

# Bill as Introduced

SB 332 - AS INTRODUCED

2010 SESSION

10-2875

08/10

SENATE BILL       **332**

AN ACT            relative to recording requirements for mortgage and foreclosure notices.

SPONSORS:        Sen. Bragdon, Dist 11

COMMITTEE:       Commerce, Labor and Consumer Protection

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ANALYSIS

This bill specifies what information shall be included in notice of sale of a mortgage.

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Explanation:     Matter added to current law appears in *bold italics*.  
                  Matter removed from current law appears [~~in brackets and struck through~~].  
                  Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Ten*

AN ACT relative to recording requirements for mortgage and foreclosure notices.

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

1 1 New Paragraph; Sale Under the Power. Amend RSA 479:25 by inserting after paragraph II-a  
2 the following new paragraph:

3 II-b. The notice to the mortgagor and any person entitled to receive notice under paragraph  
4 II shall include:

5 (a) The names and addresses of all persons who hold legal title to the debt secured by the  
6 mortgage;

7 (b) The names of all title holders of record of the real estate;

8 (c) A legal description of the real estate sufficient to identify it with reasonable certainty;

9 (d) A street address or common description of the location of the real estate;

10 (e) Identification of the mortgage and note sought to be foreclosed;

11 (f) The name, address, and phone number of the servicer, servicer's agent, or servicer's  
12 representative;

13 (g) The name, address, and phone number of a natural person, 21 years of age or older,  
14 who can accept service of process for the creditor and mortgagee; and

15 (h) The name, address, and phone number of a natural person, 21 years of age or older,  
16 who can be contacted by the town, city, municipality, or state to answer questions relating to the  
17 maintenance of the real estate and any improvements thereon.

18 2 New Paragraph; Sale Under the Power. Amend RSA 479:25 by inserting after paragraph IV  
19 the following new paragraph:

20 V. The power shall vest only in the person who holds legal title to the debt secured by the  
21 mortgage. For purposes of this section, nominees do not hold legal title. No foreclosure sale shall be  
22 valid if the power is exercised by a person who does not hold legal title to the debt secured by the  
23 mortgage.

24 3 New Section; Sale Under the Power. Amend RSA 479 by inserting after section 10 the  
25 following new section:

26 479:10-a Transfers or Assignments. Transfers or assignments of legal title in debt secured by  
27 real property located in the state of New Hampshire shall be recorded in the appropriate registry  
28 prior to the creditor enforcing its rights and remedies under the note, including foreclosure.

29 4 Effective Date. This act shall take effect 60 days after its passage.

# Committee Minutes

**SENATE CALENDAR NOTICE  
COMMERCE, LABOR AND CONSUMER PROTECTION**

*attendance*

- ✓ Senator Margaret Hassan Chairman
- ✓ Senator Betsi DeVries V Chairman
- ✓ Senator Deborah Reynolds
- ✓ Senator Jacalyn Cilley
- ✓ Senator Peter Bragdon
- ✓ Senator Sheila Roberge

|                                       |   |
|---------------------------------------|---|
| For Use by Senate Clerk's Office ONLY |   |
| <input type="checkbox"/>              | Bill Status                                   |
| <input type="checkbox"/>              | Docket  |
| <input type="checkbox"/>              | Calendar                                      |
| Proof: <input type="checkbox"/>       | Calendar <input type="checkbox"/> Bill Status |

**Date: January 28, 2010**

**HEARINGS**

**Tuesday**

**2/2/2010**

COMMERCE, LABOR AND CONSUMER PROTECTION

LOB 102

8:30 AM

(Name of Committee)

(Place)

(Time)

**EXECUTIVE SESSION MAY FOLLOW**

**Comments:** SB 368 was previously recessed on 1/26/10.

- 8:30 AM SB368 relative to notice required under the retail selling statute.
- ✓ 8:45 AM SB332 relative to recording requirements for mortgage and foreclosure notices.
- 9:00 AM SB340 relative to using credit rating for purposes of automobile and homeowner insurance.
- 9:15 AM SB401 relative to the safety of retirement accounts.
- 9:30 AM SB429 relative to disclosure of finance charges.

**Sponsors:**

**SB368**

Sen. Jacalyn Cilley  
Rep. David Nixon

Sen. Deborah Reynolds  
Rep. Anthony DiFruscia

Sen. Bette Lasky

Sen. Robert Letourneau

**SB332**

Sen. Peter Bragdon

**SB340**

Sen. Jacalyn Cilley

**SB401**

Sen. Peter Bragdon

Rep. Gary Daniels

**SB429**

Sen. Michael Downing

Rep. David Kidder

Rep. Rip Holden

*start: 8:59 AM  
end: 9:25*

**Commerce, Labor & Consumer Protection Committee  
Hearing Report**

**To:** Members of the Senate  
**From:** Greg Silverman, *Legislative Aide*  
**Re:** Hearing report on **SB332** - relative to recording requirements for mortgage and foreclosure notices.  
**Hearing date:** February 2, 2010

**Members of the Committee Present:** Senator Hassan, District 23; Senator DeVries, District 18; Senator Reynolds, District 2; Senator Roberge, District 9; Senator Bragdon, District 11; Senator Cilley, District 6.

