FLORIDA SUPREME COURT
TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES

FINAL REPORT AND RECOMMENDATIONS ON RESIDENTIAL MORTGAGE FORECLOSURE CASES

AUGUST 17, 2009

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INTRODUCTION

Picture this: the biggest road out of town. Now imagine it is rush hour. In a thunderstorm. Add that it is also a hurricane evacuation. A lane is closed due to construction delayed by budget impacts. Imagine the traffic jam.

The clearest description of the impact of the foreclosure crisis and the following recession on Florida's courts can be summarized by that picture. Imagine every car is a case. The General Jurisdiction Courts of our state have a certain amount of judicial infrastructure, just like there is a certain amount of room on the road. There is a certain capacity of judges, of court staff, of clerks, of filing space, of hearing time, of courtrooms, even of hours in the day. Year in, year out, that capacity flexes with the caseload traffic to afford reasonable, prompt, efficient and fair justice.

The enormous increase in foreclosure filings has overwhelmed those resources in many circuits and represents a caseload traffic jam that the infrastructure cannot meet in a timely and efficient manner without support and traffic management. The Task Force has looked for ways to create off-ramps to get traffic off the road, in the form of managed mediation to resolve cases at the beginning instead of at the end; and in the use of expedited proceedings in cases involving vacant or abandoned property. The traffic left on the road must be coordinated to keep it moving safely and as swiftly as possible through the use of the limited case management resources available to a judicial system where every spare staff slot has already been cut. Without case managers to assist in keeping this traffic moving, the best options are standardization of procedures and form orders.

The recommendations of this Task Force are real world recommendations. Without budgetary limitations and with infinite resources, we could have designed a case management system guaranteed to resolve all these issues. However, we live in a state in a budget crisis. Given Florida's financial situation, it would be a foolish exercise to address needs for foreclosure case managers, additional judges and support staff, special magistrates, and court-funded mediation in the absence of any realistic expectation that such recommendations could be funded. We have made recommendations, in some instances choosing the least of evils that can work on an emergency basis to immediately begin to meet the challenge of these cases. We believe it is imperative that the Florida Supreme Court address the explosion of mortgage foreclosure filings as soon as possible for the welfare of our courts, our communities, our businesses, and our state.

EXECUTIVE SUMMARY

Task Force

By Administrative Order dated March 27, 2009, Chief Justice Peggy A. Quince established a 15-member Task Force on Residential Mortgage Foreclosure Cases to recommend "policies, procedures, strategies, and methods for easing the backlog of pending residential mortgage foreclosure cases while protecting the rights of parties." AOSC09-8, In Re: Task Force on Residential Mortgage Foreclosure Cases. The Chief Justice directed the Task Force to address these matters on a statewide basis and to include in its recommendations, as may be appropriate, "mediation and other alternative dispute resolution strategies, case management techniques, and approaches to providing *pro bono* or low-cost legal assistance to homeowners." Id. The Chief Justice further directed the Task Force to "examine existing court rules and propose new rules or rule changes that will facilitate early, equitable resolution of residential mortgage foreclosure cases."

Meetings and Organizational Structure

The Task Force dedicated a huge amount of personal and professional effort to this work during the approximately 20 weeks it has been in existence. The Task Force met 18 times as a committee of the whole. The Task Force was constrained by budget limitations that allowed very limited travel, and hence met live only twice for full day meetings after it requested and was granted approval for these meetings from the Chief Justice, once on April 27 and again June 29. Those meetings lasted approximately 16 hours and included working lunches in both sessions.

The majority of the Task Force's work was conducted in conference call as a result of the budget. The Task Force met by conference call on 16 occasions, engaging in extended discussions April 3, 15, 22, May 8, 22, 29, June 3, 18, 24, July 7, 14, 21, 28, August 4, and 11. Every conference call lasted at least two hours and frequently longer. A brief emergency conference call was held August 12. It is a fair estimate that the Task Force meeting as a whole spent at least 35 hours in conference calls.

In addition, all members of the Task Force served not only as a committee of the whole, but also contributed substantially via membership on two subcommittees, each addressing key elements of the overall charge. Members'

names are shown below in relation to the subcommittee work with respect to which each has been extensively involved.

The Case Management Subcommittee met by conference call 13 times on April 9, 21, 27, May 5, 19, 28, June 9, 16, 30, July 7, 14, 21, and 28. Another meeting occurred at the working lunch in connection with the April 27 live meeting. Most calls involved substantial discussion of the foreclosure process. Members of the Case Management Subcommittee are:

Judge Claudia Isom, Chair
Rosezetta Bobo
Alan Bookman
Arnell Bryant-Willis
J. Thomas Cardwell
Tammy Teston

The Alternative Dispute Resolution Subcommittee (ADR Subcommittee) met 15 times on April 15, 22, 27, May 1, 8, 20, June 2, 17, 24, July 2, 8, 15, 22, and 29, and August 12, all but once by lengthy conference calls and again during a working lunch at the Task Force's April 27 live meeting. ADR Subcommittee calls routinely lasted 1-2 hours. Task Force members serving on the ADR Subcommittee are:

Dr. Gregory Firestone, Chair
April Charney
Judge Burton Conner
Sandra Fascell Diamond
Michael Fields
Chief Judge Lee Haworth
Perry Itkin
Rebecca Storrow

Overall, one can reasonably calculate that this task force spent over 50 hours in meetings over four months, without considering the individual email correspondence, drafting and re-drafting efforts and cyber-discussion, and research and review of materials on the underlying issues. To add in time for those efforts probably put the time expended at well over 75 hours for the members of this emergency task force.

Judge Jennifer Bailey served as Chair of the Task Force. She also served ex officio and participated in the work of both subcommittees. She would like to express personal gratitude as well as gratitude on behalf of the Court system, and the people of the State of Florida, to the Task Force members, all uncompensated volunteers, who so significantly sacrificed their time, effort, and intellect to this Herculean emergency task.

Outreach Methods

The Task Force faced two severe limitations in its information-gathering function: First, there was no budget or ability to travel. Where many task forces hold multiple public hearings, we could not do so in the face of budgetary constraints. Second, the Task Force had a very short time frame of approximately 20 weeks from the day it was appointed to the deadline for its final report.

In light of those constraints, the Task Force pursued every means at its disposal to get information from the many perspectives in these cases. It sought to publicize its work in press releases and coverage in the Florida Bar News. A number of newspapers covered the work of the Task Force, and the Chair gave multiple interviews to newspapers in Miami and Sarasota.

The state courts website offered several ways in which individuals were able to convey their opinions and information to the Task Force. First, the Dispute Resolution Center (DRC) offered a link to an on-line mailbox whereby suggestions and comments could be directly submitted to the Task Force.

In light of our inability to hold public hearings, the Task Force developed online surveys for lenders/servicers/holders; attorneys, judges and borrowers. The surveys for borrowers were translated into Spanish and Haitian Creole to provide access to the broadest possible range of individuals. Links to the surveys were accessible through the Florida Supreme Court website. Links to the surveys were sent out via email by Task Force members and others to as wide a circle of possible participants as possible. Finally, the Florida Supreme Court issued a statewide press release to inform people of the Task Force's efforts and to encourage them to participate in the surveys or to submit comments to the on-line mailbox. Again, the surveys were publicized in the Florida Bar News in the press, even turning up in the "Action Line" consumer information column of the Miami Herald.

As a result of the above outreach efforts, a total of 1, 018 individuals participated in the surveys; the number of survey participants in each group was as follows: borrowers – 510; mortgage holders/servicers – 40; attorneys – 405; and, 63 judges. Additionally, comments were received from 141 individuals through emails submitted to the DRC online mailbox and through the US Mail.

Task Force Recommendations

Recognizing the limited resources available for creative solutions, the Task Force recommends use of mediation and case management techniques to move settlements to the beginning of the case instead of late in the case, to prevent unnecessary use of court resources.

To that end, the Task Force recommends adoption of a uniform, statewide managed mediation program to be implemented through a model administrative order issued by each circuit chief judge. Under this program, all foreclosure cases involving residential homestead property will be referred to mediation, unless the plaintiff and borrower agree otherwise, or unless pre-suit mediation was conducted. All cases will be assigned to mediation to be conducted by a Florida Supreme Court certified circuit court mediator. Referral of the borrower to foreclosure counseling prior to mediation, early exchange of borrower and lender information by way of an information technology platform prior to mediation, and the ability of a plaintiff's representative to appear at mediation by telephone are features of the model administrative order. Borrowers will not pay a fee to participate in the managed mediation program. Appended to the Model Administrative Order are best practice alternative dispute resolution forms and mediator training standards.

The Task Force also recommends differentiated processing of three distinct categories of foreclosure cases: (1) homestead properties that are referred to mediation and are likely to resolve through the managed mediation program; (2) vacant and abandoned properties that can move through the courts quickly through expedited foreclosure processes; and (3) other foreclosure cases, which may include tenant-occupied or non-borrower-occupied properties, in which the borrower has been unable to communicate with the plaintiff to resolve the case, and which may be referred to the managed mediation program at equal cost to both parties. In order to facilitate improved case management of foreclosure cases that will not be resolved through the managed mediation program, the Task Force proposes a number of changes to the Rules of Civil Procedure and the Forms for

Use with Rules of Civil Procedure, as well as "best practices" forms that may be used at the discretion of the circuit court to improve efficiencies in case processing.

BACKGROUND

Summary of Presentations

The Task Force was unable to hold public hearings due to travel, time and budget constraints. However, in an effort to ensure that specific questions were answered, the Task Force invited limited individual presentations by potential stakeholders. These presentations were by a foreclosure counseling expert, large volume plaintiff firms, a mid-size plaintiff firm, an experienced foreclosure defense attorney, lenders and servicers, and the President of the Collins Center which manages the existing foreclosure managed mediation programs in the First, Eleventh, and Nineteenth circuits. The format of the presentations, which were all conducted by conference call, was to permit the presenter a brief statement at the beginning, followed by question and answer by the Task Force. The Task Force heard from:

Arden Shank, President of Neighborhood Housing Services, Miami, FL
Roy Diaz, Smith, Hyatt and Diaz, P.A., Ft. Lauderdale, FL
Beverly A. McComas, Law Offices of David J. Stern, P.A., Plantation, FL
Ron Wolfe, Florida Default Law Group, P.L., Tampa, FL
Marie Day, Bill Merrell, Todd Boothroy, Tamara Twain and Martha Graham, Wells Fargo/Wachovia Mortgage Foreclosure Team
James Kowalski, Law Offices of James E. Kowalski, Jr., P.L., Jacksonville, FL
Roderick N. Petrey, President, Collins Center for Public Policy, Inc., Tallahassee, Miami and Sarasota, FL

The presentations permitted the Task Force to gather perspective and consensus.

Foreclosure Counseling Expert

One key point of consensus across the board was the importance of certified foreclosure counseling to an effective resolution in a mortgage foreclosure case. Servicers, counselors, and attorneys on both sides agreed that foreclosure counseling served to assist in educating borrowers, documenting and promoting the loss mitigation effort, and aided in the effective effort to resolve these cases.

Foreclosure counselors are trained and certified by the U.S. Department of Housing and Urban Development, and standards for foreclosure counseling, including ethical standards, have been established by the National Industry Standards for Homeownership Education and Counseling (NHSSF). The Task Force learned that most nonprofit organizations that provide foreclosure counseling do not charge a fee. This issue was considered in the Model Administrative Order.

