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May 23, 2012

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

RE: Proposed Recommendations for Loss Mitigation and Mediation in Illinois

Dear Ladies and Gentlemen:

We write on behalf of Land of Lincoln Legal Assistance Foundation's Homeownership Task Force. This letter is in response to the proposed recommendations for Loss Mitigation and Mediation. Organized in 1972, Land of Lincoln Legal Assistance Foundation, Inc. (LOLLAF) is an Illinois not-for-profit corporation whose mission is to provide low-income and senior residents of central and southern Illinois with high quality civil legal services in order to obtain and maintain their basic human needs. Through advice, representation, advocacy, education, and collaboration, we seek to achieve justice for those whose voices might otherwise not be heard, empower individuals to advocate for themselves, and make positive changes in the communities we serve.

In the last five years, we have helped almost 2,000 low-income homeowners seeking assistance with their mortgages because they are facing foreclosure. We appreciate the opportunity to comment on the Committee's proposed recommendations for loss mitigation and foreclosure mediation. We strongly support the Committee's efforts to improve the foreclosure process in Illinois by recommending changes that would mutually benefit all parties to foreclosure.



Loss mitigation procedures and mediation allow borrowers and lenders to work together to explore mutually beneficial alternatives to foreclosure. Borrowers who receive modifications with affordable monthly payments are able to stay in their homes, while lenders are able to begin receiving payments again and maintain performing loans. Giving borrowers more affordable payments also lowers the risk of re-default. For borrowers who are unable to continue making payments and stay in their homes, non-retention alternatives such as short sales and deeds in lieu of foreclosure allow borrowers a more graceful exit from their homes than foreclosure, and they prevent deficiency judgments against borrowers who do not have the resources to satisfy such judgments. Non-retention alternatives save lenders the time and expense of prolonged foreclosure litigation and reduce their losses. Such alternatives promote judicial efficiency by reducing case backlogs in our Courts. Both retention and non-retention options reduce the number of vacant and abandoned homes that lower property values and destabilize neighborhoods.

We will address the Committee's recommendations for both pre-foreclosure loss mitigation and mediation. If rules are adopted for both, borrowers who engaged in pre-foreclosure loss mitigation should not be precluded from participating in mediation programs and having their eligibility for loan modifications reviewed again. Many borrowers are unrepresented by attorneys or housing counselors during pre-foreclosure loss mitigation, and their circumstances may have changed from the time of loss mitigation until a foreclosure is filed and a borrower requests mediation.

Discussion of Recommendations for Pre-Foreclosure Loss Mitigation

In reviewing the Committee's Topics for Discussion and questions, we took into consideration that most major servicers have signed contracts with the U.S. Department of Treasury to participate in the federal government's Making Home Affordable Program ("HAMP"). The contracts servicers signed with the Treasury require servicers to engage in much of the loss mitigation proposed by the Committee. Further, the contracts impose strict deadlines and requirements on servicers when dealing with delinquent borrowers. To that end, Land of Lincoln encourages the Supreme Court to adopt and enforce the deadlines imposed by the Treasury in HAMP contracts with servicers. Our comments below incorporate HAMP's deadlines and requirements. Such deadlines and requirements impose no additional burdens on servicers, as they are already required to comply with them to receive compensation from the federal government for participation in the HAMP program.

1. Transparency

We agree that denials must be in writing to ensure that servicers and lenders have clearly communicated to borrowers that a decision has been reached and the reason for the denial. We have had clients who were waiting months on a decision from their applications with no word from the servicer. When we contacted the servicer, we were notified that the applications were denied, but the borrowers were never informed. The borrowers were left waiting and wondering,

not knowing their applications were denied or the reason for denial, and not being given the opportunity to inquire into the denial or challenge it.

Servicer deadlines for notifying borrowers of a denial must be imposed so borrowers are promptly made aware of the denial, given the opportunity to challenge potential errors in the servicer's review, and to explore other loss mitigation options during the pre-foreclosure stage. The servicer should mail borrowers written notification of the denial within ten days of the decision, including the reason for denial, other options that are available to the borrowers, whether the servicer is currently considering the borrowers for those other options, and what documentation the borrowers must submit to be considered for those other options.

