45.031(8), F.S.

<sup>25</sup> Section 702.06, F.S.

<sup>26</sup> Section 90.103, F.S.

<sup>27</sup> *Mitchum v. State*, 251 So. 2d 298, 300 (Fla. 4th DCA 1972).

<sup>28</sup> Section 90.202(6), F.S.

<sup>29</sup> Section 90.802, F.S.

<sup>30</sup> Section 90.801(1)(c), F.S.

<sup>31</sup> Section 90.803(18), F.S.

proceedings.<sup>32</sup> In *In re Failla*,<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

### III. Effect of Proposed Changes:

The bill addresses the problem of a debtor in a bankruptcy action declaring his or her intention to give up property, then litigating to keep the property in a foreclosure action.

The bill allows for a certain documents that were filed in a bankruptcy case and that show a debtor's intention to surrender property to be filed subsequently in a mortgage foreclosure proceeding as admissions against a debtor/mortgagor. A mortgage foreclosure is a legal action by a lender against a debtor to force the sale of real property that secures a defaulted-upon loan. The proceeds of the sale are used to repay 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 later have actively contested the completion of a foreclosure proceeding regarding the property in state court.

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- Not have been withdrawn by the defendant; and
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And submitting a document meeting these criteria creates a rebuttable presumption that the defendant has waived any defenses to the foreclosure.

The bill also requires the court in a foreclosure case to take judicial notice, pursuant to s. 90.203, F.S., of any order entered in a bankruptcy case upon the request of a lienholder. Lastly, regarding the document that evidenced the defendant's intention to surrender the mortgaged property to the

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<sup>32</sup> 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).

<sup>33</sup> *In re Failla*, 838 F.3d 1170 (11th Cir. 2016).

<sup>34</sup> *In re Failla*, 838 F.3d at 1173-1175.

<sup>35</sup> *In re Failla*, 838 F.3d at 1178.

lienholder, the defendant is expressly guaranteed the authority to raise a defense in the foreclosure case based upon the lienholders' action or inaction subsequent to the document's filing.

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, thus decreasing the cost of these proceedings.

C. Government Sector Impact:

The bill may expedite some foreclosure cases, thus decreasing costs to the court system.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 702.12, 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/CS by Judiciary on March 22, 2017:**

The committee substitute requires a court in foreclosure proceeding to, upon the request of a lienholder, take judicial notice of any order entered in a bankruptcy case, pursuant to s. 90.203, F.S.

**CS by Banking and Insurance on March 6, 2017:**

The CS makes stylistic changes to improve clarity.

- B. **Amendments:**

None.