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SENATE BILL 142

52ND LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2015

INTRODUCED BY

Michael Padilla

AN ACT

RELATING TO REAL PROPERTY; CLARIFYING THAT FORECLOSURE OF
RESIDENTIAL REAL PROPERTY IS A JUDICIAL PROCEDURE; REQUIRING
CREDITORS TO PROVIDE BORROWERS NOTICE OF ANY OPPORTUNITIES FOR
LOSS MITIGATION PRIOR TO FORECLOSURE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] FORECLOSURE BY JUDICIAL ACTION
ON HOME LOANS.--Real property encumbered by a home loan shall
be foreclosed through judicial action.

SECTION 2. Section 48-10-3 NMSA 1978 (being Laws 1987,
Chapter 61, Section 3, as amended) is amended to read:

"48-10-3. DEFINITIONS.--As used in the Deed of Trust Act,
unless the context otherwise requires:

A. "beneficiary" means the person named or
otherwise designated in a deed of trust as the person for whose

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1 benefit a deed of trust is given or the person's successor in
2 interest;

3 B. "contract" means an agreement between or among
4 two or more persons, including, without limitation, a note,
5 promissory note, guarantee or the terms of any deed of trust;

6 C. "credit bid" means a bid made by the beneficiary
7 in full or partial satisfaction of the contract that is secured
8 by the deed of trust. A credit bid may only include an amount
9 owing on a contract with interest secured by liens, mortgages,
10 deeds of trust or encumbrances that are superior in priority to
11 the deed of trust and which liens, mortgages or encumbrances,
12 whether recourse or nonrecourse, are outstanding as provided in
13 the contract or as provided in the deed of trust, together with
14 the amount of other obligations provided in or secured by the
15 deed of trust and the costs of exercising the power of sale and
16 the trustee's sale, including the fees of the trustee and
17 reasonable attorney fees actually incurred by the trustee and
18 the beneficiary;

19 D. "home loan" means a loan, including an open-end
20 credit plan, other than a bridge loan, where the principal
21 amount does not exceed the conforming loan size limit for a
22 single-family dwelling as established by the federal national
23 mortgage association and where the loan is secured by:

24 (1) a mortgage or deed of trust on real estate
25 in this state upon which there is located or there is to be

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1 located a structure:

2 (a) designed principally for occupancy
3 by one to four families; and

4 (b) that is or will be occupied by a
5 borrower as the borrower's principal residence; or

6 (2) a security interest on a manufactured home
7 that is or will be occupied by a borrower as the borrower's
8 principal residence;

9 ~~[D-]~~ E. "parent corporation" means a corporation
10 that owns eighty percent or more of each class of the issued
11 and outstanding stock of another corporation or, in the case of
12 a savings and loan association, eighty percent or more of the
13 issued and outstanding guaranty capital of the savings and loan
14 association;

15 ~~[E-]~~ F. "person" means an individual or
16 organization;

17 ~~[F-]~~ G. "deed of trust" means a document by way of
18 mortgage in substance executed in conformity with the Deed of
19 Trust Act and in conformity with Section 47-1-39 NMSA 1978
20 granting or mortgaging trust real estate to a trustee qualified
21 under the Deed of Trust Act to secure the performance of a
22 contract;

23 ~~[G-]~~ H. "junior encumbrancer" means a person
24 holding a lien, mortgage or other encumbrance of record
25 evidencing an interest in the trust real estate that is

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1 subordinate in priority to the deed of trust and includes a
2 lienholder, a mortgagee, a seller and a purchaser as provided
3 in a real estate contract and, where the context is applicable,
4 escrow agents as provided in a real estate contract;

5 ~~[H.]~~ I. "trust real estate" means any legal,
6 equitable, leasehold or other interest in real estate,
7 including the term "real estate" as defined in Section 47-1-1
8 NMSA 1978 and any improvements and fixtures, which is capable
9 of being transferred whether or not the interest is subject to
10 any prior mortgages, deeds of trust, contracts for conveyance
11 of real estate, real estate contracts or other liens or
12 encumbrances; provided, however, trust real estate shall not
13 include:

14 (1) any real estate used by the trustor for
15 farming operations, including farming, tillage of the soil,
16 dairy farming, ranching, production or raising of crops,
17 poultry or livestock, and production of poultry or livestock
18 products in an unmanufactured state; or

19 (2) oil and other liquid hydrocarbons, or gas,
20 including casinghead gas, condensates and other gaseous
21 petroleum substances, or coal or other minerals in, on or under
22 real estate, including patented and unpatented mining claims,
23 unless such minerals have not been severed from and are
24 included with the surface estate.

