

SENATE BILL REPORT

HB 1349

As Reported by Senate Committee On:
Housing, March 22, 2023

Title: An act relating to foreclosure protections.

Brief Description: Concerning foreclosure protections.

Sponsors: Representatives Orwall, Leavitt, Ramel, Kloba, Reed, Lekanoff, Pollet and Fosse.

Brief History: Passed House: 2/28/23, 97-0.

Committee Activity: Housing: 3/10/23, 3/22/23 [DPA].

Brief Summary of Amended Bill

- Modifies various provisions related to nonjudicial foreclosures of deeds of trust, including changing the timeline for referral to preforeclosure mediation and modifying the exemptions from mediation and reporting and remittance requirements for certain federally insured depository institutions.
- Requires that a trustee delay a foreclosure sale for at least 30 days upon receipt of written notice from the Homeowner Assistance Fund Program that an application for federal relief funds has been submitted to the program on behalf of the borrower, a successor in interest to a deceased borrower, or a person who has been awarded title to the property.
- Provides that it is unlawful to seek or receive any fee or compensation for locating, or purporting to purchase or otherwise acquire the right to recover, surplus funds held by a court or county resulting from a foreclosure in excess of 5 percent of the value of the property reasonably expected to be recovered and reasonable attorneys' fees and costs.

SENATE COMMITTEE ON HOUSING

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.

Majority Report: Do pass as amended.

Signed by Senators Kuderer, Chair; Frame, Vice Chair; Fortunato, Ranking Member; Braun, Cleveland, Gildon, Rivers, Saldaña, Shewmake, Trudeau and Wilson, J..

Staff: Riley Bengé (786-7316)

Background: Deeds of Trust and Residential Foreclosures. Unlike a mortgage, which requires judicial foreclosure, a deed of trust may be nonjudicially foreclosed if the borrower defaults on the loan obligation. The Deeds of Trust Act (DOTA) establishes procedures for foreclosure and imposes certain requirements on beneficiaries and trustees. 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.

Foreclosure Fairness Act. In 2011, the Legislature enacted the Foreclosure Fairness Act (FFA), which made changes to the process related to nonjudicial foreclosures of deeds of trust under DOTA. The FFA is designed to help homeowners and their lenders explore possible alternatives to foreclosure and reach a resolution when possible. Prior to initiating the foreclosure, lenders must notify borrowers of the availability of foreclosure counseling and the potential for foreclosure mediation. At least 30 days before a notice of trustee's sale (NOTS) may be recorded, a borrower must be provided with a notice of default (NOD). Homeowners are eligible for mediation after a NOD is issued but no later than 20 days from the date a NOTS is recorded.

The Department of Commerce (Commerce) administers the foreclosure mediation program. Both the lender and homeowner pay for the mediation services. Lenders and servicers conducting more than 250 foreclosures in Washington State in the previous year pay \$250 for each NOD issued. The fee provides funding for free home ownership counseling, attorneys to prosecute violations of the Washington Consumer Protection Act, foreclosure prevention outreach, and the administration of the program.

Homeowner Assistance Fund. On March 11, 2021, President Biden signed the American Rescue Plan Act passed by Congress, which included the Homeowner Assistance Fund (HAF). Under the HAF program, federal funds are available to qualified homeowners who are behind on their mortgage due to hardship caused by the COVID-19 pandemic. The United States Department of the Treasury requires each state to submit a HAF plan in order to receive federal funds.

The Washington State Housing Finance Commission (WSHFC) administers the Washington HAF program. WSHFC approved Washington's HAF plan on March 24, 2022. The Washington HAF program connects Washington homeowners with housing counselors who provide free individual support and assist homeowners with navigating their options to

prevent foreclosure. Under the Washington HAF program, qualified Washington homeowners behind on their mortgage due to pandemic hardship are eligible for federal relief funds of up to \$60,000 per household.

Rescission of Trustee's 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.

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:

- 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;
- the beneficiary and borrower, prior to the sale, agreed to a loan modification or loss mitigation plan to postpone or discontinue the sale; or
- 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.

Consumer Protection Act. It is a violation of the Consumer Protection Act for any person or entity to:

- offer, or offer to accept any consideration of any type not to bid, or to reduce a bid, at a sale of property conducted pursuant to a power of sale in a deed of trust;
- violate the duty to mediate in-good faith under the foreclosure mediation program;
- fail to comply with notice of default requirements; or
- fail to initiate contact with a borrower and exercise due diligence as required prior to issuing a notice of default.

Summary of Amended Bill: Preforeclosure Mediation Referral Timeline. Under current law, a borrower may only be referred to mediation after a NOD has been issued, but not later than 20 days after the NOTS is recorded. The bill modifies this timeline and allows a referral to mediation up until 90 days prior to the date of sale listed in the NOTS, or no later

than 25 days before the date of sale listed in an amended NOTS. The mediation referral language required to be included in a NOD and NOTS is amended to reflect the transition from the 20-day timeline to the 90-day countback timeline.

Mediation Referrals for Successors in Interest. The home occupancy requirement for mediation referrals is removed for successors in interest. A deceased borrower's successor in interest does not need to occupy a property threatened by foreclosure as their primary residence in order to be referred to mediation.

Beneficiary Exemptions from Mediation Requirements. Beginning January 1, 2024, the preforeclosure mediation requirements do not apply to any federally insured depository institution that certifies to Commerce that it was not a beneficiary of deeds of trust in more than 250 trustee sales of residential real property during the preceding calendar year.

During the 2023 calendar year, the preforeclosure mediation requirements do not apply to any federally insured depository institution that certifies to Commerce that it was not a beneficiary of deeds of trust in more than 250 trustee sales of owner-occupied residential real property occurring in Washington State during 2019.