**Members of the Committee Absent:** None.

**Sponsors:** Sen. Bragdon, Dist 11.

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**What the bill does:** This bill specifies what information shall be included in notice of sale of a mortgage.

**Who supports this bill:** Celia Leonard, Banking Dept. General Counsel; Commissioner Peter Hildreth, Banking Dept.

**Who opposes this bill:** Jerry Little, NH Bankers Assn.

**Summary of testimony received:**

Senator Bragdon, District 11.

- Supports SB368.
- This bill comes from a constituent concern and collaboration with the Banking Dept.
  - For example, 18 out of 27 foreclosure notices in the Union Leader are noticed by MERS (Mortgage Electronic Registration System), who doesn't have the legal title to the debt, but acts as the nominee.
- Transparency is the main issue, as people are unaware as to who holds their mortgage.
- The committee asked about Page 1, line 13 in reference to the current statute, which requires notice by certified mail. Senator Bragdon said that line was at the suggestion of the Banking Dept.

Celia Leonard, Banking Dept.

- Supports SB332.
- Page 1, Line 13 is in direct response to conversations with consumers and consumer attorneys.
- MERS uses the word 'nominee,' which is not spelled out in NH statute.

- The committee asked if it would be more helpful to the borrower to require notice of party holding the mortgage before the foreclosure process. Ms. Leonard said as long as the consumer receives the information, the sooner the better.
- The committee asked if there was federal pre-emption which would deny NH the ability to change the statute. Ms. Leonard said she would investigate.

Gerry Little, NH Bankers Assn.

- Opposes SB332.
- Effective mortgage markets have come to rely on the purchase of home loans by willing investors to replenish the pool of funds that may be used to make more home loans.
  - This bill threatens to impair NH's access to that efficient market.
- Members of the NH Bankers Assn. might benefit from this bill, but it might discourage large national competitors from offering their products in our market, causing a long-term disadvantage.
- This bill may set up conflicts between state foreclosure law and uniform commercial code.
- Asks for additional time to clarify these issues before taking action.

Peter Hildreth, Commissioner of the Banking Department.

- Supports SB332.
- The Dept. has been aware of MERS and the lack of transparency for several years, making it difficult to find out who owns the mortgage debt.
- Federal preemption is not a problem, as entities who want to work in NH use the state's foreclosure laws.
- The bank that holds the debt makes MERS the nominee.

**Fiscal Note:** Not applicable.

**Action:** None taken.





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Unfortunately, Mortgage Electronic Registration System is not the one that holds the, I am not sure if I get the term right, but they are not the ones that actually have the mortgage on somebody's property. They act as the nominee. And so, basically what is happening now is somebody who doesn't hold the mortgage on a property is foreclosing on a property. The worst part about this, and I am probably technically incorrect on that, but in layman's terms, that's how it looks. People don't know who holds their mortgage. Mortgages are sold all over the place all the time and this seems, from my reading, to be something that is just spread across the country in recent years is this organization kind of acts as a clearing house of mortgage information.

And so, people are being foreclosed on, but they really don't know even who holds their mortgage. Especially, if a third party is handling the payments, the mortgage can be sold numerous times. And so, what's been, so in talking with the Banking Department about it, there is some interesting issues as to whether it is even legal or constitutional for someone who doesn't hold an interest in the property to actually hold the mortgage and try and foreclose on it. But, rather than address that complicated issue that I don't even understand, this was an attempt to at least deal with a part of it working with the Banking Department.

And, the first section, I believe, was just language that they added to be a little more clear in terms of what the mortgage notice needs to say. But, the second item, starting on line 18 and the third item on line 24 are the ones that, I guess, we had suggested. And, that is that if you're going to take advantage of the State's foreclosure process that is allowed, you must have legal title to the property in order to be someone foreclosing on it. I suspect what happens at this point is before any of these notices would be published, then whoever it is who holds the mortgage would then have to go to the Registry of Deeds and actually make the filing. There is probably some side issues and maybe our, if this makes it over to the House, our friends in the House, who are more in tune with county proceedings, might be very interested in the loss of revenue that occurs when mortgages no longer are recorded in the Registry of Deeds. That's, I don't know to what extent that happens and how much it affects the revenue for the counties, but I suspect they are more in tune with that.

So, this basically says if you're going to foreclosure on someone, then you kind of have to have, what's the word, the legal title to the debt, not, maybe not to the property, the legal title to the debt. So, I think it's an issue of transparency for the consumer. I think consumers have a right to know who is trying to foreclose on them and it certainly makes it easier to try and have some communication before one has to resort to the foreclosure. So, that's the simple status of it. The language was put together by the Banking

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Department. I don't know if they're here. I didn't see them on the list. But, we did sit down with them and kind of came up with this. Like I said, there is bigger issues, I think, as to whether this is even right that someone who does not have legal title to the debt can pretend to, but that's beyond the scope of my knowledge.

