

## SB 558 – Oregon’s New Mandatory Resolution Conference Law Helping Homeowners Facing Foreclosure (2013)

By

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*Introduction. After a false start in 2012, the 2013 Oregon Legislature has just passed its “new, improved” version of what was generally known as the Mandatory Mediation Law. Besides tweaking various provisions in the prior law, SB 558 closed a loophole big enough that the Big Banks were able to drive their Foreclosure Bus through it. Until July, 2012, virtually all lenders, except Wells Fargo, were conducting their foreclosures non-judicially, i.e. outside the court room. With limited exceptions, the process, which is found in [ORS 86.705 – 86.795](#), had been the sole method used for residential foreclosures in Oregon for the past fifty years. While lenders have always had the option to judicially foreclose Oregon homeowners who defaulted on their loans, it was rarely used. In fact, in 1959, when the trust deed law was enacted, it was the lenders that lobbied long and hard for it; they knew it was far faster and cheaper than going to court to foreclose.*

*However, the 2012 Mandatory Mediation Law was limited to non-judicial foreclosures. Upon passage, lenders realized that they just might have to actually sit down with struggling homeowners, look them in the eye, and address their requests to avoid foreclosure. Until July 2012, the Big Banks had outsourced the human-contact side of their foreclosure business to low level lackeys whose job, it appears, was to lead beleaguered borrower down a path of hope for months or years, before summarily denying them the relief sought.*

*Why would the Big Banks do this, you ask? Simple: During the easy credit years of 2005 – 2008, the Big Banks routinely made loans, bundled them into securities, sold them to investors, and quickly recovered back the cost of their loans. But at the same time, they retained the right to service these loans on into the future. The terms of their servicing agreements provided that they were to be paid fees based on the principal balance of the pooled loans they serviced – and they got paid even more to service non-performing loans!*

*Knowing this, is there any mystery as to why the Big Banks, in their roles as servicers, have never been in a hurry to actually help their beleaguered borrowers? The longer the borrowers circle the drain of despair, the more money the servicers make - so long as the loans remain in the pool. This money train continued until the banks - perhaps from fear of legal claims by investors who bought the securitized loans – finally pulled the plug and foreclosed.*

*So, shortly after the 2012 Mandatory Mediation Law went into effect in July, 2012 [and aided by the Oregon Court of Appeals ruling in [Niday](#)], the Big Banks made an abrupt U-turn on the fast track non-judicial foreclosure process; in an effort to avoid mediation, they stopped foreclosing non-judicially. And because of Niday, they cancelled all of their pending non-judicial foreclosures - frequently never informing their borrowers. Then they started filing all of their foreclosures in court. That way, even though it cost the Big Banks millions and millions of dollars more, and months upon months of further delay, they continued foreclosing Oregon homeowners from morally distant venues, without ever having to look them in the eye.*

*SB 558 changes all that. It now requires that regardless of whether the foreclosure is judicial or non-judicial, Big Bank personnel, or their authorized agents, must, if requested, meet with their borrowers and try to negotiate a Foreclosure Avoidance Measure with them. No more “Foreclosures by Proxy.”*  
~PCQ

### **EXECUTIVE SUMMARY of SB 558[1]**

- It requires the lender (aka the “beneficiary”) under a residential trust deed to request a “Resolution Conference”<sup>[2]</sup> with their borrower (aka the “grantor”) for purposes of negotiating a Foreclosure Avoidance Measure (e.g. short sale, loan mod, deed-in-lieu, forbearance, etc.)<sup>[3]</sup>, unless the lender is has claimed an exemption;
- It specifies the manner in which the lender must a request Resolution Conference;
- It permits the borrower to request a Resolution Conference under certain circumstances *[It remains to be seen whether the Big Banks will ignore this requirement, as they did with impunity under the 2012 law.]*;
- It specifies the documents the lender and borrower must provide each other.
- It specifies the procedure for, and duties of, the lender and borrower in the Resolution Conference process;
- It requires that the lender obtain a Certificate of Compliance following the Resolution Conference in order to foreclose a residential trust deed and specifies the conditions under which the lender may obtain the Certificate;
- It changes the name of the Foreclosure Avoidance Mediation Fund to the “Foreclosure Avoidance Fund”<sup>[4]</sup> and continuously appropriates moneys in the Fund to the Oregon Attorney General for the purposes of paying a Service Provider<sup>[5]</sup>, paying related program expenses, and implementing the provisions of the Act.
- It requires lenders to send a notice to borrowers if the lender determines that: (a) the borrower is not eligible for a Foreclosure Avoidance Measure or (b) has not complied with terms of an agreed-upon Foreclosure Avoidance Measure.
- It becomes operative 91 days after the effective date of Act, i.e. after the Governor signs.
- It declares an emergency, and is effective on passage.

