

HOUSE BILL REPORT

HB 1637

As Reported by House Committee On:

Civil Rights & Judiciary

Title: An act relating to prohibiting excessive fees or other charges for locating or recovering foreclosure surplus funds and other unclaimed property.

Brief Description: Prohibiting excessive fees or other charges for locating or recovering foreclosure surplus funds and other unclaimed property.

Sponsors: Representatives Orwall, Pollet and Fitzgibbon.

Brief History:

Committee Activity:

Civil Rights & Judiciary: 2/1/23, 2/10/23 [DPS].

Brief Summary of Substitute Bill

- Prohibits excessive fees for locating or recovering foreclosure surplus funds and other unclaimed property.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Hansen, Chair; Farivar, Vice Chair; Graham, Assistant Ranking Minority Member; Entenman, Goodman, Peterson, Rude, Thai and Walen.

Minority Report: Without recommendation. Signed by 2 members: Representatives Walsh, Ranking Minority Member; Cheney.

Staff: Yelena Baker (786-7301).

Background:

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

Foreclosure Surplus Funds.

Mortgages and deeds of trust are two forms of security interests in real property used for real estate financing. A mortgage is a pledge of real property as security for a debt owed to the lender (mortgagee) and creates a lien on the real property. A deed of trust is created when the borrower (grantor) grants a deed creating a lien on the real property to a third party (the trustee) who holds the deed in trust as security for an obligation due to the lender (the beneficiary). Most loan obligations for residential real property in Washington are secured by deeds of trust.

A mortgage may be foreclosed only through a judicial proceeding according to statutory requirements. Where the proceeds of the foreclosure sale of a mortgaged property are more than sufficient to pay the amount due and costs, the surplus must be applied to all interests in, or liens or claims of liens against, the property in the order of priority that the interest, lien, or claim attached to the property. Any remaining surplus must be paid to the mortgage debtor, or the debtor's heirs and assigns. Surplus proceeds are deposited with the clerk of the court and may be disbursed upon court order.

A deed of trust may be foreclosed either through the judicial process or a nonjudicial trustee's sale process pursuant to the Deeds of Trust Act (DOTA), which imposes detailed notice and process requirements for nonjudicial foreclosure. The DOTA requires a trustee to apply the proceeds of the trustee's sale first to the expense of the sale, including a reasonable charge by the trustee and the trustee's attorney, and then to the obligation secured by the deed of trust. Any surplus, less the clerk's filing fee, must be deposited with the clerk of the superior court of the county in which the sale took place. The trustee must mail copies of the notice of the surplus, the notice of trustee's sale, and the affidavit of mailing to each party to whom the notice of trustee's sale was sent pursuant to the DOTA.

Interests in, or liens or claims of liens against the property eliminated by the trustee's sale under the DOTA attach to the surplus in the order of priority that it had attached to the property, as determined by the court. A party seeking disbursement of the surplus funds must file a motion requesting disbursement and serve notice of the motion to all parties to whom the trustee mailed notice of the surplus, and any other party who has entered an appearance in the proceeding, not less than 20 days prior to the hearing of the motion. The clerk may not disburse the surplus except upon order of the superior court.

Unclaimed Property.

Enacted in 2022, the Revised Uniform Unclaimed Property Act (RUUPA) repealed and replaced the Uniform Unclaimed Property Act (UUPA), and updated state law governing the process of distribution and processing of unclaimed property.

Unclaimed property is money or intangible property owed to an individual or business. Property is considered unclaimed after it has been held for a specified period of time and the holder is not able to locate the property owner. Typical unclaimed property includes bank accounts, insurance proceeds, securities, safe deposit box contents, and uncashed checks.

Common holders of unclaimed property are banks and financial institutions, businesses, and state and local governments.

With the exception of local governments holding certain types of unclaimed property, all holders must report and deliver unclaimed property to the Department of Revenue (DOR), which administers a public and electronically searchable database of reported names of all apparent owners for whom property is being held by the DOR. The unclaimed property database includes instructions for filing a claim to property with the DOR and a printable claim form with instructions for its use.

The RUUPA permits, but does not require, an apparent owner of unclaimed property to enter into an agreement with another person or entity for the purposes of locating, delivering, or recovering property held by the DOR. Such an agreement is enforceable only if it meets specified requirements and states the amount or value of the property reasonably expected to be recovered, as computed before and after a fee or other compensation to be paid to the person or entity.

If an agreement to locate and deliver unclaimed property provides for compensation that is unconscionable, the agreement is unenforceable except by the apparent owner. An apparent owner that believes the agreed-upon compensation is unconscionable or the DOR, acting on behalf of an apparent owner, or both, may file an action in superior court to reduce the compensation to the maximum amount that is not unconscionable.

Summary of Substitute Bill:

Foreclosure Surplus Funds.

State law governing judicial foreclosure and the DOTA are amended to include a prohibition on excessive fees for locating or recovering foreclosure surplus funds.

It is unlawful for any person to seek or receive any fee or compensation for locating or purporting to purchase the right to recover foreclosure surplus funds where the fee is in excess of:

- 5 percent of the value of the foreclosure surplus funds returned to the owner; and
- reasonable attorneys' fees and costs, upon a motion and a hearing by a court of competent jurisdiction.

