



2009 SENATE BILL 255

August 11, 2009 – Introduced by Senators TAYLOR, LASSA, WIRCH, LEHMAN and HOLPERIN, cosponsored by Representatives YOUNG, GRIGSBY, BERCEAU, ROYS, CLARK, TURNER, A. WILLIAMS, ZEPNICK, RICHARDS and KESSLER. Referred to Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing.

1 **AN ACT** *to amend* 904.085 (2) (a); and *to create* 846.03 of the statutes; **relating**
2 **to:** notification of default and mediation regarding residential real property
3 subject to foreclosure and granting rule-making authority.

Analysis by the Legislative Reference Bureau

Under current law, if a mortgagee brings an action for foreclosure of a mortgage on a residential property, the homeowner (mortgagor or borrower) is served with a summons and complaint and the normal civil procedural rules of pleadings, discovery of evidence, pretrial, and trial apply. If the court finds that the mortgagee has the right to the foreclosure, the court issues a judgment for foreclosure of the mortgage, which entitles the mortgagee to force a sale of the property after a redemption period has ended.

This bill creates a process to allow a borrower who owes a first or second mortgage loan on a residential property to seek mediation when the borrower is in default on the loan and the mortgagee is beginning a mortgage foreclosure action. Under the bill, if the borrower has failed to make two consecutive mortgage loan payments, the mortgagee must send the borrower a notice when commencing a foreclosure action. The notice must inform the borrower of the default and what must be done to cure the default, state that the mortgagee intends to start a foreclosure action, and provide the names and addresses of credit counseling services available to homeowners.

Under the bill, when a mortgagee starts a foreclosure action, the mortgagee must inform the borrower of the right to request mediation by submitting a request

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to the director of state courts (director). If mediation is requested, the foreclosure action is stayed until mediation is completed. When the borrower requests mediation, the bill requires the director to refer the borrower to a financial analyst for advice regarding the mortgage foreclosure and to provide the mortgagee and borrower with names of persons who are available to provide mediation services. The bill requires the director to create a list of persons who have knowledge of financial matters to serve as mediators, create a separate list of persons to serve as financial analysts, and provide those persons with training related to their duties under the bill.

The bill requires the director to notify the parties of the time and place of the mediation session. The mediator may not compel a settlement between the parties, but must attempt to achieve a resolution of the issues involved in the mediation. The bill requires the parties to engage in the mediation in good faith, which includes attending the mediation sessions, providing full information to the mediator and other party, and considering debt restructuring alternatives as a method of resolving the default. The cost of the mediator may be added to the mortgage loan payments required by the borrower.

Under the bill, if the mediator determines that the borrower or mortgagee has not mediated in good faith, the mediator provides that information to the court. If the mortgagee has not mediated in good faith, the court may supervise the mediation directly, prohibit the mortgagee from continuing an action to foreclose on the residential property for 180 days, or order the mortgagee to pay the borrower's court costs, including attorney fees. If the borrower has not mediated in good faith, the mortgagee may proceed immediately to foreclose on the residential property.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 846.03 of the statutes is created to read:

2 **846.03 Notification and mediation before foreclosure of residential**
3 **real property. (1)** In this section:

4 (a) "Borrower" means the person who gives to the mortgagee a first or 2nd
5 mortgage on the residential real property owned by the person, to provide security
6 for repayment of the first or 2nd mortgage loan provided to the borrower.

7 (b) "Director" means the director of state courts.

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1 (c) “First mortgage loan” means a loan on residential real property that is
2 secured by a first lien real estate mortgage.

3 (d) “Mortgagee” means a person who receives a first or 2nd mortgage on
4 residential real property to secure payment of a first or 2nd mortgage loan made to
5 the owner of the residential real property.

6 (e) “Residential real property” means real property on which a one-family to
7 4-family dwelling is constructed or intended to be constructed in this state and that
8 the owner of the real property uses, or intends to use, as his or her principal place
9 of residence.

10 (f) “Second mortgage loan” means a loan on residential real property, including
11 the renewal or refinancing of an existing 2nd mortgage loan, that is secured by a real
12 estate mortgage, is subordinate to a first mortgage loan, includes a penalty for
13 prepayment of the loan, and has a payment schedule that causes the principal
14 balance to not decrease or to increase.

