

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 271 Bankruptcy Matters in Foreclosure Proceedings

SPONSOR(S): Rommel

TIED BILLS: None **IDEN./SIM. BILLS:** SB 220

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--|-----------|-------------|--|
| 1) Civil Justice & Claims Subcommittee | 14 Y, 0 N | Tuszynski | Bond |
| 2) Insurance & Banking Subcommittee | 12 Y, 0 N | Hinshelwood | Luczynski |
| 3) Judiciary Committee | 16 Y, 0 N | Tuszynski | Poche |

SUMMARY ANALYSIS

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

In bankruptcy, a debtor may claim certain property as exempt from the bankruptcy. When a Florida resident files for bankruptcy, Florida law provides a base exemption of \$1,000 in personal property. A debtor may also choose to exempt an additional \$4,000 in personal property if they agree to surrender the homestead property to the lender. In some cases, however, debtors have stated an intention to surrender real property in the federal bankruptcy proceedings to get the additional \$4,000 exemption for personal property, and then subsequently contest the completion of foreclosure in state court.

HB 271 provides that a lienholder in a mortgage foreclosure case may use any document filed under penalty of perjury in a federal bankruptcy court as an admission by the defendant in the state foreclosure action. The bill provides that the lienholder's submission of a document the defendant filed in the defendant's bankruptcy case that evidences intention to surrender the property to the lienholder, together with the submission of a final order entered in the bankruptcy case, creates a rebuttable presumption in favor of the lienholder that the defendant has waived any defense to the foreclosure.

The bill requires the court, upon the request of a lienholder, to take judicial notice of the final order in a bankruptcy case. A debtor/defendant may still raise a defense based on actions taken by the lienholder after the filing of the document in the bankruptcy case that evidenced the defendant's intention to surrender the property to the lienholder.

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

The bill has an effective date of October 1, 2018, and applies to any mortgage foreclosure filed on or after that date.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Mortgage Foreclosure

A lender or servicer initiates a foreclosure when the borrower 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 state court.

The following is a brief outline of the general judicial foreclosure process, although the process may be slightly different from case to case:

1. Upon proper notice of default to the defendant, the mortgage servicer files a foreclosure complaint,¹ which must allege that the plaintiff is the present owner and holder of the note and mortgage,² contain a copy of the note and mortgage,³ and allege a statement of default,⁴ along with a filing fee⁵ and a *lis pendens*, which serves to cut off the rights of any person whose interest arises after filing.⁶
2. Service of process must be made on defendants within 120 days after the filing of the initial pleadings.⁷
3. If a defendant has not filed an answer or another paper indicating an intent to respond to the suit within 20 days, then the plaintiff is entitled to an entry of default against the defendant.⁸
4. If an answer is filed (thus negating the possibility of a default judgment), the plaintiff may then file a motion for summary judgment or proceed to trial; however, the vast majority of plaintiffs file a motion for summary judgment.⁹
5. 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 favor of the plaintiff, the court renders a final judgment.¹⁰
6. If summary judgment is denied, the foreclosure proceeds to a trial without a jury.¹¹
7. 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.¹²
8. 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.¹³
9. The winning bid at a public judicial sale is conclusively presumed to be sufficient consideration for the sale.¹⁴

¹ Fla. R. Civ. P. 1.944.

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

³ Fla. R. Civ. P. 1.130(a).

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

⁵ 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.

⁶ S. 48.23, F.S.

⁷ Fla. R. Civ. P. 1.070(j); Chs. 48 and 49, F.S.

⁸ Fla. R. Civ. P. 1.500.

⁹ Fla. R. Civ. P. 1.510(a).

¹⁰ S. 45.031, F.S.

¹¹ 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.

¹² S. 45.031(1)(a), F.S.

¹³ S. 45.031(2), F.S.

¹⁴ S. 45.031(8), F.S.

10. Parties have 10 days to file a verified objection to the amount of the bid or the sale procedure.¹⁵
11. 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,¹⁶ 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.¹⁷
12. 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

Filing bankruptcy can help a person by discarding debt or making a plan to repay debts. All bankruptcy cases are handled in federal courts under rules outlined in the U.S. Bankruptcy Code.¹⁸ 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 exemptions and rights as the bankruptcy statute leaves untouched.¹⁹ The filing of a bankruptcy petition operates as an automatic stay on most legal actions against a debtor, including a foreclosure.²⁰ 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.²¹ In a proceeding under Chapter 7 of the bankruptcy code, the debtor surrenders his or her assets to a trustee who then liquidates the assets and distributes proceeds to the creditors.²² 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 there being no nonexempt property to protect.²³ A Chapter 13 petition allows the debtor to stay creditor actions and propose a plan to pay creditors, rehabilitating the debtor financially.²⁴

In Chapter 7 bankruptcy, the debtor must file a statement of intention 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.²⁵ The statement of intention 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.²⁶ 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.²⁷

In Chapter 13 bankruptcy, the debtor must create a plan to restructure and repay his debt.²⁸ For this plan to be confirmed by the court, the plan must describe how the debtor is responding to each secured claim.²⁹ The debtor must make a plan for the secured property that the holder of the claim accepts; or the debtor must surrender the property securing the claim to the claim holder; or the plan must provide

¹⁵ Id.

