

CHAPTER 200
FORMERLY
HOUSE SUBSTITUTE NO. 1
FOR
HOUSE BILL NO. 58

AN ACT TO AMEND TITLE 10 OF THE DELAWARE CODE RELATING TO FORECLOSURES INCLUDING A FORECLOSURE MEDIATION PROGRAM FOR HOMEOWNERS.

WHEREAS, the number of mortgage foreclosure complaints filed with the Superior Court continues to be at highly elevated levels and reached more than 6,000 again in 2010. Historically, Delaware has averaged 2,000 foreclosure filings a year but had 4,500 filings in 2008 and more than 6,000 in 2009. The increase in foreclosure filings is resulting in an increasing burden on judicial resources, de-stabilization of families and communities, and an adverse effect on property values and the interest of lenders in affected properties; and

WHEREAS, in 2009 the Superior Court instituted a residential foreclosure mediation program that has allowed certain eligible homeowners to initiate mediation with their lenders through the services of a trained mediator to negotiate mutually acceptable alternatives to the foreclosure action; and

WHEREAS, sound economic and public policy grounds support encouraging more lenders and homeowners to attempt to find mutually agreeable alternatives to foreclosure actions against individuals' primary residences; and

WHEREAS, mediation programs for foreclosure are being developed, expanded, and fine-tuned across the country to address the residential mortgage foreclosure crisis;

NOW, THEREFORE:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Three-fifths of all members elected to each house thereof concurring therein):

Section 1. Amend Title 10, Chapter 49, Subchapter XI (Scire Facias on Mortgage) of the Delaware Code by adding a new Section 5062C to read as follows:

“§5062C. RESIDENTIAL MORTGAGE FORECLOSURE MEDIATION PROGRAM.

(a) An Automatic Residential Mortgage Foreclosure Mediation Program is established.

(b) This Section shall apply to mortgage foreclosure actions under §5061 of this Title with respect to owner-occupied one-to-four family primary residential properties, unless the mortgage is held by the seller of the subject property who does not hold more than five such mortgages.

(c)(1) As required pursuant to §5062D(b)(3), a notice of foreclosure mediation shall accompany the complaint filed in a mortgage foreclosure action subject to this Section, which notice shall notify the defendant of the Automatic Residential Mortgage Foreclosure Mediation Program. A copy of such notice shall also accompany the posted and mailed Notice to Lienholders and Tenants required by the Superior Court Civil Rules.

(2) The notice of foreclosure mediation shall:

(A) contain the following heading, in English and in Spanish, in at least 30 point boldface type, at the beginning of the notice:

‘NOTICE REQUIRED BY DELAWARE LAW

YOUR LENDER HAS FILED A FORECLOSURE ACTION AGAINST YOUR PROPERTY. YOU ARE ELIGIBLE TO PARTICIPATE IN MEDIATION. CALL THE DELAWARE ATTORNEY GENERAL’S FORECLOSURE HOTLINE AT 1-800-220-5424 NOW OR FIND A HOUSING COUNSELOR ON THE INCLUDED LIST TO START THE MEDIATION PROCESS.’;

(B) contain the following statement, in English and in Spanish, in at least 14 point boldface type, immediately following the heading:

‘Your lender has filed a foreclosure action against your property. You are eligible for mediation with your lender. A mediation conference will be scheduled for you. Please look out for this mediation scheduling notice in the mail. Your lender will not be able to seek judgment against your property until the day after the date for which your mediation conference is scheduled.

In order to effectively participate in mediation, you must meet with a HUD-approved housing counselor and certify to the court your intent to participate in mediation within 30 days of today. You are encouraged to do this immediately; your chances of saving your home may be better the sooner you meet with a HUD-approved housing counselor. Please call the Delaware Attorney General’s Foreclosure Hotline at 1-800-320-5424 or contact a HUD-approved housing counselor. A list of HUD-approved housing counseling agencies is also provided in this notice. A housing counselor may be able to assist you with the mediation process and with applying for loss mitigation programs and emergency assistance programs. You also must work with your HUD-approved housing counselor to prepare a proposal for your lender in advance of your mediation conference. A Certificate of Participation form is attached to this notice. If you do not certify your intent to participate in mediation, you may still attend your scheduled mediation conference and meet with a representative of your lender. However, your mediation is less likely to be successful and your lender may choose to seek judgment against your property immediately after mediation.

