

REFERENCE TITLE: foreclosure mediation program

State of Arizona
House of Representatives
Fiftieth Legislature
Second Regular Session
2012

HB 2833

Introduced by
Representatives Tovar, McCune Davis, Smith D: Alston, Jones, Miranda R

AN ACT

AMENDING SECTION 33-807, ARIZONA REVISED STATUTES; AMENDING TITLE 33, CHAPTER 6.1, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTION 33-807.02; RELATING TO FORECLOSURE OF DEEDS OF TRUST.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:
2 Section 1. Section 33-807, Arizona Revised Statutes, is amended to
3 read:
4 33-807. Sale of trust property; power of trustee; foreclosure
5 of trust deed
6 A. By virtue of ~~his~~ THE TRUSTEE'S position, a power of sale is
7 conferred upon the trustee of a trust deed under which the trust property may
8 be sold, in the manner provided in this chapter, after a breach or default in
9 performance of the contract or contracts, for which the trust property is
10 conveyed as security, or a breach or default of the trust deed. At the
11 option of the beneficiary, a trust deed may be foreclosed in the manner
12 provided by law for the foreclosure of mortgages on real property in which
13 event chapter 6 of this title governs the proceedings. The beneficiary or
14 trustee shall constitute the proper and complete party plaintiff in any
15 action to foreclose a deed of trust. The power of sale may be exercised by
16 the trustee without express provision therefor in the trust deed.
17 B. The trustee or beneficiary may file and maintain an action to
18 foreclose a deed of trust at any time before the trust property has been sold
19 under the power of sale. A sale of trust property under the power of sale
20 shall not be held after an action to foreclose the deed of trust has been
21 filed unless the foreclosure action has been dismissed.
22 C. The trustee or beneficiary may file an action for the appointment
23 of a receiver according to sections 12-1241 and 33-702. The right to
24 appointment of a receiver shall be independent of and may precede the
25 exercise of any other right or remedy.
26 D. EXCEPT FOR OWNER-OCCUPIED RESIDENTIAL PROPERTY, the power of sale
27 of trust property conferred upon the trustee shall not be exercised before
28 the ninety-first day after the date of the recording of the notice of the
29 sale. The sale shall not be set for a Saturday or legal holiday. The
30 trustee may schedule more than one sale for the same date, time and place.
31 E. FOR OWNER-OCCUPIED RESIDENTIAL PROPERTY, THE POWER OF SALE OF TRUST
32 PROPERTY CONFERRED ON THE TRUSTEE SHALL NOT BE EXERCISED BEFORE THE RECORDING
33 OF THE NOTICE FROM THE COURT AS PROVIDED IN SECTION 33-807.02, SUBSECTION I
34 THAT THE MEDIATION PROCESS HAS BEEN SATISFACTORILY COMPLETED.
35 ~~E.~~ F. The trustee need only be joined as a party in legal actions
36 pertaining to a breach of the trustee's obligation under this chapter or
37 under the deed of trust. Any order of the court entered against the
38 beneficiary is binding upon the trustee with respect to any actions that the
39 trustee is authorized to take by the trust deed or by this chapter. If the
40 trustee is joined as a party in any other action, the trustee is entitled to
41 be immediately dismissed and to recover costs and reasonable attorney fees
42 from the person joining the trustee.

1 Sec. 2. Title 33, chapter 6.1, article 1, Arizona Revised Statutes, is
2 amended by adding section 33-807.02, to read:

3 33-807.02. Foreclosure mediation; fee; report; stay;
4 applicability; program termination

5 A. THE FORECLOSURE MEDIATION PROGRAM IS ESTABLISHED IN THE
6 ADMINISTRATIVE OFFICE OF THE COURTS. THE SUPREME COURT SHALL OVERSEE THE
7 FORECLOSURE MEDIATION PROGRAM TO PROVIDE MEDIATION IN THE SUPERIOR COURT FOR
8 NONJUDICIAL FORECLOSURES OF DEEDS OF TRUST ON OWNER-OCCUPIED RESIDENTIAL
9 PROPERTY.

