

SENATE BILL REPORT

SHB 2876

As Reported by Senate Committee On:
Financial Institutions & Insurance, February 24, 2016

Title: An act relating to the foreclosure of deeds of trust.

Brief Description: Addressing the foreclosure of deeds of trust.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Orwall, Kirby and Griffey).

Brief History: Passed House: 2/16/16, 97-0.

Committee Activity: Financial Institutions & Insurance: 2/24/16, 2/24/16 [DP].

SENATE COMMITTEE ON FINANCIAL INSTITUTIONS & INSURANCE

Majority Report: Do pass.

Signed by Senators Benton, Chair; Angel, Vice Chair; Mullet, Ranking Minority Member; Fain, Hobbs, Litzow, Nelson, Pedersen and Roach.

Staff: Shani Bauer (786-7468)

Background: Foreclosure of a Trust Deed. When a borrower under a trust deed fails to make loan payments as required and a default occurs, the beneficiary of the trust deed - or trustee or servicer acting on behalf of the beneficiary - must satisfy due diligence requirements in attempting to contact the borrower and providing information to the borrower including options that may be available to avoid foreclosure and how to contact a housing counselor. If the borrower does not respond to the beneficiary within 30 days, the beneficiary may send a written notice of default to the borrower. If the borrower does not pay outstanding amounts within 30 days of the issuance of the notice of default, the beneficiary may authorize the trustee to issue a notice of trustee's sale. The trustee must send written notice of trustee's sale to the borrower and any other lien holders of record and record the notice with the county auditor. The notice must be recorded at least 90 days prior to the sale date. Unless the borrower cures the default before 11 days of the sale or the sale is postponed for other reasons, the trustee may conduct the sale. A Trustee's Deed is recorded soon afterwards and the successful bidder becomes the owner.

Foreclosure Fairness Act. In 2011, the Legislature enacted the Foreclosure Fairness Act (FFA). The FFA is designed to help homeowners and their lenders explore possible

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alternatives to foreclosure and reach a resolution when possible. Lenders must notify borrowers prior to initiating the foreclosure of the availability of foreclosure counseling and the potential for foreclosure mediation.

The FFA also created the Foreclosure Fairness Account to provide funding for free homeownership counseling, attorneys to prosecute violations of the Washington Consumer Protection Act, and foreclosure prevention outreach. The account is funded through fees paid by trust deed beneficiaries based on the number of notices of default issued in the last quarter for owner-occupied residential properties. Federally insured beneficiaries conducting more than 250 foreclosures in Washington State in the previous year pay \$250 for each notice of default issued. The fees are deposited into the Foreclosure Fairness Account and distributed as follows:

- no less than 71 percent for the purposes of providing housing counseling services, except the amount may be reduced to meet funding levels for the attorney general or Commerce;
- the greater of 6 percent or \$650,000 to the office of the Attorney General to be used by the consumer protection division;
- up to 2 percent to the office of civil legal aid to provide legal representation for homeowners in foreclosure; and
- the greater of 18 percent or \$1.4 million to Commerce to be used for implementation and operation of the FFA.
- up to 3 percent to the Department of Financial Institutions for outreach and education.

The program and account are administered by the Department of Commerce. Each quarter, a trust deed beneficiary must report to the Department the number of notices of default issued on owner-occupied residential properties in the previous quarter and pay \$250 per notice to the Department to be deposited in the FFA.

Summary of Bill: Every beneficiary on whose behalf a notice of trustee's sale has been recorded on residential real property must report to the Department the number of notices of trustee's sale recorded for each residential property during the previous quarter and pay \$250 for each recorded notice of trustee's sale. A federally insured beneficiary that records fewer than 50 notices of trustee's sale in the preceding year is not required to report and pay the fee.

Residential real property is defined to include residential real property with up to four dwelling units, whether or not the property or any part is owner-occupied.

\$400,000 of the fees deposited to the Foreclosure Fairness Account are to first be used to fund the counselor referral hotline. The remaining funds are to be distributed as follows:

- 69 percent for the purposes of providing housing counseling activities to benefit borrowers;
- 8 percent to the office of the attorney general to be used by the consumer protection division;
- 6 percent to the office of civil legal aid to provide legal representation for homeowners in foreclosure; and
- 17 percent to the Department to be used for implementation and operation of the FFA.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: The bill takes effect on July 1, 2016.

Staff Summary of Public Testimony: PRO: The good news is that the number of foreclosures are going down over time. There have been cooperative discussions between many stakeholders who have come together to talk about some of the challenges in the FFA. It is anticipated those discussions will result in more recommendations for next year. The number of foreclosures has fallen from a high of around 44,000 a year to 16,500 for this past year. It is believed the number will continue to decrease to about 10,000 to 12,000 per year. As those numbers go down, the fees paid based on foreclosure notices are going down as well. This bill is designed to right-size the FFA, given that funding levels are decreasing. It recognizes the need to adjust the distribution percentages in the statute and broaden the base of those that must pay the fee. The bill provides continued funding for the Office of Civil Legal Aid, which provides direction and legal representation to homeowners facing foreclosure and represents them in the mediation process. Funding is needed for the office to be able to continue providing these services. The original bill had minimum allocations to the Attorney General and Department of Commerce. If not met, the funding would get taken out of the counseling funds, which is the most important part of the funding. This bill removes the minimum allocations and realigns the distribution formula. Recent statistics support that since the beginning of the program there have been 8500 referrals with 2000 homes retained. It is believed that 1200-1900 of those referrals are still in the program.

CON: Not much has changed in the foreclosure world since the passage of the FFA. There are dozens of anecdotal stories of banks not being fair. There are situations where borrowers have lost income in some way and now find themselves in the position where they are upside down on the property. When the borrower calls the bank, they are told that they must be three months in default in order for the bank to talk to them and help them with a loan modification. When the borrower stops paying for three months, the bank refuses to take further payments, refuses to work with the borrower, and moves to foreclosure. This is dishonest. The bill does not address the problem of failed outcomes. The state has spent \$4 million dollars, and out of 4000 referrals has only managed to save 800 homes. What borrowers need is more leverage against lenders. There are three barriers to due process in the Deed of Trust Act (DTA): the "loser pays" system for attorney fees; the requirement that the borrower post a bond; and the requirement that the homeowner bring the lawsuit so that they are the ones with the burden of proof. The DTA harms homeowners, and banks have abused the privilege of nonjudicial foreclosure. Finding documents as to who has the right to foreclose is difficult. Borrowers don't know who holds the note and who has the ability to foreclose. The DTA should be repealed.

Persons Testifying: PRO: Denny Eliason, Wa. Bankers Assoc. / United Financial Lobby; Kim Herman, WA State Housing Finance Commission; Joseph Jordan, Northwest Justice Project.

CON: Pina Belgrano, WA CAN, SAFE; Michelle Darnell, Paralegal Foreclosure Mediation advocate; and The Law Office of Jeff Jared; Shelley Erickson.

Persons Signed In To Testify But Not Testifying: PRO: Gerry P.