

# NCLC REPORTS

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### Developments and Ideas For the Practice of Consumer Law

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#### Local Foreclosure Moratoriums: The Philadelphia Story

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One approach for consumer and housing advocates confronting the foreclosure crisis is to seek help from the local court system. In Philadelphia, community organizers and legal services attorneys have a history of obtaining sheriff sale moratoriums during foreclosure crises. They have recently succeeded again in halting the foreclosure machinery to provide temporary relief to homeowners facing foreclosure.

Two earlier mass stays were achieved by special court petitions, filed jointly by community groups and the Philadelphia sheriff—the official in charge of execution sales. This time, the president judge of the local state court issued a *sua sponte* order staying owner-occupied sales for several months. He also announced an administrative regulation institutionalizing a mandatory, court-supervised conciliation process.

This article describes the new Philadelphia program, earlier court interventions into the sheriff sale machinery, and court authority for taking such action. The article also provides advice on how replicate these initiatives elsewhere.

#### Philadelphia's Residential Mortgage Foreclosure Diversion Pilot Program

Pennsylvania is a judicial foreclosure state. Foreclosure sales are executions of foreclosure judgments issued by the “common pleas” court, a county’s trial court of general jurisdiction. County sheriffs, elected officials independent of the courts, conduct the sales. The sheriffs have substantial statutory discretion in scheduling and conducting execution sales.

In Philadelphia, a monthly sheriff sale disposes of hundreds of properties subject to judgments in foreclosure.<sup>1</sup> In March 2008, the Philadelphia sheriff announced that the April sale was canceled, in response to the city’s growing foreclosure crisis. In April, president judge of the common pleas court issued a *sua sponte* order staying the May 2008 sheriff sale and announced a Residential Mortgage Foreclosure

Diversion Pilot Program, as a “joint general court regulation,” the equivalent of a temporary local rule.<sup>2</sup>

The program’s central component is a court-supervised, mandatory “conciliation conference” between the homeowner and the foreclosure plaintiff that must be offered to the homeowner prior to the sale of any owner-occupied property. The plaintiff mails a prescribed pre-sale notice to the homeowner, explaining that the homeowner has a right to a further postponement of the sheriff sale to “participate in a conference that may enable you to save your home.”<sup>3</sup>

The program takes advantage of local resources, including the network of local housing counseling agencies, a city-funded foreclosure telephone hotline,<sup>4</sup> and standardized work-out forms developed nationally by the HOPE NOW Alliance. The notice to homeowners also includes a copy of a HOPE NOW work-out form. Homeowners can get help from a counselor to complete the form and are invited to call the hotline in order to connect with a counselor.

The initial May order was followed by several similar, monthly orders that continued the postponement of previously stopped sales (where the homeowner had responded with a request for a conciliation conference) and postponed sales listed for the first time. Starting in September 2008, the regulation incorporates the conciliation-conference requirement into the procedures for newly filed foreclosure cases. A revised July 14 administrative order<sup>5</sup> requires plaintiffs at filing to identify owner-occupied foreclosure cases. In those cases, the clerk’s office automatically issues a Case Management Order setting a date for a conciliation conference, which must be served on the homeowner with the complaint. No default judgment can be entered if a homeowner follows the instructions and triggers the conciliation process.

Hundreds of conciliation conferences have been conducted, although most of the early ones were continued to allow the homeowners additional time to connect with counselors and to allow the parties to gather relevant evidence. Volunteer “pro temp” judges were appointed to preside at the conferences, and numerous additional volunteer attorneys were recruited by the local bar association to provide additional advocacy assistance at the conciliation conferences.

The regulation lists issues that must be addressed at a conciliation conference, including the homeowner-defendant’s “qualifications for any of the available work-out programs, upon review and application of guidelines established pursu-

<sup>1</sup> Extensive state law notice requirements and the enormous volume of cases results in a sheriff sale being scheduled approximately three months in advance, at the time a judgment in foreclosure is entered by the court.

<sup>2</sup> Joint General Court Regulation No. 2008-01, and the accompanying orders and forms are available on-line at [www.consumerlaw.org/unreported](http://www.consumerlaw.org/unreported).

<sup>3</sup> Joint General Court Regulation No. 2008-01, Exhibit B (required notice that must be furnished to mortgagor by the foreclosing mortgagee).

<sup>4</sup> The City contracts with legal services to staff the Save Your Home Philly Hotline. They do limited telephone triage and fact assessment and refer appropriate cases to City-funded housing counselors or to legal services.

