EAST VS. WEST:
CLEAR SUPPORT AND POTENTIAL HEARTACHE FOR MERS AND OTHER SIMILAR MORTGAGE ASSIGNMENT SYSTEMS

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Two recent decisions – one from the United States District Court for the District of Arizona, the other from the Trial Court, Land Court Department, for the Commonwealth of Massachusetts – offer varying degrees of support (the Arizona case) and heartache (the Massachusetts case) for the Mortgage Electronic Registration Systems, Inc. ("MERS") and other similar mortgage assignment systems. Below the author summarizes both decisions.

In *Cervantes v. Countrywide Home Loans, Inc.*, 2:09-CV-00517-JAT, 2009 WL 3157160 (D. Ariz. Sept. 24, 2009) ("*Cervantes*"), the United States District Court for the District of Arizona considered multiple motions to dismiss claims made by three individual plaintiffs who granted deeds of trust to two different banks that used MERS as the listed beneficiary on the deeds of trust. Among other things, the plaintiffs alleged that the various named defendants (members of the MERS system) conspired to commit fraud through the MERS system because, first, MERS is a "sham" beneficiary because it never acquires a true beneficial interest under a deed of trust, and second, the MERS system operates to circumvent the public recording requirements and allows for a lack of notice to future buyers of mortgages in the MERS system. The district court rejected the plaintiffs' allegations as having "no effect upon [the plaintiffs'] status as borrowers." *Id*. *10-11. In response to the plaintiffs' first allegation, that MERS is a "sham" beneficiary, the court noted the absence of Arizona cases finding that the MERS system is fraudulent and that the plaintiffs' "allegations would foreclose the very splitting of a promissory note from a deed of trust….[and] intrude into the realm of third-party beneficiary contracts, as well as assignments and delegations." *Id*. *10. The court also found that the plaintiffs failed to allege what effect, if any, MERS's listing as beneficiary had upon their obligations as borrowers. *Id*. As to the plaintiffs' second objection to the MERS system, the court found that also had no effect on their status as borrowers for two reasons. First, any lack of notice to future buyers of the plaintiffs' mortgages would not alter the plaintiffs' obligations under the mortgages. Second, the plaintiffs did not argue that had they been fully apprised of the MERS system they would not have entered into their loans or that they were somehow induced into entering into their loans based on a misunderstanding of the MERS system. *See id*. *11. Thus, the court dismissed the plaintiffs' claim for conspiracy to commit fraud through use of the MERS system and in doing so, offered support for MERS in contesting future allegations that the recording of MERS as beneficiary under a deed of trust is a "sham."

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GRANTING EASEMENTS: YOU MAY BE GIVING AWAY MORE THAN YOU THINK

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Property owners are frequently asked to grant utility servitudes, whether to serve their own properties or other properties in the area. Although an owner granting a utility easement may think that he or she is doing so for a particular purpose, that use may be expanded over time with changing technologies.

CenterPoint Case

In a 2008 decision, the Texas Court of Appeals held that the manner, frequency, and intensity of an easement's use may change over time to accommodate technological advances and that some flexibility in determining easement holder's rights should be allowed as long as the changes respect the original purpose stated in the grant. This increase in flexibility stems from the "technological advancement doctrine", which states that an easement should encompass technological developments that are in line with the particular purpose for which the easement is granted. *CenterPoint Energy Houston Elec. LLC v. Bluebonnet Drive, Ltd.*, 264 S.W.3d 381 (Tex. App.-Houston [1 Dist.] 2008).

Houston Lighting & Power Co. ("HL&P"), the predecessor in interest to CenterPoint Energy Houston Electric LLC ("CenterPoint"), was granted an express utility easement in 1929. HL&P acquired the easement pursuant to the grant which stated, in relevant part:

> That the San Jacinto Trust Company … does by these presents GRANT, SELL AND CONVEY, unto the said Houston Lighting & Power Company . . . a rightofway or easement for electric transmission and distributing lines consisting of variable numbers of wires and all necessary and desirable appurtenances (including towers or poles made of wood, metal or other materials, telephone and telegraph wires, props and guys) . . . .

Southwestern Bell Telephone ("SWB"), predecessor to AT&T, had been sharing the easement since 1970. There was no separate telephone easement on the site. AT&T mounted and strung land-line telephone lines on CenterPoint's poles.

