

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 Judiciary Committee

BILL: SPB 7060

INTRODUCER: For consideration by the Judiciary Committee

SUBJECT: Foreclosure

DATE: February 17, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Maclure		Pre-meeting
2.				
3.				
4.				
5.				
6.				

I. Summary:

This proposed committee bill is a result of the Judiciary Committee’s interim report on *Tenants’ Rights in Foreclosure Actions*. The bill requires a landlord to continue to hold a tenant’s deposit money during foreclosure proceedings as provided in s. 83.49, F.S. It requires a landlord to disclose the existence of foreclosure proceedings to prospective tenants and exempts a landlord’s agent from liability if the agent failed to notify a prospective tenant of the foreclosure, unless the agent received notice of the existence of the foreclosure proceeding from the landlord.

The bill provides that the title holder of a foreclosed property must give the tenants 90 days’ notice to the tenant to vacate the property. If there is a written rental agreement, the tenant may reside in the property until the end of the lease or for at least 90 days following the date the tenant receives notice, whichever is longer. If the immediate purchaser of the foreclosed property sells the property to a purchaser who will occupy the premises as a primary residence, the immediate purchaser may terminate the rental agreement only after giving 90 days’ notice to the tenant.

The bill sets forth the content to be included in a 90-day notice form to the tenant. The bill provides that notice is not necessary if the tenant is a mortgagor, or the child, spouse, or parent of the mortgagor being foreclosed, unless it is a multiunit property and other tenants occupy dwelling units; if the lease was not the result of an arm’s-length transaction; or if the rent is substantially less than the fair market rent for the property, unless it is reduced by a federal, state, or local subsidy.

The bill provides that the immediate purchaser named in the certificate of title shall credit the tenant’s account for any deposit money paid by the tenant to the predecessor in interest and may

make claims against the deposit as provided in s. 83.49, F.S. It also provides that the immediate purchaser shall also credit the tenant's account for any advance rent for the unexpired rental period. It requires the tenant to provide evidence of the amount of the deposit money or advance rent in order to receive the credit.

This bill creates the following sections of the Florida Statutes: 83.495 and 83.683.

II. Present Situation:

What is Foreclosure?

A foreclosure action is initiated when a borrower fails to make payments on his or her mortgage. Most mortgage lenders wait until the borrower has missed four payments before filing the complaint with the court. This practice is governed by what is known as a "deemer clause" in most mortgage contracts.¹ Currently under the law, a mortgage company must serve a complaint, a notice of *lis pendens*,² and a summons on the borrower in order to initiate foreclosure proceedings.

The complaint generally alleges that the plaintiff, as the holder of the note and mortgage, seeks to foreclose the mortgage held on a particular piece of real property. The action is filed in the county where the real property is located.³ The complaint must be served on all parties to the action.⁴

The Legislature created an optional "speedy" foreclosure procedure for residential foreclosures in 1993, codified at s. 702.10, F.S.⁵ This section provides a fast-track foreclosure process through an order to show cause, whereby a lender can obtain an *in rem* judgment.⁶ Upon filing a foreclosure complaint, the mortgagee can request an order to show cause for the entry of a final judgment. The judge must then read the complaint and verify that it states a cause of action.⁷ If the complaint is verified, the judge will issue an order to the defendant to show cause why a final judgment should not be entered.⁸ If a defendant waives the right to be heard, the judge shall promptly enter a final judgment of foreclosure.⁹ Upon the court's entry of a final judgment, the procedures set out in s. 45.031, F.S., for a judicial sale should be followed.

¹ Conversation with a representative from the Florida Bankers Association, August 19, 2009.

² The definition of "lis pendens," as appropriate for this report, is "[a] notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome." BLACK'S LAW DICTIONARY (8th ed. 2004). Essentially, "[t]he purpose of a notice of lis pendens is to alert creditors, prospective purchasers and others to the fact that the title to a particular piece of real property is involved in litigation." 35 FLA. JUR. 2D *Lis Pendens* s. 3 (2009).

³ Section 47.011, F.S.

⁴ *Dundee Naval Stores Co. v. McDowell*, 61 So. 108 (Fla. 1913).

⁵ Facsimile from U.S. Bankruptcy Judge Catherine Peek McEwen to the Senate Committee on Judiciary, March 12, 2007 (on file with the Senate Committee on Judiciary).

⁶ A "judgment in rem" is "[a] judgment that determines the status or condition of property and that operates directly on the property itself." BLACK'S LAW DICTIONARY (7th ed. 1999).

⁷ Section 702.10(1), F.S.

⁸ *Id.*

⁹ Section 702.10(1)(d), F.S.

