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SENATE DRS15160-RO-10 (03/06)

Short Title: Foreclosure Mediation Program. (Public)

Sponsors: Senator Jenkins (Primary Sponsor).

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO ESTABLISH A FORECLOSURE MEDIATION PROGRAM.
3 The General Assembly of North Carolina enacts:

4 **SECTION 1.** G.S. 7A-38.3B reads as rewritten:

5 "**§ 7A-38.3B. Mediation in matters within the jurisdiction of the clerk of superior court.**

6 (a) Purpose. – The General Assembly finds that the clerk of superior court in the
7 General Court of Justice should have the discretion and authority to order that mediation be
8 conducted in matters within the clerk's jurisdiction in order to facilitate a more economical,
9 efficient, and satisfactory resolution of those matters.

10 (b) Enabling Authority. – The clerk of superior court may order that mediation be
11 conducted in any matter in which the clerk has exclusive or original jurisdiction, except for
12 matters under ~~Chapters 45 and 48~~Chapter 48 of the General Statutes and except in matters in
13 which the jurisdiction of the clerk is ancillary. The Supreme Court may adopt rules to
14 implement this section. Such mediations shall be conducted pursuant to this section and the
15 Supreme Court rules as adopted.

16 (c) Attendance. – In those matters ordered to mediation pursuant to this section, the
17 following persons or entities, along with their attorneys, may be ordered by the clerk to attend
18 the mediation:

- 19 (1) Named parties.
- 20 (2) Interested persons, meaning persons or entities who have a right, interest, or
21 claim in the matter; heirs or devisees in matters under Chapter 28A of the
22 General Statutes, next of kin under Chapter 35A of the General Statutes, and
23 other persons or entities as the clerk deems necessary for the adjudication of
24 the matter. The meaning of "interested person" may vary according to the
25 issues involved in the matter.
- 26 (3) Nonparty participants, meaning any other person or entity identified by the
27 clerk as possessing useful information about the matter and whose
28 attendance would be beneficial to the mediation.
- 29 (4) Fiduciaries, meaning persons or entities who serve as fiduciaries, as that
30 term is defined by G.S. 36A-22.1, of named parties, interested persons, or
31 nonparty participants.
- 32 (5) Holders or their appropriately authorized agents and all people entitled to
33 notice pursuant to G.S. 45-21.16(b).

34 Any person or entity ordered to attend a mediation shall be notified of its date, time, and
35 location and shall attend unless excused by rules of the Supreme Court or by order of the clerk.



1 No one attending the mediation shall be required to make a settlement offer or demand that it
2 deems contrary to its best interests.

3 (d) Selection of Mediator. – Persons ordered to mediation pursuant to this section have
4 the right to designate a mediator in accordance with rules promulgated by the Supreme Court
5 implementing this section. Upon failure of those persons to agree upon a designation within the
6 time established by rules of the Supreme Court, a mediator certified by the Dispute Resolution
7 Commission pursuant to those rules shall be appointed by the clerk.

8 (e) Immunity. – Mediators acting pursuant to this section shall have judicial immunity
9 in the same manner and to the same extent as a judge of the General Court of Justice, except
10 that mediators may be disciplined in accordance with procedures adopted by the Supreme
11 Court pursuant to G.S. 7A-38.2.

12 (f) Costs of Mediation. – Costs of mediation under this section shall be borne by the
13 named parties, interested persons, and fiduciaries ordered to attend the mediation. In the case of
14 mediations ordered pursuant to G.S. 7A-38.3F, the cost shall be borne by the holders or their
15 authorized agents and anyone entitled to notice under G.S. 45-21.16(b). The rules adopted by
16 the Supreme Court implementing this section shall set out the manner in which costs shall be
17 paid and a method by which an opportunity to participate without cost shall be afforded to
18 persons found by the clerk to be unable to pay their share of the costs of mediation. Costs may
19 only be assessed against the estate of a decedent, the estate of an adjudicated or alleged
20 incompetent, a trust corpus, or against a fiduciary upon the entry of a written order making
21 specific findings of fact justifying the taxing of costs.

22 (g) Inadmissibility of Negotiations. – Evidence of statements made or conduct
23 occurring during a mediation conducted pursuant to this ~~section~~, section or G.S. 7A-38.3F,
24 whether attributable to any participant, mediator, expert, or neutral observer, shall not be
25 subject to discovery and shall be inadmissible in any proceeding in the matter or other civil
26 actions on the same claim, except in:

- 27 (1) Proceedings for sanctions pursuant to this section;
- 28 (2) Proceedings to enforce or rescind a written and signed settlement agreement;
- 29 (3) Incompetency, guardianship, or estate proceedings in which a mediated
30 agreement is presented to the clerk;
- 31 (4) Disciplinary proceedings before the North Carolina State Bar or any agency
32 established to enforce standards of conduct for mediators or other neutrals;
33 or
- 34 (5) Proceedings for abuse, neglect, or dependency of a juvenile, or for abuse,
35 neglect, or exploitation of an adult, for which there is a duty to report under
36 G.S. 7B-301 and Article 6 of Chapter 108A of the General Statutes,
37 respectively.

