

SENATE BILL REPORT

SB 6648

As of February 10, 2010

Title: An act relating to protecting and assisting consumers and homeowners from unfair lending practices and during foreclosure proceedings.

Brief Description: Protecting and assisting consumers and homeowners from unfair lending practices and during foreclosure proceedings.

Sponsors: Senators Kline, Keiser, Fairley, Kohl-Welles, Kauffman, Gordon and McDermott.

Brief History:

Committee Activity: Labor, Commerce & Consumer Protection: 1/28/10, 2/04/10 [DPS, DNP].

Ways & Means: 2/08/10, 2/09/10 [DPF].

SENATE COMMITTEE ON LABOR, COMMERCE & CONSUMER PROTECTION

Majority Report: That Substitute Senate Bill No. 6648 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Kohl-Welles, Chair; Keiser, Vice Chair; Franklin and Kline.

Minority Report: Do not pass.

Signed by Senators Honeyford and King.

Staff: Ingrid Mungia (786-7423)

SENATE COMMITTEE ON WAYS & MEANS

Staff: Jenny Greenlee (786-7711)

Background: Foreclosure Timeline. Deeds of trust, which are essentially a type of mortgage, may be foreclosed nonjudicially if the borrower defaults on the loan obligation. A notice of default must be provided to the borrower at least 30 days before the Notice of Sale is recorded in the county auditor's office. A borrower must receive notice of the foreclosure sale 90 days before the date of the sale. The foreclosure sale may not take place less than 190 days from the date of default.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Last year, the Legislature enacted ESB 5810, which added a requirement for deeds of trust made from January 1, 2003, to December 31, 2007, on owner-occupied residential property. A beneficiary cannot issue a notice of default until 30 days after the beneficiary contacts the borrower to explore options for the borrower to avoid foreclosure. During this initial contact, the beneficiary must, among other things, give the borrower contact information for a U.S. Department of Housing and Urban Development (HUD)-certified counseling agency and other places that might be able to assist the borrower. This initial contact requirement expires on December 31, 2012.

Summary of Bill (Recommended Substitute): Good Faith Review. A trustee, beneficiary, or authorized agent may not record a notice of sale on owner-occupied real property unless they have made a good faith review of the borrower's financial situation and offered, whenever eligible, a loan modification or other option to assist the borrower in bringing the arrear current. The good faith review process can start at any point after the beneficiary declares the underlying loan in default and accelerates the loan, but at least 30 days before the recording of a notice of sale pursuant to statute. A good faith review of the borrower's financial situation includes an evaluation of the borrower's eligibility for all loan modification programs established by the federal government or mortgage industry, and if the borrower elects, participation in the foreclosure mediation program. Failure to conduct a good faith review constitutes a defense to foreclosure and violates the Consumer Protection Act.

Prior to the recording of a Notice of Sale, a trustee, beneficiary, or authorized agent must provide a notice to the borrower and to the Department of Financial Institutions (Department) containing the following:

1. the name, address, and telephone number of a person with authority to negotiate a loan modification on behalf of the beneficiary of the deed of trust;
2. the telephone number of the United States Department of Housing and Urban Development to find a department certified housing counseling agency to assist homeowners in the state in avoiding foreclosure; and
3. a form notice, prescribed by the Department, explaining the mediation program, upon which the beneficiary may elect to enter into mediation.

Protect Washington Homeowners Mediation Program. The foreclosure mediation program must address all issues related to the foreclosure, including reinstatement, modification of the loan, and restructuring of the debt. If a borrower chooses to enter into mediation, the Department must notify the beneficiary. If a borrower waives mediation or fails to return the form notice to the Department, the Department will notify the beneficiary. A trustee may not record a notice of sale until 30 days after receiving a waiver of foreclosure mediation.

The timeline and each party's responsibilities during mediation are outlined in the legislation. The Department is required to maintain a list of HUD-certified counseling agencies and may establish training programs for mediators. All mediation discussions must be conducted in good faith. The failure of the beneficiary to act in good faith constitutes a defense to a foreclosure and is a violation of the CPA. The Department must report annually to the Legislature on the performance and the results of the mediation program.

