

MANDATORY MEDIATION OF FORECLOSURE CASES IS ONE
PART OF NECESSARY FORECLOSURE REFORM IN OHIO

Housing and Urban Revitalization Committee
Interested Party Testimony
Linda Cook
Senior Attorney
Ohio Poverty Law Center

Thank you for the opportunity to testify on Sub. HB 306, a bill requiring courts to establish and operate programs of mandatory foreclosure mediation in non-tax foreclosure actions on occupied residential property. I am the statewide project manager for the Ohio legal services programs' foreclosure intervention project, part of Save the Dream, Ohio's broad-based foreclosure prevention and intervention initiative. In the 18 months since the statewide hotline was opened on April 1, 2008, almost 8,000 homeowners have received some level of legal advice, service or representation from legal services programs and their allies.

At the same time that advocates were developing systems to accommodate this dramatic increase in requests for assistance and representation, the Ohio Supreme Court developed a model foreclosure mediation program. The Court did not make this program mandatory, but instead provided training and support to the 88 county common pleas courts, using its powers of persuasion to encourage those courts to adopt foreclosure mediation programs. To date, the availability of foreclosure mediation as an alternative to litigation varies widely from county to county. As part of our homeowner advocacy, the regional legal services programs have worked across the state at the local level to make mediation more available, by using the programs that

have been put in place, or by requesting mediation and pushing the courts to provide it where no formal program exists. Some counties have been active in establishing foreclosure mediation programs. Some counties have expressed interest but lack the resources to implement a sustainable program; other counties have fundamental ideas about dispute resolution that preclude ordering non-willing parties into mediation.

We have pushed for foreclosure mediation in all 88 counties because we see it as one part of the reforms necessary to change the dynamics of the lending/servicing industry and change the status quo to a system that balances the equities of homeowners and lenders, with the goal of preserving home ownership and keeping homes occupied by current owners whenever reasonably possible.

Reforms are necessary for a number of reasons. One example is that despite pressure from the Treasury and the existence of HAMP, the mortgage lending and servicing industry has been very slow to change the business model response to default on a mortgage note from foreclosing and reselling property to loss mitigation and maintaining ownership. I have included a copy of the Servicer Performance Report through October 2009 from the Making Home Affordable Program. Nationwide, only 20% of the estimated eligible 60-day delinquencies are actually in trial loan modifications as of the end of October.

According to the Ohio Supreme Court, in the period of January through July 2009, 52,340 new foreclosure cases were filed statewide. The county common pleas courts have struggled to deal with these overwhelming numbers of cases coming through the system. The result of this overload has been way a high rate of cases defaulting for want of responses from homeowners,

premature abandonment of properties, and a host of other adverse impacts on communities and borrowers.

Ohio has a responsibility to step forward and give or create the tools necessary to reform our system of dealing with home mortgage defaults. This committee has already reviewed, and subsequently passed HB 3, which calls for a number of important reforms, such as licensing and regulating mortgage loan servicers, requiring lenders to notify borrowers 60 days prior to foreclosure filing, and requiring the parties filing foreclosure complaints to attach a recent property appraisal and include information about the identity of the note holder. The low income advocate community continues to support that bill, and we hope that the Senate will soon take up that bill for consideration.

This bill is necessary because persuasion alone is not moving all of Ohio's 88 counties toward adopting foreclosure mediation programs. We support the efforts of Representative Dolan in proposing a system of mandatory foreclosure mediation. The Ohio Poverty Law Center did comment on earlier drafts of HB 306, and Representative Dolan accommodated some of our issues. However, there are still some issues this committee needs to consider.

As presently written, this bill requires homeowners to affirmatively opt into the mediation process by filing an answer or other responsive pleading. This may be fine for homeowners who are lucky enough to get some legal advice or representation. However, the vast majority of homeowners who will be working their way through the dispute resolution system will be unrepresented. In my twenty-plus years of experience representing low income clients, all defendants are intimidated by the court system, and very few are sophisticated enough to understand what it means to file an answer to a complaint. This requirement will create another

barrier for many homeowners who are already struggling to sort out their situations and take positive action to save their homes. In his sponsor testimony, Representative Dolan mentioned the possibility of developing a form for defendants to use, and I strongly urge this committee to consider incorporating a model form for homeowners to request mediation into the bill to be used in lieu of an answer. If the goal of this legislation is to help preserve home ownership, this would be a big step in that direction.

The general concept of mediation is based on the assumption that two parties of equal bargaining power can come to the table to discuss resolutions to a problem. Unfortunately, this will never be the case when borrowers are across the table from servicers and/or lenders. The lender or servicer is in a superior bargaining position, in terms of access to dollars and volume of business, and in terms of the ability to affect the borrowers financial, personal well being and knowledge and experience with the process. Any action this legislature can take to address this imbalance is important. Any tools you can give the courts to bring lenders and servicers to the table and force them to seriously engage in the mediation process are important. As currently written, the bill directs the court to dismiss the foreclosure action, absent a showing of good cause, if the filing party does not attend mediation. This is a good tool for the courts and sends a message that plaintiffs need to take the mediation process seriously.

To have that tool be effective, it has to be coupled with the requirement that a representative fully authorize to negotiate a settlement be present at the mediation. However, paragraph 2308.05(D), which seems to get at this requirement, is not clearly worded. This language needs to be changed to clearly state that the person representing the filing party must have authority to fully negotiate on behalf of that party.

To give you some figures, as of September 30, legal services advocates or Save the Dream volunteer attorneys have represented homeowners in 159 foreclosure cases referred to mediation. The parties reached an agreement in 62% of those cases. I understand this rate of agreement is somewhat higher than what is being informally reported to the Ohio Supreme Court's Alternative Dispute Resolution Section by the courts with mediation programs, but a couple of factors account for that. First of all, these homeowners were represented in the mediation by attorneys and second, the homeowners most likely also had the assistance of HUD-certified housing counselors in gathering income information, filling out loss mitigation forms and developing realistic budgets.

Other than requiring court clerks to give homeowners information, HB 306 does not connect borrower assistance into the mediation process. HB 3 does set up some funding mechanism for housing counseling, and does require the Department of Commerce to develop minimum loan modification standards which may cross over into the mediation process. These are other reasons we see HB 306 as only one part of foreclosure reform.

However, these admittedly early figures do demonstrate that mediation in foreclosure cases can be an effective tool for maintaining home ownership, and help point out why foreclosure mediation is one part of necessary reforms to Ohio's foreclosure process.