

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE
First Reader

House Bill 1009 (Delegate Stewart)

Economic Matters and Environment and
Transportation

**Mortgage Servicers - Requirements and Prohibitions During and After a State of
Emergency and Catastrophic Health Emergency (Foreclosure Relief Act of 2021)**

This bill establishes several protections for homeowners during and after a state of emergency and catastrophic health emergency, including (1) prohibiting a mortgage servicer from commencing or completing an action to foreclose; (2) upon request from a borrower, a mandated period of forbearance; (3) freezing penalties and interest; and (4) requiring mortgage servicers, on or before November 30, 2021, to provide written notice by mail to each of the servicer's borrowers with a mortgage loan secured by property in the State regarding the borrower's rights under the bill. The bill establishes that any waiver by a borrower of the provisions under the bill is contrary to public policy and void.

Fiscal Summary

State Effect: Special fund revenues for the Department of Housing and Community Development (DHCD) are delayed for the duration of the forbearance. Additional impacts on State government operations can likely be handled with existing resources, as discussed below.

Local Effect: The bill is not anticipated to materially affect local government operations or finances.

Small Business Effect: Meaningful.

Analysis

Bill Summary:

Select Definitions

“Negative financial impact” means a substantial loss of income resulting from circumstances necessitating a proclamation of a state of emergency and catastrophic health emergency. It includes, with respect to an individual, (1) job loss; (2) reduction in compensated hours of work; (3) closure of the place of employment; and (4) the need to miss work in order to care for a child who is engaged in virtual learning, as specified. With respect to a business entity, “negative financial impact” includes (1) loss or reduction in business; (2) required closure; and (3) loss of employees, whether temporary or permanent.

Mortgage Foreclosures and Forbearances

The bill prohibits a mortgage servicer from commencing or completing an action to foreclose a mortgage or deed of trust during a state of emergency and catastrophic health emergency. During a state of emergency/catastrophic health emergency, the servicer must grant a forbearance of the mortgage loan for a period of no more than 180 days if a borrower submits a request for forbearance and affirms that the borrower has experienced a negative financial impact. A borrower may also request a forbearance if a servicer has commenced an action to foreclose on the property of the borrower. The servicer is required to immediately notify the court of the borrower’s request to enter into a forbearance agreement and request that the action be stayed until the end of the forbearance period.

At the end of the forbearance period, and regardless of any mediation status or offer during the forbearance period, the servicer must submit a notice to the borrower of the right to request further mediation. The notice must include (1) the form required for the borrower to request mediation and (2) pre-addressed envelopes for the borrower to send the request form to the court and the servicer. The servicer may not assess to the borrower any costs or fees associated with this mediation.

During the two years following the termination/rescission of the state of emergency and catastrophic health emergency, a servicer that denies a request for forbearance must provide written notice to the borrower indicating the reason(s) for the denial if the borrower was current on the payments as of February 1, 2020, and is experiencing a negative financial impact that prevents the borrower from making timely payments on the mortgage obligation.

If the servicer cites any curable defect in the borrower’s request for forbearance, the servicer must specifically identify the defect, provide 21 days’ notice to cure the defect,

accept the cured request during the 21-day period, and respond to the corrected request within 5 days of receipt. If denied, the servicer must send the borrower a statement of denial.

Within one year after the termination of the state of emergency, payments subject to forbearance must be added to the end term of the loan, unless otherwise agreed to by the borrower and the servicer.

Prior to the end of the forbearance period, a servicer must disclose and implement any post-forbearance options, which generally may not include (1) requiring the buyer to make a lump sum payment or (2) an increase in a monthly principal and interest payment beyond the amounts set prior to the forbearance period. However, such requirements are permissible if the escrow account is required to be replenished or, for an adjustable rate mortgage loan, there is an adjustment of the applicable index. The bill also specifies that these provisions do not prohibit a borrower and servicer from entering into an alternative payment agreement for the payments subject to forbearance.

A servicer must communicate about forbearance and post-forbearance options in the borrower's preferred language if the servicer regularly communicates with any borrower in that language.

Penalties and Interest

During a state of emergency or catastrophic health emergency, penalties and interest may not accrue beyond the amounts scheduled and calculated under the terms of the mortgage loan.

Foreclosure Sales

For one year following a state of emergency and catastrophic health emergency, a sale of a property made pursuant to foreclosure action is not valid unless:

- with respect to residential property securing a federally backed mortgage loan, the servicer (1) no less than 30 days before sending a notice of intent to foreclose, sends written notification to the borrower indicating the borrower's right to request a forbearance in accordance with the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act and (2) otherwise complies with federal law; and
- with respect to all other property securing a mortgage loan, the servicer (1) no less than 30 days before sending a notice of intent to foreclose, sends written notification to the borrower that, if the borrower is experiencing a negative financial impact, the borrower may request a forbearance of no more than 180 days, regardless of

delinquency status; (2) provides a requested forbearance without requiring the borrower to provide information beyond an attestation of negative financial impact; and (3) halts all fees, penalties, and interest beyond those calculated under the terms of the mortgage during the forbearance period.

