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H.590

Introduced by Representatives Grad of Moretown and Jewett of Ripton

Referred to Committee on

Date:

Subject: Court procedure; chancery proceedings; foreclosure

Statement of purpose: This bill proposes to establish a program to require mediation in actions for foreclosure of a mortgage on any dwelling house of four units or less that is occupied by the owner as a principal residence.

An act relating to mediation in foreclosure proceedings

It is hereby enacted by the General Assembly of the State of Vermont:

~~Sec. 1. 12 V.S.A. § 4523 is amended to read:~~

~~§ 4523. VENUE; JOINDER OF PARTIES; RECORDING~~

~~\* \* \*~~

~~(b) The plaintiff shall file a copy of the complaint in the town clerk's office in each town where the mortgaged property is located. The plaintiff shall attach to the complaint proof of ownership of the mortgage and note, including evidence of the mortgage note, mortgage deed, and all assignments and endorsements of the note and mortgage. The clerk of the town shall minute on the margin of the record of the mortgage that a copy of foreclosure proceedings on the mortgage is filed. The filing shall be sufficient notice of the pendency~~

1 ~~of the action to all persons who acquire any interest or lien on the mortgaged~~  
2 premises between the dates of filing the copy of foreclosure and the recording  
3 of the final judgment in the proceedings. Without further notice or service,  
4 those persons shall be bound by the judgment entered in the cause and be  
5 foreclosed from all rights or equity in the premises as completely as though  
6 they had been parties in the original action.

7 \* \* \*

8 Sec. 2. 12 V.S.A. § 4531a is amended to read:

9 § 4531a. FORECLOSURE; POWER OF SALE

10 (a) When a power of sale is contained in a mortgage and the plaintiff in the  
11 foreclosure complaint, or the defendant in his or her answer requests a sale, the  
12 court may upon entry of judgment of foreclosure order that if the property is  
13 not redeemed within the time period allowed by the court, the property be sold  
14 pursuant to such power and the court may further determine the time and  
15 manner of the sale. If a sale is ordered with respect to any property other than  
16 farmland or a dwelling house of ~~two~~ four units or less when currently occupied  
17 by the owner as his or her principal residence, the redemption period shall be  
18 eliminated or reduced by the court to no more than 30 days. If the property is  
19 not redeemed, the plaintiff shall thereupon execute the power of sale and do all  
20 things required by it or by the court. No sale of a dwelling house of ~~two~~ four  
21 units or less when currently occupied by the owner as his or her principal

1 ~~residence may take place within seven months of service of the foreclosure~~  
2 complaint, unless the court finds that the occupant is making waste of the  
3 property or the parties mutually agree after suit to a shorter period.

4 (b) When a power of sale is contained in a mortgage relating to any  
5 property except for a dwelling house of ~~two~~ four units or less that is occupied  
6 by the owner as a principal residence, or farmland, instead of a suit and decree  
7 of foreclosure, the mortgagee or assignee may, upon breach of mortgage  
8 condition, exercise the power of sale without first commencing a foreclosure  
9 action or obtaining a foreclosure decree, and may give notices and do all such  
10 acts as are authorized or required by the power, including the giving of a  
11 foreclosure deed upon the completion of the foreclosure sale; but no sale under  
12 and by virtue of a power of sale shall be valid and effectual to foreclose the  
13 mortgage unless the conditions of sections 4532 and 4533a of this title are  
14 complied with.

15 \* \* \*

16 Sec. 3. 12 V.S.A. chapter 163, subchapter 9 is added to read:

17 Subchapter 9. Mediation in Foreclosure Actions

18 § 4701. MEDIATION PROGRAM ESTABLISHED

19 (a) This subchapter establishes a program to require mediation in actions  
20 for foreclosure of a mortgage on any dwelling house of four units or less that is  
21 occupied by the owner as a principal residence.

