

Department of Legislative Services
 Maryland General Assembly
 2019 Session

FISCAL AND POLICY NOTE
 First Reader

House Bill 1277 (Delegate Sydnor)
 Environment and Transportation

Real Property - Mortgages and Deeds of Trust - Foreclosure Actions

This bill (1) invalidates a power of sale or assent to decree authorized in a mortgage or deed of trust on owner-occupied residential property that is executed on or after the bill’s October 1, 2019 effective date; (2) expands the definition of a specified final loss mitigation affidavit to include additional information; (3) prohibits nonjudicial foreclosures on mortgages or deeds of trust on residential property; (4) requires that an action to foreclose a mortgage or deed of trust on residential property be commenced by filing a complaint in the circuit court and generally subjects such actions to the general rules of civil procedure; and (5) substitutes the term “the owner of a debt instrument secured by a mortgage or deed of trust” for references to “a secured party.” The bill also increases, from \$300 to \$800, the filing fee for a specified complaint to foreclose, and makes other changes to the foreclosure process and timeline.

Fiscal Summary

State Effect: General fund expenditures increase significantly beginning in FY 2020 for the Judiciary to hire additional judges and associated staff, as discussed below. Special fund revenues increase by \$5.4 million in FY 2020 due to the increased filing fee. Future year revenues reflect annualization, but decline by approximately 10% annually.

(in dollars)	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024
SF Revenue	\$5,382,800	\$6,546,600	\$5,891,900	\$5,302,700	\$4,772,500
GF Expenditure	-	-	-	-	-
Net Effect	-	-	-	-	-

Note: () = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: Local expenditures increase to hire additional administrative staff for circuit court judges. Revenues are not materially affected. **This bill may impose a mandate on a unit of local government.**

Small Business Effect: Meaningful.

Analysis

Bill Summary:

Final Loss Mitigation Affidavit

“Final loss mitigation affidavit” means an affidavit that (1) is made by a person authorized to act on behalf of the owner of a debt instrument secured by a mortgage or deed of trust on owner-occupied residential property that is the subject of a foreclosure action; (2) certifies the completion of the final determination of loss mitigation analysis in connection with the mortgage or deed of trust; (3) provides the information described under specified provisions of the Courts and Judicial Proceedings Article related to required documentation for a debt buyer or collector; and (4) if denied, provides an explanation for the denial of a loan modification or other loss mitigation *and* a detailed description of the loss mitigation programs available to the mortgagor or the grantor.

Foreclosure Actions

The bill alters the foreclosure process by requiring the owner of a debt instrument secured by a mortgage or deed of trust (a secured party) to bring an action to foreclose a mortgage or deed of trust on residential property by filing a complaint in the circuit court. The effect of these provisions is to eliminate nonjudicial foreclosure remedies, which involve filing an order to docket (OTD) with a court, but which do not require a full hearing before a court.

Required Contents of a Complaint to Foreclose

The bill specifies that the complaint to foreclose must contain, if applicable, an affidavit stating the license number of (1) the mortgage originator; (2) the owner of the debt instrument secured by the mortgage or deed of trust at the time the complaint to foreclose is filed; and (3) all mortgage servicers who serviced the mortgage loan on or before the time the complaint to foreclose is filed. Additionally, the complaint must include an affidavit stating, if applicable, that at the time the action to foreclose on the mortgage or deed of trust was filed the contents of the notice of intent to foreclose (NOI) are accurate, either as originally sent or as amended.

Motion to Strike

The bill requires the court to hold a hearing on a specified motion to strike filed by the owner of a debt instrument in response to a request for postfile mediation filed by a mortgagor or grantor.

Scheduling of Foreclosure Sale

If the parties do not reach an agreement at the postfile mediation, or the 60-day mediation period expires without an extension granted by the Office of Administrative Hearings (OAH), within 45 days after OAH files its report with the court, the court *must schedule a trial* to determine whether the owner of the debt instrument has the right to foreclose on residential property.

The bill also repeals provisions that specify that, in the case of postfile mediation, the mortgagor or grantor may file a motion to stay the foreclosure sale under specified circumstances.

Prerequisites for Foreclosure Sale

If the residential property is owner-occupied residential property and postfile mediation is requested, a foreclosure sale of residential property may not occur until at least 45 days after the court determines at trial that the owner of the debt instrument has the right to foreclose on the residential property.