Borrowers should be given 30 days to challenge the reason for denial and to provide supporting documentation, such as documentation showing that one or more NPV values used by the servicer were incorrect. The servicer should then reconsider those applications within 30 days and notify borrowers in writing whether the reconsideration resulted in an approval or another denial. Filing of foreclosures should be prohibited during the time that borrowers are in the process of challenging a denial.

2. Notice

Deadlines should be imposed to ensure that borrowers receive timely notice of their options before their homes go into foreclosure. Borrowers at risk of foreclosure should receive written notice of their retention and non-retention options and be given 30 days to submit the required documentation necessary to evaluate them for loss mitigation options.

The notice should be mailed to the property subject to the mortgage and the last known addresses of all borrowers, by certified first-class mail, return receipt requested. The notice should describe all the retention and non-retention programs for which the borrowers may be eligible and provide contact information of whom the borrowers can contact to discuss their options and receive further information.

Borrowers who receive offers for modifications or non-retention options should be given 30 days to sign acceptance of the offer and send it back to the servicers. This will ensure that borrowers have the opportunity to review the offer with an attorney or housing counselor and have time to considering whether they want to accept it. We have had clients who were given 24 or 48 hours from receipt of the offer to accept it. Rushing borrowers to immediately accept the offer or risk revocation does not give them any meaningful opportunity to review, understand, and consider the detailed terms and consequences of entering into such a loss mitigation option.

If a servicer does not receive acceptance of the offer within the deadline, the servicer should be required to engage in additional outreach to borrowers before proceeding to foreclosure, such as mailing another notice to the homeowner and extending the deadline. The written notice should

make borrowers aware that their homes may go into foreclosure as a result of failing to accept the offer.

3. Deadlines

Deadlines for outreach to borrowers should be imposed to ensure that borrowers are given a reasonable amount of time to respond before a foreclosure is filed. Servicers should send borrowers at least two written notices at least 30 days apart, in addition to two phone calls, prior to proceeding to foreclosure.

When servicers receive a loss mitigation application packet, they should be required to send written acknowledgement to borrowers within ten days of receipt. If a servicer receives an incomplete packet, the servicer should, within ten days of receipt, send borrowers written notice of the additional documentation needed and give borrowers 30 days to provide such documentation before denying the application as incomplete. If borrowers do not provide the additional documentation within 30 days, servicers should send a second notice and give the borrowers at least 15 days to respond. The second notice should inform the borrowers that failure to respond may result in denial of the application as incomplete.

If borrowers do not provide the additional documentation within the deadlines, the servicer should send a denial notice with the reason for denial, and inform borrowers how to re-apply and what documentation to submit for a complete packet.

When a servicer receives complete packets, the servicer should review the files promptly and send borrowers written notice of a decision within 30-45 days of receipt of the complete packet. As we discussed above, deadlines should also be imposed for notifying borrowers of denials and for challenging denials. Filing of foreclosures should be prohibited until all deadlines for borrower outreach, application, and challenging a denial have expired.

4. Escalation

We agree there should be an internal escalation process for challenges of denials. There should also be an internal escalation process when servicers fail to adhere to any other deadlines under rules regarding the loss mitigation process. This requirement would not be too burdensome because several servicers already have an internal escalation process and dedicated staff for files that are escalated by attorneys, housing counselors, and borrowers through the HAMP escalation process. Servicers should have written procedures and deadlines for responding to challenges of denials and complaints of non-compliance with other rules regarding pre-foreclosure loss mitigation.

5. No Dual Tracking

It is of the utmost importance to prohibit dual tracking because prohibiting it is necessary to ensure that servicers make a good faith effort to engage in loss mitigation prior to filing a foreclosure and proceeding to a foreclosure sale. Numerous clients have come to us with

scheduled foreclosure sales while their loss mitigation applications were still under review and there have been cases where borrowers' homes were sold in foreclosure sales without a decision ever being made on their applications.

This requirement is not too burdensome because servicers constantly review loss mitigation applications for borrowers who are in active foreclosure, so there is no burden on the servicer to refrain from proceeding with foreclosure while considering borrowers' eligibility for loss mitigation options. It is prejudicial to borrowers and bad faith to refer files to foreclosure, which adds attorney's fees and Court costs to the amount necessary to cure the default, then approve a borrower for a loss mitigation option, when the time and expense of filing the foreclosure could have been prevented by engaging in pre-foreclosure loss mitigation with the borrower.