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In early 1998, HL&P and SprintCom, Inc. ("Sprint") entered into an agreement to install wireless telecommunication equipment on existing electrical towers. HL&P installed the equipment on the easement in question for Sprint in the summer of 1998.

Bluebonnet Drive, Ltd. ("Bluebonnet") and Petro-Guard Co., Inc. ("Petro-Guard") purchased the property subject to the easement in 2004. Soon after the purchase, Bluebonnet and Petro-Guard sued CenterPoint and Sprint, claiming that the use of the tower exceeded the scope of CenterPoint's easement and constituted a trespass. The trial court found that CenterPoint's and Sprint's use of the easement did exceed the scope of the easement granted to HL&P and granted Bluebonnet's and Petro-Guard's motion for summary judgment.

On appeal, the Court first found that HP&L, and CenterPoint by succession, could assign the rights granted by the easement to a third party, but the assigned rights must conform to the rights that were originally conveyed to HP&L. The only rights that may pass are those that are "reasonably necessary" for the enjoyment of the easement. *CenterPoint Energy*, 264 S.W.3d at 389. The Court then held that an easement must be interpreted according to the basic principles of contact construction and interpretation. If the language in the easement is unambiguous, the Court must rely solely on the written terms of the grant. The Court stated that doubts about the parties' intent would be resolved against the servient estate in order to confer on the grantee the "greatest estate permissible under the instrument." *Id*.

In interpreting the language of the grant, the Court stated that the Texas Supreme Court has acknowledged that common law permits flexibility with regard to an easement holder's rights because the nature of the use of the easement may change over time to accommodate technological development. *Id*. at 389 (citing *Marcus Cable Assocs. v. Krohn*, 90 S.W.3d 697, 701 (Tex. 2002)). Those changes have to fall within the purposes of the original easement, as determined by the written terms of the grant. *Id.* The easement "encompasses only those technological developments for which the easement was granted." *Id.*

The Court held that the plain terms of the easement agreement encompass the use of CenterPoint's easement for Sprint's cellular transmission lines. The grant conveyed an easement for "all necessary and desirable appurtenances (including towers or poles made of wood, metal or other materials, telephone and telegraph wires, props and guys) . . . ." *Id.* at 390. The Court held that the plain meaning of those terms was that telephone and telegraph wires could be installed when necessary and desirable, and that while the technology of 1926 did not contemplate cellular equipment, under the technological advancement doctrine the installations set forth in CenterPoint's agreement with Sprint are permitted.

Additional Caselaw

The Texas Supreme Court acknowledged that common law permits flexibility with regard to an easement holder's rights because the nature of the use of the easement may change over time to accommodate technological development. It found, however, that allowing a cable company to set up equipment on an easement granted solely for electric transmissions was not within the scope of the original grant. *Marcus Cable Assocs. v. Krohn*, 90 S.W.3d 697, 701 (Tex. 2002). Here, Hill Country Electric Cooperative ("Hill Country") was granted an easement in 1939 that allowed Hill Country to "use their property for the purpose of constructing and maintaining 'an electric transmission or distribution line or system.'" *Id.* at 699. Marcus Cable Assocs. ("Marcus Cable") presented several cases from other jurisdictions that allowed cable companies to add their equipment to existing easements. Although the Court expressed no opinion on whether those cases were decided correctly, the Court distinguished those cases because all of the grants allowed for electricity *and* telephone equipment.

In 1985, the California Court of Appeals held that where an easement permitted its holder to maintain both electric and telephone wires, cable television lines were within the easement's scope because cable television service is "part of the natural evolution of communications technology." *Salvaty v. Falcon Cable Television*, 212 Cal.Rptr 31, 34 (1985). According to the Court, the primary issue is whether the use is consistent with the primary object of the original grant. In this case, the installation of the equipment was consistent with the goal of providing for "wire transmission of power and communication." *Id.* at 35. *See also Henley v. Continental Cablevision of St. Louis County, Inc.,* 692 S.W.2d 825, 828-29 (Mo. Ct. App. 1985); *Crowley v. New York Telephone Co.* , 363 N.Y.S.2d 292, 294 (1975) ("Just as we must accept scientific advances, we must translate the rights of parties to an agreement in the light of such developments.")

