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February 3, 2012

Honorable Jonathan Lippman Chief Judge of the State of New York

Honorable A. Gail Prudenti Chief Administrative Judge of the State of New York

Honorable Judy Harris Kluger Chief of Policy and Planning Unified Court System State of New York

> Re: Proposals for Improving the Residential Foreclosure Process in the New York City Courts

Dear Judges Lippman, Prudenti and Kluger:

The surge in residential mortgage foreclosure actions commenced in the wake of the recession and the housing crisis is one of the greatest challenges facing our court system. The direct, side and ripple effects of these cases have a profound impact on our economy and on the lives of people across a broad spectrum of interests. We hope the proposals outlined in this letter will assist in addressing these challenges.

The Foreclosures Task Force

The New York City Bar Association's Council on Judicial Administration (Roger Juan Maldonado, Chair) formed the New York City Bar Task Force on Residential Mortgage Foreclosures (the "Task Force") in May 2011 in response to reports that:

• foreclosure actions were clogging the courts;

- settlement conferences held in foreclosure actions were not proving as effective as had been hoped; and
- the average time needed to resolve a foreclosure case had increased to 2 ½ to 3 years in New York City, reported to be the slowest time to disposition in the nation.

The mission of the Task Force is broad: to study procedures and practicalities relating to the handling of residential foreclosure cases in the New York City courts, confer with affected and interested constituencies, and make recommendations aimed at improving the fairness, effectiveness and efficiency of the process.

The membership of the Task Force includes representatives of borrowers, loan servicers and lenders, regulators, and the court system, along with members of the Bar not otherwise involved with foreclosures. (A roster of the members of the Task Force is attached to this letter.) The full Task Force has been meeting monthly since its formation. In addition, members of the Task Force have reviewed numerous studies, articles and other materials and have solicited the views of a wide range of individuals with knowledge of the foreclosure process.

Scope of the Challenge

There were approximately 75,000 foreclosure cases pending in the New York State court system as of the end of 2011, representing more than 25% of the total civil caseload of the Supreme Court. In some counties, foreclosures account for more than 35% of that court's total caseload. In New York City, outside of New York County (where foreclosures account for 3% of the Supreme Court's caseload), foreclosure cases are a heavy burden on the court system: Queens (36%), Kings (26%), Staten Island (26%) and The Bronx (14%).

The numbers would be even higher if not for a significant fall-off in filings following New York's implementation, effective October 20, 2010, of a requirement that counsel representing lenders sign affirmations certifying the accuracy of papers filed in residential foreclosure cases. In large part as a result of this requirement - and also because of voluntary "moratoriums" adopted by certain lenders following widespread reports of "robo-signings" and other concerns about mortgage and foreclosure related documentation - the number of new cases has fallen off sharply. Thus, 46,572 new foreclosure cases were filed in 2010 in New York State while in 2011 the number was under 15,000. Although there are currently almost 75,000 pending foreclosure cases Statewide, a staggering number by any measure, court estimates suggest that there would have been over 115,000 pending cases had it not been for the affirmation requirement.

Unfortunately, the respite is not likely to be long-lived. The prolonged economic downturn and sustained high unemployment, coupled with the collapse of the housing market, have created two types of "shadow inventories" that will, absent an economic turnaround or other significant change in trends, continue to deluge the court system. First, again almost surely because of the affirmation requirement, foreclosure cases are being filed with county clerks but are not entering the system (until and unless an attorney affirmation is filed along with an RJI (request for judicial intervention)). Statistics on the number of these delayed filings are not available but anecdotal evidence suggests there are a great many. Second, the Federal Reserve Bank of New York has estimated that one out of every ten New York City mortgages was 90 days delinquent or in foreclosure as of the end of the first quarter of 2011. Only half of these have reached the foreclosure stage according to the Reserve Bank. Standard & Poor's has projected that, at the current rate of disposition, it will take more than ten years to clear the backlog of seriously delinquent mortgages in New York State.

Also contributing to the backlog of cases is the mandatory settlement conference requirement for residential foreclosure cases (CPLR § 3408) which, unfortunately, has not been as successful as the court system and legislature had hoped. The mandatory settlement conference requirement became effective at the end of 2008. Since then, New York State courts have scheduled over 250,000 settlement conference appearances. The principal goal of the settlement conferences is to help borrowers keep their homes if that can be accomplished through loan modifications that reduce cash flow requirements. Potential modifications to reduce monthly payments include reducing interest rates, lengthening repayment periods, waiving or deferring accrued interest and fees, and principal reductions. However, the conferences too rarely result in loan modifications or other settlements and are often adjourned repeatedly (sometimes more than twenty times) over a period of months or even years.

There are many reasons for this. Defaulted borrowers are not always sophisticated financially and many have difficulty, even with the assistance of legal or other volunteers, in gathering needed documents and information. There have also been a spate of press reports suggesting that servicers/lenders frequently fail to consider loan modification requests in a timely fashion, have internal communication issues and have representatives appear at the conferences with no settlement authority. In New York City, court referees – not judges – usually conduct the settlement conferences. The referees do not have authority to issue orders requiring the parties to comply with their obligations (whether under HAMP or the CPLR). As a result, directives are frequently not complied with and the only action the referee can take is to adjourn the conference to a later date. It also appears that there is often no written record of what takes place at each conference. Without a written record, the referee at the next conference has nothing to rely upon – outside of the parties' notes and recollections – making it much more difficult to achieve concrete results or progress.

