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Re: Proposed Amendments to Foreclosure Mediation Rules

Analysis of the proposed amendments to the Foreclosure Mediation Rules

The United Trustees Association (UTA) offers the following comments about the proposed Foreclosure Mediation Rules for two primary purposes:

1) to increase certainty and efficiency in the mediation and foreclosure process; and
2) to reconcile the disparity in treatment between borrowers and lenders.

Rule 3(1)

UTA commends the change that a mediation shall "conclude within 90 days" of assignment. Oftentimes, mediation negotiations are frustrated because the parties are placed in a position where decisions and agreements are compressed into a short four-hour window. This change will allow the mediation to be continued, which will provide clarity in the negotiation and decision-making process for both borrowers and lenders.

Rule 11(1)

UTA believes that an "exchange of document conference" may be beneficial to the mediation process, as it ensures that all documentation is exchanged prior to the mediation. But UTA contends that this rule can be given even further utility.

Specifically, a common tactic by borrowers at mediation is to review all documentation with a "fine-tooth comb" in an effort to find any deficiency that would prevent the foreclosure from proceeding. In other words, many borrowers use the document requirements as a sword for the sole purpose of stopping foreclosure. By way of example, when a borrower cannot pinpoint a deficiency in a core document, they may result to nitpicking about the BPO (i.e., an argument that the BPO's "computation of capitalization" does not comply with NRS 645.2515(3)(c)). Such an argument is contrived to avoid the issuance of a foreclosure certificate, as a "computation of capitalization" is far beyond the scope of the mediation. Such an argument only will result in a petition for judicial review that causes delay and unnecessary expense to all parties. Yet, borrowers often resort to such tactics to stop foreclosure.

Accordingly, UTA proposes that the document conference act as a gateway to mediation, **effectively taking any discussion over the adequacy of documents out of the mediation room**: Perhaps a mediator may issue a determination of all documentation prior to mediation, and give the parties an opportunity to fix any defects before the mediation commences. This process would also allow a mediator to seek advice from the FMP regarding "grey areas" (i.e., evidence of transfer when a Note is not endorsed; see, *Leyva*). In other words, there should not be "surprise" objections to the documents during the mediation.

Under the current mediation rules, document production has become more about gamesmanship than legitimacy. If all document issues are resolved prior to mediation, the underlying purpose of the mediation – to discuss resolutions to default – will be the proper focus of the parties.

Rule 11(3). (4), (5), and (6)

UTA offers two objections to the changes in these subsection. First, it is unclear when the "15 days" contemplated in Rule 11(3) begins to run. This can be easily remedied by stating that the documents must be submitted to the mediator and beneficiary "within 15 days of ____".

Second, these subsections demonstrate an inherent disparity in treatment under the rules. Rule 11(3) provides that the "homeowner shall use his or her **best effort**", while 11(4) heightens the standards upon the lender that refuses to request addition documents, in that the lender is "**estopped** from claiming that the review of any option was not possible."

UTA objects to the changes regarding the back-and-forth approval/review of the borrower's documents. Oftentimes, a borrower will re-submit documents at a lender's request, but the re-submitted documents do not address the underlying problems. This frequently occurs with self-employed borrowers who are unable to document they own income in accordance with underwriting standards. Borrowers may submit multiple copies of documents, but if they cannot provide the proper documents, the back-and-forth is futile.

Further, sometimes sufficient documents are provided by a borrower, but they are stale by the time the review occurs at mediation (i.e., if the documents are nearing expiration and the mediation is several weeks away, the documents may be sufficient now but will be expired later). The strict "estoppel" punishment is unduly harsh and is likely to promote antics that will frustrate the effectiveness of mediation.

Moreover, the back-and-forth places an undue burden on the lender to review the documents for sufficiency in a short time frame. Any unforeseen delay in the review, and the lender would be "estopped" from claiming that the review cannot occur. Such punishment is unduly harsh and is likely to promote antics that will frustrate the effectiveness of mediation.

Rule 11(7)(c)

UTA objects to the requirement that a servicer must produce the agreement that gives that party authority to appear at the mediation. This requirement is overly burdensome and unnecessary. In practice, UTA is unaware of any mediation in which a servicer appeared claiming to have authority when such authority did not exist. These servicers are large financial institutions with much to lose by falsely appearing at mediations. This is not a legitimate concern. Further, this issue is not as easily resolved as simply "produc[ing] the agreement" such as a Pooling and Servicing Agreement. Through these securitized trusts, the Pooling and Servicing Agreements are oftentimes quite voluminous and not readily accessible to mediation representatives. Moreover, a simple "authorization" form could not be signed because a securitized trust is an inanimate object without a signature – the servicer is the party with the authority to sign or act on the trust's behalf, which would result in a self-serving authorization form.

Until a rash of rogue servicers begin appearing at mediations without proper authority, UTA contends that a rebuttable presumption of the servicer's authority be implemented.

Rule 11(7)(f)

UTA vigorously objects to the proposed changes based upon NRS 40.451. This rule appears to be based upon a decision entered by Judge Flanagan in the *Kuhl* case in January 2011. However, since the decision in *Kuhl* was issued, numerous authorities, including Judge Flanagan, have rejected such an interpretation of 40.451.

Though unpublished, the state and federal courts have rejected the argument that the amount paid for the assignment of the beneficial interest limits the beneficiary's right to enforce an instrument through a deficiency judgment. For example, see, *Volkes v. BAC Home Loans Servicing, LP*, Supreme Court of Nevada, Case No. 57304 (Feb. 24, 2012); see also, *Interim Capital LLC v. The Herr Law Group, et al,* United States District Court, Case No. 2:09-cv-01606 (Final Judgment, October 21,1011) (stating that limiting a lien to the consideration paid by lienholder would result in a windfall to a borrower who has defaulted on their mortgage obligation).