38 No evidence otherwise discoverable shall be inadmissible merely because it is presented or
39 discussed in mediation.

40 As used in this section, the term "neutral observer" includes persons seeking mediator
41 certification, persons studying dispute resolution processes, and persons acting as interpreters.

42 (h) Testimony. – No mediator or neutral observer shall be compelled to testify or
43 produce evidence concerning statements made and conduct occurring in anticipation of, during,
44 or as a follow-up to the mediation in any civil proceeding for any purpose, including
45 proceedings to enforce or rescind a settlement of the matter except to attest to the signing of
46 any agreements reached in mediation, and except in:

- 47 (1) Proceedings for sanctions pursuant to this section;
- 48 (2) Disciplinary proceedings before the North Carolina State Bar or any agency
49 established to enforce standards of conduct for mediators or other neutrals;
50 or

1 (3) Proceedings for abuse, neglect, or dependency of a juvenile, or for abuse,
2 neglect, or exploitation of an adult, for which there is a duty to report under
3 G.S. 7B-301 and Article 6 of Chapter 108A of the General Statutes,
4 respectively.

5 (i) Agreements. – In matters before the clerk in which agreements are reached in a
6 mediation conducted pursuant to this ~~section~~, section or G.S. 7A-38.3F, or during one of its
7 recesses, those agreements shall be treated as follows:

8 (1) Where as a matter of law, a matter may be resolved by agreement of the
9 parties, a settlement is enforceable only if it has been reduced to writing and
10 signed by the parties.

11 (2) In all other matters before the clerk, including guardianship and estate
12 matters, all agreements shall be delivered to the clerk for consideration in
13 deciding the matter.

14 (j) Sanctions. – Any person ordered to attend a mediation conducted pursuant to this
15 ~~section~~ section or G.S. 7A-38.3F, and rules of the Supreme Court who, without good cause,
16 fails to attend the mediation or fails to pay any or all of the mediator's fee in compliance with
17 this section and the rules promulgated by the Supreme Court to implement this section, is
18 subject to the contempt powers of the clerk and monetary sanctions. The monetary sanctions
19 may include the payment of fines, attorneys' fees, mediator fees, and the expenses and loss of
20 earnings incurred by persons attending the mediation. If the clerk imposes sanctions, the clerk
21 shall do so, after notice and a hearing, in a written order, making findings of fact and
22 conclusions of law. An order imposing sanctions is reviewable by the superior court in
23 accordance with G.S. 1-301.2 and G.S. 1-301.3, as applicable, and thereafter by the appellate
24 courts in accordance with G.S. 7A-38.1(g).

25 (k) Authority to Supplement Procedural Details. – The clerk of superior court shall
26 make all those orders just and necessary to safeguard the interests of all persons and may
27 supplement all necessary procedural details not inconsistent with rules adopted by the Supreme
28 Court implementing this section."

29 **SECTION 2.** Article 5 of Chapter 7A of the General Statutes is amended by adding
30 a new section to read:

31 **"§ 7A-38.3F. Mediation in certain foreclosure proceedings.**

32 (a) Mandatory Mediation. – Prior to filing a notice of hearing to foreclose under the
33 power of sale in accordance with Article 2A of Chapter 45 of the General Statutes, the
34 substitute trustee shall initiate mediation pursuant to this section and G.S. 7A-39.3B. If the
35 substitute trustee brings an action to foreclose under the power of sale in a deed of trust, it shall
36 be dismissed unless the substitute trustee has satisfied the requirements of this section and
37 G.S. 7A-38.3B and obtained a certification from the mediator pursuant to subsection (f) of this
38 section or the clerk of court finds the mediator improperly failed to issue a certification that the
39 participants in the mediation satisfied the requirements of this section and G.S. 7A-38.3B. The
40 clerk shall order the holder or its agent and any or all people entitled to notice pursuant to
41 G.S. 45-21.16(b) to mediation at any time prior to issuing an order in the special proceeding if
42 the clerk reasonably believes that mediation could result in resolution other than foreclosure.
43 The clerk shall order the participants to mediation even if the participants previously waived
44 mandatory mediation pursuant to subsection (e) of this section, mediation was attempted
45 without resolution, or a participant failed to attend or participate in mediation.

46 (b) Initiation of Mediation. – Prehearing mediation required by subsection (a) of this
47 section shall be initiated by the substitute trustee. The substitute trustee shall file a request for
48 mediation with the clerk of superior court in a county in which the special proceeding may be
49 brought. The Administrative Office of the Courts shall prescribe a request for mediation form.
50 The substitute trustee filing the request for mediation shall mail a copy of the request by

1 certified mail, return receipt requested, to the holder or its designated agent, as well as each
2 person entitled to notice pursuant to G.S. 45-21.16(b).

