

IN THE SUPREME COURT OF FLORIDA

**IN RE: FINAL REPORT AND RECOMMENDATIONS
OF THE TASK FORCE ON RESIDENTIAL
MORTGAGE FORECLOSURE CASES**

**COMMENTS OF THE CHIEF JUDGE OF THE SIXTH JUDICIAL
CIRCUIT REGARDING RECOMMENDATIONS FROM THE
TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES**

Comes Now, J. Thomas McGrady, Chief Judge of the Sixth Judicial Circuit, in response to this Court's request for comments on the Final Report and Recommendations of the Task Force on Residential Mortgage Foreclosure Cases, and submits these comments.

I. SUMMARY OF TASK FORCE RECOMMENDATIONS

The Task Force on Residential Mortgage Foreclosure Cases is to be commended for its considerable efforts to produce its Final Report and Recommendations. The Task Force generated its report in a short time frame and included a variety of recommendations for this Court to consider. The Task Force recommendations are summarized as follows.

The Task Force recommends that a managed mandatory mediation program be adopted statewide. The key elements of the program are that all mortgage foreclosure cases of homestead property would be referred to mediation unless:

- (a) the plaintiff and borrower agree otherwise, or unless
- (b) pre-suit mediation was conducted.

This managed mandatory mediation would:

- (a) be managed by a program manager like the Collins Center for Public Policy, Inc.,
- (b) be conducted by a certified circuit court mediator,
- (c) require the defendant to participate in foreclosure counseling prior to mediation,
- (d) provide for early exchange of borrower and lender information through an information technology platform,
- (e) allow the lender's representative to appear at mediation by telephone, and
- (f) be paid for by the lender.

The Task Force also recommends differentiated processing of three categories of mortgage foreclosure cases:

- (a) homestead properties, which would be processed through the mandatory managed mediation program,
- (b) vacant and abandoned property, which would be processed on an expedited basis, and
- (c) other foreclosure cases, which could be referred to mediation in the court's discretion and at equal cost to both parties.

The Task Force does not propose rules to implement the managed mandatory mediation program.¹ Rather, the Task Force proposes that these recommendations would be implemented by the Supreme Court directing each Chief Judge to adopt a model administrative order.

II. COMMENTS ON RECOMMENDATIONS

A. THE SUPREME COURT SHOULD REJECT THE RECOMMENDATION FOR A MANAGED MANDATORY MEDIATION PROGRAM FOR ALL MORTGAGE FORECLOSURES OF HOMESTEAD PROPERTY.

The Task Force proposal requires all mortgage foreclosure cases of homestead property to be referred to a program manager for managed mandatory mediation. The recommendation precludes the use of other options in a circuit. The judges in the Sixth Circuit have used mediation in foreclosure cases upon request of a party or when it appears to the court at a summary judgment hearing that there is a basis to refer a case to mediation. While the number of cases referred to mediation has not been large, the mediation success rate is a respectable 42% which is similar to the settlement rate of 46% for circuit civil mediation. Recently, the emphasis on mediation in this circuit has been expanded to encourage parties who want to save their home to participate in foreclosure

¹ The Task Force proposed an amendment to the Rules of Civil Procedure to require a foreclosure complaint to be verified and also proposed several forms. None of the rule proposals are designed to implement the managed mandatory mediation program.

counseling and to request mediation as soon as the case is filed. See Sixth Judicial Circuit Administrative Order 2009-65.

<http://www.jud6.org/LegalCommunity/LegalPractice/AOSAndRules/aos/aos2009/2009-065.htm>. This model is less expensive for the parties and targets those homeowners who show a genuine interest in trying to save their home. The Court should allow these models to proceed and should not require every circuit to have a program manager with mandatory mediation of all mortgage foreclosures of homestead property. Each Chief Judge should be able to determine whether existing alternatives in a circuit meet the goal of resolving cases through mediation.

The Task Force report drew an analogy between the backlog of foreclosure cases and a clogged highway. The Task Force suggests that managed mandatory mediation provides a method for cases to get off the highway and on another road. If all residential mortgage foreclosure cases must be referred to a program manager, there is a risk that such a program will clog the mediation road. Using an independent contractor to manage the court's cases injects another entity into the process. The Supreme Court should encourage mediation but should allow each Chief Judge to continue to develop alternatives in each circuit so that one clogged highway is not exchanged for another, with additional costs to the plaintiff and possible additional delays in the court.

