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FEATURE

**LET'S TALK: HOW
MEDIATION PROGRAMS
PROVIDE ACCESS TO JUSTICE
FOR HOMEOWNERS GOING
THROUGH FORECLOSURE**

by MELINA ROZZISI

The courts of this country should not be the places where the resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.

- Justice Sandra Day O'Connor

One December morning in 2008, Zabrina Worthy started what seemed a typical day. She took her kids to school and headed to work driving her school bus route.¹ But when Worthy came home, her house was no longer hers—the windows were boarded up and the locks had been changed.²

The bank had sent Worthy only one notice of late payment, and she never received a court order for foreclosure or eviction.³ While the bank gave notice that a foreclosure was pending, it never reached Worthy's hands; rather than sending it to Worthy herself, the bank had sent it to her sister's boyfriend, who lived in a different suburb of Chicago.⁴

When the bank seized Worthy's family home, she could not access any of her belongings inside. "I completely lost everything I had," she said, devastated.⁵



A NATIONAL INVESTIGATION AND SETTLEMENT

Worthy is one of hundreds of thousands of individuals in the U.S. who fell victim to unfair mortgage foreclosure practices from 2008 to 2011.⁶ Jackie Lustig, President of the Center for Conflict Resolution in Chicago, Illinois, explains that "these are families who are now homeless and without a lot of resources. They are people with children in school and jobs to maintain."⁷ Like

Worthy, individuals and families facing the loss of their homes are bewildered by what is happening to them, and experience an overwhelming struggle to find a solution to their crisis.

A growing concern about the high number of foreclosures prompted a joint state and federal investigation of the nation's five largest mortgage servicers.⁸ Conducted by the federal government and 49 state attorneys general, the investigation uncovered the mortgage servicers' many "questionable mortgage loan servicing and foreclosure practices,"⁹ including, most notably, the unlawful practice known as "robo-signing." Robo-signing consists of "signing mortgage documents without verifying their accuracy," as well as signing them outside the presence of a public notary.¹⁰

Prompted by the results of this investigation, the 49 state attorneys general¹¹ and the mortgage servicers reached a massive \$25 billion settlement known as the National Mortgage Settlement.¹² The settlement is divided into two main disbursements with most of the money – \$20 billion – reaching homeowners indirectly through reform procedures, such as reductions on their mortgage principals as well as various options to refinance their mortgages.¹³

The states and federal government will receive the remaining \$5 billion in cash.¹⁴ Of that, \$1.5 billion will establish the Borrower Payment Fund from which each state can draw money to provide cash payments directly to homeowners who lost their homes between 2008 and 2011.¹⁵

The U.S. Department of Housing and Urban Development expects that about 750,000 former homeowners nationwide will seek relief through the program.¹⁶ The attorney general in each state will then determine how to use the remaining undispersed amounts in a way that will "repay public funds lost as a result of servicer misconduct, fund housing counselors, legal aid, and other similar purposes" ¹⁷

CREATING FORECLOSURE MEDIATION PROGRAMS IN ILLINOIS

Illinois will receive \$105,806,405 from the settlement, one of the highest payouts in the nation.¹⁸ In late December 2012, Illinois Attorney General Lisa Madigan had already dedicated \$20 million to various legal assistance programs that assist renters and homeowners. Additionally, she announced that

Illinois will commit \$3 million to establishing foreclosure mediation programs in counties that do not yet have one.¹⁹

Madigan's use of the money to create foreclosure mediation programs is not novel. The concept of mortgage foreclosure mediation programs arose when the housing crisis began to flood the courts in 2008.²⁰ Such programs offer free housing counseling, legal assistance, and mediation services to homeowners going through foreclosure, giving them an opportunity to resolve their mortgage issues in a "fair and effective manner."²¹ In Illinois, Cook, Will, Peoria, Madison/Bond, and McLean counties currently have mortgage foreclosure mediation programs that work with the courts to provide services to individuals and families going through foreclosure.²²

A PROMISING OPPORTUNITY FOR HOMEOWNERS

Steven B. Bashaw, a member of Illinois State Bar Association's Real Estate Law Section Council who currently defends homeowners in *pro bono* foreclosure cases, explains that, "most people who go through foreclosure can't afford a lawyer and don't understand the system. They come into the courtroom, they're embarrassed and don't know what's happening to them."²³

Mediation is an opportunity to remain outside of the intimidating adversarial system. It creates a forum where the parties involved in a dispute can work with a neutral party – a mediator – to create a solution for their conflict.²⁴ "The mediator is neutral; she is not the judge," explains Carlyon Amadon, Executive Director and the Center for Conflict Resolution in Chicago. "The mediator asks the right questions only to the extent that it facilitates the discussion. She asks what the solution should be and reality tests it for both sides."²⁵

