

## Legal Issues in Real Estate Foreclosure



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# **Legal Issues in Real Estate Foreclosure**

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## Presenters

**JOHN F. BURY** has practiced law in Spokane since 1975. Mr. Bury is of counsel with Winston & Cashatt, Lawyers. His areas of emphasis in practice are real estate litigation and debtor bankruptcy and reorganization. He has presented at various CLEs in the past, including LLC and easement topics. Mr. Bury is a member of the Washington State Bar Association. He is admitted to practice in the Eastern and Western districts of the U.S. District and Bankruptcy courts, the Ninth Circuit, and the U.S. Tax Court. Mr. Bury received his B.A. degree from Gonzaga University and graduated from Gonzaga School of Law.

**MATTHEW Z. CROTTY** is an attorney at Crotty & Son, PLLC. After graduation from Gonzaga University, he served four years on active duty as an intelligence officer. After leaving the Army, Mr. Crotty earned a master's degree in teaching from the University of Washington. He was accepted into the Gonzaga University School of Law while deployed overseas. Mr. Crotty graduated in the top five percent of his law school class and served as editor-in-chief of the *Gonzaga Law Review*. He spent the first five years of his legal career as an attorney in the litigation departments of Paine Hamblen and Witherspoon Kelley, the two largest law firms in Eastern Washington. During that time, Mr. Crotty litigated cases on behalf of, and against, major financial institutions, insurance carriers, and other corporations. In addition, he represented members of the military who experienced workplace discrimination in violation of the federal Uniformed Services Employment and Re-Employment Rights Act (USERRA). Mr. Crotty's USERRA work allowed him to advocate on behalf of service members ranking from private to general. His endeavors pitted him against some of the largest employers and law firms in the country. He is licensed to practice law in Idaho and Washington, and is willing and able to represent clients in employment discrimination, personal injury, and general commercial litigation matters.

**JOHN H. LOEFFLER**, a founding member of Olson, Loeffler & Landis, P.S., has a practice emphasis in the areas of real estate litigation, landlord-tenant law, estate planning, federal criminal law, and business transactions. Mr. Loeffler's practice encompasses all phases of litigation, with emphasis on civil litigation, and federal criminal litigation. His landlord-tenant practice includes commercial and residential lease preparation and negotiation, administrative law, fair housing claims, and a variety of other landlord-tenant issues and litigation. In addition to his law practice, Mr. Loeffler is an arbitration panel member under the Spokane County mandatory arbitration program, a hearing officer for the Washington State Bar Association, and he is frequently a mediator of civil and domestic matters. Mr. Loeffler received his B.A. degree from the University of Washington and his J.D. degree from Gonzaga University.

**NOEL J. PITNER**, owner of Pitner Law, PLLC, has been an attorney since 2005 after graduating, summa cum laude, from Gonzaga University School of Law. Before opening Pitner Law, PLLC, Mr. Pitner served as a principal shareholder/partner in a large Spokane firm where his primary areas of practice focused on commercial and business law with a concentration in creditor-debtor relations and bankruptcy, criminal law, civil litigation, personal injury and family law. He is also a member of the Washington State Bar Association and the Idaho State Bar, as well as the Spokane County and Kootenai County bar associations. He is a current member of the Washington State Bar Association's Debtor/Creditor and Banking and Commercial Law sections, as well as the

## Presenters (cont)

Federal Bar and Bankruptcy sections of both Washington and Idaho. Mr. Pitner has also served on the Washington State Bar Associations's Examiners Committee and currently sits on the Washington State Bar Associations Debtor/Creditor Executive Committee. In addition, he has served as a mock trial coach and adjunct professor at Eastern Washington University and an adjunct professor of legal research and writing at Gonzaga University School of Law.

**ROBERT R. ROWLEY** graduated, with honors, from the University of South Dakota. Mr. Rowley is a United States Army veteran, having served as a regular army officer with the 11th Blackhorse Cavalry Regiment in Germany as a border officer and was honorably discharged in 1991. He subsequently graduated, with honors, from the Gonzaga University Law School. With more than 20 years of experience, his law practice consists primarily of business, real estate matters and corporate transactions. He has represented clients in a variety of legal matters, including residential and commercial transactions, due diligence, acquisitions, marketing analysis, leasing proposals, landlord tenant, debtor-creditor (foreclosures, evictions, loan modifications), contract drafting and pre-litigation disputes, business formation, planning, partnership dissolutions and negotiation. He has litigated numerous matters on behalf of Fortune 500 and small local companies both in Washington and Idaho State courts, as well as the federal district and bankruptcy courts. Mr. Rowley has been recognized by his peers with multiple Attorney of the Year awards for his commitment to provide volunteer legal services for the disadvantaged and poor in his local community.

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And  
Foreclosure Avoidance Options**

**Submitted by Robert R. Rowley**



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May 5, 2014

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**BIOGRAPHICAL INFORMATION**  
**ROBERT R. ROWLEY**

Robert R. Rowley graduated with honors in 1987 from the University of South Dakota. Robert is a United States Army veteran having served as a Regular Army officer with the 11th Blackhorse Cavalry Regiment in Germany as a border officer and was honorably discharged as a Captain in 1994.

He subsequently graduated with honors from the Gonzaga University Law School in 1994. With over twenty years of experience, Robert's law practice consists primarily of business, real estate matters and corporate transactions. He has represented clients in a variety of legal matters including residential and commercial transactions, due diligence, acquisitions, marketing analysis, leasing proposals, landlord tenant, debtor-creditor (foreclosures, evictions, loan modifications), contract drafting and pre-litigation disputes, business formation, planning, partnership dissolutions and negotiation. He has litigated numerous matters on behalf of Fortune 500 and small local companies both in Washington and Idaho state courts, federal district and bankruptcy court.

Robert also has considerable personal experience setting-up and operating small businesses as an entrepreneur and investor in the real estate industry.

Robert has been recognized by his peers with multiple Attorney of the Year awards for his commitment to provide volunteer legal services for the disadvantaged and poor in his local community. His commitment to the community also involves his work as a volunteer for his sons' Boy Scout Troop, his church, the Union Gospel Mission and as a past director of the local crisis pregnancy center.

He is the proud husband of Shannon and father of their three teenagers. Robert and his family are active in their church serving in various servant-leader capacities. Robert enjoys spending time with his family and is especially fond of ultra-light backpacking, canoeing and winter camping.

## CHAPTER I

### CURRENT CASE LAW AND LEGISLATIVE UPDATE

Schroeder v. Excelsior Management Group, 297 P.3d 677, 177 Wash.2d 94 (Wash. 2013): Agricultural land must be foreclosed judicially. Parties may not waive the statute. Spokane attorneys Michael H. Church and Dianna K. Rudman. “For non-agricultural land, Washington Deed of Trust Act provides for a relatively inexpensive and fast mechanism for the lending industry to foreclose on property pledged as security for a debt through a non-judicial foreclosure action on a non-judicial foreclosure, a properly joined trustee is empowered by the Act to hold a foreclosure sale without judicial supervision. However, the Act does not allow a non-judicial foreclosure of agricultural land. Agricultural land must be foreclosed judicially. RCW 61.24.020, 030(2).”

Walker v. Quality Loan Service Corp., 308 P.3d 716, 176 Wash. App. 294 (Div I 2013): The court held that a property owner may recover damages in certain circumstances.

Bavand v. OneWest Bank, FSB, 309 P.3d 636, 176 Wash. App. 475 (Div I 2013): A borrower claims defects as it relates to MERS. Technical case.

Gardner v. First Heritage Bank, 303 P.3d 1065, 175 Wash. App. 650 (Div I 2013): Involves a commercial developer’s default on loans secured by deeds of trust on three contiguous parcels of real property. Bank conducted non-judicial foreclosures in succession on each parcel. The court held that the RCW 61.24 anti-deficiency provisions do not restrict the bank’s ability to exhaust multiple items of collateral in a series of non-judicial foreclosure proceedings.

Bert Kutty Revocable Living Trust v. Mullen, 306 P.3d 994, 175 Wash. App. 292 (Div II 2013): Case primarily deals with a claim for accounting of proceeds from a trustee sale and claims of successor liability.

Glepeco, LLC v. Reinstra, 307 P.3d 744, 175 Wash. App. 545 (Div I 2013): Quiet title action involving property purportedly sold on a non-judicial foreclosure involving issues of whether notice properly given and also claims of erroneous legal description and whether a legal description should be reformed. Technical case.

Watson v. Northwest Trustee Services, Inc., Unpublished Division I Court of Appeals Case No. 69352-2-I: Lengthy case involving Northwest Trustee Services and whether there were claims by the borrower against Northwest Trustee under the Consumer Protection Act. A “produce the note” case by borrower.

Kuntz v. JP Morgan Chase Bank, Unpublished Division II Case No. 42347-2-II: Dealt with a novel argument by the borrower that they were entitled to the surplus funds from the trustee sale because the bank was both in a first and second position on the title to the property and the bank foreclosed upon the first position deed of trust. Novel argument which ultimately did not prevail.

First-Citizens Bank & Trust Co. v. Reikow, 313 P.3d 1208 (Div II 2013): Suit by bank for deficiency judgment following trustee sale of real property secured a commercial loan which the borrowers personally guaranteed. Trial court dismissed the complaint after holding an evidentiary hearing and finding that the fair market value of the property exceeded the amount of the loan.

Metcalf v. CFA/NW Mortgage Professionals, Unpublished Division II Case No. 43103-3-II: Case involving a requirement for monthly mortgage payments as a condition of injunction to stay trustee's sale.

First Citizens Bank v. Cornerstone Homes, 314 P.3d 420 (Div II 2013): Dealt with the individual guarantors of three commercial promissory notes and a suit by lender post-foreclosure seeking deficiency judgment. Court of Appeals reversed superior court deficiency judgment against the borrowers and award of fees to bank and also granted attorney fees to borrowers on appeal. Great review of the anti-deficiency statute. RCW 61.24.100.

Ortega v. Northwest Trustee Services, Inc., Unpublished Division I Case No. 69652-1-I: Borrower's action to enjoin foreclosure of deed of trust on residence where borrowers failed to make the court-ordered mortgage payments into the court registry. Also, borrower raised issues as to whether Wells Fargo was the actual owner of the original promissory note and lawful beneficiary under the Act. The trial court most importantly found that the trial court has no discretion to restrain a non-judicial foreclosure sale without requiring mortgage payments into the court registry pursuant to RCW 61.24.130(1).

Frizzell v. Murray, 313 P.3d 1171 (Wash 2013): Court required the borrower to make certain payments into the court registry which the borrower failed to do. The trial court dismissed the borrower's claims on summary judgment. Court of Appeals reversed and remanded finding it would be inequitable to conclude that the borrower waived her claims. The Supreme Court held that the borrower waived her claims as to the foreclosure sale remanded to the trial court for consideration under RCW 61.24.127. Great waiver case.

Washington Federal Savings v. Klein, 311 P.3d 53, 177 Wash. App. 22 (Div I 2013): Bank appeals a summary judgment order dismissing as untimely its creditor claim against the deceased borrower's estate. Bank contended that because it did not receive a copy of the estate's notice to creditors it was subject to the two-year time bar on creditor's claim which it met and not the far shorter period permitted under RCW 11.40.051(A) to creditors who are given actual notice which it failed to meet. The court found that the statute only required proof that the estate's notice was mailed and not proof that it was received. The bank's evidence of non-receipt does not rebut the estate's proof of mailing and the estate prevails.

Klem v. Washington Mutual Bank, Wash 176 W.2d 771 (Wash. 2013): Lengthy case involving the estate of an individual involving a fraudulently notarized notice of sale predating the notary authorization. The falsification permitted the sale to take place earlier than it could have had the notice been dated when it was actually signed. Involving the guardianship for estate. The jury found that the trustee was negligent and that the trustee's acts violated the Consumer Protection Act and that the trustee violated its contractual obligations. Court of Appeals reversed on all but the negligence claim. Supreme Court reversed the Court of Appeals in part and restored the award based on the Consumer Protection Act and awarded the guardian reasonable attorney's fees and costs.

Sixty-01 Ass'n of Apt. Owners v. Parsons, 314 P.3d 1121 (Div I 2013): A purchaser at a sheriff's sale acquires only the right, title and interest that a debtor has at the time of the sale. Here two condominiums were purchased at the sheriff's sale which were subject to deeds of trust.

**CHAPTER II**  
**FORECLOSURE AVOIDANCE OPTIONS**

**I. CHOOSING BETWEEN WORKOUTS AND LIQUIDATION**

**A. Washington Foreclosure Fairness Act – RCW 61.24**

**Home Affordable Modification (Tier 1)**

Government modification program for primary residences purchased on or before January 1, 2009, with balances under \$729,750. This program changes the terms of a mortgage loan to lower the monthly payment amount or interest rate.

- Lenders typically using a formula developed by the U.S. Department of the Treasury, compare the Net Present Value of the requested mortgage modification with the Net Present Value of the mortgage if it is not modified. Typically the decision is not related to the Net Present Value results, but are required to provide the information used in the calculation.

**Home Affordable Modification with Principal Forgiveness (Tier 1)**

Government modification program for primary residences purchased on or before January 1, 2009, with balances under \$729,750. This program changes the terms of the mortgage loan to lower the monthly payment amount or interest rate. It also reduces the total amount owed.

**Home Affordable Modification (Tier 2)**

Government modification program for: 1) Homes that are rental properties; 2) Owners who previously did not qualify for the Home Affordable Modification Program (HAMP) (Tier 1) because their debt-to-income ratio was below 32%; 3) Owners who previously received a HAMP Trial Period Plan, but didn't make all of their trial payments; and 4) Owners who previously received a HAMP (Tier 1) permanent modification, but didn't keep their loan up to date. This program changes the terms of your mortgage loan to lower the monthly payment amount or interest rate.

**Home Affordable Modification with Principal Forgiveness (Tier 2)**

Government modification program for: 1) Homes that are rental properties; 2) Owners who previously didn't qualify for the Home Affordable Modification Program (HAMP (Tier 1) because their debt-to-income ratio was below 32%; 3) Owners who previously received a HAMP Trial Period Plan, but didn't make all of their trial payments; and 4) Owners who previously received a HAMP (Tier 1) permanent modification, but didn't keep their mortgage loan up to date. This program changes the terms of the mortgage loan to lower the monthly payment amount or interest rate. It also reduces the total amount owed.

**Bank Modification with Principal Forgiveness**

A program that changes the terms of the bank-owned mortgage loan to lower the monthly payment amount or interest rate. This program also reduces the total amount owed.

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## **Forbearance**

Forbearance temporarily reduces or suspends payments on a mortgage loan for a specific period. Forbearance is considered when the default results from particular financial hardships related to things like natural disasters or a temporary loss of income.

## **Repayment Plan**

A repayments plan is an agreement where a borrower will repay outstanding arrears while still making regularly scheduled payments. Repayment terms may include monthly payments that are multiples of regular installments, a regular payment one month and multiple payments the next, more frequent payments, or other terms.

## **2MP**

2MP is the Fannie Mae Second Lien Modification Program. It is designed to work with HAMP to help borrowers by lowering payments on first lien and second lien mortgage loans. Among the eligibility criteria, a loan must be a second lien with corresponding first lien modified under HAMP, originating on or before January 1, 2009, and have an unpaid principal balance of more than \$5,000.

## **Standard Modification**

Standard modification is designed to help borrowers who are ineligible for HAMP or who defaulted on a HAMP modification (and, sometimes, another Fannie Mae modification). While the standard modification eligibility criteria are detailed in the table, Fannie Mae will consider exceptions to those criteria when there are extenuating circumstances. The modification changes some terms of a mortgage loan to make it more affordable.

## **Foreclosure**

See RCW 61.24.

## **Strategic Default**

For a strategic default, borrower stops making payments on the house and allows the bank to foreclose. This would allow borrower to save money until the bank completes the foreclosure. After foreclosure, borrower would owe no more money to the bank for their primary loan, but they would lose their house and be less able to obtain credit in the future.

## **Chapter 13 Bankruptcy**

In chapter 13 bankruptcy, borrower can temporarily postpone foreclosure of their home while a court allows borrower to attempt to restructure their debt. If borrower can continue to make their current home loan payments while also paying off the delinquent amount over three to five years, then they may be able to keep their home. If the court determines that they cannot afford their loan, however, the house will still be subject to foreclosure.

## **Property Tax Deferral Program**

- Property Tax Deferral Program. The Washington Department of Revenue's Tax Deferral Program helps homeowners with limited income by paying 50% of property taxes and/or special assessments on behalf of the owner. For more information and a list of requirements visit the Department of Revenue's Website or call 1-360-570-5900, or call your local county assessor's office.

## Short Sale

Homeowners who owe more on their mortgages than their homes are worth may consider a short sale as a means to sell their home and/or avoid foreclosure. However, a short sale is a very complex transaction that involves numerous issues and risks.

### Short Sale or Deed-In-Lieu of Foreclosure

- Home Affordable Foreclosure Alternatives Program (HAFA): HAFA provides incentives in connection with a short sale or a deed-in-lieu of foreclosure (DIL) used to avoid foreclosure on a loan eligible for modification under the loan modification program (HAMP). Homeowners interested in taking advantage of the alternatives to foreclosure under the HAFA program need to talk to their lender.

### What is a Short Sale?

A short sale is a real estate transaction in which the property sells for less than the balance owing on the mortgage and the homeowner is unable to pay the difference.

### Do I need the lender's approval for a Short Sale?

Yes. The lender must consent to the transaction and agree to release the security interest in exchange for less than what is owed. If more than one loan, all banks must agree to allow a short sale. The lender is under no obligation to approve a short sale and will usually only grant a short sale if it is in the lender's best interest. In addition, borrower may have to show financial hardship in order to be approved for a short sale.

### Will a Short Sale discharge my debt?

The lender's approval of a short sale does not necessarily mean the lender relieves borrower of liability for repayment of the entire debt. It is possible borrower could sell the home and still owe the unpaid difference, plus interest and penalties, to the lender (the "deficiency"). The lender may then seek a deficiency judgment against the borrower for this difference. This is one of the most essential issues that homeowners must address in considering whether to sell property as a short sale. Washington is a "non-deficiency" state for the foreclosing party. If borrower agrees to deficiency judgment in a short sale agreement, borrower could be putting themselves in a worse position than if they had allowed the home to be sold at a foreclosure sale.

However, a lender has statutory limits on seeking a short sale deficiency. See RCW 61.24.060:

(1) Whenever (a) consummation of a written agreement for the purchase and sale of owner-occupied residential real property would result in contractual sale proceeds that are insufficient to pay in full the obligation owed to a senior beneficiary of a deed of trust encumbering the residential real property; and (b) the seller makes a written offer to the senior beneficiary to accept the entire net proceeds of the sale in order to facilitate closing of the purchase and sale; then the senior beneficiary must, within one hundred twenty days after the receipt of the written offer, deliver to the seller, in writing, an acceptance, rejection, or counter-offer of the seller's written offer. The senior beneficiary may determine, in its sole discretion, whether to accept, reject, or counter-offer the seller's written offer.

(2) This section applies only when the written offer to the senior beneficiary is received by the senior beneficiary prior to the issuance of a notice of default. The offer must

include a copy of the purchase and sale agreement. The offer must be sent to the address of the senior beneficiary or the address of a party acting as a servicer of the obligation secured by the deed of trust.

(3) A seller has a right of action for actual monetary damages incurred as a result of the senior beneficiary's failure to comply with the requirements of subsection (1) of this section.

(4) A senior beneficiary is not liable for the actions or inactions of any other lien holder.

(5)(a) This section does not apply to deeds of trust: (i) Securing a commercial loan; (ii) securing obligations of a grantor who is not the borrower or a guarantor; or (iii) securing a purchaser's obligations under a seller-financed sale.

(b) This section does not apply to beneficiaries that are exempt from RCW 61.24.163, if enacted, or if not enacted, to beneficiaries that conduct fewer than two hundred fifty trustee sales per year.

#### **Will a Short Sale result in a higher tax debt?**

A short sale in which the debt is forgiven is considered a relief of debt and may be treated as income for tax purposes. The Mortgage Forgiveness Debt Relief Act of 2007 created a limited exemption to allow homeowners to pay no taxes on certain types of debt forgiveness. However, the law sunset on December 31, 2013, making the forgiven debt now taxable.

#### **How will a Short Sale impact my credit score?**

The impact of a short sale on the borrower's credit score depends upon a variety of factors, including late or missed payments. A short sale may appear on a credit report as "pre-foreclosure redemption," "paid in full for less than full balance" or other similar term. However, it is important to keep in mind that once you miss mortgage payments, your credit rating will be severely impacted.

The Fair Isaac Corporation (FICO) conducted a study that compared the impact of mortgage delinquencies on credit scores. The study showed that the degree of impact on FICO® credit score is highly dependent on the starting score. However, the study found that there is no significant difference in score impact between the short sale, deed-in-lieu of foreclosure, settlement and foreclosure. Moreover, the study showed that while a score may *begin* to improve sooner, it would take up to 7-10 years to *fully* recover, assuming all other obligations are paid as agreed. Gaskin, Joanne, *Research looks at how mortgage delinquencies affect scores*, FICO® Banking Analytics Blog, <http://tinyurl.com/3eze2a5> (April 2011).

Estimated Time for FICO® Score to Fully Recover

	Customer A	Customer B	Customer C
Starting FICO® Score	-680	-720	-780
Time for FICO® Score to recover after these events:			
30 days late on mortgage	-9 months	-2.5 years	-3 years
90 days late on mortgage	-9 months	-3 years	-7 years
Short sale/deed-in-lieu/settlement (no deficiency balance)	-3 years	-7 years	-7 years
Short sale (with deficiency balance)	-3 years	-7 years	-7 years
Foreclosure	-3 years	-7 years	-7 years
Bankruptcy	-5 years	-7 to -10 years	-7 to -10 years

Note: Estimates assume all else held constant over time (e.g., no new account openings, no new delinquency, similar outstanding debt).

**Be aware of predatory rescue scams and short sale fraud**

Homeowners worried about foreclosure may be susceptible to predatory “rescue” scams which may cost money with no results, result in the loss of the home entirely, or involve the seller in a fraudulent scheme.

For more information, see this advisory from Fannie Mae: Red flags of fraudulent schemes include:

- Guarantees to stop the foreclosure
- A promise that you can buy the house back or stay in the house following transfer of title
- Upfront fees
- Instructions not to contact the lender
- Transfer of title or lease of the property
- Requests that the homeowner execute a power of attorney

Report suspected scams to the Department of Financial Institutions at [www.dfi.wa.gov](http://www.dfi.wa.gov) or 1-877-RINGDFI (746-4334).

**Be aware of the consequences of committing waste**

Damaging the property or removing fixtures such as sinks, toilets, cabinets, air conditioners and water heaters may result in liability to the lender for “waste”. In other words, the lender may be able to sue for damages if the borrower has physically abused, damaged or destroyed any part of the property.

**If you decide to pursue a short sale, understand that the process will likely take several months or more to complete. Consider taking the following actions:**

- Contact a qualified real estate professional. Interview several real estate professionals and ask about their experience in short sales, the number of short sale transactions they have handled, their education and training in short sales and inquire about any past or pending lawsuits or disciplinary actions.

- Investigate documentation and eligibility. Documentation and eligibility criteria for short sales vary depending on specific lender and investor guidelines. Generally, you must prove that you are financially incapable of paying the loan. The lender will consider this when determining the costs of accepting the short sale versus foreclosing. You will have to document your financial situation. If you have funds to pay the deficiency, a lender will not necessarily allow a short sale. However, some lenders will not require you to dip into retirement accounts to fund the deficiency. These issues will have to be negotiated with your lender.
- Determine the amount you owed on the property. All debt and costs must be factored in before a lender can determine whether a short sale is more economical for them. The analysis will include the delinquent loan, all other recorded debt (past due homeowner's association fees, unpaid property taxes), and the costs of a sale (closing costs, brokerage commissions and necessary repairs). If you have more than one loan on the property, a short sale will require the approval of all lenders.
- Determine the estimated fair market value of the property. You must prove to the lender that the home is worth less than the unpaid loan balance plus closing costs. Consult a real estate professional or an appraiser for assistance in estimating the value of the property.
- Understand there may be a waiting period before you can buy another home. Your ability to qualify for a loan to purchase another home after a short sale will likely be impacted because of the impact on your credit score. It may be some time before a lender will loan you the money to purchase another home.

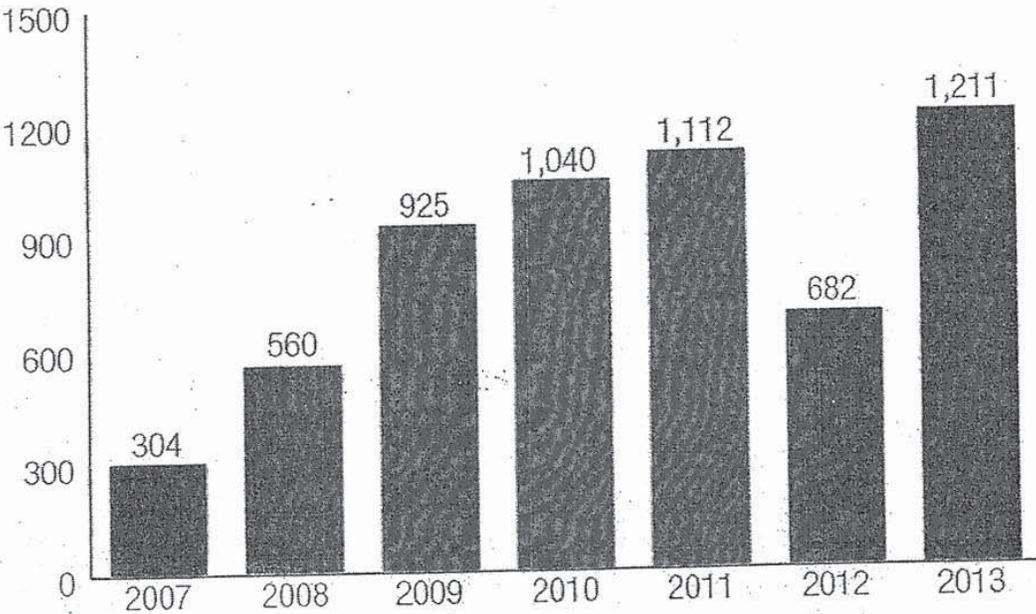
#### **Counseling and Legal Assistance**

- Washington Homeownership Counseling: Counseling and assistance is available to Washington residents. Call the Washington Homeownership Information hotline to connect with a counselor; 1-877-894-HOME (4663).
- Foreclosure Prevention Unit: The Foreclosure Prevention Unit helps low to moderate-income Washington homeowners who face foreclosure of their primary place of residence. It represents homeowners in loan modification negotiation, mediation under the Foreclosure Fairness Act and litigation to protect and enforce their rights under state and federal law. Homeowners should call our toll-free number to be screened for program eligibility 1-800 606-4819.
- HUD Certified Housing Counseling Agencies. HUD certified housing counseling agencies are available to assist you and discuss your options.
- Washington State Housing Finance Commission Approved Counselors. List of Washington Housing Finance Commission approved counselors.

# Foreclosures climbed in Spokane County last year

County tallies record defaults despite gains in home sales

**Foreclosures on deeds of trust in Spokane County**  
2007 - 2013



Source: Spokane County Auditor's Office

### About The Program

The Washington State Foreclosure Fairness Program provides homeowner foreclosure assistance by offering free housing counseling, civil legal aid, education and outreach, and the opportunity for mediation.

