

SENATE BILL NO. 307—SENATOR COPENING

MARCH 21, 2011

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to the exercise of the power of sale under a deed of trust concerning owner-occupied property. (BDR 9-958)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: Yes.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to real property; revising provisions governing the exercise of the power of sale under a deed of trust concerning owner-occupied property; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

1 Under existing law, the trustee under a deed of trust concerning owner-
2 occupied housing has the power to sell the property to which the deed of trust
3 applies, subject to certain restrictions. (NRS 107.080, 107.085, 107.086) Existing
4 law prohibits the exercise of the trustee’s power of sale concerning owner-occupied
5 property unless the trustee records in the office of the county recorder a certificate
6 issued by the entity designated as the Mediation Administrator for the foreclosure
7 mediation program which indicates that foreclosure mediation is not required or has
8 been completed. (NRS 107.086) This bill establishes additional restrictions on the
9 trustee’s power of sale with respect to owner-occupied housing which are based on
10 Maryland law and which require an analysis of the eligibility of the grantor or
11 person who holds the title of record for a loan modification or other loss mitigation
12 alternative. Under this bill, the trustee must include with the notice of default and
13 election to sell mailed to the grantor or the person who holds title of record an
14 application for a loan modification program or other loss mitigation alternative. If
15 the application is returned to the trustee: (1) the trustee must forward it to the
16 person responsible for analyzing the eligibility of the grantor or the person who
17 holds title of record for a loan modification or other loss mitigation alternative and
18 that must complete an analysis of the application; and (2) the Mediation
19 Administrator may not issue to the trustee the certificate which must be recorded
20 before the exercise of the power of sale unless the trustee serves on the Mediation
21 Administrator an affidavit certifying that an analysis of the application was
22 completed. This bill also provides the procedures to be followed if a loss mitigation
23 application is not returned within 30 days after service of the notice of default and
24 election to sell and the procedures to be followed with respect to loss mitigation



25 applications if mediation is required under existing law. Finally, this bill requires
26 the Mediation Administrator to create standard forms for the required affidavits.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 **Section 1.** NRS 107.086 is hereby amended to read as follows:
2 107.086 1. In addition to the requirements of NRS 107.085,
3 the exercise of the power of sale pursuant to NRS 107.080 with
4 respect to any trust agreement which concerns owner-occupied
5 housing is subject to the provisions of this section.
6 2. The trustee shall not exercise a power of sale pursuant to
7 NRS 107.080 unless the trustee:
8 (a) Includes with the notice of default and election to sell which
9 is mailed to the grantor or the person who holds the title of record as
10 required by subsection 3 of NRS 107.080:
11 (1) Contact information which the grantor or the person who
12 holds the title of record may use to reach a person with authority to
13 negotiate a loan modification on behalf of the beneficiary of the
14 deed of trust;
15 (2) Contact information for at least one local housing
16 counseling agency approved by the United States Department of
17 Housing and Urban Development; ~~land~~
18 (3) A form upon which the grantor or the person who holds
19 the title of record may indicate an election to enter into mediation or
20 to waive mediation and one envelope addressed to the trustee and
21 one envelope addressed to the Mediation Administrator, which the
22 grantor or the person who holds the title of record may use to
23 comply with the provisions of subsection 3;
24 (4) *A loss mitigation application for loss mitigation*
25 *programs that are applicable to the obligation secured by the deed*
26 *of trust;*
27 (5) *Instructions for completing the loss mitigation*
28 *application;*
29 (6) *A description of the eligibility requirements for the loss*
30 *mitigation programs offered by the trustee or beneficiary of the*
31 *deed of trust that may be applicable to the obligation secured by*
32 *the deed of trust;*
33 (7) *A telephone number which the grantor or the person*
34 *who holds title of record may call to confirm receipt of the*
35 *completed loss mitigation application; and*
36 (8) *An envelope preprinted with the address of the trustee;*
37 (b) Serves a copy of the notice upon the Mediation
38 Administrator; and



1 (c) Causes to be recorded in the office of the recorder of the
2 county in which the trust property, or some part thereof, is situated:

3 (1) The certificate provided to the trustee by the Mediation
4 Administrator pursuant to subsection 3 or ~~6~~ 9 which provides that
5 no mediation is required in the matter; or

6 (2) The certificate provided to the trustee by the Mediation
7 Administrator pursuant to subsection ~~7~~ 10 which provides that
8 mediation has been completed in the matter.

