RSI

Memorandum

To: Uniform Home Foreclosure Procedures Act Drafting Committee, Uniform Law Commission
From: Susan M. Yates, Executive Director, Resolution Systems Institute
Re: Recommendations for Uniform Home Foreclosure Procedures Act
Date: December 23, 2014

Thank you for the good work that the Committee has done drafting the Uniform Home Foreclosure Procedures Act. You have certainly set yourselves a challenge by addressing foreclosure in both judicial and non-judicial foreclosure states.

The current draft does a good job of addressing how foreclosure dispute resolution works. I am grateful for the invitation to provide input to improve on the current draft and I appreciated the opportunity to participate in your November 2014 Committee meeting.

Following the November Committee meeting, I asked two Resolution Systems Institute staff members who work exclusively in foreclosure mediation to review the current draft and provide comments based on their experience. Those individuals are Ms. Shawn Davis, RSI Director of Foreclosure Mediation, and Ms. Kimberly Ackmann, RSI Program Coordinator for the Illinois Seventeenth Judicial Circuit foreclosure mediation program. Shawn is the leader of RSI's foreclosure incubation efforts and manages our three northern Illinois programs. Kim does the hands-on administration, outreach, training and supervision of one of those programs. I added my perspective to theirs to round out our suggested changes.

Please read this memo and the red-lined version of the draft together. The memo addresses particular areas of the draft that we felt needed more explanation. The comments on the red-line provide suggestions in context of the draft.

Introduction

We think the most important message to the Drafting Committee is that pre-foreclosure resolution works because it closes the communication loop between homeowners, creditors and the courts, if they are involved, and creates accountability and structure that keeps the process moving forward. If homeowners have difficulty finding and contacting the program in order to receive services or if there is little follow-up and monitoring of the document exchange process in between sessions with the neutral, then the program will not be effective. Programs should design a streamlined way to identify eligible homeowners and to connect them with services. Agencies and neutrals should plan on multiple communications with both homeowners and creditors to move the process forward and facilitate document exchange and review. Program rules should provide agencies with flexibility in terms of process and timelines so that the needs of unique situations can be met in common sense ways without substantial delay.

Sections

Section 102: Definitions

Section 102(4) defines "early resolution" as "the assistance of a third-party neutral at an in-person meeting or other communication in which a creditor, obligor, and third-party-neutral simultaneously can communicate with one another with the objective of reaching an agreement between the parties for a commercially reasonable alternative to foreclosure." We suggest you broaden this definition. RSI often sees pre-foreclosure resolution programs have an impact on creditors and homeowners before communication with a third-party neutral. The structure of a pre-foreclosure resolution program often requires homeowners to work with housing counselors, legal aid and/or an agency program coordinator prior to a resolution session. Creditors are often compelled to communicate with housing counselors and the pre-foreclosure resolution program in such a way that resolutions are often obtained before meeting with a neutral, yet are achieved thanks to the communication facilitated by the program. The definition might include "the structure and services of a program that connects homeowners to resources including, but not limited to, housing counselors and legal aid and that facilitates communication between creditors and homeowners through the use of a third-party agency and its neutrals."

Section 302: Notice of Early Resolution

Section 302(c) outlines that "a notice of the right to participate in early resolution must include the following: (1) the name, address, and telephone number of each housing counseling agency, lawyer-referral service, and legal-aid agency serving the geographic area of the mortgaged property designated by the early-resolution agency." We suggest you add guidance in the Drafters' Notes to assist homeowners in accessing these services. The language might be something like this:

> "Agencies should ensure all of the listed services are partnered with the pre-foreclosure resolution agency and knowledgeable about how to coordinate efforts with the program and work with homeowners to retain rights under the program. If HUD-certified housing counselors are available, they should be on the list. Homeowners run into problems when they believe they are working with attorneys or reliable counselors in compliance with the pre-foreclosure resolution program, when they are not. Agencies should work to educate the public about foreclosure fraud and loan modification scams and to provide tips about connecting with reliable resources.
>
> Listing housing counseling and legal aid sources together is also confusing for homeowners. This makes it appear to homeowners as if they should choose one option from the list. Even when resources specify that some services are housing counseling and others are legal aid, homeowners generally do not understand this distinction and do not know if they need one, the other, or both. This leads to dangerous gaps in the services and information that homeowners need in order to be successful. For example, housing counselors are usually not able to help homeowners navigate the court system, which is often a necessary part of even accessing pre-foreclosure resolution programs, and do not provide advice on filing an appearance, motioning the court, etc. Homeowners may also have bankruptcy, divorce or heirship issues that housing counselors cannot address. Similarly, homeowners who go to legal aid may not be given the budget and

credit counseling help they need and resources are often too limited to help the homeowner put the modification packet together to pursue retention options.