It addresses the rise in foreclosures by improving communication between lenders and homeowners to avoid foreclosure when possible. It is designed to help homeowners and their lenders reach a resolution.

### Who is eligible to participate in the

#### Foreclosure Fairness Program?

Homeowners may be eligible for mediation if they received a Notice of Default from their lender and lived in the home when the foreclosure process started. Certain smaller lenders are exempt from mediation.

### What is foreclosure mediation?

Foreclosure mediation is a process where a neutral third party (the mediator) helps the homeowner and lender reach a fair, voluntary, and negotiated agreement. A mediator is not a judge and does not represent either party.

### How does a homeowner request mediation?

Homeowners cannot self-refer to get foreclosure mediation. Homeowners must be referred by a housing counselor or an attorney. See the "How The Washington State Foreclosure Fairness Program Works" guide in this brochure for details on when referral to mediation can be made. Any homeowner can contact a **FREE** housing counselor at **any time** by calling Washington State's homeownership information hotline at **1-877-894-HOME (1-877-894-4663)** or visiting **www.wshfc.org/buyers/counseling.htm** or **www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm**. Additionally, low- to moderate-income homeowners may also be eligible for help from the statewide civil legal aid hotline: call **1-800-606-4819** or visit **www.nwjustice.org/what-clear**.

### What is the cost to participate in the program?

Housing counseling is **FREE**. If referred to mediation, the cost to the homeowner is \$200. The lender will also pay \$200. The fee must be paid to the mediator prior to mediation. (If more than one mediation session is needed, additional costs may apply.)

### Department of Commerce

Innovation is in our nature.

[www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures)



WASHINGTON STATE  
HOUSING FINANCE  
COMMISSION  
[www.wshfc.org](http://www.wshfc.org)

**ANYONE** can call **1-877-894-HOME (4663)** at any time to access **FREE** housing counseling and get foreclosure assistance.

Low- to moderate-income homeowners may also be eligible for help from the statewide civil legal aid toll-free hotline. Call **1-800-606-4819**.

Visit **www.homeownership.wa.gov** for information about the mediation program, foreclosure prevention, foreclosure alternatives, how to avoid becoming a victim of foreclosure rescue scams, and more.

If you feel you have been a victim of a foreclosure rescue scam or loan modification fraud, file a complaint with the Washington Attorney General's Office at **www.atg.wa.gov/fileacomplaint.aspx** or the Washington State Department of Financial Institutions at **www.dfi.wa.gov/consumers/complaint.htm** or **877-RING-DFI (746-4334)**.

To inquire about the availability of this publication in an alternate format, please call **360-725-2650** or **TDD-TTY 360-586-0772**.

To order copies of this brochure for distribution, please call **800-746-4334** or email **dfc@dfh.wa.gov**.

# Are You Facing Foreclosure?



## DON'T WAIT until it's too late

Get foreclosure assistance **NOW!**

## How The Washington State Foreclosure Fairness Program Works

- Any time**
  - A homeowner can contact a FREE housing counselor at any time. Call 1-877-894-HOME (1-877-894-4663) as soon as there is risk of foreclosure.
- Step 1**
  - The homeowner gets a notice from the lender of the right to an opportunity to meet to discuss foreclosure. This is called a Notice of Pre-Foreclosure Options. The lender is required to send this notice to the homeowner before they can issue a Notice of Default.
  - If the homeowner requests the meeting (called "meet and confer"), the lender cannot issue the Notice of Default until 90 days after the Notice of Pre-Foreclosure Options was issued. This gives the homeowner and lender time to try to avoid foreclosure if possible.
  - The meeting can take place in person, if requested by the homeowner, and will be in the county where the homeowner lives.
  - If the homeowner and lender meet and confer and do not reach a resolution during this 90-day period, the lender may send the homeowner a Notice of Default.
  - If the homeowner does not request a meeting, the lender may send the homeowner a Notice of Default 30 days after the Notice of Pre-Foreclosure Options was issued.
- Step 2**
  - A homeowner may become eligible for mediation if a Notice of Default is issued. The homeowner should contact a housing counselor, if they haven't already, or an attorney to discuss alternatives to foreclosure and possible mediation.
  - If the homeowner is eligible, the housing counselor or attorney requests mediation on the homeowner's behalf. This request is made to the Washington State Department of Commerce (Commerce). Mediation can only be requested AFTER a Notice of Default is issued and up until 20 days after the recording date of the Notice of Trustee Sale. (A Notice of Trustee Sale is a document that tells the homeowner when the sale of the home is scheduled to take place.)
  - If the homeowner is referred to mediation before the Notice of Trustee Sale is recorded, the Notice of Trustee Sale cannot be recorded until mediation is complete.
- Step 3**
  - Commerce notifies the homeowner and lender that mediation was requested, assigns a mediator, and notifies each party of their responsibilities, such as documents required for mediation and each party's \$2000 mediator fee. This is done within 10 days of Commerce receiving a complete mediation request.
  - Mediation is scheduled by the mediator no later than 70 days after the mediator is selected, unless otherwise agreed by the homeowner and the lender.
- Step 4**
  - The homeowner sends required documents to the mediator and the lender (within 23 days of receiving the notice of mediation from Commerce).
  - The lender sends its documents to the mediator and homeowner (within 20 days of receiving the homeowner's documents).
- Step 5**
  - Mediation occurs.
  - The homeowner may be represented by an attorney, housing counselor, or other advocate. However, the homeowner (the borrower(s) named on the mortgage loan) must attend the mediation in person.
  - The lender must have a person with authority to modify the loan or negotiate an agreement either in person or available by telephone during the mediation.
  - Both the homeowner and the lender must participate in good faith throughout the entire mediation process.
  - The mediator's role is not to be a judge. The mediator is a neutral third party who encourages the homeowner and the lender to examine all options, including loan modification, to avoid foreclosure.
  - The homeowner and lender either come to an agreement (a loan modification or other alternative), or they do not come to an agreement and the foreclosure process may proceed.
- Step 6**
  - The mediator prepares written certification of mediation results and whether the homeowner and lender participated in good faith. Mediator sends certification to all parties including Commerce within seven business days of mediation.
  - If the lender does not mediate in good faith, the homeowner may be able to stop the foreclosure sale in court.

Learn more today at [www.homeownership.wa.gov](http://www.homeownership.wa.gov)

FULCRUM  
INSTITUTE **Dispute Resolution Clinic**



December 26, 2013

**Foreclosure Mediation Session**

**Parties to the Mediation**

<b>Borrower<sup>1</sup></b>	<b>Borrower<sup>2</sup></b>	<b>Beneficiary</b>
[REDACTED] Spokane, WA 99205		[REDACTED] Home Mortgage [REDACTED] [REDACTED] [REDACTED]

**Deed of Trust Secured Property**

<b>Street Address:</b>	[REDACTED] Spokane, WA 99205
<b>Loan #:</b>	Not provided
<b>Parcel #:</b>	Not provided
<b>Lot #:</b>	Not provided

*Your Foreclosure Mediation is scheduled for: **February 3 at 10 a.m.***

*Location:*

Fulcrum Institute Dispute Resolution Center  
211 W Augusta Avenue  
Spokane, WA 99205  
foreclosure@fulcrumdispute.com  
PH: 509-838-2799



**PLEASE READ THIS ENTIRE NOTICE CAREFULLY.** If you fail to follow the requirements of the Foreclosure Fairness Act – including the exchange of documents, fee payments, and timelines – it could significantly impact the outcome of the mediation you are about to attend.

### MEDIATION SESSION INFORMATION

- The borrower(s) identified above has been referred to mediation regarding the Deed of Trust Secured Property. A mediation session has been scheduled at the time, date and location above.
- The borrower may be represented in the mediation session by an attorney, housing counselor or other advocate.
- The borrower, the beneficiary on the Deed of Trust or its authorized agent, and the mediator must meet in person for the mediation session.
- A person with authority to agree to a resolution, including a proposed settlement, loan modification, or dismissal or continuation of the foreclosure proceeding, must be present either in person or via telephone or video conferencing during the mediation session.
- Any party desiring another person to participate by telephone or video conferencing may do so in accordance with the prior coordinating discussion between that party and the mediator. However the responsibility to provide the equipment to do so rests with the requesting party, unless otherwise agreed to through discussion prior to the mediation session.

### PURPOSE OF MEDIATION

The purpose of mediation is to address the issues preceding foreclosure that may enable the borrower and the beneficiary to reach a resolution, including but not limited to reinstatement, modification of the loan, restructuring of the debt, or some other workout plan. During mediation, the participants will consider the following:

- (a) The borrower's current and future economic circumstances, including the borrower's current and future income, debts, and obligations for the previous sixty (60) days or greater time period as determined by the mediator;
- (b) The Net Present Value of the payments the lender would receive from a modified loan as compared to the expected amount the lender would receive from a foreclosure sale;
- (c) Any applicable affordable loan modification calculation and net present value calculation; and
- (d) Any other loss mitigation guidelines to loans insured by the federal housing administration, the veteran's administration, and the rural housing service, if applicable.



### ACTING IN GOOD FAITH

Both parties have a duty to mediate in good faith during the mediation process. Failure to mediate in good faith may impair the beneficiary's ability to foreclose on the property or the borrower's ability to modify the loan or take advantage of other alternatives to foreclosure. A violation of the duty to mediate in good faith may include:

- (a) Failure to timely participate in mediation without good cause.
- (b) Failure of the borrower(s) to transmit the documents required for mediation to the mediator and the beneficiary within 23 days of the Department of Commerce's notice that the parties have been referred to mediation (specified below).
- (c) Failure of the beneficiary to provide the required documents (specified below) to the mediator and the borrower within 20 days of the beneficiary's receipt of the borrower's documents.
- (d) Failure of either party to pay their portion of the mediation fee(s) in advance of the mediation session.
- (e) Failure of a party to designate representatives with adequate authority to fully settle, compromise, or otherwise reach resolution with the borrower in mediation.
- (f) A request by a beneficiary that the borrower waive, as a condition of agreeing to a modification, future claims he or she may have in connection with the deed of trust except for rescission claims under the federal truth in lending act. Nothing in this section precludes a beneficiary from requesting (as a condition of modification) that a borrower dismiss with prejudice any pending claims against the beneficiary, its agents, loan servicer, or trustee arising from the underlying deed of trust.

### Mediation Service Fees

- **Mediation Service fees** are \$200 per party for scheduling, transferring documents, conducting a mediation session, and certification to Commerce. Mediation fees are non-refundable once a mediation session is scheduled, or preparation has started. Mediations lasting more than three (3) hours will be charged at \$130 for an additional hour. If a second session is requested, the fee remains \$200 per party and due upon scheduling mediation date.
- **Reschedule fees:** When it is necessary to reschedule a foreclosure mediation, a mutual agreement to extend the date for mediation must be signed by both parties. If the reschedule request occurs within 10 days of the scheduled mediation, the party requesting the change will be charged a \$50 reschedule fee. If either party cancels the mediation within 72 hours of a confirmed mediation there will be a \$200 fee in order to reschedule the mediation session.
- **Cancellation fee:** All foreclosure mediation fees are non-refundable regardless.



**REQUIRED DOCUMENTS & INFORMATION**

The parties are responsible for providing the following documents/information, to both the mediator and the other party identified on the first page of this notice.

***PLEASE REVIEW THE DOCUMENTS YOU HAVE SUBMITTED. IF THEY ARE OLDER THAN 60 DAYS, YOU MUST SUBMIT UPDATED DOCUMENTS.***

**Borrower(s)' Responsibility:**

Within 23 days of receiving the "Referral for Foreclosure Mediation Notice," you must complete and send the documents required for mediation to BOTH the Mediator and the Beneficiary.

You must follow the instructions on the "Referral for Foreclosure Mediation Notice" to submit these documents (including a HAMP Initial Package).

Provide the following documentation to **beneficiary and mediator** within 23 days of receiving the "Referral for Foreclosure Mediation Notice":

- **Two years of Tax Returns:** They must be for the two most recent years; they must bear your signature; and, they must be complete by including all worksheets that were sent to the IRS.
- **Documents substantiating your Current Income:** Pay stubs, contracts, etc. Note that a mere outline is not a substantiating document; please be sure to cover at least the past 3 months.
- **Documents substantiating your Debt:** Most current billing statements; please include utility statements.
- **Bank Statements:** Please provide 3 months of your most recent bank statements
- **Payment of \$200 made payable to and received by Fulcrum within 30 days of the referral.**

*Borrowers who are seeking any loan modification should complete the four items in the initial HAMP application:*  
<http://www.makinghomeaffordable.gov/get-assistance/request-modification/Pages/default.aspx>

*Often required by the Financial Institutions in order to meet Program Requirements: These are highly beneficial for mediation success:*

- **HAMP Application:** Beneficiary provides this application; please fill it out completely and provide all of the supporting documents that are requested.
- **RMA/Request for Modification Affidavit:** May include the requirement of filing and submitting a 4506T (Request for Transcript of Tax Return) and Dodd Frank Certificate. The Affidavit is provided by the Beneficiary; please do not delay in filling this out and forwarding it to both Fulcrum and the Beneficiary.
- **Any other financial packet that the Beneficiary forwards to you:** Please remember, paperwork requested by the Beneficiary may open up an opportunity that you may not otherwise know about and/or may not otherwise be able to consider.

If you wish to discuss something other than a loan modification during mediation (such as a short sale, deed in lieu of foreclosure, or other alternative) you should contact your housing counselor/attorney, the Beneficiary, and the Mediator prior to the mediation, if possible, to determine what supplemental information may be appropriate for your situation.

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You must send \$200 for the mediation fee to your assigned Mediator within 30 days of receiving the "Referral for Foreclosure Mediation Notice," unless the Mediator instructs you otherwise. Contact the Mediator for further details.

Failure to provide the required HAMP Initial Package and mediation fees on time may result in a finding that you have failed to Act in Good Faith. This may prevent you from being able to modify the loan or take advantage of other alternatives to foreclosure. If the Mediator reasonably believes you will not attend a mediation session based on your conduct (such as the lack of response to the mediator's e-mails or phone calls) the Mediator may cancel the mediation and the Beneficiary may proceed with the foreclosure sale after receiving the Mediator's written confirmation of cancellation.

**Beneficiary's Responsibility:**

Within 20 days of the Beneficiary's receipt of the Borrower's documents, the Beneficiary must transmit the documents required for mediation to the Mediator and the Borrower. The Beneficiary must follow the instructions on the "Referral for Foreclosure Mediation Notice," to submit these documents.

The Beneficiary or their representative must send \$200 for the mediation fee to the assigned Mediator within 30 days of receiving the "Referral for Foreclosure Mediation Notice," unless the mediator instructs otherwise.

Failure to provide the required documents and fees by the specified dates may result in a finding that the Beneficiary failed to Act in Good Faith, and impair their ability to foreclose on the property.

Provide the following documentation to **borrower** and **mediator** no later than **20 days after receipt of the borrower's documents:**

1. Net present value of receiving payments pursuant to a modified loan as compared to the anticipated net recovery following foreclosure.
2. Any affordable loan modification calculation and net present value calculation when required under any federal mortgage relief program, including the home affordable modification program (HAMP) as applicable to government-sponsored enterprise and nongovernment-sponsored enterprise loans, and any HAMP-related modification program applicable to loans insured by the federal housing administration, the veterans administration, and the rural housing service.

If such a calculation is not required, then the current calculations, assumptions, and forms that are established by the federal deposit insurance corporation and published in the federal deposit insurance corporation loan modification program guide.

3. Any other loss mitigation guidelines to loans insured by the Federal Housing Administration, the Veteran's Administration, and the Rural Housing Service, if applicable.
4. An accurate statement containing the balance of the loan as of the first day of the month in which the mediation occurs.
5. Copies of the note and deed of trust.
6. Proof that the entity claiming to be the beneficiary is the owner of any promissory note or obligation secured by the deed of trust. Sufficient proof may be a copy of the declaration described in RCW 61.24.030(7) (a).
7. The best estimate of any arrearage and an itemized statement of the arrearages.

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8. An itemized list of the best estimate of fees and charges outstanding.
9. The payment history and schedule for the preceding twelve months, or since default, whichever is longer, including a breakdown of all fees and charges claimed.
10. All borrower-related and mortgage-related input data used in any net present value analysis.
11. An explanation regarding any denial for a loan modification, forbearance, or other alternative to foreclosure in sufficient detail for a reasonable person to understand why the decision was made.
12. The most recently available appraisal or other broker price opinion most recently relied upon by the beneficiary.
13. The portion or excerpt of the pooling and servicing agreement that prohibits the beneficiary from implementing a modification, if the beneficiary claims it cannot implement a modification due solely to limitations in a pooling and servicing agreement, and documentation or a statement detailing the efforts of the beneficiary to obtain a waiver of the pooling and servicing agreement provisions.
14. Payment made payable to Fulcrum Institute in the amount of \$200, to be received by Fulcrum within 30 days of receiving "Referral for Foreclosure Mediation Notice."

Please do not hesitate to contact us if you have any questions at 509-838-2799 and ask for Gayle Cooper or Lisa Daniels.

Sincerely,

Lisa Daniels  
Fulcrum Institute Dispute Resolution Center  
211 W Augusta Avenue  
Spokane, WA 99205  
foreclosure@fulcrumdispute.com  
PH: 509-838-2799  
FX: 509838-5588

## Foreclosure Mediation Report/Certification

**Instructions - PLEASE READ!** This form must be completed by the mediator and sent to Department of Commerce, the borrower(s), beneficiary, and trustee within 7 business days after the conclusion of the mediation (RCW 61.24.163(12)).

**Please fill out the form entirely. You must list all persons** who attended the mediation (in person, by phone, or by video-conference) and **make a selection** in the "Participation" and "Authority" boxes, as applicable. If you need more space to report additional persons (attending the first mediation or any continuances), please attach a separate sheet and include all of their information as presented on this form.

On the second page, **select only one of the three outcomes**, then check the applicable box(es) listed under the outcome you selected. You must describe the circumstances when "specify" or "specify reason" are indicated or when selecting an "Other" box. Use the "Comments" box at the bottom of the second page for **any necessary clarifications or relevant comments**. Attach a separate sheet if you need more space.

**PLEASE NOTE! Once this report/certification is completed by the mediator and submitted to all parties and to Department of Commerce the case is closed. The mediator may change or withdraw a submitted certification ONLY IF there has been a material oversight in its completion. Commerce has no authority to modify or withdraw a certification or to re-open a case that had been certified closed by a mediator. Under RCW 61.24.163, mediators, not Commerce, are responsible for completing and submitting the certifications.**

Date	1st Session	2nd Session	3rd Session	Mediation Conducted	Yes	Mediator's Name	<del>XXXXXXXXXX</del>
	June 3, 2013				No		
Time	No. of Sessions Conducted				1	Mediator's Phone	<del>XXXXXXXXXX</del>
	10:00 a.m.					Mediator's Email	<del>XXXXXXXXXX@XXXXXX.COM</del>
Location	Is this an amended certification?				No	Co-Mediator's Name	
	Fulcrum						

### Borrower(s) and Representative(s)

Role	Subject Property	Borrower	Borrower's Representative
Name	<del>XXXXXXXXXX</del>	<del>XXXXXXXXXX</del>	<del>XXXXXXXXXX</del>
Address	<del>XXXXXXXXXX</del>	<del>XXXXXXXXXX</del>	<del>XXXXXXXXXX</del>
City	Spokane	Spokane	Spokane
State	WA	WA	WA
Zip	99206	99206	<del>XXXXXXXXXX</del>
Parcel#	45051.0366		
Lot#			
Phone		<del>XXXXXXXXXX</del>	<del>XXXXXXXXXX</del>
Email		<del>XXXXXXXXXX@XXXXXX.COM</del>	<del>XXXXXXXXXX@XXXXXX.COM</del>
Participation		In Person	In Person

### Beneficiary and Representative(s)

Individual	<del>XXXXXXXXXX</del>	Roberty Rowley	
Title/Role	Beneficiary Representative	Ben Rep	
Agency	Bank of America Mail Code Ca9-902-02-10	RCO Legal	
Address	<del>XXXXXXXXXX</del>	13555 SE 36th Street	
Address			
City	<del>XXXXXXXXXX</del>	Bellevue	
State	CA	WA	
Zip	<del>XXXXXXXXXX</del>	98006	
Phone	<del>XXXXXXXXXX</del>	509-252-5074	
Email	mediation.referrals@boa.com	rob@rowleylegal.com	
Participation	By Phone	In Person	
Authority	Auth'd to Settle		

## MEDIATION OUTCOME

### Mediation Occurred - Agreement Reached

<input type="checkbox"/> Reinstatement
<input type="checkbox"/> Repayment
<input type="checkbox"/> Extension
<input type="checkbox"/> Adj Rate Changed to Fixed Rate % Change:
<input type="checkbox"/> Amortization Extended
<input type="checkbox"/> Interest Rate Reduction % Change:
<input type="checkbox"/> Principal Reduction Amount: \$
<input type="checkbox"/> Monthly Principal Payment Reduced Amount: \$
<input type="checkbox"/> Monthly Interest Payment Reduced Amount: \$
<input type="checkbox"/> Refinance
<input type="checkbox"/> Other Loan Restructure/Modification
<input type="checkbox"/> Forbearance of Principal Write-off: \$
<input type="checkbox"/> Forbearance of Interest Write-off: \$
<input type="checkbox"/> Forbearance of Fees and Penalties Write-off: \$
<input type="checkbox"/> Forbearance - Other Write-off: \$
<input type="checkbox"/> Deed in Lieu of Foreclosure
<input type="checkbox"/> Short Sale - Debt/Interest Zeroed
<input type="checkbox"/> Voluntary Surrender
<input type="checkbox"/> Cash for Keys
<input checked="" type="checkbox"/> Other <u>Non-Retention Option</u> (specify - max. 100 characters):

Borrower wishes to pursue a short sale.

### Mediation Occurred - No Agreement Reached

<input type="checkbox"/> Borrower Unable to Meet Restructure Offer
<input type="checkbox"/> Borrower Unwilling to Accept Restructure Offer
<input type="checkbox"/> Parties Mediated in Good Faith, No Agreement Reached (specify - max. 100 characters):

<b>Borrower Not in Good Faith:</b>
<input type="checkbox"/> Borrower Failed to Provide Timely and/or Accurate Documents
<input type="checkbox"/> Borrower Failed to Timely Participate in Mediation
<input type="checkbox"/> Borrower's Representative Not Authorized to Make Binding Decisions
<input type="checkbox"/> Borrower Failed to Pay Mediation Fee
<input type="checkbox"/> Other (specify - max. 100 characters):

<b>Beneficiary Not in Good Faith:</b>
<input type="checkbox"/> Beneficiary Failed to Provide Timely and/or Accurate Documents
<input type="checkbox"/> Beneficiary Failed to Timely Participate in Mediation
<input type="checkbox"/> Beneficiary's Representative Not Authorized to Make Binding Decisions
<input type="checkbox"/> Beneficiary Failed to Pay Mediation Fee
<input type="checkbox"/> Beneficiary Requested Borrower to Waive Future Claims
<input type="checkbox"/> Other (specify - max. 100 characters):

### No Mediation Occurred

<input type="checkbox"/> Agreement Reached Prior to Mediation (specify - max. 100 characters):
<input type="checkbox"/> Borrower Withdrew (specify reason - max. 100 characters):
<input type="checkbox"/> Mediation Cancelled by Mediator per RCW 61.24.163(11)

<b>Borrower Not in Good Faith:</b>
<input type="checkbox"/> Borrower Failed to Provide Timely and/or Accurate Documents
<input type="checkbox"/> Borrower Failed to Timely Participate in Mediation
<input type="checkbox"/> Borrower Failed to Pay Mediation Fee
<input type="checkbox"/> Other (specify - max. 100 characters):

<b>Beneficiary Not in Good Faith:</b>
<input type="checkbox"/> Beneficiary Failed to Provide Timely and/or Accurate Documents
<input type="checkbox"/> Beneficiary Failed to Timely Participate in Mediation
<input type="checkbox"/> Beneficiary Failed to Pay Mediation Fee
<input type="checkbox"/> Other (specify - max. 100 characters):

<input type="checkbox"/> Other (specify - max. 100 characters):
---

### NET PRESENT VALUE (NPV)

Yes	1. Were NPV inputs provided by the beneficiary? (Required per RCW 61.24.163(5)(g), RCW 61.24.163(8)(c))
Yes	2. Was an NPV test/analysis completed?

If **YES** and the outcome is "No Agreement Reached," attach the test (or its description) along with the NPV inputs, identify who prepared it, and provide the test result expressed in a dollar amount. (RCW 61.24.163(12)(e))

If **NO** and the outcome is "No Agreement Reached," include below an explanation as to why there was no NPV test done. If agreement was reached or the mediation did not occur, there is no need to attach or describe the NPV test and inputs.

No	3. If YES on question 2, did the NPV of the modified loan exceed the anticipated net recovery at foreclosure? (RCW 61.24.163(14)(c))
----	--

### COMMENTS (max. 1,000 characters)

\_\_\_\_\_  
(Full Name of Approved Mediator)

do hereby attest and certify that all the information in this Mediation Report/Certification is true and correct.

*Yare Luna*  
Signature (hand-sign only)

1/27/2014  
Date



**Department of Commerce**  
Innovation is in our nature.

## Foreclosure Fairness Program

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Annual Report on Program Performance (RCW 61.24.163)

**December 2012**  
Report to the Legislature  
Rogers Weed, Director

## Acknowledgments

### **Washington State Department of Commerce**

Dan McConnon, Deputy Director, Community Services and Housing Division  
Richard Torrance, Managing Director, Public Safety Unit  
Corina Grigoras, Program Manager

### **Washington State Housing Finance Commission**

Kim Herman, Executive Director

### **Washington State Department of Financial Institutions**

Scott Jarvis, Director

### **Washington State Office of the Attorney General**

Rob McKenna, Attorney General

### **Office of Civil Legal Aid**

Jim Bamberger, Director

Special thanks to the **Dispute Resolution Centers** that partnered with Commerce to implement and deliver the Foreclosure Mediation Program.

Washington State Department of Commerce  
Foreclosure Fairness Program  
1011 Plum Street SE  
P.O. Box 42525  
Olympia, WA 98504-2525  
[www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures)

For people with disabilities, this report is available on request in other formats. To submit a request, please call 360-725-4000 (TTY 360-586-0772).

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## Executive Summary

### Overview

The Foreclosure Fairness Act (RCW 61.24.163), initially passed by the Legislature in April 2011, reshapes the non-judicial foreclosure process in Washington State to help protect homeowners from unnecessary foreclosures.

It assigns the primary responsibility for developing and managing the Foreclosure Fairness Program to the Department of Commerce (Commerce). This work is done in collaboration with the Washington State Housing Finance Commission, Department of Financial Institutions, Office of the Attorney General, Office of Civil Legal Aid, and with Dispute Resolution Centers,<sup>1</sup> mediators, attorneys, and housing professionals.

The legislation calls for the development of the Foreclosure Fairness Fund and the Foreclosure Mediation Program. The mediation program, developed and managed by Commerce, assists homeowners (borrowers) in navigating through the foreclosure process and, when possible, avoid foreclosure.

The program is funded through fees paid by mortgage lenders (beneficiaries). To participate in the mediation program, beneficiaries are required to pay a \$250 fee into the Foreclosure Fairness Fund for each Notice of Default issued to owner-occupied residential real properties. Money deposited in the fund is expended on homeowner counseling, act enforcement, development and operation of the mediation program, foreclosure prevention outreach, and legal assistance for low-income homeowners.

