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HOUSE BILL NO. 28

Offered January 11, 2012

Prefiled December 8, 2011

A BILL to amend and reenact §§ 26-15, 55-59.1, and 55-66.01 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 55-59.5 and 55-59.6, relating to foreclosure procedures; assignment of deed of trust.

Patron—Marshall, R.G.

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 26-15, 55-59.1, and 55-66.01 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 55-59.5 and 55-59.6 as follows:

§ 26-15. Accounts of sales under deeds of trust, etc.

Within six months after the date of a sale made under any recorded deed of trust, mortgage or assignment for benefit of creditors, otherwise than under a decree, the trustee shall return an account of sale to the commissioner of accounts of the court wherein the instrument was first recorded. Promptly after recording any trustee's deed, the trustee shall deliver to the commissioner of accounts a copy of the deed. The date of sale is the date specified in the notice of sale, or any postponement thereof, as required by subsection A B of § 55-59.1. The commissioner shall state, settle and report to the court an account of the transactions of such trustee, and it shall be recorded as other fiduciary reports. Any trustee failing to comply with this section shall forfeit his commissions on such sale, unless such commissions are allowed by the court.

If the commissioner of accounts of the court wherein an instrument was first recorded becomes aware that an account as required by this section has not been filed, the commissioner and the court shall proceed against the trustee in like manner and impose like penalties as set forth in § 26-13, unless such trustee is excused for sufficient reason. If after a deed of trust is given on land lying in a county, and before sale thereunder, the land is taken within the limits of the incorporated city, the returns of the trustee and settlement of his accounts shall be before the commissioner of accounts of such city.

Whenever the commissioner reports to the court that a fiduciary, who is an attorney-at-law licensed to practice in the Commonwealth, has failed to make the required return within 30 days after the date of service of a summons, the commissioner shall also mail a copy of his report to the Virginia State Bar.

§ 55-59.1. Notices required before sale by trustee to owners, lienors, etc.; if note lost.

A. *At least 45 days before any proposed sale in execution of a deed of trust, the party secured or mortgage servicer shall provide written notice to the present owner of the property to be sold of the intent of the party secured to foreclose on the property. The notice shall contain the name, address, and telephone number of the party secured, the trustee, and any employee or department of the mortgage servicer, the party secured, or any agent of the party secured that can be contacted for inquiries regarding alternatives to foreclosure, including loan modifications. The notice shall be sent by certified or registered mail to the present owner's last known address as such owner and address appear in the records of the party secured.*

B. In addition to the advertisement required by § 55-59.2, the trustee or the party secured shall give written notice of the time, date and place of any proposed sale in execution of a deed of trust, which notice shall include either (i) the instrument number or deed book and page numbers of the instrument of appointment filed pursuant to § 55-59, or (ii) ~~said notice shall include~~ a copy of the executed and notarized appointment of substitute trustee by personal delivery or by mail to ~~(i)~~ (a) the present owner of the property to be sold at his last known address as such owner and address appear in the records of the party secured, ~~(ii)~~ (b) any subordinate lienholder who holds a note against the property secured by a deed of trust recorded at least 30 days prior to the proposed sale and whose address is recorded with the deed of trust, ~~(iii)~~ (c) any assignee of such a note secured by a deed of trust provided the assignment and address of assignee are likewise recorded at least 30 days prior to the proposed sale, ~~(iv)~~ (d) any condominium unit owners' association which has filed a lien pursuant to § 55-79.84, ~~(v)~~ (e) any property owners' association which has filed a lien pursuant to § 55-516, and ~~(vi)~~ (f) any proprietary lessees' association which has filed a lien pursuant to § 55-472. Written notice shall be given pursuant to clauses ~~(iv)~~ (d), ~~(v)~~ (e) and ~~(vi)~~ (f), only if the lien is recorded at least 30 days prior to the proposed sale. Mailing of a copy of the advertisement or a notice containing the same information to the owner by certified or registered mail no less than 14 days prior to such sale and to lienholders, the property owners' association or proprietary lessees' association, their assigns and the condominium unit owners'

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59 association, at the address noted in the memorandum of lien, by ordinary mail no less than 14 days prior
60 to such sale shall be a sufficient compliance with the requirement of notice. The written notice of
61 proposed sale when given as provided herein shall be deemed an effective exercise of any right of
62 acceleration contained in such deed of trust or otherwise possessed by the party secured relative to the
63 indebtedness secured. The inadvertent failure to give notice as required by this subsection shall not
64 impose liability on either the trustee or the secured party.

