

# Understanding The New Washington Foreclosure Fairness Act Housing Washington 2013

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BRUCE NEAS  
COLUMBIA LEGAL SERVICES  
711 CAPITOL WAY  
OLYMPIA, WA  
[BRUCE.NEAS@COLUMBIALEGAL.ORG](mailto:BRUCE.NEAS@COLUMBIALEGAL.ORG)

# Judicial vs. Non-Judicial Foreclosure

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Court Decision

Bank has to file a lawsuit to foreclose  
Bank must follow proper civil and court procedure  
Proof that it owns the loan  
Mediation and Dispute Resolution  
Right of Redemption for Homeowner



Trustee's Sale

Bank or Trustee serves and records Notices  
Trustee conducts sale (auction) 90 days after NTS  
No court oversight unless homeowner enjoins sale  
No deficiency for homeowner after sale  
Process is faster and less expensive for banks

“While I am judge, it takes 13 men to steal a ranch.”

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## Objectives of the Deed of Trust Act-RCW 61.24

- The nonjudicial foreclosure process should remain efficient and inexpensive;
- The process should provide ***adequate opportunity*** for interested parties to ***prevent wrongful foreclosure***;
- The process should promote stability of land titles.

# Scope of the Harm-Foreclosures in Washington WA 11<sup>th</sup> in the Nation-August 2012

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- 7,000 foreclosure filings in 2007.
- 31,000 foreclosure filings in 2009.
- 52,000 foreclosure filings in 2010.
- Between 44,000 and 50,000 foreclosure filings in 2011.
- 80,000 WA mortgages 90 days delinquent in 4<sup>th</sup> Quarter 2011.

# Intent of the FFA-Legislative Findings

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- Home foreclosures continue to rise to unprecedented levels...a new wave of foreclosures has occurred due to rising unemployment, job loss, and higher adjustable loan payments;
- Washington's nonjudicial foreclosure process does not have a mechanism for homeowners to readily access a neutral third party to assist them in a fair and timely way;
- Foreclosure mediation programs provide a cost-effective process for the homeowner and lender, with the assistance of a trained mediator, to reach a mutually acceptable resolution that avoids foreclosure.

# Structure of the FFA

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- Effective Date-July 22, 2011.
- Notice of Pre-Foreclosure Options.
  - Right to “meet and confer” before NOD served.
- Mediation can only be requested after NOD served and before 20 days passes after NOTS recorded (6-7-12).
- Homeowner can request mediation **ONLY** through housing counselor or attorney.
- Mediation request must be “appropriate” and “based on individual circumstances.”
- Foreclosure cannot proceed until mediation concluded.

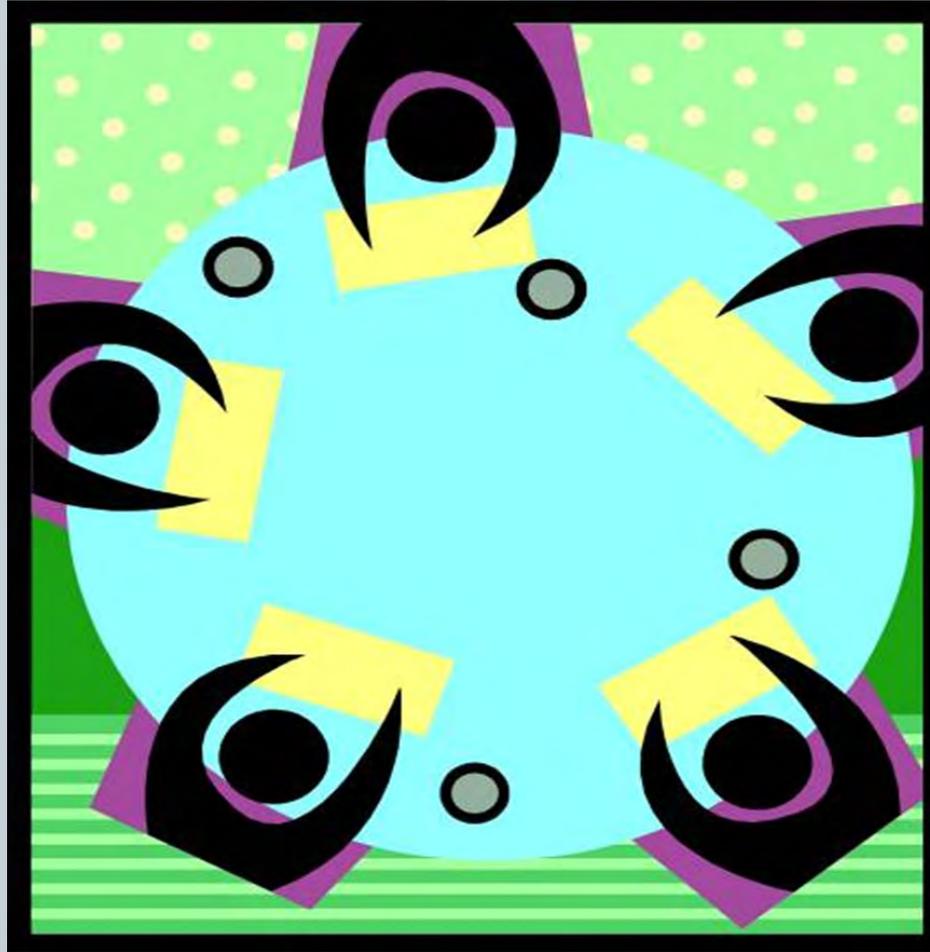
## “Meet & Confer” Process effective June 7th, 2012- **Before** Notice of Default

