

HOUSE BILL 1168

N1

5lr2837

By: **Delegates McConkey, Dumais, Gutierrez, and Rey**

Introduced and read first time: February 23, 2015

Assigned to: Rules and Executive Nominations

A BILL ENTITLED

1 AN ACT concerning

2 **Real Property – Foreclosure – Residential Property – Prefile Mediation**

3 FOR the purpose of making it mandatory, rather than discretionary, for a secured party to
4 offer prefile mediation to a mortgagor or grantor before filing an action to foreclose a
5 mortgage or deed of trust on certain residential property; making conforming
6 changes; and generally relating to foreclosure of a mortgage or deed of trust on
7 residential property.

8 BY repealing and reenacting, without amendments,

9 Article – Real Property

10 Section 7–105.1(a), (b), and (h) through (m)

11 Annotated Code of Maryland

12 (2010 Replacement Volume and 2014 Supplement)

13 BY repealing and reenacting, with amendments,

14 Article – Real Property

15 Section 7–105.1(c), (d), and (e)

16 Annotated Code of Maryland

17 (2010 Replacement Volume and 2014 Supplement)

18 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,

19 That the Laws of Maryland read as follows:

20 **Article – Real Property**

21 7–105.1.

22 (a) (1) In this section the following words have the meanings indicated.

23 (2) (i) “Certified community development financial institution” means
24 a community development financial institution that is certified by the Community

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 Development Financial Institutions Fund in the U.S. Department of the Treasury under
2 12 U.S.C. § 4701 et seq.

3 (ii) “Certified community development financial institution”
4 includes any company that controls, is controlled by, or is under common control with a
5 certified community development financial institution.

6 (3) “Final loss mitigation affidavit” means an affidavit that:

7 (i) Is made by a person authorized to act on behalf of a secured party
8 of a mortgage or deed of trust on owner-occupied residential property that is the subject of
9 a foreclosure action;

10 (ii) Certifies the completion of the final determination of loss
11 mitigation analysis in connection with the mortgage or deed of trust; and

12 (iii) If denied, provides an explanation for the denial of a loan
13 modification or other loss mitigation.

14 (4) “Foreclosure mediation” means a conference at which the parties in a
15 foreclosure action, their attorneys, additional representatives of the parties, or a
16 combination of those persons appear before an impartial individual to discuss the positions
17 of the parties in an attempt to reach agreement on a loss mitigation program for the
18 mortgagor or grantor.

19 (5) “Housing counseling services” means assistance provided to mortgagors
20 or grantors by nonprofit and governmental entities that are identified on a list maintained
21 by the Department of Housing and Community Development.

22 (6) “Loss mitigation analysis” means an evaluation of the facts and
23 circumstances of a loan secured by owner-occupied residential property to determine:

24 (i) Whether a mortgagor or grantor qualifies for a loan modification;
25 and

26 (ii) If there will be no loan modification, whether any other loss
27 mitigation program may be made available to the mortgagor or grantor.

28 (7) “Loss mitigation program” means an option in connection with a loan
29 secured by owner-occupied residential property that:

30 (i) Avoids foreclosure through loan modification or other changes to
31 existing loan terms that are intended to allow the mortgagor or grantor to stay in the
32 property;

1 (ii) Avoids foreclosure through a short sale, deed in lieu of
2 foreclosure, or other alternative that is intended to simplify the mortgagor's or grantor's
3 relinquishment of ownership of the property; or

4 (iii) Lessens the harmful impact of foreclosure on the mortgagor or
5 grantor.

6 (8) "Owner-occupied residential property" means residential property in
7 which at least one unit is occupied by an individual who:

8 (i) Has an ownership interest in the property; and

9 (ii) Uses the property as the individual's primary residence.

10 (9) "Postfile mediation" means foreclosure mediation that occurs in
11 accordance with subsection (j) of this section after the date on which the order to docket or
12 complaint to foreclose is filed.

13 (10) "Prefile mediation" means foreclosure mediation that occurs in
14 accordance with subsection (d) of this section before the date on which the order to docket
15 or complaint to foreclose is filed.