You must appear in person at your mediation conference. If you are unable to attend the mediation conference on the scheduled date, you may request that your mediation conference be rescheduled for good cause. You must make this request promptly or your request may be denied.’;

(C) contain a list of housing counseling agencies approved by the United States Department of Housing and Urban Development who may be available to provide assistance with the mediation process, along with the contact information for each listed agency;

(D) be accompanied by a Certificate of Participation form, which shall include the following information:

(i) the address of the subject property;

(ii) the following language:

'I am the borrower: ___YES ___NO

I occupy this property as my primary residence: ___YES ___NO

I want to keep living in this house or otherwise negotiate a resolution to this foreclosure that will not result in sheriff's sale: ___YES ___NO

If you checked "NO" for any of the above statements, your mediation conference will be cancelled.'

(iii) a certification substantially in the following form: 'I represent that the information herein is true, and certify that as required by the Automatic Residential Mortgage Foreclosure Mediation Program, I have met with the housing counselor identified below and a proposal will be submitted on my behalf to Plaintiff's attorney at least 14 days before the date of the Mediation Conference. '; and

(iv) the name and address of the HUD-approved housing counselor;

(v) such other information as the Superior Court shall prescribe.

(E) if a date for mediation has already been scheduled pursuant to paragraph (d)(2) of this Section, notify the defendant that the mediation conference is scheduled for that date and attach the mediation scheduling notice; in such event, the form of notice required by paragraph (2) of this subsection shall be adjusted to reflect that a mediation conference has already been scheduled.

(3) The Superior Court may also require that the notice of foreclosure mediation be accompanied by such other flyers, forms, and checklists as it deems appropriate.

(4) The Delaware State Housing Authority shall make available upon request the list of approved housing counseling agencies and the contact information for each listed agency required under paragraph (c)(2)(C).

(d)(1) The Superior Court or its delegatee shall schedule a mediation conference and issue a mediation scheduling notice to the plaintiff, the defendant, and all other necessary parties to the action as set forth in §5061. The mediation conference must be scheduled for a date that is not less than 45 days from the date the notice of foreclosure mediation was served on the defendant and not more than 75 days from such date. The mediation scheduling notice may be in such form as the Superior Court or its delegatee shall provide. The mediation scheduling notice must inform the parties of the date, time, and place of the mediation conference, the contact information for the mediator if one has been assigned, and that all necessary parties, other than the plaintiff and the defendant, must file an appearance in order to be provided with further mediation notices.

(2) The Superior Court or its delegatee may create procedures to allow plaintiffs to pre-schedule mediation conferences in connection with the filing of a complaint, in which case the mediation scheduling notice shall be attached to the notice of foreclosure mediation.

(3) The Superior Court or its delegatee may, in its discretion and either on its own initiative or in response to a request from a party or the mediator, for good cause shown, reschedule a mediation conference, except that no initial mediation conference may be scheduled sooner than 45 days from the date the notice of foreclosure mediation was served on the defendant without the written consent of the defendant and no initial mediation conference may be scheduled later than 75 days from the date the notice of foreclosure mediation was served on the defendant without the written consent of both the plaintiff and the defendant. If the Superior Court or its delegatee reschedules a mediation conference, the previously scheduled conference shall be cancelled and the Superior Court or its delegatee will issue a new mediation scheduling notice to the plaintiff, defendant and all appearing parties. The new mediation scheduling notice shall state that the previously scheduled conference was cancelled and shall inform the parties of the date, time, and place of the rescheduled mediation conference and the contact information for the mediator if one has been assigned to act as the mediator at the rescheduled mediation conference.

(4) After a Certificate of Participation has been filed identifying the borrower's HUD-approved housing counselor, the housing counselor shall be provided with copies of all subsequent mediation scheduling notices and other communications to be provided to the borrower as part of the mediation process.