<sup>5</sup> A copy of this Order is available at [www.consumerlaw.org/unreported](http://www.consumerlaw.org/unreported).

ant to this General Regulation.” This was inserted in response to advocates’ push for court-imposed affordability guidelines, but, to date, no such guideline has been adopted.

While early drafts of the order implementing the regulation included a provision expressly providing for court review where the parties are unable to reach a conciliation agreement, the final order deleted this provision. Instead, a sale can proceed absent an agreement. However, with the homeowner already connected to a counselor or lawyer, with the possibility of an individual petition to stay still available and with the court’s action having created an expectation of lender reasonableness, the new system has already undoubtedly saved homes that otherwise would have been lost.

### **Authority of Courts to Temporarily Stop Sheriff Sales Constitutionality of Foreclosure Moratoriums**

During the Depression, state legislatures adopted a variety of measures to counter widespread foreclosure sales, particularly in rural, agricultural communities. Banks challenged those measures as unconstitutional abridgements of contractual rights, violating the Constitution’s Contracts Clause.<sup>6</sup> The 1934 Supreme Court issued a closely-divided opinion in *Home Bldg. & Loan Ass’n v. Blaisdell*<sup>7</sup> upholding the constitutionality of Minnesota’s foreclosure-relief statute that temporarily extended by two years a mortgagor’s redemption right to reacquire title to a home lost through nonjudicial foreclosure.<sup>8</sup>

The Court distinguished unconstitutional impairments of substantive contractual rights with “remedial processes” that are within the states’ inherent regulatory power.<sup>9</sup> It also stated:

[T]he state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end “has the result of modifying or abrogating contracts already in effect.” Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, a government which retains adequate authority to secure the peace and good order of society.<sup>10</sup>

Finding the state had obvious power to impose “a temporary restraint of enforcement” of the contractual right to foreclose “in the presence of disasters due to physical causes such as fire, flood, or earthquake,” the Court concluded that emergency powers also applied “when the urgent public need demanding such relief is produced by other and economic causes.”<sup>11</sup>

<sup>6</sup> Article I, Section 10.

<sup>7</sup> 290 U.S. 398 (1934).

<sup>8</sup> A year later, the Court shifted the other way when it invalidated a temporary bankruptcy cram-down provision that Congress had adopted to protect family farms. *Louisiana Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). The Court refused to apply *Blaisdell* to what it considered to be a substantive, rather than remedial, limit to the mortgagee’s contractual interest.

<sup>9</sup> While the “obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them,” 290 U.S. at 431, the limitations on state power imbedded in the Contracts Clause are “qualified by the measure of control which the state retains over remedial processes.” *Id.* at 434.

<sup>10</sup> *Id.* at 434–35 (citation omitted).

<sup>11</sup> *Id.* at 439–40.

### **Authority of Courts to Supervise the Foreclosure Machinery and Respond to Equitable Circumstances**

*Blaisdell* provided constitutional underpinning to the Depression Era’s widespread moratorium movement, and establishes for today the constitutionality of limited, statewide stays of foreclosure sales that are accompanied by time-limited procedural restraints designed to offer homeowners an opportunity to save their homes. In judicial foreclosure states, like Pennsylvania, where foreclosure is itself a court-regulated “remedial process,” the power to impose delays or conditions on the execution of judgments in foreclosure is inherent in the process itself.

In Pennsylvania, statute delegates common pleas courts the authority to regulate the business of the courts. “President judges” are designated to be “the executive and administrative head of the court, [to] supervise the judicial business of the court, [and] promulgate all administrative rules and regulations.”<sup>12</sup> Courts are also explicitly empowered by the rules of civil procedure to stay foreclosure sales for “any legal or equitable reason.”<sup>13</sup>

### **Court Action’s Precedent: The 1983 and 2004 Moratoriums**

On two occasions prior to 2008, advocates successfully argued for invocation of courts’ dual powers to stay individual sheriff sales for “any equitable reason” and to administer the overall foreclosure machinery. The results were widely applicable stays of sheriff sales to respond to the kind of “urgent public need” addressed in *Blaisdell*.

