

# **Appendix L**

**Minority Report (Haworth)**

## Minority Report on the Issue of Plaintiffs' Payment of All Mediation Costs

### **I. Funding the Mediation Process - The Majority Position Summarized**

The majority of the Task Force recommends to the supreme court the adoption of a procedure whereby the borrower does not contribute financially to the mediation management fee, including that the borrower does not pay for foreclosure counseling. All costs are paid by the lender/servicers<sup>1</sup> per the Model Administrative Order (MAO), and are fully recoverable in the final judgment of foreclosure. This fee is to be paid in installments depending upon the willingness of the borrower to perform at various stages of the process, and allows for rebate of part of the fee when the borrower fails to meet with a “foreclosure counselor,”<sup>2</sup> or when a mediation session does not occur.

It should be noted that the Task Force is not recommending a particular charge for mediation, leaving that decision for later determination. However, to illustrate the issue, \$750.00 will be used as an example. This is the charge currently being assessed against plaintiffs for foreclosure mediation in several circuits. The following is a realistic example of a tiered payment plan discussed by the Task Force, using a fee of \$750.00:

**Tier 1:** Upon filing a complaint against any residential mortgagor, plaintiff would be required to pay the Program Manager an initial fee of \$400. This would cover the Program Manager’s cost of outreach to borrowers, payment for the borrowers’ individual foreclosure counseling, and for the administrative costs of collecting, organizing and uploading to a web-enabled information platform the financial data required of the borrower.

If the borrower declines participation in mediation, cannot be contacted, or fails to attend counseling, plaintiff is refunded \$125.00, the projected cost of counseling.

**Tier 2:** Plaintiff pays \$350.00 when mediation is scheduled. If mediation does not occur or is scheduled but canceled more than 5 days in advance, the plaintiff is refunded \$350.00.

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<sup>1</sup> For simplicity, the term “lender/servicer” will be used, although more accurately plaintiffs may be described as trustees appearing on behalf of securitized trusts; or agents appearing for trustees of securitized trusts; or an agent appearing on behalf of a servicer who is the agent of the trustee of a securitized trust.

<sup>2</sup> As defined in the AO, “foreclosure counselor” shall mean a counselor trained in advising persons of options available when facing a mortgage foreclosure, who has no criminal history of committing a felony or a crime of dishonesty, and who is certified by US Department of Housing and Urban Development (HUD) or National Foreclosure Mitigation Counseling Program (NFMC) as an agency experienced in mortgage delinquency and default resolution counseling.

## **II. Funding the Mediation Process - The Minority Position**

A minority of Task Force members contend the expense of mediation should not be borne alone by lender/servicers. If such expense cannot be publicly funded, which is their preference, the minority argue that non-indigent borrowers should be required to contribute to the process.

At the beginning of its work the Task Force adopted guiding principles, including the following:

- \* Its recommendations will be cost effective and affordable.
  
- \* The Task Force will be responsive to the needs of various stakeholders in designing and implementing case management and ADR process.

The majority position proposing mediation to be funded exclusively by plaintiffs is inconsistent with these principles.

### **A. Procedures adopted in the Model Administrative Order have a substantial financial impact on lender/servicers**

To comply with the attendance provisions of paragraph 13 of the MAO, during each mediation session plaintiff is required to provide:

- a. an attorney, who is to be physically present;
- b. an agent, who is to be physically present and vested authorized to sign any settlement agreement reached, which also may be the attorney;
- c. a representative with full authority to approve a settlement and who may appear by telephone or video conference, assuming proper notice is given.

Today lender/servicers may not have the resources needed to meet the demands imposed by the MAO. Expense to provide agents even by phone or video conference for each mediation session would be considerable. One informed estimate projects 30,000 cases eligible for mediation in Dade County alone. Given the unprecedented number of cases statewide that are mediation-eligible, the cost to lender/servicers of complying with an order requiring them to provide agents to attend mediation sessions electronically or in person could be prohibitive.

The Model Administrative Order adopted by the majority follows an approach successfully used in the state to mediate other legal disputes. Under contracts with the Florida Office of Insurance Regulation and paid for by legislative grants, the Collins Center for Public Policy successfully mediated or arbitrated nearly 20,000 life insurance disputes and about 30,000 hurricane related insurance claims. However, these numbers pale in comparison with the massive number of foreclosure cases that will qualify for mediation in Florida. The expense associated with meeting the requirement of providing lender agents to attend mediation has yet to be calculated, nor has it not been determined whether such an accommodation is economically feasible for plaintiffs.

Currently, lender/servicers do not have enough personnel in-house to accommodate telephone or video conference appearances for the large number of mediations that courts will order statewide, and assuming cost issues relating to recruiting additional personnel were resolved, lender/servicers cannot predict how long it would take to ramp up to timely meet the staffing demands of the MAO. There could be significant start-up delays, with lender/servicers struggling to meet the timelines imposed by the MAO. While the foreclosure crisis is serious, and deserving of accelerated action by the courts, there is no guarantee that the lender/servicers will be logistically or financially capable of quickly marshalling the resources necessary to meet the emergency requirements being recommended to the court.