The servicer may (1) extend a forbearance period requested under these provisions for an additional period of no more than 180 days if the borrower requests the extension during the initial forbearance period and (2) shorten a forbearance period or an extension of the forbearance period on request of the borrower.

Miscellaneous Requirements: Mortgage Servicers

A servicer may not furnish negative mortgage payment information to a consumer reporting agency regarding mortgage payments subject to forbearance under the bill's provisions until at least one year after the date on which the state of emergency is terminated and the catastrophic health emergency is rescinded.

A servicer is deemed in compliance with the bill if the servicer complies with the provisions and requirements of the CARES Act, as specified.

By November 30, 2021, each servicer authorized to do business in the State must provide written notice by mail to each of the servicer's borrowers with a mortgage loan secured by property in the State regarding the borrower's rights under the bill.

Cause of Action and Other Protections for Borrowers

A borrower may bring an action for injunctive relief, damages, restitution, or any other remedy if harmed by a material violation of the bill's provisions. The court may award reasonable attorney's fees and costs based on a violation, including injunctive relief against a sale or a temporary restraining order.

These actions and remedies are supplemental and independent of any other rights, remedies, or procedures afforded under any other provisions of law, and the bill may not be construed to alter, limit, or negate any such protections. Any waiver by a borrower of the provisions under the bill is contrary to public policy and must be void.

Current Law: For information regarding the State's foreclosure process, please see the **Appendix – Foreclosure Process**.

State Fiscal Effect: Numerous provisions of the bill codify and expand upon protections under existing orders related to COVID-19, thereby likely limiting a significant impact

exclusively attributable to the bill's provisions (once effective on October 1, 2021) regarding the *current* state of emergency/catastrophic health emergency.

Department of Housing and Community Development

DHCD administers the Maryland Mortgage Program, which provides low-interest mortgage loans. Because the bill increases opportunities for forbearance, DHCD finances associated with these loans are impacted to the extent that DHCD, as a servicer of mortgage loans, experiences delayed revenues from mortgage loan payments for loans subject to forbearance in accordance with the bill's provisions. Although a precise impact cannot be reliably quantified beforehand, DHCD advises that the overall impact is anticipated to be minimal.

DHCD special fund revenues may also be reduced due to uncollected fees during the duration of a state of emergency/catastrophic health emergency and the extended forbearance periods possible under the bill. However, the loss of revenues *may* be partially offset by recovery of such revenues at a later date, depending on the extent to which the extended forbearance periods allow borrowers the opportunity to avoid foreclosure actions (instead of just postponing them). Numerous fees assessed in the foreclosure process accrue to the Housing Counseling and Foreclosure Mediation Fund. These fees include (1) a \$300 fee for every order to docket or complaint to foreclose that is filed; (2) a prefile mediation fee; and (3) a \$50 postfile mediation fee. While the interruption of funding levels impacts the ability of DHCD to sustain operations associated with the fund, any such impact that is exclusively attributable to this bill cannot be specifically quantified in advance.

Maryland Department of Labor

The Maryland Department of Labor advises that the Office of the Commissioner of Financial Regulation (OCFR), as the State entity that charters and supervises banks and credit unions and licenses and supervises mortgage lenders, servicers, and debt collectors, anticipates that its operations are impacted by the bill. Due to additional requirements, OCFR's oversight may necessitate enhanced supervisory efforts to ensure compliance and address an increased volume of potential consumer complaints.

OCFR maintains general enforcement jurisdiction over mortgage fraud activity, and OCFR currently oversees and manages certain aspects of the foreclosure process, including the Notice of Intent to Foreclose electronic system for the State of Maryland. Additional oversight and enforcement activities are likely under the bill. However, OCFR advises that, although the bill necessitates – at least initially – a redirection of resources, the additional responsibilities may be able to be handled with existing resources.

Office of Administrative Hearings

The bill's provisions may affect the caseloads of the Office of Administrative Hearings (OAH) related to mediation proceedings during the forbearance period (by potentially reducing or eliminating cases) and in the months following the forbearance period (with any pent-up demand for cases). As a result of the bill's additional mediation notice requirements, parties affected by a foreclosure may seek mediation more often than at the current rate. OAH advises that it anticipates the need for one additional administrative law judge and a docket clerk. However, due to the bill's prolonged forbearance provisions, the Department of Legislative Services anticipates that OAH can handle any additional cases resulting *exclusively from the bill's provisions* with existing resources.

Judiciary

Any increase in the Judiciary's caseload is expected to be handled with existing budgeted resources.

Small Business Effect: Small businesses may adversely be affected under the bill due to the additional exposure and compliance costs related to foreclosure and forbearance. Additionally, the bill may reduce revenues if businesses are unable to collect all the interest and fees that may be described in the mortgage documents that they service.

