

Senate Bill 1576

Sponsored by Senators BOQUIST, BEYER; Senators OLSEN, TELFER (Presession filed.)

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 **as introduced**.

Requires beneficiary or beneficiary's agent under residential trust deed to send notice of mediation and enter into mediation with grantor for purpose of agreeing to foreclosure avoidance measure. Specifies form and content of notice of mediation, date by which notice must be sent and method of service.

Specifies duties of beneficiary or beneficiary's agent with respect to mediation. Requires beneficiary or beneficiary's agent to record certificate of compliance from mediation service provider in order to proceed with foreclosure of trust deed.

Permits grantor that is at risk of default to request mediation with beneficiary or beneficiary's agent.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to requirements for mediation before foreclosing residential trust deeds; creating new provisions; amending ORS 86.705, 86.735, 86.740 and 86.742; and declaring an emergency.

3
4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1. Sections 2 and 3 of this 2012 Act are added to and made a part of ORS 86.705**
6 **to 86.795.**

7 **SECTION 2. (1) As used in this section and section 3 of this 2012 Act:**

8 (a) "Foreclosure avoidance measure" means an agreement between a beneficiary and a
9 grantor that uses one or more of the following methods to modify an obligation that is secured by a trust deed:
10

11 (A) The beneficiary defers or forbears from collecting one or more payments due on the
12 obligation.

13 (B) The beneficiary modifies, temporarily or permanently, the payment terms or other
14 terms of the obligation.

15 (C) The beneficiary accepts a deed in lieu of foreclosure from the grantor.

16 (D) The grantor conducts a short sale.

17 (E) The beneficiary provides the grantor with other assistance that enables the grantor
18 to avoid a foreclosure.

19 (b) "Mediation service provider" means the Oregon Office for Community Dispute Resolution.
20

21 (2)(a) Except as provided in paragraph (e) of this subsection, a beneficiary that seeks to
22 foreclose a residential trust deed under ORS 86.735 shall enter into mediation with the
23 grantor for the purpose of negotiating a foreclosure avoidance measure in accordance with
24 the provisions of this section.

25 (b) The mediation service provider shall supervise the mediation.

26 (c) The beneficiary and the grantor shall each pay \$200 toward the cost of the mediation.

27 **The beneficiary may recover the beneficiary's portion of the cost of the mediation from the**

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 grantor if the mediation results in an agreement for a foreclosure avoidance measure.

2 (d) The Attorney General by rule may direct moneys received as a consequence of a legal
3 settlement between the State of Oregon and mortgage lenders that are appropriated to the
4 Attorney General for the purposes of this section toward funding the costs of mediation
5 under this section.

6 (e) The requirement to enter into mediation with a grantor does not apply to a benefi-
7 ciary if the grantor fails to confirm that the grantor will enter into mediation by the date
8 specified under subsection (3)(c) of this section.

9 (3) Within 30 days after the date on which the beneficiary caused a notice of mediation
10 to be served or mailed as provided in ORS 86.740, the mediation service provider shall send
11 a notice to the grantor and the beneficiary that:

12 (a) Schedules a date, time and location for the mediation. The date must be not earlier
13 than 45 days and not later than 90 days after the date on which the notice of mediation was
14 served or mailed as provided in ORS 86.740.

15 (b) Identifies and provides contact information for the mediation service provider.

16 (c) Specifies a date at least 15 days before the scheduled date of the mediation by which
17 the grantor must contact the mediation service provider to confirm that the grantor will
18 enter into mediation. The notice must state that the mediation service provider will deem
19 the grantor to have declined to enter into mediation if the grantor fails to confirm by the
20 specified date.

21 (d) Lists the costs of the mediation and specifies the portion of the costs for which the
22 grantor is responsible.

23 (e) Provides any other information that the Attorney General requires by rule.

24 (4)(a) If the grantor confirms by the date specified under subsection (3)(c) of this section
25 that the grantor will enter into mediation, the beneficiary or the beneficiary's agent shall
26 appear at the time and the location identified in the notice sent under subsection (3) of this
27 section with the documentation described in paragraph (b) of this subsection.