The exemptions from the preforeclosure mediation requirements apply retroactively to January 1, 2023, and prospectively beginning with the effective date of Section 7 of the bill, which is subject to an emergency clause and takes effect immediately.

Beneficiary Exemptions from Reporting and Remittance Requirements. During the 2023 calendar year, the reporting and remittance requirements do not apply to any beneficiary or loan servicer that is a federally insured depository institution that certifies that fewer than 50 notice of trustee's sale were recorded on its behalf in 2019.

The exemptions from the reporting and remittance requirements apply retroactively to January 1, 2023, and prospectively beginning with the effective date of Section 8 of the bill, which is subject to an emergency clause and takes effect immediately.

Continuance of a Foreclosure Sale by Trustee. A trustee shall continue a foreclosure sale for at least 30 days upon receipt of written notice from the Washington HAF program that an application has been submitted to the HAF program on behalf of the applicant. The foreclosure sale shall continue for an additional 30-day period upon receipt of a written notice from the HAF program that the applicant is deemed eligible for the program.

If an application to the HAF program is approved in an amount that would cure the default and make the beneficiary whole, a sale may not proceed while the approved application is pending for payment. A sale may proceed, however, if the HAF program issues a written confirmation that an application has been denied or no funds from the program will be paid in response to an application, and that any appeal process available to the applicant has been exhausted. The trustee has no duty to delay a sale if the applicant has already received a

continuance based on a prior application to the HAF program, unless the applicant demonstrates to the trustee that a new application is pending based upon a substantial change in circumstances supporting a new application, and that it has not been submitted solely for the purpose of delaying the sale.

Contingent expiration. The section of the bill relating to the continuance of a foreclosure sale upon application to and notice from the HAF program is subject to a contingent expiration date and expires upon the expiration and permanent closure of the HAF program.

Rescission of Trustee's Sale. Under current law, a rescission of a trustee sale may only occur if the home is purchased by a lender or beneficiary of the loan. The bill allows for a rescission of a trustee sale, subject to the statutory requirements for rescission, to occur when a third-party purchaser purchases the home at a trustee's sale.

Consumer Protection Act. It is unlawful and a violation of the Consumer Protection Act for any person to seek or receive any fee or compensation for locating, or purporting to purchase or otherwise acquire the right to recover, funds held by a court or county that are proceeds from a foreclosure in excess of 5 percent of the value thereof returned to such owner and reasonable attorneys' fees and costs.

EFFECT OF HOUSING COMMITTEE AMENDMENT(S):

- Further clarifies what may constitute reasonable documentation of the death of the borrower or grantor and what may demonstrate ownership interest to a trustee or mortgage servicer when the borrower or grantor in default is deceased and someone is claiming to be a successor in interest to the borrower's or grantor's property rights.
- Adds provisions limiting fees associated with the recovery of surplus funds resulting from a foreclosure of a deed of trust or from a foreclosure under chapter 61.12 RCW to 5 percent of the value of the property reasonably expected to be recovered and reasonable attorneys' fees and costs.
- Provides that a violation of either provision related to the recovery of surplus funds resulting from a foreclosure constitutes a per se violation of the Consumer Protection Act and prescribes penalties.

Appropriation: None.

Fiscal Note: Available.

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

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony on House Bill: *The committee recommended a different version of the bill than what was heard.* PRO: This bill is meant to strengthen

protections in the foreclosure fairness act (FFA). The foreclosure moratorium affected how we pay for the mediation counseling and some of the adjustments in the bill will keep the FFA program operating smoothly when its funding was disrupted by the foreclosure moratorium. A big part of the bill is extending the timeline to get through the application process to save their homes whenever possible.

The bill provides clarity and allows people to identify the deadlines to get into the foreclosure mediation programs. Numerous homeowners come late in the foreclosure process and it often becomes a race against the clock. This bill will make the process more efficient and provide some breathing room for the homeowner and the HAF program to fulfill its purpose. With successors in interest, people often come into a situation that is difficult and people are simply trying to save their property. This bill removes some of the encumbrances to their ability to get into foreclosure mediation. The bill would also provide a mandatory foreclosure sale delay when a HAF application has been submitted. The delay of a sale as a result of an application for HAF funding is good. It gives trustee the ability to delay a sale and remove pressure from the situation. The bill provides clarity for all parties involved.

Under the current law, if there is an error in the foreclosure of a home that is purchased by a lender or beneficiary of the loan, the statute allows an 11-day window for the nonjudicially foreclosing trustee to undo the sale at their discretion. However, when a third-party purchaser purchases the home there are no protections in the current statute. This bill fixes this and makes sure the third-party bidder is subject to the 11-day discretion of the trustee.

The FFA stakeholder group includes various interested stakeholders and convenes at least annually. All have agreed that the changes in this bill will help provide clarity to homeowners and allow the FFA programs to better help homeowners. The workgroup developed the bill and the proposed amendment and believe the amendment and the bill would benefit low-income homeowners across the state and all homeowners facing nonjudicial foreclosures. The proposed amendment would clarify the documentation needed to establish the death of a borrower and the legal status of an heir as a successor in interest. The amendment would specify what documentation was acceptable to help that process move forward. Another bill that places a cap on surplus funds that can be taken by someone who is assisting a borrower to obtain these funds would be appropriately added to this bill. Some amounts of surplus funds are very large and a cap would be crucial to make sure that homeowners that are foreclosed upon could retain as much equity as possible after foreclosure. Adding the consumer protections with respect to the surplus funds cap would fit well with this bill and the addition is encouraged.

Persons Testifying: PRO: Representative Tina Orwall, Prime Sponsor; Christina Henry; DENISE Rodriguez, Washington Homeownership Resource Center; Meredith Bruch, Northwest Justice Project; Robert McDonald, Quality Loan Service Corp..

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