16 (11) "Preliminary loss mitigation affidavit" means an affidavit that:

17 (i) Is made by a person authorized to act on behalf of a secured party
18 of a mortgage or deed of trust on owner-occupied residential property that is the subject of
19 a foreclosure action;

20 (ii) Certifies the status of an incomplete loss mitigation analysis in
21 connection with the mortgage or deed of trust; and

22 (iii) Includes reasons why the loss mitigation analysis is incomplete.

23 (12) "Residential property" means real property improved by four or fewer
24 single family dwelling units that are designed principally and are intended for human
25 habitation.

26 (b) (1) Except as provided in paragraph (2) of this subsection, an action to
27 foreclose a mortgage or deed of trust on residential property may not be filed until the later
28 of:

29 (i) 90 days after a default in a condition on which the mortgage or
30 deed of trust provides that a sale may be made; or

31 (ii) 45 days after the notice of intent to foreclose required under
32 subsection (c) of this section is sent.

1 B. The mortgage servicer, if applicable; and

2 C. An agent of the secured party who is authorized to modify
3 the terms of the mortgage loan;

4 2. The name and license number of the Maryland mortgage
5 lender and mortgage originator, if applicable;

6 3. The amount required to cure the default and reinstate the
7 loan, including all past due payments, penalties, and fees;

8 4. A statement recommending that the mortgagor or grantor
9 seek housing counseling services;

10 5. The telephone number and the Internet address of
11 nonprofit and government resources available to assist mortgagors and grantors facing
12 foreclosure, as identified by the Commissioner of Financial Regulation;

13 6. An explanation of the Maryland foreclosure process and
14 time line, as prescribed by the Commissioner of Financial Regulation; and

15 7. Any other information that the Commissioner of Financial
16 Regulation requires by regulation.

17 (5) For an owner-occupied residential property, the notice of intent to
18 foreclose shall be accompanied by:

19 (i) A loss mitigation application:

20 1. For loss mitigation programs that are applicable to the
21 loan secured by the mortgage or deed of trust that is the subject of the foreclosure action;
22 or

23 2. If the secured party does not have its own loss mitigation
24 application, in the form prescribed by the Commissioner of Financial Regulation;

25 (ii) Instructions for completing the loss mitigation application and a
26 telephone number to call to confirm receipt of the application;

27 (iii) A description of the eligibility requirements for the loss
28 mitigation programs offered by the secured party that may be applicable to the loan secured
29 by the mortgage or deed of trust that is the subject of the foreclosure action;

30 (iv) An envelope addressed to the person responsible for conducting
31 loss mitigation analysis on behalf of the secured party for the loan secured by the mortgage
32 or deed of trust that is the subject of the foreclosure action;

1 (v) [If the secured party offers prefile mediation, a] **A** notice in the
2 form that the Commissioner of Financial Regulation prescribes by regulation that states
3 that:

4 1. The secured party offers prefile mediation;

5 2. The mortgagor or grantor may elect to participate in
6 prefile mediation;

7 3. The mortgagor or grantor will not be entitled to postfile
8 mediation if the mortgagor or grantor participates in prefile mediation, except as otherwise
9 provided in a prefile mediation agreement;

10 4. The mortgagor or grantor is required to participate in
11 housing counseling services as a precondition to prefile mediation; and

12 5. A fee will be charged for the prefile mediation and the
13 amount of the fee; and

14 (vi) [If the secured party offers prefile mediation, an] **AN** application
15 to participate in prefile mediation and instructions to complete and submit the application,
16 all in the form that the Commissioner of Financial Regulation prescribes by regulation.

17 (6) For a property that is not an owner-occupied residential property, the
18 notice of intent to foreclose shall be accompanied by:

19 (i) A written notice of the determination that the property is not
20 owner-occupied residential property; and

21 (ii) A telephone number to call to contest that determination.

22 (d) (1) For owner-occupied residential property, a secured party [may] **SHALL**
23 offer to participate in prefile mediation with a mortgagor or grantor to whom the secured
24 party has delivered a notice of intent to foreclose.

25 (2) [If offered by a secured party, a] **A** mortgagor or grantor may elect to
26 participate in prefile mediation.