Senator Margaret Wood Hassan, D. 23: So, we have all sorts of questions. Let's start with Senator Reynolds.

Senator Deborah R. Reynolds, D. 2: Thank you, Madam Chair. And, thank you, Senator Bragdon. I want to compliment you because I know you are trying to reach an issue for consumers. As somebody who has actually been involved with this process as an attorney, I guess I just had a couple of quick questions.

With regard to line 15 regarding, well, I am sorry, strike that. With regard to line 13 under current law, under RSA 479:25, the statute, as it currently exists, only requires that notice of the foreclosure be sent by certified mail return receipt requested. Service is an alternative, but I guess I am sort of wondering what the purpose of asking who can accept service of process because the statute, as written, does not require service, in hand service. It requires by certified mail or service. So, I was wondering what you were trying to reach there. Do you have any idea?

Senator Peter E. Bragdon, D. 11: As I indicated in my opening comments, I believe that the section one was language suggested by the Banking Department.

Senator Deborah R. Reynolds, D. 2: Okay.

Senator Peter E. Bragdon, D. 11: And, the real issues I had are addressed by paragraphs two and three.

Senator Deborah R. Reynolds, D. 2: Okay.

Senator Peter E. Bragdon, D. 11: So, I am not really sure why they suggested that. I mean, I think the overall goal was to make it a little more cleaner as to what is expected, but as to why that particular item is there, I can't really answer that.

Senator Deborah R. Reynolds, D. 2: Okay. And, if I could have a follow up?

Senator Margaret Wood Hassan, D. 23: Yes.

Senator Deborah R. Reynolds, D. 2: I think that I understand what you're trying to do and I appreciate it. As a practical matter, are you aware that the statute is very technical in nature as it currently exists? And, even now, if you don't follow strictly the statute, the foreclosure would be basically invalid. And, I guess what I am asking you is whether or not, and I am sure we'll hear perhaps from Mr. Little and other members of the banking community that are you aware that there may be a shifting of costs here that may inadvertently or unintentionally make it more expensive and difficult to foreclose and in particular with regard to our State chartered banks, that's my concern, not the MERS, not the assignments that you're referring to. But, the State chartered banks typically have their own portfolio and would not necessarily be, you know, assigning the servicing of the loan to some out of state entity. Are you aware? Do you have any thoughts on the cost?

Senator Peter E. Bragdon, D. 11: I can respond that I saw on the sign up sheet that Mr. Little was...

Senator Deborah R. Reynolds, D. 2: Okay.

Senator Peter E. Bragdon, D. 11: Signed up to speak.

Senator Deborah R. Reynolds, D. 2: Okay.

Senator Peter E. Bragdon, D. 11: So, I anxiously await...

Senator Deborah R. Reynolds, D. 2: Okay.

Senator Peter E. Bragdon, D. 11: What he has to say.

Senator Deborah R. Reynolds, D. 2: Alright. Thank, thank you very much.

Senator Peter E. Bragdon, D. 11: And, I am sure he'll provide great clarity to the situation.

Senator Deborah R. Reynolds, D. 2: Thank you, Senator Bragdon.

Senator Margaret Wood Hassan, D. 23: Thank you. So, Senator DeVries, did you have a question?

Senator Betsi DeVries, D. 18: Briefly. And, Senator you may or may not be able to help me.

Senator Peter E. Bragdon, D. 11: Probably not.

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Senator Betsi DeVries, D. 18: Line 21, section two, the nominees that do not hold legal title. Can you just frame that for me on who would fall under the category of nominees?

Senator Peter E. Bragdon, D. 11: My understanding is that this type of issue where there is, MERS is a prime example, I guess, of the broker that just, I don't know.

Senator Betsi DeVries, D. 18: We'll see if that gets answered.

Senator Peter E. Bragdon, D. 11: And, again, to restate, I brought this issue to the Banking Department who put this together.

Senator Margaret Wood Hassan, D. 23: Right. So...

Senator Betsi DeVries, D. 18: Understood.

Senator Margaret Wood Hassan, D. 23: Got it.

Senator Peter E. Bragdon, D. 11: I didn't see them on the sign up list, but I suspect they are around somewhere.

Senator Margaret Wood Hassan, D. 23: I see people.

Senator Peter E. Bragdon, D. 11: I suspect they're around somewhere.

Senator Margaret Wood Hassan, D. 23: They'll come up next.

Senator Peter E. Bragdon, D. 11: Good.

Senator Margaret Wood Hassan, D. 23: Okay. So...

Senator Betsi DeVries, D. 18: Thank you, Senator.

