Written Comments Before the Committee On Public Services And Consumer Affairs Regarding Bill 18-0691: Saving D.C. Homes from Foreclosure Act of 2010

June 22, 2010
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The following is intended to summarize and supplement the oral testimony provided during last Monday's hearing on Bill 18-0691, the Saving D.C. Homes from Foreclosure Act of 2010. Below the summary is a detailed discussion of these points followed by several additional suggestions. We thank the committee for its attention to this matter and for the opportunity to submit these comments.

Summary of testimony

There are three keys to the success of the foreclosure mediation program to be established in the Saving D.C. Homes from Foreclosure Act of 2010:

1. Participation
2. Productive discussions between lenders and homeowners
3. The ability to adapt and evolve

To achieve these goals, we recommend the following changes to Bill 18-0691:

1. Participation
    a. Automatically schedule mediation for both parties upon receiving the notice of sale from the trustee, as defined in Sec. 2(6), instead of placing the burden on homeowners to opt-in.
    b. Amend the fees imposed by the bill so that homeowners do not have to pay for mediation. This can be achieved by raising foreclosure filing fees or permitting servicers to recoup the cost of mediation as a fee from proceeds of the foreclosure sale if mediation is unsuccessful.
2. Productive discussions
    a. Permit the parties by mutual consent or decision of the mediator to continue mediation as long as the parties are in productive discussions.
    b. As a corollary, avoid setting a time to complete mediation. Simply prohibit the sale of the property until mediation is complete.
    c. Include a requirement that the trustee (or delegated representative) bring, in addition to proof of the mortgage and the note, documentation of all loss mitigation activities.
3. Adapt and evolve
    a. Leave operational discretion with the mediation administrator so that changes can be made without the delay of council action.
    b. Include a reporting requirement for all foreclosures describing the disposition of the case, including details of settlement terms (including but not limited to loan modification, forbearance, deed-in-lieu, short sale, etc.)

as well as a record of instances where mediation did not take place and where the parties mediated but failed to reach agreement.

Automatically scheduled mediation (a.k.a 'mandatory mediation')

Foreclosure mediation has shown consistent positive results for those parties that participate. The key, therefore, is to get as many people to participate as possible, and the best way to do that is by automatically scheduling mediation when the trustee initiates foreclosure.

It appears in Section 3(I) of Bill 18-0691 that the council had in mind mandatory mediation for the District, stating that the "mortgage lender and the residential mortgage debtor must engage in mediation" prior to foreclosure sale. However, the mechanism for scheduling mediation set out in Section 3(II) requires that the homeowner "elect" mediation before it is scheduled. That makes the proposed program an "opt-in" program.

Participation rates in automatic mediation are usually several times that of opt-in programs without a loss in the ratio of successful settlements. Philadelphia and Connecticut—two of the longest running foreclosure mediation programs in the country—are good examples of this. Both began as opt-in programs and, once the administrators and legislators saw their value, subsequently converted to automatically scheduled mediation programs. Neither saw an erosion in the type or quality of settlements. Connecticut, which tracks outcomes closely, saw a 74 percent settlement rate among foreclosure mediation participants through June 2009, when the statewide program was opt-in.[1] The program went automatic in July 2010 and the program administrator reports that the settlements have remained at the same levels while participation levels have ramped up significantly.

Philadelphia reports a similar experience. Having started as an opt-in program, Philadelphia made mediation automatic nearly two years ago. Throughout this period, it has reported a consistent settlement rate of 70 percent, even as participation grew. The court still sees approximately 200 cases every Thursday and over 70 percent of settlements see homeowners keeping their homes.[2]

In contrast to Philadelphia and Connecticut, where every eligible case is scheduled for mediation, participation in opt-in states tops out at just above 20 percent. Generous estimates put participation rates at 13 percent in New Jersey;[3] 18 percent in Summit County, Ohio;[4] 20 percent in Milwaukee, Wisconsin; 20 percent in Iowa;[5] and 21 percent in Nevada. Indiana had the lowest participation rate by far, with only 3 percent of homeowners opting in during the program's first year.[6]

Permit the parties to continue talking

The proposed bill already includes certain key elements to promoting productive discussions that should remain:

1. Requiring the parties to appear in person
2. Requiring the lender to have a representative with authority to make a deal available at all times during mediation
3. Requiring the trustee to bring documentation proving that it holds the note and mortgage under which it is foreclosing

The next most important element is to let parties who are talking continue talking. Our review of 21 existing programs does not yield a single example where mediation routinely concludes in a single session. Nonetheless, the parties commit to the process and return to the table time and again to continue talking, presumably because it yields both a better deal than would foreclosure.

