

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 02/16/11

SPONSOR Boitano LAST UPDATED _____ HB _____

SHORT TITLE Home Loan Protection Act Coverage SB 200

ANALYST Leger

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY11	FY12	FY13		
	*See Fiscal Implications	*See Fiscal Implications		

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		*See Fiscal Implications		*See Fiscal Implications		

(Parenthesis () Indicate Expenditure Decreases)

*See Fiscal Implications

Relates to Senate Bill 406, Senate Bill 411, House Bill 171, and House Bill 174

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts
New Mexico Attorney General's Office (AGO)

No Responses Received From

New Mexico Mortgage Finance Authority
Regulations and Licensing Department

SUMMARY

Synopsis of Bill

Senate Bill 200 amends Section 58-21A-6, NMSA 1978 of the Home Loan Protection Act (the Act) clarifying the Act does not affect foreclosure processes pursuant Deed of Trust Act.

FISCAL IMPLICATIONS

The revenues realized by the state are minimal based on the number of foreclosures by judicial proceeding statewide; conducted in District Court in the county the property is located in. According to AOC, the fiscal impact to the judiciary would be slight; likewise, there could be a fiscal savings. AOC further states, the estimate of actual saving would be unreliably speculative.

SIGNIFICANT ISSUES

Senate Bill 200 amends the Home Loan Protection Act. Section F clarifies the Act does not affect the foreclosure process pursuant to the New Mexico Deed of Trust Act.

According to the AGO:

Under SB 200 the creditor and assignee will have the option to use either a non-judicial or a judicial procedure to foreclose on a transaction under the New Mexico Deed of Trust Act. Presently under the Act a creditor or its assignee are required to take formal judicial foreclosure procedures in home loans when borrower is in default.

The Act requires lenders to carry out adequate loan underwriting, prohibits sale of insurance by lenders to borrowers, requires documentation of borrower's ability to repay the loan, authorizes borrowers to sue for violations, provides generous statutes of limitations for pursuing claims, and expressly allows claims under the New Mexico Unfair Practices Act.

By amending Section 58-21A-6(E) and adding Sub-section (F), SB 200 makes it an exception to require creditors or creditor's assignees to use the judicial foreclosure procedures in transactions involving deeds of trust. The amendment in effect will allow creditor's or creditor's assignees in transactions under the NM Deed of Trust Act for the trustee to use its "power of sale" provided in Section 48-10-10 NMSA.

A unique aspect of a deed of trust is the "power of sale" that the trustee can exercise to conduct a non-judicial foreclosure of the property; i.e., without having to file a lawsuit, the trustee can conduct a foreclosure sale of the property at the request of the beneficiary after the borrower defaults on his loan. The act specifies the trustee's power of sale at N.M.S.A. Section 48-10-10 and the requirements for conducting a foreclosure sale.

SB 200 does not affect the right of the borrower's to assert any claim or defense to a trustee's sale, including any defense pursuant to the Act. However, the borrower has to affirmatively bring forth those claims and defenses. The historical background of the Deed of Trust Act clearly indicates that it was originally promulgated to address real estate transactions between commercial borrowers and lenders who had the means and sophistication to bring forth their claims to court. In a home loan, defaulting borrowers will not have the resources to bring forth their claims and defenses after receiving the notice of sale.

Under the provisions of the NM Deed of Trust Act, the creditor and assignee will send a notice of default, acceleration of debt and then publish notice of sale. Thus, the amendment proposed by SB 200 allows the creditor to proceed without a court overseeing the process of foreclosure.

SB 200 also eliminates the notice and right to cure since the power of sale procedure does not require or provide for such notice and right to cure. The power of sale requires only for the lender to send the notice of sale pursuant to Section 48-10-11 NMSA.

Fannie Mae and Freddie Mac have published Form 3032 for use in residential deed of trust for use in New Mexico. It appears that the deed of trust will become the preferred instrument for securing home loans under Fannie Mae and Freddie Mac guidelines. Form 3032 clearly states at paragraph 22 that, in the event of inconsistency between Form 3032 and the Act, the Act is controlling. Paragraph 22 of Form 3032 allows the lender at its option to use either and non-judicial or judicial foreclosure procedure. This is inconsistent with the Act which does not give the lender that option for home loans, rather it requires a formal judicial foreclosure procedure. Under the guidelines of Fannie Mae and Freddie Mac, the provisions of the Act with respect to default, notice, right to cure, method of foreclosures and/or other issues remain applicable to protect home buyers. The amendments proposed by SB 200 undermine the more expansive protections provided by the Act which the guidelines of Fannie Mae and Freddie Mac are willing to accept and keep.

OTHER SUBSTANTIVE ISSUES

The AGO states, while SB 200 does insert the borrower's right to assert any claim or defense to a trustee's sale, including any defense pursuant to the Home Loan Protection Act, the “power of sale”, a streamline process favoring the lender, shifts the burden to assert any claim or defense on the borrower. Without legal representation, borrowers will potentially lose all other protections provided by the NMHLPA.

ADMINISTRATIVE IMPLICATIONS

NMSA 1978 §58-21A-13 states the Financial Institution Division of the Regulation and Licensing Department shall enforce the provisions of the Act.

RELATIONSHIP

Senate Bill 200 relates to Senate Bill 406 which enacts the “Mortgage Fair Foreclosure Act”. The Act states homeowners should be given reasonable notice prior to the loss of their home and afforded a meaningful opportunity to participate in loss mitigation to prevent the loss of homeownership and to benefit the consumers and businesses operating in New Mexico to facilitate whenever possible the cure of any default on residential mortgage loans and thereby preserve homeownership. The bill contains an emergency clause.

Senate Bill 200 relates to Senate Bill 411, which amends language in Section 58-21-11 NMSA 1978 and adds three new sections to the law to require that licensees maintain an office and a registered agent in the state of New Mexico.

Senate Bill 200 relates to House Bill 171, which amends NMSA 1978 §48-10-17 of the Deed of Trust Act to prohibit deficiency judgments in a foreclosure for proceedings instituted on or after July 1, 2011.

Senate Bill 200 relates to House Bill 174, the Foreclosure Fairness Act, provides for the recovery of attorney fees and costs to defendants who prevail in foreclosure actions.

ALTERNATIVES

The AGO suggests, “Home Loan” should be re-defined and clarify that while a deed of trust can be used to secure the transaction, a formal judicial foreclosure procedure should be used upon default giving home buyers the opportunity to cure the default before having to proceed judicially. The “power of sale” provided to the trustee under the Deed of Trust Act for commercial real estate transaction can remain intact, but not for residential home loans.

JLL/bym