28 (b) The beneficiary or the beneficiary's agent must appear at the location for the medi-
29 ation with:

30 (A) The grantor's complete payment history for the obligation that is secured by the
31 residential trust deed that the beneficiary seeks to foreclose;

32 (B) Evidence that the beneficiary is the real party in interest with respect to the obli-
33 gation, including but not limited to:

34 (i) A true copy of the original debt instrument that is the basis for the right the benefi-
35 ciary claims to foreclose the trust deed; and

36 (ii) Documents that show the chain of title for the property that is subject to the resi-
37 dential trust deed from the date of the original loan for which the beneficiary seeks fore-
38 closure to the date of the notices given under ORS 86.740, including conveyances,
39 endorsements and assignments of the residential trust deed, the note and the security in-
40 strument, whether recorded or unrecorded;

41 (C) A copy of the authorization from the beneficiary to the beneficiary's agent, if the
42 beneficiary's agent appears at the mediation;

43 (D) A copy of any of the following documents that apply to the note or obligation that is
44 secured by the trust deed:

45 (i) A servicing agreement the beneficiary entered into with another person; or

1 (ii) An agreement by means of which the beneficiary pledged as collateral for a security
2 the beneficiary issued or sold all or a portion of the ownership interest in the note or other
3 obligation; and

4 (E) Other documentation the Attorney General specifies by rule.

5 (c) The beneficiary or the beneficiary's agent that enters into mediation with the grantor
6 must have or be able to obtain before the mediation concludes authority to accept or reject
7 a proposal for a foreclosure avoidance measure and authority to enter with the grantor into
8 an agreement for a foreclosure avoidance measure.

9 (5)(a) The beneficiary or the beneficiary's agent and the grantor must negotiate in good
10 faith under the supervision of the mediation service provider in accordance with guidelines
11 the mediation service provider establishes and with the objective of reaching an agreement
12 on a foreclosure avoidance measure.

13 (b) If the beneficiary or the beneficiary's agent agrees with the grantor on a foreclosure
14 avoidance measure, the mediation service provider shall witness and sign an agreement that
15 sets forth the terms of the foreclosure avoidance measure. The grantor may elect to pay the
16 grantor's and the beneficiary's portions of the cost of mediation as part of and in accordance
17 with any payment plan that is part of the foreclosure avoidance measure.

18 (c) If the beneficiary or the beneficiary's agent and the grantor do not agree on a fore-
19 closure avoidance measure, the mediation service provider shall notify the Attorney General.
20 The grantor and the beneficiary shall bear the grantor's and the beneficiary's own portions
21 of the cost of the mediation.

22 (6)(a) At the conclusion of the mediation, the mediation service provider shall provide the
23 beneficiary or the beneficiary's agent with a certificate of compliance in a form and with
24 contents that the Attorney General specifies by rule. The certificate must state that the
25 beneficiary has complied with the requirements of this section.

26 (b) If the grantor does not confirm by the date specified under subsection (3)(c) of this
27 section that the grantor will enter into mediation, the mediation service provider shall pro-
28 vide the beneficiary or beneficiary's agent with a certificate of compliance in a form and with
29 contents that the Attorney General specifies by rule. The certificate must state that the
30 grantor declined to enter into mediation with the beneficiary.

31 (c) The mediation service provider shall provide a copy of the certificate the mediation
32 service provider issues under paragraph (a) or (b) of this subsection to the grantor and to
33 the Attorney General.

34 (7)(a) A grantor that is at risk of default before the beneficiary or the trustee has filed
35 a notice of default for recording under ORS 86.735 may notify the beneficiary or trustee in
36 the trust deed or the beneficiary's or trustee's agent that the grantor wants to enter into
37 mediation. Within 10 days after receiving the request, the beneficiary or trustee or the
38 beneficiary's or trustee's agent shall respond to the grantor's request and shall notify the
39 Attorney General and the mediation service provider. The response to the grantor must in-
40 clude contact information for the Attorney General and the mediation service provider.

41 (b) A grantor that requests mediation under paragraph (a) of this subsection may also
42 notify the Attorney General and the mediation service provider of the request. The Attorney
43 General shall post on the Department of Justice website contact information for the medi-
44 ation service provider and an address or method by which the grantor may notify the At-
45 torney General.

1 (c) Within 10 days after receiving notice of the request under paragraph (a) of this sub-
 2 section, the mediation service provider shall send a notice to the grantor and the beneficiary
 3 that, except with respect to the date by which the mediation service provider must send the
 4 notice, is otherwise in accordance with the provisions of subsection (3) of this section.

5 (d) A beneficiary or beneficiary's agent that receives a request under paragraph (a) of
 6 this subsection is subject to the same duties as are described in subsections (2), (4) and (5)
 7 of this section.

