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MEDIATION PRINCIPLES IN COMMERCIAL LOAN ENFORCEMENT

By Allison C. Doucette and Megan Greene

During the past several years, Florida's economic recession has produced a backlog of state court foreclosure dockets. This has increased the appeal of alternative dispute-resolution methods for commercial loan enforcement. Through mediation, financial institutions, obligors, and counsel have been able to achieve results more efficiently and reliably than might otherwise be expected. As mediation becomes more important in commercial loan enforcement scenarios, lawyers and clients should consider common principles that underlie the mediation process and the legal guidelines that shape and define those principles.

Time to Mediate. In virtually all state and federal litigation, it is a matter of practice that a case will be mediated by court order before trial. Within federal practice, the deadline for mediation is established early in the case as part of case management under Federal Rule of Procedure 26. In state court, the process is more flexible. It can be addressed in case management of Florida Rule of Civil Procedure 1.200(a)(10), and in the context of pre-trial conference and orders under Florida Rules of Civil Procedure 1.200(b) and (d). Clients are often initially jaded about mediation; this can be overcome through conversations about how often mediation results in settlements that both parties find preferable to fully litigated results.

Against this backdrop, and considering the inevitability of mediation, the question remains of when it should occur during the process of loan enforcement litigation. First, the facts and law must be developed sufficiently so the risks and opportunities are understandable to all sides, yet not so fully developed that all litigation expenses have been incurred except for the trial. Second, clients on both sides must have fully analyzed their own business objectives, evaluated risks and litigation expenses, and determined how existing strategy has fared in comparison to initial predictions. Third, counsel must have the opportunity to confer so as to reasonably define a 'zone of settlement possibility.' This is the range in which each of the parties might settle. It will include, if applicable, the overlap between what the financial institutions are willing to receive and what the obligors are willing to offer. This final consideration involves an appreciation of the business and financial realities of the specific loan enforcement scenario at issue.

Authority to Mediate. Florida and Federal law and practice are consistent in requiring that all parties to mediation have full authority to mediate. See e.g. Florida Rule of Civil Procedure 1.720; Middle District of Florida Local Rule 9.05; and Middle District of Florida Bankruptcy Local Rule 9019-2. This requirement means that an authorized representative of the litigant who has authority to bind the litigant during the mediation must be present to the extent required by the court. In re Novak, 932 F.2d 1397 (11th Cir. 1991); TR, et al. v. St. Johns County School, 2008 WL2941281 (M.D. Fla. July 28, 2008); Inmuno Vital, Inc. v. Telemundo Group, Inc., 203 F.R.D. 561 (S.D. Fla. 2001). Under no circumstances should this requirement be presumed to compel a litigant to be willing to accede to the demands of others. Avril v. Civilmar, 605 So. 2d 988 (Fla. 4th DCA 1992). There is no requirement that a party make an offer at mediation, let alone offer what the opposition wants to settle. To the contrary, although it may be unwise to attend a mediation when one is completely inflexible regarding the rights and remedies one seeks to assert, there is no legal requirement that authority to settle include a willingness to bargain away material terms. See Kaplan v. Kaplan, 2012 WL 1072750 (M.D. Fla. Mar. 30, 2012).

Confidentiality of Communications. The mediation process can be successful only if litigants have assurance that communications will be confidential. This is because the slightest concession by a litigant behind closed doors without the mediation-related privilege can be used (and often is) by opposing counsel to suggest weakness or culpability and to influence outcomes. Florida Statutes § 44.406, Middle District of Florida Local Rule 9.05, and Middle District of Florida Bankruptcy Local Rule 9019-2 provide for complete confidentiality so lawyers and litigants will be strictly prohibited from blurting out settlement-related comments as though they are admissions. See also EEOC v. Northlake Foods, Inc., 411 F. Supp. 2d 1366 (M.D. Fla. 2005) (there is a "clear directive" by the Middle District regarding confidentiality of mediation proceedings); In re Matter of Sargeant Farms, Inc., 224 B.R. 842 (Bankr. M.D. Fla. 1998) ("Nothing should prevent full discussion and absolute candor with the mediator").

Discussing settlement-related issues between a bank officer and an obligor can be extremely troublesome. Although the provisions of Florida Statutes § 687.0304 prohibit oral loan commitments, and the language of commercial loan documents often reiterates the need for a writing to amend lending arrangements, desperate obligors routinely tax the limits of these protections. The provisions of Florida Statutes § 90.408 and its federal analogue that prohibit admissions made in compromise are significantly narrower than the broad privileges of confidentiality afforded in mediation. Accordingly, clients on both sides of the lending relationship who truly want to work out a business result should turn first to mediation, and not perpetuate unprotected communications at the client level.

