

LFC Requester:	Connor Jorgenson
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**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 **Amendment**
Correction **Substitute**

Date 2/5/15
Bill No: SB439

Sponsor: Senator Steven Neville **Agency Code:** Attorney General's Office
Person Writing David C Kramer, AAG

Short Title: HOME LOAN PROTECTION & CERTAIN FORECLOSURES **Email**
Phone: 505-222-9134 : 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 439 amends the Home Loan Protection Act (NMSA 1978, §58-21A-1, *et seq.*) but also refers to the Deed of Trust Act (NMSA 1978, § 48-10-1, *et seq.*). This bill would change New Mexico from a judicial foreclosure state (where a home loan can only be foreclosed via a lawsuit by the lender) to a non-judicial foreclosure state (where a home can be sold by a private party known as a trustee).

This bill is directly contrary to SB 142 (Sen. Michael Padilla) which confirms that trustee sales are not permitted as a foreclosure method for home loans under the Home Loan Protection Act.

FISCAL IMPLICATIONS

Arguably if lenders do not have to file foreclosure lawsuits in court, then the volume of civil lawsuits filed in district courts will decrease. However, if trustees can complete a foreclosure, that could result in higher numbers of eviction actions brought in court – typically such eviction actions are brought in metropolitan or magistrate courts.

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) The bill adds a key phrase to Section 58-21A-6, Section E:
E. A creditor or a creditor's assignee of a home loan that has the legal right to foreclose shall, in a foreclosure, use the judicial foreclosure procedures provided by law **or the non-judicial foreclosure procedures provided in the Deed of Trust Act**. In such a proceeding, the borrower may assert the nonexistence of a default and any other claim or defense to acceleration and foreclosure, including any based on a

violation of the Home Loan Protection Act, though no such claim or defense shall be deemed a compulsory counterclaim.

In New Mexico, a statute is read as a whole. Here, the next sentence after the changed sentence starts with “**in such a proceeding**” after the prior sentence refers to judicial foreclosure “procedures” and also “non-judicial foreclosure procedures.” This is confusing as written because it is unclear whether the phrase “in such a proceeding” is referring to a judicial “procedure” or a non-judicial “procedure.” The sentence states that the homeowner can, in the “proceeding,” assert a lack of default or “any other claim or defense.” Yet, in a trustee sale under the Deed of Trust Act, there is no “proceeding” in which the homeowner could raise such defenses or claims. Under a trustee sale, a trustee provides notice and then sells the home. Section 48-10-11. Thus, the phrase “in such a proceeding” is confusing because it appears to only refer to a judicial proceeding while also implying that a trustee sale involves a “proceeding” which is untrue.

- 2) The AGO has concerns about removing due process and judicial oversight of the foreclosure process given the gravity of the loss of a home to a family. There is a risk that consumers could be subjected to improper or deceptive practices without judicial oversight. For example, the Colorado Attorney General has filed eight (8) suits against foreclosing law firms for use of unlawful or deceptive practices in connection with use of trustee sales. In those suits, the Colorado Attorney General raised the issue of a lack of judicial review of the trustee’s actions as a reason why the firms could “get away with” the unlawful conduct because the trustees could not or did not review the conduct or claims. *See, e.g., State of Colorado ex rel. John W. Suthers v. Hopp*, Case No. 2014CV34780 (citing an “inherent lack of oversight” in trustee foreclosure process as the reason the unlawful acts went unchallenged).
- 3) Further, unlike a judicial foreclosure, in a trustee sale, a homeowner would have to find an attorney and file a lawsuit to contest the eviction and raise any defenses. This substantially shifts the burden to consumers to take legal action to save the home, and consumers are generally unsophisticated in their rights and unable to afford an attorney in this situation. Thus, homeowners would lose the home without any hearing or oversight. Initial reports are that mediation programs in connection with judicial foreclosures are resulting in fewer evictions, greater stability, and fewer abandoned homes. Removing the court from foreclosures could thus result in greater housing instability because the homeowner and lender would no longer be required to mediate a plan for either retention of the home or a graceful exit by the homeowners.

PERFORMANCE IMPLICATIONS- N/A

ADMINISTRATIVE IMPLICATIONS- N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP-

- 1) This bill is the converse of SB 142.

TECHNICAL ISSUES-

None.

OTHER SUBSTANTIVE ISSUES-

- 1) The AGO has an ongoing investigation into the practice of lenders in New Mexico marketing and selling mortgages but only offering a deed of trust at closing and the standard deed of trust form tends to cause confusion of the rights of the homeowner. The AGO asserts that such practices are unfair and deceptive. Should this bill pass, thousands of New Mexico homeowners who reasonably thought they had a traditional mortgage (and judicial foreclosure protection) but who actually have a deed of trust will lose the right to a “day in court” to defend a foreclosure. The AGO also asserts that any use of a trustee sale to take a home since July 31, 2009 is in violation of the Home Loan Protection Act and this bill does not alter that analysis for completed sales. Thus, this change will effectively result in a true “bait and switch” for thousands of homeowners who reasonably believed they had a traditional mortgage but now have a deed of trust which exposes them to a non-judicial foreclosure.

ALTERNATIVES- N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL –

If this bill does not pass, New Mexico will remain a judicial foreclosure state and a lender will continue to be able to foreclose on a home loan by bringing a foreclosure action in court.

AMENDMENTS- N/A