

HOUSE BILL REPORT

SSB 5378

As Reported by House Committee On:
Judiciary

Title: An act relating to deeds of trust.

Brief Description: Modifying deeds of trust provisions.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Weinstein, Kline and Rockefeller).

Brief History:

Committee Activity:

Judiciary: 2/26/08, 2/28/08 [DPA].

Brief Summary of Substitute Bill (As Amended by House Committee)

- Provides that the trustee does not have a fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust.
- Provides that the trustee is required to act impartially between the borrower, grantor, and beneficiary.
- Modifies notice requirements relating to trustee foreclosure sales.
- Provides that a trustee may decline to complete a sale or deliver the deed if it appears the bidding has been collusive or defective, or that the sale might have been void.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 11 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern, Flannigan, Kirby, Moeller, Pedersen, Ross and Williams.

Staff: Sean Gamble (786-5793) and Lara Zarowsky (786-7123).

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.

Background:

Deed of Trust

A deed of trust is, in essence, 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 deed of trust transfers title to the borrower, yet the trustee has a lien against the property until the borrower pays off the obligation in full.

Trustee

The trustee of a deed of trust may be, among others, a domestic corporation that has at least one officer who is a Washington resident; a title insurance company; an attorney; a professional corporation; or a bank or savings and loan association. A trustee may resign or be replaced by the beneficiary. The successor trustee has all powers of the original trustee once the appointment of the successor trustee is recorded in each county where the deed of trust is recorded.

Non-judicial Foreclosure

A deed of trust may be foreclosed without a judicial proceeding. If the borrower defaults on the obligation, for example by failing to make a payment under the deed of trust, the trustee may foreclose on the property by conducting a public trustee sale when the required procedural and notice requirements are met.

In order for a deed of trust to be non-judicially 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; (5) no other action is pending to seek satisfaction of an obligation secured by the deed of trust, and (6) the trustee has a street address in the state where personal service of process may be made.

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 for specified time periods.

One seeking to stop a commercial or residential foreclosure sale must apply for a preliminary injunction from a court and post a certain amount of security with the court. The challenger or borrower must deposit with the court either the "principal, interest, and reserves" required monthly under the deed, if the borrower is in default of such payment, or the amount of monthly interest required, if the obligation is then payable in full.

Summary of Amended Bill:

Trustee Rights and Obligations

The trustee or successor trustee does not have a fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust. The trustee or successor trustee is required to act impartially between the borrower, grantor, and beneficiary.

The trustee may decline to complete a sale or deliver the trustee's deed and refund the purchase price if it appears that the bidding has been collusive or defective, or that the sale might have been void.

Washington Presence

Prior to the date of notice of trustee's sale and continuing through the date of the sale, the trustee must maintain a Washington street address where personal service of process may be made. The trustee also must maintain a physical presence in Washington and have telephone service at the Washington street address.

Notice Requirements

When a trustee reschedules the foreclosure sale for a later date, the trustee is required to give notice of the new time and place of the sale to the borrower, grantor, and junior lien holders, by both first class and either certified or registered mail, return receipt requested. The notice must be mailed at least four days before the new date fixed for the sale if the sale is continued for up to seven days, or at least three days after the date of the continuance by oral proclamation if the sale is continued for more than seven days.

The trustee will respond to any written request for current payoff or reinstatement amounts within 10 days of receipt of the grantor's written request. The Notice of Foreclosure Form is amended to require notice to the grantor of the amount of principal and interest, plus costs and advances, remaining on the deed of trust.

Restraining Orders or Injunctions

A trustee sale may be restrained on any proper legal or equitable ground. The issuance of a restraining order or injunction shall not prohibit the trustee from continuing the sale as provided in the Deeds of Trust Act.

Amended Bill Compared to Substitute Bill:

The language requiring the trustee to have a duty of fairness and impartiality to the grantor, beneficiary, and other persons having an interest in the real property subject to the deed of trust, is removed. Language is added that requires the trustee to act impartially between the borrower, grantor, and beneficiary.

The number of persons the trustee is required to provide written notice of an oral continuance of a foreclosure sale is limited only to the borrower, grantor, and junior lien holders. The trustee must provide written notice of an oral continuance of a foreclosure sale only if the continuance is beyond the date of the originally scheduled date of sale.

The provision in the underlying bill, granting discretion to judges in setting the security amount when a debtor attempts to enjoin a foreclosure sale, is removed.

The definition of residential property is removed, as are references to residential and nonresidential property.

Appropriation: None.

Fiscal Note: Not requested.

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

Staff Summary of Public Testimony:

(In support) This bill was initiated to address deficiencies in the Deeds of Trust Act, and has been worked on by many parties. It addresses ambiguity created in the Cox case by clarifying that a trustee does not have a fiduciary duty, but rather a duty of fairness and impartiality. There is case law addressing the duty of fairness and impartiality, or neutrality, which is the common standard around the country. The bill addresses issues of notice, postponement, and trustee discretion. It also allows easier access to lenders by debtors, including information on what is owed on the loan, by requiring trustees to have presence and telephone numbers in the state. A fair response period for the trustees is also created by requiring them to reply within 10 days of receiving a written request for information.

(In support with concerns) There has been a lot of discussion on this bill, and parties have been working towards agreement. The housing crisis is a concern shared by everyone. The banking industry has formed alliances in an effort to increase outreach to borrowers, voluntarily lengthening the foreclosure process. Thirty days automatic continuance is available when requested. One concern around the bill deals with the duty of fairness and impartiality. The impact of this may cloud titles and chill bidding. Parties are working to compromise on these issues.

(Opposed) None.

Persons Testifying: (In support) Aleana Harris, Real Property, Probate, and Trust Section of the Washington State Bar Association; and David Leen.

(In support with concerns) Michaela Albon, Washington Mutual.

Persons Signed In To Testify But Not Testifying: None.