9 3. The grantor or the person who holds the title of record shall,
10 not later than 30 days after service of the notice in the manner
11 required by NRS 107.080, complete the form required by
12 subparagraph (3) of paragraph (a) of subsection 2 and return the
13 form to the trustee by certified mail, return receipt requested. If the
14 grantor or the person who holds the title of record indicates on
15 the form an election to enter into mediation, the trustee shall notify
16 the beneficiary of the deed of trust and every other person with an
17 interest as defined in NRS 107.090, by certified mail, return receipt
18 requested, of the election of the grantor or the person who holds the
19 title of record to enter into mediation and file the form with the
20 Mediation Administrator, who shall assign the matter to a senior
21 justice, judge, hearing master or other designee and schedule the
22 matter for mediation. No further action may be taken to exercise the
23 power of sale until the completion of the mediation. If the grantor or
24 the person who holds the title of record indicates on the form an
25 election to waive mediation or fails to return the form to the trustee
26 as required by this subsection ~~4~~ *and fails to return the loss
27 mitigation application required to be mailed to the grantor or the
28 person who holds title of record pursuant to subparagraph (4)
29 paragraph (a) of subsection 2*, the trustee shall execute an affidavit
30 attesting to ~~that fact~~ *those facts* under penalty of perjury and serve
31 a copy of the affidavit, together with the waiver of mediation by the
32 grantor or the person who holds the title of record, or proof of
33 service on the grantor or the person who holds the title of record of
34 the notice required by subsection 2 of this section and subsection 3
35 of NRS 107.080, upon the Mediation Administrator. Upon receipt of
36 the affidavit and the waiver or proof of service, the Mediation
37 Administrator shall provide to the trustee a certificate which
38 provides that no mediation is required in the matter.

39 4. *If the grantor or the person who holds the title of record
40 returns the loss mitigation application to the trustee within 30 days
41 after service of the notice in the manner required by NRS 107.080,
42 whether or not the grantor or person who holds the title of record
43 has elected to waive mediation pursuant to subsection 3 or failed
44 to return the form required by subparagraph (3) of paragraph (a)
45 of subsection 2, the trustee shall:*



1 (a) *Notify the Mediation Administrator, the beneficiary of the*
2 *deed of trust and every other person with an interest as defined in*
3 *NRS 107.090, by certified mail, return receipt requested, of the*
4 *receipt of the application.*

5 (b) *Forward the loss mitigation application to the person*
6 *responsible for conducting loss mitigation analysis on behalf of*
7 *the trustee or beneficiary of the deed of trust. Upon receipt of a*
8 *loss mitigation application pursuant to this subsection, the person*
9 *responsible for conducting loss mitigation analysis shall perform*
10 *and complete a loss mitigation analysis.*

11 5. *Upon completion of the loss mitigation analysis pursuant*
12 *to paragraph (b) of subsection 4, the trustee shall:*

13 (a) *Execute a final loss mitigation affidavit in the form created*
14 *by the Mediation Administrator;*

15 (b) *Mail the final loss mitigation affidavit by registered or*
16 *certified mail, return receipt requested, to the grantor or the*
17 *person who holds the title of record; and*

18 (c) *Serve a copy of the final loss mitigation affidavit upon the*
19 *Mediation Administrator.*

20 6. *A trustee or a person conducting loss mitigation analysis*
21 *on behalf of the trustee who has received a loan mitigation*
22 *application pursuant to this section shall not deny a loan*
23 *modification or any other loss mitigation program because of an*
24 *inability to establish communication with the grantor or the*
25 *person who holds the title of record or obtain all documentation*
26 *and information necessary to conduct the loss mitigation analysis*
27 *unless, for at least 30 days after receipt of the loss mitigation*
28 *application, the trustee or the person acting on its behalf has made*
29 *good faith attempts to:*

30 (a) *Establish communication with the grantor or the person*
31 *who holds the title of record; and*

32 (b) *Obtain all documentation and information necessary to*
33 *conduct the loss mitigation analysis.*

