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January 10, 2013

Hand Delivered

FILED
JAN 10 2014
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY ___ DEPUTY CLERK

The Honorable Mark Gibbons
Chief Justice of the Nevada Supreme Court
c/o Tracie K. Lindeman
Clerk of the Supreme Court
201 South Carson Street
Carson City, NV 89701

RE: 5th Proposed Mediation Rule changes to ADKT 0435 dated November 14, 2013

Dear Chief Justice Gibbons and Members of the Court:

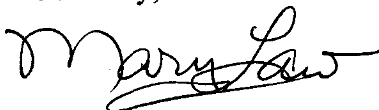
Nevada is still Number 1 in Foreclosures and Number 2 in Mortgage Fraud. Nevada still has 55,000 homeowners in some stage of foreclosure. The Attorney General's Home Again Hot Line is receiving an average of 1,000 calls a month. I don't know how many calls the NV FMP is receiving but would guess it is high. Apparently no one knows or cares to find out how many homeowners have already lost their homes and their invested cash through wrongful foreclosure and short sales. This is all evidence of our failed response to the housing crisis. These results are unacceptable.

Other states are taking positive steps to end the corruption and deception that created "toxic assets" and attempts to monetize people instead of tangible goods and services. Other states are not pre-convicting and punishing innocent homeowners for crimes they did not commit. It's time for Nevada to do the same.

The Mediation Program is only one part of the solution but it is a vital part. I'm encouraged that you did not rush to implement the proposed rule changes and appear to have an open mind for receiving constructive feedback that will improve the process and the outcomes. I've taken the extra time to expand on my prior submission and am now attaching a more complete review of the rules for your consideration. Please let me know if you have questions or need clarification.

I look forward to seeing a set of rules that will make the Mediation Program a meaningful and effective option that will actually help Nevada homeowners keep their homes.

Sincerely,



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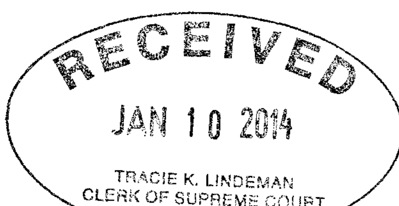

Most important 2014 NV FMP Rule Changes

DELETE Rule 12(1) through 12(6) Homeowner Documentation

This one section alone is killing the program. Homeowners don't want to mediate if doing so carries the risk of sanctions for refusing to surrender sensitive financial information to anyone we don't know or trust especially if there is no clearly stated loan modification outcome for doing so. There is also significant risk of identity theft due to the expectation of submitting this information through unsecured channels.

Banks also have a voracious appetite for collecting data that serves no known useful purpose. This has been reported by millions of homeowners in a multitude of forums and was once again confirmed by Ms. Bingham's and Ms. Gross's testimony. Specifically, the failure of excessive data collection to result in or contribute to permanent loan modifications has been well documented by the FMP Statistical reports as pointed out by Mr. Olsen.

DELETE Rule 12(7) through Rule 12(9) Beneficiary Documentation re: the note and deed of trust

The necessity for clear and clean documentation of chain of title has been addressed by the passage of SB 389 which became law on June 10, 2013 as an addition to NRS 106 and NRS 107. SB389 is very clear. It does not say "some of the assignments..." it says "all assignments of the note and deed of trust". There isn't a good reason to duplicate this law in the FMP rules. If the beneficiary doesn't have upfront proof of their right to foreclose and/or modify the loan, everything that follows is moot. They have filed a wrongful NOD and have no right to participate in mediation. The program needs to establish a process to pre-qualify trustees and beneficiaries as proper parties prior to proceeding with mediation.

Modify Rule 3(4) Mediator qualifications...

