
SUBSTITUTE SENATE BILL 5275

State of Washington

62nd Legislature

2011 Regular Session

By Senate Financial Institutions, Housing & Insurance (originally sponsored by Senators Kline, Haugen, Kohl-Welles, Hargrove, Rockefeller, Nelson, Ranker, Keiser, Swecker, White, Conway, Hobbs, Chase, Harper, Kilmer, Prentice, Shin, Murray, Fraser, and McAuliffe)

READ FIRST TIME 02/17/11.

1 AN ACT Relating to protecting and assisting homeowners from
2 unnecessary foreclosures; amending RCW 61.24.030, 61.24.031, 61.24.135,
3 and 82.45.030; reenacting and amending RCW 61.24.005; adding new
4 sections to chapter 61.24 RCW; creating new sections; repealing 2009 c
5 292 s 13 (uncodified); and declaring an emergency.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 NEW SECTION. **Sec. 1.** (1) The legislature finds and declares that:

8 (a) The rate of home foreclosures continues to rise to
9 unprecedented levels, both for prime and subprime loans, and a new wave
10 of foreclosures has occurred due to rising unemployment, job loss, and
11 higher adjustable loan payments;

12 (b) Prolonged foreclosures contribute to the decline in the state's
13 housing market, loss of property values, and other loss of revenue to
14 the state;

15 (c) In recent years, the legislature has enacted procedures to help
16 encourage and strengthen the communication between homeowners and
17 lenders and to assist homeowners in navigating through the foreclosure
18 process; however, Washington's nonjudicial foreclosure process does not

1 have a mechanism for homeowners to readily access a neutral third party
2 to assist them in a fair and timely way; and

3 (d) Several jurisdictions across the nation have foreclosure
4 mediation programs that provide a cost-effective process for the
5 homeowner and lender, with the assistance of a trained mediator, to
6 reach a mutually acceptable resolution that avoids foreclosure.

7 (2) Therefore, the legislature intends to:

8 (a) Encourage homeowners to utilize the skills and professional
9 judgment of housing counselors as early as possible in the foreclosure
10 process;

11 (b) Create a framework for homeowners and beneficiaries to
12 communicate with each other to reach a resolution and avoid foreclosure
13 whenever possible; and

14 (c) Provide a process for mediation when a housing counselor or
15 attorney determines that mediation is appropriate. For mediation to be
16 effective, the parties should attend the mediation (in person,
17 telephonically, through an agent, or otherwise), provide the necessary
18 documentation in a timely manner, willingly share information, actively
19 present, discuss, and explore options to avoid foreclosure, negotiate
20 willingly and cooperatively, maintain a professional and cooperative
21 demeanor, cooperate with the mediator, and keep any agreements made in
22 mediation.

23 NEW SECTION. **Sec. 2.** This act may be known and cited as the
24 foreclosure fairness act.

25 **Sec. 3.** RCW 61.24.005 and 2009 c 292 s 1 are each reenacted and
26 amended to read as follows:

27 The definitions in this section apply throughout this chapter
28 unless the context clearly requires otherwise.

29 (1) "Affiliate of beneficiary" means any entity which controls, is
30 controlled by, or is under common control with a beneficiary.

31 (2) "Beneficiary" means the holder of the instrument or document
32 evidencing the obligations secured by the deed of trust, excluding
33 persons holding the same as security for a different obligation.

34 (3) "Borrower" means a person or a general partner in a
35 partnership, including a joint venture, that is liable for all or part
36 of the obligations secured by the deed of trust under the instrument or

1 other document that is the principal evidence of such obligations, or
2 the person's successors if they are liable for those obligations under
3 a written agreement with the beneficiary.

4 (4) "Commercial loan" means a loan that is not made primarily for
5 personal, family, or household purposes.

6 (5) "Department" means the department of commerce or its designee.

7 (6) "Fair value" means the value of the property encumbered by a
8 deed of trust that is sold pursuant to a trustee's sale. This value
9 shall be determined by the court or other appropriate adjudicator by
10 reference to the most probable price, as of the date of the trustee's
11 sale, which would be paid in cash or other immediately available funds,
12 after deduction of prior liens and encumbrances with interest to the
13 date of the trustee's sale, for which the property would sell on such
14 date after reasonable exposure in the market under conditions requisite
15 to a fair sale, with the buyer and seller each acting prudently,
16 knowledgeably, and for self-interest, and assuming that neither is
17 under duress.

18 ((+6)) (7) "Grantor" means a person, or its successors, who
19 executes a deed of trust to encumber the person's interest in property
20 as security for the performance of all or part of the borrower's
21 obligations.

22 ((+7)) (8) "Guarantor" means any person and its successors who is
23 not a borrower and who guarantees any of the obligations secured by a
24 deed of trust in any written agreement other than the deed of trust.

25 ((+8)) (9) "Housing counselor" means a housing counselor that has
26 been approved by the United States department of housing and urban
27 development or approved by the Washington state housing finance
28 commission.

29 (10) "Owner-occupied" means property that is the principal
30 residence of the borrower.

31 ((+9)) (11) "Person" means any natural person, or legal or
32 governmental entity.

33 ((+10)) (12) "Record" and "recorded" includes the appropriate
34 registration proceedings, in the instance of registered land.

35 ((+11)) (13) "Residential real property" means property consisting
36 solely of a single-family residence, a residential condominium unit, or
37 a residential cooperative unit.

1 (~~(12)~~) (14) "Tenant-occupied property" means property consisting
2 solely of residential real property that is the principal residence of
3 a tenant subject to chapter 59.18 RCW or other building with four or
4 fewer residential units that is the principal residence of a tenant
5 subject to chapter 59.18 RCW.

6 (~~(13)~~) (15) "Trustee" means the person designated as the trustee
7 in the deed of trust or appointed under RCW 61.24.010(2).

8 (~~(14)~~) (16) "Trustee's sale" means a nonjudicial sale under a
9 deed of trust undertaken pursuant to this chapter.

