

Senate Bill 367

Sponsored by Senator BATES (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**.

Requires person that brings suit to foreclose residential trust deed to enter into mediation with grantor before bringing suit. Provides exceptions.

Requires person to serve on or mail to grantor notice of mediation at least 120 days before bringing suit to foreclose residential trust deed.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to foreclosures of residential trust deeds; amending ORS 88.010 and sections 2, 3, 4 and 4a,
3 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, **chapter 112, Oregon Laws 2012**, [*of*
7 *this 2012 Act*,] "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 **or 88.010** shall enter into mediation with the grantor
20 for the purpose of negotiating a foreclosure avoidance measure in accordance with the provisions
21 of this 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, **chapter 112, Oregon**
26 **Laws 2012** [*of this 2012 Act*]. The appointment and the agreement are not subject to ORS chapter
27 279A or 279B.

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

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

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

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

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

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

18 (ii) At the time the individual, financial institution, mortgage banker or licensee files a notice
19 of default under ORS 86.735 **or at least 120 days before the individual, financial institution,**
20 **mortgage banker or licensee or an agent of the individual, financial institution, mortgage**
21 **banker or licensee brings suit to foreclose a residential trust deed under ORS 88.010.**

22 (B) If the grantor fails to confirm that the grantor will enter into mediation by the date specified
23 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 **or 88.010 (2)(b)(A)**, the mediation service provider shall
26 send a notice to 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 **or 88.010 (2)(b)(A)**.

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 trust*
9 *deed from the date of the original loan for which the beneficiary seeks foreclosure to the date of the*
10 *notices given under ORS 86.740, including conveyances, endorsements and assignments of the residen-*
11 *tial trust deed, the note and the security instrument, whether recorded or unrecorded;]*

12 **(ii) Documents that show the chain of title for the property that is subject to the resi-**
13 **dential trust deed, including conveyances, endorsements and assignments of the residential**
14 **trust deed, the note and the security instrument, over a period of time that begins on the**
15 **date of the original loan the beneficiary seeks to foreclose and ends on the date on which the**
16 **notices were given under ORS 86.740 or 88.010 (2)(b)(A);**

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

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

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

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

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

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

30 (5)(a) The beneficiary or the beneficiary's agent must enter into mediation in accordance with
31 mediation guidelines the Attorney General establishes by rule.

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

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

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

1 the requirements of this section.

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

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

10 (7)(a) [A grantor that is at risk of default] **If**, before the beneficiary or the trustee has filed a
11 notice of default for recording under ORS 86.735 **or brought suit to foreclose the residential**
12 **trust deed under ORS 88.010, the grantor has failed for 30 days or more to make a regular**
13 **periodic payment for the obligation that is secured by the residential trust deed or the**
14 **grantor is otherwise at risk of default, the grantor** may notify the beneficiary or trustee in the
15 trust deed or the beneficiary's or trustee's agent that the grantor wants to enter into mediation.
16 Within 15 days after receiving the request, the beneficiary or trustee or the beneficiary's or trustee's
17 agent shall respond to the grantor's request and shall notify the Attorney General and the mediation
18 service provider identified in subsection (2)(b) of this section. The response to the grantor must in-
19 clude contact information for the Attorney General and the mediation service provider.

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

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

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

30 **SECTION 2.** Section 3, chapter 112, Oregon Laws 2012, is amended to read:

31 **Sec. 3.** The notice of mediation required under ORS 86.740 (1)(b) **or 88.010 (2)(b)(A)** must be in
32 a form and with the contents the Attorney General specifies by rule and must:

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

35 (2) Specify the account number or other means by which the beneficiary or trustee or an agent
36 of the beneficiary or trustee identifies the obligation that is secured by the residential trust deed.

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

38 (a) The beneficiary or an agent of the beneficiary that the beneficiary authorizes to negotiate
39 on the beneficiary's behalf;

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

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

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

45 (4) State that section 2, **chapter 112, Oregon Laws 2012**, [of this 2012 Act] requires the bene-

1 ficiary to enter into mediation with the grantor for the purpose of negotiating a foreclosure avoid-
2 ance measure.

