

**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 Banking and Insurance

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BILL: SB 220

INTRODUCER: Senator Passidomo

SUBJECT: Bankruptcy Matters in Foreclosure Proceedings

DATE: November 6, 2017

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	<b>Pre-meeting</b>
2.			JU	
3.			RC	

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**I. Summary:**

SB 220 allows a lienholder in a foreclosure proceeding to use documents filed in a defendant's bankruptcy case. A mortgage foreclosure is a legal action by a lender against a debtor to force the sale of real property that secures a defaulted-upon loan. The proceeds of the sale are used to repay the debt. Often, a debtor subject to foreclosure will file for bankruptcy as a means of obtaining an automatic stay of the foreclosure action and a discharge of the mortgage debt.

In bankruptcy, a debtor must file a statement under penalty of perjury stating his or her intent to retain, redeem, or surrender any property securing a debt. The debtor is supposed to act on that decision as a condition of obtaining a discharge of his or her debts. In some cases, debtors have stated an intention to surrender real property in bankruptcy proceedings, but later have actively contested the completion of a foreclosure proceeding regarding the property in state court.

This bill allows for documents filed under a penalty of perjury in a bankruptcy case to be filed in a mortgage foreclosure proceeding as admissions against the debtor/mortgagor. The bill also creates a rebuttable presumption that a defendant has waived any defense to a foreclosure action if the lienholder submits documents filed in the defendant's bankruptcy case which:

- Evidence intention to surrender to the lienholder the property that is the subject of the foreclosure;
- Have not been withdrawn by the defendant; and
- Show that a final order that discharges the defendant's debts or confirms the defendant's repayment plan that provides for surrender of the property.

A defendant can still raise a defense based upon the lienholder's action or inaction subsequent to the filing of the document which evidenced the defendant's intent to surrender the property.

The bill also requires a court in foreclosure proceeding, upon the request of a lienholder, to take judicial notice of any order entered in a bankruptcy case.

## II. Present Situation:

### Mortgage Foreclosure

The Florida Rules of Civil Procedure and a statutory process govern mortgage foreclosure. Foreclosure is initiated by the lender or servicer, known as the mortgagee, when the borrower, or mortgagor, 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 a court of proper jurisdiction. The following is a general outline of the judicial foreclosure process:

- Upon proper notice of default to the defendant, the mortgage servicer files a foreclosure complaint;<sup>1</sup>
- Service of process must be made on defendants within 120 days after the filing of the initial pleadings;<sup>2</sup>
- If a defendant has not filed an answer or another paper indicating an intent to respond to the suit, then the plaintiff is entitled to an entry of default against the defendant;<sup>3</sup>
- If an answer is filed, the plaintiff may then file for a motion of summary judgment or proceed to trial, however the vast majority of plaintiffs file a motion for summary judgment;<sup>4</sup>
- Following the proper motions, answers, affidavits, and other evidence being filed with the court, the judge holds a summary judgment hearing and renders a final judgment if he or she finds in the favor of the plaintiff;<sup>5</sup>
- If summary judgment is denied, the foreclosure proceeds to a trial without a jury;<sup>6</sup>
- If the plaintiff prevails, the court schedules a judicial sale of the property not less than 20 days, but no more than 35 days after the judgment;<sup>7</sup>
- 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 5 days prior to the sale;<sup>8</sup>
- The winning bid at a public judicial sale is conclusively presumed to be sufficient consideration for the sale;<sup>9</sup>
- Parties have 10 days to file a verified objection to the amount of the bid or the sale procedure;<sup>10</sup>
- 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, 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;<sup>11</sup> and

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<sup>1</sup> Fla.R.Civ.P. Form 1.944.

<sup>2</sup> Fla.R.Civ.P. 1.070(j).

<sup>3</sup> Fla.R.Civ.P. 1.500.

<sup>4</sup> Fla.R.Civ.P. 1.510(a).

<sup>5</sup> Section 45.031, F.S.

<sup>6</sup> Section 702.01, F.S.

<sup>7</sup> Section 45.031(1)(a), F.S.

<sup>8</sup> Section 45.031(2), F.S.

<sup>9</sup> Section 45.031(8), F.S.

<sup>10</sup> Section 45.031(8), F.S.

<sup>11</sup> Section 702.06, F.S.

- 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**

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 such exemptions and rights as the bankruptcy statute leaves untouched.<sup>12</sup> The filing of a bankruptcy petition operates as an automatic stay on most legal actions against a debtor, including foreclosure.<sup>13</sup> 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.

For individuals, there are two primary forms of bankruptcy. 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 when there is no nonexempt property to protect.<sup>14</sup> A Chapter 13 petition allows the debtor to stay creditor actions and propose a plan to pay creditors, rehabilitating the debtor financially.<sup>15</sup>

In a Chapter 7 bankruptcy, the debtor must express his or her intent regarding secured property. A debtor has four options:

- Declare the secured property is exempt;
- 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.<sup>16</sup>

The statement of intent must be made under penalty of perjury. The debtor must file the statement of intent 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.<sup>17</sup> 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.<sup>18</sup>

In Chapter 13 filings, the debtor must create a plan to restructure and repay his debt.<sup>19</sup> For this plan to be confirmed by the court, it must describe how the debtor is responding to each secured

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<sup>12</sup> 9 Am Jur 2d Bankruptcy Section 5.

