

HOUSE BILL REPORT

ESB 5810

As Reported by House Committee On:
Judiciary

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 History:

Committee Activity:

Judiciary: 3/23/09, 3/26/09 [DPA].

**Brief Summary of Engrossed Bill
(As Amended by House)**

- 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.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 11 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Flannigan, Kelley, Kirby, Ormsby, Roberts, Ross and Warnick.

Staff: Trudes Tango (786-7384)

Background:

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.

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.

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.

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

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.

Summary of Amended Bill:

Changes are made to the procedures governing foreclosures on deeds of trust securing residential real property. These changes affect beneficiaries, trustees, purchasers, and tenants of property subject to a trustee sale. The trustee has a duty of good faith to the borrower, beneficiary, and grantor.

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 by phone and by mail to explore options for the borrower 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 of the request. The borrower must be provided with contact information for a HUD-certified counseling agency, for the Department of Financial Institutions, and the for statewide legal aid hotline.

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, absent a violation of the trustee's duty of good faith.

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 commercial loans, obligations of a grantor who is not the borrower or a guarantor, seller-financed sales, and when the beneficiary is a homeowners' or condominium association. 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 stating that 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 purchaser of tenant-occupied property 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.

"Tenant-occupied property" means property consisting solely of residential real property that is the principal residence of a tenant or other building with four or fewer residential units that is the principal residence of a tenant.

Nonwaiver of Claims.

The failure of a borrower or grantor to enjoin a foreclosure sale does not constitute a waiver of claims for: common law fraud or misrepresentation; a violation of Title 19 RCW (business regulations, including the Consumer Protection Act); and failure of the trustee to materially comply with the provisions of the deeds of trust statutes.

The nonwaived claims must be asserted within two years from the date of the foreclosure sale, or within the applicable statute of limitations for the claim, whichever expires earlier. If the borrower or grantor brings in the same civil action a Consumer Protection Act 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.

This provision regarding claims applies only to foreclosures of owner-occupied residential real property and does not apply to foreclosures of deeds of trust used to secure commercial loans.

Requirement Before Notice of Sale is Recorded.

Before the notice of sale can be recorded, transmitted, or served, the trustee must have proof that the beneficiary is the actual holder of the promissory note secured by the deed of trust. Proof that the beneficiary is the actual holder of the note may be made by a declaration signed by the beneficiary. The trustee may rely on the beneficiary's declaration as evidence of proof, absent a violation of the trustee's duty of good faith. This requirement does not apply to beneficiaries that are homeowners' or condominium associations.

The notice of default that must be sent at least 30 days prior to recording the notice of sale must contain contact information for the Department of Financial Institutions and the statewide civil legal aid hotline. The notice of default on deeds of trust for residential real property must also contain the name and address of the owner of any promissory notes or other obligations and the name, address, and telephone number of a servicer of the obligation secured by the deed of trust.

Amended Bill Compared to Original Bill:

The striking amendment:

- requires the beneficiary's initial contact to be by letter as well as by phone;
- provides that the contact requirement does not apply when the beneficiary is a homeowner or condominium association;
- removes the provision allowing the claim to be raised in an unlawful detainer action;
- removes breach of contract from the types of claims that are not waived;
- adds to the list of nonwaived claims a violation of Title 19 RCW (regulations of businesses, including the Consumer Protection Act);
- removes language allowing for relief other than money damages if the property is owned by the beneficiary at the time the claim is brought;
- clarifies that the nonwaived claims must be brought within two years of the foreclosure sale or within the applicable statute of limitation for the claim, whichever is earlier;
- provides that the trustee's proof of the beneficiary's ownership of the promissory note may be in the form of the beneficiary's declaration (language regarding the trustee having possession of the original note is removed);
- requires that the notice of default must contain the name and address of the owner of the promissory note and servicer of any obligation secured by the deed of trust;
- clarifies that the requirement for the proof of ownership of the note applies only to residential real property;
- removes language stating the purchaser may offer a tenant payment in exchange for the tenant vacating the property before the 60 days expires;
- defines "tenant-occupied" property as property consisting solely of residential real property that is the principal residence of a tenant or other building with four or fewer residential units that is the principal residence of a tenant;

- removes the expiration date that applied to the sections on notice to tenants;
 - removes language imposing on a trustee a duty of good faith to persons other than the borrower, beneficiary, and grantor; and
 - makes other changes for clarification.
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Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) This bill has been worked on very carefully after many meetings with representatives from the community banks, consumers, and mortgage lenders. This is a compromise bill. It has been amended significantly from the original version. This is a consumer protection bill that will help homeowners who are trying to avoid foreclosure. It will require lenders to try to work out plans with borrowers to avoid foreclosure. It also provides tenants with sufficient notice so tenants who are living in houses subject to foreclosure are not surprised when the property is eventually sold. The bill provides protection to homeowners who are victims of fraud. They will be able to take their fraud claims to court. Claims brought under the bill will not put a cloud on the title of the property. Many foreclosure sales occur even when nobody can prove who owns the promissory note secured by the property; this bill will help to ensure that does not happen. This bill could be stronger for homeowners and could have more teeth, but it is a good first step towards helping homeowners. It is important that something be done to help homeowners during this economic crisis.

(Opposed) None.

Persons Testifying: Senator Kauffman, prime sponsor; Kari Burrell, Washington Office of the Governor; Marc Gaspard, United Financial Lobby; Marsha Osborn, Association of Community Organizations for Reform Now (ACORN); Bruce Neas, Columbia Legal Services; Kim Herman, Housing Finance Commission; and Holly Chisa, United Trustees Association.

Persons Signed In To Testify But Not Testifying: None.