

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 524

INTRODUCER: Senator Soto

SUBJECT: Rental Agreements

DATE: March 16, 2015

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	<b>Favorable</b>
2.			BI	
3.			RC	

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## I. Summary:

SB 524 applies in situations in which a tenant occupies a residence that is the subject of a foreclosure action. The bill provides the new purchaser of a foreclosed property to take title as a landlord if the tenant is occupying the premises at the same time the foreclosure sale is finalized.

This bill contains the substance of the Federal Protecting Tenants at Foreclosure Act, which recently expired. The bill, like the expired act, allows a tenant to occupy a foreclosed premises after a foreclosure sale by requiring purchasers of foreclosed property to provide at least 90-days notice before requiring the tenant to leave the premises. A purchaser of foreclosed property occupied by a tenant may provide the required notice to a tenant by mail, in person, or by leaving a copy at the residence if the tenant is not there. The bill applies to bona fide tenants, not to a tenant who is the mortgagor in the foreclosure action or a relative of the mortgagor.

## II. Present Situation:

### Foreclosure Crisis

Starting in 2007, the Great Recession fueled a multiple-year foreclosure crisis in the United States. Between 2007 and 2009, lenders initiated approximately 6.4 million home foreclosures.<sup>1</sup> By the end of 2010, more than 5 million homes had been foreclosed upon, representing about 10 percent of all homes having a mortgage.<sup>2</sup>

The foreclosure crisis took place in three waves. The first wave was triggered by the Great Recession along with defaults on subprime loans.<sup>3</sup> The second wave of properties foreclosed

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<sup>1</sup> Lauren E. Willis, *Introduction: Why didn't the Courts Stop the Mortgage Crisis?*, 43 LOY. L.A. L. REV. 1195, 1195 (2010).

<sup>2</sup> Tony S. Guo, *Tenants at Foreclosure: Mitigating Harm to Innocent Victims of the Foreclosure Crisis*, 4 DEPAUL J. FOR SOC. JUST. 215, 216 (2011).

<sup>3</sup> Subprime mortgages are mortgages offered to borrowers with less than optimal credit at higher interest rates. *Id.* at 222.

upon were due to the increase in interest rates on adjustable-rate mortgages. And the third phase is was caused by homeowners who had been keeping current on payments simply walking away from the property due to sustained loss in property values.<sup>4</sup>

Throughout the national foreclosure crisis, Florida consistently remained at the top of the states in numbers of foreclosed properties. As of 2009, Florida had the third highest mortgage delinquency rate, the greatest inventory of foreclosed properties, and the most foreclosure starts of any state.<sup>5</sup> By 2011, at 23 percent, Florida led the nation in the highest rate of homes either in foreclosure or delinquent on mortgage payments.<sup>6</sup>

Foreclosure cases flooded the courts. In response, the Florida Supreme Court created the “Task Force on Residential Mortgage Foreclosure Cases.”<sup>7</sup> One of the recommendations of the task force was to require mediation for foreclosure or residential properties.<sup>8</sup> The Florida Supreme Court ended the mediation program in 2011.<sup>9</sup> Still, the number of foreclosure cases in the state continue to outpace the nation in both actual number of properties and the highest percentage of mortgages in foreclosure.<sup>10</sup>

### **Protecting Tenants at Foreclosure Act<sup>11</sup>**

In the early years of the foreclosure crisis, tenants were routinely evicted with little or no notice or recourse. In foreclosure proceedings, all subordinate leases and interests, including rental agreements, are extinguished when the court issues a certificate of title in a foreclosure action.<sup>12</sup> The interests in property are extinguished in foreclosure actions because both possession and title to property are at issue and the tenants can be joined as parties.<sup>13</sup> Thus, after a foreclosure sale, the relationship between the new property owner and the tenant is that of owner and trespasser.<sup>14</sup>

In 2009, Congress passed the Protecting Tenants at Foreclosure Act (PTFA), which expired December 31, 2014. The PTFA gave protection to tenants during foreclosure. The PTFA required the successor in interest of the foreclosed property (typically the purchaser) to give tenants a notice to vacate the residence at least 90 days before the purchaser intends to occupy the residence. In situations in which a lease existed and the purchaser did not intend to occupy the residence, the tenant could stay until the end of the lease.

