Richard Zorza's Access to Justice Blog
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Foreclosure and Court Simplificaton Model: South Carolina Supreme Court Chief Orders No Foreclosure Without Prior Opportunity to Participate in Modification Programs

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The South Carolina Supreme Court is quietly becoming an access to justice leader. This week the Court, through an Administrative Order issued by Chief Jean Toal, takes another simple and sensible step, this time in the foreclosure area. The Order puts is place requirements of certification by the foreclosing attorney that the homeowner has been given an opportunity to participate in loss mitigation programs, including loan modification programs. The requirements are detailed

The Administrative Order orders that:

> *In all mortgage foreclosure actions pending on May 9, 2011,* [this is the language governing pending actions, and similar provisions apply to future actions] *before any merits hearing in the case, or if an order of foreclosure has been entered, before any foreclosure sale, the Mortgagee shall, through its attorney of record, file with the court and serve upon every Mortgagor a notice of the Mortgagor's right to foreclosure intervention. All proceedings in the foreclosure action shall be stayed until completion of such foreclosure intervention.*

No foreclosure hearing or foreclosure sale may be held in the foreclosure action until the Mortgagee's attorney certifies the following:

(a) that the Mortgagor has been served with a notice of the Mortgagor's right to foreclosure intervention for the purpose of seeking a resolution of the foreclosure action by loan modification or other means of loss mitigation;

(b) that the Mortgagee, or its designated agent, has received and examined all documents and records required to be submitted by the Mortgagor to evaluate eligibility for foreclosure intervention;

(c) that the Mortgagor has been afforded a full and fair opportunity to submit any other information or data pertaining to the Mortgagor's loan or personal circumstances for consideration by the Mortgagee;

(d) that after completion of the foreclosure intervention process, the Mortgagor does not qualify for loan modification or other means of loss mitigation, in accordance with any standards, rules or guidelines applicable to the mortgage loan, and the parties have been unable to reach any other agreement concerning the foreclosure process; and,

(e) that notice of the denial of loan modification or other means of loss mitigation has been served on the Mortgagor by mailing such notice to all known addresses of the Mortgagor; provided, that such notice shall also state that the Mortgagor has 30 days from the date of mailing of notice of denial of relief to file and serve an answer or other response to the Mortgagee's summons and complaint.

If within thirty days after having been served with notice of the Mortgagor's rights, the Mortgagor has failed, refused, or voluntarily elected not to participate in any foreclosure intervention process, the Mortgagee, through its attorney, shall certify that fact to the Court, and the foreclosure action may proceed.

The new Administrative Order is justified by the confusion in the courts caused by lack of communication about modifications that may be in process at the same time as foreclosures. It should have the effect of increasing participation in modification programs. The Order explains as to the need:

> *Since imposition of my prior order, the number of foreclosure actions filed in this State have continued to increase. The trial courts having jurisdiction over such actions have reported to this Court difficulty in making final disposition of these actions as a result of failed or delayed loss mitigation efforts between lender-servicers and mortgagor-debtors. As a result, the number of unresolved foreclosure actions has increased, with a resulting burden on the resources of the Court before which the action is pending.*

The courts have reported that these failures are the result of a breakdown of loss mitigation efforts that all parties find to be in their best interests, if possible. The trial courts report that such breakdowns are largely the result of difficulty in communication between lender-servicers and debtors, and the fact that foreclosure actions are proceeding to conclusion without regard to ongoing loss mitigation efforts by the parties.

More generally, however, the Order is a wonderful example of a court thinking about WHO should bear responsibility for WHAT steps in the process, and then putting responsibility on the party with the information and capacity to take responsibility. It shows how broad is the power of a court over its procedures to introduce some level of sanity into the system, and while doing so to advance the general cause of justice. It is a beginning step in process simplification that will both increase justice and reduce court costs. I hope that courts will continue this approach, not only in the foreclosure area, but more generally.

This step has already received national attention: Washington Post,

We look for continued leadership from the SC Court, its Access to Justice Commission, and its Bar.

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