

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 Rules

BILL: SB 220

INTRODUCER: Senator Passidomo

SUBJECT: Bankruptcy Matters in Foreclosure Proceedings

DATE: January 9, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	Favorable
2.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	Favorable
3.	<u>Billmeier</u>	<u>Phelps</u>	<u>RC</u>	Pre-meeting

I. Summary:

SB 220 specifies how certain documents from a person's bankruptcy proceeding may be used as evidence in a foreclosure action against the same person.

The bill provides that a document creates a rebuttable presumption that a foreclosure defendant has waived any defense to foreclosure if the document:

- Was filed in the defendant's bankruptcy case;
- Evidences the defendant's intention to surrender to the lienholder the property that is the subject of the foreclosure;
- Has not been withdrawn by the defendant; and
- Is submitted in the foreclosure proceeding together with a final bankruptcy order that discharges the defendant's debts or confirms the defendant's repayment plan that provides for the surrender of the property.

However, the filing of such a document in a foreclosure case "does not preclude" the defendant from raising a defense based upon the lienholder's conduct following the document's filing in the bankruptcy case.

Additionally, the bill ensures that any document that a debtor filed under penalty of perjury in a bankruptcy case may be filed in a foreclosure proceeding as an admission against this person.

II. Present Situation:

Bankruptcy Proceedings

In general, there are two purposes of bankruptcy proceedings. The first is to convert some of the debtor's assets to cash and distribute the cash to the creditors, thus discharging the debt. These nonexempt assets are called the bankruptcy "estate." The second purpose is to give the debtor a

fresh start, with the aid of those rights and exempt assets as the bankruptcy statute leaves untouched.¹

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 under Chapter 7 of the 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.² A Chapter 13 petition allows the debtor to stay creditor actions and propose a plan to pay creditors, rehabilitating the debtor financially.³

In a Chapter 7 bankruptcy, if the debtor’s schedule of assets and liabilities includes debts that are secured by property of the estate, the debtor must file a statement of his or her intention regarding the retention or surrender of the property.⁴ This statement of intention must declare one of four things regarding secured property, or “collateral”:

- The collateral is exempt from the bankruptcy estate;
- The debtor will surrender the collateral;
- The debtor will reaffirm the debt, meaning the debtor keeps the collateral but is liable for the debt in the future (the debt is not discharged by bankruptcy); or
- The debtor will redeem the collateral, which is done by paying off the security interest in cash.⁵

The statement of intention must be made under penalty of perjury. The debtor must file the statement of intention 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 is earlier.⁶ Within 30 days after the first date set for the meeting of the creditors, the debtor must “perform his intention” with respect to each piece of secured property.⁷

Instead of Chapter 7, a debtor may choose Chapter 13 bankruptcy because, among other reasons, it allows a debtor to stop, or “stay,” foreclosure proceedings on his or her home.

In Chapter 13 filings, the debtor must create a plan to restructure and repay his or her debt.⁸ For this plan to be confirmed by the court, one thing the plan must do is describe how the debtor is responding to each secured claim (such as that of a mortgagee).⁹ More specifically, the response to each secured claim must be:

- Accepted by the creditor;
- To pay the claim in the particular way set forth in statute; or
- To give up the property to the creditor.¹⁰

¹ 9 Am Jur 2d *Bankruptcy* s. 5.

² 9 Am Jur 2d *Bankruptcy* s. 68.

³ 9 Am Jur 2d *Bankruptcy* s. 72.

⁴ 11 U.S.C. s. 521(a)(2)(A)

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

⁶ 9 Am Jur 2d *Bankruptcy* s. 72.

⁷ 11 U.S.C. s. 521(2)(B).

⁸ *See* 11 U.S.C. ss. 1321 and 1322.

⁹ 11 U.S.C. s. 1325(a)(5).

¹⁰ 11 U.S.C. s. 1325(a)(5).

After the debtor fulfills 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 ways set forth in statute.¹¹ As a general matter, this discharge voids any dischargeable debt of the debtor.¹²

Mortgage Foreclosure

A mortgage creates a specific lien, held by the lender or servicer (the “mortgagee”) on the mortgaged property, such as a house.¹³ Thus, mortgagees hold a secured claim in bankruptcy.

