

**BENCH AND BAR WORK TOGETHER TO HELP  
HOMEOWNERS FACING FORECLOSURE**

*by Thomas W. Beaver, Esquire*

A Mortgage Foreclosure Intervention Task Force was appointed by the Berks County Bar Association's President Jill M. Scheidt for the purpose of developing a program, similar to ones already in place in other counties in the Commonwealth, to help financially distressed homeowners to keep their homes. The Task Force was formed in April, 2011. I was given the honor of being its chairperson, based on having initially proposed this to the Bar Association. This article will outline the diversion program that the Task Force has developed. But first, a few observations will help put its work in a meaningful context.

The necessity for a residential foreclosure diversion program in Berks County is driven by forces other than "sub-prime" mortgage defaults which precipitated the financial crisis that began in 2007, exploded in 2008, and continues today. The foreclosure crisis in Berks County derives largely from loss of employment, and has been exacerbated somewhat by medical crises occurring concurrently with unemployment or underemployment. The circumstances in Berks County do not reflect an unusually high, or administratively unmanageable, volume of residential foreclosure filings. Rather, because of the long-term unemployment-driven nature of foreclosures in Berks County, due to extraordinary lack of suitable replacement jobs available, a diversion program in Berks County is necessitated on humanitarian grounds.

The membership of the Task Force consists of attorneys Amy Ash-Goodman, Valerie West, Paul Herbein, Michael Restrepo, Eden Bucher, Fred Mogel, Rolando Ramos, Carmen Stanzola, and Anthony Distasio; Judges James Bucci and Timothy Rowley; Jennifer DeFrees, Real Estate Administrator of the Berks County Sheriff's Office; and, Cathy Marburger, of the Court Administrator's Office.

The first action taken by the Task Force was to solicit information from other counties which have already implemented foreclosure intervention programs, in an effort to learn what they had done, what seemed to work and what they may do or have done differently. Those other counties were: Allegheny, Blair, Bucks, Butler, Delaware, Fayette, Lackawanna, Lehigh, Lycoming, Northampton, Philadelphia, and Somerset. A set of uniform questions was prepared, and each member of the Task Force contacted one of these counties. The responses received were reviewed, and a "best practices" model was implemented for the design of a program for Berks County.

Following the investigation and review of what other counties were doing, four committees were created, in order to break up the work of developing the program into rational segments: drafting; implementation; outreach; and funding, which also includes exploring possibilities of providing discounted legal services to distressed homeowners whose incomes disqualify them for help from Mid-Penn Legal Services.

With this background, the Mortgage Foreclosure Intervention Program for Berks County will be outlined as follows:

1. Consumer Credit Transactions. The Program will be available only to loans arising out of a “consumer credit transaction” which are secured by owner-occupied residential real estate. The definition of consumer credit transaction, as stated in Pa.R.C.P. 2950 will apply, and which states:

*“consumer credit transaction” means a credit transaction in which the party to whom credit is offered or extended is a natural person and the money, property or services which are the subject of the transaction are primarily for personal, family or household purposes.*

Thus, any civil complaint which meets the following two (2) criteria is automatically eligible for the Program:

- (1) the action seeks to collect a debt from a consumer credit transaction, and
- (2) the debt is secured by owner-occupied residential property.

A civil action on a commercial loan secured by a mortgage on owner-occupied residential property, or a personal guaranty of a commercial loan, would be ineligible for the Program.

The Program, however, is not limited to a mortgage foreclosure action. It applies to all civil actions to collect a consumer debt which is secured by owner-occupied residential real estate (a “Qualifying Action” or “QA”). Although aimed specifically at residential mortgage foreclosure actions, the Program’s purpose is to give defendant homeowners who are at risk of losing their home as a result of the action a chance to keep their homes by providing a means to renegotiate and modify the terms of the loan which is secured by a mortgage on their home.

2. Plaintiff Certification. When plaintiffs file civil complaints after January 1, 2012, they will be required to include a “Certification” declaring whether or not the action is a Qualifying Action. This Certification will be a standardized form that must be filed by the Plaintiff with the complaint. The Certification must also be served on defendant, and will state that defendant has to right to contest a Certification that the action is not a Qualifying Action.

3. “URGENT NOTICE”. If the plaintiff certifies that the action is a QA, a prescribed “Urgent Notice” form must also be included by the plaintiff with the filing. The **URGENT NOTICE** and a copy of the Certification will be forwarded to the Sheriff, and both must be served along with the complaint by Sheriff. The Sheriff’s Return of Service must specifically indicate that the **URGENT NOTICE** was served, as well as the Certification.

The **URGENT NOTICE** will notify defendants of the existence of the Program, and what they must do if they wish to be included in it.

4. Defendants Must **OPT IN**. While all Qualifying Actions will be eligible for the Program, defendants’ participation is voluntary, not automatic. It will be the defendant homeowner’s responsibility to read the documents served upon him or her, particularly the **URGENT NOTICE**, and take the action described in it to protect his or her interests.