10 **Sec. 4.** RCW 61.24.030 and 2009 c 292 s 8 are each amended to read
11 as follows:

12 It shall be requisite to a trustee's sale:

13 (1) That the deed of trust contains a power of sale;

14 (2) That the deed of trust contains a statement that the real
15 property conveyed is not used principally for agricultural purposes;
16 provided, if the statement is false on the date the deed of trust was
17 granted or amended to include that statement, and false on the date of
18 the trustee's sale, then the deed of trust must be foreclosed
19 judicially. Real property is used for agricultural purposes if it is
20 used in an operation that produces crops, livestock, or aquatic goods;

21 (3) That a default has occurred in the obligation secured or a
22 covenant of the grantor, which by the terms of the deed of trust makes
23 operative the power to sell;

24 (4) That no action commenced by the beneficiary of the deed of
25 trust is now pending to seek satisfaction of an obligation secured by
26 the deed of trust in any court by reason of the grantor's default on
27 the obligation secured: PROVIDED, That (a) the seeking of the
28 appointment of a receiver shall not constitute an action for purposes
29 of this chapter; and (b) if a receiver is appointed, the grantor shall
30 be entitled to any rents or profits derived from property subject to a
31 homestead as defined in RCW 6.13.010. If the deed of trust was granted
32 to secure a commercial loan, this subsection shall not apply to actions
33 brought to enforce any other lien or security interest granted to
34 secure the obligation secured by the deed of trust being foreclosed;

35 (5) That the deed of trust has been recorded in each county in
36 which the land or some part thereof is situated;

1 (6) That prior to the date of the notice of trustee's sale and
2 continuing thereafter through the date of the trustee's sale, the
3 trustee must maintain a street address in this state where personal
4 service of process may be made, and the trustee must maintain a
5 physical presence and have telephone service at such address;

6 (7)(a) That, for residential real property, before the notice of
7 trustee's sale is recorded, transmitted, or served, the trustee shall
8 have proof that the beneficiary is the owner of any promissory note or
9 other obligation secured by the deed of trust. A declaration by the
10 beneficiary made under the penalty of perjury stating that the
11 beneficiary is the actual holder of the promissory note or other
12 obligation secured by the deed of trust shall be sufficient proof as
13 required under this subsection.

14 (b) Unless the trustee has violated his or her duty under RCW
15 61.24.010(4), the trustee is entitled to rely on the beneficiary's
16 declaration as evidence of proof required under this subsection.

17 (c) This subsection (7) does not apply to association beneficiaries
18 subject to chapter 64.32, 64.34, or 64.38 RCW; (~~and~~)

19 (8) That at least thirty days before notice of sale shall be
20 recorded, transmitted or served, written notice of default shall be
21 transmitted by the beneficiary or trustee to the borrower and grantor
22 at their last known addresses by both first-class and either registered
23 or certified mail, return receipt requested, and the beneficiary or
24 trustee shall cause to be posted in a conspicuous place on the
25 premises, a copy of the notice, or personally served on the borrower
26 and grantor. This notice shall contain the following information:

27 (a) A description of the property which is then subject to the deed
28 of trust;

29 (b) A statement identifying each county in which the deed of trust
30 is recorded and the document number given to the deed of trust upon
31 recording by each county auditor or recording officer;

32 (c) A statement that the beneficiary has declared the borrower or
33 grantor to be in default, and a concise statement of the default
34 alleged;

35 (d) An itemized account of the amount or amounts in arrears if the
36 default alleged is failure to make payments;

37 (e) An itemized account of all other specific charges, costs, or

1 fees that the borrower, grantor, or any guarantor is or may be obliged
2 to pay to reinstate the deed of trust before the recording of the
3 notice of sale;

4 (f) A statement showing the total of (d) and (e) of this
5 subsection, designated clearly and conspicuously as the amount
6 necessary to reinstate the note and deed of trust before the recording
7 of the notice of sale;

8 (g) A statement that failure to cure the alleged default within
9 thirty days of the date of mailing of the notice, or if personally
10 served, within thirty days of the date of personal service thereof, may
11 lead to recordation, transmittal, and publication of a notice of sale,
12 and that the property described in (a) of this subsection may be sold
13 at public auction at a date no less than one hundred twenty days in the
14 future;

15 (h) A statement that the effect of the recordation, transmittal,
16 and publication of a notice of sale will be to (i) increase the costs
17 and fees and (ii) publicize the default and advertise the grantor's
18 property for sale;

19 (i) A statement that the effect of the sale of the grantor's
20 property by the trustee will be to deprive the grantor of all their
21 interest in the property described in (a) of this subsection;

22 (j) A statement that the borrower, grantor, and any guarantor has
23 recourse to the courts pursuant to RCW 61.24.130 to contest the alleged
24 default on any proper ground;

25 (k) In the event the property secured by the deed of trust is
26 owner-occupied residential real property, a statement, prominently set
27 out at the beginning of the notice, which shall state as follows:

28 "You should take care to protect your interest in your home. This
29 notice of default (your failure to pay) is the first step in a process
30 that could result in you losing your home. You should carefully review
31 your options. For example:

- 32 Can you pay and stop the foreclosure process?
- 33 Do you dispute the failure to pay?
- 34 Can you sell your property to preserve your equity?
- 35 Are you able to refinance this loan or obligation with a new loan
36 or obligation from another lender with payments, terms, and fees that
37 are more affordable?

1 Do you qualify for any government or private homeowner assistance
2 programs?

3 Do you know if filing for bankruptcy is an option? What are the
4 pros and cons of doing so?

5 Do not ignore this notice; because if you do nothing, you could
6 lose your home at a foreclosure sale. (No foreclosure sale can be held
7 any sooner than ninety days after a notice of sale is issued and a
8 notice of sale cannot be issued until thirty days after this notice.)
9 Also, if you do nothing to pay what you owe, be careful of people who
10 claim they can help you. There are many individuals and businesses
11 that watch for the notices of sale in order to unfairly profit as a
12 result of borrowers' distress.

