The Three Ms:
Examining Mortgage Modification Mediation Programs

Prepared by the Legal League 100
Special Initiatives Working Group
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Dear Colleagues,

The Legal League 100 (LL100) is the nation's premier collection of financial services law firms organized to further its members' commitment to supporting the mortgage servicing industry through education, communication, and relationship development. The LL100's membership at large, council, and Special Initiatives Working Group (SIWG) works tirelessly to be a leading force for industry standards, education, and market research.

In advancement of this mission, the LL100's Special Initiatives Working Group (SIWG) is providing this important information on loss mitigation, particularly within the bankruptcy arena. We believe there will be a substantial increase in loss mitigation in the near future due to the effects of COVID-19.

More importantly, we believe that many bankruptcy courts will implement their own Mortgage Modification Mediation (MMM) program. As a result, our industry professionals should have an understanding as to how this works in order quickly adapt to the influx of loss mitigation that is expected to occur.

The SIWG's goal is that the following information will assist the industry as we begin to handle more loss mitigation requests in this COVID-19 environment.

Sincerely,

Legal League 100's Special Initiatives Working Group

Loss Mitigation Overview

Overarching Federal Regulation- 12 CFR 1024.41- Loss Mitigation Procedures

When reviewing borrowers for loss mitigation, it is important to first start with 12 CFR 1024.41 that covers loss mitigation procedures for servicers. The questions to ask before moving into what the regulation requires are: what loans, and who falls under 12 CFR 1024.41?

What Mortgages fall under 12 CFR 1024.41?

A **mortgage loan** means any federally related mortgage loan and does not include open-end lines of credit.

A **federally related mortgage loan** means any loan that is secured by a first or subordinate lien on a residential real property, including a refinancing of any secured loan on residential property.

Additionally, the loan is made in whole or in part by any lender that is either regulated by or whose deposits or accounts by any agency of the Federal Government, and insured, guaranteed, supplemented or assisted in any way, by the Secretary of the Department of Housing and Urban Development, is intended by the originating lender to the Fannie Mae, Ginnie Mae, Freddie Mac, or a financial institution from which the loan is to be purchased by the Federal Home Loan Mortgage Corporation (or its successors).

This can include any installment sales contract, land contract, or contract for deed on otherwise qualifying residential property if the contract is funded in whole or in part by one of the agencies listed above.

Who is excluded from compliance with the Consumer Financial Protection Bureau's (CFPB's) Loss Mitigation Requirements?

- A servicer that qualifies as a small servicer (5,000 or fewer mortgage loans).
- A servicer for any reverse mortgage transaction as defined by 1024.31.
- A servicer for any mortgage loan for which the servicer is a qualified lender as defined in 12 CFR 617.7000.

Procedures for Compliance with the CFPB's Loss Mitigation Rule

Receipt of a Loss Mitigation Application

The first step is to determine whether the loss mitigation application is complete or incomplete.

A complete loss mitigation application means (12 CFR 1024.41(b)(1)): An application in connection with which a servicer has received all the required information needed from a borrower in evaluating the application for the loss mitigation options available to the borrower.

Important items to note about a complete loss mitigation application per the official interpretation of 41(b)(1)

- A servicer has the flexibility to establish its application requirements and to decide the type and amount of information it will require from borrowers applying for loss mitigation options.
- A servicer must continue to exercise reasonable diligence to obtain documents and information from the borrower that the servicer requires to evaluate the borrower as to all other loss mitigation options available to the borrower.
- A loss mitigation application is complete when a borrower provides all information required from the borrower notwithstanding that additional information may be required by a servicer that is not in the control of a borrower.

Review of Loss Mitigation Application Submission 12 CFR 1024.41(b)(2)

If an application is **received 45 days or more** before a foreclosure sale:

- Promptly upon receipt of the loss mitigation application, review the application to determine if it is complete.
- Notify the borrower in writing within five days (excluding legal public holidays and weekends) after receiving the loss mitigation application that the servicer acknowledges receipt of the application, and that the servicer has determined that the application is either complete or incomplete. If a loss mitigation application is incomplete, the notice shall state the additional documents and information the borrower must submit to make the application complete and the applicable date pursuant to paragraph (b)(2)(ii) of this section.
    - **Foreclosure sale not scheduled:**
      For purposes of § 1024.41(b)(2)(i), if no foreclosure sale has been scheduled as of the date a servicer receives a loss mitigation application, the servicer must treat the application as having been received 45 days or more before any foreclosure sale.
    - **Foreclosure sale re-scheduled:**
      The protections under § 1024.41 that have been determined to apply to a borrower pursuant to § 1024.41(b)(3) remain in effect thereafter, even if a foreclosure sale is later scheduled or rescheduled.