(e)(1) A defendant shall meet with a HUD-approved housing counselor and file a Certificate of Participation no more than 30 days from the date the notice of foreclosure mediation was served on the defendant. The Certificate of Participation shall be filed with the Superior Court or its delegatee and the defendant shall send copies to the mediator and to the plaintiff or, if the plaintiff is represented by counsel, to the mediator and to the plaintiff's counsel, who will promptly forward the Certificate of Participation on to the plaintiff. If a defendant has checked "NO" with respect to any of the statements required to be included in the Certificate of Participation under paragraph (c)(2)(D)(ii), above, the mediation conference will be cancelled, but this shall not prevent the defendant from requesting that the mediation conference be reinstated at a later date prior to the entry of judgment.

(2) The failure of a defendant to file a Certificate of Participation will not excuse the plaintiff from attending the mediation conference and engaging in mediation in good faith, but the mediator may take the defendant's failure into consideration when making recommendations.

(3) Upon receipt of a duly completed Certificate of Participation from the defendant, the plaintiff shall pay a mediation fee to the Superior Court or its delegatee in the amount set by the Superior Court pursuant to paragraph (q) of this Section. Notwithstanding the preceding sentence, if the mediation conference has been cancelled as a result of the defendant checking "NO" on the Certificate of Participation under paragraph (e)(1) above, no mediation fee will be required. The mediation fee required under this Section shall be in addition to any other filing fees required by law. The mediation fee required under this Section must be paid by the plaintiff before the date for which the initial mediation conference has been scheduled.

(f) At least 14 days prior to the date of the mediation conference, the defendant shall provide a completed financial proposal worksheet to the plaintiff, to the mediator, and to such other entities as the court may require. The Superior Court or its delegatee may prescribe the form of such financial proposal worksheet and any accompanying materials that must be provided by the defendant. The failure of a defendant to provide a complete financial proposal worksheet to the plaintiff will not excuse the plaintiff from attending the mediation conference and engaging in mediation in good faith, but the mediator may take such failure into consideration when making recommendations and may inform the defendant that the failure to provide a complete financial proposal worksheet and accompanying materials, if required, may affect the plaintiff's ability to enter into a loss mitigation agreement or other resolution of the foreclosure.

(g) At least 7 days prior to the date of the mediation conference or such other date as agreed to by the mediator, the plaintiff shall provide the defendant and its housing counselor, if known, a checklist of documents that the plaintiff requires that the defendant bring to the mediation conference, including whether updated versions of existing documents need to be provided. Each party shall also make itself available at least 3 days prior to the date of the mediation conference to discuss the list of documents. The Superior Court or its delegatee may prescribe a form of checklist to be used under this paragraph. If the plaintiff requests at the mediation conference additional documents from the defendant that were not included on the checklist, the mediator may take any failure of the plaintiff to provide a complete checklist into consideration when making recommendations. If the defendant fails to bring the documents required by the plaintiff to the mediation conference and such documents were requested timely under this subsection, the mediator may take into consideration the defendant's failure to provide the documents when making recommendations and may inform the defendant that such failure may affect the plaintiff's ability to enter into a loss mitigation agreement or other resolution of the foreclosure.

(h) The Superior Court or its delegatee may set forth procedures for the provision of information and statements by the parties in mediation, including the use of preliminary position statements. However, the failure of a party to provide a preliminary position statement will not excuse any party from attending the mediation conference and engaging in mediation in good faith, but such failure may be taken into consideration by the mediator in assessing whether the party failing to provide the position statement is engaging in mediation in good faith.

(i) A mediation conference will be held on the day stated in the mediation scheduling notice, and shall be conducted in accordance with the following:

(1) A mediator will oversee the mediation conference and provide guidance as appropriate. However, if multiple mediation conferences are occurring in the same location simultaneously, the mediator may determine that his or her presence is not required for the entirety of the mediation session. In this event, the mediator will inform the parties that they may engage in party-led mediation and that they should seek out the mediator when questions arise and when the mediation conference is complete. The mediation shall be held in a location where fax machines and internet access is available, in order to facilitate the transmission of documents between parties and their counsel.

(2) The plaintiff and the defendant shall appear in person at each mediation conference and must have authority to agree to a proposed settlement, except that if the plaintiff is represented by counsel, the plaintiff's counsel may appear in lieu of the plaintiff to represent the plaintiff's interests at the mediation conference, provided plaintiff's counsel has the authority to agree to a proposed settlement and a representative of the plaintiff who has decision making and settlement authority is available during the mediation conference by telephone. The defendant may be accompanied by a housing counselor and may have legal representation.

