BUILDING A COMPREHENSIVE FORECLOSURE PREVENTION PROJECT AT AN LSC-FUNDED PROGRAM

By Josh Zinner[1]

At the beginning of 1998, I was hired to start up a foreclosure prevention project at South Brooklyn Legal Services (SBLS). The general goal for the Project was to use outreach, education, and litigation to reduce unnecessary foreclosures among seniors. The Project was the first of its kind in the New York City area; no other legal services programs in the area deal exclusively with defending low-income homeowners in foreclosure. Complicating the task in establishing the Project was the fact that SBLS is LSC-funded, so that I would have to labor under LSC restrictions.

We started the Project with a grant that covered the cost of one attorney for our office, plus administrative costs. We subcontracted with the National Consumer Law Center (NCLC) on our initial grant for support with substantive know-how, an invaluable collaboration that has allowed us to serve clients competently in this complicated area of law, despite beginning the Project with very basic substantive knowledge. We have since secured further grants, which have allowed us to expand the Project to two attorneys (soon to be three) and one paralegal. It is essential that any legal services office that is considering starting a foreclosure prevention project fund at least one full-time attorney who will do only foreclosure prevention work, because the scope of the work makes it extremely difficult to do on a part-time basis.

The first thing I did when I began was to meet with dozens of community groups and other non-profits, local politicians, and government agencies to identify existing resources and to inform advocates about the services available through the Project. As soon as word got out about the project, I was inundated by calls from low and moderate-income homeowners who had been victimized by predatory lending practices and were in foreclosure (New York is a judicial foreclosure state). It was readily apparent that 1) we would need to leverage resources so that the sheer volume of calls from homeowners in crisis did not overwhelm us, and 2) that in order to adequately confront the problem of predatory lending we would need to look beyond just litigation and develop a multi-faceted approach including outreach and education and community advocacy. Following are some suggestions for those who are considering starting a similar project.

I. DEVELOP A REFERRAL NETWORK OF PRO BONO ATTORNEYS

It has been vital to develop a network of attorneys and law firms to whom we can refer cases pro bono. The cases that the Project accepts for litigation generally involve complex claims under federal Truth in Lending law (TILA) and state Unfair and Deceptive Practices Act (UDAP) and common law. For every client we represent in litigation, we find pro bono co-counsel at a large corporate law firm. This serves several functions. It allows us to pass some of the legal research and writing on to co-counsel, freeing our time to take on more cases. We are also able to pass the costs of litigation on to our co-counsel at the law firms; this is particularly important when we have a large number of depositions. Finally, while the LSC regulations prohibit us from inserting a claim for attorney's fees[2], our co-counsel can ask for attorney's fees. The attorney's fee claim creates additional pressure for lenders to settle, since they face paying the types of hourly fees that the large law firms charge.

The law firms are generally eager to work on these cases because younger associates at the

[1] Coordinator of the Foreclosure Prevention Project for Seniors at South Brooklyn Legal Services.

[2] 42 C.F.R. §1642.

firms can take depositions and get other direct litigation experience. Conflict of interest problems generally present the biggest impediment to finding pro bono co-counsel. Because so many mainstream institutions are now involved in the securitization and even origination of predatory loans, we often have to shop a case around to several firms before we can find one that does not have a conflict of interest issue with one of the parties. An alternative to the large law firms is local law school clinics. We are currently co-counseling one case in federal court with a law school federal litigation clinic, a collaboration that ensures us the same benefits as our collaboration with the law firms.

The Project is committed to ensuring that low-income homeowners who are in foreclosure and who have a possible legal remedy get counsel. However, due to our limited resources, we made the decision to only accept cases where there are defenses to foreclosure based on the conduct of the lender and broker. For other cases where legal assistance is necessary, we will package the case for referral to a pro bono attorney or firm, or to a law school clinic. Examples of these types of cases include fraudulent deed transfers involving a family member, or Chapter 13 bankruptcies where there is purely a financial problem, i.e. where there are no substantive defenses to the mortgage or note. We will also refer a case to the pro bono network if the client is not income-eligible for our services.

In our work, we see patterns of TILA, Home Ownership Equity Protection Act (HOEPA), Real Estate Settlement Procedure Act (RESPA) and UDAP violations by predatory lenders that are particularly appropriate for class actions. While we are prohibited under the LSC regulations from "initiating or participating" in any class action[3], through our work in the Bar Association we are able to keep the bar informed of such violations of lending laws. We are also permitted to directly refer non-fee generating class actions to law school clinics or other unrestricted non-profit law offices.

To support our pro bono network, the Project provides a daylong training twice a year on defending foreclosures against predatory loans. These trainings include in-depth discussions of TILA, HOEPA, RESPA, and state UDAP and common law defenses. The trainings have helped spur interest among attorneys in defending against abusive foreclosures, and have helped us identify the pro bono network. Gary Klein of the NCLC is usually the co-trainer for these sessions.

II. DEVELOP A NETWORK OF COMMUNITY GROUPS AND NON-PROFIT FINANCIAL COUNSELORS FOR REFERRALS, AND COMMUNITY OUTREACH AND EDUCATION

We get an enormous number of calls from homeowners who are in default or foreclosure due to financial problems, but who do not have substantive defenses to the foreclosure action. It is vital for any foreclosure prevention project to develop a network of community groups and other non-profits where homeowners can be referred for competent and conscientious financial counseling.

