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April 3, 2023

Testimony of Leo J. Delicata, Esq., Legal Services for the Elderly, in opposition to L.D. 1015 Resolve, Establishing the Commission to Study the Foreclosure Process before the Joint Standing Committee on Judiciary

Senator Carney, Representative Moonen and members of the Joint Standing Committee on Judiciary

Legal Services for the Elderly is a non-profit legal services organization that was established in Maine following the passage of the Older American's Act in 1974. Since then, we have provided free legal assistance to our disadvantaged older adults age sixty or older when their basic human needs are at stake.

We have represented upwards of 300 older adults over the last three years, all of whom were facing the foreclosure of mortgages on their homes. For some of those clients we were able to request forbearance and negotiate loan modifications before or during the judicial foreclosure process. As a result, they were able to stay in their homes.

In cases where extended services were not provided because their cases lacked merit, we helped our clients understand the foreclosure process. This allowed them to make plans for obtaining alternative housing or choose to reside in another setting more appropriate for their personal needs. We also helped foreclosure clients with other problems that may have contributed to the arrearages that caused their mortgages to be in default. Some of our services included obtaining tax abatements, resolving consumer debt cases, helping them gain access to better health care and prescription drug programs and stopping financial exploitation.

During the Pandemic, the federal requirements for lenders/servicers to modify or refinance certain loan types under the CARES Act were in force. The intent was that individuals with home mortgage burdens could ask their lenders for help restructuring their debt. Unfortunately, some lenders and many "mortgage servicers" (business entities who collected payments and managed payment issues for themselves or the lenders) were not fully committed to making that federal policy decision work.

The Consumer Financial Protection Bureau described categories of behaviors that frustrated consumers and their attorneys at that time. Here are the categories and a link to their report:

- “...Providing incomplete or inaccurate information, such as telling consumers that only delinquent borrowers qualify for forbearance, that a fee must be paid to obtain forbearance, or that a lump-sum repayment is required at the end of forbearance;
- Incorrectly sending collection or default notices, assessing fees, or initiating foreclosures for borrowers in forbearance;
- Changing borrowers’ preauthorized funds transfers without their consent, or failing to implement the borrowers’ instructions to freeze payments;
- Failure to process forbearance requests in a timely manner;
- Enrolling borrowers in automatic or unwanted forbearance;
- Failure to enroll borrowers in an appropriate post-forbearance plan.

https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-23_2021-01.pdf

As attorneys, we experience similar difficulties providing legal help both when our clients receive a notice of default and after the judicial foreclosure is filed and as the case proceeds in the court. Suffice it to say that we are not surprised that not everyone is committed to the goal of working in good faith toward solutions that will keep homeowners in their homes and ensure the payment of their mortgage debt. However, we find that within the judicial process, the mediation opportunity afforded by the Maine Judicial Branch’s Foreclosure Diversion Program takes that goal seriously. Mediation is significantly helpful especially to homeowners who have the assistance of a lawyer. Unfortunately, many consumers who are unrepresented never ask for mediation and those who ask and act for themselves have little or no success negotiating with the mortgage servicer or the lender.

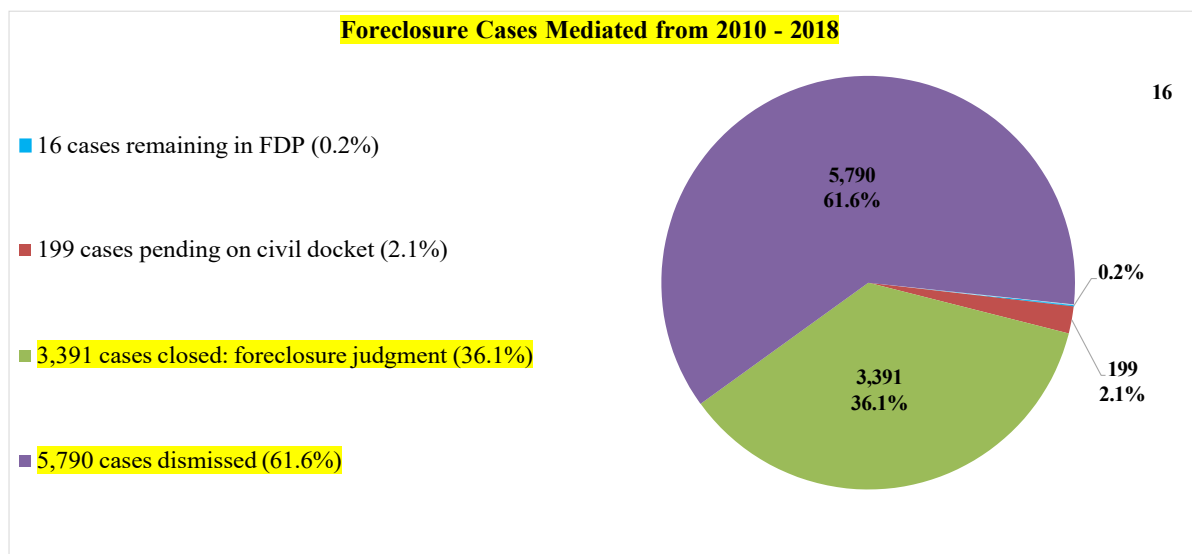
There is no doubt that Mediation works and that the results benefit both parties in the foreclosure case. To get a realistic look at what it can do in normal times it is useful to examine the Foreclosure Diversion Programs statistics. Each year the Program Manager submits a report to the Judiciary Committee as well as the Health Coverage Insurance and Financial Services Committee. Here is the link for their report dated February 12, 2020 containing the years 2010 (first year of the program) through pandemic free 2018:

<https://www.courts.maine.gov/about/reports/fdp-report-2019.pdf>

I have reproduced page 5 of the report beginning on the next page of this testimony for your convenience (I have added yellow highlights for emphasis):

- 3) Foreclosure Judgment Entered: Cases that are not settled and/or dismissed most frequently conclude with a judgment of foreclosure for the plaintiff.
- 4) Cases Dismissed: When a case is settled or closed without a judgment or trial, it is dismissed. Dismissal saves time and resources for parties and for the court. Dismissal suggests that the loan is performing again and the home has been retained, or the debt has been satisfied by sale or transfer of the property.

