



2011 Bulletin 20 Rep. Kathleen Passidomo's Fair Foreclosure Act

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Nationally, we are facing a huge foreclosure problem. Congress is holding hearings, and our friends at ALTA are actively defending the important role the title industry plays in foreclosure. The Office of the Comptroller of the Currency has new procedures requiring a loan servicer to employ independent consultants to review any foreclosures that took place in 2009 and 2010. Consumers who claim to have been harmed by faulty foreclosures will be able to request a review of their cases and, in warranted instances, be compensated by their servicers. ([More from ALTA](#)). Many of us remain concerned that this will provide further support to set aside a completed foreclosure, thus increasing the risk and uncertainty facing our title insurers and further delaying the economic recovery.

As Justin Ailes, ALTA's Vice President of Government Affairs so able stated: "Homeowners need to know that if they buy a foreclosed home, their ownership to their property won't be challenged or taken away," he said. "Manufacturing uncertainty by suggesting that defaulted borrowers will be allowed to retake title to the property will only delay a housing recovery."

In Florida, we have been working on a different approach to the problem. Rep. Kathleen Passidomo (R-Naples) filed her Fair Foreclosure Act ([HB 213](#)), which is intended to streamline several aspects of the judicial foreclosure process. This bill includes several FLTA endorsed provisions, which are vitally important to the title industry. The bill:

1. Provides a mini-MRTA for foreclosed properties. (lines 574-631) After a foreclosure has been completed, the appeals period has run or any appeals have been resolved, and the property has been sold for value to someone not affiliated with the lender or loan servicer (ie., we've insured it), any later challenges to the foreclosure, based on robo-signing, misrepresentation as to ownership of the note, etc. are statutorily treated only as a claim for money damages -- and the title and ownership of property are protected.
2. The Bill requires lenders to provide signed estoppel statements within 15 days, without charge for mortgage payoffs, with representations that they own the note and are entitled to accept payment. (starting at line 257) A separate provision allows title agents and third party purchasers or lenders to rely on those statements. (line 286)

3. After a mortgage has been paid off, it places a duty on the lender to record a satisfaction and return the original promissory note marked "paid in full" (or a lost note affidavit and adequate protections). (line 316) For years we have had difficulties with satisfactions (if they actually file one) not matching the record owner of the mortgage. In Florida, the ownership of the mortgage follows the note, whether or not it has been formally assigned. This mechanism will allow us as title agents to close that record gap by recording either our own affidavit saying "they returned the promissory note marked paid in full" or the lost note affidavit.
4. Perhaps more importantly, the bill creates a financial penalty for lenders to follow the law. The party accepting payment will be liable to their borrower for the same \$100 per day penalty they assess against us if there is a delay in returning the original loan package. (line 332)

There is a lot in this bill that the title industry will like -- but make no mistake, the bill will be controversial and likely opposed by both the bankers (because it makes them do their work before they file foreclosure and follow the niceties of the law) and the foreclosure defense bar (because it will shorten the time for legitimate foreclosures to be completed). We will have to actively support this bill if it is to have any hope of passing.

Other provisions of the bill would:

- a. Require a foreclosing lender – at the time of filing the complaint – to either file (i) the original note; (ii) certification that they have confirmed possession of the original note and will file it prior to final judgment; or (iii) complete lost note paperwork.
- b. Clarify the types of adequate protections which must be provided when asserting a right to enforce a lost note.
- c. The bill attempts to move the foreclosure process forward, particularly as to properties where no one is contesting the foreclosure, with the following provisions:
 - i. Requiring Lenders to pursue deficiency judgments sooner, rather than later.
 - ii. Providing information on when defaults are appropriate and allowing any party (including community associations) to move for the default.
 - iii. Allowing case management conferences which set hard deadlines for the various stages of the case.
 - iv. Allowing the court to condition delays on paying Condo and HOA assessments which come due after that point.
 - v. Fixing the “Show Cause” mechanisms to eliminate some of the ambiguity in the current law and the need for a second hearing.
 - vi. Dispensing with the need to advertise and hold a sale on the courthouse steps when the property is so far underwater that other bidders are unlikely.

In the next week or so, we will be reaching out to ask each of our members to contact the State Representatives and Senators to express our support for this important bill. In the meantime, please e-mail [Representative Passidomo](#) and let her know how much we appreciate her support.