13 You may feel you need help understanding what to do. There are a
14 number of professional resources available, including home loan
15 counselors and attorneys, who may assist you. Many legal services are
16 lower-cost or even free, depending on your ability to pay. If you
17 desire legal help in understanding your options or handling this
18 default, you may obtain a referral (at no charge) by contacting the
19 county bar association in the county where your home is located. These
20 legal referral services also provide information about lower-cost or
21 free legal services for those who qualify. You may contact the
22 Department of Financial Institutions or the statewide civil legal aid
23 hotline for possible assistance or referrals"; and

24 (1) In the event the property secured by the deed of trust is
25 residential real property, the name and address of the owner of any
26 promissory notes or other obligations secured by the deed of trust and
27 the name, address, and telephone number of a party acting as a servicer
28 of the obligations secured by the deed of trust((~~thirty~~)); and

29 (9) That, for owner-occupied residential real property, before the
30 notice of the trustee's sale is recorded, transmitted, or served, the
31 beneficiary has complied with RCW 61.24.031 and, if applicable, section
32 7 of this act.

33 **Sec. 5.** RCW 61.24.031 and 2009 c 292 s 2 are each amended to read
34 as follows:

35 (1)(a) A trustee, beneficiary, or authorized agent may not issue a
36 notice of default under RCW 61.24.030(8) until ((~~thirty~~)) ninety days
37 after initial contact with the borrower is made as required under (b)

1 of this subsection or (~~(thirty)~~) ninety days after satisfying the due
2 diligence requirements as described in subsection (~~((+5))~~) (4) of this
3 section.

4 (b) A beneficiary or authorized agent shall make initial contact
5 with the borrower by letter to provide the borrower with information
6 required under (c) of this subsection and by telephone (~~((in order to~~
7 ~~assess the borrower's financial ability to pay the debt secured by the~~
8 ~~deed of trust and explore options for the borrower to avoid~~
9 ~~foreclosure))~~ as required under subsection (4) of this section. The
10 letter required under this subsection must be mailed in accordance with
11 subsection (~~((+5))~~) (4)(a) of this section and must include the
12 information described in (c) of this subsection and subsection (~~((+5)(a)~~
13 ~~and))~~ (4)(e) (i) through (iv) of this section.

14 (c) (~~(During the initial contact, the beneficiary or authorized~~
15 ~~agent shall advise the borrower that he or she has the right to request~~
16 ~~a subsequent meeting and, if requested, the beneficiary or authorized~~
17 ~~agent shall schedule the meeting to occur within fourteen days of the~~
18 ~~request.—The))~~ The letter required under this subsection shall
19 include:

20 (i) A paragraph printed in no less than twelve point font and
21 bolded that reads: "You should contact a housing counselor or attorney
22 as soon as possible. Failure to contact a housing counselor or
23 attorney within one hundred twenty days from the date you receive this
24 letter may result in your losing certain opportunities, such as meeting
25 with your lender or participating in mediation. A housing counselor or
26 attorney can help you work with your lender to avoid foreclosure.";

27 (ii) The toll-free telephone number from the United States
28 department of housing and urban development to find a department-
29 approved housing counseling agency, the toll-free numbers for the
30 department of financial institutions, and the statewide civil legal aid
31 hotline for assistance and referrals to other housing counselors and
32 attorneys;

33 (iii) A paragraph stating that a housing counselor may be available
34 at little or no cost to the borrower and that whether or not the
35 borrower contacts a housing counselor or attorney, the borrower has the
36 right to request a meeting with the beneficiary; and

37 (iv) A paragraph stating that in the next sixty days the borrower
38 has an opportunity to meet with his or her beneficiary in an attempt to

1 resolve the foreclosure and that, after ninety days from the date of
2 the letter, a notice of default may be issued, which starts the
3 foreclosure process.

4 (d) If a meeting is requested by the borrower or the borrower's
5 housing counselor or attorney, the beneficiary or authorized agent
6 shall schedule the meeting to occur before the notice of default is
7 issued. An assessment of the borrower's financial ability to ((repay
8 the debt)) modify or restructure the loan obligation and a discussion
9 of options ((may)) must occur during the ((initial contact or at a
10 subsequent)) meeting scheduled for that purpose. ((At the initial
11 contact, the borrower must be provided the toll-free telephone number
12 made available by the department to find a department-certified housing
13 counseling agency and the toll-free numbers for the department of
14 financial institutions and the statewide civil legal aid hotline for
15 possible assistance and referrals.

16 ~~(d) Any meeting under this section may occur telephonically.)~~

17 (e) The meeting scheduled to assess the borrower's financial
18 ability to modify or restructure the loan obligation and discuss
19 options to avoid foreclosure must be in person, unless the requirement
20 to meet in person is waived in writing by the borrower or the
21 borrower's representative. A person who is authorized to modify the
22 loan obligation or reach an alternative resolution to foreclosure on
23 behalf of the beneficiary may participate by telephone or video
24 conference, so long as a representative of the beneficiary is at the
25 meeting in person.

26 (2) A notice of default issued under RCW 61.24.030(8) must include
27 a declaration, as provided in subsection ((+9)) (8) of this section,
28 from the beneficiary or authorized agent that it has contacted the
29 borrower as provided in subsection (1)((+b)) of this section, it has
30 tried with due diligence to contact the borrower under subsection
31 ((+5)) (4) of this section, or the borrower has surrendered the
32 property to the trustee, beneficiary, or authorized agent. Unless the
33 trustee has violated his or her duty under RCW 61.24.010(4), the
34 trustee is entitled to rely on the declaration as evidence that the
35 requirements of this section have been satisfied, and the trustee is
36 not liable for the beneficiary's or its authorized agent's failure to
37 comply with the requirements of this section.

