

Department of Legislative Services
Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE
Revised

House Bill 633

(Delegate Niemann, *et al.*)

Environmental Matters

Judicial Proceedings

Real Property - Mortgages and Deeds of Trust - Authority to Exercise a Power of Sale

This bill clarifies that a power of sale or assent to decree in a mortgage or deed of trust may be exercised only by an individual. The bill establishes that (1) the individual selling the property under a power of sale need not be named in the mortgage or deed of trust; (2) an error or omission concerning the designation of a trustee or individual authorized to exercise a power of sale does not invalidate the instrument or the ability to exercise the power of sale; and (3) if a mortgage or deed of trust allows, a trustee or individual authorized to exercise a power of sale may be appointed or substituted from time to time.

The bill takes effect June 1, 2010, and applies retroactively to a mortgage or deed of trust on record, or recorded on or after the effective date.

Fiscal Summary

State Effect: The bill does not directly affect State finances or operations.

Local Effect: None.

Small Business Effect: Potential minimal.

Analysis

Current Law: A “power of sale” provision or “assent to decree” provision may be inserted in a mortgage or deed of trust. A power of sale provision authorizes any natural person named in the instrument, including the secured party, to foreclose on the property

after a default specified in the mortgage or deed of trust. Likewise, an “assent to decree” provision may be inserted in a mortgage or deed of trust that declares the borrower’s assent to the entry of an order for a foreclosure sale of the property after a default specified in the mortgage or deed of trust.

Under the Maryland Rules, any individual authorized to exercise a power of sale may institute a foreclosure action. A secured party may foreclose under an assent to decree provision, except that an action to foreclose a deed of trust must be instituted by the beneficiary of the deed of trust, any appointed trustee, or any successor trustee.

Background: Certain local courts have interpreted deeds of trust that omit the name of the trustee or contain the name of an entity, rather than a natural person, to be void. These courts have, at times, required foreclosing attorneys to file a petition to foreclose rather than allowing a foreclosure to proceed under a power of sale provision. The bill intends to clarify that the person foreclosing must be an individual and that the failure of the lien instrument to properly designate an individual in the lien instrument does not invalidate the ability to foreclose under a power of sale clause.

Additional Information

Prior Introductions: None.

Cross File: SB 562 (Senator Raskin) - Judicial Proceedings.

Information Source(s): Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation (Office of the Commissioner of Financial Regulation); Department of Legislative Services

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