
SUBSTITUTE HOUSE BILL 1362

State of Washington

62nd Legislature

2011 Regular Session

By House Judiciary (originally sponsored by Representatives Orwall, Hope, Rolfes, Moeller, Liias, Probst, Green, Darneille, Frockt, Kirby, Miloscia, Roberts, Hunt, Dickerson, Upthegrove, Fitzgibbon, Kagi, Eddy, Hasegawa, Pettigrew, Ormsby, Sells, Kenney, Cody, Hudgins, Lytton, Moscoso, Ryu, Appleton, Reykdal, Van De Wege, Carlyle, Dunshee, Santos, McCoy, Tharinger, Haigh, Goodman, Jinkins, Jacks, Takko, Sullivan, Blake, Seaquist, Billig, Stanford, Ladenburg, Finn, and Pedersen)

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 foreclosure mediation when a housing
15 counselor or attorney determines that mediation is appropriate. For
16 mediation to be effective, the parties should attend the mediation (in
17 person, telephonically, through an agent, or otherwise), provide the
18 necessary documentation in a timely manner, willingly share
19 information, actively present, discuss, and explore options to avoid
20 foreclosure, negotiate willingly and cooperatively, maintain a
21 professional and cooperative demeanor, cooperate with the mediator, and
22 keep any agreements made in 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(~~(-#)~~); 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: (i) Thirty days after
37 initial contact with the borrower (~~(is made)~~) was initiated as required

1 under (b) of this subsection or thirty days after satisfying the due
2 diligence requirements as described in subsection ~~((+5))~~ (4) of this
3 section; or (ii) if the borrower responds to the initial contact,
4 ninety days after the initial contact with the borrower was initiated.

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

15 (c) ~~((During the initial contact, the beneficiary or authorized~~
16 ~~agent shall advise the borrower that he or she has the right to request~~
17 ~~a subsequent meeting and, if requested, the beneficiary or authorized~~
18 ~~agent shall schedule the meeting to occur within fourteen days of the~~
19 ~~request.—The))~~ The letter required under this subsection shall be
20 created by the department, as provided in section 16 of this act, and
21 at a minimum shall include:

22 (i) A paragraph printed in no less than twelve point font and
23 bolded that reads:

24 "You must respond within thirty days of the date of this letter.
25 IF YOU DO NOT RESPOND within thirty days, a notice of default may be
26 issued and you may lose your home in foreclosure.

27 IF YOU DO RESPOND within thirty days of the date of this letter,
28 you will have an additional sixty days to meet with your lender before
29 a notice of default may be issued.

30 You should contact a housing counselor or attorney as soon as
31 possible. Failure to contact a housing counselor or attorney may
32 result in your losing certain opportunities, such as meeting with your
33 lender or participating in mediation in front of a neutral third party.
34 A housing counselor or attorney can help you work with your lender to
35 avoid foreclosure.";

36 (ii) The toll-free telephone number from the United States
37 department of housing and urban development to find a department-
38 approved housing counseling agency, the toll-free numbers for the

1 statewide foreclosure hotline recommended by the housing finance
2 commission, and the statewide civil legal aid hotline for assistance
3 and referrals to other housing counselors and attorneys;

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

8 (iv) A paragraph explaining how the borrower may respond to the
9 letter and stating that after responding the borrower will have an
10 opportunity to meet with his or her beneficiary in an attempt to
11 resolve and try to work out an alternative to the foreclosure and that,
12 after ninety days from the date of the letter, a notice of default may
13 be issued, which starts the foreclosure process.

14 (d) If the beneficiary has exercised due diligence as required
15 under subsection (4) of this section and the borrower does not respond
16 by contacting the beneficiary within thirty days of the initial
17 contact, the notice of default may be issued. "Initial contact" with
18 the borrower is considered made three days after the date the letter
19 required in subsection (1)(b) of this section is sent.

