JUDICIAL MANDATED FORECLOSURE INTERVENTION PROGRAMS IN SOUTH CAROLINA;
HOW DO WE DETERMINE IF A COMMUNITY IS RIPE TO BENEFIT?
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INTRODUCTION

Justice and fairness are outcomes that both parties ultimately seek in a dispute, especially a difficult case that involves a foreclosure of a person's home. Unfortunately, many foreclosures result in harsh outcomes for borrowers, who are often the less sophisticated party in the dispute. Remarkably, while foreclosure actions in South Carolina are actions in equity, equity actually abhors foreclosures, and in the case of Lewis v. Premium, the Supreme Court of South Carolina held that a court has the power in equity to deny or delay forfeiture when fairness demands. In Buckley v. Shealey, the South Carolina Supreme Court ruled that courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible.

In 2008, the United States experienced the worst housing market collapse on record when the Case-Shiller home price index, a national home price index consisting of a composite of single-family home price indices for the nine U.S. Census divisions, reported its largest price drop in its history. The collapse of the housing market had an impact not only on home valuations, but also on large and small businesses, and Wall Street, which put the nation and the global economy into a significant recession. Today, the housing market has experienced some mild levels as of stabilization, but many believe it has still not hit bottom. The impact is still readily apparent, as many communities battle to abate what appears to be a continued tide of foreclosures and mortgage defaults. Although equity grants borrowers several powerful equitable rights and defenses in foreclosure actions, due to borrower lack of legal experience and the Pro Se nature of foreclosure proceedings, it is almost a certainty that Defendants will not assert these defenses in a foreclosure action.

Given the breadth of the foreclosure crises, public policy considerations demand that the judiciary seek equitable measures to re-level the legal playing field, and afford the borrower the tools necessary to reach a fair outcome. One effective solution is the judicially mandated foreclosure intervention program (JMFIP).
THE RESPONSE TO THE CRISIS

A significant number of federally funded programs have been launched to help homeowners avoid foreclosures. Although each of these programs has value, and each warrants scholarly analysis, it is not the purpose of this writing to summarize, or compare, or contrast their relative values. Rather, this paper focuses on the JMFIP, and, while much was been written regarding what constitutes a model JMFIP, little has been written about the factors that determine whether a jurisdiction would benefit from the application of a JMFIP. Therefore, the objective of this paper is to identify these factors, so that the judiciary may more easily determine if a jurisdiction would benefit from the implementation of a JMFIP. A secondary objective is to apply these factors to the County of Charleston – to show the reader the factors in application, and to roughly determine if Charleston County is ripe for a JMFIP. Before exploring the factors, we first need to understand what constitutes a JMFIP. To do this we will look at one JMFIP that was successful, and another that failed.

THE PHILADELPHIA RESIDENTIAL MORTGAGE FORECLOSURE DIVERSION PROGRAM

One of the most widely known and successful JMFIPs is the Philadelphia Residential Mortgage Foreclosure Diversion Program. In April 2008, after the economic recession and the collapse of the housing market, mortgage foreclosures in Philadelphia increased dramatically. In response, the Common Pleas Court in Philadelphia issued an Order delaying sales of owner occupied residential properties on the Sheriff Sale list. The Order mandated a face-to-face conciliation conference between lenders and homeowners for all foreclosure actions. The primary theory behind the conciliation conference is the belief that foreclosures are less likely to occur when homeowners and lenders meet face-to-face to work out issues. The longer a homeowner in default goes without communicating with his/her lender, the greater the likelihood that homeowner's arrearage amount will accumulate. The more the homeowner is in arrears, the less likely the homeowner will qualify for mortgage refinancing. Therefore, the earlier the homeowner and lender meet, the higher the probability that a refinance can be achieved.
Philadelphia’s JMFIP has several goals: 1) to keep homeowners facing foreclosure in their homes; 2) to preserve and protect neighborhoods from the ravages of foreclosed properties; 3) to intervene early in the process; and 4) to provide a reliable mechanism for homeowners to have a substantive discussion with their lender about resolution long before a case proceeds to trial.\textsuperscript{12}