Housing professionals agree that keeping people in their homes is not the only positive outcome of the mediation program. The intent of the program is to ensure that, even when foreclosure cannot be avoided, the process is fair and transparent, and gives both the borrower and the beneficiary the opportunity to meet and make well-informed decisions. Mediation gives borrowers the chance to understand their options and requires beneficiaries to explain why some options may not be available.

This report fulfills the requirement of RCW 61.24.163(18) for Commerce to report annually on the results of the Foreclosure Fairness Act and the mediation program.

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<sup>1</sup> Dispute Resolution Centers (DRCs) are a statewide network of organizations that provide alternatives to legal remedies. The state has provided funding for these organizations for several years to reduce court caseloads by providing affordable mediation to resolve several types of disputes, including parenting plans, divorce, landlord-tenant issues, and most recently, foreclosure.

## **Key Outcomes**

The data presented in this report cover the first fiscal year of the program, from its enactment on July 22, 2011, through June 30, 2012. Key outcomes include:

- In partnership with several Dispute Resolution Centers, Commerce trained more than 200 potential foreclosure mediators, 195 of which were then certified.
- The Washington State Housing Finance Commission provided counseling to 4,142 borrowers at risk of foreclosure.
- The number of housing counselors in the state more than doubled, from 44 to 92.
- Housing counselors and attorneys referred 1,655 borrowers to Commerce for mediation.
- Of the 1,655 referrals, 579 cases have been closed and certified by a mediator (as of June 30, 2012). The rest are either pending, were certified after June 30, or have been found to be ineligible for mediation.

Less quantifiable but very real outcomes include financial and other benefits resulting from the counseling and mediation processes.

## **Legislative Recommendations**

While Commerce, as well as stakeholders, can identify areas of the Foreclosure Fairness Act that potentially could be improved, Commerce is withholding any recommendations for legislative change until additional data has been collected and analyzed, and until a thorough review of the program has been conducted with stakeholders.

## **Background**

### **The Continuing Impact of Foreclosures**

Washington State, like most other states, has been severely impacted by the housing foreclosure crisis. Foreclosure initiations on first-lien residential mortgages in Washington jumped from 5,790 in the third quarter of 2011 to 11,150 in the second quarter of 2012.<sup>2</sup> As of June 30, 2012, Washington had the third highest rate of first-lien residential mortgages in the nation that were seriously delinquent (90 or more days past due or in foreclosure). This crisis contributes to further declines in the housing market, reduced property values, and decreased stability for families and communities.

### **Program Creation and Amendments to the Statute**

The Foreclosure Fairness Program originated in the Foreclosure Fairness Act (the Act), a bipartisan effort in the 2011 legislative session to reduce the impact of foreclosures in our state. The program's purpose is to reduce unnecessary foreclosures by providing homeowner counseling and foreclosure mediation.

After its original enactment, the Legislature made significant changes to the act (SSB 5988 during the special session of 2011 and SHB 2614 during the 2012 session) to improve the productivity of the foreclosure mediations and to make the overall process more efficient and transparent. These changes were supported by representatives of the beneficiaries (mortgage lenders), housing advocates, trustees, and mediators.

Commerce hosted several meetings with these stakeholders to discuss changes to make the program more effective. The changes included shifting the order of documents exchanged, lengthening the period for mediation, providing civil immunity to mediators, and clarifying the borrowers' eligibility criteria for the program.

### **Description of the Foreclosure Fairness Program**

#### **Roles and Responsibilities**

homeowner counseling and foreclosure mediation.

The Foreclosure Fairness Program authorizing legislation spells out some roles and responsibilities for various partners. Other roles were identified through a program development phase, initiated and directed by Commerce, and involving all of the partners. Following are the various agencies involved with the program, what they are responsible for, and what is being reported on in this report.

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<sup>2</sup> Data from the Mortgage Bankers Association National Delinquency Survey.

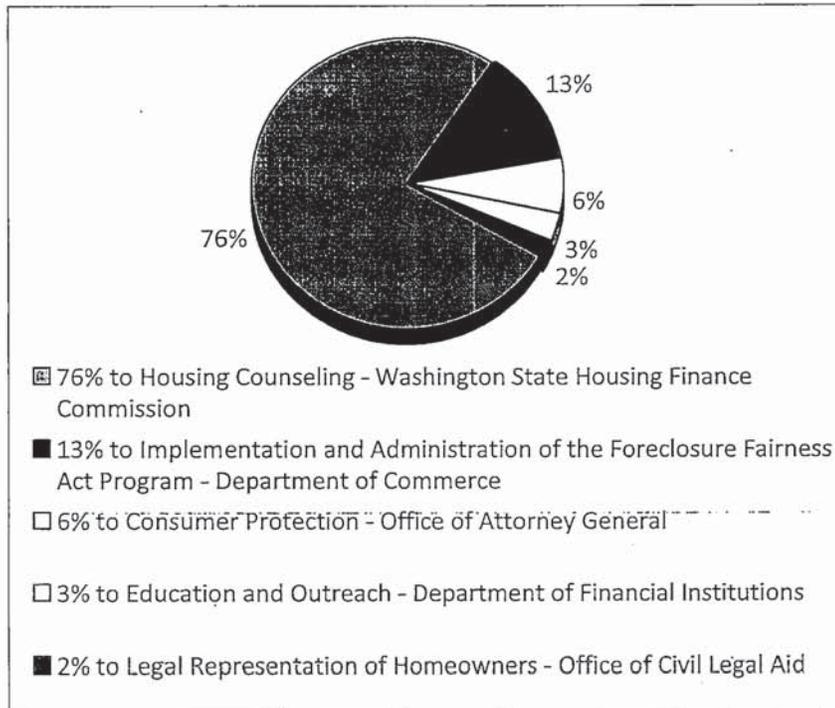
- **Washington State Department of Commerce:** Commerce is charged with the overall development and management of the Foreclosure Fairness Program, including the mediation program. Commerce is also responsible for certifying and maintaining a list of approved mediators.
- **Washington State Housing Finance Commission:** The Washington State Housing Finance Commission (the Commission) administers a homeowner counseling program, as required by the Foreclosure Fairness Act. The Commission set up a toll-free Homeownership Resource Hotline where homeowners in need of assistance can call and receive counseling at no cost to them.
- **Washington State Department of Financial Institutions:** The Washington State Department of Financial Institutions is responsible for conducting homeowner pre-purchase and post-purchase outreach and education programs.
- **Washington State Office of the Attorney General:** The Consumer Protection Division of the Washington State Attorney General's Office created the Foreclosure Compliance Program to enforce the Deed of Trust Act, as required by that act.
- **Office of Civil Legal Aid:** The Office of Civil Legal Aid provides legal assistance to low-income homeowners in matters related to foreclosure. They contract with qualified legal aid programs and submit quarterly reports to Commerce on its activities.

### **Funding**

The Foreclosure Fairness Program is supported by private funds. Beneficiaries pay a \$250 fee into the Foreclosure Fairness Fund for each Notice of Default issued to owner-occupied residential real properties. Federally insured financial institutions that issue fewer than 250 Notices of Default per year may apply for an exemption to these fees and to the mediation program. The fund provides for free foreclosure counseling, act enforcement, development and operation of the mediation program, foreclosure prevention outreach, and legal assistance for low-income borrowers.

- **Office of Civil Legal Aid:** The Office of Civil Legal Aid provides legal

**Figure 1: Foreclosure Fairness Fund Expenditures**



**Meet and Confer Period**

The “meet and confer” period, prescribed in the Act, identifies clear steps of notification prior to foreclosure.

- Beneficiaries must issue a Notice of Pre-Foreclosure Options at least 30 days before issuing a Notice of Default. The Notice of Pre-Foreclosure Options explains to the borrower that they are in danger of losing their home, that free counseling is available to help them understand their options, and the potential for mediation. It also informs the borrower of the opportunity to meet with the beneficiary to try to resolve the issue.
- If the borrower responds to the Notice of Pre-Foreclosure Options, a Notice of Default may not be issued for an additional 60 days.
- Beneficiaries must wait at least 30 days after the Notice of Default is issued before recording the Notice of Sale.

## Referral to Mediation

Following the “meet and confer” period, beneficiaries and borrowers may meet for mediation.

- Borrowers become eligible for mediation once they receive a Notice of Default and remain eligible until 20 days after the recording of the Notice of Sale, and if their beneficiary is not exempt from mediation. Federally insured depository institutions that were not a beneficiary in more than 250 trustee sales in the previous year may apply to Commerce for an exemption from mediation.
- Borrowers must be referred for mediation to Commerce by an attorney or a housing counselor.
- Commerce has 10 days to appoint a mediator and notify all of the parties.
- Then the mediator has 70 days to complete the mediation (sometimes longer if both parties agree to the extension). The participants in the mediation must address the issues of foreclosure that may enable the parties to come to an agreed resolution. To do this, the mediator will ask the participants to consider the borrower’s economic position, the net present value of receiving payments from a modified mortgage compared to the recovered costs following foreclosure, affordable modifications, and any applicable loss mitigation guidelines for loans insured by the Federal Housing Administration, the Veterans Administration, or the Rural Housing Service.

## Mediation Certification

Commerce developed standards, coordinated training, and certified 195 mediators. In addition, Commerce developed guidelines for the mediation process.

- Within seven days of the completion of the mediation, the mediator must certify the outcome of the mediation to Commerce.
- This certification must indicate if a resolution was reached, a description of the resolution, and whether the parties participated in good faith.
- If no agreement was reached, they must also include a description of the net present value<sup>3</sup> analysis used and its results.
- A finding that the beneficiary did not act in good faith constitutes a defense to the non-judicial foreclosure action.<sup>4</sup>
- A finding that the borrower failed to mediate in good faith authorizes the beneficiary to proceed with the foreclosure.

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<sup>3</sup> In the context of foreclosures, net present value is an accounting calculation that the beneficiary performs in order to assist them in comparing the costs of a loan modification to the costs of a foreclosure.

<sup>4</sup> A borrower may use this finding in court to stop the foreclosure.

## **Performance of the Program**

### **Statewide Capacity**

Housing counseling and mediation services are available to borrowers across the state. Borrowers seeking housing counseling contact the Homeownership Resource Hotline where their call is prioritized and referred to a free-of-charge local housing counselor. Since the passage of the Act, the number of housing counselors has doubled from 44 to 92 statewide. These counselors, as well as private attorneys, refer all mediation-eligible cases to Commerce. Commerce then assigns mediators to these cases based on the location of the property and mediators' capacity and availability.

### **Approved Foreclosure Mediators**

In addition to receiving referrals and assigning mediators, Commerce is responsible for maintaining a list of approved mediators. The Foreclosure Fairness Act identifies attorneys, retired judges, Housing and Urban Development-approved housing counselors, and employees and volunteers of Dispute Resolution Centers as eligible to become foreclosure mediators. Commerce requires participating mediators to take foreclosure mediation training and have additional documented mediator training and experience.

In June 2011, Commerce trained more than 200 mediators on the requirements of the act, federal loan programs, and foreclosure laws. In addition, participants attended a full-day mock mediation training hosted by Dispute Resolution Centers around the state. As a result, Commerce approved 195 mediators to conduct foreclosure mediations in Washington – 137 Dispute Resolution Center volunteers or employees, 64 attorneys, and six retired judges.

### **Referrals to Mediation**

From July 2011, when the program began, through June 2012, Commerce received 1,655 referrals to mediation. Private attorneys made 1,129 of these referrals and housing counselors made 526. Nearly 1,500 (1,499) were assigned to the Commerce-approved mediators; 99 of these referrals were found to be ineligible. As of June 30, 2012, 579 of these cases were complete and certified by the mediator.

### **Housing Finance Commission's Performance**

Commerce partners with the Washington State Housing Finance Commission (the Commission) to administer a homeowner counseling program, as required by the Foreclosure Fairness Act. Detailed housing counseling data and outcomes are included later in this report in the "Outcomes of Housing Counseling" section.

## Department of Financial Institutions' Performance

The Washington State Department of Financial Institutions is responsible for conducting homeowner pre-purchase and post-purchase outreach and education programs. From the beginning of the program through June 30, 2012, the agency:

- Printed 50,000 Foreclosure Fairness Program brochures, 30,000 of which were distributed to the public.
- Printed and distributed 20,000 Foreclosure Fairness Program business card-style handouts.
- Mailed 5,646 postcards to homeowners identified to be in foreclosure.
- Produced video public service announcements that ran 835 times on statewide television channels.
- Conducted outreach at 60 conferences and workshops.
- Provided information at six Realtor events.

## Office of the Attorney General's Performance

The Consumer Protection Division of the Washington State Attorney General's Office created the Foreclosure Compliance Program to enforce the Deed of Trust Act, as required by that act.

The Foreclosure Compliance Program received approximately 692 complaints and inquiries.<sup>5</sup>

- Direct consumer complaints – 522
- Housing counselor complaints – 139
- Private attorney inquiries regarding clients with mortgage servicing and foreclosure problems – 31

In addition to the complaints, the Foreclosure Compliance Program responded to multiple legislative and state agency inquiries.

The Foreclosure Compliance Program receives regular case-specific and issue-related input from Commerce including requests to respond to homeowners and counselors.

On February 9, 2012, the Attorney General's Office, along with 48 other states and the federal government, obtained consent judgments against five of the largest servicers of home loans: Citi, Ally/GMAC, Bank of America, JPMorgan Chase, and Wells Fargo. In addition to substantial monetary relief, the settlement contains injunctive relief that will require the servicers to comply with state foreclosure law. It requires servicers to have actual, identified authority to foreclose, which is a Deed of Trust Act requirement, and

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<sup>5</sup> All numbers are approximate because some inquiries do not always immediately present themselves as complaints and not all telephone calls made directly to attorneys or investigators are counted.

that they use lawful procedures to create the documents necessary to foreclose under the Deed of Trust Act, e.g., the assignment and the appointment of a successor trustee.

The Foreclosure Compliance Program also assisted Attorney General Rob McKenna to convene the Washington Consumer Foreclosure Remedies Fund Committee. The Foreclosure Compliance Program staffed a meeting of this group and prepared a request for grant proposals for the distribution of the \$43.8 million the state received under the national settlement.

### **Office of Civil Legal Aid's Performance**

Commerce partners with the Office of Civil Legal Aid to provide legal assistance to low-income homeowners in matters related to foreclosure. The office contracts with qualified legal aid programs and submits quarterly reports to Commerce on its activities. During the reporting period, 957 low-income homeowners received civil legal assistance.

## Results of the Mediation Program

The data presented in this report cover the first fiscal year of the mediation program (July 22, 2011, through June 30, 2012). The mediation program was developed and is administered by Commerce.

Table 1 tallies the mediation referrals that Commerce received through the end of the reporting period. Mediations are referred to Commerce by either housing counselors (approximately one-third) or private attorneys (two-thirds).

Of the 1,655 referrals, Commerce assigned 1,499 to certified mediators; 579 of those referrals have been mediated or completed. The remaining assigned cases were either pending mediation/completion or have been found to be ineligible for the mediation program. "Pending mediations/certifications" are cases that have been assigned to a mediator and Commerce has not received the certification from the mediator indicating if the mediation has occurred and the result of the mediation. "Ineligible for mediation" are cases that have been referred to Commerce but upon further review have been found to be ineligible, most typically because the beneficiary is exempt, or the timing of the referral missed the window of opportunity specified under the Act.

**Table 1: Mediation Referrals from Beginning of Program through June 30, 2012**

Category Description	Cases
<b>Mediations Requested Total</b>	<b>1,655</b>
Referred by housing counselors	526
Referred by private attorneys	1,129
Mediations assigned to mediators	1,499
Mediations/cases completed	579
Pending mediations/certifications	977
Ineligible for mediation	99

Table 2 analyzes the 579 cases that have been mediated or completed. Some cases do not reach mediation due to a variety of factors, such as the borrower's ineligibility or the beneficiary's exemption that was discovered after the case had been assigned to a mediator. Others fail to reach mediation because of a lack of good faith on either the borrower's or the beneficiary's part.

For the cases that reached mediation, mediators submitted to Commerce certifications that indicated whether an agreement was reached. Reaching an agreement does not necessarily mean the borrower was able to stay in the house. In some cases, staying in the home is just not possible because of the borrower's financial situation.

However, it is important to note that the borrower staying in the home is not the only positive outcome of this program. The purpose of the mediation program is fulfilled if both the borrower and the beneficiary are able to communicate openly, understand all the available options or why they are not available, and as a result make well-informed decisions.

The subcategories listed under “Agreement Reached – Stayed in Home” are not mutually exclusive. For instance, a borrower may receive a loan amortization extension, have the principal reduced, and also have the interest rate reduced. In this case, that same loan would be counted in all three subcategories.

In instances when an agreement was not reached or when mediation failed to occur, the mediators are required to report to Commerce if the parties acted in good faith. Typically, reported reasons for lack of good faith on either the borrower’s or beneficiary’s part include:

- Lack of timely or accurate provision of documents.
- Failure to pay share of mediation fee.
- Failure to timely appear at mediation.
- Representative not authorized to make binding decisions.

At this time, Commerce is unable to provide the number of borrowers who report a default within a year of restructuring or modification (as required under RCW 61.24.163 (18) (b)). Commerce is considering several options for gathering this data, including:

- Direct requests for the information from the borrowers that received a modification or reinstatement.
- Researching county records to determine the number of borrowers that received a modification or reinstatement to determine if they are still listed on the Deed of Trust.

**Table 2: Mediations/Cases Completed from Beginning of Program through June 30, 2012**

Category Description	Cases
<b>Mediations/Cases Completed Total</b>	<b>579</b>
Referred by housing counselors	195
Referred by private attorneys	384
<b>Agreement Reached – Stayed in Home</b>	<b>113</b>
Reinstatements	8
Repayments	5
Extensions	17
Adjusted rate to fixed rates	16
Amortizations extended	14
Interest rate reductions	49
Principal reductions	11
Monthly principal payments reduced	28
Monthly interest payments reduced	21
Refinances	3
Other loan restructures/modifications	48
Principal forbearances	11
Other forbearances/interest write-offs	3
Other forbearances/fees and penalties write-offs	7
Other forbearances	12
<b>Agreement Reached – Did Not Stay in Home</b>	<b>78</b>
<b>Agreement Not Reached at Mediation</b>	<b>272</b>
Beneficiary in good faith	246
Beneficiary not in good faith	26
Borrower in good faith	240
Borrower not in good faith	32
<b>No Mediation Occurred</b>	<b>116</b>
Beneficiary in good faith	114
Beneficiary not in good faith	2
Borrower in good faith	95
Borrower not in good faith	21

## Outcomes of Housing Counseling

Commerce partners with the Washington State Housing Finance Commission (the Commission) to administer a homeowner counseling program, as required by the Foreclosure Fairness Act. Counseling is available at no cost to Washington homeowners in need of assistance. The Commission partnered with 17 housing counseling agencies around the state that had at least two years of experience in providing foreclosure prevention counseling. The act allowed for these agencies to hire new counselors, which resulted in increasing the number of foreclosure counselors from 44 to a total of 92 statewide.

The data described in this section, provided by the Commission as required by RCW 61.24.160(6), covers the first fiscal year of the program, through June 30, 2012. Table 3 shows a breakdown by category of the total number of clients assisted (4,124) by the Commission's counselors.

The number of borrowers referred to mediation shown in Table 3 differs from the number of borrowers referred to mediation shown in the previous tables. This is because Commerce receives referrals from both the Commission's counseling program as well as other counseling programs.

**Table 3: Outcomes of Housing Counseling**

Category Description	Borrowers
<b>Total Number of Clients</b>	<b>4,142</b>
Referred to mediation	392
Referred to legal assistance	117
Referred to another social service or emergency assistance agency	93
<b>Stayed in Home</b>	
Initiated forbearance agreement/repayment plan	100
Brought their mortgage current without rescue funds	12
Brought their mortgage current with rescue funds	9
Received second mortgage	0
Obtained partial claim loan from FHA lender	0
Mortgage refinanced into FHA product	3
Mortgage was refinanced (non-FHA product)	5
Mortgage was modified with PITI less than or equal to 38 percent of gross monthly income with at least a 5-year fixed rate	82
Mortgage was modified with PITI greater than 38 percent of gross monthly income or interest rate fixed for less than 5 years and appears to be sustainable	17
<b>Did Not Stay in Home</b>	
Sold their property (not short sale)	1
Had a pre-foreclosure sale	35
Deed-in-Lieu	2
Mortgage foreclosed	27
<b>Other</b>	
Filed for bankruptcy	29
Withdrew from counseling	66
Currently in negotiation with servicer; outcome unknown	2,196
Referred to servicer with action plan and no further counseling activity; outcome unknown	173
Foreclosure was put on hold or in moratorium; final outcome unknown	22
Mortgage was modified with PITI greater than 38 percent of gross monthly income or interest rate fixed for less than 5 years and appears not to be sustainable	3
Counseled on debt management or referred to debt management agency	31

## Legislative Improvements

The Foreclosure Fairness Act amendments contained in SHB 2614 have improved the ability for mediators to conduct productive mediations and made the process more efficient and transparent. In particular, the new legislation improved the order of the document exchange to make it work more effectively for both the borrower and the beneficiary. It allows the beneficiary to use the information provided by the borrower to complete their requirements prior to the mediation.

In addition, the new amendment provided civil immunity to mediators to prevent mediators from withdrawing from the program. Changing the act eligibility requirements has also proven to be beneficial. Prior to this change, many borrowers were missing the opportunity to meet and confer with their beneficiary and going straight to mediation. Now borrowers are waiting until they get a Notice of Default to be referred to mediation. This is more in line with the design of the Deed of Trust Act legislation.

The success of the Foreclosure Fairness Act program is directly related to the relationships established with all stakeholders involved. Each time the act was amended, Commerce worked with stakeholders to achieve consensus. While Commerce and stakeholders can identify areas that need improvement – such as borrower withdrawal and subsequent re-referral, complaints about mediator certifications, and further clarification on what constitutes good faith – additional recommended legislation changes are pending upon further consultation with these very same stakeholders.



**FORECLOSURE FAIRNESS PROGRAM  
ELIGIBILITY CRITERIA & GUIDANCE FOR REFERRALS TO MEDIATION**

*Homeowners (borrowers) can only be referred to the Department of Commerce (Commerce) for foreclosure mediation by a housing counselor or an attorney. Each referring attorney and housing counselor has the responsibility to carefully review the circumstances of the borrower(s) and confirm eligibility for mediation prior to submitting the referral to Commerce. Referrers may find the following checklist useful to ensure that their submittal is complete and accurate.*

**ELIGIBILITY CHECKLIST**

- Owner-occupied residential real estate property:** The FFA applies ONLY to deeds of trust recorded against owner-occupied residential real property. "Owner-occupied" means property that is the principal residence of the borrower; "residential real property" means property consisting solely of a single-family residence, a residential condominium unit, or a residential cooperative unit (RCW 61.24.005). The property must have been owner-occupied as of the date of the initial contact under RCW 61.24.031 was made.
- Loan type:** The FFA does NOT apply to deeds of trust:
  - (a) Securing a commercial loan;
  - (b) Securing obligations of a grantor who is not the borrower or a guarantor; or
  - (c) Securing a purchaser's obligations under a seller-financed sale.
- Beneficiary exemption status:** The FFA does NOT apply to beneficiaries that are exempt from foreclosure mediation. Exempt status is effective for all referrals for mediation that are received within the same calendar year that the exemption is effective. Exempt status for the current year has no effect on referrals received in the previous year. Verify the exempt status of the beneficiary on Commerce's website at [www.commerce.wa.gov/foreclosure](http://www.commerce.wa.gov/foreclosure).
- Association beneficiaries:** The FFA does NOT apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW.
- Timelines:** FFA recognizes a borrower's eligibility based on the following:
  - 1. Borrowers who received a Notice of Default prior to July 22, 2011, are eligible to be referred up to one day prior to the date of the Trustee Sale.
  - 2. Borrowers who received a Notice of Default after July 22, 2011, are eligible to be referred until 20 days after the date a Notice of Trustee Sale has been recorded.
- Notification dates:** Referrers must include ALL beneficiary notification dates that apply to the subject property. These are: Notice of Pre-Foreclosure Options, Notice of Default, and Notice of Trustee Sale recording date. If the borrower did not receive any of these notifications, the referrers should enter N/A in the appropriate box(es). However, the borrower must have received a Notice of Default.
- Referrals during bankruptcy:** If a borrower meets all the FFA eligibility criteria and is currently in bankruptcy, Commerce will accept and process their referral if one of the following items accompanies the referral:
  - 1. Evidence of a relief from the stay; **OR**
  - 2. A consent letter from the debtor to the beneficiary pursuant to RULE 4001-2 (Federal Rules of Bankruptcy Procedure) meeting the following criteria: letter is in writing; letter is signed by either

the debtor or their attorney; letter identifies beneficiary on the deed of trust; letter contains words to the effect that the debtor consents to the beneficiary participating in mediation under the FFA; and letter contains words to the effect that mediation is for purposes of negotiation of a modification of the debt secured by the deed of trust.

- Trustee contact information required:** Commerce is required by statute to notify the current Trustee that a referral for mediation has been received. A referral cannot be processed until the Trustee information (name, address, etc.) is provided on the referral form. Typically, the Trustee's name is a matter of public record that can also be found on the correspondence received by the borrower.

**NOTE:** In order to notify a Trustee prior to a Friday sale, we must receive an eligible, complete referral by noon on the Thursday before the scheduled date of the trustee sale. Receiving the referral earlier increases the chance of notifying the Trustee before the sale. Ensure the referral is given immediate attention by also checking the box at the top of the referral application. Please note that Commerce has no control over a Trustee's decision to postpone a sale.

### OTHER REQUIREMENTS FOR REFERRERS

- Complete referrals:** Referring attorneys or housing counselors must ensure that they provide Commerce with a complete and accurate referral. The referral form (provided by Commerce at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures)) needs to be completely filled out. Commerce will assign a mediator within 10 days ONLY after receiving a complete referral. Incomplete or incorrect referrals will NOT be processed and assigned to a mediator.
- Signature requirements:** To ensure the validity of a referral for mediation, the signature of the referring attorney or housing counselor is required on the referral form. An electronic/scanned copy of the original-signed form emailed as a PDF attachment or transmitted by fax is acceptable.
- Attachments:** Referrers may attach supporting documents they feel necessary and which may speed up the review process.
- Borrower's copy of the referral:** The statute requires the referring attorney or housing counselor to send a copy of the referral to the borrower(s) (RCW 61.24.163(2)).

### SUBMITTING THE REFERRALS

Commerce prefers that referring counselors and attorneys send the scanned hand-signed referrals electronically to [ForeclosureMediation@commerce.wa.gov](mailto:ForeclosureMediation@commerce.wa.gov). Referrals can also be faxed to (360) 586-0966. If the referral is faxed, it is the responsibility of the referrer to confirm the faxed document was received by our staff. Mailing a hard copy of the referral is no longer required.

Please note that Commerce is closed on Fridays, due to a 4-day/10-hour work schedule.



**Department of Commerce**  
Innovation is in our nature.

## Foreclosure Fairness Program Guidelines

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**Last Revision: September 16, 2013**

These guidelines are frequently updated or revised. Please visit [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures) for the most current version.

Foreclosure Fairness Program Guidelines

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## INTRODUCTION

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The Foreclosure Fairness Act (FFA) ([RCW 61.24.163](#)), initially passed by the Legislature in April 2011, reshapes the non-judicial foreclosure process in Washington State to help protect homeowners from unnecessary foreclosures. It assigns the primary responsibility for developing and administering the Foreclosure Fairness Program (FFP) to the Department of Commerce (Commerce). A large part of the FFP is administering a foreclosure mediation program and approving and training foreclosure mediators.

