

SENATE BILL REPORT

SB 5275

As of February 10, 2011

Title: An act relating to protecting and assisting homeowners from unnecessary foreclosures.

Brief Description: Addressing homeowner foreclosures.

Sponsors: Senators Kline, Haugen, Kohl-Welles, Hargrove, Rockefeller, Nelson, Ranker, Keiser, Swecker, White, Conway, Hobbs, Chase, Harper, Kilmer, Prentice, Shin, Murray, Fraser and McAuliffe.

Brief History:

Committee Activity: Financial Institutions, Housing & Insurance: 1/26/11.

SENATE COMMITTEE ON FINANCIAL INSTITUTIONS, HOUSING & INSURANCE

Staff: Alison Mendiola (786-7483)

Background: Deeds of Trust. A deed of trust is a type of security interest in real property. A deed of trust is essentially a three-party mortgage. The borrower (grantor) grants a deed creating a lien on the real property to a third party (the trustee) who holds the deed in trust as security for an obligation due to the lender (the beneficiary).

The major difference between a deed of trust and a mortgage is that the deed of trust may be nonjudicially foreclosed, whereas a mortgage may only be foreclosed judicially. If the grantor defaults on the loan obligation, the trustee may foreclose on the real property as long as certain procedural and notice requirements are met.

The trustee of a deed of trust may be a domestic corporation, a title insurance company, an attorney, a professional corporation whose shareholders are licensed attorneys, an agency of the United States government, a bank, or a savings and loan association. A trustee must resign at the request of a beneficiary, and the beneficiary may designate a successor trustee.

In order for a deed of trust to be nonjudicially foreclosed, the following requirements must be met: (1) the deed contains a power of sale and provides that the real property is not used principally for agricultural purposes; (2) a default has occurred which makes the power of sale operative; (3) the deed has been recorded; (4) a notice of default is sent at least 30 days before a notice of sale is recorded; and (5) no other action is pending to seek satisfaction of an obligation secured by the deed of trust.

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.

To initiate foreclosure procedures the trustee must (1) file a notice of trustee's sale 90 days before the sale; (2) send notice of the sale to the grantor, beneficiary, and any other person with a recorded interest in the land; (3) post the notice on the property or personally serve any occupants; and (4) publish the notice of sale in a newspaper at specified dates.

The sale may not take place less than 190 days from the date of default. Any person other than the trustee may bid on the sale.

The proceeds of the foreclosure sale are distributed first to the expenses of sale and the obligation secured by the deed of trust, and the surplus is deposited with the clerk of the court. Any interests or liens on the real property that are eliminated by the sale are attached to the surplus proceeds.

Notice of trustee's sale must be given to occupants of property consisting of a single-family residence, condominium, cooperative, and dwelling with less than five units; the notice must identify personal property that may be sold and any other action that is pending to foreclose on another security; the notice must specify the potential effects of foreclosure on the occupants of the property, and there are two eight-day time periods during which the trustee must publish the notice of sale in a legal newspaper.

The trustee has a duty of good faith to the beneficiary, grantor, and others with an interest in the property.

Certain claims, such as the trustee's failure materially to comply with the deed of trust law, are not waived by the borrower's failure to bring a lawsuit to prohibit a foreclosure sale of an owner-occupied one- to four-unit residence, but these claims must be asserted within two years of the foreclosure sale.

There must be proof that the beneficiary is the actual holder of the obligation secured by the deed of trust.

Meet and Confer Requirements. In 2009 ESB 5810 placed into law an additional step in the foreclosure process for deeds of trust made from January 1, 2003, to December 31, 2007, for owner-occupied, residential property. For such properties, a 30-day extension is made to the current timeline for foreclosure. Thirty days must pass before the notice of default can be filed. The 30 days are measured from the time the lender contacts the borrower, or satisfies due diligence requirements to contact the borrower, to work out a way to avoid foreclosure.