10 B. THE PROGRAM SHALL ADDRESS ALL ISSUES OF FORECLOSURE, INCLUDING
11 REINSTATEMENT OF THE DEED OF TRUST, MODIFICATION OF THE LOAN AND
12 RESTRUCTURING OF THE DEBT. MEDIATIONS CONDUCTED PURSUANT TO THE PROGRAM
13 SHALL USE THE CALCULATIONS, ASSUMPTIONS AND FORMS THAT ARE ESTABLISHED BY THE
14 FEDERAL DEPOSIT INSURANCE CORPORATION AND PUBLISHED IN THE FEDERAL DEPOSIT
15 INSURANCE CORPORATION LOAN MODIFICATION PROGRAM GUIDE AS SET OUT ON THE
16 FEDERAL DEPOSIT INSURANCE CORPORATION'S PUBLICLY ACCESSIBLE WEBSITE.
17 COMMUNICATIONS DURING MEDIATION ARE CONFIDENTIAL AND MAY NOT BE USED IN ANY
18 SUBSEQUENT LEGAL PROCEEDINGS. THE TRUSTOR'S, TRUSTEE'S AND BENEFICIARY'S
19 RIGHTS IN THE NONJUDICIAL FORECLOSURE ARE NOT WAIVED BY PARTICIPATING IN THE
20 PROGRAM. THE TRUSTOR MAY WAIVE THE TRUSTOR'S OPTION TO PARTICIPATE IN THE
21 MEDIATION PROGRAM AT ANY TIME AND MAY PROCEED TO FORECLOSURE.

22 C. THE SUPERIOR COURT SHALL PROVIDE MEDIATION SERVICES UNDER THIS
23 SECTION, WHICH SHALL INCLUDE A MANDATORY PRELIMINARY REVIEW OF THE TRUSTOR'S
24 FINANCIAL SITUATION WITH A HOUSING COUNSELOR OR ATTORNEY SELECTED FROM A LIST
25 PROVIDED BY THE COURT. THE TRUSTOR SHALL MEET WITH THE HOUSING COUNSELOR OR
26 ATTORNEY TO DETERMINE WHETHER AND HOW MUCH THE TRUSTOR CAN AFFORD TO PAY FOR
27 HOUSING, WHICH SHALL BE REPORTED TO THE COURT.

28 D. THE COURT SHALL ESTABLISH A FEE FOR MEDIATION SERVICES TO BE
29 DIVIDED EQUALLY BETWEEN THE BENEFICIARY AND TRUSTOR. IF THE TRUSTOR REQUIRES
30 THE USE OF AN INTERPRETER, THE TRUSTOR SHALL PAY THE COST OF THE INTERPRETER.
31 THE COURT MAY ESTABLISH A TRAINING PROGRAM FOR MEDIATORS AND REQUIRE THAT
32 MEDIATORS RECEIVE THAT TRAINING BEFORE BEING APPOINTED. THE COURT SHALL
33 ASSIGN MEDIATORS WHO:

- 34 1. ARE TRAINED IN MEDIATION AND ALL RELEVANT ASPECTS OF THE LAW.
- 35 2. HAVE KNOWLEDGE OF COMMUNITY-BASED RESOURCES THAT ARE AVAILABLE IN
36 THE JUDICIAL DISTRICTS IN WHICH THEY SERVE.
- 37 3. HAVE KNOWLEDGE OF MORTGAGE ASSISTANCE PROGRAMS.
- 38 4. ARE TRAINED IN USING THE RELEVANT FEDERAL DEPOSIT INSURANCE
39 CORPORATION FORMS AND WORKSHEETS.

