

# HOUSE BILL REPORT

## HB 2421

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### As Reported by House Committee On:

Judiciary

General Government Appropriations & Oversight

**Title:** An act relating to modifying the foreclosure fairness act.

**Brief Description:** Modifying the foreclosure fairness act.

**Sponsors:** Representatives Orwall, Rodne, Ladenburg, Upthegrove, Tharinger, Maxwell, Kelley, Kenney, Kagi, Moscoso and Jinkins; by request of Washington State Department of Commerce.

### Brief History:

#### Committee Activity:

Judiciary: 1/26/12, 1/30/12 [DPS];

General Government Appropriations & Oversight: 2/2/12 [DPS(JUDI)].

#### Brief Summary of Substitute Bill

- Amends the Foreclosure Fairness Act to, among other things: (1) change when a borrower may be referred to mediation; (2) change the time period between the trustee sale and the recording of the notice of sale for owner-occupied residential real property; (3) allow the mediator discretion to cancel a mediation session and continue a session; (4) provide immunity for all foreclosure mediators; (5) clarify what information a beneficiary and borrower must provide each other before mediation; (6) change the allocation of funds remitted by beneficiaries; and (7) make other procedural changes to the mediation process.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Eddy, Hansen, Kirby, Klippert, Nealey, Orwall, Rivers and Roberts.

**Staff:** Trudes Tango (786-7384).

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

## **Background:**

### Meet and Confer Process.

Before a beneficiary can issue a notice of default to a borrower of a loan secured by a deed of trust on owner-occupied residential real property, the beneficiary must first contact the borrower to explore options to avoid foreclosure. The initial contact must be by letter, containing statutorily required information, and then by telephone. If the borrower requests a meeting with the beneficiary, the meeting must be scheduled before the notice of default is issued. The meeting must be in person, unless the borrower waives that requirement. A person authorized to modify the loan or reach an alternative resolution on behalf of the beneficiary may participate by telephone, so long as a representative of the beneficiary is at the meeting in person. The parties must attempt to reach a resolution under this process within 90 days from the date the initial contact was made.

This initial "meet and confer" requirement does not apply if the borrower has surrendered the property or the borrower has filed for bankruptcy and the bankruptcy stay remains in place or the bankruptcy court has granted relief from the bankruptcy stay allowing enforcement of the deed of trust.

### Mediation and Mediators.

Last year the Legislature enacted the Foreclosure Fairness Act (FFA), which, among other things, established a foreclosure mediation process that applies to beneficiaries and borrowers of deeds of trust on owner-occupied residential property. The borrower must be referred to mediation by a housing counselor or attorney and can be referred any time before a notice of sale has been recorded.

The referral to mediation is sent to the Department of Commerce (Department), which selects a mediator from a list of approved foreclosure mediators and sends notice to the parties. Approved foreclosure mediators must go through a training program, be familiar with relevant aspects of the law, and have knowledge of community-based resources and mortgage assistance programs.

A foreclosure mediator's fee may not exceed \$400 for a mediation session lasting between one and three hours. Payment of the fee is split equally between the beneficiary and borrower. They must pay the fee seven days before commencement of the mediation or pursuant to the mediator's instructions.

Mediators who are employees or volunteers of Dispute Resolution Centers (DRCs) are immune from suit in any civil action based on any proceedings or other official acts performed in their capacity as foreclosure mediators, except in cases of willful or wanton misconduct.

### Beneficiary Reporting Requirements.

Every quarter, a beneficiary that issues notices of default on owner-occupied residential real property must report to the Department the number of owner-occupied residential real properties for which the beneficiary has issued a notice of default during the previous quarter and remit \$250 per property to the Department. The reporting and remitting requirement

does not apply to beneficiaries that issued fewer than 250 notices of default in the previous year.

#### Allocation of Funds.

The FFA allocates a certain percentage of the funds to different agencies. Currently, 80 percent of the funds must be used for providing housing counselors to borrowers. Up to 6 percent or \$655,000, whichever is greater, is allocated to the Office of the Attorney General to its consumer protection division to enforce the FFA. Up to 2 percent goes to the Office of Civil Legal Aid to contract with legal aid programs for legal representation of homeowners. Up to 9 percent or \$451,000, whichever is greater, goes to the Department to implement the FFA. Up to 3 percent goes to the Department of Financial Institutions to conduct outreach and education programs for homeowners.

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#### **Summary of Substitute Bill:**

##### Meet and Confer.

The initial meeting between the beneficiary and borrower may be by telephone, unless the borrower requests in writing an in-person meeting. The meet and confer requirement applies to borrowers who have filed for bankruptcy.

##### Referral to Mediation.

A borrower may no longer be referred to mediation during the meet and confer period. The borrower may be referred to mediation any time after a notice of default has been issued but no later than 20 days after a notice of sale has been recorded.

##### Mediation and Mediators.

A mediation session must be held within 70 days, rather than 45 days, of the referral from the Department. The beneficiary and borrower must exchange required documents within a certain time. If the mediator reasonably believes a borrower will not attend a mediation session, the mediator may cancel a scheduled mediation session and send a written cancellation to the parties, and the beneficiary may proceed with the foreclosure. After a mediation session commences, the mediator may continue the session once, but any further continuances must be with the consent of the parties.

Changes are made regarding the information beneficiaries are required to provide. A description of any net present value test used must be provided in the mediator's written certification only if the parties did not reach a written agreement.

