Testimony to Assembly Committee on Commerce & Labor
AB149
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Michael R. Brooks, Esq.
Jolley, Urga, Wirth, Woodbury & Standish
Las Vegas, Nevada
Speaking on behalf of the United Trustees Association

My name is Michael Brooks. I am an attorney with the law firm of Jolley, Urga, Wirth, Woodbury & Standish in Las Vegas, Nevada. I am here on behalf of the United Trustees Association. The UTA is a foreclosure trustee industry organization designed to provide educational services, training and industry representation on behalf of foreclosure trustees throughout the United States. I personally am a member of the Board of Directors for the UTA and an instructor for the Nevada Foreclosure Certification Course.

About the UTA

Let me start by saying that the UTA applauds this Committee for taking up the task of reviewing foreclosure laws as part of its overall attempt to resolve the loan default crisis. The UTA shares your goals and wants to be a part of the process of scrutinizing the current foreclosure laws to determine if there are modifications that will help our economy move beyond the present turmoil.

There are those out there that are against AB149 in any form because they say that AB149 is a gift to borrowers. While I disagree with that assessment, it is important to remember that when giving a gift, it's the thought that counts.

The UTA's objective is to assist in this process. Today, the UTA wants to provide some insight into the three party relationship between the lender, the borrower and the foreclosure trustee. With that relationship in mind, the UTA will demonstrate how it believes some of the language of AB149 may be modified to accurately reflect the stated intention of this Legislature. We want to help, where as here, it is apparent that AB149 was hastily drafted without a basic working knowledge of the foreclosure process. I do not bring this up to indict this Committee or the drafters of AB149. I bring it up so that the members of this Committee can be sure that they are enacting good and beneficial laws that will bring the desired results

and not unintended harmful consequences. Further, it is important for this Committee to consider what is happening at the Federal level to achieve some of these results sought by AB149. All of these things must be thoughtfully considered.

Borrower, Lender, Trustee Relationship

Now let me address the relationship created by a Note and Deed of Trust. In its most basic sense, when a loan is made, the lender will draft loan documents reflecting the agreement between the borrower and the lender. The loan documents will include the Note and the Deed of Trust. The Deed of Trust conveys an interest in real property to secure repayment of the debt to a neutral third party – the foreclosure trustee. Therefore, if the borrower defaults on payments, the lender advises the foreclosure trustee who then commences a non-judicial foreclosure proceeding.

In this context, the foreclosure trustee is a dual agent of both parties, but not a fiduciary of either. With respect to the lender, the foreclosure trustee is responsible for properly exercising the power of sale to provide the lender a cost-effective and discrete time frame (i.e., approximately 120 days) to recover a delinquent debt. With respect to the borrower, the foreclosure trustee is responsible for making sure that the statutory notice requirements are followed to ensure that the highest level of possible bidder interest is given for the particular foreclosure auction.

Current State of Foreclosure Laws

For years, the procedures have been essentially the same. They are similar to several other states foreclosure statutes including Arizona, California, Oregon and Washington. For years, lenders have been able to calculate the costs associated with a foreclosure action and calculate the risks into its interest rate charges. For years, borrowers have realized the benefits of overbids on properties that had rapidly increased in value. For years the causes of foreclosures were generally the same: loss of employment, divorce, and health issues. More recently, we have seen that interest rate adjustments have caused gainfully employed individuals to lose their homes. However, the non-judicial foreclosure process has not been the cause of a single foreclosure in this state.

Currently, Nevada's housing is in a tremendous state of flux. The problem relates to poor lending decisions, poor buying decisions, and outright fraud leading to the collapse of the financial markets and ultimately

the decline of housing values due to the lack of available funds. Add on top of that, unemployment and a decline in real wages and we have a lot of foreclosures on our hands. The larger question is whether the legislation currently on the books can adequately address these present housing issues and secondarily whether AB149 is the means of achieving some type of stabilization. Similar questions have occupied the thoughts of state legislatures all across the country over the last two years and now it is your turn. California for example is now on its second iteration of very similar statutes.

What AB149 Seeks to Do

AB149 seeks to prevent foreclosures by requiring lenders to mediate loan terms with borrowers that are subject to the application of NRS section 107.085. Unfortunately, AB149 is based on a premise that lenders are not negotiating or working with borrowers in a commercially reasonable manner regarding loan terms and payment options. This is simply not true. For example, Nevada law only provides for a 35 day reinstatement right from the commencement of the foreclosure. However, there is not an institutional lender that will not allow a borrower to reinstate a loan almost up until the time of the foreclosure auction. Further, I see more loan modifications in a week now, than I had seen in the first 15 years of my practice combined. In many respects, the banks and financial institutions have thoughtfully considered acceptable alternatives to their present situation in an effort to mitigate the enormous losses they have suffered and that have driven many of them out of business.

Concerns About AB149

With this in mind, the UTA has identified the following issues with regard to AB149:

1) Subsection 2(a), and elsewhere in the draft bill, requires that contact information be provided for the person responsible for negotiating loan modifications "on behalf of the trustee." However, the foreclosure trustee does not hold a beneficial interest in the note and deed of trust and cannot modify it on behalf of a lender/beneficiary. As a result, contact information for the trustee would be generally meaningless. Further, the Notice of Trustee's Sale already includes contact information for the trustee.

2) The requirement that the trustee identify a local housing counseling agency approved by HUD places a burden on the trustee to identify the local HUD approved agency in outlining cities and counties;

3) The adoption of a mediation requirement will be burdensome and costly to the already taxed Court system. Several other states have adopted less costly meet and confer requirements. UTA would be pleased to offer non-controversial and effective alternative language to bring borrowers and lenders together in an effort to renegotiate loans;

4) The trustee is not the proper party to participate in the mediation as contemplated by Subsection 4 of the proposed statute.

5) Subsection 5's empowerment of judges to modify loans when it deems a "trustee's" participation no sufficient has serious constitutional questions.

6) The term "loan modification" is very vague. It is not clear if this means a conversion of the loan from adjustable interest to fixed interest. Alternatively, it is not clear if this is intended to allow for the write down of principal to more closely reflect the fair market value of the property. If this statute would allow the write down of principal, there are several problems. First, it would not likely pass Constitutional muster as a taking or a violation of the Contract clause. Secondly, a very likely unintended consequence is that it will result in a huge increase in the number of payment defaults from people trying to take advantage of the statute. A similar phenomenon is expected in the bankruptcy courts which are expected to be giving the authority to write down debt to the current value of the property. Some estimates say that 2 to 3 times the numbers of bankruptcy filings including people who become willfully unemployed. Third, this solution will cause banks to have to write down a huge chunk of their portfolio due to the mark-to-market accounting rules resulting in possible cash crunches for the lenders. This would only exacerbate the problems with these troubled loans.

Conclusion

On behalf of the UTA, I thank you for the opportunity to address you today. I am available at (702) 699-7500 if you would like to ask me any questions. Furthermore, I want you to know that the UTA is willing to be a full productive participant in creating Nevada law that works for Nevada.