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SENATE BILL NO. 888

Offered January 14, 2009

Prefiled December 31, 2008

A BILL to amend and reenact § 55-66.3 of the Code of Virginia, relating to assignments of the penalty for failure to release deed of trust.

Patron—McDougle

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:**1. That § 55-66.3 of the Code of Virginia is amended and reenacted as follows:**

§ 55-66.3. Release of deed of trust or other lien.

A. 1. Except as provided in Article 2.1 of this chapter, after full or partial payment or satisfaction has been made of a debt secured by a mortgage, deed of trust, vendor's lien, or other lien, or any one or more obligations representing at least 25 percent of the total amount secured by such lien, but less than the total number of the obligations so secured, or the debt secured is evidenced by two or more separate written obligations sufficiently described in the instrument creating the lien, has been fully paid, the lien creditor shall issue a certificate of satisfaction or certificate of partial satisfaction in a form sufficient for recordation reflecting such payment and release of lien. This requirement shall apply to a credit line deed of trust prepared pursuant to § 55-58.2 only when the obligor or the settlement agent has paid the debt in full and requested that the instrument be released.

If the lien creditor receives notice from a settlement agent at the address identified in its payoff statement requesting that the certificate be sent to such settlement agent, the lien creditor shall provide the certificate, within 90 days after receipt of such notice, to the settlement agent at the address specified in the notice received from the settlement agent.

If the notice is not received from a settlement agent, the lien creditor shall deliver, within 90 days after such payment, the certificate to the appropriate clerk's office with the necessary fee for recording by certified mail, return receipt requested, or when there is written proof of receipt from the clerk's office, by hand delivery or by courier hand delivery.

If the lien creditor has already delivered the certificate to the clerk's office by the time it receives notice from the settlement agent, the lien creditor shall deliver a copy of the certificate to the settlement agent within 90 days of the receipt of the notice at the address for notification set forth in the payoff statement.

If the lien creditor has not, within 90 days after payment, either provided the certificate of satisfaction to the settlement agent or delivered it to the clerk's office with the necessary fee for filing, the lien creditor shall forfeit \$500 to the lien obligor. No settlement agent or attorney may ~~take~~ *facilitate* an assignment of the right to the \$500 penalty to *such settlement agent or attorney or any other third party designated by the settlement agent or attorney*. Following the 90-day period, if the amount forfeited is not paid within 10 business days after written demand for payment is sent to the lien creditor by certified mail at the address for notification set forth in the payoff statement, the lien creditor shall pay any court costs and reasonable attorney's fees incurred by the obligor in collecting the forfeiture.

2. If the note, bond or other evidence of debt secured by such mortgage, deed of trust, vendor's lien or other lien referred to in subdivision 1 or any interest therein, has been assigned or transferred to a party other than the original lien creditor, the subsequent holder shall be subject to the same requirements as a lien creditor for failure to comply with this subsection, as set forth in subdivision 1.

B. The certificate of satisfaction shall be signed by the creditor or his duly authorized agent, attorney or attorney-in-fact, or any person to whom the instrument evidencing the indebtedness has been endorsed or assigned for the purpose of effecting such release. An affidavit shall be filed or recorded with the certificate of satisfaction, by the creditor, or his duly authorized agent, attorney or attorney-in-fact, with such clerk, stating that the debt therein secured and intended to be released or discharged has been paid to such creditor, his agent, attorney or attorney-in-fact, who was, when the debt was satisfied, entitled and authorized to receive the same.

C. And when so signed and the affidavit hereinbefore required has been duly filed or recorded with the certificate of satisfaction with such clerk, the certificate of satisfaction shall operate as a release of the encumbrance as to which such payment or satisfaction is entered and, if the encumbrance be by deed of trust or mortgage, as a reconveyance of the legal title as fully and effectually as if such certificate of satisfaction were a formal deed of release duly executed and recorded.

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D. As used in this section:

"CRESPA" means the Consumer Real Estate Settlement Protection Act (§ 6.1-2.19 et seq.).