To gain the most accurate picture of case resolutions, it is helpful to consider cases mediated before 2019 because most of those cases have been completed. Of the 9,396 cases mediated in the FDP through 2018, nearly 62% have concluded in dismissal.



Underlying reasons for dismissals of mediated cases are presented in the chart below. The court does not currently have an electronic system to track reasons for dismissal of cases. However, based on detailed Mediator's Reports, court pleadings, and clerk docketing, the FDP is able to report the reasons for dismissals in 68 (62.4%) of the 109 mediated cases dismissed in 2019. A majority of those 68 cases (57, or 84%) concluded in settlements that allowed homeowners to keep their homes through loan modification, reinstatement, or a repayment plan

Type of Agreement	Cases Mediated and Dismissed in 2019		Total Cases Mediated and Dismissed from 2010 - 2018	
Loan Modification	44	40.4%	1,428	24.7%
Reinstatement	11	10.1%	119	2.1%
Repayment/Forbearance Plan	2	1.8%	107	1.8%
Deed in Lieu of Foreclosure	1	0.9%	94	1.6%
Short Sale	5	4.6%	139	2.4%
Other	5	4.6%	521	9.0%
Unknown	41	37.6%	3,382	58.4%
TOTAL	109	100%	5,790	100%

It is interesting to note that of the 9396 cases that went to mediation over that nine-year period, 5790 or 61.6% were resolved without a trial. And at least 1654 or about 28.6% of homeowners who participated in mediation kept their homes because of a mutually agreed loan modification, reinstatement or a new repayment or forbearance plan. The remaining 3666 cases or 71.4% were resolved in favor of the lender and did not go to trial. The cases that proceeded to a foreclosure judgment were only 3391 or 36.1% of all the cases mediated. Whether they all required a trial is unlikely since most cases where there are no factual disputes may be resolved more quickly with a summary judgment motion to the Court. An additional fact found on page 4 of this same report is that over the life of the program the average number of mediation sessions per case is 1.7; it's fair to say that this program is efficient.

The bill before you creates a Commission that will study the foreclosure process and will have the duty to report on the topics set out in Section 5.

“Sec. 5. Duties. Resolved: That in conducting the study the commission shall consider:

1. The laws and state agency rules governing the foreclosure process, the various timelines of specific procedures in the foreclosure process and how those timelines affect the availability of foreclosed properties for affordable housing;
2. The effect on the foreclosure process of mortgages sold in the secondary mortgage market by large financial institutions and the ability of small financial institutions in the State to work to keep property owners out of foreclosure and to make foreclosed property available for sale quickly; and
3. How problems in the foreclosure process can be mitigated without losing existing consumer protections.”

We believe that the annual Foreclosure Diversion Program report submitted to this Committee and the Health Coverage Insurance and Financial Services Committee since the start of the foreclosure diversion process has provided ample opportunity for any party

dissatisfied with how the program operates or with a creative idea about how to make it better to present those ideas to either one or both Committees.

As importantly we believe that the original enactment of the duty to deliver this report also describes what it must contain and also intends that the Committees of Jurisdiction determine whether any changes should be made to the program as a result of receiving the information in the report: Title 14 Section 6379 A-7(B) says:

(The Court shall...)

B. Report annually to the joint standing committee of the Legislature having jurisdiction over insurance and financial services matters and the joint standing committee of the Legislature having jurisdiction over judiciary matters on:

(1) The performance of the program, including numbers of homeowners who are notified of mediation, who attend mediation and who receive legal counseling or legal assistance; and

(2) The results of the mediation process, including the number of loans restructured, number of principal write-downs, interest rate reductions and number of homeowners who default on mortgages within a year after restructuring, to the extent the court has available information;

C. Notwithstanding subsection 10, establish a fee upon a foreclosure filing made on or after June 15, 2009 to support mediation services to be paid for by the plaintiff; and

D. Make recommendations for any changes to the program to the Legislature.

<https://legislature.maine.gov/legis/statutes/14/title14sec6321-A.pdf>

It is reasonable to think that in the course of reviewing the annual report, this Committee could explore with the Program Manager any concerns brought to your attention about the performance of the program. Asking for more information from the Court or any of the interested parties might add to your understanding of whether or how the program performance might be improved. Additionally, you may already have particular knowledge of matters that the bill before you expects a Commission to explore or you may wish to develop that knowledge within your Committee process. The causes of the civil case backlog in our courts come to mind as something in which you are well versed. We respectfully submit that asking for a Commission to engage in discussions for matters that should be vetted by this Committee in the first instance is premature and may require an unnecessary expenditure of time and money.

We are certainly willing to engage in any discussions that you might invite us and other interested parties to join. We thank you for the opportunity to make our comments in opposition to this bill and hope that you vote it ought not to pass.