

Circuit Court of the Third Circuit
FORECLOSURE MEDIATION PILOT PROJECT REPORT
November 1, 2009 through October 31, 2010

The Supreme Court of the State of Hawaii established a Foreclosure Mediation Pilot Project (FMPP) in the Third Circuit, effective November 1, 2009 through October 31, 2010. The FMPP applies only to owner-occupant foreclosure actions filed in the Third Circuit.

It was further ordered that in any residential foreclosure action, a Foreclosure Mediation Notice shall be served along with the complaint and summons (see Attachment A - gives borrower information about the FMPP and instructions on how to participate). Borrowers are eligible to participate in the FMPP provided they occupy the property as a primary residence.

The eligible borrower can access this mediation program by completing the Foreclosure Mediation Request (see Attachment B) and filing it in the appropriate district (Hilo or Kona). The borrower is then required to mail or hand-deliver the filed Foreclosure Mediation Request to either Judge Greg K. Nakamura or Judge Ronald Ibarra (depending on the district of the property). Within ten days of the filing date of the Foreclosure Mediation Request, the plaintiff is to schedule a conference with the Judge, to be attended by all parties. At the conclusion of this conference, the Judge has the discretion to order the parties to participate in mediation.

The Third Circuit Court was ordered to submit a report for the Supreme Court's consideration within sixty days of the termination of the FMPP.

An order extending the FMPP through January 30, 2011 was filed on October 28, 2010.

BACKGROUND INFORMATION:

The real estate research firm RealtyTrac, which has been cited in many news media articles, reported that in December 2009, the Hawaii foreclosure count was about triple the filings in December 2008. RealtyTrac stated that Hawaii foreclosures rose by 183 percent in 2009.

Depending on the month, due to market fluctuations, Hawaii was said to have had at the very best, the 11th worst foreclosure rate in the nation. During some months we had the distinction of being the 9th worst. In September 2010, the

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overall number of housing units in the State which received a foreclosure filing was one home in 317. However in Hawaii County the picture was far more grave: one home in 189 received a foreclosure filing. (realtytrac.com).

West Hawaii Today writer Chelsea Jensen stated, "[The] Kailua-Kona foreclosure activity in September spiked to 165 homes from the 74 listed in July, according to RealtyTrac, a company that collects data from more than 2,200 counties nationwide, representing about 90 percent of the U.S. population. ... The state's 1,617 total foreclosure filings last month ranked the Aloha State ninth-highest in the nation for foreclosure filings, behind Nevada, which has led the list for nearly four years." ("Foreclosure Crisis Mounts in Kona", westhawaii.com, posted on 10/31/10.)

HOMEOWNERS FACING FORECLOSURE:

Some homeowners continue to struggle with their mortgage payments even as the economy and the real estate market are showing signs of a slow recovery. The relatively high levels of unemployment, as well as property values that continue to be depressed, are largely behind our still-heavy foreclosure problem. Should there be continued turmoil in financial and credit markets, foreclosure rates may also continue to increase.

There were many calls from borrowers inquiring about the FMPP. Many of these callers stated that they were intimidated and overwhelmed by the foreclosure process.

Homeowners who have fallen behind on their bills are often in a state of stress, with worries of foreclosure, bankruptcy, and repossession creating a sense of high anxiety. Homeowners may not know where to turn, or what options they may have available. In his 7/11/10 article on the foreclosure process, reporter Rob Perez stated that "For some homeowners facing foreclosure, the problem-plagued process has meant ruined finances, uncertain futures and overwhelming stress." In his article, borrowers described the foreclosure process as a "nightmare", "cruel", "makes you feel like you're a criminal", and, "traumatizing" (staradvertiser.com).

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INFORMING THE PUBLIC ABOUT THE FMPP:

Third Circuit Court staff contacted all of the attorneys who are known to represent plaintiffs in foreclosure cases in the Third Circuit, informing them of the FMPP and asking the attorneys to attach the Foreclosure Mediation Notice and Request forms to the foreclosure complaint and summons. The attorneys were provided with these forms, as well as with the Order Establishing the Foreclosure Mediation Pilot Project. Not all firms attached the Foreclosure Mediation Pilot Project forms as requested.

Of the 200 foreclosure cases being tracked, staff has been able to discern that 106 borrowers were provided the forms by the plaintiff's attorneys; 90 were not; and 4 are unknown. Six of the cases being tracked were filed prior to the inception of the FMPP (these cases are being tracked because they filed the FMPP Notice and Request).

The forms are also available on the Third Circuit Court's webpage on the Judiciary website, and accessible to anyone with internet capability.