The mediator fee of \$400 is for preparing for mediation, rather than just for a mediation session, and must be paid within 30 days of the parties' referral to mediation. The list of who can be approved as a foreclosure mediator is expanded and mediators must have a certain level of experience evidenced by number of mediations. The immunity applicable to mediators who are employees or volunteers of a DRC is extended to all foreclosure mediators.

##### Time Period for Trustee's Sale.

The time period between recording the notice of sale and the sale is extended from 90 days to 120 days for those borrowers who have received the letter under the meet and confer requirement.

Beneficiary Reporting Requirements.

The quarterly reporting by beneficiaries to the Department must also include updated beneficiary contact information. The quarterly reporting and payments required of beneficiaries are due within 45 days of the end of each quarter.

Allocation of Funds.

Changes are made to the allocation of funds remitted by beneficiaries to the Department. Instead of 80 percent of the funds allocated to provide housing counselors for borrowers, 76 percent is allocated to provide housing counseling activities to benefit borrowers. Instead of the greater of 9 percent or \$451,000 per biennium to the Department for implementation of the act, the greater of 13 percent or \$590,000 is allocated to the Department. This section has an emergency clause and takes effect immediately.

Applicability.

A borrower referred to mediation before the effective date of the bill may continue with the mediation process and does not lose the right to mediation. A borrower who has not been referred to mediation as of the effective date of the bill, may only be referred to mediation after a notice of default but no later than 20 days after a notice of sale is recorded. A borrower who has not been referred to mediation as of the effective date of the bill and who has had a notice of sale recorded, may only be referred to mediation if the referral is made before 20 days have passed from the date the notice of sale was recorded.

**Substitute Bill Compared to Original Bill:**

The original bill addressed: (1) the mediators' fees and immunity; (2) the beneficiaries' reporting requirements; and (3) the ability of the borrower to request mediation during the meet and confer process.

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**Appropriation:** None.

**Fiscal Note:** Available. New fiscal note requested on January 25, 2012.

**Effective Date of Substitute Bill:** This bill takes effect 90 days after adjournment of the session in which the bill is passed, except for section 9, relating to the allocation of funds, which contains an emergency clause and takes effect immediately.

**Staff Summary of Public Testimony:**

(In support) The FFA has helped homeowners across the state. The bill is the product of many hours of negotiating and focuses on making the process more streamlined. The stakeholder group is well represented by many folks in the industry. Dispute Resolution Centers have been working diligently to make the FFA work, and they have suffered financial

loss as a result of implementing the FFA. The Department has done an excellent job administering the process. Without the immunity, it would be difficult for mediators to maintain neutrality. They would be in fear of being sued by one side. The changes to the sequencing of the documents will help parties focus on reaching a resolution. Mediators are concerned that this is a hybrid of mediation and in the future it might be better to align this type of mediation with standard mediations.

(Opposed) None.

**Persons Testifying:** Representative Orwall, prime sponsor; Denny Eliason, Washington Bankers Association; Bruce Neas, Columbia Legal Services; Lonnie Johns-Brown, Resolution Washington; Warren Olson, Washington Mediator Association; and Dan McConnon, Department of Commerce.

**Persons Signed In To Testify But Not Testifying:** None.

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## HOUSE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS & OVERSIGHT

**Majority Report:** The substitute bill by Committee on Judiciary be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Hudgins, Chair; Miloscia, Vice Chair; Moscoso, Vice Chair; McCune, Ranking Minority Member; Taylor, Assistant Ranking Minority Member; Ahern, Blake, Fitzgibbon, Ladenburg, Pedersen, Van De Wege and Wilcox.

**Staff:** Andy Toulon (786-7178).

### **Summary of Recommendation of Committee On General Government Appropriations & Oversight Compared to Recommendation of Committee On Judiciary:**

No new changes were recommended.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed, except for section 9, relating to expenditure from the Foreclosure Fairness Account, which contains an emergency clause and takes effect immediately.

### **Staff Summary of Public Testimony:**

(In support) This was a new act last year and there are few states that have such a program. When the bill was originally passed, best estimates were made on what it would cost for the Department of Commerce (Department) to implement the program. This includes the cost of notices that need to be provided to homeowners, scheduling of mediators, and troubleshooting with mediators and counselors. It has turned out to be far more labor

intensive than originally expected. The shift in funding included in the bill will allow the Department to make sure that people get required notices on time, make necessary data system adjustments required by the bill, and pay for the costs of Dispute Resolution Centers that are not fully covered by the mediator fees paid by beneficiaries and borrowers.

The bill is the product of more than 20 hours of negotiations with all parties represented at the table to try and make the process of foreclosure more efficient. The policy changes have been agreed to by a wide variety of stakeholders. The services provided by existing fees are paid by the banking industry which agrees with the shift of funds from housing counselors to the Department. While there is a real need to get counseling services to borrowers who need them, the slight percentage reduction that will be available for housing counselors under this bill should not challenge this. It is important that the Department has adequate resources to operate the processes before them. The Department has done an admirable job in starting up the new program and the slight shift of money is necessary for implementation and will leave plenty of money for housing counselors.

(Opposed) None.

**Persons Testifying:** Dan McConnon, Department of Commerce; Denny Eliason, Washington Bankers Association; and Bruce Neas, Columbia Legal Services.

**Persons Signed In To Testify But Not Testifying:** None.