The Act required notice to be given only to bona fide tenants, which meant:

- The tenant could not be the mortgagor or the child, spouse, or parent of the mortgagor;

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<sup>4</sup> Kevin F. Jursinski, *The Mortgage Foreclosure Crisis in Florida: a 21<sup>st</sup> Century Solution*, 84 FLA. B.J. 91, 91 (June 2010).

<sup>5</sup> *In re: Final Report and Recommendations on Residential Mortgage Foreclosure Cases*, 2009 WL 5227471 (Fla. 2009).

<sup>6</sup> Tony S. Guo, *supra* note 2, at 216.

<sup>7</sup> *In re: Task Force on Residential Mortgage Foreclosure Cases*, AOSC09-8 (March 27, 2009).

<sup>8</sup> *In re: Final Report and Recommendations on Residential Mortgage Foreclosure Cases*, AOSC09-54 (December 28, 2009).

<sup>9</sup> “After the date of this order, no new cases may be referred to mediation pursuant to the statewide managed mediation program.” *In re: Managed Mediation Program for Residential Mortgage Foreclosure Cases*, AOSC11-44 (December 19, 2011).

<sup>10</sup> *Years to Go Before Foreclosures Return to ‘Normal’*, THE FLA. BAR NEWS pg. 11 (March 1, 2015).

<sup>11</sup> 12 U.S.C. s. 5220

<sup>12</sup> Tony S. Guo, *supra* note 2, at 217.

<sup>13</sup> *Redding v. Stockton, Whatley, Davin & Co.* 488 So. 2d 548, 549 (Fla. 5th DCA 1986).

<sup>14</sup> *Id.*

- The lease resulted from an arms-length transaction; and
- The rent was not substantially less than the fair market rent for the property unless it was reduced by a federal, state, or local subsidy.

The party seeking foreclosure must join a tenant as a party to extinguish a tenant's lease.<sup>15</sup> Serving tenants is advantageous to the party seeking foreclosure as the writ of possession is granted at the same proceeding, and the purchaser does not need to pursue separate legal action against the tenant.<sup>16</sup> At the foreclosure proceeding in which a lessee is named as a party, courts issue a writ of possession upon a simple showing by the purchaser of ownership in the property.<sup>17</sup>

However, sometimes a tenant rents a property subsequent to the start of foreclosure proceedings. In these instances, the tenant may not have advanced notice that the property is under foreclosure. Also, the purchaser of the foreclosed property may not have notice of the tenant's occupancy or rental agreement.

The PTFA ensures that an unaware tenant receives notice that the property in which they reside is a foreclosed property. In 2010, the Florida Supreme Court amended Form 1.996(a) to ensure that courts complied with the PTFA:

in order to ensure that the provisions of the form are not contrary to the Protecting Tenants at Foreclosure Act of 2009 ... we delete the sentence from paragraph six of the form stating, "If any defendant remains in possession of the property, the clerk shall without further order of the court issue forthwith a writ of possession upon request of the person named on the certificate of title."<sup>18</sup>

At least one circuit court in Florida adopted by administrative order language required of the petitioner in a motion for writ of possession to conform to the PTFA:

I HEREBY CERTIFY that there are no tenants in possession of the subject property or, if there are tenants in possession, such tenants have been provided with notice as required by the Federal Protecting Tenants at Foreclosure Act ... and this motion does not seek an order that violates the tenants' right to continued occupancy under the Federal Protecting Tenants at Foreclosure Act.<sup>19</sup>

The PTFA expired December 31, 2014.

