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**SUBSTITUTE SENATE BILL 5988**

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**State of Washington                      62nd Legislature                      2011 2nd Special Session**

**By** Senate Financial Institutions, Housing & Insurance (originally sponsored by Senators Hobbs, Litzow, Fain, Keiser, Frockt, Chase, and Kline)

READ FIRST TIME 12/14/11.

1            AN ACT Relating to making imperative changes to the foreclosure  
2 fairness act to ensure mediators' participation; amending RCW 61.24.163  
3 and 61.24.169; and declaring an emergency.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5            **Sec. 1.** RCW 61.24.163 and 2011 c 58 s 7 are each amended to read  
6 as follows:

7            (1) The foreclosure mediation program established in this section  
8 applies only to borrowers who have been referred to mediation by a  
9 housing counselor or attorney. The mediation program under this  
10 section is not governed by chapter 7.07 RCW and does not preclude  
11 mediation required by a court or other provision of law.

12            (2) A housing counselor or attorney referring a borrower to  
13 mediation shall send a notice to the borrower and the department,  
14 stating that mediation is appropriate.

15            (3) Within ten days of receiving the notice, the department shall:  
16            (a) Send a notice to the beneficiary, the borrower, the housing  
17 counselor or attorney who referred the borrower, and the trustee  
18 stating that the parties have been referred to mediation. The notice

1 must include the statements and list of documents and information  
2 described in subsection (5)(b)(i) through (iv) of this section; and

3 (b) Select a mediator and notify the parties of the selection.

4 (4)((+a)) Within forty-five days of receiving the referral from  
5 the department, the mediator shall convene a mediation session in the  
6 county where the borrower resides, unless the parties agree on another  
7 location. The parties may agree in writing to extend the time in which  
8 to schedule the mediation session. If the parties agree to extend the  
9 time, the beneficiary shall notify the trustee of the extension and the  
10 date the mediator is expected to issue the mediator's certification.

11 ~~((b) Prior to scheduling a mediation session, the mediator shall  
12 require that both parties sign a waiver stating that neither party may  
13 call the mediator as a live witness in any litigation pertaining to a  
14 foreclosure action between the parties. However, the mediator's  
15 certification may be deemed admissible evidence, subject to court  
16 rules, in any litigation pertaining to a foreclosure action between the  
17 parties.))~~

18 (5)(a) The mediator may schedule phone conferences, consultations  
19 with the parties individually, and other communications to ensure that  
20 the parties have all the necessary information to engage in a  
21 productive mediation.

22 (b) The mediator must send written notice of the time, date, and  
23 location of the mediation session to the borrower, the beneficiary, and  
24 the department at least fifteen days prior to the mediation session.  
25 At a minimum, the notice must contain:

26 (i) A statement that the borrower may be represented in the  
27 mediation session by an attorney or other advocate;

28 (ii) A statement that a person with authority to agree to a  
29 resolution, including a proposed settlement, loan modification, or  
30 dismissal or continuation of the foreclosure proceeding, must be  
31 present either in person or on the telephone or video conference during  
32 the mediation session;

33 (iii) A complete list of documents and information required by this  
34 section that the parties must provide to the mediator and the deadlines  
35 for providing the documents and information; and

36 (iv) A statement that the parties have a duty to mediate in good  
37 faith and that failure to mediate in good faith may impair the

1 beneficiary's ability to foreclose on the property or the borrower's  
2 ability to modify the loan or take advantage of other alternatives to  
3 foreclosure.

4 (6) The borrower, the beneficiary or authorized agent, and the  
5 mediator must meet in person for the mediation session. However, a  
6 person with authority to agree to a resolution on behalf of the  
7 beneficiary may be present over the telephone or video conference  
8 during the mediation session.

9 (7) The participants in mediation must address the issues of  
10 foreclosure that may enable the borrower and the beneficiary to reach  
11 a resolution, including but not limited to reinstatement, modification  
12 of the loan, restructuring of the debt, or some other workout plan. To  
13 assist the parties in addressing issues of foreclosure, the mediator  
14 must require the participants to consider the following:

15 (a) The borrower's current and future economic circumstances,  
16 including the borrower's current and future income, debts, and  
17 obligations for the previous sixty days or greater time period as  
18 determined by the mediator;

19 (b) The net present value of receiving payments pursuant to a  
20 modified mortgage loan as compared to the anticipated net recovery  
21 following foreclosure;

22 (c) Any affordable loan modification calculation and net present  
23 value calculation when required under any federal mortgage relief  
24 program, including the home affordable modification program (HAMP) as  
25 applicable to government-sponsored enterprise and nongovernment-  
26 sponsored enterprise loans and any HAMP-related modification program  
27 applicable to loans insured by the federal housing administration, the  
28 veterans administration, and the rural housing service. If such a  
29 calculation is not required, then the beneficiary must use the current  
30 calculations, assumptions, and forms that are established by the  
31 federal deposit insurance corporation and published in the federal  
32 deposit insurance corporation loan modification program guide; and

33 (d) Any other loss mitigation guidelines to loans insured by the  
34 federal housing administration, the veterans administration, and the  
35 rural housing service, if applicable.