34 7. Each mediation required by this section must be conducted
35 by a senior justice, judge, hearing master or other designee pursuant
36 to the rules adopted pursuant to subsection ~~8.~~ 11. The beneficiary
37 of the deed of trust or a representative shall attend the mediation.
38 The grantor or a representative shall attend the mediation if the
39 grantor elected to enter into mediation, or the person who holds
40 the title of record or a representative shall attend the mediation if the
41 person who holds the title of record elected to enter into mediation.
42 The beneficiary of the deed of trust shall bring to the mediation the
43 original or a certified copy of the deed of trust, the mortgage note,
44 ~~and~~ each assignment of the deed of trust or mortgage note ~~and~~,
45 *if the grantor or the person who holds the title of record has*



1 *returned to the trustee the loss mitigation application pursuant to*
2 *subsection 4, a copy of the loss mitigation application and the*
3 *information obtained in connection with the loss mitigation*
4 *analysis. In addition to these documents, if the grantor or the*
5 *person who holds the title of record has returned to the trustee the*
6 *loss mitigation application pursuant to subsection 4, the trustee*
7 *shall bring to the mediation a preliminary loss mitigation affidavit*
8 *or a final loss mitigation affidavit, whichever is applicable.* If the
9 beneficiary of the deed of trust is represented at the mediation by
10 another person, that person must have authority to negotiate a loan
11 modification on behalf of the beneficiary of the deed of trust or have
12 access at all times during the mediation to a person with such
13 authority.

14 ~~[5.]~~ 8. If the beneficiary of the deed of trust or the
15 representative fails to attend the mediation, fails to participate in the
16 mediation in good faith or does not bring to the mediation each
17 document required by subsection ~~[4.]~~ 7 or does not have the
18 authority or access to a person with the authority required by
19 subsection ~~[4.]~~ 7, the mediator shall prepare and submit to the
20 Mediation Administrator a petition and recommendation concerning
21 the imposition of sanctions against the beneficiary of the deed of
22 trust or the representative. The court may issue an order imposing
23 such sanctions against the beneficiary of the deed of trust or the
24 representative as the court determines appropriate, including,
25 without limitation, requiring a loan modification in the manner
26 determined proper by the court.

27 ~~[6.—1.]~~

28 9. *Except as otherwise provided in this subsection, if* the
29 grantor or the person who holds the title of record elected to enter
30 into mediation and fails to attend the mediation, the Mediation
31 Administrator shall provide to the trustee a certificate which states
32 that no mediation is required in the matter. *If the grantor or the*
33 *person who holds the title of record returned a loss mitigation*
34 *application to the trustee pursuant to subsection 4, the Mediation*
35 *Administrator may not provide the certificate to the trustee until*
36 *the trustee serves on the Mediation Administrator a final loss*
37 *mitigation affidavit.*

38 ~~[7.—1.]~~

39 10. *Except as otherwise provided in this subsection, if* the
40 mediator determines that the parties, while acting in good faith, are
41 not able to agree to a loan modification, the mediator shall prepare
42 and submit to the Mediation Administrator a recommendation that
43 the matter be terminated. The Mediation Administrator shall provide
44 to the trustee a certificate which provides that the mediation
45 required by this section has been completed in the matter. *If the*



1 *grantor or the person who holds the title of record returned a loss*
2 *mitigation application to the trustee pursuant to subsection 4, the*
3 *Mediation Administrator may not provide the certificate to the*
4 *trustee until the trustee serves on the Mediation Administrator a*
5 *final loss mitigation affidavit.*

6 ~~[8-]~~ 11. The Supreme Court shall adopt rules necessary to
7 carry out the provisions of this section. The rules must, without
8 limitation, include provisions:

9 (a) Designating an entity to serve as the Mediation
10 Administrator pursuant to this section. The entities that may be so
11 designated include, without limitation, the Administrative Office of
12 the Courts, the district court of the county in which the property is
13 situated or any other judicial entity. *The Mediation Administrator*
14 *shall create a standard form for a preliminary loss mitigation*
15 *affidavit and a final loss mitigation affidavit. A preliminary loss*
16 *mitigation affidavit and a final loss mitigation affidavit must be in*
17 *the form created by the Mediation Administrator pursuant to this*
18 *section.*

19 (b) Ensuring that mediations occur in an orderly and timely
20 manner.

21 (c) Requiring each party to a mediation to provide such
22 information as the mediator determines necessary.

23 (d) Establishing procedures to protect the mediation process
24 from abuse and to ensure that each party to the mediation acts in
25 good faith.