8 (e) A grantor that is at risk of default because the amount the grantor owes on the ob-
 9 ligation that is secured by the residential trust deed is greater than the value of the property
 10 that is subject to the residential trust deed by a ratio of 110 percent or more shall establish
 11 the value of the property at the mediation with documentation that consists of one or more
 12 of the following:

13 (A) The most recent property tax statement for the property.

14 (B) An appraisal of the property prepared by an appraiser certified or licensed under ORS
 15 chapter 674. The appraisal must have been prepared within 90 days preceding the date on
 16 which the grantor made a request under paragraph (a) of this subsection.

17 (C) A written broker's price opinion signed by an individual that is licensed under ORS
 18 chapter 696.

19 **SECTION 3.** The notice of mediation required under ORS 86.740 (1)(b) must be in a form
 20 and with the contents the Attorney General specifies by rule and must:

21 (1) List the name, address, telephone number and other contact information for the
 22 grantor or other person named in the residential trust deed.

23 (2) Specify the account number or other means by which the beneficiary or trustee or
 24 an agent of the beneficiary or trustee identifies the obligation that is secured by the resi-
 25 dential trust deed.

26 (3) Provide the address, telephone number and other contact information for:

27 (a) The beneficiary or an agent of the beneficiary that the beneficiary authorizes to ne-
 28 gotiate on the beneficiary's behalf;

29 (b) The Oregon State Bar's Lawyer Referral Service;

30 (c) Service agencies or other providers that offer free or low-cost legal services from a
 31 list of agencies or providers that the Attorney General adopts by rule; and

32 (d) A list of not-for-profit housing counselors approved by the United States Department
 33 of Housing and Urban Development or an agency of this state.

34 (4) State that section 2 of this 2012 Act requires the beneficiary to enter into mediation
 35 with the grantor for the purpose of negotiating a foreclosure avoidance measure.

36 (5) List the documents the grantor must bring to the mediation. The Attorney General
 37 by rule shall specify the documents the grantor must bring.

38 (6) State that the grantor may choose to have an attorney or a housing counselor ap-
 39 proved by the United States Department of Housing and Urban Development represent the
 40 grantor at the mediation.

41 (7) State that the grantor must pay a portion of the costs of the mediation and specify
 42 the maximum cost for which the grantor will be responsible.

43 (8) State that the mediation and mediation communications, as defined in ORS 36.110, are
 44 confidential in accordance with and to the extent provided in ORS 36.220 to 36.238.

45 (9) State that within 30 days after the date of the notice the mediation service provider

1 **will send another notice to the grantor with a date, time and location for the mediation and**
 2 **with the other information specified in section 2 (3) of this 2012 Act.**

3 **SECTION 4.** ORS 86.705 is amended to read:

4 86.705. As used in ORS 86.705 to 86.795:

5 (1) "Affordable housing covenant" has the meaning given that term in ORS 456.270.

6 (2) "Beneficiary" means a person named or otherwise designated in a trust deed as the person
 7 for whose benefit a trust deed is given, or the person's successor in interest, and who is not the
 8 trustee unless the beneficiary is qualified to be a trustee under ORS 86.790 (1)(d).

9 (3) "Eligible covenant holder" has the meaning given that term in ORS 456.270.

10 (4) "Grantor" means the person that conveys an interest in real property by a trust deed as
 11 security for the performance of an obligation.

12 (5) "Residential trust deed" means a trust deed on property upon which are situated four or
 13 fewer residential units, one of which the grantor, the grantor's spouse or the grantor's minor or
 14 dependent child occupies as a principal residence at the time a [*trust deed foreclosure is*
 15 *commenced*] **notice of default on the obligation secured by the trust deed is first recorded**
 16 **under ORS 86.735.**

17 (6) "Residential unit" means an improvement designed for residential use.

18 (7) "Trust deed" means a deed executed in conformity with ORS 86.705 to 86.795 that conveys
 19 an interest in real property to a trustee in trust to secure the performance of an obligation the
 20 grantor or other person named in the deed owes to a beneficiary.

21 (8) "Trustee" means a person, other than the beneficiary, to whom a trust deed conveys an in-
 22 terest in real property, or the person's successor in interest, or an employee of the beneficiary, if
 23 the employee is qualified to be a trustee under ORS 86.790.

