

SENATE BILL 349

Introduced by Halligan, et al.

2/06	Introduced
2/06	Referred to Business & Industry
2/14	Hearing
	Died in Committee

1 *Amended* BILL NO. *349*  
2 INTRODUCED BY *Nathan Sweeney*  
3 BY REQUEST OF THE GOVERNOR  
4

5 A BILL FOR AN ACT ENTITLED: "AN ACT TO AMEND THE SMALL  
6 TRACT FINANCING ACT OF MONTANA TO ALLOW A DEFICIENCY  
7 JUDGMENT UPON JUDICIAL FORECLOSURE ON A TRUST INDENTURE; AND  
8 AMENDING SECTIONS 71-1-302 THROUGH 71-1-305, 71-1-312,  
9 71-1-317, AND 71-1-320, MCA."  
10

11 WHEREAS, it is the intent of the Legislature to  
12 expressly overrule First State Bank of Forsyth v.  
13 Chunkapura, \_\_Mont.\_\_, 734P.2d 1203(1987).  
14

15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

16 **Section 1.** Section 71-1-302, MCA, is amended to read:

17 "71-1-302. Policy. Because the financing of homes and  
18 business expansion is essential to the development of the  
19 state of Montana and because such financing, usually  
20 involving areas of real estate of not more than 15 acres,  
21 has been restricted by the laws relating to mortgages of  
22 real property and court decisions construing this part and  
23 because more ~~such~~ financing of homes and business expansion  
24 is available if the parties can use security instruments and  
25 procedures which are both flexible and not subject to all

1 the provisions of the mortgage laws, it is hereby--declared  
2 to--be the public policy of the state of Montana to permit  
3 the use of trust indentures for estates in real property of  
4 not more than 15 acres as hereinafter provided."

5 **Section 2.** Section 71-1-303, MCA, is amended to read:

6 "71-1-303. Definitions. As used in this part, unless  
7 the context requires otherwise the following definitions  
8 apply:

9 (1) "Advertisement and sale" means a foreclosure  
10 conducted nonjudicially in accordance with the provisions of  
11 71-1-315. The term may not be construed to refer to an  
12 execution sale accomplished after the entry of judgment on  
13 any note secured by a trust indenture.

14 (2) "Beneficiary" means the person named or  
15 otherwise designated in a trust indenture as the person for  
16 whose benefit a trust indenture is given or his successor in  
17 interest, and who shall not be the trustee.

18 (3) "Fifteen acres" means 15 acres of land.

19 (4) "Grantor" means the person conveying real  
20 property by a trust indenture as security for the  
21 performance of an obligation.

22 (5) "Trust indenture" means an indenture executed  
23 in conformity with this part and conveying real property to  
24 a trustee in trust to secure the performance of an  
25 obligation of the grantor or other person named in the

1 indenture to a beneficiary and includes any instrument  
2 designated as a deed of trust.

3 {5}(6) "Trustee" means a person to whom the legal  
4 title to real property is conveyed by a trust indenture or  
5 his successor in interest."

6 **Section 3.** Section 71-1-304, MCA, is amended to read:

7 "71-1-304. Trust indentures authorized -- power of  
8 sale for breach in trustee. (1) Transfers in trust of any  
9 interest in real property of an area not exceeding 15 acres  
10 may be made to secure the performance of an obligation of a  
11 grantor or any other person named in the indenture to a  
12 beneficiary provided that it ~~shall--be~~ is unlawful to  
13 substitute a trust indenture for any mortgage in existence  
14 on March 5, 1963.

15 (2) Where any transfer in trust of any interest in  
16 real property is ~~hereafter~~ made to secure the performance of  
17 such an obligation, a power of sale is ~~hereby~~ conferred upon  
18 the trustee to be exercised after a breach of the obligation  
19 for which ~~such the~~ transfer is security.

20 (3) A trust indenture executed in conformity with this  
21 part may be foreclosed by advertisement and sale in the  
22 manner ~~hereinafter~~ provided in this part or, at the option  
23 of the beneficiary, by judicial procedure as provided by law  
24 for the foreclosure of mortgages on real property. These  
25 remedies are entirely separate and distinct. All rights

1 granted to both mortgagor and mortgagee, including  
2 mortgagor's right of redemption and mortgagee's right to  
3 docket a deficiency judgment, apply when a trust indenture  
4 is judicially foreclosed. The power of sale may be exercised  
5 by the trustee without express provision ~~therefor~~ in the  
6 trust indenture.

7 (4) Where the trust indenture states that the real  
8 property involved does not exceed 15 acres, ~~such the~~  
9 statement ~~shall--be~~ is binding upon all parties and  
10 conclusive as to compliance with the provisions of this part  
11 relative to the power to make a transfer, trust, and power  
12 of sale."

13 **Section 4.** Section 71-1-305, MCA, is amended to read:

14 "71-1-305. Trust indenture considered to be mortgage  
15 on real property. A trust indenture is ~~deemed~~ considered to  
16 be a mortgage on real property and is subject to all laws  
17 relating to mortgages on real property except to the extent  
18 that ~~such mortgage~~ laws are inconsistent with the provisions  
19 of this part, in which event the provisions of this part  
20 shall control. This section does not preclude or limit the  
21 grantor's rights of redemption in the event of a judicial  
22 foreclosure, nor does it in any manner limit the  
23 beneficiary's right to obtain a deficiency judgment if the  
24 trust indenture is judicially foreclosed. For the purpose of  
25 applying the mortgage laws, the grantor in a trust indenture

1 is ~~deemed~~ considered the mortgagor and the beneficiary is  
2 ~~deemed~~ considered the mortgagee."

