

**A SEA CHANGE IN RESIDENTIAL FORECLOSURE
PROCEDURES CHANGES THE DYNAMICS OF WHAT THE
LENDER CAN REASONABLY ANTICIPATE IN NON-JUDICIAL
FORECLOSURES**

Effective July 1, 2009,¹ the Nevada Legislature passed and Governor Jim Gibbons signed into law Assembly Bill 149 which amends Nevada Revised Statutes concerning non-judicial foreclosure.

Assembly Bill 149 will have a profound effect on the method in which Deeds of Trust are non-judicially foreclosed in the State of Nevada. The law establishes a Foreclosure Mediation Program (the “Program”) for owner-occupied residential properties that are subject to foreclosure notices (formally titled *Notice of Default and Election to Sell*) filed on or after July 1, 2009. For a homeowner to qualify for the mediation program, the homeowner’s property must be his/her primary residence, located in Nevada, and comprised of not more than four units.²

How the Program is intended to work:

Assembly Bill 149 gives a borrower the right to seek mediation of a mortgage loan if they are the owner and occupant of that home. The borrower has 30 days after being served with a foreclosure notice to elect to participate in mediation and notify the trustee (generally a title company), who shall, in turn, notify all entities with an interest in the property that the owner is requesting mediation.

The law contemplates that instructions and a form³ to request mediation should be attached to the foreclosure notice served on the borrower by the trustee. The trustee shall not have the power to sell the property until such time as the both the proper documentation⁴ is provided to the homeowner and that homeowner has either elected to participate in the Program or waived his/her right to do so.⁵

¹ Some changes do not take effect until September, but the majority of the changes took effect July 1st.

² Notices of Default issued before July 1st are not subject to the program unless all parties elect to be included. If the home has been surrendered or bankruptcy has commenced, the program does not apply.

³ These forms are being prepared by the Nevada Supreme Court. As of the time of authoring this article, those forms had not yet been prepared.

⁴ Assembly Bill 149 includes language that the trustee will be required to provide, among other things:

- 1) Contact information allowing the homeowner to reach a person with authority to negotiate a loan modification on behalf of the beneficiary of the deed of trust,
- 2) Contact information for at least one local housing counseling agency approved by the United States Department of Housing and Urban Development, and,
- 3) A form upon which the homeowner may indicate his/her election to enter into mediation or to waive mediation.

⁵ Failing to request mediation within 30 days of service of a foreclosure notice may be considered a waiver of that option and the lender can proceed with the foreclosure.

Mediation:

The current Proposed Supreme Court⁶ Rules limit mediations to four hours and require that mediations be conducted within 90 days of a foreclosure notice being filed. The rules also require that decision makers for both the lender and the borrower be physically present at the mediations. Mediations will be conducted by Senior Judges, Supreme Court Settlement Judges, hearing masters, or other qualified and trained individuals. The cost of mediation is \$400.00, shared equally by the homeowner and the lender and each party must pay their \$200.00 portion prior to the mediation.

Within 10 days of the completion of the mediation, the mediator will prepare the necessary Statement of Agreement or Non-Agreement and serve it on the parties. The original will be filed with the Foreclosure Mediation Program Administrator and the mediation will be closed. If there is an agreement, the parties will execute the appropriate documents. If both parties proceed in good faith to mediate, but agreement is not reached, then there is a Certificate issued which states that the mediation be terminated and the Trustee can proceed with the sale.

Counsel at Mediation:

You are not required to have counsel represent you at the mediation but you can anticipate that in many, if not most, foreclosures, the homeowner will be represented by counsel. As such, it seems as if the mediation protocol will soon become a foreclosure cottage industry.

Whether you have counsel or not, you must attend the mediation and be prepared to negotiate. The person that you send must have the skill sets of a trained negotiator, knowledge of the bank's lending practice and protocols, knowledge of the foreclosure process, an ability to assess the defendant's financial statements and the ability to do a risk-benefit assessment in terms of what is being presented. If you send someone who is not able to be responsive to the needs and requirements of the Mediator during the mediation process, you are at risk of a determination of bad faith in the mediation process. The statute specifically requires that the representative "must have authority to negotiate a loan modification on behalf of the beneficiary of the deed of trust or have access at all times during the mediation to a person with such authority."(emphasis added)

Possible Sanctions:

⁶ Finalized rules were intended to be adopted by the Nevada Supreme Court on June 29, 2009, but have yet to issue at the time this newsletter is being distributed.

Once a homeowner requests mediation, the lender is required to participate. If a lender fails to appear, the mediator may recommend that sanctions be imposed and/or make a finding that the lender is not participating in good faith. If the homeowner fails to appear, it may result in the forfeiture of the right to mediate. In that instance, the lender is notified that the foreclosure can proceed and the mediation would very likely be deemed to have been waived.

Even if both sides appear at the mediation, sanctions may still issue if it is perceived that the lender does not approach the mediation in good faith, i.e. does not bring the requisite documents⁷ or does not participate in good faith in the mediation negotiations.⁸ The mediators have the unfettered right to make that determination of a failure or lack of good faith. In which case, the mediator can make a recommendation to the Court and “the court may issue an order imposing such sanctions against the beneficiary of the deed of trust or his representative as the court determines appropriate, including, without limitation, a loan modification in the manner determined proper by the Courts.” (emphasis added) Therefore, in theory a court could, for example, penalize a recalcitrant lender⁹ by setting new terms for the mortgage including principal and interest rate.

Looking forward:

As the Foreclosure Mediation Program is still in its infancy, there exists the potential for the Supreme Court of Nevada to issue further guidance on the Program. There is also a possibility of pre-emptive litigation from lenders with respect to the questionable constitutionality of mediators/judges to levy sanctions including the adjustment of the principal and/or interest rate of a loan agreement previously entered into by two willing parties.

In addition, it should be noted that Assembly Bill 149 was passed into law with a piece of companion legislation, Assembly Bill 140. Assembly Bill 140 addresses the affect of the new foreclosure laws on tenants in homes that are being foreclosed, and includes provisions changing the requirements for notice to tenants, as well as providing tenants with rights to terminate their lease without further liability when a foreclosure notice has been posted, or to occupy the residence for an additional 60 day period post-foreclosure, so long as that the tenant pays rent.

With respect to both Assembly Bill 149 and 140, more information is also available through the website for the Nevada Judiciary:

⁷ The Proposed Rules contemplate the lender being required to bring to the mediation, among other documents: 1) Original or Certified Copy of the deed of trust, the mortgage note and each assignment of the deed of trust and the mortgage note, 2) any appraisals concerning the subject property, and 3) an estimate of the “short sale” value of the residence which the lender may be willing to consider as part of the negotiation if loan modification is not agreed upon.

⁸ For example, if the lender fails to send a someone to the mediation with the requisite authority to modify the underlying loan.

⁹ “Recalcitrant” may include the Lender “standing on its rights” and insisting on the performance by the Borrower of the terms of its contract, i.e. to comply with the provisions of the note and Deed of Trust.

<http://www.nevadajudiciary.us/index.php/foreclosure-mediation.html>.

If you have any questions or comments with respect to this legislation and how it affects your rights, please do not hesitate to contact us [(702) 362-7800] and ask for Matthew Forstadt, Joseph Went or Peter Navarro.