If a complete loss mitigation application is received ***more than 37 days before*** a foreclosure sale:

- Within 30 days of receiving the complete loss mitigation application, shall evaluate the borrower for all loss mitigation options available to the borrower.
- Provide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage. The servicer shall include in this notice the amount of time the borrower has to accept or reject an offer of a loss mitigation program as provided for in paragraph (e) of this section, if applicable, and a notification, if applicable, that the borrower has the right to appeal the denial of any loan modification option as well as the amount of time the borrower has to file such an appeal and any requirements for appealing, as provided for in paragraph (h) of this section.

Time Period Disclosure Requirements 12 CFR 1024.41(b)(2)(ii)

Time period disclosure requirements under the CFPB:

- **Thirty days is generally reasonable.**
  In general, and subject to the restrictions described in comments 41(b)(2)(ii)-2 and -3, a servicer complies with the requirement to include a reasonable date in the written notice required under § 1024.41(b)(2)(i)(B) by including a date that is 30 days after the date the servicer provides the written notice.

- **No later than the next milestone.**
  For purposes of § 1024.41(b)(2)(ii), subject to the restriction described in comment 41(b)(2)(ii)-3, the reasonable date must be no later than the earliest of:

  - The date by which any document or information submitted by a borrower will be considered stale or invalid pursuant to any requirements applicable to any loss mitigation option available to the borrower.

  - The date that is the 120th day of the borrower's delinquency.

  - The date that is 90 days before a foreclosure sale.

  - The date that is 38 days before a foreclosure sale.

    - **Seven-day minimum**. A reasonable date for purposes of § 1024.41(b)(2)(ii) must never be less than seven days from the date on which the servicer provides the written notice pursuant to § 1024.41(b)(2)(i)(B).

COVID-19 Loss Mitigation Options 12 CFR 1024.41(c)(2)(v)

There are new additions to the CFPB Loss Mitigation Rule, taking note of the COVID-19 pandemic. A servicer may offer a borrower a loss mitigation option based upon the evaluation of an incomplete application, if all the following criteria are met:

- The loss mitigation option permits the borrower to delay paying covered amounts until the mortgage loan is refinanced, the mortgaged property is sold, the term of the mortgage loan ends, or, for a mortgage loan insured by the Federal Housing Administration, the mortgage insurance terminates. For purposes of this paragraph (c)(2)(v)(A)(1), "covered amounts" includes, without limitation, all principal and interest payments forborne under a payment forbearance program made available to borrowers experiencing financial hardship due, directly or indirectly, to the COVID-19 emergency, including a payment forbearance program made pursuant to the Coronavirus Economic Stabilization Act, section 4022 (15 U.S.C. 9056). It also includes, without limitation, all other principal and interest payments that are due and unpaid by a borrower experiencing financial hardship due, directly, or indirectly, to the COVID-19 emergency. For purposes of this paragraph (c)(2)(v)(A)(1), "COVID-19 emergency" has the same meaning as under the Coronavirus Economic Stabilization Act, section 4022(a)(1) (15 U.S.C. 9056(a)(1)). For purposes of this paragraph (c)(2)(v)(A)(1), "the term of the mortgage loan" means the term of the mortgage loan according to the obligation between the parties in effect when the borrower is offered the loss mitigation option.

- Any amounts that the borrower may delay paying as described in paragraph (c)(2)(v)(A)(1) of this section do not accrue interest. The servicer does not charge any fee in connection with the loss mitigation option. The servicer waives all existing late charges, penalties, stop payment fees, or similar charges promptly upon the borrower's acceptance of the loss mitigation option.
- The borrower's acceptance of an offer made pursuant to paragraph (c)(2)(v)(A) of this section ends any preexisting delinquency on the mortgage loan.

Once the borrower accepts an offer made pursuant to paragraph (c)(2)(v)(A) of this section, the servicer is not required to comply with paragraph (b)(1) or (2) of this section concerning any loss mitigation application the borrower submitted before the servicer's offer of the loss mitigation option described in paragraph (c)(2)(v)(A) of this section.

Prohibition of Foreclosure Referral

Last, but not least, it is important to remember that a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:

- A borrower's mortgage loan obligation is more than 120 days delinquent.
- The foreclosure is based on a borrower's violation of a due-on-sale clause.
- The servicer is joining the foreclosure action of a superior or subordinate lienholder.

Agency Loss Mitigation Overview

Below is a closer look at the current agency loss mitigation options.

Fannie Mae

Fannie Mae offers mortgage servicers flexible options to help homeowners retain their homes while enduring a temporary financial hardship[1]. Fannie Mae provides a workout hierarchy table for guidance and the order of evaluation for available workout options for a conventional first-lien mortgage loan[2].

