

HOUSE BILL REPORT

ESHB 2614

As Passed Legislature

Title: An act relating to assisting homeowners in crisis by providing alternatives, remedies, and assistance.

Brief Description: Assisting homeowners in crisis by providing alternatives, remedies, and assistance.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Kenney, Ryu, Hasegawa and Santos).

Brief History:

Committee Activity:

Judiciary: 1/26/12, 1/30/12 [DPS].

Floor Activity:

Passed House: 2/13/12, 69-29.

Senate Amended.

Passed Senate: 2/29/12, 48-1.

House Refused to Concur.

Senate Amended.

Passed Senate: 3/5/12, 47-1.

Passed House: 3/6/12, 97-0.

Passed Legislature.

Brief Summary of Engrossed Substitute Bill

- Requires certain notifications to sellers involved in short sales, and limits the time in which a beneficiary may collect the outstanding debt after a short sale.
- Amends the Foreclosure Fairness Act to, among other things: change when a borrower may be referred to mediation; provide mediator discretion in some circumstances; provide immunity for all foreclosure mediators; clarify what information a beneficiary and borrower must provide each other before mediation; and change the allocation of funds remitted by beneficiaries.
- Makes other changes to the Deeds of Trust Act, including increasing the time period between the trustee sale and the recording of the notice of sale for owner-occupied residential real property.
- Creates a process to rescind a trustee sale in limited circumstances.

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.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Eddy, Hansen, Kirby, Klippert, Nealey, Orwall, Rivers and Roberts.

Staff: Trudes Tango (786-7384).

Background:

Short Sales.

In Washington, most loan obligations for residential real property are secured by deeds of trust. Under the Deeds of Trust Act, a beneficiary may use the non-judicial foreclosure process when a borrower defaults on the loan obligation. When there is a non-judicial foreclosure sale of residential real property, the beneficiary may not obtain a judgment to collect the remainder of the debt secured by the beneficiary's loan.

A "short sale" is a real estate transaction in which the proceeds of the sale are insufficient to pay the debts encumbering the property and the borrower is unable to pay the difference. Selling the property in a short sale can be one option for the borrower to avoid foreclosure. Generally, a beneficiary with a security interest in the property must consent to releasing its lien on the property for less than the full amount of the debt. Depending on the agreement between the borrower and the beneficiary, the borrower may or may not be liable for the remaining amounts owed to the beneficiary that are not covered by the sale.

Foreclosure Fairness Act.

Meet and Confer Process.

Before a beneficiary can issue a notice of default to a borrower of a loan secured by a deed of trust on owner-occupied residential real property, the beneficiary must first contact the borrower by letter and telephone to explore options to avoid foreclosure. If the borrower requests a meeting with the beneficiary, the meeting must be in person, unless the borrower waives that requirement. A person authorized to modify the loan on behalf of the beneficiary may participate by telephone, so long as a representative of the beneficiary is at the meeting in person.

This initial "meet and confer" requirement does not apply if the borrower has filed for bankruptcy and the bankruptcy stay remains in place or the bankruptcy court has granted relief from the bankruptcy stay allowing enforcement of the deed of trust.

Mediation and Mediators.

The Foreclosure Fairness Act (FFA), among other things, created a mediation process applicable to beneficiaries and borrowers of deeds of trust on owner-occupied residential property. The borrower must be referred to mediation by a housing counselor or attorney and can be referred any time before a notice of sale has been recorded. The referral is sent to the Department of Commerce (Department), which selects a mediator from a list of approved foreclosure mediators and sends notice to the parties.

A foreclosure mediator's fee may not exceed \$400 for a mediation session lasting between one and three hours. Payment of the fee is split equally between the beneficiary and borrower and must be remitted seven days before commencement of the mediation or pursuant to the mediator's instructions.

Mediators who are employees or volunteers of Dispute Resolution Centers (DRCs) are immune from suit in any civil action based on any proceedings or other official acts performed in their capacity as foreclosure mediators, except in cases of willful or wanton misconduct.

Beneficiary Reporting Requirements.

Every quarter, a beneficiary that issues notices of default on owner-occupied residential real property must report to the Department the number of owner-occupied residential real properties for which the beneficiary has issued a notice of default during the previous quarter and remit \$250 per property to the Department. The reporting and remitting requirement does not apply to beneficiaries that issued fewer than 250 notices of default in the previous year.

Allocation of Funds.

The funds remitted by beneficiaries are allocated between different agencies. In particular, 80 percent of the funds must be used for providing housing counselors to borrowers. Up to 9 percent or \$451,000, whichever is greater, goes to the Department to implement the FFA.

Rescission of Trustee Sale.

Trustees have numerous responsibilities in the foreclosure process. The Deeds of Trust Act authorizes certain entities to be trustees, including, among others: professional corporations, professional limited liability companies, and general partnerships, including limited liability partnerships, all of whose shareholders, members, or partners are either licensed attorneys or entities owned by licensed attorneys.

When delivered to the purchaser after a trustee's sale, the trustee's deed conveys all of the right, title, and interest in the real property sold that the grantor had or had the power to convey at the time of the execution of the deed of trust. If a trustee accepts a bid, the trustee's sale is final if it is recorded within 15 days. After a trustee's sale, there is no right by statute or otherwise, to redeem the property sold at the trustee's sale.

Summary of Engrossed Substitute Bill:

Short Sales.

