

New Jersey Law Journal

VOL. CXCVII - NO.13 - INDEX 1027

SEPTEMBER 28, 2009

ESTABLISHED 1878

COMMENTARY

An Attitude Adjustment Is Needed in N.J. Approach to Mortgage Mess

By Dennis Scardilli

The New Jersey judiciary is to be congratulated on the withdrawal of its proposed requirement that only housing counselors can request borrower participation in its foreclosure mediation program. Now, the governor's office needs to re-examine the state's entire approach to the mortgage mess.

The economic principle of anticipation causes a market to delay decision-making in the face of uncertainty. The New Jersey real estate market is stymied by uncertainty over whether a flood of foreclosure or pre-foreclosure properties will further diminish the value of non-foreclosure properties. Bank-owned properties are sold within a relatively short period, with sale prices reflecting current market conditions. Buyers are holding off purchases until they feel comfortable that future bank-owned sales will not drive down price, causing them to lose their equity investment.

New Jersey has attempted to resolve this private sector economic issue almost exclusively through government and quasi-government efforts. Foreclosure mediation needs an overhaul to be effective. Housing counselors have effectively been

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given a license to practice law, while mortgage brokers are prohibited from participating in mortgage modification.

A consent judgment between the Attorney General's Office and Countrywide Home Loans has not been enforced. There is insufficient liaison with federal agencies. The judiciary does not recognize federal guidelines on halting foreclosure activities while a mortgage modification is processed. The market would be stimulated by reducing buyer uncertainty through an aggressive effort to clean up the mess. Here's how.

God bless Chief Justice Stuart Rabner for taking the shot, because the concept of foreclosure mediation is a good one. But the program is seriously flawed, partly because it takes place just before final judgment. Would you risk your home on one, last-minute roll of the dice? Conversely, the New Jersey civil court mediation process is initiated shortly after filing the first court document. Foreclosure mediation at the front end of the process would save judicial resources, state funds and untold heartburn for defendant borrowers.

How did housing counselor prominence come about? The New Jersey Department of Banking and Insurance interpreted the mortgage broker licensing statute as prohibiting mortgage modifications. The department then used the judiciary's relaxed foreclosure rules to administratively bestow the debt adjuster license

statute license on housing counselors. The license permits mortgage modification, so the only nonattorneys who can perform mortgage modifications are housing counselors.

In a recent case, a housing counselor informed me that the agency would not permit her to provide an expert report to the court or testify as an expert. As per federal statute, regulation and Department of Housing and Urban Development guidance, housing counselors may only assist a borrower in a mortgage modification on a principal residence.

In other states, the attorney general, not the judiciary, has taken the lead in cleaning up the mortgage mess. New York Attorney General Andrew Cuomo has instituted litigation on appraisal and mortgage fraud. Martha Coakley, Massachusetts' attorney general, has pursued borrower redress from lender Freemont. New Jersey's attorney general can start with enforcing her own consent judgment with Countrywide Home Loans and pursue regulatory violations, including mortgage and appraisal fraud by both lenders and borrowers.

The state Departments of Community Affairs and Treasury should create an effective liaison with federal counterparts investigating reasons mortgage modification programs are lagging behind expectations.

The judiciary could easily create a mirror rule to the federal government's mortgage modification guidelines. Those guidelines call for a halt to foreclosure activity when a borrower is in the mortgage modification trial period. Court resources and state funds could be saved by using judicial notice, under the Court's

relaxed foreclosure rules, to recognize federal guidelines. This would then toll the clock during the pendency of modification processing and save all concerned from useless litigation.

State Sen. Jim Whelan, D-Atlantic, has asked Gov. Jon Corzine to consider

convening a bipartisan working group, including public, private and nonprofit stakeholders, to come up with a more effective policy to resolve the mortgage mess. Sen. Jeff Van Drew, D-Cape May, has joined in that request.

I hope that, as a result of a post-elec-

tion report by that group, the Legislature will pass laws that work, the executive branch will carry out those laws with the creative leverage of private sector resources and the judiciary will adopt a mirror rule reflecting federal mortgage modification guidelines.■