

Department of Legislative Services
Maryland General Assembly
2022 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1038

(Delegate Charles, *et al.*)

Judiciary

Foreclosure Proceedings – Residential Mortgagors and Grantors – Access to Counsel

This bill establishes, subject to the availability of funding, access to legal representation for individuals meeting specified qualifications (“covered individuals”) in specified foreclosure proceedings. To facilitate this access, the bill establishes the Access to Counsel in Foreclosure Proceedings (ACFP) Program, administered by the Maryland Legal Services Corporation (MLSC), to organize and direct services and resources in order to provide all covered individuals with access to legal representation. The bill also establishes (1) an ACFP Task Force and (2) an ACFP Special Fund, which is also to be administered by MLSC. The access to legal representation established by the bill must be phased in over time as determined appropriate by MLSC, with a goal of being fully implemented before October 1, 2026. The bill increases, from \$300 to \$600, specified filing fees in foreclosure actions.

Fiscal Summary

State Effect: Special fund revenues from filing fees increase by \$2.7 million in FY 2023 and by \$3.6 million annually thereafter; special fund expenditures are assumed to correspondingly increase. General fund expenditures increase, potentially significantly, to provide additional funding to the ACFP fund to implement the access to legal representation and for related costs for State agencies; special fund revenues and expenditures further correspond to any general fund appropriations to the ACFP fund.

(\$ in millions)	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027
SF Revenue	\$2.7	\$3.6	\$3.6	\$3.6	\$3.6
GF Expenditure	-	-	-	-	-
SF Expenditure	\$2.7	\$3.6	\$3.6	\$3.6	\$3.6
Net Effect	(-)	(-)	(-)	(-)	(-)

Note: () = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: The bill is not anticipated to directly affect local government operations or finances, as discussed below.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Selected Definitions

“Community group” means a nonprofit entity with the capacity to conduct outreach to mortgagors and grantors and provide engagement, education, and information.

“Covered individual” means an individual who (1) owns and occupies a residential property as the mortgagor or grantor’s principal residence and (2) is a member of a household with an income that is not greater than 50% of the State median income, as specified.

“Designated organization” means a nonprofit entity designated by MLSC with the ability to provide legal representation to covered individuals.

“Legal representation” includes all representation by an attorney beyond brief legal advice and is not limited to the formal entry of appearance in court.

Access to Counsel in Foreclosure Proceedings

The bill establishes an ACFP Program administered by MLSC to organize and direct services and resources in order to provide all covered individuals in the State with access to legal representation as provided by the bill. MLSC may contract with a designated organization to provide all or part of the services required by the bill.

Under the program, MLSC must provide a covered individual with access to legal representation for specified judicial proceedings in foreclosure actions (generally, after the failure of postfile mediation or expiration of a mediation period), including the first appeal of a decision in the proceeding if the dedicated organization determines there are sufficient legal grounds for the appeal.

A designated organization must ensure that a covered individual receives access to legal representation in a proceeding as soon as possible after (1) the date a postfile mediation concludes or (2) if no postfile mediation is held, the date the Office of Administrative Hearings (OAH) files a report with the court. If feasible, legal representation should begin

no later than five days after the date that a postfile mediation concludes or the date that OAH issues its report.

The program of legal representation must be phased in – as determined appropriate by MLSC – with the goal of full implementation by October 1, 2026. Priority in funding during the phase-in period will be given to mortgagors and grantors in local jurisdictions that provide or agree to provide significant additional local funding to effectuate ACFP proceedings in the local justification. Access to legal representation as provided in the bill is subject to the availability of funding.

Public Outreach and Reporting Requirements

MLSC must develop an informational pamphlet in English and other appropriate languages describing (1) the legal rights of mortgagors and grantors; (2) the access to counsel established under the bill; and (3) information on resources available to mortgagors and grantors. OAH must provide a copy of the pamphlet at postfile mediation or if no postfile mediation is held, by first-class mail postmarked within five days before the date OAH files its report (with the court) and by electronic delivery on the date OAH files its report. MLSC must post a link to a version of the pamphlet on its website.

MLSC must designate and contract with appropriate community groups to conduct relevant public outreach and education to mortgagors and grantors – locally and throughout the State – regarding their rights and the access to legal representation provided in the bill.

Annually by August 31, MLSC must report to the Governor and the General Assembly on (1) the number of covered individuals provided legal representation during the previous calendar year; (2) information on and metrics evaluating case outcomes; and (3) a summary of the engagement and education of mortgagors and grantors.

Access to Counsel in Foreclosure Proceedings Task Force

The bill establishes an ACFP Task Force. The task force consists of up to 15 members appointed by the Office of the Attorney General (OAG). The Attorney General must designate the chair of the task force; OAG must provide staff. The task force must (1) evaluate the provision of services provided under the bill; (2) identify and study potential funding sources; (3) identify additional legal services that may be provided to covered individuals facing foreclosure proceedings; and (4) make recommendations to improve implementation of the provisions in the bill, including necessary policy and statutory changes. A member of the task force may not receive compensation but is entitled to reimbursement for expenses under the standard State travel regulations, as provided in the State budget. The task force may apply for grants from public and private entities to carry out its duties.

By January 1, 2023, and annually thereafter, the task force must submit an annual report of its findings and recommendations to the Governor and the General Assembly.