Senator Jacalyn L. Cilley, D. 6: Thank you, Madam Chair. Just a, I remember last year during a congressional debate, one of our Congresswomen stood up and said, "You know, you just sit there, squat in your own homes, unless somebody can come and show you the title". Is that the kind of thing that we're really trying to address here that, you know, if you can't show somebody the title to, that you own this property in some way that it can't be just simply taken away from them?

Senator Peter E. Bragdon, D. 11: Well, it, my understanding, as limited as it is, is this deals with who holds the title to the debt and not title to the

property. And, the biggest issue is, you know, if someone is going to foreclose on me, at least it would be good if I kind of had an idea of who that was, not some place down in Virginia that owns, that has nominee for two-thirds of the mortgages in the country.

Senator Jacalyn L. Cilley, D. 6: Thank you.

Senator Margaret Wood Hassan, D. 23: Any further questions? Seeing none, thank you very much for your testimony.

Senator Peter E. Bragdon, D. 11: Thank you.

Senator Margaret Wood Hassan, D. 23: Want to come on up and...

Attorney Celia Leonard: I apologize for my oversight. It must have been decaf coffee this morning. So, for the record, I am Celia Leonard, General Counsel for the New Hampshire Banking Department. And, we're here in support of the bill.

I think I'll jump right in to address some of the questions that were brought up.

Senator Margaret Wood Hassan, D. 23: That would be great.

Attorney Leonard: It seems most efficient. The service of process issue, Senator Reynolds, on line 13, was in direct response, as was most of this language, to discussions with both consumers and attorneys who represent consumers in foreclosure actions that it was extremely difficult to, not extremely difficult, but using the State's long arm statutes adds a lot of time when time is of the essence in foreclosures to try to find who in fact, if you want to challenge statutory power of a sale, is going to accept service of process so you can move forward in that avenue. So, that's, it wasn't an attempt, it wasn't that the consumer who was receiving notice of the foreclosure would have to have service of process, it was if the consumer wants to challenge that foreclosure in court, that there is a quicker avenue other than using long arm statutes to do so. And, again, that was a request.

The nominees, the term is used by MERS. I think in every document I've ever seen them be in they use it when they want to do something they say they can do this because we're the nominee. When they say, well, if you ask are you then liable as a nominee, for example, for disclosure issues that may have occurred at the time of the transaction, they say, "No, no, no. We're just the nominee". So, as to what it actually means, it is going to rely on State law, to the extent there is any. A quick look at State law yesterday when I

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put in nominee trying to parse that out, the joy of New Hampshire law, there is really nothing. So, it doesn't in New Hampshire appear to have, at least through case law, anything I could find quickly, much of the meaning, but it is being bandied about by a large organization that is involved in a lot of foreclosures and a lot of mortgages in our State.

Let's see, I am trying to think, there was another question. Those are the two I noted.

Senator Margaret Wood Hassan, D. 23: So, Senator Reynolds had a follow up question, I think.

Attorney Leonard: Sure.

Senator Deborah R. Reynolds, D. 2: Thank you very much, Senator. And, thank you very much, Celia. Regarding the service of process issue, are you aware that with most of the Fannie Mae mortgages, prior to the initiation of the foreclosure, there is the bold language that requires notice to the borrower prior to acceleration if within 30 days? Are you aware of that?

Attorney Leonard: I am aware of that. And, again, this provision wasn't necessarily to get notice to the borrower. It was for the borrower to get notice to the servicer/foreclosing lender/nominee, whoever was trying to foreclosure on them.

Senator Deborah R. Reynolds, D. 2: And, if I may have a follow up.

Attorney Leonard: Sure.

Senator Deborah R. Reynolds, D. 2: I hear what you're saying.

Attorney Leonard: Okay.

Senator Deborah R. Reynolds, D. 2: In terms of trying to enjoin the foreclosure. But, I guess, if we're trying to capture, at the beginning of the process, which typically is with the 30-day demand letter, wouldn't it be more helpful to the borrower before the foreclosure starts and again, I don't know if there is a federal preemption issue here and there may be, to require the notice of the, you know, the actual party who is either holding the mortgage or attempting to foreclose be provided at that point as opposed to when the actual foreclosure itself starts.

Attorney Leonard: Gotcha. Yup. Yup. You have to put it in the demand. Certainly, I mean, I think the sooner that the consumer, there's just the

limits of what I thought of to be honest. That's a good point. So, I don't see why... As long as the consumer is getting that information, if they can get it sooner, that seems to make sense to me.

As to federal preemption, my quick and dirty on that would be that national banks and institutions rest on the pillars of state law. And, one of those pillars is debt collection, foreclosure notices, etc., and so forth, are not generally not preempted, has been my experience.

Senator Deborah R. Reynolds, D. 2: Right. And, as just a final follow up?

Senator Margaret Wood Hassan, D. 23: Yes.

Senator Deborah R. Reynolds, D. 2: I guess I am not suggesting that the statutory power of sale that we have in New Hampshire would be preempted, but, again, I am thinking about the fact that Fannie Mae has those standardized documents that most lenders in the State, at this point, are using as the template for one to four family residential mortgages. And, I guess what I am saying is that I am not sure if we, in the State, can compel Fannie Mae to change its mortgage.

