

1 State of Arkansas  
2 89th General Assembly  
3 Regular Session, 2013  
4

# A Bill

HOUSE BILL 1847

5 By: Representative Nickels  
6

## For An Act To Be Entitled

8 AN ACT TO REFORM MORTGAGE FORECLOSURE PROCEDURES AND  
9 PRACTICES; TO REQUIRE CIRCUIT CLERKS TO CONDUCT  
10 JUDICIAL SALES; TO ABOLISH THE AUTHORITY AND  
11 PROCEDURES TO PERFORM STATUTORY FORECLOSURES; AND FOR  
12 OTHER PURPOSES.  
13  
14

## Subtitle

15 TO REFORM MORTGAGE FORECLOSURE PROCEDURES  
16 AND PRACTICES; TO REQUIRE CIRCUIT CLERKS  
17 TO CONDUCT JUDICIAL SALES; AND TO ABOLISH  
18 THE AUTHORITY AND PROCEDURES TO PERFORM  
19 STATUTORY FORECLOSURES.  
20  
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23 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
24

25 SECTION 1. DO NOT CODIFY. Findings and legislative intent.

26 (a) The General Assembly finds that:

27 (1) A resident's home is often one of the resident's most  
28 valuable and cherished assets;

29 (2) Since the establishment of a nonjudicial, statutory  
30 foreclosure procedure in 1987 that largely operates independently of judicial  
31 supervision, citizens of the state have been subjected to numerous abuses and  
32 injustices, including without limitation:

33 (A) The lender's imposition of excessive fees and expenses  
34 that:

35 (i) Are not imposed or considered proper in a  
36 judicial foreclosure proceeding;



1                   (ii) Often prevent a borrower from reinstating a  
 2 loan or arranging a private sale of the property;

3                   (iii) May force a borrower to file bankruptcy in  
 4 order to cure the full arrearage the lender claims is owed; or

5                   (iv) In some cases have not yet been incurred by the  
 6 lender;

7                   (B) The inability to ascertain ownership of the borrower's  
 8 mortgage and engage in meaningful workout discussions because appropriate  
 9 assignments or other documentation reflecting transfers of the borrower's  
 10 mortgage and its current holder are not properly filed of record;

11                   (C) The inability to resolve good-faith errors or other  
 12 errors in payment records due to the failure of lenders to furnish:

13                   (i) Proof of adequate internal controls to ensure  
 14 the maintenance of good accounting records; or

15                   (ii) Evidence of the accurate recording of payments;

16                   (D) Lenders disregarding or misinforming borrowers about  
 17 loan modification agreements, payments, and procedures resulting in the  
 18 continuation or initiation of foreclosure procedures after legally binding  
 19 settlement agreements have been reached;

20                   (E) Lenders' failure to provide proper notice to  
 21 homeowners resulting in:

22                   (i) A borrower's first learning of foreclosure  
 23 proceedings when a sheriff serves him or her with a writ of assistance for  
 24 possession of the property; or

25                   (ii) Lenders entering into homes that have not been  
 26 properly foreclosed or when litigation concerning the home is pending;

27                   (F) The failure to give proper notice to interested third  
 28 parties with a recorded lien upon the subject real property; and

29                   (G) Abuses concerning the conduct of statutory foreclosure  
 30 sales, including without limitation:

31                   (i) Canceling or postponing the sale by an  
 32 announcement at the advertised time and place scheduled for the sale without  
 33 adequate notice to interested parties;

34                   (ii) Recording a deed that:

35                   (a) Contains recitals that the property had  
 36 been sold at the foreclosure sale when in fact the sale was not conducted;

1 and

2 (b) Transfers title to the property to the  
 3 foreclosing lender;

4 (iii) Failing to conduct the sale when scheduled;  
 5 and

6 (iv) Holding or rescheduling a sale without adequate  
 7 notice, making it difficult or impossible for affected homeowners or other  
 8 interested parties to bid on foreclosed properties;