20 (e) If a meeting is requested by the borrower or the borrower's
21 housing counselor or attorney, the beneficiary or authorized agent
22 shall schedule the meeting to occur before the notice of default is
23 issued. An assessment of the borrower's financial ability to ((repay
24 the debt)) modify or restructure the loan obligation and a discussion
25 of options ((may)) must occur during the ((initial contact or at a
26 subsequent)) meeting scheduled for that purpose. ((At the initial
27 contact, the borrower must be provided the toll-free telephone number
28 made available by the department to find a department-certified housing
29 counseling agency and the toll-free numbers for the department of
30 financial institutions and the statewide civil legal aid hotline for
31 possible assistance and referrals.

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

33 (f) The meeting scheduled to assess the borrower's financial
34 ability to modify or restructure the loan obligation and discuss
35 options to avoid foreclosure must be in person, unless the requirement
36 to meet in person is waived in writing by the borrower or the
37 borrower's representative. A person who is authorized to modify the
38 loan obligation or reach an alternative resolution to foreclosure on

1 behalf of the beneficiary may participate by telephone or video
2 conference, so long as a representative of the beneficiary is at the
3 meeting in person.

4 (2) A notice of default issued under RCW 61.24.030(8) must include
5 a declaration, as provided in subsection ~~((+9))~~ (8) of this section,
6 from the beneficiary or authorized agent that it has contacted the
7 borrower as provided in subsection (1)~~((+b))~~ of this section, it has
8 tried with due diligence to contact the borrower under subsection
9 ~~((+5))~~ (4) of this section, or the borrower has surrendered the
10 property to the trustee, beneficiary, or authorized agent. Unless the
11 trustee has violated his or her duty under RCW 61.24.010(4), the
12 trustee is entitled to rely on the declaration as evidence that the
13 requirements of this section have been satisfied, and the trustee is
14 not liable for the beneficiary's or its authorized agent's failure to
15 comply with the requirements of this section.

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

19 ~~(4) Within fourteen days))~~ (a) If, after the initial contact under
20 subsection (1) of this section, ~~((if))~~ a borrower has designated a
21 ~~((department certified))~~ housing counseling agency, housing counselor,
22 or attorney~~((, or other advisor))~~ to discuss with the beneficiary or
23 authorized agent, on the borrower's behalf, options for the borrower to
24 avoid foreclosure, the borrower shall inform the beneficiary or
25 authorized agent and provide the contact information to the beneficiary
26 or authorized agent. The beneficiary or authorized agent shall contact
27 the designated representative for the borrower ~~((for the discussion~~
28 ~~within fourteen days after the representative is designated by the~~
29 ~~borrower))~~ to meet.

30 (b) The beneficiary or authorized agent and the borrower's
31 representative shall attempt to reach a resolution for the borrower
32 within the ninety days from the time the initial contact is sent and
33 the notice of default is issued. A resolution may include, but is not
34 limited to, a loan modification, an agreement to conduct a short sale,
35 or a deed in lieu of foreclosure transaction, or some other workout
36 plan. Any ~~((deed of trust))~~ modification or workout plan offered at
37 the meeting with the borrower's designated representative by the
38 beneficiary or authorized agent is subject to approval by the borrower.

1 ~~((+5))~~ (4) A notice of default may be issued under RCW
2 61.24.030(8) if a beneficiary or authorized agent has ~~((not contacted~~
3 ~~a))~~ initiated contact with the borrower as required under subsection
4 (1)(b) of this section and the failure to ~~((contact))~~ meet with the
5 borrower occurred despite the due diligence of the beneficiary or
6 authorized agent. Due diligence requires the following:

7 (a) A beneficiary or authorized agent shall first attempt to
8 contact a borrower by sending a first-class letter to the address in
9 the beneficiary's records for sending account statements to the
10 borrower and to the address of the property encumbered by the deed of
11 trust. The letter must ~~((include the toll-free telephone number made~~
12 ~~available by the department to find a department-certified housing~~
13 ~~counseling agency, and the following information:~~

14 ~~"You may contact the Department of Financial Institutions, the~~
15 ~~Washington State Bar Association, or the statewide civil legal aid~~
16 ~~hotline for possible assistance or referrals."))~~ be the letter
17 described in subsection (1)(c) of this section.