The good faith review and loan modification program does not apply to deeds of trust securing a commercial loan, securing obligations of a grantor who is not the borrower or a guarantor, or securing a purchaser's obligations under a seller-financed sale. The good faith review, loan modification and mediation program only applies to deeds of trust made from January 1, 2003, to December 31, 2008, that are recorded against owner-occupies residential real property.

Servicer's Duty. A Servicer's duty under its pooling and servicing contract with a beneficiary is expanded. Servicers must maximize net present value under its pooling servicing agreement to all parties in a deed of trust pool. The mortgagee, beneficiary, or authorized agent must offer the borrower a deed of trust modification or a workout plan if the modification or plan is consistent with its contractual or other authority.

The Department is authorized to establish by rule a surcharge on notices of sale for owner-occupied residential real property for the Protect Washington Homeowners Mediation Program. The Department is responsible for the distribution and use of funds.

The act takes effect September 1, 2010 and expires December 31, 2014.

EFFECT OF CHANGES MADE BY LABOR, COMMERCE & CONSUMER PROTECTION COMMITTEE (Recommended Substitute): The recommended substitute:

1. clarifies the good faith review process can start at any point after the beneficiary declares the underlying loan in default and accelerates the loan, but at least 30 days before the recording of a notice of sale pursuant to statute;
2. requires the notice of right to mediation be mailed to the Department;
3. removes the reference to contact information and specifies the borrower must receive the name, address, and telephone number of a person with authority to negotiate a loan modification on behalf of the beneficiary;
4. specifies the borrower must receive the telephone number of the United States Department of Housing and Urban Development to find a department certified housing counseling agency to assist homeowners in the state in avoiding foreclosure;
5. amends the election of the mediation process to the borrower and beneficiary only.
6. removes references to grantor, or the person who holds title of record, the grantor or person who holds title of record or every other person with an interest;
7. removes the requirement that DFI send notice to the borrower by certified mail.
8. requires DFI to send a copy of the affidavit to the borrower if they fail to return the form notice for mediation;
9. clarifies that employees of HUD-certified counseling agencies can mediate, not DFI-certified counselors;
10. clarifies that DFI may approve other mediators by rule;
11. gives DFI the option to determine the mediation notice format;
12. requires the mediator to notify DFI of the time and place of the mediation session;
13. permits the borrower, the beneficiary, and the mediator to participate by telephone during any part of the mediation process;
14. amends the cost of mediation to be shared equally between the beneficiary and the borrower;

15. clarifies that the surcharge on notices of sale applies only to owner-occupied residential real properties;
16. adds exemptions to deeds of trust: securing a commercial loan, securing obligations of a grantor who is not the borrower or a guarantor, or securing a purchaser's obligations under a seller-financed sale;
17. adds that the good faith review, loan modification, and mediation program only applies to deeds of trust made from January 1, 2003, to December 31, 2008, that are recorded against owner-occupies residential real property;
18. adds an effective date; and
19. adds a sunset provision.

Appropriation: None.

Fiscal Note: Available.

[OFM requested ten-year cost projection pursuant to I-960]

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill (Labor, Commerce & Consumer Protection): PRO: State law has for many years allowed foreclosure without going to court. It allows a mortgage holder to issue a notice of default and 30 days later can issue a notice of foreclosure sale. It is very easy for the mortgage holder, but a little too easy if you are living in the house. The mediation provision in the bill is a voluntary settlement, not a court order. The cost is minimal and will be covered by a fee. Please create an open system for the loan modification process. Please pass this bill so counselors can stop foreclosures and stop homeowners from proceeding into the foreclosure timeline by allowing them to have options. Right now they have no options. If this bill passed, it would be one of the first steps in helping homeowners and forcing the lenders to sit down and talk with us. This is not about a lender doing a foreclosure; the entities are a pooled trust of loans which are owned by investors. Loan servicing companies are inhibiting people from modifying their loans. They make more money from people getting foreclosed as opposed to not foreclosed. Requiring someone to show up and participate in the mediation and have the authority to act would be a great step to getting something accomplished and getting homeowners who qualify for a home modification to receive one. Banks are not acting in good faith. Banks are giving people conflicting information in regards to criteria needed for the federal Making Homes Affordable program. Washingtonians have a right to know about the federal programs and know that banks will mediate in good faith. Let people have a conversation with their lender, and encourage the lender to allow people to stay in their homes while they see if a loan modification is needed.