1 ~~(b) The supreme court shall administer the foreclosure mediation program~~  
2 ~~and shall promulgate such rules as are necessary to implement the program.~~

3 (c) The supreme court shall compile a list of mediators who are qualified to  
4 act as mediators under this subchapter, who shall be licensed to practice law in  
5 the state, trained in mediation and foreclosure law, and knowledgeable about  
6 relevant mortgage assistance programs and regulations relating to loan  
7 modifications.

8 (d) The foreclosure mediation program under this subchapter shall be  
9 supported by court fees paid by plaintiffs in foreclosure actions and  
10 administered by the supreme court.

11 § 4702. NOTICE IN FORECLOSURE ACTIONS

12 (a) Whenever a person commences an action for foreclosure of a mortgage  
13 on any dwelling house of four units or less that is occupied by the owner as a  
14 principal residence, the plaintiff shall attach to the front of the foreclosure  
15 complaint a form notice in language prescribed by the supreme court that is  
16 readily understandable by the general public.

17 (b) At a minimum, the form notice shall contain the following:

18 (1) a statement that failure to answer the complaint will result in  
19 foreclosure of the property subject to the mortgage;

20 (2) a sample answer with an explanation that the defendant may fill out  
21 the form and return it to the court as the answer to the complaint;

1 ~~(3) a statement that if the defendant returns the form to the court or~~  
2 ~~otherwise contacts the court, the case will be scheduled for mediation; and~~

3 ~~(4) a description of the mediation program under this subchapter.~~

4 § 4703. MEDIATION

5 (a) In an action for foreclosure of a mortgage on any dwelling house of four  
6 units or less that is occupied by the owner as a principal residence, whenever  
7 the defendant files an answer, returns the sample answer referred to in  
8 subdivision 4702(b)(2) of this subchapter, or otherwise contacts the court in a  
9 foreclosure action prior to a foreclosure sale, the court shall refer the case to  
10 mediation pursuant to this subchapter.

11 (b) At any time during mediation under this subchapter, the mediator may  
12 refer the defendant to housing counseling or mortgage assistance programs.

13 (c) In all mediations under this subchapter, the plaintiff shall:

14 (1) Consider all available foreclosure prevention tools, including  
15 reinstatement, loan modification, forbearance, deed-in-lieu of foreclosure, and  
16 short sale.

17 (2) Use all applicable federal and state guidelines on loan modification,  
18 including the Home Affordable Modification Program guidelines and net  
19 present value test where applicable, in considering a loan modification.

20 (3) Where the plaintiff claims that a pooling and service or similar  
21 agreement prohibits modification, produce a copy of the agreement.

1 ~~(4) Upon conclusion of the mediation, produce documentation of its~~  
2 ~~consideration of each available foreclosure prevention tool, including the data~~  
3 ~~and factors considered in evaluating a particular foreclosure prevention tool.~~

4 ~~(5) Upon the request of the defendant, produce a copy of the property~~  
5 ~~appraisal, loan payment history, loss mitigation history, or any other document~~  
6 ~~contained in the loan servicing file or combination of these.~~

7 ~~(d)(1) Except as provided in subdivision (2) of this subsection, the~~  
8 ~~following persons shall participate in person in any mediation under this~~  
9 ~~subchapter:~~

10 ~~(A) the mortgagee, and any other person, including the mortgagee's~~  
11 ~~servicing agent, who has the authority to agree to a proposed settlement, loan~~  
12 ~~modification, or dismissal of the foreclosure action;~~

13 ~~(B) counsel for the plaintiff; and~~

14 ~~(C) counsel for the defendant, if represented.~~

15 ~~(2) The court may, for good cause, permit a party identified in~~  
16 ~~subdivision (1) of this subsection to participate in mediation by~~  
17 ~~videoconferencing.~~

18 ~~(e) The mediator shall include in the mediation process under this~~  
19 ~~subchapter any other person the mediator determines is necessary for effective~~  
20 ~~mediation.~~

1 § 4704. GOOD FAITH EFFORT

2 (a) The mortgagee and the mortgagee's servicing agent, if a participant in a  
3 mediation under this subchapter, shall make a good faith effort to mediate all  
4 issues.

