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H.431

Introduced by Representative Wizowaty of Burlington

Referred to Committee on

Date:

Subject: Court procedure; mediation in foreclosure actions

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

An act relating to mediation in foreclosure actions

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

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

Subchapter 9. Mediation in Foreclosure Actions

§ 4631. MEDIATION PROGRAM ESTABLISHED

(a) This subchapter establishes a program to assure the availability of mediation and application of the federal Home Affordable Modification Program (“HAMP”) government loss mitigation program 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) The requirements of this subchapter shall apply ~~only to all~~ foreclosure actions ~~involving loans that are subject to the federal HAMP guidelines on~~

~~dwelling houses of four units or less that are occupied by the owner as a~~

~~principal residence unless:~~

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

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

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

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

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

(e) As used in this subchapter:

(1) "Commercial loan" means any loan described in 9 V.S.A. § 46(1),
(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 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 (C)(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.

~~§ 4636. EFFECT OF MEDIATION PROGRAM ON FORECLOSURE~~

~~ACTIONS FILED PRIOR TO EFFECTIVE DATE~~

~~The court shall, on request of a party prior to judgment or on request of a party and showing of good cause after judgment, 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. [Repealed.]~~

§ 4637. NO WAIVER OF RIGHTS; COSTS OF MEDIATION

(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 except that the mortgagor shall be responsible for mortgagor's own costs, including the cost of mortgagor's attorney, if any, and travel costs.

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

Sec. 2. EFFECTIVE DATE

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

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

Subchapter 9. Mediation in Foreclosure Actions

~~§ 4631. MEDIATION PROGRAM ESTABLISHED~~

~~(a) This subchapter establishes a program to assure the availability of mediation and application of the federal Home Affordable Modification Program (“HAMP”) government loss mitigation program 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) The requirements of this subchapter shall apply ~~only~~ to all foreclosure actions involving loans that are subject to the federal HAMP guidelines on dwelling houses of four units or less that are occupied by the owner as a principal residence unless:~~

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

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

~~(3) the plaintiff in the foreclosure action certifies in its complaint that the requirements of subdivisions (1) and (2) of this subsection have been~~

~~satisfied and describes its efforts to meet with the mortgagor in person to discuss applicable loss mitigation efforts.~~

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

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

~~(e) As used in this subchapter:~~

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

~~(2) "Government loss mitigation program" means:~~

~~(A) the federal Home Affordable Modification Program ("HAMP");~~

~~(B) any loss mitigation program for loans owned or guaranteed by government-sponsored entities such as the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), the U.S. Federal Housing Administration, or the U.S. Department of Veterans Affairs;~~

~~(C) any loss mitigation program for loans guaranteed by the U.S. Department of Agriculture-Rural Development that are not owned by an instrumentality of the United States or the State of Vermont; or~~

~~(D) a settlement agreement with a government entity, or any state or federal law or regulation, regarding the notification, consideration, or offer of loss mitigation options.~~

§ 4632. OPPORTUNITY TO MEDIATE

~~(a) In 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 subject to this subchapter, whenever the mortgagor ~~enters an appearance in the case~~ ~~or~~ requests mediation prior to four months after judgment is entered and before the end of the redemption period specified in the decree, the court shall refer the case to mediation pursuant to this subchapter, except that the court may:~~

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

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

~~(b) Unless the mortgagee agrees and mortgagor agree otherwise or the court so orders for good cause shown, all mediation shall be completed prior to the expiration of the redemption period specified in the decree and within~~

~~120 days of the mediator's appointment. The redemption period shall not be stayed on account of pending mediation.~~

~~(c) In 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 subject to this subchapter, the mortgagee shall serve upon the mortgagor two copies of the notice described in subsection (d) of this section with the summons and complaint. The ~~supreme court~~ Supreme Court may by rule consolidate this notice with other foreclosure-related notices as long as the consolidation is consistent with the content and format of the notice under this subsection.~~

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

- ~~(1) be on a form approved by the court administrator;~~
- ~~(2) advise the homeowner of the homeowner's rights in foreclosure proceedings under this subchapter;~~
- ~~(3) state the importance of participating in mediation even if the homeowner is currently communicating with the mortgagee or servicer;~~
- ~~(4) provide contact information for legal services; and~~
- ~~(5) incorporate a form that can be used by the homeowner to request mediation from the court.~~

~~(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 if the mortgagee files a motion and~~

~~establishes to the satisfaction of the court that it has complied with the applicable requirements of HAMP and supports its motion with sworn affidavits that:~~

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

~~(2) demonstrate that the mortgagee or servicer met with the mortgagor in person or via video conferencing or made reasonable efforts to meet with the mortgagor in person.~~

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

§ 4633. MEDIATION

(a) During all mediations under this subchapter:

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

~~(1)(2) the The mortgagee shall use and consider available foreclosure prevention tools, including reinstatement, loan modification, forbearance, and short sale, and the calculations, assumptions, and forms established by the HAMP guidelines, including all HAMP-related applicable government loss~~

~~mitigation program requirements and any related "net present value"~~
~~calculations used in considering a loan modification conducted under this~~
~~subchapter;~~

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

~~(A) if a modification or other agreement is not offered, an~~
~~explanation why the mortgagor was not offered a modification or other~~
~~agreement; and~~

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

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

~~(b)(1) In all mediations under this subchapter, the mortgagor shall make a~~
~~good faith effort to provide to the mediator 20 days prior to the first mediation,~~
~~or within a time determined by the mediator to be appropriate in order to~~
~~allow for verification of the information provided by the mortgagee court or~~

~~mediator, information on his or her household income, and any other information required by HAMP unless already provided any applicable government loss mitigation program.~~

~~(2) Within 45 days of appointment, the mediator shall hold a premediation telephone conference to help the mortgagee and mortgagor complete any necessary document exchange and address other premediation issues. At the premediation telephone conference, the mediator shall at a minimum document and maintain records of the progress the mortgagee and mortgagor are making on financial document production, any review of information that occurs during the conference, any request for additional information, the anticipated time frame for submission of any additional information and the lender's review of the information, the scheduling of the mediation session, and which of the persons identified in subdivision (d)(1) of this section will be present in person at the mediation or that the parties and the mediator have agreed pursuant to subsection (e) of this section that personal presence at the mediation is not required.~~

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

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

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

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

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

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

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

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

~~(B) counsel for the mortgagee; and~~

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

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

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

~~(B) 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)~~ (a)(2) and (a)(3) of this section,~~

~~including the data and factors considered in evaluating each such foreclosure prevention tool; and~~

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

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

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

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

§ 4634. *MEDIATION REPORT*

~~(a) Within seven days of the conclusion of any mediation under this subchapter, the mediator shall report in writing the results of the process to~~

~~the court and both parties, and shall provide a copy of the report to the Office of the Attorney General for data collection purposes. The report shall otherwise be confidential, and shall be exempt from public copying and inspection under 1 V.S.A. § 317.~~

~~(b) The report required by subsection (a) of this section 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 all of 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 applicable government loss mitigation program criteria, inputs, and calculations performed prior to or during the mediation and all information related to the requirements in subsection 4633(a) of this title.~~

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

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

~~(i) attend the mediation;~~

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

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

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

~~§ 4635. COMPLIANCE WITH OBLIGATIONS~~

~~(a) Upon receipt of a mediator's report required by subsection 4634(a) of this title, the court shall determine whether the mortgagee or servicer has complied with all of its obligations under subsection 4633(a) of this title, and, at a minimum, with any ~~modification obligations under HAMP~~ applicable government loss mitigation program requirements. The court may make such a determination without a hearing unless the court, in its discretion, determines that a hearing is necessary.~~

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

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

~~(2) reasonable attorney's fees;~~

~~(3) monetary sanctions;~~

~~(4) dismissal without prejudice; and~~

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

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

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

~~The court shall, on request of a party prior to judgment or on request of a party and showing of good cause after judgment, 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. [Repealed.]~~

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

~~(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 except that the mortgagor shall be responsible for mortgagor's own costs, including the cost of mortgagor's attorney, if any, and travel costs.~~

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

~~Sec. 2. EFFECTIVE DATE~~

~~This act shall take effect on December 1, 2013 and shall apply to any mortgage foreclosure proceeding instituted after that date.~~

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

~~Subchapter 9. Mediation in Foreclosure Actions~~

~~§ 4631. MEDIATION PROGRAM ESTABLISHED~~

~~(a) This subchapter establishes a program to assure the availability of mediation and application of ~~the federal Home Affordable Modification~~~~

~~Program (“HAMP”)~~ government loss mitigation program 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) The requirements of this subchapter shall apply ~~only~~ to all foreclosure actions ~~involving loans that are subject to the federal HAMP guidelines on dwelling houses of four units or less that are occupied by the owner as a principal residence unless:~~

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

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

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

(c) To be qualified to act as a mediator under this subchapter, an individual shall be licensed to practice law in the ~~state~~ State and shall be periodically required to ~~have taken a~~ take specialized, continuing legal

education training ~~course~~ courses on foreclosure prevention or loss mitigation approved by the Vermont Bar Association.

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

(e) As used in this subchapter:

(1) "Commercial loan" means any loan described in 9 V.S.A. § 46(1),

(2), or (3).

