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S.B. 619 -- Minor changes to the Foreclosure Mediation Program

Banks Committee public hearing -- February 17, 2009
Testimony of Raphael L. Podolsky

Recommended Committee action: **APPROVE WITH ADDITIONAL CHANGES**

The Foreclosure Mediation Program has so far, in our opinion, proved to be the most successful and effective part of last year's foreclosure relief legislation. S.B. 619 makes two small changes in the act, both of which we support:

(1) Mediation notice: It makes clear that the notice of the right to request mediation should be the top page of the packet of papers served on a foreclosure defendant, i.e., it should come not only before the complaint but also before the writ and summons. This codifies the intent of last year's bill.

(2) Reopening by agreement: It makes explicit that, if the lender agrees, a foreclosure judgment can be reopened even though title has passed to the lender, so that an agreement to reinstate the homeowner can be implemented even a strict foreclosure has entered. The bill is necessary because of at least one trial court decision to the contrary. If the lender is willing to allow the judgment to be reopened, no one is prejudiced and there is no public policy reason to bar the reopening, which would allow the homeowner to retain ownership of the house.

There are, however, a number of other minor changes that we recommend be made to the Foreclosure Mediation Program to strengthen it further. We suggest the following:

(1) Eliminate the July 1, 2010 sunset date. This program has been so successful that it is already clear it should be a permanent program – there is no need to wait until next year. The foreclosure crisis will not go away and, even if it did, it is now evident that an in-court mediation program is valuable for whatever number of homeowner foreclosures there may be.

(2) Eliminate the requirement that the homeowner send copies of the request form to the other parties. There can be many parties in a foreclosure action, and it is burdensome for the homeowner, operating without legal help, to know which parties have appeared. Because the statute already requires that the clerk send the other appearing parties notice of the request for mediation, this requirement is not only burdensome but also redundant.

(3) Treat the filing of a mediation request form as being an appearance. The filing of a request form indicates that the homeowner intends to participate in the action. The request form is served with the complaint but an appearance form is not. Requiring a separate appearance creates the unnecessary risk that a homeowner who has requested mediation will be defaulted for failure to appear while in mediation or awaiting the first mediation session.

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(4) Extend the time for the mortgagor to plead until after the mediation period has been completed. It is not reasonable to expect a homeowner involved in good faith in mediation to file pleadings during mediation in order to avoid being defaulted. The homeowner is unlikely to know what to file or how to defend, and the threat of default can be used as bargaining leverage during mediation. If mediation is not successful, the lender can move forward quickly at that time.

(5) Codify the rule that judges can refer matters to the mediators that might not be eligible for the Foreclosure Mediation Program itself. In fact, this is exactly what many (we believe, most) judges have been doing by using their general equitable powers to make referrals to Judicial Branch staff (foreclosure is an "equitable" action, rather than a "legal" action). In particular, it would be helpful to make clear that, within the availability of mediators, judges can refer any residential foreclosure for mediation, including ones started before July 1, 2008, when the Foreclosure Mediation Program began, and ones involving foreclosures not based on a mortgage.

(6) Extend and consolidate some time limits so as to relieve pressure on the clerk's offices. Give the court five (rather than three) days to send out the notice that a mediation request form has been filed. Make the foreclosure mediation period 90 days, instead of requiring a motion to extend the mediation period from 60 days to 90 days as is currently permitted.

(7) Make clear that the court has the power to override the mediator's recommendation that the mediation period end. The statute speaks of the mediation period ending "automatically" upon the mediator's filing a report, but the mediator cannot override the power of the judge to make this kind of decision.

A draft of the recommended additions to this bill is attached.

S.B. 619 -- ADDITIONAL CHANGES TO FORECLOSURE MEDIATION PROGRAM.

February 17, 2009

Sec. 1 Section 16 of public act 08-176 is repealed and the following is substituted in lieu thereof (*Effective July 1, 2009*)

(a) Prior to July 1, 2010, when a mortgagee commences an action for the foreclosure of a mortgage on residential real property with a return date on or after July 1, 2008, the mortgagee shall give notice to the mortgagor of the foreclosure mediation program established in section 17 of this act by attaching to the front of the foreclosure summons and complaint that is served on the mortgagor: (1) A copy of the notice of the availability of foreclosure mediation, in such form as the Chief Court Administrator prescribes, and (2) a foreclosure mediation request form, in such form as the Chief Court Administrator prescribes.

(b) (1) Except as provided in subdivision (2) of this subsection, a mortgagor may request foreclosure mediation by submitting the foreclosure mediation request form to the court [and filing an appearance] not more than fifteen days after the return day for the foreclosure action. <u>The mortgagor shall not be required to send copies of the foreclosure mediation request form to the other parties.</u> Upon receipt of the foreclosure mediation request form, the court shall notify each appearing party that a foreclosure mediation request form has been submitted by the mortgagor. <u>The filing of a foreclosure mediation request form shall be deemed to constitute the entry of an appearance in the foreclosure action and shall automatically extend the time to plead until seven calendars days after the mediation period set forth in section 18 of public act 08-176, as amended by this act, has expired or has otherwise terminated, whichever is earlier.</u>

(2) The court may grant a mortgagor permission to submit a foreclosure mediation request form [and file an appearance] after the fifteen-day period established in subdivision (1) of this subsection, for good cause shown, except that no foreclosure mediation request form may be submitted <u>under this section</u> [and no appearance may be filed] more than twenty-five days after the return date.

