



The Mortgage Foreclosure Fairness Act Will Force Needed Conversation Between Lenders and Distressed Borrowers

The 2011 Legislature passed the Mortgage Foreclosure Fairness Act, SHB 1362. It is ambitious legislation aimed at forcing major lenders to engage in conversation and problem solving with borrowers. These conversations and problem-solving efforts should have been occurring all along, but they were not. The result encountered by most borrowers who attempt loan modifications and other negotiations with their institutional lender is frustration and never ending run-around. That is all about to change.

What does the statute require of lender, prior to foreclosure?

Under the Mortgage Foreclosure Fairness Act, certain lenders must give defaulting, owner-occupied, residential borrowers, a pre-foreclosure letter inviting the borrower to request a meeting with the lender. The letter must also advise the borrower to seek the assistance of a mortgage counselor or a lawyer. With or without the assistance of a lawyer or housing counselor, the borrower has the right to demand a meeting with the lender.

In addition, lender must attempt to reach the borrower by phone. At least three phone calls must be placed, each on different days and at different times of day. If borrower does not respond to the first letter or to any of the phone calls, lender must send a final letter advising borrower of borrower's rights to a meeting with lender. The first letter must be sent by regular, first class mail. The second must be sent certified. Both letters will be sent to the borrower's account address and the property address.

If the borrower responds to either letter or the phone calls, lender must refrain from filing a notice of default for ninety days from the date of the first letter. During this time, the borrower and the lender must meet and negotiate possible solutions to borrower's default. The solution could include a loan modification, short sale terms, an agreed deed in lieu and any other solution negotiated between the parties. The borrower has the right to demand this face to face meeting with or without the assistance of a lawyer or housing counselor. However, if the borrower obtains the assistance of a lawyer or housing counselor, the borrower may also demand a mediation with the lender. The benefits of a mediation are significant and will be explained below.

Significantly, if borrower fails to respond to the letters or the phone calls, lender may proceed with foreclosure. Borrower must take action if borrower wants to claim the right to negotiate and/or mediate with lender.

How Does Borrower Trigger A Mediation?

If a lawyer or housing counselor determines that a mediation is appropriate given all the circumstances, the lawyer or housing counselor must notify the Department of

Commerce, the state agency administering the mediation program. It is important to note that a borrower MUST consult a lawyer or housing counselor if borrower intends to demand mediation. Only a lawyer or housing counselor may demand the mediation. Borrower will not obligate lender to mediate based only on borrower's request.

For borrowers who are already in default when the statute takes effect, timing is everything. The new law goes into effect on July 22, 2011. Even if the borrower has already received a Notice of Default when the law takes effect, that borrower may demand mediation through a lawyer or housing counselor. Even though the Notice of Default has already been filed, the demand for mediation will stop the foreclosure process for the pendency of the mediation. It is critical for these borrowers to understand that they will not receive a letter or phone call from their lender as described in the previous section. Nevertheless, these borrowers may still demand mediation. They must contact a lawyer or housing counselor, however.

What Happens once the Mediation is Demanded?

When the Department receives a demand for mediation, the Department will notify the lender that a mediation will be scheduled and that lender must refrain from filing a Notice of Default for 90 days following the date of the original letter. The Department will appoint a mediator who will notify the parties of the paperwork each is expected to supply and conduct the mediation within 45 days.

Borrower and lender are required to share the mediation fee which will be \$400 for a mediation lasting up to three hours. The fee will be more if the mediation extends beyond three hours. The mediation fee must be paid before the mediation begins.

What Happens During the Mediation and Why Is Mediation So Valuable To Borrower?

During the mediation, the lender must supply a representative to meet, face to face, with the borrower and the mediator. If the lender's representative does not have authority to enter an agreement with the borrower, then a person with authority must be available by phone. The borrower may bring a lawyer or housing counselor to the mediation to advocate for the borrower.

The most significant benefit of the mediation is that lender is forced to discuss with borrower, options that may be available to assist the borrower in keeping the home. If keeping the home is not possible, then lender must discuss plans for disposing of the property in some fashion other than foreclosure. This would be the time for borrower to negotiate a short sale or deed in lieu with a discharge of the deficiency, how the lender will report borrower's default to credit bureaus and whether lender will make funds available to seller to pay relocation costs.

