

A-Engrossed
Senate Bill 628

Ordered by the Senate May 4
Including Senate Amendments dated May 4

Sponsored by Senator BONAMICI, Representative HOLVEY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Requires mandatory mediation between trustee and grantor before sale to foreclose residential trust deed. Provides for notice and procedures for conducting mediation. **Creates exception to notice requirement.**

Specifies rights of person that has lien or subsequent interest to trust deed if trustee fails to give that person notice.

Sunset on January 2, 2014.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to residential property foreclosures; creating new provisions; amending ORS 86.740 and
3 86.742; and declaring an emergency.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 86.740 is amended to read:

6 86.740. (1)(a) Subsequent to recording notice of default as provided in ORS 86.735 and at least
7 120 days before the day the trustee conducts the sale, notice of the sale [*shall*] **must** be served
8 [*pursuant to*] **in accordance with** ORCP 7 D(2) and 7 D(3) or mailed by both first class and certified
9 mail with return receipt requested[.].

10 **(b) Except as provided in subsection (5) of this section, if the sale is for the purpose of**
11 **foreclosing a residential trust deed:**

12 **(A) The notice described in paragraph (a) of this subsection must be served or mailed as**
13 **provided in paragraph (a) of this subsection at least 150 days before the date of the sale; and**

14 **(B) In addition to the notice described in paragraph (a) of this subsection, the notice**
15 **described in section 4 of this 2009 Act must also be served or mailed as provided in paragraph**
16 **(a) of this subsection at least 150 days before the date of the sale.**

17 **(2) The notices described in subsection (1) of this section must be served or mailed to the**
18 **last-known address of the following persons or [*their*] the legal representatives of the persons, if**
19 **any:**

20 (a) The grantor in the trust deed.

21 (b) [*Any*] **A** successor in interest to the grantor whose interest appears of record, or of whose
22 interest the trustee or the beneficiary has actual notice.

23 (c) [*Any*] **A** person, including the Department of Revenue or [*any other*] **another** state agency,
24 [*having*] **that has** a lien or interest subsequent to the trust deed if the lien or interest appears of
25 record or the beneficiary has actual notice of the lien or interest.

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.
New sections are in **boldfaced** type.

1 (d) *[Any]* A person *[requesting]* **that requests** notice as provided in ORS 86.785.

2 *[(2)]* **(3)** A notice served by mail under subsection (1) of this section is effective when the notice
3 is mailed. **On or before the date the trustee conducts the sale, the trustee shall file for re-**
4 **recording in the official record of the county or counties in which the property described in the**
5 **trust deed is situated an affidavit of mailing with respect to the notices required under sub-**
6 **section (1) of this section.**

7 *[(3)(a)]* **(4)(a)** The disability, insanity or death of *[any]* a person *[to whom]* **entitled to** notice of
8 sale *[must be given]* under this section does not delay or impair in any way the trustee's right under
9 a trust deed to foreclose under the deed. If the disability, insanity or death occurs *[prior to the re-*
10 *recording of]* **before the** notice of default **is recorded**, the notice *[shall]* **must** be given instead to the
11 guardian, the conservator of the **person's** estate *[of the person]* or the **person's** administrator or
12 personal representative, **as appropriate**, *[of the person, as the case may be,]* in the manner and by
13 the time set forth in this section.

14 (b) If the disability, insanity or death of *[any]* a person *[to whom]* **entitled to** notice of sale *[must*
15 *be given]* under this section occurs on or after the *[recording of]* notice of default **is recorded**, the
16 trustee shall, if and when the trustee has knowledge of the disability, insanity or death, promptly
17 give the guardian, **the** conservator of the estate or the administrator or personal representative, as
18 *[the case may be]* **appropriate**, the notice provided in ORS 86.745. *[This notice shall]* **The notice**
19 **must** be given by first class and certified mail with return receipt requested, to the last-known ad-
20 dress of the guardian, conservator or administrator or personal representative.

21 (c) *[In the event]* **If** there is no administrator or personal representative of the estate of the
22 person **entitled to** *[whom]* notice of sale *[must be given]* under this section, the notice may be given
23 instead to the heirs at law or devisees of the deceased person in the manner and by the time set
24 forth in this section.