Commerce recognizes that the FFA allows the foreclosure mediators to use their discretion on how to conduct and certify the mediation cases assigned to them. Commerce's role is not to instruct these mediators on how to conduct and certify their mediations, but to assist them to conduct mediations that comply with the statute and to facilitate the sharing of best practices between mediators.

The below list of guidelines and best practices were compiled by Commerce in an effort to provide the foreclosure mediators, referrers, and any other interested stakeholders, with useful tools in navigating the-referral and mediation process contemplated by the FFA.

**It is important to note that this is NOT an exhaustive list and that these guidelines may change without notice.**

Commerce continues to improve its FFP guidelines as the program evolves and matures and as we analyze new situations and circumstances encountered in the administration of the program. Updated guidelines, as well as other FFP information and forms, are posted regularly on our FFP website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures).

*Pub. 5/6/13.*

## **GUIDANCE REGARDING ELIGIBILITY AND REFERRALS**

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### **Mediators & Borrower Eligibility**

Mediators should NOT concern themselves with borrower eligibility matters. It is NOT the mediator's role to determine eligibility or address ineligibility claims. **Once a case is assigned by Commerce to a mediator, the mediator should assume that the borrower is eligible and proceed with the mediation process as usual.** If during the mediation process the beneficiary believes the borrower is ineligible and informs the mediator that they will not participate in mediation, the mediator will need to close the case and certify it accordingly.

Furthermore, there is no basis in the FFA for mediation to be cancelled or a borrower to become ineligible due to the beneficiary's stating that they terminated foreclosure or terminated non-judicial foreclosure. Once a borrower received a Notice of Default, they are eligible for mediation if the referral submitted to Commerce meets all the other FFA eligibility criteria. Commerce's guidance to mediators is that they proceed with the mediation process as usual and assume that the borrower is eligible for mediation. As stated above, should the beneficiary inform the mediator that they will not participate in mediation, the mediator will need to close the case and certify it accordingly.

*Pub. 6/17/13.*

### **Referral Timeline**

FFA recognizes a borrower's eligibility based on the following:

1. Borrowers who received a Notice of Default prior to July 22, 2011, are eligible to be referred up to one day prior to the date of the Trustee Sale.
2. Borrowers who received a Notice of Default after July 22, 2011, are eligible to be referred until 20 days after the date a Notice of Trustee Sale (NOTS) has been recorded.

The count starts the day after the NOTS was recorded. For example, if the referral was recorded on January 1, the 20 days count would start on January 2. The referral must be received by Commerce on January 21 to be eligible for mediation.

Commerce follows the rule set by RCW 1.12.040 to determine the eligibility of requests for foreclosure mediation. When the **last** day (of any timeline set in statute) falls on a Saturday, Sunday, or holiday, we follow RCW 1.12.040 for computing time and go to the next business day. (RCW 1.12.040 is considered to be a "statute of general applicability.")

*Pub. 5/6/13.*

### **Owner Occupancy and Residential Real Property Requirement**

The FFA applies ONLY to deeds of trust recorded against owner-occupied residential real property. "Owner-occupied" means property that is the principal residence of the borrower; "residential real property" means property consisting solely of a single-family residence, a residential condominium unit, or a residential cooperative unit (RCW 61.24.005). The property must have been owner-occupied as of the date of the initial contact under RCW 61.24.031 was made.

Borrowers remain eligible for mediation even if they **subsequently** move, as long as the property was their principal residence at the time the initial contact under RCW 61.24.031 was made. The referring attorney or housing counselor is responsible for pre-screening borrowers for eligibility.

Only the borrower/grantor on a deed of trust can participate in mediation.

A borrower who owns a mobile home and rents the land would be ineligible for mediation.

*Pub. 5/6/13.*

### **Exempt Loans (RCW 61.24.165)**

The FFA does NOT apply to deeds of trust.

- (a) Securing a commercial loan;
- (b) Securing obligations of a grantor who is not the borrower or a guarantor; or
- (c) Securing a purchaser's obligations under a seller-financed sale.

*Pub. 5/6/13. Rev. 8/26/13.*

### **Reverse Mortgage**

The FFA statute is silent regarding the eligibility of reverse mortgages for mediation. The referring attorney or housing counselor should make a fact-specific determination regarding each particular reverse mortgage situation. Commerce will rely on the referrer's determination that mediation is appropriate (per RCW 61.24.163(2)).

*Pub. 5/6/13. Rev. 5/9/13.*

### **Equity Line of Credit**

If an equity line of credit is on the principal residence of the borrower, the loan is from a non-exempt lender, the borrower is eligible, the referral meets the FFA timelines, and all other statutory requirements are met – the equity line of credit is eligible for mediation. A line of credit secured by a deed of trust is just like any other deed of trust.

*Pub. 5/6/13.*

### Referrals Regarding Second Mortgages

Commerce will accept referrals for second mortgages that are in default and assign a foreclosure mediator as usual IF all the FFA eligibility requirements are satisfied. The referral must include a trustee, as required for all other referrals. If the first mortgage is also in foreclosure, they will be mediated as separate cases. Commerce will need to receive one referral per mortgage loan.

*Pub. 5/6/13.*

### Referrals During Bankruptcy

If a borrower meets all the FFA eligibility criteria and is currently in bankruptcy, Commerce will accept and process their referral if one of the following items accompanies the referral:

1. Evidence of a relief from the stay; OR
2. A consent letter from the debtor to the beneficiary pursuant to RULE 4001-2 (Federal Rules of Bankruptcy Procedure) meeting the following criteria:
  - Letter is in writing;
  - Letter is signed by either the debtor or their attorney;
  - Letter identifies beneficiary on the deed of trust;
  - Letter contains words to the effect that the debtor consents to the beneficiary participating in mediation under the FFA; and
  - Letter contains words to the effect that mediation is for purposes of negotiation of a modification of the debt secured by the deed of trust.

*Pub. 5/6/13.*

### Quit Claim Deeds

Mediation referrals for properties with quit claim deeds should be in the original borrower's name, as they are still the "borrower" defined in RCW 61.24.005.

A quit claim deed does not necessarily change who the borrower is on the note secured by the deed of trust. And, in fact, many deeds of trust say if the borrower conveys his/her ownership interest in the property without the lender's consent, the lender may declare an immediate default. This is generally referred to as the "due on sale" clause. Generally speaking, the original borrower is still responsible, and the note is still secured by a deed of trust on the property, regardless of the quit claim deed.

However, in some circumstances the due on sale clause may not be triggered by a quit claim deed or other transfer of interest. Examples are transfers by quit claim pursuant to a divorce decree, or transfer by a deceased borrower's estate to an heir. A borrower who claims rights under such a transfer needs to seek independent legal advice in order to determine what, if any, rights he/she has relative to the deed of trust that is being foreclosed.

*Pub. 5/6/13.*

### **Eligibility of Borrowers with Special Circumstances**

Incarcerated borrowers are eligible for mediation. However, since there is no provision in the FFA that treats them differently from other borrowers, they must meet the same FFA deadlines and requirements as other borrowers.

Similarly, the FFA does not address foreclosures where the borrower is military personnel in active duty, deployed, or recently discharged. However, under a Federal law (the Servicemembers Civil Relief Act) a beneficiary may be required to obtain a court order before it can foreclose. **Borrowers who are military personnel in active duty, deployed, or recently discharged should seek independent legal advice to ascertain their rights.**

*Pub. 5/6/13.*

### **Exempt Beneficiary**

Commerce posts an annual list of financial institutions exempt from mediation on its FFP website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures). Referrers must verify the eligibility of the beneficiary against this list prior to submitting the referral form to Commerce.

If a financial institution submits a valid exemption certification for the current year, but was not exempt from mediation the previous year, all mediation referrals received by Commerce during the previous year will be honored. All requests for mediation during the current year (January 1 – December 31) will be ineligible upon receipt of the valid exemption by January 31<sup>st</sup>.

After the receipt of a referral, if Commerce is notified by a trustee that the referral should be considered ineligible based on the latest "Assignment of Deed of Trust" naming an exempt beneficiary as the holder of the note and beneficiary for the purposes of the Deed of Trust Act (RCW 61.24), Commerce will request a copy of the "Declaration of Note Holder" or "Beneficiary Declaration" as described in RCW 61.24.030(7)(a). If further clarification is needed, Commerce may also ask for a copy of the specific promissory note endorsement assigning that beneficiary to the deed of trust. Once Commerce receives the document(s), a decision on the eligibility of the referral will be determined and all parties will be notified.

*Pub. 5/6/13. Rev. 8/26/13; 9/16/13.*

### **Trustee Sale & Postponement**

Once Commerce receives a complete referral to mediation, we notify the trustee that mediation has been requested for that property. In order to notify a trustee prior to a Friday sale, we must receive the eligible, complete referral **by noon on the Thursday before the scheduled date of the trustee sale.**

**Note:** this applies only to borrowers who received a Notice of Default prior to July 22, 2011, and who are eligible to be referred up to one day prior to the date of the Trustee Sale.

*Pub. 5/6/13.*

### **Eligibility Questioned by Trustee or Beneficiary**

When the eligibility of the mediation referral is questioned by a trustee or beneficiary, an e-mail will be sent to the referrer. Unless the referrer withdraws the referral, Commerce will move forward with the assignment process as usual (with a few exceptions, e.g., if Commerce received proof that the beneficiary is exempt from mediation – see “Exempt Beneficiary” section).

It is the responsibility of the referring attorney or counselor to determine if the borrower qualifies for foreclosure mediation (RCW 61.24.160(3)). The referrer will be asked to consult with their client (the borrower) regarding the issues raised and select one option:

1. Determine if the borrower is eligible for mediation and all the information in the original referral is correct. Confirm with Commerce that they intend to keep the referral as originally submitted.
2. Determine if the borrower is eligible for mediation and make corrections to the original referral. Re-submit the referral form with the corrected information.
3. Determine that the borrower is not eligible for mediation; notify Commerce with a request to withdraw the referral. If the case had already been assigned to a mediator, the referrer should notify the mediator to withdraw and cancel the mediation with a copy to Commerce and the trustee.

*Pub. 5/6/13.*

### **Referral Signature Requirements**

To ensure the validity of a referral for mediation, the signature of the referring attorney or housing counselor is required on the referral form. An electronic/scanned copy of the original-signed form transmitted by fax or PDF attachment to an email is acceptable.

The original signature is intended to signify that the individual attorney or housing counselor whose name appears has reviewed the referral for eligibility and appropriateness with all due diligence in keeping with the standards of their respective professions.

*Pub. 5/6/13.*

### **Referrals with More than One Referrer**

Commerce expects that each referral will have one referrer—the person who signs the referral. If there is more than one referrer indicated on the form, Commerce will only record the referrer who signed the referral in the FFP database.

*Pub. 5/6/13; 9/16/13.*

### **Repeat or Subsequent Mediations**

Commerce will process only one mediation per **foreclosure proceeding**. Once a mediation case has been closed and a Certification/Report issued by the mediator, Commerce does not have the authority

to reopen it or start a new mediation process. The FFA does not contemplate repeat mediations/referrals on the same foreclosure proceeding. Since repeat or subsequent mediations are not required under the law, Commerce cannot compel the parties to re-engage and agree to mediate under the FFA for a second time. However, the parties (beneficiary and borrowers) are free to continue negotiations and even undertake subsequent mediations. The parties can voluntarily agree to follow the FFA rules, however, they would have to be outside of the FFA structure and **Commerce will not administer or monitor these mediations.** (Also see the “Mediations Outside of FFA” section.)

*Pub. 5/6/13. Rev. 8/26/13.*

### **Mediations Outside of FFA**

Commerce will not process and assign mediators for “outside of FFA” mediations. Examples include when the borrower is not eligible or the beneficiary is exempt, or when mediation already occurred on that foreclosure proceeding. Commerce will inform the parties that they are free to mutually agree to mediate, but they are not compelled by the FFA to do so. The parties are free to solicit assistance from any FFA approved mediators and they can voluntarily agree to follow the FFA rules. However, these mediations would have to be outside of the FFA structure and Commerce will not administer or monitor these cases. (Also see the “Repeat or Subsequent Mediations” section.)

*Pub. 5/6/13. Rev. 8/26/13.*

### **Request for a Second Mediation to Enforce Prior Agreements**

Borrowers cannot request a second mediation to enforce agreements reached in prior mediations. Borrowers would have to ask a court to enforce the agreement and any provisions of RCW 61.24 that were not honored by the other party(s) to the agreement. Commerce or the mediators do not have enforcing authority over any agreements made in mediation. Commerce does not have the authority to reassign a case to mediation once the case has been certified and closed.

*Pub. 5/6/13. Rev. 8/26/13.*

## **GUIDANCE REGARDING FINANCIAL INSTITUTIONS**

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### **Beneficiary's Definition**

The beneficiary is defined in RCW 61.24.005 as "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." Under Washington State law, the **current** holder of the Note is the beneficiary. Commerce relies on the referrer to identify the beneficiary on the referral form.

*Pub. 5/6/13.*

### **Exemption from Mediation**

Requests from financial institutions for mediation exemptions must be submitted to Commerce annually **no later than January 31<sup>st</sup>**. Exempt status submissions must be certified by the financial institution under penalty of perjury that they were not the beneficiary of deeds of trust in more than 250 trustee sales of owner-occupied residential real property in the previous year (RCW 61.24.166).

**Exemption certification templates** are posted on Commerce's FFP website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures). The exemptions must be renewed annually.

If a financial institution submits a valid exemption certification for the current year, but was not exempt from mediation the previous year, all mediation referrals received by Commerce during the previous year will be honored. All requests for mediation during the current year (January 1 – December 31) will be ineligible upon receipt of the valid exemption by January 31<sup>st</sup>.

*Pub. 5/6/13.*

Commerce posts the annual list of financial institutions exempt from mediation on its FFP website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures).

*Pub. 5/6/13.*

### **Exemption from Foreclosure Fairness Account Fee**

According to RCW 61.24.174, non-exempt beneficiaries must report to Commerce and pay \$250 for each notice of default it issued, or directed a trustee to issue, in the previous quarter on a deed of trust made on owner-occupied residential real property.

Federally insured depository institutions that certify under penalty of perjury that they issued, or directed a trustee or authorized agent to issue, fewer than 250 notices of default in the preceding year, are exempt from these fees.

**Exemption certification templates** are posted on Commerce's FFP website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures).

*Pub. 5/6/13.*

### Notification of New Beneficiary

A change in beneficiary should not be confused with a change in “servicer.” The beneficiary is defined in RCW 61.24.005 as “the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” If a servicer that is not the beneficiary—as defined—changes during the mediation process, the FFA process should not be affected. According to the FFA (RCW 61.24.163(8)(a)), it is the responsibility of the **beneficiary—as defined**—to have a **person** who is authorized to agree to a resolution attend the mediation (in person, by phone, or by video conference), regardless of who the loan servicer is. In some cases this person could be a servicer employee authorized by the **beneficiary** to agree to a resolution in mediation.

The FFA does not address the situation where a **beneficiary—as defined in RCW 61.24.005**—changes **AFTER** the mediation process had started. Once a proper referral has been made to Commerce and Commerce has assigned a mediator, Commerce has no control over the situation. However, we offer the following comments.

If the beneficiary changed **AFTER** the referral was processed by Commerce and the Notice was issued and sent to all parties involved, and the mediation process was started, Commerce’s view is that the successor beneficiary “steps into the shoes” of the original beneficiary for purposes of foreclosure mediation, unless it is an exempt beneficiary. If a beneficiary changes **AFTER** mediation had been requested and the mediation process had started, it is incumbent on the original beneficiary to inform the successor beneficiary of the status of the foreclosure and mediation on the loan that is being sold. The mediator should continue the mediation process as usual with the successor beneficiary. The mediator may rely on a qualifying beneficiary declaration (under RCW 61.24.163(3)) as proof of the successor beneficiary’s identity.

If the successor beneficiary is exempt from FFA mediation (per RCW 61.24.166), it may voluntarily proceed and continue the mediation process that started with the original beneficiary. In that case, the mediator should continue the mediation process as usual.

*Pub. 5/6/13. Rev. 9/16/13.*

### Trustee Sale & Postponement

RCW 61.24.163(16)(b) states, “If a borrower has been referred to mediation after the notice of sale was recorded, the sale may not occur until the trustee receives the mediator’s certification stating that the mediation has been completed.” Once Commerce receives a **complete** referral to mediation, we notify the trustee that mediation had been requested for that property. However, Commerce has no control over a trustee’s decision to postpone a sale.

*Pub. 5/6/13.*

If the successor beneficiary is exempt from FFA mediation (per RCW 61.24.166) it may voluntarily

## GUIDANCE REGARDING MEDIATION SESSIONS

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### Mediation Timeline

#### 70 Days to Session:

The 70-day to session timeline starts once the mediator receives the Notice from Commerce ([RCW 61.24.163\(6\)](#)). The mediator, or an administrator acting on their behalf, will begin contacting the two parties (borrower(s) and beneficiary) to schedule the mediation, exchange documents, and pay the fees. Mediation ends once the mediator completes and submits the Foreclosure Mediation Certification/Report to Commerce and to all the parties.

#### Postponing the Mediation:

Per [RCW 61.24.163\(6\)](#), the mediation session must take place within 70 days (from the mediator's receipt of Commerce's Notice) in the county where the borrower resides, unless the parties agree to extend this timeline. This means that **unless BOTH parties agree to extend the timeline** the mediation cannot be extended beyond the 70 days. In instances when one party does **not** agree to a time extension, the mediator should ensure that both borrower(s) and beneficiary understand that the case will be closed and certified without a session taking place and that the borrower may lose their opportunity to mediate. The mediator will then have to make a determination of good faith participation (per [RCW 61.24.163\(10\)](#)) and certify the case accordingly.

#### Documents Exchange:

The documents must be exchanged according to the statute: borrower submits documents to both mediator and beneficiary in 23 days from receipt of Commerce's Notice; the beneficiary submits documents to both mediator and borrower in 20 days from receipt of borrower's documents.

#### Scheduling Notice:

The mediator must send written notice (the "scheduling notice") of the mediation's date, time, and location to the borrower(s), the beneficiary, and copy Commerce, at least 30 days prior to the mediation session. The scheduling notice must include the statements described in [RCW 61.24.163\(7\)\(b\)](#). Commerce strongly recommends that mediators disclose in the scheduling notice their scheduling, re-scheduling, and fee policies. A sample/template scheduling notice may be found on Commerce's website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures) (see menu on the right-hand side).

#### Contacting the Parties to Ensure Readiness:

The mediator, or an administrator acting on their behalf, should contact both the borrower(s) and beneficiary prior to the scheduled mediation session "to ensure that the parties have all the necessary information and documents to engage in a productive mediation." (See [RCW 61.24.163\(7\)\(a\)](#).) If either party is not ready, the mediator must determine if the session needs to be rescheduled. However, both parties need to agree to reschedule a session beyond 70-day timeline contemplated in [RCW 61.24.163\(6\)](#).

*Pub. 5/6/13. Rev. 6/6/13; 6/17/13; 8/26/13.*

### **Borrower Eligibility in Question**

See "Mediators & Borrower Eligibility" section above.

*Pub. 6/17/13.*

### **Borrower's Attendance to Mediation, Power of Attorney**

The borrower(s) identified on the loan must attend the mediation **in person**. When a borrower cannot or does not want to attend the mediation in person, they can authorize a personal representative to act on their behalf at the mediation. However, the borrower should produce a **power of attorney** that clearly authorizes that representative to undertake binding negotiations on the borrower's behalf.

In cases with multiple borrowers, all borrowers identified on the loan must attend the mediation, unless one borrower gives written power of attorney to the other(s).

*Pub. 5/6/13.*

### **Beneficiary's Attendance to Mediation**

RCW 61.24.163(8)(a) states: "[...] a person with authority to agree to a resolution on behalf of the beneficiary may be present over the telephone or videoconference during the mediation session." During session, the mediator must ask the beneficiary's representative to indicate if they have authority to agree to a resolution on behalf of the beneficiary, and later document this in their Mediation Report/Certification.

*Pub. 5/6/13.*

### **Attendance at Additional Mediation Sessions**

A person with authority to agree to a resolution on behalf of the beneficiary must be present by phone, video, or in person during **any and all sessions**.

It is Commerce's view that the parties may agree that the borrower(s) and the beneficiary's legal representative (attorney) can appear at a **continued** session (or subsequent sessions) by phone, given that the two conditions listed below are met:

- The mediator allows it; and
- The mediator has written agreements from **both parties** (e-mail is acceptable).

*Pub. 5/6/13.*

### **Attendance of Guests, Observers, and Other Advocates**

The beneficiary, borrower, and mediator must agree in writing in order for guests and/or observers to attend a mediation session.

The borrowers need to attend the mediation in person but they are free to choose their representation, such as a housing counselor, an attorney, or any "other advocate." RCW 61.24.163(7)(i) does not specifically limit borrower's "other advocates" to housing counselors or attorneys and does not specifically limit the attendance of such supporters and/or advocates during foreclosure mediation. The foreclosure mediator can use his/her discretion to determine the extent of participation by advocate(s) for the borrower during a mediation session.

*Pub. 5/6/13.*

### Language Translation

When communicating with borrowers, the FFA does not require communication in a language other than English. However, best practice and fair dealing would favor providing letters in another language (if possible) if there is an indication that the borrower may have limited English proficiency.

Borrowers may bring any person they wish to interpret/translate the mediation proceedings with the consent of the mediator. The participation of a language interpreter during a mediation session will be determined by the foreclosure mediator. All costs associated with the interpreter will be the responsibility of the borrower.

*Pub. 5/6/13.*

### Net Present Value Requirements (Inputs vs. Test)

#### **Before mediation** (RCW 61.24.163(5)(g)):

The beneficiary must include in its document transmittal to the mediator and the borrower all the data used in any net present values (NPV) analysis. NPV input data that is required by any applicable federal mortgage relief program **must be provided**. If no federal mortgage relief program applies, the beneficiary **must provide** the NPV data inputs required by FDIC.

#### **During mediation** (RCW 61.24.163(9)(b) and (c)):

The FFA states the mediator **may require** the parties to run an NPV **test**. Commerce presumes that the mediator will require the NPV test to be completed. If a test is not completed, we expect the mediator to explain the reason for this (for example, "the borrower was not interested in keeping the house, all he wanted to discuss was a short-sale"). Also, the FFA states that the mediator must require the parties to run an NPV test during mediation if an NPV test is required for the applicable loan (e.g., federal mortgage). If the applicable loan does not require an NPV or if an NPV calculation is not provided, the beneficiary **must still provide before mediation the NPV data inputs** established by FDIC and published in the FDIC loan modification program guide (see above).

#### **After mediation** (RCW 61.24.163(12)(e)):

NPV inputs and/or test results must be reported on the certification **when an agreement was not reached**. If an NPV test was used during a mediation resulting in non-agreement, the certification must include: (1) the description of the NPV used, (2) copies of the inputs, and (3) the result of the NPV test expressed in a dollar amount. If there was no NPV test done during a mediation resulting in non-

agreement, the beneficiary must still provide copies of the NPV **inputs** and the mediator will need to provide an explanation on the certification as to why there was no NPV **test** done (as described above).

**Must the beneficiary offer a loan modification if the NPV result is positive?**

When the NPV test shows a “pass,” the beneficiary is **not** required to offer a loan modification. If it is a pass and there is no modification offered, that may constitute the basis to enjoin the foreclosure (see RCW 61.24.163(14)(c)). Commerce’s guidance is that a mediator does not find the beneficiary “in bad faith” **solely** because the NPV showed a pass and a modification was not offered. However, the mediator would need to include/attach the NPV inputs and results on the certification and indicate a loan modification was not offered along with the beneficiary’s cited basis for not offering a modification.

*Pub. 5/6/13.*

**Requirement to Produce the Pooling & Servicing Agreement**

If a beneficiary cites a Pooling & Servicing (P&S) Agreement as the basis for its inability to enter any proposed modification – including any that the borrower may propose – the beneficiary must produce the applicable sections of their P&S Agreement, and documentation, or a statement detailing the beneficiary’s efforts to obtain a waiver, as per RCW 61.24.163(5)(j).

*Pub. 5/6/13. Rev. 8/26/13.*

**Videotaping, Transcription, or Other Recording**

The FFA does not address recording mediations. The FFA appears to anticipate that mediations will not be like a “hearing” with a court recorder but more like a “private conversation.”

RCW 9.73.030 makes it unlawful to record a “private conversation” without permission (see RCW 9.73.030(1)(b)). The statute also says that consent is considered to be obtained if the person recording announces to everyone else that the conversation is being recorded and the announcement is on the recording (see RCW 9.73.030(3)). If the mediation is recorded, copies should be provided to all the parties who attended the session. If there is an objection to recording the mediation, Commerce has no authority to make a determination or provide legal advice on the issue.

*Pub. 5/6/13.*

**Relocation of a Scheduled Mediation**

Commerce will not reassign a mediator in another location for the convenience of the parties if the mediator has already made substantial efforts to prepare for the mediation session, scheduled the mediation date and/or the fee payments have been received. Commerce does not view RCW 61.24.163(4)(a) as meaning that the parties can change the location at any point in the process. In order to relocate a scheduled mediation, the parties may make compensation arrangements for the current mediator to travel to and conduct the mediation at the new location other than the location where the

mediation had been scheduled, **or** compensate the mediator on an agreed upon amount for time and effort already invested to prepare for the scheduled mediation, and **then** request that Commerce reassign the referral to another mediator. Both of these options are at the discretion of the assigned mediator.

*Pub. 5/6/13.*

### **Mediation Continuances**

The stated purpose of the foreclosure mediation process is to create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible. The mediator has the discretion to continue the mediation session **once**. Under RCW 61.24.163(8)(b), only **after a mediation session commences** the mediator may continue the mediation session **once**, and any further continuances must be with the consent of the parties.

The mediator cannot “continue” **before** the mediation commenced (i.e., parties came to the table and met)—rescheduling a mediation session is not the same as continuing the session.

Mediators can use a continuance to wait for a final decision before issuing a Mediation Certification/Report. However, because the statute (RCW 61.24.163(12)) requires the mediator to submit a certification within seven business days after the conclusion of the mediation **session**, Commerce recommends that when continuances are needed, the mediator **schedules** the continuance session, rather than keeping the mediation “open” with no scheduled session on the books. If it is determined later that the additional session is not needed, the mediator can cancel it and certify the case accordingly.

If the parties reach a temporary loan modification agreement (such as a Temporary Payment Plan), Commerce recommends that the mediator use their continuance to continue the session until the temporary loan modification period is completed. At that point, the mediator can determine if it has become a permanent loan modification and certify it accordingly. If the permanent loan modification fails, the mediator may conduct the session to complete the mediation by addressing other available alternatives to foreclosure, as required by the FFA.

*Pub. 5/6/13. Rev. 6/6/13.*

### **Substituting Mediators**

The mediator assigned by Commerce must conduct the mediation and complete and sign the Mediation Certification/Report. If the assigned mediator is unavailable or unwilling to conduct the mediation, he/she must notify Commerce immediately. Commerce will reassign the case to another approved mediator who is available within the same county and notify all parties. If the mediator is affiliated with a Dispute Resolution Center (DRC) or other mediator organization, Commerce will make all efforts to assign a mediator affiliated with the same DRC/organization, particularly if the DRC/organization has *already spent time and resources on the case*.