¹⁶ S. 45.031, F.S.

¹⁷ S. 702.06, F.S.

¹⁸ 11 U.S.C. § 101, et seq.

¹⁹ 9 Am Jur 2d Bankruptcy s. 5.

²⁰ 11 U.S.C. § 362(a)(4).

²¹ An individual can file a petition under Chapter 11, but it is rare.

²² 11 U.S.C. §§ 704 & 726.

²³ 9 Am Jur 2d Bankruptcy s. 68.

²⁴ 9 Am Jur 2d Bankruptcy s. 72.

²⁵ 11 U.S.C. § 521(a)(2)(A).

²⁶ Id.

²⁷ 11 U.S.C. § 521(a)(2)(B).

²⁸ 11 U.S.C. § 1321 & 1322.

²⁹ 11 U.S.C. § 1325(a)(5).

for the holder of the claim to retain the lien securing the claim and provide that the value of property to be distributed on account of such claim is not less than the allowed amount of such claim.³⁰

In either a Chapter 7 or Chapter 13 bankruptcy, a debtor may claim certain property as exempt from the bankruptcy estate.³¹ States may opt out of certain exemptions listed in the bankruptcy code, and Florida has chosen to do so.³² When a resident of Florida files for bankruptcy, Florida law provides exemptions from the bankruptcy estate, including a base \$1,000 in personal property.³³ A debtor may exempt an additional \$4,000 of personal property "if the debtor does not claim or receive the benefits of a homestead exemption."³⁴ In other words, a debtor who is in foreclosure may elect to either save the home with a \$1,000 general personal property exemption, or may surrender the homestead property and have a \$5,000 personal property exemption.

After the debtor has fulfilled his or her duties to the bankruptcy estate, the debtor may receive a discharge.³⁵ 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.³⁶

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 what it means for a debtor to "surrender" 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.³⁷ 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."³⁸ In October 2016, the 11th Circuit Court of Appeals heard an appeal from another Florida case where the debtors surrendered the home in bankruptcy but contested the subsequent foreclosure by the lender.³⁹ 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.⁴⁰

Florida Evidence Code

The Florida Evidence Code (Code) governs what evidence may be used in court actions in the state courts.⁴¹ The Code provides for certain matters that shall or may be judicially noticed by a court.⁴² 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.⁴³ A court may take judicial notice of records of any court of this state or any court of record of the United States.⁴⁴

³⁰ Id.

³¹ 11 U.S.C. § 522.

³² 11 U.S.C. §§ 522(b)(3)(A) & (d); S. 222.20, F.S.

³³ Fla. Const. art. X, s. 4(a)(2).

³⁴ S. 222.25(4), F.S.

³⁵ 11 U.S.C. § 727 & 1328.

³⁶ 11 U.S.C. § 524(a)(1).

³⁷ *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).

³⁸ *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).

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

⁴⁰ Id., at 1178.

⁴¹ S. 90.103, F.S.

⁴² SS. 90.201 & 90.202, F.S.

⁴³ *Mitchum v. State*, 251 So. 2d 298, 300 (1st DCA 1971).

⁴⁴ S. 92.202(6), F.S.

The Code generally prohibits hearsay testimony.⁴⁵ An exception to the hearsay prohibition is the testimony or written admission of an opposing party.⁴⁶ 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.⁴⁷

Effect of Proposed Changes

HB 271 creates s. 702.12, F.S., allowing a lienholder in a state-court foreclosure action to submit any document filed by a defendant, under penalty of perjury in a federal bankruptcy case, as an admission by the defendant.

The bill creates a rebuttable presumption in favor of the lienholder that a defendant who has filed in his or her bankruptcy case an intent to surrender the property has waived any defenses to the foreclosure. A lienholder achieves the presumption by submitting any document that evidences the defendant's intention to surrender the property that is the subject of the foreclosure to the lienholder and a final order entered in the bankruptcy case discharging the defendant's debt or confirming 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 does not preclude a defendant from raising a defense based on any action or inaction by the lienholder after the filing of the document that evidences an intent to surrender the property.

The statute applies to any mortgage foreclosure filed on or after October 1, 2018.

B. SECTION DIRECTORY:

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

Section 2: Provides an effective date of October 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

⁴⁵ S. 90.802, F.S.

⁴⁶ S. 90.957, F.S.

⁴⁷ Id.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may lead to faster resolution of certain foreclosure cases and thus may reduce litigation costs for the parties involved.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES