



Now We're Talking

A Look at Current State-Based Foreclosure Mediation Programs and How to Bring Them to Scale

Alon Cohen and Andrew Jakabovics June 2010

Center for American Progress



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Introduction and summary

There is a growing recognition in states across the country of the value of requiring foreclosure mediation when homeowners and their lenders and mortgage service companies enter the foreclosure process. A year ago, the Center for American Progress was one of the first organizations to highlight the need for these foreclosure mediation services at the federal level, pointing out the effectiveness of several of these programs at the state level.¹ Required mediation prior to foreclosure is not yet a part of federal efforts to prevent unnecessary foreclosures, either within the suite of Making Home Affordable programs, or as part of loss mitigation efforts for federally backed mortgages.² Still, there are encouraging signs; the number of states and municipalities that are in the process of implementing these kinds of mediation programs—joining other states that already boast such programs—are significantly on the rise since we completed our last report.

Today the number of jurisdictions with foreclosure mediation programs is nearly double the number a year ago, with jurisdictions in 21 states now offering foreclosure mediation or negotiation programs, up from 11 in our report last June. And we expect the list to continue to grow as legislation already introduced in additional states becomes law. What's more, the promise and practicality of foreclosure mediation is garnering support nationwide, including that of the American Bar Association.⁴

Based on our in-depth analysis of existing foreclosure mediation programs and their successes (and failures) at bringing homeowners and their mortgage servicers together to settle claims without resorting to losing/taking the property in foreclosure, we find that the optimal programs are those in which the first mediation session is automatically scheduled by the state once the mortgage servicer initiates the foreclosure process. We recommend that automatic mediation programs should be available wherever a borrower lives in a state, and, to that end, local pilot programs in some states should be expanded statewide. Specifically, we recommend that:

- States with so-called opt-in mediation programs, which require the homeowner to ask for mediation services, should evolve to automatically scheduled mediation, which is often called mandatory mediation. This step would promote greater participation while resulting in the same high percentage of win-win settlements for homeowners and mortgage servicers.
- States with mature pilot programs in selected jurisdictions now have foreclosure mediation as a proven solution to minimize foreclosures and should formalize them statewide.
- In states with pending legislation that would implement robust mediation programs, we recommend swift passage of the legislation.
- States with no mediation program and no plans for one should work through the state legislature and/or judiciary to put one in place.

In the body of our report we run through these key points, providing an update on the applicable states in greater detail along the way. (See table for a brief rundown of the various foreclosure mediation programs now operating in 21 states.)

Use of “servicers” in this report

Please note that for ease of reading we refer to lenders and mortgage servicers collectively as “servicers” throughout this report. Practically, this is because the vast majority of foreclosures are undertaken by servicers on behalf of lenders. In many instances the servicers are divisions or subsidiaries of large lenders but nonetheless operate as separate entities. While this distinction may seem small, as discussed in our previous report, the servicing agreement, the fees paid to servicers, and the consequent incentives have a major impact on foreclosure. See “It’s Time We Talked: Mandatory Mediation in the Foreclosure Process” for a more complete discussion.³

Existing mediation programs

Most states have a single method of foreclosure used the vast majority of the time

Predominant type of foreclosure

State foreclosure law is set by state statute. Most states permit both judicial and nonjudicial foreclosure, described below, but they have a single method that is used the vast majority of the time, usually because it has the simpler process under that state's law.

Judicial: The servicer sues the homeowner in court to foreclose on the property. Proceedings resemble standard civil cases, so notice will come on a court form.

Nonjudicial: The servicer issues a notice to the homeowner that they intend to put the property up for foreclosure sale at the end of a waiting period set by statute. The state court is not involved in any way.

Opt-in vs. automatic

Opt-in: Opt-in programs require that the homeowner be sent a notice that mediation (or, in a few cases below, negotiation) is avail-

able, but program administrators do not schedule a session unless the homeowner responds to the notice and requests one.

Automatic: Automatic mediation, also known as mandatory mediation, is automatically scheduled by the program administrator when foreclosure is initiated either through notice of a foreclosure sale in nonjudicial foreclosure jurisdictions or through filing a judicial foreclosure in others.

Program initiator

This refers to the state government body that put the program into effect. Legislatures create programs through state law. Judiciaries create programs under the auspices of their powers under state law, a state constitution, or common law equity. While a number of individual judicial circuits have independently created programs in the absence of state action, the only instances in which municipal legislatures have created programs have been in Rhode Island's cities, where the city councils have done so by ordinance.