Proposed Bill 18-0691 is silent on the question of continuing mediation but speaks of a "mediation session" in the singular. Acknowledging the experience of other states, the bill should refer to "mediation" rather than a single "mediation session" and permit the parties, by mutual consent, or the mediator to continue the mediation to a later date as needed. Notably, Nevada (also a nonjudicial foreclosure state) recently adopted changes to its program that allows for continuances based on mutual agreement. As initially instituted, the Nevada program allowed continuances only under extraordinary circumstances.[7]

Similarly, avoid the temptation to set a time limit on mediation. The proposed bill simply prohibits continuing the foreclosure sale until mediation concludes. This captures the right amount of time for mediation—that is, as long as the parties involved believe talks are productive.

In addition to proof of ownership, require proof of loss mitigation

The proposed bill requires the trustee to produce certain documents prior to mediation—those showing proof that the entity has the right to foreclose on this note and mortgage. That information is crucial to permit the trustee to continue the foreclosure.

We recommend including a requirement in Bill 18-0691 that the trustee produce documents that can facilitate concrete discussion in mediation, specifically a detailed breakdown of the amount due and past due on the mortgage as well as documentation of the lender or servicer's loss mitigation efforts.

A detailed breakdown of the principal, interest, costs, and fees provides the parties the necessary data to discuss each number separately. Negotiating principal reduction is often very different from altering interest rates, or challenging (seemingly arbitrary) costs or fees. Having the breakdown makes clear each amount to the homeowner, housing counselor, mediator, and even the servicer's counsel—who often has a large group of cases and may not recall each in detail—and allows all parties to verify that past payments have been correctly applied.

Documentation of loss mitigation efforts similarly helps all involved. First, it provides proof that covered lenders have run the federal Home Affordable Modification Program calculation for each home in mediation. Second, it provides the parties with the lender's assumptions regarding the homeowner's ability to pay as well as its assessment of the home's value. We have personally encountered instances in which the parties saw these numbers were incorrect and re-ran the loss mitigation calculations. This information is critical not just to homeowners, but also to servicers who wish to conclude mediation quickly in cases where they believe no settlement is possible. By having the documentation available, servicer's counsel has persuasive evidence to present to the homeowner, housing counselor, and mediator.

Grant the mediation administrator discretion to improve the program

Because every jurisdiction's demography and law is different, every foreclosure mediation program is different. Moreover, as the crisis has moved from subprime loans to prime loans, from lower value homes to higher value homes, and so on, the needs of the parties have evolved. A successful program, therefore, requires a mediation administrator with discretion.

The proposed bill grants the Department of Insurance, Securities, and Banking, or DISB, significant latitude in administering the program. This latitude is essential and should remain with the mediation administrator.

We do question whether DISB has the proper experience to administer this program. Mediators will require the assistance of a party acting in judicial capacity if parties are at an impasse or claim bad faith. The D.C. courts have experience adjudicating these matters and already have staff trained in alternative dispute resolution. We suggest providing for greater involvement of the D.C. courts in this bill, perhaps even granting the court a role in program administration.

Reporting requirement

Proposed Bill 18-0691 does not currently include a reporting requirement. Mediators simply file recommendations with the mediation administrator. Mediators should fill out a form at the end of every mediation—conducted or not, and successful or not—detailing the proceedings. Even a short mediation form, like those already published by the Ohio Supreme Court, can help capture the following information:

- The type of property (single vs. multifamily)
- The original loan principal
- The basic terms of the first mortgage (fixed, adjustable, interest-only)
    - Was the mortgage for the purpose of purchasing the home or a later equity loaner line of credit?
    - Was there a second mortgage? If so, in what amount and how was it dealt with in settlement?

