

MEDIATOR CASE STUDY OUTPUTS

November 5, 2015

Created at All-Foreclosure Mediator Event—November 2, 2015

SESSION 3: CASE STUDY

MEDIATION STAGE/TIMELINE

Mediator convenes mediation session(s), including continuances.

DISCUSSION FOCUS (based on May 2015 survey)

#2 Federal guidelines (HAMP, CFBP, etc.)
#4 NPV inputs & test
#5 Continuances and additional sessions
Beneficiary's authority to settle (based on survey comments)
Borrowers poorly or not represented (based on survey comments)

CASE BACKGROUND

The borrower shows up at the mediator's office with an incomplete packet of documents for the mediator and the beneficiary. She tells the mediator that she is following her representative's instructions. When asked if the borrower's representative could help, the borrower is very unsure of what her representative was doing for her.

After several months of struggles, the borrower submits most of the documents to the beneficiary and the mediator, saying that this is all she has. The beneficiary requests more documents, but the borrower cannot produce them. Since the referral was months ago, the mediator chooses to hold a first mediation session with the goal of determining what the beneficiary needs and what will complete the packet for a review.

At the session, it appears the borrower representative had not met their client prior to mediation and is unfamiliar with the client's circumstances. A document list is created with deadlines and both parties ask to have another session. They select a date when the mediator is available.

Borrower sends the additional documents to the beneficiary and the mediator. She also sends documents that show additional income from the new job that she just started. According to the borrower representative, the loan is now eligible for a HAMP modification due to the new income. Two weeks later, denial for loan modification is received, but without sufficient or clear explanation.

In the second session, the beneficiary brings the new NPV inputs but not an NPV analysis. The borrower's representative does not provide an NPV analysis either. As the session progresses, it appears there would still be no agreement on a modification. The parties start an argument about the beneficiary's authority. The beneficiary representative on the phone

argues that he has authority to settle, but does not provide sufficient information as to why he can't offer the modification. He says a modification would require "investor approval" and would need to "go to underwriting." He also cannot confirm whether the borrower is even HAMP eligible. An NPV analysis is not run by anyone. The beneficiary attorney requests that the mediator close the case, because two sessions occurred, and he commits to work with the borrower outside of the mediation process. The mediator certifies the case.

1. Required by RCW: What are the relevant provision(s) of the FFA for this case? Brainstorm with the group and record.

Commerce perspective (not an exhaustive list – see statute for complete requirements):

- Beneficiary has authority to settle. (RCW 61.24.163(8)(a))
- Denial provided in sufficient detail for a reasonable person to understand. (RCW 61.24.163(5)(h))
- Session may be continued once after the mediation session commences. (RCW 61.24.163(8)(b))

Also (not included in Case Study scenario, but required within this phase of mediation)

- Session scheduled within 70 days unless otherwise agreed. (RCW 61.24.163(6))
- Mediation convened in county where property located unless otherwise agreed. (RCW 61.24.163(6))
- All options to avoid foreclosure are exhausted. (RCW 61.24.163(9))
- Borrower(s) attend session in person. (RCW 61.24.163(8)(a))
- NPV test pass/fail is determined if run. (RCW 61.24.163(9)(c))
- Pooling and Servicing Agreement (PSA), other investor restriction, or waiver is provided. (RCW 61.24.163(5)(j))
- Scheduling and convening of additional session(s) follow the same requirements of the 1st session.

2. Expected by Commerce: What is the relevant guidance from Commerce for this case? Brainstorm with the group and record.

Commerce Perspective (not an exhaustive list – see Commerce guidelines for more detail):

- Mediator asks for NPV test if retention is desired, determines if pass/fail.
- If mediation continued, a date must be scheduled.
- Representation options provided to un- or poorly represented borrowers.

Also (not included in Case Study scenario, but expected within this phase of mediation)

- Scheduling Notice sent to Commerce and parties for each additional session.
- Verify party readiness for each additional session.
- Ensure agreements and deadlines are met and documents are exchanged.
- Ensure Power of Attorney (POA) produced if borrower(s) unable or unwilling to attend session(s) in person.

