

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1257

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La Costa Rickford  
Operator's Signature

10/3/03  
Date

2003 HOUSE JUDICIARY  
HB 1257

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1257

House Judiciary Committee

☐ Conference Committee

Hearing Date 2-3-03

Tape Number	Side A	Side B	Meter #
1		x	37-end
Committee Clerk Signature <i>[Signature]</i>			

**Minutes:** 12 members present, 1 member absent (Rep. Bernstein)

**Chairman DeKrey:** We will open the hearing on HB 1257.

**Rep. Klemin:** Introduced and explained the bill (see attached amendments and testimony).

**Vice Chair Maragos:** Thank you.

**Rep. Delmore:** Who's responsibility is it to let the lender know.

**Rep. Klemin:** You don't have to let the lender know, you have to record the notice.

**Rep. Delmore:** I would do that where?

**Rep. Klemin:** You would do it with County Recorder. You would record to protect your interest.

**Rep. Delmore:** Would someone direct me to do that? Would somebody make sure that I was educated enough to go through and say my son has the first mortgage, and I am doing the second mortgage, but would like to know if there is a problem with my son's.

Page 2

House Judiciary Committee  
Bill/Resolution Number HB 1257  
Hearing Date 2-3-03

**Rep. Klemm:** If I was handling the legal part for that person, we would check with the recorder's office.

**Rep. Delmore:** As far as the penalty of this goes, if then my son's property is foreclosed on, and I have the second mortgage, and the lender doesn't let me know, the only thing I am ever going to be entitled is \$500. Not anything as far as the other investment I have.

**Rep. Klemin:** You would also be the holder of the second mortgage, and could redeem the property under the mortgage foreclosure law. You could come in and pay off the whole amount that is due. We don't want to get into that stage of things, we want to keep it at the stage where the person is still paying installments.

**Rep. Onstad:** If we use contract for deed, you record that contract for deed and an unrecorded contract for deed. Now the recorded contract of deed, that's recorded.

**Rep. Klemin:** There is no requirement for the lender to give notice to an owner of the contract for deed that there is a problem.

**Rep. Onstad:** What is the difference.

**Rep. Klemin:** The difference is that a recorded contract for deed, he's not going to know that foreclosure is imminent. He is going to get served with the Summons and Complaint when the foreclosure action is actually started. The person with the unrecorded contract for deed isn't going to know at all.

**Rep. Onstad:** You can continue to have an unrecorded contract for deed?

**Rep. Klemin:** Yes.

**Rep. Wrangham:** This third person who files notice that he wants to be informed if there is a foreclosure, if in fact, there is a foreclosure, he is to receive notice; however, that notice does not

Page 3  
House Judiciary Committee  
Bill/Resolution Number HB 1257  
Hearing Date 2-3-03

have to be sent by certified or registered mail. What would be the defense of the foreclosing entity, they say I sent notice, and they say I didn't get it.

**Rep. Klemm:** The bill requires the notice be sent, it doesn't require that he receives it. All they have to do is prove that they sent it, by affidavit of service of mailing. This is not unusual.

**Rep. Delmore:** Why do you not want the person to be notified the same way as other notices.

**Rep. Klemm:** It was the choice made in this bill, the person who puts in the request, has to give his mailing address and if you mail it to that address, that should be all right. That's really all that is required.

**Vice Chair Maragos:** Thank you. Any further testimony in support or opposition?

**Jim Schlosser, ND Bankers Association:** Opposed (see attached testimony).

**Rep. Delmore:** How many cases are there, say for lending institutions, what is a reasonable number of payments missed for a foreclosure action?

**Mr. Schlosser:** It varies from institution to institution. Average of 3-4 missed payments.

**Rep. Delmore:** How many in a month for a lending institution.

**Mr. Schlosser:** In the 1980's we had quite a few, but right now, there are not many. It happens on commercial properties more than on private properties. Need a law for good and bad times.

**Rep. Delmore:** In the last paragraph on page 1, what makes you assume I would know.

**Mr. Schlosser:** If you are entering into a contract of deed you would want to have the records checked to see if there are any outstanding property taxes, etc.

**Vice Chair Maragos:** Thank you. Any further testimony. We will close the hearing.

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1257

House Judiciary Committee

☐ Conference Committee

Hearing Date 2-11-03

Tape Number	Side A	Side B	Meter #
2		xx	38.7-end
3	xx		0-8.4
Committee Clerk Signature <i>Alenose</i>			

**Minutes:** 13 members present.

**Chairman DeKrey:** What are the committee's wishes in regard to HB 1257.

**Rep. Klemin:** I move both sets of amendments.

**Rep. Maragos:** Seconded.

**Voice vote:** Carried.

**Rep. Grande:** I move a Do Pass as amended.

**Rep. Kingsbury:** Seconded.

12 YES 1 NO 0 ABSENT DO PASS AS AMENDED CARRIER: Rep. Kretschmar

30449.0103  
Title.

# 1  
Prepared by the Legislative Council staff for  
Representative Klemin  
January 28, 2003

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1257

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 32-19 of the North Dakota Century Code, relating to requests for notice of intention to foreclose.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1.** A new section to chapter 32-19 of the North Dakota Century Code is created and enacted as follows:

**Request for notice of intention to foreclose.**

1. A person, other than the <sup>legal</sup>owner of record, may record in the office of the recorder of the county in which the real estate is located a request for service of a notice of intention to foreclose a real estate mortgage or contract for deed. The request for notice must be recorded as a separate and distinct document. The request must state:
  - a. The recording data for the mortgage or contract for deed on which a notice of intention to foreclose is requested;
  - b. The names of the parties to the mortgage or contract for deed on which a notice of intention to foreclose is requested;
  - c. The name and address of the person requesting service of a notice of intention to foreclose; and
  - d. A legally sufficient description of the real property collateral affected by the real estate mortgage or contract for deed.
2. A person that records a request under subsection 1 before the date on which a notice before foreclosure required by section 32-19-20 is served is entitled to be served with a notice of intention to foreclose. The person must be served by first-class mail addressed to the person at the address shown on the recorded request. Recording a request does not affect the title to the real property collateral and does not impute knowledge to any person of an interest in the real property collateral held or claimed by the person requesting service of a notice of intention to foreclose. A person that records a request for service of a notice of intention to foreclose under this section may subsequently record an amendment withdrawing the request or supplementing or correcting the person's name, address, or other information in the request.
3. The notice of intention to foreclose required by this section must contain:
  - a. A description of the real estate;
  - b. The date of the mortgage or contract for deed;
  - c. The name and address of the recordholder of the mortgage or contract for deed; and

- d. A statement that one or more defaults exist under the mortgage or contract for deed and that if the defaults are not cured within the time permitted by law, proceedings may be commenced to foreclose the mortgage or contract for deed.
4. If foreclosure of a mortgage or contract for deed on real estate is completed and a person that had timely recorded a proper request for service of a notice of intention to foreclose under subsection 1 was not served with a notice of intention to foreclose, the person is entitled to recover five hundred dollars from the foreclosing creditor. No other remedy or sanction may be imposed against the foreclosing creditor on behalf of the person for failure to serve a notice of intention to foreclose. Failure to serve the notice does not constitute a defense to the foreclosure or invalidate the foreclosure in any way."

Renumber accordingly



Rep. Klemin  
HB 1257

Proposed amendments to proposed amendments

Add to subsection 1 as follows:

1. A person with an interest in the real estate, other than the legal owner of record

Add to the end of subsection 3.d. as follows:

The statement required by this subsection is not customer information for purposes of chapter 6-08.1.

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10/2/03  
Date

page 2

**6-08.1-01 Definitions**

**2. "Customer information" means either of the following:**

- a. Any original or any copy of any records held by a financial institution pertaining to a customer's relationship with the financial institution.**
- b. Any information derived from a record described in this subsection.**

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10/3/03  
Date

30449.0104  
Title.0200

Adopted by the Judiciary Committee  
February 11, 2003

VR  
2/12/03  
1082

HOUSE AMENDMENTS TO HOUSE BILL NO. 1257 JUD 2-12-03

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 32-19 of the North Dakota Century Code, relating to requests for notice of intention to foreclose.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1.** A new section to chapter 32-19 of the North Dakota Century Code is created and enacted as follows:

**Request for notice of intention to foreclose.**

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  - c. The name and address of the recordholder of the mortgage or contract for deed; and

Page No. 1

30449.0104

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Operator's Signature

*10/3/03*  
Date

202

- d. A statement that one or more defaults exist under the mortgage or contract for deed and that if the defaults are not cured within the time permitted by law, proceedings may be commenced to foreclose the mortgage or contract for deed. The statement required by this subsection is not customer information for the purposes of chapter 6-08.1.
4. If foreclosure of a mortgage or contract for deed on real estate is completed and a person that had timely recorded a proper request for service of a notice of intention to foreclose under subsection 1 was not served with a notice of intention to foreclose, the person is entitled to recover five hundred dollars from the foreclosing creditor. No other remedy or sanction may be imposed against the foreclosing creditor on behalf of the person for failure to serve a notice of intention to foreclose. Failure to serve the notice does not constitute a defense to the foreclosure or invalidate the foreclosure in any way."

Renumber accordingly

Date: 2/11/03  
Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1257

House Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 30449. 0104 .0200

Action Taken Do Pass As Amended

Motion Made By Rep. Grande Seconded By Rep. Kingsbury

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Vice Chairman Maragos	✓		Rep. Eckre	✓	
Rep. Bernstein	✓		Rep. Onstad	✓	
Rep. Boehning	✓				
Rep. Galvin	✓				
Rep. Grande	✓				
Rep. Kingsbury	✓				
Rep. Klemin	✓				
Rep. Kretschmar	✓				
Rep. Wrangham		✓			

Total (Yes) 12 No 1

Absent 0

Floor Assignment Rep. Kretschmar

If the vote is on an amendment, briefly indicate intent:

La Costa Rickford  
Operator's Signature

10/2/03  
Date

**REPORT OF STANDING COMMITTEE (410)**  
February 12, 2003 4:32 p.m.

Module No: HR-27-2498  
Carrier: Kretschmar  
Insert LC: 30449.0104 Title: .0200

**REPORT OF STANDING COMMITTEE**

**HB 1257: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1257 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 32-19 of the North Dakota Century Code, relating to requests for notice of intention to foreclose.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

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3. The notice of intention to foreclose required by this section must contain:
  - a. A description of the real estate;
  - b. The date of the mortgage or contract for deed;
  - c. The name and address of the recordholder of the mortgage or contract for deed; and

(2) DESK, (3) COMM

Page No. 1

HR-27-2498

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Operator's Signature

*10/3/03*  
Date

**REPORT OF STANDING COMMITTEE (410)**  
February 12, 2003 4:32 p.m.

Module No: HR-27-2498  
Carrier: Kretschmar  
Insert LC: 30449.0104 Title: .0200

- d. A statement that one or more defaults exist under the mortgage or contract for deed and that if the defaults are not cured within the time permitted by law, proceedings may be commenced to foreclose the mortgage or contract for deed. The statement required by this subsection is not customer information for the purposes of chapter 6-08.1.
4. If foreclosure of a mortgage or contract for deed on real estate is completed and a person that had timely recorded a proper request for service of a notice of intention to foreclose under subsection 1 was not served with a notice of intention to foreclose, the person is entitled to recover five hundred dollars from the foreclosing creditor. No other remedy or sanction may be imposed against the foreclosing creditor on behalf of the person for failure to serve a notice of intention to foreclose. Failure to serve the notice does not constitute a defense to the foreclosure or invalidate the foreclosure in any way."