26 (e) Establishing a total fee of not more than \$400 that may be
27 charged and collected by the Mediation Administrator for mediation
28 services pursuant to this section and providing that the responsibility
29 for payment of the fee must be shared equally by the parties to the
30 mediation.

31 ~~[9-]~~ 12. Except as otherwise provided in subsection ~~[11-]~~ 14,
32 the provisions of this section do not apply if:

33 (a) The grantor or the person who holds the title of record has
34 surrendered the property, as evidenced by a letter confirming the
35 surrender or delivery of the keys to the property to the trustee, the
36 beneficiary of the deed of trust or the mortgagee, or an authorized
37 agent thereof; or

38 (b) A petition in bankruptcy has been filed with respect to the
39 grantor or the person who holds the title of record under chapter 7,
40 11, 12 or 13 of Title 11 of the United States Code and the
41 bankruptcy court has not entered an order closing or dismissing the
42 case or granting relief from a stay of foreclosure.

43 ~~[10-]~~ 13. A noncommercial lender is not excluded from the
44 application of this section.



1 ~~{11}~~ 14. The Mediation Administrator and each mediator who
2 acts pursuant to this section in good faith and without gross
3 negligence are immune from civil liability for those acts.

4 ~~{12}~~ 15. As used in this section:

5 (a) *“Final loss mitigation affidavit” means an affidavit that:*

6 (1) *Is made by the trustee or a person authorized to act on*
7 *behalf of the trustee;*

8 (2) *Certifies the completion of the final determination of*
9 *loss mitigation analysis in connection with a deed of trust; and*

10 (3) *Certifies the denial of a loan modification or other loss*
11 *mitigation.*

12 (b) *“Loss mitigation analysis” means an evaluation of the*
13 *facts and circumstances of an obligation secured by a deed of trust*
14 *concerning owner-occupied housing to determine:*

15 (1) *Whether the grantor or the person who holds the title of*
16 *record qualifies for a loan modification; and*

17 (2) *If there will not be a loan modification, whether any*
18 *other loss mitigation program may be made available to the*
19 *grantor or the person who holds the title of record.*

20 (c) *“Loss mitigation program” means an option in connection*
21 *with an obligation secured by a deed of trust concerning owner-*
22 *occupied housing that:*

23 (1) *Avoids the exercise of the trustee’s power of sale*
24 *through loan modification or other changes to the existing terms*
25 *of the obligation that are intended to allow the grantor or the*
26 *person who holds the title of record to stay in the property;*

27 (2) *Avoids the exercise of the trustee’s power of sale*
28 *through a short sale, deed in lieu of trustee’s sale or other*
29 *alternative that is intended to simplify the relinquishment of*
30 *ownership of the property by the grantor or the person who holds*
31 *the title of record; or*

32 (3) *Lessens the harmful impact of the exercise of the*
33 *trustee’s power of sale on the grantor or the person who holds the*
34 *title of record.*

35 (d) *“Mediation Administrator” means the entity so designated*
36 *pursuant to subsection ~~{8}~~.*

37 ~~{b}~~ 11.

38 (e) *“Noncommercial lender” means a lender which makes a loan*
39 *secured by a deed of trust on owner-occupied housing and which is*
40 *not a bank, financial institution or other entity regulated pursuant to*
41 *title 55 or 56 of NRS.*

42 ~~{e}~~ (f) *“Owner-occupied housing” means housing that is*
43 *occupied by an owner as the owner’s primary residence. The term*
44 *does not include any time share or other property regulated under*
45 *chapter 119A of NRS.*



1 (g) *“Preliminary loss mitigation affidavit” means an affidavit*
2 *that:*

3 (1) *Is made by the trustee or a person authorized to act on*
4 *behalf of the trustee;*

5 (2) *Certifies the status of an incomplete loss mitigation*
6 *analysis in connection with a deed of trust; and*

7 (3) *States the reason that the loss mitigation analysis is*
8 *incomplete.*

9 **Sec. 2.** The amendatory provisions of this act apply only with
10 respect to trust agreements which concern owner-occupied housing,
11 as defined in NRS 107.086, as amended by section 1 of this act, for
12 which a notice of default is recorded on or after July 1, 2011.

13 **Sec. 3.** This act becomes effective July 1, 2011.