15 **(2) NOTICE OF DEFAULT REQUIRED.** (a) If a borrower has failed to make full
16 scheduled payments on a first or 2nd mortgage loan for 2 consecutive payment
17 periods and the failure to make these payments renders the borrower in default
18 under the terms of the first or 2nd mortgage loan, a mortgagee holding or servicing
19 the first or 2nd mortgage loan shall, before commencing an action to foreclose on the
20 first or 2nd mortgage loan, provide the borrower with a notice no later than 45 days
21 after the due date for the 2nd payment period and shall make a good faith effort to
22 speak to the borrower and inform him or her of the contents of the notice.

23 (b) The notice required under par. (a) shall inform the borrower of all of the
24 following:

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1 1. Any action or procedure required of the borrower to cure the default on the
2 first or 2nd mortgage loan, including any amount that must be paid to cure the
3 default and to bring the borrower current on the first or 2nd mortgage loan, and any
4 date by which the action or procedure must be taken.

5 2. The names and addresses of adjustment service companies licensed under
6 s. 218.02 that offer credit counseling services to homeowners.

7 3. The legal description and the postal address of the residential real property
8 that is the subject of the first or 2nd mortgage loan.

9 4. That the mortgagee intends to bring an action to obtain a court judgment of
10 foreclosure on the first or 2nd mortgage loan.

11 (c) If a mortgagee commences an action to foreclose on the first or 2nd mortgage
12 loan without meeting the requirements under this subsection, the court in which the
13 action is commenced shall, on its own motion or on the motion of a party, dismiss the
14 action and may charge the mortgagee with costs, including the borrower's attorney
15 fees.

16 **(3) COMMENCEMENT OF MORTGAGE FORECLOSURE AND MEDIATION NOTICE.** (a) When
17 the mortgagee commences an action to foreclose on a first or 2nd mortgage loan, the
18 mortgagee shall provide the borrower with a notice regarding the right to mediation
19 and a mediation request form. The mediation request form shall include spaces to
20 fill in the information necessary to identify the mortgagee, borrower, and residential
21 real property involved and the date the form was received from the mortgagee and
22 shall include the location where the form should be sent. The notice shall inform the
23 borrower of all of the following:

24 1. That the borrower has the right to request mediation regarding the first or
25 2nd mortgage loan, provided that the borrower has not participated in mediation

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1 within the past 2 years, or agreed to certain loan modifications with the same
2 mortgagee on the same residential real property within the past 3 years. The notice
3 shall include an explanation of when the limit on mediation as the result of a loan
4 modification applies.

5 2. That the right to mediation under this section regarding a first or 2nd
6 mortgage loan applies only once.

7 3. That to request mediation, the borrower must submit a request for mediation
8 to the director within 14 working days after receipt of the notice of the right to
9 mediation.

10 4. That the action to foreclose the residential real property will be stayed until
11 the mediation ends if mediation is requested within 10 days after receipt of the
12 notice.

13 5. That if mediation is not requested within 10 working days, the mortgagee
14 may immediately continue the action to foreclose on the first or 2nd mortgage loan.

15 6. That if mediation is requested, the director will provide financial analysis
16 assistance to the borrower to prepare for the mediation.

17 7. The name, telephone number, and address of the mortgagee.

18 8. The address where the request for mediation must be sent.

19 (b) To request mediation, the borrower shall submit a completed mediation
20 request form, or a substantially similar form, to the director within 10 working days
21 after receipt of the right to mediation from the mortgagee.

22 **(4) REQUEST FOR MEDIATION.** (a) Within 10 working days after receipt of a notice
23 of the right to mediation under sub. (3), the borrower may submit a request to the
24 director for mediation. If the director receives a request for mediation, the director
25 shall notify the parties of the request as provided in sub. (6). Within 5 working days

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1 after notifying the parties, the mortgagee may submit information to the director
2 asserting that the borrower is not eligible for mediation under pars. (b) or (c). If the
3 mortgagee submits the information, the director shall immediately provide the
4 borrower with the information and allow the borrower 5 working days to submit
5 information to the director in response to the mortgagee's assertion. The director
6 shall determine if the borrower has the right to mediation and notify both parties of
7 that decision within 15 working days of receipt of the mortgagee's submitted
8 information. The director's determination is appealable to the circuit court.

