White Paper

The Mediator's Perspective as to a Statewide Bankruptcy Mortgage Modification System

Suggestions, Concerns and Comments

As edited by Todd Budgen

Special Thanks to Participants

A special thanks to those who assisted with this project by lending their viewpoints, comments and suggestions.

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Goals & Objective

The group had several goals, including: 1) a review what other districts and divisions have considered, implemented and succeeded with, from a mediator's perspective; 2) to examine various procedures, to explore the possibility of a uniform statewide system and to find improvements upon existing systems; 3) to suggest a synergistic approach for a better bankruptcy mortgage modification system by sharing procedures.

Procedure and Process Used

Representatives from every district in the state met via phone to discuss concerns and suggestions. The group shared ideas via conference calls and a collaborative cloud based document-sharing system. The mediation orders from several divisions and districts were shared with one another.

Background and Premise

While it is unfortunate that the place we consider home has a real property market that suffered some of the greatest decline in the country, this market has also provided an excellent venue to develop arguably the best mortgage modification system in the country. The landscape of alternatives for real property

owners has forever changed by creating a system where assistance to homeowners had otherwise failed in other forums.

When building upon the existing bankruptcy modification system and creating more uniformity, one would be remiss not to first consider what made the system so successful to date.

There are at least five components that make the bankruptcy modification system different and these differences have likely contributed to its success. First, the Debtor has "skin in the game" by providing a presumed HAMP monthly PITI (principle, interest, taxes and insurance) payment amount, yielding adequate protection payments to the lender. This approach also removes suspicion that actions are taken merely for the purposes of delay. Second, imminent foreclosure and a ticking sale date are no longer in the picture with the automatic stay in place, while the parties seek a resolution. Typical foreclosure defense type tactics, such as standing and producing original documents fall by the wayside and the parties seek a common solution. Third, the parties may be less suspicious of one another, as the Debtor makes payments and the lender reviews investor guidelines to see what programs may fit the Debtor's needs. Fourth, an interested and invested court system supports and enforces good faith and timely behavior by all parties (counsel and their clients). Lastly, the degree of competency exhibited by the judges and practitioners, both of who deal regularly with mortgages and banking lends to the parties' success.

To keep the phenomenal success rate of 75% to 85% that is enjoyed by the existing systems, the above ideals would likely need to remain in place. If any one of

these components is removed, the court may first wish to consider whether the removal of that item would deteriorate from the overall success of the program and also the primary objective. That primary objective, of course, is to encourage successful workouts between Debtors and their lenders where possible.

With these ideals in mind, a group of mediators from around the state looked at several differences between the divisions, as well as items that could be improved.

This author has tried to the best of his ability to relay the pro's, con's, and comments as he has understood them. In the spirit of honest discussion, with the altruistic goal of providing a better system for lenders and homeowners, this author has tried to represent all the various viewpoints as best as possible.

Portal

The first topic discussed was the use of the document portal system in the Southern District.

Those who had used the existing portal system in the Southern District seem to relay generally positive feedback about their experience. The system appears to boast the same or a higher success rate as compared to the alternative systems. The most notable difference voiced with the Southern District portal system is the apparent lack of continued mediations. Remarkably, mediators with experience using the portal commented that they had relative few continuances or second mediations. Further discussion revealed that this may be because mediations are set once it appears the packet has gone to underwriting for review.

A drawback to the portal noted by all parties was the mandatory fee-per-use "Documod" form generating software. The mediators believe this component helps to fund the portal but that some lenders will not accept documents generated from this one-size fits all forms approach. At least one mediator told this author, in confidence, that he or she regularly must have dialogue and emails off the system (despite court order to the contrary) or otherwise they do not get a response from the parties.

Another mediator voiced concern over the use of this "electronic filing cabinet." A different mediator questioned whether such a system made sense uniformly, especially in low-volume divisions.

