MEASURING THE SUCCESS OF NEVADA'S FORECLOSURE MEDIATION PROGRAM

The U.S. Department of Justice (DOJ) Access to Justice Initiative has identified Nevada's Foreclosure Mediation Program (FMP) as a model program for initiating foreclosure mediation programs across the United States. In a recent report, the DOJ highlighted the efforts of state foreclosure mediation programs to facilitate an alternative to foreclosure in circumstances where such an outcome is feasible. That report cites Nevada's program as an effective program offering help to homeowners facing foreclosure in the nation's highest foreclosure state.

FMP Deputy Director Verise V. Campbell was invited to the White House on November 19, 2010, to participate in a panel hosted by the Access to Justice Initiative and Vice President Joe Biden. Following this event, the DOJ began evaluating the success of state foreclosure mediation programs and looking for best practices. Nevada's program was identified for developing policies and procedures that can be shared with other states. Recently, planners in Hawaii and Washington consulted with Nevada's program in implementing foreclosure mediation programs in those states.

The Nevada State Legislature created the Foreclosure Mediation Program in 2009 to address the foreclosure crisis in Nevada. Between September 2009 and September 2011, a total of 13,813 homeowners participated in the program with 11,674 mediations resulting in no foreclosure. During this period, 3,868 homeowners were able to remain in their homes through loan modification. Some cite these figures as a sign of success and still others say there is another story behind the numbers. Those on both sides agree that there is always room for improvement. This month, Nevada law practitioners weigh in with their opinions on the program.

NEVADA'S FORECLOSURE PROGRAM TURNS TWO YEARS OLD: IS IT WORKING?

BY BARBARA BUCKLEY, ESQ.

We've heard the lines again and again: Nevada is the foreclosure capital of the world. Nevada is ground zero in the foreclosure crisis. No state has been hit harder than Nevada.

Prior to the 2009 Nevada legislative session, I heard a common refrain from constituents in my assembly district and from clients at legal aid: why won't my lender just talk to me? Do they really want to own another home in Nevada? Because Nevada is considered a "nonjudicial" foreclosure state, homeowners had no automatic opportunity to plead their case to a judge when they were sued; their home was sold at a trustee's sale, regardless of the circumstances – even if their lender or servicer agreed to participate in a federal loan modification program but wouldn't consider the homeowner for the program or even if it wasn't clear that the beneficiary had the right to foreclose. Affirmative lawsuits were undertaken by some of these homeowners, but not often due to the cost of affirmatively filing a lawsuit. Out of these circumstances, the Nevada Foreclosure Mediation program was born.

The statutory scheme is fairly simple: a homeowner has the right to elect mediation; if a homeowner does so, the beneficiary is obligated to attend the mediation and have authority to agree to alternatives to foreclosure such as loan modification. The beneficiary must also prove they have the legal right to foreclose by producing the note, the deed of trust and any assignments, and finally the beneficiary must participate in good faith. The program was placed in the judicial branch under the Administrative Office of the Courts of the Supreme Court of Nevada. Within three months of the passage of the legislation, the first mediation was held. The Nevada Supreme Court did an incredible job creating a program structure in a very short amount of time.

Two years later, more than 13,000 mediations have taken place. In 85 percent of the cases, foreclosure was not the outcome. In 51 percent of these cases, an agreement was reached; in 49 percent of the cases, the beneficiary did not meet the requirements to foreclose, by, for example, being able to document that they own the note and deed of trust. The noncompliance rate is troubling; however, some of the cases end up resolved in an agreement after a Petition for Judicial Review is filed.

Litigation is continually shaping the program. In *Pasillas v. HSBC Bank*, 255 P.3d 1281 (Nev. 2011), a mediation was held in which the beneficiary failed to bring the required documents and did not have someone present with the authority to modify the loan. The homeowner brought a petition for judicial review seeking a resolution and the district court ruled that the foreclosure could proceed. In a unanimous decision, the Nevada Supreme Court ruled that the program requirements were mandatory and that failure to comply with these requirements is an offense subject to sanctions by the district court. The court listed a number of factors that the district court should consider when determining the sanctions that should be imposed, such as whether the violations were intentional, the amount of prejudice to the non-violating party and the violating party's willingness to mitigate any harm by continuing meaningful negotiation. The court also ruled that an assignment provided without the name of the assignee is defective for purposes of the program as it does not identify the relevant parties. It is anticipated that the noncompliance rate by the beneficiaries will drop significantly as a result of this decision.