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

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

27 (iii) A beneficiary or authorized agent satisfies the telephone
28 contact requirements of this subsection ~~((+5))~~ (4)(b) if the
29 beneficiary or authorized agent determines, after attempting contact
30 under this subsection ~~((+5))~~ (4)(b), that the borrower's primary
31 telephone number and secondary telephone number or numbers on file, if
32 any, have been disconnected or are not good contact numbers for the
33 borrower.

34 (c) If the borrower does not respond within fourteen days after the
35 telephone call requirements of (b) of this subsection have been
36 satisfied, the beneficiary or authorized agent shall send a certified
37 letter, with return receipt requested, to the borrower at the address
38 in the beneficiary's records for sending account statements to the

1 borrower and to the address of the property encumbered by the deed of
2 trust. The letter must include the information described in (e)(i)
3 through (iv) of this subsection.

4 (d) The beneficiary or authorized agent shall provide a means for
5 the borrower to contact the beneficiary or authorized agent in a timely
6 manner, including a toll-free telephone number or charge-free
7 equivalent that will provide access to a live representative during
8 business hours.

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

12 (i) Options that may be available to borrowers who are unable to
13 afford their mortgage payments and who wish to avoid foreclosure, and
14 instructions to borrowers advising them on steps to take to explore
15 those options;

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

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

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

25 ~~((+6))~~ (5) Subsections (1) and ~~((+5))~~ (4) of this section do not
26 apply if any of the following occurs:

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

30 (b) The borrower has filed for bankruptcy, and the bankruptcy stay
31 remains in place, or the borrower has filed for bankruptcy and the
32 bankruptcy court has granted relief from the bankruptcy stay allowing
33 enforcement of the deed of trust.

34 ~~((+7))~~ (6)(a) This section applies only to deeds of trust ~~((made~~
35 ~~from January 1, 2003, to December 31, 2007, inclusive,))~~ that are
36 recorded against owner-occupied residential real property. This
37 section does not apply to deeds of trust: (i) Securing a commercial

1 loan; (ii) securing obligations of a grantor who is not the borrower or
2 a guarantor; or (iii) securing a purchaser's obligations under a
3 seller-financed sale.

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

6 ~~((+8))~~ (7) As used in this section:

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

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

13 ~~((+9))~~ (8) The form of declaration to be provided by the
14 beneficiary or authorized agent as required under subsection (2) of
15 this section must be in substantially the following form:

16 **"FORECLOSURE LOSS MITIGATION FORM**

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

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

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

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

33 (3) [] The beneficiary or beneficiary's authorized agent has
34 exercised due diligence to contact the borrower as required in RCW
35 61.24.031~~((+5) and, after waiting fourteen days after the requirements~~
36 ~~in RCW 61.24.031 were satisfied, the beneficiary or the beneficiary's~~

1 ~~authorized agent sent to the borrower(s), by certified mail, return~~
2 ~~receipt requested, the letter required under RCW 61.24.031)) (4).~~

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

7 ((+4)) (5) [] Under RCW 61.24.031, the beneficiary or the
8 beneficiary's authorized agent has verified information that, on or
9 before the date of this declaration, the borrower(s) has filed for
10 bankruptcy, and the bankruptcy stay remains in place, or the borrower
11 has filed for bankruptcy and the bankruptcy court has granted relief
12 from the bankruptcy stay allowing the enforcement of the deed of
13 trust."

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

16 (1)(a) A housing counselor who is contacted by a borrower under RCW
17 61.24.031 has a duty to act in good faith to attempt to reach a
18 resolution with the beneficiary on behalf of the borrower within the
19 ninety days provided from the date the beneficiary initiates contact
20 with the borrower and the date the notice of default is issued. A
21 resolution may include, but is not limited to, modification of the
22 loan, an agreement to conduct a short sale, a deed in lieu of
23 foreclosure transaction, or some other workout plan.

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

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

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

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

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

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

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

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

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

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

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

10 (5) Housing counselors providing assistance to borrowers under RCW
11 61.24.031 are not liable for civil damages resulting from any acts or
12 omissions in providing assistance, unless the acts or omissions
13 constitute gross negligence or willful or wanton misconduct.

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

16 (1) The foreclosure mediation program established in this section
17 applies only to borrowers who have been referred to mediation by a
18 housing counselor or attorney. The mediation program under this
19 section is not governed by chapter 7.07 RCW and does not preclude
20 mediation required by a court or other provision of law.

