

COVER PAGE

May 25, 2012

Supreme Court Mortgage Foreclosure Committee
c/o Administrative Office of the Illinois Courts
3101 Old Jacksonville Road
Springfield, Illinois 62704

Re: Discussion Submitted for Public Comment and Hearing on June 8, 2012

Honorable Members of the Mortgage Foreclosure Committee:

Thank you for extending the submission deadline one day, it is truly appreciated that the courtesy was extended to me.

Please accept the enclosed testimony for the Public Hearing on June 8, 2012, and as my request to be scheduled to testify at that hearing.

Sincerely,



Toni Boughner
President, Spinnaker Cove Homeowner's Association
Carol Stream IL
Member of Occupy Naperville and Northern Illinois Jobs with Justice

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3101 Old Jacksonville Road
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Re: Discussion Submitted for Public Comment and Hearing on June 8, 2012

Honorable Members of the Mortgage Foreclosure Committee:

While I believe our laws can, and should, always be reviewed and/or revised from time to time, that process should be transparent and include the citizens of this state. I do not agree with how this committee was formed and how the members were chosen; and I especially do not agree with the fact that no homeowners or homeowner advocacy groups were included. To date, this review and revision process has not been as transparent as it could have been. To the average person, the perception is that this committee and the Supreme Court are deliberately working to undermine our rights by working with the very mortgagees/banks that preyed upon them with predatory loans, fraudulent behavior by their employees and a judicial system that is out of control by denying their due process rights and perpetrating a fraud upon the court through acceptance of fraudulent and forged documents.

Our laws should also be written or revised to protect and benefit the people rather than corporations, or mortgagees/banks in this case. With our current economic depression being caused by mortgagees/banks using the real estate industry as a casino, then expecting the taxpayers to bail them out and not be held accountable for their actions, we should be discussing how to write or revise this law to ensure that the homeowners of this state are given every opportunity, including extraordinary measures, to remain in their homes in order to stop the devastation occurring daily to our neighborhoods and communities through eviction and lack of maintenance by the mortgagees/banks who then own an empty home. Homeowner's associations particularly are being forced to contend with less revenue due to those mortgagees/banks not paying the monthly assessments for however long it takes to sell the house, which can take months or years. That behavior forces the rest of the association's members to pay for them, and if there are several foreclosed and REO units in their association, that can cause regular maintenance to be curtailed and needed improvement projects, especially capital improvement projects, to languish for lack of funds.

Foreclosed homes affect every level of government from a homeowner's association to local city, county, township and state to federal through lack of regularly occurring revenue streams and increased costs associated with the need for additional police officers to combat the resultant increase in crime, drugs and gang activity that empty homes invite. At a time when the need for services for the poor has skyrocketed, and budgets at every level are strained or broken, continued austerity measures with their correspondingly devastating cuts to the already shredded social safety nets does nothing but perpetuate our problems and precludes thinking outside the box to discuss and develop workable and equitable solutions for all parties.

As this hearing is for the Committee to gain feedback for the Loss Mitigation Subcommittee's recommendations, let me now turn to this subject. After reviewing the Subcommittee's recommendations and questions, and the Illinois Mortgage Foreclosure Law (IMFL), it is not clear how these recommendations once finalized would apply since the IMFL does not currently include any significant support for any loss mitigation or mediation remedies. Are they intended to be included in one or more specific clauses or are they to be added separately; and does the Supreme Court have the authority to create new legislation or to insert revised language into currently existing laws without benefit of discussion and voting in the Illinois Legislature and signature of the Governor?

There are also severe issues with the current federal loss mitigation remedies such as the alphabet soup of programs with acronyms like HAMP, HAFA, HARP, 2MP and UP which were created with apparent sincerity to help homeowners, but which have proven to be abysmal failures by not helping the number of homeowners stated at the time of their creation and creating additional avenues for mortgagees/banks to abuse homeowners by extracting additional fees or lying about missing payments in order to be eligible for one or more of these programs only to dual-track those efforts with the foreclosure process after promising Congress that dual-tracking had been ended. There are numerous horror stories regarding homeowner's experiences in trying to work with their mortgagee/bank to obtain help through any loss mitigation program currently in existence, including the recent suicide of Norman Rousseau in California whose mortgage was with Wells Fargo, and whose death can be attributed to the callous behavior exhibited by that bank. Mr. Rousseau is the latest victim of the foreclosure crisis following a murder-suicide in Connecticut where a woman facing foreclosure shot her 85-year old mother before turning the gun on herself. There have been stories about mortgagees/banks attempting to evict elderly and disabled homeowners who didn't know or didn't understand what they were signing. How many deaths will it take before something is done to stop the carnage that is being wrought upon the people of this country?