In judicial states, homeowners need to understand that they are on a dual track – they must keep up with the legal proceeding and with the loss mitigation process through the servicer at the same time in order to be successful. Pre-foreclosure resolution agencies should partner closely with HUD-approved housing counseling agencies and assign homeowners directly to these services. Making resources such as foreclosure information sessions offered through housing counseling or legal aid accessible can be very helpful. Many programs now require the viewing of a video or power point that explains compliance with pre-foreclosure resolution and the resources available as a mandatory step in the pre-foreclosure resolution process."

Section 302 (c)(3) states that a homeowner or obligor is eligible for the program if the homeowner makes a request within 30 days. We recommend that the model rule allow for another opportunity, after the initial time period, for the homeowner to enter the program. While it is important to have clear deadlines, it is also important to allow some flexibility when warranted. Homeowners facing foreclosure may not be ready to apply for the program within 30 days of receiving a notice regarding the program. It may take multiple contacts from the agency for the homeowner to understand the services the pre-foreclosure resolution program can provide. Homeowners may also need to track down and negotiate with co-borrowers about how to move forward. Circumstances may change, making home retention a viable option, where it may not have been before. For example, a homeowner may start a job on day 45 after receiving the notice, but their window to enter the program has closed. Therefore, it is helpful to draft some flexibility into the rule. For example, the law could provide that if a request is made to the agency [or court] after the 30 days, but prior to sale of the property, it is at the agency's or court's discretion to allow the case into the program.[1]

Another item you may want to address in the Drafter's Notes relates to when the clock starts running for each case. The court should require that the creditor communicate with the agency when new cases become eligible for the pre-foreclosure resolution program, even if the agency has taken on the responsibility of contacting homeowners about program eligibility. In judicial states, homeowner deadlines to contact the program are usually calculated from the date of service, when the homeowner also receives notice of the pre-foreclosure resolution program. The court and, therefore, the program often do not know that a homeowner has been served until the court gets the return of service, which may be days or even weeks after actual service. In these circumstances, the creditor's attorney should notify the agency as soon as a homeowner is served, so that deadlines can be accurately tracked and additional attempts to contact the homeowner can be made.

[1] In both the 17th and 20th Judicial Circuits of Illinois, the court refers cases to the program. This allows for an additional opportunity for both parties to enter the program. Cases filed prior to the enactment of the pre-foreclosure resolution rule and cases that may have missed the deadline are able to be referred. For example, in the 17th Circuit, of the cases referred by the court that have completed the pre-foreclosure resolution program, all have received offers for temporary payment plans. These are cases that otherwise missed their window to enter the program that have now achieved the first step toward successful home retention.

Section 303: Eligibility for Participation in Early Resolution

Section 303(a) gives homeowner 30 days to request early resolution. In RSI's experience, programs that adopt an opt-in model and put the burden of contacting a pre-foreclosure resolution program solely on the homeowner experience very low participation rates. Further, allocating extensive time and money to outreach efforts may not be enough to combat such limited program usage rates.[2] In order for programs to function well and serve a more desirable percentage of foreclosure cases, programs should be opt-out[3], exert extensive grassroots outreach efforts[4] or provide for an alternate referral stream, such as having judges explain the program to every homeowner and refer interested homeowners into the program. Bottom line: you need a plan of how to get people in the door that meets people where they are – don't plan on them finding the program.

Section 303(a) also states that once a homeowner makes a request for early resolution, a meeting should be scheduled with an appointed neutral. RSI recommends that early resolution meetings with neutrals be scheduled after the period of homeowner document preparation and submission and creditor review. The neutral, the agency or housing counseling may hold earlier sessions to help facilitate document collection and exchange, but pre-foreclosure resolution meetings should be held after this paperwork has been completed and reviewed so that retention or relinquishment options can be explored. Even when resolution meetings are held after a period of document review, neutrals find that the need for additional documentation is frequent and multiple meeting sessions, two on average, are required.