5 (b) A failure to comply with the requirements of section 4703 of this title  
6 shall be deemed to be a failure to mediate in good faith.

7 (c) Failure to mediate in good faith under this section shall result in  
8 dismissal of the foreclosure action with prejudice and such other sanctions as  
9 the court deems appropriate.

10 § 4705. MEDIATION REPORT

11 A mediator shall complete a report for each mediation under this  
12 subchapter, including:

13 (1) a description of the parties' compliance with each of the  
14 requirements of this subchapter; and

15 (2) the mediator's opinion as to whether mediation was in good faith as  
16 required by section 4704 of this title.

17 § 4706. NO ENTRY OF JUDGMENT OR FORECLOSURE SALE

18 (a) In any foreclosure action commenced after the effective date of this  
19 subchapter that is referred to mediation under this subchapter, no final  
20 judgment shall be entered by the court until the mediator has submitted a report

1 ~~to the court pursuant to section 4705 of this title, including a determination that~~  
2 ~~the mediation was in good faith as required by section 4704 of this title.~~

3 (b) If a defendant requests mediation after judgment has been entered, the  
4 plaintiff may not proceed with a foreclosure sale until after the mediation has  
5 been completed, the mediator has submitted his or her report to the court, and  
6 the court has authorized the plaintiff to proceed with the sale.

7 § 4707. EFFECT OF MEDIATION PROGRAM ON FORECLOSURE

8 ACTIONS FILED PRIOR TO EFFECTIVE DATE

9 The court may, in its discretion, require mediation in any foreclosure action  
10 on a mortgage on any dwelling house of four units or less that is occupied by  
11 the owner as a principal residence that was commenced prior to the effective  
12 date of this subchapter but has not yet resulted in foreclosure sale.

13 § 4708. FINANCIAL INFORMATION CONFIDENTIAL; NO WAIVER OF

14 RIGHTS; COSTS OF MEDIATION; EXEMPTIONS

15 (a) Financial information disclosed during a mediation under this  
16 subchapter shall be deemed confidential and shall not be available for public  
17 inspection but shall be made available, as necessary, to the court, to any  
18 attorneys who have entered appearances in the action, and to the parties to the  
19 mediation.

1 ~~(b) Any financial statement or information designated as confidential under~~  
2 this subsection shall be kept by the court separate from other documents in the  
3 action and shall not be used for purposes other than the mediation.

4 (c) The parties' rights in a foreclosure action are not waived by their  
5 participation in mediation under this subchapter.

6 (d) The plaintiff shall pay the required costs for any mediation under this  
7 subchapter.

8 (e) No plaintiff may shift costs of mediation to the defendant, including the  
9 mediator's fees, attorney's fees related to mediation, and travel costs related to  
10 mediation.

11 (f) The requirements of this subchapter shall not apply to a foreclosure  
12 action involving a loan for which there is no third-party servicing agent.

13 § 4709. ANNUAL REPORT

14 (a) The supreme court shall report annually to the general assembly on the  
15 following:

16 (1) The performance of the mediation program under this subchapter,  
17 including the number of defendants who are notified of mediation, referrals to  
18 mediation, and defendants who participate in mediation.

19 (2) The results of mediation, including the number of loans restructured,  
20 principal write-downs, interest rate reductions, loan term extensions,  
21 deeds-in-lieu of foreclosure, and other outcomes of mediation.

1 (3) The specific terms of all loan modifications achieved through  
2 mediation, including reductions in monthly mortgage payments, reductions in  
3 interest rate, forgiveness of principal, and extensions of loan term.

4 (b) The courts of this state shall maintain such records relating to the  
5 mediation program under this subchapter as are necessary to meet the reporting  
6 requirement of this section.

7 Sec. 4. EFFECTIVE DATES

8 This section and 12 V.S.A. § 4701 in Sec. 3 of this act shall take effect upon  
9 passage. The remainder of this act shall take effect on July 1, 2010.