25 **(5) The requirement to mail or serve a notice described in subsection (1)(b) of this section**
26 **does not apply if the property subject to the trustee's sale is property secured by a mortgage**
27 **that a government agency holds for a loan the government agency funded through a gov-**
28 **ernment program.**

29 **SECTION 2.** ORS 86.742 is amended to read:

30 86.742. (1) If the trustee fails to give notice of the sale to *[any]* a person entitled to notice under
31 ORS 86.740 *[(1)(c),]* **(2)(c)** and *[such]* **the** person did not have actual notice of the sale at least 25
32 days *[prior to]* **before** the date the trustee conducted the sale, *[such]* **the** omitted person *[shall*
33 *have]* **has** the same rights possessed by the holder of a junior lien or interest who was omitted as
34 a party defendant in a judicial foreclosure proceeding[, and the purchaser at the trustee's sale or
35 the purchaser's heirs, assigns or transferees[, shall] have the same rights *[possessed by]* a purchaser
36 at a sheriff's sale **possesses** following a judicial foreclosure.

37 (2) The omitted person may also commence an action against the trustee in the circuit court in
38 the county where the real property is located. In an action against the trustee, the omitted person
39 *[shall be]* **is** entitled to damages upon proof that:

40 (a) The trustee did not give notice of the sale to the omitted person in the manner required by
41 ORS 86.740 *[(1)(c)]* **(2)(c)** and 86.750;

42 (b) A search of the record under the **grantor's** name *[of the grantor]* as *[it]* **the name** appears
43 on the trust deed, or the name of the grantor's successor in interest, would have revealed the
44 omitted person's interest;

45 (c) The omitted person could and would have cured the default under ORS 86.753; and

1 (d) The omitted person sustained actual damages as a result of *[such]* **the** person's loss of the
2 opportunity to cure the default under ORS 86.753 (1).

3 (3) In an action against the trustee under subsection (2) of this section, *[any]* **a** defendant or
4 third party defendant may move for dismissal on the ground that the omitted person would not or
5 could not have cured the default and reinstated the trust deed if the omitted person had received
6 the notice required by ORS 86.740 *[(1)(c)]* **(2)(c)**. The court shall hold a hearing on *[such]* **the** motion
7 *[prior to any]* **before a** hearing on *[any]* **a** motion for summary judgment, and *[prior to]* **before** trial
8 of the action. The court shall deny the motion only if the omitted person produces affidavits or other
9 evidence sufficient for a reasonable jury to find, applying a standard of clear and convincing evi-
10 dence, that the omitted person had the financial ability to cure the default under ORS 86.753 prior
11 to the date of the trustee's sale, and that the omitted person would have done so had the omitted
12 person received the notice required by ORS 86.740 *[(1)(c)]* **(2)(c)**. If the court grants the motion to
13 dismiss, *[it]* **the court** shall award attorney fees pursuant to subsection (5) of this section.

14 (4) In *[any]* **an** action against the trustee or *[any other]* **another** party under this section, the
15 omitted person shall plead that the omitted person did not have actual knowledge of the sale at least
16 25 days *[prior to]* **before** the date the trustee conducted the sale, but thereafter the defendant *[shall*
17 *have]* **has** the burden of proving that the omitted person did have *[such]* notice.

18 (5) In *[all]* suits brought under this section, the applicable court may, upon entering judgment,
19 allow to the prevailing party as a part of the costs a reasonable amount for attorney fees at trial
20 and on appeal.

21 (6) The remedies described in subsections (1) to (5) of this section *[shall be]* **are** the sole reme-
22 dies available to a person entitled to notice of foreclosure by advertisement and sale under ORS
23 86.740 *[(1)(c),]* **(2)(c)** who failed to receive *[such]* notice. *[Such a]* **The** person's failure to redeem or
24 to commence an action against the trustee within five years *[of]* **after** the date of a trustee's sale
25 under ORS 86.755 *[shall bar any]* **bars an** action under this section or *[any]* **under** other applicable
26 law.