25 The character of trust real estate shall be determined as

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1 of the date of the deed of trust covering the trust real
2 estate;

3 [~~F.~~] J. "trustee" means a person qualified as
4 provided in the Deed of Trust Act. The obligations of a
5 trustee to the trustor, beneficiary and other persons are as
6 provided in the Deed of Trust Act, together with any other
7 obligations specified in the deed of trust. Both the
8 beneficiary and the trustee have all the powers of a mortgagee
9 as provided by law; and

10 [~~J.~~] K. "trustor" means the person or the person's
11 successor in interest granting or mortgaging trust real estate
12 by a deed of trust as security for the performance of a
13 contract and is the same as a mortgagor granting or mortgaging
14 real estate by way of mortgage as provided by law."

15 **SECTION 3.** Section 48-10-10 NMSA 1978 (being Laws 1987,
16 Chapter 61, Section 10, as amended) is amended to read:

17 "48-10-10. SALE OF TRUST REAL ESTATE--POWER OF
18 TRUSTEE--FORECLOSURE OF DEED OF TRUST.--

19 A. By virtue of the trustee's position, a power of
20 sale is conferred upon the trustee of a commercial deed of
21 trust under which the trust real estate may be sold as provided
22 in the Deed of Trust Act after a breach or default in
23 performance of the contract for which the trust real estate is
24 granted or mortgaged as security or a breach or default in
25 performance of the deed of trust. Except as specifically

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1 provided in the Deed of Trust Act, the trustee shall not
2 delegate the duties of the trustee as provided in the Deed of
3 Trust Act. ~~[At the option of the beneficiary]~~ A residential
4 deed of trust ~~[may]~~ on a home loan shall be foreclosed in the
5 manner provided by law for the foreclosure of ~~[mortgages on~~
6 ~~real estate]~~ home loans. The trustee does not have the power
7 of sale in a residential deed of trust on a home loan. Either
8 the beneficiary or the trustee shall constitute the proper and
9 complete party plaintiff in any action to foreclose a deed of
10 trust.

11 B. The trustee or beneficiary may commence an
12 action to foreclose a deed of trust at any time before the
13 commercial trust real estate has been sold as provided in the
14 power of sale. A sale of trust real estate as provided in a
15 power of sale in a deed of trust shall not be held after an
16 action to foreclose the deed of trust has been commenced unless
17 the foreclosure action has been dismissed.

18 C. The power of sale of trust real estate conferred
19 upon the trustee shall not be exercised before the expiration
20 of ninety days from the recording of the notice of the sale.

21 D. The trustee need only be joined as a party in
22 separate civil actions pertaining to a breach of an obligation
23 of a trustee as provided in the Deed of Trust Act or as
24 provided in the deed of trust. Any order of the court entered
25 against the beneficiary is binding upon the trustee with

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1 respect to any actions that the trustee is authorized to take
2 by the deed of trust or by the Deed of Trust Act. If the
3 trustee is joined as a party in any other separate civil
4 action, other than an action in which the trustee is an
5 indispensable or necessary party, the trustee is entitled to be
6 immediately dismissed and to recover the costs and reasonable
7 attorney fees actually incurred by the trustee from the person
8 joining the trustee and from the beneficiary, jointly and
9 severally."

10 SECTION 4. Section 58-21A-6 NMSA 1978 (being Laws 2003,
11 Chapter 436, Section 6, as amended) is amended to read:

12 "58-21A-6. DEFAULT--NOTICE--RIGHT TO CURE.--

13 A. Before an action is filed to foreclose or
14 collect money due pursuant to a home loan or before other
15 action is taken to seize or transfer ownership of property
16 subject to a home loan, the creditor or creditor's assignee of
17 the loan shall deliver to the borrower a notice of the right to
18 cure the default informing the borrower [of]:

19 (1) of the nature of the default;

20 (2) of the borrower's right to cure the
21 default by paying the sum of money required, provided that a
22 creditor or assignee shall accept any partial payment made or
23 tendered in response to the notice. If the amount necessary to
24 cure the default will change within thirty days of the notice,
25 due to the application of a daily interest rate or the addition

