HB 691

Department of Legislative Services

Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE

House Bill 691 (Delegate Niemann)
Environmental Matters

Real Property - Residential Property Foreclosure Procedures - Secured Party

This bill defines "secured party" for purposes of provisions of law governing residential property foreclosure procedures as the owner of a debt instrument secured by a mortgage or deed of trust on residential property. "Secured party" excludes the Mortgage Electronic Registration Systems, Inc. (MERS), or other similar registries or databases that track mortgage loan servicers or owners.

The bill takes effect July 1, 2011.

Fiscal Summary

State Effect: The change is clarifying and does not directly affect governmental finances.

Local Effect: The change is clarifying and does not directly affect governmental finances.

Small Business Effect: None.

Analysis

Current Law: "Secured party" is not defined for purposes of the Real Property Article.

Enforcement of a Debt Instrument

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. A person may be entitled to enforce the instrument even though the person is not the owner of the instrument or in wrongful possession of the instrument.

Foreclosure Process

Filing: "Residential property" is defined as real property improved by four or fewer single-family dwelling units designed principally and intended for human habitation. Except under specified circumstances, an action to foreclose a mortgage or deed of trust on residential property cannot be filed 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 a notice of intent to foreclose and accompanying loss mitigation application are sent.

The secured party must send 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 specified information, including the name and telephone number of the secured party and an agent of the secured party who is authorized to modify the terms of the mortgage loan. The notice must also be accompanied by a loss mitigation application, instructions for completing the application, a description of the applicable eligibility requirements for the loss mitigation programs offered by the secured party, and an envelope preprinted with the address of the person responsible for conducting loss mitigation analysis on behalf of the secured party.

An order to docket or a complaint to foreclose a mortgage or deed of trust on residential property must contain specified information and be accompanied by specified documents, including a final loss mitigation affidavit and a request for foreclosure mediation form if the loss mitigation analysis has been completed. If the loss mitigation analysis has not been completed, the secured party must include a preliminary loss mitigation affidavit and related information, file a final loss mitigation affidavit with the court at least 30 days before the foreclosure sale date and no earlier than 28 days after the order to docket or complaint to foreclose is served, and send the final loss mitigation affidavit and a request for foreclosure mediation form to the mortgagor or grantor by certified mail.

Foreclosure Mediation: A grantor or mortgagor may file with the court a completed request for foreclosure mediation not later than 15 days after the service or mailing of the final loss mitigation affidavit. A $50 dollar filing fee must accompany the request. A grantor or mortgagor must also mail a copy of the request to the secured party's foreclosure attorney. The secured party may then file a motion to strike, accompanied by an affidavit setting forth the reasons why foreclosure mediation is not appropriate. If the secured party files a motion to strike, it must mail a copy of the motion and affidavit to the grantor or mortgagor. The grantor or mortgagor has 15 days to file a response.

The court must transmit the request to the Office of Administrative Hearings (OAH) within five days of receiving the mediation request. OAH must conduct the mediation hearing within 60 days of this transmittal, unless the time is extended for good cause. Upon scheduling the mediation hearing, OAH must send notice to the parties detailing the production of specified documents by a specified date.

Both the grantor or mortgagor and the secured party, or a representative, must be present at the foreclosure mediation. The parties and the mediator must address loss mitigation programs that may be applicable to the loan secured by the mortgage or deed of trust that is the subject of the foreclosure action. OAH must file a report with the court stating the mediation's outcome by a specified date. If no agreement is reached at the foreclosure mediation, the foreclosure attorney may schedule the foreclosure sale, and the grantor or mortgagor may file a motion to stay the sale if filed within a specified date.

Cure of Loan Default: 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 the individual's attorney of the amount necessary to cure the default and reinstate the loan as well as provide instructions for delivering the payment.

Background: Historically, county recorders have kept track of ownership of property in that county, including the creation and assignment of mortgages. The transparency of this system allows potential purchasers of property to discover whether the seller purporting to own the land actually holds title to the property. To fund this service, counties charge a fee for each document they record. The securitization of mortgages and the forming of trusts containing thousand of mortgages make this system of recording each mortgage or mortgage servicing rights transfer costly for mortgage companies and banks. Consequently, several of the country's biggest banks and mortgage companies created MERS.