27 **SECTION 3. Sections 4 to 9 of this 2009 Act are added to and made a part of ORS 86.705**
28 **to 86.795.**

29 **SECTION 4. A notice that states that a grantor has the right to participate in mediation**
30 **before a trustee's sale to foreclose a residential trust deed must conform to specifications**
31 **the Director of the Department of Consumer and Business Services sets by rule. The notice**
32 **at a minimum must:**

33 (1) **Set forth the name and address for the grantor named in the residential trust deed;**

34 (2) **Itemize the amount in default and past due on the obligation secured by the residen-**
35 **tial trust deed, the amount that must be paid to cure the default and all associated costs and**
36 **fees;**

37 (3) **Provide the address, telephone number or other contact information for:**

38 (a) **The trustee, beneficiary or agent of the trustee or beneficiary that is authorized to**
39 **negotiate on the trustee's or beneficiary's behalf;**

40 (b) **The Oregon State Bar's Lawyer Referral Service; and**

41 (c) **Housing counselors that are approved by the United States Department of Housing**
42 **and Urban Development in accordance with the department's Housing Counseling Program**
43 **Handbook 7610.1 and that provide counseling services at no charge to the grantor;**

44 (4) **State that the grantor has the right to request and participate in mediation with the**
45 **beneficiary in the residential trust deed for the purpose of avoiding a trustee's sale of the**

1 **property subject to the residential trust deed;**

2 **(5) State that the grantor must contact the beneficiary within 30 days after the date of**
3 **the notice to request mediation;**

4 **(6) Provide a telephone number and other contact information the grantor may use to**
5 **request mediation with the beneficiary;**

6 **(7) List the documents and other information the grantor must bring to the mediation;**

7 **(8) List the names, addresses and telephone numbers for three persons who are qualified**
8 **under section 7 of this 2009 Act to provide mediation services either for a fee or at no charge;**

9 **(9) State that the grantor is entitled to be represented at the mediation by an attorney,**
10 **by a housing counselor approved by the United States Department of Housing and Urban**
11 **Development in accordance with the department's Housing Counseling Program Handbook**
12 **7610.1 or by another representative; and**

13 **(10) State that the grantor will bear no cost for the mediation.**

14 **SECTION 5. (1) Within 30 days after the date on which a grantor requests mediation, the**
15 **beneficiary or an agent of the beneficiary shall serve the grantor with a second notice in**
16 **accordance with ORCP 7 D(2) and 7 D(3) or mail the notice to the grantor by both first class**
17 **and certified mail with return receipt requested. The second notice must:**

18 **(a) Schedule a time and location for the mediation on a date that is not later than 90 days**
19 **after the date on which the notice described in section 4 of this 2009 Act was served or**
20 **mailed in accordance with ORS 86.740 (1); and**

21 **(b) Propose a mediator from the list included with the notice described in section 4 of this**
22 **2009 Act.**

23 **(2) If the grantor objects to the beneficiary's proposed mediator, the beneficiary shall**
24 **schedule the mediation with a mediator that the grantor proposes unless the beneficiary**
25 **objects to the grantor's proposed mediator. If the grantor and the beneficiary each object to**
26 **the other's proposed mediator, the beneficiary shall schedule the mediation with the re-**
27 **maining mediator.**

28 **(3) If the grantor and the beneficiary agree upon a schedule and a mediator, the benefi-**
29 **ciary shall send notice of the time and location of the mediation to the persons identified in**
30 **ORS 86.740 (2)(c).**

31 **(4) During the period that begins on the date the notice described in section 4 of this 2009**
32 **Act was served or mailed in accordance with ORS 86.740 (1) and that ends 30 days later, if**
33 **the grantor has not contacted the beneficiary to schedule a mediation, or that ends on the**
34 **date on which a mediation scheduled in accordance with this section concludes, a trustee or**
35 **the beneficiary may not add fees or charges to the obligation the grantor owes to the bene-**
36 **fiary. This subsection does not affect:**

37 **(a) Interest charged under the terms of the loan agreement or other evidence of the ob-**
38 **ligation; or**

39 **(b) Service fees or charges that the grantor paid as part of the obligation before the date**
40 **on which the notice described in section 4 of this 2009 Act was served or mailed in accord-**
41 **ance with ORS 86.740 (1).**

42 **SECTION 6. (1)(a) For the purposes of this section, the parties to a mediation conducted**
43 **to avoid a trustee's sale of real property described in a residential trust deed are the grantor**
44 **and the grantor's representative, if any, and the beneficiary.**

45 **(b) If a grantor is represented, the mediator, the beneficiary or the grantor may offer a**

1 reasonable settlement proposal to avoid the sale, including a proposal generated by a loan
2 modification formula described in subsection (2) of this section.

3 (c) If the grantor is not represented, the mediator shall use a loan modification formula
4 described in subsection (2) of this section to generate a settlement proposal.