9 (3) The loss of filing fees, commissioner fees, recording fees,  
 10 and transfer tax fees has cost the state and counties millions of dollars in  
 11 revenue needed to provide better and more efficient state and county  
 12 government services;

13 (4) The statutory foreclosure sale process:

14 (A) Is conducted without court supervision;

15 (B) Does not require a report of sale or confirmation  
 16 order from a court; and

17 (C) Does not utilize elected county officials who are  
 18 accountable to the citizens of the county and knowledgeable in conducting  
 19 judicial sales of real property and appropriately documenting real estate  
 20 transactions and proceedings;

21 (5) Act 53 of 1987, authorizing a statutory, nonjudicial  
 22 procedure for the enforcement of mortgages was amended by Act 1303 of 2003 to  
 23 provide that “[n]o person, firm, company, association, fiduciary, or  
 24 partnership, either domestic or foreign, shall avail themselves of the  
 25 procedures under this chapter unless authorized to do business in this  
 26 state”;

27 (6) In the emergency clause of Act 1303 of 2003, the General  
 28 Assembly found that “foreign entities not authorized to do business in the  
 29 State of Arkansas are availing themselves to the provisions of the Statutory  
 30 Foreclosure Act of 1987; that often times it is to the detriment of Arkansas  
 31 citizens; and that this act is immediately necessary because these entities  
 32 should be authorized to do business in the State of Arkansas before being  
 33 able to use the Statutory Foreclosure Act of 1987”;

34 (7) Even after the passage of the 2003 amendment, many out-of-  
 35 state national banks:

36 (A) Continued to avail themselves of the statutory

1 foreclosure procedures authorized by Act 53 of 1987, as amended;

2 (B) Disregarded the 2003 amendment requiring registration  
3 with the Secretary of State's office to obtain a certificate of authority in  
4 order to be authorized to do business in the State of Arkansas properly; and

5 (C) To this day refuse to comply with the existing law for  
6 the conduct of statutory foreclosures, contributing to abuses of the  
7 foreclosure process, which has been injurious to numerous Arkansas  
8 homeowners; and

9 (8) Judicial foreclosure proceedings:

10 (A) Have a long history and credibility for the  
11 foreclosure of mortgages in this state;

12 (B) Require lenders to provide proof of ownership of a  
13 mortgage, proof of default by the homeowner, and proof that the home is the  
14 proper collateral for the note;

15 (C) Require lenders to provide the homeowner and all other  
16 interested parties notice, a summons, and a forum to appear and raise  
17 defenses and seek equity as the facts of a case require;

18 (D) Are supervised by a court of law, are subject to  
19 appeal, and provide a full record of the proceedings;

20 (E) Result in a commercially reasonable sale conducted by  
21 a reputable county official under the guidance and supervision of the court  
22 and return excess proceeds from a sale to appropriate interested parties and  
23 homeowners;

24 (F) Require lenders to pay filing fees, recording fees,  
25 and transfer tax fees to state and county governments; and

26 (G) Protect the rights of all parties and can be conducted  
27 as quickly and inexpensively as statutory foreclosures.

28 (b) It is the intent of the General Assembly by the enactment of this  
29 act to:

30 (1) Reaffirm that it is the public policy of the state to  
31 require the regulation and supervision of lenders who seek to foreclose  
32 mortgages encumbering one of the most cherished and valuable assets of the  
33 residents of this state;

34 (2) Require that the foreclosure of a mortgage, deed of trust,  
35 or similar instrument evidencing a lien upon residential real property be  
36 conducted exclusively in a judicial proceeding under court supervision;

1           (3) Require that the circuit clerk of the county where real  
2 property is located, as part of the circuit clerk's official duties, be  
3 appointed commissioner of the court to conduct judicial foreclosure sales and  
4 that appropriate commissioner fees be used to defray expenses of the circuit  
5 clerk's office and assist the provision of services to the county; and

6           (4) Repeal Arkansas Code Title 18, Chapter 50, authorizing  
7 nonjudicial, statutory procedures for foreclosing a mortgage or deed of trust  
8 encumbering residential real property.