27 (3) If a mortgagor or grantor elects to participate in prefile mediation, the
28 mortgagor or grantor shall notify the secured party by submitting the application described
29 in subsection (c)(5)(vi) of this section not more than 25 days after the date on which the
30 notice of intent to foreclose is mailed by the secured party.

31 (4) (i) As a precondition to prefile mediation, a mortgagor or grantor
32 shall participate in housing counseling services.

1 (ii) The Department of Housing and Community Development shall
2 prescribe the timing and form of certification of participation in housing counseling
3 services.

4 (5) If a mortgagor or grantor submits an application to participate in prefile
5 mediation to the secured party in accordance with paragraph (3) of this subsection, the
6 secured party shall notify the Office of Administrative Hearings not more than 5 business
7 days after the date on which the secured party receives the application.

8 (6) The Office of Administrative Hearings shall:

9 (i) Schedule a prefile mediation session not more than 60 days after
10 the day on which it receives notice by a secured party of an election to participate in prefile
11 mediation; and

12 (ii) Notify the parties and their attorneys, if any, of the date of the
13 prefile mediation session.

14 (7) By regulation, the Commissioner of Financial Regulation shall:

15 (i) Establish the fee for prefile mediation; and

16 (ii) Prescribe the form and content of the notice about prefile
17 mediation, the application to participate in prefile mediation, and instructions to complete
18 the application.

19 (8) (i) Notwithstanding subsection (b)(1) of this section, if the [secured
20 party and] grantor or mortgagor [elect] **ELECTS** to participate in prefile mediation, an
21 order to docket or complaint to foreclose may not be filed until the completion of prefile
22 mediation in accordance with this section.

23 (ii) The date that prefile mediation is completed is the date that the
24 Office of Administrative Hearings issues the report describing the results of the prefile
25 mediation.

26 (9) The fee for prefile mediation collected under this subsection shall be
27 distributed to the Housing Counseling and Foreclosure Mediation Fund established under
28 § 4-507 of the Housing and Community Development Article.

29 (10) By regulation, the Commissioner of Financial Regulation shall
30 establish a mediation checklist that describes the matters that shall be reviewed and
31 considered in a prefile mediation.

32 (11) (i) At the commencement of a prefile mediation session, each party
33 shall review the mediation checklist.

1 (ii) The mediator shall mark each item on the mediation checklist as
2 the item is addressed at the prefile mediation session.

3 (iii) At the conclusion of a prefile mediation session, each party shall
4 sign the mediation checklist.

5 (12) If the prefile mediation results in an agreement, the parties shall
6 execute a prefile mediation agreement.

7 (13) In addition to describing the terms of the agreement among the parties,
8 the prefile mediation agreement shall, in 14 point, bold font:

9 (i) Designate the person and address to whom the mortgagor or
10 grantor may provide notice of a change of financial circumstances; and

11 (ii) State that the mortgagor or grantor is not entitled to postfile
12 mediation unless otherwise agreed by the parties.

13 (14) The Office of Administrative Hearings shall draft the prefile mediation
14 agreement and provide a copy of the executed agreement to the parties and their attorneys,
15 if any.

16 (15) The Office of Administrative Hearings shall provide a report of results
17 of mediation to the parties and their attorneys, if any.

18 (16) If a mortgagor or grantor notifies the person designated under
19 paragraph (13) of this subsection of a change of financial circumstances, the designee shall:

20 (i) Determine whether the change of financial circumstances shall
21 alter the mediation agreement or outcome of the prefile mediation; and

22 (ii) Notify the mortgagor or grantor of the determination by
23 first-class mail before any additional action is taken with respect to foreclosure.

24 (17) (i) The parties to the prefile mediation agreement may execute an
25 amended prefile mediation agreement based on a material change of financial
26 circumstances of the mortgagor or grantor.

27 (ii) The secured party shall provide a copy of the executed amended
28 agreement to the mortgagor or grantor.

29 (18) To the extent that a notice of intent to foreclose complies with this
30 section and otherwise is valid under the law, a notice of intent to foreclose issued with
31 respect to a property that has been the subject of prefile mediation continues to be valid for
32 1 year after the date on which the initial prefile mediation agreement is executed by the
33 parties.