In 1994, the Fourth Circuit held that an easement that permitted its holder to maintain pole lines for electricity and telephone services was broad enough to encompass cable television equipment. *C/R TV, Inc. v. Shannondale, Inc.*, 27 F.3d 104, 105 (4th Cir. 1994) (applying West Virginia law). In so holding, the Court relied on the similarity between the communicative aspects of both telephone services and cable television. The Court held that under West Virginia law, the two part test for determining whether a use should be permitted is, first, to determine whether the proposed use is "substantially compatible" with the original grant and, second, to determine whether it "substantially burdens" the servient estate. *Id.* at 108. *See also Jolliff v. Hardin Cable Television Co.*, 269 N.E.2d 588, 591(Ohio 1971).

In contrast, in 2005, the Florida Court of Appeal held that an easement permitting the holder to establish electric transmission lines did not allow the grantee to lease the excess capacity of communications lines to a telecommunication company because the easement was limited to electric transmission and only necessary internal communication lines fell within the scope of the easement. *Orlando v. MSD-MATTIE, L.L.C.*, 895 So.2d 1127, 1129-30 (Fla. Dist. Ct. App. 2005). The court held that the fiber optic cable is not an "electric transmission line" and therefore is only permitted to the extent that it is a necessary ancillary to the permitted use of the easement. *Id.*

Another line of cases examines technological advancement in relation to easements granted for highways. Washington and Florida courts have held that technological advancement allows for the use of highway easements for electric and telephone lines, but other courts have held that permission to establish public utility lines is not granted by highway easements. In 1931, the Washington Supreme Court held that a utility could construct a power line on a highway easement. The reasoning behind this decision was that electric and telephone lines supply communication and power that had previously been provided through messengers and freight wagons traveling on public highways. According to the Court, "a highway easement includes every reasonable means for the transmission of intelligence, the conveyance of persons, and the transportation of commodities which the advance of civilization may render suitable for a highway." *McCullough v. Interstate Power & Light Co.*, 300 P. 165, 166 (Wash. 1931). *See also Nerbonne, N.V. v. Florida Power Corp.*, 692 So.2d 928, (Fla. Dist. Ct. App. 1997). Iowa, Louisiana and Arkansas hold that permission to establish public utility lines is not granted by highway easements. In 2000, the Iowa Supreme Court held that a highway easement did not include the right to install utility poles and lines. *Keokuk Junction Railway Co. v. IES Industries, Inc.*, 618 N.W.2d 352, 360-61 (Iowa 2000) (disagreeing with the reasoning in *McCullough* and *Nerbonne*.). *See also Cathey v. Arkansas Power and Light Co.*, 97 S.W.2d 624, 626 (Ark. 1936); *Louisiana Power & Light Co. v. Dileo*, 79 So.2d 150, 155 (La. Ct. App. 1955).

These cases illustrate, that, when granting utility easements, a property owner should take care only to cover what is intended. Otherwise, that owner may lose the opportunity to dictate future uses of its property and to preserve the property's future value.

In *U.S. Bank National Association v. Ibanez*, Nos. 08 MISC 384283(KCL), 08 MISC 386755(KCL), 2009 WL 3297551 (Mass. Land Ct. Oct. 14, 2009), a Massachusetts Land Court refused to vacate a judgment entered against plaintiffs U.S. Bank National Association and Wells Fargo Bank, N.A. finding that foreclosure sales conducted by the plaintiffs were invalid under Massachusetts law and in particular under G.L. c. 244, § 14. The issue before the court on the motions to vacate judgment, and the issue on which the court previously entered judgment against plaintiff, was "[t]he right of the Plaintiff[s] to foreclose the subject mortgage[s] in light of the fact that the assignment[s] of the foreclosed mortgage[s] into the Plaintiff[s] [were] not *executed or recorded* until *after* the exercise of the power of sale." *Id*. *4 n.20 (internal quotations omitted; emphasis in original). In the motion to vacate, the plaintiffs' presented the court with "newly supplemented" facts and two new arguments for the validity of the foreclosure sales. The plaintiffs argued that "they *were* the 'present holder of the mortgage' within the scope and meaning of G.L. c. 244, § 14 at the time of notice and sale…because they possessed the note (endorsed in blank), an assignment of the mortgage in blank (*i.e*., without an identified assignee), and a contractual right to obtain the mortgage at those times." *Id*. *2 (emphasis in original). They also argued that "in the event the court disagree[d] that their possession of the note, a mortgage assignment in blank, and a contractual right sufficed to make them 'present holders of the mortgage,' they contend that the foreclosure sales were nonetheless valid because they were authorized by the last record holder of the mortgage and the plaintiffs acted as the 'agent' of that holder." *Id.*

