
SUBSTITUTE SENATE BILL 6648

State of Washington

61st Legislature

2010 Regular Session

By Senate Labor, Commerce & Consumer Protection (originally sponsored by Senators Kline, Keiser, Fairley, Kohl-Welles, Kauffman, Gordon, and McDermott)

READ FIRST TIME 02/05/10.

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;
5 creating new sections; providing an effective date; and providing an
6 expiration date.

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

8 NEW SECTION. **Sec. 1.** The legislature finds and declares that:
9 (1) The rate of home foreclosures is rising to unprecedented levels,
10 both for prime and subprime loans and foreclosures are expected to rise
11 because homeowners will not be able to afford payments due to rising
12 adjustable loan payments, reset of interest rates, and rising
13 unemployment and job loss; (2) homeowners will continue to have
14 problems selling their properties at the value of their home loans due
15 to falling housing prices; (3) foreclosures contribute to the decline
16 in the state's housing market, loss of property values, and loss of tax
17 revenues; and (4) with the number of nonjudicial foreclosures climbing
18 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) At any point after the beneficiary declares the underlying loan
24 in default and accelerates the loan, but at least thirty days before
25 the recording of a notice of sale pursuant to RCW 61.24.040 on owner-
26 occupied residential real property, the beneficiary or authorized agent
27 must make a good faith review of the borrower's financial situation and
28 offer, whenever eligible, a loan modification, or other option to
29 assist the borrower in bringing the arrears current.

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

1 (3) The foreclosure mediation program shall address all the issues
2 related to the foreclosure, including but not limited to,
3 reinstatement, modification of the loan, and restructuring of the debt.

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

8 (a) The name, address, and telephone number of a person with
9 authority to negotiate a loan modification on behalf of the beneficiary
10 of the deed of trust;

11 (b) The toll-free telephone number made available by the United
12 States department of housing and urban development to find a department
13 certified housing counseling agency to assist homeowners in the state
14 avoid foreclosure; and

15 (c) The form notice, as proscribed by the department, explaining
16 the availability of the foreclosure mediation program and upon which
17 the borrower may indicate his or her election to enter into foreclosure
18 mediation or to waive mediation. The notice must encourage the
19 borrower to meet with a housing counselor or attorney prior to
20 mediation. The notice must inform the borrower that the form must be
21 returned to the department, or the department's designee, within thirty
22 days or the right to foreclosure mediation is 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 indicates on the form the election to enter
28 into mediation, the department, or the department's designee, shall
29 notify the beneficiary of the deed of trust by mail, return receipt
30 requested, of the election of the borrower to enter into mediation.
31 The foreclosure is stayed and no further action may be taken to proceed
32 with the foreclosure until the certification of the foreclosure
33 mediation is made by the mediator.

34 (7) If the borrower indicates on the form his or her election to
35 waive mediation or fails to return the form to the department or
36 department's designee as required, the department or department's
37 designee shall execute an affidavit attesting to that fact under
38 penalty of perjury and mail a copy of the affidavit, together with the

1 waiver of mediation by the borrower, to the trustee, beneficiary, or
2 authorized agent, and in the case of a failure to return the form, to
3 the borrower.

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

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

11 (b) An employee of a United States department of housing and urban
12 development certified housing counseling agency;

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

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

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

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

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

38 (i) That the borrower may be represented in the foreclosure mediation

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

9 (c) The borrower, the beneficiary, and the mediator may participate
10 by telephone during any contact required under this section.

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

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

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

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

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

3 (a) Failure to participate in mediation sessions without good
4 cause;

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

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

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

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

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

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

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

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

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

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

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

14 (15) A loan mediator may charge fees as authorized by this
15 subsection or by the department. Unless the fee is waived or as
16 otherwise authorized by the department, a foreclosure mediator's fee is
17 set by rule by the department but may not exceed four hundred dollars
18 for a foreclosure mediation session lasting between one hour and three
19 hours. The foreclosure mediator's fee shall be divided equally between
20 the beneficiary and the borrower. The beneficiary and the borrower
21 shall tender the loan mediator's fee in full at the outset of the
22 session.

23 (16) This section applies only to deeds of trust made from January
24 1, 2003, to December 31, 2008, inclusive, that are recorded against
25 owner-occupied residential real property. This section does not apply
26 to deeds of trust:

27 (a) Securing a commercial loan;

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

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

32 (17) The department shall report annually to the legislature on:

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

35 (b) The results of the mediation program, including the numbers of
36 loans restructured or modified, the number of principal write-downs and
37 interest rate reductions, and to the extent practical, the number of

1 homeowners who default within a year of restructuring or modification;
2 and

3 (c) Make recommendations for any changes to the program to the
4 legislature.

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

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

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

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

18 (2) The mortgagee, beneficiary, or authorized agent shall offer the
19 borrower a deed of trust modification or workout plan if the
20 modification or plan is consistent with its contractual or other
21 authority.

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

24 The legislature finds that the practices covered by sections 4 and
25 5 of this act are matters vitally affecting the public interest for the
26 purpose of applying the consumer protection act, chapter 19.86 RCW. A
27 violation of sections 4 and 5 of this act is not reasonable in relation
28 to the development and preservation of business and is an unfair or
29 deceptive act in trade or commerce and an unfair method of competition
30 for the purpose of applying the consumer protection act, chapter 19.86
31 RCW.

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

34 A surcharge in an amount determined by the department of financial
35 institutions by rule but no greater than the amount of the superior

1 court civil filing fee shall be charged by the county auditor at the
2 time of recording of each notice of sale on owner-occupied residential
3 real property under RCW 61.24.040. The auditor may retain up to two
4 percent of the funds collected to administer collection. The remaining
5 funds shall be transmitted monthly to the director of financial
6 institutions who shall deposit the funds into the protect Washington
7 homeowners mediation program account under section 8 of this act. The
8 department of financial institutions is responsible for the
9 distribution of the funds in the account and shall develop rules for
10 the use of these funds to fund the protect Washington homeowners
11 mediation program and to fund housing counseling agencies approved by
12 the United States department of housing and urban development operating
13 to assist homeowners in the state avoid foreclosure.

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

16 The protect Washington homeowners mediation program account is
17 created in the custody of the state treasurer. All receipts from the
18 surcharge under section 7 of this act must be deposited into the
19 account. Expenditures from the account may be used only for the
20 purposes set forth in section 7 of this act. Only the director of
21 financial institutions or the director's designee may authorize
22 expenditures from the account. The account is subject to allotment
23 procedures under chapter 43.88 RCW, but an appropriation is not
24 required for expenditures.

25 NEW SECTION. **Sec. 9.** This act takes effect September 1, 2010.

26 NEW SECTION. **Sec. 10.** Sections 4, 7, and 8 of this act expire
27 December 31, 2014.

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