5 (2) The mediator, the grantor or the beneficiary may use as a loan modification formula
6 to generate a settlement proposal:

7 (a) An automated loan modification formula developed by the Federal Deposit Insurance
8 Corporation; or

9 (b) A formula that is consistent with the Making Home Affordable guidelines issued by
10 the United States Department of the Treasury.

11 (3) With the consent of the parties to the mediation, the mediator may adopt rules to
12 facilitate a settlement and may, with the parties' consent, have authority to suspend or
13 continue the mediation.

14 (4) If the parties agree to a settlement, the mediator and the parties shall witness and
15 sign a document that sets forth the terms of the settlement. The mediator shall provide
16 copies of the document to the parties and shall report to the Department of Consumer and
17 Business Services that the parties have reached a settlement. The beneficiary, within five
18 business days after the parties have signed a settlement document under this subsection or
19 before the scheduled date of the trustee's sale, whichever is earlier, shall instruct the trustee
20 to discontinue the trustee's sale and shall amend the beneficiary's records to reflect the
21 modified terms of the obligation that are set forth in the settlement document.

22 (5) If the parties agree to a settlement, the mediator may also propose a settlement for
23 the holder of a junior lien on the real property described in the residential trust deed. In
24 making the proposal, the mediator shall consider whether, given the market value of the real
25 property and the terms of the parties' settlement, equity to which the holder's lien may attach
26 remains in the real property.

27 (6) If the parties do not reach a settlement, the mediator shall write a report that states
28 that the parties have not reached a settlement and the trustee may proceed with the sale
29 scheduled according to the notice required under ORS 86.740 (1) to foreclose a residential
30 trust deed. In the report, the mediator shall describe the results of the mediation and the
31 method used to generate a settlement proposal, with specific reference to the formula the
32 parties used, if the parties used a formula described in subsection (2) of this section. The
33 mediator shall provide copies of the report to the parties.

34 **SECTION 7.** (1) To qualify as a mediator for the purposes of the mediation described in
35 section 6 of this 2009 Act, a person must:

36 (a) Be trained in how to generate a settlement proposal from a formula or program described
37 in section 6 (2) of this 2009 Act;

38 (b) Be a member of the Oregon State Bar or otherwise qualified as a mediator under
39 rules the Chief Justice of the Supreme Court has adopted to qualify court connected
40 mediators; and

41 (c) Provide the person's name and contact information to the Department of Consumer
42 and Business Services. The department shall maintain the person on the department's list
43 of qualified mediators if the person:

44 (A) Provides mediation services without charge; or

45 (B) Charges not more than \$125 per hour for three hours of mediation services.

1 (2) A person may not conduct a mediation described in section 6 of this 2009 Act if the
2 person has a conflict of interest related to the parties to or to the subject of the mediation
3 that prevents the person from providing mediation services in an impartial manner.

4 **SECTION 8.** (1) Except as provided in subsection (2) of this section, the rights of a pur-
5 chaser at a trustee's sale and the grantor or an heir, assign or transferee of the grantor
6 with respect to real property described in a residential trust deed are the same as the rights
7 accorded under ORS 86.742 to the purchaser and to a person entitled to notice under ORS
8 86.740 (2)(c) if the grantor proves that:

9 (a) The trustee did not send the notices required under ORS 86.740 (1) and the grantor
10 did not actually receive notice of the trustee's sale at least 120 days before the trustee con-
11 ducts the sale;

12 (b) The beneficiary did not attend a mediation scheduled under section 5 of this 2009 Act;
13 or

14 (c) The beneficiary refused to accept a settlement proposal that calculations performed
15 in accordance with a formula or program described in section 6 (2) of this 2009 Act demon-
16 strated was feasible.

17 (2) Subsection (1) of this section does not apply to the purchaser at the trustee's sale or
18 to the grantor or heir, assign or transferee of the grantor if the trustee or beneficiary named
19 in the residential trust deed attests in a signed, sworn statement filed before the date of the
20 trustee's sale with the clerk or recorder of deeds in the county in which the real property
21 described in the residential trust deed is located that:

22 (a) The real property was abandoned before the date of the trustee's sale;

23 (b) The grantor voluntarily relinquished the property to the trustee or beneficiary in re-
24 turn for valuable consideration after meeting with a housing counselor approved by the
25 United States Department of Housing and Urban Development in accordance with the de-
26 partment's Housing Counseling Program Handbook 7610.1;

27 (c) The grantor for a period of 90 days or longer has been in default under the terms of
28 a settlement to which the grantor and the beneficiary agreed under section 6 of this 2009
29 Act; or

30 (d) The grantor did not request mediation after receiving a notice under section 4 of this
31 2009 Act.