1 (3) ~~((A beneficiary's or authorized agent's loss mitigation~~
2 ~~personnel may participate by telephone during any contact required~~
3 ~~under this section.~~

4 ~~(4) Within fourteen days))~~ (a) If, after the initial contact under
5 subsection (1) of this section, ~~((if))~~ a borrower has designated a
6 ~~((department-certified))~~ housing counseling agency, housing counselor,
7 or attorney~~((, or other advisor))~~ to discuss with the beneficiary or
8 authorized agent, on the borrower's behalf, options for the borrower to
9 avoid foreclosure, the borrower shall inform the beneficiary or
10 authorized agent and provide the contact information to the beneficiary
11 or authorized agent. The beneficiary or authorized agent shall contact
12 the designated representative for the borrower ~~((for the discussion~~
13 ~~within fourteen days after the representative is designated by the~~
14 ~~borrower))~~ to meet.

15 (b) The beneficiary or authorized agent and the borrower's
16 representative shall attempt to reach a resolution for the borrower
17 within the ninety days from the time the initial contact is sent and
18 the notice of default is issued. A resolution may include, but is not
19 limited to, a loan modification, an agreement to conduct a short sale,
20 or a deed in lieu of foreclosure transaction, or some other workout
21 plan. Any ~~((deed-of-trust))~~ modification or workout plan offered at
22 the meeting with the borrower's designated representative by the
23 beneficiary or authorized agent is subject to approval by the borrower.

24 ~~((+5))~~ (4) A notice of default may be issued under RCW
25 61.24.030(8) if a beneficiary or authorized agent has not contacted a
26 borrower as required under subsection (1)(b) of this section and the
27 failure to contact the borrower occurred despite the due diligence of
28 the beneficiary or authorized agent. Due diligence requires the
29 following:

30 (a) A beneficiary or authorized agent shall first attempt to
31 contact a borrower by sending a first-class letter to the address in
32 the beneficiary's records for sending account statements to the
33 borrower and to the address of the property encumbered by the deed of
34 trust. The letter must include the ~~((toll-free telephone number made~~
35 ~~available by the department to find a department-certified housing~~
36 ~~counseling agency, and the following information:~~

37 ~~"You may contact the Department of Financial Institutions, the~~

1 ~~Washington State Bar Association, or the statewide civil legal aid~~
2 ~~hotline for possible assistance or referrals."~~) information required
3 in subsection (1)(c) of this section.

4 (b)(i) After the letter has been sent, the beneficiary or
5 authorized agent shall attempt to contact the borrower by telephone at
6 least three times at different hours and on different days. Telephone
7 calls must be made to the primary and secondary telephone numbers on
8 file with the beneficiary or authorized agent.

9 (ii) A beneficiary or authorized agent may attempt to contact a
10 borrower using an automated system to dial borrowers if the telephone
11 call, when answered, is connected to a live representative of the
12 beneficiary or authorized agent.

13 (iii) A beneficiary or authorized agent satisfies the telephone
14 contact requirements of this subsection ~~((+5))~~ (4)(b) if the
15 beneficiary or authorized agent determines, after attempting contact
16 under this subsection ~~((+5))~~ (4)(b), that the borrower's primary
17 telephone number and secondary telephone number or numbers on file, if
18 any, have been disconnected or are not good contact numbers for the
19 borrower.

20 (c) If the borrower does not respond within ~~((fourteen))~~ thirty
21 days after the telephone call requirements of (b) of this subsection
22 have been satisfied, the beneficiary or authorized agent shall send a
23 certified letter, with return receipt requested, to the borrower at the
24 address in the beneficiary's records for sending account statements to
25 the borrower and to the address of the property encumbered by the deed
26 of trust. The letter must include the information described in (e)(i)
27 through (iv) of this subsection.

28 (d) The beneficiary or authorized agent shall provide a means for
29 the borrower to contact the beneficiary or authorized agent in a timely
30 manner, including a toll-free telephone number or charge-free
31 equivalent that will provide access to a live representative during
32 business hours.

33 (e) The beneficiary or authorized agent shall post a link on the
34 home page of the beneficiary's or authorized agent's internet web site,
35 if any, to the following information:

36 (i) Options that may be available to borrowers who are unable to
37 afford their mortgage payments and who wish to avoid foreclosure, and

1 instructions to borrowers advising them on steps to take to explore
2 those options;

3 (ii) A list of financial documents borrowers should collect and be
4 prepared to present to the beneficiary or authorized agent when
5 discussing options for avoiding foreclosure;

6 (iii) A toll-free telephone number or charge-free equivalent for
7 borrowers who wish to discuss options for avoiding foreclosure with
8 their beneficiary or authorized agent; and

9 (iv) The toll-free telephone number or charge-free equivalent made
10 available by the department to find a department-~~((certified))~~ approved
11 housing counseling agency.

12 ~~((+6))~~ (5) Subsections (1) and ~~((+5))~~ (4) of this section do not
13 apply if any of the following occurs:

14 (a) The borrower has surrendered the property as evidenced by
15 either a letter confirming the surrender or delivery of the keys to the
16 property to the trustee, beneficiary, or authorized agent; or

17 (b) The borrower has filed for bankruptcy, and the bankruptcy stay
18 remains in place, or the borrower has filed for bankruptcy and the
19 bankruptcy court has granted relief from the bankruptcy stay allowing
20 enforcement of the deed of trust.

21 ~~((+7))~~ (6)(a) This section applies only to deeds of trust ~~((made~~
22 ~~from January 1, 2003, to December 31, 2007, inclusive,))~~ that are
23 recorded against owner-occupied residential real property. This
24 section does not apply to deeds of trust: (i) Securing a commercial
25 loan; (ii) securing obligations of a grantor who is not the borrower or
26 a guarantor; or (iii) securing a purchaser's obligations under a
27 seller-financed sale.

28 (b) This section does not apply to association beneficiaries
29 subject to chapter 64.32, 64.34, or 64.38 RCW.

30 ~~((+8))~~ (7) As used in this section:

31 (a) "Department" means the United States department of housing and
32 urban development.

33 (b) "Seller-financed sale" means a residential real property
34 transaction where the seller finances all or part of the purchase
35 price, and that financed amount is secured by a deed of trust against
36 the subject residential real property.