(2) "Government loss mitigation program" means:

(A) the federal Home Affordable Modification Program ("HAMP");

(B) any loss mitigation program for loans owned or guaranteed by government-sponsored entities such as the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), the U.S. Federal Housing Administration, or the U.S. Department of Veterans Affairs;

(C) any loss mitigation program for loans guaranteed by the U.S. Department of Agriculture-Rural Development that are not owned by an instrumentality of the United States or the State of Vermont; or

(D) a settlement agreement with a government entity, or any state or federal law or regulation, regarding the notification, consideration, or offer of loss mitigation options.

§ 4632. OPPORTUNITY TO MEDIATE

(a) In 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~~ subject to this subchapter, whenever the mortgagor ~~enters an appearance in the case~~ ~~or~~ requests mediation prior to four months after judgment is entered and before the end of the redemption period specified in the decree, the court shall refer the case to mediation pursuant to this subchapter, except that the court may:

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

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

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

(c) In 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~~ subject

to this subchapter, the mortgagee shall serve upon the mortgagor two copies of the notice described in subsection (d) of this section with the summons and complaint. The ~~supreme court~~ Supreme Court may by rule consolidate this notice with other foreclosure-related notices as long as the consolidation is consistent with the content and format of the notice under this subsection.

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

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

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

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

(4) provide contact information for legal services; and

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

~~(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 if the mortgagee files a motion and establishes to the satisfaction of the court that it has complied with the applicable requirements of HAMP and supports its motion with sworn affidavits that:~~

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

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

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

§ 4633. MEDIATION

(a) During all mediations under this subchapter:

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

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

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

(A) if a modification or other agreement is not offered, an explanation why the mortgagor was not offered a modification or other agreement; and

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

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

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

(2) Within 45 days of appointment, the mediator shall hold a premediation telephone conference to help the mortgagee and mortgagor complete any necessary document exchange and address other premediation issues. At the premediation telephone conference, the mediator shall at a minimum document and maintain records of the progress the mortgagee and mortgagor are making on financial document production, any review of information that occurs during the conference, any request for additional information, the anticipated time frame for submission of any additional information and the lender's review of the information, the scheduling of the mediation session, and which of the persons identified in subdivision (d)(1) of this section will be present in person at the mediation or that the parties and the mediator have agreed pursuant to subsection (e) of this section that personal presence at the mediation is not required.

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

(A) agreements about information submitted to the mediator;

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

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

(D) the steps necessary to finalize the mediation.

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

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

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

(B) counsel for the mortgagee; and

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

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

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

(B) 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)~~ (a)(2) and (a)(3) of this section, including the data and factors considered in evaluating each such foreclosure prevention tool; and

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

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

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

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

§ 4634. MEDIATION REPORT

(a) Within seven days of the conclusion of any mediation under this subchapter, the mediator shall report in writing the results of the process to the court and both parties, and shall provide a copy of the report to the Office of the Attorney General for data collection purposes. The report submitted to

the Attorney General's office shall include, in addition to the information identified in subsection (b) of this section, all applicable government loss mitigation program criteria, inputs, and calculations performed prior to or during the mediation and all information related to the requirements in subsection 4633(a) of this title. The report submitted to the Attorney General's office shall be confidential, and shall be exempt from public copying and inspection under 1 V.S.A. § 317, provided that any public report by the Attorney General may include information in aggregate form.

(b) The report required by subsection (a) of this section 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 all of 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 4633(a) of this title. [Repealed.]~~

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

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

(i) attend the mediation;

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

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

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

§ 4635. COMPLIANCE WITH OBLIGATIONS

(a) *Upon receipt of a mediator's report required by subsection 4634(a) of this title, the court shall determine whether the mortgagee or servicer has complied with all of its obligations under subsection 4633(a) of this title, and, at a minimum, with any ~~modification obligations under HAMP~~ applicable government loss mitigation program requirements. The court may make such*

a determination without a hearing unless the court, in its discretion, determines that a hearing is necessary.

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

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

(2) reasonable attorney's fees;

(3) monetary sanctions;

(4) dismissal without prejudice; and

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

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

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

~~The court shall, on request of a party prior to judgment or on request of a party and showing of good cause after judgment, 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. [Repealed.]~~

§ 4637. NO WAIVER OF RIGHTS; COSTS OF MEDIATION

(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 except that the mortgagor shall be responsible for mortgagor's own costs, including the cost of mortgagor's attorney, if any, and travel costs.~~

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

Sec. 2. REPEAL

~~2010 Acts and Resolves No. 132, Sec. 13 (repeal of Vermont mortgage foreclosure mediation program on date federal HAMP program is repealed) is repealed.~~

Sec. 3. EFFECTIVE DATE

~~This act shall take effect on December 1, 2013 and shall apply to any mortgage foreclosure proceeding instituted after that date.~~