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

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

25 (a) Send a notice to the beneficiary, the borrower, the housing
26 counselor or attorney who referred the borrower, and the trustee
27 stating that the parties have been referred to mediation. The notice
28 must include the statements and list of documents and information
29 described in subsection (5)(b)(i) through (iv) of this section; and

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

31 (4)(a) Within forty-five days of receiving the referral from the
32 department, the mediator shall convene a mediation session in the
33 county where the borrower resides, unless the parties agree on another
34 location. The parties may agree in writing to extend the time in which
35 to schedule the mediation session. If the parties agree to extend the
36 time, the beneficiary shall notify the trustee of the extension and the
37 date the mediator is expected to issue a report.

1 (b) Prior to scheduling a mediation session, the mediator shall
2 require that both parties sign a waiver stating that neither party may
3 call the mediator as a live witness in any litigation pertaining to a
4 foreclosure action between the parties. However, the mediator's
5 certification may be deemed admissible evidence, subject to court
6 rules, in any litigation pertaining to a foreclosure action between the
7 parties.

8 (5)(a) The mediator may schedule phone conferences, consultations
9 with the parties individually, and other communications to ensure that
10 the parties have all the necessary information to engage in a
11 productive mediation.

12 (b) The mediator must send written notice of the time, date, and
13 location of the mediation session to the borrower, the beneficiary, and
14 the department at least fifteen days prior to the mediation session.
15 At a minimum, the notice must contain:

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

18 (ii) A statement that a person with authority to agree to a
19 resolution, including a proposed settlement, loan modification, or
20 dismissal or continuation of the foreclosure proceeding, must be
21 present either in person or on the telephone or video conference during
22 the mediation session;

23 (iii) A complete list of documents and information required by this
24 section that the parties must provide to the mediator and the deadlines
25 for providing the documents and information; and

26 (iv) A statement that the parties have a duty to mediate in good
27 faith and that failure to mediate in good faith may impair the
28 beneficiary's ability to foreclose on the property or the borrower's
29 ability to modify the loan.

30 (6) The borrower, the beneficiary or authorized agent, and the
31 mediator must meet in person for the mediation session. However, a
32 person with authority to agree to a resolution on behalf of the
33 beneficiary may be present over the telephone or video conference
34 during the mediation session.

35 (7) The participants in mediation must address the issues of
36 foreclosure that may enable the borrower and the beneficiary to reach
37 a resolution, including but not limited to reinstatement, modification

1 of the loan, restructuring of the debt, or some other workout plan. To
2 assist the parties in addressing issues of foreclosure, the mediator
3 must require the participants to consider the following:

4 (a) The borrower's current and future economic circumstances,
5 including the borrower's current and future income, debts, and
6 obligations for the previous sixty days or greater time period as
7 determined by the mediator;

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

11 (c) Any affordable loan modification calculation and net present
12 value calculation when required under any federal mortgage relief
13 program, including the home affordable modification program (HAMP) as
14 applicable to government-sponsored enterprise and nongovernment-
15 sponsored enterprise loans and any HAMP-related modification program
16 applicable to loans insured by the federal housing administration, the
17 veterans administration, and the rural housing service. If such a
18 calculation is not required, then the beneficiary must use the current
19 calculations, assumptions, and forms that are established by the
20 federal deposit insurance corporation and published in the federal
21 deposit insurance corporation loan modification program guide; and

22 (d) Any other loss mitigation guidelines to loans insured by the
23 federal housing administration, the veterans administration, and the
24 rural housing service, if applicable.

