

Mortgage Modification Mediation
from the Chapter 13 Trustee's Perspective

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This white paper is my attempt to give the perspective of the Chapter 13 Trustee to the Mortgage Modification Mediation Procedures. While I am most familiar with how things are done in Jacksonville, I will try to represent the viewpoint of the different districts and divisions when I can. I should preface by saying that in Jacksonville, we tried to mirror some of the longer established mediation programs like Orlando that were showing successful results. However, due to a few differences in procedures and a debtors' bar that zealously advocates for their clients, there are a few deviations in practice and a few unsettled areas that are currently being litigated or under advisement by the Court. I encourage the participants of this Summit to consider what uniform procedures they can adopt to assist in reasonable and timely resolutions of mortgage modifications.

A successful mortgage modification mediation program depends on the following factors:

1. An Order Directing Mediation that provides clear guidelines.
2. Quick enforcement of the Order when there is noncompliance.
3. Good Mediators.
4. Knowledgeable parties with decision making authority.
5. Timeliness of a conclusion of the process.
6. Fair and Proper Treatment of the mortgage through the plan while attempts to modify are pending.

An Order Directing Mediation that provides clear guidelines.

We were fortunate in Jacksonville to initiate our program after the Orlando Division had done the majority of heavy lifting in establishing their program. So, when it came time for us to implement our program, a few attorneys, myself and our judges made a few minor revisions to the Orlando Division's Order Directing Mediation and the form Motion Requesting Mediation and we were

ready to go. I created a Timeline of all the applicable deadlines under the order to more easily delineate the responsibilities of each party and made everything available to our bar at a Bankruptcy Bootcamp that the Jacksonville Bankruptcy Bar Association sponsored for our rollout of the program.

The Order really does a great job of painting a picture of how the mediation process should progress and essentially provides a recipe for successful modifications if everyone does what they are supposed to do. Key among the requirements in the Order Directing Mediation is the prompt production of financial documentation by the debtor. This component of the mortgage modification process has been problematic from the very beginning of HAMP. Debtors alleged that they sent the lenders the same documents two or three times while the lenders insisted they never received the documents. The Southern District was the most recent Court to establish their mortgage modification mediation program and they addressed this problem by incorporating a web portal that the debtor can upload all financial documents and they are housed in the “cloud” and the lender has secure access to view the documents. Verification of production should never be at issue with this approach.

Quick enforcement of the Order when there is noncompliance.

Unfortunately, as we all know, despite the best laid plans of mice and men, parties don't always do what they are supposed to. In this instance, there must be a quick resolution to address noncompliance of a party with the Order Directing Mediation. Fortunately, the guidelines set forth in the Order Directing mediation are clear and specific and noncompliance is easily determined. The question becomes, are parties seeking enforcement when noncompliance is evident and if so, are the judges willing to enter orders that discourage future noncompliance? While there are a number of attorneys who routinely file Motions to Compel and keep the process moving, there are also parties that don't demand accountability often enough. When this happens, the mediation process lingers much longer than it should and ultimately becomes an obstacle to confirmation of the Chapter 13 plan strictly because parties aren't doing what they should and no one is seeking the Court's assistance in getting matters back on track.

Good Mediators.

Everyone agrees that a good mediator can make all the difference in the world when it comes to reaching a successful resolution of a conflict and in the Middle District, the parties may select a mediator of their choosing. However, in mortgage modification mediations, the qualifications of a mediator are heightened beyond the ordinary. Specific knowledge of mortgage documents and industry standards and experience with the modification programs available to debtors should be prerequisites to choosing a mortgage modification mediator. If the mediator is lacking any of this knowledge, it is very likely that settlement opportunities will either be lost or never explored. It is very important that parties choose a mediator who has the specific training that is required by Administrative Order FLMB 2013-3 and ratified by the new Bankruptcy Local Rule 9019-2(j) on Mediation in the Middle District of Florida bankruptcy courts.

Knowledgeable Parties with decision making authority.

