SB 876

Department of Legislative Services

Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE

Senate Bill 876 (Senator Benson, *et al.*)
Judicial Proceedings

Foreclosure - Indorsement of Debt Instrument, Lost Note Affidavit, and Penalties for False Statements

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This bill requires that an order to docket (OTD) or a complaint to foreclose a mortgage or deed of trust on a residential property be accompanied by the original or a certified copy of a debt instrument indorsed to the plaintiff or secured party, accompanied by an affidavit certifying ownership of the debt instrument. The bill also alters the circumstances under which a court may accept a lost note affidavit, by requiring that the affidavit list each owner in the chain of title of the debt instrument and state from whom and the date on which each owner acquired ownership. The bill makes it a misdemeanor for a person to knowingly make a false statement in a document required to be filed with the court related to a matter to foreclose a mortgage or deed of trust on residential property. On conviction, a person is subject to maximum penalties of a $10,000 fine and/or one year imprisonment.

The bill applies only prospectively and has no application to any OTD or complaint to foreclose on a residential property filed before the bill's October 1, 2015 effective date.

Fiscal Summary

State Effect: Minimal increase in general fund revenues from fines collected in District Court cases. The bill's incarceration penalty is not likely to have a material impact on State finances.

Local Effect: Minimal increase in local revenues from fines collected in circuit court cases. The bill is not likely to materially affect the circuit court's operations and expenditures and the incarceration penalty is not likely to materially impact local government finances and operations.

Small Business Effect: Minimal.

Analysis

Current Law:

Foreclosure Debt Instruments and Lost Note Affidavits

An OTD or a complaint to foreclose a mortgage or deed of trust on residential property must be accompanied by, among other specified documents, a copy of the debt instrument and an affidavit certifying ownership of the debt instrument.

A person entitled to enforce a debt instrument is (1) the holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of the holder; or (3) a person who is not in possession but able to enforce a lost, destroyed, or stolen instrument or an instrument paid for by mistake. "Holder" is defined as a person in possession of a negotiable instrument that is payable either to the bearer or to an identified person that is the person in possession. The Official Comments to the Uniform Commercial Code state that a nonholder in possession of an instrument includes any other person who, under applicable law, is a successor to the holder or otherwise acquires the holder's rights.

An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving the right to enforce the instrument to the person receiving delivery. Regardless of whether a transfer is endorsed, the right to enforce the instrument, including any rights as a holder in due course, is vested in a transferee, unless the transferee engaged in fraud or illegality affecting the instrument.

If a person is not in possession of an instrument, the person may still be entitled to enforce the instrument if (1) the person was in possession of the instrument and entitled to enforce it at the time of loss of possession; (2) the loss of possession was not the result of a transfer by the person or a lawful seizure; and (3) the person cannot reasonably obtain possession because the instrument was lost, destroyed, or stolen.

Often when the original note cannot be found, the attorney for the party filing a foreclosure action makes a motion for acceptance of a lost note affidavit. In a lost note affidavit, the foreclosing party asks the court to accept a lost note affidavit in lieu of the original note on the grounds that the note is lost, destroyed, or stolen and cannot be found by the party or note holder.

In order to accept a lost note affidavit in lieu of a copy of the debt instrument, the court requires an affidavit that (1) identifies the owner of the debt instrument and states from whom and the date on which the owner acquired ownership; (2) states why a copy of the debt instrument cannot be produced; and (3) describes the good faith efforts made to produce a copy of the debt instrument.

Perjury

A person may not willfully and falsely make an oath or affirmation as to a material fact (1) if the false swearing is perjury at common law; (2) in an affidavit required by any state, federal, or local law; (3) in an affidavit made to induce a court or officer to pass an account or claim; (4) in an affidavit required by any state, federal, or local government or governmental official with legal authority to require the issuance of an affidavit; or (5) in an affidavit or affirmation made under the Maryland Rules. A violator is guilty of the misdemeanor of perjury and on conviction is subject to imprisonment for up to 10 years.

Background: According to the Department of Labor, Licensing, and Regulation (DLLR), insisting that the foreclosing party produce the debt instrument in a foreclosure proceeding is a common occurrence. This "produce the note" defense exists due to the nature of securitization and the sheer volume of loans that were originated for the secondary market during the housing bubble. As a result of these factors, chain of title is not always clear for notes tied to loans initiated during the housing bubble, and in some cases an original copy of the note is not available. Another related factor is the advent of Mortgage Electronic Registration Systems, Inc. (MERS), which created a shadow system to track ownership of mortgages and servicing rights separate from state and local land records. During the peak years of the housing bubble, MERS was frequently named as owner of record or beneficiary on the applicable security instrument for many mortgages and deeds of trust.

DLLR also asserts that Maryland case law is relatively settled on the subject of assignments of notes and MERS. As the preferred security instrument in Maryland is a deed of trust and there is no statutory obligation to record the conveyance of a deed of trust note, analysis of whether an instrument was validly assigned is typically done under the Uniform Commercial Code (UCC) because the note is considered a negotiable instrument. The general UCC rule is that the right to enforce a negotiable instrument is transferred with possession of the instrument. *PNC Bank, Nat. Ass'n v. Braddock Properties*, 215 Md. App. 315 (2013). This interpretation effectively obviates the need for a chain of title analysis as possession of the note is the determinative factor when a plaintiff's standing to foreclose is determined. See *Anderson v. Burson*, 424 Md. 232 (2011) and *Deutsche Bank Nat. Trust Co. v. Brock*, 430 Md. 714 (2013) where a holder of a deed of trust note that is indorsed was entitled to enforce the note without proving how it came into possession of the note.

Additional Information

Prior Introductions: None.

Cross File: HB 1215 (Delegate B. Robinson) - Rules and Executive Nominations.

Information Source(s): Department of Labor, Licensing, and Regulation; Office of Administrative Hearings; Judiciary (Administrative Office of the Courts); *The Daily Record*; Department of Legislative Services

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