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

5 (6) State that the grantor may choose to have an attorney or a housing counselor approved by
6 the United States Department of Housing and Urban Development represent the grantor at the me-
7 diation.

8 (7) State the costs of the mediation and specify the maximum cost for which the grantor will
9 be responsible.

10 (8) State that the mediation and mediation communications, as defined in ORS 36.110, are con-
11 fidential in accordance with and to the extent provided in ORS 36.220 to 36.238.

12 (9) State that within 30 days after the date of the notice a mediation service provider will send
13 another notice to the grantor with a date, time and location for the mediation and with the other
14 information specified in section 2 (3), **chapter 112, Oregon Laws 2012** [of this 2012 Act].

15 **SECTION 3.** Section 4, chapter 112, Oregon Laws 2012, is amended to read:

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

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

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

29 **(b) Except as provided in paragraph (c) of this subsection, a beneficiary that brings suit**
30 **to foreclose a residential trust deed under ORS 88.010 shall on the same date on which the**
31 **beneficiary brings the suit remit to the Attorney General a fee of \$100, which the Attorney**
32 **General shall deposit into the fund described in subsection (1) of this section.**

33 [(b)] (c) An individual, a financial institution, as defined in ORS 706.008, a mortgage banker, as
34 defined in ORS 86A.100, or a licensee, as defined in ORS 725.010, is not subject to the \$100 charge
35 described in paragraph (a) **or (b)** of this subsection if the individual, financial institution, mortgage
36 banker or licensee provides to the county clerk a sworn affidavit that states that during the pre-
37 ceding calendar year the individual, financial institution, mortgage banker or licensee did not com-
38 mence or cause an affiliate or agent of the individual, financial institution, mortgage banker or
39 licensee to commence more than a total of 250 actions to foreclose a residential trust deed by ad-
40 vertisement and sale under ORS 86.735 or a residential mortgage by suit under ORS 88.010. An in-
41 dividual, financial institution, mortgage banker or licensee that intends to claim an exemption under
42 this paragraph shall provide the affidavit either:

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

1 claim the exemption; or

2 (B) At the time the individual, financial institution, mortgage banker or licensee files a notice
3 of default under ORS 86.735 **or brings suit to foreclose a residential trust deed under ORS**
4 **88.010.**

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

6 **Sec. 4a.** (1)(a) If a beneficiary determines that a grantor is not eligible for any foreclosure
7 avoidance measure or that the grantor has not complied with the terms of a foreclosure avoidance
8 measure to which the grantor has agreed, the beneficiary or the beneficiary's agent, at least 30 days
9 before the date specified for the trustee's sale in a notice served under ORS 86.740 or 86.755
10 (2)(b)[.] **or at least 30 days before the first scheduled proceeding in a suit to foreclose the**
11 **residential trust deed under ORS 88.010,** shall notify the grantor in writing of the beneficiary's
12 determination and shall cause the notice to be served as provided in ORS 86.740 (1).

13 (b) The notice must in plain language explain the basis for the beneficiary's determination.

14 (2) The beneficiary or the beneficiary's agent shall mail a copy of the notice of the determination
15 described in subsection (1) of this section to the Department of Justice on the same date on which
16 the notice is served.

17 (3)(a) At least 20 days before the date specified for the trustee's sale in a notice served under
18 ORS 86.740 or 86.755 (2)(b)[.] **or at least 20 days before the first scheduled proceeding in a suit**
19 **to foreclose the residential trust deed under ORS 88.010,** the beneficiary or the beneficiary's
20 agent shall:

21 (A) Record in the mortgage records for the property that is subject to the trustee's sale, in the
22 county or in one of the counties in which the property is located, an affidavit that states that the
23 beneficiary has complied with the requirements set forth in subsections (1) and (2) of this section;
24 and

25 (B) Mail a copy of the affidavit to the department.

