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FISCAL IMPACT REPORT

SPONSOR Cook ORIGINAL DATE 02/03/17
LAST UPDATED _____ HB 203
SHORT TITLE Home Loan Protection Act and Foreclosures SB _____
ANALYST Amacher

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
New Mexico Attorney General's Office (NMAG)
Mortgage Finance Authority (MFA)
Regulation & Licensing Department (RLD)

SUMMARY

Synopsis of Bill

House Bill 203 amends the Home Loan Protection Act by proposing a clarification that the Home Loan Protection Act does not affect foreclosure processes pursuant to the Deed of Trust Act. If enacted, this bill will become effective June 16, 2017.

FISCAL IMPLICATIONS

There are no known fiscal impacts.

SIGNIFICANT ISSUES

House Bill 203 amends the Home Loan Protection Act by proposing a clarification that the Home Loan Protection Act does not affect foreclosure processes pursuant to the Deed of Trust Act.

Section 1 amends the Default – Notice – Right to Cure (Chapter 58-21A-6 NMSA 1978) by providing an option to a creditor of a home loan, that has the legal right to foreclose, to use *either* the judicial foreclosure procedures provided by law *or* the no judicial foreclosure procedures provided in the Deed of Trust Act (Chapter 49-10-1 through 48-10-21) if the home loan is made under that act.

OTHER SUBSTANTIVE ISSUES

The proposed amendment outlined in HB 203 is clear it does not affect the foreclosure processes pursuant to the Deed of Trust Act. The amendment directs a lender to the Deed of Trust Act, makes sure that when a lender is seeking action to foreclose they may use a non-judicial foreclosure procedure so long as the home loan is made in accordance with the Deed of Trust Act. If so, the non-judicial foreclosure process generates considerable discussion related to foreclosures and due process. The amendment may be considered as an allowance to a lender and there may be a possibility that home loans generated under the Deed of Trust Act will result in other concerns as noted by the responding agencies.

The New Mexico Attorney General comments that HB 203 would change New Mexico from a judicial foreclosure state to a non-judicial foreclosure state. NMAG expressed concerns that non-judicial foreclosure procedures raise concerns about due process and the lack of judicial oversight of the foreclosure process given the gravity of the loss of a home to a family. NMAG references eight suits filed by the Colorado Attorney General against foreclosing law firms for use of unlawful or deceptive practices in connection with the use of trustee sales. In those suits, as noted by NMAG, the Colorado Attorney General raised the issue of a lack of judicial review of the trustee's actions as a reason why the firms could "get away with" the unlawful conduct because the trustees could not or did not review the conduct or claims.

The NMAG highlights that the mediation programs set up over the past few years in connection with judicial foreclosures have resulted in fewer evictions, greater stability, and fewer abandoned homes. Removing the court from foreclosures could also result in greater housing instability because the homeowner and lender would no longer be required to mediate a plan for either retention of the home or a graceful exit.

The Administrative Office of the Courts notes that some lenders assert that ambiguity exists about whether New Mexico law mandates court oversight of all residential foreclosures and therefore provides all homeowners "a day in court" before potentially losing their homes. The asserted ambiguity arises from an apparent conflict between the Home Loan Protection Act (Chapter 58-21A-1 NMSA 1978) and the Deed of Trust Act (Chapter 48-10-1 NMSA 1978). The Home Loan Protection Act provides due process rights for a borrower with either a traditional mortgage or deed of trust, with a right to cure the default and the right to put forward a defense in a court proceeding. The Deed of Trust Act, as noted by the AOC, allows foreclosures on deeds of trust to proceed without judicial process. The AOC notes that HB 203 requires creditors to use non-judicial procedure "if the home loan is made under that act". Under the Deed of Trust Act, no notice to cure the default is required. A non-judicial foreclosure can occur immediately after 90 days of the recording of the notice of sale, absent an adjudication of default, and resulting in the sale of a borrower's home.

The AOC notes HB 203 weakens due process in residential foreclosure procedures by removing judicial scrutiny in deed of trust loans. Furthermore, the AOC notes the Foreclosure Process Task Force recommends: that the New Mexico Legislature imposes a mandate for judicial oversight of foreclosure with due process protections for individual homeowners, whether their home loan is a traditional mortgage or a deed of trust.

The Regulation and Licensing Department notes that a major difference between mortgage and a deed of trust in cases involving home loans concerns how the parties may proceed in the event a borrower is unable to pay the loan repayments. In a mortgage, the foreclosure process and the selling of property must go through the courts which are known as judicial foreclosure. It is the currently mandated process under New Mexico law. RLD notes it can be a costly process for both the borrower and the lender. If a deed of trust is used the borrower and lender are not required to go through the court process. This is known as non-judicial foreclosure and is process utilized in many other states.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Lenders will continue to foreclose on a home loan by bringing foreclosure action in court.

JMA/al/jle