



# New Foreclosure Procedures Pose Challenges to Borrowers and Banks Alike

by Timothy Goodwin and Veronica Coulter

As we are all aware, Florida is a hot-spot for mortgage foreclosure activity. This has placed a tremendous burden on the judicial system and created a backlog of cases. Realtytrac reported that for the 4th quarter of 2012, the average length of time between the first foreclosure filing and bank repossession in Florida is 853 days, while the national average is 414 days. While the robo-signing scandal that plagued the mortgage industry dramatically decreased the number of foreclosure filings in 2010 and 2011, that scandal is nearing resolution and foreclosure filings are on the rise.

On June 7, 2013, Governor Scott signed into law House Bill 87 which makes significant procedural changes to the mortgage foreclosure process and is intended to quickly clear dockets effective July 1, 2013. Despite widely negative reports, the bill isn't all bad for distressed homeowners; the changes grant borrowers additional protection by reducing the statute of limitations for enforcement of a deficiency judgment and limiting the amount of a deficiency in some circumstances.

To effect its goal of speeding the foreclosure process, HB 87 amends § 702.01, *et seq.*, Fla. Stat., which provides for an expedited foreclosure in uncontested cases. First, HB 87 allows any lienholder to utilize the expedited foreclosure process, which was previously a remedy limited to the mortgagee. This provides any foreclosing plaintiff with the opportunity to reduce the number of hearings needed to secure a final judgment from two to one. Second, a foreclosure plaintiff must now make precise factual allegations, in some cases backed by sworn affidavits, as to its right to enforce the note, where previously general assertions sufficed. These specific pleading requirements appear to preemptively limit the effectiveness of a defendant's motion to dismiss on standing grounds, which is a common defense tactic. To further hinder this defense HB 87 raises the burden for dismissal by amending §702.10, Fla. Stat. to require proof similar to the burden on a motion

for summary judgment; the motion to dismiss must now "raise a genuine issue of material fact which would preclude the entry of summary judgment or constitute a legal defense to the foreclosure." Previously, a defendant needed only raise a legally sufficient defense (a *prima facie* case).

In addition to making the defense of a foreclosure action more difficult, HB 87 takes away a significant incentive for homeowners to fight a foreclosure: the prior procedures permitted homeowners to rent out their properties until the final order of foreclosure and generally keep the proceeds from rents where the mortgage contract was silent on that issue. Now, a homeowner renting the property must pay rent to the mortgage-holder during the pendency of the foreclosure proceeding where the property is not owner-occupied and funds are exchanged between the occupants and the borrower.

While HB 87 contains significant changes to the foreclosure procedures that favor lienholders, the Bill provides additional protections to consumers against deficiency judgments. A deficiency occurs when a foreclosed house is sold for less than what is owed to the lienholders. First, the statute of limitations for enforcement of a deficiency judgment is reduced from five years to one year. This amendment is expressly intended to be applied retroactively. Next, the amount of a deficiency judgment is limited to the difference between the judgment amount and the fair market value of the home-stead property, not the actual amount raised by a foreclosure sale. This gives the homeowners the benefit of the improving housing market rather than punishing the homeowner for the lower prices typically obtained through foreclosure sale.

Additionally, HB 87 provides more finality to a foreclosure sale by allowing only monetary damages in an action attacking the entry of foreclosure and subsequent sale; such an action may not recover title to the property. This modification of §702.036, Fla. Stat. appears to be aimed at increasing the number of willing purchasers of foreclosed property and the

prices obtained from such sales.

HB 87 appears to create a fast track to foreclosure for all lienholders and their representatives, but plaintiffs that would utilize these new procedures also face an increased burden of ensuring cases are adequately documented prior to the filing of a foreclosure suit. These changes aimed at clearing up languishing cases and improving judicial efficiency impose additional burdens on both plaintiffs and defendants and will present novel challenges for practitioners on both sides of these suits. The effect that HB 87 might have on the judicial backlog is yet to be determined. *AA*

*The authors practice with the Law Office of Robert Eckard & Associates, P.A. in Palm Harbor. Timothy Goodwin, Of Counsel, practices primarily business law and can be reached at tim@robteckardlaw.com. Veronica Coulter specializes in foreclosure defense and consumer bankruptcy and can be reached at veronica@robteckardlaw.com.*



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