24 **SECTION 5.** ORS 86.735 is amended to read:

25 86.735. [*The*] **A** trustee may foreclose a trust deed by advertisement and sale in the manner
 26 provided in ORS 86.740 to 86.755 if:

27 (1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any
 28 appointment of a successor trustee are recorded in the mortgage records in the counties in which
 29 the property described in the deed is situated; [*and*]

30 (2) There is a default by the grantor or other person [*owing*] **that owes** an obligation, the per-
 31 formance of which is secured by the trust deed, or by [*their*] **the grantor's or other person's** suc-
 32 cessors in interest with respect to [*any*] **a** provision in the deed [*which*] **that** authorizes sale in the
 33 event of default of [*such*] **the** provision; [*and*]

34 (3) The trustee or beneficiary has filed for record in the county clerk's office in each county
 35 where the trust property, or some part of [*it*] **the trust property**, is situated, a notice of default
 36 containing the information required by ORS 86.745 and containing the trustee's or beneficiary's
 37 election to sell the property to satisfy the obligation; [*and*]

38 (4) **The beneficiary or the beneficiary's agent has filed for recording in the official records**
 39 **of the county or counties in which the property that is subject to the residential trust deed**
 40 **is located the certificate of compliance the beneficiary received under section 2 of this 2012**
 41 **Act; and**

42 [*(4)*] (5) [*No*] **An** action has **not** been [*instituted*] **commenced** to recover the debt or any part
 43 of [*it*] **the debt** then remaining secured by the trust deed, or, if [*such*] **an** action has been
 44 [*instituted*] **commenced**, the action has been dismissed, except that:

45 (a) Subject to ORS 86.010 and the procedural requirements of ORCP 79 and 80, an action may

1 be *[instituted]* **commenced** to appoint a receiver or to obtain a temporary restraining order during
 2 foreclosure of a trust deed by advertisement and sale, except that a receiver *[shall]* **may** not be
 3 appointed with respect to a single-family residence *[which is occupied as the principal residence of]*
 4 **that** the grantor, the grantor's spouse or the grantor's minor or dependent child **occupies as a**
 5 **principal residence.**

6 (b) An action may be commenced *[for the judicial or nonjudicial foreclosure of]* **to foreclose,**
 7 **judicially or nonjudicially,** the same trust deed as to any other property covered *[thereby]* **by the**
 8 **trust deed,** or any other trust deeds, mortgages, security agreements or other consensual or
 9 nonconsensual security interests or liens *[securing]* **that secure** repayment of the debt.

10 **SECTION 6.** ORS 86.740 is amended to read:

11 86.740. (1)(a) **Except as provided in paragraph (b) of this subsection,** subsequent to recording
 12 notice of default as provided in ORS 86.735 and at least 120 days before the day the trustee conducts
 13 the sale, notice of the sale *[shall]* **with the contents described in ORS 86.745 must** be served
 14 pursuant to ORCP 7 D(2) and 7 D(3) or mailed by both first class and certified mail with return re-
 15 ceipt requested[.].

16 (b) **If the sale is for the purpose of foreclosing a residential trust deed, the notice of sale**
 17 **must be served or mailed in the manner provided in paragraph (a) of this subsection at least**
 18 **180 days before the date of the sale. A separate notice of mediation, in the form and with the**
 19 **contents described in section 3 of this 2012 Act, must accompany the notice of sale.**

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

23 (a) The grantor in the trust deed.

24 (b) Any successor in interest to the grantor whose interest appears of record, or of whose in-
 25 terest the trustee or the beneficiary has actual notice.

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

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

30 (e) **The mediation service provider, as defined in section 2 (1) of this 2012 Act, if the no-**
 31 **tices are served or mailed under subsection (1)(b) of this section.**

32 *[(2)]* (3) A notice served by mail under subsection (1) of this section is effective when the notice
 33 is mailed.

34 *[(3)(a)]* (4)(a) The disability, insanity or death of *[any]* **a person to whom** *[notice of sale]* **the**
 35 **notices required under this section** must be given *[under this section]* does not delay or impair in
 36 any way the trustee's right under a trust deed to foreclose under the deed. If the disability, insanity
 37 or death occurs *[prior to the recording of]* **before the** notice of default **is recorded,** the *[notice*
 38 *shall]* **notices required under this section must** be given instead to the guardian, the conservator
 39 of the estate of the person or the administrator or personal representative of the person[, *as the case*
 40 *may be,*] in the manner and by the time set forth in this section.

