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SENATE BILL 559

54TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2019

INTRODUCED BY

Antoinette Sedillo-Lopez

AN ACT

RELATING TO REAL PROPERTY; CLARIFYING THAT FORECLOSURE OF
RESIDENTIAL REAL PROPERTY SUBJECT TO A MORTGAGE OR A DEED OF
TRUST 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. Section 48-10-1 NMSA 1978 (being Laws 1987,
Chapter 61, Section 1) is amended to read:

"48-10-1. SHORT TITLE.--~~[Sections 1 through 21 of this
act]~~ Chapter 48, Article 10 NMSA 1978 may be cited as the "Deed
of Trust Act"."

SECTION 2. A new section of the Deed of Trust Act is
enacted to read:

"[NEW MATERIAL] JUDICIAL ACTION REQUIRED TO FORECLOSE ON A
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1 HOME LOAN.--Real property encumbered by a home loan shall be
2 foreclosed through judicial action."

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

5 "48-10-3. DEFINITIONS.--As used in the Deed of Trust Act,
6 unless the context otherwise requires:

7 A. "beneficiary" means the person named or
8 otherwise designated in a deed of trust as the person for whose
9 benefit a deed of trust is given or the person's successor in
10 interest;

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

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

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1 the beneficiary;

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

7 (1) a mortgage or deed of trust on real estate
8 in this state upon which there is located or there is to be
9 located a structure:

10 (a) designed principally for occupancy
11 by one to four families; and

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

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

17 ~~[D-]~~ E. "parent corporation" means a corporation
18 that owns eighty percent or more of each class of the issued
19 and outstanding stock of another corporation or, in the case of
20 a savings and loan association, eighty percent or more of the
21 issued and outstanding guaranty capital of the savings and loan
22 association;

23 ~~[E-]~~ F. "person" means an individual or
24 organization;

25 ~~[F-]~~ G. "deed of trust" means a document by way of

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1 mortgage in substance executed in conformity with the Deed of
2 Trust Act and in conformity with Section 47-1-39 NMSA 1978
3 granting or mortgaging trust real estate to a trustee qualified
4 under the Deed of Trust Act to secure the performance of a
5 contract;

6 ~~[G.]~~ H. "junior encumbrancer" means a person
7 holding a lien, mortgage or other encumbrance of record
8 evidencing an interest in the trust real estate that is
9 subordinate in priority to the deed of trust and includes a
10 lienholder, a mortgagee, a seller and a purchaser as provided
11 in a real estate contract and, where the context is applicable,
12 escrow agents as provided in a real estate contract;

13 ~~[H.]~~ I. "trust real estate" means any legal,
14 equitable, leasehold or other interest in real estate,
15 including the term "real estate" as defined in Section 47-1-1
16 NMSA 1978 and any improvements and fixtures, which is capable
17 of being transferred whether or not the interest is subject to
18 any prior mortgages, deeds of trust, contracts for conveyance
19 of real estate, real estate contracts or other liens or
20 encumbrances; provided, however, trust real estate shall not
21 include:

22 (1) any real estate used by the trustor for
23 farming operations, including farming, tillage of the soil,
24 dairy farming, ranching, production or raising of crops,
25 poultry or livestock and production of poultry or livestock

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1 products in an unmanufactured state; or

2 (2) oil and other liquid hydrocarbons, or gas,
3 including casinghead gas, condensates and other gaseous
4 petroleum substances, or coal or other minerals in, on or under
5 real estate, including patented and unpatented mining claims,
6 unless such minerals have not been severed from and are
7 included with the surface estate.

8 The character of trust real estate shall be determined as
9 of the date of the deed of trust covering the trust real
10 estate;

11 [~~F.~~] J. "trustee" means a person qualified as
12 provided in the Deed of Trust Act. The obligations of a
13 trustee to the trustor, beneficiary and other persons are as
14 provided in the Deed of Trust Act, together with any other
15 obligations specified in the deed of trust. Both the
16 beneficiary and the trustee have all the powers of a mortgagee
17 as provided by law; and

18 [~~J.~~] K. "trustor" means the person or the person's
19 successor in interest granting or mortgaging trust real estate
20 by a deed of trust as security for the performance of a
21 contract and is the same as a mortgagor granting or mortgaging
22 real estate by way of mortgage as provided by law."