The FMPP was covered by the media, which served to alert borrowers in foreclosure about this potential option. The story was featured in Big Island newspapers and reported on by local (statewide) newscasts; KITV's Darryl Huff reported on March 2, 2010, "The Big Island has one of the state's highest foreclosure rates, but some Hawaii county homeowners are now being given one more chance to save either their home, their savings or their credit rating. ... Judges Ronald Ibarra of Kona and Greg Nakamura [of Hilo] have had mediators specially trained to handle the negotiations. 'We'll do our best to make sure that both sides fully participate in the mediation', Nakamura said. ... The Big Island was chosen because its foreclosure rate is higher than other counties (kitv.com)."

It was featured on loanworkout.org, in its January 21, 2010 e-zine issue. "Hawaii's Big Island Offers Foreclosure Mediation to Struggling Homeowners" was the headline. Reporter Moe Bedard stated that "Homeowners on the Big Island who have been served with a foreclosure action on the residential property that they occupy, may ask to participate in mediation with the lender before the case is heard by a judge." In his article, Mr. Bedard outlined the FMPP program.

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Judge Nakamura was quoted in this article as saying, "There are many good reasons why a borrower may want to try mediation as an option to litigation ... litigation can be very expensive and time consuming. Mediation by a trained, neutral third party is a cheaper, more efficient and less divisive way to resolve a dispute. ... when compared to the court process, mediation is more informal and parties have more time to negotiate and, hopefully, reach a joint agreement on the terms."

It is noted that in spite of the publicity received and the convenience of online forms, the FMPP seems to have been underutilized: only 5% of the foreclosure cases have been mediated through the project. However, it is unknown how many of the foreclosure cases would have actually qualified, since complete information on owner occupancy is unknown (see Data section below).

Also of note is that out of the ten cases that went through the mediation process, only five of those cases reached an agreement between the parties; and of those five, only one case has actually been dismissed because the borrower was able to meet the terms of the agreement.

DATA:

At the time of this writing (October 29, 2010), data regarding the occupancy status of these properties is incomplete (and thus it cannot be determined what percentage of these cases would qualify for FMPP). Our staff made diligent attempts since the inception of FMPP to contact plaintiff's attorneys, inquiring whether or not the properties were owner-occupied. Several of the firms were non-responsive to inquiries. The information given is based on the responses received. It was not clear from my inquiries using the Judiciary databases (HAJIS and Hooike) whether or not the properties were owner-occupied.

Please see tables below for details of our tracking of judicial foreclosure cases.

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	Kona	Hilo	Total
# of foreclosure cases being tracked	80	120	200
# of these cases which resulted in foreclosure	17	32	48
# of these cases which were dismissed	7	6	13
# of these cases which are unresolved, to date	56	82	139

Data on cases seeking mediation through the FMPP:

	Mediation Requests Filed	Mediations Ordered	Cases Denied Mediation	Cases Which Decided That Mediation Was Not Necessary	No Mediation Conference to Date*
KONA	11	4	6	0	1
HILO	21	6	7	3	5
TOTAL	32	10	13	3	4

*Regarding cases which have not gone into conference: KONA: the request was filed after foreclosure. HILO: One case filed the request after foreclosure. One case did not properly file the documents, thus the cases never went into conference. Two cases are awaiting the scheduling of their conferences. The fifth case has had a conference scheduled for November.

Outcomes		KONA	HILO	TOTAL
Mediation Ordered Kona (4) Hilo (6)	Mediation Still in Process	0	2	2
	Agreement Reached, Case Dismissed	0	1	1
	Agreement Reached, Borrower Not Meeting Agreement, Unresolved	2	1	3
	Agreement Reached, Foreclosed	0	1	1
	Agreement <u>Not</u> Reached, Unresolved	2	0	2
	Agreement <u>Not</u> Reached, Foreclosed	0	1	1
Mediation Denied Kona (6) Hilo (7)	Unresolved	4	1	5
	Foreclosed	2	6	8

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MEDIATION INFORMATION:

The mediators were mostly attorneys, as well as an educator and a realtor. The mediators engaged in a day-long training which was based on the "Hawaii Diamond Model" of mediation; this model is culturally sensitive, and according to training facilitator Catherine Lampton, is recognized by the Judiciary. These mediators were not compensated for the time and effort spent on training, nor on mediating cases.

In one mediator's view, "any time you can get both sides to talking with each other, it is a benefit. ... to me, it gave the defendant at least a shot at doing something to help himself out that might have been acceptable to the plaintiff-lender. And [borrowers feel] ... that they were given a chance in the litigation process ... And to me, for these defendants who mostly are in impossible situations, at least giving them that is a plus, and a plus for the whole judicial process, because it gives the community and litigants the idea that the judicial process is fair and willing to at least give them a chance. I would encourage the project to continue."