CON: This bill is mandating loan modifications based on the borrower's circumstances at the time the loan defaults. The foreclosure process should be an easy process and fairly quick and this legislation will at least double the length of the foreclosure process. The bill adds this element of good faith to the procedure. If the lender violates these rules, they basically lose their loans. It is a very draconian remedy. The mediator is almost an unappointed judge. This bill does not mandate a timeframe for the Department of Financial Institutions

(DFI) to return the affidavit that the borrower to elected mediation or mediation certificate. The bill doesn't require the trustee to mail the notice of mediation to DFI. The bill requires contact information for people with authority to settle, but how much information is required, and is it anybody potentially involved in the settlement process? The bill requires to provide counseling agencies, but does not name the agencies. The foreclosure statutory process cannot be any sooner than 190 days after default. This will cause a foreclosure timeframe that is as long or longer than a judicial foreclosure.

OTHER: Concerned as the bill is currently drafted, think significant amendments need to be drafted. If you make the nonjudicial process too time consuming and too risky for the creditors/lenders, they will choose to do a judicial foreclosure. A judicial foreclosure will result in a deficiency judgment against a borrower, these judgments are good for ten years and can be renewed for ten years, and then borrowers will be forced to file for bankruptcy to avoid the judgments. We can make this a better bill. The bill needs to be limited to consumer loans, needs to have several inclusions, and a sunset provision.

Persons Testifying (Labor, Commerce & Consumer Protection): PRO: Senator Kline, prime sponsor; Joe Morate, Elton Parker, Mark St. Marie, Joel Bruzos, Charles Markland, Local 32; Melissa Huelsman, private consumer lawyer; Bruce Neas, Columbia Legal Services; Marcola Nixon, Solid Ground.

CON: Denny Eliason, Peter Mucklestone, Washington Bankers Association; Brian Sommer, Northwest Trustee Services Inc.

OTHER: Karen Gibbons, Real Property Probate and Trust Section, Washington State Bar Association.

Staff Summary of Public Testimony on Recommended Substitute (Ways & Means):

PRO: This bill requires lenders to do more to avoid the loss of people's homes. There has been a 70 percent increase in foreclosures over the last year. This bill goes a long way to keep people in their homes. This bill will help ensure better value to the lenders than a foreclosure auction. The mediation program is paid for by fees so does not impact the general fund. This law is needed in Washington because we are a non-judicial foreclosure state. A person has to go to court to stop a foreclosure but lenders don't need to go to court to complete a foreclosure, just a series of notices. Fourteen other states have adopted third party mediation programs. DFI's program really only costs \$800,000 and additional funds raised through fees could be given to housing counseling.

CON: Lenders can go through either non-judicial or judicial foreclosure. Typically banks use non-judicial foreclosure because it is cheaper. SB 5810, passed last year, makes the non-judicial process at least 210 days. This bill would extend the process an additional 100 days, which means non-judicial foreclosures would take almost a full year. This places banks in jeopardy of violating the Consumer Protection Act. Many banks may start to choose judicial foreclosure, which takes about nine months. This will impact the court system and possible court costs are not included in the current fiscal note. This bill places a surcharge on notices of sale. Document recording fees are already very high. Current surcharges would go from \$64 to almost \$300. The committee should consider funding this from the Housing Trust Fund. Even if this was just limited to trustee sales for owner-occupied residents, the

document doesn't delineate owner-occupied so it couldn't really limit the surcharge in that way.

Persons Testifying (Ways & Means): PRO: Bruce Neas, Columbia Legal Services; Bev Spears, Poverty Action.

CON: Brad Tower, Community Bankers of Washington; Debbie Wilke, County Auditors.