

Department of Legislative Services
 Maryland General Assembly
 2008 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 216 (Senator Pugh and the President, *et al.*)
 (By Request – Administration)

Judicial Proceedings

Environmental Matters

**Real Property - Recordation of Instruments Securing Mortgage Loans and
 Foreclosure of Mortgages and Deeds of Trust on Residential Property**

This emergency Administration bill changes the law governing recordation and foreclosure of mortgages and deeds of trust. The bill alters the requirements for recordation, notice, service of process, court filings, and cure of defaults. The bill applies prospectively.

Fiscal Summary

State Effect: Special fund expenditures could increase by \$416,400 in FY 2009 for additional staff and the creation of a new computer database in order to process the foreclosure notices required by the bill. Future year expenditure estimates reflect inflation and the elimination of one-time costs. No effect on revenues.

(in dollars)	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Revenues	\$0	\$0	\$0	\$0	\$0
SF Expenditure	416,400	117,500	122,900	132,600	134,600
Net Effect	(\$416,400)	(\$117,500)	(\$122,900)	(\$132,600)	(\$134,600)

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

Local Effect: None.

Small Business Effect: The Administration has determined that this bill has minimal or no impact on small business (attached). Legislative Services concurs with this assessment. (The attached assessment does not reflect amendments to the bill.)

Analysis

Bill Summary:

Mortgage Recordation: The bill requires a mortgage, deed of trust, or any other instrument securing a mortgage loan on residential property to contain specified information when recorded. First, the instrument must contain either • the name and Maryland mortgage originator license number of the mortgage originator that originated the loan secured by the instrument; or • an affidavit, by the person that originated the mortgage loan secured by the instrument, affirming that the individual who originated the loan is exempt from the licensing requirement for mortgage originators. Second, the instrument must contain either • the name and Maryland mortgage lender license number of the mortgage lender that made the loan secured by the instrument; or • an affidavit, by the lender that made the mortgage loan secured by the instrument, affirming that the lender is exempt from the licensing requirement for mortgage lenders.

The bill requires the Commissioner of Financial Regulation to adopt regulations to implement the provisions of the bill, including (1) minimum requirements for the inclusion of licensing information when a mortgage, deed of trust, or other instrument securing a mortgage loan on residential real property is recorded; and (2) consequences, including penalties, for the failure to include such information. Until the commissioner adopts these regulations, the failure to include the information required by the bill when recording a mortgage, deed of trust, or any other instrument securing a mortgage loan may not be the basis for a clerk of the court to fail to record the instrument.

Timing of Foreclosure Filings: The bill prohibits the filing of an action to foreclose a mortgage or deed of trust on residential property until the later of • 90 days after a default in a condition on which the mortgage or deed of trust states that a sale may be made; or • 45 days after the notice of intent to foreclose required under the bill is sent. “Residential property” is defined under the bill to mean real property improved by four or fewer single-family dwelling units.

Petitions for Immediate Foreclosure: The bill permits a secured party to petition the circuit court for leave to immediately commence an action to foreclose a mortgage or deed of trust on residential property 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 does not need to send the written notice of intent to foreclose required under the bill.

Written Foreclosure Notice Requirements: The bill requires a secured party to send a written notice of intent to foreclose to the mortgagor or grantor and the record owner at least 45 days before the filing of an action to foreclose a mortgage or deed of trust on residential property. This notice must be sent by certified mail, postage prepaid, return receipt requested, and by first-class mail. A copy of the notice must also be sent to the Commissioner of Financial Regulation in the Department of Labor, Licensing, and Regulation. The notice must be in the form that the commissioner prescribes by regulation and contain the names and telephone numbers of the secured party, the mortgage servicer, the mortgage broker or originator, and an agent of the secured party who is authorized to modify the terms of the mortgage loan. The notice must also contain • the name and license number of the Maryland mortgage lender and mortgage originator, if applicable; • the amount required to cure the default and reinstate the loan; and • any other information that the commissioner requires by regulation. Until the commissioner adopts the applicable regulations, a notice of intent to foreclose is to be construed as sufficient if it contains the information required by the bill.

Content of Court Foreclosure Filings: The bill requires that an order to docket or a complaint to foreclose a mortgage or deed of trust on residential property contain specified information. First, the filing must include, if applicable, the license number of the mortgage originator, and the license number of the mortgage lender. Second, the filing must include an affidavit stating the date on which the default occurred, the nature of the default, and, if applicable, that the notice of intent to foreclose specified in the bill was sent to the mortgagor or grantor, along with the mailing date. Third, the filing must be accompanied by • the original or a certified copy of the mortgage or deed of trust; • a statement of the debt remaining due and payable, supported by affidavit of the plaintiff or the secured party, or their agent or attorney; • a copy of the debt instrument, accompanied by an affidavit certifying ownership of the instrument; • the original or a certified copy of the assignment of the mortgage for purposes of foreclosure, or the deed of appointment of a substitute trustee, if applicable; • a copy of the notice of intent to foreclose, if applicable; and • a notice to the mortgagor as specified in the bill. Finally, if the defendant is an individual, the filing must be accompanied by an affidavit stating that the individual is not a servicemember as defined by federal law.