<sup>13</sup> 11 U.S.C. 362(a)(4).

<sup>14</sup> 9 Am Jur 2d Bankruptcy Section 68.

<sup>15</sup> 9 Am Jur 2d Bankruptcy Section 72.

<sup>16</sup> *In re Failla*, 838 F.3d 1170 (11<sup>th</sup> Cir. 2016).

<sup>17</sup> 9 AmJur 2d Bankruptcy Section 72.

<sup>18</sup> 11 U.S.C. 521.

<sup>19</sup> 11 U.S.C. 1321 and 1322.

claim.<sup>20</sup> The debtor must make a plan for the secured property that the holder of the claim accepts or the debtor surrenders the property securing the claim to the claim holder.<sup>21</sup>

After the debtor has fulfilled his or her duties to the bankruptcy estate, the debtor may receive a discharge.<sup>22</sup> 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.

### **Florida Evidence Code**

The Florida Evidence Code governs what evidence may be used in court actions in the state courts.<sup>23</sup> Sections 90.201 and 90.202, F.S., provide that a court may take judicial notice of certain facts. Judicial notice is the authority of a judge to accept as facts certain matters which are of common knowledge from sources which guarantee accuracy or are a matter of official record, without the need for evidence establishing the fact.<sup>24</sup> A court may take judicial notice of records of any court of this state or any court of record of the United States.<sup>25</sup>

The Florida Evidence Code generally prohibits hearsay testimony.<sup>26</sup> An exception to the hearsay prohibition is a written admission of an opposing party.<sup>27</sup>

### **Recent Cases Regarding Surrender of Real Property in Bankruptcy**

There have been cases where a debtor has agreed to surrender the property in a federal bankruptcy proceeding but have continued to fight the foreclosure proceeding in state court.<sup>28</sup> In *In re Failla*,<sup>29</sup> the debtors filed for bankruptcy in 2011. They admitted that they owned the home, that the home was collateral for the mortgage, and that the mortgage was valid. They filed a statement of their intention to surrender the home in the bankruptcy proceedings. After the filing of their intention to surrender, the debtors continued to live in the home and defend against the creditor's ongoing foreclosure action in state court. The debtors argued that the effect of the surrender was simply to lift the automatic stay and allow the creditor to proceed with a foreclosure action in state court.<sup>30</sup> The court held that stating an intention to surrender in bankruptcy court meant that the debtors could not contest the foreclosure action in state court.<sup>31</sup>

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<sup>20</sup> 11 U.S.C. 1325(a)(5).

<sup>21</sup> 11 U.S.C. 1325(a)(5).

<sup>22</sup> 11 U.S.C. 727.

<sup>23</sup> Section 90.103, F.S.

<sup>24</sup> See <http://dictionary.law.com/Default.aspx?selected=1065> (last accessed February 23, 2017).

<sup>25</sup> Section 90.202(6), F.S.

<sup>26</sup> Section 90.802, F.S.

<sup>27</sup> Section 90.803(18), F.S.

<sup>28</sup> See, e.g., *Green Tree Servicing v. Hardmon*, Case No. 162012-CA-13629-FC-E (Fla. 4<sup>th</sup> Judicial Circuit November 13, 2015); *In re Guerra*, 544 B.R. 707 (Bankr. M.D. Fla. 2016); *In re Metzler*, 530 B.R. 894 (Bankr. M.D. Fla. 2015).

<sup>29</sup> *In re Failla*, 838 F.3d 1170 (11<sup>th</sup> Cir. 2016).

<sup>30</sup> *In re Failla*, 838 F.3d at 1173-1175.

<sup>31</sup> *In re Failla*, 838 F.3d at 1178.

### **III. Effect of Proposed Changes:**

The bill addresses the problem of a debtor in a bankruptcy action declaring his or her intention to give up property, then litigating to keep the property in a foreclosure action. It allows for documents filed under penalty of perjury in a bankruptcy case to be filed subsequently in a mortgage foreclosure proceeding as admissions against a debtor/mortgagor.

The bill creates a rebuttable presumption that the defendant has waived any defense to a foreclosure if the lienholder submits documents from the defendant's bankruptcy case which:

- Evidence intention to surrender to the lienholder the property that is the subject of the foreclosure;
- Have not have been withdrawn by the defendant; and
- Show that a final order has been entered in the defendant's bankruptcy case which discharges the defendant's debts or confirms the defendant's repayment plan that provides for surrender of the property.

The bill does not preclude a defendant from raising a defense based on the lienholder's action or inaction subsequent to the filing of the document in the bankruptcy case.

The bill also requires the court in a foreclosure case to take judicial notice, pursuant to s. 90.203, F.S., of any order entered in a bankruptcy case upon the request of a lienholder.

The bill takes effect on October 1, 2018, and applies to foreclosure actions filed on or after that date.

### **IV. Constitutional Issues:**

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

None.

#### **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:**

The bill could have the effect of some expediting foreclosure cases.

C. Government Sector Impact:

The bill could expedite some foreclosure cases in the state court system.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 702.12 of the Florida Statutes.

**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.