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1 of late fees, as allowed by the Home Loan Protection Act, the
2 notice shall give sufficient information to enable the borrower
3 to calculate the amount at any point within the thirty-day
4 period;

5 (3) of the date by which the borrower may cure
6 the default to avoid a court action, acceleration and
7 initiation of foreclosure [~~or other action to seize the~~
8 ~~property~~], which date shall not be less than thirty days after
9 the date the notice is delivered, and the name and address and
10 telephone number of a person to whom the payment or tender
11 shall be made;

12 (4) that, if the borrower does not cure the
13 default by the date specified, the creditor or assignee may
14 file an action for money due or take steps to terminate the
15 borrower's ownership in the property by requiring payment in
16 full of the home loan and commencing a judicial foreclosure
17 proceeding [~~or other action~~] to seize the property; [~~and~~]

18 (5) of the name and address and the telephone
19 number of a person whom the borrower may contact if the
20 borrower disagrees with the assertion that a default has
21 occurred or the correctness of the calculation of the amount
22 required to cure the default; and

23 (6) of all available loss mitigation options
24 that are applicable to the borrower's home loan.

25 B. If a creditor or assignee asserts that grounds

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1 for acceleration exist and requires the payment in full of all
2 sums secured by the home loan, the borrower, or anyone
3 authorized to act on the borrower's behalf, may, at any time
4 prior to the time title is transferred by means of foreclosure
5 by judicial proceeding [~~and sale or otherwise~~], cure the
6 default and reinstate the home loan. Cure of the default shall
7 reinstate the borrower to the same position as if the default
8 had not occurred and shall nullify, as of the date of the cure,
9 an acceleration of any obligation under the home loan arising
10 from the default.

11 C. To cure a default under this section, a borrower
12 shall not be required to pay any charge, fee or penalty
13 attributable to the exercise of the right to cure a default,
14 other than the fees specifically allowed by this subsection.
15 The borrower shall not be liable for any attorney fees relating
16 to the default that are incurred by the creditor or assignee
17 prior to or during the thirty-day period set forth in
18 Subsection A of this section, nor for any such fees in excess
19 of one hundred dollars (\$100) that are incurred by the creditor
20 or assignee after the expiration of the thirty-day period but
21 prior to the time the creditor or assignee files a judicial
22 foreclosure or other judicial action [~~or takes other action to~~
23 ~~seize or transfer ownership of the real estate~~]. After the
24 creditor or assignee files a judicial foreclosure or other
25 judicial [~~action or takes other~~] action to seize or transfer

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1 ownership of the real estate, the borrower shall only be liable
2 for attorney fees that are reasonable and actually incurred by
3 the creditor or assignee, based on a reasonable hourly rate and
4 a reasonable number of hours.

5 D. If a default is cured prior to the initiation of
6 any action to foreclose or to seize the residence, the creditor
7 or assignee shall not institute a proceeding or other action
8 for that default. If a default is cured after the initiation
9 of any foreclosure action, the creditor or assignee shall take
10 such steps as are necessary to terminate the action.

11 E. A creditor or a creditor's assignee of a home
12 loan that has the legal right to foreclose shall, in a
13 foreclosure, use ~~[the]~~ judicial foreclosure procedures
14 ~~[provided by law]~~. In such a proceeding, the borrower may
15 assert the nonexistence of a default and any other claim or
16 defense to acceleration and foreclosure, including any based on
17 a violation of the Home Loan Protection Act, though no such
18 claim or defense shall be deemed a compulsory counterclaim.

19 F. When a judicial foreclosure complaint is filed,
20 a creditor shall:

21 (1) file with it a certificate of the absence
22 of loss mitigation that is current as of thirty days prior to
23 the filing of the judicial foreclosure action;

24 (2) file with it a notice of right to cure the
25 default with proof that the notice has been sent to the

1 borrower and such notice must include information required by
2 the Home Loan Protection Act; and

3 (3) deposit the original note and any
4 allonges, indorsements or other indicia of transfer of
5 ownership of the note to the creditor and all prior owners or
6 assignees of the note into the court registry.

7 G. When a creditor moves for judgment in a judicial
8 foreclosure action, the creditor shall file a certificate of
9 the absence of loss mitigation that is current as of thirty
10 days prior to the filing of the motion."

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