9  
10           SECTION 2. Arkansas Code § 21-6-412 is amended to read as follows:

11           21-6-412. Commissioners to sell property.

12           (a)~~(1)~~ As part of his or her official duties, the clerk of the circuit  
13 court of the county in which real property or personal property is located  
14 shall be appointed commissioner of the court to conduct a judicial sale of  
15 the real property or personal property.

16           (b)(1) Commissioners appointed to make conduct sales of real property  
17 under judicial decrees shall be allowed the following fees as compensation  
18 for such services as a commissioner's fee:

19	<del>On sales for \$1.00 to \$500 . . . . .</del>	<del>\$10.00</del>
20	<del>On sales for 500 to 2,500 . . . . .</del>	<del>15.00</del>
21	<del>On sales for 2,500 to 5,000 . . . . .</del>	<del>20.00</del>
22	<del>On sales for 5,000 to 10,000 . . . . .</del>	<del>25.00</del>
23	<del>On sales for 10,000 to 20,000 . . . . .</del>	<del>30.00</del>
24	<del>On sales for 20,000 to 35,000 . . . . .</del>	<del>35.00</del>
25	<del>On sales for 35,000 or more, one-tenth of one percent (0.1%).</del>	

26           (A) Ten dollars (\$10.00) if the sale price is less than  
27 five hundred dollars (\$500);

28           (B) Fifteen dollars (\$15.00) if the sale price is five  
29 hundred dollars (\$500) or more but less than two thousand five hundred  
30 dollars (\$2,500);

31           (C) Twenty dollars (\$20.00) if the sale price is two  
32 thousand five hundred dollars (\$2,500) or more but less than five thousand  
33 dollars (\$5,000);

34           (D) Twenty-five dollars (\$25.00) if the sale price is five  
35 thousand dollars (\$5,000) or more but less than ten thousand dollars  
36 (\$10,000);

1                   (E) Thirty dollars (\$30.00) if the sale price is ten  
 2 thousand dollars (\$10,000) or more but less than twenty thousand dollars  
 3 (\$20,000);

4                   (F) Thirty-five dollars (\$35.00) if the sale price is  
 5 twenty thousand dollars (\$20,000) or more but less than thirty-five thousand  
 6 dollars (\$35,000); or

7                   (G) One-tenth of one percent (0.1%) of the sale price if  
 8 the sale price is thirty-five thousand dollars (\$35,000) or more.

9                   (2) ~~Commissioners~~ A commissioner appointed to ~~make sales~~ conduct  
 10 a sale of personal property under a judicial ~~decrees~~ decree shall be allowed  
 11 as compensation for ~~such services~~ conducting the sale the fee prescribed by  
 12 the judge of the court that issued the decree.

13                   ~~(b)~~(c) In lieu of the fees provided for in this section, the court may  
 14 set reasonable fees for commissioners based upon services rendered on sales  
 15 under thirty-five thousand dollars (\$35,000).

16                   (d)(1) The fees required by this section shall:

17                   (A) Be collected by the circuit clerk and paid into the  
 18 county treasury to the credit of a fund to be known as the "circuit clerk  
 19 commissioner's fee fund"; and

20                   (B) Be used exclusively by the circuit clerk's office for  
 21 the following purposes and in the following order:

22                   (i) To offset administrative costs associated with  
 23 the performance of the commissioner's duties; and

24                   (ii) For general operational expenses of the office  
 25 of the circuit clerk.

26                   (2) Moneys deposited into the fund shall be appropriated and  
 27 expended for the uses designated in this section by the quorum court at the  
 28 direction of the circuit clerk.

29  
 30                   SECTION 3. Arkansas Code Title 18, Chapter 50, is repealed.

