

Department of Legislative Services
 Maryland General Assembly
 2017 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 936 (Senator Smith)
 Judicial Proceedings

Residential Property - Foreclosure Timelines and Procedures

This bill makes several changes to the law related to foreclosures in the State. The bill (1) expands the required contents of a final loss mitigation affidavit; (2) extends the timeline for filing an action to foreclose a mortgage or deed of trust; (3) expands the required contents of an order to docket (OTD) or complaint to foreclose; and (4) makes several changes to the postfile mediation process.

The bill has prospective application and does not apply to any foreclosure action filed before its October 1, 2017 effective date.

Fiscal Summary

State Effect: Special fund expenditures increase by approximately \$75,000 in FY 2018 for the Department of Housing and Community Development (DHCD) to prepare and provide additional documentation required under the bill. Special fund revenues decrease by approximately \$172,500 in FY 2018 due to lost interest on loans issued by DHCD from delays in the foreclosure process. General fund expenditures increase by \$49,300 in FY 2018 for the Office of Administrative Hearings (OAH) to hire an additional office clerk in order to meet the requirements of the bill, as discussed below. The Department of Labor, Licensing, and Regulation can handle the bill’s requirements with existing resources.

(in dollars)	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
SF Revenue	(\$172,500)	(\$230,000)	(\$230,000)	(\$230,000)	(\$230,000)
GF Expenditure	\$49,300	\$58,600	\$61,400	\$64,500	\$67,700
SF Expenditure	\$75,000	\$100,000	\$100,000	\$100,000	\$100,000
Net Effect	(\$296,800)	(\$388,600)	(\$391,400)	(\$394,500)	(\$397,700)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: The bill is not anticipated to affect local government operations or finances, or the operations of the circuit courts.

Small Business Effect: Minimal.

Analysis

Bill Summary:

Final Loss Mitigation Affidavit

The bill expands the required contents of a final loss mitigation affidavits. In addition to the existing requirements, a final loss mitigation affidavit must provide specific details regarding any efforts by the secured party to assist the mortgagor or grantor to avoid foreclosure. Additionally, the affidavit must disclose whether (1) the secured party received a loss mitigation application from the mortgagor or grantor; (2) the loss mitigation application was completed; (3) any documents were missing from the mitigation application; and (4) any loss mitigation programs are still available to the mortgagor or grantor.

If loan modification or loss mitigation is denied, a final loss mitigation affidavit must include a clear and detailed explanation for the denial of loan modification or loss mitigation, as well as a notice to the mortgagor or grantor of the deadline for filing an appeal to the loss mitigation analysis.

Timing of an Action to Foreclose a Mortgage or Deed of Trust on Residential Property

The bill extends, from 90 days to 120 days, the length of time after a default in a condition on which the mortgage or deed of trust authorizes a sale to be made before an action to foreclose a mortgage or deed of trust on residential property may be filed.

In addition, the bill requires that a notice of intent to foreclose (NOI) must be accompanied by a loss mitigation application for specific loss mitigation programs that are applicable to the loan that is the subject of the foreclosure. It also repeals the authorization for the notice to include a form prescribed by the Commissioner of Financial Regulation, if the secured party does not have its own loss mitigation form.

Required Contents of an Order to Docket or Complaint to Foreclose

The OTD or complaint to foreclose a mortgage or deed of trust on residential property must include an affidavit specifically detailing the results of any loss mitigation efforts prior to filing as well as the retention and nonretention options for which the loan may be eligible.

Postfile Foreclosure Mediation

The bill increases, from 30 days to 90 days, the period of time OAH may extend, for good cause, the completion of the postfile mediation process, and it describes when OAH may determine that there is good cause. The bill also, with regard to OAH instructions for the exchange of documents and information before the mediation, limits the applicability of this exchange to only the documents and information given by the secured party to the mortgagor or grantor as well as the mediator.

