

Stricken language would be deleted from and underlined language would be added to law as it existed prior to the 82nd General Assembly.

1 State of Arkansas  
2 82nd General Assembly  
3 Regular Session, 1999  
4

*As Engrossed: H3/17/99*

# A Bill

HOUSE BILL 1967

5 By: Representative Luker  
6 By: Senator Harriman  
7  
8

## For An Act To Be Entitled

9  
10 "AN ACT TO AMEND VARIOUS SECTIONS OF THE STATUTORY  
11 FORECLOSURE ACT OF 1987; AND FOR OTHER PURPOSES."  
12

### Subtitle

13  
14 "AN ACT TO AMEND VARIOUS SECTIONS OF THE  
15 STATUTORY FORECLOSURE ACT OF 1987."  
16  
17

18 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
19

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

21 "18-50-101. Definitions.

22 As used in this chapter, unless the context otherwise requires:

23 (1) 'Beneficiary' means the person named or otherwise designated  
24 in a deed of trust as the person for whose benefit a deed of trust is given,  
25 or his successor in interest;

26 (2) 'Grantor' means the person conveying an interest in real  
27 property by a mortgage or deed of trust as security for the performance of an  
28 obligation;

29 (3) 'Deed of trust' means a deed conveying real property in trust  
30 to secure the performance of an obligation of the grantor or any other person  
31 named in the deed to a beneficiary and conferring upon the trustee a power of  
32 sale for breach of an obligation of the grantor contained in the deed of  
33 trust;

34 (4) 'Trustee' means any person or legal entity to whom legal  
35 title to real property is conveyed by deed of trust, or his successor in  
36 interest;

1           (5) 'Trust property' means ~~any right, title, interest, and claim~~  
 2 ~~in and to real property owned and conveyed by the grantor at the date of~~  
 3 ~~execution of a deed of trust or acquired thereafter by the grantor or his~~  
 4 ~~successor in interest and described in the deed of trust;~~ the property  
 5 encumbered by a mortgage or deed of trust;

6           (6) 'Mortgage' means the grant of an interest in real property to  
 7 be held as security for the performance of an obligation by the mortgagor or  
 8 other person;

9           (7) 'Mortgagee' means, as the context requires, the person  
 10 holding an interest in real property as security for the performance of an  
 11 obligation, or his attorney-in-fact appointed pursuant to this chapter;

12           (8) 'Mortgagor' means the person granting an interest in real  
 13 property as security for the performance of an obligation; ~~and~~

14           (9) 'Mortgage company' means any private, state, or federal  
 15 entity which in the usual course of its business is either the mortgagee or  
 16 beneficiary, as defined in this section, of a deed of trust or mortgage-; and

17           (10) 'Sale' shall mean the public auction conducted pursuant to  
 18 Arkansas Code § 18-50-107, and shall be deemed concluded when the highest bid  
 19 is accepted by the person conducting the sale."

20  
 21           SECTION 2. Arkansas Code 18-50-102 is amended to read as follows:

22           "18-50-102. Qualifications of trustee - Appointment of successor  
 23 trustee.

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

25           (1) Attorney who is an active licensed member of the Bar of the  
 26 Supreme Court of the State of Arkansas or law firm among whose members  
 27 includes such an attorney;

28           (2) Bank or savings and loan association authorized to do  
 29 business under the laws of Arkansas or those of the United States;

30           (3) Corporation authorized to conduct a trust business in  
 31 Arkansas or the United States; or

32           (4) Agency or authority of the State of Arkansas where not  
 33 otherwise prohibited by law.

34           (b) The beneficiary may appoint a successor trustee at any time by  
 35 filing a substitution of trustee for record with the recorder of the county in  
 36 which the trust property is situated. ~~From the time the substitution is filed~~

1 ~~for record, the~~ The new trustee shall succeed to all the power, duties,  
 2 authority, and title of the original trustee and any previous successor  
 3 trustee. The beneficiary may, by express provision in the substitution of  
 4 trustee, ratify and confirm actions taken on its behalf by the new trustee  
 5 prior to the recording of the substitution of the trustee.

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

11 (d) A mortgagee may delegate his powers and duties under this chapter  
 12 to an attorney-in-fact, whose acts shall be done in the name of and on behalf  
 13 of the mortgagee. The qualifications for an attorney-in-fact shall be the same  
 14 as those for a trustee.

15 (e) The appointment of an attorney-in-fact by a mortgagee shall be made  
 16 by a duly executed, acknowledged and recorded power of attorney, which shall  
 17 identify the mortgage by stating the names of the original parties thereto,  
 18 the date of recordation, and the book and page where recorded or the  
 19 recorder's document number.

20 (f) A substitution of trustee or power of attorney shall be recorded  
 21 before any trustee's or mortgagee's deed executed by the substituted trustee  
 22 or attorney-in-fact is recorded."