[1] Fannie Mae/Servicing/Loss Mitigation, https://singlefamily.fanniemae/servicing/loss-mitigation

[2] Fannie Mae/Servicing/Loss Mitigation, https://servicing-guide.fanniemae.com/THE-SERVICING-GUIDE/Part-F-Servicing-Guide-Procedures-Exhibits-Quick-Referen/Chapter-F-2-Exhibits/F-2-11-Fannie-Mae-s-Workout-Hierarchy/1045712141/F-2-11-Fannie-Mae-s-Workout-Hierarchy-06-13-2018.htm?_ga=2.169131941.505936838.1608584807-1851219126.1601654035

Temporary Hardship	
The following table describes the servicer's requirements if the borrower is experiencing or has experienced a temporary hardship resulting from a short-term decrease in income or increase in expenses.	
If the hardship has...	**Then the servicer must consider a...**
been resolved and the borrower does not have the ability to reinstate the mortgage loan	• D2-3.2-02, Repayment Plan
been resolved and the borrower does not have the ability to afford a repayment plan	• D2-3.2-06, Payment Deferral
not been resolved	• D2-3.2-01, Forbearance Plan
Permanent Hardship	
If the borrower is experiencing a hardship that has resulted in a permanent or long-term decrease in income or increase in expenses, the servicer must evaluate the borrower for a workout option in the following order: • D2-3.2-08, Fannie Mae Flex Modification • D2-3.3-01, Fannie Mae Short Sale • D2-3.3-02, Fannie Mae Mortgage Release (Deed-in-Lieu of Foreclosure) **Note:** If a borrower requests to be evaluated for a liquidation workout option, the servicer must first evaluate the borrower for a liquidation workout option. D2-3.1-01, Determining the Appropriate Workout Option	

Additionally, Fannie Mae provides definitions of each workout type, and an entire section dedicated to COVID 19 options, along with non-retention options.

Freddie Mac

Freddie Mac, like Fannie Mae, has a loss mitigation evaluation hierarchy and performance standards. Please see the chart below[3]:

[3] Freddie Mac Loss Mitigation Evaluation Hierarchy, Effective July 1, 2020, https://guide.freddiemac.com/app/guide/section/9201.2

If a Borrower who is current or less than 31 days delinquent contacts the Servicer for loss mitigation assistance, the Servicer must first evaluate the Borrower for eligibility for a Freddie Mac Enhanced Relief Refinance® offering (refer to Chapter 4304). If the Borrower is not eligible for an Enhanced Relief Refinance Mortgage, then the Servicer must evaluate the Borrower for a reinstatement of relief option as set forth in Chapter 9203.

If a reinstatement or relief option as provided in Chapter 9203 is not appropriate based on Borrower circumstances, the Borrower may qualify for a workout option under the Guide. The Servicer must consider a Borrower for workout options in the following sequence:

1. The Servicer must first consider the Borrower for a Freddie Mac Flex Modification in accordance with the requirements of Chapter 9206
2. If a Borrower is ineligible for, does not accept, or fails to complete the Trial Period Plan, the Servicer must next consider the Borrower for a Freddie Mac Standard Short Sale ("short sale") pursuant to Chapter 9208
3. If a Borrower is ineligible for a short sale or a short sale is not viable option, the Servicer must next consider the Borrower for a Freddie Mac Standard Deed-in-Lieu of Foreclosure ("deed-in-lieu of foreclosure") in accordance with the requirements of Chapter 9209

When a Borrower becomes 90 days delinquent, or when a Borrower has a Step-Rate Mortgage and becomes 60 days delinquent within the 12 months following the first payment due date resulting from an interest rate adjustment, the Servicer must determine if the Borrower is eligible for a streamlined offer for a Flex Modification in accordance with Section 9206.5(c) and if eligible, solicit the Borrower for such modification in accordance with Section 9102.5(a).

If the Borrower's hardship is the result of an Eligible Disaster but the Borrower indicates he or she is able to resume making the existing contractual monthly payments on the Mortgage, the Servicer must evaluate the Borrower for a Capitalization and Extension Modification for Disaster Relief ("Disaster Relief Modification") as provided in Section 9206.4, if reinstatement or a repayment plan is not a viable option.

If the Borrower's hardship is one of the four listed below and the Borrower has indicated a desire to sell or vacate the property, the Servicer may consider the Borrower for a short sale without first evaluating the Borrower for a home retention option; however, the Servicer must ensure that the Borrower is aware that a home retention option may be possible:

- Death of a Borrower or death of the primary or secondary wage earner in the household
- Long-term or permanent disability; serious illness of a Borrower/co-Borrower or dependent family member
- Divorce or legal separation; separation of Borrower unrelated by marriage, civil union or similar domestic partnership under applicable law
- Distant employment transfer, including Permanent Change of Station orders or relocation due to new employment, where the transfer or new employment location is greater than 50 miles one-way from the Borrower's current Primary Residence

If the Borrower is not eligible for a relief or workout option, but the Servicer believes that a relief or workout option is still the best solution to the Delinquency, then the Servicer may submit a recommendation to Freddie Mac for review along with the reason for the recommendation, in accordance with the submission procedures in the relevant chapters for relief or workout options.

