

Suggestions for Improvements to Cuyahoga County's Proposed Foreclosure Mediation Program

To: Judges' Foreclosure Committee

From: The undersigned creditors' rights firms

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I. Introduction

The undersigned law firms regularly represent creditors in foreclosure actions. We strive to provide quality legal services in order to seek to enforce our client's rights when a borrower has defaulted on its mortgage loan. More than ever, we and our clients are aware that in many cases, an alternative to foreclosure may be a preferable result for all parties concerned, including the lender, the borrower, the neighborhood, the city, and the court. We applaud the court's desire to establish a mediation program. However, there are aspects of the Cuyahoga County's proposed Foreclosure Mediation Program that leave much room for improvement, and actually cause harm to the process.

II. Mission Statement

The mission statement of the proposed mediation program is admirable, but it will not be fulfilled effectively by the proposed program. Our comments about it are as follows:

- **Minimize case processing time.** The mayors of various cities in the county have complained forcefully that Cuyahoga County's case processing time, which exceeds most other counties in Ohio, cause destruction to the neighborhoods. The longer a foreclosure case remains pending, the more likely it is that the owner will cease maintaining the property, or will vacate the premises exposing it to vandalism, theft of fixtures, etc. The mediation program as designed contravenes the mission. It seems predictable that it will result in stays and delays in a large number of uncontested cases where the borrower has no reasonable possibility of saving the property.
- **Save cost and expenses for the parties.** While it may be true that if the parties enter into a mutually acceptable agreement to avoid foreclosure, costs and expenses may be saved, the mediation program as designed will force the lender to incur excessive, additional, unnecessary expenses to attend pre-mediation meetings and mediation meetings, in person, even in cases where no agreement is viable. According to most mortgage loan agreements,

any expenses incurred by the lender may be included in the amounts the borrower will be required to pay to resolve the debt through reinstatement, loan modification agreement, or a payment plan.

Furthermore, we must remember that it is a burden for a borrower, who is struggling to make ends meet, to be forced to take off work to personally attend a series of meetings that could have been conducted by phone. Hence, again, the mediation program as designed will do the opposite of the stated mission, and will actually make it significantly more difficult for borrowers to save their houses.

- **Prevent the adverse social consequences of vacant and abandoned houses.** The lender almost always incurs major losses when a property must be sold at a Sheriff's Sale. If the lender is the purchaser at the sale, which is most often the case, the costs to maintain, insure, pay taxes, and market the property to a new buyer in order to obtain any recovery, are astonishing. Not only are vacant and abandoned houses routinely vandalized or stripped (see 3/28/08 Plain Dealer article), property values have plummeted and it has become exceedingly difficult to find buyers for foreclosed houses. As a result of these conditions, mortgage servicing companies have been going to great lengths to reach out to borrowers prior to, and during foreclosures, to seek alternatives to foreclosures. A mediation program can help avoid some foreclosures, but if the program incurs unnecessary and significant costs and delays in uncontested foreclosures where no solution is possible, the program would again contravene the stated mission.

III. The Borrower Should be Encouraged to Communicate Directly with the Lender

As indicated above, mortgage servicing companies are highly motivated to try to contact borrowers to resolve delinquencies, in order to avoid foreclosures. Investors, such as Fannie Mae and others, have offered significant incentives to loan servicing companies to do so. Some mortgage servicers offer incentives to the foreclosure attorneys to connect the borrower and the lender's loss mitigation department directly on a phone call. The mediation request form to be provided to the borrower with the summons, should prominently recommend that the borrower contact the mortgage servicing company or the plaintiff's attorney directly, in addition to submitting the request for mediation to the court. The earliest possible communication between the borrower and the lender, will yield the best chance for a successful resolution.

IV. It is not possible to evaluate whether a borrower's request for mediation is worthwhile, unless the borrower's request is accompanied by complete details and documentation regarding his or her financial condition.

The objective should be to promote resolutions directly between the parties, and to provide the mediation service if the parties need additional assistance. Under the proposed program, the borrower merely needs to submit a request for mediation. The onus is then on the lender to complete a mediation questionnaire, and then to attend the "first meeting". The borrower is not required to submit any documentation until the first meeting is conducted. If the borrower (1) fails to attend; (2) fails to bring his or her documentation to the meeting, or (3) does not have sufficient funds available to make a reasonable proposal; the lender's efforts and expenses in traveling from perhaps

California or Texas for the first meeting will have been wasted. Furthermore, under the proposed program, the documentation required from the borrower only includes pay stubs, bank statements, a W-2 form and a tax return.

