

**Housing and Urban Revitalization Committee
Ohio House of Representatives**

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**Interested Party Testimony
HB 306**

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I am the Director of the Cuyahoga County Foreclosure Prevention Program in Cleveland. The Foreclosure Prevention Program was created as a joint effort by the County Commissioners and County Treasurer Jim Rokakis in the spring of 2006 to assist the residents of Cuyahoga County who were having trouble with (or had questions about) their home loans. The program, which has become a model for other programs nationwide, connects borrowers in distress with local, non-profit, housing counseling agencies through the United Way's First Call for Help line.

Since 2006 our program has evolved in tandem with the ever-changing Ohio foreclosure crisis and we are currently engaged in fund raising on behalf local housing counseling agencies that provide direct services to county residents facing default and foreclosure on their home loans. We also coordinate the efforts of the many public and private sector players in Cuyahoga County working to ameliorate the crisis. One of those public sector players is the Common Pleas Court Foreclosure Mediation Program and we are working to get the funding in place for on-site housing counselors to support the court's mediation effort.

It is in that context that I wanted to testify as a supportive, interested party to HB 306.

The Statewide Mediation Initiative

In December 2007, Ohio Supreme Court Chief Justice Thomas J. Moyer proposed that courts manage the ever-increasing foreclosure caseloads by expanding foreclosure mediation programs. These programs utilize the facilitative style of mediation where the mediator guides the parties through a party-driven self-determination process to see if a mutually acceptable agreement can be reached to resolve the foreclosure. The mediator is a neutral third party; not an advocate for either party and not a judicial officer who will make findings and issue a decision.

Justice Moyer's announced mediation initiative was a surprise, as was his commitment of Supreme Court resources to the statewide foreclosure effort. Soon meetings were held in Columbus bringing together a wide array of government and nonprofit entities including the Dispute Resolution Section of the Supreme Court, the Governor's office, the Attorney General, the State Treasurer, the Department of Commerce, the Department of Development, the Ohio Housing Finance Agency, the Ohio State Bar

Association, legal services lawyers, and an array of nonprofit housing and advocacy groups.

In February 2008, the Supreme Court released the Foreclosure Mediation Program Model, the first of its kind in the nation. The Dispute Resolution Section of the Supreme Court designed the 11-step model rule with input from the many stakeholders in the foreclosure process. The rule was flexible to allow local courts to modify procedures so as meet local conditions and resource limitations. The model rule includes documents and forms grounded in lessons learned from existing mediation programs around the state. The fundamental idea was to balance the needs of all the local stakeholders by accommodating the inevitable variations in the mediation programs across the eighty-eight counties. The overarching goal was for mediation to provide a more humane and effective alternative to the waves of default-driven foreclosure cases taxing common pleas courts around the state.¹

Since the release of the model rule, the Supreme Court's Dispute Resolution office has trained many hundreds of mediation professionals including, lawyers court personnel, realtors, social workers and housing counselors. As a result foreclosure mediation programs have begun and/or expanded across the state.

In one sense, mediation is a "passive" dispute resolution process:

Unlike arbitration, where the intermediary listens to the arguments of both sides and makes a decision for the disputants, a mediator assists the parties to develop a solution themselves. Although mediators sometimes provide ideas, suggestions, or even formal proposals for settlement, the mediator is primarily a "process person," helping the parties define the agenda, identify and reframe the issues, communicate more effectively, find areas of common ground, negotiate fairly, and hopefully, reach an agreement. A successful mediation effort has an outcome that is accepted and owned by the parties themselves.²

Unlike the foreclosure litigation that distances homeowners even further from their mortgage servicers, mediation offers an alternative from the endemic communication problems between the borrowers and loan servicing firms.

The Problem

The national epidemic of mortgage delinquencies has exposed the industry's inability to cope with the burgeoning demand for the direct, extended, and highly focused interaction with borrowers that is necessary to structure sustainable loan workouts. The lending industry has long insisted that delinquent borrowers are principally to blame for problems getting loan workouts accomplished. And certainly it is true that

¹ See: <http://www.supremecourt.ohio.gov/JCS/disputeResolution/foreclosure/default.asp>

² *Beyond Intractability*, Christopher Honeyman, Nita Yawanarajah, Ed. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder, Colorado.
<http://www.beyondintractability.org/essay/mediation/>

many homeowners don't take constructive action because they are paralyzed by shame, hopelessness, fear, and denial. However, the foreclosure crisis has only aggravated the industry's own lack of capacity to deal with delinquent borrowers and most of the problems at this juncture are not borrower-centric, but servicer-centric. Insufficient servicer staff, high staff turnover rates, poor training, and discretion-less, automated information and "decisioning" systems all combine to impede efficient handling of loan workouts and modifications.

The horror stories that borrowers recount detailing interactions with their servicers have passed from "urban legend" to become established lore, no longer even denied by the servicing industry. Two to three hour waits on "customer service" phone lines, staff who are limited to reading from a script rather responding to individual issues, repeatedly lost files and faxes, stale information (often related to the lost and misplaced documents), the list goes on and on. Together these continuing problems create tremendous barriers to customer communications in the delinquency periods leading up to, and then following a foreclosure filing.³

Mediation is an antidote to this communication problem. Mediations force parties to exchange relevant (hopefully current) information and provide a structured setting for using the information to explore loan restructuring options. In Cuyahoga County, the Foreclosure Mediation Program requires the direct participation of the mortgage servicing firms in every mediation. Servicers cannot merely phone-in to the mediation conference. Servicers must have a staff person, with settlement authority, attend every mediation. By requiring the mortgage servicer to send a staff person to each mediation session the communications problem, arguably the most intractable of the many issues hampering the traditional foreclosure process, is ameliorated.