26 (b) The affidavit described in paragraph (a) of this subsection must:

27 (A) Identify the property that is the subject of the trustee's sale;

28 (B) Identify the grantor and, as of the date of the affidavit, the trustee and the beneficiary;

29 (C) State that the beneficiary or beneficiary's agent has complied with the requirements set
30 forth in subsections (1) and (2) of this section; and

31 (D) Include proof of service on the grantor for the notice described in subsection (1) of this
32 section.

33 (4) The Attorney General by rule shall specify a form for and the contents of the notice of the
34 determination described in subsection (1) of this section and shall identify an address to which the
35 beneficiary or beneficiary's agent must mail the copy of the notice under subsection (2) of this sec-
36 tion and the affidavit under subsection (3) of this section.

37 (5)(a) A beneficiary or an agent of the beneficiary that fails to comply with the provisions of this
38 section is liable to the grantor in the amount of \$500 plus the amount of the grantor's actual dam-
39 ages for each failure to comply with a provision of this section.

40 (b) A grantor may bring an action against a beneficiary or an agent of the beneficiary in a cir-
41 cuit court of this state to recover the amounts described in paragraph (a) of this subsection. The
42 grantor shall commence the action within two years after the date on which the beneficiary or the
43 beneficiary's agent should have complied, but did not comply, with the provisions of this section.

44 (c) Notwithstanding an agreement to the contrary, a court may award reasonable attorney fees,
45 costs and disbursements to a grantor that obtains a final judgment in the grantor's favor.

SECTION 5. ORS 88.010 is amended to read:

88.010. (1) Except as otherwise provided by law, a lien upon real or personal property, other than that of a judgment, whether created by mortgage or otherwise, *[shall]* **must** be foreclosed, and the property adjudged to be sold to satisfy the debt *[secured thereby]* **the lien secures**, by *[a]* **bringing** suit. Except as provided in ORS 88.070, in addition to the judgment of foreclosure and sale, if **the lien debtor or another person, as principal or otherwise, has given** a promissory note or other personal obligation *[for the payment of]* **to repay** the debt *[has been given by the lien debtor or any other person as principal or otherwise]*, the court also shall enter a judgment for the amount of the debt against the *[person or persons]* **lien debtor or other person**. The provisions of this chapter as to liens upon personal property *[are not intended to]* **do not** exclude a person *[having such]* **that has a lien** from any other remedy or right *[in regard]* **with respect** to *[such]* **the property that the person otherwise has**.

(2)(a) **A person may not proceed under this section with a suit to foreclose a residential trust deed unless the person has complied with applicable provisions of sections 2, 3, 4 and 4a, chapter 112, Oregon Laws 2012, or unless the person is exempt under section 2 (2)(d), chapter 112, Oregon Laws 2012, from a requirement to enter into mediation with the grantor.**

(b) **For the purposes of the requirement in paragraph (a) of this subsection, a person has not complied with applicable requirements of sections 2, 3, 4 and 4a, chapter 112, Oregon Laws 2012, if the person has not:**

(A) **Served a notice of mediation in the form and with the contents described in section 3, chapter 112, Oregon Laws 2012, as provided in ORCP 7 D(2) and 7 D(3), or mailed the notice by both first class and certified mail with return receipt requested, at least 120 days before bringing suit under this section;**

(B) **Responded to a grantor’s request for mediation as provided in section 2 (7), chapter 112, Oregon Laws 2012;**

(C) **Filed for recording in the official records of the county or counties in which the property that is subject to the residential trust deed is located the certificate of compliance the person received under section 2, chapter 112, Oregon Laws 2012; or**

(D) **Remitted to the Attorney General the fee described in section 4 (3)(b), chapter 112, Oregon Laws 2012, unless the person is exempt from the fee under section 4 (3)(c), chapter 112, Oregon Laws 2012.**

(c) **Notwithstanding a person’s exemption under section 2 (2)(d), chapter 112, Oregon Laws 2012, from the requirement to enter into mediation with a grantor, the person may not proceed with a suit to foreclose a residential trust deed under this section unless the person has complied with the provisions of section 4a, chapter 112, Oregon Laws 2012.**

SECTION 6. This 2013 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect on its passage.