Aside from the expense of providing enough representatives to attend mediation, if 30,000 cases are mediated in Dade County, at the projected rate of \$750.00 per case, mediation would cost plaintiffs **\$22,500,000** in Dade County. Half a million mediated foreclosures statewide, which is not an unreasonable estimate, could potentially cost lender/servicers **\$375 million**.

In summary, a key question remains unanswered: Do the lender/servicers have the financial resources to meet the demands of such a costly mediation program, even if their agents with full authority to settle are allowed to participate by phone or video conference.

#### **B. Lender/servicers' costs continue to escalate nationally and statewide**

Lender/servicer opposition to paying all mediation costs must be seen in the context of other developments, some specific to the State of Florida, and some that are impacting lenders at the national level.

The majority proposal to have lender/servicers pay all mediation costs should be considered in light of recent action by the Florida legislature. Effective June 1, 2009, section 28.241, Florida Statutes (2009) imposes substantial fees upon plaintiffs filing foreclosures: \$395.00 for mortgages having a value of \$50,000 or less, \$900.00 for mortgages between \$50,000.00 and \$250,000.00, and \$1,900.00 for mortgages above \$250,000.00. Such fees are unprecedented in the state and are seriously straining the resources of all lender/servicers filing foreclosure actions in Florida.

On a national scale, expenditures of funds are being required of lender/servicers in an effort to comply with various federal laws and regulations. For example, under the Home Affordable Modification Program Guidelines (HAMP) effective March of 2009, as a condition of receiving funds from the Troubled Asset Relief Program (TARP), lender/servicers must commit to participating in mortgage foreclosure mitigation programs consistent with Treasury Department guidelines released as part of its Making Homes Affordable mortgage modification initiative. This has led to increased lender/servicers' costs to provide personnel sufficient to staff pre-suit and post-suit loss mitigation discussions with their borrowers.

### **C. Practical Considerations Favor Borrower Financial Contribution**

The minority position is that mediation without buy-in by the borrowers opens the door to defendants who, with no money invested in the process, will see this as an opportunity to delay the inevitable. Those who are not serious about a work-out, whose cases are legally or economically hopeless, may accept the invitation to mediate simply as a means of stalling litigation. This will result in a waste of the mediator's time and a needless expenditure of lender/servicers resources. Requiring some form of contribution on the part of those who have the ability to pay will act as a filter or screening mechanism, making it more likely that those who are sincere about resolving their cases will participate.

### **D. State law requires litigants to pay for other court programs and for mediation**

Under the majority plan many borrowers receiving foreclosure mediation services would have the capacity to make some contribution toward the expense but would receive the services for free. Among this group are individuals who have defaulted on their mortgage obligations over the course of several months, and who are living free of their largest housing expense while the foreclosure process moves to its conclusion. Not all borrowers are unemployed, destitute, or incapable of paying a modest fee. The position of the minority is that those who can pay should pay.

In other situations state law requires litigants to contribute toward court ordered services. In family law cases parties referred to mediation must pay to gain access to the court's in-house mediation service - \$60.00 for those whose combined income is \$50,000 or less, \$120.00 if the combined income is between \$50,000 and \$100,000. Persons whose combined income exceeds \$100,000 are required to hire a private mediator; section 44.108, Florida Statutes.

Persons determined to be indigent but who qualify for the services of the public defender or for a court appointed attorney in dependency cases are required to pay a \$50.00 application fee; section 27.52 (1)(b), and section 57.082 (1)(d), Florida Statutes. Persons unable to pay court costs, fines and fees, are routinely ordered to pay additional fees to participate in a collections court or DUI court. (Ninth Judicial Circuit Administrative Order 07-99-26-5 – Collections Court fees; Tenth Judicial Circuit Administrative Order 2-72.1 – DUI Drug Court fees.)

In other civil cases, Florida Rule of Civil Procedure 1.720(g) contemplates compensation being paid by both parties referred to mediation. It invests judges with authority to determine the reasonableness of the fee and requires the parties to pay a proportionate share of the total charges. Exempting one of the parties from contributing to mediation in foreclosure cases is an exception not justified by the history of mediation in our state.

While the majority proposal allows for the cost of mediation to be added to the final judgment, in reality this is an illusory reimbursement. Almost all of the residences being foreclosed have a value below the total of the mortgage balance and litigation costs. Without equity in the property, an award of mediation costs is worthless.