If it is an unforeseen emergency, last-minute situation (e.g., the mediation is scheduled for the next day and the mediator has a medical emergency), a DRC/organization may re-assign the case to another mediator. The DRC/organization must, however, offer two options to the borrower and beneficiary: reschedule the session or agree to the substitution in writing. If a substitution is agreed on, the DRC/organization must notify Commerce.

Commerce will not assign or re-assign mediators upon request or preference from either party.

*Pub. 5/6/13.*

### **Document Requirements When Other Foreclosure Alternatives Are Considered**

The statute provides guidance regarding documents required for a loan modification, but is silent regarding documents required for a short sale and other possible mediation outcomes. However, the FFA does say:

RCW 61.24.163(7)(a) *The mediator may schedule phone conferences, consultations with the parties individually, and other communications to ensure that the parties have all the necessary information and documents to engage in a productive mediation.*

AND the organization must notify Commerce.

RCW 61.24.163(9) *The participants in mediation must address the issues of foreclosure that may enable the borrower and the beneficiary to reach a resolution, including but not limited to reinstatement, modification of the loan, restructuring of the debt, or some other workout plan.*

When the parties indicate that they wish to discuss a short sale or something else other than a loan modification, the mediator may confer with both parties to determine what documents will be most useful to facilitate an effective discussion during mediation. The statute clearly allows the mediators to have preparatory discussions with each party and to require any and all documents necessary to complete the mediation with discussions of all available foreclosure alternatives.

Also, according to RCW 61.24.163(10)(b), the mediator has reasonable discretion to determine what documents are to be submitted and when, as well as how to conduct the scheduling of the mediation session generally.

*Pub. 5/6/13.*

### **Mediations That Do Not Occur**

The mediator assigned to a case will need to complete a Certification/Report even if the mediation is cancelled for any reason, including for the reasons listed in RCW 61.24.163(11) (see below). The Certification/Report must identify the reason for cancellation and be sent to the borrower(s), beneficiary, trustee, referrer, and Commerce. Commerce will NOT send cancellation letters to the parties (with some exceptions, e.g., if Commerce receives proof that the beneficiary is exempt from

mediation — see “Exempt Beneficiary” section). Also see “Mediation Cancelled by Mediator, per RCW 61.24.163(11)” section below.

*Pub. 5/6/13. Rev. 9/16/13.*

### **Mediation Cancelled by Mediator, per RCW 61.24.163(11)**

RCW 61.24.163(11) reads as follows:

*“If the mediator reasonably believes a borrower will not attend a mediation session based on the borrower’s conduct, such as the lack of response to the mediator’s communications, the mediator may cancel a scheduled mediation session and send a written cancellation to the department and the trustee and send copies to the parties. The beneficiary may proceed with the foreclosure after receipt of the mediator’s written confirmation of cancellation.”*

While the statute does not require documentation of the borrower’s conduct which leads to the cancellation, Commerce strongly recommends that mediators **document in writing** the basis for their “reasonable belief” that a borrower will not attend mediation. Prior to certifying the cancelled mediation due to borrower’s conduct, Commerce recommends that the mediator consider sending the borrower a **warning letter/email** specifying that their mediation may be cancelled and the possible consequences, such as the borrower’s losing their right to mediate under the FFA.

Commerce encourages mediators to contact the borrower directly if their repeated attempts to communicate with the borrower’s representative (attorney or counselor) failed. Commerce recommends that mediators document all of their communication attempts in writing.

Note that the mediation session **must have been scheduled** before the cancellation by mediator contemplated in RCW 61.24.163(11) becomes a possibility.

The beneficiary may proceed with the foreclosure after receipt of the mediator’s written confirmation of cancellation, according to RCW 61.24.163(11).

Also note that the FFA **does not specify** the mediation will be cancelled if borrower fails to submit all documents within the 23-day period. Instead, RCW 61.24.163(10) states:

*“A violation of the duty to mediate in good faith as required under this section **may** include: [...] (b) failure of the borrower or the beneficiary to provide the documentation required for mediation or pursuant to the mediators instructions.”*

The mediator has reasonable discretion to determine what documents are to be submitted and when, as well as how to conduct the scheduling of the mediation session generally.

*Pub. 5/6/13. Rev. 9/16/13.*

### Mediations Cancelled When Ineligible

Commerce will send cancellation letters to all parties when a mediation case is assigned to a mediator and is later determined by Commerce to be ineligible (such as the beneficiary is exempt or due to clerical errors).

If there are borrower ineligibility claims from the beneficiary and/or trustee, which are not clearly evidenced, Commerce will let the mediation process move forward. If the beneficiary believes it does not have to mediate for any reason, it is free to do as it chooses. Borrowers and beneficiaries alike need to explain to their mediator the reason for not participating in mediation when they chose not to. The mediator should then certify/report the case accordingly, i.e., "mediation did not occur" and list the reasons. The mediator may use his/her discretion, as contemplated under the statute, and may make a determination whether or not the beneficiary acted in good faith in not participating in mediation.

*Pub. 5/6/13.*

### Borrower Withdrawal Prior to Mediation

If the referrer or borrower withdraws the referral **before** a mediator has been assigned, Commerce will stop the process (not assign a mediator) and inform the trustee that the mediation request has been withdrawn. In these cases, cancellation letters will **not** be sent by Commerce to the parties.

If a case was already assigned to a mediator, the referrer or borrower must send their written withdrawal request, including their explanation for withdrawal, to the mediator.

When a borrower wishes to withdraw from mediation, the mediator **must attempt** to determine the cause for withdrawal before certifying the case and inform Commerce of the reason. Commerce recognizes that there are situations when a postponement rather than a withdrawal could be in both parties' interest. The mediator should encourage both parties—**borrower and beneficiary**—to discuss and reach a **mutual agreement** to postpone the mediation, to jointly request the mediator postpone and re-schedule, and to agree as to payment of any additional costs the postponement may cause.

#### Unilateral Withdrawals:

If postponement is not agreed on and the borrower withdraws from mediation for what seems to be a good reason, the mediator could certify the case as "Mediation Did Not Occur" and describe the reason or circumstances. If a borrower **unilaterally withdraws** from mediation **without good cause or explanation**, it is reasonable for the mediator to submit the report certifying that the borrower did not participate in good faith due to "lack of timely participation."

#### Agreements Reached Prior to Mediation:

The FFA provides for a mediation session conducted by a neutral third party whose role is to facilitate a full and fair evaluation of ALL documentation from both parties and ALL reasonable foreclosure alternatives, as required by the FFA. **An agreement reached outside of mediation is NOT a substitute for a complete mediation session.** The mediators must NOT certify such outside agreements as an outcome of mediation, i.e., "mediation occurred – agreement reached."

If a prior agreement takes place and no mediation occurs, **the mediator shall report the case as "Mediation Did Not Occur"** and provide an explanation of the circumstances. For example: "A Permanent Loan Modification agreement was accepted prior to mediation" or "The parties reached a short-sale agreement prior to mediation."

In cases where a **temporary** agreement is reached prior to mediation (such as a Temporary Payment Plan (TPP)) and the borrower contemplates withdrawing from mediation, Commerce recommends that mediators offer to keep the mediation case "open" until the TPP becomes permanent. This will require, however, that a mediation session **is scheduled**. If the TPP becomes a permanent modification, the mediator can cancel the session and certify the case accordingly. If the TPP fails, the mediator may then conduct the session to address other available alternatives to foreclosure, as required by the FFA.

Pub. 5/6/13. Rev. 6/6/13.

## **GUIDANCE REGARDING CERTIFICATIONS/REPORTS**

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### **Completing the Mediation Report/Certification**

Once a case had been assigned to a mediator, it is that mediator's responsibility to complete a Mediation Certification/Report at the conclusion of the mediation process, **even if a session did not occur**.

**Commerce will not cancel mediations after a case had been assigned to a mediator.** (Some exceptions may apply such as the assignment or referral was made in error, or the beneficiary is exempt.) Once a case had been assigned to a mediator, Commerce expects the assigned mediator to complete and submit a certification at the conclusion of the case. If mediation did not occur or is cancelled for any reason, the mediator must select the "No Mediation Occurred" outcome and choose from the listed options.

Commerce recognizes that all cases are different and the Certification/Report form provided cannot cover any and all possible scenarios. Mediators are encouraged to use the **Comments box** (at the bottom of the form) and include any information that cannot be captured otherwise or that may be necessary or relevant to the case.

**Commerce would like to remind mediators that these forms, once received by Commerce, become public record, so mediators should be mindful of including private and/or sensitive information.**

Commerce must have complete and accurate information to meet our reporting obligations to Legislature and stakeholders. Below are a few steps to ensure that certifications are *correctly* submitted:

1. The new Mediator Report/Certification form posted on our website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures) (see menu on the right-hand side) must be used for all cases.

2. **Mediators must follow the instructions included at the top of the form for completing, printing, and submitting their Certification/Report.**
3. The certification form needs to be typed. Commerce will not accept handwritten certifications.
4. ALL fields must be completed, so there will be no room left for guessing. N/A should be entered where not applicable.
5. The date, time, and location of the mediation session(s) are required by statute. They should not be left blanks unless the mediation did not occur.
6. The names of ALL of the persons participating in all of the mediation session(s) must be included, and a participation type for each person must be selected. The Comments box can be used to provide clarifications if necessary.
  - a. The borrower(s) must participate in person (unless they have someone with a power of attorney representing them).
  - b. The certification needs to show that a person with authority to settle for the beneficiary participated in the mediation. The person's name, title, and complete contact information must be entered. A selection in the "Authority" dropdown menu must be made.
7. The three mediation outcomes are mutually exclusive—only one outcome should be selected. Sub-outcomes pertaining to that outcome can then be selected.
8. All options that require comments (such as "specify reason" or "Other") must include a brief explanation of the circumstances. Commerce will not accept certifications that are missing explanations in the options that require comments.
9. All three Net Present Value questions must be answered. Attachments may be required, per the instructions in the Net Present Value section.
10. The Comments box should be used for additional, relevant information, or to clarify information entered in other parts of the form.
11. Once printed (by using the "Click to Print Report" button), the form must be scanned, hand-signed and dated by the mediator assigned by Commerce. Then the form must be emailed to [ForeclosureMediation@commerce.wa.gov](mailto:ForeclosureMediation@commerce.wa.gov) with "BORROWER-LAST-NAME – Certification" in the subject line. Signed forms may be mailed in hard-copy if the mediator does not have scanning capacity.

Pub. 5/6/13. Rev. 8/26/13; 9/16/13.

### **Completing the Certification When Continuances Are Necessary**

Because the statute ([RCW 61.24.163\(12\)](#)) requires the mediator to submit a certification within seven business days after the conclusion of the mediation session, Commerce recommends that when

11. Once printed (by using the "Click to Print Report" button), the form must be scanned, hand-

continuances are needed, the mediator **schedules** the continuance session, rather than keeping the mediation "open" with no scheduled session on the books. If it is determined later that the additional session is not needed, the mediator can cancel it and certify the case accordingly, with an explanation (in the Comments box) for the delay in the certification.

Pub. 6/6/13. Rev. 9/16/13.

### Distribution of Written Certifications

According to RCW 61.24.163(12): "Within seven **business** days after the conclusion of the mediation session, the mediator must send a written certification to the department and the trustee and send copies to **the parties...**" The participants listed below should receive a copy of the **signed** Mediation Report/Certification:

- The borrower(s)\*
- The borrower's attorney and/or housing counselor
- The referring party
- The beneficiary
- The beneficiary's attorney and/or other representative
- Department of Commerce
- Other participants, at the mediator's discretion

A signed Mediation Certification/Report form shall be submitted to the Department of Commerce via email at [ForeclosureMediation@commerce.wa.gov](mailto:ForeclosureMediation@commerce.wa.gov). See "Completing the Mediation Report/Certification" section above. Additional copies may be sent in either hardcopy or via email to all other participants.

- \* The mediator shall send a copy of the report to the borrower as per statute, **regardless** of a "notice of appearance" or other documents from the borrower's attorney indicating that correspondence with the borrower should be directed to the attorney.

Pub. 5/6/13.

### Re-certification or Certification Withdrawal

A mediator may withdraw or revise and redistribute the Mediation Certification/Report form **IF there was a material omission or oversight during the mediation session(s) and process, which would have changed the outcome of the mediation.**

Commerce's guidance is that if a mediator has reason to believe that there was a material oversight during the session and the mediation process (BUT before the issuance of the Mediation Report/Certification), he/she can re-issue or withdraw the certification. The mediator *should* explain what the material oversight was **and document it**. The decision to re-issue or withdraw the certification is solely the mediator's, based on documentation/evidence of the material oversight. Commerce views this guidance as consistent with the FFA requirement that a mediator issue a certification reflecting the

mediation, and that the participants in mediation address issues of foreclosure that may enable the borrower and beneficiary to reach resolution (RCW 61.24.163(9) and (12)).

If the mediator issues a re-certification or withdrawal, it should be distributed to the same parties who received the original Mediation Certification/Report with an explanation of the material omission or oversight.

*Pub. 5/6/13.*

### **Mediating in Good Faith**

When certifying whether each party has acted in good faith pursuant to RCW 64.24.163(10), the mediator has reasonable discretion to determine whether the actions of each party were in substantial compliance with the requirements and the intent of the statute, as noted by the use of the words “may include.” The items listed in RCW 64.24.163(10) indicate “lack of good faith” but are not the exclusive basis for a determination of “lack of good faith.”

The mediator should consider:

- Whether both parties mediated in good faith.
- Whether both parties were able to effectively reach a mutually acceptable agreement.
- Whether the lack of any item specified in Section RCW 61.24.163(7)(a) had a material effect on the outcome or may have compromised the result in any significant manner.

*Pub. 5/6/13.*

## **GUIDANCE REGARDING FEES**

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### **Mediation Fees**

Mediators should **disclose ALL fees** and related policies **upfront** in the mediation agreement or the scheduling notice they are sending out to the parties when the mediation is first scheduled.

For purposes of mediation payment, mediation starts once the mediator, or an administrator acting on their behalf, begins contacting the parties to schedule the mediation.

According to the FFA at RCW 61.24.163(17), mediators may charge reasonable fees as authorized by Commerce. Unless the fee is waived or the parties (borrower and beneficiary) agree otherwise, a foreclosure mediator's fee may not exceed \$400 for preparing, scheduling, and conducting a mediation session lasting between one and three hours.

Mediators are authorized to charge a fourth hour of mediation at \$130. Commerce has not authorized fees for a mediation session that extends beyond four hours.

If the parties agree, the mediator may charge the same amounts for continuances or additional sessions.

Payment of the mediator's fee(s) must be divided equally between the beneficiary and the borrower.

Mediation fees are non-refundable once the mediation session is scheduled or other substantial preparation has started. This also applies to continuances or additional sessions. However, mediators may opt to refund a portion of the fee at their discretion.

*Pub. 5/6/13.*

### **Rescheduling Fees**

RCW 61.24.163(6) states that the "[...] parties may agree to extend the time in which to schedule the session lasting between one and three hours mediation session." Commerce takes the position that once the mediation is scheduled both parties (borrower and beneficiary) may agree to reschedule or postpone the session, but rescheduling or postponing is at the discretion of the mediator. This means that the mediator may ask for a rescheduling fee. If the parties do not agree to this fee, the mediator may refuse to reschedule and the parties must attend the mediation as originally scheduled.

*Pub. 5/6/13.*

## GUIDANCE REGARDING APPROVED FORECLOSURE MEDIATORS

### Approving Mediators

In Washington State mediators can mediate FAA mediations if they meet certain minimum requirements AND are approved by Commerce (RCW 61.24.169). Commerce maintains an approved mediators list, which can be found on our FFP website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures).

**Commerce reserves the right to approve a mediator or remove a mediator from the FFA approved mediators list.**

Any candidate who wishes to become an approved foreclosure mediator will be required to successfully complete the following:

- Meet all of the minimum statutory requirements (see below).
- Submit an application to serve as a FFA mediator, which includes documentation of the mandatory experience, qualifications, and training.
- Attend a Commerce foreclosure mediator training program.
- Co-mediate at least three FFA mediations within the parameters required by Commerce.

The minimum statutory requirements identified in RCW 61.24.169(1) are:

1. Must have completed 10 mediations; **AND**
2. Must have accomplished **ONE** of the following:
  - Completed a 40-hour mediation course **AND** 60 hours of mediating
  - Has 200 hours of mediating experience; **AND**
3. Is **ONE** of the following:
  - Attorney who is active member of the Washington State Bar Association (WSBA)
  - Employee of a U.S. Department of Housing and Urban Development (HUD) approved housing counselor agency or approved by the Washington State Housing Finance Commission (HFC)
  - Employee or volunteer of a Dispute Resolution Center (DRC) under Chapter 7.75 RCW
  - Retired judge of Washington courts
  - Other experienced mediator

*Pub. 5/6/13, Rev. 6/6/13.*  
Must have completed 10 mediations; **AND**

### Assigning Mediators to Cases

Commerce relies on our FFP database to assign mediators to eligible cases based on the mediator's service county, capacity, and availability. Cases are assigned to mediators automatically, without emailing or calling in advance to inquire about the mediator's availability. Mediation case Notices are

## Foreclosure Fairness Program Guidelines

sent electronically (by email) to the mediator, trustee, and referrer. Hardcopy Notices are mailed (by postal service) to the beneficiary and the borrower(s).

Service counties mean the counties in which the mediator is willing to mediate. Capacity means the maximum number of cases that a mediator can and is willing to have open at any point in time. The availability is based on a mediator's capacity and the actual number of open cases.

Commerce will not assign or re-assign mediators upon request or preference from either party.

*Pub. 5/6/13. Rev. 9/16/13.*

### **Conflicts of Interest, Mediators Also Acting as Homebuyer Advocates**

Mediators who are also attorneys and choose to represent homebuyers in foreclosure mediations may be subject to limitations on the type and number of mediations assigned to them, due to the potential for a conflict of interest with one or more beneficiaries. Commerce expects that mediators recuse themselves from cases that pose conflicts.

*Pub. 5/6/13.*

### **Privacy and Confidentiality**

The FFA is silent as to mediator responsibility for confidentiality of parties' information. However, best practice is for mediators to observe confidentiality and refrain from sharing information outside of mediation. Mediators should also be aware that laws other than the FFA may forbid disclosure of certain information that is provided in mediation.

*Pub. 5/6/13.*

### **Complaints Regarding Mediators**

Complaints about mediators need to be submitted to Commerce in writing using the FFP Complaint Form posted on our website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures) (see menu on the right-hand side). Instructions on how to complete the form and what to expect are included in the form.

Typically, complaints are about a mediation certification or about a mediator's conduct or bias. **Commerce will NOT process complaints about a beneficiary's conduct, attorney's conduct (representing the borrower or the beneficiary), or other parties' conduct.**

Complaints about a beneficiary's conduct or actions should be submitted to the Washington State Office of the Attorney General Consumer Protection Division. The Consumer Protection Division created the Foreclosure Compliance Program to enforce the Deed of Trust Act, as required by the Act.

Complaints about Washington State housing counselors can be emailed it to [ForeclosureMediation@commerce.wa.gov](mailto:ForeclosureMediation@commerce.wa.gov). Commerce will forward them to the Housing Finance

## Foreclosure Fairness Program Guidelines

Commission, which contracts with the housing counselor agencies across the state that provide these services.

When Commerce receives a complaint regarding the manner in which an approved foreclosure mediator conducted a mediation and/or certified the results of the mediation, Commerce will review the complaint and provide the mediator with the opportunity to respond to the issues raised by the complainant.

If the complaint is about a certification, Commerce's guidance is:

- if there was a material oversight during session(s) or the mediation process, the mediator can withdraw or re-certify their certification, and provide an explanation to all parties;
- if there was no material oversight, the mediator may retain the certification as submitted.

Regardless of their decision about the certification, we ask the mediator to provide Commerce with a response to the issues raised by the complainant.

After we receive the mediator's response, we review it and evaluate it for completeness and compliance with the statute. If we need clarifications or have questions, we follow-up with the mediator by email or phone call.

Once the mediator's response is complete to Commerce's satisfaction, we respond to the complainant with our findings. In some cases we may forward a copy of the mediator's response to the complainant.

Commerce tracks all of the complaints and watches for patterns of bias, misconduct, or egregious errors. While Commerce does not have any authority to re-certify or withdraw certifications, should such a pattern become apparent for a mediator, Commerce has the authority to remove that mediator from the approved mediators list.

*Pub. 5/6/13. Rev. 6/17/13; 9/16/13.*



January 31, 2014

[REDACTED]

Loan #: [REDACTED]  
Property Address:  
[REDACTED]  
SPOKANE, WA 99205

Dear [REDACTED]:

**Congratulations! You are eligible for a Freddie Mac Standard Modification, which will permanently change the terms of your mortgage.** If you comply with the terms of the required Trial period Plan, we will modify your mortgage and may waive all prior late charges that remain unpaid.

The enclosed modification agreement ("Freddie Mac Standard Modification Agreement") reflects the proposed terms of your modified mortgage.

**To Accept This Offer:**

**Sign and return** both copies of the Loan Modification Agreement back to us in the enclosed, pre-paid envelope by **February 10, 2014**. If you do not send both signed copies of the Freddie Mac Standard Modification Agreement by the above date, you must contact us if you still wish to be considered for this program and have your loan modified.

- If the Loan Modification Agreement has notary provisions at the end, you must sign both copies before a notary public and return the notarized copies to us.
- We encourage you to make a copy of all documents for your records.

**Make all remaining trial period payments** on or before the dates they are due. If the trial period payments are made after their due dates or in amounts different from the trial period payment amount required, your mortgage loan may not be able to be modified.

To better understand the proposed terms of your modified mortgage, please read the attached summary of your modified mortgage and the Loan Modification Agreement.

Don't delay — take advantage of this great offer by February 10, 2014.

Sincerely,  
NATIONSTAR MORTGAGE LLC

*Attachments: Summary of Your Modified Mortgage, Agreement to Establish Escrow, Two copies of the Modification Agreement*



8763 11/12



\* 9 2 1 7 0 + 1 0 \*

[REDACTED]

[REDACTED]

**SUMMARY**

Here is a summary of your modified mortgage.

**NEW PRINCIPAL BALANCE.** Any past due amounts as of the end of the trial period, including unpaid interest, real estate taxes, insurance premiums, and certain assessments paid on your behalf to a third party, will be added to your mortgage loan balance. In addition, your mortgage insurance premium may increase as a result of the higher mortgage loan balance. **If you fulfill the terms of the trial period including, but not limited to, making any remaining trial period payments, we will waive ALL late charges that have accrued and remain unpaid at the end of the trial period.**

**ESCROW ACCOUNT.** The terms of your Modification Agreement require the servicer to set aside a portion of your new monthly payment in an escrow account for payment of your property taxes, insurance premiums and other required fees. Any prior waiver of escrows by your lender is no longer in effect. Your servicer will draw on this account to pay your real estate taxes and insurance premiums as they come due. Please note that your escrow payment amount will adjust if your taxes, insurance premiums and/or assessment amounts change, so the amount of your monthly payment that your servicer must place in escrow will also adjust as permitted by law. This means that your monthly payment may change. Your initial monthly escrow payment will be **\$248.37**. This amount is included in the loan payment noted in Section 3.C. of the enclosed Modification Agreement; you do not need to remit this amount separately.

**ESCROW SHORTAGE.** Due to the timing of your tax and insurance payments, we have determined that there is a shortage of funds in your escrow account in the amount of **\$1,542.00**. You may pay this amount over a 5-year (60 months) period. This monthly payment has already been included in the monthly escrow payment stated above. **If you wish to pay the total shortage now in a lump sum, please contact us. Paying this amount now in a lump sum will reduce your new monthly mortgage payment.**

**PAYMENT SCHEDULE.** The enclosed Modification Agreement includes a payment schedule in Section 3.C. showing your payment plan for the life of your modified loan after the trial period.

**FEES.** There are no fees or other charges for this modification.

**REPRESENTATIONS.** Please read the enclosed Modification Agreement carefully and make sure that you understand it and that the statements set forth in the "My Representations" section are true and accurate. If you have any questions, please contact us at 1-888-366-1119.



Loan No.: [REDACTED]  
Borrower: [REDACTED]

### AGREEMENT TO MAINTAIN ESCROW ACCOUNT

WHEREAS, [REDACTED] ("Borrower") desires NATIONSTAR MORTGAGE LLC ("Lender") to collect payments from Borrower to be held by Lender for the payment of certain sums due in connection with Borrower's Note and Security Instrument, dated \_\_\_\_\_, (hereinafter referred to as "Note" and "Security Instrument" respectively) currently held by Lender;

NOW THEREFORE, in consideration of the foregoing and the mutual covenants contained in this Agreement ("Agreement"), Borrower agrees to pay Lender, on the day Periodic Payments are due under the Note, until the Note is paid in full, or the Escrow Account is otherwise terminated pursuant to this Agreement or in accordance with applicable law, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over the Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under the Security Instrument; and (d) Mortgage Insurance Premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums. These items are called "Escrow Items." In the event that Borrower receives bills, assessments, invoices, or other requests for payment of Escrow Items, Borrower shall promptly furnish to Lender all such notices.

Borrower shall pay Lender the Funds for Escrow Items unless this Agreement is terminated either by Lender, or pursuant to applicable law. In the event of termination, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. In the event Borrower is obligated to pay Escrow Items directly, and Borrower fails to pay the amount due for an Escrow Item, Lender may pay such amount in accordance with the terms of the Note and Security Instrument and Borrower shall then be obligated to repay Lender any such amount. Additionally, if Borrower is obligated to pay Escrow Items directly, and Borrower fails to pay the amount due for an Escrow Item, Lender may, in accordance with applicable law, require Borrower to maintain an Escrow Account.

Borrower agrees to make an initial payment of Funds to establish the escrow account, which amount shall be based on an estimate of the amount and date of expenditures for future Escrow Items, or otherwise in accordance with the Real Estate Settlement Procedures Act ("RESPA"). The estimate of expenditures of future Escrow Items shall be made based on current data available to Lender. Borrower acknowledges that the actual payments of Escrow Items may vary from the estimated amounts.

Lender will collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with applicable law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time period specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charge. Unless agreed to in writing or applicable law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to



Loan No.: [REDACTED]  
Borrower: [REDACTED]

Lender the amount necessary to make up the shortage in accordance with RESPA. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument or termination of this Agreement, Lender shall promptly refund to Borrower any Funds held by Lender.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Agreement to Maintain Escrow Account.

\_\_\_\_\_  
Borrower - [REDACTED]

\_\_\_\_\_  
Date

\_\_\_\_\_  
Borrower - [REDACTED]

\_\_\_\_\_  
Date

\_\_\_\_\_  
Borrower -

\_\_\_\_\_  
Date

\_\_\_\_\_  
Borrower -

\_\_\_\_\_  
Date



After Recording Return To:  
NATIONSTAR MORTGAGE LLC  
350 HIGHLAND DRIVE  
LEWISVILLE, TX 75067

This Document Prepared By:  
NATIONSTAR MORTGAGE LLC  
350 HIGHLAND DRIVE  
LEWISVILLE, TX 75067  
Tatiana Vakidis

Parcel ID Number: Prior instrument  
reference:

\_\_\_\_\_

\_\_\_\_\_ [Space Above This Line For Recording Data]

Loan No.: \_\_\_\_\_

Original Loan Amount: \_\_\_\_\_  
New Money: \$29,343.03

## FREDDIE MAC STANDARD MODIFICATION AGREEMENT

Borrower ("I"): \_\_\_\_\_ and \_\_\_\_\_. If more than one Borrower or Mortgagor is executing this document, each is referred to as "I." For purposes of this document words signifying the singular (such as "I") shall include the plural (such as "we") and vice versa where appropriate.