Parties can't treat the mediation as a hold button on the main case and not prepare adequately. They must invest the time to become knowledgeable of their clients' circumstances and what options may be available. This should include a thorough review of all financial documentation that will be relied upon and a strong knowledge of what loss mitigation programs, whether statutorily created or in house programs, are available to the debtors. Only then will there be a fair outcome for all concerned.

Additionally, the parties attending mediation must be prepared and have the ability to settle. This means that lenders can't send someone that doesn't have the authority to agree to the terms of the modification. Too often I hear representations at confirmation such as, "We have reached an agreement, your honor. We're just waiting for the proper parties at the bank to sign off." The Order Directing the parties to Mediation should have indicated that attendees at the mediation must have settlement authority, so not having a signed agreement at the mediation when settlement is reached is an indication of bad faith in the process.

Timeliness of Conclusion of the Process.

The Mediation Programs throughout the state are governed by the Order Directing Mediation and the timelines provided therein. The importance of these timelines cannot be understated. Very often, the pending mediation will require a continuance of the confirmation hearing and delay payment of creditors who are not to blame for the delay. The decision to seek mediation should be made prior to the filing of the Chapter 13 case and a Motion to Request Mortgage Modification Mediation should be filed *prior to the 341 Meeting*. If parties are dragging their feet in complying with the Order Directing Mediation, they should be held accountable and compelled to perform in a timely manner. Delays in this process are unwarranted and should not be tolerated. It is in the best interests of all concerned to reach a quick determination of the fate of this residence so that one of the parties can feel secure in maintaining the property and preserving the value of the residence and neighborhood.

Fair and Proper Treatment of the Mortgage through the Plan While Attempts to Modify are Pending.

Rather than enforce the provisions of the Order Directing Mediation, some debtors' attorneys propose a Chapter 13 plan that preemptively punishes the mortgage lender by not providing adequate protection payments while the mediation is pending. These plans offer various clauses that essentially result in the debtor staying in the property for free until either a modification is reached or if not, the plan will be amended to surrender the collateral to the lender. The explanation for treating the claim like this is that it prevents the creditor from delaying the mediation process. I disagree to this treatment. If there is unnecessary delay in the process by any party, there are provisions within Order Directing Mediation that can be used to mandate compliance. Additionally, most loss mitigation programs, if not all, have a requirement of trial payments by the debtor prior to a permanent modification becoming effective. Many debtors have successfully negotiated in the mediation that the timely paid adequate protection payments that they have provided in their initial plan of 31% of their gross income

should be considered satisfaction of the trial payment period. This allows them to emerge from mediation with a permanently modified mortgage.

Additionally, once the permanent modification is agreed to, the payment of the modified mortgage should be made through the Chapter 13 plan. It is well established that if a plan modifies the rights of a creditor, payments must be made through the plan, absent a compelling reason. Avoiding a Trustee fee is not a compelling reason and debtors must be prepared to pay the “freight” for receiving the benefits of bankruptcy.

Aside from the issue of Trustee percentage fees, there are plenty of solid reasons why the debtors’ modified mortgage payments should be paid through the plan. HAMP and the various mortgage modification mediation procedures throughout the state were all created to address the historical instances of inaccurate bookkeeping data compiled by lenders, poor communication between mortgagors and mortgagees and the myriad frustrations experienced by debtors attempting to modify mortgages directly. Removing payment of the modified mortgage outside of the plan will lift the automatic stay and the bankruptcy court will cease to exercise jurisdiction over future issues with the modified mortgage. It is naïve to believe that the problems that gave rise to our procedures would somehow disappear once a mortgage is permanently modified. It is not in the best interests of the debtor to waive the court’s oversight of future problems with the mortgage while the bankruptcy is open.

It must be remembered that this is not a mortgage that has always remained current. A mortgage modification is essentially a restart button that is pushed and it will impact many different departments within the bank. Future assignments and transfers of the mortgage, as well as future contingencies related to payment history and principal reduction are all important factors that need to be considered.