Right to Cure Default

The mortgagor or grantor of residential property has the right to cure the default by paying all past due payments, penalties, and fees and reinstate the loan at any time up to 30 business day *after* the foreclosure sale occurs.

Current Law: For information about the foreclosure process generally, including recent foreclosure activity in the State, see the **Appendix – Foreclosure Process**.

Sale of Property

Generally, a mortgage or deed of trust may authorize the sale of the property or declare the borrower's assent to the passing of a decree for the sale of the property, on default in a condition following which the mortgage or deed of trust authorizes that a sale may be made. Such authority is referred to as a power of sale or assent to decree.

Final Loss Mitigation Affidavit

“Final loss mitigation affidavit” means an affidavit that (1) is made by a person authorized to act on behalf of a secured party of a mortgage or deed of trust on owner-occupied residential property that is the subject of a foreclosure action; (2) certifies the completion of the final determination of loss mitigation analysis in connection with the mortgage or

deed of trust; and (3) if denied, provides an explanation for the denial of a loan modification or other loss mitigation.

Required Contents of an Order to Docket or Complaint to Foreclose

An OTD or a complaint to foreclose a mortgage or deed of trust on residential property must include, if applicable, the license number of (1) the mortgage originator and (2) the mortgage lender. An OTD or a complaint to foreclose must also include an affidavit stating (1) the date on which the default occurred and the nature of the default and (2) if applicable, that an NOI was sent to the mortgagor or grantor in accordance with specified requirements and the date on which the notice was sent, and affirming that at the time the NOI was sent, the contents of the NOI were accurate.

Motion to Strike

In a foreclosure action on owner-occupied residential property, the mortgagor or grantor may file with the court a completed request for postfile mediation under specified circumstances. The secured party may file a motion to strike the request for postfile mediation in accordance with the Maryland Rules. The mortgagor or grantor may file a response to the motion to strike within 15 days, and must mail a copy of the response to the foreclosure attorney. If the court grants the motion to strike, the court must instruct OAH to cancel any scheduled postfile mediation.

Scheduling of Foreclosure Sale

If the parties do not reach an agreement at the postfile mediation, or the 60-day mediation period expires without an extension granted by OAH, the foreclosure attorney may schedule the foreclosure sale. In the case of postfile mediation, the mortgagor or grantor may file a motion to stay the foreclosure sale under specified circumstances.

Prerequisites for Foreclosure Sale

If the residential property is owner-occupied residential property and postfile mediation is requested, a foreclosure sale of residential property may not occur until at least 15 days after (1) the date the postfile mediation is held or (2) if no postfile mediation is held, the date OAH files a specified report with the court.

Right to Cure Default

The mortgagor or grantor of residential property has the right to cure the default by paying all past due payments, penalties, and fees and reinstate the loan at any time up to one business day *before* the foreclosure sale occurs.

Housing Counseling and Foreclosure Mediation Fund

Revenue collected from the filing fee is required to be distributed to the Housing Counseling and Foreclosure Mediation Fund administered by the Department of Housing and Community Development (DHCD). The fund may only be used for foreclosure prevention and mediation programs, housing counseling programs, and administrative expenses related to those programs at DHCD; the Department of Labor, Licensing, and Regulation (DLLR); the Judiciary; and OAH. Revenue for the fund is generated by the collection of a \$50 fee when a borrower requests specified foreclosure mediation services, in addition to the \$300 filing fee.

Background: The Office of the Commissioner of Financial Regulation (OCFR) within DLLR advises that, in fiscal 2018, OCFR received 67,765 NOIs. For comparison, in fiscal 2012, the highest year on record, OCFR received 178,518 NOIs.

The Judiciary (Administrative Office of the Courts (AOC)) advises that, in fiscal 2018, 14,548 foreclosure actions were filed in the circuit courts related to residential property.

Housing Counseling and Foreclosure Mediation Fund

The filing fee is collected by the circuit court and transferred to the Housing Counseling and Foreclosure Mediation Fund on a monthly basis. The fund supports a number of services related to home purchases and foreclosure activities, including supporting nonprofit and government housing counselors and other nonprofit entities with providing (1) legal assistance to troubled homeowners or occupants who are trying to avoid foreclosure or manage foreclosure proceedings and (2) homebuyer education, housing advice, or financial counseling for homeowners, prospective homeowners, and low- and moderate-income households. DHCD advises that, in fiscal 2018, expenditures from the fund totaled \$4.2 million. The fund ended fiscal 2018 with a balance of \$2.3 million.