Another mediator noted that more time was expended preparing for and conducting the mediation than he expected, however he felt the time well spent. He wanted to emphasize two points: that the lender's representative should be empowered to make decisions on behalf of the lender; and that all parties should participate "in person".

A third mediator wrote, "I can only stress the importance of the mediation process itself. Bridging the different communication paradigms ... is an important part of a successful mediation ... we did it, and the home was saved ... it's always worth the work when an agreement can be reached! ... This program is great, and I really want it to be successful. I'm hoping that more and more mediations will get ordered ..."

CONCLUSION:

The goal of FMPP is to give homeowners the opportunity to negotiate with the lenders, and stay in their homes. Through mediation, it is hoped that the lender will be able to collect the back payments owed, the homeowner will be able to

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keep his home, and hopefully walk away with a more realistic mortgage payment that will prevent him from defaulting again in the future.

As mentioned above, in spite of publicity and convenience, a very small percentage of cases sought mediation. There has been just one case which was mediated successfully where the borrowers were able to meet the agreement terms, and the case was subsequently dismissed. Other cases which were mediated either could not come to an agreement; or if an agreement was reached, the borrower could not meet the terms of their agreement. Given the small number of cases which resulted in a successful mediation (1), we do not recommend an extension of the program as it is presently structured, at this time. However, modifications to the program may increase the utilization of the mediation program - such as holding a mandatory conference in all foreclosure cases involving owner-occupants of real property; to determine whether mediation is appropriate.

Respectfully Submitted,



Ronald Ibarra
Chief Judge
Third Circuit Court Third Circuit

NOV 10 2010

Date



Lester D. Oshiro
Chief Court Administrator
Third Circuit Court Third Circuit

NOV 10 2010

Date

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
STATE OF HAWAII

Case Name: _____

Civil No: _____

FORECLOSURE MEDIATION NOTICE

You have been served with a foreclosure complaint that could cause the loss of your home.

The Court has a **Foreclosure Mediation Pilot Project** to assist parties to resolve foreclosure cases. You are eligible to participate in mediation under this Program if:

- (1) you are the borrower or co-borrower, and**
- (2) you occupy the property as your primary residence.**

Foreclosure mediation is a process in which a neutral mediator assists parties in trying to reach a voluntary agreement to avoid foreclosure. To help you prepare for mediation, you should consult with an attorney and with a HUD-certified counseling agency (which you can find by calling 1-888-995-4673 and/or going to www.995hope.org or www.gov/offices/hsg/sfh/hcc/hccprof14.frm). You may also bring your attorney to the mediation.

To participate in the Foreclosure Mediation Pilot Project, no later than 15 days after you were served with this Notice, you must complete the Foreclosure Mediation Request attached and file these two documents (original and 3 copies) at:

Legal Documents Branch/Section
Circuit Court of the Third Circuit
Hale Kaulike
777 Kilauea Avenue
Hilo, HI 96720

**Attachment A
Foreclosure Mediation Notice**

If the property is located in the Districts of Kau, Puna, North Hilo, South Hilo, or Hamakua, and the case will be heard in Hilo; or at:

Legal Documents Branch
Third Circuit Court
Kona Division
Keakealani Building
79-1020 Haukapila Street
Kealahou, HI 96750

If the property is located in the Districts of North Kona, South Kona, North Kohala, or South Kohala, and the case will be heard in Kona.

You must immediately mail or deliver a file-stamped copy of these two documents to the Plaintiff's attorney, _____, whose address is _____ and to:

The Honorable Greg Nakamura
Third Circuit Court
Hale Kaulike
777 Kilauea Avenue
Hilo, HI 96720

If the case is to be heard in Hilo;

or to:

The Honorable Ronald Ibarra
Third Circuit Court
Kona Division
Keakealani Building
79-1020 Haukapila Street
Kealahou, HI 96750

If the case is to be heard in Kona.

A conference will be held with the Judge to consider the Mediation Request. You must attend the conference.

Attachment B
Foreclosure Mediation Request

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
STATE OF HAWAII

FORECLOSURE MEDIATION REQUEST

Your Name _____

Address _____

Home Phone _____ Cell Phone _____

Work Phone _____ Email address: _____

Mailing Address: _____

I request foreclosure mediation in my case and certify that I am the borrower or co-borrower in this case and I occupy the property referenced in this case as my primary residence.

Signature

Print Name

Date Signed