In *Leyva v. Nat'l. Default Servicing Corp.*, 255 P.3d 1275 (Nev. 2011), the Nevada Supreme Court reiterated the rules of the program and offered further guidance on the issue of assignments, stating that when one mortgage company transfers a deed to another, it must

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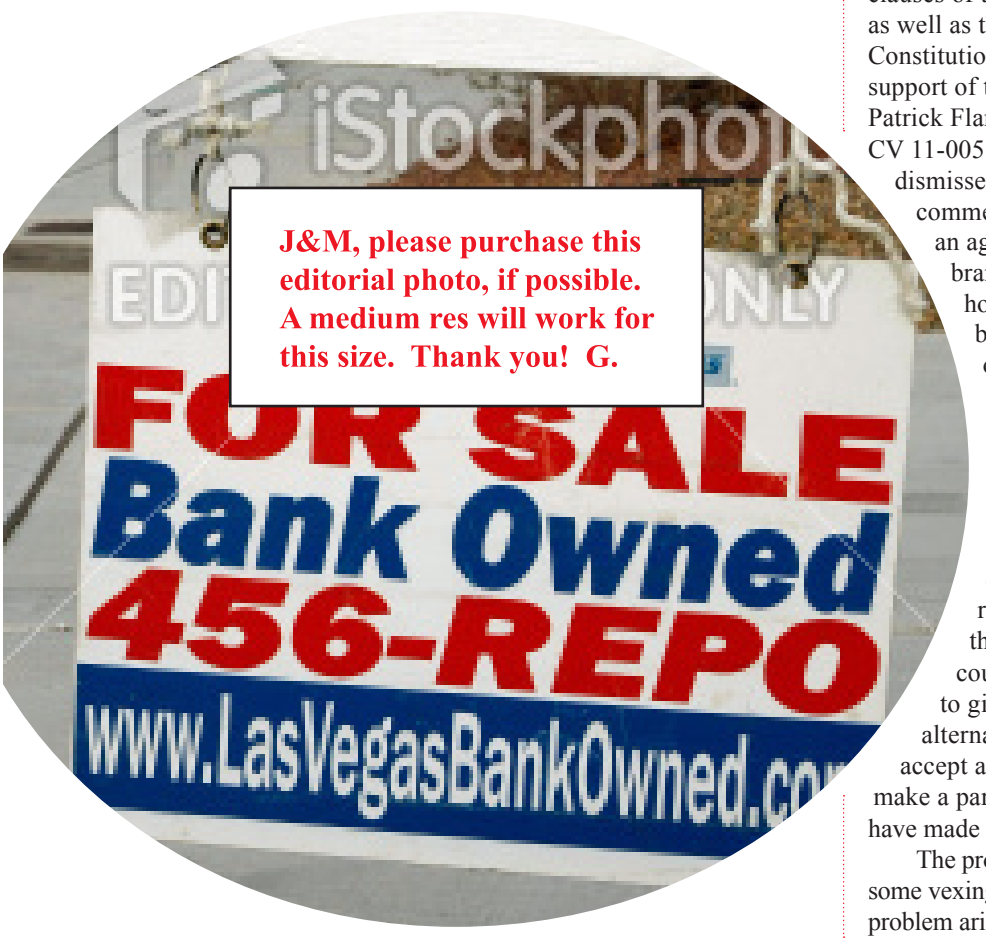
produce a signed assignment. A "letter" from the company acquiring the mortgage is insufficient. The court further clarified that when a note is transferred, Article III of the UCC applies. The court, in great detail, discusses whether or not a note is payable to bearer or payable to order; if a note is payable to bearer, the person in possession is entitled to payment. If the note is payable to order and is sought to be enforced by a party other than the one to whom the note is originally payable, the note must be either negotiated or transferred, requiring either an endorsement or proof of transfer.