A notable attribute and drawback of the approach seem to be the lack of mediations. Although the overall system appears more efficient, it also lends to less human interaction. The systems utilizes telephonic conferences which sometimes may operate more like a status call, with the mediator merely repeating and reporting the status to the court.

Some mediators felt the face-to-face interaction allowed discussions of not only what documents may be needed, but also dialogue as how to provide alternatives when those requests could not be met.

Mediators described the portal system as very effective at policing the parties, keeping them on task and keeping them to a schedule. One of the mediators suggested that there might be alternatives that are less onerous though. A suggestion was made that creditor's counsel file a document at a prescribed time with the court either announcing that a packet is complete or otherwise why it is not

complete. A suggestion was made that an optional portal system could be used, but it may be under-utilized if not compulsory. A senior and knowledgeable person familiar with the system suggested that a different approach to a document portal (including different ways to fund it) may be the best alternative.

Lastly, as homes continue to appreciate, the author suggests an exit strategy to any central document repository may be necessary as modifications become less popular in the years to come.

Fees

Parties in the Southern District felt their fees were appropriate relative to the work expended (appx. $600). Almost every party from every other district felt the fees earned were low relative to the work expended (appx. $350).

The Mediator's Role

The group felt it was never the mediator's role to act as a person who passed judgment or made decisions. The group felt that mediators should enjoy immunity while also not be asked to make determinations of bad or good faith and the like. The parties felt the mediator's role in the bankruptcy mediation system was one of a facilitator, ensuring parties were communicating, while reporting to the court if an outcome was reached.

New Mediators

A concern was expressed as to new mediators being able to get involved while still ensuring the competency of the program by involving experienced and knowledgeable participants. Some mediators wished to have greater access while

others expressed concerns that any mediators in the program must have minimum levels of competency to ensure the continued integrity of the program.

A suggestion was made that the formation of a statewide bankruptcy mediator bar, email lists and other collaborative tools (while also requiring ongoing education requirements, such as annual or semi-annual brown bags) could alleviate concerns.

Additional Comments

A frustration echoed by both the Middle and Northern District mediators was the complete and utter lack of being able to conclude during the first mediation. The vast majority of first mediations were a status call where the parties merely discussed whether documents were received. Sometimes the first mediation is merely one party acknowledging that the documents were received while other times only one or two items are requested.

While the mediator is able to help the parties communicate and assist with what may be needed, as well as develop a timeline, an offer is rarely given at the first mediation. Whether it be a portal or some other system, effectuating communication between the parties as to either what documents are still needed or where questions arise concerning those documents, it may be useful for the parties to have discussed these items beforehand. Simply stated most parties wait for the first mediation for the file to be reviewed and see “where it is at.” Sometimes, this is because the packet was just sent days earlier. An alternative could take the form of a court filing announcing a packet is ready, a portal, a brief call beforehand with a mediator, or some other form to facilitate communications.

Mediator Escalation

A senior person within the program echoed a concern that banks counsel be able to somehow approach mediator or otherwise escalate a situation when necessary to facilitate an outcome. The scenario was given where bank counsel is attempting to assist Debtor's counsel, but aggressive pursuit of sanctions is interfering with that ability. Creditor counsel mentioned that the ability to ask the mediator to intervene (in a genuine way) for this type of scenario would be helpful. The suggestion of a mediator chair or some other way to escalate was posed but the group was not able to offer a solution.

Offer Mitigation Loss Options or other Conclusion

The suggestion was made that it could be helpful if creditor's counsel came to mediation not only with an offer or denial, but also with whether loss mitigation options were available with that particular investor. The group understood that a short sale or deed-in-lieu would necessarily involve different paperwork and new questions, but the options would be useful to the parties when it appears an agreement cannot be reached.

Conclusion

It is important to remember that people's lives are affected in a real, life-lasting and material way by the success or failure of this program. Few things are as important to a family as an affordable home, whether that be their current address or a new address after a fresh start.

All the mediators commented that they have each enjoyed being a part of a successful program that had made such differences in so many peoples' lives.