Of the Loss Mitigation points proposed, many of the federal programs have attempted to hold mortgagees/banks to certain standards regarding most of what the Subcommittee has proposed. The federal efforts have failed because they were made voluntary rather than mandatory for these mortgagees/banks to follow through on them. The offered payments for compliance were not large enough to offset the revenues that are received through foreclosure, thus ensuring that cooperation would be spotty at best. The consequence for non-compliance was a small fine, which those mortgagees/banks factored into their cost of doing business; and for which they needn't have bothered since Treasury Secretary Timothy Geithner and HUD Secretary Shaun Donovan have consistently refused to apply. There is always a choice between doing what is right and doing what is easy, and unfortunately, everyone involved with the application and enforcement of these programs have consistently chosen what is easy due to what appears to be greed and contempt for the rule of law that is supposed to be what our country was founded upon. There also appears to be a political motivation for the creation of these federal programs and their subsequent failures of enforcement because of the revolving door between Wall Street and our government, and the level of contributions that flow into campaign coffers for those elected officials who comply with the wishes of the few rather than working toward the needs of the many.

Loss mitigation and/or mediation for homeowners with Government Sponsored Enterprise (GSE) mortgages backed by Fannie Mae or Freddie Mac have also been problematic since the single largest benefit is principal reductions and the Federal Housing Finance Authority (FHFA) has consistently refused to consider that option even though studies have shown that it is of benefit to the taxpayers. Even the recent 49-state settlement leaves the vast majority of homeowners in trouble without remedy due to having a GSE loan. I fail to see how instituting loss mitigation and mediation efforts on the state level would help when federal efforts have repeatedly fallen short of their stated goals!

Speaking specifically to the recommendations under discussion today, the first thing that jumps out is the use of the word "regime" in the introductory paragraph. That word has a negative connotation in the average person's mind and its use here can also be perceived as code that this Committee has a predetermined outcome in mind or place and is only holding this hearing to give a veneer of respectability to their final decision. I sincerely hope that is not the case and that the Committee, both individually and as a whole, come to this hearing with open minds to what I and other speakers might have to say or suggest.

Overall, these recommendations and questions have merit, but questions remain regarding their applicability and fairness. For the thousands of Illinois homeowners who are in some stage of foreclosure – whether it is pre-foreclosure, in process, or completed – how will the final procedures work? Are notices deemed received by the homeowner just because the mortgagee/bank says that they sent something? There have been incidents reported where the mortgagee/bank presents a copy of some sort of notice in court, but in reality it was never actually sent. It may be difficult or cost-prohibitive to send notices in such a way as to require the

homeowner's signature, but shouldn't we err on the safe side here? I agree with all of the proposed Loss Mitigation points with the following comments:

Point 3 answers the Questions raised in Points 1, 2 and 3 regarding deadlines.

Point 4 suggests lenders create an internal escalation process for challenges to denials of loss mitigation. I would suggest that this process be transparent to the borrower as well.

Point 5 requires a halt to dual tracking of those loans in loss mitigation and foreclosure, with loss mitigation being required to be completed before foreclosure activities may begin or continue. I agree with the question regarding "good faith" as being too nebulous of a concept. "Good faith" used to mean something in earlier times, but lenders have consistently proven that they have no understanding of what that term means today. I would also raise questions regarding foreclosures currently in process or completed and having already incurred fees for both court and possibly legal fees. How are those to be dealt with? Borrowers can pay thousands of dollars to an attorney only to have a judge repeatedly continue the case for months or years in what appears to be an effort to eventually run them out of money to continue, which then also leaves them without money to move or rent an apartment. This point definitely needs far more discussion before being finalized.

Point 6 suggests a single point of contact with the lender, which was already instituted on the federal level and has been as much of a failure as their other efforts.

Point 7 suggests that a failure of Points 1-6 may be used as a valid defense to foreclosure or sale of the borrower's home. There is nothing suggested here as to how that might be utilized or presented, or what remedy or remedies may be provided. What are the follow up actions to this? Does this dismiss the case with or without prejudice? Does the lender have to start over with their foreclosure action? What rights do borrowers have regarding these defenses? To the specific questions that other Subcommittee members presented, I would answer that this is not too burdensome and that there may be an acceptable middle ground.

Point 8 suggests that a Loss Mitigation Affidavit be utilized to prove compliance. I would suggest that this is not too burdensome and that it could be presented at any stage of a foreclosure action. However, as we found with the robo-signing scandal, this is another avenue that could be exploited by lenders. My suggestion is that any affidavit be signed by both parties and in court or with another neutral party as a witness.

My suggestion regarding merit holds true for the mediation points. Specifically in this section, there are some very good recommendations that are impossible to implement with any degree of success. HUD-Certified counseling agencies are overwhelmed and legal aid is non-existent for more than a lucky few who just want to know how long they have before being evicted. Continued budget cuts have forced these agencies to cut staff to levels that preclude even the appearance of assistance to a homeowner. Any effort in this area needs to be mandatory on both sides, and the lenders need to ensure that their representatives are empowered to enter into any negotiated agreement. My comments for these points are:

Point 1 suggests ways to reach out to borrowers, all of which are excellent suggestions, though I too question how to manage that in more sparsely populated areas.