### **Passage of HEMAP**

The early 1980s was a period of severe economic disruption and high unemployment in declining industrial cities like Pittsburgh and Philadelphia. In both cities, strong organizations of the unemployed with close links to the labor movement—the Mon Valley Unemployed Committee and the Philadelphia Unemployment Project (PUP)—organized unemployed homeowners facing foreclosures. A statewide legislative campaign sought a state foreclosure prevention program and local efforts sought a moratorium of foreclosure sales to give the legislative campaign time to work.

The legislation proposed ultimately became the Homeowners Emergency Mortgage Assistance Act of 1983 (HEMAP),<sup>14</sup> Pennsylvania’s unique revolving loan program, administered by the Pennsylvania Housing Finance Agency. For delinquent, eligible homeowners, the agency pays creditors an amount that brings the loan current, securing that assistance with a second mortgage with very affordable terms.<sup>15</sup> A remarkable testament to the power of organizing—and of the potential for attracting widespread, bi-partisan support for measures protecting homeownership—HEMAP was adopted

<sup>12</sup> 42 Pa. C.S.A. § 325(a).

<sup>13</sup> Rules 3121(b)(2), 3183(d)(3), Pa. Rules of Civil Procedure.

<sup>14</sup> Act 91 of 1983, 35 Pa. Stat. Ann. § 1680.401 *et seq.*

<sup>15</sup> HEMAP eligibility requires a the delinquency caused by a temporary crisis involving unemployment, illness, or other unanticipated event. 35 Pa. Stat. Ann. § 1680.404c. A predatory loan would not be such an event. Foreclosing creditors must provide delinquent homeowners a standardized 30-day notice, informing them of their right to apply for HEMAP assistance and listing the contact information for housing counseling agencies that can initiate HEMAP applications. Notice is a jurisdictional prerequisite to filing a foreclosure action and submission of an application to the state housing agency prevents the creditor from commencing a foreclosure action. § 1680.402c.

into law during a Republican administration at the same time that welfare programs were under attack.

### 1983 Moratorium

While the fight to pass HEMAP was pending, it was important that those facing foreclosure not lose their homes before help arrived, and Mon Valley and PUP sought a stay of foreclosure sales in Pittsburg and Philadelphia. In Pittsburgh, Allegheny County sheriff, with the prospect of thousands of unemployed steel workers losing their homes, persuaded the local president judge to issue a general stay of all owner-occupied sales.<sup>16</sup> Soon thereafter, the Philadelphia sheriff joined with PUP to petition the president judge of the Philadelphia court of common pleas. Represented by Community Legal Services (CLS), the cited legal basis for the petition was the Rules of Civil Procedure, *Blaisdell*, and Pittsburgh's stay.

Initially, the court stayed sales for a month, followed by another stay the next month. Eventually, a temporary local court rule emerged that imposed a system of conciliation conferences on the sheriff sale process, conducted by the president judge's law clerk. The purpose was to develop a consensual temporary payment plan. Citing its broad power under the rules to stay a sheriff sale for "any equitable reason,"<sup>17</sup> the court declared its power to impose an equitable payment plan if the parties were unable to reach agreement. Once declared, this power was rarely invoked. With an expectation of reasonableness being established, payment agreements were adopted on a large scale. The moratorium and the temporary court rule that implemented it lasted for more than a year, ending shortly after HEMAP was enacted.

### 2004 Moratorium

In 2004, PUP and CLS tried the moratorium route again. Serious underfunding of HEMAP, an increasingly ineffective loss mitigation system for FHA borrowers, and the growing effect of the subprime mortgage explosion produced huge increases in foreclosures. Monthly sheriff sale lists were three times longer than when emergency action was taken in 1983.

PUP asked the Philadelphia sheriff to join it in an action similar to what his predecessor had done in 1983. The sheriff assembled stakeholders into a foreclosure "task force" that discussed the issue. Eventually, the sheriff postponed the March 2004 sale of owner-occupied homes until April. The sheriff's office then mailed a letter to all homeowners on the March and April lists, inviting them to participate in a "Save Your Home Event" at the local convention center. Two weeks later, the event occurred, publicized widely in the press, coordinated by members of the task force, including city-funded housing counselors, legal services paralegals and attorneys, and representatives from several lenders.

Approximately 170 of the affected homeowners attended or contacted task force members; all were put in contact with housing counselors or legal services. Importantly, the state housing finance agency announced its willingness to help address the crisis, agreeing to retrain its staff to increase HEMAP approvals and inviting HEMAP applications—and promising expedited action on those applications—for all homeowners listed for sale in Philadelphia in March or April, 2004. This was the case even if they had been denied assis-

tance previously and even if they had failed to apply during the ordinary program time deadline.

