

House Bill 2400

Sponsored by Representative WITT; Representatives BAILEY, BUCKLEY, DOHERTY, FREDERICK, GELSER, HOLVEY (Pre-session 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**.

Removes exemption for certain beneficiaries from requirement to enter into mediation with grantor before initiating foreclosure of residential trust deed by advertisement and sale. Removes exemption for certain beneficiaries from requirement for beneficiary to pay \$100 fee to county clerk when recording notice of default.

Requires beneficiary or beneficiary's agent to enter into mediation with grantor in good faith.

Becomes operative 91 days after effective date of Act.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to foreclosures of residential trust deeds; creating new provisions; amending ORS 86.735
3 and 86.740 and sections 2 and 4, chapter 112, Oregon Laws 2012; and declaring an emergency.

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

5 **SECTION 1.** Section 2, chapter 112, Oregon Laws 2012, is amended to read:

6 **Sec. 2.** (1) As used in this section and sections 3 and 4a [*of this 2012 Act*], **chapter 112, Oregon**
7 **Laws 2012**, "foreclosure avoidance measure" means an agreement between a beneficiary and a
8 grantor that uses one or more of the following methods to modify an obligation that is secured by
9 a trust deed:

10 (a) The beneficiary defers or forbears from collecting one or more payments due on the obli-
11 gation.

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

14 (c) The beneficiary accepts a deed in lieu of foreclosure from the grantor.

15 (d) The grantor conducts a short sale.

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

18 (2)(a) Except as provided in paragraph (d) of this subsection, a beneficiary that seeks to fore-
19 close a residential trust deed under ORS 86.735 shall enter into mediation with the grantor for the
20 purpose of negotiating a foreclosure avoidance measure in accordance with the provisions of this
21 section.

22 (b) The Attorney General shall:

23 (A) Appoint a mediation service provider to coordinate a mediation program and shall enter into
24 an agreement to pay the mediation service provider for the mediation service provider's services
25 from the Foreclosure Avoidance Mediation Fund established in section 4 [*of this 2012 Act*], **chapter**
26 **112, Oregon Laws 2012**. The appointment and the agreement are not subject to ORS chapter 279A
27 or 279B.

28 (B) Prescribe qualifications, training and experience requirements for mediators by rule.

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 (C) Set the schedule of fees for the mediation by rule.

2 (c) The beneficiary and the grantor shall share the cost of the mediation, except that the
 3 grantor's portion of the cost may not exceed \$200. The mediator may waive the grantor's portion
 4 of the fee in accordance with rules that the Attorney General adopts to describe circumstances that
 5 permit a waiver.

6 (d) The requirement to enter into mediation with a grantor does not apply[:]

7 [(A) *To an individual, a financial institution, as defined in ORS 706.008, a mortgage banker, as*
 8 *defined in ORS 86A.100, or a licensee, as defined in ORS 725.010, if the individual, financial institu-*
 9 *tion, mortgage banker or licensee provides to the Attorney General a sworn affidavit that states that*
 10 *during the preceding calendar year the individual, financial institution, mortgage banker or licensee*
 11 *did not commence or cause an affiliate or agent of the individual, financial institution, mortgage banker*
 12 *or licensee to commence more than a total of 250 actions to foreclose a residential trust deed by ad-*
 13 *vertisement and sale under ORS 86.735 or a residential mortgage by suit under ORS 88.010. An indi-*
 14 *vidual, financial institution, mortgage banker or licensee that intends to claim an exemption under this*
 15 *subparagraph shall file the affidavit either:]*

16 [(i) *Within 30 days after the operative date specified in section 11 of this 2012 Act to claim the*
 17 *exemption for calendar year 2012 and not later than January 31 in any subsequent calendar year in*
 18 *which the individual, financial institution, mortgage banker or licensee intends to claim the exemption;*
 19 *or]*

20 [(ii) *At the time the individual, financial institution, mortgage banker or licensee files a notice of*
 21 *default under ORS 86.735.]*

22 [(B)] if the grantor fails to confirm that the grantor will enter into mediation by the date spec-
 23 ified under subsection (3)(c) of this section.

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

27 (a) Schedules a date, time and location for the mediation. The date must be not earlier than
 28 45 days and not later than 90 days after the date on which the notice of mediation was served or
 29 mailed as provided in ORS 86.740.

