

## **UPDATE REGARDING THE RESIDENTIAL MORTGAGE FORECLOSURE DIVERSION PROGRAM FOR HOMEOWNERS IN BERKS COUNTY**

*by Thomas W. Beaver, Esquire*

A few issues back appeared an article I wrote for the *Barrister*, introducing the Mortgage Foreclosure Diversion Program. The Program is now nearing the end of its 7<sup>th</sup> month of operation. I'd like to provide my colleagues with an update on how it's working so far. I'll begin with a brief recap about the Program itself, then provide some data and other details that gauge its effectiveness.

A Mortgage Foreclosure Intervention Task Force was established in April, 2011 to address the effects of the "Great Recession" on homeowners here in Berks County. I pointed out in my earlier article that the foreclosure crisis in Berks County derives largely from loss of employment, with some added pressure caused by medical crises occurring concurrently with or even precipitating job loss.

After soliciting information from other counties which had already implemented foreclosure intervention programs, the Task Force used the responses obtained to craft a "best practices" model for the design of the Berks County Program. The result is the Diversion Program, which, in summary, works as follows: It is applicable only to loans arising out of a "consumer credit transaction" which are secured by owner-occupied residential real estate. Foreclosure complaints filed after January 1, 2012 against qualifying mortgages are required to include an "Urgent Notice" which is served along with the complaint by Sheriff. The Urgent Notice notifies defendants of the availability of the Diversion Program, and gives them a telephone number to call if they wish to participate. While all qualifying mortgages are eligible for the Program, participation is voluntary, not automatic. Defendants are required to call the phone number on the Urgent Notice within ten (10) days after being served in order to "opt in." The phone number connects them with a housing counselor ("HC") at Neighborhood Housing Services of Greater Berks County, Inc. ("NHS"). NHS acts as an initial point of contact and intake for defendants who wish to participate. After being contacted by a defendant, the HC contacts Berks County Court Administration ("CA") by telephone within 3 days of being contacted by a defendant.

The HC's contact with CA initiates the court-administered operation of the Program, beginning with the issuance of a "Conciliatory Conference Scheduling Order" that is signed by a judge, and served by the Prothonotary on the parties. At present Conferences are being scheduled initially between 60-70 days after the issuance of the Scheduling Order. Within that time frame, homeowners meet with the HC, who gathers their income and other financial information, with current backup documents, and sends it to the Plaintiff's law firm. By the time the Conference takes place, the Plaintiff is expected to have reviewed the defendant homeowners' documents and be prepared to negotiate a modification or other settlement with them.

The “keystone” of the Program is an **automatic stay** of further action in the foreclosure case, which eliminates one of the most egregious traps for homeowners in foreclosures: “dual tracking,” or “parallel foreclosure,” in which the plaintiffs continue moving forward, often obtaining a default judgment or a judgment on the pleadings, commencing execution and scheduling the subject residence for sheriff’s sale, while at the same time continuing to communicate and even negotiate with the homeowner about possible modification. The effect of dual tracking was its overwhelming tendency to mislead homeowners into thinking they were not about to lose their homes, often up to and even after their home was sold at sheriff’s sale.

Conciliatory Conferences take place at the Courthouse on the date specified in the Scheduling Order. Defendants are required to appear in person, and may be represented by a HC, an attorney, or both. Typically, the Plaintiff’s attorney attends on behalf of the Plaintiff. In addition, a representative of the Plaintiff, who is (i) familiar with the defendant’s financial report, and (ii) authorized to agree to a settlement, if one can be reached, must be available by phone.

Conferences are conducted by impartial, court-appointed “Conciliators,”<sup>1</sup> whose role is not to mediate a loan modification, but rather to act as a referee, making sure the parties are following the requirements of the Program. The other responsibility of the Conciliators is to submit a “Conciliatory Report” to the Court.