State Revenues: Based on information provided by AOC, special fund revenues for DHCD increase by approximately \$5.4 million in fiscal 2020 due to the increase in the filing fee effective October 1, 2019. AOC further estimates that special fund revenues increase by approximately \$7.3 million in fiscal 2021, based solely on the amount of the fee increase and the number of foreclosure actions filed related to residential properties in fiscal 2018. However, the Department of Legislative Services (DLS) advises that in prior analyses, based on historical information provided by DHCD, special fund revenues based on foreclosure filing fees have been estimated assuming a 10% annual reduction in the total number of filing fees collected to reflect recent declines in foreclosure activity. Thus, future year revenues included in this analysis incorporate this reduction.

State Expenditures: General fund expenditures increase significantly beginning in fiscal 2020 for the Judiciary to hire additional judges and associated staff. In its response, AOC estimated that the bill would necessitate the hiring of a total of 31 additional staff, including 7 circuit court judges, based on an analysis of the estimated additional amount of court time required for each foreclosure action. However, as AOC was unable to specify *which* circuit courts would require additional judges in order to handle the increased caseload, DLS advises that a specific estimate of the number of staff required and the total impact on expenditures is not available at this time. Nevertheless, additional staff, including circuit court judges, court room clerks, law clerks, and general judiciary clerks in the clerk's office are needed to meet the bill's requirements. *For illustrative purposes only*, if the entire compliment of 31 additional staff is needed, general fund expenditures for the Judiciary increase by more than \$2.7 million in fiscal 2020, and by \$3.4 million fiscal 2021 and beyond to reflect annualization.

Local Expenditures: The counties are responsible for funding the salaries and operating expenses of administrative assistants for circuit court judges. Therefore, local government expenditures increase beginning in fiscal 2020 to fund additional administrative assistants. However, because it is unknown which jurisdictions will require additional circuit court judges, or how many, a specific estimate of the number of additional administrative assistants required, or the specific jurisdictions affected, is not available at this time.

Small Business Effect: Small business owners of debt instruments secured by mortgages or deeds of trust are required to pay higher fees when filing a complaint to foreclose a right of redemption under the bill. Additionally, delays in the foreclosure process due to the bill's hearing requirement and extension of the foreclosure timeline likely lead to additional costs and lost revenue. Additional expenses may be incurred in order to meet the enhanced documentation requirements.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Office of the Attorney General (Consumer Protection Division); Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Department of Housing and Community Development; Office of Administrative Hearings; RealtyTrac; Department of Legislative Services

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sb/kdm

Analysis by: Nathan W. McCurdy

Direct Inquiries to:
(410) 946-5510
(301) 970-5510

Appendix – Foreclosure Process

Beginning with the financial downturn in 2007, Maryland saw a significant increase in the number of foreclosure actions. Foreclosure activity likely peaked in 2010, when the number of foreclosure events exceeded 50,000. Due to a multitude of factors, including legislation addressing the State’s foreclosure mediation process, consumer outreach efforts, and enhanced mortgage industry regulation and enforcement surrounding many banks’ and mortgage companies’ foreclosure practices, the number of foreclosure events decreased significantly to 16,049 in 2011. However, these changes also resulted in the general lengthening of the foreclosure process, leaving many housing units in limbo for years at a time.

Despite improvements, the number of foreclosure events in Maryland has remained stubbornly high, even with national trends downward. According to the real estate information company RealtyTrac, as of November 2018, Maryland ranked first in overall foreclosure rate among states and the District of Columbia, with 1 in every 989 housing units facing some form of foreclosure action, compared to the national average of 1 in every 2,486 housing units. Other states with high foreclosure rates include New Jersey (1 in every 996 housing units) and Delaware (1 in every 1,324 housing units).