However, foreclosure mediation is not a panacea. Problems remain in the mediation model, many of which are related to the historically "industrial" nature of the litigation that has defined home foreclosures for generations. Servicer capacity problems notwithstanding, the assembly-line aspects of foreclosure cases is a result of the simple fact that over 90% of all mortgage foreclosures begin and conclude as "default" cases. The homeowner rarely makes a formal, or even informal, appearance in the case, and in the rare instances where there is some borrower "pushback" it usually comes from an unrepresented homeowner and is too late in the process to affect the already inevitable outcome.

The lack of representation for homeowners in foreclosure cases remains a serious problem around the state. Most attorneys decline to represent homeowners in foreclosure cases for two basic reasons. Practically speaking, there are rarely bona fide legal defenses to assert that will stop the foreclosure action, and the dire economic

³ *Major Banks Still Grappling with Foreclosures*, Chris Arnold, NPR, Morning Edition, 9/9/09, <http://www.npr.org/templates/story/story.php?storyId=112660935>; *5 Dumb Reasons You Can't Get Mortgage Help*, Tami Luhby, CNNMoney.com, 8/11/09, http://money.cnn.com/2009/08/11/news/economy/dumb_reasons_no_mortgage_modification/ and *Mortgage Firms Struggle to Redo Hard Hit Loans* Carrick Mollencamp, Serena Ng, WSJ, 7/16/09 <http://online.wsj.com/article/SB124770337352248707.html>

circumstances of the defendant-homeowner mean that the lawyer cannot expect to get paid for their time. Unfortunately, these professional and economic dynamics remain unchanged in the mediation context. The majority of homeowners who request mediation do not have counsel, and they must navigate the mediation system with a lay understanding of the process. Perhaps more crucially, homeowners bring little insight regarding the purely economic determinants that will limit or enhance their ability to negotiate a sustainable mortgage workout with the servicer.

Foreclosure Prevention Counseling in Support of Mediation

Experience with foreclosure mediation programs from around the state demonstrates that preparing a homeowner to discuss their household budget with a foreclosing mortgage servicer exponentially increases the chances for success in the mediation process. "Success" is defined here as keeping the homeowner in their house, paying a reasonable sum on the mortgage obligation that will be sustainable over the long haul. However, "getting to yes" requires that the homeowner bring informed and realistic expectations to the process. Housing counselors are uniquely positioned to assist homeowners with their relevant skill set and the professional experience to get borrowers prepared to face the "nuts and bolts" budget issues that confront them. Only then can delinquent borrowers work constructively with their servicer to fashion a mutually acceptable compromise.

Foreclosure prevention counseling provides detailed information to homeowners on how to avoid (or escape) foreclosure. Counselors will oversee the gathering of relevant income and expense information and then work with the homeowner to create a realistic monthly budget. They can review the mechanics and timing of the foreclosure and mediation process and explain the many details that need to be addressed when seeking to re-negotiate a mortgage loan. Counselors can review and sometimes even predict the specific workout offers that the borrower will encounter depending upon whether their loan is owned by Fannie Mae or Freddie Mac, is a "private label" subprime loan, or a federally insured FHA, VA or Rural Housing Service loan. Counselors can warn homeowners about the tax and credit rating implications of particular workout structures, and disabuse the homeowner of the all-too-prevalent notion that tragic personal circumstances are a sufficient basis upon which to demand a modified mortgage loan.

We are convinced that if foreclosure mediation is to reach its full potential, it must cultivate and rely upon the support that counselors can give to borrowers facing the loss of their home. The imbalance in power, knowledge and sophistication that defines the foreclosure relationship can be counteracted by counselor interventions and will inevitably produce a more fruitful and directed negotiation with the mortgage servicer. Servicers will attest that a prepared homeowner exponentially improves the chances for a loan workout, and it is housing counselors who can provide that crucial support for the lowest cost.

Unfortunately, homeownership counseling remains little appreciated, yeoman's work and has received short shrift in the national policy frameworks implemented to address

the foreclosure disaster. Case in point: the federal HAMP initiative has set aside \$75B in TARP funds mostly to encourage mortgage servicers to simply meet their existing contractual obligations to investors. Homeowner counseling on the other hand, has received less than \$1B from all federal sources to bring desperately needed assistance to homeowners in distress. Worse, in Ohio, that paltry allocation of federal dollars is going to dry up in June of 2010, leaving many counseling programs without any support whatsoever from any source to continue working on homeowners' behalf.

Without long term and committed funding intervention, the hard fought for, expanded foreclosure counseling capacity in Ohio will virtually collapse. We are therefore urging that HB 306 be amended to specifically include foreclosure counseling services as part of any fee structure employed to support court based mediation.

Conclusion

Unfortunately, there are no silver bullets that will fully and finally dispatch the foreclosure monster that sore afflicts Ohio. Committed as we are to the model of counselor supported, court-based mediation, it is not a panacea and must be viewed as one of many tools that we need to ameliorate this economic and social crisis. We support the constructive direction of HB 306 and believe that it can be tweaked to create an expanded, workable system to help many more homeowners in Ohio than are currently benefiting from mediation.

However, in the final analysis we need a comprehensive, omnibus approach to make more progress in Ohio. State servicer regulations, foreclosure-specific filing requirements, rules to discourage or prohibit bank walk-aways, real time data and tracking systems and realistic, industry-funded fees that will support these many initiatives will help all Ohioans--Ohioans facing foreclosure, as well as Ohioans who may be secure in the their homes but lost in a swooning economy that simply can't afford to endure anymore massive, industry-spawned market failures. We hope that this bill and other proposals can be joined with HB 3, currently pending in the Senate, to create a stronger Ohio, better equipped to cope with this unprecedented, and ongoing mortgage disaster.