3 (c) Selection of Mediator. – The clerk shall provide each participant with a list of
4 mediators certified by the Dispute Resolution Commission. If the participants agree in writing
5 to the selection of a mediator from that list, the clerk shall appoint that mediator selected by the
6 participants. If the participants do not agree on the selection of a mediator, the substitute trustee
7 shall bring the matter to the attention of the clerk, and a mediator shall be appointed by the
8 senior resident superior court judge. The clerk shall notify the mediator and the parties of the
9 appointment of the mediator. Persons ordered to mediation pursuant to this section have the
10 right to designate a mediator in accordance with rules promulgated by the Supreme Court.
11 Upon failure of those persons to agree upon a designation within the time established by rules
12 of the Supreme Court, a mediator certified by the Dispute Resolution Commission pursuant to
13 those rules shall be appointed by the clerk. Any mediator conducting mediation pursuant to
14 subsection (a) of this section shall meet the following qualifications:

- 15 (1) Qualified pursuant to G.S. 7A-38.2 and the rules promulgated by the
16 Supreme Court implementing G.S. 7A-38.3B.
- 17 (2) Trained in mediation and all relevant aspects of the law, as determined by
18 the Supreme Court.
- 19 (3) Knowledgeable about the community-based resources that are available in
20 the county in which the mediator serves.
- 21 (4) Knowledgeable about various mortgage assistance programs.

22 A mediator may refer borrowers who participate in the foreclosure mediation program to
23 community-based resources when appropriate. The Dispute Resolution Commission may
24 establish a training program for mediators appointed under this section and require that
25 mediators receive the training prior to being appointed.

26 (d) Documents to Be Provided in Advance of Mediation. – For mediations conducted
27 pursuant to this section, the following documents shall be provided:

- 28 (1) Within 10 days of being ordered to mediation, the holder or its agent shall
29 provide the following documents to the mediator and all other participants in
30 the mediation:
 - 31 a. A list of all loan-specific loss mitigation options offered by the
32 beneficiary or its agent and the information required by the
33 beneficiary or its agent to assess eligibility for each option.
 - 34 b. A disclosure stating whether the loan is of a type that the beneficiary
35 or its agent is participating in or subject to any local, State, or
36 federally required loss mitigation programs.
- 37 (2) Within 20 days of receipt of information described in subdivision (1) of this
38 subsection, all other participants in the mediation shall provide the
39 information necessary to be considered for any of the listed loss mitigation
40 options.
- 41 (3) Within 21 days of being ordered to mediation, the holder or its agent must
42 provide the following documents to the mediator and all participants in the
43 mediation:
 - 44 a. An accurate statement containing the balance of the loan.
 - 45 b. A copy of the Note signed by the borrower with all endorsements,
46 riders, and addenda.
 - 47 c. A copy of the Deed of Trust signed by the borrower.
 - 48 d. Assignments of the Deed of Trust, whether recorded or unrecorded.
 - 49 e. An itemized statement of the arrearage.
 - 50 f. An itemized list of the fees and charges.

- 1 g. Payment history for the previous 12 months or since the date of
2 default, whichever is longer.
- 3 h. An affidavit providing the following:
- 4 1. All borrower and mortgage-related input data used in any net
5 present value analysis.
- 6 2. An explanation regarding any denial for a loan modification,
7 forbearance, or other alternative to foreclosure in sufficient
8 detail for a reasonable person to understand why the
9 application was denied. The explanation should provide
10 specific information regarding denial of any modification
11 under the Making Home Affordable program, the National
12 Servicing Settlement, and FHA, VA, and RHA loss
13 mitigation standards.
- 14 i. The portion or excerpt of the pooling and servicing agreement that
15 prohibits the beneficiary from implementing a modification, if the
16 servicer claims it cannot implement a modification due solely to
17 limitations in a pooling and servicing agreement, and documentation
18 of, or an affidavit detailing the efforts of, the servicer to obtain a
19 waiver of the pooling and servicing agreement provisions.
- 20 j. The appraisal or other broker price opinion most recently relied upon
21 by the servicer.
- 22 (e) Waiver of Mediation. – The participants ordered to mediation pursuant to subsection
23 (a) of this section may waive the mediation required by that subsection by informing the
24 mediator of their waiver in writing. No costs shall be assessed to any participant if all
25 participants waive mediation prior to the occurrence of an initial mediation meeting.
- 26 (f) Certification That Mediation Concluded. – Immediately upon a waiver of mediation
27 under subsection (e) of this section or upon the conclusion of mediation required by subsection
28 (a) of this section, the mediator shall prepare a certification stating the date on which the
29 mediation was concluded and the general results of the mediation, including, as applicable, that
30 the participants waived the mediation, that an agreement was reached, that mediation was
31 attempted but an agreement was not reached, or that one or more participants to be specified in
32 the certification failed or refused without good cause to attend one or more mediation meetings
33 or otherwise participate in the mediation. The mediator shall file the original of the certification
34 with the clerk and provide a copy to each participant. Each participant to the mediation has
35 satisfied the requirements of this section upon the filing of the certification, except any party
36 specified in the certification as having failed or refused to attend one or more mediation
37 meetings or otherwise participate.
- 38 (g) Related Provision. – All mediations required by subsection (a) of this section shall
39 be conducted in accordance with this section and G.S. 7A-38.3B."

40 **SECTION 3.** This act becomes effective October 1, 2013.