| LFC Requester: | Clint Elkins |
|---|---|

**AGENCY BILL ANALYSIS**
**2015 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:**

**LFC@NMLEGIS.GOV**

***and***

**DFA@STATE.NM.US**

***{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}***

**SECTION I: GENERAL INFORMATION**
***{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}***

*Check all that apply:*
**Original** X **Amendment** ____
**Correction** ___ **Substitute** ____

**Date** 1/15/15
**Bill No**: SB142

**Sponsor:** Senator Michael Padilla
**Agency Code**: Attorney General's Office
**Person Writing** AAG David C Kramer
**Short Title:** Foreclosure as Judicial Procedure
**Phone:** 505-222-9134 **Email:** dkramer@nmag.gov

**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

| Appropriation | | Recurring or Nonrecurring | Fund Affected |
|---|---|---|---|
| **FY15** | **FY16** | | |
| | | | |
| | | | |

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

| Estimated Revenue | | | Recurring or Nonrecurring | Fund Affected |
|---|---|---|---|---|
| **FY15** | **FY16** | **FY17** | | |
| | | | | |
| | | | | |

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

| | FY15 | FY16 | FY17 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|---|---|---|---|---|---|---|
| **Total** | | | | | | |

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act:

**SECTION III: NARRATIVE**

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

**BILL SUMMARY**

Synopsis:

Senate Bill 142 amends two existing laws – the Home Loan Protection Act (NMSA 1978, §58-21A-1, et seq.) and the Deed of Trust Act (NMSA 1978, § 48-10-1, et seq.). The bill makes three major changes to these laws: (1) clarifying that only judicial foreclosure may be used to foreclose a lien on a residence; (2) adding a loss mitigation notice to the required notice sent to the borrower/consumer in the event of default; and, (3) requiring the lender, in the foreclosure lawsuit, to file a "certificate of absence of loss mitigation" ("CALM") with the Court that is current, plus requiring the lender file the original promissory note with the court.

First, the bill changes language in both the Home Loan Protection Act and Deed of Trust Act to confirm that the only lawful method to foreclose on a home in New Mexico is through a judicial foreclosure (a lawsuit filed in court by the lien-holder against the homeowner). The bill does this by first amending Section 48-10-10 in the Deed of Trust Act to state that even in cases in which the consumer/homeowner has signed a deed of trust "**the trustee does not have the power of sale in a residential deed of trust on a home loan**." The bill also adds a definition of "home loan" to this Section and that definition is taken directly from the Home Loan Protection Act. Then the bill removes the phrase "**or otherwise**" from the portion of the Home Loan Protection Act which now states:

> If a creditor or assignee asserts that grounds for acceleration exist and requires the payment in full of all sums secured by the home loan, the borrower, . . . , may, at any time prior to the time title is transferred by means of foreclosure, by judicial proceeding and sale *or otherwise*, cure the default, and reinstate the home loan.

At times, lenders and others have asserted or argued that the inclusion of the phrase "or otherwise" after the phrase "by judicial proceeding" states or implies that an "other" method (trustee sale) exists under New Mexico law to take title to a residence, particularly when combined with the fact that the Deed of Trust Act was amended to include residences.

The bill removes the language in the "notice of default" section (Section 58-21A-6) that a lender could take an "**other action**" to seize ownership of the home. Again, by removing the phrase, "or other action" the exclusivity of a judicial foreclosure is re-affirmed and bolstered. The paragraph in Section 58-21A-6 would then read as follows:

> *[The creditor shall deliver to the borrower a notice of the right to cure the default and in that notice notify the borrower. . .]:*
>
> (3) of the date by which the borrower may cure the default to avoid a court action, acceleration and initiation of foreclosure ~~or other action to seize the property~~, which date shall not be less than thirty days after the date the notice is delivered, and the name and address and telephone number of a person to whom the payment or tender shall be made;

Secondly, the bill requires that upon default, a notice be sent to the borrower that now advises the homeowner/consumer "**of all available loss mitigation options that are applicable to the borrower's home loan.**" This is a new requirement but most lenders are likely providing this information already to comply with federal regulations (Regulation X, 12 C.F.R. § 1024).

