

VBA BANKRUPTCY LAW SECTION BENCH-BAR BROWN BAG LUNCH MEETING
with Honorable Colleen A. Brown, U.S. Bankruptcy Judge

Tuesday, June 21, 2011 ~ 12:00 pm – 1:00 pm
United States Bankruptcy Court, Rutland
~ Participation may be in person or by telephone ~

AGENDA

1. EXPANDING AND IMPROVING RESOLUTION OF MORTGAGE DISPUTES IN BANKRUPTCY COURT:

A dialog about how to modify the procedures currently in place to most effectively address all mortgage disputes, even if a foreclosure complaint has not yet been filed or the mortgage is not covered by the HAMP regulations, when it would be beneficial to administration of the bankruptcy case to do so, without unduly increasing the burden on the mortgagees or diminishing the precedential value of the process in state court.

One option would be to modify the Standing Order # 10-01 to:

- a. provide that the filing of a bankruptcy case or the filing of a motion for relief both trigger the mediation requirements, *unless mediation has already been completed in this Court or State Court*;
 - b. provide that a creditor may be required to engage in mediation of all mortgage loans, i.e., HAMP and non-HAMP mortgages, upon a showing of good cause and potential benefit to the estate;
 - c. set a time frame for the mediation process and create a form scheduling order for mediation;
 - d. establish a procedure to be followed when a mediation results in surrender (both when there is and is not already a lift stay order in effect); and
 - e. make clear that completion of the mediation process in this Court satisfies the requirement in State Court *to avoid risk that a creditor who mediates in good faith during a bankruptcy case could be compelled to incur the cost / delay of a mediation again if the bankruptcy case fails and foreclosure action resumes.*
- Attached are the State Court *drafts* of an “Order of Referral to Foreclosure Mediation” (Attachment A) and “Foreclosure Mediation Timeline” (Attachment B) – the State Superior Court Oversight Committee is inviting comments (*committee meeting was on 6/17 - an update from that meeting TBA on 6/21*).
- Question: would it be beneficial to adopt these forms (when final) for use in Bankruptcy Court?

Another option would be to adopt a Loss Mitigation (“LM”) Program in this Court, similar to the programs in effect in the Southern & Eastern Districts of New York and Rhode Island, to supplement (or perhaps replace?) the current mediation program that would address these considerations:

- a. critical differences between LM and the mediation program are that there is no mediator (it is overseen directly by judge), and it is generally mandatory upon the filing of a relief from stay motion;

- b. LM is typically triggered by the filing of RFS motions and can apply to non-HAMP mortgages;
- c. LM is less expensive to creditors – and might be able to proceed more quickly – because no mediator;
- d. defendants are typically not represented by attorneys in VT foreclosure actions but are almost always represented by attorneys in bankruptcy cases, thus (possibly) reducing the need for mediator here;
- e. a VTB LM program could include a right to opt for a 3rd party mediator or include the Trustee in the process if the parties are unsuccessful after a designated number of good faith meetings; and
- f. a VTB LM program could be set up such that the debtor/ mortgagor would make an intentional, attorney-advised election for LM over mediation with the goal that such an election would be effective in state court unless the parties in a subsequent state court action were different.

Proposal for Discussion: replace current mediation program with a Loss Mitigation focused program that:

- gives debtors the right to make an affirmative election to proceed with LM instead of mediation,
- follows the SDNY model (modified as needed to comport with local customs and practice), and
- includes the right to opt for a mediator (under state program) if LM is not successful.

2. VTB LOCAL RULES REVISION PROCESS:

To begin this summer with goal of issuing revised local rules in first quarter of 2012

– *Looking for attorneys from all constituencies to serve on the Rules Revision Committee.*

3. FOLLOW UP RE: ISSUES RAISED AT APRIL BENCH-BAR MEETING

- a. Presumed Reasonable Fee for Ch 13 Cases – *bar & ch 13 Trustee to present a proposal*;
- b. New Procedure/Revised Local Rule re: Shortening Notice for Motions to Continue Initial Ch. 13 § 341 Meetings and Confirmation Hearings – *draft attached (Attachment C)*;
- c. Revised Standing Order re Mediation – *proposal to be drafted by R. Rice and circulated*;
- d. Motions to Approve Mortgage Modifications – *draft attached (Attachment D)*;
- e. Wage Withholding Orders – *modified to make clear that orders are effective immediately*.

4. TOPICS FOR OCTOBER BENCH-BAR MEETING.

Report from the Trustee on status of conduit mortgage payments and related procedures.

These Bench-Bar Lunch Meetings are coordinated by the Bankruptcy Court
Questions? Call Kathy Ford at 802-776-2003 or e-mail her at kathleen_ford@vtb.uscourts.gov
 No fee, no pre-registration required. Soft drinks and bottled water will be provided.

