



RICHARD B. ORFINGER
CHIEF JUDGE

JACQUELINE R. GRIFFIN
THOMAS D. SAWAYA
WILLIAM D. PALMER
DAVID A. MONACO
VINCENT G. TORPY, JR.
C. ALAN LAWSON
KERRY I. EVANDER
JAY P. COHEN
BRUCE W. JACOBUS
JUDGES

SUSAN WRIGHT
CLERK

TY W. BERDEAUX
MARSHAL

DISTRICT COURT OF APPEAL
FIFTH DISTRICT
300 SOUTH BEACH STREET
DAYTONA BEACH, FLORIDA 32114
(386) 947-1500 COURT
(386) 255-8600 CLERK

October 21, 2011

The Honorable Charles T. Canady
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1900

Dear Chief Justice Canady:

The Assessment Workgroup for the Managed Mediation Program for Residential Mortgage Foreclosure Cases submits the following report to the Supreme Court pursuant to its charge under In re: Assessment Workgroup for the Managed Mediation Program for Residential Mortgage Foreclosure Cases, AOSC11-33 (Sept. 26, 2011). The order directed the workgroup to: (1) assess the success of the statewide managed mediation program, as evidenced by data collected to date, as well as other relevant information, and make recommendations to the Court to continue, modify, or eliminate the statewide program; and (2) recommend steps to be taken to manage pending and new residential mortgage foreclosure cases if the mandate for the statewide program is eliminated.

The workgroup met six times by conference call between October 3 and October 19, and engaged in significant outreach, soliciting public comments about the statewide program from attorneys for borrowers and lenders, lenders, borrowers, judges and court personnel, program managers, mediators, concerned citizens, and others. A quantitative summary of the 123 comments received is appended to this report. In addition, the workgroup by conference call obtained input from the circuit chief judges. Of the 12 circuits that provided comments, seven supported a local option to the statewide program, three supported continuation of the statewide program as a mandate, and one supported elimination of the statewide program altogether.

The workgroup reviewed the August 2011 Key Determinants Report and the April 2011 120-day Quarterly Status Report, as well as summary reporting system foreclosure case filing data from 2005 to July 2011. The workgroup was provided with and considered other reports, including the September 2011 report of the Federal Housing Finance Agency Office of Inspector, "Evaluation of FFHFA's Oversight of Fannie Mae's Management of Operational Risk," an August 2011 University of Wisconsin study of mandatory foreclosure mediation, "Mandatory Mediation and Mortgage Contracts," and foreclosure mediation data from other states obtained from the National Center for State Courts' May 2011 report, "Foreclosure Mediation and Mitigation Program Models."

After consideration of the available program data, public comments, chief judge input and other information, the workgroup voted to: (1) eliminate the mandate for a statewide managed mediation program; and (2) allow circuits to opt in to a new, revised uniform model administrative order, either as an exclusive approach or in addition to referral of cases to mediation on a case-by-case basis under relevant court rules and statutes. The workgroup concluded that for those circuits that choose to continue a managed mediation program, adherence to a modified model administrative order is important to maintain consistency throughout the state. In those circuits that choose not to opt in to a modified model administrative order, the chief judge should be responsible for devising a plan for discontinuing the local managed mediation program.

The workgroup agreed that significant modifications must be made to the model order issued in In re: Final Report and Recommendations of the Task Force on Residential Mortgage Foreclosure Cases, AOSC09-54 (Dec. 28, 2009) to address program weaknesses. The workgroup recommends that the Court establish a separate workgroup to develop modifications to the order, including the following:

- Require borrowers to affirmatively opt in to the program upon service of suit papers
- Develop steps to improve the integrity of borrowers' financial information and to identify the appropriate lender contact
- Develop steps to improve performance on document exchange and document review
- Review and update document exchange requirements for both parties
- Clarify the correlation between bankruptcy and participation in the program
- Explore options for sanctions for noncompliance by either party

- Explore fee reductions, including borrower contributions to fees, borrower payment of foreclosure counseling fees, and reduction of overall program costs
- Develop data mechanisms to track post-mediation settlements
- Shorten the timeframe for completion of mediation
- Eliminate the mandate for referral of all residential mortgage foreclosure cases to the program.
- Examine the manner in which the results of mediation are reported

