

Florida Mortgage Modification Mediation Summit

The Lender Perspective

By

Kevin A. Comer, Esq. & Kevin L. Hing, Esq.

As counsel to a majority of the Lenders currently participating in active LMM Mortgage mediations, we have listed the following comments and observations regarding the LMM Mediation process based on our observations of the process over the past several years. The following are our own observations, recommendations and questions regarding the LMM Mediation process and the extent to which uniformity and improvement can be achieved in the short and long term.

Timing of the Filing of Mediation Motion and Completion of Mediation: The concerns of the Lenders regarding the timing of the Mediation process are primarily focused on the length of time mandated in the Order(s) for completion of the mediations. The mediation orders currently in use in the Middle, Southern and Northern Districts of Florida specify differing timeframes for completion of the mediation. As creditor counsel, we believe that all districts should specify the same deadline. We recommend at least 90 days.

Limitation of Available Chapters: While the vast majority of mediations occur in cases under Chapter 13, in some limited recent circumstances there have been ordered entered in Chapter 7 cases compelling mediation (in some instances, when the Debtor is pro se). We believe that a legitimate topic for consideration by all stakeholders is whether LMM Mediations should be limited to cases under Chapter 13. We believe that LMM Mediations should be limited to cases under Chapter 13 for a number of reasons, including 1) the Chapter 7 case lacks the clear benefits of the institutional presence and management of the Chapter 13 trustee, 2) the core policy/goal of preserving homestead home ownership is more consistent and better advanced in the framework of a chapter 13 case, as opposed to the liquidation policies inherent in a chapter 7 case. We are concerned that by extending LMM Mediations to Chapter 7 cases that this blurs the lines between the two.

Timing of Confirmation: Should the LMM Mediation process allow entry of a confirmation order prior to the conclusion of the LMM Mediation, or should the LMM Mediation process require confirmation to occur only after the conclusion of the mediation process. Throughout Florida both options are now being used.

We are unable to offer a clear recommendation on this issue. In our observation, the primary concern of the Lenders is the timely participation of the Debtors in the LMM Mediation process and, once an LMM determination is made by the Lender, that the parties effectuate prompt implementation/approval of the Modification Agreement and that the Lender and/or Investor receive prompt and timely payments pursuant to the terms of any approved Trial or Final Modification Agreement.

Inclusion of LMM Agreement in Plan: Another area lacking District-wide uniformity is whether a Trial and/or Final Modification Agreement should be included/paid in the Chapter 13 Plan or whether it should be “paid outside” the Plan. Some stakeholders have advocated that inclusion/payment of the Modification Agreement in the Chapter 13 Plan provides a distinct benefit to the Debtor and the administration of the Chapter 13 case by reason of the supervision and management oversight of the Chapter 13 Trustee. Other stakeholders have questioned the necessity of Chapter 13 Trustee administration of ongoing LMM payments and the corresponding fees that result from participation of the Chapter 13 Trustee in this aspect of the process.

Adequate Protection Calculation: As lender counsel, we are seeing an increasing number of cases where Debtors are pursuing not only a LMM mediation with regards to their homestead, but also with regards to additional investment properties. So the question is, how is the 31% income calculation conducted when a Debtor is seeking multiple modifications on multiple properties, each of which require inclusion of the same 31% income and do not factor in the income already attributed to a prior or additional loan modification?

Permissibility of Multiple Modification Agreements for Multiple Properties: This question is related to the Adequate Protection Calculation question above. i.e., should the LMM Mediation program allow or disallow LMM Mediations with regards to non-homestead properties when an LMM Mediation is in progress or has been concluded with regards to the homestead? Should LMM Mediations/Modifications be limited to homestead properties only?

Selection of LMM Mediators: Yet another area lacking in District-wide uniformity is the mechanism by which the LMM mediator is selected. In some jurisdictions, the selection of the mediator is a joint decision by the Debtor and Lender. In other jurisdictions, the mediator is selected by the Debtor and is specified by the Debtor in the LMM Motion. Other stakeholders have advocated that the LMM Mediator should be selected by the Judge. Having experienced each of these selection techniques in practice, our view as lender counsel is that the efficiency and integrity of the LMM Mediation process requires a meaningful opportunity for the Lenders to participate in the process of selecting and approving the mediators who preside over the LMM mediations. We also observe that the LMM Mediation processes in each of the districts currently lack an effective, objective mechanism for Lenders to raise legitimate concerns and issues that may arise concerning the selection and/or conduct of a mediator during a particular LMM mediation.

Mediator Qualification: In light of the fact that the LMM Mediation programs in each of Florida’s districts have proven to be extremely (and increasingly) popular, we anticipate that the total number of practicing LMM mediators will increase over time. As a result, we believe that an important area of focus for the LMM Mediation program should be creating a uniform, state-wide standard of qualification(s) for all persons seeking to serve as mediators. For example, among the threshold standards that we believe should be the subject of additional review, consideration and consensus are: 1) whether there should be a requirement that all mediators be licensed attorneys, and 2) whether all mediators should have experience in bankruptcy law (and if so, how many years of experience?).

LMM Portal Uniformity: Perhaps the most frequent issue/question we have heard from all stakeholders when discussing the enhancement of District-wide LMM Mediation uniformity is the question whether the use of a single LMM Portal should be mandatory state-wide. As Lender counsel,

we believe that the Lenders as a whole recognize the administrative and transactional advantages and efficiencies that uniform use of a Portal would provide. However, we have also heard a variety of concerns relating to expanded implementation of a Portal in the LMM mediation process, including the following: 1) Lenders have expressed concern regarding the ability of Portal administration to provide the validation of information security necessary to allow the Lenders to maintain a state of full compliance with all regulatory requirements imposed upon them relating to the protection of confidential borrower information, 2) access issues, including the current inability of the Portal to allow multiple lender counsel to be assigned to a mediation file – i.e. allowing both LMM counsel and separate litigation counsel handling a sanctions motion to have access to the LMM Portal.