Additional Comments: On March 5, 2020, Governor Lawrence J. Hogan, Jr., declared a state of emergency and catastrophic health emergency in an effort to control and prevent the spread of COVID-19. The state of emergency was most recently renewed on February 19, 2021.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 724 (Senator Carter) - Judicial Proceedings.

Information Source(s): Judiciary (Administrative Office of the Courts); Department of Housing and Community Development; Maryland Department of Labor; Office of Administrative Hearings; Department of Legislative Services

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Appendix – Foreclosure Process

Beginning with the financial downturn in 2007, Maryland saw a significant increase in the number of foreclosure actions. Foreclosure activity likely peaked in 2010, when the number of foreclosure events exceeded 50,000. Due to a multitude of factors, including legislation addressing the State’s foreclosure mediation process, consumer outreach efforts, and enhanced mortgage industry regulation and enforcement surrounding many banks’ and mortgage companies’ foreclosure practices, the number of foreclosure events decreased significantly to 16,049 in 2011. However, these changes also resulted in the general lengthening of the foreclosure process, leaving many housing units in limbo for years at a time.

Foreclosure Process in Maryland

Generally, 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 and the record owner, then file and serve an order to docket (OTD) or a complaint to foreclose. A copy of the NOI must be sent to the Commissioner of Financial Regulation, and if the property is owner-occupied, the NOI must be accompanied by a loss mitigation application. Whether the filing of an OTD, or a complaint to foreclose, is appropriate depends on the lien instrument held by the secured party. An action to foreclose a mortgage or deed of trust may not be filed until the later of (1) 90 days (or 120 days if the loan is “federally related”) after a default in a condition on which the mortgage or deed of trust specifies that a sale may be made or (2) 45 days after an NOI is 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 it was sent.

A secured party may petition the circuit court for leave to immediately commence an action to foreclose the mortgage or deed of trust if:

- the loan secured by the mortgage or deed of trust was obtained by fraud or deception;
- no payments have ever been made on the loan secured by the mortgage or deed of trust;
- the property subject to the mortgage or deed of trust has been destroyed;
- the default occurred after the stay has been lifted in a bankruptcy proceeding; or
- the property is found by a court to be vacant and abandoned.

The court may rule on the petition with or without a hearing. If the petition is granted, the action may be filed at any time after a default in a condition on which the mortgage or deed of trust provides that a sale may be made, and the secured party is not required to send a written NOI.

Prerequisites for Foreclosure Sales

Generally, if the residential property is *not* owner-occupied, a foreclosure sale may not occur until at least 45 days after specified notice is given. If the residential property is owner-occupied, and foreclosure mediation is not held, a foreclosure sale may not occur until the later of (1) at least 45 days after providing specified notice that includes a final loss mitigation affidavit or (2) at least 30 days after a final loss mitigation affidavit is mailed. Finally, if the residential property is owner-occupied residential property and postfile mediation is requested, a foreclosure sale may not occur until at least 15 days after the date the postfile mediation is held or, if no postfile mediation is held, the date the Office of Administrative Hearings (OAH) files its report with the court.

A foreclosure mediation may be extended for good cause by OAH for up to 30 days, unless all parties agree to a longer extension. Additionally, both parties have an obligation to provide instructions regarding documents and information to each other and the mediator. Any motion to stay a foreclosure sale must come within 15 days of the date the postfile mediation is held. Notice of the sale of a foreclosed property must be sent 10 days before the date of sale.

Generally, notice of the time, place, and terms of a foreclosure sale must be published in a newspaper of general circulation in the county where the action is pending at least once a week for three successive weeks. The first publication of the notice must be more than 15 days before the sale, and the last publication must be within one week of the sale.

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.

Expedited Foreclosure Process for Vacant and Abandoned Property

Statutory provisions also set forth an expedited foreclosure process for vacant and abandoned property. Generally, if the residential property is found to be vacant and

abandoned and the court grants the petition for leave to immediately begin an action to foreclose a mortgage or deed of trust, specified mediation and other preliminary foreclosure process requirements do not apply.

COVID-19 and Foreclosures

In response to the continuing catastrophic public health emergency caused by COVID-19, on December 17, 2020, Governor Lawrence J. Hogan, Jr., issued [Executive Order 20-12-17-02](#), which amended and extended previous executive orders relating to housing. The order, and subsequent guidance issued regarding its effect, provides housing protections for State residents, including (1) prohibiting the initiation of residential foreclosures until April 1, 2021, and (2) prohibiting a foreclosure on a property from proceeding unless the loan servicer provided specified types of notice to the borrower of the borrower's right to request forbearance, which varies depending on whether the mortgage is federally backed. If applicable, the servicer must also demonstrate compliance with the federal Coronavirus Aid, Relief, and Economic Security (better known as CARES) Act. The Commissioner of Financial Regulation must suspend operations of the NOI system until a "Re-Start Date," which may be no later than 30 days after the state of emergency is terminated and the catastrophic health emergency is rescinded. Effective as of the Re-Start Date, and until the termination/rescission date, the Commissioner of Financial Regulation must obtain a certification from a servicer or secured party that indicates compliance with requirements specified under the order.