THE FIRST HOMEOWNER RELIEF LEGISLATION THAT MIGHT ACTUALLY HELP
Assembly Bill 149

By Michael Radmilovich, Esq., Sutton Law Center, P.C.

The hyped programs engendered by the federal government and the big banks that have been rolled out to help distressed borrowers stave off foreclosure have thus far been all but impotent. Shamefully so.

So the Nevada Legislature's enactment of Assembly Bill 149 is remarkable for its logic and teeth -- namely the requirement that the beneficiary of a deed of trust (lender) participate in mediation before the trustee of the deed of trust may exercise the power of sale and the borrower's home is foreclosed.

Why remarkable? Because, at a minimum, it should prevent the detestable propensity of these financial institutions to foreclose on homeowners while the parties are ostensibly in loan modification negotiations. You see, this happens all the time. Once foreclosure proceedings have begun the distressed borrowers have -- generally -- roughly four months to save their homes, depending on the alacrity of the given lender or loan servicer. Now, while the institution is demanding documentation from the borrower and then losing it on account of its own abject negligence or willful intransigence, the clock is ticking. Typically, as the trustee's sale date is looming, the bank will offer a modification which will not fundamentally help the homeowner -- but take it or leave it, the foreclosure date is two days away. (Why? Banks make more money foreclosing on homes than they do modifying loans.) Or the foreclosure agent, a separate entity entirely, simply may not have been instructed by the lender that negotiations are pending and the sale date should be postponed but, because one hand knows not what the other is doing, it forecloses anyway.

Banks know that the only way a borrower can stop the exercise of the power of sale is by way of a court-ordered injunction, but what borrower on the brink of losing her home has the wherewithal to retain an attorney, file a complaint, obtain a temporary restraining order then bankroll the hearing

at which time the judge will or won't enter a preliminary injunction? Then too, because the borrower has been strung along during the process, even if she could afford to go to court, it's simply too late.

Assembly Bill 149, by virtue of mandatory participation imposed upon the lender, accords a de facto temporary restraining order in favor of the borrower.

To be sure, it cannot be denied that to date loan modifications, a thrown bone, have had abysmal success rates. Lenders' concessions on principal balances are extremely rare, arrearages may simply be rolled in to the modified loan and one out of two borrowers is in trouble again six months down the line. The close-fisted banks' and mortgage backed security holders' unwillingness to meaningfully compromise is a big factor. Ironic since the only reason these exotic investments still live is a result of charitable taxpayers, you and me, who bailed out the financial industry in the first place. (Thanks very much Countrywide, Wall Street, investment bankers, *et al.*) And at bottom, the borrowers most likely to benefit from a loan modification program are the least likely to be foreclosed in the first place.

But this legislation seems propitious.

It's administrated by the Nevada Supreme Court, Justice Hardesty being its overseer. When a homeowner receives a notice of default from the trustee vested with the power of sale after July 1st -- unfortunately for those in the maw of the process already, the legislation is not retroactive -- he or she may request a mediation with his or her lender which will be overseen by a senior judge, Supreme Court settlement conference judge or a designee.

Importantly, the default notice must include contact information from the lender or servicer for the person with authority to negotiate a loan modification on behalf of the beneficiary of the deed of trust, which is critical: If you can't get through to someone with authority, all effort is futile. If you haven't had the pleasure of experiencing the loan modification process, you couldn't possibly fathom the

intentionally impenetrable layers the loan servicers and banks put between you and those with decision-making authority who determine the fate of homeowners.

The homeowner must notify the trustee of the deed of trust of her intent to mediate within 30 days of service of the notice of default. The mediation must occur within 90 days after the notice of default is recorded. Also of note, the representative of the lender must bring to the mediation the original, or certified copy, of the deed of trust, the promissory note and each assignment of either. Either party may seek a determination that the other participated in bad faith and sanctions may be imposed by the district court.

The costs are reasonable: the compensation of the mediator is $400, split equally by the parties to the mediation.

The legislation appears to be the most equitable that's come down thus far in this implacable housing crisis. But if it does only one thing, curb the all too common and abominable custom of banks that actually foreclose on borrowers' homes while negotiating a loan modification, it's a victory.

Michael Radmilovich is a real estate attorney with Sutton Law Center, P.C., in Reno, Nevada. For more information visit www.sutlaw.com or radmilovich.com.