

MEDIATION PROGRAM FOR DISTRESSED HOMEOWNERS: JUDICIAL FORECLOSURE STATES

PREAMBLE: (Include a strong statement of the purpose of the bill, the state's authority to enact foreclosure moratoria and other remedies which are more draconian than this bill, the state's authority to enact this bill, and data regarding the nature and extent of the foreclosure crisis in this state).

APPLICABILITY: To mortgage loans secured by residential property that is the principal dwelling of the homeowner.

PROVISIONS:

1. In a complaint seeking to foreclose upon residential real estate as herein defined, the plaintiff must itemize the following: the principal balance, earned interest and method of calculation, and all fees and costs that the plaintiff alleges are due. The complaint must also allege with specificity the standing and capacity of the plaintiff to file the suit, the name, address, and telephone number of the holder/owner of the loan note and mortgage, and attach copies of all relevant powers of attorney, a copy of the loan note and any riders, a copy of each and every endorsement of the loan note or in the case of bearer paper, a copy of all documents showing the date of the transfer of possession, a copy of each assignment of the mortgage/deed of trust, and a copy of the Truth in Lending statement, and a copy of the final settlement statement. The complaint shall list the names and addresses of any subordinate mortgage lienholders.

2. Upon the filing of the complaint, the clerk of the court shall send a notice of mediation to the parties and subordinate mortgage lienholders listed in the complaint. The notice shall include the date, time, and location of the initial mediation session that shall occur within XX [30] days of the filing of the complaint. The notice also shall inform the borrower of the existence of local (within 100 miles) housing counseling agencies, lawyer referral services, and legal services offices where the homeowner may obtain assistance or representation. The notice shall also instruct the defendant to bring specific information and supporting documentation (relevant to the current version of the FDIC Loan Modification Program ("FDIC Box" available at <http://www.fdic.gov/consumers/loans/loanmod/loanmodguide.html>)). The notice also instructs the plaintiff and subordinate lienholders to bring proof of authority to bind the holder, proof of the identity of the current holder (including copies of all relevant powers of attorney, copies

of each and every endorsement of the loan note or in the case of bearer paper, copies of all documents showing the date of the transfer of possession, and copies of each assignments of the mortgage/deed of trust), the loan documents (including the loan note and riders, Truth in Lending statement, and final settlement statement), and specific information and supporting documentation (relevant to the FDIC Box). The mediator shall be trained on the current version of the FDIC Box and accompanying materials, loss mitigation options generally, and on issues related to standing and capacity to sign any resulting agreements. The mediator shall bring a laptop with the FDIC Excel spreadsheet, the FDIC Handbook, and capability to print out the prescribed documents. The attending parties shall negotiate in good faith.

3. No additional fees¹ can accrue and no further action to pursue the foreclosure can occur during the mediation timeline (which begins on the date the clerk sends the mediation notice and ends on the date the mediator files a report as described below). The defendant's obligation to answer the complaint and the court case are stayed for this period. No motions can be filed during this time.

4. If the defendant is represented by an attorney, the defendant, plaintiff or subordinate lienholder can offer any reasonable proposal or can ask the mediator to first use the FDIC Box. If the FDIC Box is used and a loan modification is "feasible"² and agreed to by the parties to the foreclosure, the mediator shall obtain the signature of the plaintiff (so long as the plaintiff has apparent authority to sign) and the defendant, file a copy with the local land records office, and provide copies to each attendee. The loan modification agreement shall be in substantially the same form as the FDIC model document and include an affirmation separately signed by the plaintiff that it has the legal authority to bind the holder, the name, address, and telephone number of the current holder, and the date the first payment is due and the amount. The plaintiff shall promptly change its internal records to reflect the agreement terms. If an agreement is reached without the use of the FDIC Box, the defendant's attorney shall promptly submit the agreement in written form to the mediator and the plaintiff. The plaintiff shall promptly sign and return the agreement to the defendant, file it with the local land records office, and change its internal records to reflect the

¹ "Fees" does not include interest lawfully accruing under the terms of the loan note or reasonable fees to preserve the real estate securing the loan, if permitted in the loan note or mortgage.