25 (8) A violation of the duty to mediate in good faith as required
26 under this section may include:

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

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

31 (i) An accurate statement containing the balance of the loan as of
32 the first day of the month in which the mediation occurs;

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

34 (iii) Proof that the entity claiming to be the beneficiary is the
35 owner of any promissory note or obligation secured by the deed of
36 trust. Sufficient proof may be a copy of the declaration described in
37 RCW 61.24.030(7)(a);

- 1 (iv) The best estimate of any arrearage and an itemized statement
2 of the arrearages;
- 3 (v) An itemized list of the best estimate of fees and charges
4 outstanding;
- 5 (vi) The payment history and schedule for the preceding twelve
6 months, or since default, whichever is longer, including a breakdown of
7 all fees and charges claimed;
- 8 (vii) All borrower-related and mortgage-related input data used in
9 any net present value analysis;
- 10 (viii) An explanation regarding any denial for a loan modification,
11 forbearance, or other alternative to foreclosure in sufficient detail
12 for the mediator to explain to the borrower why the decision was made;
- 13 (ix) The most recently available appraisal or other broker price
14 opinion most recently relied upon by the beneficiary; and
- 15 (x) The portion or excerpt of the pooling and servicing agreement
16 that prohibits the beneficiary from implementing a modification, if the
17 beneficiary claims it cannot implement a modification due solely to
18 limitations in a pooling and servicing agreement, and documentation or
19 a statement detailing the efforts of the beneficiary to obtain a waiver
20 of the pooling and servicing agreement provisions;
- 21 (c) Failure of the borrower to provide documentation to the
22 beneficiary and mediator, at least ten days before the mediation or
23 pursuant to the mediator's instruction, showing the borrower's current
24 and future income, debts and obligations, and tax returns for the past
25 two years;
- 26 (d) Failure of either party to pay the respective portion of the
27 mediation fee in advance of the mediation as required under this
28 section;
- 29 (e) Failure of a party to designate representatives with adequate
30 authority to fully settle, compromise, or otherwise reach resolution
31 with the borrower in mediation; and
- 32 (f) A request by a beneficiary that the borrower waive future
33 claims he or she may have in connection with the deed of trust, as a
34 condition of agreeing to a modification, except for rescission claims
35 under the federal truth in lending act. Nothing in this section
36 precludes a beneficiary from requesting that a borrower dismiss with
37 prejudice any pending claims against the beneficiary, its agents, loan

1 servicer, or trustee, arising from the underlying deed of trust, as a
2 condition of modification.

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

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

7 (b) The names of all persons attending in person and by telephone
8 or video conference, at the mediation session;

9 (c) Whether a resolution was reached by the parties, including
10 whether the default was cured by reinstatement, modification, or
11 restructuring of the debt, or some other alternative to foreclosure was
12 agreed upon by the parties;

13 (d) Whether the parties participated in the mediation in good
14 faith; and

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

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

21 (11)(a) The mediator's certification that the beneficiary failed to
22 act in good faith in mediation constitutes a defense to the nonjudicial
23 foreclosure action that was the basis for initiating the mediation. In
24 any action to enjoin the foreclosure, the beneficiary shall be entitled
25 to rebut the allegation that it failed to act in good faith.

26 (b) The mediator's certification that the beneficiary failed to act
27 in good faith during mediation does not constitute a defense to a
28 judicial foreclosure or a future nonjudicial foreclosure action if a
29 modification of the loan is agreed upon and the borrower subsequently
30 defaults.

31 (c) If an agreement was not reached and the mediator's
32 certification shows that the net present value of the modified loan
33 exceeds the anticipated net recovery at foreclosure, that showing in
34 the certification shall constitute a basis for the borrower to enjoin
35 the foreclosure.

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

1 (13)(a) A trustee may not record the notice of sale until the
2 trustee receives the report stating that the mediation has been
3 completed.

4 (b) If the trustee does not receive the report, the trustee may
5 record the notice of sale after ten days from the date the report to
6 the trustee was due. If the notice of sale is recorded under this
7 subsection (13)(b) and the mediator subsequently issues a report
8 alleging the beneficiary violated the duty of good faith, the trustee
9 may not proceed with the sale.

10 (14) A mediator may charge reasonable fees as authorized by this
11 subsection and by the department. Unless the fee is waived or the
12 parties agree otherwise, a foreclosure mediator's fee may not exceed
13 four hundred dollars for a mediation session lasting between one hour
14 and three hours. For a mediation session exceeding three hours, the
15 foreclosure mediator may charge a reasonable fee, as authorized by the
16 department. The mediator must provide an estimated fee before the
17 mediation, and payment of the mediator's fee must be divided equally
18 between the beneficiary and the borrower. The beneficiary and the
19 borrower must tender the loan mediator's fee seven calendar days before
20 the commencement of the mediation or pursuant to the mediator's
21 instructions.