B. IN THE ALTERNATIVE, THE SUPREME COURT SHOULD LIMIT THE TYPES OF MORTGAGE FORECLOSURE CASES SUBJECT TO MANAGED MANDATORY MEDIATION. ONLY OWNER-OCCUPIED HOMESTEAD PROPERTY WHERE THE DEFENDANT FILES A RESPONSIVE PLEADING SHOULD BE SUBJECT TO MANAGED MANDATORY MEDIATION.

If the Supreme Court rejects comment II.A above, that circuits be allowed to use alternatives to a managed mandatory mediation program, then the Court should at least narrow the types of mortgage foreclosure cases required to be included in a managed mediation program. Managed mandatory mediation should be limited to those mortgage foreclosure cases where homestead property remains owner-occupied and where a responsive pleading has been filed.

1. Managed mandatory mediation should be limited to owner-occupied homestead property.

Only those homeowners who still reside in homestead property should be required to be referred to managed mediation. These individuals are most likely to benefit from mediation because they have a significant stake in saving their home. If a homestead property owner has abandoned the property, the owner will have less incentive to participate in mediation.

This limitation is not included in the Task Force recommendations but is consistent with the Task Force recommendation for a differentiated process for foreclosure cases involving vacant or abandoned property.

2. Managed mandatory mediation should be limited to those cases in which the defendant files a responsive pleading.

When a defendant files an answer or motion to dismiss, the defendant has shown initiative to save the property. Persons who do not respond to the lawsuit are unlikely to respond to attempts at mediation or to be successful at mediation. Resources should be focused on those cases most likely to resolve through mediation.

If a homeowner has not filed an answer or other responsive pleading, the plaintiff, pursuant to Rule of Civil Procedure 1.500, is entitled to seek a default from the Clerk. The plaintiff who is entitled under the Rules to obtain a default from the Clerk should not also be ordered to participate in mediation.²

Limiting mandatory mediation referrals to cases in which the defendant files a responsive pleading is not included in the Task Force recommendations but is consistent with the Task Force recommendation for a differentiated process for foreclosure cases that are likely to resolve through a managed mediation program.

² The administrative order proposed by the Task Force would prevent a default from being issued, something that is contrary the Rules of Civil Procedure.

C. IF THE SUPREME COURT REQUIRES COMPLIANCE WITH ANY OF THE RECOMMENDATIONS, IT SHOULD DO SO BY ADOPTING RULES OF CIVIL PROCEDURE. THE SUPREME COURT SHOULD NOT DIRECT A CHIEF JUDGE TO ADOPT AN ADMINISTRATIVE ORDER.

If the Court rejects these comments and determines that statewide procedures should be established, it should do so by adopting Rules of Civil Procedure. The purpose of rules of procedure is to provide for uniformity. A court rule is “a rule of practice of procedure adopted to facilitate the uniform conduct of litigation applicable to all proceedings, all parties, and all attorneys.” Rule of Judicial Administration 2.120(a). If statewide procedures are to be mandated, and a Chief Judge’s discretion is to be limited, the Court should use the rulemaking process and should not direct a Chief Judge to issue a particular administrative order.

D. THE SUPREME COURT SHOULD REJECT THE TASK FORCE PROPOSAL THAT COSTS BE BORNE BY THE PLAINTIFF AND PROVIDE FOR COST ALLOCATION SIMILAR TO THAT PROPOSED IN THE MINORITY REPORT.

The Task Force recommends that plaintiffs be assessed costs for managed mandatory mediation. The filing fees in foreclosure cases were significantly increased by the Florida Legislature during the 2009 legislative session. See SB 1718, Chapter 2009-61, Laws of Florida. Plaintiffs now pay filing fees of up to \$1,900.00, based upon the value of the property. In addition to the filing fee, the Task Force recommends that plaintiffs pay the fee for managed mediation. The

Collins Center for Public Policy, Inc., currently charges \$750 for managed mediation.

A Task Force Minority Report, authored by Judge Lee A. Haworth, suggests that these costs should be allocated between the plaintiff and defendant. (Appendix L). The minority report presents a better option. Mediation creates an opportunity for unscrupulous borrowers to continue to reside in a property without paying rent as long as the foreclosure process can be delayed. If the homeowner has a stake in mediation by paying a portion of the costs, only those homeowners who have a possibility of saving their home are likely to choose to participate in mediation. It is suggested that plaintiffs should pay two-thirds of the costs, with homeowners paying one-third of the costs.

Also, the State Courts System should seek legislation to authorize a fee for circuit civil mediation. If a special session is called, the Supreme Court should support an amendment to section 44.108, Florida Statutes, to authorize a fee for circuit civil mediation. A fee is already authorized for family law mediation. See section 44.108(2), Fla. Stat. The fee should be set at an amount to recover the court's costs to manage a program. This is consistent with the Task Force Minority Report authored by Rebecca Storrow. (Appendix M).

