

State of Arkansas

76th General Assembly

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AS ENGROSSED 1/23/87

HOUSE BILL 1154

By: Rep. Wilson

AS ENGROSSED 2/12/87

"AN ACT TO BE ENTITLED 'THE STATUTORY FORECLOSURE ACT OF 1987'; AND FOR OTHER PURPOSES."

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

SECTION 1. Definitions. As used in this act, unless the context requires otherwise:

(A) "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 successor in interest.

(B) "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.

(C) "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 to a beneficiary and conferring upon the trustee a power of sale for breach of an obligation of the grantor contained in the deed of trust.

(D) "Trustee" means a person to whom legal title to real property is conveyed by a deed of trust, or his successor in interest.

(E) "Trust Property" means any right, title, interest and claim in and to real property owned and conveyed by the grantor at the date of execution of a deed of trust or acquired thereafter by said grantor or his successor in interest and described in the deed of trust.

(F) "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.

(G) "Mortgagee" means the person holding an interest in real property as security for the performance of an obligation.

(H) "Mortgagor" means the person granting an interest in real property

as security for the performance of an obligation.

(I) "Mortgage company" means any entity, private, state or Federal which in the usual course of its business it is either the mortgagee or beneficiary as defined herein, of a deed of trust or mortgage.

SECTION 2. Qualifications of trustee-appointment of successor trustee.

(A) A trustee of a deed of trust shall be:

(1) Any attorney who is an active licensed member of the Bar of the Supreme Court of the State of Arkansas.

(2) Any bank or savings and loan association authorized to do business under the laws of Arkansas or the United States;

(3) Any corporation authorized to conduct a trust business in Arkansas or the United States; or

(4) Any agency or authority of the State of Arkansas where not otherwise prohibited by law.

(B) The beneficiary may appoint a successor trustee at any time by filing for record with the recorder of the county in which the trust property is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the power, duties, authority, and title of the original trustee and any successor trustee.

(C) The substitution shall identify the deed of trust by stating the names of the original parties thereto, the date of recordation and the book and page where recorded or the recorder's document number, shall state the name of the new trustee and shall be executed and duly acknowledged by all the beneficiaries or their successors in interest.

SECTION 3. Conditions to exercise of power. A trustee or mortgagee, as the case may be, may not exercise a power of sale unless:

(A) The deed of trust or mortgage, any assignments of the mortgage by the mortgagee or of the deed of trust by the trustee or the beneficiary and any substitution of trustee are filed for record with the recorder of the county in which the trust property is situated;

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

such provision;

(C) 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 Section 4 of this Act;

(D) 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

(E) At least sixty (60) days has lapsed since the recording of the notice of default and intention to sell.

SECTION 4. Contents of notice. Persons to receive notice.

(A) 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 amount owing on the obligation secured by the mortgage or deed of trust.
- (6) 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".
- (7) The time, date and place of sale.

(B) The mortgagee's or trustee's notice of default and intention to sell shall be mailed within ten (10) days of the recording of the notice by certified mail, return receipt requested, 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 of the deed of trust.
- (2) Any successor in interest to the mortgagor or grantor whose interest appears of record, or whose interest the mortgagor 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 where such lien or interest appears of record or where the mortgagee or the trustee or the beneficiary has actual notice of such lien or interest.

(4) Any person requesting notice as provided in Section 13.

(C) 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 the notice has been given in the manner required by this section to the guardian or conservator or the administrator or executor, as the case may be.

SECTION 5. Publication of notice. In addition to giving notice of default and intention to sell to those persons identified in Section 4, the mortgagee or trustee shall also publish the notice in a newspaper of general circulation in the county in which the trust property is situated for thirty (30) days, once a week for four consecutive weeks prior to the date of sale, the final publication to be no more than seven (7) days prior to the sale.

SECTION 6. Trustee's affidavit. On or before the date the mortgagee or trustee conducts the sale, a duly acknowledged affidavit of mailing and publication of the notice of default and intention to sell shall be filed for record with the recorder of the county in which the trust property is situated.

SECTION 7. Manner of sale. (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 the hours of 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.

(3) not be held on a Saturday or Sunday or on a legal holiday.

(B) Any person, including the mortgagee and the beneficiary, may bid at the sale. The trustee may bid for the beneficiary but not for himself. The attorney for the mortgagee or trustee may conduct the sale and act at the sale as the auctioneer of the mortgagee or trustee. No bid shall be accepted that is less than two-thirds (2/3) of the entire indebtedness due at the date of

sale.

(C) The person conducting the sale may postpone the sale from time to time and, in every such case, notice of postponement shall be given by public proclamation thereof by such person at the time and place last appointed for the sale. No other notice of the postponement need be given unless the sale is postponed for longer than seven (7) days beyond the date designated in the notice, in which event, notice thereof shall be given pursuant to Section 4.