Depending on how a mortgage is assigned, often times bundled with hundreds or thousands of other nonmodified mortgages, the new servicer may not be aware of the permanent modification. In fact, there are instances of foreclosures being reinstated and the

debtor not having any relief available in the bankruptcy court because the automatic stay had been lifted due to the direct payment of the modified mortgage.

Additionally, most modification programs whether through HAMP, HARP, HARP 2, or in house programs have lender credits and/or principal reduction components tied to timeliness of payments. This will require a reliable transactional history of payments that is, without question, best handled by the Chapter 13 Trustee.

Finally, the payment of the permanently modified mortgage outside of the plan creates problems with the recently enacted amendments to the Federal Rules of Bankruptcy Procedure, specifically Rule 3002.1. Rule 3002.1 was adopted in order to better police the mortgage industry's charging of post petition fees and costs and require timely notices of mortgage payment changes. With payment of the modified mortgage outside of the plan and the stay lifted, there is no opportunity for the debtor to object to these notices in the bankruptcy court. There is also a provision in Rule 3002.1 that allows the Trustee to file a Motion to Deem the Mortgage Current at the end of the case and provide a confident fresh start for the debtor. This too would be eliminated due to the payment history being unknown to the Trustee.

Other Considerations.

1. Timing of Motion for Mediation – Currently there is no rule or established local practice requiring a deadline in which the debtor should file the Motion for Mediation, however, it is clear that delay of filing such a motion contributes to all sorts of problems and obstacles at confirmation, so there has been a groundswell of support for establishing a drop dead date in which to file the Motion. Most suggestions are that it be filed prior to the 341 Meeting.
2. Timing of Confirmation – In Jacksonville, our judges consider confirmation of the chapter 13 plan at the initial confirmation and any claims filed after confirmation but prior to the bar date are either dealt with by amendment to the confirmation Order exhibit or modification of the confirmed plan. If there

is a pending mortgage mediation at the initial confirmation, we will continue the hearing until after the bar date.

Depending upon the circumstances of how the mortgage is dealt with in the plan, we may continue numerous times until a permanent modification is reached or we may confirm and include special language directing the lender and debtor to advise the court of the ultimate outcome of mediation and take appropriate measures to provide for the claim based upon that outcome. Orlando also confirms cases subject to a pending mediation.

3. Fees – Most Chapter 13 practitioners do not welcome keeping time records to support their fees and most courts establish presumptively reasonable or “no look” fees for various tasks performed by debtors’ counsel. In Jacksonville, we got input from the debtors’ bar that was willing to keep time records initially and we determined that a reasonable fee for initiating and participating in a mortgage modification mediation was \$1500.00. We’ve had some difficulty justifying the same fee when debtors’ counsel opts not to mediate and works directly with the mortgage company to modify and still require time records in those instances.
4. Best Practices – It is always important to establish proper procedures in the practice of Chapter 13. It not only establishes a good reputation for you before the bench, but it also creates efficiency in your practice which translates into profitability. Some of the best practices that I would recommend for debtors’ counsel when dealing with mortgage modification mediations are:
 - a. Prior to filing the Chapter 13 case, have a thorough meeting with your client and compile and review all of the debtors’ financial documents that will be needed to provide in the mediation process.
 - b. File your Motion for Mediation prior to the 341 meeting.

- c. Upon entry of the Order Directing Mediation, calendar each deadline contained in the order to insure timely and proper performance of your responsibilities.**
- d. Create form pleadings that address opposing party's noncompliance to assist in a quick resolution of the offense**
- e. Provide for proper adequate protection payments to the lender while the mediation is pending and negotiate that those AP payments can satisfy any temporary payment plan requirements.**
- f. Amend or Modify the Chapter 13 plan to include the permanently modified mortgage payment to retain the court's jurisdiction and the benefits of a Trustee's transactional history.**
- g. If in doubt that your fee may be questioned, keep time records.**