23  
 24 SECTION 3. Arkansas Code 18-50-103 is amended to read as follows:

25 "18-50-103. Conditions to exercise of power.

26 A trustee or mortgagee, ~~as the case may be,~~ may not ~~exercise a power of~~  
 27 ~~sale~~ sell the trust property unless:

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

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

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

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

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

10  
11 SECTION 4. Arkansas Code 18-50-104 is amended to read as follows:  
12 "18-50-104. Contents of notice - Persons to receive notice.

13 (a) The mortgagee's or trustee's notice of default and intention to  
14 sell shall set forth:

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

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

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

20 (4) The default for which foreclosure is made;

21 ~~(5) The amount owing on the obligation secured by the mortgage or~~  
22 ~~deed of trust;~~

23 ~~(6)~~(5) The mortgagee's or trustee's intention to sell the trust  
24 property to satisfy the obligation, including in conspicuous type a warning as  
25 follows: "YOU MAY LOSE YOUR PROPERTY IF YOU DO NOT TAKE IMMEDIATE ACTION"; and

26 ~~(7)~~(6) The time, date, and place of sale.

27 (b) The mortgagee's or trustee's notice of default and intention to  
28 sell shall be mailed within ~~ten (10)~~ thirty (30) days of the recording of the  
29 notice by certified mail, ~~return receipt requested~~, postage prepaid, and by  
30 first class mail, postage prepaid, to the address last known to the mortgagee  
31 or the trustee or beneficiary of the following persons:

32 (1) The mortgagor or grantor of the deed of trust;

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

36 (3) Any person having a lien or interest subsequent to the

1 interest of the mortgagee or trustee where that lien or interest appears of  
2 record or where the mortgagee, the trustee, or the beneficiary has actual  
3 notice of such lien or interest; and

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

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

10  
11 SECTION 5. Arkansas Code 18-50-105 is amended to read as follows:

12 "18-50-105. Publication of notice.

13 "The mortgagee or trustee shall publish the notice:

14 (a) ~~in~~ In a newspaper of general circulation in the county in which the  
15 trust property is situated or in a newspaper of general statewide daily  
16 publication one (1) time a week for four (4) consecutive weeks prior to the  
17 date of sale. The final publication shall be no more than ten (10) days prior  
18 ~~to the sale;~~ and

19 (b) By utilizing a third party posting provider to post notice at the  
20 place at the county courthouse where foreclosure sales are customarily  
21 advertised and conducted."

22  
23 SECTION 6. Arkansas Code 18-50-107(b) is amended to read as follows:

24 "(b) Any person, including the mortgagee and the beneficiary, may bid  
25 at the sale. The trustee may bid for the beneficiary but not for himself. ~~The~~  
26 ~~attorney for the~~ The mortgagee or trustee may shall engage a third party to  
27 conduct the sale and act at the sale as the auctioneer of the mortgagee or  
28 trustee. No bid shall be accepted that is less than two-thirds (2/3) of the  
29 entire indebtedness due at the date of sale."

30  
31 SECTION 7. Arkansas Code 18-50-107(c) through (e) are amended to read  
32 as follows:

33 "(c) The person conducting the sale may postpone the sale from time to  
34 time. In every such case, notice of postponement shall be given by:

35 (1) ~~public~~ Public proclamation thereof by such person; or

36 (2) Written notice of postponement posted at the time and place

1 last appointed for the sale. No other notice of the postponement need be given  
 2 unless the sale is postponed for longer than ~~seven (7)~~ thirty (30) days beyond  
 3 the date designated in the notice. In that event, notice thereof shall be  
 4 given pursuant to § 18-50-104.

5 (d) Unless otherwise agreed to by the trustee or mortgagee, The the  
 6 purchaser shall pay at the time of sale the price bid, and, within ten (10)  
 7 days thereafter, Interest shall accrue on any unpaid balance of the price bid  
 8 at the rate specified in the note secured by the mortgage or deed of trust.  
 9 Within ten (10) days after the sale, the mortgagee or trustee shall execute  
 10 and deliver the trustee's deed or mortgagee's deed to the purchaser. The  
 11 mortgagee or beneficiary shall receive a credit on its bid for the amount  
 12 representing the unpaid principal owed; accrued interest as of the date of the  
 13 sale; advances for the payment of taxes, insurance, and maintenance of the  
 14 trust property; and costs of the sale, including reasonable trustee's and  
 15 attorney's fees.

16 (e) The purchaser at the sale shall be entitled to immediate possession  
 17 of the property, ~~upon the filing of record of the trustee's or mortgagee's~~  
 18 ~~deed. Any person remaining in possession thereafter under an interest~~  
 19 ~~subordinate to the interest of the mortgagee or trustee shall be deemed to be~~  
 20 ~~a tenant at sufferance, and the purchaser shall be entitled, upon application,~~  
 21 ~~to a writ of assistance. Possession may be obtained by filing a complaint in~~  
 22 the chancery court of the county in which the property lies and attaching a  
 23 copy of the recorded trustee's or mortgagee's deed, whereupon the purchaser  
 24 shall be entitled to an ex parte writ of assistance. Alternatively, the  
 25 purchaser may bring an action for forcible entry and detainer pursuant to  
 26 Arkansas Code beginning at § 18-60-301. In either event, the provisions of  
 27 Arkansas Code 18-50-116(d) shall apply."