In each instance, the note endorsed in blank and an assignment of mortgage in blank (an assignment that was never recorded, was not legally recordable, and in the court's view was ineffective to transfer an interest in the mortgage because it did not name the assignee) were passed from entity to entity as the loans were sold, ultimately ending up in the hands of the plaintiffs, acting as trustees for two different trusts. None of the transfers were recorded in the public records, and although the offering documents issued for purposes of selling certificates in the trusts to investors required that the custodian of each mortgage loan in the trust pool obtain an original assignment of the mortgage in recordable form, no such assignments were made. Thus, the court found that at the time the foreclosure sales were noticed and conducted, the plaintiffs held only the notes; the mortgages securing the notes remained with the loan originator, Option One. And because neither plaintiff was a valid assignee under the mortgages nor "held" the mortgages at the time of the notice and sale, neither plaintiff possessed the statutory or contractual power to sell under the mortgages.

The court also found that the plaintiffs could not validate the foreclosures by arguing that they were "authorized" by the actual mortgage holders to conduct the sales for two reasons. First, the plaintiffs received their direction to initiate the foreclosure sales not from Option One, but from another entity in its capacity as loan servicer, and there was nothing in the record to show that the directing entity had the capacity to act for Option One generally or as originator and holder of the mortgage or that the entity had any authority to order the disposition of Option One's assets. Secondly, the court found that G.L. c. 244, § 14 "requires complete transparency." *Id*. *12. Because the plaintiffs explicitly represented that they were the present holders of the mortgages and failed to disclose the name of their principals (the true holders of the mortgages), the required transparency and strict compliance with the statute was not achieved, invalidating the foreclosure sales.

ARKANSAS BANKRUPTCY COURT VOIDS MORTGAGE LIEN ON BASIS OF FAULTY ACKNOWLEDGMENT

By
Katie Graves Williams

Recently, an Arkansas Bankruptcy Court allowed the trustee to avoid a mortgage lien due to a defective acknowledgment. *In Re Stewart,* Case No. 1:08-bk-71338, (Chapter 7), AP NO. 1:08-ap-07153 (Bankr. W.D. Ark. 2009). The Court stated that although the debtor's name was omitted from the acknowledgment, this alone did not create the defective notice because referencing the document as a whole could have provided the missing information. However, the acknowledgment incorrectly referenced the debtor as a "he", and that this, coupled with the missing debtor's name, was enough to create ambiguity thus requiring extrinsic evidence. *Id* at 4088.

The debtor, Mary Stewart, granted a mortgage lien to the lender, JP Morgan Chase, to secure a $105,000.00 note. The debtor filed for Chapter 7 bankruptcy protection under the United States Bankruptcy Code, and the trustee filed an adversary proceeding against the lender to avoid the lien. At issue was the defective acknowledgment. It was missing the debtors name entirely and was instead left blank. In addition, the pronoun "he" was used in the acknowledgment, when the debtor was a single woman. The trustee argued that constructive notice was not provided and therefore the lien should be avoided altogether. The Bankruptcy Court agreed.

Citing *Hawkins v. First Nat'l, Bank (In re Bearhouse),* 99 B.R. 926, 927 (Bank.W.D. Ark. 1989), the Court noted that an acknowledgment can be deemed sufficient if it *substantially* complies with Arkansas state law. In *Bearhouse,* the mortgage was deemed to have provided constructive notice to third parties when it was improperly acknowledge because the document as a whole was regular on it's face. *Id at 927.* In addition, the Arkansas Supreme Court held in *Magness v. Arnold,* 31 Ark. 103 (1876), an acknowledgment on a deed which was missing the grantors name did not make the deed defective. In *Magness,* the justice was able to identify the grantor as the person who appeared before him and this was enough for the court to hold the acknowledgment as being sufficient. Moreover, in *Farm Bureau Finance Co., Inc. v. Carney,* 100 Idaho 745, 750, 605 P.2d 509, 514 (1980), the court held that the omission of a pronoun or use of the wrong gender is not generally considered a fatal error to an acknowledgment.

