

Mandatory Mediation Proposals

MBA RECOMMENDS

MBA suggests that states implement borrower information campaigns rather than impose cumbersome mandatory mediation requirements. MBA does not support mandatory mediation because it creates costly processes that duplicate loss mitigation.

BACKGROUND

Recently, there has been an increase in state legislative activity mandating mediation between the borrower and the servicer as a condition to the lender's right to foreclose. Such programs were first introduced in 2007 in Pennsylvania and Ohio and in Connecticut in 2008. More recently, bills have been introduced in Massachusetts, Maine, Illinois, Indiana, Pennsylvania, New York, Nevada, Minnesota, Iowa and Oregon requiring mediation as part of the foreclosure process. Proponents of mediation support this concept as a means to ensure servicers respond to homeowners who want to work out a deal so they can keep their homes.

Lenders, however, often find mediation to be a foreclosure stall tactic that produces few positive results that are independent from their own loss mitigation efforts. Imposing mediation creates an expensive and bureaucratic process that is not necessary and confuses the loss mitigation process. Mediation programs are expensive, with direct fees to servicers and borrowers, duplication of requirements, increased investor, tax and insurance advances, duplication of foreclosure costs, technology and staffing time. These funds could be more wisely spent directly on loss mitigation efforts.

The mortgage industry devotes a great deal of resources to provide workable loss-mitigation solutions to troubled borrowers on an individualized, case-by-case basis. Servicers contact borrowers soon after they fall behind in their mortgage payments to explore loss mitigation strategies. Mandatory mediation proposals require mortgage servicers to shift

their focus from directly helping borrowers to navigating bureaucratic processes. Time and effort that servicers currently spend helping large numbers of troubled borrowers will be redirected to ensuring compliance with burdensome notice requirements and orders of the mediator.

MBA POSITION

MBA does not support mandatory mediation because it creates costly processes that duplicate existing loss mitigation in a far more cumbersome manner. Servicers are only able to comply with the current requirements because very few jurisdictions have mandated mediation. Adoption of mediation across 50 states and possibly a far greater number of local jurisdictions is a model that is unsustainable for the servicing industry. Moreover, there is no empirical evidence that shows the effectiveness of such programs separate from the servicers' own loss mitigation efforts.

States should focus their efforts to encourage communications between lenders and borrowers to explore alternatives to foreclosure when borrowers are unable to afford their current mortgage payment. This could be achieved by state media campaigns.

PRINCIPLES IN THE EVENT OF STATE IMPOSED MEDIATION

If states are determined to pass state mediation requirements, several principles should be adopted to limit duplicating existing loss mitigation efforts and costs.

- Blanket foreclosure moratoria should not be part of mediation programs and servicers should not be forced to halt the foreclosure process. Counseling and mediation efforts can be undertaken parallel to the foreclosure process. Any mediation proposal should fit within a state's current foreclosure timeline so as not to create an artificial delay.
- Mediation should only be contemplated on owner-occupied primary residences. Vacant properties should be excluded from any state mediation requirement as it is in everyone's best interest to get these properties quickly into the hands of new owners.
- Borrowers should be required to opt into mediation. Many borrowers are already in negotiations with their servicers and a separate mediation event may be unwanted, unnecessary, confusing and costly.
- Mandatory mediation should be used as a last resort when servicers have been unresponsive to a borrower's request for loss mitigation prior to foreclosure sale. Mandatory mediation should not be used to contest a loss mitigation decision by the servicer. Mandatory mediation should only be available to borrowers who can prove they tried to contact their servicer to seek loss-mitigation well before the foreclosure sale, but have received no response from their servicers. By making mandatory mediation contingent on the borrower contacting their servicer first, the need for mandatory mediation will be lessened.
- The mediation process should begin during the first legal action phase of foreclosure, which is approximately the 120th day of the delinquency, to avoid duplicating existing loss mitigation processes.
- Servicers should not be required to provide originals or copies of legal documents. Mediation is not a legal proceeding and there is no need to duplicate or exceed the state's legal requirements to foreclose. Moreover, the risk of losing original documents is too great.
- If an actual mediation session is needed, conference calls and other communication channels should be permitted. Servicers are simply unable to support in-person sessions given the high volume of loss mitigation activity.
- Mediators should be HUD-approved housing counselors. Mediators should not have the authority to dictate a settlement. Borrowers should be obligated to provide requested information to the servicer prior to any mediation session. If the borrower fails to cooperate, such as fails to provide requested documentation, or fails to participate in the mediation session, the mediation should be considered abandoned and the foreclosure should be allowed to proceed.
- Mediation should be a one-time event, not a series of events. Other reasonable limits should be placed on the borrower's use of mediation, including how often this option can be invoked.
- Where property retention is not an option for the borrower, the servicer should be permitted to use non-retention loss mitigation options, such as short sales and deeds in lieu of foreclosure, as a satisfactory outcome to mediation or loss mitigation without mediation.



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