Mortgage Foreclosure Crisis

The foreclosure crisis began in 2007 and shows no signs of slowing. RealtyTrac reported that the number of households that received a foreclosure-related notice in rose 21 percent in 2009 from 2008 and that one in 45 homes were sent a filing, which includes default notices, scheduled foreclosure auctions, and bank repossessions. In December, more than 349,000 households, or one in 366 homes, were hit with a foreclosure-related notice. That represents a 14-percent increase from November and a 15-percent increase from December 2008.¹⁰

The same three states that led the nation in foreclosure rates in December also posted the highest rates for the entire year: Nevada, Arizona and Florida. More than 10 percent of Nevada housing units received at least one foreclosure filing in 2009, with Florida and Arizona following with about 6 percent each. The other states ranked in the top 10 for the year were California, Utah, Idaho, Georgia, Michigan, Illinois, and Colorado.¹¹

According to reports, the crisis was a result of lenders doing a high volume of subprime lending. Subprime loans are loans with adjustable rates (also known as ARMs) that allow borrowers to have extremely low monthly payments for perhaps the first two to four years. After the two to four years, however, the rate can jump to much higher rates, which can result in the borrower's payment sometimes being more than 100 percent higher than the original rate, making it financially impossible to pay. These loans created a housing boom that allowed for many buyers with poor credit to purchase homes with little or no down payment. In early 2007, a rash of overextended borrowers began to default on these mortgages.¹²

In the meantime, these loans had been repackaged and sold by banks and financial institutions and then assembled into pools by a governmental, a quasi-governmental, or a private entity. This activity is known as the securitization process, whereby entities issue "securities that represent claims on the principal and interest payments made by borrowers on the loans in the pool."¹³ Once these loans were sold by the original lender, it made it difficult for borrowers to know who actually owned the mortgage, which in turn made it extremely difficult for borrowers to seek loan modifications.¹⁴

Statistics compiled by the Office of the State Courts Administrator show that foreclosure filings in Florida have grown at an exponential rate over the last three years. The office reports 238,080 filings from January through September 10, 2009 (excluding Dixie County). This number is more than triple the amount of filings reported for the entire year in 2006.¹⁵

¹⁰ Associated Press, *Foreclosures set a grim record in 2009*, January 14, 2010, <http://www.msnbc.msn.com/id/34847676/> (last visited February 15, 2010).

¹¹ *Id.*

¹² Brian Grow, Keith Epstein, and Robert Berner, *How Banks Are Worsening the Foreclosure Crisis*, Business Week, February 12, 2009, http://www.businessweek.com/print/magazine/content/09_08/b4120034085635.htm.

¹³ U.S. Securities and Exchange Commission, *Mortgage-Backed Securities*, <http://www.sec.gov/answers/mortgagesecurities.htm>.

¹⁴ Conversation with a representative from Jacksonville Area Legal Aid, July 24, 2009. See also FLORIDA SUPREME COURT TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, FINAL REPORT AND RECOMMENDATIONS, August 17, 2009, 19.

¹⁵ Summary Reporting System (SRS), *Real Property/Mortgage Foreclosure Filings by County and Month*, provided by the Office of the State Courts Administrator (on file with the Senate Committee on Judiciary).

Renters' Rights in Foreclosure

When a property subject to foreclosure is being rented, service of the proceedings is often made on a "Jane or John Doe" at the address of the property in addition to the borrower. Once the foreclosure lawsuit is filed, a tenant's rights are limited. If the property is sold at auction, a writ of possession is entered, which requires the tenant to vacate the premises.¹⁶ A tenant's options before a writ of possession is entered can include moving out before an eviction or delaying the foreclosure process by filing a motion to delay the auction.

Foreclosure actions often leave tenants with questions about what to do next. In some cases, the tenant may not have received a notice of the foreclosure. Some questions tenants might ask include:

- If I am the tenant, why am I being served?
- As a tenant, am I supposed to respond to the notice?
- How long can I stay?
- Will I get my security deposit back?
- What if the landlord states that he or she plans to stop the foreclosure?
- Can I continue to rent from the new landlord?

Federal Law

On May 20, 2009, the Helping Families Save Their Homes Act of 2009, P.L. 111-22, became law. Part of the law includes the Protecting Tenants at Foreclosure Act, which gives certain protections to tenants during foreclosure. This legislation has significantly affected the policy landscape being explored by state legislatures with respect to giving tenants notice before they are forced to vacate the property after the sale in foreclosure.

The law requires that the successor in interest of the foreclosed property (usually the purchaser) give tenants a notice to vacate the residence at least 90 days before the purchaser intends to occupy the residence. In situations where there is a lease and the purchaser does not intend to occupy the residence, the tenant may continue to stay in the residence until the end of the lease. For those tenants without a lease, the purchaser at the time of foreclosure must still provide to the tenants a 90-day notice to vacate the residence.

The law requires that notice be given to bona fide tenants, which means that the tenant cannot be the mortgagor, or the child, spouse, or parent of the mortgagor; that the lease was the result of an arm's-length transaction; and that the rent is not substantially less than the fair market rent for the property unless it is reduced by a federal, state, or local subsidy. The law specifically states that it does not affect any state or local law that provides longer time periods or other additional protections for tenants. The provisions of the act will expire on December 31, 2012.