(3) At the mediation conference, the parties shall address, among other things, loss mitigation programs offered by the plaintiff for which the defendant could be eligible, along with other potential resolutions that may allow the defendant to continue to own the property or otherwise avoid a foreclosure judgment or sheriff's sale, including without limitation the following options where applicable: bringing the mortgage loan current; paying off the mortgage; a repayment plan to bring the loan current over time; agreeing to vacate in the near future in exchange for not contesting the matter and a monetary payment; offering the lender a deed in lieu of foreclosure; filing bankruptcy proceedings; paying the mortgage default over 60 months; and requesting a loan modification.

(4) The individual appearing at the mediation conference on behalf of the plaintiff will be responsible for receipt of all information requested from defendant and will be responsible for communicating that information to the plaintiff.

(5) The individual appearing at each mediation conference on behalf of the plaintiff shall bring to the mediation conference an updated itemization of all fees and costs, including any other charges and attorneys fees requested, that must be paid as of the date of the mediation in order to reinstate the loan secured by the property subject to the foreclosure action and an current itemization of all overdue amounts causing that loan to be in default.

(6) At a minimum, the mediator will advise the defendant that: (i) the mediation does not suspend the defendant's obligation to respond to the foreclosure complaint; and (ii) entry of judgment in the foreclosure action may cause the defendant to lose the residential mortgage property.

(7) Absent mutual agreement of the parties, the mediator will have no authority to bind the parties to a resolution, except that the mediator may recommend to the Superior Court that the foreclosure action be dismissed due to the plaintiff's failure to appear for 2 successive mediation conferences. In no event shall any determination issued by a mediator under this program form the basis of an appeal of any foreclosure judgment.

(8) The parties to a foreclosure action may agree in a mediation conference to schedule an additional mediation conference, which fact shall be recorded in the mediation record at the end of the present mediation conference. If the plaintiff has not yet been required to pay a mediation fee under paragraph (e)(3) of this Section because the defendant did not file a completed Certificate of Participation in a timely manner, upon the scheduling of the first additional mediation conference after the initial mediation conference, the plaintiff shall be required pay a mediation fee to the Superior Court or its delegatee in the amount set by the Superior Court pursuant to paragraph (q) of this Section. The mediation fee required under this paragraph shall be in addition to any other filing fees required by law. The mediation fee required under this paragraph must be paid by the plaintiff before the date for which the first additional mediation conference has been scheduled.

(9) At the conclusion of a mediation conference, the mediator shall sign a mediation record that shall also be cosigned by all parties present at the mediation conference and filed with the Superior Court. The mediation record shall be on such form as the Superior Court or its delegatee shall provide, shall allow the mediator to make recommendations, and shall state:

(A) that the mediation process is complete due to the defendant's failure to appear and that the foreclosure action may continue; or

(B) that the defendant has failed to appear and an additional mediation conference is being scheduled for the next available mediation day at the plaintiff's request and that no judgment may be entered in the foreclosure action until the day after such date; or

(C) that an additional mediation conference is being scheduled for the next available mediation day due to the plaintiff's failure to appear and that no judgment may be entered in the foreclosure action until the day after such date; or

(D) that the mediation process was unsuccessful because the parties failed to come to agreement and that the foreclosure action may continue; or

(E) that the parties have agreed to an additional mediation conference scheduled for a date specified and that no judgment may be entered in the foreclosure action until the day after such date; or

(F) that the parties have reached a mutually agreeable resolution, that the plaintiff agrees that no entry of default judgment will be sought pending the execution of documents memorializing the agreement of the parties, and that the plaintiff will seek to dismiss the foreclosure action upon such execution (or, in the case of a trial mortgage modification, upon the conversion of the trial mortgage modification to a permanent mortgage modification) or take such other actions as may be authorized by the Superior Court; or

(G) that the case is not suitable for mediation because:

(i) there was improper service of the complaint or of the notices required under this Section or under Section 5062B of Title 10, and a new mediation conference will be scheduled after proper service has been made, and no judgment may be entered in the foreclosure action until the day after such date of such new mediation conference; or

(ii) a bankruptcy petition has been filed and upon termination of the automatic stay, plaintiff shall request that a mediation conference be scheduled and no judgment may be entered in the foreclosure action until the day after such date of such new mediation conference; or

(iii) the subject property is not an owner-occupied one-to-four family primary residence and that the foreclosure action may continue; or

(iv) such other reasons as the mediator shall state; or

(H) that the mediator is recommending that the foreclosure action be dismissed due to the plaintiff's failure to appear for 2 successive mediation conferences; or

(I) such other resolutions as may be agreed to by the parties.