If a beneficiary or mortgagee, or its assignees, of debt secured by owner-occupied real property intends to release its deed of trust or mortgage in the property for less than full payment of the debt, it must provide written notice to the borrower that, among other things, it is either waiving or reserving its right to collect full payment of the debt. If the beneficiary or mortgagee, or its assignees, does not initiate a court action to collect the outstanding debt within three years of the date it released its security interest, the right to collect the outstanding debt is forfeited. This provision applies to debts incurred by individuals primarily for personal, family, or household purposes and not to debts for business, commercial, or agricultural purposes. The six year statute of limitations for written contracts

is amended to cross-reference the three year limitation applicable to deficiencies in short sales.

The statutorily required pamphlet a real estate licensee provides to clients must include a disclosure stating the real estate licensee must notify a seller in writing that a short sale does not automatically relieve the seller of the obligation to pay any debt or costs remaining at closing, including fees such as the real estate licensee's commission.

Foreclosure Fairness Act.

Meet and Confer.

The initial meeting between the beneficiary and borrower may be by telephone, unless the borrower requests in writing an in-person meeting. The meet and confer requirement applies to borrowers who have filed for bankruptcy.

Referral to Mediation.

A borrower may no longer be referred to mediation during the meet and confer period. The borrower may be referred to mediation any time after a notice of default has been issued but no later than 20 days after a notice of sale has been recorded.

Mediation and Mediators.

A mediation session must be held within 70 days, rather than 45 days, of the referral from the Department. The beneficiary and borrower must exchange required documents within a certain time, and changes are made regarding the information beneficiaries are required to provide the mediator.

If the mediator reasonably believes a borrower will not attend a mediation session, the mediator may cancel a scheduled mediation session and send a written cancellation to the parties, and the beneficiary may proceed with the foreclosure. After a mediation session commences, the mediator may continue the session once, but any further continuances must be with the consent of the parties.

The mediator fee of \$400 is for preparing for mediation, rather than just for a mediation session, and must be paid within 30 days of the parties' referral to mediation. The list of who can be approved as a foreclosure mediator is expanded and mediators must have a certain level of experience evidenced by the number of mediations. The immunity applicable to mediators who are employees or volunteers of a DRC is extended to all foreclosure mediators.

Time Period for Trustee's Sale.

The time period between recording the notice of sale and the sale is extended from 90 days to 120 days for those borrowers who have received the letter under the meet and confer requirement.

Beneficiary Reporting Requirements.

The quarterly reporting by beneficiaries to the Department must include updated beneficiary contact information, and beneficiaries have up to 45 days from the end of each quarter to report.

Allocation of Funds.

Changes are made to the allocation of funds remitted by beneficiaries to the Department. Instead of 80 percent of the funds allocated to provide housing counselors for borrowers, 76 percent is allocated to provide housing counseling activities to benefit borrowers. The greater of 13 percent or \$590,000 is allocated to the Department.

Applicability.

A borrower referred to mediation before the effective date of the bill may continue with the mediation process and does not lose the right to mediation. A borrower who has not been referred to mediation as of the effective date of the bill, may only be referred to mediation after a notice of default but no later than 20 days after a notice of sale is recorded. A borrower who has not been referred to mediation as of the effective date of the bill and who has had a notice of sale recorded, may only be referred to mediation if the referral is made before 20 days have passed from the date the notice of sale was recorded.

Rescission of Trustee's Sale.

A domestic limited liability corporation may be a trustee under the Deeds of Trust Act.

Up to 11 days following a trustee's sale, the trustee, beneficiary, or authorized agent for the beneficiary may declare the sale and trustee's deed void if: (a) the trustee, beneficiary, or authorized agent asserts that there was an error with the foreclosure sale process including, but not limited to, an erroneous opening bid; (b) the beneficiary and borrower, prior to the sale, agreed to a loan modification or loss mitigation plan to postpone or discontinue the sale; or (c) the beneficiary or authorized agent accepted funds that fully reinstated or satisfied the loan.

The trustee must refund the bid amount to the purchaser. The trustee must send a notice of rescission to parties no later than 15 days following the sale. If the rescission is based on an error in the sale process or based on the borrower and beneficiary previously agreeing to a loan modification or postponement of the sale, the trustee may set a new sale date within a certain time and must comply with certain notice requirements.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed, except for section 12, regarding the allocation of funds, which contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) Homeowners think they have extinguished their debt after a short sale, but they find out that the lender intends to collect the rest of the debt. The lender generates the Internal Revenue Service (IRS) form, then "double collects" by getting the benefit of the loss in its accounting but collecting the rest of the debt.

(With concerns) This is a good concept, but the specific language needs to be changed to provide more certainty and clarity for homeowners. The bill must be clarified so that it only applies to single family owner occupied residential real property and not to sales when the home was used as collateral for a commercial loan. The bill should allow lenders to review the circumstances in its totality and allow lenders to say no to a short sale.

(Opposed) The second part of the bill regarding the lender consenting to the short sale is most problematic. If the bill is enacted as written, lenders will veto these sales because they will lose all ability to pursue a deficiency judgment. Community banks fund small business activities which are often funded with home equity lines of credit. The decision to release collateral for the short sale is separate from the decision to relieve the debt. The bank's ability to collect on a debt extends far beyond the single transaction. The notion of "double dipping" is not accurate. The bank would have to issue a revised IRS form and show it as income if the bank is still pursuing the debt. Short sales are complicated transactions. All parties who have a lien must agree to the sale and this type of legislation will make the process more complicated.

Persons Testifying: (In support) Representative Kenney, prime sponsor.

(With concerns) Bob Mitchell, Washington Association of Realtors; Stacy Augustine, Northwest Credit Union Association; and Denny Eliason, Washington Bankers Association.

(Opposed) Brad Tower, Community Bankers of Washington.

Persons Signed In To Testify But Not Testifying: None.