Additionally, Freddie Mac has a charge-off option available to cease collection and loss mitigation activities on a Mortgage, under certain conditions. (see Sections 9210.1 through 9210.5 for requirements related to the charge-off option.)

Federal Housing Administration (FHA)

FHA has five different sections on Loss Mitigation regarding Servicer requirements and review under the FHA Single Family Handbook 4000.1. The FHA requires the Mortgagee to evaluate monthly all loss mitigation options for borrowers in default if the mortgage remains delinquent. The focus will be on the HUD's Loss Mitigation Option Priority Waterfall. This applies to owner-occupant borrowers utilizing the process in the loss mitigation home retention option, to determine which, if any, home retention options are appropriate under HUD guidance.

Loss Mitigation Home Retention Waterfall Options

Step	Decision Point	Yes	No
1	Household or Borrower(s) has experienced a verified loss of income or increase in living expenses?	Step 2	Informal or Formal Forbearance/repayment plan workout tools
2	One or more Borrowers receive Continuous Income in the form of Employment (e.g., wages, salary, or self-employment earnings), Social Security, disability, veterans' benefits, Child Support, survivor benefits, and/or Pensions?	Step 3	Special Forbearance
3	Front-end ratio is at or less than 31%?	Step 4	FHA-HAMP (Step 5)
4	85% of surplus income is sufficient to cure arrears within 6 months?	Formal Forbearance/r	FHA-HAMP (Step 5)
5	**FHA-HAMP Loan Modification**[2] *(Requires Successful Completion of Trial Payment Plan)*		

The use of an FHA-HAMP Option is to both alleviate the Borrower's burden of immediate repayment of arrears and to adjust monthly payments to a level sustainable by the household's current income. The FHA-HAMP Option may or may not include a Partial Claim.

Partial Claim: the total amount available is the lesser of: (1) the unpaid principal balance as of the date of Default associated with the initial Partial Claim, if applicable, multiplied by 30%, less any previous Partial Claim(s) paid on this Mortgage; (2) if there are no previous Partial Claim(s), the unpaid principal balance as of the date of the current Default multiplied by 30% or (3) the total amount required to meet the target payment. The Partial Claim amount may include: arrearages; legal fees and foreclosure costs related to a canceled foreclosure action; and principal deferment (per below calculation). No portion of the Partial Claim may be used to bring the modified Mortgage Payment below the target payment.

Loan Modification:
1. Calculate the target total Mortgage Payment:
   A. Calculate 30% of gross income
   B. Calculate 80% of current total Mortgage Payment
   C. Calculate 25% of gross income
   D. Take the greater of B and C
   E. Take the lesser of A and D
2. Calculate total Mortgage Payment on the total outstanding debt to be resolved at the market interest rate[3] and 360months' term.
3. If the result of Step 2 is at or below the result from Step 1E, then the Borrower is eligible for an FHA-HAMP Standalone Loan Modification only at the market interest rate; otherwise go to Step 4.
4. Calculate amount required to meet target payment.
   A. Reduce loan balance used in Step 2 until calculated Mortgage Payment reaches target amount from Step 1 or else the maximum allowable deferment is reached per amount available as calculated above per instructions in the "Partial Claim" section.
   B. If the final Mortgage Payment is greater than 40% of current income, and the unemployment status is verifiable, then the Borrower is eligible for a reduced payment option under the Special Forbearance.
   C. If there is no verifiable unemployment status and the Borrower has already been reviewed for retention options under the waterfall but does not qualify for any (i.e., the Borrower does not have sufficient surplus income or other assets that could repay the indebtedness), then the Borrower is eligible for FHA's non-retention options.

As mentioned, FHA has five sections on loss mitigation, including a new addition and expansion as it relates to Presidentially Declared Major Disaster Areas (PDMA) options, and COVID-19 Home Retention Options.

Veteran's Administration (VA)

The Servicer Handbook, Chapter 5, covers Loss Mitigation requirements for Servicers. For the VA home retention option, the handbook states, "the home retention option should not be approved unless it is within the borrower's financial ability to reinstate the delinquency."[4]

Home Retention Options include:

- Repayment plan
- Special forbearance
- Loan modification

Additionally, the VA has also announced additional programs considering COVID-19 and the Cares Act[5].

