Stricken language would be deleted from and underlined language would be added to present law.

Act 885 of the Regular Session

State of Arkansas
88th General Assembly
Regular Session, 2011

By: Representative T. Rogers

A Bill

AS ENACTED: H3/23/11

HOUSE BILL 1811

For An Act To Be Entitled

AN ACT TO REQUIRE ADDITIONAL INFORMATION AND TO
ENCOURAGE LOSS MITIGATION AND LOAN MODIFICATIONS
BEFORE INITIATING A STATUTORY FORECLOSURE; AND FOR
OTHER PURPOSES.

Subtitle

TO REQUIRE ADDITIONAL INFORMATION AND TO
ENCOURAGE LOSS MITIGATION AND LOAN
MODIFICATIONS BEFORE INITIATING A
STATUTORY FORECLOSURE.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 18-50-101 is amended to read as follows:

As used in this chapter:

(1) “Beneficiary” means the person named or otherwise designated
in a deed of trust as the person for whose benefit a deed of trust is given
or his or her successor in interest;

(2) “Deed of trust” means a deed conveying real property in
trust to secure the performance of an obligation of the grantor or any other
person named in the deed or an obligor that is secured by the deed of trust
to a beneficiary and conferring upon the trustee a power of sale for breach
of an obligation of the grantor or obligor contained in the deed of trust;

(3) “Grantor” means the person conveying an interest in real
property by a mortgage or deed of trust as security for the performance of an
obligation secured by the mortgage or deed of trust;
(4) "Mortgage" means the grant of an interest in real property
to be held as security for the performance of an obligation by the mortgagor
or other person;

(5) "Mortgage company" means any private, state, or federal
entity which in the usual course of its business is either the mortgagee
or beneficiary of a deed of trust or mortgage;

(6) "Mortgagee" means the person holding an interest in real
property as security for the performance of an obligation secured by a
mortgage or his or her attorney-in-fact appointed pursuant to this chapter;

(7) "Mortgagor" means the person granting an interest in real
property as security for the performance of an obligation secured by a
mortgage;

(8) "Obligor" means a person owing an obligation that is secured
by a mortgage or deed of trust;

(9) "Sale" means the public auction conducted pursuant to §
18-50-107 and shall be deemed concluded when the highest bid is accepted by
the person conducting the sale;

(10) "Trust property" means the property encumbered by a
mortgage or deed of trust; and

(11) "Trustee" means any person or legal entity to whom
legal title to real property is conveyed by deed of trust or his or her
successor in interest.

SECTION 2. Arkansas Code § 18-50-103 is amended to read as follows:

18-50-103. Conditions to exercise of power of sale.

A trustee beneficiary or mortgagee may not sell the trust property
initiate a foreclosure under this chapter unless:

(1) The deed of trust or mortgage is filed for record with the
recorder of the county in which the trust property is situated;

(2)(A) The beneficiary or mortgagee:

(i) Has personal knowledge of the records and
information provided under this subdivision (2); and

(ii) At least ten (10) days before initiating the
foreclosure has provided by standard mail to the grantor, mortgagor, or
obligor at the address of the property encumbered by the mortgage or deed of
trust or the mailing address of the grantor, mortgagor, or obligor:
(a) A true and correct copy of the note with all required endorsements, the mortgage, or the deed of trust;

(b) The name of the holder and the physical location of the original note;

(c) A true and correct copy of the original mortgage or deed of trust and if in the possession of the beneficiary or mortgagee, each assignment or allonge of the mortgage or deed of trust;

(d) Information, including the applicable telephone number and Internet address, regarding the availability to the grantor, mortgagor, or obligor of each program for loan modification assistance or forbearance assistance offered:

   (1) Solely by the beneficiary or the mortgagee; or

   (2) By a government agency if the beneficiary or mortgagee participates in the government agency’s program; and

   (e) If the default is the result of the failure to make payment, a payment history showing the date of default.

(B) If a true and correct copy of the original note, mortgage, deed of trust, or an assignment or allonge of the note, mortgage, or deed of trust is lost or otherwise unavailable, the beneficiary or mortgagee may instead of providing true and correct copies of the note, mortgage, deed of trust, or assignment or allonge of the note, mortgage, or deed of trust, provide a statement that the document is lost or otherwise unavailable, and shall recite the good faith efforts the beneficiary or mortgagee has made to locate the document.

(C) The duties of the beneficiary or mortgagee to provide information under subdivision (2) of this section are not delegable to the beneficiary’s trustee or the mortgagee’s attorney-in-fact.

(2)(3) There is a default by the mortgagor, grantor, or other person owing an obligation, the performance of which obligation is secured by the mortgage or deed of trust or by their successors in interest obligor with respect to any provision in the mortgage or deed of trust that authorizes sale in the event of default of the provision; and

(3) The mortgagee, trustee, or beneficiary has filed for record with the recorder of the county in which the trust property is situated a duly acknowledged notice of default and intention to sell containing the
information required by § 18-50-104;

(4) No action has been instituted to recover the debt or any part of it secured by the mortgage or deed of trust or, if such action has been instituted, the action has been dismissed and.

(5) A period of at least sixty (60) days has elapsed since the recording of the notice of default and intention to sell.

SECTION 3. Arkansas Code § 18-50-104 is amended to read as follows:

18-50-104. Prerequisites for foreclosure sale – Contents of notice of sale – Persons to receive notice.