Renumber accordingly

2003 SENATE JUDICIARY

HB 1257

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1257

Senate Judiciary Committee

☐ Conference Committee

Hearing Date 03/18/03

Tape Number	Side A	Side B	Meter #
1		X	0.0 - End
Committee Clerk Signature <i>Maria L. Solberg</i>			

Minutes: Senator John T. Traynor, Chairman, called the meeting to order. Roll call was taken and all committee members present. Sen. Traynor requested meeting starts with testimony on the bill:

**Testimony in Support of HB 1257**

Rep Lawrence Klemin - Dist 47, Introduced the Bill (meter 0.2) and Read Testimony - Attachment #1.

**Testimony in Opposition of HB 1257**

Greg Tschider - Attorney representing ND Credit Union League - Read Testimony - Attachment #2

Sen. Trenbeath discussed serving notice on intervening recorded notice persons subsection 2 covers that? The person that records the request under subsection 1, before the date on which a notice before foreclosure required by 32.19-20 is served is entitled to serve with a notice of ... -you do not have serve anyone after that date you served it on. Tschider agreed that he was

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Senate Judiciary Committee

Bill/Resolution Number HB1257

Hearing Date 03/18/03

wrong but if someone filed in between they do not get the benefit of this law? True but that is not the way you stated it rebutted Senator Thomas L. Trenbeath, you stated it as a problem of yours having to update the final work. You are exactly right... I made a mistake Senator,

Tschider responded. (meter 18)

Marilyn Foss - NDBA (meter 20.2) We recommend a do not pass. Contract for deed cancellations are in a different chapter then 32.19. Read Testimony - Attachment #3.

Sen. Traynor asked did Marilyn feel the banks would be in a difficult position of trying to comply with the law and protect the privacy of the files of its customers? Uh, yes that does summarize it and it also states that the bank has to accept payment from a second mortgage holder and that is not correct.

Don Forsberg - ND Banks (meter 29) we oppose.

Rep Klemin Responded lengthily (meter 30).

Testimony Neutral to HB 1257

None

Senator John T. Traynor, Chairman closed the hearing

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1257

Senate Judiciary Committee

☐ Conference Committee

Hearing Date 03/24/03

Tape Number	Side A	Side B	Meter #
1	X		10 - 18
Committee Clerk Signature <i>Maria L. Solberg</i>			

Minutes: Senator John T. Traynor, Chairman, called the meeting to order. Roll call was taken and all committee members present. Sen. Traynor requested meeting starts with committee work on the bill:

Discussion of opposition. Sen. Trenbeath questioned why this opposition was not heard in the house. I am not sure this is good legislation but some of the testimony we heard against this was pretty spurious to. Spoke of banks e-mail to the senators. Continuous discussion of the foreclosure process, second mortgage and current statute.

Motion Made to DO NOT PASS HB 1257 Sen. Nelson and seconded by Sen. Dever

Roll Call Vote: 4 Yes. 1 No. 1 Absent

Motion Passed

Floor Assignment: Sen. Traynor

Senator John T. Traynor, Chairman closed the hearing

Date: March 25, 2003

Roll Call Vote #: 1

**2003 SENATE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. HB 1257**

Senate JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken DO NOT PASS

Motion Made By Sen. Nelson Seconded By Sen. Dever

Senators	Yes	No	Senators	Yes	No
Sen. John T. Traynor - Chairman	X		Sen. Dennis Bercier	A	A
Sen. Stanley Lyson - Vice Chair	X		Sen. Carolyn Nelson	X	
Sen. Dick Dever	X				
Sen. Thomas L. Trenbeath		X			

Total (Yes) FOUR (4) No ONE (1)

Absent ONE (1)

Floor Assignment Sen. Traynor

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE (410)**  
March 24, 2003 12:20 p.m.

Module No: SR-52-5520  
Carrier: Traynor  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**  
HB 1257, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) recommends **DO NOT PASS** (4 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). Engrossed HB 1257 was placed on the Fourteenth order on the calendar.

(2) DESK, (3) COMM

Page No. 1

SR-52-5520

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2003 TESTIMONY

HB 1257

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Sal Costa Rickford

Date

10/3/03

IP

**HOUSE BILL 1257  
TESTIMONY OF REP. LAWRENCE R. KLEMIN  
HOUSE JUDICIARY COMMITTEE  
FEBRUARY 3, 2003**

Mr. Chairman and members of the House Judiciary Committee. I am Lawrence R. Klemm, Representative from District 47 in Bismarck. I am here today to testify in support of House Bill 1257.

I have handed out a proposed amendment to House Bill 1257, which is a hoghouse amendment that substantially revises the original bill. The bill is derived from Section 205 of the proposed Uniform Nonjudicial Foreclosure Act from the National Conference of Commissioners on Uniform State Laws.