(D) The purchaser shall pay at the time of sale the price bid and, within ten (10) days thereafter, the mortgagee or trustee shall execute and deliver the trustee's deed to the purchaser. The mortgagee or beneficiary shall receive a credit on its bid for the amount representing the unpaid principal owed, accrued interest as of the date of the sale, advances for the payment of taxes, insurance, and maintenance of the trust property, and costs of the sale, including reasonable trustee's and attorney's fees.

(E) The purchaser at the sale shall be entitled to possession of the property upon the filing of record of the trustee's or mortgagee's deed, and any person remaining in possession thereafter under an interest subordinate to the interest of the mortgagee or trustee, shall be deemed to be a tenant at sufferance and the purchaser shall be entitled, upon application, to a writ of assistance.

SECTION 8. Effect of sale. (A) A sale made by a mortgagee or trustee or the attorney for the mortgagee trustee shall foreclose and terminate all interest in the trust property of all persons to whom notice is given under Section 4 and of any other person claiming by, through or under such person. A failure to give notice to any person entitled to notice shall not affect the validity of the sale as to persons notified. A person entitled to notice, but not given notice, shall have the rights of a person not made a defendant in a judicial foreclosure.

(B) A sale shall terminate all rights of redemption and no person shall have a right to redeem the trust property after a sale.

(C) No notice shall be required to be given to any person claiming an interest subsequent to the filing of the notice of default and intention to sell as set forth in Section 3(C). The filing of the notice of default and intention to sell shall have the same force and effect as the filing of a lis pendens in a judicial proceeding.

SECTION 9. Disposition of proceeds of sale. The trustee or mortgagee shall apply the proceeds of the sale as follows:

(1) To the expenses of the sale, including compensation of the trustee or mortgagee, and a reasonable fee by the attorney.

(2) To the indebtedness owed.

(3) To all persons having recorded liens subsequent to the interest of the trustee or mortgagee as their interests may appear in the order of the priority.

(4) The surplus, if any, to the grantor of the trust deed or to the successor in interest of the grantor entitled to such surplus.

SECTION 10. Affidavit of sale. Within ten (10) days after a sale the trustee or mortgagee shall file of record with the recorder of the county in which the trust property is located a duly acknowledged affidavit stating that a sale conforming to the requirements of this Act has occurred, including the time, place and date of the sale, property was sold, and the purchase price. Upon recording, copy of the affidavit shall be mailed by first class mail, postage prepaid, to all persons entitled to notice of default and intention to sale under Section 4.

SECTION 11. Form and effect of trustee's or mortgagee's deed. (A) The trustee's or mortgagee's deed shall contain recitals of compliance with the requirements of this Act relating to the exercise of the power of sale and sale of the trust property, including recitals concerning mailing and publication of notice of default and intention to sell, and the conduct of the sale. Upon the filing of the deed for record with the recorder of the county in which the trust property is situated, such recitals shall be prima facie evidence of the truth of the matters set forth therein, but the recitals shall be conclusive in favor of a purchaser for value in good faith relying upon them.

(B) The trustee's or mortgagee's deed shall convey to the purchaser all right, title and interest in the trust property the mortgagor or grantor had, or had the power to convey, at the time of the execution of the mortgage or deed of trust together with all right, title and interest in the mortgagor or grantor or their successors in interest acquired after the execution of the mortgage or deed of trust.

SECTION 12. Deficiency judgment. (A) At any time within twelve (12) months after a sale under this Act, a money judgment may be sought for the balance due upon the obligation for which a mortgage or deed of trust was given as security. In such action, the plaintiff shall set forth in his complaint and shall have the burden of proving the entire amount of indebtedness which was secured by the mortgage or deed of trust, the amount for which the trust property was sold and the fair market value of the trust property at the date of sale, together with interest from such date of sale, costs and attorney's fees.

(B) Judgment shall not exceed the lesser of the following:

(1) The amount for which the indebtedness due at the date of sale, with interest from the date of sale, costs and trustee's and attorney's fees, exceeds the fair market value of the trust property.

(2) The amount for which the indebtedness due at the date of sale with interest from the date of sale, costs and trustee's and attorney's fees, exceeds the amount for which the trust property was sold.

SECTION 13. Request for notice. (A) At any time subsequent to the recordation of a mortgage deed of trust and prior to a recording of a notice of default and intention to sell under the mortgage or deed, any person desiring a copy of any such notice may file for record with the recorder of the county where the trust property is situated, a duly acknowledged request for a copy of any notice of default and intention to sell.