3. Mediator Discretion, Best/Effective Practices: What best/effective practices could the mediator have used in this case (strategies, skills, responses)? Brainstorm with the group and record on the flip chart.

Themes from the group flipcharts:

- Communication
 - Timeline, expectations, agreements, caucus
- Session documentation
 - Mediator provides? MOU?
 - Notes? Timeline?
- NPV
 - Timely inputs?
 - Run by mediators?
 - Run by parties?
- Continuance or certification
 - Leverage legislative intent and good faith participation
- Authority
 - Beneficiary authority?
 - Mediator authority?
 - What is it?
 - How to use it?

Case Study 3 – Question 3 Mediator Group Responses	
Group 1	<ul style="list-style-type: none"> • Steer the buyer towards Commerce: how to do forms – when poorly represented • Call Rep (Borrower directly if not involved) • Remind clients: for purposes of certifications, nothing about this mediation is confidential • Require from BE: explanation of HAMP denial and NPV analysis • Summarize during mediation • Use your power as a mediator • “I can certify this for bad faith....” • Use an agreement to mediate
Group 2	<ul style="list-style-type: none"> • Facilitate document exchange • Use discretion to schedule another session • Ask agreement about NPV inputs or not • Ask who underwriter is • Lack of authority clear, close now and find in bad faith or agree to 2nd session

Group 3	<ul style="list-style-type: none"> • Continue the 2nd session • Have a signed memorandum of understanding at 1st session • References for under-served clients • Required “plain language explanation” for HAMP denial • Require NPV inputs • Clear, early communication
Group 4	<ul style="list-style-type: none"> • Education all parties: explain FFP process and expectations • Proactively request required documents and identify submission date • Email communications to all parties (Borrower, Borrower’s rep) of deficiencies • Conference call when deficiencies noted • Provided itemized session summary to include timelines, agreements, consequences w/mediator discretion • Schedule another session after determining borrower will be reviewed for • When denial letter is received – reach back to borrower rep w/question “what is their next step?” • Before end of session obtain NPV analysis for both parties
Group 5	<ul style="list-style-type: none"> • Attach both NPVs to the cert (borrower’s and BE’s) • If person on phone doesn’t have authority, encourage underwriter/person with authority to make decision during. Offer to wait for duration of session while they confer with underwriter • Early in process, ask BE: Do you have full settlement authority? Denote 1 session to retention. If that doesn’t succeed, hold another session to discuss non-retention. Other mediators will discuss both in one session. • If caucus, ask BO and BE reps what a finding of lack of good faith would mean for their clients
Group 6	<ul style="list-style-type: none"> • Have parties run NPV (not mediator) • NPV inputs are more important than analysis/results include borrower and rep in emails- call rep if needed. • Contact borrower rep and refer to resources – NSP, com site
Group 7	<ul style="list-style-type: none"> • Mediator should be aware of beneficiary requirements • Be transparent about what input needed to do NPV analysis in mediation – if no info, this is in bad faith - use the hammer – law is clear – hands are tied - no autopilot here • Mediator say my NPV calculation is not as important as your parties calculation • Be polite - maybe something going on behind scene but say WA law requires person with authority must be at mediation (no investor/underwriting approval needed excuse) • Rely on beneficiary’s attorney to explain this law to client • Mediator have parties sign off after doing in mediation NPV • Call borrower’s atty/rep re status • Suggest repo only meet to discuss status before mediation starts if issues on NPV inputs
Group 8	<ul style="list-style-type: none"> • Mediator discretion. Authority of mediator to add a session when change of circumstances arise with borrower (ie earn more \$\$)

