

# SENATE BILL REPORT

## ESSB 5797

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As Passed Senate, March 8, 2017

**Title:** An act relating to the services and processes available when residential real property is abandoned or in foreclosure.

**Brief Description:** Concerning the services and processes available when residential real property is abandoned or in foreclosure.

**Sponsors:** Senate Committee on Financial Institutions & Insurance (originally sponsored by Senators Mullet, Fain and Hobbs).

**Brief History:**

**Committee Activity:** Financial Institutions & Insurance: 2/14/17, 2/14/17 [DPS].

**Floor Activity:**

Passed Senate: 3/08/17, 48-0.

**Brief Summary of Engrossed First Substitute Bill**

- Authorizes the Housing Finance Commission to issue Certificates of Abandonment for a fee not to exceed \$100.
- Establishes processes for servicers—acting on behalf of the beneficiary of a trust deed—to enter abandoned property to take reasonable steps to secure it.
- Increases the fee for each notice of trustee's sale recorded on residential real property from \$250 to \$300.

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**SENATE COMMITTEE ON FINANCIAL INSTITUTIONS & INSURANCE**

**Majority Report:** That Substitute Senate Bill No. 5797 be substituted therefor, and the substitute bill do pass.

Signed by Senators Angel, Chair; Mullet, Ranking Minority Member; Fain, Fortunato, Hobbs and Kuderer.

**Staff:** Jeff Olsen (786-7428)

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*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.*

**Background:** Most loan obligations for residential real property in Washington are secured by deeds of trust. 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.

The Foreclosure Fairness Act (Act) was enacted in 2011, making changes to the process related to the nonjudicial foreclosure of deeds of trust under the Deed of Trust Act (DOTA). As part of those changes, the Foreclosure Fairness Program (Program) was established. The following agencies are involved with the Program and their roles and responsibilities are summarized below:

1. The Department of Commerce (Department) is charged with the overall development and management of the Program, including the mediation program. The Director of the Department authorizes expenditures from the Foreclosure Fairness Account (Account).
2. The Housing Finance Commission (Commission) administers the homeowner counseling program and oversees a toll-free hotline where homeowners in need of foreclosure prevention assistance can call and receive free foreclosure prevention counseling.
3. The Office of the Attorney General (AGO) Consumer Protection Division investigates consumer protection complaints and enforces deed of trust foreclosure laws.
4. The Office of Civil Legal Aid (OCLA) contracts with qualified legal aid programs to provide free legal assistance to low-income and moderate-income homeowners in matters related to foreclosure.

The Account is funded through a \$250 fee paid by trust deed beneficiaries based on the number of notices of default issued on residential property. The remittance requirement does not apply to a beneficiary or loan servicer that is a federally insured depository institution with fewer than 50 notices of trustee's sale recorded on its behalf in the preceding year, or any homeowners' or condominium association beneficiaries.

Authorized expenditures from the Account are as follows:

- \$400,000 to fund the counselor referral hotline, and of the remaining funds;
- 69 percent for housing counseling activities;
- 8 percent to the AGO to be used by the Consumer Protection Division to enforce the DOTA;
- 6 percent to the OCLA to be used for the representation of homeowners in matters related to foreclosure; and
- 17 percent to the Department to be used for implementation and operation of the Act.

In 2016, a majority of the Washington Supreme Court held in *Jordan v. Nationstar* that Washington law prohibits lenders from taking possession of property prior to foreclosure. Entry provisions contained in many deeds of trust allow servicers to secure vacant or undersecured property to prevent unauthorized entry or possible damage. The Washington Supreme Court held that the entry provisions enable the lender to take possession after default, and were found to be in conflict with state law.

**Summary of Engrossed First Substitute Bill:** The Commission may issue a certificate of abandonment (COA) for a fee not to exceed \$100. Upon issuance of a COA, the Commission must notify the appropriate city, town, or county. A COA permits a servicer or its agent to enter property to take reasonable steps to secure it. Several conditions must be met before a COA is issued including the borrower is in default and the property is abandoned; the property is open and unprotected, and in reasonable danger from exposure or vandalism; or a local official has requested that the borrower secure the residential real property.

Within 7 days of issuance of a COA, a servicer or its agent must post a written notice informing occupants that after 30 days the servicer intends to enter the dwelling to take reasonable steps to secure the property. However, if there is imminent danger or harm, such as flooding or notification from local officials of an immediate danger, the servicer may enter the property immediately and must post the required notice to the occupants. The servicer must document all steps to enter and secure the property. The authority of an agent to enter abandoned property is derived solely from a servicer's authority, and agents must possess all applicable permits, licenses, bonds, and insurance. In addition, agents must implement stringent background checks on all employees engaged in on-site property preservation.