40 E. A MEDIATOR SHALL INCLUDE IN THE MEDIATION PROCESS UNDER THIS
41 SECTION ANY PERSON THE MEDIATOR DETERMINES IS NECESSARY FOR EFFECTIVE
42 MEDIATION. MEDIATION AND APPEARANCE IN PERSON ARE MANDATORY FOR:

- 43 1. THE BENEFICIARY, EXCEPT THAT THE BENEFICIARY MAY PARTICIPATE BY
44 TELEPHONE. A REPRESENTATIVE OF THE BENEFICIARY MUST HAVE SUFFICIENT

1 AUTHORITY TO AGREE TO A PROPOSED SETTLEMENT, LOAN MODIFICATION OR DISMISSAL
2 OF THE LOAN.

3 2. THE TRUSTOR AND ANY COUNSEL FOR THE TRUSTOR.

4 3. THE TRUSTEE, EXCEPT THAT THE TRUSTEE MAY PARTICIPATE BY TELEPHONE.

5 F. THE BENEFICIARY SHALL PROVIDE COPIES OF THE FOLLOWING DOCUMENTS TO
6 THE TRUSTOR AND THE MEDIATOR AT LEAST TEN DAYS BEFORE THE MEDIATION:

7 1. AN ACCURATE STATEMENT CONTAINING THE BALANCE OF THE LOAN AS OF THE
8 FIRST DAY OF THE MONTH IN WHICH THE MEDIATION OCCURS.

9 2. COPIES OF THE NOTE AND DEED OF TRUST.

10 3. PROOF THAT THE ENTITY CLAIMING TO BE THE BENEFICIARY IS THE OWNER
11 OF ANY PROMISSORY NOTE OR OBLIGATION SECURED BY THE DEED OF TRUST.

12 4. THE PAYMENT HISTORY AND SCHEDULE FOR THE PRECEDING TWELVE MONTHS,
13 OR SINCE DEFAULT, WHICHEVER IS LONGER, INCLUDING A BREAKDOWN OF ALL FEES AND
14 CHARGES CLAIMED AND AN ITEMIZED STATEMENT OF ARREARAGES, INCLUDING ALL FEES
15 AND CHARGES.

16 5. ALL BORROWER-RELATED AND MORTGAGE-RELATED INPUT DATA USED IN ANY
17 NET PRESENT VALUE ANALYSIS.

18 6. AN EXPLANATION REGARDING ANY DENIAL FOR A LOAN MODIFICATION,
19 FORBEARANCE OR OTHER ALTERNATIVE TO FORECLOSURE IN SUFFICIENT DETAIL FOR A
20 REASONABLE PERSON TO UNDERSTAND WHY THE DECISION WAS MADE.

21 7. THE MOST RECENTLY AVAILABLE APPRAISAL OR OTHER BROKER PRICE OPINION
22 MOST RECENTLY RELIED ON BY THE BENEFICIARY.

23 8. THE PORTION OR EXCERPT OF THE POOLING AND SERVICING AGREEMENT THAT
24 PROHIBITS THE BENEFICIARY FROM IMPLEMENTING A MODIFICATION, IF THE
25 BENEFICIARY CLAIMS IT CANNOT IMPLEMENT A MODIFICATION DUE SOLELY TO
26 LIMITATIONS IN A POOLING AND SERVICING AGREEMENT AND DOCUMENTATION OR A
27 STATEMENT DETAILING THE EFFORTS OF THE BENEFICIARY TO OBTAIN A WAIVER OF THE
28 POOLING AND SERVICING AGREEMENT PROVISIONS.

29 G. THE TRUSTOR SHALL PROVIDE COPIES OF THE FOLLOWING DOCUMENTS TO THE
30 BENEFICIARY AND THE MEDIATOR AT LEAST TEN DAYS BEFORE THE MEDIATION:

31 1. EVIDENCE OF THE TRUSTOR'S CURRENT AND FUTURE INCOME, INCLUDING
32 EMPLOYER STATEMENTS AND TAX DOCUMENTS, INCLUDING TAX RETURNS FOR THE
33 PRECEDING TWO YEARS.

34 2. EVIDENCE OF THE TRUSTOR'S DEBTS AND OTHER FINANCIAL OBLIGATIONS.