State ⁵	Predominant type of foreclosure	Opt-in vs. automatic	Date	Program initiator
1 CA	Nonjudicial	Automatic*	9/6/2008	Legislature
2 CT	Judicial	Automatic†	7/1/2008	Legislature
3 DE ⁶	Judicial	Opt-in	9/15/2009	Judiciary
4 FL	Judicial	Automatic†	Early 2009	Judiciary
5 HI ⁷	Nonjudicial	Opt-in	11/1/2009	Judiciary
6 IL	Judicial	Opt-in	7/1/2009	Judiciary
7 IN ⁸	Judicial	Opt-in	7/1/2009	Legislature
8 KY (Single jur.)	Judicial	Opt-in	3/30/2009	Judiciary
9 MD ⁹	Nonjudicial	Opt-in	4/13/2010	Legislature
10 ME	Judicial	Opt-in	1/1/2010	Legislature
11 MI	Nonjudicial	Opt-in*	7/5/2009	Legislature
12 NV	Nonjudicial	Opt-in	9/1/2009	Legislature
13 NJ	Judicial	Opt-in	10/16/2008	Judiciary
14 NH	Judicial	Opt-In	6/29/2009	Legislature
15 NM (Single jur.)	Judicial	Opt-in	4/30/2009	Judiciary
16 NY	Judicial	Automatic†	6/1/2008	Legislature
17 OH (mult. jur.)	Judicial	Opt-In	11/1/2008	Judiciary
18 OR	Nonjudicial	Opt-in*	9/28/2009	Legislature
19 PA (mult. jur.)	Judicial	Automatic	4/16/2008	Judiciary
20 RI (mult. jur.)	Nonjudicial	Automatic†	8/7/2009	Legislature (local)
21 WI	Judicial	Opt-in	7/1/2009	Legislature

* Negotiation program; no requirement for presence of a neutral third party.

† Changed from an opt-in to automatic program since our previous report.

Source: Authors' analysis of state programs.

State of play for foreclosure mediation

Types of foreclosure mediation in 21 states

There are two types of foreclosure mediation programs: opt-in (where homeowners have to initiate the mediation process) and automatically scheduled, often referred to as mandatory mediation.

Before we turn to our state-by-state analysis, a quick review of the types of foreclosure mediation programs now in operation will be helpful. Both opt-in and automatically scheduled or mandatory mediation refer to the way in which the homeowner accesses the program once a mortgage servicer initiates the foreclosure process. Under an opt-in program, once a borrower has received notice that the foreclosure process has begun (the mechanics of which vary by state), the borrower can inform the mediation program's administrator of his or her desire for mediation. Participation in opt-in programs is effectively voluntary for the homeowner and mandatory for the servicer.

Opt-in programs are currently the more popular structure among states and municipalities, but like opt-in programs in other areas of public policy (a popular example being organ donation¹⁰), participation rates are below 25 percent. In contrast, eligible homeowners participate around 75 percent of the time in programs with automatic scheduling.

Jurisdictions have seen the value of foreclosure mediation; nothing in mediation requires the parties to settle—they only do so if settlement nets the servicer greater value than foreclosure—and the high rate of settlements speak to its efficacy. The remaining obstacle is low participation—fewer people benefit if fewer participate. The answer is to increase participation. Some jurisdictions are now seeking these higher participation rates by replacing opt-in mediation with automatically scheduled mediation programs.

Fast facts on automatic mediation vs. opt-in mediation

Mandatory programs show high participation and results

	Automatic mediation	Opt-in mediation
Participation	Participation is about 75 percent of eligible homeowners.	The most generous estimate of eligible homeowner participation is about 21 percent.
Results	Consistently 70–75 percent reach settlement, with 60 percent of homeowners reaching settlements that permit them to keep their homes.	A wide range of results. New York saw settlements in 3 percent of mediations, with 1 percent of homeowners keeping their homes. Connecticut saw the same settlement rates in its opt-in and automatic programs—75 percent settle with 60 percent of homeowners staying in their homes.
Procedure	A program administrator schedules mediation upon initiation of foreclosure for eligible properties. Eligibility standard is broad and simple, usually covering owner-occupied residential properties.	A servicer or the court provides notice to the homeowner that mediation is available, enclosing a reply form. Court clerks must process reply forms, determining whether replies are timely and in the proper form. Certain states require homeowners to meet with housing counselors, to complete financial worksheets, and to certify these steps are complete prior to mediation. Other states require a notice that mediation is available be sent multiple times either by the court or the servicer. Still others require the court to determine whether the case is appropriate for mediation in the first place.

In automatically scheduled or simply “automatic” mediation, no additional homeowner request is required. Today, most automatic mediation programs are centered in judicial foreclosure states, but there is nothing preventing nonjudicial foreclosure states from implementing them as well. Providence, Rhode Island, for example, has an automatic program implemented by the city council that requires both parties to appear and engage in settlement discussions and may potentially penalize parties for failing to appear.

