

FORECLOSURE PROCESS TASK FORCE

SUMMARY OF FINAL REPORT AND RECOMMENDATIONS

PURSUANT TO SENATE MEMORIAL 11 AND HOUSE MEMORIAL 15:

2014 REGULAR SESSION OF THE NEW MEXICO LEGISLATURE

Sponsored by New Mexico Senator Michael Padilla, District 14

Submitted by

United South Broadway Corporation

Task Force Convener

November 13, 2014



BACKGROUND: During the 2014 regular session of the New Mexico Legislature, both chambers passed identical Memorials sponsored by New Mexico State Senator Michael Padilla and Representative Gail Chasey. The Memorials established the Foreclosure Process Task Force. In light of the mortgage meltdown devastating New Mexican families and neighborhoods, the legislature requested that United South Broadway Corporation convene a Task Force to recommend improvements to the foreclosure process, including preservation of the due process right of homeowners to judicial oversight before losing their homes to foreclosure; removal of barriers to loss mitigation and loan modifications for eligible homeowners; and prevention of improper foreclosures.

The Task Force is composed of diverse stakeholders representing a range of interests and experiences. Task Force members represent community banks, local mortgage lenders and servicers, NM Title Association, NM Bankers Association, NM Mortgage Lenders Association, NM Mortgage Finance Authority and local governments. Task Force members include attorneys who represent homeowners and one who represents large national banks, a settlement facilitator for the 2nd Judicial District, a retired Chief Justice of the NM judiciary, housing counselors who assist families struggling to keep their homes, and homeowners.

The Task Force met every three weeks for six months in Albuquerque. Members traveled from Las Cruces, Alamogordo, Raton, Santa Fe, and Belen to participate, dedicating time and resources to improve the foreclosure process for the state's homeowners who run into trouble.

The report reflects general consensus reached over months of deliberation that at times included vigorous debate. Small community lenders and servicers are exempt from the state mortgage servicing standards recommended in this report. The Task Force found that New Mexico-based lenders are not the problem because they are rooted in their communities and they communicate with their customers. State standards are necessary because large out-of-state national banks own the majority of loans in our state. However, they have no personnel or decision-makers in New Mexico who handle loss mitigation and are accessible to homeowners trying to save their homes. Homeowners are rarely able to talk to anyone with authority to help them within these large out-of-state institutions.

A major focus of the Task Force was how to address this lack of borrower-lender communication that costs families their homes. Poor communication undermines the ability of homeowners to understand their rights and manage the foreclosure process. Taken as a whole, these recommendations offer a significant step toward improving communication between homeowners and servicers, while at the same time leveling the playing field for homeowners trying to negotiate with large out-of-state financial institutions.

I. REAFFIRM THAT NEW MEXICO IS A JUDICIAL FORECLOSURE STATE WITH FILING AND NOTICE OF SALE REQUIREMENTS

The right to a “day in court” before losing one’s home to foreclosure is a longstanding right of New Mexicans. A “day in court” increases the likelihood that homeowners can save their homes, gives them a chance to find assistance from a housing counselor and obtain a loan modification, and reduces occurrences of the type of unfair practices that resulted in multi-billion settlements between the states’ Attorneys General and large national banks.

Recommendation: A substantial majority of the Task Force recommends that the New Mexico Legislature remove any perceived ambiguity about the right of all New Mexico homeowners to court oversight of foreclosure. The Task Force recommends a clear and unambiguous statutory mandate for judicial oversight of foreclosure with due process protections for individual homeowners, whether their home loan is a traditional mortgage or a deed of trust.

Such law should include the following filing and notice requirements:

- a. When the foreclosure complaint is filed, lenders should be required to:
 - File as a condition precedent to the filing of the complaint a uniform Certification of the Absence of Loss Mitigation (CALM) that is current as of 30 days prior to the filing of the complaint. When Plaintiff moves for judgment, they are required to provide a second CALM that is current as of 30 days prior to the filing of the motion.
 - File notice of right to cure the default with proof that the notice has been sent to the homeowner and such notice must include information required by HLPa, NMSA 58-21-A.
 - Deposit the original Note and any allonges, indorsements, or other indicia of transfer of ownership to the Plaintiff or prior owners in the chain of ownership associated with the Note into the court registry.
- b. Notice of sale: Written notice to the homeowner or the attorney of record, whichever is appropriate, should be provided and filed with the court at least 21 days prior to the original or any subsequent sale dates.