36 (8) A violation of the duty to mediate in good faith as required  
37 under this section may include:

38 (a) Failure to timely participate in mediation without good cause;

1 (b) Failure of the beneficiary to provide the following  
2 documentation to the borrower and mediator at least ten days before the  
3 mediation or pursuant to the mediator's instructions:

4 (i) An accurate statement containing the balance of the loan as of  
5 the first day of the month in which the mediation occurs;

6 (ii) Copies of the note and deed of trust;

7 (iii) Proof that the entity claiming to be the beneficiary is the  
8 owner of any promissory note or obligation secured by the deed of  
9 trust. Sufficient proof may be a copy of the declaration described in  
10 RCW 61.24.030(7)(a);

11 (iv) The best estimate of any arrearage and an itemized statement  
12 of the arrearages;

13 (v) An itemized list of the best estimate of fees and charges  
14 outstanding;

15 (vi) The payment history and schedule for the preceding twelve  
16 months, or since default, whichever is longer, including a breakdown of  
17 all fees and charges claimed;

18 (vii) All borrower-related and mortgage-related input data used in  
19 any net present value analysis;

20 (viii) An explanation regarding any denial for a loan modification,  
21 forbearance, or other alternative to foreclosure in sufficient detail  
22 for a reasonable person to understand why the decision was made;

23 (ix) The most recently available appraisal or other broker price  
24 opinion most recently relied upon by the beneficiary; and

25 (x) The portion or excerpt of the pooling and servicing agreement  
26 that prohibits the beneficiary from implementing a modification, if the  
27 beneficiary claims it cannot implement a modification due solely to  
28 limitations in a pooling and servicing agreement, and documentation or  
29 a statement detailing the efforts of the beneficiary to obtain a waiver  
30 of the pooling and servicing agreement provisions;

31 (c) Failure of the borrower to provide documentation to the  
32 beneficiary and mediator, at least ten days before the mediation or  
33 pursuant to the mediator's instruction, showing the borrower's current  
34 and future income, debts and obligations, and tax returns for the past  
35 two years;

36 (d) Failure of either party to pay the respective portion of the  
37 mediation fee in advance of the mediation as required under this  
38 section;

1 (e) Failure of a party to designate representatives with adequate  
2 authority to fully settle, compromise, or otherwise reach resolution  
3 with the borrower in mediation; and

4 (f) A request by a beneficiary that the borrower waive future  
5 claims he or she may have in connection with the deed of trust, as a  
6 condition of agreeing to a modification, except for rescission claims  
7 under the federal truth in lending act. Nothing in this section  
8 precludes a beneficiary from requesting that a borrower dismiss with  
9 prejudice any pending claims against the beneficiary, its agents, loan  
10 servicer, or trustee, arising from the underlying deed of trust, as a  
11 condition of modification.

12 (9) Within seven business days after the conclusion of the  
13 mediation session, the mediator must send a written certification to  
14 the department and the trustee and send copies to the parties of:

15 (a) The date, time, and location of the mediation session;

16 (b) The names of all persons attending in person and by telephone  
17 or video conference, at the mediation session;

18 (c) Whether a resolution was reached by the parties, including  
19 whether the default was cured by reinstatement, modification, or  
20 restructuring of the debt, or some other alternative to foreclosure was  
21 agreed upon by the parties;

22 (d) Whether the parties participated in the mediation in good  
23 faith; and

24 (e) A description of the net present value test used, along with a  
25 copy of the inputs, including the result of the net present value test  
26 expressed in a dollar amount.

27 (10) If the parties are unable to reach any agreement and the  
28 mediator certifies that the parties acted in good faith, the  
29 beneficiary may proceed with the foreclosure.

30 (11)(a) The mediator's certification that the beneficiary failed to  
31 act in good faith in mediation constitutes a defense to the nonjudicial  
32 foreclosure action that was the basis for initiating the mediation. In  
33 any action to enjoin the foreclosure, the beneficiary shall be entitled  
34 to rebut the allegation that it failed to act in good faith.