10  
*Sec. 1. Rule 80.1 of the Vermont Rules of Civil Procedure is amended to read:  
RULE 80.1. FORECLOSURE OF MORTGAGES AND JUDGMENT LIENS*

*\* \* \**

*(b) Complaint; Process.*

*(1) Complaint. The complaint in an action for foreclosure shall set forth the name of the mortgagor and mortgagee, the date of the mortgage deed, the description of the premises, the debt or claim secured by the mortgage, any attorney's fees claimed under an agreement in the mortgage or other instrument evidencing indebtedness, any assignment of the mortgage, the condition contained in the mortgage deed alleged to have been breached, the names of all parties in interest and, as to each party in interest, the date of record of the instrument upon which the interest is based, shall pray that defendants' equity of redemption in the premises be foreclosed and explain that the defendant or defendants must enter their appearance in order to receive notice of the foreclosure judgment which will set forth the amount of money they must deposit to redeem the premises and the period of time allowed them to deposit this amount. The plaintiff shall attach to the complaint copies of the note and mortgage and proof of ownership thereof, including all assignments and endorsements of the note and mortgage. All parties in interest shall be joined as parties defendant. Failure to join any party in interest shall not invalidate the action nor any subsequent proceedings as to*

*those joined. A claim for foreclosure in an action under this paragraph may not be joined with a claim for a deficiency except when a defendant in the answer has requested foreclosure pursuant to a power of sale in the mortgage.*

*\* \* \**

*Sec. 2. 12 V.S.A. § 4523(b) is amended to read:*

*(b) The plaintiff shall file a copy of the complaint, without supporting attachments, in the town clerk's office in each town where the mortgaged property is located. The clerk of the town shall minute on the margin of the record of the mortgage that a copy of foreclosure proceedings on the mortgage is filed. The filing shall be sufficient notice of the pendency of the action to all persons who acquire any interest or lien on the mortgaged premises between the dates of filing the copy of foreclosure and the recording of the final judgment in the proceedings. Without further notice or service, those persons shall be bound by the judgment entered in the cause and be foreclosed from all rights or equity in the premises as completely as though they had been parties in the original action.*

*Sec. 3. 12 V.S.A. § 4531a is amended to read:*

*§ 4531a. FORECLOSURE; POWER OF SALE*

*(a) When a power of sale is contained in a mortgage and the plaintiff in the foreclosure complaint, or the defendant in his or her answer requests a sale, the court may upon entry of judgment of foreclosure order that if the property is not redeemed within the time period allowed by the court, the property be sold pursuant to such power and the court may further determine the time and manner of the sale. If a sale is ordered with respect to any property other than farmland or a dwelling house of ~~two~~ four units or less when currently occupied by the owner as his or her principal residence, the redemption period shall be eliminated or reduced by the court to no more than 30 days. If the property is not redeemed, the plaintiff shall thereupon execute the power of sale and do all things required by it or by the court. No sale of a dwelling house of ~~two~~ four units or less when currently occupied by the owner as his or her principal residence may take place within seven months of service of the foreclosure complaint, unless the court finds that the occupant is making waste of the property or the parties mutually agree after suit to a shorter period.*

*(b) When a power of sale is contained in a mortgage relating to any property except for a dwelling house of ~~two~~ four units or less that is occupied by the owner as a principal residence, or farmland, instead of a suit and decree of foreclosure, the mortgagee or assignee may, upon breach of mortgage condition, exercise the power of sale without first commencing a foreclosure action or obtaining a foreclosure decree, and may give notices and*

*do all such acts as are authorized or required by the power, including the giving of a foreclosure deed upon the completion of the foreclosure sale; but no sale under and by virtue of a power of sale shall be valid and effectual to foreclose the mortgage unless the conditions of sections 4532 and 4533a of this title are complied with.*

\* \* \*

*Sec. 4. 12 V.S.A. chapter 163, subchapter 9 is added to read:*

*Subchapter 9. Mediation in Foreclosure Actions*

*§ 4701. MEDIATION PROGRAM ESTABLISHED*

*(a) This subchapter establishes a program to assure the availability of mediation and compliance with the federal Home Affordable Modification Program (“HAMP”) requirements in actions for foreclosure of a mortgage on any dwelling house of four units or less that is occupied by the owner as a principal residence.*

