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FISCAL IMPACT REPORT

ORIGINAL DATE 1/28/15
 LAST UPDATED 3/5/15

SPONSOR Padilla HB _____

SHORT TITLE Foreclosure as Judicial Procedure SB 142/aSCORC

ANALYST A. Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB27, SB28, SB29, SB30, SB141, SB142 and SB143.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Attorney General’s Office (AGO)

SUMMARY

Synopsis of Bill of SCORC Amendment

Senate Corporation and Transportation Committee amendment to Senate Bill 142 removes the requirement that a creditor or creditor’s assignee inform the buyer of all available applicable loss mitigation options, and removes the requirement that a creditor file certain documents with the court with a judicial foreclosure complaint.

Synopsis of Original Bill

Senate Bill 142 adds a new requirement to Section 48-10-3 NMSA 1978, Deed of Trust Act, which requires real property encumbered by a home loan to be foreclosed through judicial action, defines “home loan” as an open-ended credit plan, not a bridge loan for a single family dwelling secured by a mortgage or deed of trust on real estate, for a family home with an occupancy of one to four people and is or will be occupied by the borrower as the principal residence. The bill does not give the trustee the power of sale in a residential deed trust on a home loan. The bill also amends Section 58-21A-6 NMSA 1978, Home Loan Protection Act, requiring the creditor or the creditor’s assignee to inform the borrower of all available loss mitigation options applicable to the borrower’s loan and requires the creditor to include a certificate of absence of loss mitigation and the original promissory note when a judicial foreclosure complaint is filed with the Court.

FISCAL IMPLICATIONS

According to the AOC, as amended, SB 142 affirms that foreclosure is a judicial process in New Mexico, and will ensure that borrowers using a deed of trust are granted the same due process protections and notices that apply to homeowners with traditional mortgages. Enactment of SB 142 as amended is not expected to significantly affect foreclosure filings in the district courts. There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes.

SIGNIFICANT ISSUES

According to the AGO, to the extent there is ambiguity in the current law and lenders believe they may foreclose on a home through the use of a trustee sale (as provided for in a deed of trust instrument) without affording homeowners the notices and protections provided to homeowners with mortgages, SB142 will clarify and remove such ambiguities. The bill will ensure that homeowners covered by deeds of trust receive the same protections and notices that apply to homeowners with traditional mortgages.

The AGO in its response indicates that the exclusivity of a judicial foreclosure is re-affirmed and bolstered by the bill removing the words “or otherwise” or “other action”. At times, lenders and others have asserted or argued that the inclusion of the phrase “or otherwise” after the phrase “by judicial proceeding” states or implies that an “other” method (trustee sale) exists under New Mexico law to take title to a residence, particularly when combined with the fact that the Deed of Trust Act was amended to include residences.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

According to the AGO, the requirement for a default notice that contains information regarding loss mitigation arguably duplicates regulations created by the Consumer Financial Protection Bureau (CFPB) that went into effect on January 12, 2014. In particular, 12 C.F.R § 1024.39(b) (the “early intervention” section) requires the lender or servicer to send a notice to the borrower by the forty-fifth (45th) day of delinquency which contains loss mitigation information including how to apply for a loan modification and how to contact the servicer. The CFPB has promulgated “model clauses” that the servicer can use to fulfill this requirement and it appears that the industry has generally adopted these notices to comply with this regulation.

SB 142 relates to SB 27 (Foreclosure Process Task Force), SB28 (Pre-Purchase Homebuyer Education Program), SB 30 (Home Loan Loss Mitigation Servicing Standards), SB 29 (Foreclosure Deficiency Judgment Time Periods), SB 141 (Settlement Facilitation Before Foreclosure) and SB 143 (Judgment Sales Records and Notices), all of which resulted from the Foreclosure Process Task Force in 2014.

OTHER SUBSTANTIVE ISSUES

According to the AGO, It is possible that by seeking to regulate the details of how lenders file pleadings in a civil action that SB142 arguably invades upon the courts’ role of regulating the “practice and procedure” of the courts, which is the exclusive domain of the Supreme Court. *See, e.g. Ammerman v. Hubbard Broadcasting*, 89 N.M. 307, 551 P.2d 1354 (1976). The other provisions in connection with affirming judicial foreclosure as the only method to foreclose a

lien do not suffer from this possible issue.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to the AGO, lenders could potentially argue or take the position that trustee sales are a lawful method to take a homeowner's residence based upon some of the perceived ambiguity in the Home Loan Protection Act and Deed of Trust Act.

Without this law, some foreclosures could possibly be completed without full disclosure to the Court that the lender is (or is not) engaged in loss mitigation with the borrower through the use of a "certificate of the absence of loss mitigation" (CALM).

ABS/bb/aml