(10) If no mediation record is signed by all parties present at the mediation conference, the mediator shall file a mediation record with the Superior Court stating that the mediation process was unsuccessful or such other recommendations as the mediator deems appropriate.

(11) The Superior Court or its delegatee may arrange a program to allow for volunteer attorneys to provide legal representation to homeowners at mediation conferences.

(j) If a mediation conference has been scheduled, the parties may cancel the conference by mutual agreement by filing with the Superior Court or its delegatee a mediation cancellation record signed by each party and the mediator. The mediator shall be permitted to sign a mediation cancellation record on behalf of a party if the mediator discusses the terms of the mediation cancellation record with such party and receives authority from such party to sign on its behalf. Such authority may be granted verbally or in writing. The mediation cancellation record shall be on such form as the Superior Court or its delegatee shall provide, shall allow the mediator to make recommendations, shall state that the parties have agreed that the scheduled mediation conference is not necessary, and shall state any other resolutions as may be agreed to by the parties.

(k) A plaintiff shall not be entitled to attorney's fees for time spent in a mediation conference if the court finds that the plaintiff has failed to comply with subsection (i) of this Section, or if the plaintiff has requested that the mediation conference be rescheduled due to plaintiff's lack of preparation, or if the plaintiff has requested additional documents that were not included on the checklist provided pursuant to subsection (g) of this Section, unless in each case the court finds reasonable cause for such failure. The mediator shall note any such fact in his or her recommendations on the mediation record.

(l) The mediator may be an employee of the Superior Court, an employee of the Consumer Protection Unit of the Department of Justice, an employee of a non-profit legal services entity organized in Delaware, or an independent mediator who may be compensated through the funds collected through the Automatic Residential Mortgage Foreclosure Mediation Program. The Superior Court or its delegatee shall determine the qualifications and training required of mediators and shall keep a list of mediators available to participate in the Automatic Residential Mortgage Foreclosure Mediation Program. Mediators will be assigned at the discretion of the Superior Court or its delegatee.

(m)(1) If the parties have reached a mutually agreeable resolution through the mediation process, the terms of the agreement will be memorialized in writing at the conclusion of the mediation conference or, in the case of a cancelled mediation conference, promptly upon signing the mediation cancellation record. Promptly thereafter, the parties shall deliver to each other fully executed documents.

(2) Promptly upon receipt of documents executed by the defendant that reflect the agreement of the parties or, in the case of a trial mortgage modification, promptly upon the conversion of the trial mortgage modification to a permanent mortgage modification:

(i) if no answer or motion for summary judgment has been filed by the defendant in the foreclosure action, Plaintiff shall file a notice of dismissal with the Superior Court; or

(ii) if the defendant has filed an answer or motion for summary judgment in the foreclosure, Plaintiff shall seek to obtain a stipulation of dismissal signed by all parties and file the stipulation with the Superior Court and, if such stipulation cannot be obtained, move for an order of the Superior Court dismissing the foreclosure action.

(3) If the documents fail to reflect a party's understanding of the agreement reached between the parties or if a party fails to execute the documents or if the terms of a trial modification are not satisfied, either party may request that an additional mediation conference be scheduled.

(4) With respect to foreclosure actions subject to this Section that have reached a mutually agreeable resolution through the mediation process or otherwise and recorded such fact in the mediation record at the conclusion of a mediation conference or in a mediation cancellation record, notwithstanding any provisions of the Delaware Code to the contrary, no judgment may be entered unless an additional mediation conference has been scheduled pursuant to paragraph (3), and the date for such additional mediation conference has passed.

(n) Notwithstanding any provisions of the Delaware Code to the contrary, no judgment may be entered in any action subject to this Section for which a mediation conference has been scheduled until the day after the date for which such mediation conference has been scheduled.

(o) If seeking a default judgment in an action subject to this Section, the Plaintiff or Plaintiff's counsel must have provided proper service of the notices required under subsection (b) of this Section and under subparagraph (a)(3)(A) of §5062B of this Title.