Homeowners should not have to include "luck of the draw" in regard to the mediator as to how they are treated before, during and after mediation. It's very clear that there is a great deal of inconsistency and therefore injustice depending on which mediator is assigned. The two mediators I had were "okay" although not as skilled and knowledgeable as I would have liked. However, I've heard "horror stories" of other mediators that sound like they should have been terminated but were not. This is an area that compels the court to pay attention and take appropriate action. Mediators appear to be lacking in financial training and unable to validate "good faith" terms and conditions that are consistent with truth in lending laws and other regulations regarding real estate transactions. This needs to be added to required skills.

Change Rule 1(5) Recording.

From: The mediation session(s) shall not be recorded.

To: The mediation session(s) may be recorded.

There isn't a good reason to not allow both parties to record mediation sessions.

Change Rule 20 Confidentiality

Once the homeowner's personal and private financials and "hardship letters" are eliminated by deleting rules 12(1) through 12(6) there is nothing that is "confidential" and the great debate over open records can end.

The subject and title for this rule should be changed to read:

Audits

Financial Institutions are required to provide full disclosure and transparency of any product they are offering to the public such as HAMP, HARP, Hardest Hit and all of the "alternatives" such as "cash for keys", "deed for lease", "short sale" etc. Trustees must be held accountable for the accuracy of the forms they submit to the program without the homeowner's knowledge or consent. Servicers must be held accountable for the notices they are sending homeowner and the program. Without random and statistically valid audits for accuracy and honesty, agents for these institutions will continue to lie, cheat and steal. This court must implement relevant auditing procedures and reports if the program is going to be successful.

Change rule 11 (1) Delete Rule 11(1)(a) – 11(1)(d) Representation

The rule for representation should read as follows:

Both parties to mediation must appear in person.

- The person representing the lender/beneficiary must be regularly employed by the lender/beneficiary as a "loan officer" and qualified to negotiate loan modifications and other options.

Both parties in mediation may bring anyone else they want to bring to mediation.

If someone is acting in a legal capacity on behalf of one of the parties, they must present proper documentation of authorization to do so.

The promise and purpose of mediation is to allow the homeowner to meet face to face with the person who has full decision making authority to modify the loan. The words "modify the loan" includes the option to totally void the existing loan and write a new one or come to any other agreeable settlement. The promise and purpose of mediation does not include meeting with lawyers, data takers and others who add no value to the negotiation process. The current "advertising" for the program and the "reality" of what happens in mediation is nothing more than deceptive "bait and switch".

Modify Rule 9 Judicial Foreclosures and Rule 12(7) Non-Judicial Foreclosure Only and Rule12(8) Non Judicial Foreclosure Only

Figure out how to take the "best" of both paths (judicial and non-judicial foreclosure) and consolidate into "one path for both". Homeowners do not need or want the additional burden of more legal tedium. Apparently there are significant "consequential differences" for one path versus the other but the first goal is to stop predatory lending and mortgage fraud. How the "predators" start the process is irrelevant until resolution. The differences should be written up in "legal aid brochures" and made available to homeowners as needed.

ADD Rule 12(x)(a) Determination of cash invested by both parties

It has been an egregious oversight to disregard the amount of money the homeowner has invested and the amount of money the "current beneficiary" has invested. To claim that the " in place" current homeowner isn't in a superior position compared to the mere holder of a bundle of notes is unacceptable in good faith negotiations. It is also inconsistent with homeowner's rights as private citizens versus the fiduciary responsibilities of public financial institutions. I recommend the following wording:

In order to avoid the temptation for "undue windfall profit taking" and "profiteering" by financial institutions the beneficiary MUST disclose

a) what they paid for the note if they are not the original lender
b) the remaining principal balance on the note

The homeowner MUST disclose

a) closing cost
b) mortgage payments (both principal and interest) paid
c) cost of maintenance, repairs and improvement that can be documented and included at the homeowner's discretion

Regardless of who paid or was supposed to pay; the status of the following must be reconciled and disclosed:

a) Property taxes and other local property related taxes (such as Washoe sewer tax)
b) Hazard Insurance
c) Mortgage Insurance
d) HOA(s) fees and dues
e) Other "liens" or encumbrances on the property.

