

SENATE AMENDMENTS TO SENATE BILL 628

By COMMITTEE ON CONSUMER PROTECTION AND PUBLIC AFFAIRS

May 4

- 1 On page 1 of the printed bill, line 2, after “ORS 86.740” insert “and 86.742”.
- 2 Delete lines 5 through 30 and delete pages 2 through 5 and insert:
- 3 “**SECTION 1.** ORS 86.740 is amended to read:
- 4 “86.740. (1)(a) Subsequent to recording notice of default as provided in ORS 86.735 and at least
- 5 120 days before the day the trustee conducts the sale, notice of the sale [*shall*] **must** be served
- 6 [*pursuant to*] **in accordance with** ORCP 7 D(2) and 7 D(3) or mailed by both first class and certified
- 7 mail with return receipt requested[.].
- 8 “(b) **Except as provided in subsection (5) of this section, if the sale is for the purpose of**
- 9 **foreclosing a residential trust deed:**
- 10 “(A) **The notice described in paragraph (a) of this subsection must be served or mailed**
- 11 **as provided in paragraph (a) of this subsection at least 150 days before the date of the sale;**
- 12 **and**
- 13 “(B) **In addition to the notice described in paragraph (a) of this subsection, the notice**
- 14 **described in section 4 of this 2009 Act must also be served or mailed as provided in paragraph**
- 15 **(a) of this subsection at least 150 days before the date of the sale.**
- 16 “(2) **The notices described in subsection (1) of this section must be served or mailed to**
- 17 **the last-known address of the following persons or [*their*] the legal representatives of the persons,**
- 18 **if any:**
- 19 “(a) The grantor in the trust deed.
- 20 “(b) [*Any*] **A** successor in interest to the grantor whose interest appears of record, or of whose
- 21 interest the trustee or the beneficiary has actual notice.
- 22 “(c) [*Any*] **A** person, including the Department of Revenue or [*any other*] **another** state agency,
- 23 [*having*] **that has** a lien or interest subsequent to the trust deed if the lien or interest appears of
- 24 record or the beneficiary has actual notice of the lien or interest.
- 25 “(d) [*Any*] **A** person [*requesting*] **that requests** notice as provided in ORS 86.785.
- 26 “[2] (3) **A notice served by mail under subsection (1) of this section is effective when the notice**
- 27 **is mailed. On or before the date the trustee conducts the sale, the trustee shall file for re-**
- 28 **recording in the official record of the county or counties in which the property described in the**
- 29 **trust deed is situated an affidavit of mailing with respect to the notices required under sub-**
- 30 **section (1) of this section.**
- 31 “[3](a) (4)(a) The disability, insanity or death of [*any*] **a** person [*to whom*] **entitled to** notice
- 32 of sale [*must be given*] under this section does not delay or impair in any way the trustee’s right
- 33 under a trust deed to foreclose under the deed. If the disability, insanity or death occurs [*prior to*
- 34 *the recording of*] **before the** notice of default **is recorded**, the notice [*shall*] **must** be given instead
- 35 to the guardian, the conservator of the **person’s** estate [*of the person*] or the **person’s** administrator

1 or personal representative, **as appropriate**, [of the person, as the case may be,] in the manner and
2 by the time set forth in this section.

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

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

14 “**(5) The requirement to mail or serve a notice described in subsection (1)(b) of this sec-**
15 **tion does not apply if the property subject to the trustee’s sale is property secured by a**
16 **mortgage that a government agency holds for a loan the government agency funded through**
17 **a government program.**

18 “**SECTION 2.** ORS 86.742 is amended to read:

19 “86.742. (1) If the trustee fails to give notice of the sale to [any] a person entitled to notice
20 under ORS 86.740 [(1)(c),] **(2)(c)** and [such] **the** person did not have actual notice of the sale at least
21 25 days [prior to] **before** the date the trustee conducted the sale, [such] **the** omitted person [shall
22 have] **has** the same rights possessed by the holder of a junior lien or interest who was omitted as
23 a party defendant in a judicial foreclosure proceeding[,] and the purchaser at the trustee’s sale or
24 the purchaser’s heirs, assigns or transferees[, shall] have the same rights [possessed by] a purchaser
25 at a sheriff’s sale **possesses** following a judicial foreclosure.