These organizations obtain grants from the National Foreclosure Mitigation Counseling program to cover counseling costs. Foreclosure counseling is offered by dozens of organizations in Florida. While the Task Force believes that the capacity is there to require counseling, it is also apparent that additional counselors will have to be trained and brought on board to meet potential demand. For that reason, a foreclosure counseling fee was included in the recommendations so that the necessary numbers of counselors can be available to assist, as opposed to creating the need without having grant funds available to meet the need. Foreclosure counseling can be, and often is, done by telephone.

Plaintiffs' Bar

The Task Force also learned that there is significant concern about demonization of lenders within the plaintiff's bar. In the view of these attorneys, the cases are simple: one party provided money, the other promised to repay the money. They didn't. As a result, the lender has the right to take their house.

The plaintiffs' representatives also emphasized that lender/investor plaintiffs are not the winners in the mortgage foreclosure crisis. They are losing millions, with no chance to recover losses. The largest losses are incurred in cases where the property is foreclosed and then marketed for re-sale. Plaintiffs and borrowers have a compelling interest in having as many defaulted mortgage contracts resolved as performing loans within the ability of the borrower and the current market conditions. While lenders agree that all loans that can be modified should be modified, issues associated with the volume of defaulted loans, establishing processes and training for mortgage modifications, communication between the parties, and the general economic downturn have resulted in an inability to prevent the situation from becoming a crisis. The plaintiff's attorneys acknowledged that the loss mitigation system is not operating effectively.

Most loans are considered in default in four months; foreclosure proceeds even with continuing loss mitigation efforts. Plaintiffs file motions to vacate foreclosures to permit time for borrowers to determine qualifications for federal

assistance. Telephone appearance makes participation by plaintiff's representative possible. Plaintiff's counsel signs settlement agreements on behalf of the lenders. Lenders/investors use servicers to manage mortgage activity. Servicers, according to the plaintiffs' attorneys interviewed, have the authority to conduct loss mitigation.

There seemed to be general agreement among the plaintiffs' representatives that the means to address the backlog of pending foreclosure cases is to provide responsible borrowers and lenders the opportunity to have meaningful contact, thereby limiting foreclosure case volume. However, the plaintiffs' attorneys felt that any mandatory mediation process should limit mediation to those cases in which the borrower has expressed a desire to mediate, require the borrower to opt in by providing relevant financial data, and require the borrower to contribute equally to the cost of the mediation process. Policies to address the mortgage foreclosure crisis should not assume that borrowers are incompetent. These are not traditional adversarial dialogues; rather they are a discussion to reach a mutually beneficial solution for both parties. In this new breed of troubled assets, there is a possibility for a win/win situation. They also felt strongly that the most effective process for resolving foreclosure cases would permit the plaintiffs' representative to appear at mediation by telephone since: (1) the plaintiff will already have the necessary financial data from the borrower; (2) the plaintiff will be in a position to submit settlement proposals or request additional information from the borrower; and (3) there is no benefit to requiring lenders/investors to hire and train mediation representatives who will do nothing more than relay information to the servicers. Extending the length of time to process foreclosures where the borrower does not have the desire or ability to settle negatively impacts market values so this process should not prolong litigation.

The plaintiffs' attorneys acknowledged that the current crisis requires a non-traditional approach. The system or model should be flexible enough to cover many types of meaningful settlement contacts, should encourage early communication and settlement discussions by creating an opt-in approach that rewards responsible borrowers and lenders. A voluntary pre-suit mediation process would encourage both parties to engage early in the process to avoid costs, and would provide a plaintiff the ability to opt out of any mandatory program by documenting previous efforts to settle. Exchange of information is vital to the success of any potential settlement process. The Task Force was encouraged by the general support for the mediation process, but disagreed that effective case management could rely upon borrowers to individually invoke the mediation process given the limited understanding of that process by most of these borrowers.

The Task Force followed up to determine potential delay due to sales cancellations. plaintiffs' counsel reported that as of late July, Florida's smaller counties, such as Pinellas, Citrus, Escambia, etc. are generally setting sales in 30+ days, in most larger counties sales dates are being set at 60+, Collier County is 90+ for sales dates, and Miami-Dade County is at 200+ days. Further investigation revealed that one of the reasons for the extended sales dates in Miami is an ongoing cancellation rate of over 50-60 percent of the sales set each month.

Lenders and Servicers

The Task Force also made a point to hear from the servicers' perspective. Servicers interact directly between lenders and borrowers based upon lenders' servicing guidelines. They are strong proponents of handling mediations by telephone, and do not believe there is a significant difference between telephone and in-person mediations. The servicers agreed that the best practice is a non-profit HUD-approved counselor working with the borrower as early as possible to keep arrears low and to assist borrower in pursuing a workout. The servicer can approve or deny a workout on the spot based upon financial data provided by the borrower. There is an unacceptably high number of borrowers who do not trust the servicers. Servicers need borrower information 30 days prior to a workout effort. Workouts are encouraged, but the challenge has been when the borrower is not talking with the servicer, or the borrower's financial circumstances will not permit a workout. It is very difficult if the servicer is requested to change the terms of the loan because this cannot be accomplished without investor approval. The key is to get the borrower into a relationship with a foreclosure counselor early. Foreclosure continues unless there is an agreement, even if the servicer and borrower are negotiating a workout. Principal reductions do not occur often. Life of loan history is not always available if there were prior servicers. Data from former servicers is not always reliable.

Further, the servicers acknowledged that loss mitigation departments were created mid-crisis. They acknowledged problems with accessing borrower documents and requiring borrowers to send in the same information repeatedly. The servicers also discussed the segregation of departments within the servicer: in this instance, there was a mediation department, which was separate from the loss mitigation department, which was separate from the group handling the foreclosure lawsuits, which was separate from the real estate owned department, all of which it appears contribute to confusion and lost documents.

Defense Bar

From the defense bar, we learned that many current loan modification efforts are stymied because it is not profitable for servicers to modify loans. There is a disconnect between servicers and investors, and an inherent conflict since servicers earn an enhanced fee during the foreclosure process. The simple lack of ability to know the future presents an obstacle as servicers, lenders, investors and attorneys focus on short-term solutions and profits rather than long-term efforts to repair the economy of which they are a part. In addition, it is difficult for the borrower to obtain a life of loan history since many problems occur when the loan history is moved electronically from one servicer to another. However, servicers should provide the life of loan history to a facilitator or mediator, with reference to the actual documents and the parameters for modification. Servicers have wide latitude to modify loans. The facilitator or mediator needs the source material on what loan modification authority the servicer has.

The defense attorney also noted that servicer employee turnover is high, and plaintiffs' attorneys do not even review the case files. Quality foreclosure counseling would help as long as the interview is geared to understanding financial concepts and the counselor has access to an attorney for substantive issues. Substantive matters, such as standing issues or wrongfully applied payments, can be used as leverage in these cases as an incentive for servicers to modify loans. Telephone appearance is problematic because the mediator loses the ability to read the person and to ask questions. Generally, defense attorneys concur that injustice is occurring because so many borrowers are unrepresented and so completely out of their depth in dealing with servicers and lenders. They suggest that volunteer screening attorneys are needed to assist borrowers from the beginning of the process. There are three tracks of cases. First, those with substantive issues, usually math problems on the part of the servicer; second, those with financial issues, where the need is for long-term loan modification to fit the borrower's ability to stay in the house; and third, those cases in which there is an inability to meet the financial requirements of the loan, and which can be resolved by a short sale or a deed in lieu. There are some cases in which there are substantive legal issues that need to be addressed. He urged that these cases should be abated.

Requiring the borrower to pay a share of mediation expenses is a disaster, unless substantial leverage and increased efforts to shift the playing field away from an overwhelming advantage to the servicer is accomplished.

Managed Mediation Program

The Task Force also reviewed the progress made in connection with the managed mediation programs facilitated by the Collins Center for Public Policy, Inc., which presently operates managed mediation programs in the First, Eleventh and Nineteenth circuits. The coordinating judges, Judge Bailey in the Eleventh and Judge Connor in the Nineteenth, also served on the Task Force and shared information about the successes and problems of the programs.

The Collins Center is a non-profit entity. It was chosen in all three circuits after a presentation to the chief judges of the circuit courts. The presentation outlined the substantial experience and background that the Collins Center has in managed mediation, having previously handled mass mediation involving life insurance and in the recent hurricane years, handling mass mediations for hurricane-related insurance matters for the Florida Office of Financial Regulation. The Collins Center offered the necessary staff experience and support and technology and technical support to test the system through these pilot projects in the circuits. In addition, the Collins Center secured private funding to absorb the costs of initial set up without a substantial investment from the courts or the parties who are utilizing this service. Being able to create the program without start-up court funding is a significant benefit to utilizing this program for the pilot in these circuits.

The outline of the program is established in the administrative orders of the three circuits, all of which vary to some degree. All mediators working for the programs are Supreme Court certified circuit court mediators and complete one-day training in foreclosures. The program is open to participation by any certified circuit court mediator. The mediators agree by contract to perform a minimum number of mediations. There has been a high participation rate among mediators.

The Collins Center focuses significantly on personal outreach to advise borrowers that this is a court-sponsored program that enables the borrower to talk with the lender or servicer to facilitate and identify potential solutions, including modification of the mortgage. It is important to let borrowers know that this program is safe—not a scam, and free to the borrower. It charges currently charges a $750 fee, to be paid up front by the lender. Of that amount, $350 goes to the mediator, $125 to the financial counselor and the remainder is for administrative costs of the program, which pays for staff, the mediation locations, the IT platform, calls and postage for outreach to borrowers, mediation information and court compliance reporting. The mediator's function is to facilitate agreement

of the parties and to provide an opportunity for parties to meet. The mediators do have specialized training in foreclosures.

The program is based on a tight time frame, and the lawsuit is not abated during this process. In order to participate, the borrower must complete foreclosure counseling and provide their financial documentation to the lender. While all three circuits are still generally in the start-up phase, within the first four to five months, the success rate is impressive. Many cases are settling through foreclosure counseling without the necessity of formal mediation. The overall settlement rate as a result of mediation in all three circuits is 73%. If those cases that settle prior to mediation, during foreclosure counseling, are included the settlement rate is 79%. All three circuits and the Collins Center acknowledge that the raw numbers are very limited at this point in time as there are a limited number of cases that have gone all the way through the process due to the recent start dates this spring. There are 434 cases with confirmed mediation dates.

Although the number of cases handled is still very small, the Collins Center success rate is ratified by national data regarding mandatory mediation programs in foreclosure cases. According to the Center for American Progress, the best foreclosure mandatory mediation programs have a success rate of nearly 75%. Andrew Jakabovics and Alon Cohen, It's Time We Talked - Mandatory Mediation in the Foreclosure Process, Center for American Progress at 1 (June 22, 2009).

There are a significant number of cases in which the Collins Center has been unable to reach the borrower. There are a very significant number of cases in which the contact information provided to the Collins Center by the plaintiff at time of filing is so incomplete or inaccurate as to prevent borrower contact without significant additional investigation, and there are other cases where the borrower is simply unable to be contacted. Those cases are being returned to court according to the process designed in the administrative orders. A chart showing Collins Center managed mediation program outcomes, workflow and cases received is appended to this report.

