

Department of Legislative Services  
Maryland General Assembly  
2015 Session

FISCAL AND POLICY NOTE  
Revised

Senate Bill 877

(Senator Benson, *et al.*)

Judicial Proceedings

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Fair Foreclosure Act of 2015

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This bill prohibits nonjudicial foreclosures on mortgages or deeds of trust on residential property. The bill requires that an action to foreclose a mortgage or deed of trust on residential property (1) be commenced by filing a complaint in the circuit court and (2) subjects such actions to the general rules of civil procedure, except as otherwise specified. The bill applies only prospectively.

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Fiscal Summary

**State Effect:** General and special fund expenditures increase to the extent the Department of Housing and Community Development (DHCD) incurs additional costs due to the longer foreclosure process that results from the bill's requirements, as discussed below. The Office of the Attorney General, Consumer Protection Division, can handle the bill's requirements with existing resources, assuming 50 or fewer new complaints are generated by the bill. The Department of Labor, Licensing, and Regulation can handle the bill's requirements with existing resources.

**Local Effect:** The Judiciary advises that the bill's requirements can be handled by the circuit courts with existing resources.

**Small Business Effect:** Minimal.

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## Analysis

### **Bill Summary:**

#### *Foreclosure Actions*

The bill alters the foreclosure process by requiring a secured party to bring an action to foreclose a mortgage or deed of trust on residential property by filing a complaint in the circuit court. The effect of these provisions is to eliminate nonjudicial foreclosure remedies, which involve filing an order to docket (OTD) with a court, but which do not require a full hearing before a court.

#### *Notice Requirements*

The bill requires the notice that must be served on the mortgagor or grantor in an action to foreclose to include the time within which the mortgagor or grantor must file an answer to the complaint to foreclose.

#### *Timing of Hearing*

The bill requires all court proceedings in an action to foreclose a mortgage or deed of trust on specified residential property to be stayed until the earlier of (1) the date the Office of Administrative Hearings (OAH) files a report with the court following foreclosure mediation or (2) 60 days after the request for foreclosure mediation is sent to OAH, plus any extension granted by OAH.

#### *Payment to Cure Default*

The bill alters a mortgagor's or grantor's right to cure a default by requiring the mortgagor or grantor to pay the amount ordered by the court plus interest on the amount of the judgment from the date the judgment is entered, rather than requiring a mortgagor or grantor to pay all past-due payments, penalties, and fees and reinstate the loan.

#### *Timing of Foreclosure Sale*

A foreclosure sale may not occur until at least 30 days after a judgment is entered by the court, unless the court stays the judgment pending an appeal.

## **Current Law:**

### *Foreclosure Process*

Except under specified circumstances, to foreclose on residential property in Maryland, the secured party must first send a notice of intent to foreclose (NOI) to the mortgagor or grantor, then file and serve an OTD or a complaint to foreclose. Whether an OTD is appropriate, or a complaint to foreclose, is based on the lien instrument held by the secured party. Generally, an OTD is appropriate when the action to foreclose a lien on specified property is brought pursuant to a power of sale provision in a lien instrument. A power sale is a provision in a lien instrument that authorizes a sale of the property when a specified default occurs. A complaint to foreclose is generally appropriate when the lien instrument contains an assent to a decree *or* does not contain a power of sale or an assent to a decree. An assent to a decree is a provision on a lien instrument that assents, in the event of a specified default, to the entry of an order for the sale of the subject property.

Prefile mediation may occur prior to the filing of an OTD or a complaint to foreclose on owner-occupied residential property. A secured party is not required to offer prefile mediation; however, the secured party must include specified information with the NOI if it does offer the option. If a mortgagor or grantor elects to participate in prefile mediation, the mortgagor or grantor must notify the secured party by submitting an application within 25 days after the secured party mails the NOI. Once the secured party receives the application, the secured party must notify OAH within five business days. OAH must (1) schedule a prefile mediation session within 60 days after the day on which it receives the notice from the secured party; (2) notify the parties and their attorneys, if any, of the date of the prefile mediation session; and (3) provide a report to the parties and their attorneys, if any, describing the result of the mediation upon its completion.

An action to foreclose a mortgage or deed of trust may not be filed until the later of 90 days after a default in a condition on which the mortgage or deed of trust specifies that a sale may be made or 45 days after an NOI and accompanying loss mitigation application are sent. An OTD or complaint to foreclose must be filed with the circuit court, and a copy must be served on the mortgagor or grantor. An OTD or a complaint to foreclose must include, if applicable, the license number of both the mortgage originator and the mortgage lender. The OTD or complaint to foreclose must also contain an affidavit stating the date and nature of the default and, if applicable, that the NOI was sent and that the contents of the NOI were accurate at the time the NOI was sent.

Postfile mediation may occur subsequent to the filing of an OTD or complaint to foreclose under specified circumstances. A grantor or mortgagor may file with the court a completed request for postfile mediation within 25 days after the service or mailing of the final loss mitigation affidavit. The secured party may then file a motion to strike, accompanied by

an affidavit setting forth the reasons why postfile 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.