However, in the instant case, the Court finds that although an acknowledgment missing a debtor's name or an acknowledgment whose pronoun use was of the wrong gender would not alone be held to provide defective notice to third parties, the combination of the two flaws did. *In Re Stewart,* Case No. 1:08-bk-71338, (Chapter 7), AP NO. 1:08-ap-07153 (Bankr. W.D. Ark. 2009). By referencing the mortgage document as a whole, one could easily fill in the missing debtor's name on the blank acknowledgment. But by using "he" instead of "she" when the debtor is clearly marked as a single women, this caused enough ambiguity so as to require extrinsic evidence. *Id*. Therefore, the mortgage instrument is deemed defective in that it fails to provide constructive notice to third parties. Lastly, the lender sought an equitable remedy of reformation of the mortgage due to mutual mistake. Because the trustee is considered a bona fide purchaser under 11 U.S.C. § 544(a)(3), and would be prejudiced by any equitable reformation of the mortgage, this relief was denied.

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Uninsured But Not Uninformed;
Exclusion of Creditors Rights Title Insurance Coverage

By
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Recently, the American Land Title Association (ALTA) voted to withdraw the ALTA Endorsements 21 and 21/06, effective March 8, 2010 (and the California Land Title Association (CLTA) voted on February 4, 2010 to decertify state counterparts CLTA 131 and 131-06). This coincides with the position of many title companies that they will no longer delete creditors' rights exclusions from new title policies nor add creditors' rights endorsements to existing policies. This significant development has already delayed and/or prevented the closing of a number of real estate transactions, and may affect the risk management and mitigation strategies of parties entering into future transactions requiring the issuance or continuation of title insurance.

As background, in the early 1990s, concerns about risks and potential losses relating to loan restructurings and bankruptcies in the then very depressed real estate market led title companies to add an exclusion to the 1990 form policy for losses resulting from a bankruptcy court determination that (i) the transfer of property to a purchaser (insured under an owner's title policy) constitutes a fraudulent conveyance or (ii) the grant of a mortgage to a lender (insured under a lender's title policy) constitutes a fraudulent conveyance or preferential transfer.[2] Under applicable bankruptcy and insolvency laws, a "fraudulent conveyance" consists of a transfer made either with the intent of defrauding creditors or for less than "reasonably equivalent value" while the transferor was insolvent. A "preference" under Section 547 of the Bankruptcy Code consists of a payment or transfer to a creditor in respect of an antecedent debt made within 90 days before the date of the filing of the bankruptcy petition that favors such creditor as compared to other creditors. Such a determination, therefore, could result in the voiding of such conveyance or grant, or recovery of the value thereof for the benefit of the bankrupt's estate.

The environment of the 1990s is obviously strikingly similar to our current fiscal crisis. In this severe real estate down cycle, it is commonplace for a creditor in a workout context to ask a weakened borrower for additional collateral to secure its existing (antecedent) indebtedness to such creditor. Also, it is now commonplace for opportunistic investors to actively seek distressed real estate investment opportunities in which a potentially insolvent borrower sells property, or loan seller agrees to transfer assets, for a relatively low price that may or may not

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2 The exclusion did not eliminate coverage against creditor's rights stemming from either (i) failure by the title company to timely record the insured instrument or (ii) failure of the insured recorded instrument to impart constructive notice to third parties.

constitute “reasonably equivalent value”. Such transactions, therefore, present a risk that they will be determined to constitute avoidable transfers if, following such grant of additional collateral or asset transfer, such borrower or seller becomes (voluntarily or involuntarily) a debtor in a bankruptcy proceeding.

In 1992, acceding to heavy pressure from dissatisfied lenders, title companies offered policy endorsements to modify the exclusion, and thereby provide coverage against certain creditors' rights claims. Today, however, in the midst of one of the worst real estate markets on record, debtor insolvencies are widespread and there is a heightened risk of challenges to workouts and sale transactions in bankruptcy proceedings. In the face of significant losses stemming from having issued endorsement coverage in a few high profile transactions, the title companies have recognized that they are not in the business of underwriting credit risk. Consequently, the title industry has reached a general consensus that it will no longer modify the exclusion, and that virtually all title policies will now include the unmodified creditors' rights exclusion.

In light of this decision, lenders and buyers of distressed debt will need to perform more thorough due diligence in order to better assess the risks of structuring transactions that could be subject to attack under applicable fraudulent conveyance and preferential transfer laws when entering into real estate purchase and financing transactions. Additionally, borrowers will be forced to address changing expectations of their lenders, as both parties seek to come up with new structures and solutions to address the title companies' shift in underwriting policies.