The diversion program procedure begins with the lender filing a foreclosure complaint. When eligible homeowners are served with the foreclosure complaint, the court supplies them with diversion program information and the date of their conciliation conference.\textsuperscript{13} The conference requires the mortgage company and the homeowner to explore alternative options to foreclosure such as federal programs (e.g., HAMP), state programs (e.g., Pennsylvania’s Homeowners’ Emergency Mortgage Assistance program, or “HEMAP”), loan modifications or reinstatements, forbearance plans, or the “graceful exit.”\textsuperscript{14}

The program also instructs eligible homeowners to call the SaveYourHomePhilly hotline, which schedules an appointment with a housing counselor to discuss alternatives to foreclosure prior to the court conciliation conference.\textsuperscript{15} The goal of counseling is to help the borrower comprehend the consequences of mortgage default, to ensure that he/she understands and responds to bank correspondence, and to help him/her budget expenses in order to continue making payments. SaveYourHomePhilly is an agency funded by private philanthropy and the city of Philadelphia.\textsuperscript{16} Staffing is also supplied by the Philadelphia Legal Assistance.\textsuperscript{17} Eligible low-income homeowners have access to free legal assistance from Community Legal Services, Inc., Philadelphia Legal Assistance, or Philadelphia Volunteers for Indigent Program.\textsuperscript{18}

Due to the mandated conciliation conference, one in five cases participating in the program closes with an agreement.\textsuperscript{19} About 70% of all eligible homeowners avail themselves to the program, thus reducing the Sheriff sale rate for these homeowners from 27% to 5.7%.\textsuperscript{20} Of those participants, 85% of the homeowners are still living in their homes more than 18 months later.\textsuperscript{21} As for the impact on the court system, the average length of each case is well within the range of what was previously typical for residential foreclosure sales.\textsuperscript{22} The major impact to legal efficiency is improved access to legal assistance
and reduced Sheriff sale court proceedings. Though the program does not stop all foreclosure Sheriff sales, more homeowners have found solutions to stay in their home.

**THE FLORIDA JMFIP FAILURE**

The Florida program is an example of a JMFIP that was not successful. In 2009, the Florida Supreme Court mandated mediation for cases involving primary residences that were in foreclosure to help courthouses deal with the flood of foreclosure cases. At the time, more than 456,000 foreclosure cases were pending in Florida, and the state was experiencing the nation's highest foreclosure rate. The order directed mediation to be scheduled between two and four months after the foreclosure complaint was filed, and lenders or mortgage servicers had to pay the cost of mediation, which could be as high as $750.

The program experienced problems early on, and was dogged by complaints from defense attorneys who claimed that lender attorneys had greater access to financial records than defense lawyers, and that banks dictated the dates and times of the mediation sessions without checking the schedules of opposing counsel and homeowners. Statewide, between March and June of 2010, there were 13,417 cases referred to mediation, and of those, only 6% resulted in the borrower and lender coming to an agreement. During this period, some counties showed settlement rates as low as 1%. Between March 2010 and March 2011 only 3.6% of the cases referred to mediation in the state resulted in a written agreement between the lender and homeowner.

In September 2011 the Florida Supreme Court ordered a review of its foreclosure mediation program, and in December 2011 the Florida Supreme Court terminated its statewide program. For the period of the program, only 4% of cases eligible for mediation concluded with a settlement.

Why such a disparity between the success of the Philadelphia and Florida JMFIPs? First, the Florida program tried to be a “one size fits all” program. But what worked in Miami-Dade County did not necessarily work in more rural areas of Florida, which lacked proportional resources. In contrast, the Philadelphia JMFIP focused on a specific area of the state, which also happened to be an area that contained the counseling and legal resources necessary to implement an effective program. Second, the
Florida program suffered from a lack of community outreach. Borrowers in Florida were either not contacted, or could not be contacted, before the 60-day mediation window closed. For those borrowers who were contacted, they were often unfamiliar with the program, and rightfully reluctant to opt-in. The program was not well publicized as a court referred program and borrowers distrusted the program, and its legitimacy. However, the Philadelphia program had robust outreach and used community groups such as PUP, ACORN and the Office of Housing and Community Development to inform homeowners of the benefits of the program, which was cited as an important piece of the process get homeowners into counseling, and ultimately into conferencing.