23 SECTION 4. Section 48-10-10 NMSA 1978 (being Laws 1987,
24 Chapter 61, Section 10, as amended) is amended to read:

25 "48-10-10. SALE OF TRUST REAL ESTATE--POWER OF TRUSTEE--

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1 FORECLOSURE OF DEED OF TRUST.--

2 A. By virtue of the trustee's position, a power of
3 sale is conferred upon the trustee of a commercial deed of
4 trust under which the trust real estate may be sold as provided
5 in the Deed of Trust Act after a breach or default in
6 performance of the contract for which the trust real estate is
7 granted or mortgaged as security or a breach or default in
8 performance of the deed of trust. Except as specifically
9 provided in the Deed of Trust Act, the trustee shall not
10 delegate the duties of the trustee as provided in the Deed of
11 Trust Act. ~~[At the option of the beneficiary]~~ A residential
12 deed of trust ~~[may]~~ associated with a home loan shall be
13 foreclosed in the manner provided by law for the foreclosure of
14 ~~[mortgages on real estate]~~ home loans. The trustee shall not
15 have a power of sale in a residential deed of trust associated
16 with a home loan. Either the beneficiary or the trustee shall
17 constitute the proper and complete party plaintiff in any
18 action to foreclose a deed of trust.

19 B. The trustee or beneficiary may commence an
20 action to foreclose a deed of trust at any time before the
21 commercial trust real estate has been sold as provided in the
22 power of sale. A sale of trust real estate as provided in a
23 power of sale in a deed of trust shall not be held after an
24 action to foreclose the deed of trust has been commenced unless
25 the foreclosure action has been dismissed.

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

4 D. The trustee need only be joined as a party in
5 separate civil actions pertaining to a breach of an obligation
6 of a trustee as provided in the Deed of Trust Act or as
7 provided in the deed of trust. Any order of the court entered
8 against the beneficiary is binding upon the trustee with
9 respect to any actions that the trustee is authorized to take
10 by the deed of trust or by the Deed of Trust Act. If the
11 trustee is joined as a party in any other separate civil
12 action, other than an action in which the trustee is an
13 indispensable or necessary party, the trustee is entitled to be
14 immediately dismissed and to recover the costs and reasonable
15 attorney fees actually incurred by the trustee from the person
16 joining the trustee and from the beneficiary, jointly and
17 severally.

18 E. For the purposes of this section:

19 (1) "commercial deed of trust" means a deed of
20 trust that secures real estate in the state other than real
21 estate:

22 (a) on which no buildings or structures
23 are located and that is zoned for single-family residential
24 use; or

25 (b) containing one or more single-family

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1 residential units, including apartments, condominiums,
2 townhouses or homes in a subdivision when sold, leased or
3 otherwise conveyed on a unit-by-unit basis; and

4 (2) "residential deed of trust" means a deed
5 of trust that secures real estate in the state:

6 (a) on which no buildings or structures
7 are located and that is zoned for single-family residential
8 use; or

9 (b) containing one or more single-family
10 residential units, including apartments, condominiums,
11 townhouses or homes in a subdivision when sold, leased or
12 otherwise conveyed on a unit-by-unit basis."

13 SECTION 5. Section 58-21A-6 NMSA 1978 (being Laws 2003,
14 Chapter 436, Section 6, as amended) is amended to read:

15 "58-21A-6. DEFAULT--NOTICE--RIGHT TO CURE.--

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

22 (1) of the nature of the default;

23 (2) of the borrower's right to cure the
24 default by paying the sum of money required, provided that a
25 creditor or assignee shall accept any partial payment made or

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1 tendered in response to the notice. If the amount necessary to
2 cure the default will change within thirty days of the notice,
3 due to the application of a daily interest rate or the addition
4 of late fees, as allowed by the Home Loan Protection Act, the
5 notice shall give sufficient information to enable the borrower
6 to calculate the amount at any point within the thirty-day
7 period;

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

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

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

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

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

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

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1 ~~seize or transfer ownership of the real estate~~]. After the
2 creditor or assignee files a judicial foreclosure or other
3 judicial ~~[action or takes other]~~ action to seize or transfer
4 ownership of the real estate, the borrower shall only be liable
5 for attorney fees that are reasonable and actually incurred by
6 the creditor or assignee, based on a reasonable hourly rate and
7 a reasonable number of hours.

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

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

22 F. When a judicial foreclosure complaint is filed,
23 a creditor shall:

24 (1) file with it a certificate of the absence
25 of loss mitigation that is current as of thirty days prior to

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1 the filing of the judicial foreclosure action;
2 (2) file with it a notice of right to cure the
3 default with proof that the notice has been sent to the
4 borrower and such notice must include information required by
5 the Home Loan Protection Act; and
6 (3) deposit the original note and any
7 allonges, indorsements or other indicia of transfer of
8 ownership of the note to the creditor and all prior owners or
9 assignees of the note into the court registry.
10 G. When a creditor moves for judgment in a judicial
11 foreclosure action, the creditor shall file a certificate of
12 the absence of loss mitigation that is current as of thirty
13 days prior to the filing of the motion."