SENATE BILL REPORT
SB 5275

As of February 23, 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, 2/16/11 [DPS-WM].
Ways & Means: 2/24/11.

SENATE COMMITTEE ON FINANCIAL INSTITUTIONS, HOUSING & INSURANCE

Majority Report: That Substitute Senate Bill No. 5275 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Hobbs, Chair; Prentice, Vice Chair; Benton, Ranking Minority Member; Fain, Haugen, Keiser and Litzow.

Staff: Alison Mendiola (786-7483)

SENATE COMMITTEE ON WAYS & MEANS

Staff: Richard Ramsey (786-7412)

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.

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.

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.

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 (Recommended Substitute): 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. If a borrower responds to the lender's outreach or is working with an approved housing counselor or attorney, the notice of default may not be issued for 90 days from the date of initial contact.

Foreclosure Mediation. Up until the day prior to recording the notice of sale, a housing counselor or attorney working with the borrower may refer the borrower to the Department of Commerce (Commerce) for mediation.

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.

If a borrower enters into mediation, a trustee may not record a notice of sale until the trustee has received a certificate provided by the mediator.

Notice of Default Surcharge. For each owner-occupied property for which a notice of default is issued, beneficiaries are to remit $250 to Commerce to be deposited into the foreclosure fairness account which funds housing counseling, mediation, enforcement by the Office of the Attorney General and homeowner representation through the Office of Civil Legal Aid.

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.

EFFECT OF CHANGES MADE BY FINANCIAL INSTITUTIONS, HOUSING & INSURANCE COMMITTEE (Recommended Substitute): If a borrower responds to a lender's request and/or works with an approved housing counselor or attorney, the homeowner may have up to an additional 60 days to negotiate with the lender prior to the issuance of the notice of default. A housing counselor or attorney working with a homeowner has up until the day before the Notice of Trustee's Sale is issued to request mediation between the borrower and the beneficiary.

Beneficiaries are to pay a $250 fee per property for which a notice of default is issued. These funds are to pay for the mediation program, housing counseling, enforcement by the Office of the Attorney General, for foreclosure representation through the Office of Civil Legal Aid, and a foreclosure counseling outreach campaign by the Department of Financial Institutions.

No financial institutions are exempt from the provisions of this bill.

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.

Staff Summary of Public Testimony on Original Bill (Financial Institutions, Housing & Insurance): PRO: Financial institutions have not been responding to inquiries by homeowners, or a homeowner enters into a temporary loan modification and it's never made permanent, or the beneficiary still proceeds with the foreclosure resulting in confusion. Documents sent by homeowners are consistently lost. Foreclosure impacts people all across the income spectrum and creates high levels of frustration; people are feeling demoralized and are constantly resubmitting paperwork. Housing counselors are helpful but sometimes they get the same run around with lost documents or are constantly passed along to other people, given inconsistent answers. When this happens, a borrower should have the ability to mediate to see if there can be a resolution. Also, borrowers who try to modify are often just told no without any justification. What if the input was wrong, such as wrong income, value of the house, etc? Even in Nevada which has the highest foreclosure rate and mediation program, only about 15 percent of the troubled borrowers are entering mediation. The program in Nevada started from the ground up. They are still working on sorting out start-up issues but things are working well as they continue to address any systemic problems. In a non-judicial foreclosure state like Washington, borrowers are at a disadvantage because there is no third-party overseeing the process which is why mediation is necessary. Over 20 states have some sort of foreclosure mediation program. We want an effective system and not litigation. The issue of foreclosure is the greatest challenge in the Attorney General's Office. Adding the Consumer Protection Act as a remedy that would be helpful. Counseling is also tremendously effective, to date of the 3,700 families that have gone through foreclosure counseling, 60 percent have reached a resolution, which doesn't necessarily mean they kept the house. Families just want a straightforward timely option to talk with their lenders. Banks are ignoring federal programs meant to help homeowners, leaving families at the mercy of large lenders.

CON: Trustees need certainty so they can execute a sale without a challenge and the effectiveness to ensure that when a homeowner is looking to reinstate a loan there isn't a large bill for a foreclosure at the end. As for Nevada's mediation program, there has been lower participation than anticipated. Lenders are increasing their loss mitigation efforts indentifying homeowner's with an income who would qualify to modify. Many are going to mediation but don't have the qualification needed to modify. Meanwhile, the homeowners are staying in their homes during this process without paying. In Nevada there is a problem getting the certificates due to a backlog and a problem with the language of the statute. Sometimes lenders are considered not to be in compliance for completely frivolous issues. Foreclosure should be the option and everyone's situation is different. Other changes can be made to our statutes without requiring mandatory mediation. Mediation is supposed to be voluntary so you can't compel a result. Borrowers might think they are eligible for a loan modification but there are a lot of factors to consider. The Colorado model of working with qualified borrowers has been successful, so much so that the feds have asked Colorado to share their model. The role of a housing counselor can serve the interests of both the borrower and lender.

OTHER: Commerce has no position on the bill, but if the recording fee was used for counseling instead of mediation then there would be no general-fund impact. The mediation process in the bill is not what is considered traditional mediation. The role of the Attorney

General is not to sue on behalf of the individual but the marketplace, so they look for trends and act accordingly.

Persons Testifying (Financial Institutions, Housing & Insurance): PRO: Senator Kline, prime sponsor; Bev Spears, Kate Buber, Statewide Poverty Action Network; Erin Reardon, Solid Ground; Simona Alvarez, Arturo Gonzalez, El Centro de la Raza; Silvia Hurtado, Eleazar Sevilla, Nels Cone, homeowners; Jonathon Johnson, National Association for the Advancement of Colored People; Michael Warren, Washington State Alliance for Retired Americans; Steve Breaux, Washington Public Interest Research Group; Sara Jane Siegfriedt, King County Democrats; Tom Borer, private investor; Peggy Quan, American Association of Retired People; Flor Alaron, Poverty Action Network; Dan Blackstrom, Nancy Beck, Michael Bird, citizens; Lili Sotelo, Northwest Justice Project; Kim Herman, Washington State Housing Finance Commission; Marc Cote, Washington Homeownership Resource Center; Loren Shekell, Parkview Services; Alex Kamaunu, Family Finance Resource Center; Angela Brand, Sandy Thueringer, Service Employees International Union 775; Connie Brown, Tacoma Pierce County Affordable Housing; John-Paul Cloisson-Cardenas, Washington Community Action Network.

CON: Denny Eliason, Washington Bankers Association; Michelle Redosavich, Davis, Wright and Tremaine; Zachary Urban, Colorado Coalition of Housing Counseling; Michael Brooks, United Trustees Association; James McMahan, Washington Association of County Officials; Karen Gibbon, Real Property Section of the Washington State Bar Association.

OTHER: Jim Sugarman, Office of the Attorney General; Dan McConnon, Department of Commerce.