Lender or Servicer ("Lender"): **NATIONSTAR MORTGAGE LLC, whose address is 350 HIGHLAND DRIVE, LEWISVILLE, TX 75067**

Date of first lien mortgage, deed of trust, or security deed ("Mortgage") and Note ("Note"):

Loan Number: \_\_\_\_\_

Property Address ("Property"): \_\_\_\_\_  
**SPOKANE, WA 99205**

### Legal Description:

If my representations and covenants in Section 1 continue to be true in all material respects, then this Freddie Mac Standard Modification Agreement ("Agreement") will, as set forth in Section 3, amend and



FREDDIE MAC STANDARD MODIFICATION AGREEMENT  
8783b 01/14

(page 1 of 9 pages)

supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage. The Mortgage and Note together, as they may previously have been amended, are referred to as the "Loan Documents." Capitalized terms used in this Agreement and not defined have the meaning given to them in Loan Documents.

I understand that after I sign and return two copies of this Agreement to the Lender, the Lender will send me a signed copy of this Agreement. This Agreement will not take effect unless the preconditions set forth in Section 2 have been satisfied.

**1. My Representations and Covenants.** I certify, represent to Lender, covenant and agree:

- A. I am experiencing a financial hardship, and as a result, (i) I am in default under the Loan Documents, and (ii) I do not have sufficient income or access to sufficient liquid assets to make the monthly mortgage payments now or in the near future;
- B. The property has not been condemned nor have I received notice of condemnation.
- C. There has been no impermissible change in the ownership of the Property since I signed the Loan Documents. A permissible change would be any transfer that the lender is required by law to allow, such as a transfer to add or remove a family member, spouse or domestic partner of the undersigned in the event of a death, divorce or marriage;
- D. I have provided documentation for all income that I receive (and I understand that I am not required to disclose child support or alimony unless I chose to rely on such income when requesting to qualify for the Freddie Mac Standard Modification Program ("Program"));
- E. Under penalty of perjury, all documents and information I have provided to Lender in connection with this Agreement, including the documents and information regarding my eligibility for the Home Affordable Modification Program (HAMP) and Freddie Mac Standard Modification, are true and correct; and
- F. I have made or will make all payments required under a Trial Period Plan or as directed by my Lender until my Loan Documents are permanently modified in accordance with this Agreement.
- G. In the event that I was discharged in a Chapter 7 bankruptcy proceeding subsequent to the execution of the loan documents and did not reaffirm the mortgage debt under applicable law, Lender agrees that I will not have personal liability on the debt pursuant to this Agreement.

**2. Acknowledgements and Preconditions to Modification.** I understand and acknowledge that:

- A. If prior to the Modification Effective Date as set forth in Section 3 the Lender determines that any of my representations in Section 1 are no longer true and correct, the Loan Documents will not be modified and this Agreement will terminate. In that event, the Lender will have all of the rights and remedies provided by the Loan Documents;



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B. The Loan Documents will not be modified unless and until (i) I receive from the Lender a copy of this Agreement signed by the Lender, and (ii) the Modification Effective Date (as defined in Section 3) has occurred. I further understand and agree that the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Agreement; and

C. I DO NOT MEET THE ELIGIBILITY REQUIREMENTS FOR A MODIFICATION UNDER THE FEDERAL GOVERNMENT'S HOME AFFORDABLE MODIFICATION PROGRAM AND THEREFORE I WILL NOT RECEIVE ANY INCENTIVE PAYMENTS FOR TIMELY PAYMENTS OF MY MONTHLY PAYMENT.

3. **The Modification.** If my representations and covenants in Section 1 continue to be true in all material respects and all preconditions to the modification set forth in Section 2 have been met, the Loan Documents will automatically become modified on **February 1, 2014** (the "Modification Effective Date") and all unpaid late charges that remain unpaid will be waived. I understand that if I have failed to make any payments as a precondition to this modification under a trial period plan, this modification will not take effect. The first modified payment will be due on **March 1, 2014**.

A. The Maturity Date will be: **February 1, 2054**.

B. The modified principal balance of my Note will include all amounts and arrearages that are past due past due as of the Modification Effective Date (including unpaid and deferred interest, fees, escrow advances and other costs, but excluding unpaid late charges, collectively, "Unpaid Amounts") less any amounts paid to the Lender but not previously credited to my Loan. The new principal balance of my Note will be **\$155,191.36** (the "New Principal Balance"). I understand that by agreeing to add the Unpaid Amounts to the outstanding principal balance, the added Unpaid Amounts will accrue interest based on the interest rate in effect under this Agreement. I also understand that this means interest will now accrue on the unpaid Interest that is added to the outstanding principal balance, which would not happen without this Agreement.

C. Interest at the rate of **4.000%** will begin to accrue on the New Principal Balance as of **February 1, 2014** and the first new monthly payment on the New Principal Balance will be due on **March 1, 2014**. My payment schedule for the modified Loan is as follows:

Years	Interest Rate	Interest Rate Change Date	Monthly Prin & Int Payment Amount	Monthly Escrow Payment Amount	Total Monthly Payment	Payment Begins On	Number of Monthly Payments
1-40	4.000%	February 01, 2014	\$648.60	\$248.37 May adjust periodically	\$896.97 May adjust periodically	March 01, 2014	480



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\*The escrow payments may be adjusted periodically in accordance with applicable law and therefore my total monthly payment may change accordingly.

The above terms in this Section 3.C. shall supersede any provisions to the contrary in the Loan Documents, including but not limited to, provisions for an adjustable, step or simple interest rate.

I understand that, if I have a pay option adjustable rate mortgage loan, upon modification, the minimum monthly payment option, the interest-only or any other payment options will no longer be offered and that the monthly payments described in the above payment schedule for my modified Loan will be the minimum payment that will be due each month for the remaining term of the Loan. My modified Loan will not have a negative amortization feature that would allow me to pay less than the interest due resulting in any unpaid interest being added to the outstanding principal balance.

- D. I will be in default if I do not comply with the terms of the Loan Documents, as modified by this Agreement.
- E. If a default rate of interest is permitted under the Loan Documents, then in the event of default under the Loan Documents, as amended, the interest that will be due will be the rate set forth in Section 3.C.
- F. I agree to pay in full the Deferred Principal Balance and any other amounts still owed under the Loan Documents by the earliest of: (i) the date I sell or transfer an interest in the Property, (ii) the date I pay the entire Interest Bearing Principal Balance, or (iii) the Maturity Date.

4. **Additional Agreements.** I agree to the following:

- A. That all persons who signed the Loan Documents or their authorized representative(s) have signed this Agreement, unless (i) a borrower or co-borrower is deceased; (ii) the borrower and co-borrower are divorced and the property has been transferred to one spouse in the divorce decree, the spouse who no longer has an interest in the property need not sign this Agreement (although the non-signing spouse may continue to be held liable for the obligation under the Loan Documents); or (iii) the Lender has waived this requirement in writing.
- B. That this Agreement shall supersede the terms of any modification, forbearance, Trial Period Plan or other agreement that I previously entered into with Lender.
- C. To comply, except to the extent that they are modified by this Agreement, with all covenants, agreements, and requirements of Loan Documents including my agreement to make all payments of taxes, insurance premiums, assessments, Escrow Items, impounds, and all other payments, the amount of which may change periodically over the term of my Loan.
- D. That this Agreement constitutes notice that the Lender's waiver as to payment of Escrow Items, if any, has been revoked, and I have been advised of the amount needed to fully fund my escrow



account

- E. That the Loan Documents are composed of duly valid, binding agreements, enforceable in accordance with their terms and are hereby reaffirmed.
- F. That all terms and provisions of the Loan Documents, except as expressly modified by this Agreement, remain in full force and effect; nothing in this Agreement shall be understood or construed to be a satisfaction or release in whole or in part of the obligations contained in the Loan Documents; and that except as otherwise specifically provided in, and as expressly modified by, this Agreement, the Lender and I will be bound by, and will comply with, all of the terms and conditions of the Loan Documents.
- G. That, as of the Modification Effective Date, notwithstanding any other provision of the Loan Documents, I agree as follows: If all or any part of the Property or any interest in it is sold or transferred without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by the Mortgage. However, Lender shall not exercise this option if state or federal law, rules or regulations prohibit the exercise of such option as of the date of such sale or transfer. If Lender exercises this option, Lender shall give me notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which I must pay all sums secured by the Mortgage. If I fail to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by the Mortgage without further notice or demand on me.
- H. That, as of the Modification Effective Date, I understand that the Lender will only allow the transfer and assumption of the Loan, including this Agreement, to a transferee of my property as permitted under the Garn St. Germain Act, 12 U.S.C. Section 1701j-3. A buyer or transferee of the Property will not be permitted, under any other circumstance, to assume the Loan. Except as noted herein, this Agreement may not be assigned to, or assumed by, a buyer or transferee of the Property.
- I. That, as of the Modification Effective Date, if any provision in the Note or in any addendum or amendment to the Note allowed for the assessment of a penalty for full or partial prepayment of the Note, such provision is null and void.
- J. That, I will cooperate fully with Lender in obtaining any title endorsement(s), or similar title insurance product(s), and/or subordination agreement(s) that are necessary or required by the Lender's procedures to ensure that the modified mortgage Loan is in first lien position and/or is fully enforceable upon modification and that if, under any circumstance and notwithstanding anything else to the contrary in this Agreement, the Lender does not receive such title endorsement(s), title insurance product(s) and/or subordination agreement(s), then the terms of this Agreement will not become effective on the Modification Effective Date and the Agreement will be null and void.
- K. That I will execute such other documents as may be reasonably necessary to either (i) consummate the terms and conditions of this Agreement; or (ii) correct the terms and conditions



of this Agreement if an error is detected after execution of this Agreement. I understand that a corrected Agreement will be provided to me and this Agreement will be void and of no legal effect upon notice of such error. If I elect not to sign any such corrective Agreement, the terms of the original Loan Documents shall continue in full force and effect, such terms will not be modified by this Agreement.

- L. Mortgage Electronic Registration Systems, Inc. ("MERS") is a separate corporation organized and existing under the laws of Delaware and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, a mailing address of P.O. Box 2026, Flint, MI 48501-2026, a street address of 1901 E Voorhees Street, Suite C, Danville, IL 61834, and telephone number of (888) 679-MERS. In cases where the loan has been registered with MERS who has only legal title to the interests granted by the borrower in the mortgage and who is acting solely as nominee for Lender and Lender's successors and assigns, MERS has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling the mortgage loan.
- M. That Lender will collect and record personal information, including, but not limited to, my name, address, telephone number, social security number, credit score, income, payment history, government monitoring information, and information about account balances and activity. In addition, I understand and consent to the disclosure of my personal information and the terms of the trial period plan and this Agreement by Lender to (i) the U.S. Department of the Treasury, (ii) Fannie Mae and Freddie Mac in connection with their responsibilities under the Home Affordability and Stability Plan; (iii) any investor, insurer, guarantor or servicer that owns, insures, guarantees or services my first lien or subordinate lien (if applicable) mortgage loan(s); (iv) companies that perform support services for the Home Affordable Modification Program and the Second Lien Modification Program; and (v) any HUD certified housing counselor.
- N. That if any document related to the Loan Documents and/or this Agreement is lost, misplaced, misstated, inaccurately reflects the true and correct terms and conditions of the Loan as modified, or is otherwise missing, I will comply with the Lender's request to execute, acknowledge, initial and deliver to the Lender any documentation the Lender deems necessary. If the Note is replaced, the Lender hereby indemnifies me against any loss associated with a demand on the Note. All documents the Lender requests of me under this Section 4.N. shall be referred to as "Documents." I agree to deliver the Documents within ten (10) days after I receive the Lender's written request for such replacement.
- O. That the mortgage insurance premiums on my Loan, if applicable, may increase as a result of the capitalization which will result in a higher total monthly payment. Furthermore, the date on which I may request cancellation of mortgage insurance may change as a result of the New Principal Balance.



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P. This Agreement modifies an obligation secured by an existing security instrument recorded in County, WA, upon which all recordation taxes have been paid. As of the date of this agreement, the unpaid principal balance of the original obligation secured by the existing security instrument is \$125,848.33. The principal balance secured by the existing security instrument as a result of this Agreement is \$155,191.36, which amount represents the excess of the unpaid principal balance of this original obligation.



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\* 9 2 1 7 0 + 1 0 \*

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In Witness Whereof, the Lender and I have executed this Agreement.

\_\_\_\_\_  
[Redacted]-Borrower (Seal)

\_\_\_\_\_  
[Redacted] Borrower (Seal)

\_\_\_\_\_ [Space Below This Line For Acknowledgments] \_\_\_\_\_

State of Washington

County of \_\_\_\_\_

I certify that I know or have satisfactory evidence that \_\_\_\_\_

\_\_\_\_\_  
(name of person) is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument and acknowledged it to be (his/her) free and voluntary act for the uses and purposes mentioned in the instrument.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature of Notary

\_\_\_\_\_  
Title

My Commission expires: \_\_\_\_\_



FREDDIE MAC STANDARD MODIFICATION AGREEMENT  
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**NATIONSTAR MORTGAGE LLC**

By: \_\_\_\_\_ (Seal) - Lender  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
Date of Lender's Signature  
\_\_\_\_\_[Space Below This Line For Acknowledgments]\_\_\_\_\_

State of \_\_\_\_\_

County of \_\_\_\_\_

I certify that I know or have satisfactory evidence that

\_\_\_\_\_, the \_\_\_\_\_ of

\_\_\_\_\_  
(name of person) is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument and acknowledged it to be (his/her) free and voluntary act for the uses and purposes mentioned in the instrument.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature of Notary

\_\_\_\_\_  
Title

My Commission expires: \_\_\_\_\_



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## FEDERAL HOUSING FINANCE AGENCY



### NEWS RELEASE

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For Immediate Release  
March 27, 2013

**Contact:** Corinne Russell (202) 649-3032  
Stefanie Johnson (202) 649-3030

#### **FHFA Announces New Streamlined Modification Initiative Borrowers and Servicers to Benefit From Simplified Program**

**Washington, DC** – The Federal Housing Finance Agency (FHFA) today announced that Fannie Mae and Freddie Mac will offer a new, simplified loan modification initiative to minimize losses and to help troubled borrowers avoid foreclosure and stay in their homes. Beginning July 1, servicers will be required to offer eligible borrowers who are at least 90 days delinquent on their mortgage an easy way to lower their monthly payments and modify their mortgage without requiring financial or hardship documentation.

The new Streamlined Modification Initiative eliminates the administrative barriers associated with document collection and evaluation. Eligible borrowers must demonstrate a willingness and ability to pay by making three on-time trial payments, after which the mortgage will be permanently modified. Homeowners are encouraged to continue working with their servicer to evaluate all of their foreclosure prevention options. Documenting income and financial hardship could result in a modification with additional savings for the borrower.

“The Streamlined Modification Initiative adds to the suite of home retention tools offered by Fannie Mae and Freddie Mac,” said FHFA Acting Director Edward J. DeMarco. “This new option gives delinquent borrowers another path to avoid foreclosure. We will still encourage such borrowers to provide documentation to support other modification options that would likely result in additional borrower savings.”

The Streamlined Modification Initiative builds on the principles of the Servicing Alignment Initiative by encouraging servicers to resolve delinquencies earlier and in a more consistent and expeditious manner to keep more people in their homes and to minimize losses to Fannie Mae, Freddie Mac and taxpayers. The program expires August 1, 2015.

The program is available to those homeowners with loans owned or guaranteed by Fannie Mae or Freddie Mac. Since being placed into conservatorships, Fannie Mae and Freddie Mac have completed 2.7 million foreclosure prevention transactions, including 1.3 million loan modifications.

Attached: Frequently Asked Questions  
[Link to Fannie Mae Guidance to Lenders](#)  
[Link to Freddie Mac Guidance to Lenders](#)

**Frequently Asked Questions**  
**Streamlined Modification Initiative**

**1. What is the Streamlined Modification Initiative?**

The new Streamlined Modification Initiative is designed to help more borrowers with mortgages owned or guaranteed by Fannie Mae and Freddie Mac maintain homeownership. The initiative builds on lessons learned with the Servicing Alignment Initiative (SAI) - namely that early, effective borrower outreach and engagement is critical for successful modification solutions. Under the Streamlined Modification Initiative, many borrowers who are at least 90 days delinquent will be sent a Streamlined Modification Solicitation Offer that includes a Trial Period Plan specifying the dollar amount of the new mortgage payment based upon a fixed interest rate, extending the payment terms to 40 years, and providing principal forbearance for certain underwater borrowers. Borrowers will not be required to document their hardship or financial situations to receive the Streamlined Modification.

**2. Why is FHFA directing Fannie Mae and Freddie Mac (the Enterprises) to launch the Streamlined Modification Initiative?**

Throughout the financial crisis, one of the biggest challenges in assisting troubled homeowners has been the administrative challenge of document collection. Since the inception of the Making Home Affordable (MHA) program, FHFA, Fannie Mae and Freddie Mac have been measuring and monitoring borrower and servicer responsiveness to borrower assistance programs to understand why many borrowers are not able to get a loan modification. Removing the administrative barriers associated with document collection and servicer evaluation should enable significantly more borrowers to access the available options for home retention.

**3. When will the Streamlined Modification Initiative be available?**

The Streamlined Modification Initiative will begin July 1, 2013 and end August 1, 2015. Fannie Mae and Freddie Mac are issuing guidance to their mortgage servicers to implement the Streamlined Modification Initiative.

**4. What are the eligibility requirements?**

The loan must be owned or guaranteed by Fannie Mae or Freddie Mac. Homeowners must be 90 days to 24 months delinquent, and have a first-lien mortgage that is at least 12 months old with a loan-to-value ratio equal to or greater than 80 percent. Loans that have been modified at least two times previously are not eligible. Click on these links to see if your loan is owned or guaranteed by [Fannie Mae](#) or [Freddie Mac](#).

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**4. What are the eligibility requirements?**

**5. How is the Streamlined Modification Initiative different from other Fannie Mae or Freddie Mac mortgage modification options?**

The Streamlined Modification builds on the success of the Standard Modification program that Freddie Mac and Fannie Mae announced last year under the Servicing Alignment Initiative. Starting July 1, 2013, servicers will be required to send a Streamlined Modification Solicitation Offer to borrowers who are at least 90 days delinquent and meet the initiative's eligibility requirements. The key difference is that borrowers will not be required to document their hardship or financial situation, but will be able to accept a Streamlined Modification Offer by simply making the trial period payments and agreeing to the terms of the modification. Borrowers will also be advised that more beneficial terms may be available if they document their financial situation and work with their servicer to pursue the full range of foreclosure prevention options.

**6. How does the Streamlined Modification Initiative differ from the Home Affordable Modification Program (HAMP)?**

Borrowers can look to take advantage of HAMP as soon as they run into financial troubles, but must provide financial, income and hardship documentation to their servicer to be considered for the program. The Streamlined Modification Initiative is only available for borrowers who are at least 90 days delinquent and it does not require borrowers to provide financial or hardship documentation. HAMP enables servicers to evaluate the borrower for modification terms based on an affordable payment that is 31 percent of the borrower's gross monthly income. HAMP may provide a more affordable monthly payment than the Streamlined Modification Initiative. In addition, borrowers may be eligible to receive financial incentive payments under HAMP.

**7. Will all delinquent borrowers with Fannie Mae or Freddie Mac mortgages receive a Streamlined Modification Trial Period Plan after July 1, 2013 if he or she is 90+ days delinquent?**

As of July 1, 2013, servicers must identify eligible borrowers who are 90 days to 24 months delinquent and send them an offer letter that states the terms of the modification, including the monthly payment required for a Streamlined Modification. These eligible borrowers can accept a Streamlined Modification Trial Period Plan by sending the specified payment to the loan servicer.

**8. How long will the Trial Period last?**

Similar to the Standard Modification, the Streamlined Modification Trial Period Plan will last three months. If the borrower makes on-time payments during the trial period and meets necessary criteria, the borrower will be asked to sign an agreement making the terms of the mortgage modification permanent.

**9. What happens if a borrower misses a payment during the Streamlined Modification Trial Period Plan?**

If the borrower misses a payment during the Streamlined Modification Trial Period Plan, the borrower will not be eligible for a permanent Streamlined Modification. However, the borrower may submit a Borrower Response Package to the servicer and will be evaluated for other alternatives to foreclosure, including other modification options.

**10. Should struggling borrowers wait until the Streamlined Modification takes effect on July 1, 2013 to contact their servicer when they miss a payment?**

For borrowers struggling to make their payments, calling the servicer as early as possible is the best option to ensure they are evaluated for the most appropriate alternative to foreclosure. When the borrower documents their financial situation, the servicer will be able to evaluate the borrower for alternative modification options with more beneficial terms. Calling the servicer will not exclude a borrower from receiving the Streamlined Modification solicitation.

**11. When should I expect a letter from my servicer?**

Servicers will be required to begin evaluating borrowers for a solicitation on July 1, 2013. Depending on the volume of delinquent borrowers and servicer capacity and systems, letters should be sent within a timely period.

**12. What steps are Fannie Mae and Freddie Mac taking to discourage strategic defaults by borrowers who stop paying their loans to get a Streamlined Modification?**

Fannie Mae and Freddie Mac have existing proprietary screening measures to prevent strategic defaulters from taking advantage of a Streamlined Modification. Additionally, only those borrowers with loans more than 12 months old with a mark-to market loan-to-value ratio greater than 80 percent and who have not had two or more previous loan modifications will be solicited for participation.

**13. Why limit eligibility to borrowers who have missed three or more monthly payments?**

Because many borrowers who miss one or two payments have a temporary hardship and often reinstate their mortgage to current status, it is most effective to target borrowers who are at least 90 days delinquent. Borrowers who are current or less than 90 days delinquent and have a permanent hardship should contact their servicer to submit a Borrower Response Package so they can be evaluated for a mortgage modification or other alternative to foreclosure.

**14. Does the Streamlined Modification cover borrowers with delinquent Freddie Mac or Fannie Mae mortgages secured by second homes and/or investment properties?**

Yes. Delinquent borrowers with Fannie Mae or Freddie Mac mortgages secured by second homes or investment properties are eligible to participate in the Streamlined Modification Initiative and may receive trial period plan offers, provided they also meet other eligibility criteria.

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## Financial Institutions Exempted from Foreclosure Mediation in Washington State in 2014

Last Revision: February 28, 2014

This is the list of federally insured financial institutions exempt from the mediation requirements of the Foreclosure Fairness Act in 2014. They are exempt because they have certified under penalty of perjury to Department of Commerce, no later than January 31, 2014, that they were not the beneficiary of deeds of trust in more than 250 trustee sales of owner-occupied residential real property that occurred in Washington State between January 1 and December 31, 2013 (per RCW 61.24.166).

1st Security Bank	Columbia Credit Union
Advantis Credit Union	Commencement Bank
Alaska USA Federal Credit Union	Community 1st Credit Union
American Lake Credit Union	Community Healthcare Federal Credit Union
AmericanWest Bank	Connection Credit Union
Amicus Federal Credit Union	Consolidated Community Credit Union
Anchor Bank	Coulee Dam Federal Credit Union
Avista Corp Credit Union	Cowlitz Credit Union
Bank of the Pacific	CU Home Mortgage Solutions, LLC
Bank of the West	Cutting Edge Federal Credit Union
Bank of Washington, The (The Bank of Washington)	East West Bank
Banner Bank	Eastern Savings Bank, fsb
Blue Mountain Credit Union	EvergreenDIRECT Credit Union
Boeing Employees' Credit Union (BECU)	Fibre Federal Credit Union
CALCOE Federal Credit Union	Fidelity Bank
Capital One, N.A.	Fife Commercial Bank
Cascade Forest Products Credit Union	Fifth Third Bank
Cashmere Valley Bank	First Citizens Bank & Trust Co.
Cathay Bank	First Community Credit Union
Celink	First Federal Savings and Loan Association of Port Angeles
Central Mortgage Company	First Republic Bank
Central Washington Federal Credit Union	First Sound Bank
Cheney Federal Credit Union	First Tech Federal Credit Union
Clackamas County Bank	Foundation Bank
Clackamas Federal Credit Union	

Fred Meyer Employees Federal Credit Union (Fred Meyer EFCU)  
Gesa Credit Union  
Glacier Bank (Mountain West Bank, a Division of Glacier Bank)  
Global Credit Union  
GRANCO Federal Credit Union  
Great NorthWest Federal Credit Union  
HAPO Community Credit Union  
Harborstone Credit Union  
HomeStreet Bank  
Horizon Credit Union  
HSBC Bank USA, National Association  
Icon Credit Union  
Industrial Credit Union of Whatcom County  
Inland Northwest Bank  
Intermountain Community Bank, a Division of Panhandle State Bank  
iQ Credit Union  
Islanders Bank  
KaiPerm Northwest Federal Credit Union  
KBR Credit Union  
KeyBank, N.A.  
Kitsap Bank  
Kitsap Credit Union  
Lacamas Community Credit Union  
Liberty Bay Bank  
Longshore Federal Credit Union  
Longshoremen's Local 4 Federal Credit Union  
Lower Columbia Longshoremen's Federal Credit Union  
Lower Valley Credit Union  
Manufacturers and Traders Trust Company (M&T Bank)  
MidFirst Bank  
Mill Town Credit Union  
Mint Valley Federal Credit Union

Monad Federal Credit Union  
Mountain Pacific Bank  
Mountain West Bank, a Division of Glacier Bank  
MountainCrest Credit Union  
Mutual of Omaha Bank  
NAPUS Federal Credit Union (NAPUS FCU)  
Navy Federal Credit Union  
North Coast Credit Union  
North Valley Bank  
Northwest Community Credit Union  
NorthWest Plus Credit Union  
Numerica Credit Union  
NW Preferred Federal Credit Union (NW Preferred FCU)  
NW Priority Credit Union  
O Bee Credit Union  
Olympia Credit Union  
One Washington Financial  
OneWest Bank, FSB  
OnPoint Community Credit Union  
Oregon Community Credit Union  
Oregonians Federal Credit Union  
Our Community Credit Union  
Pacific Continental Bank  
Pacific Crest Savings Bank  
Pacific Northwest Credit Union  
Pacific Northwest Ironworkers Federal Credit Union  
Pacific NW Federal Credit Union  
Panhandle State Bank (Intermountain Community Bank, a Division of Panhandle State Bank)  
Peninsula Community Federal Credit Union (Peninsula Credit Union)  
Pentagon Federal Credit Union (PenFed)  
Peoples Bank  
People's Community Federal Credit Union  
Portland Local 8 Federal Credit Union  
Prime Pacific Bank

PrimeSource Credit Union	Sunset Science Park Federal Credit Union
Progressions Credit Union	SunTrust Bank
Providence Federal Credit Union	SunTrust Mortgage, Inc.
PUD Federal Credit Union	Tacoma Longshoremen Credit Union
Puget Sound Bank	TAPCO Credit Union
Puget Sound Federal Credit Union	Teamsters Council #37 Federal Credit Union
Qualstar Credit Union	Thurston First Bank
Raymond Federal Bank	Timberland Bank
Red Canoe Credit Union	TLC Federal Credit Union
Regal Financial Bank	Tri-Cities Community Federal Credit Union
Regions Bank dba Regions Mortgage	Twin River National Bank
RiverBank	TwinStar Credit Union
Rivermark Community Credit Union	Umpqua Bank
Riverview Community Bank	Union Bank, N.A.
Safeway Federal Credit Union	United Advantage NW Federal Credit Union (United Advantage NW FCU)
Salal Credit Union	United Health Services Credit Union
Seattle Bank	Unitus Community Credit Union
Seattle Metropolitan Credit Union	USAgencies Credit Union
Seattle Mortgage Company	Valley Bank & Trust Company
Security State Bank (Security State Mortgage)	Valley Credit Union
SELCO Community Credit Union	Verity Credit Union
Skagit State Bank	Washington Business Bank
Sno Falls Credit Union	Washington Federal
Solarity Credit Union	Washington State Employees Credit Union (WSECU)
Sound Banking Company	Washington Trust Bank
Sound Credit Union	WCLA Credit Union
Spokane City Credit Union	Wenatchee Valley Federal Credit Union
Spokane Federal Credit Union	Whatcom Educational Credit Union (WECU)
Spokane Firefighters Credit Union	Wheatland Bank
Spokane Law Enforcement Credit Union (SLECU)	Whidbey Island Bank
Spokane Media Federal Credit Union (Spokane Media FCU)	White River Credit Union
Spokane Teachers Credit Union (STCU)	Woodstone Credit Union
St. Helens Community Federal Credit Union	Yakima Federal Savings and Loan Association
State Bank Northwest	Zions First National Bank
Sterling Savings Bank (Sterling Bank)	

**Non-Judicial Foreclosure:  
Update Of Recent Case Law**

**Submitted by John F. Bury**



**NON-JUDICIAL FORECLOSURE:  
UPDATE OF RECENT CASELAW**

**BY**

**JOHN F. BURY**

John “Jack” Bury is an attorney with Winston & Cashatt, Lawyers, in Spokane, Washington. Mr. Bury received his B.A. from Gonzaga University in 1971, and his J.D. from Gonzaga in 1975. His practice has emphasized real estate and real estate based lending.