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<sup>15</sup> *Dundee Naval Stores Co. v. McDowell*, 61 So. 108 (Fla. 1913); *Commercial Laundries of West Florida, Inc. v. Tiffany Square Investors Ltd. Partnership*, 605 So. 2d 116 (Fla. 5th DCA 1992); *Commercial Laundries, Inc., v. Golf Course Towers Associates*, 568 So. 2d 501 (Fla. 3d DCA 1990).

<sup>16</sup> *Redding v. Stockton, Whatley, Davin, & Co.*, 488 So. 2d 548, 549 (Fla. 5th DCA 1986). (Foreclosure is a case in equity, and a writ of possession is ancillary to it.).

<sup>17</sup> *Id.*

<sup>18</sup> *In re: Amendments to Fla.R.Civ.P. Form 1.996*, 51 So. 3d 1140 (Fla. 2010).

<sup>19</sup> Administrative Order 3.307 – 7/09 (Fla. 15th Circ. Ct. 2009).

### III. Effect of Proposed Changes:

SB 524 applies to situations in which a tenant occupies a residence that is the subject of a foreclosure action. This bill provides for a purchaser of a residential property at a foreclosure sale to take title as a landlord if a tenant is occupying the premises at the same time a foreclosure sale of the property is finalized.

This bill contains the substance of the expired Federal Protecting Tenants at Foreclosure Act.

Assuming a 90-day notice is provided to a tenant at the earliest possible time, the bill authorizes the tenant to occupy a foreclosed property for:

- The longer of 90 days or the remaining term of the lease, if a written lease existed before the certificate of title was issued.
- 90 days after the purchaser at a foreclosure sale sells the property to a subsequent purchaser who intends to occupy the property, if a written lease existed before the certificate of title was issued.
- 90 days, if a written lease did not exist before the certificate of title was issued.

The bill provides a form for the 90-day notice of termination which notifies the tenant that:

- The rental agreement terminates 90 days after the date the notice is delivered or the end of the date provided in the written rental agreement, whichever occurs later; and
- The tenant must send the payment of rent to a contact and address specified, during the 90-day period or remainder of the rental agreement at the same amount paid up to that point.

The notice of termination must be delivered by mail, in person, or if the tenant is absent from the premises by leaving a copy at the residence.

The authorization for a tenant to remain in a foreclosed residence does not apply if:

- The tenant is not a bona fide tenant (as the mortgagor in the foreclosure or the child, spouse, or parent of the mortgagor, unless the property is a multiunit residential structure with other tenants).
- The rental agreement is not the result of an arm's length transaction.<sup>20</sup>
- The rental agreement allows payment of rent that is substantially less than the fair market rent for the premises, unless the rent is reduced or subsidized due to a federal, state, or local subsidy.

The bill takes effect upon becoming a law.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

The bill does not affect cities or counties.

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<sup>20</sup> An arm's length transaction is a transaction between two unrelated and unaffiliated parties. BLACK'S LAW DICTIONARY (2014).

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

If a tenant does not receive notice of foreclosure proceedings, the bill may help a tenant avoid unexpected moving costs. However, case law seems to require that tenants be named as parties to a foreclosure proceeding and receive notices of the proceedings.

The lack of information about lessees who occupy a property before the issuance of a certificate of title after a foreclosure sale may create uncertainty that affects the selling price at a foreclosure sale. If this lack of information depresses the price of a property at a foreclosure sale, the mortgagor may potentially face a larger deficiency judgment. This uncertainty may also affect the ability of a foreclosing lender to resell a property it acquires at a foreclosure sale. However, a purchaser may be willing to pay more for a property that is occupied by a tenant who has a history of making rental payments on-time.

**C. Government Sector Impact:**

The Office of the State Courts Administrator (OSCA) indicates that the guidance provided by the bill will increase the efficiency of the courts. However, OSCA is not able to accurately determine the fiscal impact of the bill because of the unavailability of necessary data.<sup>21</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 83.561, Florida Statutes.

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<sup>21</sup> Office of the State Courts Administrator, *2015 Judicial Impact Statement* (March 13, 2015).

**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.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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