Take-Aways and Goals

The economic and geopolitical factors that have brought about the current residential mortgage crisis are incredibly complex. The overlay of federal regulation and relief efforts and other regulatory strictures adds to the complexity. Differing points of view between borrowers, their representatives and advocates, on the one hand, and representatives and advocates of lenders, servicers and holders of mortgages, on the other hand, also make reform efforts more difficult. Clearly, there is no quick or simple fix.

We believe, however, that it is possible to identify some common ground and shared goals and that doing so is a step toward improving the process, for the benefit of all interested parties and society at large. Both sides of the table appear to agree that:

- the settlement conference parts have not achieved a sufficient number of dispositions, whether through loan modifications or otherwise, and are plagued by too many wasted scheduled appearances and too many adjournments; and
- the average time from commencement to foreclosure in New York City $-2\frac{1}{2}$ to 3 years is too long.

It also appears that most or all interested and affected constituencies can agree on the goals of any reform effort:

- help homeowners keep their homes when economic and other circumstances make that a realistic possibility;
- help lenders to more efficiently and speedily foreclose (or arrange deeds in lieu of foreclosure or short sales) on loans in default that cannot realistically be salvaged; and
- reduce court congestion and improve efficiency.

Recommendation: Create servicer-specific conference parts to enhance efficiency and accountability

A pilot program should be implemented which, at least initially, could encompass one or both of Queens and Kings Counties, and the four largest servicers: Bank of America, CitiGroup, JPMorgan Chase and Wells Fargo. (It has been estimated that these four institutions together service almost 70% of New York State mortgages.) One way to structure the program would be to rotate the parts on a weekly basis – the first week of the month would be Bank of America, the second week of the month would be CitiGroup, etc. In addition to enhancing accountability and

increasing efficiency, dedicated parts would ease the burden on servicers of being in multiple places at one time. Dedicated parts would also allow servicers to benchmark their case resolutions against those achieved by other servicers and perhaps create incentives to resolve more cases consensually and promptly. The Task Force believes that, to be effective, the dedicated parts should be presided over by judges rather than referees.

Other Potential Process Improvements:

1. <u>Cases should be sent to the servicer-specific parts only after a referee or other</u> <u>presiding official determines they are ready or where the parties are not negotiating in good faith</u>. Cases that can potentially be resolved short of foreclosure should be the focus of the dedicated conference parts. These would include not only those in which the borrower could likely stay compliant with a modified loan, but also cases that are candidates for resolution through a deed in lieu of foreclosure or a short sale.

For the dedicated parts to be effective, it will be important for the referee or other court official to whom a case is initially assigned to make sure servicers are clear about what information they need and that borrowers have provided the information. Good written records should be kept by the referee and form part of the "record." Ideally, at a first conference, the servicer should provide a list of information needed to consider a modification request. The borrower should then provide the information and, at a second conference, the referee should confirm that the paperwork and information is complete. The case should then be "certified" as ready for the dedicated part presided over by a judge. Referees should also refer a case to the dedicated part when one or both parties have failed to negotiate in good faith and in other situations in which the greater authority and "gravitas" of a judge is needed.

At some point, if the servicer-specific parts are working as hoped, having dedicated parts at the referee level might also be considered, especially in counties like Kings and Queens with the largest volume of foreclosure cases. The program could also be expanded to include dedicated parts for smaller servicers.

2. <u>Cases should not be allowed to linger in either the referee or judicial settlement</u> parts. When settlement options have been exhausted, cases should be sent to a normal case disposition track before the assigned IAS judge, so that foreclosure or whatever other disposition may be appropriate can be accomplished with reasonable speed and efficiency and, of course, fairness.

3. <u>Cases in which the borrower has failed to appear and cases involving vacant</u> properties should be considered for separate tracking. We are told that it often takes as long as a year to secure a foreclosure judgment in New York City even when the borrower fails to answer,

attend the settlement conferences or otherwise appear. These cases and those involving vacant properties should be brought in and out of the system more quickly.

4. <u>Consider whether volunteers might be enlisted and used to assist borrowers and the court system</u>. Volunteers could possibly help address the "shadow inventory" of foreclosure cases filed with the county clerks which have not yet entered the system through the filing of an RJI. Another potential role for volunteers is doing outreach to homeowners who have not answered foreclosure complaints. Law firms, accounting firms, banks and many other types of professional organizations could all be sources of volunteers. Law school students might also be a talent pool. Of course, we recognize that it is no small effort to recruit, train and supervise such volunteers. We would think, however, that many would consider the opportunity to assist a troubled homeowner to be a highly worthwhile pro bono activity.

Conclusion

The Task Force and the New York City Bar stand ready to assist our court system in any way we can in addressing the critical challenges presented by residential mortgage foreclosure cases. We suggest that a meeting to discuss ways of implementing our proposals, attended by appropriate representatives of the court system and the Task Force, would be a useful next step.

Respectfully yours,

Steven M. Kayman

Chair New York City Bar Task Force on Residential Mortgage Foreclosures

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^{*} All views expressed by members of the Task Force are their own and not necessarily those of the organizations to which they belong.

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