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- Beneficiary serves Notice of Pre-Foreclosure Options
- Beneficiary/Servicer must offer to **meet and confer**
- Homeowner has 30 days to respond to offer to meet
- Acceptance adds 60 days to the process
- If homeowner does not request meeting, beneficiary serves NOD

# Mediation

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# Everything You Need to Know about the FFA in One Slide

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- **Only Attorney or Housing Counselor** can refer to mediation.
- Referral after the NOD issued, no later than 20 days after the NOTS is recorded.
- Parties must mediate in good faith.
- Must try to reach a resolution to avoid foreclosure.
  
- **Beneficiary's lack of good faith is a CPA violation:**
  - Basis to restrain the sale
  - Attorney's fees
  - Treble damages

# Exceptions to Mediation

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- **Beneficiaries who are:**
  - “Federally-insured depository institutions”; and,
  - Do less than 250 trustee sales of owner-occupied residential real property in preceding calendar year.
- Property not “Owner-Occupied.”
- No commercial loans, HOA foreclosures, or seller-financed sales.

# At the Table

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- Homeowner
- Homeowner's advocate
- Mediator
- Beneficiary's representative
- Beneficiary's Attorney



**Note:** *Servicer* usually attends on behalf of beneficiary.  
Beneficiary's attorney usually hired by *Trustee*.

# Mediators Must Be Familiar With:

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- Relevant aspects of the law;
- Knowledge of community-based resources and mortgage assistance programs, and:
- Refer borrowers to these programs where appropriate.
- The net present value must be considered in mediation:
  - Value of receiving payments under a modified mortgage loan, compared with
  - Anticipated net recovery following foreclosure.

# Participant Issues at Mediation

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- Borrower's current and future economic circumstances, debts and obligations.
- NPV of receiving payments pursuant to a loan mod versus foreclosure sale.
- Any loan modification programs applicable, e.g., HAMP or other loss mitigation program.

# Dialogue at Mediation

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- **Mediator** introduction
- Homeowner **opening** statement
- Beneficiary requests documents or explains **denial**
- Attorneys **argue** about who failed to do what
- **Mediator** intervenes – “we’re having a conversation”
- Attorneys argue about **NPV**
- **Mediator** intervenes
- Beneficiary wants to pursue **non-retention options**
- Homeowner requests **second session**
- Parties reach an **agreement**
- Discuss **process** moving forward

# Foreclosure Mediation Timeline

1. Within **10 days** of receiving mediation request, Commerce to notify parties and select mediator.
2. Mediation scheduled no later than **70 days** after notification by Commerce, unless otherwise agreed.
3. Mediator will set a time, date and place for the mediation **30 days** before the mediation session.
4. Borrower transmits required documents to beneficiary/mediator **23 days** after notice by Commerce.
5. Beneficiary transmits required documents to borrower **20 days** after receipt of borrower's documents.
6. Within **7 days** of mediation, the mediator must issue written certification-results & good faith.

# Outcomes at Mediation

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- **Resolution: loan modification; work out; debt forgiveness; short sale; deed in lien, cash for keys; principal reduction; etc.**
- **No resolution AND parties mediate in good faith, foreclosure proceeds.**
- **No resolution AND homeowner fails to mediate in good faith, foreclosure proceeds.**

# Outcomes at Mediation-continued

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- If no resolution AND beneficiary fails to mediate in good faith, foreclosure proceeds, but homeowner may be able to enjoin foreclosure in court.
- If no resolution and the certification shows the NPV of a modified loan exceeds the anticipated net recovery at foreclosure, then borrower may use to enjoin foreclosure.

# Duty of Good Faith-61.24.163(10)

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A violation of the duty of good faith **may** include:

- Failure to timely participate;
- Failure to provide required documentation;
- Not having a representative with **adequate authority** to settle, compromise, or resolve;
- Beneficiary cannot require waiver by borrower of any future claims.

# Challenges

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- **Training**
  - Mediators
  - Industry
  - Housing Counselors/Homeowner Attorneys
- **Data**
  - Best Practices
  - Increase in Participation of Hardest Hit Communities
- **FFA Changes**
  - Exemption
- **Accountability**

## For More Information on Foreclosure Mediation Programs

- **It's Time We Talked: Mandatory Mediation in the Foreclosure Process**  
<http://www.americanprogress.org/issues/2009/06/time-we-talked.html>
- **Walk the Talk: Best Practices on the Road to Automatic Foreclosure Mediation**  
<http://www.americanprogress.org/issues/issues/2010/11/pdf/walk-the-talk.pdf>
- **Foreclosure Mediation Programs**  
<http://www.nclc.org/issues/foreclosure-mediation-programs.html>