For example, we had one client who had enough money to reinstate her mortgage (\$2,000), but when she contacted the foreclosing law firm before a lawsuit had been filed, they told her she already owed an additional \$3,000 in attorneys' fees and court costs. Then they filed the foreclosure case the next day. With the additional fees and costs, she could not afford to reinstate and did not qualify for HAMP.

Good faith is an appropriate measurement of a lender or servicer's efforts to engage in loss mitigation. Good faith should be defined as a servicer following internal loss mitigation procedures and deadlines, as well as HAMP or Government-sponsored Enterprise procedures, such as FHA, VA, RHS, Fannie Mae and Freddie Mac. Good faith would also require compliance with any rules promulgated by the Supreme Court regarding pre-foreclosure loss mitigation.

6. Single Point of Contact

We agree that borrowers should have a single point of contact so they do not receive conflicting information every time they speak with their servicer, as often happens when there is no single point of contact. There should not be any exceptions to this rule as a single point of contact for all borrowers creates a smoother process for loss mitigation.

7. Defense to Foreclosure

We support the Committee's recommendation that failure to comply with any required procedures and practices should be a defense to foreclosure, including grounds to set aside a judicial sale. If lenders and servicers fail to comply with any procedures or deadlines by filing a foreclosure or proceeding to a sale, they should be held accountable for failing to engage in loss mitigation efforts in good faith. Borrowers who have reached out to their servicers for help must have a meaningful form of relief from servicers that attempt to dispossess borrowers of their homes without first engaging in loss mitigation.

8. Loss Mitigation Affidavit

A loss mitigation affidavit should be required with the filing of every foreclosure. Such an affidavit should be easy to read for a lay person who is not familiar with all the technical terms and acronyms of various loss mitigation programs.

Requiring an affidavit should ensure that the lender and servicer have engaged in all required retention and non-retention loss mitigation efforts before proceeding to foreclosure. It would avoid problems where a defendant appears later in the foreclosure and asserts that the servicer did not follow pre-foreclosure loss mitigation procedures. Such an affidavit is not too burdensome if servicers and lenders are already required to document their loss mitigation efforts and denials prior to filing a foreclosure.

Discussion of Recommendations for Mediation

Our organization assisted in the development of a mediation program in the Third Judicial Circuit and we are currently assisting in the development of a program in the Twentieth Judicial Circuit. We strongly support foreclosure mediation. It provides borrowers the opportunity to engage in loss mitigation early in the foreclosure process and ensures that lenders and borrowers have explored all possible mutually beneficial options before the foreclosure process continues. Mediation should include all possible loss mitigation options, including non-retention options. Borrowers who do not qualify for modifications or other retention options and are unable to save their homes should have the opportunity to explore non-retention options through mediation before the foreclosure proceeds.

1. Outreach

The costs of outreach and administration of a mediation program could be covered by adding an additional Plaintiff's filing fee for each foreclosure filed. The additional fee would fund the program administrator, mediators, program information sent to borrowers, and any other borrower outreach.

The best method of outreach in densely and sparsely populated areas would be to attach mediation information and request forms to the foreclosure summonses when the borrowers are served. The attachments should include general information about the program, which borrowers are eligible, and how to apply. The information should also include referrals to local HUD-certified housing counselors and the local legal aid office for advice on foreclosure and possible representation in mediation or foreclosure.

2. Mandatory or Opt-in

Mediation programs should be opt-in for borrowers and mandatory for lenders in any cases in which borrowers have requested mediation. A borrower opt-in program would allow interested borrowers to engage in loss mitigation without requiring all borrowers to participate. An opt-in program would save the mediation program the time and expense of scheduling mediation for borrowers who do not wish to participate.

There should be limitations to an opt-in program, such as limiting it to owner-occupied residential real estate where at least one of the borrowers still occupies the home. This would conserve the limited resources of the mediation program, and many existing mediation programs in Illinois and throughout the country are limited to residential real estate.