Group 9	<ul style="list-style-type: none"> • Direct borrower to their reps office with the packet • Confirm whether that same packet is being provided to the beneficiary • In 1st session, clarify what the borrower will be reviewed for • Direct borrower to resources that will help them prepare for the mediation process • List of expectations to be ready for 2nd session • List of documents required for 2nd session (expired or missing documents) • Perform NPV analysis in session • Confirm readiness PRIOR to 2nd session (2nd weeks or 10 days) • Require explanation from beneficiary for any denial • Confirm borrower agreement to certification • Draft certification circulated
Group 10	<ul style="list-style-type: none"> • Attention to legislature intent • Use continuances • Willingness to talk through NPV and relevant guidelines. Identify consensus and disagreement
Group 11	<ul style="list-style-type: none"> • Denial – what income figures used • Continue mediations vs certify • At outset, set clear deadlines • Engage in timely communications • Hold 1st session to clarify document exchange requirements • With new income, which specific documents are required • Ask open-ended, clarity questions • Denial – reasonable person explanation
Group 12	<ul style="list-style-type: none"> • NPV inputs with/without NPV analysis • Is there agreement on the inputs? • Yes then mediator may run FDIC/NPV • No-work out detail by detail/process of determination NPC shows pass and do gets denial • Ask for explanation that reasonable person could understand about why they were denied • Parties do or do not agree to 3rd session • Use mediator wild card • If mediation wild card is no longer available – start to have certification conversation

4. Good Faith: What, if anything, in this case would you take into consideration when determining good faith participation? Brainstorm with the group and record on the flip chart.

Scenario elements that impact Determination of Good Faith

Themes from the group flipcharts:

- What are criteria for lack of good faith?

- Didn't supply NPV
 - Inputs
 - Analysis
- Didn't consider new income
- Failure to provide PSA
 - Investor guidelines
- Beneficiary authority?
- Inadequate explanation of denial

Case Study 3 – Question 4 Mediator Group Responses	
Group 1	<ul style="list-style-type: none"> • Didn't supply info for NPV • Didn't consider new income • Failure to provide PSA • No explanation for HAMP eligibility • Be authority • Investor authority denied prematurely
Group 2	<ul style="list-style-type: none"> • Full review • New circumstances • No answer, no agreement to continue; bad faith • PSA (Compliance with FFA, inadequate reason for ??)
Group 3	<ul style="list-style-type: none"> • No NPV • No explanation for denial • Lack of authority/investor approval • Failure to review doc and consider change of circumstances
Group 4	<ul style="list-style-type: none"> • Unable to produce documents in timely manner • Unexplained denial = lack of good faith? • Confirm most recent NPV inputs were used
Group 5	<ul style="list-style-type: none"> • Consider – full settlement authority • No clear reason/explanation for denial of mod. • BE has insufficient knowledge of loan
Group 6	<ul style="list-style-type: none"> • Benef must provide clear explanation for denial. • Not mediator responsibility to enforce federal guidelines • Mediator ask in writing for explanation (of denial etc) from benef before resort to not in good faith • Hold rep on phone who ways "yes" to having authority responsible for what they say in session

Group 7	<ul style="list-style-type: none"> • A hapless borrower though person is represented • Look to see if something going on w/ attorney/rep to create situation in case • When faced with argument on investor-underwriter approval needed, eligibility doc on HAMP push for 3rd session or say will find you in bad faith • Pressure to close the case • Will parties keep at the table in this situation? • Note: should statute require running NPV at mediation when analysis can be highly manipulated based on inputs made
Group 8	<ul style="list-style-type: none"> • Verbal challenges to representative – authority to settle – NPV inputs • Always examine criteria for lack of good faith • Base lack of good faith on actions
Group 9	<ul style="list-style-type: none"> • On the phone has questionable authority to settle • Failure to provide NPV inputs • Failure to provide explanation for denial • Failure to provide PSA and waiver
Group 10	<ul style="list-style-type: none"> • Beneficiary authority (lack) • Borrower participation in doc exchange • We would not certify
Group 11	<ul style="list-style-type: none"> • Beneficiary authority • No denial explanation • Investor agreement – not provided • Beneficiary agent “incompetence” HAMP eligibility
Group 12	<ul style="list-style-type: none"> • Lack of investor guidelines in BE submission that later limited ability to modify • No NPV • Issues of authority to settle – needs to be better defined