



Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

FORECLOSURE BY ADVERTISEMENT

House Bill 5721 as enrolled
Public Act 327 of 1994
Second Analysis (2-15-95)

Sponsor: Rep. Gary L. Randall
House Committee: Business and Finance
Senate Committee: Corporations and
Economic Development

THE APPARENT PROBLEM:

The Revised Judicature Act (RJA) sets forth the procedures for foreclosing by advertisement, by far the most common method of foreclosure, which involves publication and posting of foreclosure and sale notices. (For simplicity, this analysis will refer to "foreclosure" to mean foreclosure by advertisement under the applicable article of the Revised Judicature Act.) Recent decisions of the Michigan Supreme Court have suggested that the foreclosure procedures of the act must be strictly followed.

In its 1993 decision on Senters v Ottawa Savings Bank (443 Mich 45), the court held that foreclosure sales by advertisement are defined and regulated by statute. The court said that once a mortgagee elects to foreclose by this method, Chapter 32 of the Revised Judicature Act governs the prerequisites of the sale, notice of foreclosure and publication, mechanisms of the sale, and redemption. This reasoning was used to uphold a former mortgagor's redemption of property from the foreclosure sale purchaser (who was also the original mortgagee, or mortgage lender) without reimbursing the mortgagee/purchaser for a construction lien it had paid following its purchase of the property at its own foreclosure sale. Since statute did not require reimbursement for such liens under such circumstances, the property could be redeemed without the mortgagor paying that sum in addition to the statutorily-prescribed amounts.

Of more urgent concern to many, however, are the potential ramifications of a more recent supreme court response to an unpublished decision of the court of appeals. In May 1993, the court of appeals issued its first decision in Arnold v DMR Financial Services (No. 90-00778), a case in which the mortgage challenged foreclosure of a mortgage

that had been assigned to the Guaranty National Mortgage Association (GNMA). The RJA provides in part that as a condition of foreclosing by advertisement, "the mortgage containing such power of sale has been duly recorded; and if it shall have been assigned, that all assignments thereof shall have been recorded." In accordance with standard GNMA procedures, the assignment had not been recorded, and Ms. Arnold challenged the foreclosure on the basis that not all assignments had been recorded. The court of appeals initially ruled against Ms. Arnold, saying that the mortgage had not been harmed by the failure to record, and that there was no reason to void the sale. Ms. Arnold appealed to the supreme court, which, instead of granting leave to appeal, remanded the case to the court of appeals for reconsideration in light of Senters. The court of appeals, citing Senters, subsequently ruled in favor of Ms. Arnold, ruling the foreclosure sale void because the assignment to GNMA had not been recorded as required by the RJA. The case is now being appealed to the supreme court, which has scheduled oral arguments for early March 1995.

The decision has raised concern among mortgage experts, who say that the purpose of the statutory requirement to record assignments of a mortgage is to ensure that the entity publishing the notice holds record title to the property. Thus, someone facing foreclosure can go to the register of deeds to find out who are the parties with whom the person must negotiate to retain his or her property. GNMA assignments, on the other hand, do not operate to transfer title; assigning a mortgage to GNMA means that GNMA guarantees that purchasers of the mortgage on the secondary mortgage market will receive payments due from the original mortgagee/lender. Mortgage payments continue to

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be collected by the original mortgagee/lender from the mortgagor/borrower, and it is to this lender, not GNMA, that foreclosure powers belong. Critics point out that for statute to require that an assignment to GNMA be recorded would be to saddle GNMA with administrative duties it neither wants nor can manage.

To address concerns raised by the Senters decision and subsequent court action, amendments to foreclosure procedures have been proposed.

THE CONTENT OF THE BILL:

The bill would amend Chapter 32 of the Revised Judicature Act to:

**** Delete a requirement that all assignments of a mortgage must have been recorded as a prerequisite for foreclosure.**

**** State that the party foreclosing the mortgage must be either the owner of the indebtedness (or of an interest in it) or the servicing agent of the mortgage. If the party foreclosing is not the original mortgagee, there would have to be a record chain of title evidencing the assignment of the mortgage to the party foreclosing the mortgage.**

**** Require someone redeeming property sold at a foreclosure sale to reimburse the purchaser for amounts paid to redeem senior liens from foreclosure. If the redemption payment included an amount used to redeem a senior lien from a nonjudicial foreclosure, the mortgagor would have the same defenses against the purchaser with respect to the amount used to redeem the senior lien as the mortgagor would have had against the senior lien.**

MCL 600.3204 et al.

FISCAL IMPLICATIONS:

The Senate Fiscal Agency has reported that the bill would not have a regulatory or fiscal impact on the Department of Commerce or on other agencies of state government. No mandated costs would be imposed on local governmental units. (12-1-94)

ARGUMENTS:

For:

The bill would provide a speedy resolution to problems raised by recent court decisions. Of particular concern is a court of appeals decision saying that all mortgage assignments must be recorded with the register of deeds in order for a foreclosure to go forward. For mortgages that have been sold on the secondary mortgage market, especially those backed by GNMA ("Ginnie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and the Federal National Mortgage Association ("Fannie Mae"), the decision of the court of appeals is problematic: these entities almost invariably merely have a security assigned to them, not a record title. They do not have, nor are they in a position to assume, the role played by the original mortgagee, who services the mortgage and proceeds with any foreclosure. By eliminating a confusingly overbroad provision for all assignments to be recorded, and by linking foreclosure authority to mortgage servicing (with certain exceptions for flexibility), the bill would better reflect the real world of mortgage finance.

For:

The bill would require someone redeeming property from foreclosure to reimburse the purchaser for any amounts paid to discharge senior liens (such as construction liens) from foreclosure. The bill thus would restore a basic fairness to the law, enabling foreclosure purchasers to receive sums they paid out to lienholders.

Against:

There is a public interest in seeing redemptions go forward; people facing temporary hardship should have every reasonable chance to keep their homes. The bill, by adding to the sums that would have to be reimbursed by people trying to redeem their homes following foreclosure, would tend to make redemption more expensive and thus more difficult to do.