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

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

31 “(b) A search of the record under the **grantor’s** name [of the grantor] as [it] **the name** appears
32 on the trust deed, or the name of the grantor’s successor in interest, would have revealed the
33 omitted person’s interest;

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

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

37 “(3) In an action against the trustee under subsection (2) of this section, [any] a defendant or
38 third party defendant may move for dismissal on the ground that the omitted person would not or
39 could not have cured the default and reinstated the trust deed if the omitted person had received
40 the notice required by ORS 86.740 [(1)(c)] **(2)(c)**. The court shall hold a hearing on [such] **the** motion
41 [prior to any] **before a** hearing on [any] a motion for summary judgment, and [prior to] **before** trial
42 of the action. The court shall deny the motion only if the omitted person produces affidavits or other
43 evidence sufficient for a reasonable jury to find, applying a standard of clear and convincing evi-
44 dence, that the omitted person had the financial ability to cure the default under ORS 86.753 prior
45 to the date of the trustee’s sale, and that the omitted person would have done so had the omitted

1 person received the notice required by ORS 86.740 [(1)(c)] **(2)(c)**. If the court grants the motion to
2 dismiss, [it] **the court** shall award attorney fees pursuant to subsection (5) of this section.

3 “(4) In [any] **an** action against the trustee or [any other] **another** party under this section, the
4 omitted person shall plead that the omitted person did not have actual knowledge of the sale at least
5 25 days [prior to] **before** the date the trustee conducted the sale, but thereafter the defendant [shall
6 have] **has** the burden of proving that the omitted person did have [such] notice.

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

10 “(6) The remedies described in subsections (1) to (5) of this section [shall be] **are** the sole rem-
11 edies available to a person entitled to notice of foreclosure by advertisement and sale under ORS
12 86.740 [(1)(c),] **(2)(c)** who failed to receive [such] notice. [Such a] **The** person’s failure to redeem or
13 to commence an action against the trustee within five years [of] **after** the date of a trustee’s sale
14 under ORS 86.755 [shall bar any] **bars an** action under this section or [any] **under** other applicable
15 law.

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

18 “**SECTION 4. A notice that states that a grantor has the right to participate in mediation**
19 **before a trustee’s sale to foreclose a residential trust deed must conform to specifications**
20 **the Director of the Department of Consumer and Business Services sets by rule. The notice**
21 **at a minimum must:**

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

23 “(2) **Itemize the amount in default and past due on the obligation secured by the resi-**
24 **dential trust deed, the amount that must be paid to cure the default and all associated costs**
25 **and fees;**

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

27 “(a) **The trustee, beneficiary or agent of the trustee or beneficiary that is authorized to**
28 **negotiate on the trustee’s or beneficiary’s behalf;**

29 “(b) **The Oregon State Bar’s Lawyer Referral Service; and**

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

33 “(4) **State that the grantor has the right to request and participate in mediation with the**
34 **beneficiary in the residential trust deed for the purpose of avoiding a trustee’s sale of the**
35 **property subject to the residential trust deed;**

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

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

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

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

43 “(9) **State that the grantor is entitled to be represented at the mediation by an attorney,**
44 **by a housing counselor approved by the United States Department of Housing and Urban**
45 **Development in accordance with the department’s Housing Counseling Program Handbook**

1 7610.1 or by another representative; and

2 “(10) State that the grantor will bear no cost for the mediation.

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

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

10 “(b) Propose a mediator from the list included with the notice described in section 4 of
11 this 2009 Act.

12 “(2) If the grantor objects to the beneficiary’s proposed mediator, the beneficiary shall
13 schedule the mediation with a mediator that the grantor proposes unless the beneficiary
14 objects to the grantor’s proposed mediator. If the grantor and the beneficiary each object to
15 the other’s proposed mediator, the beneficiary shall schedule the mediation with the re-
16 maining mediator.