28  
 29 SECTION 8. Arkansas Code 18-50-108(a) and (b) are amended to read as  
 30 follows:

31 "(a) A sale made by a mortgagee or trustee ~~or the attorney for the~~  
 32 ~~mortgagee or trustee~~ shall foreclose and terminate all interest in the trust  
 33 property of all persons to whom notice is given under § 18-50-104 and of any  
 34 other person claiming by, through, or under such person. A failure to give  
 35 notice to any person entitled to notice shall not affect the validity of the  
 36 sale as to persons notified. A person entitled to notice, but not given

1 notice, shall have the rights of a person not made a defendant in a judicial  
2 foreclosure.

3 (b) A sale shall terminate all rights of redemption, and no person  
4 shall have a right to redeem the trust property after a sale, notwithstanding  
5 that the deed to and possession of the trust property have yet to be  
6 delivered."

7

8 SECTION 9. Arkansas Code 18-50-110 is repealed.

9 ~~18-50-110. Affidavit of sale.~~

10 ~~Within ten (10) days after a sale, the trustee or mortgagee shall file~~  
11 ~~of record with the recorder of the county in which the trust property is~~  
12 ~~located a duly acknowledged affidavit. The affidavit shall state that a sale~~  
13 ~~conforming to the requirements of this chapter has occurred, including the~~  
14 ~~time, place, and date of the sale, that the property was sold, and the~~  
15 ~~purchase price. Upon recording, a copy of the affidavit shall be mailed by~~  
16 ~~first-class mail, postage prepaid, to all persons entitled to notice of~~  
17 ~~default and intention to sell under § 18-50-104.~~

18

19 SECTION 10. Arkansas Code 18-50-111 is amended to read as follows:

20 "18-50-111. Form and effect of trustee's or mortgagee's deed.

21 (a)(1) The trustee's or mortgagee's deed shall contain recitals of  
22 compliance with the requirements of this chapter relating to the exercise of  
23 the power of sale and sale of the trust property, including recitals  
24 concerning mailing and publication of notice of default and intention to sell,  
25 and the conduct of the sale.

26 (2) Upon the filing of the deed for record with the recorder of  
27 the county in which the trust property is situated, the recitals shall be  
28 prima facie evidence of the truth of the matters set forth therein, but the  
29 recitals shall be conclusive in favor of a purchaser for value in good faith  
30 relying upon them.

31 (b) The trustee's or mortgagee's deed shall convey to the purchaser all  
32 right, title, and interest in the trust property the mortgagor or grantor had,  
33 or had the power to convey, at the time of the execution of the mortgage or  
34 deed of trust, together with all right, title, and interest in the mortgagor  
35 or grantor or their successors in interest acquired after the execution of the  
36 mortgage or deed of trust, which conveyance shall be deemed effective and

1 relate back to the time of the sale."

2  
3 SECTION 11. Arkansas Code 18-50-116(d) is amended to read as follows:

4 "(d) Nothing in this chapter shall be construed to:

5 (1) Create an implied right of redemption in favor of any person;

6 or

7 (2) Impair the right of any person or entity to assert his legal  
8 and equitable rights in a court of competent jurisdiction; provided, however,  
9 that any such claim or defense shall be asserted prior to the sale, or be  
10 forever barred and terminated."

11  
12 SECTION 12. Arkansas Code 18-50-116 is amended to add an additional  
13 subsection to read as follows:

14 "(e) At any time prior to the delivery of the trustee's or mortgagee's  
15 deed, the trustee or mortgagee shall be authorized to set aside a sale  
16 conducted pursuant to this act by declaring the sale null and void and  
17 returning the purchase price to the highest bidder without any further  
18 liability to such bidder. In this event, the trustee or mortgagee shall file  
19 an affidavit declaring the sale null and void with the recorder of the county  
20 in which the trust property is located, and all terms and provisions of the  
21 mortgage or deed of trust shall be revived and reinstated as if no sale had  
22 occurred."

23  
24 SECTION 13. All provisions of this act of a general and permanent  
25 nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas  
26 Code Revision Commission shall incorporate the same in the Code.

27  
28 SECTION 14. If any provision of this act or the application thereof to  
29 any person or circumstance is held invalid, such invalidity shall not affect  
30 other provisions or applications of the act which can be given effect without  
31 the invalid provision or application, and to this end the provisions of this  
32 act are declared to be severable.

33  
34 SECTION 15. All laws and parts of laws in conflict with this act are  
35 hereby repealed.