Attorney Leonard: I am not asking them to change their mortgage. I am asking to change their debt collection security. How they... So, that's... None of these address the contract of mortgage.

Senator Deborah R. Reynolds, D. 2: Right.

Attorney Leonard: That would interfere with the power of a national bank. This is how you go about effectuating your security interest. That is State law, and that can change and that has to be followed by everyone, just like contract law. Again, there is certain pillars that every national, every business has to do, including national banks. And, your debt collection laws are one of them.

Oftentimes, you'll see, for example, for a large bank, you'll have your debt collection notices and there will be the standard one and then there will be the riders, just like in insurance. The one you send to California residents has the six different ones. The one you send to Vermont has about 30, very consumer friendly, and etc. So, this doesn't address the mortgage itself. It addresses how when you go to exercise your security interest under that mortgage you have to do it in the State of New Hampshire.

Senator Deborah R. Reynolds, D. 2: And, if I could have just a follow up?

Senator Margaret Wood Hassan, D. 23: Yup.

Senator Deborah R. Reynolds, D. 2: Just to be clear, I understand what the effort is. What I am talking about in terms of federal preemption though is that if we're really trying to help the borrowers and we're really trying to help them earlier in the process, before the notice of foreclosure actually goes out, when the demand letter is submitted, I am just wondering, if we, as a State, if we were to look at that notice that's required, the demand, had the ability to change that, and I don't know the answer to that and that's what I was really speaking to. Thank you.

Attorney Leonard: Oh, I see. I would believe so. But, I would have to look at that, because again, if it's, I'd have to look at it.

Senator Deborah R. Reynolds, D. 2: Thank you.

Attorney Leonard: Sure.

Senator Margaret Wood Hassan, D. 23: Senator Cilley?

Senator Jacalyn L. Cilley, D. 6: Thank you, Madam Chair. And, I don't know if the answer to this is sufficiently succinct that I can ask it in a Committee hearing, but I can follow up if it looks like it is complicated. It's, could you...

Senator Margaret Wood Hassan, D. 23: So, there is a threshold question. Is it complicated? And, then...

Attorney Leonard: Yes, it's complicated.

Senator Jacalyn L. Cilley, D. 6: Got the answer to that one. Alright.

Attorney Leonard: Okay.

Senator Jacalyn L. Cilley, D. 6: It is my understanding that in the world of mortgaging today, you know, in fact, I, when I bought a piece of property, by the time I got to the table it had already changed hands three times. So, they take this mortgage and they put it into this pot, if you will, and pretty much shares are sold in that pot. Have I got it anywhere near correct so far? Because it, this may be a much longer conversation. Here is my fundamental question. The names of all title holders of record to the real estate...



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Attorney Leonard: Not beneficial. The title is usually held, for example, by one trust. All the people who buy the shares are the beneficiaries. This isn't asking for the share information.

Senator Jacalyn L. Cilley, D. 6: That's the distinction. As opposed to beneficiaries of a trust...

Attorney Leonard: Right.

Senator Jacalyn L. Cilley, D. 6: Or the trust.

Attorney Leonard: That's correct. The trust holds the legal title.

Senator Jacalyn L. Cilley, D. 6: Okay.

Attorney Leonard: Right. Same as in...

Senator Jacalyn L. Cilley, D. 6: I was trying to figure out, you know, in this global market...

Attorney Leonard: Yeah. No, no, no. No.

Senator Jacalyn L. Cilley, D. 6: If we could go after everybody who owned a little piece of something. But, that's how that works. Okay.

Senator Margaret Wood Hassan, D. 23: Are there any other questions? Is there anything else you'd like to tell us?

Attorney Leonard: I don't think so, no.

Senator Margaret Wood Hassan, D. 23: Thank you. Seeing no other questions for Ms. Leonard, thank you very much for your testimony. Mr. Little, please?

Jerry Little: Good morning.

Senator Margaret Wood Hassan, D. 23: Good morning.

Mr. Little: How are you?

Senator Margaret Wood Hassan, D. 23: Well.

Mr. Little: Good morning. For the record, my name is Jerry Little. I am President of the New Hampshire Bankers Association. We have certainly

heard the concerns of Senator Bragdon. I've had a couple of brief opportunities to chat with him a bit about them previous to this. We are concerned, however, that the solutions, as proposed, are pretty much the proverbial pendulum that are going to, is going to swing too far and going to have a lot of unintended consequences. Effective mortgage markets today rely on the purchase of home loans by willing investors to replenish the pool of available funds here in the State of New Hampshire and elsewhere to continue lending to homeowners. And, we think that what SB 332 may do is threaten our ability to continue to attract that investor interest in the State of New Hampshire.