Foreclosure Mediation Timeline
12 V.S.A. §§ 4631-4637

Defendant requests foreclosure mediation

↓ 30 days

Parties agree on mediator, or court appoints one and issues:
Order of Referral to Foreclosure Mediation

↓ 30 days after Order

Mediator informs court of scheduled date of mediation, to be completed within 90 days of Order

↓ *In the event that 60 days have passed since the Order, or more than 30 days have passed since mediation was scheduled and the court has received nothing, court sends Request for Mediation Report; if nothing filed in 10 days, schedule status.*

Mediation takes place; sometimes requires multiple sessions but should be completed within 90 days of Order (*schedule status if taking too long*)

↓ 7 days

Mediation Report filed

↓ 10 days

Order re Compliance with Foreclosure Mediation, issued by court

Important: If the report shows that settlement was reached, schedule a status conference for 90 days* out to review whether the settlement is on track. Transition from temporary to permanent modification should be taking place by then, but often gets delayed.

* this time frame is used because typically a modification must be in effect for 90 days before it becomes permanent

STATE OF VERMONT

SUPERIOR COURT
XXXXXXXXX UNIT

CIVIL DIVISION
DOCKET NO. 00-0-00 Xxcv

XXXXXXX,
Plaintiff

vs.

YYYYYYYY,
Defendant

ORDER OF REFERRAL TO FORECLOSURE MEDIATION

The court hereby refers this case to Mediator _____, Esq. for
foreclosure mediation as provided for in 12 V.S.A. § 4632 (a).

The Mediator shall contact Plaintiff's lawyer and Defendants^{*} within ten days to schedule
mediation. Contact information:

Plaintiff:	Attorney ABC [Contact info]	
Defendant:	John Doe [Contact info]	John Doe's attorney [contact info]
Mediator:	Attorney LMNO [Contact info]	

If Defendant's address changes, Defendant shall notify the court and Mediator immediately.

If either party fails to respond to the Mediator's attempts to schedule mediation, the
Mediator shall notify the court and the other party, who may move the court for relief, including
costs incurred by ~~xxxxxx~~ as a result of the delay caused by that party's failure to respond.

Any motion to strike this Order of Referral on the grounds that the loan is not subject to
foreclosure mediation under 12 V.S.A. §4631(a) shall be filed within 15 days of this Order. If
not filed by that date, any claim to strike the Order on the grounds that foreclosure mediation is
not required by statute will be waived. In addition, any claim that Plaintiff is not obligated for
the cost of mediation will be waived, and the costs of the mediation will, pursuant to statute, be
paid by the Plaintiff.

^{*} or Defendant's attorney, if there is one

No later than 30 days from this Order, the Mediator shall inform the court of the date of the scheduled mediation. The Mediator shall also inform the court of any postponements or continuation sessions. Mediation shall be complete no later than 90 days from this Order except as extended by the court upon motion.

The Mediator shall have full authority over all decisions related to the conduct of mediation consistent with 12 V.S.A. § 4633 and in order to further the statutory purpose, including (but not limited to) the following:

- 1. Require personal attendance of interested parties, including Plaintiff's attorney;
- 2. Specify particular documents and information each party is to provide, including when and to whom it must be provided;
- 3. Determine whether documents and information that one party wants from the other must be or need not be provided;
- 4. Require consideration of "all available foreclosure prevention tools" as well as HAMP calculations, pursuant to 12 V.S.A. § 4633 (a)(1).

The Mediator may not require the parties to execute a separate mediation agreement. All terms of mediation are governed by 12 V.S.A. §§4631-37 and this Order.

The Mediator is directed to submit to the court a Mediation Report as required by statute within seven days of completion of mediation. The court will determine whether Plaintiff has complied with its obligations pursuant to 12 V.S.A. § 4635.

The court may schedule a status conference at any time to review whether timely progress is being made.

Any issues concerning the Mediator's fee may be addressed to the court by motion.

Dated at _____, Vermont this ____ day of _____, 2011.

Hon.
Superior Court Judge

cc: Plaintiff's attorney
Defendants
Mediator

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In re:

**AMENDMENT OF LOCAL RULES OF PRACTICE
AND PROCEDURE IN BANKRUPTCY COURT,
DISTRICT OF VERMONT**

STANDING ORDER 11-

**TO REDUCE NOTICE PERIOD REQUIRED UNDER
VERMONT LOCAL BANKRUPTCY
RULE 3015-2(f)(1) REGARDING REQUESTS
TO POSTPONE INITIAL CONFIRMATION HEARINGS**

DRAFT (6/15/11)

