

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 6033 Rental Agreements upon Foreclosure

**SPONSOR(S):** Sirois

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N	Mawn	Luczynski
2) Insurance & Banking Subcommittee	15 Y, 0 N	Hinshelwood	Cooper
3) Judiciary Committee	17 Y, 0 N	Mawn	Luczynski

### SUMMARY ANALYSIS

A mortgage foreclosure is a civil action brought by a mortgage lender against a borrower in state court to force the sale of real property securing a mortgage loan when the borrower defaults on his or her loan obligation.

During the 2007-2008 financial crisis, lending practices, falling home prices, and high unemployment rates led to a high number of foreclosures across the United States. The impact was not limited to borrowers; one in five properties in foreclosure was a rental property, and roughly 40 percent of families facing eviction due to foreclosure were tenants. Prior to 2009, tenant protection at foreclosure varied by state, generally providing tenants few, if any, protections. However, on May 20, 2009, the President signed into law the Federal Protecting Tenants at Foreclosure Act ("PTFA") to provide bona fide tenants basic rights in residential property foreclosure proceedings. Specifically, the PTFA required the successor in interest at foreclosure to:

- Honor a tenant's lease until the end of the lease term; however, if the successor in interest at foreclosure were to sell the property to a purchaser who intended to occupy the unit as a primary residence, the lease could be terminated as of the date of sale so long as the tenant received at least 90 days' notice to vacate.
- Give a tenant at least 90 days' notice to vacate if there was either no lease or a lease terminable at will.
- Assume the housing assistance payments contract associated with an existing Section 8 lease.

The PTFA expired under a sunset clause on December 31, 2014, leaving state and local laws the sole source of tenant rights at foreclosure. To fill the void, s. 83.561, F.S., became law on June 2, 2015. This statute mirrors the PTFA in its application to the same types of properties, leases, tenants, and tenancies. However, Florida's statute differs from the PTFA in that a successor in interest at foreclosure does not have to honor an existing lease and may petition for a writ of possession only 30 days after serving the tenant with a lease termination notice.

On May 24, 2018, the President signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act, permanently restoring the PTFA in its original form. Because the restored PTFA provides greater protections for tenants at foreclosure than, and therefore conflicts with, s. 83.561, F.S., the PTFA preempts Florida's law. Thus, a successor in interest at foreclosure must adhere to the PTFA's standards.

HB 6033 repeals s. 83.561, F.S., as it conflicts with, and is therefore preempted by, the PTFA. The repeal clarifies the rights of Florida tenants and successors in interest at foreclosure, which may reduce litigation resulting from confusion over applicable law.

The bill will have no fiscal impact on state or local governments and will have an indeterminate impact on the private sector.

The bill provides an effective date of July 1, 2020.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Foreclosure

A mortgage foreclosure is a civil action brought by a mortgage lender<sup>1</sup> against a borrower in state court to force the sale of real property<sup>2</sup> securing a mortgage loan<sup>3</sup> when the borrower defaults<sup>4</sup> on his or her loan obligation. State law provides significant rights to borrowers facing foreclosure, including a right to service of the foreclosure complaint,<sup>5</sup> a right to respond to the suit,<sup>6</sup> and a right to a summary judgment hearing or a bench trial.<sup>7</sup>

During the 2007-2008 financial crisis, lending practices, falling home prices, and high unemployment rates led to a high number of foreclosures across the United States.<sup>8</sup> The impact was not limited to borrowers; one in five properties in foreclosure was a rental property, and roughly 40 percent of families facing eviction due to the foreclosure crisis were tenants.<sup>9</sup> Prior to 2009, tenant protection in foreclosure proceedings varied by state, generally giving tenants few, if any, protections.<sup>10</sup> In most states, a tenant could be legally required to move with only a few days' notice.<sup>11</sup>

##### Tenant Rights Legislation

###### *Federal Protecting Tenants at Foreclosure Act*

On May 20, 2009, President Barack Obama signed into law the Federal Protecting Tenants at Foreclosure Act ("PTFA") to provide bona fide tenants basic rights in foreclosure proceedings.<sup>12</sup> Specifically, the PTFA required the successor in interest at foreclosure<sup>13</sup> to:

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<sup>1</sup> A mortgage foreclosure may be brought by a person entitled to enforce a mortgage note, as defined in s. 673.3011, F.S. "The term 'person entitled to enforce' [a mortgage note] means: (1) The holder of the [mortgage note]; (2) A nonholder in possession of the [mortgage note] who has the rights of a holder; or (3) A person not in possession of the [mortgage note] who is entitled to enforce the [mortgage note] pursuant to s. 673.3091 or s. 673.4181(4). A person may be a person entitled to enforce the [mortgage note] even though the person is not the owner of the [mortgage note] or is in wrongful possession of the [mortgage note]." S. 673.3011, F.S. Depending on the circumstances, the person entitled to enforce the mortgage note may be the original lender, a servicer, or a holder in due course such as a subsequent purchaser of the note. *Id.*; Fla. R. Civ. P. 1.210(a) (commonly known as the real party in interest rule); *Rodriguez v. Wells Fargo Bank, N.A.*, 178 So. 3d 62, 63 (Fla. 4th DCA 2015) ("A servicer that is not the holder of the note may have standing to commence a foreclosure action on behalf of the real party in interest . . .").

<sup>2</sup> "Real property" means land, buildings, fixtures, and all other improvements to land. S. 192.001(12), F.S.

<sup>3</sup> "Mortgage loan" means "[a] loan secured by a mortgage . . . on real property." BLACK'S LAW DICTIONARY 955 (8th ed. 2004). "Mortgage" means "[a] lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulated terms." *Id.* at 1031.

<sup>4</sup> A borrower defaults when he or she breaches a term of his or her mortgage loan agreement. For example, a borrower defaults on his or her loan if he or she fails to make a scheduled mortgage payment. See "Default," Legal Information Institute, available at <https://www.law.cornell.edu/wex/default> (last visited Jan. 23, 2020).

<sup>5</sup> Fla. R. Civ. P. 1.070(j); Chs. 48 and 49, F.S.

<sup>6</sup> Fla. R. Civ. P. 1.500.

<sup>7</sup> Fla. R. Civ. P. 1.510(a); Ss. 45.031(2) and 702.01, F.S.

<sup>8</sup> Elayne Weiss, *Protecting Tenants at Foreclosure*, National Low Income Housing Coalition, available at [https://nlihc.org/sites/default/files/AG-2019/06-06\\_PTFA.pdf](https://nlihc.org/sites/default/files/AG-2019/06-06_PTFA.pdf) (last visited Jan. 23, 2020).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Protecting Tenants at Foreclosure Act of 2009, Pub. L. 111-22, 123 Stat. 1660.

<sup>13</sup> A successor in interest at foreclosure is the person or entity acquiring title to a foreclosed property at the end of the foreclosure action. It could be the mortgage lender or a person who purchased the property at foreclosure. See *Protecting Tenants at Foreclosure*, *supra* note 8.

- Honor a tenant’s lease until the end of the lease term; however, if the successor in interest at foreclosure were to sell the property to a purchaser who intended to occupy the unit as a primary residence, the lease could be terminated as of the date of sale so long as the tenant received at least 90 days’ notice to vacate.
- Give a tenant at least 90 days’ notice to vacate if there was either no lease or a lease terminable at will.
- Assume the housing assistance payments contract associated with an existing Section 8<sup>14</sup> lease.<sup>15</sup>

The PTFA applied to foreclosures on residential properties, including single family homes and multi-unit properties.<sup>16</sup> Tenants with lease rights of any kind, including month-to-month leases or leases terminable at will, were protected as long as the tenancy existed on the date of the notice of foreclosure and the tenant:

- Occupied the premises under an arm’s length transaction rental agreement;
- Did not have a rental agreement significantly below market value; and
- Was not the mortgagor<sup>17</sup> in the subject foreclosure or the mortgagor’s child, spouse, or parent.<sup>18</sup>

Additionally, the PTFA preempted<sup>19</sup> conflicting state law but specifically provided that it did not affect “any [s]tate or local law that provides longer time periods or other additional protections for tenants.”<sup>20</sup> However, the PTFA expired under a sunset clause<sup>21</sup> on December 31, 2014,<sup>22</sup> and though the 114th Congress considered legislation to make the PTFA permanent, no extension passed.<sup>23</sup> State and local law again became the sole source of tenant rights at foreclosure.<sup>24</sup>