In *Holt v. Reg'l Tr. Servs. Corp*, 127 Nev. Adv. Opinion 80 (Dec. 15, 2011), the beneficiary did not attend the mediation. Following a Petition for Judicial Review, the district court declared RTSC acted in bad faith, and as sanctions, directed that the certificate to foreclose not be issued and that the Holts be awarded attorney fees. RTSC then filed another Notice of Default. The homeowner filed suit, claiming that the order denying the certificate to foreclose on the previous notice of default carries claim and issue preclusive effect and permanently prevents foreclosure. The court rejected this argument, holding that denial of a certificate to foreclose does not, without more, permanently preclude foreclosure. The opinion states that if an omission that leads to denial of a certificate to foreclose costs the lender its security and gives the property free and clear to the homeowner, it would convert the mediation from a cooperative endeavor to an antagonistic one. The court commented that if this was the purpose of the program, the legislature would need to say so directly. The court finally noted that while sanctions conceivably could be imposed that would wipe out the lender's security, it would not decide that issue as it was not presented.



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The latest legal case just briefed before the Nevada Supreme Court is *Wells Fargo Bank v. Renslow*, Case No. 58283. This case is a frontal attack on the program alleging, inter alia, that the program violates the takings and contracts clauses of the United States and Nevada Constitutions as well as the separation of powers clause of the Nevada Constitution. The Attorney General filed an amicus brief in support of the program, attaching an opinion from Judge Patrick Flanagan from another case, *Deutsche Bank v. Truex*, CV 11-00584. In that lengthy opinion, Judge Flanagan dismissed arguments based on separation of powers, dryly commenting that the Supreme Court is not running an agency that needs to be based in the executive branch. The court noted that in a system in which homeowners do not know who owns their loans because the beneficiary recorded in the county office is a mere placeholder and their point of contact is a mere servicer, providing a forum designed in part to address the ownership issue does help prevent litigation and certainly helps prevent needless litigation. The court also noted, even though Nevada is a nonjudicial foreclosure state, it did not take foreclosure controversies outside the realm of the judiciary; rather, it removed automatic judicial oversight and placed the burden on the homeowner to take the matter to court. The district court found that it is permissible to give back limited oversight, or to create an alternative method of oversight, saying it is difficult to accept a proposition stating that the legislature could not make a partial restoration of judicial oversight when it could have made a complete restoration.

The program continuously deals with new issues and some vexing ones that have existed since its inception. One problem arising again and again is that a beneficiary will send

a servicer to the mediation because the loan was sold, resold, securitized, divided up and is now being "managed" by a servicer. The servicer may not have the same interest as the beneficiary. (This point was sharply made in the amicus curiae brief of the Attorney General in the *Renslow* case discussed above). The law and the rules make it so that, while a beneficiary may send a representative to the mediation on their behalf, the attendee must have "authority." This issue will likely be discussed more in future Nevada Supreme Court decisions.

In an effort to improve the rules and operations of the program, the Nevada Supreme Court recently appointed an Advisory Committee to suggest new rules/policies in ways to improve the program. The committee consists of representatives of beneficiaries, trustees, homeowners, realtors and others. Among the issues being considered by the committee are new forms for the beneficiaries to utilize when producing documents, a new portal to allow electronic submission of data and a new timeline to allow more time for document review prior to the mediation.

Because of a new law (AB 284) requiring that beneficiaries file all documents under penalty of perjury prior to filing a notice of default, foreclosure filings have dropped significantly. All observers of the process believe that the filings will pick up soon. When they do, the Nevada Foreclosure Mediation program will be needed more than ever. ■

BARBARA BUCKLEY is the executive director of the Legal Aid Center of Southern Nevada, a nonprofit legal aid organization serving residents of Clark County. From 1995 through 2010, she served in the Nevada Legislature, including four sessions as Majority Leader and two sessions as Speaker. She is the author/sponsor of AB 149, which created the Nevada Foreclosure Mediation Program.