The mediation process presents a promising alternative to the adversarial court process in which a judge must elicit an order that results in one party winning and the other party losing; an imbalance that often results in eviction for the homeowner.²⁶ Jack Block, a retired lawyer from the Legal Assistance Foundation and current Professor of Mediation Advocacy at Loyola University Chicago School of Law expands on the advantages of mediation, stating "a mediation session can benefit both sides by giving the parties an opportunity

to come up with constructive, forward-looking solutions, as opposed to litigation that looks backwards, trying to determine who is right and who is wrong.”

Amadon touches on the idea as well. “The really cool thing about mediation is the opportunity for a ‘win-win’ because first, both sides get to articulate what they want - and the mediator is trained to help them articulate that,” Amadon says.²⁷ She continues to explain that, “what the parties want might not be something a judge could provide in a court of law.”²⁸ As such, solutions reached through mediation can allow a homeowner to preserve her home while still pacifying the mortgage lender.

IMPROVING ACCESS TO JUSTICE THROUGH MEDIATION

By nature, mediation is not a social service program.²⁹ However, the opportunity to engage in mediation in order to solve a dispute is a significant benefit to low-income individuals who cannot otherwise afford attorneys.³⁰ Through mediation, homeowners maintain autonomy in a process that frequently disregards them. “At the end of the day, part of access to justice is that people feel like they have been heard; they want to tell their story,” Amadon says.³¹ “Mediation provides an opportunity to do that.”³²

Mediation corrects any imbalance that may exist between the parties.³³ For example, it might be the homeowner’s first chance to talk face-to-face with a representative of mortgage-holder. In that situation, Amadon identifies how mediation “lets the homeowner more so know what is going on, causing them to have less fear.”³⁴ She continues, “after, when the parties have sat down with a mediator and they have talked through things, the homeowner understands things more.”³⁵

That experience alone often improves the foreclosure experience for homeowners because, as Lustig emphasizes, homeowners are already in a stressful situation, “so just being able to talk to someone and tell them their side of the story has a significant impact on them.”³⁶

Additionally, mediation services improve access to justice by alleviating a huge burden on the courts.³⁷ Illinois Supreme Court Justice Mary Jane Theis acknowledges how mediation services serve as “a diversion program, in a sense,

of cases to settlement so that not all 78,000 cases are going to be ending up in our courts.”³⁸

Judge Katherine McGury of the Circuit Court of Cook County agrees. “I think mediation is a better, faster, quicker way to do things. And even if the case doesn’t settle, it sorts things out and moves it to trial quicker.”³⁹ She explained how mediation can narrow down the issues so, if cases do end up back in court, “it has advanced a few steps; [the parties] don’t have to go back to square one because they’ve been moved from square one, so it saves them time and the court time.”⁴⁰

COOK COUNTY’S MORTGAGE FORECLOSURE MEDIATION PROGRAM

Cook County has seen success with its Mortgage Foreclosure Mediation Program, which was the first of its kind in Illinois.⁴¹ Managed by the Chicago Bar Foundation, the program is a collaboration between the Circuit Court of Cook County and various legal service providers in the community.⁴² By 2012, the program had mediated 2,754 cases with a 47% success rate; the program helped 1,304 people reach some sort of agreement with the bank and one out of every three borrowers left with a modification to their loan that would save their home.⁴³

The Center for Conflict Resolution (“CCR”) provides the mediation services for Cook County’s program.⁴⁴ Founded in 1979, the CCR recognizes that litigation might not be an option or may not actually resolve problems for low-income individuals.⁴⁵ As such, the CCR provides mediation services for landlord/tenant disputes and other various small claims, and has a specialized mediation program that provides services for the Cook County Mortgage Foreclosure Mediation Program.⁴⁶

Since the inception of the mediation program in July 2010, the CCR has mediated over 4,000 mortgage foreclosure cases.⁴⁷ The program is undoubtedly a success, as those that have used the services report a 90-95% satisfaction rate.⁴⁸ While these figures do not indicate that 90-95% of homeowners stay in their home, the clients who go through mediation are satisfied with their experience, even if they are unable to keep their home. “In other words,” says Amadon, “they are really happy to have been heard.”⁴⁹

AN OPPORTUNITY FOR LAW STUDENTS TO CONTRIBUTE

In the fall of 2013, students at the Loyola University Chicago School of Law will have an opportunity to contribute to mediation programs that improve access to justice for individuals involved in many different types of legal disputes, including mortgage foreclosure. Loyola will join several other schools in the Chicago area in offering a semester-long course where students can become certified mediators.⁵⁰

