

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Florida Law

Foreclosure is the legal process for enforcing a lien against real property through the use of a forced sale of the property where the proceeds of the sale are paid to the lender or other persons who hold liens against the property in the order of their priority. As of August, 2009, Florida had the second highest residential foreclosure rate in the country, with 1 in every 140 housing units in foreclosure.¹

Florida law does not provide any specific protection to tenants in foreclosure. A tenant will be given notice of the foreclosure at its commencement, and will be provided periodic notices if the tenant files an appearance in the action. However, a tenant who enters into occupancy after the commencement of the foreclosure may not receive any notice required by state law until the conclusion of the process. That notice is a Writ of Possession, which gives the tenant 24 hours notice to vacate. A tenant that does not vacate within those 24 hours may be forcibly removed.

A recent federal law appears to resolve the issue of some tenants receiving very little notice to vacate. On May 20, 2009, the President signed a law containing the "Protecting Tenants at Foreclosure Act of 2009."² The act provides that the purchaser of residential real property at foreclosure takes title subject to the rights of a bona fide tenant of the property. A bona fide lease is an arms-length lease where the tenant is not a close relative of the owner who was foreclosed and the rent is not substantially less than the fair-market rent for the property. A bona fide tenant must be given 90 days notice to vacate the property. The purchaser at the foreclosure sale must also honor the lease of a bona fide tenant through its term, although if the property is subsequently sold to a person who will occupy the property the tenant may be asked to leave on 90 days notice. The act is repealed effective December 31, 2012.

Tenants, together with the general public, are given notice that a property subject to foreclosure will be auctioned off at public sale at a date and time certain. Every tenant has the right, under current law, to purchase the leased property at its fair market value at the foreclosure sale.

¹ *FORECLOSURE ACTIVITY REMAINS NEAR RECORD LEVEL IN AUGUST*, by RealtyTrac, accessed at <http://www.realtytrac.com/contentmanagement/pressrelease.aspx?channelid=9&acct=0&itemid=7381> on October 12, 2009.

² Title VII of Pub.L. 111-22

Effect of Bill

This bill creates an unnumbered section of law regarding tenants' rights in foreclosure.

The bill requires a lender to notify a tenant that a foreclosure case is pending. The form of notice is not specified. If the lender fails to provide this notice, the lender is liable to the tenant for "closing costs or relocation costs and attorney's fees and related costs." It is unclear how these damages would be calculated. A tenant has 90 days after learning of the foreclosure within which to file an action for damages under this provision.

The bill requires a lender to "provide the tenant or lessee with a first right of refusal to purchase the property at fair market value." It is unclear what this means. A "first right of refusal" is the right to match the price offered by a third party, which price may or may not be the fair market value of the property. For a tenant to have this option right, the tenant must show proof of the rental agreement and must have been a tenant for at least one year prior to the exercise of the right.

If the tenant exercises the purchase option, the lender must credit the remaining balance in the escrow fund for closing costs. If a tenant does not exercise the option, the lender must use escrow funds to pay the tenants' relocation costs.

B. SECTION DIRECTORY:

Section 1 creates an unnumbered section of law related to tenants' rights in foreclosure actions.

Section 2 provides an effective date of July 1, 2010.

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.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill appears to create the potential for a significant negative economic impact on mortgage lenders and a corresponding positive impact on tenants.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

This bill requires a lender to disburse monies held in the escrow account for the benefit of a tenant. The escrow fund represents monies paid by the borrower and held for the benefit of the borrower until paid for a specific purpose. The typical specific purpose of those funds in escrow is to pay property taxes and property insurance owed by the borrower, and to ensure to the lender that these important obligations are paid. Until disbursed for those purposes on behalf of the borrower, the borrower is the owner of such funds. A requirement to use escrow funds for another purpose and to be distributed to another person may be construed by a court to be in impairment of contract prohibited by art. I, s. 10 of the state and federal constitutions, or may be considered an unlawful taking under art. X, s. 6 of the state constitution or the 14th amendment to the federal constitution.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

A lack of specificity in the bill is likely to lead to extensive litigation. The bill uses the term "first right of refusal", but appears to create an option to purchase the real property. The bill requires sale at fair market value, but fails to say how fair market value is to be determined, the form of notice to the tenant, what date the tenant will be required by exercise the option by, and who is responsible for closing costs. It is unclear how the lender can comply with the requirement to offer the property for sale to the tenant, given that the notice appears to be required at the commencement of the action, yet the lender is not the legal owner of the property at that time (and will not be the legal owner of the property unless the owner continues to default, the court enters a final judgment, the property goes to sale, and the lender is the winning bidder at the auction).

The bill presumes that a lender will have escrow funds available to pay to a tenant. By the time a property is sold at foreclosure sale, it is uncommon for there to be any funds in escrow. Escrow funds are used by a lender to pay property insurance and property taxes. Federal law limits lenders to holding no more than is necessary in the escrow account, plus a cushion of no more than 2 months. Lenders typically wait at least 3 months without payment before filing a foreclosure suit, and a typical foreclosure case is over a year from filing to foreclosure sale, thus it would be unusual for there to be a remaining balance in an escrow account.

The measure of damages for failure to give a tenant notice required by this bill is the tenants' moving costs. It is unclear how these damages would be calculated and is unclear whether such damages would be limited to the cost of a local move or limited to reasonable costs incurred by the tenant.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 1, 2010, the Civil Justice & Courts Policy Committee adopted one strike-all amendment. The amendment removed the right of first refusal and removed the provision regarding mortgage escrow balances. The notice provision in the original bill was removed, and replaced with two new notice points related to distressed real property. One provision would have required a specific notice to be served with the initial pleadings in a foreclosure case giving information on housing assistance programs. The other notice would have required a property owner signing a listing agreement that contemplates a short sale would have had to notify the tenant of such listing.