32 (3) The trustee or beneficiary shall serve the grantor with a copy of the sworn statement
33 described in subsection (2) of this section, or mail a copy to the grantor, within three busi-
34 ness days after the trustee files the statement with the county clerk or recorder of deeds.

35 **SECTION 9.** The Director of the Department of Consumer and Business Services may
36 adopt rules necessary to administer sections 4 to 7 of this 2009 Act.

37 **SECTION 10.** ORS 86.740, as amended by section 1 of this 2009 Act, is amended to read:

38 86.740. [(1)(a)] (1) Subsequent to recording notice of default as provided in ORS 86.735 and at
39 least 120 days before the day the trustee conducts the sale, notice of the sale must be served in
40 accordance with ORCP 7 D(2) and 7 D(3) or mailed by both first class and certified mail with return
41 receipt requested.

42 [(b) Except as provided in subsection (5) of this section, if the sale is for the purpose of foreclosing
43 a residential trust deed:]

44 [(A) The notice described in paragraph (a) of this subsection must be served or mailed as provided
45 in paragraph (a) of this subsection at least 150 days before the date of the sale; and]

1 *[(B) In addition to the notice described in paragraph (a) of this subsection, the notice described in*
2 *section 4 of this 2009 Act must also be served or mailed as provided in paragraph (a) of this subsection*
3 *at least 150 days before the date of the sale.]*

4 (2) The [notices] **notice** described in subsection (1) of this section must be served or mailed to
5 the last-known address of the following persons or the legal representatives of the persons, if any:

6 (a) The grantor in the trust deed.

7 (b) A successor in interest to the grantor whose interest appears of record, or of whose interest
8 the trustee or the beneficiary has actual notice.

9 (c) A person, including the Department of Revenue or another state agency, that has a lien or
10 interest subsequent to the trust deed if the lien or interest appears of record or the beneficiary has
11 actual notice of the lien or interest.

12 (d) A person that requests notice as provided in ORS 86.785.

13 (3) A notice served by mail under subsection (1) of this section is effective when the notice is
14 mailed. *[On or before the date the trustee conducts the sale, the trustee shall file for recording in the*
15 *official record of the county or counties in which the property described in the trust deed is situated*
16 *an affidavit of mailing with respect to the notices required under subsection (1) of this section.]*

17 (4)(a) The disability, insanity or death of a person entitled to notice of sale under this section
18 does not delay or impair in any way the trustee's right under a trust deed to foreclose under the
19 deed. If the disability, insanity or death occurs before the notice of default is recorded, the notice
20 must be given instead to the guardian, the conservator of the person's estate or the person's ad-
21 ministrator or personal representative, as appropriate, in the manner and by the time set forth in
22 this section.

23 (b) If the disability, insanity or death of a person entitled to notice of sale under this section
24 occurs on or after the notice of default is recorded, the trustee shall, if and when the trustee has
25 knowledge of the disability, insanity or death, promptly give the guardian, the conservator of the
26 estate or the administrator or personal representative, as appropriate, the notice provided in ORS
27 86.745. The notice must be given by first class and certified mail with return receipt requested, to
28 the last-known address of the guardian, conservator or administrator or personal representative.

29 (c) If there is no administrator or personal representative of the estate of the person entitled
30 to notice of sale under this section, the notice may be given instead to the heirs at law or devisees
31 of the deceased person in the manner and by the time set forth in this section.

32 *[(5) The requirement to mail or serve a notice described in subsection (1)(b) of this section does not*
33 *apply if the property subject to the trustee's sale is property secured by a mortgage that a government*
34 *agency holds for a loan the government agency funded through a government program.]*

35 **SECTION 11. Sections 3 to 9 of this 2009 Act are repealed on January 2, 2014.**

36 **SECTION 12. The amendments to ORS 86.740 by section 10 of this 2009 Act become op-**
37 **erative on January 2, 2014.**

38 **SECTION 13. This 2009 Act being necessary for the immediate preservation of the public**
39 **peace, health and safety, an emergency is declared to exist, and this 2009 Act takes effect**
40 **on its passage.**