Residential Mortgage Foreclosure Crisis in Florida

As of its Interim Report submitted May 8, 2009, the Task Force reported on the statistics for foreclosures in Florida. The situation has grown increasingly grim since that filing. Florida has the third highest mortgage delinquency rate, the worst foreclosure inventory, and the most foreclosure starts in the nation. National

Delinquency Survey from the Mortgage Bankers Association, First Quarter 2009 (May 28, 2009).

As noted in a July Government Accounting Office (GAO) report on Treasury programs, "Dramatic increases in home mortgage defaults and foreclosures have imposed significant costs on borrowers, lenders, mortgage investors and neighborhoods; and have been a key contributor to the current financial crisis." United States Government Accountability Office Report to Congressional Committees, Troubled Asset Relief Program Treasury Actions Needed to Make the Home Affordable Modification Program More Transparent and Accountable at 1 (July 23, 2009). The foreclosure crisis, which began due to adjusting loan and maturing payment vehicles in the subprime market, has now moved to the prime loan market. People are no longer defaulting simply because of a change in the payment structure of their loan. They are defaulting because of lost jobs or reduced hours or pay**.**

The National Delinquency Survey of the Mortgage Bankers Association, First Quarter 2009, reflects shattered records for the highest seasonally adjusted delinquency rate on record. The July GAO report confirms the highest default and foreclosure rate in 30 years. GAO Report at 9. The foreclosure start rate is the highest on record. The national delinquency rate of 12.07% of mortgages is the highest ever recorded. Seriously delinquent prime loans were up 271% from first quarter 2008 to first quarter 2009. Seriously delinquent subprime loans were up 846% during the same time period. National Delinquency Survey, First Quarter 2009, at 2. In terms of seriously delinquent loans, the numbers increased 94% over the last quarter of 2008.

The latest news for Florida is horrifying. The National Delinquency Survey determined that of the 3,542,940 loans being serviced in Florida, 374,134 are in the judicial foreclosure process. A total of 98,848 foreclosures were initiated in the first quarter of 2009, during a time period when many moratoria were in place. Another 378,031 loans are delinquent, with 181,044 seriously delinquent (90+ days delinquent). The flow of foreclosure cases and homes in the Florida pipeline to foreclosure filing shows only signs of increasing. Early information from the United States Treasury Department indicates that the following Florida communities will qualify under the Home Price Decline Protection program, beginning September 1, 2009: Jacksonville, Daytona Beach, Deltona, Lauderdale, Cape Coral-Ft. Myers, Tampa, St. Petersburg and Clearwater.

Financial data for the first quarter of 2009 on residential first mortgages serviced by national banks and federally regulated thrifts, as published in the Mortgage Metrics Report produced by the U.S. Office of the Comptroller of the Currency and the Office of Thrift Supervision, establishes that serious delinquencies, the precursor to foreclosure filings, are up 9% from the last quarter of 2008.[1] See Appendix D. Prime loan delinquencies increased nearly 22%, and increased 73% in the past year. Foreclosure filings on prime loans increased 21% from fourth quarter 2008 to first quarter 2009. Foreclosures nationally rose 22% in the first quarter of 2009 and rose 73% in the last year.

There is, however, some good news in the Mortgage Metric Report for the first quarter. Lenders are beginning to recognize the need to reduce monthly payments during loan modifications resulting in a 31% lower re-default rate. Modifications reducing monthly payments increased 10% from the fourth quarter. Loan modifications overall increased 55% from the fourth quarter 2008 through the first quarter 2009, and increased 173% over the past year. Foreclosures pursued to final judgment and sale decreased 12% nationally, likely due to increased workouts.

The State Foreclosure Prevention Working Group, a group of fifteen attorneys general and state banking regulators,[2] has expressed disappointment in the progress even as of its September 2008 report: "While some progress has been made in preventing foreclosures, the empirical evidence is profoundly disappointing. Too many homeowners face foreclosure without receiving any meaningful assistance by their mortgage servicer, a reality that is growing worse rather than better, as the number of delinquent loans, prime and subprime, increases." State Foreclosure Prevention Working Group Data Report No. 3, Analysis of Subprime Mortgage Servicing Performance at 2 (September 2008). The Working Group's findings indicated that only 23% of trouble borrowers receive any loss mitigation assistance. Data Report at 6. The report further notes that, "The mortgage industry's failure to develop systematic approaches to prevent foreclosures has only spurred declines in property values and further increased expected losses on mortgage loan portfolios. Based on the rising numbers of delinquent prime loans and projected numbers of payment option ARM loans facing reset over the next two years, we fear that continued reactive approaches will lead to another wave of unnecessary and preventable foreclosures." Data

[1] The second quarter report has not been released yet.

[2] The State Foreclosure Prevention Working Group consists of the attorneys general of California, Nevada, Arizona, Massachusetts, Ohio, Illinois, Michigan, Texas, North Carolina, Washington, Iowa and Colorado, and the chief banking regulators of New York, Maryland and North Carolina.

Report at 2. Loss mitigation efforts by lenders continue to face staffing training, and communication problems. As of May 2008, only 23% of troubled borrowers received any loss mitigation assistance. Data Report at 6. Eight out of ten delinquent homeowners are not on track for loss mitigation, an increasing number from previous data. Data Report at 2. The Working Group found that throughout much of the nation, loss mitigation is focused on short sales and deeds in lieu of foreclosure: "...we believe that the modification programs offered by servicers have reached only a limited pool of homeowners wanting to stay in their home, and instead of improving and expanding their programs to promote home retention, servicers have increased efforts directed to short sales, as a cheaper and quicker alternative to foreclosure." The Working Group finds that servicers continue to rely heavily on short sales and deeds in lieu, which dispossess the borrower. The Working Group's statistics found an increase of deeds in lieu of 54% from January to May 2008.

At the time of its September 2008 report, the Working Group noted that only about 40% of loss mitigation efforts result in closed loss mitigation despite substantial public and non-profit efforts that have gone into assisting borrowers and the increase in staffing at major servicers. The paperwork required for loss mitigation efforts is often cited as a reason for the failure of loss mitigation efforts to close. Servicers have raised concerns about borrowers failing to complete and return paperwork, while borrowers and foreclosure prevention counselors cite concerns over overwhelmed loss mitigation departments." Data Report at 8. The report concluded that, "Recent events on Wall Street have demonstrated the connection between the financial health of the American homeowner and the health of our financial markets…The mortgage servicing system was not designed to work out loans on this magnitude, and while progress has been made, that progress pales in comparison to the numbers of homeowners needing assistance. The need for systematic approaches and comprehensive solutions to current foreclosure levels is urgent." Data Report at 16.

The challenges facing the Task Force were rendered more acute by a constantly-changing context. The Bush Administration established the Troubled Asset Relief Program (TARP) program on October 3, 2008. GAO Report at 1. The Obama administration announced its Making Homes Affordable Program on February 18; the U.S. Treasury Department announced its program guidelines March 4; on April 15 the Treasury Department launched its administrative website with guidelines for Home Affordable Modification Plan (HAMP) servicing participants; on April 28 the Treasury Department added details about second liens, a new HAMP program component; and on May 14 the Treasury announced

its Home Price Decline Protection program, which adds additional incentives for those who owe more than their home is worth, of crucial importance to many Florida homeowners. However, the rules and regulations implementing these programs are trailing the initiatives.

Not only was the Task Force challenged to understand the foreclosure process as it currently exists and is impacting the courts, but the Task Force had to understand the new programs and their potential impact on settlement as a case management tool. GAO Report. The entire purpose of the HAMP program by the Treasury's Office of Financial Stability is to "…share the cost of reducing monthly payment on first-lien mortgages with mortgage holders/investors and provide financial incentives to servicers, borrowers, and mortgage holders/investors for loans modified under the program."

The role of securitization and its affect on the foreclosure process also represented a learning curve for the Task Force. As noted in the GAO report, "Most mortgages are bundled into mortgage-backed securities that are bought and sold by investors…The originator/lender of a pool of securitized assets usually continues to service the securitized portfolio, including providing customer service and payment processing for borrowers and collection actions, in accordance with the pooling and servicing agreement. The decision to modify loans held in a mortgage-backed security typically resides with the servicer. However, one of the challenges that servicers face in modifying these loans is making transparent to investors the analysis supporting the value of modification over foreclosure. Additionally, the pooling and servicing agreements may place some restrictions on the servicers' ability to make large-scale modifications of the underlying mortgage without the investor's approval." GAO Report at 8.

The efforts that Florida's state courts have made to adjust to the rising tide of foreclosures are reflected in the Summary Reporting System (SRS) data on disposition rates. See Appendix B. Across the board, every circuit has cleared more and more foreclosure cases each calendar year since 2006. The percentage of cases cleared, however, was static or falling, comparing calendar year 2007 to 2008, due to the increased number of filings, and the need to adjust to the influx of cases. Comparing calendar year 2008 to the first six months of 2009, all but three circuits have increased their clearance rates. Ten circuits have substantially increased their clearance rates by double digits. Annualizing the six-month data to project a yearly clearance for 2009, we expect that Florida's judges will clear 239,298 foreclosure cases, an increase of 74,872 cases over calendar year 2008 clearances. Despite the hard work reflected in these increased clearance numbers,

the courts are falling behind in terms of the number of cases filed due to the sheer volume. At the end of the year, there will still be an inventory of 174,182, based on annualized figures, of pending foreclosure cases filed in 2009 that have not been closed, a figure that does not include the increasing pending inventory that has accrued since 2006. Judges simply cannot resolve the filings at this volume level by hard work and elbow grease alone.

Recognizing the limited resources available for creative solutions, the Task Force has recommended use of case management and mediation techniques to move settlements to the beginning of the case instead of late in the case, to prevent unnecessary use of court resources. We have also recommend changes to forms and rules, as well as created a set of "best practices" forms that can be adopted for circuits. We encourage the circuits to use standard forms without variation as much as possible, in order to achieve statewide efficiencies. Both plaintiff and defense foreclosure lawyers decried the current patchwork response of forms and systems, and urged standardization as much as possible.

Attorney Involvement in the Mortgage Foreclosure Crisis

We also encourage the lawyers involved in this work to take responsibility for effectively using judicial resources. Currently, there are hearing dates blocked and squandered due to last minute cancellations for lack of preparation, there are communication problems between lawyers which result in appearances for cancelled hearings because no one was called, there are rampant complaints about unreturned phone calls, emails and difficulties in communicating with firms that handle a particularly large volume of the foreclosure plaintiffs' work. The endless cycle of voice mail and getting switched around is particularly frustrating for pro se litigants. We urge these firms to monitor quality control and assure professional conduct. Complaints alleging lost note should only be filed upon a good faith investigation. These problems have caused the Task Force to recommend a requirement that pleadings be verified.

In addition, in the vast majority of these cases, settlement negotiations are not handled by the firm litigating the foreclosure. As a result, most lawyers who appear in court have no idea of the settlement posture of the case. Many of these cases are being resolved after final judgment, many even after sale. As a result, these cases are consuming every available judicial resource to reach a resolution that may have been available at the beginning of the case. Sales are frequently cancelled at the last minute due to negotiations or a resolution. While we want to encourage settlement, that process should occur at the front end of the case, so that

properties that must be sold on the courthouse steps can get a reasonable sale date without months of delay due to cancellations taking those sales spots.