As in all mediation, neither type of program—not even automatically scheduled mediation—forces the parties to reach a settlement or allow the mediator to impose a settlement. Critically, mediation programs should not be confused with arbitration, in which the third-party arbitrator adjudicates the dispute. Rather, mediation creates an opportunity for both parties to engage in meaningful communication and negotiate a solution both sides can live with. But it’s equally important to note that even without the imposition of a settlement by a third party, a majority of cases that enter foreclosure mediation reach a settlement, indicating that mediation can often net both parties a better deal than proceeding all the way through the foreclosure process.

Three of the programs in the table above—California, Michigan, and Oregon—are noted as being “negotiation” programs, not mediation programs. While we do count these programs, they do not require the presence of a neutral third party during settlement discussions. Without a third party, there is also little need for a neutral meeting place or a meeting in person, and there is nobody to provide an

objective report on the outcome. Consequently, these programs have not reported any results, though the anecdotal experience of participants has been largely negative. This is in part the reason that California, which still has one of the highest per capita foreclosure rates in the country, has been working to convert its program from negotiation to mediation.

What we do not count in this report are purely voluntary initiatives claiming to be mediation programs. The reason: Homeowners and servicers can always meet for voluntary foreclosure settlement talks. Nothing in any program prevents the borrowers and servicers from doing so. Indeed, voluntary negotiation occurs all the time. Any time a homeowner or servicer reaches out to discuss mortgage modification outside of a formal program, such as the federal government's Home Affordable Modification Program, or HAMP, that is a voluntary negotiation.

Unlike formal mediation programs, in voluntary programs negotiating sessions only take place if all parties wish to engage. The point of instituting a formal mediation program is to address the frequent communication breakdown between homeowners and mortgage servicers caused at least in part by a shortage of personnel among mortgage institutions, which often prevents—or permits only sporadic—negotiations prior to the loss of a home in foreclosure. Voluntary programs offer no solution to this; they do not bring servicers to the negotiating table, even when the borrower reaches out in the interest of making a deal, so they offer little in the way of relief.

Below is a discussion of individual state programs, each offering an example of our key points: States need to evolve programs from opt-in to automatic mediation, expand existing pilot programs statewide, and—if there is no program yet in place—put one in place. As we'll demonstrate, our recommendations for states to embrace automatic mediation programs are based on solid analysis of how well these programs work across the country.

Opt-in programs evolving to automatic scheduling

Automatic scheduling makes sense. Both Connecticut and Philadelphia, two programs highlighted in our original report, evolved from opt-in to automatically scheduled foreclosure mediation. Both jurisdictions reported that around 75 percent of all participants in the program reached a settlement, and that moving from an opt-in program (where participation rarely tops 20 percent) to automatic mediation (where participation approaches 75 percent) would increase the number of participants without eroding settlement success rate.

And they were right. Both jurisdictions report a substantial jump in the number of participants, while success rates, defined as the two parties reaching a settlement regardless of the terms, remain largely unchanged.

Moreover, New York and Florida—both of which were singled out for criticism in our last report—are now noteworthy for the changes they’ve made in the past year. Both states skipped opt-in mediation—currently the majority of programs in operation across the country—and went straight to automatic mediation as they implemented statewide programs.

Connecticut’s program is described below. Discussions of Philadelphia, Florida, and New York can be found in the section on expansion to the state level beginning on page 15.

Maine is also discussed below, having chosen to go straight to automatic scheduling.

After that, we detail the experience in several states with opt-in programs that should move to automatic mediation, specifically New Jersey, Nevada, Delaware, New Hampshire, and Maryland. Among these states, Nevada is perhaps the most important state that should evolve its opt-in program to one of automatically scheduled mediation. The reason: Nevada has one of the highest foreclosure rates in the country and is significant for implementing the first foreclosure mediation program in a nonjudicial state. That program would benefit from the increased participation rates of automatic scheduling.

Let's now turn to each of the state programs.