31                   ~~Chapter 50 — Statutory Foreclosures~~

32                   ~~18-50-101. Definitions.~~

33                   ~~As used in this chapter:~~

34                   ~~(1) "Beneficiary" means the person named or otherwise designated~~  
 35 ~~in a deed of trust as the person for whose benefit a deed of trust is given~~  
 36 ~~or his or her successor in interest;~~

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

6           ~~(3) “Grantor” means the person conveying an interest in real~~  
 7 ~~property by a mortgage or deed of trust as security for the performance of an~~  
 8 ~~obligation secured by the mortgage or deed of trust;~~

9           ~~(4) “Mortgage” means the grant of an interest in real property~~  
 10 ~~to be held as security for the performance of an obligation by the mortgagor~~  
 11 ~~or other person;~~

12           ~~(5) “Mortgage company” means any private, state, or federal~~  
 13 ~~entity that in the usual course of its business is either the mortgagee or~~  
 14 ~~beneficiary of a deed of trust or mortgage;~~

15           ~~(6) “Mortgage loan servicer” means an entity that holds itself~~  
 16 ~~out as being able to service loans secured by liens or mortgages encumbering~~  
 17 ~~real property;~~

18           ~~(7) “Mortgagee” means the person holding an interest in real~~  
 19 ~~property as security for the performance of an obligation secured by a~~  
 20 ~~mortgage or his or her attorney in fact appointed pursuant to this chapter;~~

21           ~~(8) “Mortgagor” means the person granting an interest in real~~  
 22 ~~property as security for the performance of an obligation secured by a~~  
 23 ~~mortgage;~~

24           ~~(9) “Obligor” means a person owing an obligation that is secured~~  
 25 ~~by a mortgage or deed of trust;~~

26           ~~(10) “Sale” means the public auction conducted pursuant to § 18-~~  
 27 ~~50-107;~~

28           ~~(11) “Trust property” means the property encumbered by a~~  
 29 ~~mortgage or deed of trust; and~~

30           ~~(12) “Trustee” means any person or legal entity to whom legal~~  
 31 ~~title to real property is conveyed by deed of trust or his or her successor~~  
 32 ~~in interest.~~

33  
 34           ~~18-50-102. Parties authorized to foreclose mortgage or deed of trust.~~

35           ~~(a) Parties authorized to foreclose a mortgage or deed of trust under~~  
 36 ~~this chapter are limited to:~~

1           ~~(1) A trustee or attorney in fact who is an active licensed~~  
 2 ~~member of the Bar of the Supreme Court of the State of Arkansas or a law firm~~  
 3 ~~among whose members includes such an attorney if the attorney or law firm~~  
 4 ~~maintains an office that:~~

5                     ~~(A) Is located within this state;~~

6                     ~~(B) Is accessible to the public during regular business~~  
 7 ~~hours; and~~

8                     ~~(C) Has the ability to accept funds from a grantor,~~  
 9 ~~mortgagor, or obligor to reinstate or pay off a mortgage or deed of trust;~~

10           ~~(2) A state-chartered bank, nationally chartered bank, state-~~  
 11 ~~chartered or federally chartered savings and loan association, state-~~  
 12 ~~chartered or federally chartered credit union, or a mortgage loan company~~  
 13 ~~subject to licensing, supervision, and auditing by a federal agency, a~~  
 14 ~~government-sponsored enterprise, and the Bank Commissioner or Securities~~  
 15 ~~Commissioner, as applicable, as an approved mortgage loan servicer authorized~~  
 16 ~~to do business under the laws of the State of Arkansas if the state-chartered~~  
 17 ~~bank, nationally chartered bank, state-chartered or federally chartered~~  
 18 ~~savings and loan association, state-chartered or federally chartered credit~~  
 19 ~~union, or mortgage loan company:~~

20                     ~~(A) Has a physical business location open for business for~~  
 21 ~~normal banking hours located within the State of Arkansas;~~

22                     ~~(B) Is either the holder or the mortgage loan servicer for~~  
 23 ~~the holder of a note secured by a mortgage or deed of trust; and~~

24                     ~~(C) Does not collect a fee or cost for any action taken~~  
 25 ~~under this chapter unless authorized by a court order; or~~