Access to Counsel in Foreclosure Proceedings Special Fund

The ACFP Special Fund established by the bill is a special, nonlapsing fund that is only to be used (1) for services provided by a designated organization or activity by a community group to implement the program, as specified in the bill; (2) if a local jurisdiction enacts a similar program, as authorized under the bill, for services provided by the local jurisdiction to implement ACFP (including all costs associated with required legal representation in any proceeding and any outreach and education activities); (3) for administrative expenses of MLSC; and (4) for expenses related to the study and evaluation of services, activities, funding amounts, and sources necessary to fully implement the program, as specified.

Local Jurisdictions

Local jurisdictions may enact local laws providing for legal representation in foreclosure proceedings. If a local jurisdiction enacts a substantially similar program, MLSC must direct funding that would have been allocated under the bill's provisions for the benefit of that jurisdiction's covered individuals to the local program.

Filing Fees in Foreclosure Proceedings

The bill increases, from \$300 to \$600, the filing fee that must accompany an order to docket (OTD) or a complaint to foreclose a mortgage or deed of trust on residential property. Of the fee collected, \$300 must be distributed to the ACFP Special Fund.

Miscellaneous Provisions

The bill contains a severability provision.

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

MLSC, as established in Title 11 of the Human Services Article, generally has the purpose of receiving and distributing funds to "grantees" that provide legal assistance to eligible clients in civil proceedings or matters. A grantee means a nonprofit organization that is (1) qualified under § 501(c)(3) of the Internal Revenue Code; (2) provides legal assistance to eligible clients; and (3) receives financial assistance, as specified, from MLSC. Pursuant to Chapter 746 of 2021, MLSC also administers the State Access to Counsel in Evictions Program.

State Fiscal Effect: Special fund revenues increase from revenues collected from filing fees directed to the special fund established under the bill; special fund expenditures increase correspondingly as the funding is used to implement the bill's provisions. Even with the special fund revenues generated from increased filing fees (discussed below), it is assumed that general fund expenditures are required to fully implement the access to legal representation under the bill; special fund expenditures and revenues likewise increase correspondingly to any general fund appropriations to the fund. General fund expenditures increase further for the Department of Housing and Community Development (DHCD) and OAH, as discussed below.

As previously noted, the bill increases, from \$300 to \$600, the filing fee for an OTD or complaint to foreclose a mortgage or deed of trust on residential property; \$300 of the fee collected must be distributed to the ACFP Special Fund. The Administrative Office of the Courts advises that over 12,000 such complaints were filed in fiscal 2020. For purposes of this analysis, it is assumed that the volume of filings in future years is similar, thereby generating revenues of approximately \$3.6 million annually for the ACFP Special Fund (\$2.7 million in fiscal 2023 to reflect the bill's October 1, 2022 effective date); special fund expenditures correspondingly increase as the funds are used for authorized purposes under the bill.

Although this fiscal and policy note generally assumes special funds *directly attributed* to annual filing fee revenues are being used for the program within the same fiscal year in which they are collected, it is not possible to reliably predict *overall* expenditures for specific fiscal years, as the impact will depend on decisions made by MLSC, the availability of additional funding, and the volume of foreclosure proceedings. Furthermore, the Department of Legislative Services (DLS) notes that the fund created by the bill is also specifically authorized to be used for expenses related to *the study of funding amounts* and sources necessary to fully effectuate ACFP.

Department of Housing and Community Development

The bill also increases expenses for DHCD related to foreclosure proceedings. For example, DHCD anticipates expenditures associated with increased filing fees and additional contractual costs for legal representation (as once a mortgagor/grantor has access to legal representation, it is assumed that costs for cases associated with loans held by DHCD likewise increase to reflect additional complexity in such cases). Based on *current* contractual costs, DHCD anticipates legal fees of \$4,500 for each case in which it requires representation under the bill. The expenditure impact in any particular year depends in part on the bill's overall implementation and the extent to which (and how quickly) individuals who have loans held by DHCD are provided legal representation.

Office of Administrative Hearings

OAH advises that general fund expenditures increase minimally due to increased postage costs required by the bill. It is assumed that other changes under the bill can be handled using existing budgeted resources.

Judiciary

The Judiciary advises that the bill results in a significant operational impact. Generally, the average length of a case may increase with the presence of counsel, requiring more clerical and judicial attention. However, any operational impact is not anticipated to materially affect State finances (or those of the circuit courts).

Office of the Attorney General

OAG is required to staff the ACFP task force and advises that an additional part-time assistant attorney general is necessary to do so. However, despite the additional duties required under the bill, DLS assumes that OAG can generally handle any additional staffing with existing budgeted resources.

Local Fiscal Effect: As noted above, pursuant to MLSC's existing statutory authority (which is unchanged by this bill), its purpose is to receive and distribute funds to specified "grantees," which are nonprofit organizations. Although the bill includes requirements for MLSC to direct funding that would have been allocated for the benefit of a local jurisdiction's mortgagors and grantors to a local program, if a local program is enacted, it is assumed that local jurisdictions that elect to establish a program similar to the program under the bill will not *directly* be provided funding from MLSC. Instead, it is assumed that eligible nonprofit entities within these jurisdictions receive funding from MLSC for services rendered in foreclosure proceedings for the benefit of the local jurisdiction's covered individuals.

Small Business Effect: Any small business lenders are subject to increased filing fees in specific foreclosure proceedings and potential increases in legal costs to the extent that having opposing counsel results in additional time spent on each case.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Caroline, Montgomery, and Prince George's counties; Maryland Association of Counties; Office of the Attorney General; Judiciary (Administrative Office of the Courts); Department of Housing and Community Development; Maryland Department of Labor; Office of Administrative Hearings; Department of Legislative Services

Fiscal Note History: First Reader - March 1, 2022
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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 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.