WHEREAS the Court's goals in the chapter 13 confirmation process are to allow parties sufficient time to prepare cases for confirmation, to give all parties adequate notice of the actual date of the initial confirmation hearing, to hold initial confirmation hearings within 60 days of the filing of the plan, and to confirm as many plans as possible at initial confirmation hearings; and

WHEREAS it is often difficult for debtors' counsel to predict whether a case is ready for confirmation more than 14 days before the date set for the initial confirmation hearing, and it is both expensive and a potential risk to employment for a debtor to be required to appear in Bankruptcy Court on multiple days for the meeting of creditors and confirmation hearing; and

WHEREAS since most active case participants accept notice via electronic means, notice that complies with principles of due process can now be accomplished more quickly than when Vt. LBR 3015-2(f) was enacted; and

WHEREAS these factors persuade the Court that it is possible to accomplish its goals for the chapter 13 confirmation process without requiring that debtors file requests to postpone hearing at least 14 days prior to the initial date set for the confirmation hearing; therefore

IT IS HEREBY ORDERED that Vt. LBR 3015-2(f)(1) is amended to read as follows:

Request to Postpone the Initial Confirmation Hearing. A request to postpone the initial confirmation hearing may be made by motion or stipulation. In either event, it must

- (1) be filed at least 7 days prior to the initial confirmation hearing date,
- (2) be accompanied by the Trustee's consent,
- (3) set forth good cause for the continuance, and
- (4) be served on all creditors and parties in interest.

The Court will grant the motion if it finds that the movant has set forth good cause for the continuance and that the granting of the continuance will not prejudice creditors.

ATTACHMENT C

Unless the Court enters an order granting the continuance and canceling the initial confirmation hearing, the initial confirmation hearing will proceed as scheduled and the debtor's attorney must appear at the hearing.

SO ORDERED.

Rutland, Vermont
_____ 2011

Colleen A. Brown
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In re:

**AMENDMENT OF RULE 6004-1 OF THE
LOCAL RULES OF PRACTICE AND
PROCEDURE IN BANKRUPTCY COURT,
DISTRICT OF VERMONT**

STANDING ORDER 11-

**PROCEDURE FOR SEEKING COURT
APPROVAL OF MORTGAGE MODIFICATIONS**

DRAFT (6/15/11)

WHEREAS, on March 4, 2009, the United States Department of the Treasury began the Home Affordable Modification program (HAMP), a loan modification program designed to reduce delinquent and at-risk borrowers' monthly mortgage payments; and

WHEREAS, since that date, debtors and creditors involved in bankruptcy cases in this District have more frequently engaged in mortgage modification transactions and, in many instances, those mortgage modifications have enabled debtors to successfully reorganize under Title 11 or to increase the dividends paid to their creditors through their bankruptcy cases; and

WHEREAS, it appears to be in the best interest of all parties to create a streamlined procedure for this Court to address and approve mortgage modification requests, similar to that available for the approval of a sale or refinance; therefore

IT IS HEREBY ORDERED that Vt. LBR 6004-1 is amended to insert a new subsection (b) to address mortgage modifications in chapter 12 and 13 cases; it shall read as follows:

(b) Mortgage Modifications in Chapter 12 and 13 Cases

- (1) Approval Procedures. No modification of a mortgage secured by the debtor's principal residence or other real property may take place while a Chapter 12 or 13 case is pending unless it is signed by both the lender and the debtor(s) and either
 - (A) the Court approves the mortgage modification after notice to all parties in interest, pursuant to Bankruptcy Rule 2002(a)(2); or
 - (B) the mortgage modification is approved as part of the plan confirmation process; or
 - (C) the debtor obtains the Chapter 12/13 Trustee's approval using the procedure described in subparagraph (2) below.
- (2) Trustee's Approval. If the three following conditions are met, a debtor may obtain approval of a mortgage modification via a "Certificate of Approval" from the Chapter 12/13 Trustee, on seven (7) days' notice to all parties in interest:
 - (A) the debtor will not receive any cash or incur any new debt through the mortgage modification;
 - (B) the modification will reduce the debtor's monthly mortgage payment; and
 - (C) as a result of the modification, the debtor will be able to fund a Chapter 12 or 13 plan.

ATTACHMENT D

The debtor's request for a Certificate of Approval must affirm that all three conditions are satisfied, be filed with the Court, and include a certificate of service showing proper service on all necessary parties. If no objections are timely filed, then after the expiration of the notice period, the Chapter 12/13 Trustee may issue and file a Certificate of Approval authorizing the debtor to proceed with the mortgage modification. If a timely objection is filed, then the Clerk shall set a hearing on the request.

IT IS FURTHER ORDERED that the current subsections (b)–(f) of Vt. LBR 6004-1 are amended to be renumbered as subsections (c)–(g).

SO ORDERED.

Rutland, Vermont
_____, 2011

Colleen A. Brown
United States Bankruptcy Judge