² "Feasible" means that the FDIC Box shows that the net present value (NPV) test is met using the terms most favorable to the homeowner that meet the NPV test.

agreement terms. The mediator also must promptly file a report of the outcome of the mediation with the court on a prescribed form and provide a copy to each attendee.

5. If the defendant is not represented by an attorney, the mediator must use the FDIC Box. The mediator inputs all relevant information into the FDIC Box. If a loan modification is feasible using the FDIC Box and the parties, other than any subordinate lienholder, agree, the mediator shall obtain the signature of the defendant and plaintiff (so long as the plaintiff has apparent authority to sign), file a copy with the clerk, and provide copies to each attendee. The loan modification agreement shall be in substantially the same form as the FDIC model document and include an affirmation separately signed by the plaintiff that it has the legal authority to bind the holder, the name, address, and phone number of the current holder, and date on which the first payment is due and the amount. The plaintiff and holder shall promptly change its internal records to reflect the agreement terms. If a loan modification is not feasible after exhausting all possibilities using the FDIC Box, the mediation is terminated. Regardless of the outcome, the mediator must promptly file a report of the outcome of the mediation with the court on a prescribed form and provide a copy to each attendee. If the parties agree to a loan modification, the mediator may also discuss a loan workout with a subordinate lienholder that is reasonable and feasible taking into consideration whether the fair market value of the property in relation to the amount owed on the first mortgage leaves any equity in the property to which the subordinate lien attaches.

6. If the mediation does not result in an agreement, upon the filing of the mediator's report, the clerk shall send a notice to the defendant(s) informing them that the foreclosure case will proceed, that the stay is lifted, and that the defendant must file an answer within XX [30] days or the case may proceed by default.

7. The cost of mediation for up to a total of three hours (including any postponement), at an hourly rate of XXX [\$125] shall be split evenly between the parties to the mediation. However, the plaintiff must advance the entire amount by bringing a check drawn from the servicer's business account (or the servicer attorney's account) payable to the mediator. The homeowner's portion may be included in the principal balance of any agreed upon loan modification, paid separately in cash, or otherwise paid to the plaintiff through the terms of the agreement. If the parties do not reach an agreement, the defendant's portion of the mediator's fee may be taxed as costs in the foreclosure lawsuit against the defendant if the plaintiff prevails in the foreclosure suit. The cost of the parties to attend the mediation shall be borne by the party who incurred the cost.

8. There shall be a privilege against disclosure of a mediation communication as in section 4 and related sections of the Uniform Mediation Act (UMA).³ Section 7 of the UMA restricting the ability of the mediator to report regarding the mediation is super ceded to a limited extent by provisions in this outline. Any documents generated by the parties or the mediator and that are required to be filed with the clerk or the land records office under these provisions shall contain only the last four digits of the homeowner's SSN and account number. The plaintiff and defendant shall receive copies of the FDIC spreadsheet if the program approves a loan modification, whether or not the parties agree to the loan modification. The mediator shall retain the FDIC spreadsheet in electronic form for XXX months/years and shall not release it unless in response to a subpoena issued by any court of competent jurisdiction.⁴

9. The state shall set standards for the quality of the persons seeking to be mediators under this program and shall provide training to all persons selected to serve as mediators, including training on loss mitigations programs and the FDIC loan modification program in effect at the mediator is approved to serve.

10. The court may enact rules to carry out these provisions.

11. The state legislature shall appropriate sufficient funding to cover the cost of the agency operations and staff to accept the required filings, schedule mediations, and train mediators. Suggested sources include imposing filing fees to record these additional documents, raising current filing fees, and/or imposing a surcharge on deed transfers or loan closing activities.

³ The Uniform Mediation Act is available at (<http://www.nccusl.org/Update/ActSearchResults.aspx>. Section 2 defines a “mediation communication.” Section 5 addresses waivers and preclusion of the privilege; Section 6 creates exceptions to the privilege.

⁴ This exception to the privilege of confidentiality is intended to supplement but not eliminate exceptions listed in Section 6 of the UMA.