

Applying for Mortgage Modification through Mediation is now available throughout all Bankruptcy Courts in Florida. The process has been a success and can be even more successful by learning from each other across the state on what is most effective

Debtor Counsel Prospective

Overview

Mortgage Modification programs are now available in the Northern, Middle and Southern Districts of the Bankruptcy Courts in Florida through Chapter 13. The pilot program, Mortgage Modification Mediation (“MMM”) began in Orlando in the spring of 2010. It was adapted from the State Court Civil Foreclosure mediation programs and for multiple reasons has a greater success rate than the State Court system. Orlando has maintained statistics on the outcome of the mediations and those that resulted in loan modification being offered and accepted has averaged 70%. In the State Court system the average was less than 3.6%. The rest of the Middle District followed suit and in April of 2013 the Southern District launched their Loss Mitigation Mediation Program (“LMM”) and the Northern District launched their program in June of 2013.

All Districts report high levels of success although it is usually a bumpy road getting to a final decision. As we have learned mortgage modifications are basically refinances and all loans must be underwritten following guidelines established by many different programs available depending on the ownership of the mortgage and at times the servicer of the mortgage.

One of the biggest challenges is that mortgage companies don’t speak “bankruptcy” and bankruptcy attorneys don’t speak “mortgage underwriting”. Good Mediators help bridge that gap and open up communication that otherwise would not take place in the traditional setting outside of bankruptcy where you only speak to customer service representatives that don’t have the appropriate knowledge about loan modification and aren’t a part of the actual decision making process.

Current Statewide Procedures

Robert Branson, Esquire who practices in the Middle District, Orlando Division and Tammy Branson, his paralegal have gathered information with Mitch Nowack, Esquire who practices in the Southern District, Rob McDaniel, Esquire who practices in the Northern District, Chip Parker, Esquire who practices in Middle District, Jacksonville Division and Robert Geller, Esquire who practices in the Middle District, Tampa Division to compile to the best of their abilities the current procedures in place from their debtor practice view.

A few of the main components of the process and areas we believe may need improvement are:

Timing: When should a debtor file a Motion for Referral to Mediation?

Court Location	Current Procedures
Middle-Orlando	Before Confirmation hearing if requesting case to be confirmed subject to MMM pending
Middle-Tampa	No Timeframe, usually filed early on because unable to be confirmed subject to MMM pending
Middle-Jacksonville	Before the 341 Meeting of Creditors
Southern	90 days after petition date with 14 days negative notice, after 90 days if mortgage company hasn't received relief from stay you can still file motion but motion will be set for hearing
Northern	No timeframe, usually filed early on because unable to be confirmed subject to MMM pending

Recommendation: Motion should be filed within 90 days after filing case

The pitfalls of starting the process too soon are that the lenders generally do not hire counsel early on in the case and even though the Orders direct lenders to designate a representative to set mediation, more often than not the Order is not reacted to. If there is no one to communicate with to set mediation it can be like banging your head against the wall and will result in Motions to Compel being filed with the Court and cause more hearing time.

Should cases be confirmed prior to completing mediation?

Court Location	Court Procedures
Middle-Orlando	Yes, confirmed with the following language in Order: THE PLAN PROPOSES A MODIFIED PAYMENT TO THE CREDITOR. SIXTY (60) DAYS FOLLOWING THE FILING OF THE MEDIATORS REPORT THE DEBTOR SHALL EITHER MODIFY TO PAY THIS CLAIM AS FILED, OR MODIFY TO PAY THE MODIFIED MORTGAGE PAYMENT IF DIFFERENT THAN WHAT IS BEING PAID UNDER THE PLAN. IF NEITHER IS DONE, RELIEF FROM THE AUTOMATIC STAY IS GRANTED TO CREDITOR WITHOUT FURTHER HEARING.
Middle-Tampa	No, only if trial payment has been offered and provided for in plan
Middle-Jacksonville	No, only if trial payment has been offered and provided for in plan
Southern District	Yes-no specific language in Order but language is contained in plan: If the Lender and the Debtor fail to reach a settlement, then no later than 14 calendar days after the Mediator's Final Report is filed, the Debtor will amend or modify the plan to (a) conform to the Lender's Proof of Claim (if the Lender has filed a Proof of Claim) or (b) provide that the real property will be surrendered. If the amended or modified plan provides that the real property is to be surrendered, then the obligations to the Lender will be considered "treated outside the plan" and the Lender shall have in rem relief from the automatic stay as to the real property being surrendered. Notwithstanding the foregoing, Lender may file a motion to confirm that the automatic stay is not in effect as to the

	real property. Confirmation of the plan will be without prejudice to the assertion of any rights the Lender has to address payment of its Proof of Claim.”
Northern District	No, only if trial payment has been offered and provided for in plan

Recommendation: Allow confirmation pending mediation provided language is used such as the language used in the Middle District-Orlando Division and/or Southern District. It is important that attorneys are able to be paid in a reasonable amount of time to encourage participation in the programs.

Submission of Documents: How should documents be exchanged and prepared?

Court Location	Mechanism	Document Prep by Vendor Required
Middle District –All Divisions	Directly to Creditor Counsel via Email	No
Southern District	Use of Portal (25.00 charge)	Yes-40.00 charge
Northern District	Directly to Creditor Counsel Via Email	No

Recommendation: Use of Portal, eliminates human or computer errors in lender receiving documents and good way to communicate with all parties.

