
Judiciary Committee

HB 1942

Title: An act relating to foreclosures on deeds of trust.

Brief Description: Concerning foreclosures on deeds of trust.

Sponsors: Representatives Orwall, Rodne, Kirby, Hasegawa, Pedersen, Jacks, Morrell, Van De Wege, Appleton, Liias, Moeller, Darneille, Sells, Ormsby, Miloscia, Upthegrove, Carlyle, Dickerson, Conway, Kenney, Simpson, Goodman, Kagi and Santos; by request of Governor Gregoire.

Brief Summary of Bill

- Requires a mortgagee or beneficiary, before filing a notice of default, to contact the borrower and assess the borrower's financial situation and explore alternatives to foreclosure.
- Provides that a tenant of residential property that was sold in foreclosure shall have 60 days written notice before the tenant may be removed from the property.
- Provides that the borrower's failure to bring a court action to enjoin a foreclosure does not waive certain claims the borrower may have, such as claims based on fraud or breach of a trustee's duty.
- Specifies duties owed by the trustee to the borrower.

Hearing Date: 2/11/09

Staff: Trudes Tango (786-7384)

Background:

Unlike mortgages, which require judicial foreclosure, deeds of trust may be non-judicially foreclosed if the grantor defaults on the loan obligation. The Deeds of Trust Act establish procedures for foreclosure.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

A foreclosure under a deed of trust cannot occur until at least 190 days from the date of default on the loan. Within that time, the trustee or beneficiary must comply with specific notice provisions. The beneficiary or trustee must send a notice of default to the borrower at least 30 days before the trustee records a notice of trustee's sale. The trustee must record, mail, and serve the notice of trustee's sale at least 90 days before the sale.

At any time prior to the 11th day before the trustee's sale, the borrower may cure the default by paying the back payments, plus the trustee's costs and fees. This will discontinue the sale. However, within 11 days of the sale, if the borrower offers to cure, the beneficiary can reject the cure and demand full payment of the loan. The trustee's sale is automatically stayed if the borrower files for bankruptcy. In addition, the trustee has discretion to delay the sale for up to 120 days.

Anyone having an interest in the real property, including the borrower, may restrain the sale on any proper ground. Among the proper grounds for enjoining a sale are: no default on the loan; defective notice of sale; a workout or settlement has been agreed to; and, defenses to the debt, such as truth in lending violations or misrepresentations of the seller.

The action to enjoin can be filed anytime before the scheduled trustee sale. However, a person seeking to enjoin the trustee sale must give five days notice of the action to the trustee and the beneficiary. In *Brown v. Household Realty Corp.* (2008), the court of appeals held that a party waives the right to post-foreclosure sale remedies where the party received notice of the right to enjoin the sale, the party had actual or constructive knowledge of a defense to foreclosure prior to the sale, and the party failed to bring an action to enjoin the sale. The court stated that applying the waiver doctrine to claims arising out of underlying obligations further the three goals of the Deeds of Trust Act: (1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles.

The trustee has strict obligations imposed by statute and case law. The trustee must act impartially between the borrower, grantor, and beneficiary. The Washington Supreme Court has held that because the deed of trust foreclosure process is generally conducted without review or confrontation by a court, the fiduciary duty imposed upon the trustee is high.

The purchaser at a trustee's sale has the right to possession of the property on the 20th day following the sale.

Summary of Bill:

Contact Requirements Before Notice of Default

In addition to the existing timeframes under the deeds of trust statutes, a mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default until 30 days after contacting, or attempting in due diligence to contact, the borrower. A mortgagee, beneficiary, or agent must contact the borrower either in person or by telephone to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure.

During the initial contact, the borrower must be advised that he or she has the right to request a subsequent meeting, which if requested, must be scheduled within 14 days. Any meeting may be by telephone. The borrower must be provided the toll-free number of a housing counseling agency certified by the U.S. Department of Housing and Urban Development. The borrower may designate a housing counseling agency, attorney, or other advisor to discuss options with the mortgagee, beneficiary, or agent. Any deed of trust modification or workout plan offered at the meeting must be approved by the borrower.

If the mortgagee, beneficiary, or agent fails to contact the borrower after due diligence, it may file a notice of default. What constitutes due diligence is specified in statute, and includes, for example, attempts to contact the borrower by letter, by telephone at least three times at different times and days, sending certified mail, providing a toll-free number with access to a live representative, and posting information on a website.

Contacting the borrower and waiting 30 days before filing the notice of default is not necessary in the following cases: (1) if the borrower has surrendered the property; (2) the borrower has contracted with an entity or person whose primary business is advising people who have decided to leave their homes on how to extend the foreclosure process and avoid paying their mortgage; or (3) the borrower has filed for bankruptcy.

The contact requirements apply to deeds of trust made from January 1, 2003, to December 31, 2007, that are secured by owner-occupied residential real property. The contact requirements expire January 1, 2013.

Duty of Trustee

The trustee must: (1) act in the borrower's best interest and in the utmost good faith toward the borrower, must disclose any and all interests to the borrower, and must not accept or provide any undisclosed compensation or remuneration that benefits the trustee on an expenditure made for the borrower; (2) carry out all lawful instructions provided by the borrower; (3) disclose to the borrower all material facts of which the trustee has knowledge that might reasonably affect the borrower's rights, interests, or ability to receive intended benefits from the loan; (4) use reasonable care in performing duties; and (5) provide an accounting to the borrower.

Waiver of Claims

The following claims are not waived by the borrower's failure to bring a lawsuit to enjoin a trustee sale: (1) common law fraud and misrepresentation; (2) unlawful or deceptive acts in the making or brokering of a residential mortgage loan; (3) damages against the lender that may be grounds for contractual rescission, if asserted in a timely manner before the foreclosure sale; and (4) breach of certain duties by the trustee or lender. The claims may be asserted in an unlawful detainer action and must be asserted or brought within one year from the date of the sale.

Tenants in Foreclosed Houses

A tenant in possession of a rental housing unit at the time the property is sold in foreclosure must be given 60 days written notice before the owner may evict the tenant. When posting a notice of sale on residential real property in which there might be a tenant, a trustee must also post a notice

telling the resident that: (1) 20 days after the date of the notice, the property may be sold at foreclosure; and (2) if the person is a tenant, the new property owner may either enter into a new lease or provide the tenant with a 60-day eviction notice. This section expires January 1, 2013.

Duty of Servicers

The Legislature declares that any duty that servicers may have to maximize net present value under their pooling and servicing agreements is owed to all parties in a deed of trust pool and not to any particular party. A servicer acts in the best interest of all parties if it agrees to a deed of trust modification or workout plan when the deed of trust is in payment default (or payment default is foreseeable) and the anticipated recovery under a modification or workout plan is more than the anticipated recovery from a foreclosure. The mortgagee, beneficiary, or agent must offer the borrower a modification or workout plan if consistent with its contractual or other authority.

Enjoining a Sale

Upon good cause shown to the court, a foreclosure sale of an owner-occupied residence may be enjoined if the lender has not been responsive to a borrower's documented, reasonable, and material requests.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.