

Memo

To: Mark Nichols, Esq., Barbara Riesberg, Esq.
From: Manuel Farach, Esq.
Date: 1/16/2012
Re: Pre-foreclosure Certificate of Abandonment, S.B. 970 (Bennett)

Senator Michael S. "Mike" Bennett has filed S.B. 970 which seeks to permit lenders to seek and obtain a pre-foreclosure judgment "certificate of abandonment" with regard to property a lender is seeking to foreclose. While laudable in its apparent attempt to allow distressed properties to be secured, there appear to be factual and legal problems to this proposed legislation. First, a summary of the proposed law.

The law seeks to allow a foreclosing lender to apply to a court for and obtain a "certificate of abandonment" upon showing the property has been "posted" with a notice of abandonment and there appear to be no persons living or residing in the property. If 30 days pass and the property seems to be abandoned upon a second inspection, a court may permit a lender to:

- "1. Secure the property;
2. Maintain utilities to the property;
3. Remove trash and debris;
4. Maintain the lawn in a reasonable manner;
5. Maintain any pool in a safe, clean and secure manner;
6. Perform other reasonable and necessary acts to preserve the property and prevent waste as ordered by the court;
7. Maintain property insurance against catastrophic damage; and
8. Pay any and all property taxes."

The lender that seeks and obtains this court order is absolved from any liability for any acts.

Factually, it will be difficult to have a judicial determination stand up in court as "abandonment" as it is a legal concept that is dependent on the state of mind of the persons living or acting in the premises. By example borrowed from the landlord tenant law on the issue of abandonment, "[a]bandonment of property requires a showing of actual acts of relinquishment accompanied by an intention to abandon." *Bobo v. Vanguard Bank & Trust Co., Inc.*, 512 So. 2d 246, 247 (Fla. 1st DCA 1987). The problem exists with any finding or claim of abandonment that is found in the manner set forth in the proposed legislation in that it does not take into account the state of mind of the property owner, and thus the finding of "abandonment" can be later challenged. As an example, a homeowner could be called out of

town for her job for a period in excess of thirty days (with no intention of abandoning her home) during which time the finding could be made. This factual finding seems problematic, especially since personal service (only "posting") is not required in order to initiate the action.

Just as problematic is the remedy, which is so extensive as to amount to a prejudgment dispossession of the landowner without the protections of law. The Florida Supreme Court has been clear that a property owner may be dispossessed only upon certain acts, i.e., foreclosure or appointment of a receiver. See *Carolina Portland Cement Co. v. Baumgartner*, 99 Fla. 987, 128 So. 241, 248 (1930). This principle holds even when parties contractually agree to appointment of a receiver, i.e., the court must still exercise its discretion and must find the movant will prevail and that there is no equity in the property nor other manner in which to protect the mortgagor. *DeSilva v. First Community Bank of America*, 42 So. 3d 285 (Fla. 2d DCA 2010) (court must still cautiously exercise its discretion to appoint a receiver, even if the loan instruments unequivocally provide such right to the lender). Finally, there is no requirement to post a bond in order to dispossess the property owner, which may run afoul of constitutional requirements. See *Boyd v. Banc One Mortg. Corp.*, 509 So. 2d 966 (Fla. 3d DCA 1987).

While Sen. Bennett is to be commended for suggesting a novel and unique approach to the mortgage foreclosure process, this proposed legislation suffers from factual, legal and constitutional problems and should be opposed by the Business Law Section.