(a) The trustee or mortgagee may not sell the trust property unless:

(1) The mortgagee, trustee, or beneficiary has filed for record with the recorder of the county in which the trust property is situated a duly acknowledged notice of default and intention to sell containing the information required by subsection (b) of this section;

(2) A period of at least sixty (60) days has elapsed since the recording of the notice of default and intention to sell; and

(3)(A)(i) The beneficiary or mortgagee has certified to its trustee or attorney-in-fact under § 18-50-102 that each mortgagor, grantor, or obligor who applied for loan modification or forbearance assistance has been notified that the mortgagor, grantor, or obligor does not meet the criteria for loan modification or forbearance assistance under any program offered by:

(a) The beneficiary or mortgagee; or

(b) A government agency if the beneficiary or mortgagee participates in the government agency’s program.

(ii) The notice shall be sent to the property address or mailing address of the mortgagor, grantor, or obligor by certified and first class mail at least ten (10) business days before the sale.

(B) The duties of the beneficiary or mortgagee under subdivision (a)(3)(A) of this section are not delegable to the beneficiary’s trustee or the mortgagee’s attorney-in-fact.

(a)(b) The mortgagee’s or trustee’s notice of default and intention to sell shall set forth:

(1) The names of the parties to the mortgage or deed of trust;

(2) A legal description of the trust property and, if
applicable, the street address of the property;

(3) The book and page numbers where the mortgage or deed of trust is recorded or the recorder's document number;

(4) The default for which foreclosure is made;

(5) The mortgagee's or trustee's intention to sell the trust property to satisfy the obligation, including in conspicuous type a warning as follows: "YOU MAY LOSE YOUR PROPERTY IF YOU DO NOT TAKE IMMEDIATE ACTION";

and

(6) The time, date, and place of sale; and

(7) The name, address, and telephone number of the party initiating foreclosure.

(b) The mortgagee's or trustee's notice of default and intention to sell shall be mailed within thirty (30) days of the recording of the notice by certified mail, postage prepaid and by first class mail, postage prepaid, to the address last known to the mortgagee or the trustee or beneficiary of the following persons:

(1) The mortgagor or grantor, and obligor of the deed of trust;

(2) Any successor in interest to the mortgagor or grantor whose interest appears of record or whose interest the mortgagee or the trustee or beneficiary has actual notice;

(3) Any person having a lien or interest subsequent to the interest of the mortgagee or trustee when that lien or interest appears of record or when the mortgagee, the trustee, or the beneficiary has actual notice of the lien or interest; and

(4) Any person requesting notice, as provided in § 18-50-113.

The disability, incapacity, or death of any person to whom notice must be given under this section shall not delay or impair in any way the mortgagee's or trustee's right to proceed with a sale, provided that the notice has been given in the manner required by this section to the guardian or conservator or to the administrator or executor, as the case may be.

SECTION 4. Arkansas Code § 18-50-107 is amended to read as follows:


(a) The sale shall be held on the date and at the time and place designated in the notice of default and intention to sell, except that the sale shall:
(1) Be held between 9:00 a.m. and 4:00 p.m.;
(2) Be held either at the premises of the trust property or at the front door of the county courthouse of the county in which the trust property is situated; and
(3) Not be held on a Saturday, Sunday, or a legal holiday.

(b)(1)(A) Any person, including the mortgagee and the beneficiary, may bid at the sale.
        (B) The trustee may bid for the beneficiary but not for himself or herself.

(2) The mortgagee or trustee shall engage a third party to conduct the sale and act at the sale as the auctioneer of the mortgagee or trustee.

(3) No bid shall be accepted that is less than two-thirds (2/3) of the entire indebtedness due at the date of sale.

(c)(1) The person conducting the sale may postpone the sale from time to time.
        (2)(A) In every such case, notice of postponement shall be given by:
                (i) Public proclamation thereof by that person; or
                (ii) Written notice of postponement posted at the time and place last appointed for the sale.

        (B)(i) No other notice of the postponement need be given unless the sale is postponed for longer than thirty (30) days beyond the date designated in the notice.
                (ii) In that event, notice thereof shall be given pursuant to § 18-50-104.

(d) The sale is concluded when the highest bid is accepted by the person conducting the sale.

(4)(1)(e)(1) Unless otherwise agreed to by the trustee or mortgagee, the purchaser shall pay at the time of sale the price bid.
        (2) Interest shall accrue on any unpaid balance of the price bid at the rate specified in the note secured by the mortgage or deed of trust.
        (3) Within ten (10) days after the sale, the mortgagee or trustee shall execute and deliver the trustee's deed or mortgagee's deed to the purchaser.
        (4) The mortgagee or beneficiary shall receive a credit on its
bid for:

(A) The amount representing the unpaid principal owed;
(B) Accrued interest as of the date of the sale;
(C) Advances for the payment of taxes, insurance, and maintenance of the trust property; and
(D) Costs of the sale, including reasonable trustee’s and attorney’s fees.

(e)(1) The purchaser at the sale shall be entitled to immediate possession of the property.

(2)(A) Possession may be obtained by filing a complaint in the circuit court of the county in which the property lies and attaching a copy of the recorded trustee’s or mortgagee’s deed, whereupon the purchaser shall be entitled to an ex parte writ of assistance.

(B) Alternatively, the purchaser may bring an action for forcible entry and detainer pursuant to § 18-60-301 et seq.

(C) In either event, the provisions of § 18-50-116(d) shall apply.

/s/T. Rogers

APPROVED: 03/31/2011