
SENATE BILL 6648

State of Washington

61st Legislature

2010 Regular Session

By Senators Kline, Keiser, Fairley, Kohl-Welles, Kauffman, Gordon, and McDermott

Read first time 01/20/10. Referred to Committee on Labor, Commerce & Consumer Protection.

1 AN ACT Relating to protecting and assisting consumers and
2 homeowners from unfair lending practices and during foreclosure
3 proceedings; reenacting and amending RCW 61.24.005; adding new sections
4 to chapter 61.24 RCW; adding a new section to chapter 36.22 RCW; and
5 creating new sections.

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

7 NEW SECTION. **Sec. 1.** The legislature finds and declares that:
8 (1) The rate of home foreclosures is rising to unprecedented levels,
9 both for prime and subprime loans and foreclosures are expected to rise
10 because homeowners will not be able to afford payments due to rising
11 adjustable loan payments, reset of interest rates, and rising
12 unemployment and job loss; (2) homeowners will continue to have
13 problems selling their properties at the value of their home loans due
14 to falling housing prices; (3) foreclosures contribute to the decline
15 in the state's housing market, loss of property values, and loss of tax
16 revenues; and (4) with the number of nonjudicial foreclosures climbing
17 the current system for resolving foreclosure matters is inadequate.

1 NEW SECTION. **Sec. 2.** This act may be known and cited as the
2 protect Washington homeowners act.

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

5 The definitions in this section apply throughout this chapter
6 unless the context clearly requires otherwise.

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

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

12 (3) "Borrower" means a person or a general partner in a
13 partnership, including a joint venture, that is liable for all or part
14 of the obligations secured by the deed of trust under the instrument or
15 other document that is the principal evidence of such obligations, or
16 the person's successors if they are liable for those obligations under
17 a written agreement with the beneficiary.

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

20 (5) "Department" means the department of financial institutions.

21 (6) "Fair value" means the value of the property encumbered by a
22 deed of trust that is sold pursuant to a trustee's sale. This value
23 shall be determined by the court or other appropriate adjudicator by
24 reference to the most probable price, as of the date of the trustee's
25 sale, which would be paid in cash or other immediately available funds,
26 after deduction of prior liens and encumbrances with interest to the
27 date of the trustee's sale, for which the property would sell on such
28 date after reasonable exposure in the market under conditions requisite
29 to a fair sale, with the buyer and seller each acting prudently,
30 knowledgeably, and for self-interest, and assuming that neither is
31 under duress.

32 (~~(+6)~~) (7) "Grantor" means a person, or its successors, who
33 executes a deed of trust to encumber the person's interest in property
34 as security for the performance of all or part of the borrower's
35 obligations.

36 (~~(+7)~~) (8) "Guarantor" means any person and its successors who is

1 not a borrower and who guarantees any of the obligations secured by a
2 deed of trust in any written agreement other than the deed of trust.

3 ~~((+8+))~~ (9) "Owner-occupied" means property that is the principal
4 residence of the borrower.

5 ~~((+9+))~~ (10) "Person" means any natural person, or legal or
6 governmental entity.

7 ~~((+10+))~~ (11) "Record" and "recorded" includes the appropriate
8 registration proceedings, in the instance of registered land.

9 ~~((+11+))~~ (12) "Residential real property" means property consisting
10 solely of a single-family residence, a residential condominium unit, or
11 a residential cooperative unit.

12 ~~((+12+))~~ (13) "Tenant-occupied property" means property consisting
13 solely of residential real property that is the principal residence of
14 a tenant subject to chapter 59.18 RCW or other building with four or
15 fewer residential units that is the principal residence of a tenant
16 subject to chapter 59.18 RCW.

17 ~~((+13+))~~ (14) "Trustee" means the person designated as the trustee
18 in the deed of trust or appointed under RCW 61.24.010(2).

19 ~~((+14+))~~ (15) "Trustee's sale" means a nonjudicial sale under a
20 deed of trust undertaken pursuant to this chapter.