***[Continued on next page]***



## **SB 558 – WHAT IT SAYS IN DETAIL**

### **Lender Exemptions.**

1. If the lender submits to the Attorney General a sworn affidavit stating that during the preceding calendar year it did not commence *[or cause an affiliate, subsidiary or agent to commence]* more than 100 non-judicial or judicial foreclosures. A lender that is a trustee<sup>[1]</sup> must include, as part of the total number of foreclosure actions that the lender commenced in the previous calendar year, all foreclosure actions that it commenced in its capacity as a trustee.
2. A lender that intends to claim an exemption must submit the affidavit either:
  - 2.1. Not later than January 31 in any calendar year in which the lender intends to claim the exemption for the remainder of the calendar year; or
  - 2.2. At the time the lender files a judicial or non-judicial foreclosure.
3. The exemption expires at the end of the calendar year in which the lender claims the exemption.

### **Lender's Request For Resolution Conference.**

1. Subject to certain exceptions, a lender that intends to foreclose a residential trust deed shall first request a Resolution Conference with the borrower before the Notice of Default is filed *[in a non-judicial foreclosure]* or before the lender brings suit *[if a judicial foreclosure]*.
2. The lender's request for the Resolution Conference is brought through the Service Provider. It may be submitted electronically, or by mail, and shall include a processing fee in an amount the Attorney General specifies by rule.
3. The Service Provider shall pay to the Attorney General, for deposit into the Foreclosure Avoidance Fund, moneys the Service Provider receives from the lender as a part of the request for Resolution Conference.
4. The lender's request must identify the residential trust deed sought to be foreclosed and list the name, title, address, telephone number and other available contact information for: (a) The lender; (b) Any agent of the lender that will attend the Resolution Conference; (c) Any other person that will receive, on the lender's behalf, notices or other communications related to the Resolution Conference; and (d) The borrower.
5. If a lender has submitted an affidavit of exemption, it may, without waiving the exemption, request a Resolution Conference with a borrower. The lender shall follow the same procedure as other non-exempt lenders, except that it does not need to submit a processing fee.

### **Borrower's Request for Resolution Conference.**

If a lender does not request a Resolution Conference, a borrower may do so if:

1. The lender or the trustee has not commenced a judicial or non-judicial foreclosure; and
  - 1.1. The borrower first obtains from a housing counselor<sup>[2]</sup> a certification in writing that the borrower is more than 30 days in default, or
  - 1.2. If the borrower is not in default, that he/she has a financial hardship that the housing counselor believes may qualify them for a Foreclosure Avoidance Measure;

2. The borrower's request is to be made through the Service Provider. It may be transmitted electronically, or by mail, and shall enclose with the request a copy of the housing counselor's certification;
  - 2.1. The Attorney General by rule, shall specify the information that the request must include;
  - 2.2. A lender that receives a notice from a Service Provider on behalf of a borrower is subject to the requirements set forth in ("Timing and Events") below.

**Timing & Events.**

1. Within 10 days after the Service Provider receives a request for a Resolution Conference, it shall schedule the conference and mail a notice to the lender and borrower;
2. The Service Provider shall schedule the Resolution Conference to occur within 75 days after the date on which the Service Provider sends the notice;
3. The notice must:
  - 3.1. Specify the date, time and location of the Resolution Conference;
  - 3.2. State that the lender and borrower each must pay the Facilitator's<sup>[3]</sup> fees for the Resolution Conference;
  - 3.3. List and describe the documents that the lender and the borrower must submit to the Service Provider;
  - 3.4. State that the borrower must consult a housing counselor before attending the Resolution Conference unless the borrower notifies the Service Provider that the borrower could not obtain an appointment with a housing counselor before the date of the Resolution Conference;
  - 3.5. State that the borrower may have an attorney or housing counselor present to represent him/her at the Resolution Conference; and
  - 3.6. Include any other information the Attorney General requires by rule.
4. Within 25 days after the date on which the Service Provider sends the notice:
  - 4.1. The borrower shall pay a fee to the Service Provider for the Facilitator's services in an amount the Attorney General specifies by rule, but not exceeding \$200;
  - 4.2. The borrower must submit to the Service Provider:
    - 4.2.1. Information about the borrower's income, expenses, debts and other obligations;
    - 4.2.2. A description of the borrower's financial hardship, if any;
    - 4.2.3. Documents that verify the borrower's income; and
    - 4.2.4. Any other information the Attorney General requires by rule.
  - 4.3. Within 25 days after the Service Provider makes the information the borrower submitted available to the beneficiary, the beneficiary shall:
    - 4.3.1. Pay a fee to the Service Provider for the Facilitator's services in an amount the Attorney General specifies by rule; and
    - 4.3.2. Submit to the Service Provider:
      - 4.3.2.1. The residential trust deed and a certified true copy of the promissory note that is evidence of the obligation the residential trust deed secures;
      - 4.3.2.2. The name and address of the person that owns the obligation that is secured by the residential trust deed;
      - 4.3.2.3. A record of the borrower's payment history for the longer of the preceding 12 months, or since the lender last deemed the borrower current on the obligation;
      - 4.3.2.4. An itemized statement that shows:
        - 4.3.2.4.1. The amount the borrower owes on the obligation;
        - 4.3.2.4.2. The amount of fees and charges the lender has assessed; and