Binding Nature of Mediation. A mediation agreement, when executed unconditionally, is authoritatively binding on all parties. See RAHO of Pass-A-Grille, Inc. v. Pass-A-Grille Beach Motel, Inc., 923 So. 2d 564 (Fla. 2d DCA 2006). It can support court approval of the entry of a judgment, the dismissal of the case, and a range of other remedies that might not otherwise be within the jurisdiction of the presiding court. The requirement of complete and unqualified authority to settle is directly related to reaching full and final resolution through mediation.

There are certain techniques for enhancing the chances of a favorable result. The lawyer must work with the client to define the scope of settlement authority, a task that may ▶

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include (a) evaluation of required financial documentation, (b) recommendations based on analysis of the legal posture of the litigation and the business and financial realities of the lending relationship, and (c) sketching the contours of a mediation agreement that might be acceptable to the client. In many cases, the lawyer should prepare a mediation statement that informs either the mediator or all parties (depending upon the animus of the mediation) of the client's view of the facts, the law, the prospects for success, and the alternatives for resolution. Finally, if mediation does not produce an immediate result due to logistical realities, but the trend is favorable, adjournment allows well-prepared parties to preserve a favorable posture toward settlement.

Judicial Involvement. The norm in mediation is that the court presiding over the loan enforcement action will also preside in all meaningful respects over the mediation. For example, the court will either select the mediator or approve the parties' selection of the mediator. The court will determine whether or not litigants have appeared in the requisite manner, and with the requisite authority. The court will determine whether mediation has produced a final result, whether it is a settlement or impasse, and how to give that result legal effect. The court will retain jurisdiction to enforce a mediated settlement and to compel compensation to the mediator. Finally, the court is called on (when necessary) to determine if violations of confidentiality have occurred. In all of these respects, the court has authority to enforce the law, applicable procedural rules, and agreements of the parties, and the right to sanction lawyers and litigants whose conduct does not comport with rules regulating mediation.

The use of mediation to solve loan enforcement problems is increasing as loan enforcement litigation becomes more costly and time-consuming. To use this method successfully, it is important to understand and follow the contours that govern the process. Every lawyer involved must understand how to work closely with clients to fulfill the obligations imposed by mediation and to achieve the best outcomes.

CASE NOTES

Clarification of Florida Foreclosure Law

Several recent cases have clarified Florida foreclosure law.

In US Bank v Vogel, 2014 WL 1225065 (4th DCA), the appellate court held that the failure to communicate to plaintiff's counsel about bid instructions was sufficient grounds to set aside a sale. The bank had sent bid instructions of $51,000 to its attorney, but due to a clerical scheduling error, the plaintiff's attorney did not bid at the sale. A third party acquired the property for $35,200. The court held that proving inadequacy of price is not required in order to set aside a sale, and that a mistake by the lender's agent is sufficient grounds to set aside the sale.

In Vantium Capital v Hobson 2104 WL 1225142 (4th DCA), the court upheld the standard that it is an abuse of discretion to fail to award a deficiency judgment to the lender when the borrower presents no evidence opposing the sale price at foreclosure. The lender moved for deficiency judgments and introduced the bid price of the underlying collateral, as well as an affidavit from an appraiser as to the fair market value of the collateral. The debtors failed to appear. Nevertheless, the trial judge rejected the appraiser's affidavits as hearsay and reasoned that the lender only established the bid price, and denied the motion. On appeal, the appellate court reversed the trial court and reaffirmed the rule in Florida that the burden is on the borrower to present evidence of fair market value of collateral on the date of the sale once the lender submits evidence of the bid price.

In Samaroo v Wells Fargo Bank, 2014 WL 1255428 (5th DCA), the court reversed a summary judgment for the lender and held that an acceleration notice without information about the right to reinstate does not comply with the condition precedent prior to foreclosure of the mortgage. The default section of the mortgage included detailed requirements for notice and the court held that the failure to include any one of them makes the notice noncompliant.

LAW FIRM UPDATE

Anthony & Partners Named Title Agent

Anthony & Partners is pleased to announce that it has been named title agent for Old Republic National Title Insurance Company. Our firm will handle residential and commercial sales, refinances and loans. We offer title insurance policies and mortgage-lending products and services to individual consumers, mortgage lenders, businesses and government agencies. Acting as agent gives our clients full use of these products and services on a local and statewide basis.

ANTHONY & PARTNERS NEWS

John Anthony Presents at Alexander L. Paskay Bankruptcy Seminar

Anthony & Partners managing member John Anthony was chosen to speak at the 38th Annual Alexander L. Paskay Bankruptcy Seminar in March. He participated in a lively debate about the applicability of the 'Absolute Priority Rule' in individual Chapter 11 bankruptcy cases.

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