9 (b) If the borrower has participated in mediation with the same mortgagee on
10 the same residential real property within the past 2 years, the borrower is not eligible
11 for mediation under this section.

12 (c) If the borrower has agreed to a loan modification with the same mortgagee
13 on the same residential real property within the past 3 years, the borrower is not
14 eligible for mediation under this section. This paragraph does not apply if the loan
15 modification did not meet the debt-to-income guidelines established by a federal
16 agency that insures or guarantees loans. This paragraph does not apply if the loan
17 modification did not take into account the borrower's ratio of current assets to
18 current liabilities at the time the loan modification was completed.

19 (d) If a borrower has requested mediation under this subsection and has not
20 been found ineligible for mediation under par. (a), (b), or (c), the director shall notify
21 the court that the borrower has requested mediation and is eligible for mediation
22 under this section. Upon receipt of the notification, the court shall stay the
23 foreclosure action until the mediation is completed.

24 **(5) MEDIATORS AND FINANCIAL ANALYSIS.** (a) The director shall create a list of
25 persons who have the character and ability to serve as mediators, and who have

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1 knowledge of financial or residential housing matters and of mediation processes, to
2 act as mediators under this section. The director shall create a list of persons who
3 have the character and ability to serve as financial analysts, and who have
4 knowledge of financial and residential housing matters, to act as financial analysts
5 under this section. The director shall provide each mediator with sufficient training
6 to develop or maintain the skills necessary to perform his or her duties under this
7 section.

8 (b) The mortgagee shall compensate mediators and financial analysts for travel
9 and other necessary expenses in amounts the director approves. A mortgagee may
10 recover the costs of compensating any mediator and financial analyst used in the
11 mediation by adding that cost to the periodic payments made by the borrower on the
12 first or 2nd mortgage loan. A mortgagee may not recover the costs of compensating
13 mediators and financial analysts under this paragraph if the mortgagee does not
14 mediate in good faith. If a mortgagee mediates in good faith but the borrower does
15 not mediate in good faith, the borrower shall compensate any mediator and financial
16 analyst used in the mediation.

17 (c) Mediators and financial analysts are immune from civil liability for any act
18 or omission within the scope of their performance of their duties under this section.

19 (d) All mediators and financial analysts shall keep confidential all information
20 and records obtained in performing their duties under this section. The director shall
21 keep confidential all information and records that may serve to identify any party
22 to mediation under this section. Any information required to be kept confidential
23 under this paragraph may be disclosed if the director and the parties agree to
24 disclosure.

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1 **(6) MEDIATION PROCESS.** (a) Within 3 working days after receipt of a request for
2 mediation, the director shall notify the borrower and mortgagee of receipt of the
3 request and provide the mortgagor with the name, telephone number, and address
4 of a financial analyst who can without charge provide the borrower with advice and
5 written materials to help him or her prepare for the mediation. The financial analyst
6 may meet with the borrower to prepare for the mediation.

7 (b) If the residential real property is located in whole or part in a county having
8 a population of 500,000 or more, the borrower shall meet with a counselor certified
9 by the federal department of housing and urban development before mediation as a
10 condition of having the right to mediation under this subsection.

11 (c) Within 10 working days after determining under sub. (4) that mediation
12 may occur, the director shall provide the borrower and mortgagee with the names,
13 telephone numbers, and addresses of not fewer than 2 mediators in the geographical
14 area in which the residential real property is located. Within 5 working days after
15 the director submits to the parties the names of the mediators, each party shall select
16 a mediator and notify the director of the party's selection. If the parties agree on a
17 mediator, the director shall notify them of the agreed upon mediator within 5
18 working days after receipt of their selection. If the parties do not agree on a mediator,
19 if one party does not notify the director of a selection in a timely manner, or if both
20 parties so request, the director shall, within 15 days after the director submitted the
21 names of the mediators to the parties, select a mediator and notify the parties of the
22 selection.

23 (d) Within 10 working days after the parties are notified of the selection of a
24 mediator, the director shall notify the parties and the mediator of the place and time

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1 of the first mediation session. The first mediation session shall take place not later
2 than 20 working days after the parties are notified of the selection of a mediator.

