BROOKS BAUER LLP

Highlights from the Public Hearing for the Foreclosure Mediation Program December 6th of 2010

The Nevada Supreme Court held a public hearing on December 6, 2010 in the Las Vegas Supreme Court Chambers with all seven (7) Supreme Court justices in attendance. In the past, the Court has issued its final Rules Amendments within 3 - 4 weeks after the public hearing. Set forth below are a series of highlights of the issues that affect lenders/servicers and trustees in the preparation for and participation in the Foreclosure Mediation Program ("FMP").

1. The Administrative Office of the Court's Report on the First Quarter of 2010-2011.

Verise Campbell from the Administrative Office ("AOC") of the Supreme Court provided the Court with the relevant statistics for the first quarter of fiscal year 2010-2011. Unfortunately, I can only say that the statistics were quite vague on a number of fronts and did not provide answers to some of our most important questions. We learned that in 89% of the files where mediation was elected, there were no certificates allowing the foreclosure to proceed. In essence, the statistics tell us that the Foreclosure Mediation Program is where foreclosures go to die.

Statistics for the first quarter (July 1-September 30, 2010).

- Approximately 15% of all the NOD's elected to mediate.
    - Our review of the numbers shows that the actual percentage was closer to 10%.
- Of the 15% that elected mediation, 89% have resulted in the homeowner being able to stay in their home. In other words, only 11% got certificates according to the Administrative Office of the Court.
    - The actual numbers provided by the AOC make it appear as though no certificates issued once mediation was elected.

Of those that elected mediation:

- 1800 cases were mediated during the first quarter.
    - We think this is an approximate number.
- 436 Mediations ended in no agreement and no certificate issued.
- 457 Agreed to vacate.
    - It is unclear whether a certificate issued. However, Ms. Campell has made it clear that she has no authority to issue a certificate where the parties reached an agreement even if it was an agreement to vacate.

- 916 Mediations reached an agreement such as a modification or short sale.
    - No Certificate Issued.

Based on these numbers provided by Ms. Campbell, there were no certificates issued when the borrower elected mediation in the first quarter.

None of these numbers address the larger issue which is that those files wherein the borrower has not elected mediation are not timely receiving certificates to be able to proceed with foreclosure.

2. Conflicts and Bias of Mediators.

A rule change was proposed that would preclude lender or borrowers representatives from acting as mediators in the program. This is much broader that the Rules of Ethics would require in a situation where an attorney has an ethical obligation not to sit as a mediator in a case where there is an actual conflict. It would create a presumption of an actual conflict even when you simply act as an advocate for either borrowers or lenders.

There were arguments and numerous witnesses on both sides. Those in favor of the rule change argued:

1) Many mediators will act as mediator involving a lender and then that same afternoon act as counsel for a borrower in a different mediation against the same lender.
2) A party who represents lenders or borrowers is not able to be objective as a mediator.
3) A borrowers' attorney that acts as a mediator can obtain loan modification proposals and information shared in confidence that can be used against the lender in a subsequent mediation.

Those arguing against the proposed rule change stated:

1) The best and most efficient mediators in the program are also representatives of borrowers or lenders because of their working knowledge of the industry.

A third option was addressed:

1) Simply hold parties to compliance with the rules of professional conduct and expect them to recuse themselves whenever there is a direct conflict with a particular borrower or lender.

In the end, some type of change will be made, but what it will be is not entirely clear.

3. Proposal to Limit a Trustee's Ability to Rescind a NOD and Restart a Foreclosure Sale Once Mediation has been Elected.

There is a perception that lenders are choosing to rescind a Notice of Default and restarting a foreclosure sale everytime the borrower elects to mediate in an effort to discourage the borrowers participation in the FMP. Most of this evidence is anecdotal. However, it has happened that the lender has chosen to start a sale over again after an adverse ruling on a mediation or after a petition for judicial review. In essence, the proposed rule would provide that a foreclosure trustee may rescind the NOD but they will be subject to the ongoing mediation process regardless of the initiation of a new NOD.

Rande Johnson spoke on behalf of the UTA and addressed the problems that can be created by limiting a trustees ability to manage its files. Also, Rande pointed out that the there are a number of reasons for rescission of a Notice of Default and that alternative solutions should be examined.

Based on comments from the Supreme Court, the primary concern was that the borrower was left having to file a new election and pay a new fee. Eventually, the court felt that the borrower would just give up rather than pay the $200.

4. Allows an Uncompensated Person Holding a Power of Attorney to Represent the Borrower.

During the last rule change, the Court placed strict limits on those that could act as representatives for borrowers. In an attempt to loosen that requirement ever so slightly, the rule proposes to allow uncompensated individuals with a properly executed Power of Attorney to act as the borrower's representative. The Supreme Court was not clear on whether that meant the borrower still had to be there or not.

It is not clear where this is coming from. Anecdotally, there were recounting of times when borrowers were left to rely on relatives to appear for them. However, it would best serve the interests of the real estate agents that are attempting to get time to complete a short sale. They are presumably not compensated for the mediation but will receive compensation upon the sale of the property.

5. Extension from 15 to 30 days for Filing of a Petition for Judicial Review from the reception of the mediator's statement.

This provision is rather self-explanatory. The purpose was to give the parties more time post-mediation to finalize their agreements before a party had to file a petition. In most respects, the 15 day cut-off has been meaningless because the judges are not denying/dismissing petitions for judicial review due to a failure to comply with the 15 day cut-off.

6. Documents required by Governmental Entities.

This provision allows a mediator to add to the list of documents that the borrower must produce, anything "required by a governmental entity." In theory, having these documents will be extremely helpful to the success of the mediation. However, there were concerns raised about unrepresented debtors who may have trouble navigating Lender forms for HAMP and HAFA.

7. Provision allowing for Issuance of a Certificate where the Borrower Wishes to Vacate.

This is a helpful section which will allow the borrower to enter into an agreement where they vacate the premises and authorizes the release of the certificate of sale to the servicer in conjunction with that mediation. The language is quite vague in some areas. Further, it assumed a vacate date prior to the issuance of a foreclosure certificate and a foreclosure sale when the lender cannot even obtain access to the premises. As a result, some testimony was taken on allowing the borrower to remain in the premises and allowing the certificate to issue so that the date to vacate can occur at or near the time of the foreclosure.