As the Supreme Court pointed out in *Volkes*, the Nevada legislature's treatment of NRS 40.451's lack of attention by the Legislature also contradicts the meaning that Borrowers attempt to ascribe to the statute. Enacted in 1969 in substantially its current form, NRS 40.451 has been amended only once (in 1989). See, 1969 Nev. Stat. ch. 327, § 3, at 572-73; 1989 Nev. Stat. ch. 750, § 8, at 1769. This lack of attention is particularly noteworthy considering the Legislature's substantial amendment to NRS 40.455 in 2009. Namely, in conjunction with enacting the FMP, the Legislature amended NRS 40.455 to provide a limited and prospective prohibition on a deed of trust beneficiary's right to pursue a deficiency judgment. See 2009 Nev. Stat., ch. 310, §§ 2-3, at 1330-31. In light of its 2009 actions, it is highly unlikely that the Legislature would completely ignore NRS 40.451's potential effect if the statute were intended to apply in a manner consistent with counsel's argument.

In short, this proposed rule change would have the Foreclosure Mediation Program acting in a legislative and judicial capacity by creating a rule that interprets the meaning of NRS 40.451.

Rule 11(8)

UTA is concerned that Rule 11(8) imposes impermissible requirements on many lenders. Subsections (a) and (b) relate to the "Home Affordable Modification Program" ("HAMP") and the "Net Present Value test" ("NPV"). However, both HAMP and NPV are terms associated only with lenders who have accepted government funding – not all lenders participate in HAMP, and thus do not conduct an NPV test.

But for lenders that participate in HAMP, providing the calculations and the NPV formula are unduly burdensome and unnecessary. HAMP modifications are already governed by the federal government's guidelines and criteria for acceptance. Further implementation of rules against HAMP lenders will only encourage participants to reconsider participation and reflect on lending practices in Nevada.

Rule 11.8 also states that the requirements therein "shall" be provided. These requirements are futile in cases in which a borrower is not interested in home retention options. Accordingly, "shall" acts as an inflexible modifier that will create a significant amount of paperwork that is not always germane to the borrower's intentions.

In effect, the changes proposed in Rule 8 will bog down the mediation process in excessive, unnecessary paperwork. Production of proprietary work product and analytics, complex calculations, and pooling and servicing agreements will create an environment in which the arguments over documents will continue to overshadow the meritorious conversation regarding loss mitigation options.

By creating too many rules that govern this process, lenders may be apt to invoke Rule 11(8)(e), by refusing to modify loans in Nevada because of the over-litigation of the mediation process.

Rule 14

UTA commends the changes in Rule 14 for the same reasons stated above under Rule 3(1). Allowing for continuances will foster an environment in which the parties have additional time to work out resolutions to the default.

Rule 16

UTA commends the inclusion of a "Certificate Issuance Date", since the former use of the term "vacate date" referred to the time at which the certificate will issue. The new change provides clarity.

Rule 21(2)

UTA opposes the changes in Rule 21(2), because they highlight the double-standard in treatment between lenders and borrowers. Under this subsection, the purpose of a judicial review is aimed only at the lender's behavior. The subsection makes no mention of the borrower's conduct, document production, good faith participation, etc. In other words, there is no recourse or penalty for a borrower who fails to provide documentation or negotiate in good faith. Such scrutiny of only the lender's actions is innately disparate.

UTA proposes that a certificate be issued and sanctions awarded when a borrower fails to provide the proper documents or fails to negotiate in good faith, regardless of the lender's participation. For example, when a borrower points to any flaw in a lender's documents, that borrower may then disengage from the mediation without repercussion of foreclosure. Also, a borrower can come into mediation requesting a principal reduction or nothing. Lenders would be reprimanded for such practices, and borrowers should be held to a comparable standard.

Rule 24

UTA opposes the inclusion of Rule 24 because it again demonstrates the disparity in treatment between lenders and borrowers. Lenders are being judged for facial manifestation of bad faith, whereas a borrower's good/bad faith participation is unnoted.

Further, Rule 24 mirrors the issues stated above in Rule 11, in that the punishment upon a lender who does not timely object to a borrower's documents is unduly harsh. Additionally, Rule 24(c) contemplates review by unaffiliated third-parties, such as the Nevada Hardest Hit Fund and Attorney General Settlement Programs. It is unreasonable to expect a mediation representative to know about such outside programs that are beyond the scope of the offers that can be made by that individual lender.

Conclusion

A significant problem with the Foreclosure Mediation Program is that it has become less about resolving defaults and more about arguing over documentation. The proposed rule changes will largely require even more documents to be produced by lenders, which will result in further argument over the documents, leaving less time for the real task at hand: discussing resolutions to the borrower's default. Many of the proposed rules seem aimed at increasing the burden on lenders, which is bound to result in an increase in judicial reviews and a prolonging of the recovery as it takes longer to process a defaulted loan file. In fact, increased legislation of this program may influence lenders to avoid the mediation process.

At a time when Nevada needs to purge itself of bad loans and promote recovery in the real estate market, several of the new proposed mediation rules will slow down the foreclosure process and turn even more files toward unnecessary litigation. UTA promotes certainty and efficiency through the mediation program, but over-legislation of the mediation process will have a contrarian effect.

UTA membership is comprised of those acting as trustees under real property deeds of trust, including employees of title companies, financial institutions, and independent companies. UTA members also work in allied and support organizations, including posting and publishing companies and computer service firms. The UTA is a national, non-profit corporation.