The combined effect of these actions produced a compelling case to ask the court to continue postponing sales, but the sheriff only requested a stay that for homeowners that had requested assistance from an organization in the sheriff's task force. Community organizations, seeing the lack of support for a wider stay, joined the request for a limited stay. In March 2004, the sheriff, PUP, and ACORN, filed a petition, authored by CLS, addressed to the court's "inherent power ... to control its own processes, including the enforcement of judgments, to prevent great hardship and unnecessary inconvenience."<sup>18</sup> The sheriff, alleging a steady increase in the numbers of properties being subjected to sale on a monthly basis, cited additional facts.<sup>19</sup> The petition also included affidavits summarizing unemployment statistics and foreclosure data, and describing problems in the HEMAP and FHA systems.

The 2004 petition produced a series of postponements for foreclosure defendants who came forward during that period and sought help through the sheriff's office, PUP, ACORN, housing counselors, or legal services offices. Many individual cases were resolved as a result, although some houses ultimately did go to sale.

The most lasting effect of the 2004 proceeding was to convince the assigned judge of the immensity of the foreclosure problem and of the need to institute some form of ongoing, court-supervised dialogue between the foreclosure and defense bar. The judge created a foreclosure "steering committee" that began meeting periodically with her over the next several years. The committee's work did produce some results, including a *pro se* system for petitions to stay sheriff sales, and some reductions in sheriff sale advertising costs that are passed on to homeowners seeking to reinstate their mortgages.

As the national subprime meltdown hit Philadelphia, foreclosure filings—which had gone down in 2006—began to rise precipitously once again. PUP and ACORN, recalling the earlier campaigns, began calling for a new moratorium on sheriff sales. A newly elected city councilman held hearings on the foreclosure crisis and, at the conclusion of those hearings, convinced the council to pass a resolution that called on the sheriff and president judge to stop the sales, citing the previous court stays in 1983 and 2004.

Soon after the sheriff's unilateral action to postpone the April 2008 sale, the president judge and the "foreclosure steering committee" judge convened an emergency meeting of the foreclosure firms, advocates, and lawyers for the city and the court system. It emerged in that meeting that, through the precedent of the earlier interventions in 1983

<sup>18</sup> A copy of the 2004 petition is available at [www.consumerlaw.org/](http://www.consumerlaw.org/) unreported.

<sup>19</sup> The sheriff alleged:

- a) that some significant portion of foreclosure sales can be prevented under corrective measures being taken by the state Housing Finance Agency [regarding the HEMAP program]; b) that a large percentage of the underlying mortgages appear to be "subprime" home equity loans, the products most often associated with the problem of "predatory lending" that is plaguing many elderly and vulnerable homeowners in the City; c) the rise in sheriff sales appears to be disproportionately located in neighborhoods that have been designated by the [City] as particularly vulnerable to blight; d) that the FHA foreclosure prevention programs are not functioning as intended; and e) that the magnitude of sheriff sales will add unimaginable pressures to the City's fragile social services system as people losing their homes seek various kinds of social services from the City.

<sup>16</sup> The popularity of this action led the judge to a successful election to the state supreme court years later.

<sup>17</sup> Rules 3121(b)(2), 3183(d)(3), Pa. Rules of Civil Procedure.

and 2004, the judges already believed that an emergency existed and that their supervisory authority over the foreclosure process enabled them to take action to respond to that emergency, even without the necessity of a petition being filed.

### Replicating the Philadelphia Model

In trying to replicate the Philadelphia work and develop a local foreclosure moratorium campaign, factors contributing to the Philadelphia story must be considered. The essential engine powering the Philadelphia campaign was skilled community organizing, grounded in both the facts driving the foreclosure numbers and in the local political scene. Legal services lawyers cannot do this on their own, but must hearken back to the origins of legal services, when it had client organizations pushing for change. PUP's 25-year commitment to foreclosure prevention is unique, but ACORN chapters and other community organizing assets exist in many low-income communities. Creating relationships between those organizations and the lawyers able to draft resolutions, legislation, and court petitions is the key to success.

A local judiciary that not only administers the foreclosure process but also is elected<sup>20</sup> created a politically opportune potential for Philadelphia advocates. However, neither of these features should be regarded as necessary to a successful campaign. After all, the *Blaisdell* case came out of a nonjudicial foreclosure state where the state legislature imposed the moratorium. What is critical is that any campaign be grounded in an analysis that pinpoints those decisionmakers in a particular state or local context that have the power and, potentially, the will to intervene.