This full disclosure is necessary to fairly evaluate "who owes who how much" and if appropriate to pro-rate the current value of the home among the proper parties.

ADD Rule 12(x)(b) Determination of realistic current market value of the home.

Realtors used to provide free current market analysis (CMAs). Why they now charge for a brokers priced opinion (BPOs) is a mystery the realtors will have to explain. Experience demands that at least three to five "analysis" or "opinions" are necessary to reach a reasonable value for good faith negotiations.

Banks used to "refinance" based on "internal" information regarding home values. Holding homeowners hostage to ridiculous "note and interest" values is wrong.

The usual tools responsible and intelligent people would use for valuation have been so corrupted no one really knows what our sustainable and growable "right price" is for each of the many micro-real estate markets in Nevada. However, there are ways to figure out a fresh and realistic starting point and the issue must be raised and addressed by actual experts in the field of real estate risk and investment management. Self-serving sales and marketing managers are not experts in this area and should be ignored.

Change Rule 14(4) Calendaring

Change the hours of mediation to allow for working homeowners to mediate during "non-work" hours if necessary. It's egregious to require homeowners take time off work to attend mediation.

Change Rule 17 Temporary Agreements or Agreements to Relinquish; Expiration Date.

Delete the "temporary agreements". We all now know this is nothing but a deceptive "bait and switch" tactic. Agreements may allow for "steps" but these have to have measurable outcomes and a date specific end date. More appropriate wording would be:

If both parties have shown "good faith" by entering a "step plan" NO CERTIFICATE SHALL ISSUE while the "step plan" is effective. PJR's may be filed within 30 days of a "breach" by either party.

Modify Rule 18 Mediator's Statement.

The rule should read as follows:

Mediators must provide a copy at the conclusion of mediation to both parties.

Mediators must file their "final" copy with the Administrator and "mail" to the parties within 10 days. *Some of the lawyers have suggested that a copy of the mediator's statement must also be filed with the district court. This may be a good idea but is outside my fields of expertise.*

Modify Rule 23 Advisory Committee

Expand the advisory committee to include fair representation from North, South and Rural Nevada. Multiple meetings and/or processes may be appropriate and necessary.

Monthly "open round table discussion" meetings are needed. It's appropriate for the chair to limit discussion to "topics "and to include "ad hoc" agenda items as urgency and/or time permits.

The current practice of "secret", unscheduled or limited access sub-committee meetings are not appropriate if there is no public discussion prior to submitting recommendations and concerns to the Supreme Court. The sub-committees and the names of the persons serving on them should be published so that the public can make appropriate contact and submit recommendations.

Hire staff to do the Administrative work! "Lack of funding" is a lame and unacceptable excuse. The program has always been well funded and access to additional funding from the NV State General Fund and/or the Attorney General's settlement funds was given during the last legislative cycle. The program has the need and the ability to contribute to reducing unemployment in Nevada and should take immediate steps to do so.

ADD Rule 25 SANCTIONS

a) *Under NO CIRCUMSTANCES shall the homeowner be "sanctioned" or threatened with "sanctions". As was pointed out early on, homeowners are fighting to keep their homes and the money they invested in their homes. The "threat" of losing one or both is more punishment than necessary for the victims of the financial institutions criminal activity.*
b) *Sanctions against lenders, beneficiaries, servicers or other so called "stakeholders" MUST BE significant enough to stop predatory lending, mortgage fraud and other deceptive practices.*
c) *The Nevada bar can figure out a fee schedule for mediation representation and PJR and/or appeal representation for the homeowner. The "beneficiary" who files the NOD is responsible for paying the costs in the event it is discovered that they don't have the right to foreclose. The "beneficiary "and their "servicers" must be stopped from using onerous litigation and foreclosure as a threat.*