

SENATE BILL REPORT

ESB 5810

As Amended by House, April 9, 2009

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: Financial Institutions, Housing & Insurance: 2/18/09, 2/24/09 [DPS].

Passed Senate: 3/12/09, 33-16.

Passed House: 4/09/09, 98-0.

SENATE COMMITTEE ON FINANCIAL INSTITUTIONS, HOUSING & INSURANCE

Majority Report: That Substitute Senate Bill No. 5810 be substituted therefor, and the substitute bill do pass.

Signed by Senators Berkey, Chair; Hobbs, Vice Chair; Franklin, McDermott, Parlette and Schoesler.

Staff: Diane Smith (786-7410)

Background: 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, or a bank or savings and loan association. A trustee must resign at the request of a beneficiary, and the beneficiary may designate a successor trustee.

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.

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.

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 at the sale. After sale of the property there is no right of redemption and no right to a deficiency judgment.

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 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.

Summary of Engrossed Bill: For deeds of trust made from January 1, 2003, to December 31, 2007, for owner-occupied, residential property, 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 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.

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 60 days' written notice before they are removed from the property by an unlawful detainer action.

The trustee has a duty of good faith to the beneficiary, grantor, and others with an interest in the property. This requirement has no expiration date.

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 enjoin 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. This requirement has no expiration date.

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

Existing law is conformed to the specific requirements of this bill.

Other than as mentioned above, this bill expires January 1, 2013.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

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

Staff Summary of Public Testimony: PRO: The numbers of foreclosures are increasing and are expected to continue to increase for some period. This bill will complement very well the Obama plan that came out today. Our Senate provided a wonderful package of counseling for homeowners last year. The landscape continues to change. We continue to work with the banks and the bar association. While the legal language is complicated, we need to make sure it protects both the financial institutions and the consumers. This bill is part of the Governor's stimulus package. A lot of work has been done to prevent foreclosures in the future. This bill helps people who are struggling now. Loan modifications are just not happening. This bill will not be enough. Lenders are not acting correctly. The third party trained mediation could be the solution to this crisis in a lot of ways. We need a loan modification plan with teeth. The Brown court case fix is important. If done right, this could be the single most important piece of consumer protection legislation we see in our careers. There were more January foreclosures than sales in King County. Few homeowners know who has the authority to negotiate with them due to loan repackaging. The entity owning the loan should have to present the paper to prove they have authority to foreclose.

CON: It is important to maintain the trustee's impartiality by not adding duties that undermine that neutrality. The unconstitutionality arises from casting too large a net.

OTHER: We are concerned that we get this legislation right for consumers and for the health of our financial institutions. We need to amend the bill so that nonjudicial foreclosure works for both parties. This bill is important in preventing foreclosures. When people get

depressed, they get difficult to reach. Some language in the bill is not applicable to our Deed of Trust Act and some is unconstitutional. It is important to strike the balance between judicial and nonjudicial foreclosure. Trustees do not want to be caught in the middle of terms that are not well defined.

Persons Testifying: PRO: Kari Burrell, Governor's Policy Office; Melissa Huelsman, private consumer attorney; Bruce Neas, Columbia Legal Service; Nick Federici, Washington Low Income Housing Alliance; Georgene T. Monday, ACORN; Michelle Thomas, Tenants Union of Washington.

CON: Stu Halsan, Washington Land Title; Aleana Harris, Real Property Realtors, Trust Section of the Washington State Bar Association.

OTHER: Denny Eliason, Washington Bankers Association; Joe Sakay, Washington Mortgage Lenders Association.

House Amendment(s): Requires the beneficiary's initial contact to be by phone and letter. The contact requirement does not apply when the beneficiary is a homeowner or condominium association. Language stating the contact requirements do not apply if the borrower contracts with a distressed home consultant is removed.

The provision allowing the claim to be raised in an unlawful detainer action is removed. An action for breach of contract is removed from the types of claims that are not waived. A violation of Title 19 RCW (regulations of businesses, including the Consumer Protection Act) is added to the list of nonwaived claims. 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, is clarified.

The trustee's proof of the beneficiary's ownership of the promissory note may be in the form of the beneficiary's declaration and the language regarding the trustee having possession of the original note is removed. The trustee may rely on the declaration, unless the trustee violated its duty of good faith.

Beneficiaries that are homeowner or condominium associations are exempt from the bill. 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. That the requirements apply only to residential real property, is clarified.

Language stating the purchaser may offer a tenant payment in exchange for the tenant vacating the property before the 60 days expires is removed.

"Residential real property" is defined as property consisting solely of a single family residence, a residential condominium unit, or a residential cooperative unit.

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

The expiration date that applied to the sections on notice to tenants is removed.

Language imposing on a trustee a duty of good faith to persons other than the borrower, beneficiary, and grantor, is removed.

Makes other changes for clarification.