41 (b) If the disability, insanity or death of *[any]* **a person to whom** *[notice of sale]* **the notices**
 42 **required under this section** must be given *[under this section]* occurs on or after the *[recording*
 43 *of]* notice of default **is recorded,** the trustee shall, if and when the trustee has knowledge of the
 44 disability, insanity or death, promptly give the guardian, **the** conservator of the estate or the ad-
 45 ministrator or personal representative[, *as the case may be, the notice provided in ORS 86.745. This*

1 *notice shall be given* **required notices by sending the notices** by first class and certified mail with
 2 return receipt requested[,] to the last-known address of the guardian, conservator or administrator
 3 or personal representative.

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

8 *[(4)]* **(5)** If the owner of real property subject to foreclosure dies and the real property is also
 9 subject to a transfer on death deed, as provided by ORS 93.948 to 93.979, *[notice of sale]* **the notices**
 10 **required under this section** must be given *[under this section]* to the beneficiary designated under
 11 the transfer on death deed.

12 **SECTION 7.** ORS 86.742 is amended to read:

13 86.742. (1) If the trustee fails to give notice of the sale to *[any]* **a** person entitled to notice under
 14 ORS 86.740 *[(1)(c)]* **(2)(c)**, and *[such]* **the** person did not have actual notice of the sale at least 25
 15 days *[prior to]* **before** the date **on which** the trustee conducted the sale, *[such]* **the** omitted person
 16 *[shall have]* **has** the same rights *[possessed by]* **that** the holder of a junior lien or interest who was
 17 omitted as a party defendant in a judicial foreclosure proceeding **possesses**, and the purchaser at
 18 the trustee's sale or the purchaser's heirs, assigns or transferees, *[shall have]* **have** the same rights
 19 *[possessed by]* **that** a purchaser at a sheriff's sale following a judicial foreclosure **possesses**.

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

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

25 (b) A search of the record under the name of the grantor as *[it]* **the grantor's name** appears
 26 on the trust deed, or **as** the name of the grantor's successor in interest **appears**, would have re-
 27 vealed the omitted person's interest;

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

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

31 (3) In an action against the trustee under subsection (2) of this section, *[any]* **a** defendant or
 32 third party defendant may move for dismissal on the ground that the omitted person would not or
 33 could not have cured the default and reinstated the trust deed if the omitted person had received
 34 the notice required by ORS 86.740 *[(1)(c)]* **(2)(c)**. The court shall hold a hearing on *[such]* **the** motion
 35 *[prior to any]* **before a** hearing on *[any]* **a** motion for summary judgment, and *[prior to trial of]* **be-**
 36 **fore trying** the action. The court shall deny the motion only if the omitted person produces affida-
 37 vits or other evidence sufficient for a reasonable jury to find, applying a standard of clear and
 38 convincing evidence, that the omitted person had the financial ability to cure the default under ORS
 39 86.753 *[prior to]* **before** the date of the trustee's sale, and that the omitted person would have done
 40 so had the omitted person received the notice required by ORS 86.740 *[(1)(c)]* **(2)(c)**. If the court
 41 grants the motion to dismiss *[it]*, **the court** shall award attorney fees *[pursuant to]* **under** subsection
 42 (5) of this section.

43 (4) In *[any]* **an** action against the trustee or *[any other]* **another** party under this section the
 44 omitted person shall plead that the omitted person did not have actual knowledge of the sale at least
 45 25 days prior to the date the trustee conducted the sale, but thereafter the defendant *[shall have]*

1 **has** the burden of proving that the omitted person did have *[such]* notice.

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

5 (6) The remedies described in subsections (1) to (5) of this section *[shall be]* **are** the sole reme-
 6 dies available to a person entitled to notice of foreclosure by advertisement and sale under ORS
 7 86.740 *[(1)(c)]* **(2)(c)**, who failed to receive *[such]* notice. *[Such a]* **The** person's failure to redeem or
 8 to commence an action against the trustee within five years of the date of a trustee's sale under
 9 ORS 86.755 *[shall bar]* **bars** any action under this section or any other applicable law.

10 **SECTION 8. Sections 2 and 3 of this 2012 Act and the amendments to ORS 86.705, 86.735,**
 11 **86.740 and 86.742 by sections 4 to 7 of this 2012 Act apply to requests for mediation that a**
 12 **grantor sends and notices of sale and mediation that a trustee or beneficiary or an agent of**
 13 **a trustee or beneficiary sends on or after the effective date of this 2012 Act.**

14 **SECTION 9. This 2012 Act being necessary for the immediate preservation of the public**
 15 **peace, health and safety, an emergency is declared to exist, and this 2012 Act takes effect**
 16 **on its passage.**

17