26           ~~(3) An agency or authority of the State of Arkansas where not~~  
 27 ~~otherwise prohibited by law.~~

28           ~~(b)(1) The beneficiary may appoint a successor trustee at any time by~~  
 29 ~~filing a substitution of trustee for record with the recorder of the county~~  
 30 ~~in which the trust property is situated.~~

31                     ~~(2) The new trustee shall succeed to all the power, duties,~~  
 32 ~~authority, and title of the original trustee and any previous successor~~  
 33 ~~trustee.~~

34                     ~~(3) The beneficiary, by express provision in the substitution of~~  
 35 ~~a trustee, may ratify and confirm actions taken on its behalf by the new~~  
 36 ~~trustee prior to the recording of the substitution of the trustee.~~



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

6           ~~(d) A mortgagee may delegate his or her powers and duties under this~~  
 7 ~~chapter to an attorney in fact, whose acts shall be done in the name of and~~  
 8 ~~on behalf of the mortgagee.~~

9           ~~(e) The appointment of an attorney in fact by a mortgagee shall be~~  
 10 ~~made by a duly executed, acknowledged, and recorded power of attorney that~~  
 11 ~~shall identify the mortgage by stating the names of the original parties~~  
 12 ~~thereto, the date of recordation, and the book and page where recorded or the~~  
 13 ~~recorder's document number.~~

14           ~~(f) A substitution of trustee or power of attorney shall be recorded~~  
 15 ~~before any trustee's or mortgagee's deed executed by the substituted trustee~~  
 16 ~~or attorney in fact is recorded.~~

17  
 18           ~~18-50-103. Conditions to exercise of power of sale.~~

19           ~~A beneficiary or mortgagee may not initiate a foreclosure under this~~  
 20 ~~chapter unless:~~

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

23                           ~~(2)(A) The beneficiary or mortgagee:~~

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

26                                   ~~(ii) At least ten (10) days before initiating the~~  
 27 ~~foreclosure has provided by standard mail to the grantor, mortgagor, or~~  
 28 ~~obligor at the address of the property encumbered by the mortgage or deed of~~  
 29 ~~trust or the mailing address of the grantor, mortgagor, or obligor;~~

30   ~~(a) A true and correct copy of the note with~~  
 31 ~~all required endorsements, the mortgage, or the deed of trust;~~

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

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

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

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

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

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

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

19 (C) The duties of the beneficiary or mortgagee to provide  
20 information under subdivision (2) of this section are not delegable to the  
21 beneficiary's trustee or the mortgagee's attorney-in-fact;

22 (3) There is a default by the mortgagor, grantor, or obligor  
23 with respect to any provision in the mortgage or deed of trust that  
24 authorizes sale in the event of default of the provision; and

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

28  
29 18-50-104. Prerequisites for foreclosure sale—Contents of notice of  
30 sale—Persons to receive notice.

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

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

36 (2) A period of at least sixty (60) days has elapsed since the

1 ~~recording of the notice of default and intention to sell; and~~

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

8 ~~(a) The beneficiary or mortgagee; or~~

9 ~~(b) A government agency if the beneficiary or~~  
 10 ~~mortgagee participates in the government agency's program.~~

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

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

17 ~~(b) The mortgagee's or trustee's notice of default and intention to~~  
 18 ~~sell shall set forth:~~

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

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

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

24 ~~(4) The default for which foreclosure is made;~~

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

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

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

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

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

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

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

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

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

14  
 15       ~~18-50-105. Publication of notice.~~

16       ~~The mortgagee or trustee shall publish the notice:~~

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

22           ~~(2) By employing a third-party posting provider to post notice~~  
 23 ~~at the place at the county courthouse where foreclosure sales are customarily~~  
 24 ~~advertised and conducted; and~~

25           ~~(3) By employing a third-party Internet foreclosure sale notice~~  
 26 ~~information service provider.~~