Third, the Florida program developed an adversarial character. Florida homeowners were allowed to opt out; but lenders were required to participate if a homeowner opted-in. Compounding the angst from lenders, they had to pay the entire bill for mediation. This forced lenders to play hardball with homeowners if the lender desired to avoid the program. Over time this created a perception to homeowners that the program was adversarial. On the other hand, the Philadelphia program required both the borrower and lender to participate, at least initially, but both possessed equal rights to withdraw if they believed an impasse was reached.

Fourth, lenders never got on board with the Florida program, because lenders were not invited to participate in the development of the program. In contrast, it was the lender community that initiated the Philadelphia’s program. The Honorable Annette M. Rizzo, in her testimony before the United States Senate Judiciary Committee, said that the most frequently asked question to her was how did she get lenders to buy-in to the program? Her response, “they didn’t buy into the program - they were the architects of the program,” and she felt that this was the essence of the program’s success, and a key element required for the creation of such programs in other jurisdictions.

The benefits to a homeowner under a JMFIP are relatively clear, but what entices a lender to come to the table? According to Andrea Kupfer Schneider and Keith L. Seat, lenders lose a significant amount of their investment at each foreclosure, an average loss of $145k per home. Lenders also lose the income stream from properties that stand empty, and are increasingly pressured by local governments to
perform maintenance on properties to prevent blight. Lenders have to insure foreclosed properties, and take measures to prevent vandalism, crime or even squatters, which often forces lenders to hire additional employees, or hire 3rd party contractors.

**THE FACTORS**

How does one determine if the costs associated with the implementation of a JMFIP would be offset by an adequate reduction in foreclosures? To answer this question, we have compiled several factors that, if present, appear to make an area a more likely candidate for JMFIP. Neither factor is determinative, and no effort has been made to give more weight to one factor or the other, rather each factor must be analyzed against the totality of the circumstances.

**Factor (1) – The area contains a high or increasing foreclosure rates.** This factor is likely the most easily recognized, and most easily applied. It is easy to appreciate that an area devastated by foreclosures rates is a better candidate for a JMFIP than one that was not touched by the crisis. But the analysis is more difficult when there is “just an increase” in foreclosures in an area, but not a devastation of foreclosures. What number or percentage of increased foreclosures, compared to pre-crisis foreclosures, is a number that warrants intervention? Hard to say definitively because the problem with this factor is that it is a historical, rather than a predictive analysis. It can tell you where you have been, but it lacks a robust ability to forecast the future, although some predictive information can be gleaned from a year-to-year trend line analysis.

*Would Charleston County benefit by the implementation of judicially mandated foreclosure intervention program? Since 2008, over 8,200 foreclosures have been filed with the Charleston County Master-in-Equity, and foreclosure filings in 2012 appear on pace to equal, if not surpass, all previous year’s foreclosure rates. Although the percent of owner-occupied homeowners in default in Charleston County dropped from 4.25% in 2010 to 3.58 in 2011,36 unfortunately, the number of foreclosures in Charleston County dramatically increased during the same period from a low of 3.74% in 2010 to a 2011-year high of 5.31%.37 When first mortgages are combined with home equity loans and home equity lines of credit, this number bumps up to 7.18%.38 Based on 2011’s rates, without a foreclosure*
intervention program, the Charleston County Master will adjudicate more than 2000 foreclosures in 2012 – which will undoubtedly place considerable burden on the Master’s Court, consume substantial docket time, and deplete limited and valuable judicial resources.

Factor (2) – The area contains a high concentration of subprime, interest only, and adjustable rate mortgages. Typically, homeowners with these types of mortgages are those most at risk for default. The percentage of subprime mortgages rose from the historical 8% or lower range of all mortgages to approximately 20% of all mortgages from 2003–2006, with much higher ratios in some parts of the U.S. As interest rates rise, as some predict will happen to curb inflation, adjustable-rate mortgages will re-adjust to higher interest rates, and cause higher monthly payments, which will likely lead to soaring mortgage delinquencies in areas with these types of loans. Homeowners are more likely to walk away from an interest only mortgage, because they have no equity to lose.