This bill relates to alternative or secondary financing and permits a person to record a request for a notice of intention to foreclose a mortgage or contract for deed. The purpose of the bill is to allow persons with an interest in the property to be informed that a foreclosure is imminent due to a default in the payments due on a mortgage or contract for deed by the person responsible for making the payments. The intention is to protect other persons, who may actually be providing the funds for the payments, from the consequences of an acceleration of the total amount of a debt and a subsequent foreclosure.

Some examples of the interests involved include:

**Lease with an option to buy.** Many times property is sold under a lease with an option held by the tenant to buy the property. This happens mostly with residential property, but can also occur with commercial property. Often some or all of the payments made on the lease are applied to the purchase price. The lease with an option can be recorded in the real estate records, but frequently is not. The landlord may have a mortgage on the property and remains responsible for making the payments on the mortgage. The lender may not know that the landlord is no longer occupying the property. If the landlord does not pay the mortgage payments, the lender can start foreclosure proceedings. The foreclosure law requires the lender to give a borrower a notice of intention to foreclose the mortgage at least 30 days before a lawsuit to foreclose can be commenced. See Section 32-19-20 attached. The amount due on the mortgage cannot be accelerated during this 30 day period, that is, the loan remains payable in installments and the lender cannot demand that the borrower pay the full amount of the entire debt in order to stop the commencement of a foreclosure action. The tenant may not know that any of this is happening and continues to pay the landlord, who pockets the money. If the lender serves a notice on the tenant, then the tenant will know what is happening and can then take steps to protect his interest, which may include curing the default to prevent the foreclosure.

Contract for deed subject to a first mortgage. This is similar to the lease, except that the person making payments on the contract is actually buying the property and is not renting it. The payments under the contract for deed may be equal to or more than the payments due on the mortgage. The contract for deed may or may not be recorded. Sometimes the lender knows about this arrangement and sometimes not. Even if the lender knows that there is an unrecorded contract for deed subject to the first mortgage, there is nothing that requires the lender to tell the person making the payments on the contract that the original owner is not making the payments on the mortgage. When a mortgage foreclosure action starts, the buyer under a recorded contract for deed is joined as a defendant along with his seller and can eventually lose all of his investment unless he can pay off the mortgage in full. A buyer under an unrecorded contract for deed may not even know about the foreclosure until it is all over and the lender shows up to evict him. In the meantime, he has continued to make the contract payments to the seller, who pockets the money.

Second mortgages. Sometimes property is sold and the buyer doesn't have the money to make the down payment. The seller then takes a second mortgage for the amount of the down payment. If the buyer of the property doesn't pay the first mortgage and a foreclosure suit is commenced, the seller with the second mortgage is joined as a defendant and will have to pay off the entire amount of the first mortgage in order to keep his interest in the property. If the holder of the first mortgage had given notice to the holder of the second mortgage that a foreclosure was imminent, the holder of the second mortgage could have taken steps to protect his interest before the total amount due under the first mortgage was accelerated and due in full. I have seen this situation where mom and dad sell the family farm to son and then move to town or to another state. Son isn't paying the second mortgage, but mom and dad don't know he isn't paying the first mortgage either until it's too late. This can also happen with residential property with unrelated parties. Sometimes a seller just can't sell a house without engaging in some form of secondary financing like this.

In all of these cases, the idea is to protect the innocent person from losing his or her investment in property without knowing what is happening. These kinds of things can and do happen and I have seen it many times myself. This type of situation arises often enough that the National Uniform Laws Commission is taking action to develop a uniform law on the subject for states where nonjudicial foreclosures are permitted. North Dakota doesn't allow nonjudicial foreclosures except by state agencies, but the same rationale for the request for notice exists even in a judicial foreclosure.

The burden on lenders to comply with this new requirement is extremely small. Usually, when a person is in default in making payments on a mortgage, a lender may have sent several letters to the borrower and has also probably talked to the borrower about the default in payments. If payments remain in default, the matter is turned over to the lender's attorney to take action to foreclose the mortgage. The first thing that a



foreclosure attorney does is to check the title to the property, because the notice of intention to foreclose the mortgage must be served on the "title owner of record" or it is not valid. See N.D.C.C. §32-19-20 attached. I have handled hundreds of foreclosures in my career and have never sent out a notice of intention to foreclose without checking the record first to make sure who the title owner of record is and what title problems there may be that need to be resolved as a part of the foreclosure. When the record is checked, the recorded notice of the request for service under this bill will be seen and the requesting party can be sent a notice along with the defaulting borrower. It is a very simple matter with the word processing software in use today to send the requesting person a notice that is identical to the notice that is sent to the defaulting borrower, except for the detailed financial information required by Section 32-19-21(3), a copy of which is also attached.

As you can see from Section 32-19-28, copy attached, if the default is cured after the notice is sent, the mortgage is reinstated and can't be foreclosed. I have also included a copy of Section 32-19-39 so you can see that a person with an unrecorded interest is bound by a foreclosure judgment, even if he didn't know about it.

I have worked out the details of this bill with two prominent North Dakota foreclosure attorneys. One is from Fargo and has handled thousands of foreclosures over the years, primarily for residential and commercial mortgages. The other attorney is from Bismarck and has handled many farm foreclosures, among other things. They are satisfied that the terms of this bill are workable and don't provide an undue burden on the foreclosure process. This bill will help to prevent inequities from occurring and will also benefit lenders. I know that lenders don't want to go through the time and expense of a foreclosure and then have to sell the property later if they can just get paid instead. This bill may also help them to get paid.

