



COUNSELOR'S CORNER

Foreclosure Fairness Act A Look at the First Six Months

By Kathleen A. Nelson, *Lane Powell PC*



The Foreclosure Fairness Act (“FFA”), which took effect in Washington state on July 22, 2011, provides an opportunity for Washington homeowners to seek relief from the foreclosure tidal wave of the past four years.

The housing crisis continues to escalate nationwide. In Washington alone, foreclosures jumped from approximately 7,000 in 2007 to more than 45,000 in 2010, ranking Washington around tenth in the nation in the number of foreclosures. Homeowners are feeling particularly frustrated by the securitizing of home loans, perceived lack of accountability of loan servicers, and perceived lack of compliance with laws concerning pre-foreclosure rights. One of their biggest complaints, however, is the inability to speak with someone who has the actual authority to modify their loan. Additional complaints at the top of their list include loss of paperwork by the servicer, inappropriate denial of temporary loan modifications, and what they feel is a lack of response to the question of who has the proper authority to foreclose.

The FFA provides that, once a homeowner becomes delinquent on his or her loan, the

beneficiary or authorized agent must send the borrower an initial contact letter at least 30 days before issuing a notice of default. This letter must inform the borrower to contact a housing counselor or attorney as soon as possible. The borrower must respond within 30 days of receipt of this letter, or the beneficiary can issue a notice of default.

Full Disclosure at Mediation

If the borrower’s housing counselor or attorney determines that mediation is appropriate, he or she may refer the borrower to the mediation program through the Washington state Department of Commerce (“DOC”). Prior to mediation, the beneficiary must provide specific documents as identified by the DOC. The documents must include the loan balance and itemized list of fees and charges, payment history and most importantly, information indicating the net present value (“NPV”). The borrower must also provide specific enumer-

ated documents. The goal of the mediation session is to allow the parties to meet face-to-face and examine the borrower’s financial ability to stay in his or her house by reaching a mutually satisfactory agreement to avoid foreclosure. This agreement can include reinstatement, a loan modification, an agreement to conduct a short sale, and a deed in lieu of foreclosure or some other work-out plan. The mediator must consider the borrower’s current and future income, debts and financial obligations, as well as the net present value of receiving modified payments compared to the anticipated net recovery following foreclosure.

Within seven business days of the mediation, the mediator must certify that mediation occurred, that the parties participated in good faith, and a description of the net present value used (expressed in a dollar amount). If the parties are unable to reach an agreement during or following the mediation session, and if the mediator certifies that the parties acted in good faith, the beneficiary may proceed with foreclosure.

Waiver Requirement Eliminated

It has been six months since the FFA took effect, and it has proven to be a very slow process without many results. One of the reasons for this is that the FFA required the parties to sign a waiver stating that neither party can call the mediator as a witness in any lawsuit related to the foreclosure process. Dispute Resolution Centers (“DRC”), which handle 75 percent of foreclosure mediations, expressed concern over the waiver requirement, slowing the mediation process to a crawl. On December 14, 2011, Senate Bill 5988 was passed, removing the requirement that the parties sign a waiver and instead include the language in the statute providing DRC foreclosure mediators’ immunity, except in cases of willful misconduct. The hope is that this legislation, effective immediately, will get the process rolling again.


How Is It Working?

Six months into the FFA, there are several kinks to work out in the mediation program. The program has had very limited results. As of December 2011, 771 loans were referred to

► — continued on page 22



► COUNSELOR'S CORNER — continued from page 20

mediation, with only 55 mediations being completed, resulting in only 11 loan modifications. It remains to be seen just how effective the program will be in the long term, and if the modified loan agreements or other relief efforts offered to borrowers are satisfactory to both parties involved. Nevertheless, borrowers, beneficiaries, servicers and the attorneys who represent them will have to adapt to this requirement, which will no doubt reduce the number of non-judicial foreclosures and related litigation in Washington. For those with the goal of saving their home, the program is off to a very slow start. However, sometimes success is achieved when a borrower is offered “cash for keys,” providing them with some cash to use for moving expenses, as well as a little more time in the home to explore other options, ultimately resulting in a fresh start. Whatever the goal of the parties, the FFA provides a vehicle to meet face-to-face to consider all pertinent information and to arrive at a solution if at all possible. The hope is that the FFA mediation process speeds ahead in 2012. 



Kathleen A. Nelson is a Shareholder at Lane Powell PC, where she is a member of the Firm’s Mortgage and Consumer Finance and Class Action practices. She has extensive experience in representing national and regional financial institutions, as well as mortgage brokers and lenders in a variety of disputes, including claims under the Real Estate Settlement Procedures Act, Truth in Lending Act and state consumer protection statutes. She can be reached at 206.223.7268 or nelsonk@lanepowell

► INDUSTRY NEWS — continued from page 21

County and will support up to \$50 million in new loans.

Mountain Pacific Bank President & CEO Mark Duffy stated, “We’re excited to be in position to grow and support the economic recovery in our local community. Mountain Pacific Bank was founded and funded entirely by local people to provide a unique experience in local banking. With this new capital, we look forward to growing and serving the needs of more customers as we help our local economy prosper.”

Rick Pedack, Chairman of the Board added, “We are proud that Mountain Pacific Bank has been able to create such a strong local capital base without taking any government money from the taxpayers and without leaving our local community to attract new capital. We’re totally focused on building a local, community-oriented Bank for the people and businesses of Snohomish County – one that doesn’t require its customers to deal with the issues that out of state ownership or control bring.” 