The following states have successfully implemented automatic mediation

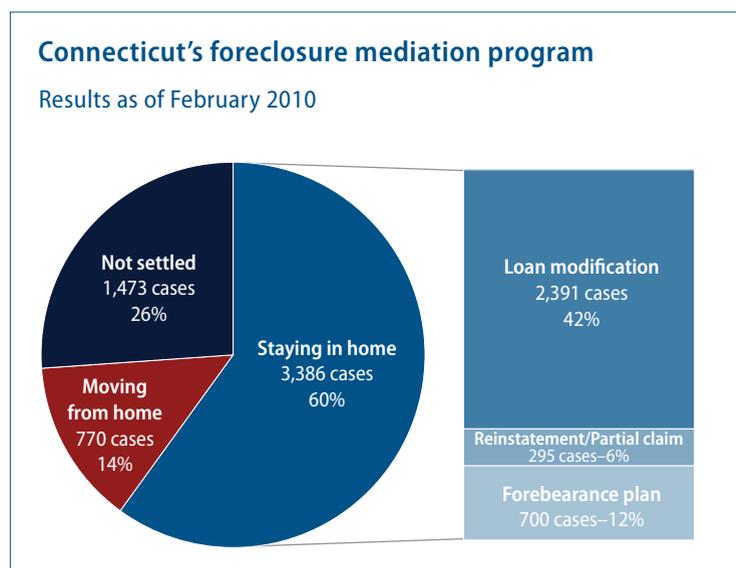
Connecticut: From opt-in to automatic

Connecticut's foreclosure mediation program was highlighted in our first report as the most comprehensive in scope—a fully funded, statewide mediation effort. The story of Connecticut's program serves to underscore one of our key points in our original report: Participation is the key to a successful program. We posited that mediation results in a settlement rate of over 70 percent whether participation is automatic or opt-in, so enlarging a program by converting it from opt-in to automatic would not erode the percentage of successful settlements. That appears to be the case in Connecticut, where the program was converted by the legislature from an opt-in program to automatic scheduling beginning with foreclosures filed on or after July 1, 2009.¹¹ The legislation also increased program funding to expand the number of mediators to be able to handle the anticipated increased volume of activity.

Through the end of June 2009, 73 percent of mediated cases had reached settlement, with 59 percent of homeowners staying in their homes and 14 percent negotiating a “graceful exit,” a term coined in Philadelphia to include a deed in lieu of foreclosure, short sale, cash for keys, or similar arrangement in which a homeowner can negotiate greater control over their departure from their home while simultaneously permitting the servicer to avoid the cost and delay of foreclosure.

Through the end of February 2010 (the latest available data), the results were essentially unchanged, with 74 percent of mediated cases reaching settlement, split between 60 percent of homeowners staying in their homes and 14 percent negotiating a “graceful exit” (see chart).

Under the original legislation, Connecticut's program was slated to end July 1, 2010, but legislation was recently signed into law that will extend and fund the program through July 1, 2012.¹²



Note: Statewide, 5,629 cases have completed mediation as of February 28, 2010. This chart illustrates the outcome of these cases. The category “moving from home” includes agreements for a short sale, a deed in lieu, or an extension of the law day or sale date. The categories “moving from home” and “staying in home” when added together result in a settlement rate of 74%.

Source: Connecticut Judiciary.

Maine

Maine skipped opt-in mediation altogether, enacting Public Law Chapter 402 at the end of 2009, which created an automatically scheduled mediation program that started in January 2010.¹³ Mediation is scheduled immediately in those cases where the homeowner answers the complaint. Sessions will be conducted by volunteer Maine judges. Given the newness of the program, results are not yet available.

The following states should move from opt-in to automatic mediation

New Jersey

Like Connecticut, New Jersey started with a successful, state-funded opt-in mediation program but should move to automatic scheduling. There is much to like about the state's opt-in program. Participants are not charged for mediation thanks to a \$12.5 million legislative appropriation for mediator and court fees.¹⁴ A separate appropriation covers housing counseling. Homeowners are sent notice that mediation is available three separate times during the foreclosure process and can request mediation any time up until the foreclosure sale. The mediation does not stay the proceedings, but the foreclosure sale cannot take place if mediation is in progress.

Like most other states' opt-in programs, participants in New Jersey get good results. As of September 30, 2009, 3,100 mediations had been scheduled, and 1,850 of those ran their course, with approximately 925 reaching settlement, or about 50 percent. Of the settlements, 70 percent, or about 650, permitted homeowners to stay in their homes.¹⁵

The problem with the opt-in program, however, is getting people to participate in the first place. Through September 30, 2009, New Jersey had approximately 47,500 foreclosure filings.¹⁶ Even generously assuming that only half of those would qualify for mediation as one- to three-unit owner-occupied residential properties, only 13 percent of eligible homeowners are requesting mediation. Automatically scheduled mediation would likely multiply participation several times over.

Nevada

Nevada's program is important for several reasons. First, the state's per capita foreclosure rate during the housing crisis has consistently put it in the top three of all states.