"Lien creditor" and "creditor" shall be construed as synonymous and mean the holder, payee or obligee of a note, bond or other evidence of debt and shall embrace the lien creditor or his successor in interest as evidenced by proper endorsement or assignment, general or restrictive, upon the note, bond or other evidence of debt.

"Mortgage" means any mortgage, deed of trust or vendor's lien.

"Obligor's designee" shall include an attorney or other settlement agent closing a transaction which results in the obligor's loan being paid off.

"Payoff letter" means a written communication from the lien creditor or servicer stating, at a minimum, the amount outstanding and required to be paid to satisfy the obligation.

"Satisfactory evidence of the payment of the obligation secured by the mortgage" means (i) any one of (a) the original canceled check or a copy of the canceled check, showing all endorsements, payable to the lien creditor or servicer, as applicable, (b) confirmation in written or electronic form of a wire transfer to the bank account of the lien creditor or servicer, as applicable, or (c) a bank statement in written or electronic form reflecting completion of the wire transfer or negotiation of the check, as applicable; and (ii) a payoff letter or other reasonable documentary evidence that the payment was to effect satisfaction of the obligation secured or evidenced by the mortgage.

"Servicer" means a person or entity that collects loan payments on behalf of a lien creditor.

"Settlement agent" has the same meaning ascribed thereto in § 6.1-2.20, provided that a person shall not be a settlement agent unless he is registered pursuant to § 6.1-2.26 and otherwise fully in compliance with the applicable provisions of Chapter 1.3 (§ 6.1-2.19 et seq.) of Title 6.1.

E. Release of lien by settlement agent.

A settlement agent may release a mortgage in accordance with the provisions of this subsection (i) if the obligation secured by the mortgage has been satisfied by payment made by the settlement agent and (ii) whether or not the settlement agent is named as a trustee under the deed of trust or otherwise has received the authority to release the lien.

1. Notice to lienholder.

a. After or accompanying payment in full of the obligation secured by a mortgage, a settlement agent intending to release a mortgage pursuant to this subsection shall deliver to the lien creditor by certified mail or guaranteed overnight delivery service a notice of intent to release the mortgage with a copy of the payoff letter and a copy of the release to be recorded as provided in this subsection.

b. The notice of intent to release shall contain the name of the lien creditor and the servicer if loan payments on the mortgage are collected by a servicer, the name of the settlement agent, and the date of the notice. The notice of intent to release shall conform substantially to the following form:

NOTICE OF INTENT TO RELEASE

Notice is hereby given to you concerning the (mortgage) described on the (release of mortgage), a copy of which is attached to this notice, as follows:

1. The undersigned has paid the obligation secured by the (mortgage) described above.

2. The undersigned will release the (mortgage) described in this notice unless, within 90 days from the date this notice is mailed by certified mail or guaranteed overnight delivery service, the undersigned has received by certified mail or guaranteed overnight delivery service a notice stating that a release of the (mortgage) has been recorded in the clerk's office or that the obligation secured by the (mortgage) described above has not been paid, or the lien creditor or servicer otherwise objects to the release of the mortgage. Notice shall be sent to the address stated on this form.

(Signature of settlement agent)

(Address of settlement agent)

(Telephone number of settlement agent)

(Current Virginia CRESPA registration number of settlement agent)

2. Certificate of satisfaction and affidavit of settlement agent.

a. If, within 90 days following the day on which the settlement agent mailed or delivered the notice of intent to release in accordance with this subsection, the lien creditor or servicer does not send by certified mail or guaranteed overnight delivery service to the settlement agent a notice stating that a release of the mortgage has been recorded in the clerk's office or that the obligation secured by the mortgage has not been paid in full or that the lien creditor or servicer otherwise objects to the release of the mortgage, the settlement agent may execute, acknowledge and file with the clerk of court of the jurisdiction wherein the mortgage is recorded a certificate of satisfaction, which shall include (i) the affidavit described in subdivision 2 b of this subsection and (ii) a copy of the notice of intent to release that was sent to the lender. The certificate of satisfaction shall include the settlement agent's currently active CRESPA registration number issued by the Virginia State Bar and shall note that the individual executing the certificate of satisfaction is doing so pursuant to the authority granted by this subsection. After filing or recording the certificate of satisfaction, the settlement agent shall mail a copy of the

certificate of satisfaction to the lien creditor or servicer. The validity of a certificate of satisfaction otherwise satisfying the requirements of this subsection shall not be affected by the inaccuracy of the CRESPA registration number placed thereon or the failure to mail a copy of the recorded certificate of satisfaction to the lien creditor or servicer and shall nevertheless release the mortgage described therein as provided in this subsection.