17 “(3) If the grantor and the beneficiary agree upon a schedule and a mediator, the bene-
18 ficiary shall send notice of the time and location of the mediation to the persons identified
19 in ORS 86.740 (2)(c).

20 “(4) During the period that begins on the date the notice described in section 4 of this
21 2009 Act was served or mailed in accordance with ORS 86.740 (1) and that ends 30 days later,
22 if the grantor has not contacted the beneficiary to schedule a mediation, or that ends on the
23 date on which a mediation scheduled in accordance with this section concludes, a trustee or
24 the beneficiary may not add fees or charges to the obligation the grantor owes to the bene-
25 ficiary. This subsection does not affect:

26 “(a) Interest charged under the terms of the loan agreement or other evidence of the
27 obligation; or

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

31 “SECTION 6. (1)(a) For the purposes of this section, the parties to a mediation conducted
32 to avoid a trustee’s sale of real property described in a residential trust deed are the grantor
33 and the grantor’s representative, if any, and the beneficiary.

34 “(b) If a grantor is represented, the mediator, the beneficiary or the grantor may offer
35 a reasonable settlement proposal to avoid the sale, including a proposal generated by a loan
36 modification formula described in subsection (2) of this section.

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

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

41 “(a) An automated loan modification formula developed by the Federal Deposit Insurance
42 Corporation; or

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

45 “(3) With the consent of the parties to the mediation, the mediator may adopt rules to

1 facilitate a settlement and may, with the parties' consent, have authority to suspend or
2 continue the mediation.

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

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

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

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

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

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

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

33 “(A) Provides mediation services without charge; or

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

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

38 “SECTION 8. (1) Except as provided in subsection (2) of this section, the rights of a
39 purchaser at a trustee's sale and the grantor or an heir, assign or transferee of the grantor
40 with respect to real property described in a residential trust deed are the same as the rights
41 accorded under ORS 86.742 to the purchaser and to a person entitled to notice under ORS
42 86.740 (2)(c) if the grantor proves that:

43 “(a) The trustee did not send the notices required under ORS 86.740 (1) and the grantor
44 did not actually receive notice of the trustee's sale at least 120 days before the trustee conducts
45 the sale;

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

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

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

11 “(a) The real property was abandoned before the date of the trustee’s sale;

12 “(b) The grantor voluntarily relinquished the property to the trustee or beneficiary in
13 return for valuable consideration after meeting with a housing counselor approved by the
14 United States Department of Housing and Urban Development in accordance with the de-
15 partment’s Housing Counseling Program Handbook 7610.1;

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

19 “(d) The grantor did not request mediation after receiving a notice under section 4 of this
20 2009 Act.

21 “(3) The trustee or beneficiary shall serve the grantor with a copy of the sworn state-
22 ment described in subsection (2) of this section, or mail a copy to the grantor, within three
23 business days after the trustee files the statement with the county clerk or recorder of
24 deeds.

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

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

28 “86.740. [(1)(a)] (1) Subsequent to recording notice of default as provided in ORS 86.735 and at
29 least 120 days before the day the trustee conducts the sale, notice of the sale must be served in
30 accordance with ORCP 7 D(2) and 7 D(3) or mailed by both first class and certified mail with return
31 receipt requested.

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

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

36 “[(B) In addition to the notice described in paragraph (a) of this subsection, the notice described
37 in section 4 of this 2009 Act must also be served or mailed as provided in paragraph (a) of this sub-
38 section at least 150 days before the date of the sale.]

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

41 “(a) The grantor in the trust deed.

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

44 “(c) A person, including the Department of Revenue or another state agency, that has a lien or
45 interest subsequent to the trust deed if the lien or interest appears of record or the beneficiary has

1 actual notice of the lien or interest.

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

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

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

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

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

22 “[*(5) The requirement to mail or serve a notice described in subsection (1)(b) of this section does
23 not apply if the property subject to the trustee’s sale is property secured by a mortgage that a govern-
24 ment agency holds for a loan the government agency funded through a government program.*]

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

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

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

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