5. Contact Housing Counselor. The **URGENT NOTICE** will instruct defendant to contact a housing counselor (“HC”) at Neighborhood Housing Services of Berks County (“NHS”). NHS will act as a clearing house, forwarding the defendant to an HC within NHS or other housing counseling agencies for further processing.

6. Time Limit. The time limit for defendants to contact NHS will be TEN (10) DAYS after being served.

7. Notice to Court Administration. The HC will contact Berks County Court Administration (“CA”) by telephone within 3 days of being contacted by a defendant.

8. Stay of Proceedings. The “keystone” of the Program is an **automatic stay** of further proceedings. When CA is notified by the HC, CA will issue an order in a standard form (the “Order”), which will inform all parties of: (i) the immediate automatic stay of proceedings; (ii) the requirement that defendant must complete financial information forms; (iii) notice that defendant’s financial report will be forwarded to the plaintiff; and (iv) establish a date for a conciliation conference 60-70 days after the date the Order is issued.

9. Defendant’s Financial Information. The Program will require that defendants provide financial information for the plaintiff to the HC within 20 days after contacting NHS. The defendant’s completed financial report will be sent by the HC to the plaintiff not less than 21 days prior to the conciliation conference (the “Conference” or “CC”).

10. Conciliation Conference. The Conference will take place at the Courthouse, on the date specified in the Order. Defendants will be required to appear in person, and may be represented by a HC, an attorney, or both. A representative of the plaintiff must be available by telephone, but plaintiff’s attorney must also appear in person. The plaintiff’s representative must be (i) familiar with the defendant’s financial report, and (ii) authorized to agree to a settlement, in the form of a modification of the defendant’s loan.

The Conference will be conducted by an impartial “Conciliator,” whose role will be to mediate a loan modification, if possible, and submit a report to the Court. This report will be described below. The Conciliator will not be an advocate. He or she will, however, observe that the requirements of the Program, and particularly the Conference itself, are being followed. The Conciliator will be able to continue the Conference and set a date for a new or follow up Conference if the circumstances justify doing so. He or she will not have power or authority to compel the parties to settle on a modification of the loan.

Until the Conciliator submits his or her report to the judge to whom the case has been assigned, the AS remains in force.

11. Continuations. If defendant submits the required financial report to the HC within the prescribed time period, but plaintiff’s representative is not prepared for the Conference on the scheduled date, the Conference will re continued to a new date. In the meanwhile, the AS will remain in force, and the plaintiff will not be permitted to proceed

with the case. This continuation of the AS will eliminate the evil of “dual track” or “parallel” foreclosure, in which lender’s attorneys continue foreclosing even while plaintiffs are actively negotiating modifications with homeowners.

12. Conciliator Report. At the conclusion of the Conference, including any continuation, he or she will complete a standard Conciliation Conference Report (“Report”) form, indicating the outcome of the Conference: i.e., “not settled despite good faith negotiations;” “settled,” with terms stated; or “not ready, rescheduled” to date specified. The Conciliator may also include comments, such as how well the parties negotiated to reach a settlement, and may include a recommendation to meet with or have a hearing before the Judge.

13. Final Order. In every case, the Conciliator’s Report will be forwarded to the assigned Judge. If the parties reached a settlement, the Judge will order the case dismissed without prejudice.

If no settlement was reached, the Judge will have several options. He or she may order lifting of the AS and permitting plaintiff to proceed, if convinced that plaintiff has engaged in good faith settlement negotiations, while defendant has been unable to demonstrate an ability to comply with a reasonable offer of loan modification. The Judge, alternatively, may order further conciliation efforts and “remand” the case back to the Conciliator, with the AS remaining in force.

14. Judicial Option. While defendants must OPT IN to the Program, Judges will be able to use their discretion and order consumer collection cases into the Program sua sponte.

15. Effective Date. The Program will apply to consumer credit mortgages for which foreclosure complaints are filed after January 1, 2012. However, certain residential foreclosure cases which were filed before January 1, 2012 will also qualify for the Program under transition provisions described later on.

16. Transition for Certain Pending Cases. In addition to cases commenced after January 1, 2012, certain cases pending as of that date will also qualify for the Program. Those transitional cases will be those filed prior to January 1, 2012 for which plaintiff has not obtained a judgment. CA is evaluating means of notifying defendants in such cases of their eligibility to apply to the Program. In these transitional cases, the AS will not apply, however. Defendants may petition the Court for a temporary stay, the granting of which will be discretionary with the assigned Judge.

Once the Program goes into effect, there will still be ongoing work to develop efficient means for putting the Program into practice. Ongoing efforts also will be made to determine what, if any, costs require funding for the Program, and to explore sources for acquiring such funds. Finally, the Task Force will meet periodically (perhaps semi-annually) to evaluate its effectiveness and examine suggestions for areas or features that could be improved.

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