Obligations of the lender to the borrower are to advise the borrower of his or her right to request a subsequent meeting, to schedule that meeting to occur within 14 days, and to give the borrower a toll-free telephone number for contacting a HUD-certified housing counselor.

The notice of default must include a declaration from the lender that it contacted the borrower or used due diligence in attempting to do so. Actions by the lender to contact the borrower and the times at which these actions are to be taken are specified in detail.

Under certain circumstances the 30-day delay in filing the notice of default and the due diligence requirements need not be met. This meet and confer requirement expires on December 31, 2012.

Tenants. Tenants in non-owner-occupied one- to four-unit residences must be notified of the impending foreclosure sale; the potential consequences to them; and their option to contact a lawyer, legal aid, or a housing counselor about their rights. Tenants living in foreclosed property must be given written notice 60 days before they are removed from the property by an unlawful detainer action.

Mediation. Mediation, a form of alternative dispute resolution, is a way of resolving disputes between two or more parties. A third party, the mediator, assists the parties to negotiate their own settlement.

Summary of Bill: Meet and Confer. The meet and confer requirements established in ESB 5810 apply to all deeds of trust and this requirement does not expire. The form that the beneficiary or its authorized agent must complete is revised.

In addition to the meet and confer requirements, after the notice of default has been issued but before the notice of sale is recorded, the beneficiary or authorized agent must conduct a good faith review of the borrower's financial situation and, if the borrower is eligible, must offer a loan modification or other option to assist the borrower in avoiding foreclosure.

Foreclosure Mediation. Prior to recording the notice of sale, the beneficiary or authorized agent is to provide notice to the borrower and the Department of Commerce (Commerce) information including (1) contact information of the person with authority to negotiate a loan modification on behalf of the beneficiary, (2) contact information for housing counselors, and (3) information regarding the availability of the Foreclosure Mediation Program (mediation), on a form proscribed by Commerce. The borrower elects whether or not to opt-in to mediation. The form is to be returned to Commerce within 30 days or the borrower is deemed to have waived mediation and the beneficiary is able to proceed with the foreclosure..

Within five days of being notified that a borrower opts for mediation, Commerce selects the mediator and notifies the parties. Commerce maintains a list of approved mediators who may be attorneys licensed to practice in Washington, employees of a HUD-certified counseling agency, employees or volunteers of dispute resolution centers under Chapter 7.75 RCW, retired Washington judges, statewide organizations that provide mediation services, or others as authorized by Commerce.

The mediator must convene the mediation with 45 days of receiving the referral from Commerce, unless both parties agree to extend the time. The parties must receive 15 days advance notice of the mediation, and at that time the parties are provided a form stating what materials are required for the parties to mediate in good faith. Ten days prior to the mediation the parties are to share information necessary for the mediation, as provided in statute.

Within seven business days of the mediation the mediator must provide a written certification to Commerce and the parties including whether the default was cured and the parties acted in good faith. At this point, the foreclosure proceeding may continue.

Unless agreed otherwise, the mediation fee is not to exceed \$400 and includes a mediation session lasting from one to three hours, paid equally by both parties.

Starting in 2012 and annually thereafter, Commerce is to report to the Legislature the performance of the program, the results of the mediation program, and any recommendations for statutory changes.

A trustee may not record a notice of sale until the trustee has received a waiver of foreclosure mediation or a certificate provided by the mediator.

Community banks and credit unions are exempt from the mediation requirements.

Recording Surcharge. There is a \$30 surcharge at the time of recording a notice of trustee's sale on owner-occupied residential real property. Commerce is to use the funds to fund housing counselors.

Consumer Protection Act (CPA). It is a violation of the CPA for any party to violate the good faith requirements of the mediation program or for any person to fail to comply with the meet and confer requirements.

Appropriation: None.

Fiscal Note: Available.

[OFM requested ten-year cost projection pursuant to I-960.]

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.