Section 304: Participation in Early Resolution

Section 304(a) discusses the creditor's obligation to inform homeowners about the loss mitigation options available to them. Facilitating the document exchange process and getting creditors to complete loss mitigation review so that results can be shared with homeowners in a timely fashion is

---

[2] In Illinois' 19th Judicial Circuit, the foreclosure mediation program requires that homeowners contact the program after receiving two notices about the program. Extensive outreach has been conducted in the community, yet the percentage of foreclosure that contact the program remains at 10%. Illinois' 16th Judicial Circuit adopted an opt-out model, where all homeowners are sent communications saying that they are part of a foreclosure mediation program and must communicate with the program to continue participation. In this program, 25% of foreclosures contact the program. In Illinois' 16th Judicial Circuit, the model is opt-in, but the court refers homeowners to the program *sua sponte* and homeowners can begin their participation in the program by registering online. The result has been 24% of foreclosures contact the pre-foreclosure resolution program.

[3] Programs that are opt-out assume that all residential foreclosure cases that meet program eligibility are automatically in the pre-foreclosure resolution program, unless a homeowner specifically requests to be removed from the program or until the homeowner fails to comply with program requirements. This design conveys to homeowners and creditors that pre-foreclosure resolution is the required next step in the foreclosure process. Programs may be defined as mandatory and creditors may be required to inform homeowners about the program and direct them to participate. In judicial states, opt-out programs may provide an automatic stay under the pre-foreclosure resolution process for all newly filed residential mortgage foreclosure cases filed to facilitate homeowners working with the agency,

[4] Illinois' Cook County reaches homeowners by sending housing agencies door to door. Homeowners eligible for the pre-foreclosure resolution program get multiple in-person visits to their home in an effort to talk to homeowners face to face about the program and to sign them up.

one of the greatest benefits of and challenges to a pre-foreclosure resolution program. We recommend that you address this in the Drafter's Notes with something like the following:

> "When establishing programs, agencies and courts should consider the timeframes that creditors will be required to adhere to in terms of document review. Is it contemplated that document review will be completed before the first pre-foreclosure resolution meeting? This is a laudable goal, but difficult to achieve. Programs should be designed so that early in the process, a creditor should let the homeowner know which loss mitigation options they are eligible for and should then evaluate if the homeowner qualifies under these loss mitigation programs. Programs should clearly define what the goals are for each step of the pre-foreclosure resolution process so that expectations can be set for the parties. Agencies should expect to play a significant role in facilitating communication between homeowners, housing counselors, creditors and attorneys during the document exchange and review process. Document exchange status checks facilitated by the agency before the pre-foreclosure resolution meeting stage can be useful in moving the process forward."

Section 304(e) provides that "a homeowner or obligor may be accompanied at an early-resolution meeting by an attorney, housing counselor, or other individual." RSI has found that a lack of legal services accessible to homeowners has been a major hurdle for pre-foreclosure resolution programs. Again, this is something you may want to address in the Drafter's Notes.

> "Programs will benefit from close relationships with legal aid services and should consider the availability of these resources when designing a program. Partnering with housing counseling agencies will help ensure that homeowners have the resources needed to work with a creditor and prepare a loan modification packet, but without legal aid resources, important gaps in service will remain that have a negative consequence on the effectiveness of pre-foreclosure resolution meetings. For example, homeowners facing foreclosure may also be dealing with divorce or heirship issues that require legal guidance. Homeowners may have been through bankruptcy and now have questions about the loan and the status of the bankruptcy. Homeowners that wish to relinquish their home may need special tax advice.
>
> Pre-foreclosure resolution sessions can also be challenging when a homeowner is unrepresented because of the power imbalance in the room. Homeowners may feel intimidated by the process and unfamiliar with what questions to ask and issues to raise. Homeowners represented by an attorney better understand how to prepare for the session and are better equipped to navigate the process. If homeowners will be unrepresented at pre-foreclosure resolution meetings, neutrals should receive additional training in how to fairly and effectively conduct meetings with such potential power imbalances. It also may be helpful to communicate with local law schools that may be willing to provide legal resources through student learning opportunities supervised by a law professor."

Conclusion

If you have questions about any of our suggestions, please contact me. I can be reached at Yates@AboutRSI.org, 312-922-6475, or 11 East Adams, Suite 500, Chicago, IL 60603. I would be happy to put you in touch with RSI staff members who are involved in foreclosure mediation on a daily basis.

Again, thank you for your interest in this input.