65 BC. If a note or other evidence of indebtedness secured by a deed of trust is lost or for any reason
66 cannot be produced and the beneficiary submits to the trustee an affidavit, *under penalty of perjury*, to
67 that effect, the trustee may nonetheless proceed to sale, provided the beneficiary has given written notice
68 to the person required to pay the instrument that the instrument is unavailable and a request for sale will
69 be made of the trustee upon expiration of 14 days from the date of mailing of the notice. The notice
70 shall be sent by certified mail, return receipt requested, to the last known address of the person required
71 to pay the instrument as reflected in the records of the beneficiary and shall include the name and
72 mailing address of the trustee. The notice shall further advise the person required to pay the instrument
73 that if he believes he may be subject to a claim by a person other than the beneficiary to enforce the
74 instrument, he may petition the circuit court of the county or city where the property or some part
75 thereof lies for an order requiring the beneficiary to provide adequate protection against any such claim.
76 If deemed appropriate by the court such a petition is made, the court may conditionally shall not permit the
77 sale on a finding unless it finds that the person required to pay the instrument is adequately protected
78 against loss that might occur by reason of a claim by another person to enforce the instrument.
79 Adequate protection may be provided by any reasonable means. If the trustee proceeds to sale, the fact
80 that the instrument is lost or cannot be produced shall not affect the authority of the trustee to sell or
81 the validity of the sale.

82 CD. When the written notice of proposed sale is given as provided herein, there shall be a rebuttable
83 presumption that the lienholder has complied with any requirement to provide notice of default
84 contained in a deed of trust. Failure to comply with the requirements of notice contained in this section
85 shall not affect the validity of the sale, and a purchaser for value at such sale shall be under no duty to
86 ascertain whether such notice was validly given.

87 DE. In the event of postponement of sale, which may be done in the discretion of the trustee, no
88 new or additional notice need be given pursuant to this section.

89 § 55-59.5. *Sale by trustee; additional requirements; nominee cannot request sale.*

90 A. *On or after July 1, 2012, if a deed of trust or mortgage has been assigned by the original grantee*
91 *or mortgagee, the trustee, or any substitute trustee, under any deed of trust or mortgage shall not*
92 *proceed with any sale of the property unless (i) all assignments of the deed of trust or mortgage have*
93 *been duly recorded with the land records of the county or city in which the property is located and (ii)*
94 *the person who asserts that he is the holder of the obligation secured by the deed of trust or mortgage*
95 *can directly trace his interest through the duly recorded assignments to the original grantee or*
96 *mortgagee.*

97 B. *If all assignments of the deed of trust or mortgage have not been duly recorded with the land*
98 *records of the county or city in which the property is located, the trustee, or any substitute trustee, may*
99 *proceed with the sale of the property conveyed to him by the deed of trust or mortgage upon (i) the*
100 *recordation of any assignments necessary to trace the interest of the person who asserts that he is the*
101 *holder of the obligation secured by the deed of trust or mortgage to the original grantee or mortgagee*
102 *of, if an intervening assignment cannot be recorded because the assignee no longer exists, the provision*
103 *of an affidavit by the party secured to the trustee, or any substitute trustee, attesting under penalty of*
104 *perjury that the person is the party secured under the deed of trust, and (ii) the payment of all fees,*
105 *taxes, and other costs applicable to the recording of the assignments. The person who asserts that he is*
106 *the holder of the obligation secured by the deed of trust or mortgage is solely responsible for paying all*
107 *fees, taxes, and other costs required in clause (ii).*

108 C. *A nominee of a grantee, mortgagee, or beneficiary for a deed of trust or mortgage has no*
109 *authority to request that the trustee, or any substitute trustee, proceed with any sale of the property and*
110 *the trustee, or any substitute trustee, shall not proceed with any such sale upon the request of the*
111 *nominee. As used in this subsection, "nominee" means a person who is designated in the deed of trust*
112 *or mortgage, or who is subsequently designated to act on behalf of the grantee, mortgagee, or*
113 *beneficiary. The term "nominee" does not include an agent or other fiduciary.*