### *Florida’s Response*

On June 2, 2015, Governor Rick Scott signed into law HB 779, creating s. 83.561, F.S.<sup>25</sup> This statute filled the void left by the PTFA’s expiration, mirroring the PTFA in its application to the same types of properties, leases, tenants, and tenancies. However, Florida’s statute differs from the PTFA in that a successor in interest at foreclosure does not have to honor an existing lease and may petition for a writ of possession<sup>26</sup> 30 days after serving the tenant with a lease termination notice.

<sup>14</sup> Section 8 of the United States Housing Act of 1937, Pub. L. 75-412, codified at 42 U.S.C. § 1437 *et seq.*

<sup>15</sup> See *supra* note 12.

<sup>16</sup> *Id.*

<sup>17</sup> “Mortgagor” means “[o]ne who mortgages property; the mortgage-debtor, or borrower.” BLACK’S LAW DICTIONARY 1034 (8th ed. 2004).

<sup>18</sup> See *supra* note 12.

<sup>19</sup> The United States Constitution’s Supremacy Clause provides that federal law is “the supreme Law of the Land..., anything in the Constitution or Laws of any State to the contrary notwithstanding.” From this concept springs the federal preemption doctrine, under which federal law preempts, or supplants, conflicting state laws. The United States Supreme Court identified two ways in which federal law preempts state law: expressly, when a federal law contains explicit preemptive language, and impliedly, when the federal law’s structure and purpose contains implicit preemptive intent. See U.S. Const. art. VI., cl. 2.; see also *Glade v. Nat’l Solid Wastes Mgmt. Assn.*, 505 U.S. 132 (1963).

<sup>20</sup> See *supra* note 12.

<sup>21</sup> A law with a sunset clause automatically terminates unless expressly renewed. See “sunset law,” Legal Information Institute, [https://www.law.cornell.edu/wex/sunset\\_law](https://www.law.cornell.edu/wex/sunset_law) (last visited Jan. 23, 2020).

<sup>22</sup> See *supra* note 12; Mortgage Reform and Anti-Predatory Lending Act, Pub. L. 111-203, 124 Stat. 2204.

<sup>23</sup> See *supra* note 8.

<sup>24</sup> *Id.*

<sup>25</sup> Ch. 2015-96, Laws of Fla.

<sup>26</sup> A writ of possession, issued by a clerk to the sheriff after entry of a judgment in favor of a landlord, describes the subject premises and commands the sheriff to put the landlord in possession of such premises after 24 hours’ notice conspicuously posted thereon. S. 83.62, F.S.

## *PTFA Restoration*

On May 24, 2018, President Donald J. Trump signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act, permanently restoring the PTFA in its original form.<sup>27</sup> Because the restored PTFA provides greater protections for tenants at foreclosure than, and therefore conflicts with, s. 83.561, F.S., the PTFA preempts Florida's statute. Thus, a successor in interest at foreclosure must adhere to the PTFA's standards.

### **Effect of Proposed Changes**

HB 6033 repeals s. 83.561, F.S., as it conflicts with, and is therefore preempted by, the PTFA. The repeal clarifies the rights of Florida tenants and successors in interest at foreclosure, which may reduce litigation resulting from confusion over applicable law.

#### **B. SECTION DIRECTORY:**

**Section 1:** Repeals s. 83.561, F.S., relating to termination of rental agreement upon foreclosure.

**Section 2:** Provides an effective date of July 1, 2020.

## **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:**

The impact on the private sector is indeterminate. The PTFA currently applies to Florida tenants and successors in interest at foreclosure due to its preemption of s. 83.561, F.S. However, repealing this Florida statute may reduce litigation resulting from confusion over applicable law.

#### **D. FISCAL COMMENTS:**

None.

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<sup>27</sup> Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. 115-174, 132 Stat. 1339.

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

##### **1. Applicability of Municipality/County Mandates Provision:**

Not applicable. This bill does not appear to affect county or municipal governments.

##### **2. Other:**

None.

#### **B. RULE-MAKING AUTHORITY:**

None.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**