27  
 28       ~~18-50-106. Trustee's affidavit.~~

29       ~~On or before the date the mortgagee or trustee conducts the sale, a~~  
 30 ~~duly acknowledged affidavit of mailing and publication of the notice of~~  
 31 ~~default and intention to sell shall be filed for record with the recorder of~~  
 32 ~~the county in which the trust property is situated.~~

33  
 34       ~~18-50-107. Manner of sale.~~

35       ~~(a) The sale shall be held on the date and at the time and place~~  
 36 ~~designated in the notice of default and intention to sell, except that the~~

1 ~~sale shall:~~

2 ~~(1) Be held between 9:00 a.m. and 4:00 p.m.;~~

3 ~~(2) Be held either at the premises of the trust property or at~~  
 4 ~~the front door of the county courthouse of the county in which the trust~~  
 5 ~~property is situated; and~~

6 ~~(3) Not be held on a Saturday, Sunday, or a legal holiday.~~

7 ~~(b)(1)(A) Any person, including the mortgagee and the beneficiary, may~~  
 8 ~~bid at the sale.~~

9 ~~(B) The trustee may bid for the beneficiary but not for~~  
 10 ~~himself or herself.~~

11 ~~(2) The mortgagee or trustee shall engage a third party that is~~  
 12 ~~licensed to sell real estate under the Real Estate License Law, § 17-42-101~~  
 13 ~~et seq., and licensed to act as an auctioneer under the Auctioneer's~~  
 14 ~~Licensing Act, § 17-17-101 et seq., to conduct the sale and act at the sale~~  
 15 ~~as the auctioneer.~~

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

18 ~~(c)(1) The person conducting the sale may postpone the sale from time~~  
 19 ~~to time.~~

20 ~~(2)(A) In every such case, notice of postponement shall be given~~  
 21 ~~by:~~

22 ~~(i) Public proclamation thereof by that person; or~~

23 ~~(ii) Written notice of postponement posted at the~~  
 24 ~~time and place last appointed for the sale.~~

25 ~~(B)(i) No other notice of the postponement need be given~~  
 26 ~~unless the sale is postponed for longer than thirty (30) days beyond the date~~  
 27 ~~designated in the notice.~~

28 ~~(ii) In that event, notice thereof shall be given~~  
 29 ~~pursuant to § 18-50-104.~~

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

32 ~~(e)(1) Unless otherwise agreed to by the trustee or mortgagee, the~~  
 33 ~~purchaser shall pay at the time of sale the price bid.~~

34 ~~(2) Interest shall accrue on any unpaid balance of the price bid~~  
 35 ~~at the rate specified in the note secured by the mortgage or deed of trust.~~

36 ~~(3) Within ten (10) days after the sale, the mortgagee or~~

1 trustee shall execute and deliver the trustee's deed or mortgagee's deed to  
2 the purchaser.

3           (4) ~~The mortgagee or beneficiary shall receive a credit on its  
4 bid for:~~

5                   (A) ~~The amount representing the unpaid principal owed;~~

6                   (B) ~~Accrued interest as of the date of the sale;~~

7                   (C) ~~Advances for the payment of taxes, insurance, and  
8 maintenance of the trust property; and~~

9                   (D) ~~Costs of the sale, including reasonable trustee's and  
10 attorney's fees.~~

11           (f)(1) ~~The purchaser at the sale shall be entitled to immediate  
12 possession of the property.~~

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

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

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

21  
22           ~~18-50-108. Effect of sale.~~

23           (a)(1) ~~A sale made by a mortgagee or trustee shall foreclose and  
24 terminate all interest in the trust property of all persons to whom notice is  
25 given under § 18-50-104 and of any other person claiming by, through, or  
26 under the person. A failure to give notice to any person entitled to notice  
27 shall not affect the validity of the sale as to persons notified.~~

28           (2) ~~A person entitled to notice, but not given notice, shall  
29 have the rights of a person not made a defendant in a judicial foreclosure.~~

30           (b) ~~A sale shall terminate all rights of redemption, and no person  
31 shall have a right to redeem the trust property after a sale, notwithstanding  
32 that the deed to and possession of the trust property have yet to be  
33 delivered.~~

