

## VIRGINIA ACTS OF ASSEMBLY — CHAPTER

*An Act to amend and reenact § 55.1-321 of the Code of Virginia, relating to foreclosure procedures; subordinate mortgage; affidavit required.*

[H 184]

Approved

**Be it enacted by the General Assembly of Virginia:**

**1. That § 55.1-321 of the Code of Virginia is amended and reenacted as follows:**

**§ 55.1-321. Notices required before sale by trustee to owners, lienors, etc.; if note lost.**

A. In addition to the advertisement required by § 55.1-322, 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, and such notice shall include either (i) the instrument number or deed book and page numbers of the instrument of appointment filed pursuant to § 55.1-320, or (ii) a copy of the executed and notarized appointment of substitute trustee by personal delivery or by mail to (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; (b) any subordinate lienholder who holds a note against the property secured by a deed of trust recorded at least 75 days, in the case of a deed of trust conveying owner-occupied residential real estate, or 30 days, in the case of all other deeds of trust, prior to the proposed sale and whose address is recorded with the deed of trust; (c) any assignee of such a note secured by a deed of trust, provided that the assignment and address of assignee are likewise recorded at least 75 days, in the case of a deed of trust conveying owner-occupied residential real estate, or 30 days, in the case of all other deeds of trust, prior to the proposed sale; (d) any condominium unit owners' association that has filed a lien pursuant to § 55.1-1966; (e) any property owners' association that has filed a lien pursuant to § 55.1-1833; and (f) any proprietary lessees' association that has filed a lien pursuant to § 55.1-2148. Written notice shall be given pursuant to clauses (d), (e), and (f) only if the lien is recorded at least 75 days, in the case of a deed of trust conveying owner-occupied residential real estate, or 30 days, in the case of all other deeds of trust, prior to the proposed sale. If the secured party has received notification that the owner of the property to be sold is deceased, the notice required by clause (a) shall be given to (1) the last known address of such owner as such address appears in the records of the party secured; (2) any personal representative of the deceased's estate whose appointment is recorded among the records of the circuit court where the property is located, at the address of the personal representative that appears in such records; and (3) any heirs of the deceased who are listed on the list of heirs recorded among the records of the circuit court where the property is located, at the addresses of the heirs that appear in such records. 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 60 days prior to such sale, in the case of a deed of trust conveying owner-occupied residential real estate, or 14 days prior to such sale, in the case of all other deeds of trust, and to lienholders, the property owners' association or proprietary lessees' association, their assigns, and the condominium unit owners' association, at the address noted in the memorandum of lien, by ordinary mail no less than 60 days prior to such sale, in the case of a deed of trust conveying owner-occupied residential real estate, or 14 days prior to such sale, in the case of all other deeds of trust, shall be a sufficient compliance with the requirement of notice. The written notice of proposed sale when given as provided in this subsection shall be deemed an effective exercise of any right of acceleration contained in such deed of trust or otherwise possessed by the party secured relative to the indebtedness secured. The inadvertent failure to give notice as required by this subsection shall not impose liability on either the trustee or the secured party. The foreclosure sale cannot go forward unless the trustee has proof that the notice has been sent.

A1. If the proposed sale is initiated due to a default in payment under a security instrument that (i) was, at the time it was recorded, subordinate to another security interest encumbering the same real property and (ii) has not subsequently been elevated to a first priority lien by a recorded voluntary subordination agreement, such subordinate mortgage lienholder shall submit to the trustee an affidavit affirming whether monthly statements were sent to the property owner for each period that any interest, fees, or other charges were assessed. No such interest, fees, or other charges shall be assessed or charged for any period during which periodic statements were not sent unless the subordinate mortgage lienholder identifies a specific exemption pursuant to applicable law for which such subordinate mortgage lienholder was not required to send such specific statements for any period of time enumerated in the affidavit. Such affidavit shall also include an itemized list of the current amount owed, including any periods in which interest, fees, and other charges were waived because no monthly

statements were sent during such period. The subordinate mortgage lienholder shall provide a copy of such affidavit to the person required to pay the instrument with written notice that a request for sale shall be made of the trustee upon the expiration of 60 days from the day of mailing such notice. Such notice shall be sent by certified mail, return receipt requested, to the last known mailing address of such person required to pay the instrument. Such notice shall advise the person required to pay the instrument that if such person believes that such interest, fees, or other charges have been assessed in error, such person may, prior to the sale, petition the circuit court of the city or county where such property or some part thereof lies for an accounting and order declaring the proper balance secured by the subordinate mortgage. If the court determines that charges were assessed in error, such person shall be entitled to recover attorney fees and costs against the subordinate mortgage lienholder. The provisions of this subsection shall not apply to subordinate lienholders who are either (a) the original creditor, (b) a mortgage servicer acting on behalf of the original creditor, (c) a national or state chartered bank, or (d) a federal or state chartered credit union.

A2. Any purchaser at a foreclosure sale shall provide certification that such purchaser shall pay off any priority security instruments no later than 90 days from the date that the trustee's deed conveying the property pursuant to such sale is recorded in the land records. The person originally required to pay the instrument shall have the right to petition the circuit court of the city or county where the property or some part thereof lies to recover from the purchaser any payments toward such priority lien amounts made by such person required to pay the instrument after the date of the foreclosure sale, plus any attorney fees and costs.

B. If a note or other evidence of indebtedness secured by a deed of trust is lost or for any reason cannot be produced and the beneficiary submits to the trustee an affidavit to that effect, the trustee may nonetheless proceed to sale, provided that the beneficiary has given written notice to the person required to pay the instrument that the instrument is unavailable and a request for sale will be made of the trustee upon expiration of 60 days from the date of mailing of the notice, in the case of a deed of trust conveying owner-occupied residential real estate, or 14 days from the date of mailing of the notice, in the case of all other deeds of trust. The notice shall be sent by certified mail, return receipt requested, to the last known address of the person required to pay the instrument as reflected in the records of the beneficiary and shall include the name and mailing address of the trustee. The notice shall further advise the person required to pay the instrument that if he believes he may be subject to a claim by a person other than the beneficiary to enforce the instrument, he may petition the circuit court of the county or city where the property or some part thereof lies for an order requiring the beneficiary to provide adequate protection against any such claim. If deemed appropriate by the court, the court may condition the sale on a finding that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means. If the trustee proceeds to sale, the fact that the instrument is lost or cannot be produced shall not affect the authority of the trustee to sell or the validity of the sale.

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

D. In the event of postponement of sale, which may be done in the discretion of the trustee, no new or additional notice is required to be given pursuant to this section.

E. In the case of a deed of trust conveying owner-occupied residential real estate, the notice to the owner in subsections A and B shall include the website address of the U.S. Housing and Urban Development's (HUD) Office of Housing Counseling with a listing of HUD-certified housing counseling agencies, the website address and telephone number of the statewide legal aid center, and the following language, or language that is substantially similar, in at least 12-point type: "This is NOT a notice to vacate the premises. You should consider contacting an attorney or your local legal aid or housing counseling agency."

F. In the case of a deed of trust conveying owner-occupied residential real estate, the notice to the owner in subsections A and B shall include the date of the last payment received and the amount received; the total amount of principal, interest, costs, and fees due in arrears; and the remaining total principal balance due on the instrument.