

1 H.431

2 Introduced by Representative Wizowaty of Burlington

3 Referred to Committee on

4 Date:

5 Subject: Court procedure; mediation in foreclosure actions

6 Statement of purpose of bill as introduced: This bill proposes to amend a  
7 number of the requirements for mediation in foreclosure actions.

8 An act relating to mediation in foreclosure actions

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

10 Sec. 1. 12 V.S.A. chapter 163, subchapter 9 is amended to read:

11 Subchapter 9. Mediation in Foreclosure Actions

12 § 4631. MEDIATION PROGRAM ESTABLISHED

13 (a) This subchapter establishes a program to assure the availability of  
14 mediation and application of ~~the federal Home Affordable Modification~~  
15 ~~Program (“HAMP”)~~ government loss mitigation program requirements in  
16 actions for foreclosure of a mortgage on any dwelling house of four units or  
17 less that is occupied by the owner as a principal residence.

18 (b) The requirements of this subchapter shall apply ~~only~~ to all foreclosure  
19 actions ~~involving loans that are subject to the federal HAMP guidelines on~~

1 dwelling houses of four units or less that are occupied by the owner as a  
2 principal residence unless:

3 (1) the loan involved is not subject to any government loss mitigation  
4 program requirements;

5 (2) prior to commencing the foreclosure action, the mortgagee or a  
6 representative of the mortgagee met with or made reasonable efforts to meet  
7 with the mortgagor in person in Vermont to discuss any applicable loss  
8 mitigation options; and

9 (3) the plaintiff in the foreclosure action certifies in its complaint that  
10 the requirements of subdivisions (1) and (2) of this subsection have been  
11 satisfied and describes its efforts to meet with the mortgagor in person to  
12 discuss applicable loss mitigation efforts.

13 (c) To be qualified to act as a mediator under this subchapter, an individual  
14 shall be licensed to practice law in the ~~state~~ State and shall be required to ~~have~~  
15 ~~taken a~~ periodically take specialized, continuing legal education training  
16 ~~course~~ courses on foreclosure prevention or loss mitigation approved by the  
17 Vermont Bar Association.

18 (d) This subchapter shall not apply to a commercial loan.

19 (e) As used in this subchapter:

20 (1) "Commercial loan" means any loan described in 9 V.S.A. § 46(1),  
21 (2), or (3).

1           (2) “Government loss mitigation program” means:

2                   (A) the federal Home Affordable Modification Program (“HAMP”);

3                   (B) any loss mitigation program for loans owned or guaranteed by

4 government-sponsored entities such as the Federal National Mortgage

5 Association (Fannie Mae), the Federal Home Loan Mortgage Corporation

6 (Freddie Mac), the U.S. Federal Housing Administration, or the

7 U.S. Department of Veterans Affairs;

8                   (C) any loss mitigation program for loans guaranteed by the

9 U.S. Department of Agriculture-Rural Development that are not owned by an

10 instrumentality of the United States or the State of Vermont; or

11                  (D) a settlement agreement with a government entity, or any state or

12 federal law or regulation, regarding the notification, consideration, or offer of

13 loss mitigation options.

14 § 4632. OPPORTUNITY TO MEDIATE

15           (a) In an action for foreclosure ~~of a mortgage on any dwelling house of four~~

16 ~~units or less that is occupied by the owner as a principal residence~~ subject to

17 this subchapter, whenever the mortgagor enters an appearance in the case or

18 requests mediation prior to four months after judgment is entered and before

19 the end of the redemption period, the court shall refer the case to mediation

20 pursuant to this subchapter, except that the court may:

1           (1) for good cause, shorten the four-month period or thereafter decline  
2 to order mediation; or

3           (2) decline to order mediation if the mortgagor requests mediation after  
4 judgment has been entered and the court determines that the mortgagor is  
5 attempting to delay the case, or the court may for good cause decline to order  
6 mediation if the mortgagor requests mediation after judgment has been entered.

7           (b) Unless the mortgagee ~~agrees~~ and mortgagor agree otherwise or the  
8 court so orders for good cause shown, all mediation shall be completed prior to  
9 the expiration of the redemption period and within 120 days of the mediator's  
10 appointment. The redemption period shall not be stayed on account of pending  
11 mediation.

12           (c) In an action for foreclosure of a mortgage ~~on any dwelling house of four~~  
13 ~~units or less that is occupied by the owner as a principal residence~~ subject to  
14 this subchapter, the mortgagee shall serve upon the mortgagor two copies of  
15 the notice described in subsection (d) of this section with the summons and  
16 complaint. The ~~supreme court~~ Supreme Court may by rule consolidate this  
17 notice with other foreclosure-related notices as long as the consolidation is  
18 consistent with the content and format of the notice under this subsection.

