

REVIEW OF FORECLOSURE LEGISLATION

Report to the Governor for consideration and response to the General Assembly

In response to the letter of request dated January 25, 2011 from Delegate Clifford L. Athey, Jr., Chairman of the Civil Subcommittee of the House Courts of Justice Committee, the Virginia Foreclosure Task Force (the “Task Force”) has reviewed the following bills:

- House Bill 1506 and House Bill 2473, introduced by Del. Robert G. Marshall
- House Bill 1665, introduced by Del. Kenneth C. Alexander
- House Bill 1920 and House Bill 1921, introduced by Del. Robin Abbott
- Senate Bill 837, introduced by Sen. Chap Peterson, as amended and passed by the Senate.

Background

Governor Robert F. McDonnell formed the Virginia Foreclosure Task Force in April 2010 as a component of Executive Order Ten establishing a Housing Policy Framework for the Commonwealth. The Task Force was established to bring representatives of the mortgage, real estate and homebuilding industries, consumer advocates, and policy experts together to monitor state efforts to address the Commonwealth’s foreclosure-related issues and any state action that could assist with housing market recovery. Virginia’s Secretary of Veterans Affairs and Homeland Security, the Honorable Mrs. Terrie L. Suit was designated to chair the Task Force. During the 2011 General Assembly Session Delegate Athey requested, and the Governor through his policy office and Secretary Suit accepted, a request that the Governor’s Foreclosure Task Force review and comment on the above legislation.

The Task Force met seven times during the period of March through November 2011. During the first five meetings in March, April, May, June and September, the Task Force received expert testimony and public comment in the following areas that were the subjects of the above referenced legislation:

- The foreclosure process, including notice to mortgagors
- Documentation and recordation, including recordation of assignments, authority of nominees, and the lost note affidavit
- Rights, duties and remedies, including the duty to respond to inquiries, the right to cure, and remedies for fraud

Also, in July Senate Bill 795, introduced by Senator A. Donald McEachin, was referred to the Virginia Foreclosure Task Force by the Virginia Housing Commission at the request of Senator McEachin. The issues in this bill were discussed during the meeting in September. During the two meetings in October and November, the members of the Task Force reviewed and discussed the public comments and issues in the legislation, including the recent developments relating to servicing practices and the foreclosure process, and finalized this review.

At the meetings, the Task Force also received updates from experts on the status of foreclosures in the state. High levels of foreclosures continue to impact and to be impacted by weak macro-economic factors. The effects are felt not only by citizens facing foreclosure, but by housing markets, financial institutions and local communities. Continuing through 2011, the problem has remained essentially unchanged. Delinquency rates have peaked, but remain stubbornly high. Internal foreclosure processing issues continue to prolong the finality to a foreclosure keeping large numbers of loans in foreclosure status. Weak home purchase demand continues to inhibit the reduction in lender-owned homes. The key factor affecting the high rates of delinquencies and foreclosures and the weak home purchase demand is unemployment and underemployment. The reinforcing interplay of declining home values and large distressed inventories has not been broken. Substantial improvement in the foreclosure problem is unlikely until macro-economic conditions show meaningful change. These conditions include renewed jobs and income growth and further reduction of household debt.

Recent Developments

Since the last session of the General Assembly, there have been a number of recent developments affecting loan servicing practices and foreclosures.

The role of MERS (Mortgage Electronic Registrations Systems, Inc.) as the beneficiary and nominee of the lender under the deed of trust has been the subject of controversy and was discussed and considered by the Task Force. In July 2011, MERS changed its procedures and will no longer initiate the foreclosure process by sending the statutory notice to the trustee to commence foreclosure. As a result, the secured party or its servicing agent will be the party responsible for sending this notice for loans on which MERS was acting as beneficiary and nominee under the deeds of trust. Also, in April 2011 MERS executed a consent order with federal regulators that is intended to improve its internal controls and corporate governance and to address quality assurance issues, particularly with regard to data integrity and signature authorization.

Another area of controversy has been the inability of borrowers to identify the owner (not to be confused with servicer) of their loans after the loans have been sold. The Task Force was advised that, in addition to the 2009 amendments to the Truth-in-Lending Act requiring notice to the homeowner within 30 days of the purchase of his or her loan, the 2010 Dodd-Frank Act will require servicers to disclose to the homeowner the name of the owner of the loan within 10 days of receipt of a written request from the homeowner.

Enforcement actions, investigations and settlement negotiations have been initiated by governmental authorities because of alleged defective servicing and foreclosure practices. The Justice Department, Federal Trade Commission, the U.S. Treasury Department, the U.S. Department of Housing and Urban Development and attorneys general of 48 states, including Virginia (but excluding New York and

California) are proceeding with investigations of, and negotiations with, five of the largest servicers that would provide relief for borrowers who were harmed by wrongful foreclosures and that would require the servicers to improve their servicing practices for loan delinquencies and foreclosures. In addition, pursuant to consent orders entered in April 2011, federal regulators are requiring 14 large servicers to correct deficiencies in their servicing and foreclosure processes and to engage independent firms to conduct review of foreclosure actions in 2009 and 2010 (including contacting more than 4 million borrowers) in order to evaluate whether borrowers suffered financial injury through deficiencies in foreclosure practices and to determine appropriate remediation. Also, pursuant to consent orders executed with federal regulators in April 2011, Lender Processing Services, Inc., which provides services related to foreclosures, will be required to address deficient practices related primarily to the document execution services provided to servicers in connection with foreclosure.