Additionally, the mediator or one of the parties may propose a loan modification that satisfies certain guidelines. If the lender rejects the loan modification despite borrower's willingness to accept the modification, that fact may have significance. If the modification is rejected by lender, the mediator must evaluate the proceeds that would be anticipated receipts to lender based on the modification versus the anticipated proceeds from the sale of the property at foreclosure. If the loan modification would yield greater proceeds than the foreclosure of the property, yet lender refuses the loan modification while pressing forward with foreclosure, then the mediator will file a report with the Department of Commerce, finding that lender engaged in bad faith. This particular report of bad faith will enable the borrower to enjoin or stop the pending foreclosure. The lender will have to start the entire foreclosure process over, including making another mediation session available to borrower. In addition, lender's rejection of the loan modification may give rise to a Consumer Protection Act claim by borrower.

There are other reasons the mediator may find the lender to have engaged in bad faith. For example, if lender fails to provide all documentation requested by the mediator or fails to have a decision maker available, the mediator will likely find bad faith by lender. A determination of bad faith by the mediator, based on one of these standards, may be enough to stop a foreclosure.

While the mediator may find that the borrower engaged in bad faith, the consequences of that finding are less significant.

Based on a finding of bad faith by the borrower, the lender may simply proceed with foreclosure.

To Which Lenders Does The Statute Apply?

These forced conversations are likely to be productive for borrowers. Unfortunately, not all borrowers will be able to take advantage of the statutory benefits. The new law only applies to lenders who foreclosed at least 250 owner-occupied deeds of trust in the prior year. Lenders must account to the Department of Commerce as to the number of foreclosures processed by the lender each quarter. Presumably, the Department of Commerce will post a list of lenders subject to the new law.

How Is This New Program Funded?

Interestingly, the mediation program and related expenses are funded by the lenders who are subject to the new law. Every lender subject to the Act must pay \$250 per Notice of Default issued. The subject lenders will have to account to the Department at the end of each quarter, including the quarter ended just prior to enactment of the new legislation.

The statute designates how these collected funds may be spent. The funds are paid into a dedicated account that will be used, primarily, to provide housing counselors. The remainder of the funds will be used to support the Office of the Attorney General, the Department Of Commerce and the Department of Financial Institutions as they implement and enforce the legislation with a small amount being used to fund legal aid services.

What Is The Role of A REALTOR® In This New Legislation?

REALTORS® should be prepared to play an important role in educating clients as to the potential benefits of this new statute. Too often, distressed and depressed property owners simply dispose of letters and notices from their lending institution rather than focusing on the difficult information contained in the mailings. More often than not, calls from lenders are left to go to voice mail. However, it will be critical for defaulting borrowers to read, pay attention to and respond to the requisite letters and

phone calls from their lender. If the borrower does not act on the information contained in the lender's letters within a short time period, borrower will lose the right to demand a meeting and/or mediation.

In addition, borrowers should be advised to consult with a housing counselor or lawyer before signing any agreements with their lender. A borrower's rights under the Foreclosure Fairness Act can be waived. Borrowers should be cautioned not to sign anything that may constitute a waiver of borrower's rights.

Owner-occupied residential borrowers residing in Washington State have access to free housing counselors by virtue of their ownership of a home in Washington. Borrowers should be encouraged to call a counselor, even if the borrower views their own situation as hopeless. They likely have nothing to lose by contacting a counselor and may have much to gain. REALTORS® should be prepared to provide this valuable phone number to distressed borrowers: 1-877-894-HOME (4663).

Finally, REALTORS® should take advantage of ongoing educational opportunities to stay abreast of laws, regulations and practices that seem to change quickly in this rapid-paced and relatively new world of widespread distressed homeownership. Perhaps the best service a broker can provide to a distressed homeowner is to empower that homeowner with hope and information. If the homeowner will simply pick up the phone and place the critical first phone call to their lender and/or to a housing counselor, the future for that homeowner could improve instantly.

Hotline Attorney Annie Fitzsimmons writes the Legal Hotline Question and Answer of the Week. Please submit questions to legalhotline@warealtor.org or call (800) 562-6027. Please have your NRDS number ready when you call or e-mail the Hotline with your question.

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