At a foreclosure mediation, the bill retains the requirement that the representative of the secured party have authority to settle the matter and repeals the option of the representative to be able to readily contact a person with authority to settle the matter. In addition, the bill requires the secured party to have the sole responsibility to provide documents and information to the mediator, including:

- all documents relating to loss mitigation received by the secured party from the mortgagor or grantor;
- a full payment history of the loan secured by the mortgage or deed of trust which is the subject of the foreclosure action; and
- a complete and unredacted correspondence log of account activities for the loan secured by the mortgage or deed of trust which is the subject of the action.

The secured party must also provide an affidavit disclosing the specific retention and nonretention options for which the loan secured by the mortgage or deed of trust may be eligible.

The secured party, or a representative of the secured party, must act in good faith with respect to transparency and the disclosure of any loss mitigation programs that may be applicable to the loan which is the subject of the foreclosure action, as well as act in good faith with respect to participation in the foreclosure mediation.

The bill authorizes OAH to enter an order prohibiting a foreclosure sale for up to 180 days, or an order deeming that the secured party has failed to appear if a representative of the secured party with the authority to settle the matter is not present at the mediation, as required.

The bill requires written notice to the owner of the property of a proposed foreclosure sale to be sent at least 21 days in advance of the sale.

Unless there is good cause for an untimely filing, a motion to stay the foreclosure sale – if there is no active loss mitigation – must be filed within 15 days. If there is active loss mitigation, a stay must be filed within 15 days after the date the secured party sends notice to the mortgagor or grantor that the loss mitigation has concluded.

Current Law:

Foreclosure Process in Maryland

Generally, to foreclose on residential property in Maryland, the secured party must first send an NOI to the mortgagor or grantor and the record owner, then file and serve an OTD or a complaint to foreclose. Whether an OTD is appropriate, or a complaint to foreclose, is based on the lien instrument held by the secured party. An action to foreclose a mortgage or deed of trust may not be filed until the later of 90 days after a default in a condition on which the mortgage or deed of trust specifies that a sale may be made, or 45 days after an NOI and accompanying loss mitigation application are sent. An OTD or complaint to foreclose must be filed with the circuit court, and a copy must be served on the mortgagor or grantor. An OTD or a complaint to foreclose must include, if applicable, the license number of both the mortgage originator and the mortgage lender. The OTD or complaint to foreclose must also contain an affidavit stating the date and nature of the default and, if applicable, that the NOI was sent and that the contents of the NOI were accurate at the time it was sent.

A secured party may petition the circuit court for leave to immediately commence an action to foreclose the mortgage or deed of trust if:

- the loan secured by the mortgage or deed of trust was obtained by fraud or deception;
- no payments have ever been made on the loan secured by the mortgage or deed of trust;
- the property subject to the mortgage or deed of trust has been destroyed; or
- the default occurred after the stay has been lifted in a bankruptcy proceeding.

The court may rule on the petition with or without a hearing. If the petition is granted, the action may be filed at any time after a default in a condition on which the mortgage or deed of trust provides that a sale may be made, and the secured party is not required to send a written NOI.

Perquisites for Foreclosure Sales

If the residential property *is not* owner occupied, a foreclosure sale may not occur until at least 45 days after specified notice is given. If the residential property *is* owner occupied, and postfile foreclosure mediation is not held, a foreclosure sale may not occur until the later of (1) at least 45 days after providing specified notice that includes a final loss mitigation affidavit or (2) at least 30 days after a final loss mitigation affidavit is mailed. Finally, if the residential property is owner-occupied residential property and postfile mediation is requested, a foreclosure sale may not occur until at least 15 days after the date the postfile mediation is held or, if no postfile mediation is held, the date OAH files its report with the court.

A foreclosure mediation may be extended for good cause by OAH for up to 30 days, unless there is agreement by all parties. Additionally, both parties have an obligation to provide instructions regarding documents and information to each other and the mediator. Any motion to stay a foreclosure sale must come within 15 days of the date the postfile mediation is held. Notice of the sale of a foreclosed property must be sent 10 days before the date of sale.