Finally, it is critical that these firms be candid, clear, and truthful and accurate in connection with pleadings and affidavits filed with the Courts. A leading plaintiff's lawyer and a major plaintiff's law firm have been the subject of a public reprimand and sanctions due to untruthful filings with the courts. Judges continue to see affidavits of amounts due and owing signed by law firm employees, and cost affidavits charging very high service of process fees for process serving firms owned by the law firm principals. To some extent, it is fair to be concerned whether the press of the case load is interfering with a judge's ability to police the conduct of the firms before them in these usually uncontested, unopposed foreclosure cases.

There are also issues on the defense bar side of the equation. Lawyers are advertising for clients to pay them, and they will delay foreclosure. Defenses based on loan closing irregularities are being pleaded without any good faith investigation, in some cases after the statute of repose has already expired. Boilerplate motions to dismiss and discovery requests are filed without ever being set for hearing or for motions to compel. Not infrequently, an answer is filed raising multiple defenses without any discovery, and the attorney then subsequently withdraws from the case due to nonpayment of fees. Nonpayment of fees would seem to be somewhat foreseeable for a defendant who is in foreclosure. Defense lawyers should litigate in good faith, defend in a timely fashion, and not manipulate the courts or the case for simple purposes of delay.

Judges should also recognize their responsibility to ensure that in uncontested cases, the necessary evidentiary basis has been laid for the entry of summary judgment. In particular, judges should take every step to insure that the original note is produced, that the note is held in due course by the plaintiff with a right under the note to foreclose, and that the note is cancelled upon entry of the final judgment. Much discussion has occurred about failures to produce the notes. However, the judges' survey responses indicate that the original note is produced in the vast majority of the cases. Further, judges should to the fullest extent possible, control the behavior of the lawyers before them through sanctions and attorneys fees where there has been noncompliance with the Rules of Civil Procedure and with local rules requiring communication. It is important to recognize that a cancellation may be no big deal to a lender lawyer sitting on the phone in his or her office, or to a local lawyer paid to attend a hearing, but may be a very big deal to a borrower who had to take off work, and who is likely not

getting paid, to come down for a properly noticed court date and who was not advised in advance of the cancellation. Further, judges must be vigilant as to violations of The Florida Bar Rules of Professional Conduct.

Consumer Education about Residential Mortgage Foreclosures

There are many well-intentioned efforts going on across the state to address foreclosures. Many communities have formed foreclosure task forces and foreclosure fraud task forces. These task forces do not appear to have any central coordination. Executive office efforts are not coordinated. Local workshops and community meetings are constant. However, they are completely uncoordinated, and incur resulting inefficiencies particularly in terms of publicity and knowledge-sharing. There is no central coordinating point. It is impossible for any individual to get full information about the foreclosure process in his community without consulting multiple websites and sources. Many borrowers have no idea of what programs are out there, and what help exists. Florida borrowers and foreclosure defendants are being victimized by foreclosure rescue scams and attorneys who take their money and do nothing to defend the case. Further, when borrowers who have been taken advantage of show up in court for the summary judgment hearing, there is no clear place for the judge to send individuals to report scammers, as there are multiple investigating agencies involved.

It is urgent that a central statewide foreclosure website should be cooperatively established cooperatively by the executive and judicial branches to give all Floridians education and access to basic information that is currently strewn haphazardly across the Internet: links on finding certified foreclosure counselors, contacting lenders, accessing online court dockets, basic foreclosure information, reporting illegal foreclosure activity, locating low-cost or free legal services, mediation programs in each circuit, foreclosure events in their community, links to foreclosure forms, links to loss mitigation contact information, accessing information about foreclosure sales, links to websites describing government foreclosure prevention programs and links to property sales information. This information is currently available on the web if one knows where to look, and this largely involves setting up a page with links. This would not be expensive and would of huge benefit, at least for those individuals who had web access. Early inquiry by the Task Force indicated a lack of resources to create such a website. The Task Force urges the executive branch, in cooperation with the judicial branch, to examine the cost involved in the creation of such a page. We need a “myfloridaforeclosure.com” for our citizens.

Widespread consumer education should be provided by the executive branch on avoiding foreclosure scams and providing clear information about where to report mortgage fraud, foreclosure scams, and other illegal foreclosure activity. The Florida Bar should aggressively prosecute attorney misconduct in foreclosure defense scams and mortgage fraud cases. The courts, where possible, should assist and support making information available and routing pro se litigants to community support where appropriate.

Pro Bono Attorney Efforts to Assist Borrowers

In the past year, voluntary bar associations and other attorney groups in Florida have made efforts to encourage *pro bono* attorney assistance to low-income borrowers facing foreclosure, but these efforts have had limited success. A significant problem encountered by these organizations has been the lack of volunteer attorneys to represent low-income borrowers in litigated cases.

The Real Property, Probate and Trust Law Section of The Florida Bar, along with The Florida Bar Foundation and Florida Legal Services, Inc., created Florida Attorneys Saving Homes (FASH), a volunteer program to assist low-income borrowers who are not yet in foreclosure. Statewide, about 1000 volunteer transactional attorneys have provided assistance to borrowers through FASH, but the need for private attorney involvement to litigate *pro bono* cases has been largely unmet. Kent Spuhler, executive director of Florida Legal Services, stated that some of the funds from the 2008 multi-million dollar Countrywide Financial Corporation settlement dispersed by the Florida Office of the Attorney General will go to increase staffing at some legal services offices for assistance to borrowers. However, there is little hope of marshaling significant numbers of *pro bono* attorneys with the skills necessary to defend foreclosure cases. The Miami-Dade Bar Association similarly hopes to provide assistance to borrowers, but has not established a system for providing litigation support. In the Twelfth Judicial Circuit, volunteer attorneys with the Sarasota chapter of the American Board of Trial Attorneys (ABOTA) provide services to borrowers in the circuit's conciliation program, but there are few volunteers for litigation situations. The Cuban American Bar Association's Pro Bono Project provides representation to borrowers who qualify under poverty guidelines, but most borrowers who contact the association are not eligible under those guidelines. The Clearwater Bar Association and the Community Law Program in St. Petersburg have sponsored a "Mortgage Foreclosure Defense" education program for attorneys. In Escambia and Santa Rosa counties, the local bar associations do not offer foreclosure assistance to borrowers, but provide information to borrowers about the mediation

services offered in the First Circuit by the Collins Center for Public Policy. What is clear from these many efforts is that attorneys are available and standing by to assist borrowers, but these resources are not being effectively marshaled.

Judicial Foreclosure in Florida

Florida is a judicial foreclosure state. The remedy of foreclosure is governed by chapter 702, Florida Statutes. At this point, the vast majority of foreclosure cases in the state of Florida are brought by a very limited pool of plaintiffs' firms, who handle approximately 90% of the cases state-wide. Two of the firms control approximately 60% of the cases.

A foreclosure case is initiated by the filing of a complaint. The complaint should contain all the good faith allegations to support the foreclosure, including that the plaintiff owns and holds the note secured by the mortgage, the property description of the property which is subject to foreclosure, and the acts of default. Pursuant to rule 1.130, Florida Rules of Civil Procedure, a copy of the note and the mortgage should be attached to the complaint.

However, a recently developed business practice affects the filing of the complaint. Due to the frequency of sales of notes and mortgages, central depositories developed to hold the actual paper while the transactions between servicers and lenders which bought and sold notes occurred. As a result, plaintiff lawyers told the Task Force, the firms frequently do not have the note in hand at the time the action is brought. As a result, prophylactic lost note counts are filed in most actions filed by firms handling a volume foreclosure practice. This practice leads to confusion among defendants because they may not recognize the entity suing or be aware that this entity now owns or services the loan.

After the complaint is filed, the summons are issued and sent to process servers for service upon the various borrowers. The documentation of service varies among process server companies. In addition, the process servers usually conduct the diligent search in the event that they are unable to serve the borrower personally. The inconsistent quality of the diligent search efforts caused the Task Force to recommend a new form for affidavits of diligent search tailored to mortgage foreclosure cases. Further, at least one law firm is having process served in all its foreclosure cases by a process serving firm owned by the lawyer-principals of the law firm, many times charging expedited rates, as reflected in affidavits of costs filed in those cases. Without a defense lawyer on the other side, these practices may go unchallenged by defaulted borrowers.

Once service is achieved, either through personal service or publication, defaults are submitted if no answer has been filed. In the vast majority of cases, borrowers are defaulted and no defense is submitted to the foreclosure action. People who cannot afford to pay their house payments usually cannot afford an attorney. It is at this stage, when borrowers know a foreclosure case has been filed against them, that borrowers are the most vulnerable to foreclosure workout scams where they pay hundreds or thousands of dollars to an individual or a company for help in trying to renegotiate their loan or to keep their houses, which results in no action on their behalf due to the scam. Any judge who handles foreclosure can share terrible stories of borrowers who appear at summary judgment hearing, having paid as much as $12,000 for a foreclosure rescue, only to learn that nothing was done.

Review and processing of the defaults is a tremendous challenge to the clerk of court offices across the state. There have been complaints about delays in the entry of defaults which generally seem attributable to the volume of filings. In many cases, the plaintiff is electing to proceed to summary judgment after service without the entry of defaults.

A motion for summary judgment is filed with the affidavits of amounts due and owing. There are some legal issues in connection with the filing of the affidavits. For example, one firm uses its office manager as "attorney in fact" to sign affidavits of amounts due and owing for its foreclosure clients. Without a defense attorney on the other side, these practices go unchallenged.

At the summary judgment hearing, the original note should be presented to the Court if it has not been previously filed with the clerk of court into the court file. At this point, due to the burden on the clerks imposed by the volume of the court filings, many firms are only filing copies until the actual hearing, and presenting the original at the hearing. The supporting affidavits and necessary documents to assure service, non-military affidavits, and/or defaults should all be presented to the court as well.

If no opposition has been filed and it appears that summary judgment is in order, then the judge will sign the final judgment. A sale date is assigned and entered into the final judgment, at which time the property will be sold "on the courthouse steps."

Community associations and their members, who are owners of parcels in the communities, are severely impacted by the foreclosure situation because delinquent owners do not pay statutorily required association maintenance assessments, and mortgage holders do not pay assessments until after the foreclosure is over and title has passed, and then the delinquent amount is statutory reduced to a mere fraction of an association's expense to maintain the property. Especially inequitable is that community associations and their members are involuntary participants, never being involved or profiting from the mortgage process; nevertheless, they are statutorily and contractually required to maintain the foreclosed property. This is a windfall for mortgage holders and delinquent owners residing in the property because the remaining parcel owners who timely pay assessments are in fact paying for the property's insurance, utilities, cable television, exterior maintenance, and access to roads and other common facilities, depending on the community. As associations preserve cash flow by increasing assessments on owners who timely pay, the resulting strain has lead to more defaults, threats of violence, and the expense of police attending association meetings to keep the peace, as well further decreasing property values for the entire community because the association cannot afford to maintain entrances and other common facilities.

The slow pace of foreclosure cases in the courts adversely impacts communities. Property owners describe neighborhoods of long-vacant homes with boarded up windows, exposed swimming pools, and weed-choked yards.

It is important to note that the final summary judgment hearing is usually the first actual hearing in the case. For pro se borrowers, it is the first and only opportunity to see the judge. The vast majority of borrowers who appear at the final hearing report that they are in negotiations with their lenders and request more time. Frequently, the attorney appearing for the plaintiff has no knowledge whether loss mitigation efforts are ongoing in the case or not. The settlement discussions which occur in foreclosure cases are handled in-house by the plaintiff/clients themselves, and the attorneys have no role in settlement in most cases. As a result, the attorneys have very little knowledge, and frequently no knowledge, as to the status of the negotiations.

Once the sale date is assigned, the clerk of court takes over the matter. The sale is advertised and ultimately held. There are delays occurring in foreclosure cases because of a limited capacity for a number of sales on any given day. The current form foreclosure judgment permits the plaintiff to cancel the sale unilaterally simply by not showing up, because it includes the language that the

sale will not be held unless the plaintiff's representative is present. As a result, a vast number of properties are in a state of limbo between final judgment and sale. For the sale to be reset, a judge must sign another order. Reviewing the motions to reset sale, an explanation of the cancellation is seldom given. Even if the cancellation is due to workout efforts with the borrower, there is no report of the status of the efforts. As a result, there is enormous waste of sale capacity and duplication of efforts in terms of resetting those sales being unnecessarily consumed in these cases.

To the extent that the sales are cancelled due to borrower workout, the Task Force seeks to find ways to move those efforts to the beginning of the case, before substantial judicial resources are consumed, as opposed to having those efforts focused at the post-final judgment stage.

ALTERNATIVE DISPUTE RESOLUTION PROPOSALS

The most critical case management issue in the foreclosure crisis is the severe and significant communication issues which are impeding early resolution of foreclosure cases. The plaintiffs complain of being ignored by borrowers despite multiple efforts and outreach, the borrowers complain of being unable to get through to loss mitigation departments, being asked to send and resend the same financial information repeatedly and being unable to get a decision on their case.

These problems are magnifying the emergency situation that the foreclosure crisis poses and as a result of this failure to communicate, motions and cancellations are extremely common, cases resolve long after final judgments and sales, and judicial resources are squandered. As discussed earlier in this report, it is fundamental to effective case management that cases that can be resolved should be resolved early, before scarce judicial resources are consumed.

An effective Alternative Dispute Resolution (ADR) Program is the best method that the courts can employ to assure that plaintiff-borrower communications occur, and occur early enough in the case to avoid wasted time and resources for the court and the parties.

The subcommittee considered various ADR options. In particular the subcommittee discussed non-binding arbitration, private judging, special magistrates, conciliation conference and mediation. The Task Force looked at other programs nationwide. The subcommittee also interviewed Albert Orosa of

the American Arbitration Association, which handled mass mediation of Hurricane Katrina cases in Louisiana and Mississippi.

Non-binding arbitration was considered to be ineffective, as its main incentive for settlement is posed by the possibility of the imposition of attorney's fees which are already recoverable in foreclosure actions. Private judging seemed unlikely to resolve cases due to the requirement of consent of both parties. Special magistrates to serve as fact-finders, on pseudo-bankruptcy trustee model was one idea discarded due to the lack of resources to manage and fund such a program and the lack of enforceability of any finding. Conciliation conferences such as the Conciliation Conference program currently utilized in the Twelfth Circuit (which requires lenders comply with court-ordered procedures, including participation in a telephone conference) were also considered. Though mandatory, the conciliation conference is simply a meeting between the parties without benefit of a mediator or other third-party neutral. The Task Force recognized that confidentiality protections were inadequate to promote frank communication between the parties and believed that a neutral and impartial facilitator was needed to manage the negotiation communications

In the final determination, the Task Force determined that the real problem here was capturing an opportunity for communication: for the borrower and the lender to convene in an informal and non-adversarial session to determine what could be worked out if anything. Mediation is the obvious vehicle for optimizing the possibility of meaningful ADR settlement. However the Task Force recognized that section 44.108, Florida Statutes, does not allow the court to collect fees for the provision of circuit civil mediation services and therefore an outside entity, a mediation manager, would be needed to manage the mediation program.

The emergency character of the foreclosure crisis substantially shaped the Task Force's decision-making. We confronted a situation in which an ADR solution had to be proposed that essentially assumes no additional public financial resources and no additional staff resources, given the financial and budgetary constraints facing the judicial branch. This is a crisis. There is no time to go lobby the legislature, propose bills, to explore grants, to do all those things that might identify and obtain other funding sources. In addition, the size, scope, and unique character of the caseload shaped an ADR solution unlike any ever proposed in the State of Florida.

The Task Force cannot emphasize strongly enough that the traditional mediation framework and structure, which has been established over a quarter

century's work and which is acknowledged as a leading national mediation framework among the states, must not be compromised as a result of the hard decisions made here. What we recommend regarding a modification of the plaintiff's appearance requirement must not provide any opening or opportunity for those who wish to avoid traditional appearance in mediation in non-foreclosure matters to use these recommendations to try to erode the superstructure of mediation created in the Florida statutes and years of rules work. Bluntly put, the recommendations of this Task Force on foreclosure mediation, particular in connection with fee-based outside management, with the plaintiff paying the cost, borrower counseling requirement and permitting telephone appearance by emergency administrative order should never be utilized to suggest that these are acceptable across the board solutions outside this particular unique emergency situation. The above exceptions are justified by the emergency nature of the statewide mortgage foreclosure crisis, the need for utilization of a mediation manager who is actively involved in outreach and coordination of the mediation with the borrower and plaintiff and the need to prepare the borrower for mediation via HUD approved counselors.

Since it is an emergency, the Task Force considered the availability of options consistent with existing law and rules, so as to avoid unnecessary delay due to rules changes or statutory revisions. Upon identifying existing legal authority, members looked at court programs already in place, particularly those which may have adequate staffing and budgetary resources potentially re-directed to the foreclosure problem. It was determined that existing court in-house programs were prohibited by statute and budget from foreclosure mediation. Though section 44.108, Florida Statutes, provides for funding of family and county court mediation programs, there is no statutory authority under which the courts may collect fees for mediation services in foreclosure cases.

A variety of circuits had already begun to tackle this challenge. The subcommittee examined the variety of circuit programs state-wide. The programs in the First, Eleventh and Nineteenth circuits utilize a managed mediation model generally adopted by the Task Force. Other circuits have adopted a more limited mediation approach in dealing with a lesser number of pending foreclosure actions. In addition, some circuits, such as the Ninth Circuit, have established volunteer mediation programs. The Task Force questioned whether volunteers could be relied upon to handle the full foreclosure caseload and therefore rejected relying upon volunteers. In addition, while waiting for the outcome of this report, many circuit judges across the state are utilizing traditional civil pre-trial mediation when requested by the parties. One of the consistent complaints from lawyers across the

state is the growing difficulty of meeting the demands of the varying programs in the circuits and keeps track of the patchwork of programs.

In order to cope with the size of the problem, the huge numbers of incoming foreclosure cases, the Task Force concluded that only managed mediation could handle the problem in a consistent manner statewide.

The subcommittee tackled the overall description of the program, and explored various associated issues, including parameters defining managed mediation, mediator availability and training, court-ordered participation, costs, disparate bargaining power (particularly in actions involving pro se borrowers), exchange of essential information, and required appearance by persons having authority to settle.

Statewide Managed Mediation

Managed mediation is essentially defined as mediations, conducted on a large scale basis across the state, which involve substantially similar issues, which can be coordinated by an outside coordinator to best assist the parties to best use their time, effort and resources to achieve resolution. In order to have managed mediation, you must have management who will contact and enroll the parties, make the necessary referrals, supervise the exchange of information, recruit and train the mediators, schedule, monitor compliance, and report and evaluate program effectiveness. While court-funded programs may not assign staff to *mediate* foreclosure matters, court personnel would not be prohibited from assuming a *coordinating* function in this regard. However, every spare staff slot in the judicial branch has been cut through rounds of budget cutbacks. There are simply no available human resources within the state courts system to perform this function. The Task Force agreed, as a whole, that if public funding of managed mediation were possible, that would be the recommendation of the Task Force. There are other jurisdictions, for example in Ohio, that are running statewide mediation through public funding. However, this is an emergency situation. Florida's courts do not have the luxury of waiting while other branches of government try to identify funding streams since the courts must allow people to have access to justice within a reasonable time frame.

The Task Force determined that a statewide model for managed mediation will open communication and facilitate problem-solving between the parties while conserving limited judicial time. Handling these matters in the context of mediation will emphasize the needs and interests of the parties, fairness, procedural

flexibility, party self-determination, full disclosure, and confidentiality. Considering potential benefits and detriments in light of time and budgetary constraints, the Task Force believed these aspects of the eventual recommendation best serve the courts' interest in easing the backlog of pending residential mortgage foreclosure cases while protecting the rights of all parties.

As a consequence, the Task Force recommends approval of a statewide program of managed mediation requiring mediation of foreclosure actions prior to these matters being set for final hearing. The Task Force believes that each circuit should be charged with handling the selection of its own mediation manager, but that the criteria should be consistent statewide in order to avoid differing requirements and achieve economies of scale for the parties. Circuits may, of course, wish to join together to create a regional managed mediation system.

The Task Force recommends specific written parameters for qualifying providers of managed mediation services. These nonprofit entities must be both independent of the judicial branch and capable of sustained operation without fiscal impact on the courts. The provider must be politically and professionally neutral and have a demonstrable ability to efficiently manage the large number of residential mortgage foreclosure actions in the circuit or circuits in which services are to be provided. Providers may include qualifying local bar associations, organizations of professional mediators, and state universities, as well as independent entities organized for the sole purpose of providing statewide managed mediation services. However, potential providers must have the capacity and technology to effectively deal with mediations on a mass scale or at least on the scale for the circuit they propose to serve. Among other administrative matters, all providers will be responsible for receiving referrals to mediation and, within designated time frames, reaching out to borrowers, impartially assigning mediators, facilitating the exchange of documents between parties, scheduling mediation conferences, and developing procedures for verifying compliance.

A key component of this program is the requirement of individual outreach by the mediation manager to inform borrowers of the program and seek to enroll them. Borrowers at this point are extremely distrustful of lenders and their representatives. Many of the borrowers we are dealing with in Florida are based in an oral culture and uncomfortable and intimidated and sometimes terrified about court procedures, fancy forms and written requirements. Many of the borrowers are extremely frustrated from failed efforts to deal with their lenders. It is essential that the mediation manager effectively communicate with borrowers from all walks of life and in multiple languages to explain that this is a court program, that

it is safe and not a scam, that it will be free to the borrower. Managers will be expected to communicate with borrowers immediately after suit has been filed, ensuring both *pro se* litigants and attorneys are fully informed regarding the mediation process and availability of mediation in foreclosure actions.

Model Administrative Order

The Task Force recommends implementation of a statewide model for managed mediation programs by administrative orders issued by the circuit court chief judges in their respective circuits. Uniformity of essential statewide standards would be ensured upon the court's approval of a model administrative order. Selection of a qualified managed mediation provider would be left up to the individual circuits based on an assessment of each circuit's needs in relation to the management capabilities and skills offered by proposed providers. Circuits can and should partner where appropriate to achieve efficiencies.