3 (e) The mediator shall encourage a voluntary settlement between the parties.
4 The mediator may not compel a settlement. The mediator shall advise the parties
5 of assistance programs that are available and attempt to arrive at a fair agreement
6 to adjust, refinance, or pay the first or 2nd mortgage loan. The mediator shall
7 schedule meetings of the parties, direct the parties to prepare for the meetings,
8 attempt to achieve a resolution to the issues between the parties and, if the parties
9 request, assist the parties in preparing a written agreement. All mediation meetings
10 shall be held in this state and be conducted under the laws of this state and may be
11 held using telecommunications.

12 (f) Mediation may continue during a period not to exceed 60 days after the first
13 mediation session. After the expiration of the 60 days, the parties may no longer
14 participate in the mediation process regarding the same first or 2nd mortgage loan
15 unless the parties and the mediator agree to continue the mediation.

16 (g) The parties have full responsibility for reaching and enforcing any mediated
17 agreement. The mediation agreement may be enforced by the circuit court for the
18 county in which the residential real property is located.

19 (h) The parties shall engage in mediation in good faith. Failure to mediate in
20 good faith includes any of the following:

21 1. Failing on a regular basis to attend and participate in mediation sessions
22 without good cause.

23 2. Failing to provide full information regarding the party's financial
24 obligations.

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1 3. Failure of a party to designate a representative with adequate authority to
2 fully settle, compromise, or otherwise mediate the matter.

3 4. Failure of a party to consider debt restructuring alternatives and to provide
4 a written statement as to why debt restructuring alternatives are unacceptable.

5 5. Other similar behavior that indicates the lack of good faith of a party to
6 engage in mediation.

7 (i) If the mediator determines that a party is not engaged in the mediation in
8 good faith or that the borrower has withdrawn from the mediation, the mediator
9 shall provide to both of the parties and to the director an affidavit indicating the
10 reasons for the determination. If a party disagrees with the mediator's affidavit that
11 he or she is not acting in good faith, the party may request by motion that the circuit
12 court review the mediator's determination. If the court finds that the mediator's
13 determination was in error, the court shall order the mediator to continue the
14 mediation.

15 (j) If the mediator provides an affidavit indicating that the borrower is not
16 acting in good faith or has withdrawn from the mediation, and the borrower has not
17 requested a review of the mediator's determination under par. (i) or the court has
18 found that the mediator's determination was correct, the mortgagee may
19 immediately proceed with any legal remedies to foreclose on the first or 2nd
20 mortgage loan.

21 (k) If the mediator provides an affidavit indicating that the mortgagee is not
22 acting in good faith, and the mortgagee has not requested a review of the mediator's
23 determination under par. (i) or the court has found that the mediator's determination
24 was correct, the borrower may seek an order by motion in the circuit court to have
25 the court supervise mediation between the parties. The borrower shall include a copy

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1 of the mediator's affidavit with the motion filed with the court. Upon receipt of the
2 motion and affidavit, the court shall hold a hearing to determine if the parties should
3 be subject to mediation supervised by the court. The court may require the parties
4 to mediate in good faith under the court's supervision for up to 60 working days and
5 may issue any orders necessary to enforce the requirement. If the court finds that
6 the mortgagee has not participated in the court-ordered mediation in good faith, the
7 court shall prohibit the mortgagee from continuing any action to foreclose on the first
8 or 2nd mortgage loan for 180 days. In addition, the court shall order the mortgagee
9 to pay costs and attorney fees incurred by the mortgagee related to the court action
10 under this subsection.

11 **(7) REDEMPTION PERIOD REDUCED.** If the parties have completed the mediation
12 process under sub. (6) and agree that the foreclosure action should continue, the
13 redemption period shall be reduced to 6 months after the judgment for foreclosure
14 is entered.

15 **(8) OTHER CREDITORS; NO DELAY.** With respect to mediation between parties
16 before an action to which they are parties has been initiated, no agreement to
17 mediate, or the fact that mediation is currently occurring, may have the effect of
18 delaying, postponing, or extending any time limits in any legal proceeding
19 commenced to enforce a mortgage, land contract, lien, security interest, or judgment
20 commenced by a creditor other than the mortgagee participating in the mediation.

21 **(9) FORMS, RULE MAKING, AND PUBLICITY.** (a) The director shall prepare all forms
22 necessary for the administration of this section and shall ensure that the forms are
23 disseminated to the clerks of circuit court for distribution to the public without
24 charge.