34           (c)(1) ~~No notice shall be required to be given to any person claiming  
35 an interest subsequent to the filing of the notice of default and intention  
36 to sell as set forth in § 18-50-103(3).~~

1           ~~(2) The filing of the notice of default and intention to sell~~  
2 ~~shall have the same force and effect as the filing of a lis pendens in a~~  
3 ~~judicial proceeding.~~

4  
5           ~~18-50-109. Disposition of proceeds of sale.~~

6           ~~The trustee or mortgagee shall apply the proceeds of the sale as~~  
7 ~~follows:~~

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

10           ~~(2) To the indebtedness owed;~~

11           ~~(3) To all persons having recorded liens subsequent to the~~  
12 ~~interest of the trustee or mortgagee as their interests may appear in the~~  
13 ~~order of the priority; and~~

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

16  
17           ~~18-50-111. Form and effect of trustee's or mortgagee's deed.~~

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

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

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

35  
36           ~~18-50-112. Deficiency judgment.~~

1           ~~(a)(1) At any time within twelve (12) months after a sale under this~~  
2 ~~chapter, a money judgment may be sought for the balance due upon the~~  
3 ~~obligation for which a mortgage or deed of trust was given as security.~~

4           ~~(2) In such action, the plaintiff shall set forth in his or her~~  
5 ~~complaint, and shall have the burden of proving, the entire amount of~~  
6 ~~indebtedness which was secured by the mortgage or deed of trust, the amount~~  
7 ~~for which the trust property was sold, and the fair market value of the trust~~  
8 ~~property at the date of sale, together with interest from the date of sale,~~  
9 ~~costs, and attorney's fees.~~

10          ~~(b) Judgment shall not exceed the lesser of the following:~~

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

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

17  
18          ~~18-50-113. Request for notice.~~

19          ~~(a) At any time subsequent to the recordation of a mortgage or deed of~~  
20 ~~trust and prior to a recording of a notice of default and intention to sell~~  
21 ~~under the mortgage or deed, any person desiring a copy of any such notice may~~  
22 ~~file for record with the recorder of the county where the trust property is~~  
23 ~~situated a duly acknowledged request for a copy of any notice of default and~~  
24 ~~intention to sell.~~

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

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

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



1  
2 ~~18-50-114. Reinstatement of mortgage or deed of trust.~~

3 ~~(a)(1) Whenever all or a portion of the principal sum of any~~  
4 ~~obligation secured by a mortgage or deed of trust, prior to the maturity date~~  
5 ~~fixed in such obligation, has become due or has been declared due by reason~~  
6 ~~of a breach or default in the performance of any obligation secured by the~~  
7 ~~mortgage or deed of trust, including a default in the payment of interest or~~  
8 ~~of any installment of principal, or by reason of a failure of the grantor to~~  
9 ~~pay, in accordance with the terms of the mortgage or deed of trust, taxes,~~  
10 ~~assessments, premiums for insurance, or advances made by the mortgagee or~~  
11 ~~beneficiary in accordance with the terms of such obligation or of such~~  
12 ~~mortgage or deed of trust, then the mortgagor or grantor or their successors~~  
13 ~~in interest in the trust property may pay, at any time subsequent to the~~  
14 ~~filing for record of a notice of default and intention to sell and prior to~~  
15 ~~the sale, to the mortgagee or beneficiary or their successor in interest the~~  
16 ~~entire amount then due under the terms of such mortgage or deed of trust,~~  
17 ~~including costs and expenses actually incurred in enforcing the terms of the~~  
18 ~~obligation and mortgage or deed of trust, and trustee's and attorney's fees~~  
19 ~~other than that portion of the principal which would not then be due had no~~  
20 ~~default occurred, and thereby cure the default theretofore existing.~~