(B) The request shall contain the name and address of the person requesting a copy of the notice and shall identify the mortgage or deed of trust by stating the names of the parties thereto, the date of recordation of the mortgage or deed, the book and page number where the mortgage or deed is recorded, or the recorder's document number.

(C) The recorder shall index the request so that the name of the mortgagor or of the grantor in the deed of trust is indexed as the grantor and the name of the requesting party is indexed as the grantee.

(D) No request, statement, or notation placed on record pursuant to this section shall affect the title to the trust property or be deemed notice to any person that any person so recording the request has any right, title, interest in, lien or charge upon said property.

SECTION 14. Reinstatement of mortgage or deed of trust. (A) Whenever all or a portion of the principal sum of any obligation secured by a mortgage or deed of trust has, prior to the maturity date fixed in such obligation, become due or has been declared due by reason of a breach or default in the performance of any obligation secured by the mortgage or deed of trust, including a default in the payment of interest or of any installment of principal, or by reason of a failure of the grantor to pay, in accordance with the terms of the mortgage or deed of trust, taxes, assessments, premiums for insurance, or advances made by the mortgagee or beneficiary in accordance with the terms of such obligation or of such mortgage or deed of trust, the mortgagor or grantor or their successor in interest in the trust property, at any time subsequent to the filing for record of a notice of default and intention to sell and prior to sale, may pay to the mortgagee or beneficiary or their successor in interest the entire amount then due under the terms of such mortgage or deed of trust, including costs and expenses actually incurred in enforcing the terms of such obligation and mortgage or deed of trust, and trustee's and attorney's fees other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing and, thereupon, all proceedings under this Act theretofore had or instituted shall be dismissed or discontinued and the obligation and mortgage or deed of trust shall be reinstated and shall be and remain in force and effect, the same as if no acceleration had occurred.

(B) If the default is cured and the mortgage or deed of trust reinstated in the manner provided in this section, the mortgagee, beneficiary, or their successor in interest, shall file for record with the recorder of the county in which the trust property is situated, a duly acknowledged cancellation of the recorded notice of default and intention to sell under such mortgage or deed of trust.

SECTION 15. Implied powers in mortgages. Subject to the provisions of Section 14 and notwithstanding the terms of the mortgage, a power of sale is hereby implied in every mortgage of real property situated in this state that is duly acknowledged and recorded. The exercise of the implied power of sale shall be pursuant to the provisions of this Act. A mortgagor and his successor in interest shall have the rights and duties of a grantor and a mortga-

gee and his successor in interest shall have the rights and duties of a trustee and a beneficiary. The mortgagee shall comply with Sections 3, 4, 5, 6, 7, 9 and 10 and the mortgagee's deed shall comply with Section 11.

SECTION 16. Miscellaneous. (A) The procedures set forth in this Act for the foreclosure of a mortgage or deed of trust shall not impair or otherwise affect the right to bring a judicial action to foreclose a mortgage or deed of trust.

(B) A notice of default and intention to sell shall be filed within the time the foreclosure of the mortgage or deed of trust by judicial action could have been commenced.

(C) The procedures set forth in this Act shall apply only to mortgages or deeds of trust on one to four family residential real property and only if the mortgagee or beneficiary is a bank, savings and loan, or mortgage company as defined herein. This Act shall not apply to a mortgage or a deed of trust encumbering trust property used primarily for agricultural purposes or to a deed of trust securing an indebtedness incurred in connection with the construction of a dwelling, building or other improvement on the trust property.

(D) Nothing in this Act shall be construed to create an implied right of redemption in favor of any person.

(E) Nothing in this Act shall be construed to impair the right of any person or entity to assert his legal and equitable rights in a court of competent jurisdiction.

SECTION 17. (a) Section 1 of Act 71 of March 17, 1897, as amended, the same being Arkansas Statute 51-1112; Section 2 of Act 71 of March 17, 1897, the same being Arkansas Statute 51-1113 and 51-1114; Section 1 of Act 21 of 1933, as amended, the same being Arkansas Statute 51-1115; Section 3 of Act 21 of 1933, as amended, the same being Arkansas Statute 51-1117; Section 4 of Act 21 of 1933, as amended, the same being Arkansas Statute 51-1118; and Section 5 of Act 21 of 1933, as amended, the same being Arkansas Statute 51-1119, are hereby repealed.

(b) All laws and parts of laws in conflict with this Act are hereby repealed.

SECTION 18. Severability. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

SECTION 19. Emergency. It is hereby found and determined by the General Assembly that the present laws regarding foreclosures are awkward, requiring appraisals before the sale and giving the homeowner a one year statutory right of redemption that may not be waived; whereby this Act would provide an efficient and fair procedure for the liquidation of defaulted mortgage loans to the benefit of both the homeowner and the mortgage lender. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.

/s/Mike Wilson