    - Was the servicer participating in HAMP? If so, was it applied in this case and what was the result?
- Number of mediation sessions held
- Was resolution reached?
    - If resolution was not reached, did the matter continued to foreclosure or was it settled privately?
    - Type of resolution:
        - Homeowner staying in the home?
            - Loan modification, specifying whether the interest rate or the principal was modified and, if so, listing the original and resulting rates
            - Changes to the term of the loan, specifying the original and modified terms
            - Reinstatement/repayment plan, specifying the amounts being repaid and the terms and duration of the repayment plan
            - Forbearance, specifying the terms and the amount forborne
        - Homeowner leaving the home
            - Deed in lieu of foreclosure
            - Short sale
            - For any of the above, did the homeowner receive a payment ("cash for keys")?

Additional recommendations

- Section 2(6) defines a "trustee" in a manner that appears to encompass the term "beneficiary of the deed of trust." The latter term is used repeatedly in the bill and may be superfluous and could be replaced with "trustee or his representative."

- Others, including Legal Counsel for the Elderly and Legal Aid note the complexity and difficulty surrounding the requirement that homeowners return the election for mediation by certified mail. Automatic mediation obviates that concern.

- Notice of the mediation should be sent by either the mediation administrator or the trustee by certified and regular mail to make it as easy as possible for homeowners to receive it.

- In Section IV, if an entity cannot prove it owns a note, the bill should require that the foreclosure be canceled. The bill should grant the mediation administrator the ability to impose sanctions in such cases, particularly if a trustee notices foreclosure on a property more than once—or on multiple properties—without proper documentation.

- If a trustee claims that loan modification is prohibited by a pooling and servicing agreement, the bill should require the trustee to produce the relevant sections of

the agreement at mediation. Restrictions on modifications in these agreements should not allow a trustee to forgo mediation; mediation can still provide the necessary forum for a discussion of other foreclosure alternatives.

- The bill should make clear that the homeowner has the right attend mediation with an attorney, a housing counselor, as well as a representative.

Endnotes

[1] The numbers included here were provided by Connecticut's program administrator, Ms. Roberta Palmer. They are available on request.

[2] These figures are reported by VIP, or Volunteers for the Indigent Program, a body that coordinates pro bono representation for homeowners participating in the program. Program administrators in Philadelphia confirm to us that the numbers align with their experience as well. A full report is available the forthcoming paper, Andrew Jakabovics and Alon Cohen, "Now We're Talking: A look at current state-based foreclosure mediation programs and how to bring them to scale" (Washington: Center for American Progress, 2010).

[3] New Jersey reports 3,100 mediation requests. Marge DellaVecchia, "Foreclosure Prevention in New Jersey" (Trenton: New Jersey Housing & Mortgage Finance Agency, 2009), available at http://www.state.nj.us/dca/hmfa/home/foreclosure/pdf/foreclosure_prevention_in_nj.pdf. There were approximately 47,500 foreclosure filings in New Jersey last year. Even if we assume half were not owner-occupied small residential homes eligible for mediation, that would leave 23,750 and a participation rate of 13 percent. Calculated based on RealtyTrac's 2009 totals: http://www.realtytrac.com/contentmanagement/pressrelease.aspx?channelid=9&itemid=8333.

[4] Kevin Kemper, "Foreclosure mediation program performing better than expected," *Columbus Business First,* September 25, 2009, available at http://columbus.bizjournals.com/columbus/stories/2009/09/28/story11.html.

[5] "# of applications processed per week – Rounds 1 and 2" available at http://www.state.ia.us/government/ag/latest_news/releases/mar_2010/Mortgage_Help_trends.pdf. This is compared with Realty Trac's 2009 yearly total of 5681 Iowa foreclosure filings. RealtyTrac, "RealtyTrac® Year-End Report Shows Record 2.8 Million U.S. Properties with Foreclosure Filings in 2009," (2009) available at http://www.realtytrac.com/contentmanagement/pressrelease.aspx?channelid=9&itemid=8333.

[6] Indiana RealEstateRama, "1000 Trained to Handle Mortgage Foreclosure Cases Indiana Supreme Court Offers New Pledge of Support," October 19, 2010, available at http://indiana.realestaterama.com/2009/10/19/1000-trained-to-handle-mortgage-foreclosure-cases-indiana-supreme-court-offers-new-pledge-of-support-ID0103.html.

[7] Supreme Court of the State of Nevada, "Order Amending Foreclosure Mediation Rules," April 22, 2010, available at http://www.nevadajudiciary.us/images/foreclosure/adkt435_amendedrules.pdf.