Subsection 1 of the bill would allow a person, other than the "legal" owner of record, to record a request for a notice of intention to foreclose. The request must contain identifying information concerning the mortgage or contract for deed. The hoghouse amendment before you does not include the word "legal" before the word "owner" on the first line of subsection 1 and "legal" should be added.

Section 2 of the bill requires the lender to serve a notice of intention upon the requesting party by first class mail to the address shown on the request. I suggest that this section be amended to include the following language if there is a concern that simply informing another that a foreclosure is imminent without giving any financial details could be considered a violation of the financial disclosure laws:

The statement required by this subsection is not customer information for purposes of chapter 6-08.1.

Subsection 3 contains the requirements of the notice required by the bill. This notice does not contain any financial details, but is otherwise the same as the language that is used in the notice of intention to foreclose sent to a defaulting borrower. The contents of that notice are set out in Section 32-19-21, a copy of which is attached.

Subsection 4 requires payment of a monetary penalty of \$500 if the foreclosing lender failed to comply with the bill. However, failure to serve the notice required by this bill does not invalidate a foreclosure in any way. The sum of \$500 is the same amount used in the Uniform Nonjudicial Foreclosure Act. The amount of the penalty could be a different amount, but it should be enough to get the lender's attention in order to ensure compliance.

Please recommend a "do pass" on House Bill 1257. I would be happy to answer any questions that you may have. Thank you very much.

**NORTH DAKOTA CENTURY CODE CHAPTER 32-19  
FORECLOSURE OF REAL ESTATE MORTGAGES BY ACTION**

**32-19-20. Notice before foreclosure.**

At least thirty days and not more than ninety days before the commencement of any action or proceeding for the foreclosure of a mortgage on real estate, a written notice shall be served on the title owner of record of the real estate described in the mortgage as shown by the records in the office of the recorder of the county in which such real estate is situated.

**32-19-21. Contents of notice.**

The notice before foreclosure shall contain:

1. A description of the real estate.
2. The date and amount of the mortgage.
3. The amount due for principal, interest, and taxes paid by the owner of the mortgage, stated separately.
4. A statement that if the amount due is not paid within thirty days from the date of the mailing or service of the notice proceedings will be commenced to foreclose the mortgage.

**32-19-28. Default may be cured.**

If the title owner of record or the administrator or executor of the owner's estate, within thirty days from the service of notice before foreclosure, shall perform the conditions or comply with the provisions upon which default in the mortgage shall have occurred, such mortgage shall be reinstated and shall remain in full force and effect the same as though no default had occurred therein.

**32-19-39. Judgment and decrees to be binding against whom.**

All orders, judgments, or decrees entered in any action brought under the provisions of sections 32-19-29 through 32-19-38 shall be binding upon all persons proceeded against as defendants, whether of age or minors, and all those claiming by, through, or under them after the commencement of the action, and all persons whose interests did not appear of record in the office of the recorder, county auditor, or clerk of the district court of the county wherein said action is brought at the time of the commencement of the action.

**TESTIMONY OF NORTH DAKOTA BANKERS ASSOCIATION ON HB 1257**

Mr. Chairman, members of the Judiciary Committee, I am representing the North Dakota Bankers Association and we view this bill differently than its sponsor and feel we must bring our concerns to the committee..

We believe the bill places lenders in the middle of a difficult situation which the lender did not create and which the lender has no independent power to solve. We also think if the bill is adopted some customers may be angry because our banks will be forced, on penalty of a \$500 fine, to disclose a borrower's mortgage loan default to anybody who files a request for that information.

A loan default is information which banks, borrowers, and most people view as being private and, which in fact, according to our general counsel, banks are forbidden to disclose without the borrower's written consent because it is "customer information" under our state financial institution privacy laws, NDCC Chapter 6-08.1.

We understand the problem Representative Klemin has seen, but in the situations he's discussed, the tenant or contract for deed purchaser know or have the opportunity to know that there is a filed mortgage which is a first lien on the property and that the lease or contract for deed is subject to that mortgage. If the tenant or contract purchaser is concerned about paying the mortgage, the lease or contract for deed can provide that the payments be made directly to the lender and applied on the mortgage.

We also think that a notice from the lender will cause the recipient to go to the lender to try to find out about more about the situation. The lender can't discuss the borrower's situation without the written consent of the borrower. If the borrower wanted to talk to the tenant or contract purchaser, he doesn't need a notice from the bank to do so.

In subsection 3 the bill seems to establish a new and different form of notice before foreclosure. The new notice form appears to be a substitute for the notice which is addressed in NDCC 32-19-21. If that is correct, then the borrower will get less information about correcting a default than the law now requires, as the Notice must contain the amount due for principle, interest and taxes paid. If the banker chooses the wrong form of notice before foreclosure the bank is either going to be hit with a \$500 penalty for failure to give the third party notice or jeopardize the foreclosure because the notice didn't give the information required by 32-19-21. It is also possible that two different notices will be required, one for the borrower, and one for the party filing the notice.

The bill will require lenders to now have title work done before a notice before foreclosure is sent in order to determine whether anyone has filed the request for notice before foreclosure. This expense will have to be paid for by the borrower, if the default is cured or the property redeemed.

Will the bill leave lenders open for abuse from massive filings like occurred in the 1980's with the posse committatus? We also take exception to the \$500 penalty in Section 4 of the amendments which requires a lender to pay a third party if for some reason the notice of intention to foreclose is not provided to a person recording a notice in order to assist in resolving an issue between the third party and the borrower. For these reasons the North Dakota Bankers Association, Independent Community Bankers of North Dakota and the North Dakota Credit Union League oppose HB1257.