The proposed model administrative order applies to all residential mortgage foreclosure actions filed against homestead property involving loans which originated under federal truth in lending regulations, which generally include servicers and lenders. Private individual lenders, for example, a seller who took back "paper" would not be subject to the program. The logic of this distinction is this: borrowers and their attorneys are not protesting that they can't get in touch with local individual lenders. The log jam is with national institutions. Condominium foreclosures, homeowners' association foreclosures and statutory lien foreclosures are not included in the administrative order, again because communication is occurring in those cases. The administrative order issued by the respective chief judges constitutes a formal referral to mediation unless the plaintiff and borrower file a written stipulation not to participate, or unless pre-suit mediation has been conducted with the mediation manager. A borrower may opt out of the process by declining to participate upon being contacted by the mediation manager, or by not completing the pre-mediation requirements of foreclosure counseling and submission of financial documentation. Notice regarding managed mediation must accompany the summons served on each defendant. The order further provides the mediation process must be completed before plaintiffs may apply for a default judgment, a summary judgment hearing, or a final hearing in an action to foreclose on homestead property.

The Task Force has included a number of other associated issues in the model administrative order. The Task Force recommends provisions relating to mediator availability and training, disproportionate bargaining power of the parties,

the exchange of essential information between the parties, costs, required appearance by persons with authority to settle, and instances in which pre-suit mediation may be a factor.

A. Mediator Availability and Training

Under the model administrative order, only Florida Supreme Court certified circuit civil mediators specially trained in residential mortgage foreclosure matters may be assigned to mediate these cases. The current number of certified circuit civil mediators is believed adequate based on belief a successful mediation can generally be accomplished within a single session, most cases of this sort requiring no more than two hours. The Task Force developed detailed training standards and objectives for training mediators to mediate foreclosure matters. Those standards are appended to the Model Administrative Order as Exhibit 12. See Appendix J.

B. Responsibilities of the Parties

The Task Force addressed disproportionate bargaining power largely in the context of a balanced allocation of responsibilities between the plaintiff and the borrower.

Plaintiff's counsel must file a completed Form A with the clerk of court and electronically transmit the form to the program manager via a web-enabled information platform. This IT platform must be specified in the any order issued by the Florida Supreme Court, because otherwise, the experience of the First, Eleventh and Nineteenth circuits indicates that plaintiff's firms will not upload the data due to system incompatibilities. However, no mediation manager will be able to come up with a platform that can adapt to every different plaintiff's firm's platform. By analogy, this is like requiring everyone to submit a document in a Microsoft Word program. We recommend use of a common IT platform. A common platform should be identified by OSCA information technology staff and made part of the Court's order.

Form A requires plaintiff's counsel to certify the subject property is homestead property, the names of plaintiff's representatives having settlement authority, and whether plaintiff and borrower participated in pre-suit mediation with the mediation manager. Plaintiff's counsel must further certify the identity of the plaintiff's representative who will appear at the mediation.

The model order requires the borrower to meet with a certified mortgage foreclosure counselor prior to scheduling the mediation. Foreclosure counseling is a critical step in the process, because empirical evidence demonstrates that cases that have received foreclosure counseling are much less likely to re-default. See Robert G. Quercia, Spencer M. Cowan, Ana B. Morena, The Cost-Effectiveness of Community-Based Foreclosure Prevention, Family Housing Fund (December 8, 2005); Home Ownership Preservation Initiative, Three Year Final Report, Partnership Lessons & Results (July 17, 2006); U.S. Department of the Treasury, Comptroller of the Currency Administrator of National Banks, Community Developments, Foreclosure Prevention: Improving Contact with Borrowers (June 2007). Foreclosure counselors also assist the borrowers, many of whom are from an oral culture, in dealing with the financial forms and documentation requirements for consideration of a modification or deal. Servicers, attorneys, counselors and lenders agreed on the importance of foreclosure counseling for the borrower. The borrower must provide financial disclosure to the program manager for transmittal to the lender. Upon written request of the borrower, plaintiffs are required to deliver to the program manager evidence that plaintiff is the owner and holder of the mortgage, a life of loan history, a statement of the plaintiff's position on the net present value of the loan, and any current appraisal. All this occurs prior to the scheduling of mediation.

C. Responsibilities of the Program Manager

The model administrative order further enumerates responsibilities of the program manager. The manager is directed to contact borrowers to explain the residential mortgage foreclosure mediation program and must refer borrowers to a foreclosure counselor. Upon learning a borrower will not participate in foreclosure mediation, the manager must file a notice to that effect. The program manager accepts and delivers party disclosures and is responsible for uploading these on a shared electronic platform. This shared electronic platform is again a key piece. Currently, there is a huge problem of document management in the loss mitigation departments. Borrowers consistently report that they have to send their financial documentation over and over again. In the servicer presentation, servicer representatives acknowledged that because these departments were built after the eruption of the crisis, document management can be very ad hoc, and described their current system as being based on scanning of documents. A safe, encrypted secure web-based platform would get everyone on the same page and working from the same documents. The Eleventh Circuit's program with the Collins Center requires such a platform.

The manager is further required to advise any borrower not represented by an attorney that he or she has a right to counsel and may seek assistance of a volunteer *pro bono* attorney. The mediation manager assigns Florida Supreme Court certified circuit court mediators specially trained in foreclosure mediation, schedules mediation sessions, addresses foreign or sign language interpreter needs, and files notices with the clerk of court. Managers maintain written procedures subject to the chief judge's approval for appointment of mediators. It is contemplated that any certified circuit court mediator would have an opportunity to participate in the managed mediation program. The mediation manager must oversee the mediation training and compliance. The program manager is responsible, as well, for monitoring compliance and submitting periodic reports to the chief judge.

D. Costs

After substantial debate, the Task Force voted that the cost of the program should be borne by the plaintiff. The model order provides for staged payments, part at the time of filing and the balance after mediation is scheduled. Those costs would be fully recoverable in the final judgment of foreclosure. The order further provides plaintiffs shall be entitled to a refund of fees attributable to foreclosure counseling if borrowers do not participate in this aspect of the program. Similarly, plaintiffs shall be entitled to refunds if cases settle prior to mediation or if borrowers cease participation in the program before mediating the case.

In considering the payment question, the Task Force again emphasizes that this is an emergency situation. The need to establish this mediation system as a means of effective communication between the plaintiff and the borrower is to meet the critical need to resolve those cases that can be resolved early in the process. There are a number of reasons why the loss mitigation departments that plaintiff's have established nationwide are not meeting that need, including overwork, understaffing, ad hoc technology and a myriad of problems associated with building those departments after the crisis hit. However, the bottom line is that this managed mediation program is necessary because borrowers cannot effectively try to resolve their cases with the plaintiffs without it. In the meantime, those same plaintiffs squander court resources on cases that can and should be resolved, and often are resolved after judgments or sale. One commenter to the e-mail box reported that one lender won't even talk to a borrower until after the foreclosure judgment is entered. This situation is being caused by dysfunction on the plaintiffs' side.

While the Task Force was not in a position to do a cost/benefit analysis due to the proprietary character asserted in connection with plaintiffs' loss mitigation staffing and efforts, a 2005 study by Freddie Mac researchers, Crews Cutts and Green, cited an industry analysis showing the cost of a foreclosure for the lender averages $58,000. However, the current system is set up premised on borrowers calling in on an unscheduled basis, being asked to submit documents, those documents are submitted and it seems, largely hand-scanned into a data base that may include all the original loan documentation, borrowers calling in again unscheduled to find out what is going on, being told that the information cannot be located, sending the information again, it being scanned, again, and so on and so on. It is elementary economics that an organized systematic approach in which the borrower is contacted, referred to foreclosure counseling, the data is gathered in an organized fashion and forms properly executed, reviewed by the foreclosure counselor, uploaded to the data base for encrypted access by both sides, and a date and time set for discussion and decision-making about the case is substantially likely to result in overall savings to the plaintiffs despite bearing the fee, as well as an improved resolution rate and better quality outcome, which will reduce defaults. The asset moves from non-performing to performing status much earlier in the process.

In sum, this is not a traditional referral to mediation. In traditional mediation referrals for circuit civil disputes the court does not make a party go through counseling and lay out their financial history before it will even schedule a mediation. The minority feels that a split fee is essential to fairness and that the borrower needs to have a stake in the process. The majority of the Task Force determined that the threat of the loss of one's home, along with a requirement for successful completion of foreclosure counseling and the uploading of completed financial information represented a sufficient investment in the process by the borrower and that a financial payment is not required as an additional incentive to resolve the case. Even more importantly is this simple truth: most borrowers are in foreclosure because they are in dire economic straits. If this process is to serve as a meaningful case management tool in terms of getting those cases that can be settled out of the court system early, then requiring borrowers to pay runs the risk of compromising that goal by creating a barrier to participation, or delay to allow the borrower to gather the money together. Greater utilization of mediation will likely lead to increased savings for plaintiffs as more cases will be resolved in a manner less expensive than in litigation. By allowing plaintiffs to satisfy the mediation requirement by participating in the managed mediation process prior to filing, we believe there will be even greater savings to the plaintiffs by avoiding filing fees and attorneys' fees.

E. Appearance

Plaintiff must have a representative present who can bind the plaintiff to any mediated settlement agreement, and may designate plaintiff's counsel as his signatory in advance. The model order permits plaintiff's representative to appear electronically with full authority to settle without further consultation. The borrower and plaintiff's counsel must physically attend mediation. Again, the Task Force only recommends electronic appearance as a necessary evil given the emergency character of the caseload. The appearance exception is justified by the emergency nature of the statewide mortgage foreclosure crisis, the involvement of a mediation manager who is actively involved in outreach and coordination of the mediation process and the requirement that borrowers receive financial counseling prior to mediation.

The Task Force believes electronic appearance is in compliance with existing mediation rules because rule 1.720(b), Florida Rule of Civil Procedure, permits a change in the appearance requirement by order of the court. In addition, the Task Force believes the "order" language contained in rule 1.720(b) encompasses an emergency administrative order directed to a class of cases, such as an order directing residential mortgage foreclosure cases to a managed mediation program.

Implementation of the model order by the state's circuit court chief judges is sufficient to modify the appearance requirement where sometimes simultaneous hearings in thousands of foreclosure mediations nationwide make physical appearance impractical. As indicated above, this recommendation by the Task Force is made solely due to the unique character of this emergency. We roughly calculate that 100,000 cases could be eligible for managed mediation. Many of these cases involve the same ten institutions that are the leading foreclosure filers in Florida.[3] The Task Force recognizes that forcing plaintiffs, many of whom are not Florida institutions, to have a live representative with full settlement authority at each of the mediations would be completely cost prohibitive. In addition, plaintiffs presently do not have the staff to accommodate such a need. Having recognized this issue, however, the Task Force's recommendation is based upon having meaningful electronic participation. The issues of appearance by a plaintiff's representative who does not have full settlement authority, or does not

[3] The Task Force requested each of the clerks of court to list the top five foreclosure filers in their county. The compiled lists showed that the top foreclosure filers in Florida are Deutsche Bank, U.S. Bank, Wells Fargo, Chase Home Finance, SunTrust Mortgage, Bank of New York, Bank of American and Countrywide Financial Corporation, J.P.Morgan and CitiMortgage.

fully participate in the mediation by electronic means were very real concerns to the Task Force. It will be up the mediation manager, and ultimately the court, to make sure that there is compliance with the electronic appearance requirements. The Task Force does not contemplate or believe that the emergency use of an administrative order allowing electronic appearances in this situation should be used to subsequently justify wholesale electronic appearances in other cases which would be subject to traditional mediation. The Task Force would also enthusiastically urge use of visual computer conferencing, such as Skype, web cams and iChat, as an alternative to telephone appearances in foreclosure mediations.