MERS is a registry designed to keep track of mortgage transfers. MERS began operation in 1997 and has since registered over 65 million loans, including about two-thirds of all newly originated loans in the United States mortgage companies and banks subscribe to MERS and pay annual fees to use its services. It is owned by many of the country's biggest banks and mortgage companies, including Federal Home Loan Mortgage Corporation (Freddie Mac), Federal National Mortgage Association (Fannie Mae), GMAC, Washington Mutual, and Wells Fargo, and was created to bypass the traditional system of recording each change in mortgage assignment with a county recorder. When a mortgage is created by a MERS member, the mortgage lien is nominally granted to MERS. MERS is the beneficiary of the deed of trust and its name is used on the land records. However, mortgagors sign an instrument identifying the payee of the loan as the mortgagee and MERS as the "nominee." According to some home loan industry experts, the instrument does not contain a definition of "nominee," nor do the contracts explicitly express that MERS is an agent for the lender. As a result, the impression may be created that MERS is both the mortgagee and the nominal mortgagee, a legal impossibility.

Mortgage companies and banks then use MERS to record the assignment of mortgages from one company or bank to another. MERS merely tracks this exchange using a database. To do this, MERS relies on "certifying officers." While certifying officers take titles from MERS, such as assistant secretary or vice president, they are not employed by MERS but rather members of MERS. Consumer advocates have raised concerns that certifying officers are not required to update the MERS database after each assignment and must sign an agreement stating MERS is not responsible for the accuracy of the database's information. The chief executive officer (CEO) of MERS testified before the U.S. Senate in 2010 that the assignment recordation is akin to "an electronic handshake."

This electronic handshake means that mortgage companies using MERS, and similar databases, do not need to record the assignment with county recorders because MERS remains the nominee mortgagee after each assignment. By using MERS, mortgage companies eliminate the need to pay a fee and fill out paperwork. County recorder fees typically cost around $40 for each mortgage assignment while MERS charges close to $7 for every loan registered. The securitization of home mortgages has generated significant savings for the mortgage industry. In a 2009 deposition, the MERS CEO claimed that the registry has saved the mortgage industry $2.4 billion.

MERS has initiated thousands of foreclosure actions. Lawyers for the homeowners have argued that MERS does not have standing to bring a foreclosure action because it does not own the loan. The success of this reasoning has depended on the laws of each state. The Maine Supreme Court recently held that MERS was not a mortgagee under Maine's foreclosure statute because it suffered no injury as a result of the homeowner's failure to

make loan payments. *Mortgage Elec. Registration Sys., Inc. v. Saunders, No. 09-640, 2010 WL 3168374*, (Me. August 12, 2010). The Kansas and Arkansas Supreme Courts have issued similar rulings. However, the Minnesota Supreme Court, citing a 2004 state statute, held that a violation of the state's recording laws did not mean that MERS could not initiate a foreclosure hearing. *Jackson v. Mortgage Elec. Registration Sys., Inc.*, 770 N.W.2d487 (Minn.2009). Additionally, a Superior Court ruling in Rhode Island held that, because the mortgage contained a provision granting the statutory power to MERS, it qualified as a mortgagee pursuant to Rhode Island law. *Bucci v. Lehman Brothers Bank, FSB*, No. PC-2009-3888, 2009 R.I. Super. LEXIS 110 (Sup. Ct. R.I. Aug. 25, 2009).

Additional Information

Prior Introductions: None.

Cross File: SB 206 (Senator Frosh) - Judicial Proceedings.

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; Office of Administrative Hearings; U.S. House of Representatives, Committee on the Judiciary; U.S. Senate Banking, Housing and Urban Affairs Committee; Bloomberg.com; *Daily Record*; *Daily Finance*; *New York Times*; *Norton Bankruptcy Law Advisor*; Reuters; *Wall Street Journal*; *Washington Post*; Department of Legislative Services

Fiscal Note History: First Reader - February 15, 2011
ncs/kdm

Analysis by: Michael F. Bender

Direct Inquiries to:
(410) 946-5510
(301) 970-5510