37 ~~((+9))~~ (8) The form of declaration to be provided by the

1 beneficiary or authorized agent as required under subsection (2) of
2 this section must be in substantially the following form:

3 **"FORECLOSURE LOSS MITIGATION FORM**

4 **Please select applicable option(s) below.**

5 The undersigned beneficiary or authorized agent for the beneficiary
6 hereby represents and declares under the penalty of perjury that [check
7 the applicable box and fill in any blanks so that the trustee can
8 insert, on the beneficiary's behalf, the applicable declaration in the
9 notice of default required under chapter 61.24 RCW]:

10 (1) [] The beneficiary or beneficiary's authorized agent has
11 contacted the borrower under, and has complied with, RCW 61.24.031
12 (contact provision to "assess the borrower's financial ability to pay
13 the debt secured by the deed of trust and explore options for the
14 borrower to avoid foreclosure") and the borrower did not request a
15 meeting.

16 (2) [] The beneficiary or beneficiary's authorized agent has
17 contacted the borrower as required under RCW 61.24.031 and the borrower
18 or the borrower's designated representative requested a meeting. A
19 meeting was held in compliance with RCW 61.24.031.

20 (3) [] The beneficiary or beneficiary's authorized agent has
21 exercised due diligence to contact the borrower as required in RCW
22 61.24.031 ~~((+5) and, after waiting fourteen days after the requirements~~
23 ~~in RCW 61.24.031 were satisfied, the beneficiary or the beneficiary's~~
24 ~~authorized agent sent to the borrower(s), by certified mail, return~~
25 ~~receipt requested, the letter required under RCW 61.24.031)) (4).~~

26 ~~((+3))~~ (4) [] The borrower has surrendered the secured property
27 as evidenced by either a letter confirming the surrender or by delivery
28 of the keys to the secured property to the beneficiary, the
29 beneficiary's authorized agent or to the trustee.

30 ~~((+4))~~ (5) [] Under RCW 61.24.031, the beneficiary or the
31 beneficiary's authorized agent has verified information that, on or
32 before the date of this declaration, the borrower(s) has filed for
33 bankruptcy, and the bankruptcy stay remains in place, or the borrower
34 has filed for bankruptcy and the bankruptcy court has granted relief
35 from the bankruptcy stay allowing the enforcement of the deed of
36 trust."

1 NEW SECTION. **Sec. 6.** A new section is added to chapter 61.24 RCW
2 to read as follows:

3 (1)(a) A housing counselor who is contacted by a borrower under RCW
4 61.24.031 has a duty to act in good faith to attempt to reach a
5 resolution with the beneficiary on behalf of the borrower within the
6 ninety days provided from the date the beneficiary initiates contact
7 with the borrower and the date the notice of default is issued. A
8 resolution may include, but is not limited to, modification of the
9 loan, an agreement to conduct a short sale, a deed in lieu of
10 foreclosure transaction, or some other workout plan.

11 (b) Nothing in RCW 61.24.031 or this section precludes a meeting or
12 negotiations between the housing counselor, borrower, and beneficiary
13 at any time, including after the issuance of the notice of default.

14 (c) A borrower who is contacted under RCW 61.24.031 may seek the
15 assistance of a housing counselor or attorney at any time.

16 (2) Housing counselors have a duty to act in good faith to assist
17 borrowers by:

18 (a) Preparing the borrower for meetings with the beneficiary;

19 (b) Advising the borrower about what documents the borrower must
20 have to seek a loan modification or other resolution;

21 (c) Informing the borrower about the alternatives to foreclosure,
22 including loan modifications or other possible resolutions; and

23 (d) Providing other guidance, advice, and education as the housing
24 counselor considers necessary.

25 (3) A housing counselor or attorney assisting a borrower may refer
26 the borrower to a mediation program, pursuant to section 7 of this act,
27 if:

28 (a) The housing counselor or attorney determines that mediation is
29 appropriate based on the individual circumstances; and

30 (b) A notice of sale on the deed of trust has not been recorded.

31 (4) A referral to mediation by a housing counselor or attorney does
32 not preclude a trustee issuing a notice of default if the requirements
33 of RCW 61.24.031 have been met.

34 (5) Housing counselors providing assistance to borrowers under RCW
35 61.24.031 are not liable for civil damages resulting from any acts or
36 omissions in providing assistance, unless the acts or omissions
37 constitute gross negligence or willful or wanton misconduct.

1 NEW SECTION. **Sec. 7.** A new section is added to chapter 61.24 RCW
2 to read as follows:

3 (1) The mediation program established in this section applies only
4 to borrowers who have been referred to mediation by a housing counselor
5 or attorney. This section does not preclude mediation required by a
6 court or other provision of law.

7 (2)(a) A housing counselor or attorney referring a borrower to
8 mediation shall send a notice to the borrower and the department,
9 stating that mediation is appropriate.

10 (b) No later than sixty days after the effective date of this
11 section, the department must create the notice form to be used by
12 housing counselors and attorneys to refer borrowers to mediation under
13 this section.

14 (3) Within ten days of receiving the notice, the department shall:

15 (a) Send a notice to the beneficiary, the borrower, the housing
16 counselor or attorney who referred the borrower, and the trustee
17 stating that the parties have been referred to mediation; and

18 (b) Select a mediator and notify the parties of the selection.

19 (4)(a) Within forty-five days of receiving the referral from the
20 department, the mediator shall convene a mediation session in the
21 county where the borrower resides, unless the parties agree on another
22 location. The parties may agree in writing to extend the time in which
23 to schedule the mediation session. If the parties agree to extend the
24 time, the beneficiary shall notify the trustee of the extension and the
25 date the mediator is expected to issue a report.

26 (b) Prior to scheduling a mediation session, the mediator shall
27 require that both parties sign a waiver stating that neither party may
28 call the mediator as a live witness in any litigation pertaining to a
29 foreclosure action between the parties. However, the mediator's
30 certification may be deemed admissible evidence, subject to court
31 rules, in any litigation pertaining to a foreclosure action between the
32 parties.