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

24 (a) The performance of the program, including the numbers of
25 borrowers who are referred to mediation by a housing counselor or
26 attorney;

27 (b) The results of the mediation program, including the numbers of
28 loans restructured or modified, the change in the borrower's monthly
29 payment for principal and interest, the number of principal write-downs
30 and interest rate reductions, and, to the extent practical, the number
31 of borrowers who default within a year of restructuring or
32 modification; and

33 (c) Any recommendations for changes to the statutes regarding the
34 mediation program.

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

37 (1) Section 7 of this act applies only to deeds of trust that are

1 recorded against owner-occupied residential real property. The
2 property must have been owner-occupied as of the date of the initial
3 contact under RCW 61.24.031 was made.

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

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

9 (a) Securing a commercial loan;

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

12 (c) Securing a purchaser's obligations under a seller-financed
13 sale.

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

16 The provisions of section 7 of this act do not apply to any
17 federally insured depository institution, as defined in 12 U.S.C. Sec.
18 461(b)(1)(A), that was not a beneficiary of deeds of trust in more than
19 two hundred fifty trustee sales of owner-occupied residential real
20 property that occurred in this state during the calendar year preceding
21 the month of recording the notice of trustee's sale.

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

24 (1) For the purposes of section 7 of this act, the department must
25 maintain a list of approved foreclosure mediators. The department may
26 approve the following persons to serve as foreclosure mediators under
27 this section:

28 (a) Attorneys who are active members of the Washington state bar
29 association;

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

32 (c) Employees or volunteers of dispute resolution centers under
33 chapter 7.75 RCW;

34 (d) Retired judges of Washington courts; and

35 (e) Other statewide organizations that provide mediation services.

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

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

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

11 The foreclosure fairness account is created in the custody of the
12 state treasurer. All receipts received under section 12 of this act
13 must be deposited into the account. Only the director of the
14 department of commerce or the director's designee may authorize
15 expenditures from the account. The account is subject to allotment
16 procedures under chapter 43.88 RCW, but an appropriation is not
17 required for expenditures. Expenditures from the account must be used
18 as follows: (1) No less than eighty percent must be used for the
19 purposes of providing housing counselors for borrowers; (2) up to six
20 percent to the office of the attorney general to be used by the
21 consumer protection division to enforce this chapter; (3) up to two
22 percent to the office of civil legal aid to be used for the purpose of
23 contracting with qualified legal aid programs for legal representation
24 of homeowners in matters relating to foreclosure. Funds provided under
25 this subsection (3) must be used to supplement, not supplant, other
26 federal, state, and local funds; (4) up to nine percent to the
27 department to be used for implementation and operation of the
28 foreclosure fairness act; and (5) up to three percent to the department
29 of financial institutions to conduct homeowner prepurchase and
30 postpurchase outreach and education programs as defined in RCW
31 43.320.150.

32 The department shall enter into interagency agreements to contract
33 with the appropriate entities to implement the foreclosure fairness
34 act.

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

1 (1) Except as provided in subsection (4) of this section, beginning
2 October 1, 2011, and every quarter thereafter, every beneficiary
3 issuing notices of default on owner-occupied residential real property
4 under this chapter must:

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

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

9 (2) For each owner-occupied residential real property for which a
10 notice of default has been issued, the beneficiary issuing the notice
11 of default shall remit two hundred fifty dollars to the department to
12 be deposited, as provided under section 11 of this act, into the
13 foreclosure fairness account. The two hundred fifty dollar payment is
14 required per property and not per notice of default. The beneficiary
15 shall remit the total amount required in a lump sum each quarter.

16 (3) No later than thirty days after the effective date of this
17 section, the beneficiaries required to report and remit to the
18 department under this section shall determine the number of owner-
19 occupied residential real properties for which notices of default were
20 issued during the three months prior to the effective date of this
21 section. The beneficiary shall remit to the department a one-time sum
22 of two hundred fifty dollars multiplied by the number of properties.
23 The department shall deposit the funds into the foreclosure fairness
24 account as provided under section 11 of this act.

