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May 25, 2012

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

To Whom it May Concern:

On behalf of the Association of Foreclosure Defense Attorneys (AFDA), I wish to give testimony at the June 8, 2012 hearing regarding loss mitigation procedures. Thank you.

My responses to the recommendations are enclosed.

Very truly yours,

MINCHELLA & ASSOCIATES, LTD.

A handwritten signature in black ink that reads "Erica Crohn Minchella".

Erica Crohn Minchella
President, Association of Foreclosure Defense Attorneys

MEMORANDUM

TO: Supreme Court Committee on Foreclosures

FROM: Erica Crohn Minchella, President, Association of Foreclosure Defense Attorneys

Re: Loss Mitigation Recommendations

Date: May 25, 2012

The Association of Foreclosure Defense Attorneys puts forth the following responses to the recommendations regarding Loss Mitigation from the Supreme Court Committee on Foreclosures

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.

RESPONSE: AFDA believes that this would be a major change from the current manner in which the lenders deal with homeowners. The problem will be with enforcement in mediation. If there can be enforcement of this provision, there might actually be some hope for homeowners getting modifications in reasonable time frames and on reasonable terms. There is one issue that comes up over and over again with homeowners which needs to be addressed here. Lenders claim that they have not gotten the documents that were sent over. It doesn't matter how many times they were sent over, what fax numbers or how many fax numbers they are sent to, what other means are used to send them over, the lenders still manage not to get them. It happens repeatedly. It happens with just about every lender, although the largest five are the biggest culprits. So either homeowners' personal financial information is being sent out to places where anyone can have access, the systems for the receipt of information is inadequate or Lender's employees are lying. Without some way of solving this problem, mediation will be ineffective.

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.

RESPONSE: AFDA agrees with this recommendation.

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.

RESPONSE: AFDA agrees with this recommendation.

4. Escalation. The lender must establish an internal escalation process to deal with challenges to denials of loss mitigation.

RESPONSE: AFDA agrees with this recommendation.

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.

RESPONSE: AFDA agrees with this recommendation. We also feel that where a short-sale request has been submitted, the same requirements should be in place.

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.

RESPONSE: Although AFDA agrees with this provision in principle, it may not be possible in practice as bank employees may leave the bank's employment, be promoted, etc. If the documentation of verbal and written communication are left in the control of a single department which would have access to all communications, this might be a manner of resolving this frustrating issue for homeowners.

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.

RESPONSE: AFDA agrees with this provision.

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.

RESPONSE: AFDA agrees with this recommendation

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?

RESPONSE: AFDA provides no response to this recommendation.

2. Mandatory or Opt-in. Current Illinois mediation programs are either mandatory or option, 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?

RESPONSE: Mediation should be available to those who want it and can realistically qualify for a resolution. It should not be restricted to modifications. Using mediation to finalized short sales for which responses are being delayed, while foreclosures proceed, would help to bring the finality to homeowners' situations and could improve communications, help to improve the real estate market by not putting more foreclosed properties on the rolls.

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?

RESPONSE: AFDA believes that attorneys who practice in the area of foreclosure defense, work to help homeowners modify loans, and negotiate short sales are as qualified as HUD-certified housing counselors to help homeowners. It would take a cost burden out of the system.

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?

RESPONSE: If the pro bono attorneys, law school interns and recent law graduates are sufficiently trained this could certainly address some of the cost burden. These programs should not, however, be funded by the Plaintiff's bar, as is being done by some volunteer programs in Cook County currently.

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?

RESPONSE: AFDA believes that these programs have to have reasonable expectations of homeowners who have jobs and have to work during the hours that Court case management and mediations are held. If the case management or mediation is for the sole purpose of telling the homeowner that they need to provide updated or new documents and that no decision is ready to be given or discussed, both homeowners should not need to attend, and to the extent it can be done, communications should be by other means other than in person.

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?

RESPONSE: AFDA has no response to this recommendation.