Service of Process in Foreclosure Actions: The bill requires the service of process of orders to docket and complaints to foreclose on residential property. A copy of the order to docket or complaint and all other papers filed with it must be served by either personal delivery of the papers to the mortgagor or grantor, or by leaving the papers with a resident of suitable age and discretion at the mortgagor's or grantor's dwelling house or

usual place of abode. If at least two good faith efforts to complete this service of process on different days have not succeeded, the plaintiff may effect service by • filing an affidavit with the court describing the good faith efforts to complete service; • mailing a copy of the order to docket or complaint and all accompanying papers by certified mail, return receipt requested, and first-class mail to the mortgagor's or grantor's last known address; and • posting a copy of the order to docket or complaint and all accompanying papers in a conspicuous place on the property subject to the mortgage or deed of trust. The individual making service of process must file proof of service with the court in accordance with the Maryland Rules.

Notice and Timing of Foreclosure Sales: A foreclosure sale of residential property may not occur until at least 45 days after service of process is made as specified under the bill. Notice of the time, place, and terms of a foreclosure sale of residential property must be published in a newspaper of general circulation at least once a week for three successive weeks, with the first publication at least 15 days before the sale and the last not more than one week before the sale.

Right to Cure Defaults: The mortgagor or grantor of a mortgage or deed of trust has the right to cure a default and reinstate the loan at any time up to one business day before a foreclosure sale occurs 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 the individual's attorney of the amount necessary to cure the default and reinstate the loan, as well as instructions for delivering the payment.

Statute of Limitations: An action for failure to comply with the foreclosure provisions of the bill must be brought within three years after the date of the order ratifying a foreclosure sale.

Current Law: Most mortgage or deeds of trust include a "power of sale" (a provision authorizing a foreclosure sale of the property after a default) or an "assent to decree" (a provision declaring an assent to the entry of an order for a foreclosure sale after a default). When the lien instrument does not contain a power of sale or an assent to a decree, foreclosure requires the filing of a complaint, and process must be served. In this case, the action proceeds as any other civil action. Under the Maryland Rules, however, it is not necessary to serve process or hold a hearing prior to a foreclosure sale pursuant to a power of sale or an assent to a decree.

In these situations, an action to foreclose is commenced by the filing of an order to docket in the circuit court for the county where the property is located. The homeowner is not entitled to be personally served with process. Notice of the filing of the action is

required to be sent to the homeowner by certified and first-class mail; however, the lender is not required to show that the notice was actually received. Written notice of the foreclosure sale must also be sent by certified and first-class mail not earlier than 30 days and not later than 10 days before the date of the sale, but actual notice is not required. The homeowner is not entitled to a hearing before the sale – the only recourse under State law to challenge the lender’s claim of default is to file a motion for injunction to stay the sale.

Notice of the sale is required to be published in a newspaper of general circulation once a week for three successive weeks before the sale. A sale can conceivably occur within 15 days after the filing of the order to docket, but this rarely occurs in actual practice. The person making the sale must file a report of the sale with the court within 30 days. The homeowner may file exceptions to the ratification of the sale. Objections are generally based on the insufficiency of the sales price. However, the sales price must be so low as to “shock the conscience of the court” in order to set aside the sale.

Background: Maryland’s current foreclosure process, from the first foreclosure filing to final sale, is among the shortest in the nation. Maryland is a quasi-judicial state, meaning that the authority for a foreclosure sale is derived from the mortgage or deed of trust, but a court has oversight over the foreclosure sale process. Consumer advocates contend that the short timeframes and weak notice provisions in current law seriously limit a homeowner’s options to avoid foreclosure by, for example, working out a payment plan with the lender or selling the house. In addition, filing a request for an injunction is expensive, time consuming, and not a realistic option for most homeowners.

In June 2007, the Governor established the Homeownership Preservation Task Force to develop an action plan to address rising foreclosures and preserve homeownership in Maryland. The Legal and Regulatory Reform Workgroup of the task force reviewed existing laws, regulations, and practices relating to mortgage lending and foreclosures and developed recommendations to promote homeownership. The bill reflects several recommendations of the task force. The Attorney General also formed a workgroup to provide input on issues relating to lending practices in Maryland. In addition, the Senate Finance and Judicial Proceedings committees and the House Economic Matters and Environmental Matters committees held hearings during the 2007 interim to examine various aspects of mortgage lending practices and the foreclosure process.

State Fiscal Effect: Mortgage Special Fund expenditures could increase by an estimated \$416,362 in fiscal 2009, based on an anticipated July 1, 2008 hiring date. This estimate reflects the cost of the creation of a new computer database for the Commissioner of Financial Regulation to process and record the notices of intent to foreclose as required by the bill. The estimate also includes the cost of hiring two administrative specialists,

assigned to the commissioner, to process the required notices. This estimate is based on the roughly 4,100 foreclosure events that occurred in Maryland in the second quarter of 2007, as reported by the Department of Housing and Community Development. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. In addition, the estimate includes other technology costs associated with creation of the database. DLLR reports that the Mortgage Special Fund balance as of December 2007 was \$6.4 million.

Positions	2
Salaries and Fringe Benefits	\$100,942
Contractual Services – Database	300,000
Operating Expenses	<u>15,420</u>
Total FY 2009 State Expenditures	\$416,362

Future year expenditures reflect • full salaries with 4.4% annual increases and 3% employee turnover; • 2% annual increases in ongoing operating expenses; and • database maintenance.

Additional Information

Prior Introductions: None.

Cross File: HB 365 (The Speaker, *et al.*) – Environmental Matters.

Information Source(s): Office of the Attorney General (Consumer Protection Division); Department of Labor, Licensing, and Regulation; Department of Legislative Services

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