It was the consensus of the workgroup that the emergency in residential mortgage foreclosure filings that occurred in 2008-09 continues to exist as an emergency in pending foreclosure cases. There are now approximately 350,000 backlogged foreclosure cases in the circuit courts. Pending case statistics by county are appended to this report. These cases will continue to languish if additional resources are not provided to the courts. RealtyTrac, which compiles foreclosure data nationwide, reports that another wave of foreclosure filings is imminent in Florida. Circuit courts likely will face a new surge of cases in 2012, which will further exacerbate the backlog and further delay finality. The Mortgage Bankers Association National Delinquency Survey, Fourth Quarter 2010, appended to this report, shows that Florida, along with Nevada, has the highest percentage of seriously delinquent mortgage loans in the nation. Florida's economy will continue to be depressed as long as there are massive numbers of mortgages in default that have not been resolved by foreclosure. The workgroup recommends that the Court consider a variety of means to assist the courts in reducing the backlog.

Because of the ongoing emergency in foreclosure cases, the workgroup recommends that the Court continue to allow plaintiffs' representatives to appear by telephone or other electronic method at mediation sessions that occur within circuit programs operating under a new, revised model administrative order. If a circuit chooses to refer foreclosure cases to mediation pursuant to chapter 44, Florida Statutes, appearance at mediation must be determined on a case-by-case basis, as required by court rule.

The workgroup did not have sufficient time to develop more refined recommendations. This report is based on the best information available at this time. The Key Determinates Report does not track cases settled after mediation when an impasse was previously reported, pre-suit mediation success rates, or cases settled after referral but prior to mediation. Anecdotal evidence from

program managers suggests that the percentage of cases resulting in settlement would materially increase if such data could be obtained. Form 1.998, Final Disposition Form, shows post-mediation settlements, and may provide a mechanism for collecting this data. In order to accurately assess the success or failure of the circuit managed mediation programs, cases should be followed for the life of the case from the point the program receives the case to final disposition by the court.

The managed mediation program offers much more than mediation. It is also a document exchange program and a foreclosure counseling program. These features explain why a significant number of cases settle after impasse is declared at mediation. Unfortunately, the current data collection system does not accurately gauge the success of the program.

A number of factors skewed the success rate of the program downward. The public comments received provided evidence that servicers on a broad scale resisted providing representatives at mediation with full authority to settle and refused to consider more than a narrow range of settlement options, most of which were of little value to borrowers. Servicers had economic incentives not to settle and to keep foreclosure cases in limbo to avoid the expenses that accompany home ownership. An analysis of a sample of Eleventh Circuit foreclosure cases that ended in impasse at mediation showed that 78.5% of the cases remained open up to two years after impasse. The analysis is appended to this report. In addition, because the managed mediation program was not well publicized as a court-referred program, borrowers mistrusted the program and were uncertain about its legitimacy. These factors contributed to the low rate of borrower contact.

It is clear that the statewide managed mediation program has not had time to mature. A chart showing the implementation dates for the circuit programs is appended to this report. Only three circuits had operational programs in December 2009 when AOSC09-54 issued. The remaining circuits implemented programs six to eight months later. The intervening time period is inadequate for a determination of the success of the program. Significantly, a number of crises occurred during this timeframe, including the robo-signers scandal, the discovery that plaintiffs were filing fraudulent documents with the courts, the collapse of two

major foreclosure law firms, civil and criminal investigations of lender and lenders' attorney foreclosure practices, and the banks' voluntary moratoria on foreclosure filings. All of these impacted the number of cases that could have been settled.

Sincerely,

A handwritten signature in black ink, appearing to read "W. D. Palmer". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

William D. Palmer, Chair
Assessment Workgroup

APPENDIX

1. Quantitative Summary of Public Comments
2. Foreclosure and Economic Recovery Status Report, Total Initiative Dispositions by County, Fiscal Year 2010-11
3. Mortgage Bankers Association National Delinquency Survey, Fourth Quarter 2010
4. Eleventh Circuit Impasse Report
5. Circuit Managed Mediation Program Implementation Dates