19           (d) The notice required by subsection (c) of this section shall:

20           (1) be on a form approved by the court administrator;

1           (2) advise the homeowner of the homeowner's rights in foreclosure  
2 proceedings under this subchapter;

3           (3) state the importance of participating in mediation even if the  
4 homeowner is currently communicating with the mortgagee or servicer;

5           (4) provide contact information for legal services; and

6           (5) incorporate a form that can be used by the homeowner to request  
7 mediation from the court.

8           ~~(e) The court may, on motion of a party, find that the requirements of this~~  
9 ~~subchapter have been met and that the parties are not required to participate in~~  
10 ~~mediation under this subchapter if the mortgagee files a motion and establishes~~  
11 ~~to the satisfaction of the court that it has complied with the applicable~~  
12 ~~requirements of HAMP and supports its motion with sworn affidavits that:~~

13           ~~(1) include the calculations and inputs required by HAMP and employed~~  
14 ~~by the mortgagee; and~~

15           ~~(2) demonstrate that the mortgagee or servicer met with the mortgagor in~~  
16 ~~person or via videoconferencing or made reasonable efforts to meet with the~~  
17 ~~mortgagor in person.~~

18           The Vermont Bar Association (VBA) shall have the authority to establish a  
19 fair and neutral mediator-selection process. If the mortgagee and mortgagor  
20 are unable to select a mediator through the selection process established by the  
21 VBA, the court shall appoint a qualified mediator for the case.

1 § 4633. MEDIATION

2 (a) During all mediations under this subchapter:

3 (1) The parties shall address the available foreclosure prevention tools  
4 and, if disputed, the amount due on the note for the principal, interest, and  
5 costs or fees.

6 ~~(1)(2) the~~ The mortgagee shall use and consider available foreclosure  
7 prevention tools, including reinstatement, loan modification, forbearance, and  
8 short sale, and the ~~calculations, assumptions, and forms established by the~~  
9 ~~HAMP guidelines, including all HAMP related~~ applicable government loss  
10 mitigation program requirements and any related “net present value”  
11 calculations used in considering a loan modification conducted under this  
12 subchapter;

13 ~~(2)(3) the~~ The mortgagee shall produce for the mortgagor and mediator  
14 documentation of its consideration of the options available in this subdivision  
15 and subdivision (1) of this subsection, including the data used in and the  
16 outcome of any HAMP related “net present value” calculation; and:

17 (A) if a modification or other agreement is not offered, the reason  
18 that the mortgagor failed to qualify for the program; and

19 (B) for any applicable government loss mitigation program, the  
20 criteria for the program and the inputs and calculations used in determining the  
21 homeowner’s eligibility for a modification or other program.

1           ~~(3)(4)~~ Where the mortgagee claims that a pooling and servicing  
2 or other similar agreement prohibits modification, the mortgagee shall produce  
3 a copy of the agreement. All agreement documents shall be confidential and  
4 shall not be included in the mediator's report.

5           (b)(1) In all mediations under this subchapter, the mortgagor shall make a  
6 good faith effort to provide to the mediator ~~20 days prior to the first mediation,~~  
7 ~~or within a time determined by the mediator to be appropriate in order to allow~~  
8 ~~for verification of the information provided by the mortgagee~~ court,  
9 information on his or her household income, and any other information  
10 required by HAMP ~~unless already provided~~ any applicable government loss  
11 mitigation program.

12           (2) Within 45 days of appointment, the mediator shall hold a  
13 premediation telephone conference to help the mortgagee and mortgagor  
14 complete any necessary document exchange and address other premediation  
15 issues. At the premediation telephone conference, the mediator shall at a  
16 minimum document and maintain records of the progress the mortgagee and  
17 mortgagor are making on financial document production, any review of  
18 information that occurs during the conference, any request for additional  
19 information, the anticipated time frame for submission of any additional  
20 information, and the lender's review of the information and scheduling of the  
21 mediation session.

1           (3) During the mediation, the mediator shall document and maintain  
2 records of:

3           (A) agreements about information submitted to the mediator;

4           (B) whether a modification or other foreclosure alternative is  
5 available and, if so, the terms of the modification;

6           (C) if a modification or other foreclosure alternative is not available,  
7 the reasons for the unavailability; and

8           (D) the steps necessary to finalize the mediation.

9           (c) The parties to a mediation under this subchapter shall cooperate in good  
10 faith under the direction of the mediator to produce the information required by  
11 subsections (a) and (b) of this section in a timely manner so as to permit the  
12 mediation process to function effectively.

13           (d)(1) The following persons shall participate in person or by telephone in  
14 any mediation under this subchapter:

15           (A) the mortgagee, or any other person, including the mortgagee's  
16 servicing agent, who meets the qualifications required by subdivision (2) of  
17 this subsection;

18           (B) counsel for the mortgagee; and

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

1 (2) The mortgagee or mortgagee's servicing agent, if present, shall have:

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

4 (B) real time access during the mediation to the mortgagor's account  
5 information and to the records relating to consideration of the options available  
6 in subdivisions ~~(a)(1) and (2)~~ (a)(2) and (a)(3) of this section, including the  
7 data and factors considered in evaluating each such foreclosure prevention  
8 tool; and

9 (C) the ability and authority to perform ~~necessary HAMP-related~~  
10 government loss mitigation program-related "net present value" calculations  
11 and to consider other options available in subdivisions ~~(a)(1) and (2)~~ (a)(2) and  
12 (a)(3) of this section during the mediation.