Items Considered by the Task Force

The Task Force considered the following foreclosure related items addressed in the bills.

1. Require that, prior to the notice of sale, an additional notice be sent by the secured party/beneficiary or its agent/servicer to the owner that includes the following: (i) information about the status of the loan, (ii) contact information for the lender/servicer and HUD counseling agencies, and (iii) foreclosure alternatives.
2. Require the recording of either (i) all assignments of mortgage loans or (ii) assignments necessary to evidence ownership of the mortgage loan prior to foreclosure.
3. Prohibit nominees from requesting the trustee to foreclose.
4. Provide that, if the owner files a petition in circuit court to seek protection against claims by other persons to enforce a lost note, the court may not permit the sale unless the court finds that the owner is adequately protected against such claims.
5. Require the secured party to respond to inquiries by the owner about loan status, amounts necessary to cure, and foreclosure alternatives.
6. Give the owner whose loan is in default a right to cure and reinstate the loan once every 18 months.
7. Provide that the execution of a false lost note affidavit is perjury.
8. Impose \$5,000 civil penalties for fraudulent statements or documents in support of foreclosure.
9. Provide that the owner shall have the right to equitable relief and/or compensatory damages (or treble damages) and attorneys' fees for fraudulent statements or documents in support of foreclosure.

10. Require that information about the prior history/status of the loan, including default history, any loan modification actions, lender contact information and basis of lender's authority, be included in the request to foreclose that is given by the secured party/beneficiary to the trustee.
11. Require that the statutory notice of foreclosure sale to the owner be given by personal service (or, if the owner cannot be located, by certified or registered mail to his last known address) and be posted on the residence.
12. Require that statutory notice(s) to the owner be given again if the sale is postponed for more than 30 days.
13. Require that the lost note affidavit contain additional information, including the storage location, the storage and retrieval methods, the last known location of the note, the steps taken to locate the note, the individual who determined the note to be lost, and the date of the determination.
14. Require that the secured party/beneficiary accept and apply debt payments after the request to the trustee to foreclose.
15. Require the deed from a foreclosing trustee that is a corporation or other entity to contain contact information (including name, telephone number and address) about the individual signing the deed.
16. Provide that the individual's signature on the trustee's deed constitutes a certification under oath that the individual has determined that the statutory requirements for foreclosure have been met.
17. Specify the fiduciary duties of the trustee, including identifying the secured party/beneficiary, distributing the foreclosure sale proceeds promptly, obtaining the note (or lost note affidavit) and any assignments, and confirming compliance with statutory requirements.
18. Require the foreclosure sale to be postponed by the trustee pending resolution of questions that are raised about the default status of the loan, the identity of the note holder/beneficiary, or the trustee's authority to proceed to sale.
19. Provide that a failure to comply with the statutory foreclosure requirements is a violation of the Virginia Consumer Protection Act.

After a review and thorough discussion of these items there was no consensus among the members of the Task Force to recommend legislation addressing them.

A number of items addressed by the bills or raised by members of the public during the meetings related to servicing practices, rather than foreclosure prevention, and would require federal regulation to remedy because of the inability of the state to regulate federally chartered financial institutions. Additionally, the provisions in the bills would, if enacted, not be expected to have a significant impact on preventing foreclosures;

however, they would concern the integrity of the foreclosure process and the need for public confidence that the actual process of foreclosure itself is fair and enforceable.

Conclusion

In reviewing the bills, the Task Force received a great deal of information from the public and its members about the foreclosure process in Virginia and the effect that the bills would have on that process. The Task Force members found this to be exceptionally informative. While the provisions in the bills would probably not have a significant impact on preventing foreclosures, they do address some issues relating to the integrity of the foreclosure process. While members did not reach a clear consensus on recommending any of the provisions of the bills, certain provisions did receive the support of at least half of the members with the other members expressing that the provisions were inconsequential, unnecessary or detrimental.

The Task Force hopes that the information in this report will be helpful to the Governor as well as the General Assembly in its consideration of legislation relating to the foreclosure process that may be introduced in the 2012 Session of the General Assembly. The work of the Task Force on these matters was broad and is now complete. The Task Force does not anticipate a need for review of any additional legislation but hopes the members of the General Assembly will reflect on the concepts reviewed herein and use this information prospectively. The Task Force will continue its work under the direction of the Governor.

Attachments:

- Attachment A: List of members
- Attachment B: Meeting agendas and notes
- Attachment C: Process flow of a typical foreclosure