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

31 (c) Specifies a date at least 30 days before the scheduled date of the mediation by which the
 32 grantor must contact the mediation service provider to confirm that the grantor will enter into
 33 mediation. The notice must state that the mediation service provider will deem the grantor to have
 34 declined to enter into mediation if the grantor fails to confirm by the specified date.

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

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

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

42 (b) The beneficiary or the beneficiary's agent must appear in person at the location of the me-
 43 diation unless the mediator permits the beneficiary or the beneficiary's agent to appear in another
 44 manner for good cause shown. The fact that a beneficiary or beneficiary's agent is located outside
 45 this state does not alone constitute good cause for the purposes of this paragraph. The beneficiary

1 or the beneficiary's agent must appear at the mediation with:

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

4 (B) Evidence that the beneficiary is the real party in interest with respect to the obligation,
5 including but not limited to:

6 (i) A true copy of the original debt instrument that is the basis for the right the beneficiary
7 claims to foreclose the trust deed; and

8 (ii) Documents that show the chain of title for the property that is subject to the residential
9 trust deed from the date of the original loan for which the beneficiary seeks foreclosure to the date
10 of the notices given under ORS 86.740, including conveyances, endorsements and assignments of the
11 residential trust deed, the note and the security instrument, whether recorded or unrecorded;

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

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

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

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

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

21 (c) The beneficiary or the beneficiary's agent that enters into mediation with the grantor must
22 have or be able to obtain, before the initial mediation session concludes, authority to accept or re-
23 ject a proposal for a foreclosure avoidance measure and authority to enter with the grantor into an
24 agreement for a foreclosure avoidance measure.

25 (5)(a) The beneficiary or the beneficiary's agent must enter into mediation **in good faith and** in
26 accordance with mediation guidelines the Attorney General establishes by rule.

27 (b) If the beneficiary or the beneficiary's agent agrees with the grantor on a foreclosure avoid-
28 ance measure, the beneficiary or beneficiary's agent and the grantor shall set forth the terms of the
29 foreclosure avoidance measure in a written agreement, a copy of which the beneficiary or
30 beneficiary's agent shall provide to the Attorney General. The beneficiary may elect to pay the
31 grantor's portion of the cost of the mediation or the grantor and the beneficiary may agree to in-
32 clude the cost of the mediation as part of and in accordance with any payment plan that is part of
33 the foreclosure avoidance measure.

34 (c) If the beneficiary or the beneficiary's agent and the grantor do not agree on a foreclosure
35 avoidance measure, the mediation service provider shall notify the Attorney General that the medi-
36 ation did not result in an agreement.

37 (6)(a) At the conclusion of the mediation, if the beneficiary has complied with the requirements
38 of subsections (4) and (5) of this section, the mediation service provider shall provide the beneficiary
39 or the beneficiary's agent with a certificate of compliance in a form and with contents that the At-
40 torney General specifies by rule. The certificate must state that the beneficiary has complied with
41 the requirements of this section.

42 (b) If the grantor does not confirm by the date specified under subsection (3)(c) of this section
43 that the grantor will enter into mediation, the mediation service provider shall provide the benefi-
44 ciary or the beneficiary's agent with a certificate of compliance in a form and with contents that
45 the Attorney General specifies by rule. The certificate must state that the grantor declined to enter

1 into mediation with the beneficiary.

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

5 (7)(a) A grantor that is at risk of default before the beneficiary or the trustee has filed a notice
 6 of default for recording under ORS 86.735 may notify the beneficiary or trustee in the trust deed
 7 or the beneficiary's or trustee's agent that the grantor wants to enter into mediation. Within 15 days
 8 after receiving the request, the beneficiary or trustee or the beneficiary's or trustee's agent shall
 9 respond to the grantor's request and shall notify the Attorney General and the mediation service
 10 provider identified in subsection (2)(b) of this section. The response to the grantor must include
 11 contact information for the Attorney General and the mediation service provider.

12 (b) A grantor that requests mediation under paragraph (a) of this subsection may also notify the
 13 Attorney General and the mediation service provider of the request. The Attorney General shall
 14 post on the Department of Justice website contact information for the mediation service provider
 15 and an address or method by which the grantor may notify the Attorney General.

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

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

22 **SECTION 2.** Section 4, chapter 112, Oregon Laws 2012, is amended to read:

23 **Sec. 4.** (1) The Foreclosure Avoidance Mediation Fund is established in the State Treasury,
 24 separate and distinct from the General Fund. The fund consists of moneys the Attorney General
 25 collects or receives for the purpose of paying the expenses of coordinating a mediation program
 26 under section 2 [of this 2012 Act], **chapter 112, Oregon Laws 2012**, and related expenses. The
 27 moneys in the fund are continuously appropriated to the Attorney General for the purposes of pay-
 28 ing the expenses of coordinating the mediation program and related expenses.