FORECLOSURE MEDIATION FAQs

An American Bar Association Dispute Resolution Section Background on Residential Foreclosure Mediation

What is mediation and how does it work in foreclosure cases? Mediation is a process of guided negotiations. A neutral individual, called a mediator, works with the parties to a mortgage, with or without attorneys, in a discussion of their problem. The talks are an effort to resolve the issue with the mortgage by mutual agreement before it goes in arrears, before further legal proceedings, or before foreclosure sale. The mediator has no authority to make a decision. The mediator serves as a discussion leader to help the participants negotiate more efficiently, and, hopefully, reach an agreement sooner than they could on their own.

What is a mediator? A mediator is an independent, trained neutral who helps people settle disputes. The mediator, who is impartial, conducts a discussion process to facilitate communication and negotiation between parties. The process assists them in developing better mutual understanding, creative options, and, when appropriate, a voluntary agreement. A mediator does not provide financial or legal advice to either side, but will work with the parties and their representatives to explore all topics of interest.

Why is the American Bar Association involved in foreclosure mediation? The ABA has been promoting the use of dispute resolution mechanisms like mediation since the mid-1970s. At the urging of the Dispute Resolution Section, the House of Delegates, the highest governing body of the ABA, passed a policy in August 2009 supporting the national use of mediation in residential foreclosure matters. The rationale for the policy is the benefit to lenders and homeowners through lower cost, reduced delay, avoidance of legal proceedings, and greater likelihood of restoring the homeowner to the status of a performing mortgage borrower. There are benefits to society from the use of foreclosure mediation, such as reduced court dockets, more stable neighborhoods, maintenance of local property values, and fewer vacant homes. Even if a foreclosure mediation does not lead to a reworked mortgage, it can still have benefits in the form of an agreed deed in lieu of foreclosure, or other businesslike turnover of the property.

Why should a homeowner bother to mediate a mortgage problem? Many difficulties with mortgages, either before suit is filed (such as when a ARM reset is approaching or when a homeowner is slightly behind in payments) or after foreclosure has started, can be resolved through reasonable discussions. An experienced mediator can help the parties find a creative solution that they may have overlooked. Because mortgage lenders don't want to own houses, they are generally willing to talk with a borrower about reasonable, practical solutions to bring the mortgage current. Borrowers can discuss their unique personal financial circumstances with their lender. Mediation, with the chance to talk privately with the mediator, has a better opportunity to reach a resolution than a possibly tense or difficult one-on-one negotiation.

Why should a lender bother to mediate a delinquent mortgage? Many difficulties with non-performing mortgages can be the result of temporary problems for the borrower, such as a job layoff, medical bills, or a divorce. An experienced mediator can help the parties focus on the unique circumstances at hand and craft a mutually beneficial solution. Because mortgage lenders don't want the cost of maintaining vacant houses and prefer a steady cash flow stream, they can talk with a borrower about several ways to bring the mortgage current. Borrowers can discuss their unique personal financial circumstances directly with a decision maker for their lender. Mediation, with the chance to talk privately and candidly outside of a legal proceeding, has a better opportunity to reach a resolution than a possibly cumbersome telephone negotiation.

How is mediation different than some "debt relief" services that are advertised? Many debt relief services are actually scams where the "service" charges an owner a hefty monthly fee, but provides little or nothing in return. No "debt relief service" is going to pay a mortgage for an owner or reduce their monthly payments. However, the mediation of a foreclosure problem through an order of the court or by agreement gives everyone, the lender and the borrower, the chance to talk candidly and openly about the current problem with the mortgage, and look for a long-term solution that satisfies everyone. Perhaps the loan can be extended, the interest rate amended, or a homeowner given more time to catch up on overdue payments. It is also possible to work out a turnover of the house by the owner, but at a time and under terms that are mutually beneficial. A mediation generally leads to an agreement that both sides find fair and workable going forward.

Will the mediator issue a decision in a case? No. All the mediator can do is help the parties and attorneys look at the dispute more objectively, discuss various options for a workout of the mortgage, listen to each side privately, and assist the participants in finding a mutually acceptable solution. A mediator makes no decision, judgment, award, or recommendation on the outcome.