II. REDUCE THE TIME OF ENFORCEABILITY OF DEFICIENCY JUDGMENTS TO FOUR YEARS

Deficiency judgments result from a home sale following foreclosure at a price less than the amount of the judgment debt. The lender can seek a personal judgment against the former homeowner for the difference for 14 years. These judgments prevent New Mexicans who have lost their homes to foreclosure from getting back on their feet by threatening collection efforts as well as liens on real estate. Deficiency judgments attach to any real estate transactions which

occur as long as they are outstanding, and must be paid before a consumer can purchase a home in the future. Reducing the effective time of deficiency judgments to four years will encourage both individual and real estate market economic recovery. Four years mirrors industry timelines for credit restoration.

Recommendation: Deficiency judgments should be enforceable for no more than 4 years after entry of the judgment by a District Court and determination of the deficiency consistent with the due process rights of the consumer and lender.

III. ENACT NEW MEXICO MORTGAGE SERVICING STANDARDS

Barriers for homeowners trying to save their homes continue to plague the mortgage servicing process. Despite federal standards aimed at eliminating unfair servicing practices, families continue to lose their homes due to the same improprieties that led to multi-billion dollar settlements between the states and major banks. The Task Force recommends state standards to fill gaps in federal protections and provide local oversight. State standards will increase the likelihood that homeowners who hit a financial bump in the road get a fair chance to avoid foreclosure. New Mexico-based small servicers should be exempt from these standards.

Recommendation: The Task force recommends that the Legislature impose the following mortgage servicing standards in order to improve borrower-lender communication and provide homeowners with better information about options to foreclosure:

- If a loan servicer has a loss mitigation program, it must be offered to all eligible borrowers.
- Servicers should provide a knowledgeable and accessible single point of contact for borrowers within 45 days of delinquency.
- Prohibit dual tracking.
- Require promulgated standards for key consumer notice/disclosure content pertinent to stages of delinquency.
- Notice to local government when foreclosure occurs, notifying them of property owner.
- Require referrals to multilingual versions of notice/disclosure to be promulgated and provided by a state resource.
- Require loss mitigation outreach by servicers to homeowners in distress, including descriptions of available options and counseling contacts within 36 days of delinquency.
- Ban robo-signing.
- Require servicers to maintain records of consumer documents and communication via neutral data base accessible to authorized third parties (e.g., HOPE LOAN PORTAL).
- Impose statutory maximum time limit for servicer responses to applications for loss mitigation to 30 days from verified lender receipt or posting in neutral data base.
- Require servicers to file an affidavit of loss mitigation performance no less than 30 days prior to the foreclosure sale date.

- If a court finds that there has been a material violation of any provision of the NM servicing standards by the servicer, the court may in its discretion halt the foreclosure process until the servicer complies with the requirements of the law, dismiss the action, impose sanctions, attorney fees and costs, and order any other relief provided by law.

IV. EXTEND MEDIATION PROGRAM CURRENTLY OPERATING IN JUDICIAL DISTRICTS 2 AND 13.

Mediation shortens the time to resolution to as little as 90 days from the date of filing by providing a window of opportunity for all parties to meet face to face to work out an alternative to foreclosure. Settlement facilitation is designed to assist homeowners to retain the home when possible, or to facilitate loss mitigation options such as cash for keys, deed in lieu of foreclosure, short sale, or an extended occupancy option. In light of communication barriers facing homeowners trying to negotiate with large out-of-state financial institutions, mediation provides a unique forum to shorten the time to resolution with in-person meetings on neutral ground.

The Task Force recommends that the mediation program includes two additional pre-foreclosure options, contingent upon agreement by the parties. These options would reduce the number of homes that become vacant or abandoned: (1) fast track judicial foreclosure process for properties that are vacant and abandoned with proof that owner has no intent to return; and (2) extended occupancy program allowing homeowners to "stay and pay" through a deed-for-lease that could also pay down the mortgage loan.

Recommendation: Mandate a face-to-face settlement facilitation conference for all new residential foreclosure actions involving owner-occupants based on models currently operating in 2nd and 13th Judicial Districts. Owner-occupants are notified of the mediation opportunity by court order. The case is stayed for 90 days from the time the court order is issued. The homeowner has 30 days from the date of the order to participate in an orientation. The settlement facilitation is scheduled at the orientation and takes place within 60 days of the initial court order. If the matter is settled at facilitation, the case is dismissed. If not, it goes directly to litigation. During the conference, owner occupants and their housing counselors and legal representatives meet with lenders/servicers to explore alternatives to foreclosure.