*(b) To be qualified to act as a mediator under this subchapter, an individual shall be licensed to practice law in the state and shall be required to have taken a specialized, continuing legal education training course on foreclosure prevention or loss mitigation approved by the Vermont Bar Association.*

*§ 4702. OPPORTUNITY TO MEDIATE*

*(a) Prior to commencing an action for foreclosure of a mortgage on any dwelling house of four units or less that is occupied by the owner as a principal residence, Vermont counsel for the mortgagee shall notify the mortgagor that an action for foreclosure is imminent, and that mediation is available in order to consider alternatives to foreclosure. The notice shall be given by any method capable of showing proof of delivery of two copies thereof, with a self-addressed, stamped envelope, to the mortgagor personally, or by leaving copies thereof at the mortgagor’s dwelling with a person of suitable age and discretion then residing therein. Mortgagee’s counsel shall simultaneously send notice to the department of banking, insurance, securities, and health care administration’s mortgage assistance program, which shall maintain a list of all mortgagors who have been sent a notice of the opportunity to mediate.*

*(b) The notice shall be in substantially the following form:*

*IMPORTANT NOTICE TO HOMEOWNER*

*To: [Name(s) of homeowner(s)]*

*! YOU ARE AT RISK OF LOSING YOUR HOME !*



(c) If a request for mediation is received by the mortgagee's attorney within 20 days of receipt of the notice by the mortgagor, the mortgagee's attorney shall refer the case to a qualified mediator, who shall promptly schedule a mediation session, giving notice to all appropriate parties. If no request for mediation is received by the mortgagee's attorney within 20 days of receipt of the notice by the mortgagor, or if mediation is held but is not successful, the mortgagee shall allege in any complaint and the mortgagee's attorney shall certify on personal knowledge that notice of the availability of mediation was properly given, that the mortgagor did or did not request mediation, and, if requested, that mediation occurred but was not successful. The mortgagee shall attach to the complaint proof of delivery of the notice and the mediator's report, if mediation occurred.

~~(c) If no request for mediation is received by mortgagee's attorney within 20 days of receipt of the notice by the mortgagor, or if mediation is held but is not successful, the mortgagee shall allege in any complaint, and mortgagee's attorney shall certify on personal knowledge, that notice of the availability of mediation was properly given, that the mortgagor did or did not request mediation, and, if requested, that mediation occurred but was not successful. Mortgagee shall attach to the complaint proof of delivery of the notice and the mediator's report, if mediation occurred.~~

(d) After an action for foreclosure is commenced, and until the expiration of 20 days from the date of service of the summons and complaint, the court, on motion or request of a party, shall order mediation unless mediation has previously been completed, in which case such order shall be issued only upon a showing of good cause. Thereafter, on its own motion or on the motion of a party for good cause, the court may order mediation. All mediation shall be completed prior to the expiration of the redemption period, and the redemption period shall not be stayed on account of pending mediation. If a mortgagor requests mediation after judgment has been entered, the court may grant the request only if the mortgagor has returned a request for mediation in an amount of time sufficient to allow for a proper mediation to occur, and the court determines that the mortgagor is not attempting to delay the case. The mediator shall report the results of the process, as described in subsection 4704(b) of this subchapter, to the court and both parties in writing.

(e) The court may, on motion of a party, find that the requirements of this subchapter have been met, and that the parties are not required to participate in mediation under this subchapter because they participated in a proceeding providing the substantive protections of mediation under this subchapter.

§ 4703. MEDIATION

(a) Prior to or during all mediations under this subchapter:

(1) the mortgagee shall consider available foreclosure prevention tools, including reinstatement, loan modification, forbearance, and short sale;

(2) the participants shall use the calculations, assumptions, and forms established by the HAMP guidelines, and employ all HAMP-related "net present value" calculations in considering a loan modification conducted under this subchapter; and

(3) the mortgagee shall produce for the mortgagor and mediator documentation of its consideration of the options available in subdivisions (1) and (2) of this subsection, including the data used in and the outcome of any HAMP-related "net present value" calculation.