3 **Section 5.** Section 71-1-312, MCA, is amended to read:

4 "71-1-312. Discontinuance of foreclosure proceedings  
5 when entire amount of default paid. (1) Whenever all or a  
6 portion of any obligation secured by a trust indenture has,  
7 prior to the maturity date fixed in such the obligation,  
8 become due or been declared due by reason of a breach or  
9 default in the performance of any obligation secured by the  
10 trust indenture, including a default in the payment of  
11 interest or of any installment of principal or by reason of  
12 failure of the grantor to pay, in accordance with the terms  
13 of such the trust indenture, taxes, assessments, premiums  
14 for insurance, or advances made by the beneficiary in  
15 accordance with the terms of such the obligation or of such  
16 the trust indenture, the grantor or his successor in  
17 interest in the trust property or any part of the trust  
18 property thereof or any other person having a subordinate  
19 lien or encumbrance of record thereon on the trust property  
20 or any beneficiary under a subordinate trust indenture, at  
21 any time prior to the time fixed by the trustee for the  
22 trustee's sale if the power of sale is to be exercised, may  
23 pay to the beneficiary or his successor in interest the  
24 entire amount then due under the terms of such the trust  
25 indenture and the obligation secured by the trust indenture

1 thereby (including costs and expenses actually incurred and  
2 reasonable trustee's and attorney's fees) other than such  
3 the portion of the principal ~~as that~~ would not then be due  
4 had no default occurred and thereby cure the default  
5 theretofore-existing.

6 (2) Thereupon Upon payment under subsection (1), all  
7 prior proceedings ~~theretofore~~ had or instituted to foreclose  
8 the trust indenture shall be canceled and the obligation and  
9 the trust indenture shall be reinstated and shall be and  
10 remain in force and effect the same as if no such  
11 acceleration had occurred.

12 (3) If the default is cured and the obligation and the  
13 trust indenture are reinstated in the manner hereinabove  
14 provided in this section, the beneficiary or his assignee  
15 shall, on demand of any person having an interest in the  
16 trust property, execute, acknowledge, and deliver to him a  
17 request that the trustee execute, acknowledge, and deliver a  
18 cancellation of the recorded notice of sale under such the  
19 trust indenture.

20 (4) Any beneficiary under a trust indenture or his  
21 assignee who, for a period of 30 days after such demand,  
22 refuses to request the trustee to execute, acknowledge, and  
23 deliver such the cancellation ~~shall--be~~ is liable to the  
24 person entitled to such the request for all damages  
25 resulting from such the refusal.

(5) A cancellation of a recorded notice of sale shall, when executed and acknowledged, be entitled to be recorded and shall be sufficient if it sets forth a reference to the trust indenture and the book and page where ~~the same~~ it is recorded, a reference to the notice of sale and to the book and page where ~~the same~~ it is recorded, and a statement that ~~such the~~ notice of sale is canceled. The cancellation of a foreclosure by advertisement and sale does not in any circumstance preclude either the subsequent filing of a nonjudicial foreclosure by advertisement and sale or a subsequent lawsuit to foreclose by judicial procedure."

**Section 6.** Section 71-1-317, MCA, is amended to read:

"71-1-317. Deficiency judgment not allowed upon nonjudicial foreclosure. (1) When a trust indenture executed in conformity with this part is foreclosed nonjudicially by advertisement and sale, no other or further action, suit, or proceedings ~~shall~~ may be taken or judgment entered for any deficiency against the grantor or his surety, guarantor, or successor in interest, if any, on the note, bond, or other obligation secured by the trust indenture or against any other person obligated on ~~such the~~ note, bond, or other obligation. This section does not limit the beneficiary's right to obtain a deficiency judgment against a grantor if a trust indenture is judicially foreclosed. Section 71-1-232 controls if a trust indenture secures a purchase price

obligation due to a vendor of the real property.

(2) Whenever multiple tracts or parcels of property, not exceeding 15 acres in the aggregate, are transferred in trust to secure a debt, a single nonjudicial foreclosure of the separate tracts or parcels may be conducted. The provisions of subsection (1) do not apply until the nonjudicial foreclosure is concluded."

**Section 7.** Section 71-1-320, MCA, is amended to read:

"71-1-320. Trustees' fees and attorneys' fees. Reasonable trustees' fees and attorneys' fees to be charged to the grantor in the event of foreclosure by advertisement and sale ~~shall~~ may not exceed, in the aggregate, 5% of the amount due on the obligation, both principal and interest, at the time of the trustee's sale. If prior to the trustee's sale the obligation and the trust indenture ~~shall--be~~ are reinstated in accordance with provisions of 71-1-312, the reasonable trustees' fees and attorneys' fees to be charged to the grantor ~~shall~~ may not exceed the lesser of \$1,000 or ~~1% 2%~~ of the amount due on the obligation, both principal and interest, at the time of default. Costs advanced for abstracts, title reports, recording fees, and other similar expenses incurred in the foreclosure process may not be considered as fees. In no event shall trustees' fees and attorneys' fees be charged to a grantor on account of any services rendered prior to the commencement of foreclosure."

-End-