b. The certificate of satisfaction used by the settlement agent shall include an affidavit certifying (i) that the settlement agent has satisfied, and possesses satisfactory evidence of payment of the obligation secured by the mortgage described in the certificate; (ii) that the lien of the mortgage may be released; (iii) that the person executing the certificate is the settlement agent or is duly authorized to act on behalf of the settlement agent; and (iv) that the notice of intent to release was delivered to the lien creditor or servicer and the settlement agent received evidence of receipt of such notice by the lien creditor or servicer. The affidavit shall be substantially in the following form:

AFFIDAVIT OF SETTLEMENT AGENT

The undersigned hereby certifies that, in accordance with the provisions § 55-66.3 of the Code of Virginia of 1950, as amended and in force on the date hereof (the Code) (a) the undersigned is a settlement agent as defined in subsection D of § 55-66.3 of the Code or a duly authorized officer, director, member, partner or employee of such settlement agent; (b) the settlement agent has satisfied the obligation secured by the mortgage and possesses satisfactory evidence of the payment of the obligation secured by the mortgage described in the certificate recorded herewith; (c) the settlement agent delivered to the lien creditor or servicer in the manner specified in subdivision E 1 of § 55-66.3 of the Code the notice of intent to release and possesses evidence of receipt of such notice by the lien creditor or servicer; and (d) the lien of the mortgage is hereby released.

(Authorized signer)

3. Effect of filing.

When filed or recorded with the clerk's office, a certificate of satisfaction that is executed and notarized as provided in this subsection, and accompanied by (i) the affidavit described in subdivision 2 b of this subsection, and (ii) a copy of the notice of intent to release that was sent to the lender, lien creditor or servicer shall operate as a release of the encumbrance described therein and, if the encumbrance is by deed of trust or mortgage, as a reconveyance of the legal title as fully and effectively as if such certificate of satisfaction were a formal deed of release duly executed and recorded.

4. Effect of wrongful or erroneous certificate; damages.

a. The execution and filing or recording of a wrongful or erroneous certificate of satisfaction by a settlement agent does not relieve the party obligated to repay the debt, or anyone succeeding to or assuming the responsibility of the obligated party as to the debt, from any liability for the debt or other obligations secured by the mortgage that is the subject of the wrongful or erroneous certificate of satisfaction.

b. A settlement agent that wrongfully or erroneously executes and files or records a certificate of satisfaction is liable to the lien creditor for actual damages sustained due to the recording of a wrongful or erroneous certificate of satisfaction.

c. The procedure authorized by this subsection for the release of a mortgage shall constitute an optional method of accomplishing a release of a mortgage secured by property in this Commonwealth. The nonuse of the procedure authorized by this subsection for the release of a mortgage shall not give rise to any liability or any cause of action whatsoever against a settlement agent or any title insurer by any obligated party or anyone succeeding to or assuming the interest of the obligated party.

5. Applicability.

a. The procedure authorized by this subsection for the release of a mortgage may be used to effect the release of a mortgage after July 1, 2002, regardless of when the mortgage was created, assigned or satisfied by payment made by the settlement agent.

b. This subsection applies only to transactions involving the purchase of or lending on the security of real estate located in the Commonwealth containing not more than four residential dwelling units.

c. The procedure authorized by this subsection applies only to the full and complete release of a mortgage. Nothing in this subsection shall be construed to authorize the partial release of property from a mortgage or otherwise permit the execution or recordation of a certificate of partial satisfaction.

d. No settlement agent utilizing the process provided in this subsection for release of a mortgage may take an assignment from a lien obligor or his designee of the right to collect the \$500 penalty established in subsection A of this section.