Point 2 asks whether Point 1 should be mandatory or opt-in. There are serious questions related to both, but considering this is regarding housing, I would agree with making it mandatory since that could definitely help those borrowers whose first language is not English, and for those who may not have understood the loan terms and were coerced into signing the loan documents against their best interest. This is again one of those areas where I believe we should err on the safe side.

Point 3 suggests counseling be provided and I would suggest that counseling has its place, but that it is not necessarily a great option since lenders have traditionally refused to work with counseling agencies. Were this

to be included, I would be in favor of using only HUD-certified counseling agencies rather than any for-profit agency as that would invite abuses.

Point 4 suggests legal aid be provided to borrowers. I would normally agree with this suggestion, but in our current economic times, legal aid agencies are being forced to do more with less through budget cuts, which means that they are not available to most borrowers who would require their assistance. Legal aid for a foreclosure action is also not a right according to those agencies. I would certainly agree with using law school interns or recent grads provided fair and strict guidelines are instituted.

Point 5 suggests a court-monitored pre-mediation process, which begs the question of how this could possibly be implemented with our courts already being overwhelmed. The Dupage Coffeehouse discussed the foreclosure crisis in February of this year with the Executive Director of the Dupage Homeownership Center and me as speakers. As part of their process, small groups are formed to discuss that night's topic in order to brainstorm possible solutions. In my opinion, one of the best solutions presented was to institute a Foreclosure Advocate Program for borrowers going through the foreclosure process. This would be similar to the Children's Advocate Program in that a neutral third party is assigned to each borrower to ensure that they are represented in court and that their rights are not violated.

Point 6 suggests trained mediators be utilized. I agree with this point and with the question regarding how to ensure a sufficient supply of mediators might be created.

All of these points require some sort of payment be established in order to implement them. I would suggest that a fee be instituted for every foreclosure filing, similar to what Cook County has established. The fee amount would need to set appropriately to cover these services. I think we can all agree that ongoing and consistent communication with homeowners is one of the desired goals here. Putting procedures, processes and practices in place that are fair to all parties is laudable, but those need to actually be fair to all parties and combined with consequences for not adhering to them.

In addition to the suggested points in both areas, I would also suggest these points be considered:

1. **Loan Review** – the majority of our current foreclosures are due to non-traditional type loans and the ongoing unemployment crisis created by the economic crash of 2008. Each borrower should have their loan compared to traditional underwriting processes and if it is found that they should not have been approved by their lender, there should be a process established to compensate both parties fairly.
2. **Securitization Review** – with the advent of mortgage loans being used as collateral for securities, many loans are bought and sold several times, and unless recorded properly with the County Recorder's office, it can be difficult or impossible to determine who actually owns the loan and has legal standing to bring a foreclosure action. With the establishment of Mortgage Electronic Registration Systems (MERS) in the mid-1990's by lenders, investment banks and GSE's to bypass the recordation of every assignment or change in ownership as has been required by property and recordation law for centuries, there is no way for the borrower – or anyone else – to know who actually owns any given loan. A process should be established to determine if the borrower's loan was securitized, and that the original documents be provided to prove legal standing by the plaintiff in any foreclosure action. If the original documents cannot be provided, then a process needs to be established to compensate all parties fairly.
3. **Bifurcation of Documents** – as I am not an attorney or expert in real estate matters, my understanding of this item may be somewhat simplistic, but I do know that a mortgage loan, or note, is a secured loan, meaning that the loan is dependent upon the deed or title to be valid, especially in any action that appears in court. If a bifurcation occurs where the note and deed or title are separated, they cannot then be valid in court because the note becomes a non-secured debt, and as such, may be discharged in bankruptcy as with all non-secured debt. With the establishment of MERS and securitization, bifurcation is a common occurrence.

4. Disability – this is not something that every borrower will experience, but if at any point during a foreclosure action, loss mitigation or mediation process the borrower files a disability claim with Social Security, forbearance should immediately be granted until a determination of their claim is made. As disability claims can take some time to reach that determination point, a process should be created to allow the borrower to remain in their home that is fair to all parties. In the event that a borrower's claim is successful, it can take additional time to receive the award letter, but once that is received, the lender should then be required to enter into a loan modification discussion to determine if a satisfactory and fair conclusion can be reached for all parties.

5. Deficiency Judgment – Illinois allows deficiency judgments, but considering how we reached this point, and that the ARRA, more commonly known as the Stimulus Bill of 2009, waives this item currently through the end of 2012, and that the GSE's have their own guidelines regarding this item, I would suggest that we not allow lenders to file or report any deficiency judgment due to their culpability as to why this hearing and revisions to judicial processes and modification to the IMFL are being discussed and considered.

In closing, these are very serious issues that affect thousands of homeowners and the communities in which they live; and I urge this Committee to move forward with all due care and consideration of the consequences of their actions and decisions. The people of this state have been repeatedly traumatized for the last several years and we have a chance here to provide some relief, however small it may seem.

Sincerely,



Toni Boughner
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