1 (19) Nothing in this subsection shall prohibit a secured party and mortgagor
2 or grantor from engaging in loss mitigation by other means.

3 (e) An order to docket or a complaint to foreclose a mortgage or deed of trust on
4 residential property shall:

5 (1) Include:

6 (i) If applicable, the license number of:

7 1. The mortgage originator; and

8 2. The mortgage lender; and

9 (ii) An affidavit stating:

10 1. The date on which the default occurred and the nature of
11 the default; and

12 2. If applicable, that:

13 A. A notice of intent to foreclose was sent to the mortgagor or
14 grantor in accordance with subsection (c) of this section and the date on which the notice
15 was sent; and

16 B. At the time the notice of intent to foreclose was sent, the
17 contents of the notice of intent to foreclose were accurate; and

18 (2) Be accompanied by:

19 (i) The original or a certified copy of the mortgage or deed of trust;

20 (ii) A statement of the debt remaining due and payable supported by
21 an affidavit of the plaintiff or the secured party or the agent or attorney of the plaintiff or
22 secured party;

23 (iii) A copy of the debt instrument accompanied by an affidavit
24 certifying ownership of the debt instrument;

25 (iv) If applicable, the original or a certified copy of the assignment of
26 the mortgage for purposes of foreclosure or the deed of appointment of a substitute trustee;

27 (v) If any defendant is an individual, an affidavit that is in
28 compliance with § 521 of the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 et seq.;

29 (vi) If applicable, a copy of the notice of intent to foreclose;

1 (vii) If the [secured party and] mortgagor or grantor [have] elected to
2 participate in prefile mediation, the report of the prefile mediation issued by the Office of
3 Administrative Hearings;

4 (viii) If the [secured party and the] mortgagor or grantor [have not
5 elected] **DID NOT ELECT** to participate in prefile mediation, a statement that the [parties
6 have not elected] **MORTGAGOR OR GRANTOR DID NOT ELECT** to participate in prefile
7 mediation;

8 (ix) In addition to any other filing fees required by law, a filing fee in
9 the amount of \$300; and

10 (x) 1. If the loss mitigation analysis has been completed subject
11 to subsection (g) of this section, a final loss mitigation affidavit in the form prescribed by
12 regulation adopted by the Commissioner of Financial Regulation; and

13 2. If the loss mitigation analysis has not been completed, a
14 preliminary loss mitigation affidavit in the form prescribed by regulation adopted by the
15 Commissioner of Financial Regulation.

16 (h) (1) A copy of the order to docket or complaint to foreclose on residential
17 property and all other papers filed with it in the form and sequence as prescribed by
18 regulations adopted by the Commissioner of Financial Regulation, accompanied by the
19 documents required under paragraphs (2), (3), and (4) of this subsection, shall be served on
20 the mortgagor or grantor by:

21 (i) Personal delivery of the papers to the mortgagor or grantor; or

22 (ii) Leaving the papers with a resident of suitable age and discretion
23 at the mortgagor's or grantor's dwelling house or usual place of abode.

24 (2) The service of documents under paragraph (1) of this subsection shall
25 be accompanied by a separate, clearly marked notice, in the form prescribed by regulation
26 adopted by the Commissioner of Financial Regulation, that states:

27 (i) The significance of the order to docket or a complaint to foreclose;

28 (ii) The options for the mortgagor or grantor to take, including
29 housing counseling services and financial assistance resources the mortgagor or grantor
30 may consult; and

31 (iii) In the case of a mortgagor or grantor who has participated in
32 prefile mediation, that the mortgagor or grantor is not entitled to postfile mediation except
33 as otherwise provided in the prefile mediation agreement.

34 (3) If the order to docket or complaint to foreclose is accompanied by a
35 preliminary loss mitigation affidavit, the service of documents under paragraph (1) of this

1 subsection shall be accompanied by a loss mitigation application form and any other
2 supporting documents as prescribed by regulation adopted by the Commissioner of
3 Financial Regulation.