¹⁶ Fla. R. Civ. P. 1.580.

No federal regulations will be issued regarding the implementation or the interpretation of the legislation.¹⁷ However, there are still questions that have arisen:

- Is the landlord required to pursue an eviction action after the 90 days?
- What information should be included in the 90-day notice?
- Is the tenant still required to pay rent and to whom?
- Does the tenant have an obligation to stay?
- Does the property manager have any ongoing obligation to the property?
- What happens with the security deposit?

Committee on Judiciary's Interim Report on Tenants' Rights in Foreclosure

Based on the research conducted on tenants' rights in foreclosure, professional staff of the Committee on Judiciary identified four policy options available to the Legislature if it wished to address tenants' rights in the foreclosure process.¹⁸ Since the federal legislation expires on December 31, 2012, one option was for the Legislature to hold off taking action with respect to tenants and foreclosure and wait and see whether Congress reenacts or otherwise extends the policy. The second option was for the Legislature to incorporate the federal policy into its own state law by creating a comparable and consistent requirement in state law to provide 90 days' notice. The third option was for the Legislature to incorporate the federal policy into related aspects of landlord-tenant law. The fourth option would require a landlord to notify a prospective tenant – before he or she executes a lease – that the property is subject to a filed foreclosure action.

III. Effect of Proposed Changes:

Notice of Foreclosure to Prospective Tenants and Tenants' Deposit Money

The bill requires that landlords or their agents, who have received a notice of foreclosure, hold deposit money received from current or prospective tenants as security for performance of the rental agreement or as advance rent.

It requires that the landlord or the landlord's agent disclose to prospective tenants the existence of the foreclosure proceeding in the rental agreement or other written document. The disclosure must inform the tenant that his or her right to continue to live in the dwelling may be affected and that the deposit money deposited or advanced by the tenant will be held for the benefit of the tenant as required under s. 83.49, F.S.

It provides that the landlord's agent is not liable for failure to notify a prospective tenant of a foreclosure proceeding unless the agent received notice of the existence of the foreclosure proceeding from the landlord.

¹⁷ Board of Governors of the Federal Reserve System, Letter to the Officers and Managers in Charge of Consumer Affairs Sections, *Information and Examination Procedures for the "Protecting Tenants at Foreclosure Act of 2009,"* July 30, 2009, <http://www.federalreserve.gov/boarddocs/caletters/2009/0905/caltr0905.htm>.

¹⁸ Committee on Judiciary, Fla. Senate, *Tenants' Rights in Foreclosure*, (Interim Report 2010-124), http://www.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-124ju.pdf.

90-Day Notice to Vacate

The bill provides that the title holder of a foreclosed property must give the tenants 90 days' notice to vacate the property. If there is a written rental agreement, the tenant may reside in the property until the end of the lease or for at least 90 days following the date the tenant receives notice, whichever is longer. If the immediate purchaser of the foreclosed property sells the property to a purchaser who will occupy the premises as a primary residence, the immediate purchaser may terminate the rental agreement only after giving 90 days' notice to the tenant.

The bill sets forth the content to be included in a 90-day notice form to the tenant. It advises the tenant that the rental agreement is terminated 90 days after the delivery date of the notice or at the end of the term of the rental agreement, whichever is later and that the landlord is demanding possession of the premises on that date. It informs the tenant that he or she is still required to pay rent during the 90 days or during the term of the written rental agreement in the amount the tenant had been paying. Delivery of the written notice must comply with the provisions of s. 83.56, F.S.¹⁹

The bill provides that notice is not necessary if the tenant is a mortgagor, or the child, spouse, or parent of the mortgagor being foreclosed, unless it is a multiunit property and other tenants occupy dwelling units; if the lease was not the result of an arm's-length transaction; or if the rent is substantially less than the fair market rent for the property, unless it is reduced by a federal, state, or local subsidy.

The bill provides that the immediate purchaser named in the certificate of title shall credit the tenant's account for any deposit money paid by the tenant to the predecessor in interest and may make claims against the deposit as provided in s. 83.49, F.S. It also provides that the immediate purchaser shall also credit the tenant's account for any advance rent for the unexpired rental period. It requires the tenant to provide evidence of the amount of the deposit money or advance rent in order to receive the credit. The bill provides that this section of the bill expires December 31, 2012.

Effective Date

The bill provides that act shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

¹⁹ Section 83.56(4), F.S., provides that delivery of written notices shall be by mail or delivery of a true copy or, if the tenant is absent from the premises, by leaving a copy at the residence.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

By requiring landlords to keep a tenant's deposit money after the initiation of a foreclosure proceeding, tenant's will benefit financially. The additional time given to tenants before they have to vacate the residence after the sale of the residence in foreclosure might also have a beneficial fiscal impact on the tenant.

C. Government Sector Impact:

None

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

None.

B. Amendments:

None.