(3) No foreclosure mediation request form may be submitted to the court on or after July 1, 2010.

(c) If at any time on or after July 1, 2008, but prior to July 1, 2010, the court determines that the notice requirement of subsection (a) of this section has not been met, the court may, upon its own motion or upon the written motion of the mortgagor, issue an order that no judgment may enter <u>until</u> [for] fifteen days <u>after such notice has been given,</u> during which period the mortgagor may submit a foreclosure mediation request form to the court.

(d) Notwithstanding any provision of the general statutes or any rule of law to the contrary, prior to July 1, 2010, no judgment of strict foreclosure nor any judgment ordering a foreclosure sale shall be entered in any action instituted by the mortgagee to foreclose a mortgage on residential real property unless: (1) Notice to the mortgagor has been given by the mortgagee in accordance with subsection (a) of this section and the time for submitting a foreclosure mediation request form has expired and no foreclosure mediation request form has been submitted, or if such notice has not been given, the time for submitting a foreclosure mediation request form pursuant to subsection (b) or (c) of this section has expired and no foreclosure mediation request form has been submitted, or (2) the mediation period set forth in section 18 of this act has expired or has otherwise terminated, whichever is earlier.

(e) None of the mortgagor's or mortgagee's rights in the foreclosure action shall be waived by the mortgagor's submission of a foreclosure mediation request form to the court. Nothing in this act shall limit the equitable powers of the court to make referrals to foreclosure mediators for the purpose of foreclosure mediation, including in foreclosures other than mortgage foreclosures.

Sec. 2. Sec. 18 of public act 08-176, as amended by section 8 of public act 08-2 of the November 24 Special Session, is repealed and the following is substituted in lieu thereof (*Effective July 1, 2009)*

(a) The mediation period under the foreclosure mediation program established in section 17 of public act 08-176 shall commence when the court sends notice to each appearing party that a foreclosure mediation request form has been submitted by a mortgagor to the court, which notice shall be sent not later than five [three] business days after the court receives a completed foreclosure mediation request form. The mediation period shall conclude not more than ninety [sixty] days after the return day for the foreclosure action, except that the court may, in its discretion, for good cause shown, (1) extend, [by not more than thirty days,] or shorten the mediation period on its own motion or upon motion of any party, or extend [by not more than thirty days] the mediation period upon written request of the mediator..

(b) The first mediation session shall be held not later than fifteen business days after the court sends notice to all parties that a foreclosure mediation request form has been submitted to the court, provided that no mediation shall be required to be held prior to the return day. The mortgagor and mortgagee shall appear in person at each mediation session and shall have authority to agree to a proposed settlement, except that if the mortgagee is represented by counsel, the mortgagee's counsel may appear in lieu of the mortgagee to represent the mortgagee's interests at the mediation, provided such counsel has the authority to agree to a proposed settlement and the mortgagee is available during the mediation session by telephone or electronic means.

(c) Not later than two days after the conclusion of the first mediation session, the mediator shall determine whether the parties will benefit from further mediation. The mediator shall file with the court a report setting forth such determination and mail a copy of such report to each appearing party. If the mediator reports to the court that the parties will not benefit from further mediation, the mediation period shall terminate automatically, unless the court otherwise orders. If the mediator reports to the court after the first mediation session that the parties may benefit from further mediation, the mediation period shall continue.

(d) If the mediator has submitted a report to the court that the parties may benefit from further mediation pursuant to subsection (c) of this section, not more than two days after the conclusion of the mediation, but no later than the termination of the mediation period set forth in subsection (a) of this section, the mediator shall file a report with the court describing the proceedings and specifying the issues resolved, if any, and any issues not resolved pursuant to the mediation. The filing of the report shall terminate the mediation period automatically, unless the court otherwise orders. If certain issues have not been resolved pursuant to the mediation, the mediator may refer the mortgagor to any appropriate community-based services that are available in the judicial district, but any such referral shall not cause a delay in the mediation process.

(e) The Chief Court Administrator shall establish policies and procedures to implement this section. Such policies and procedures shall, at a minimum, provide that the mediator shall advise the mortgagor (1) at the first mediation session required by subsection (b) of this section that: (A) [(1)] Such mediation does not suspend the mortgagor's obligation to respond to the foreclosure action in accordance with applicable rules of the court; and (B) [(2)] a judgment of strict foreclosure or foreclosure by sale may cause the mortgagor to lose the residential real property to foreclosure and (2) at the last mediation session before the mediation period is terminated, of the status of pleadings in the case and of the consequences of failing to file an appropriate pleading to prevent the entry of a default judgment.

(f) In no event shall any determination issued by a mediator under this program form the basis of an appeal of any foreclosure judgment.

(g) Foreclosure mediation request forms shall not be accepted by the court on or after July 1, 2010, and the foreclosure mediation program shall terminate when all mediation has concluded with respect to any applications submitted to the court prior to July 1, 2010.

(h) At any time during the mediation period, the mediator may refer the mortgagor to the mortgage assistance programs, except that any such referral shall not prevent a mortgagee from proceeding to judgment when the conditions specified in subsection (d) of section 16 of public act 08-176 have been satisfied.