21 ~~(2) Thereupon, all proceedings under this chapter theretofore~~  
22 ~~had or instituted shall be dismissed or discontinued, and the obligation and~~  
23 ~~mortgage or deed of trust shall be reinstated and shall be and remain in~~  
24 ~~force and effect, the same as if no acceleration had occurred.~~

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

31  
32 ~~18-50-115. Implied powers in mortgages.~~

33 ~~(a)(1) Subject to the provisions of § 18-50-114 and notwithstanding~~  
34 ~~the terms of the mortgage, a power of sale is implied in every mortgage of~~  
35 ~~real property situated in this state that is duly acknowledged and recorded.~~

36 ~~(2) The exercise of the implied power of sale shall be pursuant~~

1 ~~to the provisions of this chapter.~~

2 ~~(b) A mortgagor and his or her successor in interest shall have the~~  
 3 ~~rights and duties of a grantor, and a mortgagee and his or her successor in~~  
 4 ~~interest shall have the rights and duties of a trustee and a beneficiary.~~

5 ~~(c) The mortgagee shall comply with §§ 18-50-103—18-50-107, 18-50-~~  
 6 ~~109, and 18-50-110 [repealed], and the mortgagee's deed shall comply with §~~  
 7 ~~18-50-111.~~

8  
 9 ~~18-50-116. Miscellaneous provisions.~~

10 ~~(a) The procedures set forth in this chapter for the foreclosure of a~~  
 11 ~~mortgage or deed of trust shall not impair or otherwise affect the right to~~  
 12 ~~bring a judicial action to foreclose a mortgage or deed of trust.~~

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

16 ~~(c) The procedures set forth in this chapter shall apply only if the~~  
 17 ~~mortgagee or beneficiary is a mortgage company as defined in § 18-50-101 or~~  
 18 ~~is a bank or savings and loan. This chapter shall not apply to a mortgage or~~  
 19 ~~a deed of trust encumbering trust property used primarily for agricultural~~  
 20 ~~purposes.~~

21 ~~(d) Nothing in this chapter shall be construed to:~~

22 ~~(1) Create an implied right of redemption in favor of any~~  
 23 ~~person; or~~

24 ~~(2)(A) Impair the right of any person or entity to assert his or~~  
 25 ~~her legal and equitable rights in a court of competent jurisdiction.~~

26 ~~(B) However, a claim or defense of a person or entity~~  
 27 ~~asserting his or her or its legal and equitable rights shall be asserted~~  
 28 ~~before the sale or it is forever barred and terminated, except that the~~  
 29 ~~mortgagor may assert the following against either the mortgagee or trustee:~~

30 ~~(i) Fraud; or~~

31 ~~(ii) Failure to strictly comply with the provisions~~  
 32 ~~of this chapter, including without limitation subsection (c) of this section.~~

33 ~~(C)(i) The claims or defenses described in subdivision~~  
 34 ~~(d)(2)(B) of this section may not be asserted against a subsequent purchaser~~  
 35 ~~for value of the property.~~

36 ~~(ii) For purposes of this section, "purchaser for~~

1 value” does not include the mortgagee or the trustee.

2       ~~(e)(1) At any time prior to the delivery of the trustee’s or~~  
3 ~~mortgagee’s deed, the trustee or mortgagee shall be authorized to set aside a~~  
4 ~~sale conducted pursuant to this chapter by declaring the sale null and void~~  
5 ~~and returning the purchase price to the highest bidder without any further~~  
6 ~~liability to the bidder.~~

7       ~~(2) In this event, the trustee or mortgagee shall file an~~  
8 ~~affidavit declaring the sale null and void with the recorder of the county in~~  
9 ~~which the trust property is located, and all terms and provisions of the~~  
10 ~~mortgage or deed of trust shall be revived and reinstated as if no sale had~~  
11 ~~occurred.~~

12  
13       ~~18-50-117. Foreign corporations and other entities.~~

14       ~~No person, firm, company, association, fiduciary, or partnership,~~  
15 ~~either domestic or foreign, shall avail themselves of the procedures under~~  
16 ~~this chapter unless authorized to do business in this state.~~