Choice of words is also important. While described in this article as a foreclosure "moratorium," Philadelphia advocates learned to characterize their requests as a request for a "temporary postponement." Substantively, there may be little difference between the two, but there has been less resistance to calls for a "temporary postponement" of sheriff sales.

Any request for a mass postponement of foreclosure sales should be accompanied with a rationale for the postponement. The original 1983 Philadelphia campaign was able to point to the HEMAP legislative effort as the reason why delay could conceivably change the outcome for affected homeowners. The current national attention on loan work-outs presents a similar opportunity. The apparent promise of help offered by HOPE NOW, the recently enacted Hope for Homeowners FHA program, or by the various, already negotiated, servicer-specific programs can be presented as the reason why foreclosing servicers should be forced to sit down with homeowners. Creating a court-supervised process within which that discussion takes place—staffed by housing counselors or other advocates—increases the likelihood that a positive outcome will occur.

Having a precedent that supports a request to stop sales makes a big difference. That Philadelphia courts had stopped the sheriff sale process in the past made it easier to convince them to stop it again. The Philadelphia proceedings should certainly be cited in other jurisdictions.

Finally, consider what the Philadelphia campaign has and has not accomplished. In the end, all that the new program is providing homeowners is a referral to the City's hotline and an opportunity to sit down with representatives of their

<sup>20</sup>The Pennsylvania experience teaches that saving homes from foreclosure is something that vote-conscious judges are likely to find attractive.

mortgage company with some outside assistance. It does not create any right to obtain a particular loan work-out and it does not include a right to court review of the results of a conciliation conference. Moreover, the conciliation conference system itself presents the real risk that sloppy, high-volume representation could result in pressure to accept waivers of claims or inadequate and/or impermanent loan modifications. Finding ways to monitor and impact the quality of these interventions in Philadelphia is a work in progress. What has been achieved to date is the knowledge that more homeowners in trouble will find their way to counselors and attorneys who know what they are doing.

### HOPE for Homeowners Act of 2008

In July 2008, the President signed into law a 694-page wide-ranging housing bill—the Housing and Economic Recovery Act of 2008. A key component of that law is the HOPE for Homeowners Act of 2008.<sup>21</sup> The Act creates a new, temporary program authorizing FHA to refinance homeowners into 30-year fixed rate FHA mortgages. Beginning on October 1, 2008 and lasting until September 30, 2011, the principal balance and interest rate for an eligible homeowner's mortgage is reduced through refinancing into an affordable FHA-insured loan based on current property values.

Like the industry-sponsored Hope NOW program and the FHA's current refinance program, FHASecure, this new program is voluntary and therefore may not significantly impact the current foreclosure crisis. Without mandatory approaches, such as would be required by pending bills authorizing mortgage modifications in chapter 13 bankruptcies, many homeowners may continue to be left with no recourse.

### Who Is Eligible?

To be eligible for refinancing under this new HOPE program, the homeowner's existing mortgage must have been originated on or before January 1, 2008. In addition, the homeowner must:

- Be unable to afford his or her current mortgage payments, based on standards to be developed by the Board.<sup>22</sup>
- Certify that the home is the homeowner's primary residence and that it is the only residence in which the homeowner currently has an ownership interest.
- Certify that he or she has not intentionally defaulted on the mortgage or any other debt or knowingly furnished false information to qualify for the program.
- Have a ratio of mortgage debt to income greater than 31% as of March 1, 2008.
- Not have been convicted of mortgage fraud in the past 10 years.

It is expected that FHA will soon publish further eligibility requirements, which may be similar to the requirements for the existing FHASecure program. On FHA's website announcing the HOPE program, FHA states that homeowners can determine if they are eligible for the HOPE program through FHASecure.<sup>23</sup>

<sup>21</sup> Title IV of H.R. 3221 (House passed July 24, 2008).

<sup>22</sup> The Act establishes a four-person Board to set policy and program standards. Members shall be the HUD secretary, Treasury secretary, Federal Reserve Board chair, and FDIC chair.

<sup>23</sup> Fact Sheet: FHA to Provide Additional Mortgage Assistance to Struggling Homeowners, [www.hud.gov/fha/home080730.cfm](http://www.hud.gov/fha/home080730.cfm).