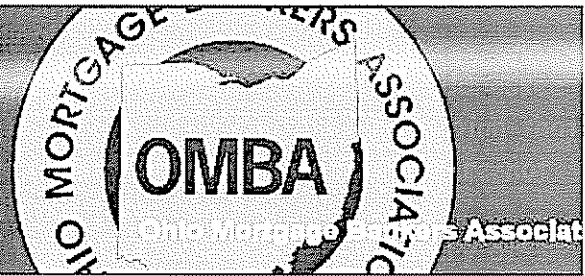


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House Members Weigh Constitutionality, 'Efficacy' of Foreclosure Prevention Bill

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The House majority's benchmark legislation on foreclosure prevention met resistance Wednesday on several fronts, including the judicial profession that would be charged with administering key provisions of the bill.

Testimony and member questions from the House Housing and Urban Revitalization Committee raised a number of concerns about HB3 (Foley), which would impose a six-month moratorium on foreclosures, authorize courts to modify the terms of individual mortgages, and grant the Ohio Department of Commerce new powers to regulate loan servicers and establish rules for loan modifications; among other provisions Republicans joined Franklin County Judge Charles Schneider in reiterating doubts about the constitutionality of ceding courts unilateral authority to rewrite legal contracts, a concern voiced by the Ohio State Bar Association (OSBA) at last week's hearing. (See The Hannah Report, 3/18/09.)

Not all comments were negative, as Montgomery County Commissioner Dan Foley - the chairman and sponsor's brother - told members the bill would help forestall the tripling of home foreclosures since 1997 and provide the courts new "tools" to deal with troubled mortgages - roughly 45 percent of the civil docket in Montgomery County, he said

"Our judges would use this tool responsibly, and they would use it to find the right balance between protecting the rights of the mortgage servicers and the homeowners."

Commissioner Foley responded to OSBA concerns by urging the bar and the Ohio Judicial Conference to participate in the drafting of rules for loan modifications by the courts.

Several citizens testified about the loss of family homes because of confusing lending rates, lost work time and mounting legal fees assessed by Chase Home Finance. President John Ebersole of the law firm Baver and Bookwalter Co. LPA told more stories about homeowners caught up in bad mortgages and refinance deals, calling the need for HB3 "urgent."

"The bill's provisions regarding registration, establishment of standards and regulation by the Department of Commerce are, frankly, long overdue," he said.

President John Malanowski of First Federal Savings and Loan Association of Lorain sympathized with the bill's basic objectives but called for a "dramatic reworking" of HB3. He said several of its provisions would only complicate the foreclosure prevention efforts of many lenders

"We originate loans in our market area, we own our loans, and we service our loans," he said of local institutions like his own with a major investment - both literal and figurative - in their communities "We have numerous customers who are 90-plus days due on their mortgage that we have chosen not to initiate foreclosure action" on.

Malanowski said in particular that the six-month moratorium on foreclosures caused him "great concern," a position he supported with a litany of audio-visuals that showed First Federal properties trashed during a period of vacancy and legal limbo. "We'll continue to work with our customers who work with us. However, when foreclosure becomes a necessity, allow us to proceed to protect our interest in the property on a timely basis."

Chairman Mike Foley (D-Cleveland) responded by saying the distinction between reputable and rogue mortgage companies was a major challenge for the Legislature. "How do you define responsible lenders?" he observed, asking Malanowski for any help he could offer.

The witness said ironically that waiting on the legal process envisioned by the bill - the moratorium, the service of papers, the defendant's response, and the scheduled hearings - would not be part of that definition

"From what I understand, by the time all that has happened, we're another six months down the road."

Rep. Nan Baker (R-Westlake) pointed to the collateral damage deteriorating homes and home values could have on surrounding properties, saying downward loan renegotiations under the bill would drag down other homeowners as well

"I am concerned for property owners that have done the right thing, have paid their mortgages, and then someone down the street renegotiates a loan and lowers property values even further," she said.

Chairman Foley challenged her logic "Once the property goes through the foreclosure process, the value of that property has been washed out. The neighbor will actually benefit from a higher property value under this process."

Rep. Clayton Luckie (D-Dayton) countered Baker further by noting other foreclosure mitigation efforts had been underway for several years, and agreed with Commissioner Foley's earlier comments that HB3 would provide new and different tools

"This bill will give your communities - the people you represent - some air under their wings," the commissioner had responded

Rep. Shannon Jones (R-Springboro) took up the assurances of Democrats on the committee. "I think there is a lot of really good stuff in this bill," she observed - noting they did not include any of the issues discussed Wednesday. "Just because it's

'different' does not make it good."

She had asked Commissioner Foley whether he would also support a moratorium on tax foreclosures. He said he would get back with her on that question

Jones and her colleague on the other side of the aisle, Rep. John Otterman (D-Akron), told the commissioner they were hearing doubts from the courts about the feasibility of judicial modifications. Foley said he had not had extensive conversations but had heard "anecdotally" of several judges in his area who supported the bill

Almost anticipating Judge Schneider's remarks, Ebersole told the committee that "large lenders and servicers of mortgages do not have the staff or expertise to even conduct an analysis of whether a 'work out' of some kind is in their best interest "

Schneider's concerns were remarkably similar, though directed toward the courts. He said neither judges nor their staff have the financial expertise to modify loans, and that to retain such knowledge would require a "dramatic and costly increase in court personnel in a court system that is already heavily burdened "

Moreover, he reaffirmed the position of OSBA and various Republicans that judicial modifications would not pass legal muster. "We can't change the terms of a contract because we don't like them . . . or because we want to be nicer to this person than to that one.

"I am confident that the issue will be raised and litigated through our court system until the Ohio Supreme Court decides the constitutionality of the statute," he said. "It will be a long and costly road to get to that determination "

Chairman Foley responded by stating that judges would be empowered but not required to perform loan work-outs under the bill

"Then it becomes just a section in a piece of legislation that doesn't reach the point of efficacy either," Schneider answered, saying such an outcome was no improvement on tepid mediation efforts or laws that currently prevent bankruptcy courts from addressing foreclosure as part of a homeowner's larger troubles. "If they lose their job, the judge can't fix that. "

Rep. Matt Dolan (R-Chardon) had remained silent for most the hearing but directed a question at the chairman toward the end. "Are you suggesting this will trump other liens on the affected home?" he asked, referring to a provision that would award the lender any home sale profits above the value of the renegotiated loan. "Is this a 'Super Lien?'"

Chairman Foley said he did not have a complete answer at this time, but after committee told Hannah News the foreclosure prevention lien would likely preempt all others, except property taxes. Dolan had said outside the hearing that this subordinate status would appear to include any other public assessments, such as sidewalk costs and the like. Foley was less certain about that specific question

"I would assume wherever it fits now, it would stay "