### **III. Alternate proposal for borrower payment**

#### **A. Plaintiff and non-indigent borrower each pay one-half of the mediation fee**

Without conceding the issue of whether compliance with an order requiring large numbers of plaintiffs' agents to participate in mediations is financial sustainable, the minority suggests both sides pay half, according to the following scheme, using \$750 as a reasonable mediation charge:

Lender/servicers would pay \$375.00 to the manager when suit is filed. This would be expended by the manager as follows:

\$125.00 for foreclosure counseling

\$250.00 for Program Manager administration, including outreach to borrowers

If the borrower could not be contacted or declines mediation prior to counseling, or counseling does not occur the \$125.00 counseling fee would be refunded to plaintiff. The \$250.00 is retained by the manager.

If counseling did occur, the borrower would be required to pay \$375.00 within 10 days of scheduling of mediation. This would be allocated between the manager and the mediator pursuant to their contract.

If mediation is cancelled prior to 5 days before the scheduled mediation, \$350 is refunded to the borrower. \$25.00 is retained by the manager for its administrative costs.

If the session is cancelled within 5 days of mediation, the manager retains the \$375.00, to share with the mediator per their arrangement.

An alternative Model Administrative Order incorporating this proposal is attached as an exhibit to this Minority Report.

#### **B. Plaintiff pays 75% of the mediation fee for the indigent; manager and mediator accept reduced fee**

The policy of the state as expressed through the courts and the legislature is that the indigent receive without charge those court services that are necessary to effectively participate in civil litigation. For example, Chapter 57, Florida Statutes, sets forth the procedure for the determination of indigent status for certain types of court services. A person who asks to be declared indigent and who meets the criteria of section 57.082 (which requires disclosure of assets, liability and income) is exempt from paying court costs, and is entitled to free court-subsidized mediation services. The statute provides a model for indigency determination that may be instructive in foreclosure cases. Section 57.081(1) in pertinent part says:

Any indigent person \* \* \* who is a party \* \* \* in any judicial or administrative agency proceeding or who initiates such proceeding shall receive the services of the courts \* \* \* with respect to such proceedings, despite his or her present inability to pay for these services. Such services are limited to \* \* \* mediation services and fees; \* \* \* and any other cost or service arising out of pending litigation.

Under this statutory scheme, the clerk makes a threshold determination of indigency. If the applicant is declared not to be indigent, he or she is entitled to have the issue reviewed by the court having jurisdiction over the matter; section 57.082 (2).

In addition, section 57.082(2)(a)(2) provides:

There is a presumption that the applicant is not indigent if the applicant owns, or has equity in, any intangible or tangible personal property or real property or the expectancy of an interest in any such property having a net equity value of \$2,500 or more, excluding the value of the person's homestead and one vehicle having a net value not exceeding \$5,000.

When it comes to homestead foreclosure cases, it can be anticipated that a number of homeowners will be indigent.

Consequently, when the court initiates its foreclosure mediation program accommodation must be made for the indigent to insure they can access services to the same extent as a paying party. See, also, section 44.108(1), Florida Statutes, (mediation should be accessible to all parties regardless of financial status).

In indigency cases it is suggested that plaintiffs be required to pay 75% of the total mediation fee, and that the Program Manager and mediator, after foreclosure counseling is paid, accept the balance in full payment of their services. As an example, assuming the typical fee to be \$750.00, plaintiffs would pay \$562.50, rounded to \$563.00. The sum remaining after payment of counseling services, \$438.00, would be available for remittance to the manager and the mediator, in an allocation to be determined between themselves. The mediator's fee can be attenuated by requiring them to contribute a number of *pro bono* sessions for the indigent as a condition of their eligibility for employment in full-pay foreclosure cases.

Contribution toward the cost of mediation from parties who have the ability to pay is critical to sustaining a plan that will support foreclosure mediation for the indigent. Without public funding, the only entity available to pay is the lender/servicer, and without having non-indigent borrowers contributing to the cost of mediation in their own cases, an unacceptable financial burden is imposed on plaintiffs.

All members of the Task Force support the concept of public funding of foreclosure mediation. In the past, the legislature has appropriated funds to allow the Florida Office of Insurance Regulation to contract with a vendor to mediate large number of hurricane damage and life insurance claims. The foreclosure crisis confronting the courts is too large for a single vendor, but it justifies a comparable approach.

#### **IV. Summary**

Requiring financial contribution by both parties is consistent with current Florida mediation law and practice. In foreclosure cases it will act as a screening mechanism to separate those borrowers who are serious about mediating from those who are not. Those with the ability to pay should contribute to a process that will benefit both parties.

The minority respectfully suggest it would be inequitable and imprudent to adopt by judicial fiat a mediation program which requires plaintiffs to subsidize the entire cost of the mediation process, when many defendants retain the ability to share the expense and where the imposition of an onerous charge could have profound and unintended economic consequences for the entity forced to advance the money.

Lender/servicers do not have unlimited resources, but even if they did, a court sponsored system that puts the entire cost of mediation on their shoulders is fundamentally inequitable and should not be part of a judicial system that strives for fairness for all parties.

Respectfully submitted,

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