

## MEMORANDUM

TO: Bill Breetz  
FROM: Heather Scheiwe Kulp  
DATE: 06/01/2012 05:57 PM  
RE: **COMMENTS ON PROBLEMS AND ISSUES MEMO**

Bill – Your memo touched on many of the points that are in the lenders' and borrower advocates' minds when they discuss legislation of any kind, so I think this will be a big help in educating the committee. I think there are a few additional issues that perhaps I missed in the memo; in any case, here they are:

1. **MERS:** While you mentioned the mortgage registry system that would help with liens, etc., I wonder if it would be helpful for the committee to consider the current role of MERS, since some states' legislation has specifically banned MERS from being considered a legitimate plaintiff.
2. **DUAL TRACKING:** This remains a big problem, especially in the mediation world, even though there are restrictions on it in the Attorney Generals' Consent Settlement, as described in Section II C of the Summary of that Settlement that you distributed.

Some mediation programs do not halt the underlying foreclosure proceeding, so a borrower may be working out a deal with a lender in mediation while another department at the lender's office is in court getting a foreclosure sale confirmed. This creates havoc on predictability for the homeowner, which is so important to have when they're facing the potential of losing a home. It also defeats the purpose of having any sort of mitigation program, if the lender can keep going with the process during the mitigation period, what's the point of participating in mitigation efforts at all?

This is also a problem outside the mediation context. I've heard of multiple homeowners who are working with a person in their lender's mitigation department and are in the process of being reviewed for a loan modification while another person in their lender's foreclosure department continues to pursue foreclosure in the case. Once again, what's the point of having a single point of contact at the lender if multiple departments are allowed to handle and process the file at one time?

3. **VALUATION OF THE HOME:** For most of these loss mitigation options you mention (HAMP, internal loan mod, short sale) the calculations (NPV or otherwise) must include a valuation of the home. Too often, this number is determined by someone hired by the lender to drive by the neighborhood. Sometimes, there is even less care than that; a broker will simply give a price opinion based on a website or other written communication about the area of town or the town itself. This is not an accurate valuation of the home and can skew the homeowners' qualification for a loan modification considerably. We've mediated the issue of how a home is evaluated multiple times and no bank seems to have a consistent and accurate way of doing this.

4. **INVESTORS:** A major barrier to actual negotiations of a loan is the fact that few loans are

actually owned by the people at the table. This is not just an issue of "authority to settle." Investors have agreements with servicers about what servicers can and cannot do. So, even if it would make economic sense for the servicer to agree to a reduction in principle or a rent-back option, the servicer's hands may be tied by its need to comply with contracts it has with investor pools. This, more than simply a stubbornness of banks, is the #1 reason that creative loss mitigation options cannot be achieved. Servicers do not want to be sued by investors for violating terms of their agreement. Perhaps the observers present at the meeting can comment on this subject and how it might be addressed.

**5. SERVICERS NOT CONVERTING TEMPORARY MODIFICATIONS TO PERMANENT MODIFICATIONS:** If a mortgage modification is done pursuant to the federal Home Affordable Mortgage Program ('HAMP'), that modification is initially made for a short period of time- as a 'trial' loan modification; generally, it is supposed to become permanent if the borrower complies with the modification terms during the initial modification period. However, there are times when the servicer fails to convert the temporary modification to a permanent one. This issue arises fairly regularly and can pose a significant challenge to the unsuspecting borrower. In a recent decision by the 7<sup>th</sup> Circuit Court of Appeals, *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. Mar. 7, 2012), the Court held that the servicer's determination to provide the borrower with a trial modification with which borrower complied created a contract between the servicer and borrower for a permanent modification and that the borrower was entitled to enforce that contract. The Drafting Committee may wish to explore the extent to which this is an issue to be addressed in a model state statute.

**6. BORROWERS HAVING LITTLE TO NO INCOME:** More than 80% of borrowers who have gone into foreclosure say that the main reason for it is a loss of employment. When borrowers have little to no income, it is nearly impossible to find a solution that allows them to remain as homeowners. It seems a shame to not have options for these folks, but the truth is there's very little to be done in a loss mitigation context to help them. Rent-back options may be possible. Cash-for-keys would be particularly helpful to folks that need their moving expenses covered. However, many lenders challenge that these folks should not be in mediation, as there's nothing to mediate. The addition of 'graceful exit' strategies to a mandatory mediation process could work for both parties.

**7. BORROWERS NOT UNDERSTANDING THE FORECLOSURE PROCESS:** If I were not an attorney, I would have no clue where to go to find out how long and what steps are involved in the foreclosure process. Every borrower I've ever mediated with has expressed confusion about the foreclosure process. Many think they will be kicked out of their homes immediately if they cannot find a solution in mediation. Few understand what the loan modification process entails, including what each of the documents are they need to supply to the lender. So, the process will often be delayed (adding more fees) because they do not have their tax returns with a real signature (not electronic), or because they do not include their husband's social security income properly, or their wages are not documented the way that the bank needs them to be, etc. Borrowers need outside assistance (not from the neutral) if they are to understand and fully participate in a mediation or other loss mitigation process.

**8. DESTRUCTION OF PROPERTY:** Sometimes, borrowers will take their anger out on the property. Or, in the rush to leave during an eviction, they'll leave furniture, cars, pools, dogs (<http://latimesblogs.latimes.com/lanow/2010/07/three-dogs-abandoned-for-weeks-at-foreclosed-home.html> [note that the lender did not secure the property for weeks after completing the eviction]). This further decreases property values and further discourages lenders from getting rid of shadow inventory or maintaining the home.

**9. LACK OF INCENTIVE TO SERVICERS TO AVOID FORECLOSURE:** A recent article outlines how some servicers actually make more money foreclosing than they do offering loan modifications, since the insurance and some other incentives cover the cost of foreclosure: <https://digital.lib.washington.edu/dspace-law/handle/1773.1/1074>