Thirdly, the bill adds a new requirement that when a lender files a judicial foreclosure complaint, it must include a Certificate of Absence of Loss Mitigation ("CALM") that is current, specifically, from within the prior thirty (30) days. This form is required now by the Second Judicial District Court and Thirteenth Judicial District Court as a matter of court practice (not formal rule). Plus, upon filing the suit, the lender must certify that it provided the information in the default notice to the borrower, including the new provision regarding "all available loss mitigation options." The lender also is required, at the initiation of the suit, to "deposit with the court" the *original* promissory note which it claims gives it the right to foreclose. Finally, the bill imposes a duty to file an update CALM at the time the lender seeks a judgment and that form must be accurate within thirty (30) days of filing.

**FISCAL IMPLICATIONS**

None

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

**SIGNIFICANT ISSUES**

1) To the extent there is ambiguity in current law and that lenders believe they may foreclose on a home through the use of a trustee sale (as provided for in a deed of trust instrument) without affording homeowners the notices and protections provided to homeowners with mortgages, this bill will clarify and remove such ambiguities. It will ensure that homeowners covered by deeds of trust receive the same protections and notices that apply to homeowners with traditional mortgages.

2) Whether to adopt requirements aimed at preventing avoidable foreclosures by specifically and directly requiring the lender to advise the court of the status of loss mitigation activity, both at the start of the case and then also at the "end" when the lender is seeking a default judgment or summary judgment. The AGO has observed foreclosure cases where a CALM form is filed reflecting that no loss mitigation was underway but that form was many months old and stale at the time it was filed. Further, in the last three years, numerous consumers have filed complaints with the Consumer Protection Division alleging that while the consumer is working with his or her lender on loss mitigation, the lender is proceeding to seek a judgment and complete the foreclosure. This requirement would at a minimum require the lender to affirmatively state to the court that no such loss mitigation is underway and/or prompt a discussion regarding why it should be allowed to proceed to sale.

**PERFORMANCE IMPLICATIONS- N/A**

**ADMINISTRATIVE IMPLICATIONS- N/A**

**CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP-**

The requirement for a default notice that contains information regarding loss mitigation arguably duplicates regulations created by the Consumer Financial Protection Bureau (CFPB) that went into effect on January 12, 2014. In particular, 12 C.F.R § 1024.39(b) (the "early intervention" section) requires the lender or servicer to send a notice to the borrower by the forty-fifth (45$^{th}$) day of delinquency which contains loss mitigation information including how to apply for a loan modification and how to contact the servicer. The CFPB has promulgated "model clauses" that the servicer can use to fulfill this requirement and it appears that the industry has generally adopted these notices to comply with this regulation.

**TECHNICAL ISSUES-**
**None.**

**OTHER SUBSTANTIVE ISSUES-**

It is possible that by seeking to regulate the details of how lenders file pleadings in a civil action that this bill arguably invades upon the courts' role of regulating the "practice and procedure" of the courts, which is the exclusive domain of the Supreme Court. *See, e.g. Ammerman v. Hubbard Broadcasting*, 89 N.M. 307, 551 P.2d 1354 (1976). The other provisions in connection with affirming judicial foreclosure as the only method to foreclose a lien do not suffer from this possible issue.

**ALTERNATIVES- N/A**

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL –**

Lenders could potentially argue or take the position that trustee sales are a lawful method to take a homeowner's residence based upon some of the perceived ambiguity in the Home Loan Protection Act and Deed of Trust Act.

Without this law, some foreclosures could possibly be completed without full disclosure to the Court that the lender is (or is not) engaged in loss mitigation with the borrower through the use of a “certificate of the absence of loss mitigation” (CALM).

**AMENDMENTS- N/A**