

✱HOT TOPIC✱

RESIDENTIAL FORECLOSURE MEDIATION

Is Managed Mediation the Solution?

By Patrick J. Mastronardo



Editor's Note: The following article was written before the Supreme Court issued its latest Administrative Order on Residential Mortgage Foreclosures. The full text of the order is on the Supreme Court web page as noted on page one of this issue. However, since the Supreme Court adopted virtually all of the recommendations of the Task Force, most of the observations in this article remain relevant.

Florida and its court system are in a serious residential foreclosure crisis. In March 2009, the Florida Supreme Court established a Task Force to propose ways to ease the backlog of pending cases. After receiving Task Force recommendations, the Court invited public comments and heard oral arguments.

The Task Force recommended a uniform, statewide managed mediation program be adopted and implemented through a model administrative order issued by each circuit judge. Accordingly, homestead foreclosure cases must be referred to independent "managed mediation" prior to being set for a final hearing. Each circuit judge must select a management mediation provider, independent of the judicial branch, capable of operating indefinitely without financial assistance from the courts. The selected provider shall have authority to contact and enroll lender and borrower, make necessary referrals, supervise information exchange between the parties, recruit and train mediators, schedule mediations, monitor full compliance with the program, and to evaluate its effectiveness.

Homeowners are required to participate in foreclosure counseling prior to mediation. The selected provider must develop an information technology platform to facilitate electronic exchange of information between borrowers and lenders. Counsel for plaintiff is required to appear personally at mediation with a representative of the lender having full settlement authority who may appear electronically. Plaintiffs bear the entire cost of managed mediation.

Foreclosure cases involving residences not occupied by the borrower may be excluded from managed mediation at the discretion of the circuit court. Cases involving foreclosure of vacant and abandoned properties are to be expedited.

Critics of Task Force recommendations urge the Supreme Court either to reject managed mediation as an unproven constraint upon the circuit courts or to adopt a modified version. It is maintained that circumstances and needs differ in each circuit, and each Chief Judge ought to have the flexibility to select a conventional court mediation program that is far less expensive. The Florida Court System was asked to seek legislation to amend Section 44.108, Florida Statutes, to permit courts to collect fees for circuit civil mediation services (now prohibited). Providers of managed mediation are said to exercise quasi judicial authority, which requires legislative authorization.

Among various modifications proposed were (1) require the homeowner to specifically request managed mediation within a limited time frame ("opt in") and/or to file a responsive pleading, or (2) permit the homeowner to waive managed mediation ("opt out"), or (3) require homeowners to bear some part of the cost of the program.

Having learned from more than one year of experience, lenders, attorneys, and mediators usually are on the same page at mediation - all genuinely endeavor to participate in a positive and constructive manner, and recognize that no better alternative to seek settlement exists. It is gratifying to participate in a collaborative encounter between a prepared homeowner and an experienced bank loss mitigation representative. It should happen more frequently.

At foreclosure mediations, the parties do not sign an unconditional settlement agreement. In what may be called "settled" foreclosure mediations, the parties review all available facts and agree, in principle, upon a plan of action. The defendant elects to remain in or to leave the homestead, and to meet conditions to implement an alternative to foreclosure (e.g. loan modification or short sale). The parties exchange contact information so they are able to effectively communicate directly with each other thereafter, which obviates the need for a continuance of mediation. The homeowner must take the initiative and perform to avoid foreclosure on the sale date. Plaintiff may agree to put the foreclosure process and/or sale date on hold (though usually not). The "settlement" is memorialized by the signing of a briefly worded agreement prepared by lender's counsel. However, in similar cases, plaintiffs insist upon "impasse" since "settlement" is conditioned upon the uncertainty of performance by the homeowner. Naturally, questions now are raised as to the accuracy of reported mediated "settlements" furnished by the Collins Center programs and conventional court mediation programs.

Currently, there are three independent "managed mediation" programs operating in Florida, pursuant to contracts between the circuits and their selected provider, the Collins Center. Those programs are in the 1st, 11th, and 19th Judicial Circuits.

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To measure the mediated settlement rate, it may be desirable, subject to court or legislative authorization, to require the mediator to report a case coded outcome indicating the alternative to foreclosure contemplated at mediation. For any designated time period, the Circuit Court then would be able to (1) statistically summarize promptly all case coded outcomes of mediation, i.e., impasse and/or each specific primary alternative to foreclosure contemplated; and (2) at a later date, if feasible, compare said outcomes with a current summarized status/disposition of the underlying cases, e.g., "sale at foreclosure", "action withdrawn", "pending", etc. It is well to note a foreclosure action may remain pending until a trial loan modification is made permanent.

The future direction of foreclosure mediation in Florida is still uncertain. The Florida Supreme Court heard oral arguments regarding the Task Force's recommendations on November 4, 2009; but as of the time this article is written, it has not yet rendered its opinion on the report. [Editor's note: See page one regarding Administrative Order issued December 28, 2009.] Pending in the 2010 session of the Florida House of Representatives is bill HB 75 to enact a "Foreclosure Bill of Rights". Its original text makes no reference to "managed mediation"; see www.myfloridahouse.gov. Due to its present controversial content, HB 75 very likely will be modified, and proposed revisions may relate to "managed mediation".

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