(b) In all mediations under this subchapter, the mortgagor shall provide to the mediator information on his or her household income and any other information required by HAMP.

(c)(1) The following persons shall participate in any mediation under this subchapter:

(A) the mortgagee, or any other person, including the mortgagee's servicing agent, who shall have:

(i) authority to agree to a proposed settlement, loan modification, or dismissal of the foreclosure action;

(ii) real time access during the mediation to the mortgagor's account information and to the records relating to consideration of the options available in subdivisions (a)(1) and (2) of this section, including the data and factors considered in evaluating each such foreclosure prevention tool; and

(iii) the ability and authority to perform necessary HAMP-related "net present value" calculations and to consider other options available in subdivisions (a)(1) and (2) of this section during the mediation;

(B) counsel for the mortgagee; and

(C) the mortgagor, and counsel for the mortgagor, if represented.

(2) The mediator may permit a party identified in subdivision (1) of this subsection to participate in mediation by telephone or videoconferencing.

(d) The mediator shall include in the mediation process under this subchapter any other person the mediator determines is necessary for effective mediation.

#### § 4704. MEDIATION REPORT

(a) Within seven days of the conclusion of any prelitigation mediation, the mediator shall report the results of the process to both parties in writing. If

prelitigation mediation does not result in a settlement or if the court orders mediation after an action for foreclosure has commenced, within seven days of the conclusion of the mediation, the mediator shall report the results of the process to the court and both parties in writing.

(b) The report shall not disclose the mediator's assessment of any aspect of the case or substantive matters discussed during the mediation, except as is required to report the information required by this section. The report shall contain the following items:

(1) The date on which the mediation was held, including the starting and finishing times.

(2) The names and addresses of all persons attending, showing their role in the mediation and specifically identifying the representative of each party who had decision-making authority.

(3) A summary of any substitute arrangement made regarding attendance at the mediation.

(4) All HAMP-related "net present value" calculations and other foreclosure avoidance tool calculations performed prior to or during the mediation and all information related to the requirements in subsection 4703(a) of this subchapter.

(5) The results of the mediation, stating whether full or partial settlement was reached and appending any agreement of the parties.

#### § 4705. COMPLIANCE WITH OBLIGATIONS

Upon receipt of the mediator's report, pursuant to subsection 4704(a) of this subchapter, the court shall promptly and without hearing determine whether the servicer has complied with all of its obligations under subsection 4703(a) of this subchapter.

#### § 4706. EFFECT OF MEDIATION PROGRAM ON FORECLOSURE ACTIONS FILED PRIOR TO EFFECTIVE DATE

The court shall, on request of a party, require mediation in any foreclosure action on a mortgage on any dwelling house of four units or less that is occupied by the owner as a principal residence that was commenced prior to the effective date of this subchapter but only up to 30 days prior to the end of the redemption period.

#### § 4707. NO WAIVER OF RIGHTS; COSTS OF MEDIATION; EXEMPTIONS

(a) The parties' rights in a foreclosure action are not waived by their participation in mediation under this subchapter.

(b) The mortgagee shall pay the required costs for any mediation under this subchapter. The mortgagor shall be responsible for mortgagor's own costs, including the cost of mortgagor's attorney, if any, and travel costs.

(c) No mortgagee may shift to the mortgagor the costs of the mortgagee's or the servicing agent's attorney's fees or travel costs related to mediation.

(d) The requirements of this subchapter shall apply only to foreclosure actions involving loans that are subject to the federal HAMP guidelines.

*Sec. 5. EFFECTIVE DATE*

This act shall take effect 45 days after passage but no later than July 1, 2010.

*Sec. 6. SUNSET*

This act shall be repealed on the same day as the expiration date of the federal Home Affordability Modification Program ("HAMP").