

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: HB 6033 Rental Agreements upon Foreclosure

SPONSOR(S): Sirois

TIED BILLS: **IDEN./SIM. BILLS:** SB 1362

FINAL HOUSE FLOOR ACTION: 115 Y's 0 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

HB 6033 passed the House on March 10, 2020, as SB 1362.

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 ("FPTFA") to provide bona fide tenants basic rights in residential property foreclosure proceedings. Specifically, the FPTFA 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 intended to occupy the unit as a primary residence, the lease could be terminated as of the date of foreclosure if 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 FPTFA 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 FPTFA in its application to the same types of properties, leases, tenants, and tenancies. However, Florida's statute differs from the FPTFA 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 FPTFA in its original form. Because the restored FPTFA provides greater protections for tenants at foreclosure than, and therefore conflicts with, s. 83.561, F.S., the FPTFA preempts Florida's law. Thus, a successor in interest at foreclosure must adhere to the FPTFA's standards.

The bill repeals s. 83.561, F.S., as it conflicts with, and is therefore preempted by, the FPTFA. 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 was approved by the Governor on June 27, 2020, ch. 2020-99 L.O.F., and will become effective on July 1, 2020 except as otherwise expressly provided.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Foreclosure

A mortgage foreclosure is a civil action brought by a mortgage lender¹ against a borrower in state court to force the sale of real property² securing a mortgage loan³ when the borrower defaults⁴ on his or her loan obligation. State law provides significant rights to borrowers facing foreclosure, including a right to service of the foreclosure complaint,⁵ a right to respond to the suit,⁶ and a right to a summary judgment hearing or a bench trial.⁷

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.⁸ 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.⁹ Prior to 2009, tenant protection in foreclosure proceedings varied by state, generally giving tenants few, if any, protections.¹⁰ In most states, a tenant could be legally required to move with only a few days' notice.¹¹

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 ("FPTFA") to provide bona fide tenants basic rights in foreclosure proceedings.¹² Specifically, the FPTFA required the successor in interest at foreclosure¹³ 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.

¹ 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 . . .").

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

³ "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." Black's Law Dictionary 1031 (8th ed. 2004).

⁴ 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 Legal Information Institute, *Default*, <https://www.law.cornell.edu/wex/default> (last visited Mar. 18, 2020).

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

⁶ Fla. R. Civ. P. 1.500.

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

⁸ Elayne Weiss, *Protecting Tenants at Foreclosure*, National Low Income Housing Coalition, https://nlihc.org/sites/default/files/AG-2019/06-06_PTFA.pdf (last visited Mar. 18, 2020).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

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

¹³ 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. Weiss, *supra* note 8.

- 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 8¹⁴ lease.¹⁵

The FPTFA applied to foreclosures on residential properties, including single family homes and multi-unit properties.¹⁶ 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 mortgagor¹⁷ in the subject foreclosure or the mortgagor's child, spouse, or parent.¹⁸

Additionally, the FPTFA preempted¹⁹ 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."²⁰ However, the FPTFA expired under a sunset clause²¹ on December 31, 2014,²² and though the 114th Congress considered legislation to make the FPTFA permanent, no extension passed.²³ State and local law again became the sole source of tenant rights at foreclosure.²⁴

Florida's Response

On June 2, 2015, Governor Rick Scott signed into law HB 779, creating s. 83.561, F.S.²⁵ This statute filled the void left by the FPTFA's expiration, mirroring the FPTFA in its application to the same types of properties, leases, tenants, and tenancies. However, Florida's statute differs from the FPTFA in that a successor in interest at foreclosure does not have to honor an existing lease and may petition for a writ of possession²⁶ 30 days after serving the tenant with a lease termination notice.

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

¹⁵ Protecting Tenants at Foreclosure Act of 2009, Pub. L. 111-22, 123 Stat. 1660.

¹⁶ *Id.*

¹⁷ "Mortgagor" means "[o]ne who mortgages property; the mortgage-debtor, or borrower." Black's Law Dictionary 1034 (8th ed. 2004).

¹⁸ Protecting Tenants at Foreclosure Act of 2009, Pub. L. 111-22, 123 Stat. 1660.

¹⁹ 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).

²⁰ Protecting Tenants at Foreclosure Act of 2009, Pub. L. 111-22, 123 Stat. 1660.

²¹ A law with a sunset clause automatically terminates unless expressly renewed. See Legal Information Institute, *Sunset Law*, https://www.law.cornell.edu/wex/sunset_law (last visited Mar. 18, 2020).

²² Protecting Tenants at Foreclosure Act of 2009, Pub. L. 111-22, 123 Stat. 1660; Mortgage Reform and Anti-Predatory Lending Act, Pub. L. 111-203, 124 Stat. 2204.

²³ Weiss *supra* note 8.

²⁴ *Id.*

²⁵ Ch. 2015-96, Laws of Fla.

²⁶ 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.

FPTFA Restoration

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

Effect of the Bill

The bill repeals s. 83.561, F.S., as it is preempted by the FPTFA, clarifying the rights of Florida tenants and successors in interest at foreclosure, which may reduce litigation resulting from confusion over applicable law. The bill also:

- Contains a savings clause creating s. 83.5615, F.S., effective upon the repeal of the FPTFA, which is substantively identical to the FPTFA.
- Directs the director of the Division of Consumer Services of the Department of Agriculture and Consumer Services to notify the Division of Law Revision within 10 days after the FPTFA's repeal.

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.

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The impact on the private sector is indeterminate. The FPTFA 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.