Second, unlike Pennsylvania and Connecticut, Nevada is a nonjudicial foreclosure state, which creates certain challenges. In Pennsylvania and Connecticut, diverting a court case to mediation in a judicial foreclosure state simply takes advantage of an existing judicial option. Requiring parties in a nonjudicial foreclosure to attend a mediation could be seen as injecting a quasi-judicial element into Nevada's nonjudicial process, which led some observers to raise concerns that nonjudicial states would have difficulty implementing foreclosure mediation programs.

To the contrary, we argued in our first report that nonjudicial foreclosure was the product of statute and, therefore, could be easily amended by statute to include foreclosure mediation. Nevada is living proof that the legislature in a nonjudicial foreclosure simply needs to amend the foreclosure statute to require mediation.

Finally, and most relevant to this section, is that Nevada's program is opt-in and should move to automatic mediation. Even with increasing interest, the program still has—at best—a 21 percent participation rate.

The program went live in July 2009, and initial reports raised concerns. Even with over 7,500 foreclosure filings per month, Nevada's program had scheduled just 10 mediation sessions by August 10, 2009—two weeks before mediations were to begin.¹⁷ But by mid-October, the picture had changed significantly, with 2,600 homeowners requesting mediation and with over 1,000 filing the necessary paperwork and paying for mediation. By mid-October, 70 mediation sessions had already been held.¹⁸

By the end of February, the program had dramatically ramped up, conducting a total of 1,440 mediation sessions since it began.¹⁹ The number of sessions held in March and April—1,195 in the two months combined—was nearly double the number held through February, so it is clear the program has begun to hit its stride.²⁰ Between December 2009 and May 2010, Nevada announced that it was swearing in 175 additional mediators, bringing the total to 270.²¹ Between July 2009 and the end of April 2010, there were 7,915 requests for mediation out of 74,031 notices of default in the state. If we assume that half of all foreclosure fil-

ings are on ineligible properties, such as those that are not owner occupied, at best, the 21 percent participation rate for the opt-in program lags far behind that of programs in other states that automatically schedule the mediations.²²

Eight months of running the program also prompted Nevada to adopt rule changes in line with the recommendations we have previously put forth. Among them:

- Extend timelines for mediations to occur from 90 days to 135 days
- Allow a second mediation if a lender does not make a temporary modification permanent after a homeowner fulfills all obligations of that agreement
- Permit postponements in mediations if the parties agree²³

Additional proposed changes benefit servicers by streamlining the process by which nonowner occupied properties—which are ineligible for mediation—can be excluded from the process, permitting the servicer to dispose of the property without further delay.²⁴

Delaware

Delaware stands in contrast to Maine, which developed its mediation program about the same time. Unlike the automatically scheduled mediations in Maine, Delaware created an opt-in program effective September 15, 2009, set to run through December 2012, but saw only five requests for mediation through its first three months.²⁵ Automatic scheduling would undoubtedly provide an immediate boost in participation.

Under Delaware's program, a homeowner who desires mediation has just 15 days to meet with a housing counselor and complete a financial worksheet. We believe 15 days is too short a period for homeowners who have just requested mediation because the homeowner must also complete a financial worksheet that may require the assistance of a housing counselor. In addition, foreclosure proceedings are not stayed during the mediation process, though a homeowner who does not file an answer to the foreclosure complaint but does complete the financial worksheet in preparation for mediation gets a 60-day reprieve before the servicer can seek a default judgment to move forward with the foreclosure.

That said, if mediation is not held within 60 days, regardless of the reason, and the homeowner has not filed an answer with defenses against the foreclosure, the

servicer can obtain a default judgment without completing the mediation. We recommend that Delaware change this last provision and prohibit default judgment or, at the very least, prohibit foreclosure sale prior to the end of mediation.

This is particularly true in a mediation program that requires so much of homeowners before they ever get to their first mediation session. The homeowner is often times the most flexible and available to attend mediation sessions. The problem lies with the understaffed courts and servicers. It isn't fair to have a homeowner who has gone through the effort to prepare for mediation lose their home because of others' delay.

New Hampshire

One of the major advantages of automatic scheduling is that it eliminates the administrative cost of vetting cases to determine eligibility—all foreclosures that meet the broad guidelines are scheduled for mediation. The other options all fall short: If the court decides eligibility, then the process saps already stretched judicial resources. If homeowners must opt in, participation drops. Permitting servicers to determine a homeowner's eligibility for mediation can be a little like leaving the wolf to guard the henhouse. New Hampshire provides a prime example.