21 NEW SECTION. **Sec. 4.** A new section is added to chapter 61.24 RCW
22 to read as follows:

23 (1) A trustee, beneficiary, or authorized agent shall not record a
24 notice of sale pursuant to RCW 61.24.040 on owner-occupied residential
25 real property unless the beneficiary or authorized agent has made a
26 good faith review of the borrower's financial situation and offered,
27 whenever eligible, a loan modification, or other option to assist the
28 borrower in bringing the arrears current.

29 (2) A good faith review of the borrower's financial situation
30 includes, but is not limited to, an evaluation of the borrower's
31 eligibility for all loan modification programs established by the
32 federal government or mortgage industry, and if the borrower elects,
33 participation in the foreclosure mediation program established in this
34 section. Failure to act in good faith constitutes a defense to a
35 foreclosure and a violation of the consumer protection act.

36 (3) The foreclosure mediation program shall address all the issues

1 related to the foreclosure, including but not limited to,
2 reinstatement, modification of the loan, and restructuring of the debt.

3 (4) Prior to the recording of a notice of sale pursuant to RCW
4 61.24.040, a trustee, beneficiary, or authorized agent shall provide a
5 notice to the borrower by both first-class and either certified or
6 registered mail, return receipt requested, containing the following:

7 (a) The contact information to reach a person with authority to
8 negotiate a loan modification on behalf of the beneficiary of the deed
9 of trust;

10 (b) The contact information, including the toll-free telephone
11 number for housing counseling agencies approved by the United States
12 department of housing and urban development operating to assist
13 homeowners in the state avoid foreclosure; and

14 (c) A form notice, as proscribed by the department, explaining the
15 availability of the foreclosure mediation program and upon which the
16 grantor or person who holds title of record may indicate his or her
17 election to enter into foreclosure mediation or to waive mediation.
18 The notice must encourage the borrower to meet with a housing counselor
19 or attorney prior to mediation. The notice must inform the borrower
20 that the form must be returned to the department, or the department's
21 designee, within thirty days or the right to foreclosure mediation is
22 waived.

23 (5) A trustee may not record a notice of sale under RCW 61.24.040
24 until thirty days after receiving a waiver of foreclosure mediation as
25 provided in subsection (7) of this section or the certification as
26 required by subsection (12) of this section.

27 (6) If the borrower or the person who holds the title of record
28 indicates on the form the election to enter into mediation, the
29 department, or the department's designee, shall notify the beneficiary
30 of the deed of trust and every other person with an interest by
31 certified mail, return receipt requested, of the election of the
32 borrower or the person who holds the title of record to enter into
33 mediation. The foreclosure is stayed and no further action may be
34 taken to proceed with the foreclosure until the certification of the
35 foreclosure mediation is made by the mediator.

36 (7) If the borrower or the person who holds the title of record
37 indicates on the form his or her election to waive mediation or fails
38 to return the form to the department or department's designee as

1 required, the department or department's designee shall execute an
2 affidavit attesting to that fact under penalty of perjury and mail a
3 copy of the affidavit, together with the waiver of mediation by the
4 borrower or the person who holds title of record, to the trustee,
5 beneficiary, or authorized agent.

6 (8) The department, or department's designee, shall maintain a list
7 of foreclosure mediators and may establish a required training program
8 for foreclosure mediators and require the training prior to being
9 appointed. The following persons may serve as foreclosure mediators
10 under this section:

11 (a) An attorney who is an active member of the Washington state bar
12 association;

13 (b) A department certified housing counselor;

14 (c) An employee or volunteer of a dispute resolution center; or

15 (d) Any other person authorized by the department.

16 (9) Within ten business days of the election by the borrower of
17 mediation, the department shall provide the borrower and the
18 beneficiary with the names, telephone numbers, and addresses of no
19 fewer than two mediators in the geographical area in which the
20 residential real property is located. Within five business days after
21 the department provides this information, each party shall select a
22 mediator and notify the department of the party's selection. If the
23 parties agree on a mediator, the department shall notify them of the
24 agreed upon mediator within five business days. If the parties do not
25 agree on a mediator, if one party does not notify the department of a
26 selection in a timely manner, or if both parties so request, the
27 department shall select a mediator and notify the parties of the
28 selection.

29 (10)(a) The foreclosure mediator may schedule phone conferences,
30 consultations with the parties individually, and other communications
31 to ensure that the parties have all the necessary information to engage
32 in a productive foreclosure mediation session. The foreclosure
33 mediator shall convene a foreclosure mediation session no later than
34 sixty days after receiving a referral from the department.