**I. The Rationale of The Statutory Scheme**

In 1965, the Washington Legislature enacted the Washington Deed of Trust Act, which specifically provides for non-judicial foreclosures.

The statutory scheme is designed to be shorter and less expensive for Lenders. While Borrowers are entitled to a less costly foreclosure process, and relief from deficiency liability (on non-commercial loans), Borrowers also no longer have a right of redemption and narrow grounds to challenge the Trustee’s procedure.

The Supreme Court has noted that the advantages to Lenders encourages land-backed financing by assuring Lenders a reliable method for realizing on their security interest. *Glidden v. Tacoma*, 111 Wn.2d 341, 305.

For a long time, the Courts held that technical deviations in the strict foreclosure process did not derail the process.

With the collapse of the real estate based lending in 2009, an avalanche of foreclosures inevitably fomented both legislation, federal and state, and litigation.

The Lenders needed to seek deficiencies in the face of their own capital requirements.

Washington State adopted major amendments to the Deed of Trust Act in 2009; in 2011 added the Foreclosure Fairness Act; and amended again in 2012. All these amendments are direct responses to Borrowers’ previously limited rights and bargaining position.

There is the pre-default “meet and confer” requisite. The post Notice of Default, state and federal mediation program. Short sale notices can now implicate the Consumer Protection Act.

A series of five cases, most recently February 13, 2014, elucidate new Borrower’s rights and remedies in a new balance with Lenders.

**II. Non-Judicial Foreclosure Procedure**

**A. REQUISITES TO NON-JUDICIAL TRUSTEE'S SALE**

**I. Deed of Trust.**

1. Contains a statement that property is:

A. Used in an operation that produces crops, livestock or aquatic goods, RCW 61.24.020.

- B. Recorded in the Auditor's Office:
  - 1. Indian trust land might be recorded in Portland or Spokane BIA title offices
- C. Contains a power of sale.
- 2. A default has occurred in:
  - A. The obligation secured; or
  - B. Covenant of the grantor.
- 3. No court action is pending which was COMMENCED BY THE BENEFICIARY to seek satisfaction of the obligation secured.
- 4. The Trustee must have a street address for service of process.
- II. At least thirty (30) days before the Notice of Trustee's Sale.
  - A. Recorded, transmitted or served, written Notice of Default with statutory requisites, sent certified or registered mail, and
  - B. Either posted or personally served.
- III. At least 90 days before Trustee's Sale.
  - A. Record Notice of Trustee's Sale.
  - B. Trustee shall send certified registered Notice of Sale to:
    - 1. Borrower/grantor and Guarantor;
    - 2. Junior recorded beneficiary;
    - 3. Any Vendee's recorded interest;
    - 4. A Lessee's Junior recorded interest;
    - 5. Any subordinate lien holder;
    - 6. Holder of a judgment;
    - 7. Occupants of a single family residence or condo with less than five residential units, without any recorded interest, may be addressed simply to "occupant";
    - 8. Post conspicuously.
    - 9. Send an extra notice to the Department of Treasury 30 days before the sale.

IV. Notice of Foreclosure.

V. Preserve a deficiency claim against a guarantor(s):

- A. Notice of Default
- B. Notice of Foreclosure, and
- C. Notice of Trustee's Sale.

Of "commercial loan" by sending:

1. At the same time as Notice is given to the grantor of the Department of Treasury;
2. Containing notice of resulting liability for difference between greater and the secured amount of debt;
3. No right of redemption.
4. Collection suit must be filed in one (1) year after the sale date.
5. Fair value defined in RCW 61.24.005. It is a value determined by a court of adjudicator as a "most probable price" payable in cash after reasonable exposure to the market under conditions requisite to a fair sale with prudent, knowledgeable parties for their self-interest without duress.

B. THE HOUSING COUNSELOR NOTICE.

In 2012, additional notification requirements were added to the Washington Deed of Trust Act. RCW 61.24.030(8)(k). Where the real property is owner-occupied residential, a statement shall be prominently shown in the Notice of Default.

1. Contact a housing counselor or a Washington attorney [to] refer you to mediation if you might benefit.
2. Deadline. Mediation must be requested between the date of receipt of the Notice of Default and no later than twenty (20) days after the Notice of Trustee's Sale is recorded.
3. The mediation program can be no cost to the owner through the Washington Housing Finance Commission or HUD.

SHORT SALE

- A. In 2011, a short sale provision was added to the Washington Deed of Trust Act. In a short sale, the net proceeds are insufficient to pay in full the debt secured by the first Deed of Trust. RCW 61.24.026.

- B. This process and the owner's rights are time sensitive.
- C. The owner must make a written offer to the senior beneficiary to accept the entire net proceeds to facilitate closing – to be received prior to issuance of Notice of Default.
- D. While acceptance is within the sole discretion of the senior debt holder, failure to respond in writing with an acceptance/rejection/counter-offer within 120 days, affords the seller an action for damages.
- E. This short sale statute does not apply to deeds of trust securing commercial loans; securing obligations where the owner is not the borrower or guarantor; or seller-financed sales.

THE RCW 61.24.030(8) NOTICE.

- A. The beneficiary may not issue the Notice of Default until thirty (30) days after satisfying the due diligence requirement and no response from borrower; or
- B. If borrower responds, the 90 days after initial contact was initiated.
- C. Due diligence starts with a letter and a telephone call. The minimum requirements of the letter detail housing counseling, bankruptcy, toll free telephone numbers for HUD and State Department of Commerce program, and more accommodations in simple to understand form. If a borrower requests a meeting, the lender MUST meet before the Notice of Default is issued. An assessment of the borrower's financial abilities and a discussion of options to modify or restructure the loan MUST occur during the meeting. The meeting may be telephonic, but must be face to face if requested in writing within the first 30 days of contact. A person with lender authority must be at the meeting or on the telephone.
- D. The Deed of Trust beneficiary MUST post a link on its website nonresponse detailing options for avoiding foreclosure, a list of necessary financial documents, a toll free telephone number, numbers of the beneficiary and a Department approved housing counseling agency. This section has the same restricted scope as the counseling letter. RCW 61.24.030(8).
- E. The statutes contain model language for the initial letter, and foreclosure mitigations notice.

### **III. EXTERNAL FORCES**

#### **A. Fair Debt Letter**

The fair debt letter is the initial communication sent to the debtor once a property is referred for foreclosure. It is sent within 5 days of receipt of the referral. The letter outlines the debtor's rights under the Fair Debt Collection Practices Act including the borrower's right to dispute the debt.<sup>1</sup>

#### **B. Title Examination**

When a property is referred by a lender or servicer for foreclosure proceedings a title search is ordered. The title search is necessary to determine the priority of the referred lien and reveal any interested parties that may require notice of the foreclosure sale. A thorough title search will also reveal any title defects that may prevent the foreclosure sale from proceeding or prevent the insurability of title post-sale. Most defects that are uncovered in the title search can be cured during the foreclosure process.

#### **C. Bankruptcy Protection**

Prior to initiation of foreclosure and throughout the foreclosure process the attorney will ascertain the status of any bankruptcy filing by the debtor or co-debtor. The property address is also monitored for inclusion in a bankruptcy filing. If the debtor has filed for bankruptcy relief they are protected against foreclosure by the imposed automatic stay, unless the debtor has been discharged, the bankruptcy filing has been terminated, the debtor is a serial filer, or relief from the stay has been granted to the lender or servicer.

#### **D. Servicemember's Civil Relief Act**

Prior to initiation of the foreclosure and throughout the foreclosure process the attorney will conduct a search of the Department of Defense database to determine if either the debtor or the co-debtor is currently active duty and protected by the Servicemember's Civil Relief Act (SCRA). The SCRA provides protection to individuals who are Active Duty if the loan originated prior to the term of Active Duty status and the debtor is currently Active

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<sup>1</sup> 16 U.S.C. 5 1692

Duty or has recently terminated his Active Duty status. SCRA protection continues for 12 months after termination of Active Duty status.

**E. Real Estate Settlement Procedures Act – Regulation X**

As of January 10, 2014 a lender or servicer may not make the first foreclosure notice filing until the debtor is 120 days delinquent. If the debtor provides a complete loss mitigation application during the 120 day “pre-foreclosure” period the servicer shall not proceed with the filing of the first foreclosure notice unless a denial notice has been sent to the debtor, the debtor rejects the loss mitigation option offered or the debtor fails to perform.

**IV. EFFECTS AND FINALITY OF THE NON-JUDICIAL FORECLOSURE PROCESS**

**A. No Right of Redemption/No Deficiency.**

The foreclosure sale terminates all rights of redemption and no person shall have a right to redeem the trust property after a sale. This is a corollary of the Washington rule that when a mortgage lender elects to foreclose non-judicially, it also elected to waive any deficiency if the value of the property was less than the obligation.

**B. The anti-deficiency provision presented a lingering question for trustees and beneficiaries, when deficiencies were judicially against guarantors on commercial loans.**

Three decisions in the last year have resolved these questions.

**C. The Consumer Protection Act Comes Into Play.**

**D. Recent Decisions**

1. Gardiner v. First Heritage Bank

March 25, 2013, Court of Appeals, Div. I

175 Wn.App. 650

Anti-deficiency provisions of Deed of Trust Act do not restrict lender's ability to conduct multiple property foreclosures in SERIES.

2. Peterson v. Kitsap Community Federal Credit Union

October 23, 2012, Court of Appeals, Div. II

Apply the CPA in a class action, to "Reconveyance Fee" and challenging undisclosed "professing fee."

3. Albice v. Premier Mortgage Services, Inc.

May 24, 2012

Supreme Court, 174 Wn.2d 560

Property owners rights and BFP status of successful bidder

4. Bain v. Metropolitan Mortgage Group

August 16, 2012

Supreme Court en banc, 175 Wn.2d 183

Certified from U.S. District Court, Judge Coughenour, "whether MERS is a lawful beneficiary of a Deed of Trust when MERS does not hold the promissory note secured thereby." It is not the CPA may apply. What are the legal effects on a foreclosure and bankruptcy?

5. Boeing Employee's Credit Union v. Burns

March 19, 2012, Court of Appeals, Div. I

167 Wn.App. 625

The Deed of Trust lien is not extinguished by civil judgment on the promissory note secured thereby.

The Supreme Court has repeatedly stated that the Deed of Trust Act must be construed in favor of borrower because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting non-judicial foreclosure sales.

6. Washington Federal v. Gentry

February 18, 2014, Court of Appeals, Div. I, 7004-9-I

Clarifies the new application of anti-deficiency provision to guarantees secured by the Deed of Trust after First Citizens Bank v. Cornerstone Homes and Development, LLC, 178 Wn.App. 207 (Div. II, 2013)



# **Protecting Tenants From Foreclosure**

**Submitted by John H. Loeffler**



**PROTECTING TENANTS IN FORECLOSURE**  
**(PTFA, DTA )**

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## **I. INTRODUCTION**

In March 2007, the United States' subprime mortgage industry collapsed due to higher-than-expected home foreclosure rates, with more than 25 subprime lenders declaring bankruptcy, announcing significant losses, or putting lender businesses up for sale.<sup>1</sup> The stock of the country's largest subprime lender, New Century Financial, plunged 84% amid Justice Department investigations, until ultimately it filed for bankruptcy on April 2, 2007, with liabilities exceeding \$100 million.<sup>2</sup> This trend was no less a problem in the State of Washington, where in February of 2013, a statewide trend pushed Washington's foreclosure rate to the fifth highest in the nation.<sup>3</sup> It is estimated that 40% of the total number of families that faced eviction was due to foreclosures.<sup>4</sup> These housing issues together became known as the "housing crisis."

As a result of the housing crises, substantial state and federal legislation was passed to protect homeowners and tenants from the massive amount of foreclosure activity. These materials will concentrate on a subset of the legislation, The Protecting Tenants Foreclosure Act of 2009<sup>5</sup> ("PTFA"), (see appendix "A") along with certain amendments to the Washington Deeds of Trust Act. Also covered will be the Fair Debt Collection Practices Act ("FDCPA").

## **II. PROTECTING TENANTS IN FORECLOSURE**

### **A. State Legislated Tenant Protections**

The Washington Deeds of Trust Act ("DTA") has been amended three times over the past four years, along with other portions of RCW to address the housing crisis (jointly the "Amendments"). In addition to significant foreclosure protections for the borrower, the Amendments provide certain protections to tenants and occupants of residential real property, prior to possession granted to the purchaser at the trustee's sale. The primary tenant related amendments are contained in SB 5810. Prior to the Amendments, a purchaser at the trustee's sale was entitled to possession of the property on the 20<sup>th</sup> day following the trustee's sale, as against the owner and any tenants residing in the property, regardless of lease provisions. Under

the Amendments, tenants or subtenants of tenant occupied property are entitled to a new rental agreement or must be given written notice 60 days or more before the end of the monthly rental period to vacate the property. The previous owner or occupants who are not tenants are still required to vacate the property within 20 days following the trustee's sale.

If it is not known whether the property is tenant-occupied property, it is recommended that the required pre-foreclosure and post-foreclosure notices be posted and mailed to avoid violating the notice provisions.

**1. Pre-foreclosure Notices to Tenants.**

At the time the Notice of Trustee's Sale is posted in a nonjudicial foreclosure, the trustee or its authorized agent must also post and mail a notice to the occupant of tenant-occupied property.<sup>6</sup> Tenant-occupied property is defined as property consisting solely of residential real property that is the principal residence of a tenant subject to Chapter 59.18 of RCW or other building with four or fewer residential units that is the principal residence of the tenant subject to Chapter 59.18 of RCW. If the Trustee elects to foreclose the interest of any occupant or tenant-occupied property, in addition to the Notice of Trustee Sale under RCW 61.24.040, the trustee or agent must post and mail an envelope addressed to the "Resident of property subject to foreclosure sale," a notice in the following form:

"The foreclosure process has begun on this property, which may affect your right to continue to live in this property. Ninety days or more after the date of this notice, this property may be sold at foreclosure. If you are renting this property, the new property owner may either give you a new rental agreement or provide you with a sixty-day notice to vacate the property. You may wish to contact a lawyer or your local legal aid or housing counseling agency to discuss any rights that you may have."

**2. Post-Foreclosure Notice to Tenants.**

Following the Trustee's sale, the purchaser of tenant-occupied property at the trustee's sale must, according to RCW 61.24.060, provide written

notice to the occupants and tenants at the property purchased by both first-class mail and either certified or registered mail, return receipt requested, a notice in substantially the following form:

**"NOTICE:** The property located at . . . . ., was purchased at a trustee's sale by . . . . . on . . . . . (date).

1. If you are the previous owner or an occupant who is not a tenant of the property that was purchased, pursuant to RCW 61.24.060, the purchaser at the trustee's sale is entitled to possession of the property on . . . . . (date), which is the twentieth day following the sale.

2. If you are a tenant or subtenant in possession of the property that was purchased, pursuant to RCW 61.24.146, the purchaser at the trustee's sale may either give you a new rental agreement OR give you a written notice to vacate the property in sixty days or more before the end of the monthly rental period."

**NOTE: SEE BELOW FOR A HYBRID NOTICE INCORPORATING BOTH STATE AND FEDERAL NOTICE REQUIREMENTS.**

**B. Federal Legislation Protecting Tenants**

On May 20, 2009, Congress passed *The Protecting Tenants at Foreclosure Act* ("PTFA" or "the Act"), aimed at protecting tenants of properties subject to foreclosure. The PTFA had an initial sunset provision that was to take effect on December 31, 2012. The Dodd-Frank Wall Street Reform And Consumer Protection Act delayed the operation of the sunset clause to December 31, 2014. The central provision of the PTFA allows tenants to remain at the property for up to 90 days after foreclosure or for the remaining period of their lease as long as the successor in interest does not intend to use the property as a primary residence.

**1. 90 day Notice to Vacate**

Section 702(a)(1) of the Act requires successors in interest, where they require tenants to vacate the property, to provide at least 90 days notice to vacate. Successors in interest are also required to observe the terms of any leases entered before the notice of foreclosure, including allowing the tenant to remain for the duration of the lease periods.<sup>7</sup> An exception to this rule is where the property has been sold to a purchaser who will use the property as a primary residence.<sup>8</sup>

## **2. Payment of Rent During the 90-Day Period**

The Act assumes that the tenant's obligation to pay rent continues during the 90 days. However, the new owner may not demand or collect the rent or even want to enter into a landlord-tenant relationship. If the new owner makes a demand for rent, and the tenant wants to stay for the 90-day period, the tenant arguably must keep paying rent. If the tenant fails to pay rent or to meet other terms of an existing lease, the Act provides that the tenant may be evicted "pursuant to state law." The rent issue is complicated however because State law provides for a 60-day notice to vacate. During that period, a new owner may only evict the tenant if the tenant commits waste or nuisance — but NOT for non-payment of rent. The owner and tenant may decide to enter into a new rental agreement or the tenant may take advantage of the 90 days' notice under federal law. In either of those cases, the tenant would have to keep paying rent under federal law.

## **3. Bona Fide Leases.**

Under section 702(b) of the Act, a lease or tenancy is considered to be bona fide where the mortgagor, or the child, spouse or parent of the mortgagor under the contract is not the tenant 702(b)(1). The lease or tenancy must also be the result of an arms-length transaction 702(b)(2)), or in other words have acted independently, with no relationship to each other, without personal influence, control, pressure or duress from the other party. Finally, to qualify as a bona fide lease, the lease must not concern rental rates that are substantially less than fair market rent for the property unless the rent is reduced or subsidized due to a Federal, State or local subsidy. Thus a lease or tenancy is "bona fide" only if:

- (1) The mortgagor or a child, spouse, or parent of the mortgagor under the contract is not the tenant;
- (2) The lease or tenancy was the product of an arm's-length transaction; and
- (3) The lease or tenancy requires the receipt of rent that is not substantially less than fair market rent or the rent is reduced or subsidized due to a federal, state, or local subsidy.

4. **Section 8 Tenants**

Section 703 of PTFA provides in part as follows:

In the case of any foreclosure on any federally-related mortgage loan (as that term is defined in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602)) or on any residential real property in which a recipient of assistance under this subsection resides, the immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to the lease between the prior owner and the tenant and to the housing assistance payments contract between the prior owner and the public housing agency for the occupied unit, except that this provision and the provisions related to foreclosure in subparagraph (C) shall not affect any State or local law that provides longer time periods or other additional protections for tenants.

Thus the PTFA clearly states that foreclosure in itself is not sufficient to provide “good cause” for eviction of Section 8 tenants. For Section 8 tenants, it does not matter when the foreclosure happened as long as they were tenants on or after the date PTFA was passed (May 20, 2010). Also, the new owner must honor the terms of the housing assistance payments (HAP) contract that established the Section 8 tenancy. The new owner may not use the "other good cause" clause of the HAP contract to terminate the lease if the "other good cause" is that evicting the tenant will make the property easier to sell.

5. **Wording on 90-day Notice.**

The PTFA does not create specific legal requirements as to the wording on the 90-day notice. To prepare a valid 90-day notice to vacate, successors in interest must also look to the local or state laws. With respect to the PTFA, successors in interest cannot engage in unfair and misleading trade practices by misleading as to their rights on the PTFA 90-day notice. For example, a notice demanding that the tenant immediately vacate the property or the failure to notify the tenant of the right to 90 days under the Act could be an unfair and misleading trade practice.

The notice should list the reason that the successor in interest is serving the notice to vacate, whether it is because they intend to make the dwelling their primary residence, or because the tenant is no longer a bona fide tenant because there was no lease, or because the lease is terminable at will under state law.

**6. Summary of 90-Day Notice Provisions**

The 90 day minimum notice requirements contained within the Act at Section 702 are as follows:

- Successors in interest must give at least the 90-Day notice period to tenants in any foreclosed dwellings or residential real property, irrespective of the type of loan or security interest.
- If state or local laws provide more generous period or terms, those and not the federal provisions must be observed.
- Anyone who is a bona fide tenant on the date of the notice of foreclosure (date on which complete title to a property is transferred to a successor entity or person) must be given the notice whether or not there is a lease or if there is a lease otherwise terminable at will under state law.
- Successors in interest who wish to occupy the property as a primary residence must also give the minimum 90 day notice.

**7. Enforcement Under PTFA**

The PFTA has no enforcement provisions federally in that there is no agency responsible for enforcing the provisions of the law. As a result, tenants and their advocates must understand the provisions of PTFA and be prepared to assert their rights. For example, a tenant or their advocate should send notice to the new owner in which the rights under PTFA are explained. See Appendix “B” attached for notice provisions which could be included in a letter or incorporated into a memorandum to the court in response to an unlawful detainer action.

**8. A Few Ambiguities in the PFTA**

a. Notice of Foreclosure. Foreclosure in the Act generally refers to the process by which a mortgagee or lender obtains a court ordered termination of a mortgagor's equitable right of redemption. Section 702 specifically refers to a notice

of foreclosure, a term which was not defined in the original Act and does not exist in some state jurisdictions. In the July 21, 2010 Dodd-Frank<sup>9</sup> legislation, notice of foreclosure was defined to mean:

the date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.

As a result of this definition, lease agreements that are entered into before the date of transfer of complete title to the successor in interest must be recognized by the new owner. This suggests that the lease or rental agreement must have been signed prior to the date of the Trustee Sale and not the Notice of Default in order for it to be automatically taken on by the successor in interest. In the event there is no lease or there is a lease terminable at will under state law, the 90-Day notice period will still apply.

b. Deposits, Back and Pre-Paid of Rent. Security deposits and deposits in general are regulated by state law which regulates the process for obtaining and returning deposits.<sup>10</sup> In the event of foreclosure, given that the PTFA states that any lease entered in before the notice of foreclosure (as defined and clarified by Dodd-Frank), remains valid and is taken on by the successor in interest, the responsibility for the security deposit is passed on to the successor in interest. For the same reason, back rents must be paid to the successor in interest, who then accounts for any balance with the old owner.

c. Purchase Options or Rent to Own. The main issue here is whether the PTFA applies to treat the option purchaser as a tenant. First it must be determined whether the agreement between owner and tenant/purchaser is one of an agreement for sale or merely an agreement allowing an option to purchase. Presumably an agreement to sell will be extinguished as a junior lien during the foreclosure process, leaving the buyer free to pursue remedies for breach against the previous owner. It is likely that the tenant/purchaser will still be protected by the PTFA as to the tenant/purchaser's role as a tenant.

d. When Must the 90 Day Notice be given. The PTFA does not define when the notice must be given. For example, it is unclear if the notice to vacate must be given 90 calendar days prior to the effective date of the notice or at least 90 days before the end of the current rental period. Although there does not appear to be case law on this issue, the fact that the Act generally defaults to state law where detail is lacking, the likely answer to the question is that the tenant is entitled to at least 90 days' notice before the end of the current rental period, as is required for other notices under Washington law.<sup>11</sup>

### **C. HOW THEY FIT TOGETHER**

There is little guidance in the PTFA or within the Amendments to the DTA on giving of proper state and federal notices to the tenant. Of course confusion will result for the tenant receiving a 60-day state notice and a 90-day federal notice. It could be argued that the tenant should be given two separate notices, one for the state law requirements and one for the federal law requirements. Such an approach would, I believe, result in needless confusion. Instead, I would suggest the use of a hybrid notice which incorporates a 90 day notice period. Because the DTA notice requirements allow for "sixty days or more before the end of the monthly rental period,"<sup>12</sup> caution and fairness would mitigate in favor of a 90 day notice without offering a 60 day notice. Given the complete lack of guidance in this area I have attempted to provide notice in a way granting the benefit of any doubts in favor of the tenant. An example of a hybrid notice is attached as Appendix "C," along with a request for verification found at Appendix "D."

### **D. SHORT SALES**

Short sales are becoming a lot more common and offer the homeowner an alternative to foreclosure. Short sales aren't foreclosures, and so the tenant is not covered under state or federal foreclosure protection legislation. However, the tenant is protected by any existing lease under state law.

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- <sup>1</sup> "The Mortgage Mess Spreads". BusinessWeek. 2007-03-07.
- <sup>2</sup> <http://www.marketwatch.com/story/new-century-financial-files-for-chapter-11-bankruptcy?dist=rss&siteid=mktw>.
- <sup>3</sup> <http://www.columbian.com/news/2013/mar/14/foreclosures-spike-in-clark-county-state/>.
- <sup>4</sup> National Housing Law Project, 'The Foreclosure Crisis and Its Impact on Tenants' (2009) Resource Center, National Housing Law Project, <http://www.nhlp.org/resourcecenter?tid=68>.
- <sup>5</sup> The PTFA appears as Title VII, §§ 702-703, of the *To Prevent Mortgage Foreclosures and Enhance Mortgage Credit Availability Act, Pub. L. No. 111-22, 123 Stat. 1632 (2009)*.
- <sup>6</sup> RCW 61.24.040 and RCW 61.24.143.
- <sup>7</sup> Title VII, §702 702(a)(2)(A).
- <sup>8</sup> U.S. Department of Housing and Urban Development (HUD), 'Notice of Responsibilities Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property,' 74 Federal Register 120 (June 24 2009), pp 30106 – 30107.
- <sup>9</sup> *Dodd-Frank Wall Street Reform and Consumer Protection Act*, P.L. 111-203 Section 1484 .
- <sup>10</sup> RCW 59.18.260-285.
- <sup>11</sup> RCW 59.18.200.
- <sup>12</sup> RCW 61.24.146.

**Public Law 111-22, (May 20, 2009)**  
**TITLE VII--PROTECTING TENANTS AT FORECLOSURE ACT (PTFA)<sup>1</sup>**

**SEC. 701. SHORT TITLE.**

This title may be cited as the 'Protecting Tenants at Foreclosure Act of 2009'.

**SEC. 702. EFFECT OF FORECLOSURE ON PREEXISTING TENANCY.**

(a) In General- In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to--

- (1) the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and
- (2) the rights of any bona fide tenant--

(A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1); or  
 (B) without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90 day notice under subsection (1),

except that nothing under this section shall affect the requirements for termination of any Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.

