

Department of Legislative Services
Maryland General Assembly
2008 Session

FISCAL AND POLICY NOTE

Senate Bill 389 (Senator Frosh)
Judicial Proceedings

Foreclosure - Residential Property - Trustee Commissions and Attorney's Fees

This bill directs that in an action to foreclose a mortgage or deed of trust on residential property improved by four or fewer single-family dwelling units, a court may only approve a trustee commission and attorney's fees that the court finds reasonable after considering the factors enumerated in Rule 1.5 of the Maryland Rules of Professional Conduct. The bill prohibits a court from approving a trustee commission exceeding \$500 or attorney's fees exceeding \$800.

Fiscal Summary

State Effect: The bill would not directly affect State finances or operations. The bill would not materially affect the overall workload of the Judiciary.

Local Effect: None.

Small Business Effect: Potential minimal.

Analysis

Current Law/Background: A mortgage or deed of trust may 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). Under the Maryland Rules, it is not necessary to serve process or hold a hearing prior to the sale in an action to foreclose a lien pursuant to a power of sale or an order for sale under an assent to a decree. When the lien instrument does not contain a power of sale or an assent to a decree, a complaint to foreclose must be filed, and process

must be served. In this case, the action will proceed just as in any other civil action. The vast majority of mortgages and deeds of trust in Maryland contain either a power of sale or an assent to decree or both.

During a typical foreclosure, a trustee is appointed to conduct the foreclosure process on behalf of the lien holder. Once notice requirements have been met and the sale has taken place, the trustee must file with the court a report of the sale. A party to the foreclosure action may file exceptions to the sale. If no exceptions are filed or if exceptions are filed and overruled and the court is satisfied that the sale was fairly and properly made, the court may ratify the sale and refer the matter to an auditor to determine distribution of the proceeds of the sale and state an account.

First, the proceeds are used to pay expenses relating to the sale, including the trustee's commission, the cost of sending and filing required notices, advertising costs, and attorney's fees other than those specified in the lien instrument. Second, the unpaid principal, late fees, interest, attorney's fees, and any other unpaid charges that are specified in the lien instrument are paid. Finally, any remaining funds from the foreclosure sale go to the mortgagor.

Most mortgages and deeds of trust contain clauses wherein the borrower contractually agrees to pay a specific trustee's commission and attorney's fees in the event of a foreclosure following default. In Maryland, trustee commissions are set by local circuit court rules and are based on the sales price, generally 5% of the sales price. Trustee commissions, auctioneer fees, and attorney's fees must be approved by the court before payment.

Rule 1.5 of the Maryland Rules of Professional Conduct states that a lawyer "shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." The rule sets forth eight factors to be considered in determining the reasonableness of a fee, which are • the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; • the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer; • the fee customarily charged in the locality for similar legal services; • the amount involved and the results obtained; • the time limitations imposed by the client or by the circumstances; • the nature and length of the professional relationship with the client; • the experience, reputation, and ability of the lawyer or lawyers performing the services; and • whether the fee is fixed or contingent.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts), Department of Legislative Services

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