35 (b) The foreclosure mediator shall send written notice of the time,
36 date, and location of the foreclosure mediation session to the borrower
37 and the beneficiary at least seven days prior to the foreclosure
38 mediation session. The same notice must also state: (i) That the

1 borrower may be represented in the foreclosure mediation session by an
2 attorney or other advocate; (ii) that a person with authority to agree
3 to a proposed settlement, loan modification, and dismissal or
4 continuation of the foreclosure proceeding must represent the
5 beneficiary at the foreclosure mediation session; and (iii) the
6 complete list of documents and calculations that must be taken by the
7 parties to the mediation, including the documents and calculations as
8 required under subsection (12)(b) of this section.

9 (11) The participants in a foreclosure mediation session shall
10 address all issues of foreclosure, including but not limited to
11 reinstatement, modification of the loan, or restructuring of the debt,
12 that will enable the borrower and the lender to avoid foreclosure. Any
13 loan modification offered to the borrower must comply with current
14 federal and state law and the borrower must be able to reasonably
15 afford to repay the loan, as modified, according to the scheduled
16 payments. The mediator shall require the participants to address these
17 issues by considering the following:

18 (a) The borrower's current circumstances, including the borrower's
19 current income, debts, and obligations;

20 (b) The net present value of receiving payments pursuant to a
21 modified mortgage loan as compared to the anticipated net recovery
22 following foreclosure; and

23 (c) Any affordable loan modification calculation and net present
24 value calculation when required under the federal home affordable
25 modification program. If the loan is insured by the federal housing
26 administration, subject to federal national mortgage association or
27 federal home loan mortgage corporation guidelines, or insured by the
28 veterans administration, then the calculations required by those
29 agencies must be used. If such a calculation is not required, then the
30 beneficiary must use the current calculations, assumptions, and forms
31 that are established by the federal deposit insurance corporation and
32 published in the federal deposit insurance corporation loan
33 modification program guide. Any worksheet, spreadsheet, or other
34 calculation tool used to make the calculations, including all inputs
35 and numerical assumptions, must be provided to the borrower.

36 (12) The parties shall conduct all discussions in good faith. A
37 violation of the obligation of good faith includes:

1 (a) Failure to attend and participate in mediation sessions without
2 good cause;

3 (b) Failure of the beneficiary to bring to the foreclosure
4 mediation session the following documentation: An accurate statement
5 containing the balance of the loan; copies of original loan documents;
6 proof that the entity claiming to be the beneficiary is the owner of
7 any promissory note or obligation secured by the deed of trust; the
8 amount of any arrearage; an itemized list of fees and charges
9 outstanding; the payment history and schedule; an itemized statement of
10 the arrearage, including a breakdown of all fees and charges claimed;
11 an affordable loan modification calculation; a net present value
12 calculation showing all inputs and the outcome of the net present value
13 test expressed in a dollar amount; most recently available appraisal;
14 any other relevant information as determined by the department; and if
15 the beneficiary claims it is unable to implement a loan modification
16 due to limitations in a pooling and servicing agreement, a copy of the
17 pooling and servicing agreement containing the restriction and
18 documentation of efforts the beneficiary made to obtain a waiver of the
19 provision;

20 (c) Failure of a party to designate a representative with adequate
21 authority to fully settle, compromise, or otherwise mediate the matter;

22 (d) The beneficiary or lender requests, as a condition of agreeing
23 to a modification in the terms or conditions of the loan, that the
24 borrower waive other rights or claims he or she may have in connection
25 with the loan; or

26 (e) Failure of a beneficiary to agree to a modification of the loan
27 where the net present value of the modified loan exceeds the
28 anticipated net recovery at foreclosure.

29 (13) Within five business days after the conclusion of a
30 foreclosure mediation session, the foreclosure mediator shall make a
31 written certification to the department and send copies to the parties
32 of:

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

34 (b) The names of all persons in attendance at the loan mediation
35 session;

36 (c) Whether the default was cured by entry of a reinstatement,
37 modification of the loan, or restructuring of the debt;

1 (d) If held, whether the parties participated in the foreclosure
2 mediation in good faith; and

3 (e) A description of the net present value test used, and a copy of
4 the calculation including the result of the net present value test
5 expressed in a dollar amount.

