

# BURR ALERT

## Governor Scott Signs Expedited Foreclosure Bills

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### **Legislative Response to the Mortgage Foreclosure Crisis**

The mortgage foreclosure crisis has exacted a toll on Florida's economy and judiciary. In the span of four years, foreclosure filings in Florida increased almost sevenfold, from 57,106 in 2005 to 399,118 in 2009. Florida currently boasts the largest share of foreclosure inventory of any state. The explosion in foreclosure filings has produced a substantial case backlog in the courts. The average foreclosure action in Florida now requires 853 days to complete, more than double the national average of 414 days.

In response to the backlog of foreclosure actions, Governor Rick Scott signed into law House Bill 87. The bill seeks to reduce the case backlog by expediting foreclosure actions. Additionally, the bill introduces more onerous pleading requirements on foreclosure plaintiffs and reduces the statute of limitations for deficiency judgments. The bill amends existing statutes and creates several new ones as well. The entirety of the bill applies immediately and retroactively, except for the newly introduced pleading requirements, which apply to cases filed on July 1, 2013 and thereafter.

### **The Amended Alternative Foreclosure Procedure**

The bill amends Section 702.10, which contains an alternative foreclosure procedure. As amended, Section 702.10 now allows any lienholder, such as a homeowner's association with a lien for unpaid assessments, and not just a mortgagee, to invoke the alternative foreclosure procedure in cases that are uncontested or in which there is no legitimate defense. A lienholder may also now request an order to show cause for the entry of final judgment. Upon such request, the court must immediately review the court file in chambers without a hearing. If the court finds that the complaint is verified, complies with the new pleading requirements, and alleges a proper cause of action for foreclosure, then the court shall issue an order to show cause why a final judgment should not be entered for the plaintiff.

The hearing on the show cause order may not occur before the later of 20 days after service of the order or 45 days after service of the initial complaint. If service is made by publication, then the hearing may not be set sooner than 30 days after the first publication. Any motion, responsive pleading, affidavit, or other papers filed before the hearing that raise a genuine issue of material fact shall constitute cause for the court to not enter final judgment.

The amended alternative procedure also removes the necessity of an additional hearing on attorneys' fees if the mortgage provides for fees and if the fees are no more than 3% of the principal amount

owed. Additionally, a plaintiff may request the court to enter an order directing the mortgagor to show cause why an order to make payments during the pendency of the foreclosure or to vacate the premises should not be entered. However, this avenue is unavailable to a plaintiff if the property is owner-occupied residential real estate (the bill creates a rebuttable presumption that homestead property is owner-occupied). This amended alternative procedure applies retroactively and prospectively, including in pending cases.

### **The Tradeoff: Stricter Pleading Requirements**

As a tradeoff in favor of mortgage borrowers, the bill imposes more onerous pleading requirements on foreclosure plaintiffs and permits courts to sanction plaintiffs for noncompliance. Under the new Section 702.015, a complaint must either affirmatively allege that the plaintiff is the holder of the original note or allege with specificity the basis for the plaintiff's right to enforce the note. Furthermore, if the plaintiff has been delegated authority to prosecute the action on behalf of the person entitled to enforce the note, then the complaint must describe this authority with specificity. Perhaps most burdensome, a plaintiff in possession of the original note must file under penalty of perjury a certification that the plaintiff is in possession of the note. The certification must also state the location of the note, the name and title of the person giving the certification, the name and title of the person who personally verified such possession and the time and date on which the possession was verified. Correct copies of the note and all allonges must be attached to the certification, which must be filed contemporaneously with the complaint. Additionally, the original note and allonges must be filed with the court before entry of any judgment. These requirements apply to all cases filed on July 1, 2013 and thereafter.

### **Lost, Destroyed, or Stolen Notes**

Additionally, the bill introduces more stringent requirements when the plaintiff seeks to enforce a lost, destroyed, or stolen note. The plaintiff must attach to the complaint an affidavit that details a clear chain of all endorsements or assignments of the note, sets forth facts showing that the plaintiff is entitled to enforce the note, and contains copies of the note or other evidence of ownership and possession of the note.

### **Statute of Limitations in Action for Deficiency Judgment**

As a further tradeoff, the legislature reduced the statute of limitations on an action for a deficiency judgment from five years to one year, measured from the day after the certificate of foreclosure sale is issued by the clerk of court or the day after the mortgagee accepts a deed in lieu of foreclosure. Furthermore, the bill limits the amount of a deficiency in the case of an owner-occupied home to the difference between the judgment amount—or, in the case of a short sale, the outstanding debt—and the fair market value of the property on the date of the sale.

The new Section 702.11 gives courts guidance on the definition of "adequate protection" in the context of a lost note. In pleading a lost note, any of the following constitutes adequate protection: (1) a written indemnification agreement; (2) a surety bond; (3) a letter of credit; (4) a deposit of cash collateral with the clerk; or (5) such other security as the court may deem appropriate.

Finally, the legislature has indicated its desire to preserve the finality of foreclosure judgments—ostensibly to protect bona fide purchasers at foreclosure sales. As long as the party seeking relief from a judgment of foreclosure was properly served, final judgment of foreclosure was entered, all appeals periods have run, and the purchaser is not affiliated with the foreclosure lender or owner, then the court shall treat the request solely as a claim for monetary damages and may not disturb the title of the property.

The effect of these changes will be felt immediately by parties to foreclosure litigation. But whether the bill ultimately expedites the foreclosure process and reduces the burden on the judiciary remains to be seen.

**FOR MORE INFORMATION, CONTACT:**

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