In order for any lender to even begin to evaluate any possible alternatives to foreclosure, the lender will always need to review more complete details as to the borrower's assets and debts. As an example, attached hereto is Fifth Third Bank's "Loss Mitigation Financial Statement and Documents Checklist," and "Financial Assistance Application." In order for the mediator to determine that a mediation request has any viability, or for the lender to respond, complete details and documents in a similar format should be required to be submitted with the request for mediation.

V. A less cumbersome program can better accomplish the mission.

The program can be made much more practical for all parties concerned, and better achieve the goals, as follows:

1. The borrower submits a request for mediation together with complete documents and financial statement information. The request and documents are filed with the ADR Department, and a copy is sent to the lender's attorney. The lender can then promptly evaluate and attempt to resolve the matter directly with the borrower before additional payments or costs are incurred, without waiting for a mediation meeting.
2. If the mediator deems the request and borrower's information worthy, the mediator schedules a conference call for two weeks later. The borrower can attend in person if he or she desires, or by phone. The mediator or the lender's attorney can initiate the call, and the borrower, borrower's attorney if any, lender's attorney, and the lender can all participate, to discuss whether a resolution can be entered into immediately, or where further discussion is necessary.
3. The mediator can schedule a conference call two weeks later if the parties have not resolved the matter directly by then. If at any time the mediator determines that it is essential to the process to have at least the borrower and the lender's attorney present in person, the mediator can schedule a meeting. At the meeting, the lender's attorney will appear, and will have the lender available by cell phone. If the lender fails to be available by phone, or if the mediator determines that the lender is not participating in good faith, at that point the mediator can reschedule the meeting and require the lender's personal attendance.

Hence, all of the goals of the mediation program can be better fulfilled with one or two conference calls or a single meeting. This is obviously preferable to the proposed program, which requires three meetings with all of the parties' personal attendance. Rather than speculate that the program won't work unless the litigants are required to attend in person, there should at least be a trial period of say, six months, to determine whether that is the case, and if so, the requirement can be reconsidered.

Requiring the lender to appear in person at the pre-mediation meetings is a patently counterproductive measure. Lenders are fervently attempting to maintain sufficient staff to manage

an overwhelming number of nationwide loan workout or modification requests. To require the lender's loss mitigation representative to travel to Cuyahoga County, to attend a pre-mediation meeting obviously would take that representative out of its office for up to two or even three days on three separate occasions, making them unavailable to assist perhaps hundreds of other customers during that time. In addition, the rapidly rising cost of the flight and hotel for this purpose seems to be plainly disproportionate, and as indicated above, only adds to the borrower's burden to fulfill a reinstatement, loan modification agreement, or payment plan.

VI. Even if a case goes to mediation, the foreclosure case should not be stayed.

A formal stay upon the filing of a mediation request has implications beyond merely waiting for the mediation process to be completed. If a mediation is unsuccessful, the Plaintiff will be required to have perfected service of the summons on all parties in order to proceed. The perfection of service of summons on any party, even on other lienholders, during the period of the stay, will likely be deemed void, requiring additional delay and additional costs to reissue service of the summons. If the borrower has cause to contest the case or to file a counterclaim, he or she should file a responsive pleading within the usual time frame. The lender has a right to know the allegations, which could have a bearing on the negotiating postures of the parties.

A formal stay of the case would be unnecessary if there were a rule that dispositive motions are not to be filed until the mediation process is concluded. If a borrower requests a mediation but then vacates the property and does not respond further, a stay would result in additional loss and delay, and the property would have additional exposure to vandalism or stripping. Hence, the proposed program, which includes a stay of the foreclosure, contradicts all three goals of the program's mission statement. It will prolong the case processing time. It will increase cost and expenses for the parties, and it will increase the adverse social consequences of vacant and abandoned houses.

VII. Conclusion

We fully support the establishment of an effective mediation program, but request that the proposed program be revised along the lines suggest above. We thank the Court for its attention to this matter.