E. THE SUPREME COURT SHOULD NOT UNDULY RESTRICT A CHIEF JUDGE’S AUTHORITY TO MANAGE CASES IN A CIRCUIT.

Whatever recommendations the Supreme Court adopts, the Chief Judge should have flexibility in implementing any new directives. The Task Force emphasizes the desire for statewide uniformity for the convenience of lenders but each circuit has unique issues that may not make the recommendations practical in that area. The desire for statewide uniformity for the convenience of lenders should not overshadow the Chief Judge’s responsibility pursuant to Article V, section 2, of the Florida Constitution, for the administrative supervision of the courts in his circuit.

If the Supreme Court sets a deadline to comply with any new directives, then the deadline should take into consideration the time needed for implementation of those directives. For instance, if each circuit is required to select a mediation manager, the deadline should take into account the time for a competitive process to select the mediation manager.

III. COMMENTS ON PROPOSED ADMINISTRATIVE ORDER

If the Court rejects the suggestions in this comment and requires a Chief Judge to adopt a particular administrative order, the proposed model administrative order should be modified.

A. The scope and style of the proposed model administrative order should be modified.

The proposed order, Appendix J, page 4, states: “[H]owever, compliance with this Administrative Order varies depending on whether the property secured by the mortgage is a homestead residence.” The order should be restructured to more clearly state which provisions apply to homestead property. The order should also more clearly state who is being ordered to take action.

The proposed model administrative order uses “whereas” clauses, a drafting style that is inconsistent with directives from the Supreme Court to use plain language. See AO SC06-14 regarding drafting of court rules.

B. The provisions in the proposed model administrative order that test the limits of the Chief Judge’s authority should be eliminated or modified.

The proposed administrative order (Appendix J, p. 5) prohibits a plaintiff from applying for a default judgment until after mediation, even though a plaintiff is authorized by Rule of Civil Procedure 1.500 to seek a default. The Chief Judge does not have authority to issue an administrative order that is contrary to a rule of procedure. See *Obando v Bradshaw*, 920 So. 2d 198 (Fla. 4th DCA 2006) (administrative order requiring ROR violated Rule of Criminal Procedure 3.131(j)); *Hatcher v. Davis*, 798 So. 2d 765 (Fla. 2d DCA 2001) (administrative order conflicted with Family Law Rules of Procedure and improperly delegated court calendaring).

The proposed administrative order (Appendix J, p. 8) requires certain information to be transmitted on a web-enabled information platform. This requirement should be deleted. A mediation manager should be allowed to use other methods to transmit information between the parties. Also, it is not appropriate for the Chief Judge to direct by administrative order that such a system be developed.

The proposed administrative order (Appendix J, p. 12) provides that mediation communications are confidential. The Chief Judge cannot by administrative order make such communications confidential. The statutes and rules cited provide for confidentiality of communications during mediation.

C. The Clerk of the Circuit Court should not be given responsibility for the notice to homeowner.

The proposed model administrative order, Appendix J, page 5, requires the Clerk of the Circuit Court to attach a notice regarding managed mediation to the summons. This puts an additional burden on the Clerk when the burden should be upon the plaintiff to provide a copy of the notice to be served with the summons.

D. The Notice to Homeowner should be simplified.

The proposed Notice to Homeowner, Appendix J, page 23, is too lengthy and too technical to be understood by many homeowners. A more simplified notice should be provided. For an example, see Sixth Judicial Circuit Administrative Order 2009-65, Attachment C.

IV. CONCLUSION

For the above stated reasons, the Chief Judge of the Sixth Judicial Circuit recommends that the Supreme Court reject the recommendations of the Task Force on Residential Mortgage Foreclosure Cases that require managed mandatory mediation of all mortgage foreclosure cases of homestead property. Instead the Court should encourage mediation and allow each Chief Judge to continue to develop targeted alternatives in each circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to The Honorable Jennifer D. Bailey, 73 W. Flagler St., Ste 1307, Miami, FL 33130-4764; Mark A. Romance, Chair of Civil Proc. Rules Committee, Richman Greer P.A., 201 S. Biscayne Blvd., Ste 1000, Miami, FL 33131-4327; and Jack Harkness, Exec. Dir., The Florida Bar, 651 E. Jefferson St., Tallahassee, FL 32399-6584, this 14th day of October 2009.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Appellate Procedure 9.100(l) I certify that this computer generated response is prepared in Times New Roman 14 point font and complies with the Rule's font requirements.

B. Elaine New