Mortgages have become a commodity; it is as simple as that. We've recently experienced nationwide, globally, what happens when the market for those commodities seizes up. It impacts a lot of people. Not just those of us who lend into the mortgage market, but it affects borrowers, it affects builders, it affects businesses that provide home goods. Other industries and individuals are going to suffer. Current homeowners' property values decline when the cost of credit goes up. There is pressure on their prices.

Oddly, we think that members of the New Hampshire Bankers Association could ultimately benefit from this by chasing other non-local institutions out of the mortgage market. We don't believe it would benefit consumers, however. And, we ask you to keep that in mind that when you remove options and opportunities for financing from the market and leave just a few, and we suspect those few would be us, then you remove much of the aspect of competition.

Mortgages are negotiable instruments. And as such, they have to comply with the Uniform Commercial Code. We think that SB 332, as drafted, particularly at sections two and three, which were not the sections that Attorney Leonard were, was just speaking to, sets up conflicts between State foreclosure law and State Uniform Commercial Code. There is interplay between the two of them. We have not had time to follow it all the way through, and I apologize for that and I feel a bit unprepared this morning. But, I do hope that you will give us time to work with yourselves and Senator Bragdon, in particular, to see if we can't figure out exactly what those conflicts are. For instance, the Uniform Commercial Code does allow you to appoint a nominee to act on your behalf regarding disposition of the asset and as we read the amendments, that would no longer be permitted.

We love New Hampshire. We all do in this room, but we are a very, very, very tiny piece of the overall mortgage market in the region, in the nation, globally. And, we're afraid that one of the things that will happen as a result of this legislation is it will become far too easy for some of the big players that

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access, that open access to the, to the secondary market for us will simply decide to go away. We don't think that's good for New Hampshire. So, we'd like some more time to work on this.

Senator Margaret Wood Hassan, D. 23: Thank you. Are there any questions for Mr. Little? Seeing none, thank you very much for your testimony. Was there anybody else who wanted to testify on Senate Bill 332? Commissioner?

Commissioner Peter Hildreth: I wasn't going to, Madam Chairman, but I would like to say a few words. And, I think it would be good... For the record, my name is Peter Hildreth, and I am the State Banking Commissioner. And, Senator Bragdon did call us about this. We were aware of the MERS issue for several years. But, on our scale of what we're dealing with, we weren't sure we were going to put that, take that on. And, I was happy to see Senator Bragdon do it for us with... So, he came to us, we talked about it.

The issue, I think, is not that there is a nominee or not, for example, I think that's fine. The problem is the lack of transparency. If you look, I don't know, how many pages of things the other day did we find in the *Union*, the *Sunday News* remember about six or four. And, most of those said MERS, Mortgage Electronic. How, if you're the, if you're an attorney who is trying to put something together trying to get the loan modified, trying to do something, how can you find out who owns the loan? Normally, in the old days when I was practicing law, you would go to Registry of Deeds and you would search. And, you would say, "Okay, you know, the Hildreth Bank did the closing and they sold it to the Bragdon Bank who then sold it to..." But, there would be an assignment of title listed each time, assignment of mortgage each time it changed hands. That doesn't happen any more. What happens is MERS says, "It's us". Well, what's MERS? It is some computer system somewhere. So, there is a problem for New Hampshire consumers and there is the problem that we heard from consumer oriented attorneys who need to serve a stay on the foreclosure and there is no way to find them within the timeframe that they have to do it in order to get the foreclosure enjoined. So, there is a problem here and I hope that we can work something out that would resolve the issue.

I know there was an earlier question about preemption. I don't think there is a problem with preemption because entities that want to use our foreclosure system have to follow our law. It's not like it is a banking law that we're trying to enforce, it's the, how we allow. I mean, a lot of states don't have the power of sale mortgages. They have to go to court and go through a process. So, in some ways we're easier than other states to do foreclosures.

Senator Margaret Wood Hassan, D. 23: Senator Cilley?

Senator Jacalyn L. Cilley, D. 6: Thank you, Madam Chair. These nominees are the ones that actually enforce the payment, you know, they are the ones that are collecting the mortgage?

Commissioner Hildreth: Not necessarily.

Senator Jacalyn L. Cilley, D. 6: Not necessarily?

Commissioner Hildreth: I mean, it may very, I don't think that MERS collects. I don't believe there is, I believe there is probably a servicer or it may be the bank that holds it or whatever it does with it that makes them the nominee. I am not sure, but I have not heard that MERS collects the mortgages, no.

Senator Jacalyn L. Cilley, D. 6: Follow up, if I may?

Senator Margaret Wood Hassan, D. 23: Yes.

Senator Jacalyn L. Cilley, D. 6: For somebody who issues a foreclosure notice, what authority do they have to do so?

Commissioner Hildreth: Well, in the first place they have under State law, there are two actually still in the process. There is the judicial sale, I believe it used to be there anyway. But, that's very seldom done because it's a more cumbersome, lengthy process. So, in the mortgage itself, it says that there would be a foreclosure under State law and the State law provides for the notice without court action and the sale of the property. You have to publicly, that's what you see the notices in the paper that we referenced, notice to the person owning the property. There is an actual auction.