3. Housing Counseling

Borrowers in mediation should be informed in writing of local HUD-certified housing counseling agencies and not-for-profit legal aid offices where the homeowner may obtain assistance or representation. Mediation programs would not have to fund these representatives, as they provide services to borrowers free of charge. Limiting housing counselors to those who are HUD-certified would ensure that loan modification scammers who charge borrowers exorbitant fees and make unfounded promises to save homes would be kept out of the mediation process.

4. Legal Aid

Representation by legal aid and pro bono attorneys in all mediations is preferable, but will not be possible for all borrowers. All borrowers should receive a notice with the foreclosure summons that provides referrals to legal aid, pro bono attorneys, and clinical and lawyer referral programs to determine whether they are able to receive free assistance.

5. Pre-Mediation Process

The purpose of a pre-mediation conference or process should be to allow the borrower and lender to come together to discuss the borrower's current circumstances and determine whether the borrower is interested in and potentially able to stay in his or her home. If so, the lenders should provide borrowers the documents and information necessary for the borrowers to submit a loss mitigation packet to the lender.

If information provided at the pre-mediation conference shows it would be impossible for the borrower to keep the house or the borrower does not want to keep the house, then the mediator or administrator can explore alternatives such as a deed in lieu of foreclosure waiving any deficiency.

Mediators could handle the pre-mediation process, depending on the size of the foreclosure docket. Otherwise, a mediation program administrator or case manager could handle the process, including scheduling conferences and monitoring compliance by all parties. Mediators and administrators could be funded by an additional filing fee added to the cost of filing foreclosures.

The pre-mediation process would not have to include court appearances, but the courts should retain jurisdiction during the mediation process to impose sanctions for non-compliance or order a case back to mediation if necessary. A lender employee or authorized agent, with full settlement authority, must be present at least by phone during any pre-mediation conference or at

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mediation. This is critical to the process, because local counsel for the lender will need authority from the lender for any settlement.

6. Trained Mediators

In order to ensure a sufficient supply of mediators, mediators should be compensated with funds provided by an additional filing fee. All mediators should receive basic mediation training, as well as training specific to loss mitigation and foreclosure.

In addition to our comments above, we have attached a list of the elements we believe are crucial to an effective mediation program. We look forward to the Supreme Court's adoption of rules that will provide borrowers and lenders mutually beneficial alternatives, allowing borrowers the opportunity to save their homes and stabilize their communities, and allowing lenders to recoup their investments and increase the number of performing loans. Thank you for your consideration of our comments.

Sincerely,



Clarissa Gaff

Senior Staff Attorney and Homeownership Task Force Coordinator



Sandi Gordon

Senior Staff Attorney and Consumer Task Force Co-Chair



Debby R. Knoblock
Staff Attorney

Land of Lincoln Legal Assistance Foundation, Inc.

KEY ELEMENTS OF AN EFFECTIVE MEDIATION PROGRAM

1. The program must be sustainable and self-supporting, which can be accomplished by requiring an additional filing fee for all foreclosure cases.
2. All residential borrowers must be given the opportunity to request mediation (i.e. to opt-in).
3. With the summons in foreclosure and again at the initial pre-mediation or mediation conference, the defendant borrower should be given a written notice about help that may be available, including contact information for local HUD-certified housing counseling agencies and not-for-profit legal aid offices where the homeowner may obtain assistance or legal representation.
4. Plaintiffs must prove their standing to file the foreclosures.
5. Plaintiffs must provide borrowers any pooling and servicing agreements, the loan origination documents, the appraisal at the time of loan origination, a payment history with all fees and costs, an itemization of the amounts needed to reinstate or redeem the mortgage loan, and the loss mitigation packet the borrower would be required to complete for a loan modification. The mediation rules should require that the packet be submitted to the lender's counsel, rather than directly to the lender.
6. Plaintiffs must provide borrowers detailed reasons for denials of retention and non-retention options, including the results of any NPV tests performed, and must explain why it is more beneficial to the plaintiff to foreclose in lieu of loss mitigation.
7. All proceedings in the foreclosure action must be stayed throughout the mediation process.
8. At all pre-mediation and mediation conferences, a lender employee or authorized agent, with full settlement authority, must be present at least by phone.
9. Courts must retain jurisdiction over the cases while in mediation to ensure that the parties participate in good faith and to impose sanctions on plaintiffs who do not participate in good faith.
10. Mediators must receive basic mediation training, as well as training specific to loss mitigation and foreclosure.