(b) Bona Fide Lease or Tenancy- For purposes of this section, a lease or tenancy shall be considered bona fide only if--

- (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;
- (2) the lease or tenancy was the result of an arms-length transaction; and
- (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.

(c) Definition- For purposes of this section, the term 'federally-related mortgage loan' has the same meaning as in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602). For purposes of this section, the date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.

**SEC. 703. EFFECT OF FORECLOSURE ON SECTION 8 TENANCIES.**

Section 8(o)(7) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)(7)) is amended--

(1) by inserting before the semicolon in subparagraph (C) the following: 'and in the case of an owner who is an immediate successor in interest pursuant to foreclosure during the term of the lease vacating the property prior to sale shall not constitute other good cause, except that the owner may terminate the tenancy effective on the date of transfer of the unit to the owner if the owner--

- (i) will occupy the unit as a primary residence; and
- (ii) has provided the tenant a notice to vacate at least 90 days before the effective date of such notice.'; and

(2) by inserting at the end of subparagraph (F) the following: 'In the case of any foreclosure on any federally-related mortgage loan (as that term is defined in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602)) or on any residential real property in which a recipient of assistance under this subsection resides, the immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to the lease between the prior owner and the tenant and to the housing assistance payments contract between the prior owner and the public housing agency for the occupied unit, except that this provision and the provisions related to foreclosure in subparagraph (C) shall not affect any State or local law that provides longer time periods or other additional protections for tenants.'

**SEC. 704. SUNSET.**

This title, and any amendments made by this title are repealed, and the requirements under this title shall terminate, on December 31, 2014.

123 STAT. 1632, 1660

<sup>1</sup> The PTFA was clarified and extended in section 1484 of P.L. 111-203 (July 21, 2010).

## APPENDIX “B”

### Tenant Communications To New Owner

#### A. Non Section 8 Notice Language

The Protecting Tenants at Foreclosure Act (PTFA), P.L. 111-22, §§ 701-704 (May 20, 2009) as amended, applies to state eviction proceedings.<sup>1</sup> This law requires that a person or entity (including a bank) that becomes the new owner of a residential rental property as the result of a foreclosure **honor existing leases with a fixed term until the end of the lease term**. The law also mandates that, **no matter what the lease term, the new owner must provide the tenant(s) in the property with at least 90 days’ notice before requiring the tenant(s) to vacate the property**. There is an exception in the law for new owners who will live in the unit as their primary residence. Such owners are not required to honor the existing lease until the end of its term but still must still provide at least 90 days’ advance notice before requiring a tenant to leave.

All bona fide leases entered into before the date on which complete title is transferred to the new owner are covered by the law. The 90 day period cannot start until the date on which complete title is transferred to the new owner and the new owner properly serves the tenant with a 90 day notice to vacate

#### B. Section 8 Notice Language.

The Protecting Tenants at Foreclosure Act (PTFA), P.L. 111-22, §§ 701-704 (May 20, 2009) as amended, applies to state eviction proceedings.<sup>1</sup> This law requires a person or entity (including a bank) who becomes the new owner of residential rental property as a result of a foreclosure to **continue to honor and be bound by both the Section 8 voucher lease and the Housing Assistance Payments (HAP) contract** that existed with the original landlord.

If the Section 8 lease and HAP contract have more than 90 days left, a new owner must give the tenant at least 90 days notice to vacate prior to the end of the lease.

If the Section 8 lease and HAP contract have less than 90 days remaining in their term, or if the new owner plans to live in the property as his or her primary home, the new owner can require a tenant to leave the property **after giving at least 90 days’ advance notice**.

All bona fide leases entered into before the date on which complete title is transferred to the new owner are covered by the law. The 90 day period cannot start until the date on which complete title is transferred to the new owner and the new owner properly serves the tenant with a 90 day notice to vacate

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<sup>1</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203 (July 21, 2010), in § 1484, clarified and amended the PTFA.

**APPENDIX "C"**

**FORECLOSURE NOTICE TO QUIT**

TO: \_\_\_\_\_; AND

ALL OCCUPANTS RESIDING AT:

\_\_\_\_\_  
**NOTICE IS HEREBY GIVEN THAT** \_\_\_\_\_ ("Beneficiary/Trustee"), or its successor in interest, purchased the property located at \_\_\_\_\_ ("The Premises") at a foreclosure sale held in accordance with Revised Code of Washington 61.24 and pursuant to the power of sale contained in a Deed of Trust recorded in the Official Records of \_\_\_\_\_ County, and that title to the Premises is duly perfected in \_\_\_\_\_.

**YOU SHOULD TALK TO A LAWYER NOW TO SEE WHAT YOUR RIGHTS ARE.**

**NOTICE IS FURTHER GIVEN THAT:**

**YOU ARE REQUIRED TO VACATE AND SURRENDER POSSESSION** of the Premises, or the portion in which you reside, to \_\_\_\_\_, within the applicable NOTICE PERIOD provided below pursuant to Section 702(a)(2)(A) of the federal "Protecting Tenants at Foreclosure Act of 2009" ("PTFA") or you are protected by Section 703 of the PTFA (relating to Section 8 housing) or are a tenant subject to chapter 59.18 RCW having protections under 61.24.146 RCW.

**NOTICE PERIOD:** Your applicable notice period depends on whether you are a bonafide tenant or subtenant or whether you are a Trustor of the Deed of Trust foreclosed or successor in interest to the Trustor.

1. If you are the Trustor(s) of the Deed of Trust described above, or successor in interest to said Trustor(s), or any person **who is not a bona fide tenant** or subtenant, then your Notice period is within twenty (20) days after service of this Notice; or
2. If you are a bona fide tenant or a subtenant of the Trustor(s) of the Deed of Trust described above, or a bona fide tenant or a subtenant of a successor in interest to said Trustor(s), your Notice Period is within (90) days after service on you of this Notice or the end of your lease period, whichever is later.

If within the applicable Notice Period set forth above, EITHER you fail to surrender possession OR fail to provide evidence that you are a bona fide tenant pursuant to Section 702(a)(2)(A) of the PTFA or are protected by Section 703 of the PTFA or RCW 61.24.146, an action for unlawful detainer (Eviction) may be brought against you, following 20 days of service of this notice, pursuant to RCW 59.18 and/or RCW 59.12.

PURSUANT TO THE PTFA AND RCW 61.24.060, demand is hereby made that if you believe you are a tenant with a bonafide lease pursuant to the above referenced laws, you must contact the new owner at the address listed below and produce a copy of the lease. Failure to exercise your potential

**FORECLOSURE NOTICE TO QUIT page 1**

legal rights may result in legal action for possession of the property, the rent, late fees, court costs and attorney fees, if applicable.

This Notice is given pursuant to the provisions of the PTFA and includes the 60 day notice provision of RCW 61.24.142, within the above 90-day Notice period of the PTFA.

**Alternative 1: This notice also constitutes a notice of non-renewal of any lease applicable to the Premises.**

**Alternative 2: In the Alternative to requiring you to vacate the premises following the Notice Period above, the New Owner would like to contact you concerning the possibility of entering into a new lease agreement, once you have provided information regarding your current lease. In this regard, please return the ADDENDUM TO NOTICE TO QUIT, included with this notice.**

Dated: \_\_\_\_\_

New Owner:

\_\_\_\_\_

\_\_\_\_\_

Signature

**APPENDIX "D"**

**ADDENDUM TO NOTICE TO QUIT**

THE FOLLOWING TENANT INFORMATION MUST BE PROVIDED IF YOU CLAIM YOU ARE A BONA FIDE TENANT ENTITLED TO PROTECTION BY THE PROTECTING TENANTS IN FORECLOSURE ACT OF 2009 ("PTF A") OR THE PROTECTIONS OF 61.24.146 RCW.

IF YOU ARE A TENANT of the prior owner, please provide the following information:

- A copy of your lease agreement;
- A return phone number and hours to reach you;
- The receipts for the last four (4) payments made to the landlord of the property located at \_\_\_\_\_

Provide this information by mail, fax, or in person to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

For any questions, please call: \_\_\_\_\_

DATED: \_\_\_\_\_

New Owner: \_\_\_\_\_

Signature: \_\_\_\_\_



# **How Do Bankruptcy Laws Affect Foreclosure?**

**Submitted by J. Shane Cox**



## **VIII. How Bankruptcy Laws Affect the Foreclosure Process**

### **A. The Automatic Stay and how it Stop the Foreclosure in Its Tracks.**

#### **a. Automatic Stay is “Automatic in Nature”**

The moment the debtor(s) files a bankruptcy case, under any chapter of the Bankruptcy Code, an injunction is triggered against the continuance of any action by any creditor against the debtor or the debtor's property pursuant to 11 U.S.C. §362. The automatic stay acts as a proverbial shield to protect the debtor and her property from the contact and collection efforts of the creditors.

#### **b. The real property had already when to sale when the debtor filed for bankruptcy. Now What?**

Judge Mixon took this very issue up in *In re Jenkins*, 422 B.R. 175, (Bankr. E.D. Ark. January 12, 2010). Upon objection to confirmation of a Chapter 13 plan by the mortgagee, the Court ruled that the debtor could cure her mortgage default and resume mortgage payments on her principal residence when the property had been sold in a foreclosure sale pre-bankruptcy but the trustee's deed had not been recorded before the debtor filed her bankruptcy petition. The Court held the debtor's principal residence is sold for purposes of the bankruptcy code, under the Arkansas non-judicial Foreclosure Act, when the foreclosure deed is delivered to the buyer.

#### **c. Risks to be Mindful of When dealing with a Bankruptcy Filing:**

- Just because the debtor is represented by an attorney, it does not mean the creditor can violate the stay by contacting the attorney in a collection effort in lieu of the debtor.
- Just because a debtor schedules the debt as “surrendered” in the bankruptcy schedules or Chapter 13 plan, it does not mean the foreclosure can initiate or continue.
  - In some states such as certain districts in Texas, if the Chapter 13 debtor list the property as surrendered in the plan, upon confirmation

of the plan, the creditor can proceed with foreclosure. Arkansas is not one of those states; a court order lifting stay is required.

**d. Exceptions to the Automatic Stay: Repeat Filings and Other Bad Behaviors**

Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), debtors could file repeatedly in order to remain within the protection of the bankruptcy courts. This made it difficult for creditors to collect on debts that were owed. The Bankruptcy Code now includes two provisions that limit the protection offered to debtors in bankruptcy:

§362(c)(3) & (4) terminates the automatic stay 30 days after the filing of Chapter 7, 11 and 13 cases if a previous dismissed case was pending within 1 year before the current filing. In such case, the stay may remain in effect after notice and hearing in which the court finds that the filing of the current case is in good faith.

A filing is presumed not in good faith if:

- More than one case was pending within the previous year; or
- The debtor failed to file or amend the petition or schedules, provide adequate protection ordered by the court, or perform the terms of a confirmed plan; or
- There has not been a substantial change in the financial or personal affairs of the debtor or there is any other reason to conclude that a discharge will not be granted in Chapter 7 or a plan confirmed and performed in Chapters 11 & 13; or
- As to a particular creditor, if that creditor obtained a lifting of the stay in a previous case.

If 2 or more previous cases were open within 1 year before the present case, the automatic stay does not become effective. The stays may be put into effect after notice and hearing in which it is found that the filing of the present case is in good faith.

§362(d)(4) continues the relief from the stay (usually via an order granting relief) regarding real property as to subsequent cases filed within 2 years if the bankruptcy

petition was part of a scheme to delay, hinder, and defraud creditors and involved transfer the real property or multiple bankruptcy filings.

## **B. How Chapter 7 and 13 Filings Can Dictate When to Initiate Foreclosure.**

### **a. The Purpose of the Chapter 13 Bankruptcy**

Chapter 13 Bankruptcy is designed for an individual debtor who has a regular source of income. Chapter 13 is usually more desirable than a Chapter 7 because it enables the debtor to keep the collateral. This type of filing allows the debtor to propose a plan to repay creditors over a three or five year time frame. Alternatively, the debtor has the option of surrendering his secured debts during the bankruptcy term. Unless the debtor completes the plan, he cannot receive a discharge of his debts. Even if the debtor completes the plan, it does not that he is necessary discharge such as situation where he is a repeat bankruptcy filer.

### **i. The Chapter 13 Discharge**

In a Chapter 13 case, the automatic stay is terminated as to the debtor and the property when the debtor is discharged. Similar to a Chapter 7, the discharge order severs the debtor's personal liability on most of his debts. However, long-term mortgage debt is not one of those debts where the debtor's liability is discharged. Bankruptcy Code § 1328(a) precludes long-term mortgage debt from discharge. Therefore, post-discharge mortgagee collection efforts against a Chapter 13 debtor who paid his mortgage during the bankruptcy term are not a violation of the discharge order.

### **ii. Proof of Claims in a Chapter 13 Bankruptcy**

Bankruptcy Code § 501 allows a creditor having a stake in the bankruptcy to prove-up the debt by filing a proof of claim. Pursuant to Fed. R. Bankr. P. 3002(c), the claim must be filed within 90 days of the first date set for the meeting of creditors (341 meeting). Section 502(b) allows a party in interest to object to the untimely claim. If the objection is successfully, the secured party cannot be part of the bankruptcy and can make not collection efforts while the debtor is protected by the

stay. However, just because a secured creditor has not filed a timely proof of claim, does not mean the secured creditor's lien is void. *See Shelton v. Citimortgage, Inc.*, Case No. 12-3555 (8th Cir. November 4, 2013).

### **b. The Purpose of the Chapter 7 Bankruptcy**

The purpose of a Chapter 7 bankruptcy is for the trustee to liquidate the debtors non-exempt assets and divide the proceeds to pay unsecured creditors (who file a proof of claim). Often unsecured creditors do not file claims necessary and in such a case any assets remaining will go back to the debtor. Debtors must keep the assets as property of the bankruptcy estate until the assets have been officially abandoned.

#### **i. The Elusive Chapter 7 Discharge**

In a Chapter 7 case, the automatic stay is terminated as to the debtor when the debtor is discharged. The stay is terminated on the estate when the case is closed or when the property is abandoned by the estate pursuant to 11 U.S.C. § 362(c). When a debtor is successfully discharged in a Chapter 7 case, his personal liability on most of his debts such as long-term mortgage debt is severed unless he reaffirmed the debt during the bankruptcy. Without reaffirming the pre-petition debt, the creditor cannot sue the discharged debtor for a deficiency judgment pursuant to Section 524(a)(2) of the Bankruptcy Code .

#### **ii. The Reaffirmation Agreement and Discharged Debt**

In order for a reaffirmation agreement to be considered valid, it must fully comply with the statutory requirements of 11 U.S.C. § 524(c) and (d). A reaffirmation agreement is only enforceable against a debtor who is represented by counsel if: (1) the agreement was made in advance of the debtor's discharge; (2) the agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after the agreement is filed with the court, whichever occurs later; (3) the agreement has been filed with the court; and (4) the debtor has not rescinded the agreement. The

reaffirmation agreement is in the discretion of each party to the agreement and is not way mandatory.

Does a post-discharge refinance or loan modification on a loan that was not reaffirmed violate the discharge injunction? Arkansas has not yet directly taken up this issue but consider the following two cases:

- *In re Heirholzer*, 170 B.R. 938 (Bankr. N.D. Ohio 1994), found that a post-discharge agreement was not an invalid reaffirmation agreement where consideration offered by the lender came in the form of an agreement not to foreclose on a mortgage.
- Any post-petition agreement which obligates a debtor on a discharged debt must comply with the relevant Code sections dealing with reaffirmation. Failure to do so will result in the agreement being considered invalid and collection upon that agreement a violation of the discharge injunction. *See In re Getzoff*, 180 B.R. 572 (9th Cir. BAP 1995)

### **iii. The Trustee's No Asset Report**

The Bankruptcy Trustee must submit to the US Trustee a Final Report, Distribution of the Estate Dividends, and a final account of Certification the Estate has been Fully Administered and Applications to be discharged. The Final Report is usually due 60 days after the 341 meeting. In a Bankruptcy case where the trustee does not find any exempt assets and therefore no assets to administer, the Trustee will issue a report of no assets (NAR).

### **iv. Combining the NAR and the Discharge Order**

Often creditors believe the NAR is actual abandonment by the estate of the property listed on the report. As such, with the NAR in one hand and a discharge order in the other, they may initiate foreclosure on the real property. If the case were still open, this action would be a violation of the stay against the estate, because the NAR is not actual abandonment, rather is simply a report indicating the trustee does not think there is any non-exempt property to liquidate and distribute to unsecured creditors.

So the question becomes how may the mortgagee initiate foreclosure on real property that is part a Chapter 7 asset case? There are two ways: 1. Wait for the bankruptcy case to close. 2. File a motion for relief and abandonment pursuant to 11 U.S.C. § 554, and reach an agreement regarding the real property with the interested parties.

#### **v. Post-Discharge Foreclosure Issues**

##### **1. The NOD, Discharge, and Possibility of Deficiency**

A recent Nevada Bankruptcy decision, *In re Grihalva*, Case No.: 11-26893 (Bankr. Nev. August 28, 2013) shows how the foreclosure process may violate the debtor's discharge injunction. The case involves a Motion to Reopen a Chapter 7 case and a motion for contempt. The debtor received a Chapter 7 discharge in early 2012.

Later than year, the mortgagee mailed a default letter to the debtor that among the usual such as payment demand, it stated, "If you received a bankruptcy discharge which included this debt, this notice is not intended and does not constitute an attempt to collect a debtor against you personally" and "TO THE EXTENT YOUR OBLIGATION HAS BEEN DISCHARGED OR IN SUBJECT TO THE AUTOMATIC STAY IN A BANKRUPTCY PROCEEDING, THIS NOTICE IS FOR INFORMATIONAL PURPOSES ONLY AND DOES NOT CONSTITUTE A DEMAND FOR PAYMENT OR AN ATTEMPT TO COLLECT AN INDEBTEDNESS AS YOUR PERSONAL OBLIGATION."

Later, the attorney for the mortgagee filed a foreclosure complaint in State Court. The complaint stated that no deficiency after the sale will be sought against the Debtor or any other named defendant, but it also stated that the mortgagee might amend the complaint solely as to the Debtor in the event that the sale proceeds are insufficient to satisfy the full amount of the judgment. The debtor made the above mentioned motions and argued the mortgagee violated the discharge injunction by attempting to collect a debt that has been discharged pursuant to Section 524(a)(2). The Court agreed the mortgagee violated the discharge injunction and stated the mortgagee put the Debtor in an untenable position by engaging in conduct

inconsistent with the discharge: By seeking a determination of liability for the full amount, by preserving a possible deficiency after sale, and by omitting any reference to the discharge, the mortgagee forced the Debtor to assert his bankruptcy discharge in response.



# **Ethical Considerations In Foreclosure**

**Submitted by Matthew Z. Crotty**



## Legal Issues in Real Estate Foreclosure

### **A. The trustee must be neutral.**

"In Washington, [a deed of trust] is a statutorily blessed 'three-party transaction in which land is conveyed by a borrower, the 'grantor,' to a 'trustee,' who holds title in trust for a lender, the 'beneficiary,' as security for credit or a loan the lender has given the borrower.'" *Klem v. Washington Mut. Bank*, 176 Wn. 2d 771, 782-83 (2013). The trustee has a duty of good faith to the borrower, beneficiary, and grantor. RCW 61.24.010(4). However, the Washington Supreme Court holds that the Deed of Trust Act "must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrower's interests and the lack of judicial oversight in conducting non-judicial foreclosure sales." *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-916 (2007).

At times foreclosing financial institutions (primarily banks) hire an attorney to serve as a foreclosure trustee. In doing so, lenders should be aware of possible conflicts of interest and waiver of the attorney-client privilege should a lender hire utilize an attorney for both non-foreclosure purposes and foreclosure trustee purposes. While there is no known Washington or Idaho case that establishes that communication between a foreclosure trustee and a foreclosing lender are privileged, other courts addressing the issue have found that a lender does not enjoy blanket attorney-client privilege with a trustee who happens to be an attorney. *In re Brokers, Inc.*, No. 04-53451, 2006 WL 897137, at \*2 (Bankr.M.D.N.C. Mar.27, 2006) ("[A]ny communications related to the Deed of Trust in

which Gayle was named as trustee are not privileged."); *Wells Fargo Bank, N.A., Tr. v. Konover*, 2010 WL 814894, at \*2 (D. Conn. Mar. 5, 2010); *In re Ward*, 10-42456-13, 2011 WL 839518, at \*3 (Bankr. W.D. Mo. Mar. 7, 2011). In *Konover*, the court stated that it would "examine each of the communications at issue to determine whether the attorney was acting as outside counsel for the client or was acting as the foreclosure trustee at the time the communication was made" and held that if the communication occurred in the framework of the attorney acting as counsel for the bank then that communication would likely be privileged but if the communication occurred in the foreclosure trustee capacity then the privilege would be waived.

Washington law provides that, "[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them." *Cox v. Helenius*, 103 Wn. 2d 383, 389 (1985)(citing G. Osborne, G. Nelson & D. Whitman, *Real Estate Finance Law* § 7.21 (1979)("The trustee is bound by his office to present the sale under every possible advantage to the debtor as well as to the creditor. He is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and creditor alike."). *Klem*, 176 Wn.2d at 790. See also *Diamond v. Sandpoint Title Ins., Inc.*, 132 Idaho 145, 151 (1998). While Idaho law is not as developed on this point, it is consistent in establishing that a trustee has equal duties to both his beneficiary and trustor and must be impartial. *Diamond v. Sandpoint Title Ins., Inc.* 132 Idaho 145, 151, 968 P.2d 240 (1998).

Since Washington courts have held that attorney-client privilege does not apply if an attorney works for the mutual benefit of two parties, a Washington court could conclude that an attorney trustee acting as a lender's counsel and foreclosure trustee waives privilege in both capacities. *See e.g. Seattle Nw. Sec. Corp. v. SDG Holding Co., Inc.*, 61 Wn.App. 725, 736 (1991)("[T]he attorney-client privilege does not apply between parties when the attorney has acted for their mutual benefit."); *Billias v. Panageotou*, 193 Wn. 523, 526 (1938).

**B. The foreclosing entity's paperwork should be in order.**

A foreclosing entity should have the documentation needed to show that it is a proper beneficiary. The Washington State Supreme Court in *Bain v. Metropolitan Mortg. Group, Inc.* 175 Wn.2d 83 (2012), held that a deed of trust beneficiary who did not "hold the [underlying promissory] note" was "not a lawful beneficiary" capable of causing a trustee to execute a foreclosure sale. *Bain*, 175 Wn.2d at 89. *Bain* reasoned that, in Washington, the trustee - - - the entity that carries out foreclosures of real property and who owes duties of good faith to both the beneficiary and borrower - - - must "have proof that the beneficiary is the owner of any promissory note." *Bain*, 175 Wn.2d at 94. *Bain* further held the trustee has to see such proof of note ownership as failure to do so would cause the trustee to breach the good faith duties it owes the borrower. *See id.* at 94 (*citing* RCW 61.24.030(7)(a) & (8)(l)). For not requiring such proof would allow "the non-

[note] holding beneficiary to credit to its [foreclosure sale] bid funds to which it has no right." *Bain*, 175 Wn.2d at 102. Stated differently: a non-note holder beneficiary could foreclose on plaintiffs' property and obtain assets (e.g. plaintiffs' home or plaintiffs' payments) to which it has no right.

*Bain* is not an outlier. Other courts have found that a party seeking to enforce a deed of trust must establish proper ownership of the underlying note. *In re Kemp*, 440 B.R. 624, 629-30 (Bankr. D.N.J. 2010)(Disallowing bank's proof of claim and stating "the fact that the owner of the note, the Bank of New York, never had possession of the note, is fatal to its enforcement. Second, upon the sale of the note and mortgage to the Bank of New York, the fact that the note was not properly indorsed to the new owner also defeats the enforceability of the note."); *Bank of New York v. Silverberg*, 86 A.D.3d 274, 283, 926 N.Y.S.2d 532, 539 (2011)("[B]ecause MERS was never the lawful holder or assignee of the notes described and identified in the consolidation agreement, the corrected assignment of mortgage is a nullity, and MERS was without authority to assign the power to foreclose to the plaintiff."); *BAC Home Loans Servicing, L.P. v. White*, 2011 OK CIV APP 35, 256 P.3d 1014, 1017 (reversing summary judgment in favor of bank because questions of fact existed as to who owned the note); *Wells Fargo Bank, N.A. v. Guy*, 19 Misc. 3d 1127(A), 866 N.Y.S.2d 96 (Sup. Ct. 2008)(reversing default judgment of bank and stating "the Court needs a properly offered copy of the pooling and servicing

agreements, to determine if the servicing agent may proceed on behalf of plaintiff")<sup>1</sup>; *First Gibraltar Bank, FSB, v. Farley*, 895 S.W.2d 425, 428–29 (Tex.App.-San Antonio 1995)(Unexplained gap in the chain of title may present a fact issue on the question of ownership.). *U.S. Bank Nat. Ass'n v. Ibanez*, 458 Mass. 637, 638, 941 N.E.2d 40, 44 (2011). The Massachusetts Supreme Court affirmed the trial court's dismissal of U.S. Bank's quiet title action because U.S. Bank, "who [was] not the original mortgagee[.], failed to make the required showing that [it was] the holder[] of the mortgages at the time of foreclosure." *See generally Bradford v. HSBC Mortg. Corp.*, 799 F.Supp.2d 625 (E.D. Va. 2011)(allowing plaintiff-homeowner claim to proceed after three different companies attempted to foreclose on plaintiff's property). *In re Foreclosure Cases*, 1:07CV2282, 2007 WL 3232430, at \*3 n.3 (N.D. Ohio Oct. 31, 2007)(dismissing fourteen foreclosure actions because the plaintiff-financial institutions could not produce evidence showing that plaintiffs were the holders of the notes).

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<sup>1</sup> The *Guy* court further inquired as to why Wells Fargo purchased, from MERS, a nonperforming loan. *Guy*, at \*3 ("Also, the Court requires an explanation from an officer of plaintiff WELLS FARGO as to why, in the middle of our national subprime mortgage financial crisis, plaintiff WELLS FARGO purchased from MERS, as nominee of FIRST FRANKLIN, a nonperforming loan. Could it be that WELLS FARGO and FIRST FRANKLIN desired to assign to the bondholders of plaintiff's C.D.O. a nonperforming loan...rather than keep it on FIRST FRANKLIN's books?").

**C. The bank should keep its customer's affairs confidential.**

Washington courts hold that "a bank is under a duty not to disclose the financial condition of its customers." *Tokarz v. Frontier Fed. Sav. & Loan Ass'n*, 33 Wn. App. 456, 459 (1982)(citing *Milohnich v. First Nat'l Bank of Miami Springs*, 224 So.2d 759 (Fla.Dist.Ct.App.1969); *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284, 92 A.L.R.2d 891 (1961); *State v. McCray*, 15 Wn. App. 810, 817 (1976)). Other courts are in accord. *First Nat. Bank in Lenox v. Brown*, 181 N.W.2d 178, 183 (Iowa 1970); *Burrows v. Superior Court*, 13 Cal. 3d 238, 245, 529 P.2d 590 (1974)(holding bank customer has "reasonable expectation of privacy in bank statements" and suppressing evidence bank voluntarily disclosed to police); *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652, 657, 542 P.2d 977 (1975)("[I]t is the general rule in other jurisdictions that a bank impliedly agrees not to divulge confidential information without the customer's consent unless compelled by court order.").

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