The recommendation of electronic mediation is conditioned upon the premise that no change to the Rules of Civil Procedure governing mediation is required. The Task Force recognizes that the rules as presently set forth work effectively for virtual all types of civil mediation and the Task Force does not recommend any rule change. If the court determines that a rule change is required to allow for electronic appearance, then the Task Force respectfully requests that the court refer the matter back to the Task Force for consideration of other appearance options.

F. Pre-suit Mediation

The model order explicitly encourages pre-suit mediation. The order provides that participation in pre-suit mediation with the mediation manager in a manner consistent with the requirements of the model order can satisfy the plaintiff's requirement to participate in mediation prior to foreclosure litigation. For case management purposes, the best case is the one that is never filed. If the parties utilize pre-suit mediation though the mediation manager, they could reduce costs to parties of pursuing unnecessary litigation and minimize to additional stress on the limited resources of the courts. The Task Force absolutely encourages the lenders to pursue pre-suit mediation in order to avoid expensive filing fees and attorneys' fees. While nothing precludes a presiding judge from again sending a case to mediation after suit is filed if it is litigated, the mediation requirement of the model order would be satisfied by pre-suit participation in mediation with the mediation manager.

G. Information Technology Platform

An information technology platform is proposed to facilitate electronic exchange of plaintiff and borrower information for purposes of participation in mediation. The information platform component is a key component of this process because it is aimed at facilitating secure and efficient access to the information necessary to the mediation in advance of the mediation to assure that the parties fully understand their options. The Task Force cannot emphasize strongly enough how endemic the problem of lost and missing documentation is within the loss mitigation departments, and how frustrating it is to borrowers. More importantly, that chaotic process results in squandered court time and unnecessarily delayed cases. The purpose of the IT Platform is to make sure that everyone is speaking the same language and has the same information. These platforms are in place in the Eleventh Circuit. In addition, Neighborworks America, the national housing non-profit established by Congress, has a platform. This technology is available and out there and can be used.

The Task Force consulted with the Florida Courts Technology Commission through its chair, Eleventh Judicial Circuit Judge Judith Kreeger, and was advised that the platform, as an information system operating outside the state courts system for use by private entities, would not require approval by the commission.

Information that will be exchanged on the platform will include the borrower's financial disclosure information to the plaintiff's representative, and the plaintiff's certifications regarding the property that is the subject of the lawsuit, the identity of the plaintiff representative who will attend mediation with full authority to settle, and the persons who will represent the plaintiff in mediation with full authority to modify the existing loan and to settle the mortgage foreclosure case, as well as the documents and information to be provided by the plaintiff upon request by the borrower prior to mediation.

H. Forms Accompanying Model Administrative Order

1. Form A
    a. Certificate of Plaintiff's Counsel Regarding Status of Residential Property
    b. Certificate of Plaintiff's Counsel Regarding Pre-Suit Mediation
    c. Certificate of Plaintiff's Counsel Regarding Plaintiff's Representative at Mediation

2. Notice of Residential Mortgage Foreclosure Mediation Program to be Served with Summons
3. Borrower's Request to Participate in Residential Mortgage Foreclosure Mediation Program
4. Notice of Borrower's Nonparticipation
5. Borrower's Financial Disclosure for Mediation
6. Borrower's Request for Plaintiff's Disclosure for Mediation
7. Plaintiff's Notice of Attending Mediation by Telephone
8. Plaintiff's Certification Regarding Attending Mediation by Telephone
9. Mediation Report
10. Certification Regarding Settlement Authority (Residence Not Borrower-Occupied)
11. Orders for Referrals, Compliance, and Enforcement
12. Mediation Training Standards
13. Managed Mediation Flow Chart

CASE MANAGEMENT CONSIDERATIONS

The Task Force has determined that for case management applications, foreclosure cases fall into roughly three broad categories in terms of initial triage of the cases:

Borrower-occupied properties: these are the properties where public policy in the form of U.S. Treasury Department and servicer efforts have been most keenly focused and where most financial incentive exists to settle a foreclosure case. All three circuits which have implemented managed mediation programs have focused on borrower-occupied properties. Frequently in these cases, borrowers appear in court reporting that they have repeatedly attempted to contact the plaintiff to work out their case without success due to inability to talk to a person, repeatedly lost documents, or inability to get a decision. These are the cases that are most likely to resolve. Identifying these cases at the onset of filing is challenging. It should not be, given the TARP imperatives that servicers contact their borrowers in default to see if their loans should be modified, however, most plaintiff firms assert that they do not know at time of filing whether the property is borrower-occupied. For that reason, we have focused on properties in which a homestead exemption is in place as being an objective criterion.

Vacant properties a/k/a "walk-aways": There are some properties no one lives in. These represent the other end of the spectrum. The borrower may have chosen to leave the property, or never lived there in the first place, or the property

is unoccupied investment property. These properties should move quickly through the foreclosure process because there are few due process impediments after service is properly achieved due to lack of interest in keeping the property. Moving these cases quickly also recognizes the issues of crime, property value, and community stabilization. For these cases, the Task Force is recommending the use of sections 702.065 and 702.10, Florida Statutes, which provide for expedited treatment of these cases. These statutes are under-utilized and are available in residential foreclosure actions. In addition, depending on the character of each circuit, chief judges may wish to designate a foreclosure division or foreclosure judge to handle those cases which are uncontested and in which the property is vacant.

The third category of cases represents the cases that are neither of the first two categories. These cases may be either tenant-occupied or occupied by other members of the family but not the borrower, or have unspecified occupants. In these cases, the borrower may wish to resolve the case, even by a short sale or deed in lieu of foreclosure, but is unable to effectively communicate with the plaintiff to explore those options. The Task Force recommends that these properties be given the choice to opt into managed mediation at equal cost to the parties. In addition, chief judges should explore in each circuit the necessary structural improvements in calendar management to allow cases to move as smoothly as possible. One possibility is the use of open calendars versus closed calendars, described in the circuit by circuit analyses included in Appendix H to this report. It is important for judges to recognize that foreclosure cases represent a significant proportion of their dockets as opposed to the minimal work they once represented.

Once the cases have been segregated pursuant to the characteristics listed above, they can be further separated according to the litigation quality of the case. A defense lawyer suggested further stratification according to cases where there are financial issues, cases which have substantive legal issues, and cases which are "clean," in which there are no apparent legal issues or financial issues. One of the challenges of managing the volume of foreclosure cases is this: the reality of the numbers of cases being filed leaves no time for judges to manage that case load. There are no additional staff or administrative resources available to manage these cases. Those circuits that are actively managing their foreclosure dockets are doing so by reallocating existing resources. In most circuits, the cases are left to the management of the plaintiffs as opposed to the judges. This can be challenging. One law firm is currently handling 50,000 foreclosure cases. One resulting problem is that many of the plaintiff's firms have so many cases that they are not effectively moving the cases forward either. For example, there are delays

in summary judgment motions because plaintiffs have failed to set or resolve outstanding motions to dismiss filed by defendants, or because there is outstanding discovery past due to which plaintiffs have never responded, resulting in squandered hearing time, or because original documents have not arrived to the court yet.

In a perfect world, cases which have financial issues (issues in connection with the evidence of amounts due and owing or the financial character of the alleged default) and cases in which there are substantive issues of law would be identified early by the judge and set for case management conferences to make sure the cases are moving forward appropriately. One case management system that allows this manner of management without utilizing too many judicial resources is in use in the Fifteenth Judicial Circuit under the circuit's administrative order, Case Management Status Conferences in Homestead Foreclosure Actions by Institutional Lenders, which directs that cases filed on certain days will automatically appear for a case management conference on a future date certain. The circuit's case management order is included in the Appendix to this report.

PROPOSALS FOR RULE AND FORM CHANGES

The Task Force by separately filed petition has proposed emergency changes to the Rules of Civil Procedure, in accordance with its charge under In re: Task Force on Residential Mortgage Foreclosure Cases, No. AOOSC09-8 (March 27, 2009) to propose rules or rule changes that will facilitate early, equitable resolution of residential mortgage foreclosure cases. The Task Force solicited comments on its proposals for rule changes from The Florida Bar Rules of Civil Procedure Committee, which promptly responded to the request for review and comment. The Committee's vote on the proposed changes, and comments and recommendations are appended to this report as Appendix K-22.

The Task Force has submitted one rule change, a proposed amendment to the civil cover sheet, and two new forms to the Supreme Court for approval. The proposed rule change requires verification of mortgage foreclosure complaints. The proposed forms add specificity to Form 1.997, the Civil Cover Sheet, standardize affidavits of diligent search and clarify the grounds for moving to cancel and reschedule a foreclosure sale. The Task Force's proposal for adding specificity to the Civil Cover Sheet was submitted to the Supreme Court Task Force on Management of Cases Involving Complex Litigation, through its chair, former Second Judicial Circuit Judge Thomas H. Bateman. The Task Force on

Management of Cases Involving Complex Litigation had proposed changes to the Civil Cover Sheet, which the Court approved in its opinion, In Re: Amendments to the Florida Rules of Civil Procedure – Management of Cases Involving Complex Litigation, Case No. SC08-1141 (May 28, 2009). The amended Civil Cover Sheet will be effective January 10, 2010. The additional changes to the Civil Cover Sheet proposed by the Task Force on Residential Mortgage Foreclosure Cases will be noted without objection in a response filed by the Task Force on Management of Cases Involving Complex Litigation to comments filed in Case No. SC08-1141.

These rule and form proposals have been narrowly tailored because the work of the Task Force has been directed at the current court emergency caused by the flood of mortgage foreclosure cases in Florida's courts. The Task Force is also recommending a number of forms as "best practice" standard forms that chief judges throughout the state will be asked to consider using, and that are directed at the underlying emergency. See Appendix K-61. As such, these forms are not suitable for inclusion in the Rules of Civil Procedure, which should be used on a long-term basis and stand the test of time, as opposed to being directed at what we hope is a short-term emergency.

Following is a summary of the proposals for changes and additions to the Rules of Civil Procedure submitted to the Court by separate rule petition, as well as an explanation of the reason for the proposal.

Amendment to Rule 1.110. General Rules of Pleading

This rule change requiring verification of a mortgage foreclosure complaint is recommended because of the new economic reality dealing with mortgage foreclosure cases in an era of securitization. Frequently, the note has been transferred on multiple occasions prior to default and filing of the foreclosure. Plaintiff's status as owner and holder of the note at the time of filing has become a significant issue in these cases, particularly because many firms file lost note counts as a standard alternative pleading in the complaint. There have been situations where two different plaintiffs have filed suit on the same note at the same time. Requiring the plaintiff to verify its ownership of the note at time of filing provides incentive to review and ensures that the filing is accurate, ensures that investigation has been made and that the plaintiff is the owner and holder of the note. This requirement will reduce confusion and give the trial judges the authority to sanction those who file without assuring themselves of their authority to do so. The proposed rule was adapted from Florida Probate Rule 5.020.

Form 1.997. Civil Cover Sheet

The purpose of this proposal is to allow the Court to case manage foreclosure cases. Residential cases will be case-managed differently than commercial cases. Those residential cases that are homestead will be managed differently than non-homestead properties. Requiring these designations on the Civil Cover Sheet permits categorization of the cases as early as possible. The Task Force elected to use homestead status as it is an objective analysis of whether the property currently has a homestead exemption with the property tax appraiser, a matter easily determined without requiring locating the borrower.