Vendor for documents not necessary, if court felt it should be necessary, we recommend only for debtor attorneys that have completed 5 or less loan modifications

(Few glitches that could be fixed with portal: a way for mediator to email creditor counsel; emails listed on activity page; a way to pull a list of cases ready to be scheduled for mediation or automatic email sent notifying case ready to be set versus viewing each case)

Adequate Protection Payments: How much should adequate payments be while mediation is pending? How and when should those payments be made?

Court Location	Percentage of Gross Income	Paid through	When Disbursed	Trial Payments
Middle District-Orlando	31% less HOA	Chapter 13 Trustee	Monthly after proof of Claim filed by lender	Chapter 13 Trustee
Middle District-Tampa	31% less HOA	Chapter 13 Trustee	varies	Chapter 13 Trustee or direct if requested
Middle District-Jacksonville	31% less HOA	Chapter 13 Trustee	Monthly after proof of claim filed by lender	Chapter 13 Trustee
Southern District	31%	Chapter 13 Trustee	In Miami no	In Miami Chapter

			<p>disbursements are made prior to confirmation</p> <p>In FTL/WPB, monthly if in plan if email sent to Trustee requesting disbursement or trial can be outside plan. Debtor's choice</p>	<p>13 Trustee does disburse trial payments if trials starts after confirmation. They are made as part of monthly trustee disbursements.</p> <p>In WPB you choose to pay through plan or pay direct</p>
Northern District	31%	Chapter 13 Trustee	Monthly	Chapter 13 Trustee

Recommendation: Pay 31% of gross income less HOA; payments should be paid through the Chapter 13 Trustee; look for guidance from all parties to see if adequate protection payments should be held by Trustee to show good faith but used for trial payments when trial payment is offered.

Recommendation on calculating income: only debtors on note; child support, alimony, contributor income at borrower's discretion; allow spouses or co-borrowers only that were either awarded property through a dissolution of marriage or have Quit claim to the property to apply for loan modification without other spouse joining in on loan modification, even if both on note since HAMP, Fannie Mae and most other programs allow for this

Fees: What are reasonable fees for all parties?

Court Location	Mediator	How Paid	Debtor Counsel	Creditor Counsel
Middle District-Orlando	350.00 pd by Debtor for two hours	Through Trustee	1850.00 no look	Reasonable fee
Middle District-Tampa	350.00 split by parties for two hours	Directly to Mediator	1850.00 no look	Reasonable fee
Middle District-Jacksonville	350.00 pd by Debtor for two hours	Directly to Mediator	1500.00 no look	Reasonable fee although some attorneys submit order stating both parties bear their own fees
Southern District	600.00 split by parties for two-one hour sessions	Directly to Mediator	2500.00 plus 100 in costs Note: 1500 is deemed earned through uploading documents and 1000 is deemed earned through the	Hasn't been addressed

			balance of the mediation process (does not include Portal or documod costs)	
Northern District	350.00 pd by Debtor for two hours	Paid through Trustee	Fee application required	Reasonable fee to be included in the loan modification agreement or amended proof of claim

Recommendation on fees:

<i>Debtor Counsel</i>	<i>2500 plus 100 costs</i>
<i>Creditor Counsel</i>	<i>No recommendation</i>
<i>Mediator if Portal used</i>	<i>600.00 split by parties</i>

Selection of Mediator and Mediation Date

Court Location	Method of Selection	Qualifications	Setting Mediation
Middle District	Parties agree to mediator, if they are unable to agree the Court will assign a mediator	State Court Civil Certified 8 Hour Course approved by Court	Agreed date by coordinating with all parties
Southern District	Debtor chooses mediator, if creditor files an objection to the verified motion Court randomly selects approved mediator (in most instances parties agree to a mediator prior to court involvement)	The Mediator shall be governed by the standards of professional conduct set forth in the Florida Rules for Certified and Court-appointed Mediators and shall have judicial immunity in the same manner and to the same extent as a judge.	Mediator sets date
Northern District	Parties agree to mediator, if they are unable to agree Court will assign mediator	Court keeps list of approved mediators	Agreed date by coordinating with all parties

Recommendation: Mediators be chosen by agreement of both parties and Court intervention if unable to agree; Mediator should be bankruptcy practitioners or at a minimum attend 8 hour approved course in loan modifications through bankruptcy; parties should all coordinate date and time of mediation

Approving Loan Modifications: What type of pleadings should be filed with the Court?

Court Location	Pleadings	Negative Notice used
Middle District-Orlando	Motion approving Loan Mod, Order Granting Motion to Approve Loan Mod (contains full details of all changes, monthly payment amount, rate change, new loan balance, term of loan, any forbearance or forgiveness etc)	Order contains 14 days negative notice
Middle District-Jacksonville	Motion with agreement attached and Order entered without hearing –Judge Glenn Judge Funk requires hearing	Trial no negative notice, perms negative notice
Southern District	Motion and Order done Exparte, attach agreement	No negative notice
Northern District	Motion and Order	Trial no negative notice, perms negative notice

Recommendation: Motion and Order that contains all information or has loan modification attachment, since parties are in agreement entry exparte or negative notice in Order (less calendaring and alleviates hearing time)

Technical issues:

Many lenders are requiring subordination of secondary liens to the modification agreement. In Orlando it is common practice to file a Motion to Subordinate and have the Bankruptcy Judge declare the liens remain in second position to the modification. Wells Fargo and its attorneys were involved in the language that was proposed and it has been working effectively.

How do we treat rental properties? Mortgage underwriters tell us it's about affordability versus DTI of 31% like homestead properties. Should we use a threshold of perhaps market rate over 360 months plus escrow?

Rental Income is 75% of the amount of rent for calculation purposes (accounts for non-vacancy rate)