USDA Rural Development (USDA)

For the Single-Family Housing Guaranteed Loan Program, there is a Loss Mitigation Servicer User Guide for Servicers to utilize and review Borrowers for Loss Mitigation[6]. Additionally, in Chapter 18 of the online program Handbook, there is an entire section on loss mitigation[7]. "The servicer must attempt to obtain information on the borrower's financial condition and make an informed determination of the borrower's ability to repay the arrearage and continue making mortgage payments as scheduled. Details on consideration and processing of the below actions are located in the Attachment 18-A, Loss Mitigation Guide"[8]:

Loss Mitigation Guide

- Servicing early delinquent loans
- Informal repayment agreement
- Loss mitigation overview
- General policies, procedures, and minimum actions that constitute effective loss mitigation techniques
- Special forbearance
- Traditional loan modification
- Special loan servicing options
- Pre-foreclosure sale
- Deed-in-lieu of foreclosure

[4]VA Servicer Handbook M26-4, Chapter 5, Loss Mitigation, https://www.benefits.va.gov/WARMS/M26_4.asp

[5]VA Circulars, https://www.benefits.va.gov/HOMELOANS/resources_circulars.asp

[6]USDA Linc Training & Resource Library, https://www.rd.usda.gov/page/usda-linc-training-resource-library

[7]HB-1-3555 SFH Guaranteed Loan Program Technical Handbook, https://www.rd.usda.gov/sites/default/files/3555-1chapter18.pdf

[8]HB-1-3555 SFH Guaranteed Loan Program Technical Handbook, https://www.rd.usda.gov/sites/default/files/3555-1chapter18.pdf

- Servicing plan, checklists, and disposition cost-benefit analysis
- Reporting – ESR and status of mortgage codes

Attachment 18-A referenced above

Disposition (PFS/DIL) Cost Benefit Analysis (Example)

This worksheet is being provided to demonstrate cost savings to Government, as described under 7 CFR 3555.305. Voluntary liquidation methods must demonstrate the expected cos to the Government to be the same as or less than the cost of foreclosure. Other methods of liquidation must demonstrate how the proposal will result in savings to the Government. These options are appropriate for borrowers who have experienced a verified, involuntary inability to meet their mortgage obligation. Borrowers that have abandoned their mortgage obligation or strategically defaulted may not be eligible. For further eligibility clarification, please refer to the "Loss Mitigation Guide" Failure to comply with Agency Regulation, Policies and Guidance may result in a reduction or denial of any future Loss Claim. If you need further assistance, please contact the Customer Servicing Center at 1-866-550-5887.

Voluntary/Other Liquidation Method	
Current Market Value	$180,000.00
[1]Gross Sales Price	$172,500.00
[2]Net Sales Proceeds	$157,482.63
[3]Actual Net Sales Price %	91.294%
Unpaid Principal Balance	$203,325.62
Interest to Settlement Date	$5,622.79
Escrow Shortage	$900.00
FC Cost	$1,513.25
Other Cost	$129.13
Total Debit	**$211,499.79**
Less Net Sales Proceeds	$157,482.63
Total Estimated Less Claim	**$54,008.16**

[1]If no offer is available enter Market Value in lieu of Gross Sales Price.
[2]If no offer is available reduce Market Value by Management Acquisition Factor (14.95%) and enter in lieu of Net Sales Proceeds.
[3]The result of the Net Sales Price divided by the Current Market Value.

Foreclosure Method	
Current Market Value	$180,000.00
[1]Estimated Liquidation Value	$151,200.00
Unpaid Principal Balance	$203,325.62
Interest to FC Sale Date	$6,401.16
Escrow Shortage	$1,100.00
FC Cost	$2,731.55
Other Cost	$129.13
[2]Estimated REO Marketing Cost	$22,604.40
Total Debit	**$236,291.86**
Less Estimated Liquidation Value	$151,200.00
Total Estimated Less Claim	**$85,091.86**

[1]Equal to 84% of the Current Market Value
[2]Multiply Estimated Liquidation Value by Management Acquisition Factor (14.95%)

Cost Savings to the Government: $31,083.70

Florida Foreclosure Mediation

During the financial crisis of 2009 in the United States, Florida experienced one of the highest rates and highest numbers of residential foreclosures in the country. Four states accounted for more than 50 percent of the nation's 2009 total, with more than 1.4 million properties receiving a foreclosure filing in California, Florida, Arizona, and Illinois combined. Florida posted the nation's second-largest total, after California, with 516,711 properties being foreclosed in 2009, in court filings, as Florida is a judicial state, a 34 percent increase from 2008.[9]

Florida Task Force on Residential Mortgage Foreclosure Crisis, March 27, 2009

On March 27, 2009, Florida Supreme Court Justice Peggy A. Quince established a 15 member Task Force on Residential Mortgage Foreclosure Crisis to recommend strategies for "...easing the backlog of pending residential mortgage foreclosure cases while protecting the rights of parties." The task force focused on mediation and other alternative dispute resolutions (ADR), with a deadline of August 15, 2009, for a final report. Stakeholders from various industry groups, including judges, plaintiffs, and defense counsel, and ADR specialists comprised the task force.[10]