4 (4) (i) Except as provided in subparagraph (ii) of this paragraph, if the
5 order to docket or complaint to foreclose is accompanied by a final loss mitigation affidavit
6 and concerns owner-occupied residential property, the service of documents under
7 paragraph (1) of this subsection shall be accompanied by a request for postfile mediation
8 form and any other supporting documents as prescribed by regulation adopted by the
9 Commissioner of Financial Regulation.

10 (ii) The order to docket or complaint to foreclose may exclude the
11 request for postfile mediation form if:

12 1. The mortgagor or grantor has participated in prefile
13 mediation and the prefile mediation agreement does not give the mortgagor or grantor the
14 right to participate in postfile mediation; or

15 2. The property subject to the mortgage or deed of trust is not
16 owner-occupied.

17 (5) If at least two good faith efforts to serve the mortgagor or grantor under
18 paragraph (1) of this subsection on different days have not succeeded, the plaintiff may
19 effect service by:

20 (i) Filing an affidavit with the court describing the good faith efforts
21 to serve the mortgagor or grantor; and

22 (ii) 1. Mailing a copy of all the documents required to be served
23 under paragraph (1) of this subsection by certified mail, return receipt requested, and
24 first-class mail to the mortgagor's or grantor's last known address and, if different, to the
25 address of the residential property subject to the mortgage or deed of trust; and

26 2. Posting a copy of all the documents required to be served
27 under paragraph (1) of this subsection in a conspicuous place on the residential property
28 subject to the mortgage or deed of trust.

29 (6) The individual making service of documents under this subsection shall
30 file proof of service with the court in accordance with the Maryland Rules.

31 (i) (1) If the order to docket or complaint to foreclose is accompanied by a
32 preliminary loss mitigation affidavit, the secured party, at least 30 days before the date of
33 a foreclosure sale, shall:

34 (i) File with the court a final loss mitigation affidavit in the form
35 prescribed by regulation adopted by the Commissioner of Financial Regulation; and

1 (ii) Send to the mortgagor or grantor by first class and by certified
2 mail:

3 1. A copy of the final loss mitigation affidavit; and

4 2. A request for postfile mediation form and supporting
5 documents as provided under subsection (h)(4) of this section.

6 (2) A final loss mitigation affidavit shall be filed under this subsection no
7 earlier than 28 days after the order to docket or complaint to foreclose is served on the
8 mortgagor or grantor.

9 (j) (1) (i) This paragraph applies to a mortgagor or grantor who:

10 1. Has not participated in prefile mediation; or

11 2. Has participated in prefile mediation that resulted in a
12 prefile mediation agreement that gives the mortgagor or grantor the right to participate in
13 postfile mediation.

14 (ii) In a foreclosure action on owner-occupied residential property,
15 the mortgagor or grantor may file with the court a completed request for postfile mediation
16 not later than:

17 1. If the final loss mitigation affidavit was delivered along
18 with service of the copy of the order to docket or complaint to foreclose under subsection (h)
19 of this section, 25 days after that service on the mortgagor or grantor; or

20 2. If the final loss mitigation affidavit was mailed as provided
21 in subsection (i) of this section, 25 days after the mailing of the final loss mitigation
22 affidavit.

23 (iii) 1. A request for postfile mediation shall be accompanied by a
24 filing fee of \$50.

25 2. The court may reduce or waive the filing fee under
26 subparagraph 1 of this subparagraph if the mortgagor or grantor is eligible for a
27 reduction or waiver under the Maryland Legal Services guidelines.

28 (iv) The mortgagor or grantor shall mail a copy of the request for
29 postfile mediation to the secured party's foreclosure attorney.

30 (2) (i) The secured party may file a motion to strike the request for
31 postfile mediation in accordance with the Maryland Rules.

32 (ii) The motion to strike must be accompanied by an affidavit that
33 sets forth the reasons why postfile mediation is not appropriate.

1 (iii) The secured party shall mail a copy of the motion to strike and
2 the accompanying affidavit to the mortgagor or grantor.

3 (iv) There is a presumption that a mortgagor or grantor is entitled to
4 postfile mediation with respect to owner-occupied residential property unless:

5 1. Good cause is shown why postfile mediation is not
6 appropriate; or

7 2. The mortgagor or grantor participated in prefile mediation
8 and the prefile mediation agreement does not give the mortgagor or grantor the right to
9 participate in postfile mediation.