Senator Jacalyn L. Cilley, D. 6: Yes?

Senator Margaret Wood Hassan, D. 23: One follow up. We're about a half hour behind.

Senator Jacalyn L. Cilley, D. 6: Okay. So, if MERS is publishing that notice, they are saying they have title to the property? This is going to require a little investigation.

Commissioner Hildreth: Yeah, it's going to take some time. Sometimes they say as nominee. Sometimes it just lists them.

Senator Deborah R. Reynolds, D. 2: They don't have title anyway. The owner has title.

Senator Peter E. Bragdon, D. 11: Correct.

Commissioner Hildreth: Right.

Senator Peter E. Bragdon, D. 11: Correct.

Senator Deborah R. Reynolds, D. 2: They have ...

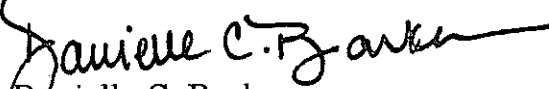
Senator Margaret Wood Hassan, D. 23: Okay. That was Senator Reynolds speaking. I am just thinking of the record here. Okay. Any further questions about the particulars of this bill? Okay. Seeing none, thank you very much for your testimony.

Commissioner Hildreth: Thank you, Madam Chair.

Senator Margaret Wood Hassan, D. 23: Was there anybody else who wanted to testify on Senate Bill 332? Seeing no one else, close the hearing on 332.

Hearing closed at 9:25 a.m.

Respectfully submitted,



Danielle C. Barker  
Senate Secretary

2/10/10

# Speakers



# Testimony



**SB 332, An Act relative to recording requirements  
for mortgage and foreclosure notices.**

**Testimony of the New Hampshire Bankers Association  
Presented by Gerald H. Little, President  
To the  
Senate Commerce, Labor and Consumer Protection Committee**

**Tuesday, February 2, 2010**

Thank you, Chairwoman Hassan and members of the Senate Commerce, Labor and Consumer Protection Committee, for this opportunity to speak with you about SB 332. For the record, I am Jerry Little, President of the New Hampshire Bankers Association, (NHBA).

The New Hampshire Bankers Association has heard the concerns of Senator Bragdon, and would like to work with him to address them. However, we are very concerned that the solutions proposed in SB 332 are likely to represent the proverbial pendulum that swings too far in the other direction, and will bring serious unintended consequences to bear on New Hampshire citizens.

Effective mortgage markets have come to rely on the purchase of home loans by willing investors to replenish the pool of funds that may be used to make more home loans. SB 332, as written, threatens to impair New Hampshire's access to that efficient market.

Mortgages are a commodity. We have recently experienced what happens to the economy when markets for trading commodities, (and in particular mortgages), seizes. A great number of industries and individuals suffer, including borrowers, builders, businesses that sell home goods and current homeowners who see their property values decline.

Oddly, many members of the New Hampshire Bankers Association might actually benefit from SB 332 if one of the effects of passage, as we suspect it might be, is to discourage large national or global competitors from offering their products in our market. First, banks with a physical presence in the state that generally conducted sound underwriting are experiencing normal foreclosure activity for a deeply recessionary period and usually have much of the information suggested in the bill easily at hand. For the other half of the market, however, that is not necessarily the case, and requiring it as a condition of enforcing a mortgage contract will easily discourage them from lending into the New Hampshire market in the future.

In fact, mortgages are negotiable instruments governed under the New Hampshire Uniform Commercial Code. We have not had a chance to work through the interplay between RSA 479:25, (the subject of amendment under SB 332), and RSA 382-A:3, (Article 3 of the UCC, Negotiable Instruments), but do suspect that, at a minimum, Sections 2 and 3 of SB 332 limiting who may hold title to debt secured by real property and related rights to enforce a mortgage contract may set up conflicts between state foreclosure law and uniform commercial code.

I apologize for not being more specific in our concerns at this moment, and hope the committee and Senator Bragdon will afford us additional time to clarify these issues before taking action.

# Voting Sheets

# Senate Commerce, Labor & Consumer Protection Committee EXECUTIVE SESSION

Bill # SB 332

Hearing date: 2/2/10

Executive session date: 3-18-10

Motion of: ITL

VOTE: 3-1

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| <u>Made by</u>  | Hassan   | <input type="checkbox"/>            | <u>Seconded</u>    | Hassan   | <input type="checkbox"/>            | <u>Reported</u>    | Hassan   | <input type="checkbox"/> |
| <u>Senator:</u> | DeVries  | <input type="checkbox"/>            | <u>by Senator:</u> | DeVries  | <input checked="" type="checkbox"/> | <u>by Senator:</u> | DeVries  | <input type="checkbox"/> |
|                 | Reynolds | <input checked="" type="checkbox"/> |                    | Reynolds | <input type="checkbox"/>            |                    | Reynolds | <input type="checkbox"/> |
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Motion of: \_\_\_\_\_