After my initial meetings with numerous community groups and other non-profits, interest in the predatory lending problem was so strong that we formed the City-Wide Foreclosure Prevention Task Force. The Task Force includes non-profit financial counselors, as well as other community groups and government agencies. Task Force members share information about fraudulent lending practices and about how to deal with these practices. Most importantly, the Task Force gives us an organized and efficient referral network. Our Project is able to quickly refer clients for foreclosure counseling, including help with workouts or loss mitigation on FHA loans, and Task Force members are able to identify predatory loans

[3] 45 C.F.R. § 1617.

and refer them to our office for possible legal action.

The Task Force is also a crucial tool for community outreach and education on predatory lending practices. We compiled an educational pamphlet in English and Spanish discussing warning signs of potentially abusive home equity loans, and providing a list of alternative resources for low-income homeowners who are considering high-rate refinancing. Through the Task Force, we have disseminated thousands of these educational pamphlets citywide through churches, government agencies, local politicians, senior centers, and other community organizations. The Task Force has also conducted a series of workshops for both advocates and homeowners on how to recognize abusive lenders, brokers, and contractors, and where to locate alternative resources.

III. WORK WITH ENFORCEMENT AGENCIES TO MAXIMIZE PRESSURE ON PREDATORY LENDERS, BROKERS, AND CONTRACTORS

It has also been vital to the Project to develop sound relationships with the relevant enforcement agencies. Work with enforcement agencies not only helps pressure predatory lenders to curtail abusive practices, but also helps force settlements for individual clients. The Project has developed working relationships with the State Attorney General, the Kings County District Attorney, the City Department of Consumer Affairs, and the State Banking Department. The Project brought a pattern of HOEPA, TILA, RESPA, and UDAP violations by Delta Funding to the attention of the Attorney General and Banking Department, leading those agencies to instigate a widespread investigation of the company's practices which led to a settlement agreement late last year. (The settlement was not nearly as sweeping as we had hoped, which also demonstrates the limitations in relying on law enforcement to combat predatory lending). Both agencies are continuing their investigation into other predatory lenders and brokers operating in the State.

Based on information we have provided, the District Attorney is also investigating several mortgage brokers for criminal fraud in falsifying income on loan applications. The investigation will likely benefit several of our clients by making the lenders more willing to settle to avoid the taint of criminal fraud by brokers with whom they do business. Similarly, in each of our cases that involve questionable practices by home improvement contractors, we file a complaint with the City Department of Consumer Affairs, which licenses contractors, and help facilitate the investigation of that contractor. In addition to making referrals and sharing information, we have conducted on-site trainings for staff at several enforcement agencies on how to recognize predatory lending practices. Our cooperation with enforcement agencies helps us recognize patterns that assist us in both our litigation and our advocacy.

IV. USE THE MEDIA

The media can also be a useful tool for community advocacy and education, as well as for individual litigation. It is important to develop press contacts to publicize both individual cases and predatory practices by lenders and brokers in general. We are constantly pushing stories in the print media, on radio, and on television. Media attention has proved to be a highly effective means of educating the public about predatory lending; of pressing enforcement agencies into action; and of helping to convince lenders to settle foreclosure cases.

V. WEIGH IN ON LEGISLATIVE AND REGULATORY PROPOSALS TO THE EXTENT ALLOWABLE BY THE LSC REGS

The LSC regulations are very clear that LSC-funded programs may not do any grassroots lobbying and may not "attempt to influence" any legislation or the like.[4] This puts us in an awkward position at the Project— there is significant movement in New York toward legislative

[4] 45 C.F.R. § 1612.3 and 1612.4.

and regulatory reform regarding predatory lending, and because of our expertise, we are constantly sought out to comment on needed reforms. Our challenge is to try to contribute to the debate as much as possible while being careful not to violate the LSC regulations.

The LSC regulations state that recipients may use non-LSC funds to "respond to a written request" from a governmental agency or elected official to testify orally or in writing, or to provide information, analysis, or comments on existing or proposed legislation or regulations.[5] The regulations mandate that such communications can only be distributed to the extent that the distribution is required to comply with the request.[6] It is also mandated that one is not allowed to solicit a request from an official.[7]

The key then, is to develop good relationships with elected officials and government agencies, so that when officials or agencies want substantive information on proposed legislation or regulations, they know where to turn. In addition, it is permissible to comment on proposed regulations if there is a public comment period.[8] There is thus ample opportunity to weigh in meaningfully on proposed reforms within the framework of the LSC regulations, but one must be very careful to "comment" on the reforms, rather than to "attempt to influence" them.

For more information on the Foreclosure Prevention Project for Seniors, contact Josh Zinner at 718-237-5567, or Nancy Slahetka at 718-246-3277.

---

[5] 45 C.F.R. § 1612.6(a).

[6] 45 C.F.R. § 1612.6(b).

[7] 45 C.F.R. § 1612.6(c).

[8] 45 C.F.R. § 1612.6(a) and (e).