- 4.3.2.4.3. The amount the borrower must pay to cure the borrower's default;
- 4.3.2.4.4. A document that identifies:
  - 4.3.2.4.4.1. Each net present value model that the lender, or the lender's agent, uses to evaluate the borrower's eligibility for a Foreclosure Avoidance Measure;
  - 4.3.2.4.4.2. The input values that the lender, or the lender's agent, uses for each net present value model;
  - 4.3.2.4.4.3. The output values that each net present value model produces;
  - 4.3.2.4.4.4. The appraisal or price opinion the lender relied on most recently to determine the value of the property;
  - 4.3.2.4.4.5. The portion of any pooling agreement, servicing agreement or other agreement that the lender cites as a limitation or prohibition on modifying the terms of the obligation, together with a statement that describes the extent to which the lender sought to have the limitation or prohibition waived;
  - 4.3.2.4.4.6. A description of any additional documents the lender requires to evaluate the borrower's eligibility for a Foreclosure Avoidance Measure; and
  - 4.3.2.4.4.7. Any other information the Attorney General requires by rule.
- 5. The Service Provider may postpone or reschedule a Resolution Conference if:
  - 5.1. The lender and the borrower agree to a new date;
  - 5.2. The lender or the borrower requests a new date in writing and can show good cause for the request; or
  - 5.3. The lender does not pay the required fee by the due date. *[The Service Provider may wait until the lender has paid the fee before rescheduling the Resolution Conference.]*
  - 5.4. The Service Provider shall cancel a scheduled Resolution Conference if the borrower does not pay the fee by the due date.
- 6. A Resolution Conference conducted in accordance with this law is not subject to the mediation and arbitration statutes in [ORS Chapter 36](#) and does not preclude mediation that a court or another provision of law requires.
- 7. The Facilitator is not subject to a subpoena in any proceeding between a lender and a borrower that is related to, and occurs, after a Resolution Conference.
- 8. A Facilitator's act or omission in the course of a Resolution Conference does not subject him/her to civil liability unless he/she acted, or failed to act, in bad faith, with malicious intent, or in a manner that exhibited a willful or wanton disregard of the rights, safety or property of another person.
- 9. Information that a lender or a borrower submits to a Service Provider is not subject to disclosure under [ORS 192.410 to 192.505](#) (Oregon's Public Records Laws). *[Note that a Service Provider may disclose information that relates to the result of a Resolution Conference if the information does not identify a party that participated in the Resolution Conference.]*

**Lender Attendance at Resolution Conference.**

- 1. A lender that must request a Resolution Conference shall attend and participate in person.
  - 1.1. However, a lender may send an agent if the agent attends the Resolution Conference in person and has complete authority to negotiate on the lender's behalf and commit the lender to a Foreclosure Avoidance Measure.
  - 1.2. If the agent does not have complete authority, the lender shall require a person who does have complete authority to participate in the Resolution Conference by remote communication in accordance with rules the Attorney General adopts;

2. If agreement is reached, the lender and the borrower shall sign a written document that sets forth the terms of the Foreclosure Avoidance Measure.

**Postponements of Resolution Conference.**

1. A Facilitator may suspend or postpone a Resolution Conference after it has begun:
  - 1.1. One time only on the Facilitator's initiative, or in response to a request for a suspension or postponement from the lender or the borrower;
  - 1.2. After a suspension or postponement, only if the lender and the borrower agree to the additional suspension or postponement;
  - 1.3. If the lender or the borrower needs additional time to write or sign a document that sets forth the terms of a Foreclosure Avoidance Measure.

