

Department of Legislative Services
Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 450

(Senator Frosh)

Judicial Proceedings

Environmental Matters

Real Property - Residential Property Foreclosure Procedures - Lost Note Affidavit

This bill prohibits a court from accepting a lost note affidavit in lieu of a copy of the debt instrument in a foreclosure action, unless the affidavit identifies the owner of the debt instrument and states from whom and the date on which the owner acquired ownership; states why a copy of the debt instrument cannot be produced; and describes the good faith efforts made to produce a copy of the debt instrument.

The bill applies only prospectively and has no application to any order to docket or complaint to foreclose on residential property before the bill's effective date.

The bill takes effect July 1, 2011.

Fiscal Summary

State Effect: Potential minimal decrease in the Judiciary's general fund expenditures due to a reduction in foreclosure filings under the bill; however, it is unlikely that any decrease in filings will be substantial. Revenues are not affected.

Local Effect: Potential minimal reduction in circuit court expenditures due to a reduction in foreclosure filings under the bill; however, it is unlikely that any decrease in filings will be substantial. Revenues are not affected.

Small Business Effect: None.

Analysis

Current Law/Background: An order to docket or a complaint to foreclose a mortgage or deed of trust on a residential property must be accompanied by, among other things, a copy of the debt instrument and an affidavit of ownership.

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 a recent Maryland decision *Anderson v. Burson*, Md. App., No. 434, Sept. Term 2009 (December 22, 2010), the court lifted a stay of foreclosure. In *Anderson* substitute trustees submitted a motion for acceptance of a lost note affidavit. The affidavit stated that the lender was the note holder under the deed of trust being foreclosed and that the note had been lost or destroyed and could not be produced. In fact, the lender, Deutsche Bank, was not the note holder because the transferor of the note to Deutsche had relinquished all right or interest to convey the note before the date of the transfer. However, the Court of Special Appeals held that the substitute trustees could continue the foreclosure process because, while not a holder of the note, Deutsche was a nonholder in possession of the note who had the rights of a holder.

Additional Information

Prior Introductions: None.

Cross File: HB 412 (Delegate Niemann) - Environmental Matters.

Information Source(s): Office of the Attorney General (Consumer Protection Division); Department of Housing and Community Development; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Department of Legislative Services

Fiscal Note History: First Reader - February 15, 2011
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