On June 29, 2009, the New Hampshire legislature adopted S.B. 70, which authorized the Judicial Branch's Office of Mediation and Arbitration to provide pre-foreclosure alternative dispute resolution services.²⁶ The court has since launched the opt-in program, which is free to participants.²⁷

The program permits the servicer to determine whether the homeowner qualifies for mediation:

The lender has the authority to screen for eligibility for the program and may screen out cases in which the borrowers are: 1) eligible for the Federal Home Rescue plan, [presumably HAMP²⁸] 2) where the borrower's circumstances make a successful loan re-structure, work-out, or modification of the debt, unlikely, or 3) where the borrower has unreasonably refused to communicate with the lender about renegotiating the terms of an at-risk loan, when the lender has made prior attempts to renegotiate the existing loan terms with the borrower, directly.²⁹

These terms grant the servicer tremendous discretion without any oversight by the court or its representatives. Effectively, it places the onus on the homeowner to understand the determination of the servicer and object where needed—a difficult task for an unsophisticated party. Indeed, requiring a homeowner to opt-in and then potentially having to fight to stay in the program may create two separate barriers to entry, thus defeating the goal of broad participation.

Further, asking the servicer to determine a homeowner’s eligibility for a workout once the servicer has decided to foreclose is contradictory because servicers have the option to attempt a workout before filing foreclosure. The decision to foreclose can be taken to mean that the servicer has already considered and dismissed the option of a successful loan restructuring. Clearly, that is not the intent of the program.

One interesting aspect of New Hampshire’s initiative, however, is that it permits the homeowner to request mediation even before a foreclosure is filed, so long as the property is “at-risk” to qualify:

The property must be deemed by the lender to be “at risk” of foreclosure and the lender shall execute the “Lender’s Agreement to Participate”... It is not necessary for a notice of foreclosure to have been sent to the borrowers to qualify. A lender’s determination that the property is at risk of foreclosure is enough to trigger sending the notice to borrowers that the foreclosure mediation program exists and to permit borrowers to apply if the lender agrees to participate in the program.³⁰

It remains to be seen if servicers will agree to participate prior to the start of foreclosure.

Maryland

Maryland’s program is one of the newest. On May 20, 2010, Maryland Gov. Martin O’Malley signed into law General Assembly House Bill 427 creating a statewide opt-in program slated to go into effect in July 2010.³¹ We hope it serves as an example to all future states that starting off statewide is best.

The governor’s initial legislation echoed the recommendations of his foreclosure mediation task force formed in fall 2009, made up of stakeholders representing the government, lenders, homeowners, and counselors. The final legislation

requires a servicer to provide a homeowner with notice of intent to foreclose 45 days before initiating a nonjudicial foreclosure, the common method in the state. That notice must include a form for the homeowner to request “loss mitigation,” the industry term for activities related to delinquent loans. The goal of loss mitigation with regard to these loans—also known as “past due” or “nonperforming”—is to keep as much of the original value as possible, that is, to mitigate losses, by modifying interest, payment, or principle terms of the original loan. The servicer must complete the loss mitigation analysis and, if it declines to offer loss mitigation, notify the homeowner 30 days before going ahead with the foreclosure sale. The homeowner has 15 days to request mediation, leaving 15 days until the sale.

We find Maryland’s timetables troubling. As an initial matter, homeowners need more than 15 days to digest, complete, and return a request for foreclosure mediation, particularly when faced with the simultaneous, imminent need to secure housing if mediation does not yield a settlement.

Second, and perhaps more important, pushing foreclosure mediation to the very end of the foreclosure process may very well hobble the effort. By then, a servicer is an inch away from a foreclosure sale and will have little incentive to deal, having already expended much of the time and money foreclosure mediation is intended to save.

Similarly, a homeowner facing imminent foreclosure has far less bargaining power. Any offer from a homeowner comes with risk—something the foreclosure sale avoids altogether. Why agree to modifications, forbearances, move-out dates, cash for keys, or even a deed in lieu of foreclosure when a servicer has built up so much inertia in the foreclosure process and can be rid of a property in less than two weeks? The timing also makes certain options, such as short sales of the property, almost impossible because it takes too long to find a buyer and negotiate a deal.

Maryland should move foreclosure mediation to its rightful place at the start of foreclosure where it can save the parties the maximum amount of time and money, so the chances for settlement go way up.

Expand local programs to the state level

Foreclosure mediation successfully alleviates the stress on state courts and provides superior value for homeowners and servicers alike. Still, some states with existing programs have yet to deploy them statewide. It is time they did. Similarly, states considering localized pilot programs as a way of starting foreclosure mediation should not take a wait-and-see approach, but instead put plans in place from the get-go to take them statewide after an initial ramp-up period.

Of the 21 states with active foreclosure mediation programs, five (Illinois, New Mexico, Ohio, Pennsylvania, Rhode Island, and Wisconsin) offer programs in some jurisdictions within the state, but they do not have cohesive plans at the state level. Illinois, New Mexico, and Wisconsin are each testing opt-in programs, described below. Ohio and Pennsylvania have long-running mediation programs in several counties.