29 (2) The Attorney General may receive moneys for the purposes set forth in subsection (1) of this
 30 section from any public or private source.

31 [(3)(a)] (3) [Except as provided in paragraph (b) of this subsection,] A trustee or beneficiary that
 32 files a notice of default under ORS 86.735 shall pay to the county clerk that records the notice \$100
 33 in addition to and not in lieu of any fee that the county clerk charges for recording the notice of
 34 default. The county clerk at the end of each month shall forward the proceeds of the \$100 charge
 35 to the Attorney General for deposit into the fund described in subsection (1) of this section.

36 [(b) An individual, a financial institution, as defined in ORS 706.008, a mortgage banker, as de-
 37 fined in ORS 86A.100, or a licensee, as defined in ORS 725.010, is not subject to the \$100 charge de-
 38 scribed in paragraph (a) of this subsection if the individual, financial institution, mortgage banker or
 39 licensee provides to the county clerk a sworn affidavit that states that during the preceding calendar
 40 year the individual, financial institution, mortgage banker or licensee did not commence or cause an
 41 affiliate or agent of the individual, financial institution, mortgage banker or licensee to commence more
 42 than a total of 250 actions to foreclose a residential trust deed by advertisement and sale under ORS
 43 86.735 or a residential mortgage by suit under ORS 88.010. An individual, financial institution, mort-
 44 gage banker or licensee that intends to claim an exemption under this paragraph shall provide the af-
 45 fidavit either:]

1 [(A) *Within 30 days after the operative date specified in section 11 of this 2012 Act to claim the*
 2 *exemption for calendar year 2012 and not later than January 31 in any subsequent calendar year in*
 3 *which the individual, financial institution, mortgage banker or licensee intends to claim the exemption;*
 4 *or]*

5 [(B) *At the time the individual, financial institution, mortgage banker or licensee files a notice of*
 6 *default under ORS 86.735.*]

7 **SECTION 3.** ORS 86.735, as amended by section 6, chapter 112, Oregon Laws 2012, is amended
 8 to read:

9 86.735. A trustee may foreclose a trust deed by advertisement and sale in the manner provided
 10 in ORS 86.740 to 86.755 if:

11 (1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any
 12 appointment of a successor trustee are recorded in the mortgage records in the counties in which
 13 the property described in the deed is situated;

14 (2) There is a default by the grantor or other person that owes an obligation, the performance
 15 of which is secured by the trust deed, or by the grantor's or other person's successors in interest
 16 with respect to a provision in the deed that authorizes sale in the event of default of the provision;

17 (3) The trustee or beneficiary has filed for record in the county clerk's office in each county
 18 where the trust property, or some part of the trust property, is situated, a notice of default con-
 19 taining the information required by ORS 86.745 and containing the trustee's or beneficiary's election
 20 to sell the property to satisfy the obligation;

21 (4) The beneficiary or the beneficiary's agent has filed for recording in the official records of
 22 the county or counties in which the property that is subject to the residential trust deed is located
 23 the certificate of compliance the beneficiary received under section 2, chapter 112, Oregon Laws
 24 2012[, *if the beneficiary must enter into mediation with the grantor under section 2 (2)(a), chapter 112,*
 25 *Oregon Laws 2012*];

26 (5)(a) The beneficiary or the beneficiary's agent has complied with the provisions of section 4a,
 27 chapter 112, Oregon Laws 2012; and

28 (b) The grantor is not in compliance with the terms of a foreclosure avoidance measure upon
 29 which the beneficiary and the grantor have agreed; and

30 (6) An action has not been commenced to recover the debt or any part of the debt then re-
 31 maining secured by the trust deed, or, if an action has been commenced, the action has been dis-
 32 missed, except that:

33 (a) Subject to ORS 86.010 and the procedural requirements of ORCP 79 and 80, an action may
 34 be commenced to appoint a receiver or to obtain a temporary restraining order during foreclosure
 35 of a trust deed by advertisement and sale, except that a receiver may not be appointed with respect
 36 to a single-family residence that the grantor, the grantor's spouse or the grantor's minor or de-
 37 pendent child occupies as a principal residence.

