

Legislative Analysis



FORECLOSURE BY ADVERTISEMENT

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House Bill 5859 as enrolled

Public Act 186 of 2004

Sponsor: Rep. Alexander C. Lipsey

House Committee: Commerce

Senate Committee: Banking and Financial Institutions

Second Analysis (12-29-04)

BRIEF SUMMARY: The bill would amend the Revised Judicature Act to specify that a chain of title must exist for a mortgage before the date of a foreclosure sale that results from a foreclosure by advertisement (but need not exist before the foreclosure by advertisement process is initiated).

FISCAL IMPACT: The bill would have no significant fiscal impact on the judiciary.

THE APPARENT PROBLEM:

The Revised Judicature Act (RJA) sets forth the procedures for foreclosure by advertisement, said to be the most common method of foreclosure on mortgages. It involves the publication and posting of foreclosure and sale notices. The RJA currently says that a party can foreclose by advertisement if, among other things, the mortgage containing the power of sale has been properly recorded and, in cases where the party foreclosing is not the original mortgagee, "a record chain of title exists evidencing the assignment of the party foreclosing the mortgage". A disagreement reportedly exists in the legal community over whether this provision means that the most recent assignment of a mortgage needs to have been recorded by a register of deeds prior to the initiation of foreclosure proceedings or to have been recorded only prior to the foreclosure sale of the property.

Home mortgages are commonly assigned by the original lender to a new mortgagee. Knowledgeable observers say that in some jurisdictions the officials responsible for recording assignments have a considerable backlog (exacerbated by the recent boom in refinancing of mortgages) and, as a result, the record chain of title may not exist at the time a mortgagee wants to begin foreclosure by advertisement. Legislation has been introduced that would clarify the current statute and require the chain of title be in place only before the foreclosure sale and not before initiating the foreclosure by advertising process.

THE CONTENT OF THE BILL:

The bill would amend Section 3204 of the Revised Judicature Act (MCL 600.3204 et al), which deals with the foreclosure of mortgages by advertisement, a common method of foreclosure that involves publication and posting of foreclosure and sale notices. The bill

would specify that if the party foreclosing a mortgage by advertisement is not the original mortgagee, a chain of title must exist prior to the date of sale under Section 3216, evidencing the assignment of the mortgage to the party foreclosing the mortgage.

Currently, the section says that a party can foreclose by advertisement if, among other things, the mortgage containing the power of sale has been properly recorded and, if the party foreclosing is not the original mortgagee, “a record chain of title exists evidencing the assignment of the mortgage to the party foreclosing the mortgage”. The words in quotation marks would be deleted. (The bill is understood, as a result, to require the chain of title to exist before the sale of the property rather than prior to initiating the foreclosure by advertisement.)

[Section 3216 referred to above addresses the nature of the public sale of mortgaged property being foreclosed on: it must be held between 9 a.m. and 4 p.m. where the circuit court is held in the county in which the premises to be sold are located; and the sale is to the highest bidder.]

The bill also would 1) replace the term “suit” where it appears with the term “action”; and 2) require every notice of foreclosure by advertisement to contain, among other things, the name of the mortgagor, the original mortgagee, and the foreclosing assignee (the underlined language would be added).

ARGUMENTS:

For:

The aim of the bill is to clarify a current dispute over when a record chain of title showing the assignment of the mortgage to the foreclosing mortgagee needs to exist in the foreclosure by advertisement process. The bill would say that it needs to be in place prior to the foreclosure sale not prior to the initiation of the foreclosure process.

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