The above paragraphs describe how the Program is supposed to work. I will now describe how it is working actually. First, I will give some illuminating statistics, courtesy of Renee Notario in CA. Through July 16<sup>th</sup>, a total of 867 new foreclosure cases were filed. This number, however, includes non-Qualifying Actions, as it is not feasible to separate them out. Through July 16, there have been a total of 216 requests to participate in the Program, of which 165 were cases filed after January 1<sup>st</sup>. Fifty-one (51) cases were permitted to enter the Program under the Program’s “transition” rule for pending cases as of December 31, 2012. Of those 51 transition cases, 24 entered upon defendants’ receiving a 10-day notice of intent to enter default judgment. The remaining 27 cases were admitted by Court order following petitions by defendants for admission.

Treatment of cases in the Program has consisted of the following:

- 6 cases have resulted in permanent loan modifications;
- 5 cases have been settled by means other than permanent modifications;
- 15 cases have resulted in “trial period plans,” or trial modification agreements, and the automatic stay has remained in effect for all of them;

---

<sup>1</sup> Much appreciation is due to the twelve Court-appointed Conciliators: Anthony Distasio, Jill Scheidt, Eugene Orlando, Eden Bucher, George Lutz, Michael Restrepo, Valerie West, George Shoop, Michael Gombar, Alexa Antanavage, John Forry, and Scott Hoh.

-- 17 cases have been removed from the Program due to defendants' failure to follow through;

-- 14 cases have been removed from the Program as no agreement between plaintiff and defendant could be reached;

-- of the 51 transition cases allowed into the Program, 10 were rejected for a variety of reasons, of which only 1 was rejected on its merits, the other 9 for technical reasons.

In summary, participation in the Program seems to be running at about 25%. This is consistent with participation rates in other counties. There are many homeowners who might be able to obtain a modification if they participated in the Program, but who have not, which is sad.

Based on a survey of the Court-appointed Conciliators that I conducted, it appears that one of the most serious issues arising at Conferences is the Plaintiff lender's lack of readiness to participate. Under the present layout of the Program, Plaintiffs have approximately 21 days to review defendant homeowners' financial information and determine whether to offer a modification or accept a proposal for one. Of the 216 cases that the Program has taken, there have been a total of 158 continuances through July 16. Many of those continuances, as explained, are due to Plaintiffs being unprepared.

Nevertheless, and despite the frequency of continuances granted due to plaintiffs being unprepared, plaintiff lenders have not been oppositional or adversarial towards the Program in general. There are some who might be willing to attribute this willingness to cooperate to an attitude of wanting to avoid taking homes in foreclosure sales. Regardless of their reasons for cooperating in the process of the Diversion Program in general, however, in my own experiences with my clients, as well as anecdotal reports from other attorneys, and particularly Conciliators, there still appears to be ongoing lender resistance to making full use of the numerous tools that are available for modifying mortgages so that homeowners can afford to pay their monthly payments.

One significant obstacle to obtaining modifications may be referred to as the "delinquency nut," which is turning out to be a hard nut to crack. This consists of the sum of past due payments, late charges, fees and expenses incurred by the lender or servicer, and advances for such expenses as homeowners' insurance and property taxes. A sizeable delinquency nut may grow during a period of unemployment. When the homeowner successfully regains adequate income-producing employment so as to be able to resume even higher monthly mortgage payments, many lenders/servicers are refusing to accept any modification proposal unless the delinquency nut is paid in full, or mostly so.

Another major obstacle to successful modifications is the reduced value of many homes, as a result of the nationwide housing bubble burst. As a consequence, the relation of the outstanding principal mortgage balance and the fair market value of the home is an upside down LTV. When delinquency nuts are added to unpaid principal balances, the

inverted LTV is even greater. Not only do homeowners question the sensibility of modifying such an underwater mortgage, some lenders/services are simply refusing to do so.

*Editor's Note: Thomas W. Beaver, Esquire, is with Rabenold Koestel Scheidt and chairs the Berks County Bar Association's Mortgage Foreclosure Intervention Task Force.*