

# FINAL BILL REPORT

## ESB 5810

---

---

### Synopsis as Enacted

**Brief Description:** Concerning foreclosures on deeds of trust.

**Sponsors:** Senators Kauffman, Berkey, Shin, Franklin, Keiser, Tom and Kohl-Welles; by request of Governor Gregoire.

**Senate Committee on Financial Institutions, Housing & Insurance**  
**House Committee on Judiciary**

**Background:** A deed of trust is a type of security interest in real property. A deed of trust is essentially a three-party mortgage. The borrower (grantor) grants a deed creating a lien on the real property to a third party (the trustee) who holds the deed in trust as security for an obligation due to the lender (the beneficiary).

The major difference between a deed of trust and a mortgage is that the deed of trust may be nonjudicially foreclosed, whereas a mortgage may only be foreclosed judicially. If the grantor defaults on the loan obligation, the trustee may foreclose on the real property as long as certain procedural and notice requirements are met.

The trustee of a deed of trust may be a domestic corporation, a title insurance company, an attorney, a professional corporation whose shareholders are licensed attorneys, an agency of the United States government, or a bank or savings and loan association. A trustee must resign at the request of a beneficiary, and the beneficiary may designate a successor trustee.

In order for a deed of trust to be nonjudicially foreclosed, the following requirements must be met: (1) the deed contains a power of sale and provides that the real property is not used principally for agricultural purposes; (2) a default has occurred which makes the power of sale operative; (3) the deed has been recorded; (4) a notice of default is sent at least 30 days before a notice of sale is recorded; and (5) no other action is pending to seek satisfaction of an obligation secured by the deed of trust.

To initiate foreclosure procedures the trustee must (1) file a notice of trustee's sale 90 days before the sale; (2) send notice of the sale to the grantor, beneficiary, and any other person with a recorded interest in the land; (3) post the notice on the property or personally serve any occupants; and (4) publish the notice of sale in a newspaper at specified dates.

---

*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

The sale may not take place less than 190 days from the date of default. Any person other than the trustee may bid at the sale. After sale of the property there is no right of redemption and no right to a deficiency judgment.

The proceeds of the foreclosure sale are distributed first to the expenses of sale and the obligation secured by the deed of trust, and the surplus is deposited with the clerk of the court. Any interests or liens on the real property that are eliminated by the sale attached to the surplus proceeds.

Notice of trustee's sale must be given to occupants of property consisting of a single-family residence, condominium, cooperative, and dwelling with less than five units; the notice must identify personal property that may be sold and any other action that is pending to foreclose on another security; the notice must specify the potential effects of foreclosure on the occupants of the property; and there are two eight-day time periods during which the trustee must publish the notice of sale in a legal newspaper.

**Summary:** For deeds of trust made from January 1, 2003, to December 31, 2007, for owner-occupied, residential property, a 30-day extension is made to the current timeline for foreclosure. Thirty days must pass before the notice of default can be filed. The 30 days are measured from the time the lender contacts the borrower by letter and telephone, or satisfies due diligence requirements to contact the borrower, to work out a way to avoid foreclosure.

Obligations of the lender to the borrower are to advise the borrower of his or her right to request a subsequent meeting; to schedule that meeting to occur within 14 days; and to give the borrower toll-free telephone numbers for contacting the Department of Financial Institutions, a Housing and Urban Development-certified counselor, and statewide civil legal aid.

The notice of default must include a declaration from the beneficiary that it contacted the borrower or used due diligence in attempting to do so. Actions by the lender to contact the borrower and the times at which these actions are to be taken and what constitutes due diligence are specified in detail.

Under certain circumstances the 30-day delay in filing the notice of default and the due diligence requirements need not be met.

Tenants in non-owner-occupied one- to four-unit residences must be notified at least 90 days in advance of the impending foreclosure sale, of the potential consequences to them, and their option to contact a lawyer, legal aid, or a housing counselor about their rights. Tenants living in foreclosed property must be given 60 days' written notice by the new owner before the tenants are removed from the property.

The trustee has a duty of good faith to the borrower, beneficiary, and grantor.

The claims of common law fraud and the trustee's failure materially to comply with the deed of trust law, are not waived by the borrower's failure to bring a lawsuit to enjoin a foreclosure sale of an owner-occupied one- to four-unit residence, but these claims must be asserted within two years of the foreclosure sale.

There must be proof that the beneficiary is the owner of the obligation secured by the deed of trust. A declaration by the beneficiary that the beneficiary is the actual holder is sufficient proof.

Existing law is conformed to the specific requirements of this bill.

Provisions for the 30-day pre-notice of default period expire on December 31, 2012.

**Votes on Final Passage:**

Senate	33	16	
House	98	0	(House amended)
Senate	46	2	(Senate concurred)

**Effective:** 90 days.