Every contract for any fee or compensation for locating or purporting to purchase the right to recover foreclosure surplus funds must contain a notice that meets specified requirements, including a statement that a homeowner is entitled to cancel the contract within 10 days of signing it.

Unclaimed Property.

The RUUPA is amended to include a provision that existed in the repealed UUPA, the

previous statute governing unclaimed property, and that prohibits excessive fees for locating or recovering unclaimed property.

It is unlawful for any person to seek or receive any fee in excess of 5 percent of the value of the property or funds returned to the owner as compensation for locating, or purporting to locate:

- any property which the person knows has been reported, paid, or delivered to the DOR pursuant to the RUUPA;
- any funds held by a court or county that are proceeds for a foreclosure for delinquent property taxes, assessments, or other liens; or
- funds that are otherwise held by a county because of a person's failure to claim funds held as reimbursement for unowed taxes, fees, and other government charges.

The prohibition on excessive fees for locating or recovering unclaimed property applies retroactively to January 1, 2023, and to all civil actions and proceedings commenced prior to January 1, 2023, in which a claim or cause of action was asserted pursuant to the UUPA prior to its repeal. Any such action or proceeding that may have been dismissed as a result of the repeal is saved and reinstated, and may proceed under the bill.

Additionally, the prohibition on excessive fees for locating or recovering unclaimed property applies to all claims and causes of action based on conduct that occurred prior to January 1, 2023, and that at that time violated the UUPA. Any such claim or cause of action that could have been commenced under the UUPA and has been extinguished by the repeal may proceed under the bill, provided that the claim or cause of action is not barred by any applicable statute of limitations.

Enforcement.

A violation of the prohibition on excessive fees is a per se violation of the Consumer Protection Act.

A person who violates the prohibition on excessive fees for locating or recovering foreclosure surplus funds and other unclaimed property is guilty of a misdemeanor and will be fined or imprisoned for not more than 30 days, or both. The fine must be in the amount not less than the fee or charge the person sought, received, or contracted for, and not more than 10 times such amount. These penalties apply prospectively from the effective date of the bill, including in cases where the prohibition applies retroactively.

Substitute Bill Compared to Original Bill:

The substitute bill modifies provisions related to prohibiting excessive fees for locating unclaimed property reported or delivered to the DOR and:

- provides that the bill's prohibition on excessive fees applies to all civil actions and proceedings commenced prior to January 1, 2023, in which a claim or cause of action was asserted pursuant to the UUPA prior to its repeal; any such action or proceeding

that may have been dismissed as a result of the repeal is saved and reinstated, and may proceed under the bill;

- provides that the bill's prohibition on excessive fees applies to all claims and causes of action based on conduct that occurred prior to January 1, 2023, and that at that time violated the UUPA; any such claim or cause of action that could have been commenced under the UUPA and has been extinguished by the repeal may proceed under the bill, provided that the claim or cause of action is not barred by any applicable statute of limitations; and
- specifies that the criminal penalties for violating the prohibition on excessive fees apply prospectively from the effective date of the bill, rather than retroactively to January 1, 2023.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Washington has laws that help homeowners stay in their homes and protect homeowners during the foreclosure process. Those protections used to include a 5 percent cap on fees charged for locating and recovering surplus funds, which result after a home is sold at foreclosure and the proceeds exceed the amount owed.

In 2022 the RUUPA inadvertently repealed the per se violations for excessive fees or charges relating to the recovery of property held by the state. This opened the door for scammers to prey upon vulnerable homeowners who experience a foreclosure. As home values rose, foreclosure scams have evolved; they now target homeowners with surplus funds remaining after the payment of liens and are designed to strip homeowners of their hard-earned equity. In one case a company scammed several Washington homeowners out of equity, including a family who would have lost over \$90,000, or 67 percent of their equity in the home, if the Attorney General and the Consumer Protection Division had not stepped in and stopped the scam.

The bill seeks to restore the status quo by reinstating this 5 percent cap on fees and the per se violations. The bill also explicitly applies the 5 percent cap to surplus funds resulting from foreclosures under the DOTA and not just foreclosures of tax liens under the RUUPA. The bill makes it less profitable to scam homeowners who have already lost their homes and ensures that homeowners know their rights with regard to surplus funds.

This bill is instrumental to the Consumer Protection Division's efforts to protect consumers

from foreclosure-related scams, and per se violations of the Consumer Protection Act play a key role in holding these types of companies accountable. Relying on the unconscionability standard in the RUUPA requires significant access to lawyers and legal resources that many consumers and homeowners simply do not have. The bill simplifies investigations and litigation of foreclosure-related scams, and makes the Attorney's General efforts to protect consumers more efficient.

Pending cases that have been filed before the repeal of the UUPA are severely affected by the repeal and by the fact that there is no current legislation that prohibits excessive fees. The bill should be amended to ensure that there are remedies available for people who have been affected by these practices before the repeal of the UUPA.

(Opposed) None.

Persons Testifying: Representative Tina Orwall, prime sponsor; Chip Goss; Denise Rodriguez, Washington Homeownership Resource Center; Heidi Anderson, Washington State Attorney General's Office; Guy Beckett, Berry and Beckett, PLLP; and Justin Thomas.

Persons Signed In To Testify But Not Testifying: None.