25 (4) This section does not apply to any beneficiary that certifies
26 under penalty of perjury that it has issued fewer than two hundred
27 fifty notices of default in the preceding year.

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

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

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

1 (2) Anticipated recovery under a modification or workout plan
2 exceeds the anticipated recovery through foreclosure on a net present
3 value basis.

4 **Sec. 14.** RCW 61.24.135 and 2008 c 153 s 6 are each amended to read
5 as follows:

6 (1) It is an unfair or deceptive act or practice under the consumer
7 protection act, chapter 19.86 RCW, for any person, acting alone or in
8 concert with others, to offer, or offer to accept or accept from
9 another, any consideration of any type not to bid, or to reduce a bid,
10 at a sale of property conducted pursuant to a power of sale in a deed
11 of trust. The trustee may decline to complete a sale or deliver the
12 trustee's deed and refund the purchase price, if it appears that the
13 bidding has been collusive or defective, or that the sale might have
14 been void. However, it is not an unfair or deceptive act or practice
15 for any person, including a trustee, to state that a property subject
16 to a recorded notice of trustee's sale or subject to a sale conducted
17 pursuant to this chapter is being sold in an "as-is" condition, or for
18 the beneficiary to arrange to provide financing for a particular bidder
19 or to reach any good faith agreement with the borrower, grantor, any
20 guarantor, or any junior lienholder.

21 (2) It is an unfair or deceptive act in trade or commerce and an
22 unfair method of competition in violation of the consumer protection
23 act, chapter 19.86 RCW, for any person or entity to: (a) Violate the
24 duty of good faith under section 7 of this act; (b) fail to comply with
25 the requirements of section 11 of this act; or (c) fail to initiate
26 contact with a borrower as required under RCW 61.24.031.

27 **Sec. 15.** RCW 82.45.030 and 1993 sp.s. c 25 s 503 are each amended
28 to read as follows:

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

35 (2) If the sale is a transfer of a controlling interest in an
36 entity with an interest in real property located in this state, the

1 selling price shall be the true and fair value of the real property
2 owned by the entity and located in this state. If the true and fair
3 value of the real property located in this state cannot reasonably be
4 determined, the selling price shall be determined according to
5 subsection (4) of this section.

6 When a transfer or conveyance is made by deed in lieu of
7 foreclosure to satisfy a deed of trust, total consideration shall not
8 include the amount of any relocation assistance provided to the
9 transferor.

10 (3) As used in this section, "total consideration paid or
11 contracted to be paid" includes money or anything of value, paid or
12 delivered or contracted to be paid or delivered in return for the sale,
13 and shall include the amount of any lien, mortgage, contract
14 indebtedness, or other incumbrance, either given to secure the purchase
15 price, or any part thereof, or remaining unpaid on such property at the
16 time of sale.

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

20 (4) If the total consideration for the sale cannot be ascertained
21 or the true and fair value of the property to be valued at the time of
22 the sale cannot reasonably be determined, the market value assessment
23 for the property maintained on the county property tax rolls at the
24 time of the sale shall be used as the selling price.

25 NEW SECTION. Sec. 16. A new section is added to chapter 61.24 RCW
26 to read as follows:

27 (1)(a) The department must create the initial contact letter to be
28 used by beneficiaries as required under RCW 61.24.031. The letter must
29 explain how the borrower may respond to the letter. The information
30 must be written in both English and Spanish in the same letter.

31 (b) No later than thirty days after the effective date of this
32 section, the department must create the notice form to be used by
33 housing counselors and attorneys to refer borrowers to mediation under
34 section 7 of this act.

35 (2) The department may create rules to implement the mediation
36 program under section 7 of this act and to administer the funds as
37 required under section 11 of this act.

1 NEW SECTION. **Sec. 17.** 2009 c 292 s 13 (uncodified) is repealed.

2 NEW SECTION. **Sec. 18.** 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. 19.** Sections 11, 12, and 16 of this act are
7 necessary for the immediate preservation of the public peace, health,
8 or safety, or support of the state government and its existing public
9 institutions, and take effect immediately.

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