Thank you.

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La Costa Rickford  
Operator's Signature

10/3/03  
Date



Representative Lawrence R. Klemm  
District 47  
1709 Montego Drive  
Bismarck, ND 58501

## NORTH DAKOTA HOUSE OF REPRESENTATIVES

STATE CAPITOL  
600 EAST BOULEVARD  
BISMARCK, ND 58505-0360



COMMITTEES:  
Judiciary  
Government and  
Veterans Affairs

### HOUSE BILL 1257 TESTIMONY OF REP. LAWRENCE R. KLEMM SENATE JUDICIARY COMMITTEE MARCH 18, 2003

Mr. Chairman and members of the Senate Judiciary Committee. I am Lawrence R. Klemm, Representative from District 47 in Bismarck. I am here today to testify in support of House Bill 1257.

This bill relates to alternative or secondary financing and permits a person to record a request for a notice of intention to foreclose a mortgage or contract for deed. The bill is derived from Section 205 of the proposed Uniform Nonjudicial Foreclosure Act from the National Conference of Commissioners on Uniform State Laws. The purpose of the bill is to allow persons with an interest in the property to be informed that a foreclosure is imminent due to a default in the payments due on a mortgage or contract for deed by the person responsible for making the payments. The intention is to protect other persons, who may actually be providing the funds for the payments, from the consequences of an acceleration of the total amount of a debt and a subsequent foreclosure.

Some examples of the interests involved include:

Lease with an option to buy. Many times property is sold under a lease with an option held by the tenant to buy the property. This happens mostly with residential property, but can also occur with commercial property. Often some or all of the payments made on the lease are applied to the purchase price. The lease with an option can be recorded in the real estate records, but frequently is not. The landlord may have a mortgage on the property and remains responsible for making the payments on the mortgage. The lender may not know that the landlord is no longer occupying the property. If the landlord does not pay the mortgage payments, the lender can start foreclosure proceedings. The foreclosure law requires the lender to give a borrower a notice of intention to foreclose the mortgage at least 30 days before a lawsuit to foreclose can be commenced. See Section 32-19-20 attached. The amount due on the mortgage cannot be accelerated during this 30 day period, that is, the loan remains payable in installments and the lender cannot demand that the borrower pay the full amount of the entire debt in order to stop the commencement of a foreclosure.

*La Costa Rickford*  
Operator's Signature

*10/3/03*  
Date

action. The tenant may not know that any of this is happening and continues to pay the landlord, who pockets the money. If the lender serves a notice on the tenant, then the tenant will know what is happening and can then take steps to protect his interest, which may include curing the default to prevent the foreclosure.

**Contract for deed subject to a first mortgage.** This is similar to the lease, except that the person making payments on the contract is actually buying the property and is not renting it. The payments under the contract for deed may be equal to or more than the payments due on the mortgage. The contract for deed may or may not be recorded. Sometimes the lender knows about this arrangement and sometimes not. Even if the lender knows that there is an unrecorded contract for deed subject to the first mortgage, there is nothing that requires the lender to tell the person making the payments on the contract that the original owner is not making the payments on the mortgage. When a mortgage foreclosure action starts, the buyer under a recorded contract for deed is joined as a defendant along with his seller and can eventually lose all of his investment unless he can pay off the mortgage in full. A buyer under an unrecorded contract for deed may not even know about the foreclosure until it is all over and the lender shows up to evict him. In the meantime, he has continued to make the contract payments to the seller, who pockets the money.

**Second mortgages.** Sometimes property is sold and the buyer doesn't have the money to make the down payment. The seller then takes a second mortgage for the amount of the down payment. If the buyer of the property doesn't pay the first mortgage and a foreclosure suit is commenced, the seller with the second mortgage is joined as a defendant and will have to pay off the entire amount of the first mortgage in order keep his interest in the property. If the holder of the first mortgage had given notice to the holder of the second mortgage that a foreclosure was imminent, the holder of the second mortgage could have taken steps to protect his interest before the total amount due under the first mortgage was accelerated and due in full. I have seen this situation where mom and dad sell the family farm to son and then move to town or to another state. Son isn't paying the second mortgage, but mom and dad don't know he isn't paying the first mortgage either until it's too late. This can also happen with residential property with unrelated parties. Sometimes a seller just can't sell a house without engaging in some form of secondary financing like this.

In all of these cases, the idea is to protect the innocent person from losing his or her investment in property without knowing what is happening. These kinds of things can and do happen and I have seen it several times myself. This type of situation arises often enough that the National Uniform Laws Commission is taking action to develop a uniform law on the subject for states where nonjudicial foreclosures are permitted. North Dakota doesn't allow nonjudicial foreclosures except by state agencies, but the same rationale for the request for notice exists even in a judicial foreclosure.



The burden on lenders to comply with this new requirement is extremely small. Usually, when a person is in default in making payments on a mortgage, a lender may have sent several letters to the borrower and has also probably talked to the borrower about the default in payments. If payments remain in default, the matter is turned over to the lender's attorney to take action to foreclose the mortgage. The first thing that a foreclosure attorney does is to check the title to the property, because the notice of intention to foreclose the mortgage must be served on the "title owner of record" or it is not valid. See N.D.C.C. §32-19-20 attached. I have handled hundreds of foreclosures in my career and have never sent out a notice of intention to foreclose without checking the record first to make sure who the title owner of record is and what title problems there may be that need to be resolved as a part of the foreclosure. When the record is checked, the recorded notice of the request for service under this bill will be seen and the requesting party can be sent a notice along with the defaulting borrower. It is a very simple matter with the word processing software in use today to send the requesting person a notice that is identical to the notice that is sent to the defaulting borrower, except for the deletion of the detailed financial information required by Section 32-19-21(3), a copy of which is also attached.