What can a mediator tell a judge? Next to nothing. The mediator will only tell a court whether or not the case settled. Discussions in mediation are inadmissible at trial under evidence rules and the Uniform Mediation Act if adopted in a particular state. Even if the foreclosure proceeding goes forward after mediation fails to reach a settlement, the mediator is still subject to the obligation to disclose nothing about the mediation discussions.

Should a party bring witnesses and exhibits to the mediation? No. A mediation is not like a trial or arbitration. While the attorneys, parties, and the mediator will discuss the situation, there are no witnesses, no testimony, no exhibits, no objections, no cross examination, and no arguments. An owner and the lender or servicer may bring documents that relate to and explain the situation surrounding the mortgage, the owners' financial circumstances, and potential workout plans.

Will anyone be expected to testify? No. Because mediation is a focused negotiation process, the mediator uses a conference room, but everyone sits at the table as equals in a discussion format. Mediations can be held in a courthouse conference room, or by agreement elsewhere at the parties' convenience. There is no witness stand and no testimony. Parties will be expected to listen, participate in the discussions as appropriate, and make decisions about how to negotiate, and whether or not to settle.

Can the mediator tell an owner how to handle their case? No. The mediator is not there as a judge, jury, or arbitrator of the case, or as an advocate or advisor for either side. It is important that everyone analyzes and reasonably evaluates the financial situation and the benefits of working out possible new terms for the mortgage. The mediator may point out certain problems to each side, but this is just part of looking at the case objectively. The mediator, the attorneys, and the parties will also discuss the costs and drawbacks of going forward with foreclosure as compared to the benefits of settlement.

Is the mediator there to "save the home" for the borrower? No. The mediator is impartial and does not side with, favor, or represent either party. It is up to the homeowner to make decisions and take affirmative steps to save their own home. The mediator is there just to make sure the discussions go smoothly in a focused manner.

What options can be discussed at a mediation? The parties in a foreclosure mediation can consider and discuss many options for resolution, including but not limited to a forbearance plan, modification of the interest rate, conversion from an adjustable rate mortgage (ARM) to a fixed rate, reduction of principle, deferring certain costs or payments to the end of the mortgage, loan modification, waiver of fees or expenses, deed in lieu of foreclosure, a short sale, deed and lease back, special payment arrangements, extending the term of the mortgage, assistance from a federal agency, or any other practical mechanism for solving the current problem.

How is a mediator different from a HUD certified housing counselor? A HUD certified housing counselor, working with a non-profit agency, is an adviser to a homeowner who offers information and guidance about mortgage assistance programs, personal budgets, and options to work out the mortgage deficiency. The counselor can also negotiate on behalf of the owner with the lender or servicer to achieve a resolution. A mediator works with both parties in a discussion process and does not advise or negotiate for either side.

Will both sides be at the mediation? Generally yes. A representative of the mortgage lender, with authority to settle, and the current property owner(s) should be at the conference and prepared to negotiate. Telephone participation of the lender is permitted by prior permission of the court or the mediator. During the course of the mediation, the mediator can and usually will meet separately with each side for private, more candid discussions.

Can a party bring an attorney to the mediation? Yes. Under the Uniform Mediation Act if a particular state has adopted it, a party in mediation can bring their attorney or any other support person to the conference. This would include translators for non-English speaking parties. The lender is usually represented at the conference by local counsel.

What if the owner just wants to give up the house and walk away? Giving up a house in the face of a foreclosure case is a serious decision and one that should not be made lightly. Returning the ownership of a mortgaged property to the lender is called "a deed in lieu of foreclosure". The parties to a foreclosure can still mediate about such issues as when is the house to be turned over, when does the family have to move out, and what other money obligations exist as part of the deed in lieu of foreclosure mechanism.

The owner wants his/her day in court. Why should he/she settle? Every citizen has a right to seek a fair hearing in court, but one should consider that a trial is not the only legal choice available. Foreclosure cases rarely, if ever, go to trial. Almost always, the judge (or other legal official in states where foreclosures do not go through court) concludes a foreclosure proceeding based on written documents filed by the lender with that court or official. Each side should thoroughly discuss every factor in the current situation before making the important choice to settle with new terms or go through with foreclosure. Mediation is an opportunity for both sides of a case to explore settlement possibilities without risk or penalty, and with the aid of a trained mediator.