The course, Mediation Certification and Courthouse Practicum taught by Professors Jack Block and Ceylan Eatherton, will train students in mediation, working to get them certified by the Center for Conflict Resolution.⁵¹ After reaching the level of certification, students will mediate disputes at the Cook County Circuit Court. Ultimately, students can take another training course at the CCR so that they can mediate foreclosure cases. The availability of student mediators will help alleviate the large caseload stemming from an increase in demand for mediation.⁵²

In general, the positive impacts that foreclosure mediation programs can have on a homeowner's experience during the devastating foreclosure process are clear. Therefore, Loyola's course offering and Attorney General Madigan's dedication of the National Settlement funds to creating more of these kinds of programs in Illinois are promising steps towards increasing access to the justice system.

NOTES

1 Christopher David Gray & Michael Boyd, *Not a Wonderful Life: The Effects of Aggressive Foreclosure*, GAPERS-BLOCK, April 4, 2011, <http://gapersblock.com/mechanics/2011/04/04/not-a-wonderful-life-the-effects-of-aggressive-foreclosure/>.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *National Mortgage Settlement Summary*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/banking/national-mortgage-settlement-summary.aspx> (last visited Mar. 26, 2013) [hereinafter *National Mortgage Settlement Summary*]; Les Christie, *What the foreclosure settlement means for you*, CNN MONEY, Feb. 9, 2012, http://money.cnn.com/2012/02/09/real_estate/mortgage_settlement/index.htm.

7 Telephone Interview with Jackie Lustig, President, Board of Directors at the Center for Conflict Resolution in Chicago (Mar. 17, 2013).

8 Ally Financial, Bank of America, Citigroup, JPMorgan Chase and Wells Fargo. *About the Settlement*, NAT'L MORTG. SETTLEMENT, <http://www.nationalmortgagesettlement.com/about> site (last visited Mar. 26, 2013). See also *National Mortgage Settlement Summary*, *supra* note 6; Christie, *supra* note 6; The Associated Press, *\$25B Mortgage Settlement with Banks is Official*, USA TODAY MONEY, March 12, 2012, <http://usatoday30.usatoday.com/money/economy/housing/story/2012-03-12/mortgage-settlement/53502706/1> [hereinafter *\$25B Mortgage Settlement with Banks is Official*].

9 *National Mortgage Settlement Summary*, *supra* note 6.

10 *National Mortgage Settlement Summary*, *supra* note 6; *About the Settlement*, *supra* note 8.

11 Oklahoma did not participate in the settlement; therefore its residents are not eligible for this particular relief. *About the Settlement*, *supra* note 8; *\$25B Mortgage Settlement with Banks is Official*, *supra* note 8. However, the Oklahoma Attorney General reached an independent settlement agreement with the five service providers from which its residents will benefit. *Oklahoma Mortgage Settlement Fact Sheet*, OKLA. OFFICE OF THE ATTORNEY GEN., <http://www.oag.state.ok.us/oagweb.nsf/mortgageinfo.html> (last visited Mar. 28, 2013).

12 *About the Settlement*, *supra* note 8; Christie, *supra* note 6.

13 Christie, *supra* note 6; *\$25B Mortgage Settlement with Banks is Official*, *supra* note 8; *Fact Sheet: Mortgage Servicing Settlement*, U.S DEP'T OF HOUS. AND URBAN DEV., <http://portal.hud.gov/hudportal/HUD?src=/mortgageservicingsettlement/fact-sheet> (last visited Mar. 26, 2013) [hereinafter *Fact Sheet*].

14 *Fact Sheet*, *supra* note 13; *\$25B Mortgage Settlement with Banks is Official*, *supra* note 8.

15 *Fact Sheet*, *supra* note 13; *Joint State-Federal Mortgage Servicing Settlement FAQ*, NAT'L MORTG. SETTLEMENT, <http://www.nationalmortgagesettlement.com/faq> (last visited Mar. 26, 2013) [hereinafter *Joint State-Federal Mortgage Servicing Settlement FAQ*]; *National Mortgage Settlement Summary*, *supra* note 6. To be eligible, borrowers must have lost their home between January 1, 2008 and December 31, 2011, had their loan serviced by one of the five providers that were parties to the settlement, and live in a state that signed the settlement. *Joint State-Federal Mortgage Servicing Settlement FAQ*.