Sometimes a lender doesn't use an attorney to send out the notice of intention to foreclose and doesn't check the record title before sending it. However, at some point before the foreclosure action starts, the record will have to be checked to determine if there are any junior lienholders or judgment creditors who will need to be joined in the action as defendants. At this point, if there is a request for notice on file with the County Recorder, all that will happen is that the lender will have to send out notice to the requesting person before starting the foreclosure.

As you can see from Section 32-19-28, copy attached, if the default is cured after the notice is sent, the mortgage is reinstated and can't be foreclosed. I have also included a copy of Section 32-19-39 so you can see that a person with an unrecorded interest is bound by a foreclosure judgment, even if he didn't know about it.

I have worked out the details of this bill with two prominent North Dakota foreclosure attorneys. One is from Fargo and has handled thousands of foreclosures over the years, primarily for residential and commercial mortgages. The other attorney is from Bismarck and has handled many farm foreclosures, among other things. They are satisfied that the terms of this bill are workable and don't provide an undue burden on the foreclosure process. This bill will help to prevent inequities from occurring and will also benefit lenders. I know that lenders don't want to go through the time and expense of a foreclosure and then have to sell the property later if they can just get paid instead. This bill may also help them to get paid.

Subsection 1 of the bill would allow a person, other than the "legal" owner of record, to record a request for a notice of intention to foreclose. The request must

contain identifying information concerning the mortgage or contract for deed.

Section 2 of the bill requires the lender to serve a notice of intention upon the requesting party by first class mail to the address shown on the request.

Subsection 3 contains the requirements of the notice required by the bill. This notice does not contain any financial details, but is otherwise the same as the language that is used in the notice of intention to foreclose sent to a defaulting borrower. The contents of that notice are set out in Section 32-19-21, a copy of which is attached.

Subsection 4 requires payment of a monetary penalty of \$500 if the foreclosing lender failed to comply with the bill. However, failure to serve the notice required by this bill does not invalidate a foreclosure in any way. The sum of \$500 is the same amount used in the Uniform Nonjudicial Foreclosure Act. The amount of the penalty could be a different amount, but it should be enough to get the lender's attention in order to ensure compliance.

I ask you to recommend a "do pass" on House Bill 1257. I would be happy to answer any questions that you may have. Thank you very much.

**NORTH DAKOTA CENTURY CODE CHAPTER 32-19  
FORECLOSURE OF REAL ESTATE MORTGAGES BY ACTION**

**32-19-20. Notice before foreclosure.**

At least thirty days and not more than ninety days before the commencement of any action or proceeding for the foreclosure of a mortgage on real estate, a written notice shall be served on the title owner of record of the real estate described in the mortgage as shown by the records in the office of the recorder of the county in which such real estate is situated.

**32-19-21. Contents of notice.**

The notice before foreclosure shall contain:

1. A description of the real estate.
2. The date and amount of the mortgage.
3. The amount due for principal, interest, and taxes paid by the owner of the mortgage, stated separately.
4. A statement that if the amount due is not paid within thirty days from the date of the mailing or service of the notice proceedings will be commenced to foreclose the mortgage.

**32-19-28. Default may be cured.**

If the title owner of record or the administrator or executor of the owner's estate, within thirty days from the service of notice before foreclosure, shall perform the conditions or comply with the provisions upon which default in the mortgage shall have occurred, such mortgage shall be reinstated and shall remain in full force and effect the same as though no default had occurred therein.

**32-19-39. Judgment and decrees to be binding against whom.**

All orders, judgments, or decrees entered in any action brought under the provisions of sections 32-19-29 through 32-19-38 shall be binding upon all persons proceeded against as defendants, whether of age or minors, and all those claiming by, through, or under them after the commencement of the action, and all persons whose interests did not appear of record in the office of the recorder, county auditor, or clerk of the district court of the county wherein said action is brought at the time of the commencement of the action.

Att #2

# TESTIMONY IN OPPOSITION OF ENGROSSED HOUSE BILL NO. 1257

GREG TSCHIDER, ND CREDIT UNION LEAGUE

Mr. Chairman and Members of the Senate Judiciary Committee, I am Greg Tschider and I represent the North Dakota Credit Union League.

This bill imposes on financial institutions a burden that results from the actions of third parties after the financial institution has completed the mortgage process. Thus, at the time of the granting of the mortgage, the financial institution has no knowledge and no way of determining what lies ahead.

This bill permits any third party "with an interest in the real estate" to record a notice stating that the third party desires to be informed of a default in the debtor's loan. This bill presents the following problems:

1. What is the definition of "a person with an interest in the real estate"? Is that a person who has a month to month lease? Is that a person that the landlord is attempting to evict? Is that a neighbor who has a dispute over the location of a fence line or just a neighbor who desires to buy the land or is just snoopy?

La Costa Rickford  
Operator's signature

10/3/03  
Date

2. Kind of Notice. The present law requires that in the event of default in the mortgage payment, the holder of the mortgage must give the debtor a notice reciting a default has occurred and that the debtor has 30 days to cure the default. The notice must describe the mortgage, state the amount that must be paid to cure the default, and also must specify how much is still owing on the total debt for principal and interest.

This bill apparently requires a different notice. I presume that the notice is different because of privacy concerns, or is this new notice intended to replace the old notice?