Foreclosure Process in Maryland

Generally, to foreclose on residential property in Maryland, the secured party must first send a notice of intent to foreclose (NOI) to the mortgagor or grantor and the record owner, then file and serve an order to docket (OTD) or a complaint to foreclose. A copy of the NOI must be sent to the Commissioner of Financial Regulation, and if the property is owner-occupied, the NOI must be accompanied by a loss mitigation application. Whether the filing of an OTD, or a complaint to foreclose, is appropriate depends on the lien instrument held by the secured party. An action to foreclose a mortgage or deed of trust may not be filed until the later of (1) 90 days (or 120 days if the loan is “federally related”) after a default in a condition on which the mortgage or deed of trust specifies that a sale may be made or (2) 45 days after an NOI is sent. An OTD or complaint to foreclose must be filed with the circuit court, and a copy must be served on the mortgagor or grantor. An OTD or a complaint to foreclose must include, if applicable, the license number of both the mortgage originator and the mortgage lender. The OTD or complaint to foreclose must also contain an affidavit stating the date and nature of the default and, if applicable, that the NOI was sent and that the contents of the NOI were accurate at the time it was sent.

A secured party may petition the circuit court for leave to immediately commence an action to foreclose the mortgage or deed of trust if:

- the loan secured by the mortgage or deed of trust was obtained by fraud or deception;
- no payments have ever been made on the loan secured by the mortgage or deed of trust;
- the property subject to the mortgage or deed of trust has been destroyed;
- the default occurred after the stay has been lifted in a bankruptcy proceeding; or
- the property is found by a court to be vacant and abandoned.

The court may rule on the petition with or without a hearing. If the petition is granted, the action may be filed at any time after a default in a condition on which the mortgage or deed of trust provides that a sale may be made, and the secured party is not required to send a written NOI.

Prerequisites for Foreclosure Sales

Generally, if the residential property is *not* owner-occupied, a foreclosure sale may not occur until at least 45 days after specified notice is given. If the residential property is owner-occupied, and foreclosure mediation is not held, a foreclosure sale may not occur until the later of (1) at least 45 days after providing specified notice that includes a final loss mitigation affidavit or (2) at least 30 days after a final loss mitigation affidavit is mailed. Finally, if the residential property is owner-occupied residential property and postfile mediation is requested, a foreclosure sale may not occur until at least 15 days after the date the postfile mediation is held or, if no postfile mediation is held, the date the Office of Administrative Hearings (OAH) files its report with the court.

A foreclosure mediation may be extended for good cause by OAH for up to 30 days, unless all parties agree to a longer extension. Additionally, both parties have an obligation to provide instructions regarding documents and information to each other and the mediator. Any motion to stay a foreclosure sale must come within 15 days of the date the postfile mediation is held. Notice of the sale of a foreclosed property must be sent 10 days before the date of sale.

Generally, notice of the time, place, and terms of a foreclosure sale must be published in a newspaper of general circulation in the county where the action is pending at least once a week for three successive weeks. The first publication of the notice must be more than 15 days before the sale, and the last publication must be within one week of the sale.

Curing Defaults

The mortgagor or grantor of residential property has the right to cure a default and reinstate the loan at any time up to one business day before a foreclosure sale by paying all past-due payments, penalties, and fees. Upon request, and within a reasonable time, the secured party or the secured party's authorized agent must notify the mortgagor or grantor or his or her attorney of the amount necessary to cure the default and reinstate the loan as well as provide instructions for delivering the payment.

Expedited Foreclosure Process for Vacant and Abandoned Property

In an effort to reduce the number of vacant and abandoned residential properties lingering in foreclosure, Maryland passed legislation during the 2017 session designed to expedite the foreclosure process. Chapter 617 of 2017 authorized a secured party to petition the circuit court for leave to immediately begin an action to foreclose a mortgage or deed of trust on a vacant and abandoned residential property, and required the court to promptly rule on the petition. A residential property is vacant and abandoned if (1) the court finds that the mortgage or deed of trust on the property has been in default for 120 days or more; (2) no mortgagor or grantor has filed with the court an answer or objection that would prevent the court from entering a final judgment and a decree of foreclosure; (3) no mortgagor or grantor has filed with the court a written statement that the property is not vacant and abandoned; and (4) at least three of several criteria listed in statute, such as the accumulation of debris or the lack of connected utilities, are present.

Generally, if the residential property is found to be vacant and abandoned and the court grants the petition for leave to immediately begin an action to foreclose a mortgage or deed of trust, specified mediation and other preliminary foreclosure process requirements do not apply.