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. Therefore, 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 to compel the sale of the property, with the sale proceeds going toward payment of the loan balance.¹⁴

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;¹⁵
- Process is served on the defendant, which service must occur within 120 days after the filing of the initial pleadings;¹⁶
- The defendant must timely file an answer or another paper indicating an intent to respond to the suit; otherwise, the plaintiff is entitled to an entry of default against the defendant;¹⁷
- If an answer is filed, the plaintiff usually moves for summary judgment, though the plaintiff may instead elect to proceed toward trial;¹⁸
- Following the proper motions, answers, affidavits, and other evidence being filed with the court, it holds a summary judgment hearing and renders a final judgment if it finds in the favor of the plaintiff;¹⁹
- If summary judgment is denied, the foreclosure proceeds to a non-jury trial;²⁰
- 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;²¹
- 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;²²

¹¹ 11 U.S.C. s. 727(a).

¹² 11 U.S.C. s. 727(b).

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

¹⁴ *See, e.g., id.* at 251 (Fla. 3d DCA 2012).

¹⁵ Fla.R.Civ.P. Form 1.944.

¹⁶ Fla.R.Civ.P. 1.070(j).

¹⁷ Fla.R.Civ.P. 1.500.

¹⁸ Fla.R.Civ.P. 1.510(a).

¹⁹ Section 45.031, F.S.

²⁰ Section 702.01, F.S.

²¹ Section 45.031(1)(a), F.S.

²² Section 45.031(2), F.S.

- The winning bid at a public judicial sale is conclusively presumed to be sufficient consideration for the sale;²³
- Parties have 10 days to file a verified objection to the amount of the bid or the sale procedure;²⁴
- 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;²⁵
- The clerk may issue a writ of possession giving possession of the real property to the purchaser and directing the sheriff to assist the purchaser with obtaining possession; and
- Up to the point that a writ of possession is served on the property, the debtor who was property 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 in this state's courts.²⁶ Under the code, courts may take "judicial notice" of certain facts.²⁷ 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."²⁸ 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.²⁹

The Florida Evidence Code generally prohibits the admission of hearsay evidence.³⁰ Hearsay is an out-of-court statement admitted to prove the truth of the matter asserted in the statement.³¹ The general prohibition on the admission of hearsay is subject to many exceptions, including a written admission of an opposing party.³²

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 proceedings.³³ For example, in *In re Failla*,³⁴ 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. Moreover, they filed a statement of their intention to surrender the home in

²³ Section 45.031(8), F.S.

²⁴ Section 45.031(8), F.S.

²⁵ Section 702.06, F.S.

²⁶ Section 90.103, F.S.

²⁷ See s. 90.201 and 90.202, F.S.

²⁸ *Mitchum v. State*, 251 So. 2d 298, 300 (Fla. 1st DCA 1971).

²⁹ Section 90.202(6), F.S.

³⁰ Section 90.802, F.S.

³¹ Section 90.801(1)(c), F.S.

³² Section 90.803(18), F.S.

³³ 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).

³⁴ *In re Failla*, 838 F.3d 1170 (11th Cir. 2016).

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 their surrender of the house in the bankruptcy proceeding was "not inconsistent" with their effort to stop the mortgagee from foreclosing on the house.³⁵ The 11th Circuit Court of Appeals held that stating an intention to surrender in bankruptcy court meant that the debtors could not contest the foreclosure action in state court.³⁶

III. Effect of Proposed Changes:

The bill specifies how certain documents from a person's bankruptcy proceeding may be used as evidence in a foreclosure action against the same person.

The bill provides that a document creates a rebuttable presumption that a foreclosure defendant has waived any defense to foreclosure if the document:

- Was filed in the defendant's bankruptcy case;
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- Has not been withdrawn by the defendant; and
- Is submitted in the foreclosure proceeding together with a final bankruptcy order that discharges the defendant's debts or confirms the defendant's repayment plan that provides for the surrender of the property.

However, the filing of such a document in a foreclosure case "does not preclude" the defendant from raising a defense based upon the lienholder's conduct following the document's filing in the bankruptcy case.

Additionally, the bill ensures that any document that a debtor filed under penalty of perjury in a bankruptcy case may be filed in a mortgage foreclosure proceeding as an admission against this person. Finally, the bill also requires the court in a foreclosure proceeding, upon the request of a lienholder, to take judicial notice of any order entered in a bankruptcy case.

The bill takes effect on October 1, 2018, 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.

³⁵ *In re Failla*, 838 F.3d at 1173-1175.

³⁶ *In re Failla*, 838 F.3d at 1178.

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 costs 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 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.