UTA
United Trustees Association

January 5, 2011

Honorable Jason Frierson
Nevada Legislature
Legislative Building
401 S. Carson Street
Carson City, NV 89701-4747

Comments Regarding 2011 Amendments to AB149

The United Trustees Association ("UTA"), on behalf of its member organizations, and through Board Director Michael R. Brooks submit some of its suggestions for legislative changes to the mediation program.

Overview:

The UTA is grateful for the opportunity to work with the Nevada Legislature on the important task of making the Foreclosure Mediation Program ("FMP") work for all of Nevada. In particular, the UTA wishes to thank Assemblyman Frierson for providing this opportunity for the UTA and all trustees to air their concerns and comments on how to improve the FMP. The UTA submits that an efficient foreclosure process which provides borrowers a full opportunity to resolve payment issues and lenders the ability to foreclose on those files that are not eligible for mediation is ultimately in the best interest of all constituencies involved. In that spirit, UTA makes the following suggestions.

Concerns and Suggestions:

1. Foreclosure Certificate Bypass Procedure.

Current Statutory Operation:

The principal concern of many of the members of the UTA is the amount of time that it is taking to receive a foreclosure certificate from the Administrative Offices of the Court ("AOC") in those cases where the borrower is not eligible for mediation, or the borrower has not elected mediation. By statute, the law does not apply to these properties and the sale should be allowed to proceed. However, the AOC has stated that it is their belief that a certificate is required in all residential sales. Further, it has become a title industry practice to require the issuance of a certificate in connection with all residential foreclosures.

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Concerns of Trustees:

What many trustees are finding is that the issuance of a foreclosure certificate does not occur for approximately 4 to 6 months, or more after the deadline to request a mediation. In foreclosure terms, that delays the sale for 3 to 4 months beyond the 120 days of a typical unopposed foreclosure. Given the deleterious affects of a delay in foreclosure as cited by Freddie Mac and others, it is important that the time frames for foreclosure closely approximate the statutory time frames.

Suggested Revision from the UTA:

The UTA is suggesting the enactment of a procedure or authorization to proceed with a foreclosure sale where no mediation has been elected. Specifically, the UTA contemplates a procedure whereby a trustee records an affidavit of non-election concurrently with the Notice of Trustees Sale allowing for the sale to proceed. Alternatively, the UTA requests that the AOC be tasked with the issuance of a certificate within45 days of the expiration of the right to request mediation.

2. Revising The Definition Of Eligible Participant Under The Foreclosure Mediation Program.

Current Statutory Operation:

AB149 by virtue of its requirement for the issuance of a certificate to complete a foreclosure allows a defaulted borrower to remain in the subject property without making payments during the pendency of the mediation. This time frame is continued even further when the borrower seeks judicial review of a Mediation Statement and/or appeal of the District Court ruling to the Supreme Court. In many instances, borrowers and their counsel have taken advantage of this arrangement to live as long as possible mortgage free. Anecdotally, at least one attorney charges his clients monthly for as long as he can keep them in the property.

Concerns of Trustees:

The failure to make monthly mortgage payments frequently includes the failure to pay property taxes and homeowners association dues. This is very disruptive to the cash flow of local county taxing authorities and also to HOAs. Furthermore, it unfairly shifts the burden of paying the borrowers most basic living expenses onto the lender.

UTA's Suggested Statutory Revision:

The UTA submits that AB149 should define an eligible participant as a homeowner who remains current on all property taxes and HOA dues upon election to mediation. This includes all payment arrears to taxing authorities and HOAs.

3. Clarification of NRS 107.086(2)(b).

Current Statutory Language:

NRS 107.086(2) provides:

Includes with the notice of default and election to sell which is mailed to the grantor or the person who holds the title of record as required by subsection 3 of NRS 107.080:

(1) Contact information which the grantor or the person who holds the title of record may use to reach a person with authority to negotiate a loan modification on behalf of the beneficiary of the deed of trust;

(2) Contact information for at least one local housing counseling agency approved by the United States Department of Housing and Urban Development; and

(3) A form upon which the grantor or the person who holds the title of record may indicate an election to enter into mediation or to waive mediation and one envelope addressed to the trustee and one envelope addressed to the Mediation Administrator, which the grantor or the person who holds the title of record may use to comply with the provisions of subsection 3;

(b) Serves a copy of the notice upon the Mediation Administrator

Concerns of the UTA Members:

The area of concern is the word "notice" in subsection (b). "Notice" is not a defined term anywhere in Chapter 107 of the NRS. Furthermore, the statutory framework provides for numerous types of notices in connection with a foreclosure. Further still, the AOC has asked that all trustees stop sending Notices of Default to their offices. As a result, trustees are not entirely clear what the term notice is referring to in subsection (b). By some counts, the term "notice" could refer to 4 different notices within the statutory framework of Chapter 107: 1) Notice of Default and Election to Sell; 2) Notice of Right to Mediation; 3) Notice of Counseling Agencies; or 3) Notice of Trustees Sale.

UTA's Suggested Statutory Changes:

The UTA submits that the language could be clarified by defining which notice (i.e., which subsection of Chapter 107) is required to be sent to the AOC. Suggested language can be provided for consideration if desired.

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4. Sunset provision on the entirety of AB149.

Current Statutory Operation:

The current version of AB149 has no sunset provision. The concept of phasing out this statute in the future was contemplated initially in the drafting of the bill and was borrowed from the actions of neighboring states such as California. In fact, California's "Meet and Confer" law has now been sunsetted and is no longer enforceable in California.

Concerns of the UTA:

The UTA believes that the need for the enactment of AB149 is approaching its end. In fact, the numbers of expected mediation requests has been significantly less than the projections at the time the statute was enacted in part because of the response of the Federal government, and lenders to the mortgage crisis. Under the circumstances, the additional administrative cost associated with the mediation and its program puts Nevada borrowers at a competitive disadvantage to other borrowers across the country. At a time when lenders are making borrowing a significant challenge, it is apparent that Nevada needs to increase its attractiveness to lenders relative to other jurisdictions. More importantly, Nevada borrowers should not be forced to look less attractive because of the presence of the mediation program.

UTA's Suggested Statutory Change:

The UTA suggests that the AB 149 be sunsetted and shut down by July 31, 2012.

Sincerely,

Michael R. Brooks, Esq.

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