VOTE: \_\_\_\_\_

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|                 | Roberge  | <input type="checkbox"/> |                    | Roberge  | <input type="checkbox"/> |                    | Roberge  | <input type="checkbox"/> |

| <u>Committee Member</u>     | <u>Present</u>                      | <u>Yes</u>                          | <u>No</u>                           | <u>Reported out by</u>   |
|-----------------------------|-------------------------------------|-------------------------------------|-------------------------------------|--------------------------|
| Senator Hassan, Chairman    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Senator DeVries, Vice-Chair | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Senator Reynolds            | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Senator Cilley              | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/> |
| Senator Bragdon             | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Senator Roberge             | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/>            | <input type="checkbox"/> |

\*Amendments: \_\_\_\_\_

Notes: \_\_\_\_\_

# Committee Report

STATE OF NEW HAMPSHIRE  
SENATE  
REPORT OF THE COMMITTEE

Date: March 18, 2010

THE COMMITTEE ON Commerce, Labor and Consumer Protection  
to which was referred Senate Bill 332

AN ACT                      relative to recording requirements for mortgage and  
foreclosure notices.

Having considered the same, the committee recommends that the Bill:

**IS INEXPEDIENT TO LEGISLATE**

BY A VOTE OF:    3-1

AMENDMENT #        s

Senator Deborah R. Reynolds  
For the Committee

Danielle Barker 271-3093

## New Hampshire General Court - Bill Status System

**Docket of SB332**

Docket Abbreviations

**Bill Title:** relative to recording requirements for mortgage and foreclosure notices.*Official Docket of SB332:*

| <b>Date</b> | <b>Body</b> | <b>Description</b>  |
|-------------|-------------|---|
| 01/06/2010  | S           | Introduced 1/6/2010 and Referred to Commerce, Labor and Consumer Protection; <b>SJ 1</b> , Pg.5 |
| 01/28/2010  | S           | Hearing: February 2, 2010, Room 102, LOB, 8:45 a.m.; <b>SC5</b>                                 |
| 03/18/2010  | S           | Committee Report: Inexpedient to Legislate 3/24/10; <b>SC12</b>                                 |
| 03/24/2010  | S           | Inexpedient to Legislate, MA, VV === BILL KILLED === <b>SJ 11</b> , Pg.175                      |

NH House

NH Senate

Contact Us

*New Hampshire General Court Information Systems  
107 North Main Street - State House Room 31, Concord NH 03301*

# Other Referrals

# COMMITTEE REPORT FILE INVENTORY

SB332 ORIGINAL REFERRAL

RE-REFERRAL

1. THIS INVENTORY IS TO BE SIGNED AND DATED BY THE COMMITTEE SECRETARY AND PLACED INSIDE THE FOLDER AS THE FIRST ITEM IN THE COMMITTEE FILE.
2. PLACE ALL DOCUMENTS IN THE FOLDER FOLLOWING THE INVENTORY IN THE ORDER LISTED.
3. THE DOCUMENTS WHICH HAVE AN "X" BESIDE THEM ARE CONFIRMED AS BEING IN THE FOLDER.
4. THE COMPLETED FILE IS THEN DELIVERED TO THE CALENDAR CLERK.

DOCKET (Submit only the latest docket found in Bill Status)

COMMITTEE REPORT

CALENDAR NOTICE on which you have taken attendance

HEARING REPORT (written summary of hearing testimony)

HEARING TRANSCRIPT (verbatim transcript of hearing)  
List attachments (testimony and submissions which are part of the transcript) by number [1 thru 4 or 1, 2, 3, 4] here: +

SIGN-UP SHEET

ALL AMENDMENTS (passed or not) CONSIDERED BY COMMITTEE:

\_\_\_\_ - AMENDMENT # \_\_\_\_\_      \_\_\_\_ - AMENDMENT # \_\_\_\_\_  
\_\_\_\_ - AMENDMENT # \_\_\_\_\_      \_\_\_\_ - AMENDMENT # \_\_\_\_\_

ALL AVAILABLE VERSIONS OF THE BILL:

AS INTRODUCED      \_\_\_\_ AS AMENDED BY THE HOUSE  
\_\_\_\_ FINAL VERSION      \_\_\_\_ AS AMENDED BY THE SENATE

PREPARED TESTIMONY AND OTHER SUBMISSIONS (Which are not part of the transcript)

List by letter [ a thru g or a, b, c, d] here: a

EXECUTIVE SESSION REPORT

\_\_\_\_ OTHER (Anything else deemed important but not listed above, such as amended fiscal notes):

IF YOU HAVE A RE-REFERRED BILL, YOU ARE GOING TO MAKE UP A DUPLICATE FILE FOLDER

DATE DELIVERED TO SENATE CLERK 7/7/10

  
COMMITTEE SECRETARY