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Bill Analysis
Legislative Service Commission

H.B. 668

123rd General Assembly
(As Introduced)

Reps. Tiberi, Goodman, Trakas, Britton, Terwilleger, Taylor, Buchy, Schuler

BILL SUMMARY

- Modifies the Real Property law relative to the effectiveness of recording a mortgage that is improperly witnessed, acknowledged, or signed.
- States that the bill is retroactive in its operation and remedial in its application to improperly witnessed mortgages.
- Declares an emergency.

CONTENT AND OPERATION

Defective witnessing, acknowledgment, or signing of a recorded mortgage

(sec. 5301.234(A) and (B))

Existing law

Generally, the recording of encumbrances on real property, including a mortgage, in the records of a county recorder is necessary to establish priority of creditors rights in that real property and must be properly extinguished to establish marketable title in the real property. Under current law, a recorded mortgage is "irrebuttably presumed to be properly executed, regardless of any actual or alleged defect in witnessing or acknowledgment on a mortgage," unless (1) the mortgagor, "under oath denies signing" it, or (2) the "mortgagor is not available, but there is other sworn evidence of fraud upon the mortgagor." In addition, existing law provides that evidence of an actual or alleged witnessing or acknowledgment defect is not evidence of fraud upon the mortgagor and does not rebut the presumption that a mortgage was properly executed.

Current law also specifies that the recording of a mortgage is constructive notice of the mortgage to all persons, including subsequent (1) bona fide purchasers or (2) holders of any interest in the property. And "an actual or alleged

defect in the witnessing or acknowledgment on the recorded mortgage does not render the mortgage ineffective for purposes of constructive notice."

The bill

The bill eliminates current law described above and instead provides that a recorded mortgage that is not properly witnessed is not defective and is valid, effective, and deemed properly executed, unless (1) the mortgagor did not sign the mortgage, or (2) the mortgagor's signature was obtained by fraud. In addition, the bill provides that a recorded mortgage that is not properly witnessed in the office of the county recorder of the county in which the property that is the subject of the mortgage is situated does not provide constructive notice to a subsequent bona fide purchaser or subsequent holder of an interest in the property, if (1) the mortgagor did not sign the mortgage, or (2) the mortgagor's signature was obtained by fraud.

Application of the bill

(sec. 5301.234(C) and (D); Sections 3 and 4)

The bill states the general rule that it applies to all recorded mortgages that are in the possession, custody, or control of a county recorder on or after its effective date, regardless of whether the mortgage was executed or recorded prior to or on or after its effective date (sec. 5301.234(C)). This general rule, however, is modified by two other provisions of the bill. First, the bill provides that it is retroactive in its operation and *remedial* in its application to improperly witnessed mortgages that were signed or recorded prior to the bill's effective date (Section 3). Relatedly, a second provision of the bill specifies that it does not affect *accrued substantive rights or vested rights* that came into existence prior to the bill's effective date (sec. 5301.234(D)). (See **COMMENT.**)

Finally, the bill declares that it is an emergency measure to take immediate effect because it is necessary "to ensure that hundreds of Ohio families do not lose their homes unnecessarily."

COMMENT

The two modifying provisions (Section 3 and sec. 5301.234(D)) to the general rule (sec. 5301.234(C)) appear to address section 1.48 of the Revised Code (which provides a presumption of prospective operation of statutes unless expressly made retroactive) and Section 28 of Article II of the Ohio Constitution (which generally prohibits the General Assembly from passing "retroactive laws). That section of the Constitution has been construed, however, as prohibiting only those retroactive laws that *adversely* affect *substantive rights, duties, or*

obligations, and not those retroactive laws that are purely *remedial* in nature and pertain to the methods of enforcement of rights or obtaining redress. The precise relationship between, and the application of, the modifying provisions and the general rule may depend on the circumstances of a particular case, including the terms and conditions of the mortgage.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	04-18-00	p. 1837

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