In Ohio, the state Supreme Court established a framework for the programs in late 2008, but implementation decisions were made locally. In Pennsylvania, the largest and oldest program is in Philadelphia, but Allegheny County, which includes Pittsburgh, also has a program that has been in place for more than a year.³²

Rhode Island has been the odd man out from the start with programs initiated and run completely at the city level.

These states should follow the leads of New York and Florida. New York previously rolled out what were effectively pilot programs in several counties under a mediation program that required courts to first determine whether the loan in question was “high cost” or otherwise subprime before permitting mediation. The state expanded its program in late 2009, providing all owner-occupied one- and two-family residences with automatic mediation and going statewide.

Florida took a similar path. Despite having one of the highest foreclosure rates in the country, Florida previously left each of its 20 judicial circuits to respond to

the foreclosure crisis independently. At the beginning of this year, however, the Florida Supreme Court reviewed the recommendations of a task force it set up for this purpose and issued new rules requiring uniform mediation procedures in all judicial circuits.³³ Those are in the process of being rolled out.

New York

New York's program, in place since 2008, permitted homeowners to request a settlement conference conducted by a judicial hearing officer or court-appointed referee. While some observers believe this did not constitute mediation, it is hard to see how a neutral third-party tasked with facilitating and reporting on the proceedings (termed a "referee," no less) is anything but a mediator.³⁴

The previous iteration of the program had two issues. Most important, the program limited its previous foreclosure mediation efforts to subprime, "high cost," and "nontraditional" mortgages—such as option adjustable-rate mortgages and those with interest rates significantly above the prime lending rate.³⁵ The result was a program with high administrative costs and little to show for it.³⁶ Second, while the program was technically statewide, it was in fact rolled out only in New York City, borough by borough—first Brooklyn, then Queens, Staten Island, and finally the Bronx—and, by all accounts, inconsistently at that. The result was a program that by June 2009 held only 800 conferences with resolutions in just 3 percent, or 24. Of those, only six were modifications.

On December 15, 2009, Gov. David Paterson signed a law to "[e]xpand the scope of the early mandatory settlement conference to include borrowers of all home loans and not just borrowers with subprime loans."³⁷ The eligibility requirements in the new law echo those of existing successful programs, applying to foreclosures on owner-occupied, one- to four-family residential properties.

The changes will potentially carry New York from the bottom to the top of the heap in terms of effective mediation programs. The state now has an automatic, statewide foreclosure mediation program and requires servicers to provide a payment history, an itemized list of principal, costs, and fees, and proof that the servicer rightly controls the underlying mortgage.

The amended rules also introduced a requirement that the parties negotiate in "good faith," though the term is not defined and failure to comply carries no clear

penalty.³⁸ As we've previously noted, such requirements can be counterproductive because they are necessarily poorly defined and difficult to enforce. A set of objective requirements provides greater value.

Considering the widespread lack of compliance by servicers' attorneys to bring required documentation to settlement conferences identified by the Center for New York City Neighborhoods in the summer of 2009,³⁹ it remains to be seen whether the program's improvements, notably automatic scheduling of settlement conference for all home mortgages facing foreclosure, will improve outcomes for participants.

Florida

Florida, one of the earliest and still one of the hardest-hit states in the foreclosure crisis, has finally unified its approach to foreclosure mediation. As detailed in CAP's original report, each of Florida's 20 judicial circuits developed separate approaches to the foreclosure crisis. Some, like Lee County, simply prohibited parties from appearing by phone in foreclosures and put in place a "rocket docket" to speed cases through in mere seconds or minutes. Others, like Miami-Dade County, automatically scheduled mediation for parties and hired the nonprofit Collins Center to administer the program. The Collins Center reports a success rate of 74 percent for mediations completed through December 2009.⁴⁰

The Collins Center programs, originally run in the Miami-Dade, Okechobee, and Okaloosa judicial circuit courts, became the prototype for the Florida Supreme Court's order dated December 28, 2009.⁴¹ Based on the recommendations in the final report of the Court's Task Force on Residential Mortgage Foreclosure, as well as the Court's own hearings, the order requires each judicial circuit to establish and manage a foreclosure mediation program that automatically schedules mediation, permits the homeowner to opt-out, and charges fees up to \$750 to the servicer.⁴²

The Florida program requires that mediation be scheduled at least 60 days after the plaintiff files its case, providing what we believe to be adequate time for the individual parties, as well as any housing counselors, to prepare the relevant materials. Many programs, particularly those with opt-in provisions, require homeowners to opt in to mediation within a very short window—usually around 14 days—with mediation scheduled soon afterward, making meaningful participation difficult for many homeowners.