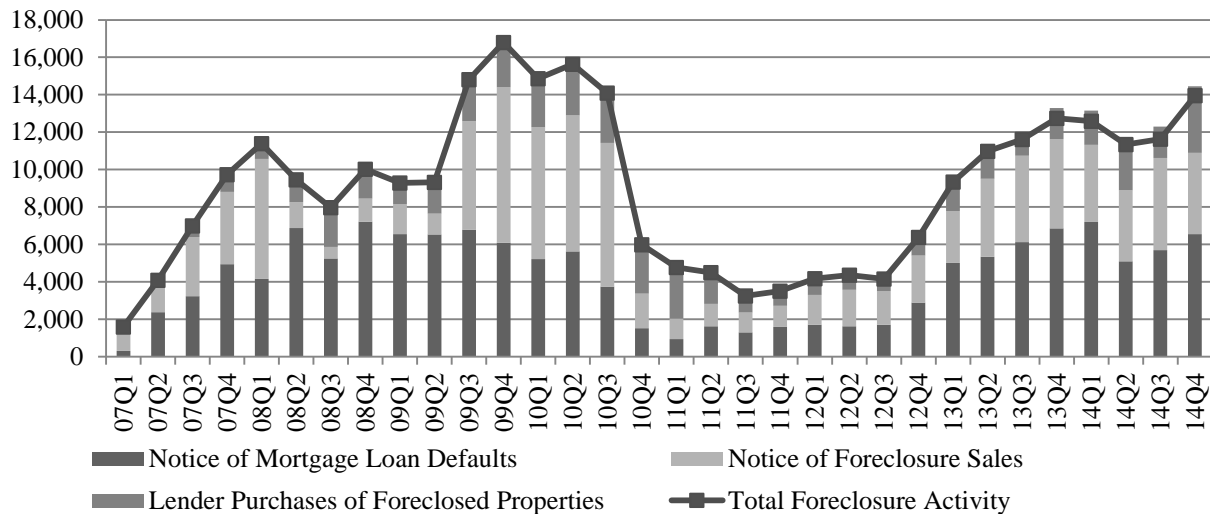
The court must transmit a request for postfile mediation to OAH within five days of receiving the request. OAH must conduct the mediation within 60 days after transmittal of the request, unless the time is extended for good cause. Upon scheduling the mediation, OAH must send notice to the parties with instructions regarding the production of specified documents by a specified date. Following the mediation, OAH must file a report with the court within seven days. 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 within a specified period of time.

### *Curing Defaults*

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 his or her attorney of the amount necessary to cure the default and reinstate the loan as well as provide instructions for delivering the payment.

**Background:** The number of foreclosure events in Maryland has spiked markedly in three separate periods: the latter half of 2007, in 2009, and the latter half of 2012 into 2014, despite a tapering off in the second quarter of 2014. Foreclosure events encompass real estate-owned purchases (property acquired by a lender as a result of an unsuccessful foreclosure sale on the property), notice of foreclosure sales, and notices of mortgage loan default. After the period of high rates of foreclosures in 2009, the number of property foreclosures decreased significantly from 42,446 in 2010 to 14,321 in 2011. However, property foreclosures rose in 2012, totaling 17,126, up 18.8% from 2011 levels. Foreclosure activity began a more rapid increase in the fourth quarter of 2012, with the number of foreclosure events totaling 6,381. This rapid increase in foreclosure activity continued in 2013 with foreclosure activity reaching the highest level in three years during the third quarter. In the fourth quarter of 2014, foreclosure activity reached 13,959, the highest level since 2010. These trends are exhibited in **Exhibit 1**.

**Exhibit 1**  
**State Foreclosure Events**  
**2007-2014**



Source: Department of Housing and Community Development

The dramatic decrease in 2011 was due, in part, to two factors: (1) Maryland’s legislative response to the foreclosure crisis, which provided additional protections to homeowners at risk of losing their homes; and (2) the delay by mortgage servicers to begin foreclosure procedures until the results of a foreclosure settlement between five of the largest lenders and the U.S. government were known. The results of the National Mortgage Settlement were announced in February 2012. The uncertainty surrounding the settlement and Maryland’s new increased consumer protections created a backlog of foreclosures which lenders have since been addressing. In the fourth quarter of 2013, Maryland had the second highest foreclosure rate in the nation. In 2014, DHCD attributed the surge in foreclosure activity that began in 2012 to a “rebound in the housing market which encouraged lenders to return inventory of seriously delinquent loans to the market at an increasing pace,” allowing servicers to clear the backlog. The State currently has the third highest foreclosure rate in the nation, behind Florida and Nevada.

However, DHCD advises that other measurements of the State’s foreclosure situation depict a different story, noting that foreclosure case data supplied to DHCD by the Maryland courts shows that new foreclosure filings were down 20% in 2014 over 2013. Further, DHCD reports, Maryland ranks twelfth best in the nation in foreclosure sales as a percentage of mortgages in service (6.9% in Maryland compared to a U.S. average of 18.1%, and 11.0%, 8.3%, and 7.8% in Virginia, Delaware, and Pennsylvania, respectively),

indicating that homeowners in the State were more likely to remain in their homes than any of the surrounding states.