33 (5)(a) The mediator may schedule phone conferences, consultations
34 with the parties individually, and other communications to ensure that
35 the parties have all the necessary information to engage in a
36 productive mediation.

37 (b) The mediator must send written notice of the time, date, and

1 location of the mediation session to the borrower, the beneficiary, and
2 the department at least fifteen days prior to the mediation session.
3 At a minimum, the notice must contain:

4 (i) A statement that the borrower may be represented in the
5 mediation session by an attorney or other advocate;

6 (ii) A statement that a person with authority to agree to a
7 resolution, including a proposed settlement, loan modification, or
8 dismissal or continuation of the foreclosure proceeding, must be
9 present either in person or on the telephone or video conference during
10 the mediation session;

11 (iii) A complete list of documents, calculations, or information
12 that the parties must provide to the mediator and the deadlines for
13 providing the documents, calculations, or information; and

14 (iv) A statement that the parties have a duty to meet in good faith
15 and that failure to mediate in good faith may impair the beneficiary's
16 ability to foreclose on the property or the borrower's ability to
17 modify the loan.

18 (6) The borrower, the beneficiary or authorized agent, and the
19 mediator must meet in person for the mediation session. However, a
20 person with authority to agree to a resolution on behalf of the
21 beneficiary may be present over the telephone or video conference
22 during the mediation session.

23 (7) The participants in mediation must address the issues of
24 foreclosure that may enable the borrower and the beneficiary to reach
25 a resolution, including but not limited to reinstatement, modification
26 of the loan, restructuring of the debt, or some other workout plan. To
27 assist the parties in addressing issues of foreclosure, the mediator
28 must require the participants to consider the following:

29 (a) The borrower's current and future economic circumstances,
30 including the borrower's current and future income, debts, and
31 obligations for the previous sixty days or greater time period as
32 determined by the mediator;

33 (b) The net present value of receiving payments pursuant to a
34 modified mortgage loan as compared to the anticipated net recovery
35 following foreclosure;

36 (c) Any affordable loan modification calculation and net present
37 value calculation when required under any federal mortgage relief
38 program, including the home affordable modification program (HAMP) as

1 applicable to government-sponsored enterprise and nongovernment-
2 sponsored enterprise loans and any HAMP-related modification program
3 applicable to loans insured by the federal housing administration, the
4 veterans administration, and the rural housing service. If such a
5 calculation is not required, then the beneficiary must use the current
6 calculations, assumptions, and forms that are established by the
7 federal deposit insurance corporation and published in the federal
8 deposit insurance corporation loan modification program guide; and

9 (d) Any other loss mitigation guidelines applicable to loans
10 insured by the federal housing administration, the veterans
11 administration, and the rural housing service.

12 (8) A violation of the duty to meet in good faith as required under
13 this section includes, but is not limited to:

14 (a) Failure to timely participate in mediation without good cause;

15 (b) Failure of the beneficiary to provide the following
16 documentation to the borrower and mediator at least ten days before the
17 mediation or pursuant to the mediator's instructions:

18 (i) An accurate statement containing the balance of the loan;

19 (ii) Copies of the note and deed of trust;

20 (iii) A copy of the declaration required by RCW 61.24.030(7)(a)
21 stating that the entity claiming to be the beneficiary is the owner of
22 any promissory note or obligation secured by the deed of trust,
23 including proof that the entity seeking to foreclose is the current
24 assignee of the deed of trust. The proof may be provided by an
25 affidavit;

26 (iv) The best estimate of any arrearage and an itemized statement
27 of the arrearages;

28 (v) An itemized list of fees and charges outstanding;

29 (vi) The payment history and schedule for the preceding twelve
30 months, or since default, whichever is longer, including a breakdown of
31 all fees and charges claimed;

32 (vii) All borrower-related and mortgage-related input data used in
33 any net present value analysis;

34 (viii) An explanation regarding any denial for a loan modification,
35 forbearance, or other alternative to foreclosure in sufficient detail
36 for the mediator to explain to the borrower why the decision was made;

37 (ix) The most recently available appraisal or other broker price
38 opinion most recently relied upon by the beneficiary; and

1 (x) The portion or excerpt of the pooling and servicing agreement
2 that prohibits the beneficiary from implementing a modification, if the
3 beneficiary claims it cannot implement a modification due solely to
4 limitations in a pooling and servicing agreement, and documentation or
5 a statement detailing the efforts of the beneficiary to obtain a waiver
6 of the pooling and servicing agreement provisions;

7 (c) Failure of the borrower to provide accurate and complete
8 documentation to the beneficiary and mediator, at least ten days before
9 the mediation or pursuant to the mediator's instruction, showing the
10 borrower's current and future income, debts and obligations, and tax
11 returns for the past two years;

12 (d) Failure of either party to pay the respective portion of the
13 mediation fee in advance of the mediation as required under this
14 section, or for the payment to be rejected or returned for insufficient
15 funds;

16 (e) Failure of a party to designate representatives with adequate
17 authority to fully settle, compromise, or otherwise reach resolution
18 with the borrower in mediation; and

19 (f) A request by a beneficiary that the borrower waive future
20 claims he or she may have in connection with the deed of trust, as a
21 condition of agreeing to a modification, except for rescission claims
22 under the federal truth in lending act. Nothing in this section
23 precludes a beneficiary from requesting that a borrower dismiss with
24 prejudice any pending claims against the beneficiary, its agents, loan
25 servicer, or trustee, arising from the underlying deed of trust, as a
26 condition of modification.

27 (9) Within seven business days after the conclusion of the
28 mediation session, the mediator must send a written certification to
29 the department and the trustee and send copies to the parties of:

30 (a) The date, time, and location of the mediation session;

31 (b) The names of all persons materially participating in person and
32 by telephone or video conference, at the mediation session;

33 (c) Whether a resolution was reached by the parties, including
34 whether the default was cured by reinstatement, modification, or
35 restructuring of the debt, or some other alternative to foreclosure was
36 agreed upon by the parties;

37 (d) Whether the parties participated in the mediation in good
38 faith; and

1 (e) A description of the net present value test used, along with a
2 copy of the inputs, including the result of the net present value test
3 expressed in a dollar amount.