38 (b) An action may be commenced to foreclose, judicially or nonjudicially, the same trust deed
 39 as to any other property covered by the trust deed, or any other trust deeds, mortgages, security
 40 agreements or other consensual or nonconsensual security interests or liens that secure repayment
 41 of the debt.

42 **SECTION 4.** ORS 86.740, as amended by section 7, chapter 112, Oregon Laws 2012, is amended
 43 to read:

44 86.740. (1)(a) Subsequent to recording notice of default as provided in ORS 86.735 and at least
 45 120 days before the day the trustee conducts the sale, notice of the sale with the contents described

1 in ORS 86.745 must be served pursuant to ORCP 7 D(2) and 7 D(3) or mailed by both first class and
 2 certified mail with return receipt requested.

3 (b) If the sale is for the purpose of foreclosing a residential trust deed [*and the beneficiary in the*
 4 *trust deed must enter into mediation with the grantor under section 2 (2)(a), chapter 112, Oregon Laws*
 5 *2012*], a separate notice of mediation, in the form and with the contents described in section 3,
 6 chapter 112, Oregon Laws 2012, must be served or mailed in the manner provided in paragraph (a)
 7 of this subsection at least 60 days before the notice of sale described in paragraph (a) of this sub-
 8 section is served or mailed.

9 (2) The notices described in subsection (1) of this section must be served or mailed to the last-
 10 known address of the following persons or the legal representatives of the persons, if any:

11 (a) The grantor in the trust deed.

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

14 (c) Any person, including the Department of Revenue or another state agency, that has a lien
 15 or interest subsequent to the trust deed if the lien or interest appears of record or the beneficiary
 16 has actual notice of the lien or interest.

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

18 (e) The mediation service provider that the Attorney General appoints under section 2 (2)(b),
 19 chapter 112, Oregon Laws 2012, if the notices are served or mailed under subsection (1)(b) of this
 20 section.

21 (3) A notice served by mail under subsection (1) of this section is effective when the notice is
 22 mailed.

23 (4)(a) The disability, insanity or death of a person to whom the notices required under this sec-
 24 tion must be given does not delay or impair in any way the trustee's right under a trust deed to
 25 foreclose under the deed. If the disability, insanity or death occurs before the notice of default is
 26 recorded, the notices required under this section must be given instead to the guardian, the
 27 conservator of the estate of the person or the administrator or personal representative of the person
 28 in the manner and by the time set forth in this section.

29 (b) If the disability, insanity or death of a person to whom the notices required under this sec-
 30 tion must be given occurs on or after **the date on which** the notice of default is recorded, the
 31 trustee shall, if and when the trustee has knowledge of the disability, insanity or death, promptly
 32 give the guardian, the conservator of the estate or the administrator or personal representative **the**
 33 required notices by sending the notices by first class and certified mail with return receipt requested
 34 to the last-known address of the guardian, conservator or administrator or personal representative.

35 (c) If there is no administrator or personal representative of the estate of the person to whom
 36 the notices required under this section must be given, the notices may be given instead to the heirs
 37 at law or devisees of the deceased person in the manner and by the time set forth in this section.

38 (5) If the owner of real property subject to foreclosure dies and the real property is also subject
 39 to a transfer on death deed, as provided by ORS 93.948 to 93.979, the notices required under this
 40 section must be given to the beneficiary designated under the transfer on death deed.

41 **SECTION 5. (1) The amendments to ORS 86.735 and 86.740 and sections 2 and 4, chapter**
 42 **112, Oregon Laws 2012, by sections 1 to 4 of this 2013 Act become operative 91 days after the**
 43 **effective date of this 2013 Act.**

44 **(2) The Attorney General may take any action before the operative date specified in**
 45 **subsection (1) of this section that is necessary to enable the Attorney General to exercise,**

1 on and after the operative date specified in subsection (1) of this section, all of the duties,
2 functions and powers conferred on the Attorney General by the amendments to ORS 86.735
3 and 86.740 and sections 2 and 4, chapter 112, Oregon Laws 2012, by sections 1 to 4 of this 2013
4 Act.

5 SECTION 6. The amendments to ORS 86.735 and 86.740 and sections 2 and 4, chapter 112,
6 Oregon Laws 2012, by sections 1 to 4 of this 2013 Act apply to notices of sale and mediation
7 that a trustee or beneficiary, or an agent of the trustee or beneficiary, sends on or after the
8 operative date specified in section 5 of this 2013 Act.

9 SECTION 7. This 2013 Act being necessary for the immediate preservation of the public
10 peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect
11 on its passage.
12