Affidavit of Diligent Search Form

The Task Force proposes adoption of the Affidavit of Diligent Search as a new form. Many foreclosure cases are served by publication, and currently, affidavits of diligent search are formatted many different ways and include different information. This form was adapted from the Forms 12.913(b) and (c), Florida Family Law Forms. These are categories of criteria that are available to locate a defendant, and only those utilized would be checked. The entire affidavit will be reviewed for diligence upon application for default. The most significant addition is the additional criteria that if the process server serves an occupant in the property, he inquires of that occupant whether he knows the location of the borrower-defendant. Currently, that is not occurring. The logic is that those occupants are probably paying rent to a defendant-owner someplace. The goal is to locate defendants and make sure they are on notice as efficiently as possible.

Motion to Cancel and Reschedule Foreclosure Sale

The Task Force proposes a new standard Motion to Cancel and Reschedule Foreclosure Sale. Currently, many foreclosure sales set by the final judgment and handled by the clerks of court are the subject of vague last-minute motions to reset sales without giving any specific information as to why the sale is being reset. It is important to know why sales are being reset so as to determine when they can properly be reset, or whether the sales process is being abused. Therefore, this form requires that the movant advise the court specifically as to why the foreclosure sale is being sought to reset. Again, this is designed at promoting effective case management and keeping properties out of extended limbo between final judgment and sale.

BEST PRACTICES FORMS

In addition, the Task Force has included a set of "best practices" forms and orders in Appendix K. As previously stated, these are forms aimed at moving

cases forward. Some would have to be tailored to the practices in each individual circuit, for example, the order directed at non-service under rule 1.080, Florida Rules of Civil Procedure, or the orders directed at dismissing settled cases or removing them from the pending docket. Others depend on how the circuit or the individual judge wishes to approach cases, for example, the case management orders. Other forms are directed at solving specific problems; for example, the sample notice of hearing form contains a warning in Spanish and Haitian Creole that the Court does not provide interpreters at these hearings and that if you do not speak English, you should bring someone over the age of 18 to translate for you. This form is directed at a problem that applies in counties with non-English speaking populations. All forms are simply presented for consideration by the Florida Supreme Court and the judges of this state for their potential usefulness.

PROBLEMS AND RECOMMENDATIONS SUMMARY

PROBLEM	**RECOMMENDATION**
Currently across the state, circuits have developed widely varying responses to the foreclosure crisis and resulting case load, in terms of forms and requirements for handling foreclosure proceedings. Given that many plaintiffs have cases all over the state, and that the vast majority of foreclosure cases are prosecuted by a very small number of flat fee firms, these variations increase expense and delay. Courts should utilize sound established case management principles to deal with foreclosure cases.	Uniformity of forms and procedures statewide should be a goal in terms of affordability and efficiency, in light of the number of parties and limited number of firms who are litigating in the various circuits across the state. Further, fundamental case management principles dictate that management of a crowded dockets entails getting those cases that will settle to settle early, and get them out of the court system before substantial resources are consumer; and further dictates that those cases which will be uncontested be moved quickly through the system before substantial delay occurs.
There are many well-intentioned efforts going on across the state to address foreclosures. They are completely uncoordinated, and incur resulting inefficiencies	A central statewide foreclosure website should be cooperatively established by the Executive and Judicial branch to give all Floridians education and access to basic information which is currently strewn

particularly in terms of publicity and knowledge-sharing. It is impossible for any individual to get full information about the foreclosure process in his community without consulting multiple websites and sources.	haphazardly across the Internet: links on finding certified foreclosure counselors, contacting lenders, accessing online court dockets, basic foreclosure information, reporting illegal foreclosure activity, locating low-cost or free legal services, mediation programs in each circuit, foreclosure events in their community, links to foreclosure forms, links to loss mitigation contact information, accessing information about foreclosure sales, links to websites describing government foreclosure prevention programs and links to property sales information.
Florida borrowers and foreclosure defendants are being victimized by foreclosure rescue scams and attorneys who take their money and do nothing to defend the case.	Widespread consumer education should be provided by the executive branch on avoiding foreclosure scams and providing clear information about where to report mortgage fraud, foreclosure scams, and other illegal foreclosure activity. The Florida Bar should aggressively prosecute attorney misconduct in foreclosure defense scams and mortgage fraud cases.
As a result of the modern economic reality of multiple transactions of the note and mortgage from the original lender, most lenders no longer maintain the loan documentation at their home facility. The paper is stored centrally and the transactions noted electronically. As a result, foreclosure actions are filed without the original note being provided to counsel. For that reason, lost note counts are filed in virtually every case, resulting in substantial confusion on the part of the	Plaintiffs must, at the time of filing, ascertain whether they are the owner and holder of the note which is the subject of the foreclosure action and whether it is in their possession, and verify the same to the Court at the time of filing, for purposes of clearly establishing standing at the time of filing.

defendants as to who the plaintiff is, what their relationship is to the loan, and whether they actually own the note at the time of filing, resulting in delays in cases.	
Borrowers who appear at foreclosure hearings overwhelming describe multiple attempts to contact plaintiffs for loss mitigation review without response, with request to send and resend their financial documentation over and over again, and without receiving decisions. This process can drag on for months. Plaintiffs describe having to ramp up loss mitigation departments as this crisis exploded and generally concede that those departments are not fully staffed. Under current procedures, the outreach by loss mitigation departments is not very successful at reaching out to borrowers and getting them to participate. Equally, borrowers contact these loss mitigation departments through random telephone calls which require the loss mitigation representative to attempt to locate and analyze the defendant's information in a chaotic and haphazard fashion.	Mandatory managed mediation in homestead cases should be required statewide prior to final hearing, on an opt out basis; with the initial cost to be borne by Plaintiffs subject to recovery in full in the final judgment. While the Task Force was unable to conduct a cost/benefit analysis due to the proprietary nature of loss mitigation cost information, it would seem that providing a structure in which the borrower's loss mitigation package is assembled with the assistance of an expert foreclosure counselor, delivered to the Plaintiff in advance of the mediation day, and then a mediation occurs with the participation of the loss mitigation representative and counsel at a specific date and time instead of the random process of the current phone efforts would achieve a higher success rate and significantly improved loss mitigation resource utilization for Plaintiffs, as well as the opportunity to take a non-performing asset and move it to performing much earlier in the process. It would also create a structure for those institutions participating in TARP/HAMP to assure compliance with the loss mitigation efforts of those programs.
The managed mediation fee is designed to underwrite specific tasks for which the Court system has no current resources.	Payment of managed mediation fees should be tied to event benchmarks in order to keep the process as affordable as possible. The process may be broken into

	three components: 1) the initial case intake, personal outreach to borrower and enrollment into foreclosure counseling 2) the completion of foreclosure counseling, upload of financial documentation and access by Plaintiff and 3) mediation. While the Task Force's initial recommendation is that the Plaintiff front the initial fee for the managed mediation program, we note that a number of other jurisdictions have mediation programs underwritten by governmental funding sources, such as the state of Ohio. NJ? Florida should explore those options, with the ultimate goal that this program could operate without expense to either party.
Borrowers suffer from a significant imbalance of power when negotiating with their note-holders. Many do not understand the information, can be confronted with take it or leave it deals, and can have unrealistic expectations of the loss mitigation process and/or available government programs. Further, many borrowers, particularly in the subprime market, are not confident in dealing with the significant document-based requirements of the loss mitigation process.	All borrowers in managed mediation must receive certified foreclosure financial counseling and provide their financial documentation prior to the scheduling of any mediation. The foreclosure counselor provided education as to sound financial decision-making, what realistic options may exist, and assists the borrowers in assembling their financial documentation for loss mitigation analysis. Research demonstrates that borrowers who have been through foreclosure counseling are much less likely to re-default.
Currently, loss mitigation departments are challenged with hundreds of thousands of documents being submitted daily nation-wide. Since this crisis sprang fully-formed, document management systems have been	A common information technology platform should be specified statewide for use in all managed mediation programs which is safe and secure; which will allow all authorized parties to exchange and access the financial documentation necessary to resolve foreclosure cases.

built "on the fly" if at all. As a result, when a loss mitigation specialist needs a borrower's documents they are frequently lost or unavailable, and delay and frustration increases as the borrower is asked to resubmit.	
Loss mitigation is not coordinated with the filing and progression of a foreclosure case, resulting in misinformation, scheduling and rescheduling consuming scarce hearing time, and post-judgment motions to vacate or "undo" the entire foreclosure after the sale of the property has already occurred and after full consumption of judicial resources.	Pre-filing foreclosure mediation should be encouraged. Plaintiffs should be provided with an "escape hatch." If they mediated in compliance with standards of fairness prior to the filing, they need not mediate again. The Task Force determined that the best way to assure fairness and compliance with the standards established in the managed mediation program is to require the mediation manager to make its program available to Plaintiffs both before and after filing. If Plaintiff participated in the managed mediation program pre-filing which resulted in an impasse or non-participation by the borrower, Plaintiff can proceed with their case without further referral to mediation.
Most borrowers are unrepresented, and the vast majority of foreclosure cases proceed to final summary judgment after default or without any paper or defense being asserted by the borrower.	To the extent possible, lawyers and bar associations should target pro bono efforts at dealing with the borrowers in these cases, the vast majority of whom are unrepresented, including providing training to attorneys in foreclosure matters.
Foreclosure cases are exceeding the available judicial infrastructure across the state. While state court judges are working hard, adding calendars, and utilizing technology to move cases, ultimately there is	Hearings should be provided within a reasonable time of request, to the extent possible given limited judicial infrastructure and the lack of additional resources. In recognition of resource limitations, parties should engage in

more case traffic than the court system can bear.	quality control, and follow rules of professionalism and ethics to assure that those resources are not squandered. Obviously, there are potential solutions of adding new judges or additional senior judge days to hear these cases, however, in light of Florida's current state budget crisis, such solutions seem an unlikely option.
Cases with "walkaways", vacant or abandoned property can get stuck in the traffic of all the foreclosure cases and delay can occur.	Plaintiffs should be encouraged to utilize sections 702.065 and 702.10, Florida Statutes, to seek expedited resolution where appropriate, particularly in the case of vacant or abandoned property, and case management should afford prompt expedited hearings when called for by these statutes to avoid the issues of crime, declining property values, community destabilization, and simple danger that vacant properties can cause.
In Florida, many properties are part of condominium or homeowner associations. In some areas, dues and fees are not being paid while a property is in foreclosure, resulting in substantial financial adversity to these associations and the paying members of the association remaining in the community.	Where possible, recognition should be given by presiding judges to the impact of delays in foreclosure cases on co-defendant condominium and homeowner associations, and delays in the cases should be limited so as to avoid prolonged non-payment of association fees and resulting burdens on other association members.
Over time, language has been added to final judgments of foreclosure tailored to the needs of individual firms rather than the law or the case; for example, directions to the clerk on how to make out a check, assignment of bid language, etc.	Final Judgment Language should be limited to actual issues pleaded and proved to the Court.

Significant numbers of sales cancellations at the last minute are resulting in delays of sales, and squandered resources; and further are requiring additional resources to reset the cancelled sale.	Parties should not be able to unilaterally cancel foreclosure sales set in final judgments without explanation, so as to assure reasonably prompt sales dates and avoid sales delays and wasted resources due to last minute cancellations.
Foreclosure cases today can be quite complicated and require understanding of the underlying transactions and burdens of proof, even where undefended.	Judges should receive judicial education about foreclosure cases.