

HEADNOTE

THE MORTGAGE CRISIS: WHY NOT ASK LAWYERS FOR HELP?

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I write as a work-a-day civil trial lawyer. As I understand the current mortgage crisis, in the next five years there are projected to be 6.5 million foreclosure actions that possibly will result in millions of homeowners losing their homes, and mortgage holders becoming owners of millions of properties, most of which will have to be sold on a distress basis. Although Congress has passed significant legislation to give relief, it is only expected to reduce the scale of the problem.

Historically, bank officers have performed workouts with homeowners in default, and the banks have, thus, restructured poorly performing mortgages. As a result, most homeowners in default have retained their homes, and banks usually have not had to sell the properties at distress prices. Recently, most mortgages have been sold by banks, as part of securitized packages. Therefore, there are no bank officers available to do informal workouts, and foreclosures are largely unavoidable.

Yet, there is a way to implement a workout system roughly equivalent to the relatively efficient bank officer system. We practicing lawyers are available (along with retired bank officers and retired lawyers) to mediate and arbitrate foreclosure controversies in law office conference rooms throughout the United States. Most lawyers have finely tuned mediation skills from

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years of mediating between our clients' interests and the claims of others. Yet, no one has asked us to assist with this mortgage crisis. Perhaps a governor, legislature, attorney general, president, Congress, or some bar president can mobilize us.

One could envision, for example, a 90 day cooling off period after initiation of a foreclosure with a homeowner to pay, *e.g.*, a \$250 fee and a mortgage holder to pay, *e.g.*, a \$1,000 fee to partially offset the costs of setting up and administering a system and conducting one day training sessions for mediators and arbitrators. Mediation could be optional and no one should be required to agree to a workout during mediation. Arbitration could be available for parties who fail to mediate successfully. Arbitrators could be empowered to reduce the face value of mortgage notes depending on the value of the properties, extend payment periods, reduce interest rates or monthly payment amounts depending on income and assets (or lack thereof) of homeowners, etc. If someone was to ask the community of lawyers in a city, a state, or the country to participate as mediators or arbitrators, I believe that many would step forward and work largely without fee.

There is a problem which can defeat my proposal. I am informed that the loan documents evidencing the mortgages now outstanding provide for trustees (or other like empowered fiduciaries) for the mortgage holders in the event of a default. A trustee can (if he, she, or it wishes) step into the shoes of a bank officer and do workouts. However, trustees have fiduciary duties to mortgage holders in being empowered to act in their stead upon default. Probably most such trustees would be reluctant to agree to, *e.g.*, a lower interest rate or a lower loan balance as part of a workout for fear of being sued by the mortgage holder. Thus, I presume it may be difficult to secure the cooperation of a trustee in negotiating a restructured mortgage loan. There is a remedy: Legislatures can pass laws absolving trustees of liability in the event a restructuring is negotiated or mandated in any court-supervised or bar association-sponsored mediation or arbitration proceeding.

The law of New York or the law of Delaware will probably govern in a substantial percentage of mortgage foreclosure proceedings pursuant to the mortgage documents. A law passed by the New York legislature could provide for the proposed mediation and arbitration procedure and protect the trustees from the mortgage holders. Such a statute could help a substantial

number of homeowners and mortgage holders avoid the terrible consequences of foreclosure. In addition to the consequences of individual foreclosures, mass foreclosures have already decimated large sections of many cities, e.g., Cleveland and Baltimore, and have wiped out the tax basis of thousands of properties in cash strapped cities throughout the country. Whatever anyone thinks of my proposal, I hope that it will help start a dialogue. Such a dialogue might lead to some more reasonable solutions than the “no win” foreclosure proceedings that are commencing in the thousands week after week throughout the country.