(p) None of the plaintiff's or defendant's rights in the foreclosure action shall be waived by participation in the Automatic Residential Mortgage Foreclosure Mediation Program.

(q) The Automatic Residential Mortgage Foreclosure Mediation Program shall be funded with the mediation fees collected pursuant to subparagraphs (e)(3) and (i)(8) of this Section. The Superior Court shall set the amount of the mediation fee in an amount to approximate and reasonably reflect the costs necessary to defray the expenses in whole or in part of the Automatic Residential Mortgage Foreclosure Mediation Program. The Superior Court or its delegatee shall collect the mediation fees and disburse funds from the collection of such fees to pay mediators, administrative expenses and other operating costs of the program. Any funds remaining from the collection of mediation fees in excess of the Automatic Residential Mortgage Foreclosure Mediation Program's direct operating costs in the immediately preceding quarter may be distributed to reimburse any Delaware-based HUD-approved housing counseling agencies or non-profit legal services entity organized in Delaware that have provided assistance in the Automatic Residential Mortgage Foreclosure Mediation Program for a portion of their costs of participating in the program.

(r) The Superior Court may, by rule, administrative directive, or otherwise, make all necessary rules respecting the Automatic Residential Mortgage Foreclosure Mediation Program. Nothing in this legislation shall impair the authority of the Superior Court to institute procedures to manage its caseload.

(s) As necessary to remain consistent with the purpose of the Automatic Residential Mortgage Foreclosure Mediation Program and related State and Federal foreclosure prevention programs, the Superior Court may by rule adjust the mechanics of the Automatic Residential Mortgage Foreclosure Mediation Program set forth in this Section.

(t) The Superior Court or its delegatee shall collect and compile statistics on the effectiveness of the Automatic Residential Mortgage Foreclosure Mediation Program, which shall be made available to the public on a periodic basis. The entity responsible for the compilation of statistics shall be provided with copies of all Certificates of Participation, all mediation records, and all mediation cancellation records. Parties shall provide the entity responsible for the compilation of statistics with such non-privileged information as may be necessary to evaluate or report on the effectiveness of the Automatic Residential Mortgage Foreclosure Mediation Program."

Section 2. Amend Title 10, Chapter 49, Subchapter XI (Scire Facias on Mortgage) of the Delaware Code by adding a new Section 5062D to read as follows:

“§5062D. COMPLAINTS AND ANSWERS.

(a) A complaint to foreclose a mortgage in an action subject to this Chapter shall contain a statement as to whether the mortgage foreclosure action is subject to the Automatic Residential Mortgage Foreclosure Mediation Program and, where it is not subject to the Automatic Residential Mortgage Foreclosure Mediation Program, a statement of the reason why it is not subject to that program.

(b) In an action subject to the Automatic Residential Mortgage Foreclosure Mediation Program, in addition to any other requirements set forth in the Delaware Code or by the Superior Court, a complaint to foreclose the mortgage shall be accompanied by:

(1) if applicable, an affidavit stating that a notice of intent to foreclose was sent to the defendant in accordance with subsection (a)(3) of Section 5062B and the date on which the notice was sent;

(2) A statement of the debt remaining due and payable supported by an affidavit of the plaintiff or the mortgage holder or the agent or attorney of the plaintiff or mortgage holder; and

(3) the notice of foreclosure mediation described under §5062C(c)(2), which notice shall be attached to the front of the copy of the complaint served on the defendant.

(c) Notwithstanding any provisions of the Delaware Code to the contrary, no answer to a complaint in a mortgage foreclosure action subject to the Automatic Residential Mortgage Foreclosure Mediation Program shall be deemed untimely if it is filed on or before the date of any scheduled mediation conference.”

Section 3. Amend §5061, Chapter 49, Title 10 of the Delaware Code by deleting the word “Upon” from the beginning of subsection (a) and by substituting in lieu thereof, the following:

“Subject to the provisions of Sections 5062A, 5062B, 5062C and 5062D of this Title, upon”

Section 4. This Act shall take effect 120 days after its enactment into law and shall only apply to mortgage foreclosure actions commenced from the effective date of this Act to the date that is two years after such date.

Approved September 21, 2011