Generally, notice of the time, place, and terms of a foreclosure sale must be published in a newspaper of general circulation in the county where the action is pending at least once a week for three successive weeks. The first publication of the notice must be more than 15 days before the sale, and the last publication must be within one week of the sale.

Final Loss Mitigation Affidavit

The final loss mitigation affidavit is made by a person authorized to act on behalf of a secured party of a mortgage or deed of trust on owner-occupied residential property that is the subject of a foreclosure action. The affidavit must certify the completion of the final determination of loss mitigation analysis in connection with the mortgage or deed of trust, and that if denied, provides an explanation for the denial of a loan modification or other loss mitigation.

Curing Defaults

The mortgagor or grantor of residential property has the right to cure a default and reinstate the loan at any time up to one business day before a foreclosure sale by paying all past-due payments, penalties, and fees. Upon request, and within a reasonable time, the secured party or the secured party's authorized agent must notify the mortgagor or grantor or his or her attorney of the amount necessary to cure the default and reinstate the loan as well as provide instructions for delivering the payment.

Background: The number of foreclosure events on residential property in Maryland has remained stubbornly high, despite national trends downward. DHCD data demonstrates that, in 2016, 14,895 properties were the subject of a notice of mortgage loan default or OTD.

State Revenues: According to DHCD, special fund revenues decrease by \$172,500 in fiscal 2018 due to lost accrued interest on loans because of the prolonged foreclosure process authorized under the bill. This estimate takes into account the bill's October 1, 2017 effective date. Revenues decrease by \$230,000 in the out-years to reflect annualization. Specifically, DHCD estimates that revenues decrease by \$1,000 per loan for every month the foreclosure process is delayed and that the extension of the timeline for completing the foreclosure mediation hearings from 30 days to 90 days results in the loss of approximately \$190,000 in accrued interest annually. Additionally, DHCD estimates that the bill's authorization for OAH to delay the commencement of the foreclosure process from two months to six months results in the loss of approximately \$40,000 in accrued interest annually.

State Expenditures:

Department of Housing and Community Development

Special fund expenditures increase by approximately \$75,000 in fiscal 2018 for DHCD to prepare and provide additional documentation required under the bill, with total expenditures in the out-years reaching \$100,000. This estimate reflects two processes that are affected and takes into account the bill's October 1, 2017 effective date. First, DHCD advises that expenditures increase by approximately \$100 for each final loss mitigation letter as a result of additional research required. DHCD estimates that it averages 500 final loss mitigation notices each year, for a total increase of \$50,000 annually associated with that process. Second, DHCD advises that it delivers approximately 1,000 NOIs per year, and that the bill's requirements increase expenditures related to the preparation of each notice by \$50, for a total of \$50,000 annually associated with that process.

Office of Administrative Hearings

General fund expenditures for OAH increase by \$49,339 in fiscal 2018, which accounts for the bill's October 1, 2017 effective date. This estimate reflects the cost of hiring one docketing clerk to manage the more complex mediation schedule necessitated by the bill's requirements. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses. OAH advises that the scheduling of the mediation program was originally managed by two clerks, but that one clerk position was recently abolished, necessitating the hiring of another clerk to handle the enhanced scheduling.

Position	1
Regular Salary and Fringe Benefits	\$42,230
One-time Start-up Costs	6,640
Operating Expenses	469
Total FY 2018 OAH General Fund Expenditures	\$49,339

Future year expenditures reflect a full salary with annual increases and employee turnover and ongoing operating expenses.

Additional Information

Prior Introductions: None.

Cross File: None designated; however, HB 1515 (Delegate Lafferty – Environment and Transportation) is identical.

Information Source(s): Judiciary (Administrative Office of the Courts); Department of Housing and Community Development; Department of Labor, Licensing, and Regulation; Office of Administrative Hearings; State Department of Assessments and Taxation; Department of Legislative Services

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