The percentage of subprime, interest only, and adjustable rate mortgages within Charleston County is high. Charleston County exceeds the national average in both interest only and adjustable rate mortgages by approximately 50 % and 25 % respectively.\textsuperscript{39} Except for Hilton Head, Charleston County has the highest percentage of owner-occupied interest only mortgages in South Carolina; and except for Myrtle Beach, Charleston County has the highest number of adjustable rate mortgages.\textsuperscript{40}

Factor (3) – The area is experiencing depreciating home values. Declining home prices play a significant role in rising default rates, because homeowners are willing to “strategically default” when they find the debt they owe is greater than the value of the property (negative equity or underwater), and is expected to remain so for the foreseeable future.\textsuperscript{41}

South Carolina has experienced 10.4% depreciation in home values since the first quarter of 2009.\textsuperscript{42} Although the Mean House Price Index increased in the 4th quarter of 2011, it still posted an overall value decline of 3.2% for the entire year.\textsuperscript{43}

Factor (4) – The area is experiencing improving unemployment rates. At first, this indicator may seem counter-intuitive. Logically, improved employment should lead to fewer foreclosures, but employment does not always mean full employment, nor does it mean homeowner’s are employed at pre-
2009 income levels. When the economic crises hit in 2008, most foreclosures involved borrowers who found themselves “unemployed” and with no leverage to renegotiate loan terms with their lender. Therefore, for this type of borrower, a JMFIP would not have been helpful. But to the employed borrower, or the underemployed borrower, steady employment and financial income confers an ability to renegotiate loan terms, and to such a borrower, a JMFIP is a valuable tool.

According to the Bureau of Labor Statistics,\textsuperscript{44} as of March 16, 2011 the unemployment rate in Charleston, North Charleston and Summerville area dropped from a high of 9.5% in 2009, to a low of 7.9%.

Factor (5) – The area has an increase in new home housing starts. As economic conditions improve within a community, new home housing starts predictably increase, and in turn compete with existing home sales. This influx of new homes makes it more difficult for homeowners to sell existing homes, which may force some distressed homeowners into a foreclosure that might have otherwise been avoided.

The number of residential building permits issued in South Carolina has risen 46.6% since January 2011.

Factor (6) – The area has homeowners with a high “Selected Monthly Owner Costs as a Percentage of Household Income” (SMOCAPI). A homeowner with a SMOCAPI over 30% is considered burdened and are generally at a higher risk of default.

According to the U.S. Census Bureau, the 2006-2010 survey 5-Year estimates indicate that over half of all the housing units within Charleston County have a Selected Monthly Owner Costs as a Percentage of Household Income (SMOCAPI) of over 25%, and more than a third have a SMOCAPI of over 35%.\textsuperscript{45}

Factor (7) – Pro-bono legal and housing counselor services within the area are adequate to sustain a foreclosure intervention program. For a JMFIP to be successful, it requires that homeowners have access to experienced housing counselors and legal services. Counseling helps the borrower comprehend the consequences of mortgage default, ensures that he/she understands and responds to bank
correspondence, and helps him/her budget expenses in order to continue making payments. Without this help, homeowners and lenders often fail to communicate. Many homeowners complain they have difficulty reaching lender decision makers, and most lenders complain of the impossibility of getting homeowners to provide the documentation necessary to make a refinance decision.

_Resources within Charleston County are adequate for a foreclosure intervention program. The County contains a high concentration of attorneys, who are well organized under the Charleston County Bar Association. The County also benefits by having the Charleston School of Law located in downtown Charleston. Charleston School of Law prides itself in steering its law students towards pro bono legal services, and its students would be ideal candidates to serve as community outreach organizers, housing counselors, or as legal assistants under the supervision of a licensed attorney._

**Factor (8) – The area has lending institutions that file foreclosure complaints in a timely manner.**

One of the primary theories behind the JMFIP is that homeowners and lenders must meet early in the foreclosure process, when arrearage amounts are manageable low, for the intervention to be successful. But, if lenders are slow to file complaints, such a delay risks adding thousands, or tens of thousands of dollars to the arrearage amount, thus making refinance more difficult.

