

**SUPREME COURT RULES COMMITTEE ON FORECLOSURES
TOPICS FOR DISCUSSION AT PUBLIC HEARING
LOSS MITIGATION AND MEDIATION**

Loss Mitigation

Each of the below are possible elements of a regime of mandatory pre-foreclosure loss mitigation. Each has been recommended by some members of the Committee. The questions reflect objections, concerns, or issues raised by other members of the Committee.

1. **Transparency.** There must be general transparency between the lender and the borrower throughout the loss mitigation process. If a Net Present Value (NPV) or other similar test is used, then the test, inputs, and results must be made available. Denials of requests for loan modifications or other loss mitigation must be communicated in writing, promptly and accurately. Written denials must include documentation supporting the reasons for denial, and borrowers must have the opportunity to challenge any reason for denial.
Questions: Should deadlines be added here? If so, what deadlines? What type of challenge to a denial is appropriate?
2. **Notice.** Borrowers must get timely written notices advising them of their loss mitigation options, how to apply, what information is required, what loss mitigation is being offered and on what terms, any relevant deadlines, and any decisions denying loss mitigation with reasons for denial and supporting information.
Questions: Should deadlines be added here? If so, what deadlines?
3. **Deadlines.** There must be clear deadlines for lender outreach to the borrower, for loss mitigation application, review, and response, and for deadlines related to challenging denials of loss mitigation and proceeding with foreclosure.
Questions: Should deadlines be added here? If so, what deadlines?
4. **Escalation.** The lender must establish an internal escalation process to deal with challenges to denials of loss mitigation.
Questions: Should more details be given? Or is this requirement too burdensome?
5. **No dual tracking.** Loan modification review must occur before the foreclosure process has been initiated and before any foreclosure fees have been incurred. The lender must conduct such review in good faith, including making good faith efforts to contact a borrower who fails to respond or to provide necessary information. The lender must make at least two efforts at contact, both at least 30 days before initiating a foreclosure. Where an initial application is made by the borrower after the foreclosure process has begun, the foreclosure process must be halted pending review.
Questions: Is “good faith” too nebulous a concept? If so, how should it be defined? Are the specified efforts and timeline appropriate? Is the entire concept of no dual tracking too burdensome?
6. **Single point of contact.** The borrower must, upon initial application for loss mitigation, be given contact information for a representative who will serve as the borrower’s single point of contact throughout the loss mitigation process.
Questions: Are there any appropriate exceptions to this requirement?
7. **Defense to foreclosure.** All of the above must be part of the loss mitigation conducted prior to filing foreclosure. Failure to comply with any of the above best practices will serve as a defense to a foreclosure action or as a ground to set aside a judicial sale.
Questions: Is this too burdensome? Is there some acceptable middle ground?

8. Loss Mitigation Affidavit. A loss mitigation affidavit must be filed with a foreclosure complaint, such as the affidavit (attached) used effective March 1, 2012, in Connecticut state foreclosure court.

Questions: Is this too burdensome? Could such an affidavit be required at a later stage in the process? Perhaps only where a defendant appears?

Mediation

Each of the below are possible elements of mediation programs which can be approved by the Supreme Court, or which can be required by statute. Each (except number two) sets forth a recommendation made by some members of the Committee. The questions reflect concerns or issues raised by other members of the Committee.

1. Outreach. Court systems should reach out to homeowners in foreclosure to make them aware of local mediation programs, both through information on the foreclosure summons, other media efforts, and, where feasible, door-to-door campaigns.
Questions: How to pay for outreach? How to do outreach in more sparsely populated areas?
2. Mandatory or Opt-in. Current Illinois mediation programs are either mandatory or opt-in, depending on the county.
Questions: Should a mediation program be mandatory for all residential foreclosures, or should it only available via a borrower opt-in process? If opt-in, should all borrowers be eligible, or should there be any limitations?
3. Housing Counseling. Housing counseling should be provided as part of the mediation process, since the focus is determining realistic options for homeowners, and then helping those who might qualify for loan modification or other loss mitigation.
Questions: Should the housing counseling agencies be limited to HUD-certified housing counselors? How to pay for housing counselors?
4. Legal Aid. Pro bono legal services must be provided to explain the foreclosure process to mortgagors so that they understand their rights and possible defenses. At a minimum, legal aid services prior to any mediation or court hearing should be able to: review the case for any possible defenses such as fraud, assist in preparing an appearance, answer, and any applicable motions; and explain the mortgage foreclosure process and the rights and responsibilities of the homeowner under the Illinois Mortgage Foreclosure Law.
Questions: Can pro bono attorneys also represent the homeowner at the mediation? If so, how to arrange for this? How might law school interns and/or recent law grads fulfill some of these attorney functions?
5. Pre-Mediation Process. There should be a court-monitored pre-mediation process with sanctions for non-compliance by either the mortgagor or mortgagee (governing documentation, response times, exchange of documents, etc.). Active case management by the court (or an appointed arm of the court) will ensure that both the homeowner and the lender are exchanging documents and complying with applicable deadlines.
Questions: Who should shepherd the pre-mediation process? Should this include court appearances? How to get these resources? Must a lender employee be present at some point before or at the mediation?
6. Trained Mediators. Mediators must be provided to facilitate loss mitigation and other workout options between the mortgagor and mortgagee when pre-mediation efforts by the homeowner fail. Mediators should be neutral individuals trained in mediation or court-certified as a mediator, and they should be knowledgeable as to the basics of foreclosures and as to modification options including government-sponsored programs.
Questions: How to get a sufficient supply of mediators?