16 Christie, *supra* note 8.

17 *Fact Sheet*, *supra* note 13. See *National Mortgage Settlement Summary*, *supra* note 6 for drafts of how each state plans to allocate the money. A large number of homeowners struggling with foreclosure issues will not directly benefit from this settlement because Fannie Mae and Freddie Mac, which control a great deal of the nation's mortgage loans, are not eligible for the settlement. *Joint State-Federal Mortgage Servicing Settlement FAQ*, *supra* note 14; *\$25B Mortgage Settlement with Banks is Official*, *supra* note 8. Consequently, how the state chooses to spend the remaining funds is a key concern for this group of homeowners.

18 *National Mortgage Settlement Summary*, *supra* note 6.

19 Mary Ellen Podmolik, *Illinois AG Awarding \$70M From National Mortgage Settlement*, CHI. TRIB., December 21, 2012, http://articles.chicagotribune.com/2012-12-21/business/chi-illinois-ag-awarding-70m-from-national-mortgage-settlement-20121221_1_illinois-ag-largest-mortgage-servicers-national-mortgage-settlement.

20 Maria Kantzavelos, *Housing Crisis Intervention: Foreclosure Mediation in Illinois*, 100 ILL. BAR J. 296, June 2012, available at <http://www.isba.org/ibj/2012/06/housingcrisisinterventionforeclosur>.

21 *Mortgage Foreclosure Mediation Program*, THE CHI. BAR FOUND., <http://www.chicagobarfoundation.org/courts/mortgage-foreclosure> (last visited Mar. 28, 2013) [hereinafter *Mortgage Foreclosure Mediation Program*].

- 22 Kantzavelos, *supra* note 20.
- 23 Kantzavelos, *supra* note 20.
- 24 *About Mediation*, THE CTR. FOR CONFLICT RESOLUTION IN CHI., <http://www.ccrchicago.org/about-mediation.html> (last visited Mar. 28, 2013).
- 25 Telephone Interview with Carolyn Amadon, Executive Director at the Center for Conflict Resolution in Chicago (Mar. 22, 2013).
- 26 Interview with Jack Block, Professor of Mediation Advocacy at Loyola University Chicago School of Law (Mar. 17, 2013); *About Mediation*, *supra* note 24.
- 27 Telephone Interview with Carolyn Amadon, *supra* note 25.
- 28 *Id.*
- 29 Telephone Interview with Jackie Lustig, *supra* note 75.
- 30 Interview with Jack Block, *supra* note 26.
- 31 Telephone Interview with Carolyn Amadon, *supra* note 25.
- 32 *Id.*
- 33 Telephone Interview with Jackie Lustig, *supra* note 7.
- 34 Telephone Interview with Carolyn Amadon, *supra* note 25.
- 35 *Id.*
- 36 Telephone Interview with Jackie Lustig, *supra* note 7.
- 37 Kantzavelos, *supra* note 20; *Video About Services*, THE CTR. FOR CONFLICT RESOLUTION IN CHI., <http://www.ccrchicago.org/index.html> (last visited Mar. 28, 2013) [Hereinafter *CCR Video About Services*].
- 38 Kantzavelos, *supra* note 20; *CCR Video About Services*, *supra* note 37.
- 39 *CCR Video About Services*, *supra* note 37.
- 40 *Id.*
- 41 Karen Tokarz, Kim L. Kim, and Justin Vail, *Foreclosure Mediation Programs: A Crucial and Effective Response by States, Cities, and Courts to the Foreclosure Crisis*, ST. LOUIS BAR J., Summer 2012, at 31, available at <http://law.wustl.edu/ADR/documents/st%20louis%20bar.pdf>.
- 42 The Cook County Program is a collaboration between the Chicago Legal Clinic, providing the initial legal advice such as explaining to homeowners their legal rights and expectations and the explanations of the process, Chicago Volunteer Legal Services, providing legal representation, and The Center for Conflict Resolution, performing the mediations. *Partners*, CIRCUIT COURT OF COOK CNTY. MORTG. FORECLOSURE MEDIATION PROGRAM, <http://cookcountyforeclosurehelp.org/partners/> (last visited Mar. 28, 2013).
- 43 Kantzavelos, *supra* note 20.
- 44 *Mortgage Foreclosure Mediation Program*, *supra* note 21.
- 45 Telephone Interview with Carolyn Amadon, *supra* note 25.
- 46 *Id.*
- 47 *Id.*
- 48 Telephone Interview with Carolyn Amadon, *supra* note 25.
- 49 *Id.*
- 50 Interview with Jack Block, *supra* note 26.
- 51 *Id.*
- 52 Telephone Interview with Jackie Lustig, *supra* note 7.