In their Interim Report dated May 8, 2009, the task force noted that Florida foreclosure court filings increased from 74,000 cases in 2006 to 370,000 in 2008, an increase of 400%, without an increase in court infrastructure. Some of Florida's 20 judicial circuits had higher increases: 20th circuit, in southwest Florida, saw a 788% increase from 2006 to 2008, and the 12th circuit, in central west Florida, saw a 631% increase. The task force sounded an alarm about the increasing foreclosure rate in Florida and favored a uniform, statewide response, once the court system had jurisdiction.[11]

The introduction to the task force's final report dated August 17, 2009, began as follows:

> Picture this: the biggest road out of town. Imagine it is rush hour. In a thunderstorm. Add that it is also a hurricane evacuation. A lane is closed due to construction delayed by budget impacts. Imagine the traffic jam.

The clearest description of the impact of the foreclosure crisis and the following recession on Florida's courts can be summarized by that picture. Imagine every car is a case. The General Jurisdiction Courts of our state have a certain amount of judicial infrastructure, just like there is a certain amount of room on the road. There is a certain capacity of judges, of court staff, of clerks, of filing space, of hearing time, of courtrooms, even of hours in the day. Year in, year out, that capacity flexes with the caseload traffic to afford reasonable, prompt, efficient, and fair justice.

This is very vivid imagery in the state of Florida, and the task force wanted to emphasize the very real revenue crisis in the Florida court system which was being flooded by the foreclosure crisis.

[9] https://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2010-01-14%20RealtyTrac%20Year-End%20Report%20Shows%20Record%202.8%20Million%20US%20Properties%20with%20Foreclosure%20Filing.pdf

[10] https://www.floridasupremecourt.org/content/download/240707/file/AOSC09-8.pdf

[11] https://www.floridasupremecourt.org/content/download/242887/file/05-08-2009_Foreclosure_TaskForce_Interim_Report.pdf

Their recommendations reflected the lack of state revenue available to increase system capacity, including additional staffing. The task force too lacked funding for in-person meetings, so reminiscent of pandemic remote meetings, met a total of 50-75 hours over four months in mostly telephonic and video conference meetings.[12]

The task force recommended the adoption of a uniform, statewide managed mediation program, including the following:

- A model administrative order issued by each circuit chief judge which includes:
  - o Referral of the borrower to foreclosure counseling before mediation.
  - o An early exchange of borrower and lender information by way of an information technology platform before mediation.
  - o Allowing the plaintiff's representative to appear telephonically, but borrowers and plaintiffs' counsel appear in person.
  - o Borrowers not required to pay a fee to participate, expense borne by plaintiffs.
- All residential homestead property foreclosure cases will be referred to mediation, unless parties agree otherwise, or unless pre-suit mediation is conducted.
- Conducted by a Florida Supreme Court certified circuit court mediator.
- Vacant and abandoned properties not included but instead, foreclosure can be expedited.
- Tenant occupied properties can opt-in.
- Model forms provided too.

The task force heard from and documented feedback from a variety of stakeholders: plaintiffs' firms, defense firms, servicers, and consumer legal services groups, as well as reviewed scholarly articles about the foreclosure court crisis. The stakeholders often were at odds with one another, but the task force identified what they saw as the main issue: lack of effective communication early in the legal process.

The most critical case management issue in the foreclosure crisis is the severe and significant communication issues which are impeding early resolution of foreclosure cases. The plaintiffs complain of being ignored by borrowers despite multiple efforts and outreach, the borrowers complain of being unable to get through to loss mitigation departments, being asked to send and resend the same financial information repeatedly and being unable to get a decision on their case.[13]

Florida Supreme Court Order dated December 28, 2009, Mandates Residential Foreclosure Mediations

On December 28, 2009, Florida Supreme Court Justice Peggy A. Quince signed the order requiring mediation in residential foreclosure cases, which traced the recommendations from the Task Force. The 105-page order contained 95 pages of guidelines and template forms to use with the mediation program. Fees, paid by plaintiffs, were set at $750.00 per mediation, with $400.00 paid upfront for administration costs, and then $350.00 paid for the mediator at the time of mediation.[14]

[12]https://www.floridasupremecourt.org/content/download/242871/file/Filed_08-17-2009_Foreclosure_Final_Report.pdf

[13]Id, page 28.

[14]https://www.floridasupremecourt.org/content/download/242863/file/AOSC09-54_Foreclosures.pdf

The mediation process was as follows:

- Form A- homestead, TILA loan, representative, and borrower contact information are filed with the foreclosure complaint.
- Notice of available mediation is attached to the summons which is served on borrowers.
- Mediation programs that are established in each circuit affirmatively reach out to borrowers to set the mediation.
- A $400 nonrefundable fee paid by the plaintiff at the time of filing the case.
- Mediation must be completed within 120 days of filing the case.
- Upon borrower request, the plaintiff must disclose owner and holder of mortgage and note, payment of history, the net present value of the loan- modified cash flow vs. foreclosure costs, most recent appraisal.
- Borrowers are required to receive HUD counseling, provide HAMP-type financials and desired outcome.