Funding: Current funding for the 18 month pilot programs based in the 2nd and 13th Judicial Districts is a joint project of the Administrative Office of the Courts and the Office of the New Mexico Attorney General. Funds were generated by the national mortgage settlement. New funding will be necessary to expand to a statewide program. Over 30 states have court run mediation programs, with most requiring a lender to pay a small fee when filing the litigation. Others provide a fee-sharing model; some are funded through a combination of state and federal funds. The Task Force recommends maintaining program resources in the 1st, 2nd, 3rd and 13th Judicial Districts, while extending the resources statewide via video links and/or a circuit-riding provision. Based on estimates by the Administrative Office of the Courts, an appropriation of

\$1,575,00.00 is needed to maintain programs in the 13th, 2nd, and 3rd Judicial Districts, with four additional programs serving multiple districts as a coordinated program with circuit riding and video links to cover the state.

V. APPROPRIATION FOR A STATEWIDE PRE-PURCHASE HOMEBUYER EDUCATION PROGRAM

Pre-purchase counseling significantly lowers delinquency and foreclosure rates.¹ Homebuyers often do not understand the legal rights and responsibilities to which they are bound by a mortgage, and are unprepared for a financial crisis that affects their ability to keep up with payments. An effective homebuyer education program will provide knowledge and tools that support successful homeownership. The New Mexico Mortgage Finance Authority could be the fiscal agent for the program and HUD-certified housing counseling agencies could develop and deliver the program.

Recommendation: APPROPRIATION. -- [insert number] of dollars is appropriated from the general fund to the [insert department] for annual expenditure by the [insert entity] to create, implement and advertise to lenders and the public a statewide pre-purchase homebuyer education program. The program shall be made available statewide in both English and Spanish, with interpreters made available to provide culturally relevant content; provide a certification upon successful completion, and include in its curriculum education on the closing process, money management, borrowers' rights in the event of default, and financial recovery information for borrowers who have gone through foreclosure or short sale. All lenders in the state of New Mexico shall be encouraged to promote the program to first-time homebuyers. (FHA definition of a first-time homebuyer is a person who has not owned his or her primary residence for at least three years leading up to purchase.)

VI. REDUCE THE NUMBER OF HOMES THAT BECOME VACANT AND ABANDONED BECAUSE OF FORECLOSURE

Vacant homes blight neighborhoods, drag down neighboring home values, and slow New Mexico's economic recovery. Homeowners who could have qualified for loan modifications or short sales frequently are denied and forced out, while properties sit vacant, sometimes for years. Poor communication from lenders is a leading reason for homeowners to leave properties vacant before foreclosure. Some national lenders or their attorneys advise homeowners to vacate their properties if they are merely behind on payments; others send delinquency notices threatening speedy eviction. Borrowers often don't know about alternatives to foreclosure, such as loan modifications or short sales. In some cases, lenders initiate foreclosure but then fail to pursue the process and walk away.

¹ Smith, Marvin, et.al. *The Effectiveness of Pre-Purchase Homeownership Counseling and Financial Management Skills*. Federal Reserve Bank of Philadelphia, April 2014. www.philadelphiafed.org/community-development/publications/special-reports.

This is a multifaceted problem calling for multi-faceted solutions. The recommendations in this report work together to reduce the number of vacant properties resulting from foreclosure, primarily by making it more likely that homeowners keep their homes when feasible. In addition, the following reforms recommended in previous sections of this report would ameliorate the vacancy problem:

- Notice of date of foreclosure sale to homeowners when the initial sale date is postponed or rescheduled.
- State mortgage servicing standards that specify the responsibilities of a "single point of contact" to assist the homeowner with loss mitigation.
- Notice to local governments when a foreclosure has occurred, informing them who owns the vacant property.
- Mediation options: extended occupancy to avoid vacancy and fast track judicial foreclosure when property is abandoned with proof the homeowner does not intend to return.

VII. PROVIDE STATE SUPPORT FOR THE TASK FORCE TO CONTINUE ITS WORK.

Thus far, the Task Force has been funded entirely by United South Broadway with a grant from the Marguerite Casey Foundation. In order to continue the work, state support is needed. The Task Force has spent six months tackling the complex issues surrounding foreclosure, but there is still much to be done in order to create a fair and accessible foreclosure process. To that end, the Task Force and its sponsor, Senator Michael Padilla, would like to hold meetings around the state to collect input from geographically diverse homeowners and mortgage lenders.