After default, a borrower may authorize a servicer through written permission to enter a premise for inspection and repair. A servicer must notify the Commission if it has been granted written permission by the borrower so the Commission may notify the appropriate city, town, or county.

A servicer may perform reasonable external maintenance without the borrower's permission if after default and inspection there is reasonable cause to believe the property is abandoned and entry to the property is necessary to maintain the property in accordance with local ordinances. The servicer must provide proper notice to the occupants of the property and also notify the Commission that it intends to enter the property for external maintenance.

Beginning 30 days after obtaining written permission from the owner to enter the property to maintain it, a court order allowing entry to the premises to maintain it, or the issuance of a certificate of abandonment, a beneficiary or a beneficiary's agent or servicer is under a duty to maintain vacant property. Local governments may notify servicers of failures to maintain vacant property and may require servicers to remedy public health or safety concerns. If a servicer fails to remedy a violation, a local government may remedy and require reimbursement for reasonable costs. A local government that has incurred costs has a lien on the property for unreimbursed costs. The duty to maintain the vacant property ends with the recording of the trustee's deed by the purchaser, or 15 days after physical delivery of the trustee's deed to the purchaser, whichever is later. Similar to the processes for maintaining property prior to foreclosure, a beneficiary or a beneficiary's agent or servicer is under a duty to maintain vacant property.

Remittances to the Account, which includes funds that are used for services such as housing counselors, consumer protection, legal representation of homeowners, and implementation and operation of the Act, are modified as follows:

- for each notice of trustee's sale on noncommercial loans on residential real property, a beneficiary must remit \$300 to the county auditor at the time of recording;

- the county auditor may retain 3 percent for purposes of operations and maintenance, and must remit the remaining funds monthly to the State Treasurer for deposit into the Account;
- beneficiaries that are federally insured depository institutions that record fewer than 50 notices of trustee's sale during a calendar year may apply to Commerce for a refund of the recording fee, on either a quarterly or an annual basis, rather than being exempt from the fee;
- a notice of trustee's sale must include a cover sheet on which it is clearly indicated the name of the beneficiary and whether the loan is commercial or noncommercial; and
- the county auditor must index the notice of trustee's sale by beneficiary.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

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

**Staff Summary of Public Testimony on Proposed Substitute:** *The committee recommended a different version of the bill than what was heard.* PRO: A recent court decision, *Jordan v. Nationstar*, has invalidated key provisions of the foreclosure process allowing servicers to access and maintain property until foreclosure is complete. Stakeholders have been working on foreclosure issues for several years, and the working group has a good track record for resolving differences. Liability needs to be established for the agents and subcontractors that are entering property for the work that they perform. While the current bill still needs work, including addressing real estate owned or bank owned properties, the bill contains key protections for homeowners and addresses servicers needs. Issues around entry to abandoned homes are addressed in the bill, however, more could be done regarding the licensing and regulation of third party contractors who are the ones performing the work on the property. The Foreclosure Fairness Account needs some modifications to continue providing services to homeowners facing foreclosure. The bill protects homeowners and provides structure to access that is needed to maintain abandoned properties. Washington law does not provide permission for lenders to take ownership before foreclosure, and procedures are needed to safeguard rights of homeowners from trespass. Cities have seen an increase in abandoned properties, and the communication requirements in the bill identifying which properties are abandoned will help local governments. One issue is if the legislation should be applied retroactively to avoid lawsuits against Fannie Mae and Freddie Mac, unless a servicer has acted inappropriately. Another concern is establishing procedures and certainty in the foreclosure process when the homeowner is deceased. Trustees want changes to provide the beneficiaries declaration document earlier in the process, and a declaration of non-monetary status in the foreclosure.

OTHER: Community bankers are supportive of the efforts to address the recent court case and address the issues securing property in foreclosure. However, there are concerns about the fee increase and the restructuring of the Foreclosure Fairness Act, and the refund process established in the bill.

**Persons Testifying:** PRO: Senator Mark Mullet, Prime Sponsor; Clay Gatens, Lead Counsel for Jordan in *Jordan v. Nationstar*; Denny Eliason, Washington Bankers Association; Lili Sotelo, Columbia Legal; Briahna Murray, City of Tacoma, SeaTac, Spokane Valley; Jessica Fortescue, WA Mortgage Bankers Assn.; Holly Chisa, United Trustees Assn.; Melissa Huelsman, Predatory Lending Law.

OTHER: Brad Tower, Community Bankers of Washington.

**Persons Signed In To Testify But Not Testifying:** No one.