35 H. ON REQUEST OF THE TRUSTOR, THE PARTIES SHALL MEDIATE AND ATTEMPT TO
36 RESOLVE THE ISSUES IN THE FORECLOSURE. THE MEDIATOR SHALL ENSURE THAT THE
37 PARTIES COMPLETE IN FULL AND IN GOOD FAITH THE NET PRESENT VALUE WORKSHEET IN
38 THE FEDERAL DEPOSIT INSURANCE CORPORATION LOAN MODIFICATION PROGRAM GUIDE.
39 THE MEDIATOR SHALL RETAIN A COPY OF THE WORKSHEET UNTIL COMPLETION OF THE
40 FORECLOSURE PROCEEDINGS. THE MEDIATOR SHALL SUBMIT A REPORT TO THE COURT ON
41 THE OUTCOME OF THE MEDIATION AND SHALL INCLUDE THE OUTCOMES OF THE NET
42 PRESENT VALUE WORKSHEET.

43 I. DURING THE MEDIATION PROCESS, THE BENEFICIARY AND THE TRUSTEE SHALL
44 NOT TAKE ANY FURTHER ACTION IN THE FORECLOSURE, AND ANY RELATED COURT PROCESS
45 IS STAYED DURING THE MEDIATION PROCESS PURSUANT TO THIS SECTION. THE

1 FORECLOSURE PROCESS MAY COMMENCE AGAIN ONLY ON CERTIFICATION AND RECORDATION
2 OF NOTICE FROM THE COURT THAT REQUIREMENTS UNDER THE PROGRAM WERE SATISFIED,
3 AS DETERMINED BY THE COURT. ALL FEES AND COSTS RELATED TO THE FORECLOSURE
4 AND DELINQUENCY, INCLUDING INTEREST, REMAIN FIXED FROM THE DATE OF THE
5 SCHEDULED MEDIATION UNTIL THE DATE THAT THE NOTICE OF SATISFACTION IS
6 RECORDED BY THE COURT.

7 J. IF THE COURT FINDS THAT EITHER PARTY FAILED TO MAKE A GOOD FAITH
8 EFFORT TO MEDIATE, THE COURT MAY IMPOSE SANCTIONS THAT INCLUDE A STAY ON THE
9 FORECLOSURE WITH PAYMENT OF COSTS AND FEES.

10 K. THIS SECTION APPLIES TO OWNER-OCCUPIED RESIDENTIAL PROPERTIES FOR
11 WHICH A NOTICE OF SALE HAS NOT BEEN RECORDED ON OR BEFORE THE EFFECTIVE DATE
12 OF THIS SECTION.

13 L. THE PROGRAM ESTABLISHED BY THIS SECTION ENDS ON JULY 1, 2022
14 PURSUANT TO SECTION 41-3102.

15 Sec. 3. Legislative findings and intent

16 A. The legislature finds the following:

17 1. The rate of home foreclosures continues to rise along with
18 continued unemployment, higher adjustable loan payments and uncertainties in
19 the market for refinancing and home price stability.

20 2. Prolonged foreclosures contribute to the decline in the state's
21 housing market, loss of property values and other loss of revenue to the
22 state.

23 3. This state's nonjudicial foreclosure process does not have a
24 mechanism for homeowners to readily access a neutral third party for timely
25 assistance and advice.

26 B. It is the intent of the legislature to:

27 1. Provide for communication between homeowners and lenders and to
28 assist homeowners in minimizing foreclosure whenever possible.

29 2. Encourage homeowners to use the skills and professional judgment of
30 housing counselors as early as possible in the foreclosure process, including
31 assisting homeowners in analyzing the homeowners' financial and providing a
32 realistic assessment of what the homeowner can afford to pay and whether a
33 loan modification is feasible.

34 3. Create a framework for homeowners and beneficiaries to communicate
35 with each other to reach a resolution and avoid foreclosure whenever
36 possible.

37 4. Provide a process for foreclosure mediation when a housing
38 counselor or attorney determines that mediation is appropriate.