

Foreclosure Fairness Act

Recent legislation adds a new mediation step to the foreclosure process.

As of July 22, Washington state's new foreclosure mediation program, established by the Foreclosure Fairness Act (FFA), provides a mechanism for borrowers facing foreclosure to pursue modified loan agreements with the help of a professional advocate and a neutral mediator. For beneficiaries, trustees and their agents, the mediation program is an opportunity to further explore alternatives to foreclosure, but it also establishes additional requirements that must be fulfilled before a foreclosure can be completed.

Under Washington's Deeds of Trust Act (RCW 61.24, et seq.), which governs nonjudicial foreclosures, the beneficiary or its authorized agent must send the borrower an initial contact letter at least 30 days before issuing a notice of default. Under the FFA amendments, this letter must now inform the borrower that if he or she responds within 30 days, he or she will have an additional 60 days to meet with the lender before a notice of default is issued. This letter must also advise the borrower of the right to contact an approved housing counselor or an attorney.

Significantly, borrowers cannot institute the mediation process on their own. If the housing counselor or attorney determines that mediation is appropriate and no notice of sale has been recorded, he or she may send a request for mediation to the state Department of Commerce. Within 10 days of the request, the department will notify the beneficiary, borrower, trustee and referring counselor or attorney of the selected mediator and the documents and information they must provide in advance of the mediation. Once the mediator is selected, mediation must occur within 45 days, unless the parties agree upon a later date. Before the mediation, the homeowner must provide a financial statement and future income information, debts and obligations, and the past two years' tax returns. The beneficiary must provide the loan balance, an itemized list of fees and charges, payment history and other requested documents.

The goal of mediation is to avoid foreclosure by reaching a mutually satisfactory agreement. This may include reinstatement, modification of the loan, restructuring of the debt or some other workout plan. The parties must consider the borrower's current and future income, debts and financial obligations, as well as the net present value of receiving modified payments compared to the anticipated net recovery following foreclosure. They must also consider any loan modification and net present value calculations required under the Home Affordable Modification Program or other applicable federal mortgage relief programs. Within seven business days of the mediation, the mediator



must certify that mediation occurred. The certification must include basic information (e.g., time, date and place of mediation), as well as whether the parties mediated in good faith, the conclusion reached and a description of the net present value test used.

Participants in the mediation program must mediate in good faith, and a violation of this requirement may give the homeowner a defense to the foreclosure action. Violations of this duty include failure to timely participate, provide required information, or to designate a representative with sufficient authority to negotiate on the beneficiary's behalf. A mediator's certification that the net present

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value of a modified loan exceeds the anticipated net recovery from a foreclosure also provides a defense to the foreclosure. However, if the borrower defaults on a modification agreement, the beneficiary's lack of good faith is no longer a defense. If the parties do not come to a new agreement, the existing loan agreement remains in place. Once the trustee receives a certification that the mediation has been completed, it may record a notice of sale.

It remains to be seen how effective the mediation program will be in promoting modified loan agreements that work for both parties. What is certain is that borrowers, beneficiaries, trustees and the attorneys who represent them must adapt to the program's impact on the nonjudicial foreclosure process and related litigation.

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