
Judiciary Committee

ESB 5810

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

Brief Description: Concerning foreclosures on deeds of trust.

Sponsors: Senators Kauffman, Berkey, Shin, Franklin, Keiser, Tom and Kohl-Welles; by request of Governor Gregoire.

Brief Summary of Engrossed Bill

- Requires a beneficiary, before issuing a notice of default, to contact the borrower and explore options for the borrower to avoid foreclosure.
- Provides that a tenant of property that has been sold in foreclosure receive 60 days written notice before the tenant can be removed.
- Provides that a borrower's failure to enjoin a foreclosure does not constitute a waiver of certain claims.
- Requires that before a notice of sale may be recorded, the trustee must have proof that the beneficiary is the actual holder of the promissory note secured by the deed of trust.

Hearing Date: 3/23/09

Staff: Trudes Tango (786-7384)

Background:

Unlike mortgages, which require judicial foreclosure, deeds of trust may be nonjudicially foreclosed if the borrower defaults on the loan obligation. The deeds of trust statutes establish procedures that must be followed by beneficiaries, trustees, and borrowers. The trustee must act impartially between the borrower, grantor, and beneficiary.

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 sale 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 grantor. After 30 days from the date the notice of default is sent, the trustee may record a notice of the foreclosure sale. The foreclosure sale may not occur until after 90 days from the time the notice of foreclosure sale is recorded, mailed, and served. Within certain time frames, the borrower may cure the default and discontinue the sale. The trustee's sale is automatically stayed if the borrower files for bankruptcy.

The borrower may file an action in court to enjoin the sale on any proper ground, such as an assertion that the borrower is not in default on the loan or that the borrower did not receive the required notices. The action to enjoin the sale can be filed anytime before the scheduled trustee sale, but five days notice of the action must be given to the trustee and the beneficiary.

In *Brown v. Household Realty Corp.* (2008), the Washington Court of Appeals held that a party waives the right to post-foreclosure sale remedies where the party failed to bring an action to enjoin the sale. The court stated that applying the waiver doctrine furthers 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.

Once the property is sold, the purchaser has the right to possession of the property on the 20th day following the sale.

Summary of Bill:

Changes are made to the procedures for foreclosure on deeds of trust. The trustee has a duty of good faith to the borrower, beneficiary, grantor, and other persons with an interest in the property.

Requirement to contact the borrower

A notice of default may not be issued to the borrower until 30 days after the beneficiary contacts, or exercises due diligence to contact, the borrower to explore options to avoid foreclosure. During the initial contact, the beneficiary must advise the borrower that he or she has the right to request a subsequent meeting, which if requested, the beneficiary must schedule within 14 days. The borrower must be provided with contact information for a HUD-certified counseling agency.

A notice of default must include a declaration by the beneficiary that it has contacted, or tried with due diligence to contact, the borrower. A trustee is not liable for the beneficiary's failure to satisfy the contact requirements.

Due diligence includes mailing the borrower a letter, calling the borrower at various times, providing the beneficiary's toll-free number for the borrower to call, and if the beneficiary has a website, posting a link on the website with information specifically for borrowers in default.

The contact requirement does not apply in specified circumstances, such as if the borrower has surrendered the property. The contact requirement does not apply to: deeds of trust securing a debt incurred primarily for commercial purposes; securing a guarantor's obligations under a guaranty; or seller-financed sales.

The contact requirement applies to deeds of trust for owner-occupied residential real property made from January 1, 2003, to December 31, 2007. The contact requirement expires on December 31, 2012.

Tenants in possession of property sold at foreclosure

Upon posting a notice of trustee sale, the trustee must also post on nonowner-occupied residential real property a notice that states: the property may be sold at foreclosure; and the tenant may enter a new lease with the new owner or may be given a 60-day notice to vacate. The trustee or beneficiary must also mail the notice to the address of the property subject to foreclosure.

If the property is sold, the new owner must give the tenant 60 days written notice before the tenant may be removed. The new owner may negotiate a new lease with the tenant or offer to pay the tenant to vacate sooner.

The 60-day notice provisions for tenants expire on December 31, 2007.

Nonwaiver of claims

The failure of a borrower or grantor to enjoin a foreclosure sale does not constitute a waiver of the following claims: common law fraud, misrepresentation or breach of contract; unlawful lending under the mortgage lending laws; and failure of the trustee to materially comply with the provisions of the deeds of trust statutes.

A nonwaived claim may be brought in an unlawful detainer action if the borrower or grantor asserting the claim is a defendant in an unlawful detainer action brought by the lender. A borrower or grantor may assert a nonwaived claim independently against a lender or trustee regardless of whether a third party was a successful bidder at the foreclosure sale.

The nonwaived claims must be asserted within two years from the date of the foreclosure sale. The claim may not seek any remedy other than money damages unless the property is owned by the beneficiary at the time the action is filed. If the borrower or grantor brings in the same civil action a Consumer Protection Act (CPA) claim arising out of the same alleged facts, relief is limited to actual damages, treble damages as allowed under the CPA, and a reasonable attorney's fee.

The claim may not otherwise affect the validity or finality of the foreclosure sale to a bona fide purchaser.

Requirement before notice of sale is recorded

Before the notice of sale can be recorded, transmitted, or served, the trustee must either: have proof that the beneficiary is the actual holder of the promissory note secured by the deed of trust; or possess the original note showing that the entity initiating the foreclosure sale has the authority to enforce the note. Proof that the beneficiary is the actual holder of the note must be made by affidavit by a person with personal knowledge of the physical location of the note. If the original note is lost, the beneficiary may provide a copy of the notice and a notarized statement asserting that the original note has been lost.

Appropriation: None.

Fiscal Note: Available.

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