_Untunately, the data collected by the Charleston County Master-in-Equity does not currently track this information._

**CONCLUSION**

Equity abhors forfeiture, and within the foreclosure proceedings the courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible. Although in a foreclosure action borrowers have equitable rights and equitable defenses, most borrowers do not understand these defenses or are not able to investigate these defenses to halt a foreclosure process once commenced.

Though the implementation a JMFIP, a borrower has the opportunity to access resources to mediate a remedy other than the most likely result, a judicial ordered sale. A successful JMFIP enables
more borrowers to stay in their homes and more creditors receive monies promised in the mortgage agreement, thus thwarting the harsh losses associated with many judicial foreclosures.

5 http://en.wikipedia.org/wiki/Case-Shiller_home_price_index
6 Id.
7 Equitable Right of Redemption, Hardship, Unfairness, Unclean Hands, Laches, Estoppel, Equitable Tolling, Wrongdoing, Fraud, Misrepresentation, Concealment and Nondisclosure
8 See U.S. Department of Justice Access to Justice Initiative report on foreclosure mediation emphasizes best practices at...
10 Id. at 3.
11 Id.
12 Id. at 2.
13 Id. at 3.
14 Id.
15 Id. at 3.
16 Id.
17 Id. at 4.
18 Id. at 3, 4.
19 Id. at 9.
20 Id. at 23.
21 Id. at 24.
22 Id. at 23.
23 Id. at 13, 23.
24 Id. at 13.
25 See In re: Final Report and Recommendations on Residential Mortgage Foreclosure Cases, AOSC09-54, (Dec. 28, 2009) and In Re: Guidance Concerning Managed Mediation Programs for Residential Mortgage Foreclosure Cases, AOSC10-57 (Nov. 5, 2010).
26 12/29/09 Bradenton Herald (Bradenton, FL) (Pg. Unavail. Online) 2009 WLNR 26039118 Loaded Date: 12/29/2009
29 Florida Supreme Court Order No. AOSC11-44: Managed Mediation Program for Residential Mortgage Foreclosure Cases. December 19, 2011
32 Judge Rizzo’s testimony before the Senate;
www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da141cf71&wid_id=e65f9e2809e5476862f735da141cf71-1-2
33 Court of Common Pleas, 1st Judicial District of Pennsylvania
34 See Judge Rizzo’s testimony before the Senate;
www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da141cf71&wid_id=e65f9e2809e5476862f735da141cf71-1-2
35 Andrea Kupfer Schneider, Professor of Law, Director of the Dispute Resolution Program, Marquette University Law School; Keith L. Seat, International Academy of Mediators, American Bar Association’s Section of Dispute Resolution
36 Mortgage Performance Study, The Federal Reserve Bank of Richmond, Housing Market and Mortgage Performance in South Carolina, Quarterly Update, 3rd Quarter, 2011, Table 14, p.15
37 Mortgage Performance Study, The Federal Reserve Bank of Richmond, Housing Market and Mortgage Performance in South Carolina, Quarterly Update, 3rd Quarter, 2011, Table 14, p.15
38 Figures are based on the FRBNY Consumer Credit Panel, which constitutes a 5% random sample of the U.S. population of individuals who have credit reports with Equifax.
41 See, “A Regional Look at the Role of House Prices and Labor Market Conditions in Mortgage Default” Economic Quarterly, Volume 97, Number 1—First Quarter 2011, Sonya Ravindranath Waddell, Anne Davlin, and Edward Simpson Prescott, p.3
43 Federal Housing Finance Agency, Four-Quarter Percent Change in FHFA MSA-Level House Price Indexes (All Transactions Index, 2011Q4)
45 http://factfinder2.census.gov/faces/tablesservices/jsf/pages/productview.xhtml?src=bkmk