3. Who pays for the additional costs involved in this notice?

Under existing law, the notice of default is sent to the borrower. The proposed bill obviously requires that the financial institution search the public record to determine who has recorded the requests for notice. Who pays for the search? It appears that the financial institution would be required to update the abstract before sending out the notices. This bill does not permit the financial institution to pass those costs on to the debtors or the persons who have filed the notices. Why should financial institutions be required to pay the costs?

4. Privacy. Assuming that the notice is sent to a third party, it is assumed that the third party will then contact the financial institution and request financial information such as how much is delinquent, when the payments are due, and how much is owing on the loan. Under the privacy law, this information cannot be released. So what is the benefit to the third party of this notice?

5. Third parties have the responsibility to protect themselves.

Normally if a person is buying real estate on contract for deed, a title search is done. The buyer will then know that a mortgage is on the property. In the contract, the buyer can provide that his or her payments would be paid to the financial institution. Or, in the event of a lease, the lease can also provide that the lease payments be paid to the financial institutions.

In summary, this bill imposes an unreasonable burden on the holder of a mortgage. Therefore, it is respectfully requested that this Committee give this bill a "DO NOT PASS".

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AH # 3

TESTIMONY OF MARILYN FOSS (NDBA) OPPOSING HB 1257

Mr. Chairman, members of the Judiciary Committee, I am Marilyn Foss, general counsel for the North Dakota Bankers Association. Even though the House amended the bill in an effort to address some of the problems we pointed out, we are concerned about it and urge this committee to recommend a Do Not Pass.

The focal point of this bill is its requirement for a bank or other lender to notify a person other than the borrower that the borrower has defaulted on a loan and may be facing foreclosure. Although the bill excludes its required written notice from the protection which the banking laws give to "customer information", NDBA regards the notice to a third party as, nonetheless, breaching the legitimate privacy interests of the borrower without adequate reason. So far as I can tell, the major effect of the bill, if passed, will be to place the lender in the middle of a situation 1) the lender did not create, 2) and has no independent power to solve, 3) in order to address a risk which the tenant, contract for deed vendee, or holder of a second mortgage knowingly took on and could have easily addressed in that person's contract with the borrower and for which there is no remedy which doesn't already exist in our law.

Mortgages are filed in the public records; any person who buys or rents land which is subject to a prior mortgage or who sells land and takes a second mortgage as part of the deal knows or can determine that there is debt which is first in line to be paid and which may result in a foreclosure and loss of an investment if it is not paid by the borrower who is the lessor or seller. If the tenant, contract for deed vendee or second mortgage holder actually wants to protect himself by making sure the payments are

applied to the mortgage, he or she may make contractual arrangements to pay the debt directly to the lender.

We do also object to the bill for the "typical" reasons. . . it does require more paperwork and increases costs for mortgage lenders and borrowers. However, it also imposes a \$500 penalty on banks to address a problem which is not of our making. However there is more to our opposition than that. If this bill is enacted, the notice it mandates will lead the recipient to think s/he should contact the bank and that there must be a remedy which the recipient is entitled to exercise. Otherwise, why would the notice be given? Yet, that's simply not correct.

When the recipient contacts the bank, the bank won't be able to talk to him about the situation because of the privacy laws. ( Or, perhaps the bank will be confused and think it can talk freely, thereby violating the privacy laws and exposing itself to a \$1000 penalty per conversation.) No doubt the notice recipient will be confused and frustrated angry at the bank when it refuses to discuss the situation. The borrower will also likely be angry at the bank. After all, if the borrower wanted the recipient to know about the default or to enlist his help in correcting the problem, the borrower didn't need the bank to make the contact by sending out a notice.

Current law requires a detailed notice before foreclosure to the borrower. The point of the notice before foreclosure is to give a borrower a chance to cure the default or defaults and avoid foreclosure. Some borrowers actually receive several notices before foreclosure during the multi-year term of a typical mortgage loan and are able to correct the problems. If the borrower doesn't cure, the lender may accelerate the mortgage debt



and require payment in full. The third party who claims an interest in the land doesn't possess a right to cure. So, there's actually no protection and no remedy to be achieved by this forced disclosure of the borrower's situation to the third party.

The bill also has other problems:

It's not clear in the bill whether the new notice, with its new contents, replaces the current notice or is an additional notice. Yet, if the banker is wrong about this the penalty is either a defective foreclosure or a \$500 fine.

The bill imposes real costs which have to be borne by the borrower on cure or as part of the foreclosure process. With this bill every notice before foreclosure will have to be preceded by title work. That's not necessary now and it's expensive. It can also make lenders less willing to terminate the process on a negotiated basis such as a restructuring which is short of full cure because the process has been made so cumbersome.

The bill does nothing to define the "interest" a person must have to be eligible to file the request for notice and thus makes it easy for abusive notices to be filed. Think Posse Comitatus.

It should also be noted that the Uniform Non Judicial Foreclosure Act has not been enacted in any state and that banks other than the Bank of North Dakota and other private lenders can not use non-judicial foreclosure in North Dakota. In North Dakota, a person claiming an interest in property may file the claim and receive notice of the foreclosure under current law.

And, last but not least, this bill means that everyone who files the request for notice will be a defendant in the foreclosure proceeding if there is one. Frankly, I

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suspect some of them may not appreciate in the legal notice section of the newspaper in the capacity of defendant in a foreclosure proceeding.

With that I'd ask you to recommend a Do Not Pass and attempt to answer your questions. Thank you.

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