

MORTGAGE MODIFICATION MEDIATION FROM THE
PERSPECTIVE OF DEBTOR'S COUNSEL
IN THE PENSACOLA DIVISION

The Northern District of Florida implemented standardized procedures for Mortgage Modification Mediation on June 1, 2013. The program as it relates to our district is relatively new and my particular sample size is small; however I have seen positive results in so much as my debtor clients being approved for mortgage modifications when having previously failed in state court. The program is modeled on what has been successfully implemented in the Orlando division. And while the current procedures are working quite well, the program would likely be enhanced by exploring the implementation of uniform statewide procedures in some areas.

OVERVIEW: The program guidelines for our district are set forth on Attachment A. There is no time requirement for the filing of the motion for mediation. Best practice is to decide prior to filing the case whether a mortgage modification will be attempted. This allows the debtor to get the process started within a few days of filing the Chapter 13 petition. In some cases however it is difficult to determine, pre-filing, if mortgage modification is necessary. From time to time the original goal is to pay the arrearage through the plan; however once the proof of claim is filed the arrearage is too large for the debtor to repay. Therefore the debtor needs the flexibility to “shift gears” and seek modification through the plan. Thus while debtor’s counsel should file the motion for mediation no more than a couple weeks after filing the petition, careful consideration should be given prior to implementation of rigid deadlines.

ORDER DIRECTING MEDIATION: The Motion and Order being used in the Northern District are demonstrated with Attachment B. Like Jacksonville, we were the beneficiaries of the hard work done by those in the Orlando Division. Once the motion for mediation is filed, the Order is automatically generated by the Court without hearing which streamlines the proceeding. An exception to this however is if the debtor is unable to submit 31% of their gross income to the

modified payment. If this is the case then the motion for mediation must be heard.

In my opinion, the Order is the single most important component of the Mortgage Modification Mediation program. For any practitioner who attempted to obtain a loan modification for his or her client through the state court system, it was obvious the greatest problem was communication. Now that lenders are subject to the strict time requirements listed in the Order, mortgage modification is not only possible but likely. Although approval of a mortgage modification is rarely finalized at mediation, being able to get confirmation that all required documents have been received and submitted to underwriting leads to much greater success.

One issue that needs to be addressed is the designation of the creditor representative (#1 in the Northern District Order). Although some lenders are worse than others, timely designation is not the norm. A possible cause of this issue could be that the Order is not sent to the best address for the lender. A possible solution could be a uniform/statewide list where lenders can designate the address for the Order to be sent (comparable to the designation of the Philadelphia address for the Internal Revenue Service). Another solution could be uniformed procedures and timelines for compelling lenders to adhere to the Order.

MEDIATORS: A list of approved mediators in the Northern District is set forth on Attachment C. Unlike contested matters however, the mediator's role to date has been rather limited. Communication between the debtor and lender as to which documents are needed for a mortgage modification review is the most important factor in seeking a mortgage modification. So due to the Order timelines referenced earlier resolving this issue, the actual mediation provides the tool necessary to allow the debtor to obtain confirmation from the lender that all required documents have been received.

To date, the mediations have been quick with the most important aspect being able to obtain confirmation that the debtor has performed all acts necessary to get a definitive answer from the lender. In most instances an answer

from the lender has been received within a week of the mediation date. Of course the best result would be to obtain the actual loan modification terms at mediation; therefore any advice would be welcomed if other divisions have been successful at getting the actual loan modification terms on the mediation date.

TIMING OF CONFIRMATION: In Pensacola, confirmation of the chapter 13 plan is not considered until after the claims bar date as passed. If the motion for mediation is filed timely (i.e. within a couple of weeks after filing the petition), an answer can be received from the lender as to whether the mortgage modification request has been approved or denied. In practice however, continuation of the confirmation hearing is usually necessary due in large part to the lender not having timely designated its representative as stated earlier.

FEES: The Order directs the debtor to pay to the Chapter 13 Trustee a total fee of \$385.00. \$350.00 of the fee is paid to the mediator with the remaining \$35.00 to the trustee. The Debtor needs to make sure this payment is separate from the monthly plan payment and designated as such. Otherwise there could be delay in the mediator getting paid by trustee. Attorney's fees in the Northern District are awarded by the filing of a fee application and attaching time records. We do not have a "no look" fee at this time.

ISSUES:

Priority of a modified loan – Debtor's counsel must be able to deal with real property law issues during the mortgage modification process. One issue that has arisen is the lender's priority once it modifies the loan. In theory, only the promissory note is being modified with the mortgage lien being the same lien that existed since the initial loan was created. However certain lenders will obtain a title search report after entering into the trial modification period and then refuse to finalize the trial mortgage modification unless all liens are removed. These liens have included judgment liens obtained by credit card companies after the debtor had purchased the home. Under Florida law the lien would not have attached to the debtor's homestead in this situation. Certain lenders however require that all liens be removed or subordinated which can create a

substantial amount of additional work by debtor's counsel. Furthermore, lenders have proven extremely difficult to work with on this particular issue with the communication breaking down like it did in the state court modifications.

Designation of Creditor Representative – As stated earlier, lenders are not timely designating the representative which causes delays. Therefore a streamlined process of enforcement and/or a statewide database for lenders to designate an address would be helpful.

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