ADVOCACY OF PRE-SUIT FORECLOSURE MEDIATION

I've been watching the news, reading the paper, scanning the internet, and all of the information I see and hear about concerning Florida foreclosures leads me to conclude that the volume of lawsuit filings and the "bottleneck" in the court system is only getting worse, with no apparent relief in sight. Apparently, the Florida Supreme Court had similar concerns when it published its Administrative Order AOSC09-54 in December 2009, requiring mandatory mediation for residential homestead foreclosures before the cases are allowed to move to final judgment. I am not aware of any study results yet published measuring the effectiveness of this directive, nor have I heard that the burden on the court system has yet been alleviated. While the Administrative Order tasked the Committee on Alternative Dispute Resolution Rules and Policy with implementing a reporting system to collect data on the number of cases statewide referred to managed mediation programs, and to provide statistics regarding the effectiveness of those programs, the data is not due until December 28, 2010. That aside, one can only envision the glut of foreclosures in the court system maintaining its volume, or even increasing in the near future. In light of recent articles in the news concerning certain lenders' voluntary suspension of foreclosure filings (to allow time to review internal policies), I would suspect to see an even greater flood of lawsuit filings as a "backlash" effect when the self-imposed hiatus is over.

It seems that the greatest problem lenders encounter is the delay in processing the foreclosure in the court system as well as the difficulty in proving standing, or the right to sue, because it holds (or is entitled to hold) the promissory note backed by the security interest (the mortgage) in the real property. Often times, these two problems are interrelated as the delay is caused by the difficulty in getting the evidence to prove standing. From the borrowers' perspective, aside from the obvious loss of the property, they need sufficient time to find new homes and to relocate. Additionally, they have legitimate concerns about the effect of the foreclosure upon their credit ratings (which, in turn, can affect the ability to acquire a new home). Please be aware that there may be other concerns on both sides, and these examples are not conclusive of all considerations for the parties. However, the point I am demonstrating is that both parties have issues which could be addressed and resolved in mediation more readily than they could be in Court. Extending this demonstration in regard to the concerns mentioned previously, a mediation settlement ***could*** allow for the borrowers to give a deed in lieu of foreclosure to the lender and in return receive an agreed upon deadline for vacating the property, an avoidance of bad credit. There are numerous possibilities to custom tailor a consensual agreement that works for both parties. In fact, mediated resolutions have options available that could never be achieved in a Final Judgment. Pre-suit mediation holds incredible potential for benefitting both parties and for providing better outcomes than if the resolution were left to the judicial process. Add to that the consideration of saving the expense of a foreclosure suit filing fee, and you have to wonder why more lenders and borrowers don't engage in ***pre-suit mediation***. Clearly, in the wake of a successful pre-suit mediation, it would be a significant benefit to eliminate the not insignificant filing fee.

By "pre-suit mediation," I mean conducting mediation ***before*** any lawsuit is filed. At least one major investor seems to agree that pre-suit mediation is optimal. Fannie Mae is now requiring pre-suit mediation for mortgages in its own portfolio, as well as those that are part of a mortgage-backed securities (MBS) pool with a special servicing option, and those with a shared-risk MBS pool for which Fannie Mae markets the acquired property. In this author's opinion, now is the time for all lenders and borrowers to explore this option seriously. It simply makes sense. In fact, the Florida Supreme Court's Administrative Order AOSC09-54 provides that if pre-suit mediation is accomplished, substantially complying with the managed mediation program requirements (e.g. early exchange of borrower and lender information, as well as counseling for the borrower, -both prior to mediation, and the use of either a managed mediation program or a Florida Supreme Court certified circuit civil mediator specially trained to mediate residential mortgage foreclosure actions), then the post-filing requirement of mediation for residential homestead cases is dispensed with. The Administrative Order actually states that the parties "opt out" of the post-suit managed mediation when they participate in a complying (-meeting the specific requirements of the Administrative Order) pre-suit mediation. Thus, there is no real concern that the parties will incur a duplication of effort, time and expense by having to mediate twice. So, what's the down side of this? I can't see one.

Effectuating the pre-suit mediation may potentially involve a bit more effort, as not all circuit managed mediation programs offer this service. However, by contacting the local circuit court's program manager, the parties can easily get referrals to both qualified foreclosure counselors (for the borrowers), and to a Florida Supreme Court certified circuit civil mediator who is specially trained to mediate residential mortgage foreclosure actions. This author is of the firm opinion that pre-suit mediation is an incredible opportunity to expediently and consensually resolve issues between the parties.

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