4 (10) If the parties are unable to reach any agreement and the
5 mediator certifies that the parties acted in good faith, the
6 beneficiary may proceed with the foreclosure.

7 (11)(a) The mediator's certification that the beneficiary failed to
8 act in good faith in mediation constitutes a defense to the nonjudicial
9 foreclosure action that was the basis for initiating the mediation. In
10 any action to enjoin the foreclosure, the beneficiary shall be entitled
11 to rebut the allegation that it failed to act in good faith. The
12 mediator's certification that the beneficiary failed to act in good
13 faith during mediation does not constitute a defense to a judicial
14 foreclosure or a future nonjudicial foreclosure action if a
15 modification of the loan is agreed upon and the borrower subsequently
16 defaults.

17 (b) If an agreement was not reached and the mediator's
18 certification shows that the net present value of the modified loan
19 exceeds the anticipated net recovery at foreclosure by more than five
20 percent, that showing in the certification shall constitute a basis for
21 the borrower to enjoin the foreclosure.

22 (12) The mediator's certification that the borrower failed to act
23 in good faith in mediation authorizes the beneficiary to proceed with
24 the foreclosure.

25 (13) A trustee may not record the notice of sale until the trustee
26 receives the report stating that the mediation has been completed. If
27 the trustee does not receive the report, the trustee may record the
28 notice of sale after ten days from the date the report to the trustee
29 was due.

30 (14) A mediator may charge reasonable fees as authorized by this
31 subsection and by the department. Unless the fee is waived or the
32 parties agree otherwise, a foreclosure mediator's fee may not exceed
33 four hundred dollars for a mediation session lasting between one hour
34 and three hours. For a mediation session exceeding three hours, the
35 foreclosure mediator may charge a reasonable fee, as authorized by the
36 department. The mediator must provide an estimated fee before the
37 mediation, and payment of the mediator's fee must be divided equally
38 between the beneficiary and the borrower. The beneficiary and the

1 borrower must tender the loan mediator's fee seven calendar days before
2 the commencement of the mediation and pursuant to the mediator's
3 instructions.

4 (15) Beginning December 1, 2012, and every year thereafter, the
5 department shall report annually to the legislature on:

6 (a) The performance of the program, including the numbers of
7 borrowers who are referred to mediation by a housing counselor or
8 attorney;

9 (b) The results of the mediation program, including the numbers of
10 loans restructured or modified, the change in the borrower's monthly
11 payment for principal and interest, the number of principal write-downs
12 and interest rate reductions, and, to the extent practical, the number
13 of borrowers who default within a year of restructuring or
14 modification; and

15 (c) Any recommendations for changes to the statutes regarding the
16 mediation program.

17 NEW SECTION. **Sec. 8.** A new section is added to chapter 61.24 RCW
18 to read as follows:

19 (1) Section 7 of this act applies only to deeds of trust that are
20 recorded against owner-occupied residential real property. The
21 property must have been owner-occupied as of the date of the initial
22 contact under RCW 61.24.031 was made.

23 (2) A borrower under a deed of trust on owner-occupied residential
24 real property who has received a notice of default on or before the
25 effective date this section may be referred to mediation under section
26 7 of this act by a housing counselor or attorney.

27 (3) Section 7 of this act does not apply to deeds of trust:

28 (a) Securing a commercial loan;

29 (b) Securing obligations of a grantor who is not the borrower or a
30 guarantor; or

31 (c) Securing a purchaser's obligations under a seller-financed
32 sale.

33 NEW SECTION. **Sec. 9.** A new section is added to chapter 61.24 RCW
34 to read as follows:

35 (1) For the purposes of section 7 of this act, the department must

1 maintain a list of approved foreclosure mediators. The department may
2 approve the following persons to serve as foreclosure mediators under
3 this section:

4 (a) Attorneys who are active members of the Washington state bar
5 association;

6 (b) Employees of United States department of housing and urban
7 development-approved housing counseling agencies;

8 (c) Employees or volunteers of dispute resolution centers under
9 chapter 7.75 RCW;

10 (d) Retired judges of Washington courts;

11 (e) Other statewide organizations that provide mediation services;

12 and

13 (f) Any other persons authorized by the department.

14 (2) The department may establish a required training program for
15 foreclosure mediators and may require mediators to acquire training
16 before being approved. The mediators must be familiar with relevant
17 aspects of the law, have knowledge of community-based resources and
18 mortgage assistance programs, and refer borrowers to these programs
19 where appropriate.

20 (3) The department may remove any mediator from the approved list
21 of mediators.

22 NEW SECTION. **Sec. 10.** A new section is added to chapter 61.24 RCW
23 to read as follows:

24 The foreclosure fairness account is created in the custody of the
25 state treasurer. All receipts received under this section, except nine
26 percent retained by the department of commerce for the implementation
27 and operation of the foreclosure mediation program under this chapter,
28 must be deposited into the account. Except as otherwise provided in
29 this section, the administrative expenses for the account may not
30 exceed three percent of the remaining funds, and expenditures from the
31 account must be used for implementation and operation of the
32 foreclosure fairness act as follows: Of the remaining: (1) Up to six
33 percent to the office of the attorney general to be used by the
34 consumer protection division to enforce this chapter; (2) up to two
35 percent to the office of civil legal aid to be used for the purpose of
36 contracting with qualified legal aid programs for legal representation
37 of homeowners in matters relating to foreclosure. Funds provided under

1 this subsection (2) must be used to supplement, not supplant, other
2 federal, state, and local funds; and (3) up to eighty percent to be
3 used by the Washington state housing finance commission for the
4 purposes of providing housing counselors for borrowers. Of this
5 amount, up to four hundred thousand dollars may be used in fiscal year
6 2012 and up to two hundred thousand dollars in fiscal year 2013 by the
7 department of financial institutions to conduct homeowner prepurchase
8 and postpurchase outreach and education programs as defined in RCW
9 43.320.150. Only the director of the department of commerce or the
10 director's designee may authorize expenditures from the account. The
11 account is subject to allotment procedures under chapter 43.88 RCW, but
12 an appropriation is not required for expenditures.