114 § 55-59.6. *Foreclosure; civil penalty for fraud; civil action.*

115 A. *Any person who (i) knowingly makes, uses, or causes to be made or used a false or fraudulent*
116 *record, document, or statement or (ii) knowingly swears or affirms falsely to any matter, in support of*
117 *any foreclosure on property under this chapter shall be liable for a civil penalty of \$5,000 for each*
118 *violation.*

119 B. *Any attorney for the Commonwealth for the county or city or any attorney for the county, city, or*
120 *town in which the alleged violation occurred may bring an action to recover the civil penalty, which*

shall be paid into the local treasury. A person violating this section shall be liable for reasonable attorney fees and costs of a civil action brought to recover any such penalty.

C. The owner of the property subject to foreclosure has a civil cause of action against a person who has violated this section and shall be entitled to recover from such person compensatory damages in the amount of three times the damages incurred by the owner as a result of the violation in addition to reasonable attorney fees and costs.

D. The civil penalty provisions of this section shall apply in addition to any applicable criminal penalties for forgery set forth in §§ 18.2-168 and 18.2-172 and perjury set forth in § 18.2-434 or any other applicable criminal penalty.

§ 55-66.01. Protection of assignees or transferees of debts secured by real estate; form of certificate of transfer.

A. Whenever a debt or other obligation secured by a deed of trust, mortgage or vendor's lien on real estate has been assigned, the assignor or the assignee, at its option, may cause the instrument of assignment to be recorded in the clerk's office of the circuit court where such deed of trust, mortgage or vendor's lien is recorded provided such instrument is otherwise in recordable form, or may cause a certificate of transfer signed by the assignor to be recorded in such clerk's office, and such instrument of assignment or certificate of transfer, upon recordation, shall operate as a notice of such assignment. The instrument of assignment or certificate of transfer shall be indexed in the name of the assignor and in the names of the obligor or maker, and the trustees, as applicable, all of whose names shall be set forth in such instrument or certificate. The certificate of transfer shall conform substantially to the following:

CERTIFICATE OF TRANSFER

Place of Record: Clerk's Office of the Circuit

Court of the of

....., Virginia

Date of [Deed of Trust/

Mortgage/Vendor's Lien]:,

Deed Book

....., Page

Name of Obligor or Maker:

Names(s) of Trustee(s)

[if a Deed of Trust]:

.....

Name of Original

Payee or Obligee:

Original Amount Secured

[if applicable]:

\$

The undersigned, the original payee or obligee [or the subsequent assignee] of the obligation secured by the above-mentioned [Deed of Trust/Mortgage/Vendor's Lien], hereby certifies that the obligations secured thereby have been assigned to

.....

[If a credit line deed of trust, the name and address to which notice may be mailed or delivered to the Noteholder as provided by § 55-58.2 is as follows:

.....

.....]

Given under [my/our] hand(s) as of the

day of,

.....

(Assignor)

..... of

County/City of, to wit:

Subscribed, sworn to and acknowledged before me by

this day of 20

My Commission Expires:

.....

Notary Public

179 For purposes of this statute, the word "assigned" shall include endorsed, pledged, hypothecated or
180 otherwise transferred. Nothing in this statute shall be deemed to invalidate any other form or notice of
181 assignment that may have been heretofore recorded. Nothing in this statute shall imply that recordation
182 of the instrument of assignment or a certificate of transfer is necessary in order to transfer to an assignee
183 the benefit of the security provided by the deed of trust, mortgage or vendor's lien.

184 *B. On or after July 1, 2012, all assignments of a debt or other obligation secured by a deed of trust*
185 *or mortgage shall be recorded in the clerk's office of the circuit court where such deed of trust or*
186 *mortgage is recorded. The trustee, or any substitute trustee, under any deed of trust or mortgage shall*
187 *not proceed with any sale of the property conveyed to him by the deed of trust or mortgage at the*
188 *request of a person who asserts that he is the holder of the obligation secured thereby unless the land*
189 *records of the county or city in which the property is located contain a duly recorded instrument*
190 *evidencing the assignment of the secured obligation to such person.*

191 **2. That the provisions of this act may result in a net increase in periods of imprisonment or**
192 **commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is \$0**
193 **for periods of imprisonment in state adult correctional facilities and is \$0 for periods of**
194 **commitment to the custody of the Department of Juvenile Justice.**