*State's Response to the Foreclosure Crisis:* The State's multifaceted approach has involved legislative reforms of mortgage lending laws, extensive consumer outreach efforts, and enhanced mortgage industry regulation and enforcement. This approach began with the Maryland Home Preservation Task Force, which was convened by the Governor in 2007 in response to the dramatic increase in foreclosure events. The task force's charge was to develop a plan which addressed escalating foreclosure rates through revisions in statute, increased opportunity for housing counseling and education programs, and enhanced regulatory authority by the Commissioner of Financial Regulation. The task force's final report in November of 2007 made multiple recommendations which became the backbone for Maryland's response to the foreclosure crisis.

Legislation passed during the 2008, 2009, 2010, and 2011 sessions:

- created the Mortgage Fraud Protection Act, Maryland's first comprehensive mortgage fraud statute (Chapters 3 and 4 of 2008);
- tightened mortgage lending standards and required a lender to give due regard to a borrower's ability to repay a loan (Chapters 7 and 8 of 2008);
- prohibited foreclosure rescue transactions and granted the Commissioner of Financial Regulation additional enforcement powers (Chapters 5 and 6 of 2008);
- reformed the foreclosure process to provide homeowners with greater time and additional notices before their properties are sold (Chapters 1 and 2 of 2008);
- required additional notices to be given to residential tenants renting properties pending foreclosure (Chapters 614 and 615 of 2009);
- required a lender, under specified circumstances, to provide to a borrower notice regarding homebuyer education or housing counseling (Chapter 736 of 2010);
- established procedures for loan modification or mitigation and postfile mediation (Chapter 485 of 2010); and
- lengthened the time period within which a homeowner may elect to participate in foreclosure mediation (Chapter 355 of 2011).

Consumer outreach efforts have included statewide public workshops to assist distressed homeowners, in coordination with the Maryland Foreclosure Prevention Pro Bono Project. These efforts, coupled with the new requirements imposed on the foreclosure process, were at least partially a cause of the decrease in foreclosures in the State.

By the time the Governor convened the next task force, the Maryland Foreclosure Task Force, in fall 2011, foreclosure events had sharply declined from their 2007-2010 levels. The task force was charged with developing new ideas to combat the continuing foreclosure crisis. It included representatives from the Department of Labor, Licensing, and Regulation; DHCD; the General Assembly; the Judiciary; and private industry. In January 2012, the task force issued its report, including 12 recommendations aimed at addressing the continuing foreclosure crisis in Maryland. Several pieces of 2012 legislation resulted from these recommendations, including laws allowing banks to offer prefile mediation in addition to postfile mediation and the creation of a foreclosure registry.

*Foreclosure Settlement:* On February 9, 2012, the U.S. Department of Justice, U.S. Department of Housing, and 49 state Attorneys General announced an agreement with five major banks providing for compensation for damages arising from improper foreclosure procedures, including robo-signing, and to provide relief to states and homeowners from underwater mortgages. The value of the settlement is approximately \$25 billion.

The settlement agreement has four primary components:

- *Principal Reduction:* \$17 billion allocated to mortgage debt forgiveness/loan modifications, forbearance, short sales, and other assistance to homeowners, primarily by reducing the principal on mortgages that have negative equity and are delinquent. It is estimated that the funding could benefit up to 1 million homeowners nationally.
- *Refinancing:* Homeowners who have negative equity but are current on their mortgages receive about \$3.0 billion in refinancing; up to 750,000 homeowners could be eligible for this refinancing.
- *Payments to Foreclosed Homeowners:* About \$1.5 billion allocated to homeowners who had their homes foreclosed upon between January 1, 2009, and December 31, 2011, and who meet specified criteria. These borrowers receive approximately \$2,000 each, depending on the level of response from the field of qualified borrowers. Borrowers who still owe money following the foreclosure sale (a *deficiency*) may have an opportunity to have some or all of that debt forgiven.
- *Government Payments:* The federal government receives \$750 million under the settlement. States receive approximately \$2.5 billion to help fund consumer protection and state foreclosure protection efforts.

In addition to the above components, the settlement also requires mortgage servicers to reform several of their practices. According to the Office of Mortgage Settlement

Oversight, these reforms are intended to prevent servicers from the practice of robo-signing and other improper foreclosure procedures.

**State Fiscal Effect:** General and special fund expenditures significantly increase to the extent DHCD incurs additional costs due to the longer foreclosure process that results from the bill's requirements. These increased costs would include, but are not limited to, legal fees related to each foreclosed property newly required to go through a judicial foreclosure process, additional hazard insurance premiums for affected properties for the duration of any delay caused by the bill's requirements, and additional real estate taxes on the properties affected. The total number of properties that may be affected by the bill's provisions cannot be reliably predicted at this time, but the operational and fiscal impact is anticipated to be significant.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** HB 1195 (Delegate B. Robinson, *et al.*) - Environment and Transportation.

**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; Office of Mortgage Settlement Oversight; Department of Legislative Services

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