13 NEW SECTION. **Sec. 11.** A new section is added to chapter 61.24 RCW
14 to read as follows:

15 (1) Beginning October 1, 2011, and every quarter thereafter, every
16 beneficiary issuing notices of default on owner-occupied residential
17 real property under this chapter must:

18 (a) Report to the department the number of owner-occupied
19 residential real properties for which the beneficiary has issued a
20 notice of default during the previous quarter; and

21 (b) Remit the amount required under subsection (2) of this section.

22 (2) For each owner-occupied residential real property for which a
23 notice of default has been issued, the beneficiary issuing the notice
24 of default shall remit two hundred fifty dollars to the department to
25 be deposited, as provided under section 10 of this act, into the
26 foreclosure fairness account. The two hundred fifty dollar payment is
27 required per property and not per notice of default. The beneficiary
28 shall remit the total amount required in a lump sum each quarter.

29 (3) No later than thirty days after the effective date of this
30 section, the beneficiaries required to report and remit to the
31 department under this section shall determine the number of owner-
32 occupied residential real properties for which notices of default were
33 issued during the three months prior to the effective date of this
34 section. The beneficiary shall remit to the department a one-time sum
35 of two hundred fifty dollars multiplied by the number of properties.
36 The department shall deposit the funds into the foreclosure fairness
37 account as provided under section 10 of this act.

1 (4) Any beneficiary that certifies under penalty of perjury that it
2 has issued fewer than two hundred fifty notices of default in the
3 preceding year may provide annual, rather than quarterly, figures and
4 make an annual payment.

5 NEW SECTION. **Sec. 12.** A new section is added to chapter 61.24 RCW
6 to read as follows:

7 Any duty that servicers may have to maximize net present value
8 under their pooling and servicing agreements is owed to all parties in
9 a deed of trust pool, not to any particular parties, and a servicer
10 acts in the best interests of all parties if it agrees to or implements
11 a modification or workout plan when both of the following apply:

12 (1) The deed of trust is in payment default, or payment default is
13 reasonably imminent; and

14 (2) Anticipated recovery under a modification or workout plan
15 exceeds by five percent or more the anticipated recovery through
16 foreclosure on a net present value basis.

17 **Sec. 13.** RCW 61.24.135 and 2008 c 153 s 6 are each amended to read
18 as follows:

19 (1) It is an unfair or deceptive act or practice under the consumer
20 protection act, chapter 19.86 RCW, for any person, acting alone or in
21 concert with others, to offer, or offer to accept or accept from
22 another, any consideration of any type not to bid, or to reduce a bid,
23 at a sale of property conducted pursuant to a power of sale in a deed
24 of trust. The trustee may decline to complete a sale or deliver the
25 trustee's deed and refund the purchase price, if it appears that the
26 bidding has been collusive or defective, or that the sale might have
27 been void. However, it is not an unfair or deceptive act or practice
28 for any person, including a trustee, to state that a property subject
29 to a recorded notice of trustee's sale or subject to a sale conducted
30 pursuant to this chapter is being sold in an "as-is" condition, or for
31 the beneficiary to arrange to provide financing for a particular bidder
32 or to reach any good faith agreement with the borrower, grantor, any
33 guarantor, or any junior lienholder.

34 (2) It is an unfair or deceptive act in trade or commerce and an
35 unfair method of competition in violation of the consumer protection

1 act, chapter 19.86 RCW, for any person to violate the duty of good
2 faith under section 7 of this act or for any entity to fail to comply
3 with the requirements of section 10 of this act.

4 **Sec. 14.** RCW 82.45.030 and 1993 sp.s. c 25 s 503 are each amended
5 to read as follows:

6 (1) As used in this chapter, the term "selling price" means the
7 true and fair value of the property conveyed. If property has been
8 conveyed in an arm's length transaction between unrelated persons for
9 a valuable consideration, a rebuttable presumption exists that the
10 selling price is equal to the total consideration paid or contracted to
11 be paid to the transferor, or to another for the transferor's benefit.

12 (2) If the sale is a transfer of a controlling interest in an
13 entity with an interest in real property located in this state, the
14 selling price shall be the true and fair value of the real property
15 owned by the entity and located in this state. If the true and fair
16 value of the real property located in this state cannot reasonably be
17 determined, the selling price shall be determined according to
18 subsection (4) of this section.

19 When a transfer or conveyance is made by deed in lieu of
20 foreclosure to satisfy a deed of trust, total consideration shall not
21 include the amount of any relocation assistance provided to the
22 transferor.

23 (3) As used in this section, "total consideration paid or
24 contracted to be paid" includes money or anything of value, paid or
25 delivered or contracted to be paid or delivered in return for the sale,
26 and shall include the amount of any lien, mortgage, contract
27 indebtedness, or other incumbrance, either given to secure the purchase
28 price, or any part thereof, or remaining unpaid on such property at the
29 time of sale.

30 Total consideration shall not include the amount of any outstanding
31 lien or incumbrance in favor of the United States, the state, or a
32 municipal corporation for taxes, special benefits, or improvements.

33 (4) If the total consideration for the sale cannot be ascertained
34 or the true and fair value of the property to be valued at the time of
35 the sale cannot reasonably be determined, the market value assessment
36 for the property maintained on the county property tax rolls at the
37 time of the sale shall be used as the selling price.

1 NEW SECTION. **Sec. 15.** 2009 c 292 s 13 (uncodified) is repealed.

2 NEW SECTION. **Sec. 16.** If any provision of this act or its
3 application to any person or circumstance is held invalid, the
4 remainder of the act or the application of the provision to other
5 persons or circumstances is not affected.

6 NEW SECTION. **Sec. 17.** This act is necessary for the immediate
7 preservation of the public peace, health, or safety, or support of the
8 state government and its existing public institutions, and takes effect
9 immediately.

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