A year later—December 28, 2010

On December 28, 2010, exactly a year after the order implementing the program, a Mortgage Foreclosure Subcommittee established by the order tracked the progress of the mediation programs and issued a report on the program's efficacy. As of July 1, 2010, six months after the start of the program, only seven of Florida's twenty circuits were able to collect data.

This subcommittee focused on a couple of data points: how timely was the outreach to borrowers to determine whether they want to participate in mediation; what were borrowers' responses once they were contacted; and what did the written settlements say about effective outcomes?

The Mortgage Foreclosure Subcommittee provided some limited statistics, again, from seven of twenty circuits who had reporting capabilities, which showed that less than half of eligible cases participated in the program, less than half of the eligible borrowers were contacted, and almost two-thirds of the mediations did not result in written settlements.[15]

Almost two years later—September 26, 2011

On September 26, 2011, Florida Supreme Court Justice Charles T. Canady appointed a six-person Statewide Managed Mediation Program Assessment Workgroup to evaluate the efficacy of the managed residential foreclosure mediation program, noting that "...the program was intended to be a temporary response to an emergency arising from an extreme and unprecedented number of foreclosure filings in the circuit courts."[16]

The workgroup issued a report on October 21, 2011, after reviewing data and comments from stakeholders, recommended eliminating the mandate for a statewide managed mediation program and allow the individual circuits to opt in to a new, revised uniform model administrative order.

[15] https://www.floridasupremecourt.org/content/download/242861/file/12-28-2010_Foreclosure_Mediation_Report_1.pdf

[16] https://www.floridasupremecourt.org/content/download/240820/file/AOSC11-33.pdf

The workgroup recommended that the following changes be made to the model order issued on December 28, 2009:

- Require borrowers to opt into the program at the time of service of process.
- Improve the integrity of borrowers' financial information and lenders' contact information.
- Improve document exchange and document review performance and requirements.
- Determine how the correlation between bankruptcy and the program.
- Implement sanctions for noncompliance.
- Explore borrower contributions to fee.
- Shorten timeline for completion of the mediation.
- Track post-mediation settlements.

Interestingly, though the workgroup recommended eliminating mandatory mediation, they noted evidence indicating plaintiffs/servicers "...resisted providing representatives at mediation with full settlement authority to settle and refused to consider more than a narrow range of settlement options, most of which were of little value to borrowers. Servicers had economic incentives not to settle and to keep foreclosure cases in limbo to avoid the expenses that accompany homeownership."17

End of the Florida Residential Foreclosure Managed Mediation Program, December 19, 2011

Florida Supreme Court Chief Justice Charles T. Canady, in a two-page order, without any explanation other than to say that the Court reviewed reports and cannot justify the continuation, terminated the program.18

The Foreclosure Initiative Workgroup issued another report on April 10, 2013, which was followed by an Order issued on June 21, 2013, by Florida Supreme County Chief Justice Ricky Polston directing each of Florida's chief judge in the twenty judicial circuits establish a case management plan to resolve foreclosure cases and that clerks and courts continue to compile data regarding foreclosure cases.19

Contrast with U.S. Bankruptcy Court Mortgage Modification Mediation (MMM) Program—U.S. Bankruptcy Court, Northern, Southern, and Central District of Florida

In contrast, the MMM program is not a mandatory mediation but is a program established by many bankruptcy courts which creates a set of procedures for qualifying debtors to begin a mediation process with their mortgage lenders for a loan modification. The lender can also initiate the mediation. Neither party is obligated to reach an agreement, though good-faith negotiation is required.

[17]https://www.floridasupremecourt.org/content/download/242860/file/10-21-2011_Workgroup_Final_Report.pdf

[18]https://www.floridasupremecourt.org/content/download/242858/file/12-19-2011_Order_Managed_Mediation.pdf

[19]https://www.floridasupremecourt.org/content/download/242859/file/04-10-2013_Foreclosure_Report.pdf;
https://www.floridasupremecourt.org/content/download/240924/file/AOSC13-28.pdf

While each court has adopted slightly different procedures for its MMM program, the basics are the same:

- Chapter 13 debtor or lender petitions the court for MMM, debtors usually required to dedicate 31% of their gross income to a modified mortgage (or, for some, 75%-100% of the current monthly mortgage payment.)
- Each party pays an amount (typically between $200-$400) for the mediation fees and agrees to split any additional costs evenly.
- The modification agreement is then approved by the court.

