

THE FLORIDA SENATE
2013 SUMMARY OF LEGISLATION PASSED
Committee on Banking and Insurance

CS/CS/HB 87 — Mortgage Foreclosures

by Appropriations Committee; Judiciary Committee; and Rep. Passidomo and others (CS/CS/SB 1666 by Judiciary Committee; Banking and Insurance Committee; and Senator Latvala)

Statute of Limitations on Certain Actions

The bill reduces the statute of limitations period for a lender to enforce a deficiency judgment following the foreclosure of a one-family to four-family dwelling unit from 5 years to 1 year, for any such deficiency action that commences on or after July 1, 2013, regardless of when the cause of action accrued.

The Foreclosure Complaint

The bill requires that in order to bring a complaint to foreclose a mortgage on residential real property designed principally for occupation by 1 to 4 families, including condominiums and cooperatives but excluding timeshare interests under part III of ch. 721, F.S., the complaint must establish that the plaintiff holds the original note or is a person entitled to enforce a promissory note. If a plaintiff has been delegated the authority to institute a foreclosure action on behalf of the person entitled to enforce the note, the complaint must describe with specificity the authority of the plaintiff and the document that grants such authority to the plaintiff.

A plaintiff in possession of the original promissory note must certify, under penalty of perjury, that the plaintiff possesses the original note. An “original note” or “original promissory note” is defined as the signed or executed promissory note, including a renewal, replacement, consolidation, or amended and restated note or instrument that substitutes for the previous promissory note. The term includes a transferrable record, but not a copy of any of the foregoing. The required certification must be submitted contemporaneously with the foreclosure complaint, and set forth the location of the note and other specified information. The original note and allonges must be filed with the court before the entry of any judgment of foreclosure or judgment on the note.

A plaintiff seeking to enforce a lost, destroyed, or stolen instrument must attach to the complaint an affidavit executed under penalty of perjury, detailing the chain of all endorsements, transfers, or assignments of the promissory note, and setting forth the facts and documents showing that the plaintiff is entitled to enforce the instrument. Adequate protection as required under s. 673.3091(2), F.S., must be provided before final judgment.

Finality of Mortgage Foreclosure Judgment

The bill provides that an action to challenge the validity of a final judgment of mortgage foreclosure, or to establish or re-establish a lien or encumbrance of property is limited to monetary damages if all of the following apply:

- The party seeking relief from the final judgment of mortgage foreclosure was properly served in the foreclosure lawsuit;
- The final judgment of mortgage foreclosure was entered as to the property;
- All applicable appeals periods have run as to the final judgment with no appeals having been taken or having been finally resolved; and
- The property has been acquired for value by a person not affiliated with the foreclosing lender or the foreclosed owner, at a time in which no lis pendens regarding the suit is in the official county records.

The bill defines affiliates of the foreclosing lender to include any loan servicer for the loan being foreclosed, and any past or present owner or holder of the loan being foreclosed, and:

- a parent entity, subsidiary, or other person who directly or indirectly controls, is controlled by, or under common control of any such entities; or
- a maintenance company, holding company, foreclosure services company or law firm under contract with such entities.

The bill provides that the former owner can continue to pursue money damages against the lender. The claims of the former owner, however, cannot impact the marketability of the property of the new owner.

The bill provides that when a foreclosure of a mortgage occurs based upon enforcement of a lost, destroyed, or stolen note, a person who was not a party to the foreclosure action but claims entitlement to enforce the promissory note secured by the mortgage has no claim against the foreclosed property once it is conveyed to a person not affiliated with the foreclosing lender or the foreclosed owner. That person may still pursue recovery from any adequate protection given pursuant to s. 673.3091, F.S., or from the party who wrongfully claimed entitlement to enforce the promissory note, from the maker of the note, or any other person against whom a claim may be made.

Deficiency Judgments

The bill limits the amount of a deficiency judgment on owner-occupied residential property to the difference between the judgment amount and the “fair market value” on the date of the foreclosure sale. Similarly, the deficiency for a short sale may not exceed the difference between the outstanding debt and the fair market value of the property on the date of the sale.

Show Cause Procedure

The bill makes several revisions to the show cause process. The bill provides that after filing a complaint, the plaintiff may request an order to show cause for the entry of final judgment, and the court must immediately review the request and the court file in chambers without a hearing. If the complaint is verified, complies with the requirements in s. 702.015, F.S., and alleges a cause of action to foreclose on real property, the court must issue an order to show cause why a final judgment of foreclosure should not be entered to the other parties named in the action. The

bill adds a number of elements that must be included in the court's order to show cause that is sent to the other parties named in the action. The court must set a hearing no sooner than the later of 20 days after service of the order to show cause or 45 days after service of the initial complaint. The hearing is no longer required to be held within 60 days of the date of service, as required by current law. The bill specifies that the Legislature intends that the alternative show cause procedure may run simultaneously with other court proceedings.

The bill adds the requirement that the plaintiff must file the original note, establish a lost note, or show the court the obligation to be foreclosed is not evidenced by a promissory note, before the court can enter a final judgment of foreclosure after the court has found that all defendants have waived the right to be heard. If the hearing time is insufficient, the court may announce a continued hearing on the order to show cause.

The bill exempts foreclosures of owner-occupied residences from provisions authorizing the plaintiff to request the court to enter an order to show cause why it should not enter an order to make payments during the pendency of the foreclosure proceedings, or an order to vacate the premises.

Adequate protections for lost, destroyed, or stolen notes

The bill provides that the following may constitute reasonable means of providing adequate protection, if so found by the court:

- A written indemnification agreement by a person reasonably believed sufficiently solvent;
- A surety bond;
- A letter of credit issued by a financial institution;
- A deposit of cash collateral with the clerk of the court; or
- Such other security as the court deems appropriate under the circumstances.

The bill provides that a person who wrongly claims to be the holder of a note or to be entitled to enforce a lost, stolen, or destroyed note is liable to the actual holder of the note for damages and attorney fees and costs. The bill specifies that the actual holder of the note can pursue any other claims or remedies it may have against the person who wrongly claimed to be the holder, or any person who facilitated or participated in the claim.

Application and Implementation of Bill

The Legislature finds that the act is remedial and not substantive in nature. The act applies to all mortgages encumbering real property and all promissory notes secured by a mortgage, regardless of when executed. The following sections are exempted from this general rule of application:

- Section 702.015, F.S., only applies to cases filed on or after July 1, 2013.
- The amendments to s. 702.10, F.S., and the entirety of s. 702.11, F.S., apply to causes of action pending on the act's effective date.

The Legislature also requests the Supreme Court to amend the Rules of Civil Procedure to implement the expedited foreclosure process.

If approved by the Governor, these provisions take effect upon becoming law.

Vote: Senate 26-13; House 87-26