**Conclusion of Resolution Conference; Reports.**

1. After the Resolution Conference concludes, the Facilitator shall submit to the Service Provider a written report that:
  - 1.1. Lists the date(s) on which the Resolution Conference occurred;
  - 1.2. Lists the name, title, address, telephone number and other available contact information for each person that participated in the Resolution Conference;
  - 1.3. Notes whether the person attended the Resolution Conference in person or by remote communication;
  - 1.4. States whether the lender or its agent who attended the Resolution Conference had complete authority to negotiate and commit to a Foreclosure Avoidance Measure;
  - 1.5. Summarizes the terms of the Foreclosure Avoidance Measure to which the lender and the borrower agreed, or notes that the lender and the borrower did not agree to a Foreclosure Avoidance Measure; and
  - 1.6. Provides any other information the Attorney General requires by rule.

**The Certificate of Compliance.**

1. The Service Provider shall issue, within 5 days after receiving a report from a Facilitator, a Certificate of Compliance to a lender that it:
  - 1.1. Complied with the Act;
  - 1.2. Submitted the required materials to the Service Provider;
  - 1.3. Appeared in person, or sent an agent in person, to the Resolution Conference with complete authority to negotiate and commit to a Foreclosure Avoidance Measure or, if the lender or agent did not have complete authority, required a person with complete authority to participate in the Resolution Conference by remote communication in accordance with rules the Attorney General adopts; and
  - 1.4. Signed a document that sets forth the terms of any agreed-upon Foreclosure Avoidance Measure.
2. A Certificate of Compliance expires one year after the date on which the Service Provider issues it.
3. The Service Provider shall notify a lender that failed to meet a requirement to which it was subject that the Service Provider will not issue a Certificate of Compliance, and explain why.
4. The Service Provider shall provide a copy of the notice to the borrower and to the Attorney General;

5. If a Service Provider cancels a Resolution Conference, it shall issue a Certificate of Compliance to the lender within 5 days thereafter.

**Role of the Oregon Attorney General.**

1. Appoint and enter into an agreement with a Service Provider to coordinate a program implementing the Act.
2. The Attorney General shall pay for the Service Provider's services from the Foreclosure Avoidance Fund.
3. The appointment and the agreement are not subject to [ORS Chapter 279A \(Public Contracting\)](#) or [279B \(Procurement\)](#).
4. Receive affidavits of exemption from lenders.
5. Specifies:
  - 5.1. The amount a lender must pay as a processing fee to the Service Provider;
  - 5.2. The amount a borrower must pay for the Facilitator's services; and
  - 5.3. The amount a lender must pay for the Facilitator's services.
  - 5.4. Adopt rules to implement the Act.

**Lender Violation is an Unlawful Trade Practice.**

In addition to, and not in lieu of any other penalty provided by law, a lender's violation of certain sections of the Act is an unlawful practice under [ORS 646.607](#) that is subject to enforcement under [ORS 646.632](#).

**Miscellaneous.**

1. **Borrower Ineligibility Under The Act.** Whether or not a lender participates in a Resolution Conference, if the lender determines that a borrower under a residential trust deed is not eligible for any Foreclosure Avoidance Measure, or that the borrower has not complied with the terms of a Foreclosure Avoidance Measure to which the borrower had agreed, the lender shall notify the borrower within 10 days after making that determination, by mailing a written notice that explains in plain language, the basis for the lender's determination. The lender shall mail a copy of the notice to the Department of Justice on the same date that the lender mails the notice to the borrower.
  - 1.1. At least 5 days before the trustee sells the property, the lender must record in the mortgage records of the county in which the property is located, an affidavit stating that the lender has complied with the above requirement.
  - 1.2. A lender that fails to comply with this provision is liable to the borrower in the amount of \$500 plus the borrower's actual damages for each failure to comply.
  - 1.3. A borrower may bring an action against a lender in a circuit court to recover these sums.
  - 1.4. The borrower shall commence the action within one year after the date on which the lender should have complied, but did not.
  - 1.5. Notwithstanding an agreement to the contrary, a court may award reasonable attorney fees, costs and disbursements to a borrower that obtains a final judgment in their favor.
2. **Recording of Assignments in Non-Judicial Foreclosures.** A trustee may not commence a non-judicial foreclosure unless:
  - 2.1. There is a default by the borrower;