6 (14) The failure of the beneficiary to act in good faith at the
7 mediation constitutes a defense to a foreclosure and is a violation of
8 the consumer protection act. If a mediation agreement was not reached
9 and the report of the mediator indicates that the calculations showed
10 the net present value of the modified loan exceeds the anticipated net
11 recovery at foreclosure, the borrower may enjoin the foreclosure.

12 (15) A loan mediator may charge fees as authorized by this
13 subsection or by the department. Unless the fee is waived or as
14 otherwise authorized by the department, a foreclosure mediator's fee is
15 set by rule by the department but may not exceed four hundred dollars
16 for a foreclosure mediation session lasting between one hour and three
17 hours. A person representing the beneficiary shall tender the loan
18 mediator's fee in full at the outset of the session. Fifty percent of
19 the loan mediator's fee may be added to the outstanding balance of the
20 loan if the foreclosure mediator certifies that the beneficiary
21 participated in the loan mediation session in good faith.

22 (16) The department shall report annually to the legislature on:

23 (a) The performance of the program, including the numbers of
24 homeowners who are notified of mediation and who attend mediation;

25 (b) The results of the mediation program, including the numbers of
26 loans restructured or modified, the number of principal write-downs and
27 interest rate reductions, and the number of homeowners who default
28 within a year of restructuring or modification; and

29 (c) Make recommendations for any changes to the program to the
30 legislature.

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

33 (1) The legislature finds and declares that any duty that servicers
34 may have to maximize net present value under their pooling and
35 servicing agreements is owed to all parties in a deed of trust pool,
36 not to any particular parties, and that a servicer acts in the best

1 interests of all parties if it agrees to or implements a deed of trust
2 modification or workout plan for which both of the following apply:

3 (a) The deed of trust is in payment default, or payment default is
4 reasonably foreseeable; and

5 (b) Anticipated recovery under the deed of trust modification or
6 workout plan exceeds the anticipated recovery through foreclosure on a
7 net present value basis.

8 (2) The mortgagee, beneficiary, or authorized agent shall offer the
9 borrower a deed of trust modification or workout plan if the
10 modification or plan is consistent with its contractual or other
11 authority.

12 NEW SECTION. **Sec. 6.** The legislature finds that the practices
13 covered by sections 3 and 4 of this act are matters vitally affecting
14 the public interest for the purpose of applying the consumer protection
15 act, chapter 19.86 RCW. A violation of this chapter is not reasonable
16 in relation to the development and preservation of business and is an
17 unfair or deceptive act in trade or commerce and an unfair method of
18 competition for the purpose of applying the consumer protection act,
19 chapter 19.86 RCW.

20 NEW SECTION. **Sec. 7.** A new section is added to chapter 36.22 RCW
21 to read as follows:

22 A surcharge in an amount determined by the department of financial
23 institutions by rule but no greater than the amount of the superior
24 court civil filing fee shall be charged by the county auditor at the
25 time of recording of each notice of sale under RCW 61.24.040. The
26 auditor may retain up to two percent of the funds collected to
27 administer collection. The remaining funds shall be transmitted
28 monthly to the director of financial institutions who shall deposit the
29 funds into the protect Washington homeowners mediation program under
30 section 7 of this act. The department of financial institutions is
31 responsible for the distribution of the funds in the account and shall
32 develop rules for the use of these funds to fund the protect Washington
33 homeowners mediation program and to fund housing counseling agencies
34 approved by the United States department of housing and urban
35 development operating to assist homeowners in the state avoid
36 foreclosure.

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

3 The protect Washington homeowners mediation program account is
4 created in the custody of the state treasurer. All receipts from the
5 surcharge under section 7 of this act must be deposited into the
6 account. Expenditures from the account may be used only for the
7 purposes set forth in section 7 of this act. Only the director of
8 financial institutions or the director's designee may authorize
9 expenditures from the account. The account is subject to allotment
10 procedures under chapter 43.88 RCW, but an appropriation is not
11 required for expenditures.

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