The lender just wants to promptly get possession of the home. Why should it mediate? The ABA policy concerning foreclosure mediation is intended for owner occupied residential property. Certain situations may not suitable for foreclosure mediation, such as vacant homes, some rental properties, or properties bought on speculation. There may be other circumstances where prior efforts at a workout have failed and a home is in foreclosure a second time. A well-designed local foreclosure mediation program will have mechanisms for initially screening cases and/or removing inappropriate cases from mediation. A lender should thoroughly consider every factor in the current situation, including new federal mortgage assistance programs, before making the final decision to go through with foreclosure. Mediation is an opportunity for both sides of a case to explore settlement possibilities one final time as needed, and without risk or penalty, with the aid of a trained mediator.

Can't mediation be used as a delaying tactic to the disadvantage of the lender? It is theoretically possible for an owner to abuse the mediation process to put off an inevitable foreclosure and loss of a home. But it is more advantageous for everyone (lenders, owners, courts, bond holders, and the community) to sort out the occasional abuser case-by-case in a well-run foreclosure mediation program than to have no program at all and miss the opportunity to convert many delinquent mortgages into long-term performing loans. Many foreclosure mediation programs proceed in parallel with pending foreclosure cases; thus, little if any time is lost when a mediation does not settle. A few bad apples who stall should not be a reason to disregard the majority of the homeowners who are sincerely trying to bring their mortgages current. And given the delays in some jurisdictions in getting properties to sale, it may be quicker to resolve cases in mediation than to wait for a sheriff's sale.

What happens if the parties can't settle? If the parties cannot settle at the mediation, several things might happen. The parties or attorneys may agree to negotiate further later on, or the mediator can schedule a follow-up mediation. Or the case could ultimately go forward in the foreclosure proceeding. There is no penalty or extra cost for using mediation.

What are the advantages of the ABA's national policy to promote foreclosure mediation? The ABA's efforts in this area are (1) to identify and promote successful existing foreclosure mediation programs at the state and local level, (2) copy those existing successful programs in jurisdictions that don't have any, (3) enlist the national support of public and private entities for greater use of foreclosure mediation, (4) increase public awareness of the existence and benefits of foreclosure mediation, (5) improve efficiency in the use of foreclosure mediation through standardization of procedures and forms, and (6) reduce resistance to the use of foreclosure mediation by improving mediator training and encouraging the adoption of best practices in the field. A unified and standardized program for the promotion of foreclosure mediation at the national level would be superior to inconsistent or nonexistent local efforts.

As a lender, servicer, or trade association, what can we do to assist the ABA's efforts? Such entities can support the ABA's foreclosure mediation policy by (1) pledging at the highest executive level to participate in existing and future state and local foreclosure mediation programs, and upholding that pledge at all organizational levels, (2) making public service announcements about foreclosure mediation, (3) including printed information about foreclosure mediation in mailings to homeowners receiving materials about mortgage delinquency or foreclosure, (4) conducting in-house trainings for loss mitigation employees about the mediation process, (5) committing to having authorized decision makers prepared and available in person or by phone for every foreclosure mediation, (6) assisting the ABA's Dispute Resolution Section in the identification of best practices and paperwork that merit duplication and distribution nationally, (7) supporting the industry-wide use of foreclosure mediation so that no entity is perceived to be at a competitive advantage by avoiding that process, and (8) working with courts and bar associations at the state and local levels to implement quality foreclosure mediation programs in those areas that do not yet have them.

Where can I get more information about foreclosure mediation? The ABA Dispute Resolution Section maintains a web site with foreclosure mediation resources at [http://www.abanet.org/dispute/mediation/resources.html. You may contact the ABA Dispute Resolution Section staff attorney in charge David Moora at moorad@staff.abanet.org or (202) 870-1787. The web sites for several state supreme courts have information about foreclosure mediation in their respective states. Search engines can locate other foreclosure mediation resources on the web. Individuals facing foreclosure may wish to contact their local court or bar association about local foreclosure mediation programs.

Reference: ABA Policy #300, Adopted August 3, 2009 by the House of Delegates:

RESOLVED, That the American Bar Association supports federal, state or territorial legislation, regulations, or court rules that promote the use of mediation to assist in resolving disputes that could lead to foreclosure of mortgages on residential real property, and foreclosure cases that are already pending in federal, state or territorial courts and promote access to pro bono or low cost counsel or other advocates for parties who would otherwise be unrepresented in the mediation process.