- 2.2. The trustee or lender has filed for record in the county clerk's office in each county where the property, or some part of the property, is situated, a notice of default containing the information required by [ORS 86.745](#) and containing the trustee's or lender's election to sell the property;
- 2.3. The lender has filed for recording in the official records of the county(ies) in which the subject property is located:
  - 2.3.1. A valid and unexpired Certificate of Compliance that a Service Provider issued to the lender; or
  - 2.3.2. A copy of the affidavit with which the lender claimed an exemption that has not expired;
    - 2.3.2.1. That the lender has complied with the provisions of the Act;
    - 2.3.2.2. That the borrower has not complied with the terms of any agreed-upon Foreclosure Avoidance Measure; and
    - 2.3.2.3. An action has not been commenced to recover the debt, or any part of the debt, then remaining secured by the trust deed, or, if an action has been commenced, the action has been dismissed, except that:
3. Subject to [ORS 86.010](#) and the procedural requirements of [ORCP 79 and 80](#) [*provisional process, e.g. injunctions, receiverships, etc.*], an action may be commenced to appoint a receiver or to obtain a temporary restraining order during a non-judicial foreclosure of a trust deed, except that a receiver may not be appointed with respect to a single-family residence that the borrower, the borrower's spouse or the borrower's minor or dependent child occupies as a principal residence.

#### Certificate of Compliance in Judicial Foreclosures.

[ORS 88.010](#) is amended to read:

4. Except as otherwise provided by law, a lien upon real or personal property, other than that of a judgment, whether created by mortgage or otherwise, must be foreclosed, and the property adjudged to be sold to satisfy the debt the lien secures, by bringing suit.
5. Except as provided in [ORS 88.070](#), in addition to the judgment of foreclosure and sale, if the borrower has given a promissory note or other personal obligation for the payment of the debt, the court also shall enter a judgment for the amount of the debt against the lien debtor or other person. These provisions as to liens upon personal property do not exclude a person that has a lien from any other remedy or right that the person otherwise has with respect to the property.
6. A complaint in a suit to foreclose a residential trust deed must include as an attachment a true copy of:
  - 6.1. A valid and unexpired Certificate of Compliance that a Service Provider issued to a lender;
  - 6.2. The affidavit of exemption that has not expired; or
  - 6.3. The notice the lender received regarding the lender's failure to obtain a Certificate of Compliance from the Service Provider.
7. A court on its own motion, or in response to a motion from a borrower-defendant, may dismiss without prejudice, a suit that a person brings to foreclose a residential trust deed, or may stay proceedings on the suit, if the person:
  - 7.1. Fails to file with the court the Certificate of Compliance or the affidavit of exemption; or
  - 7.2. Files with the court a notice from the Service Provider that the lender failed to obtain a Certificate of Compliance.
8. The court may release a stay [*e.g. injunction stopping the foreclosure*] if the person files with the court the Certificate of Compliance or the affidavit of exemption.

9. The court may award a defendant-borrower that prevails on a motion to dismiss the foreclosure, reasonable costs and attorney fees associated with bringing the motion, and any other relief the court deems proper.

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[1] A trustee is the third party to the trust deed *[in addition to the lender and borrower]*; if a non-judicial foreclosure is commenced, the trustee, upon the lender's instruction, handles all of the paperwork and conducts the sale. See, [ORS 86.705\(8\)](#).

[2] **"Housing counselor"** means a counselor employed by a nonprofit housing counseling agency that the Housing and Community Services Department or a successor state agency approves by rule."

[3] **"Facilitator"** means a person that a Service Provider selects to conduct a Resolution Conference."

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[1] The Executive Summary and following description of SB 558 are taken directly from the bill itself. I have resisted the nearly overwhelming temptation to add editorial comment. That will be saved for later after we see exactly how the Big Banks will try to game the system.

[2] **"Resolution conference"** means a meeting at which a borrower and a beneficiary attempt to negotiate and agree upon a foreclosure avoidance measure."

[3] **"Foreclosure avoidance measure"** means an agreement between a beneficiary and a borrower that uses one or more of the following methods to modify an obligation that is secured by a residential trust deed: (a) The beneficiary defers or forbears from collecting one or more payments due on the obligation. (b) The beneficiary modifies, temporarily or permanently, the payment terms or other terms of the obligation. (c) The beneficiary accepts a deed in lieu of foreclosure from the borrower. (d) The borrower conducts a short sale. (e) The beneficiary provides the borrower with other assistance that enables the borrower to avoid a foreclosure."

[4] **"The Foreclosure Avoidance Fund"** is established in the State Treasury, separate and distinct from the General Fund. The Foreclosure Avoidance Fund consists of moneys the Attorney General collects or receives for the purpose of paying a Service Provider to coordinate a program to implement the provisions of [the Act] and to pay related expenses. The moneys in the fund are continuously appropriated to the Attorney General for the purposes of paying a Service Provider to coordinate a program to [the Act] and paying related expenses.

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

[5] “**Service provider**” means a person that the Attorney General appoints under section 6 of this 2013 Act to coordinate a program to implement the provisions of [the Act]”

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