The U.S. Bankruptcy Court for the Middle District of Florida implemented its MMM program on February 1, 2013, and continues to improve the program, with the latest process found online here.

The Northern and Southern Districts of Florida soon followed and established their own MMM programs. The MMM programs have been expanding to other bankruptcy districts and are effective enough to maintain the programs, in contract with Florida's program. Why the difference?

By virtue of filing a bankruptcy case, borrowers have some tools not available in state court, namely, the automatic stay which gives time without the threat of an ongoing foreclosure case; the ability to strip off unsecured junior mortgages in Chapter 13 cases; and discharging substantial amounts of credit card, medical, and other unsecured debts in bankruptcy that allow better cash flow for a modification.[20]

Contrasted with the Florida program, rather than requiring an initial outreach to borrowers and mandatory payment of a $400.00 fee by plaintiffs, the bankruptcy MMM program is initiated by either party, which then triggers adherence to certain requirements. MMM programs have been in place for several years and the antidotal feedback for stakeholders is that it works and is worth keeping, albeit with modifications as needed.

With the next financial crisis looming over student loan debt, the Middle District of Florida implemented a Student Loan Management Program which operates similarly to the MMM program. With a looming financial crisis connected with the Covid-19 pandemic, all stakeholders are evaluating and anticipating the implementation of loss mitigation programs. Might the Florida and bankruptcy mediation models hold value for pandemic workouts? It appears that the MMM model, which is ongoing, could be adapted to assist with the resolution of pandemic related bankruptcy filings.

What is Mortgage Modification Mediation?

Mortgage Modification Mediation, more commonly known as "MMM," is a court-ordered and supervised loss mitigation program that takes place via the bankruptcy court. Typically, the process begins with the debtor filing a motion for referral to mortgage modification mediation and the bankruptcy court entering an order directing the parties to mediation. Depending on the jurisdiction, this process is available in Chapter 13, 11, and "7".

[20] https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1334&context=cl_pubs

Why is MMM Successful?

On average, the MMM program has a 75% success rate. The main attribution to the high success rate has to do with the fact that the parties communicate via a secure portal. For instance, once the MMM order is entered, counsel for the debtor, counsel for the lender, the lender, and the mediator register on a secure portal. All communications, including document submission, must be via this portal, thus avoiding crucial documents and communications being delayed (or not arriving) via the mail as well as documents going stale. For example, if the lender notices that the RMA is not filled out properly, the lender may send a quick message in the portal advising the same. This message is transmitted to all parties, as well as the mediator. The same applies if the lender needs further documentation to clarify any discrepancies in the application.

Mediation conferences also lead to success. Depending on the jurisdiction, most MMM orders provide for a maximum of two (2) one (1) hour mediation conferences. The parties also split the cost of the mediation, including the mediator's fee, which is set by the court. It is not uncommon for a mediation to be held before a decision on the loan modification being reached. This typically occurs if there are issues in the loan application and or discrepancies that cannot be resolved via messages. It is helpful when all parties are together (via remote means) and able to discuss and work to resolve the issues.

Moreover, in the event of loan medication denial, a mediation after a denial letter may result in a loan modification. This is because the lender will be able to explain the reason for the denial. Most often either the debtor's counsel or the mediator will ask the lender representative what is needed for the debtor to qualify for a modification. This could be either showing an increased income (i.e. contribution income from other family members) or even a simple letter of explanation that can be sent to the underwriters. Sometimes a modification is simply not feasible either due to lack of income, investor requirements, or other factors that may not be known to the debtor. A mediation conference may be used to explain these reasons, thereby diminishing any false hope the debtor may have in the future regarding loss mitigation.

The final reason MMM is successful has to do with the good faith requirement. Most orders require that all parties participate and mediate in good faith. This means that the debtor must submit all documents promptly, the lender must timely review and notify the debtor of any missing documents, and all parties must respond to messages and requests on time. In the event either party is not adhering to the terms of the order, the other party may file a Motion to Compel Compliance or a Motion to Vacate. In either case, the matter then goes before the bankruptcy judge assigned to the case who will issue a ruling—sometimes in the form of a sanctions order against the lender or vacating the MMM order if the at-fault party is the debtor.

Basic MMM Fundamentals

There are several uniform requirements of the MMM program, although some may vary from jurisdiction to jurisdiction. They are as follows:

- The debtor is required to provide adequate protection payments to the lender. These payments are either 31% of the gross monthly income (if homestead property) or 75% of the rental proceeds (if investment property.)
- The parties are required to split the mediator's fee. The fee ranges from $500.00 to $600.00 depending on the jurisdiction. This fee usually includes two (2) mediations.
- Parties are required to mediate in good faith, including timely submitting documents.
- In the event the mediation results in an impasse, the Debtor is required to amend/modify the plan to either conform to the proof of claim or treat the property outside.

THE LEGAL LEAGUE 100

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