13 (e) The mediator may permit a party identified in subdivision (d)(1) of this  
14 section to participate in mediation by telephone or videoconferencing. The  
15 mortgagee and mortgagor shall each have at least one of the persons identified  
16 in subdivision (d)(1) of this section present in person at the mediation unless  
17 all parties and the mediator agree otherwise in writing.

18 (f) The mediator may include in the mediation process under this  
19 subchapter any other person the mediator determines would assist in the  
20 mediation.

1 (g) Unless the ~~parties~~ mortgagee and mortgagor agree otherwise, all  
2 mediations under this subchapter shall take place in the county in which the  
3 foreclosure action is brought pursuant to subsection ~~4523(a)~~ 4932(a) of this  
4 title.

5 § 4634. MEDIATION REPORT

6 (a) Within seven days of the conclusion of any mediation under this  
7 subchapter, the mediator shall report in writing the results of the process to the  
8 court and both parties, and shall provide a copy of the report to the Office of  
9 the Attorney General for data collection purposes. The report shall otherwise  
10 be confidential, and shall be exempt from public copying and inspection under  
11 1 V.S.A. § 317.

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

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

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

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

3           (4) All ~~HAMP-related “net present value” calculations and other~~  
4 ~~foreclosure avoidance tool~~ applicable government loss mitigation program  
5 criteria, inputs, and calculations performed prior to or during the mediation and  
6 all information related to the requirements in subsection 4633(a) of this title.

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

9           (6)(A) A statement as to whether any person required under  
10 subsection ~~(d) of section 4633~~(d) of this title to participate in the mediation  
11 failed to:

12                   (i) attend the mediation;

13                   (ii) make a good faith effort to mediate; or

14                   (iii) supply documentation, information, or data as required by  
15 subsections 4633(a)–(c) of this title.

16           (B) If a statement is made under subdivision (6)(A) of this  
17 subsection (b), it shall be accompanied by a brief description of the applicable  
18 reason for the statement.

19 § 4635. COMPLIANCE WITH OBLIGATIONS

20           (a) Upon receipt of a mediator’s report required by subsection 4634(a) of  
21 this title, the court shall determine whether the mortgagee or servicer has

1 complied with all of its obligations under subsection 4633(a) of this title, and,  
2 at a minimum, with any ~~modification obligations under HAMP~~ applicable  
3 government loss mitigation program requirements. The court may make such  
4 a determination without a hearing unless the court, in its discretion, determines  
5 that a hearing is necessary.

6 (b) If the mediator's report includes a statement under subdivision  
7 ~~4635(b)(6)~~ 4634(b)(6) of this title, or if the court makes a determination of  
8 noncompliance with the ~~obligations~~ requirements under subsection 4635(a) of  
9 this title, the court may impose appropriate sanctions against the noncomplying  
10 party, including:

11 (1) tolling of interest, fees, and costs;

12 (2) reasonable attorney's fees;

13 (3) monetary sanctions;

14 (4) dismissal without prejudice; and

15 (5) prohibiting the mortgagee from selling or taking possession of the  
16 property that is the subject of the action with or without opportunity to cure as  
17 the court deems appropriate.

18 (c) No mediator shall be required to testify in an action subject to this  
19 subchapter.

1 § 4636. ~~EFFECT OF MEDIATION PROGRAM ON FORECLOSURE~~  
2 ~~ACTIONS FILED PRIOR TO EFFECTIVE DATE~~

3 ~~The court shall, on request of a party prior to judgment or on request of a~~  
4 ~~party and showing of good cause after judgment, require mediation in any~~  
5 ~~foreclosure action on a mortgage on any dwelling house of four units or less~~  
6 ~~that is occupied by the owner as a principal residence that was commenced~~  
7 ~~prior to the effective date of this subchapter but only up to 30 days prior to the~~  
8 ~~end of the redemption period. [Repealed.]~~

9 § 4637. NO WAIVER OF RIGHTS; COSTS OF MEDIATION

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

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

15 (c) If the foreclosure action results in a sale with a surplus, the mortgagee  
16 may recover the full cost of mediation to the extent of the surplus. Otherwise,  
17 the mortgagee may not shift to the mortgagor the costs of the mortgagee's or  
18 the servicing agent's attorney's fees or travel costs related to mediation but  
19 may shift up to one-half of the costs of the mediator.

20 Sec. 2. EFFECTIVE DATE

21 This act shall take effect on December 1, 2013.