10 (3) (i) The mortgagor or grantor may file a response to the motion to
11 strike within 15 days.

12 (ii) The mortgagor or grantor shall mail a copy of the response to the
13 foreclosure attorney.

14 (iii) If the court grants the motion to strike, the court shall instruct
15 the Office of Administrative Hearings to cancel any scheduled postfile mediation.

16 (k) (1) Within 5 days after receipt of a request for postfile mediation, the court
17 shall transmit the request to the Office of Administrative Hearings for scheduling.

18 (2) (i) Within 60 days after transmittal of the request for foreclosure
19 mediation, the Office of Administrative Hearings shall conduct a foreclosure mediation.

20 (ii) For good cause, the Office of Administrative Hearings may
21 extend the time for completing the foreclosure mediation for a period not exceeding 30 days
22 or, if all parties agree, for a longer period of time.

23 (3) The Office of Administrative Hearings shall send notice of the
24 scheduled foreclosure mediation to the foreclosure attorney, the secured party, and the
25 mortgagor or grantor.

26 (4) The notice from the Office of Administrative Hearings shall:

27 (i) Include instructions regarding the documents and information,
28 as required by regulations adopted by the Commissioner of Financial Regulation, that must
29 be provided by each party to the other party and to the mediator; and

30 (ii) Require the information and documents to be provided no later
31 than 20 days before the scheduled date of the foreclosure mediation.

- 1 (1) (i) By regulation, the Commissioner of Financial Regulation shall
2 establish a mediation checklist that describes the matters that shall be reviewed and
3 considered in a postfile mediation.
- 4 (ii) At the commencement of a postfile mediation session, each party
5 shall review the mediation checklist.
- 6 (iii) The mediator shall mark each item on the mediation checklist as
7 the item is addressed at the postfile mediation session.
- 8 (iv) At the conclusion of a postfile mediation session, each party shall
9 sign the mediation checklist.
- 10 (2) At a foreclosure mediation:
- 11 (i) The mortgagor or grantor shall be present;
- 12 (ii) The mortgagor or grantor may be accompanied by a housing
13 counselor and may have legal representation;
- 14 (iii) The secured party, or a representative of the secured party, shall
15 be present; and
- 16 (iv) Any representative of the secured party must have the authority
17 to settle the matter or be able to readily contact a person with authority to settle the matter.
- 18 (3) At the foreclosure mediation, the parties and the mediator shall address
19 loss mitigation programs that may be applicable to the loan secured by the mortgage or
20 deed of trust that is the subject of the foreclosure action.
- 21 (4) The Office of Administrative Hearings shall file a report with the court
22 that states the outcome of the request for foreclosure mediation within the earlier of:
- 23 (i) 7 days after a foreclosure mediation is held; or
- 24 (ii) The end of the 60-day mediation period specified in subsection
25 (k)(2) of this section, plus any extension granted by the Office of Administrative Hearings.
- 26 (5) Except for a request for postponement or a failure to appear, the rules
27 of procedure for contested cases of the Office of Administrative Hearings do not govern a
28 foreclosure mediation conducted by the Office.
- 29 (m) (1) If the parties do not reach an agreement at the postfile mediation, or
30 the 60-day mediation period expires without an extension granted by the Office of
31 Administrative Hearings, the foreclosure attorney may schedule the foreclosure sale.

1 (2) (i) In the case of postfile mediation, subject to subparagraphs (ii),
2 (iii), and (iv) of this paragraph, the mortgagor or grantor may file a motion to stay the
3 foreclosure sale.

4 (ii) A motion to stay under this paragraph shall be filed within 15
5 days after:

6 1. The date the postfile mediation is held; or

7 2. If no postfile mediation is held, the date the Office of
8 Administrative Hearings files its report with the court.

9 (iii) A motion to stay under this paragraph must allege specific
10 reasons why loss mitigation should have been granted.

11 (3) Nothing in this subtitle precludes the mortgagor or grantor from
12 pursuing any other remedy or legal defense available to the mortgagor or grantor.

13 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
14 October 1, 2015.