35 (b) The mediator's certification that the beneficiary failed to act  
36 in good faith during mediation does not constitute a defense to a  
37 judicial foreclosure or a future nonjudicial foreclosure action if a

1 modification of the loan is agreed upon and the borrower subsequently  
2 defaults.

3 (c) If an agreement was not reached and the mediator's  
4 certification shows that the net present value of the modified loan  
5 exceeds the anticipated net recovery at foreclosure, that showing in  
6 the certification shall constitute a basis for the borrower to enjoin  
7 the foreclosure.

8 (12) The mediator's certification that the borrower failed to act  
9 in good faith in mediation authorizes the beneficiary to proceed with  
10 the foreclosure.

11 (13)(a) A trustee may not record the notice of sale until the  
12 trustee receives the mediator's certification stating that the  
13 mediation has been completed.

14 (b) If the trustee does not receive the mediator's certification,  
15 the trustee may record the notice of sale after ten days from the date  
16 the certification to the trustee was due. If the notice of sale is  
17 recorded under this subsection (13)(b) and the mediator subsequently  
18 issues a certification alleging the beneficiary violated the duty of  
19 good faith, the trustee may not proceed with the sale.

20 (14) A mediator may charge reasonable fees as authorized by this  
21 subsection and by the department. Unless the fee is waived or the  
22 parties agree otherwise, a foreclosure mediator's fee may not exceed  
23 four hundred dollars for a mediation session lasting between one hour  
24 and three hours. For a mediation session exceeding three hours, the  
25 foreclosure mediator may charge a reasonable fee, as authorized by the  
26 department. The mediator must provide an estimated fee before the  
27 mediation, and payment of the mediator's fee must be divided equally  
28 between the beneficiary and the borrower. The beneficiary and the  
29 borrower must tender the loan mediator's fee seven calendar days before  
30 the commencement of the mediation or pursuant to the mediator's  
31 instructions.

32 (15) Beginning December 1, 2012, and every year thereafter, the  
33 department shall report annually to the legislature on:

34 (a) The performance of the program, including the numbers of  
35 borrowers who are referred to mediation by a housing counselor or  
36 attorney;

37 (b) The results of the mediation program, including the number of  
38 mediations requested by housing counselors and attorneys, the number of

1 certifications of good faith issued, the number of borrowers and  
2 beneficiaries who failed to mediate in good faith, and the reasons for  
3 the failure to mediate in good faith, if known, the numbers of loans  
4 restructured or modified, the change in the borrower's monthly payment  
5 for principal and interest and the number of principal write-downs and  
6 interest rate reductions, and, to the extent practical, the number of  
7 borrowers who report a default within a year of restructuring or  
8 modification;

9 (c) The information received by housing counselors regarding  
10 outcomes of foreclosures; and

11 (d) Any recommendations for changes to the statutes regarding the  
12 mediation program.

13 **Sec. 2.** RCW 61.24.169 and 2011 c 58 s 10 are each amended to read  
14 as follows:

15 (1) For the purposes of RCW 61.24.163, the department must maintain  
16 a list of approved foreclosure mediators. The department may approve  
17 the following persons to serve as foreclosure mediators under this  
18 section:

19 (a) Attorneys who are active members of the Washington state bar  
20 association;

21 (b) Employees of United States department of housing and urban  
22 development-approved housing counseling agencies or approved by the  
23 Washington state housing finance commission;

24 (c) Employees or volunteers of dispute resolution centers under  
25 chapter 7.75 RCW; and

26 (d) Retired judges of Washington courts.

27 (2) The department may establish a required training program for  
28 foreclosure mediators and may require mediators to acquire training  
29 before being approved. The mediators must be familiar with relevant  
30 aspects of the law, have knowledge of community-based resources and  
31 mortgage assistance programs, and refer borrowers to these programs  
32 where appropriate.

33 (3) The department may remove any mediator from the approved list  
34 of mediators.

35 (4)(a) A mediator under this section who is an employee or  
36 volunteer of a dispute resolution center under chapter 7.75 RCW is

1 immune from suit in any civil action based on any proceedings or other  
2 official acts performed in his or her capacity as a foreclosure  
3 mediator, except in cases of willful or wanton misconduct.

4 (b) A mediator is not subject to discovery or compulsory process to  
5 testify in any litigation pertaining to a foreclosure action between  
6 the parties. However, the mediator's certification and all information  
7 and material presented as part of the mediation process may be deemed  
8 admissible evidence, subject to court rules, in any litigation  
9 pertaining to a foreclosure action between the parties.

10 NEW SECTION. **Sec. 3.** This act is necessary for the immediate  
11 preservation of the public peace, health, or safety, or support of the  
12 state government and its existing public institutions, and takes effect  
13 immediately.

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