Since December 2009, about a quarter of Florida's Judicial Circuits have implemented compliant programs. The 1st, 11th, and 19th circuits kept their already compliant Collins Center programs, and the 14th circuit, covering the Florida Panhandle, is now using them as well.⁴³ The 12th circuit, which includes Manatee, Sarasota, and De Soto counties, will also be using the Collins Center in conjunction with the University of South Florida's Conflict Resolution Collaborative.⁴⁴ The 4th judicial circuit's program will be managed by the Jacksonville Bar Association, while the 17th's will be managed by the American Arbitration Association.⁴⁵ Many other circuits have active bidding processes underway.⁴⁶

An interesting aspect of the Florida program is a carve-out for pre-foreclosure mediation in which the servicer and homeowner decide to mediate before ever initiating formal proceedings. In the Court's words:

*The parties may also opt out of post-filing managed mediation if they participated in pre-suit mediation either directly through the managed mediation program or through a Supreme Court-certified circuit civil mediator specially trained to mediate residential mortgage foreclosure actions, providing the borrower has participated in foreclosure counseling, there has been a supervised exchange of plaintiff and borrower disclosures, and mediation resulted in either settlement or impasse. In order to qualify as an opt-out from the managed mediation program, pre-suit mediation must share characteristics of the managed mediation program; that is, it must be independent, genuine, fair, and impartial.*⁴⁷

It will be interesting to see what role, if any, pre-lawsuit mediation plays going forward. Foreclosure mediation was created in part because homeowners and servicers could not find a way to communicate prior to foreclosure. It is hard to imagine servicers having the resources to engage homeowners prior to foreclosure for the foreseeable future.

Moreover, servicers will want to know for certain that pre-lawsuit mediation precludes post-lawsuit mediation before investing the resources—a guarantee not present in the general legal standard set out by the Court that such mediation must be “independent, genuine, fair and impartial.” Servicers' attorneys will undoubtedly question whether the language simply invites homeowners having reached an impasse in pre-lawsuit mediation to attack it in the hopes of getting a second bite at the apple. The conservative solution will be to simply ignore the option and file suit.

Ohio: Statewide from the start but still needs to scale

Ohio has ostensibly had a foreclosure mediation presence in each of its 88 counties since 2009, but no coherent state program has emerged. In February 2009, the state Supreme Court published guidance documents and assigned mediation contacts to each local court.⁴⁸ The local courts were then charged with putting programs in place, which they have to varying degrees.⁴⁹ The three major programs are in Cuyahoga County, covering the Cleveland metro area, Franklin County, and Lucas County.⁵⁰

Cuyahoga's program is among the most advanced in the nation, employing both counseling and mediation-based approaches.⁵¹ Counseling is conducted by one of four state-funded nonprofit agencies prior to the initiation of foreclosure proceedings: Community Housing Services, Empowering and Strengthening Ohio's People, Cleveland Housing Network, and Neighborhood Housing Services. Together, these agencies counseled approximately 5,000 of the over 13,000 foreclosure filings in the county during the three years between March 2006 and February 2009.⁵²

From March 2008 through February 2009, the agencies completed 1,300 counseling cases. In these cases, 63 percent of homeowners reached a workout with their lender, and 53 percent were able to remain in their homes.⁵³ Of the remainder, the majority, or 20 percent, withdrew from counseling with the result unknown, while 4 percent entered bankruptcy and 7 percent were referred to legal and social services for additional assistance.

Many of the cases left unresolved through counseling ended up in foreclosure and, thus, mediation. In the year from June 2008 through June 2009, 2,416 qualifying homeowners were referred to mediation, representing 23 percent of all foreclosure filings in Cuyahoga County. Ohio rules require that the parties attend a pre-mediation session where the court determines whether the parties have collected the necessary paperwork and are prepared to negotiate effectively. As noted above with regard to New Hampshire's program, this vetting siphons valuable time and resources from all parties. Such sessions were held in 1,542, or 63 percent of qualifying cases. Despite the high number of pre-mediation sessions, only 443 mediations were completed in that year, of which 52 percent, or 231 cases, reached settlement.⁵⁴

If Ohio follows the pattern of other programs in other states, the low number of completed mediations is likely due to homeowners' need for time to collect their paperwork on one hand and servicers being overwhelmed at the volume of cases

on the other. As in most other jurisdictions, this prompts parties to consent to continuation of their case.

While the 231 settled cases represent just under 10 percent of cases qualifying for mediation, the number is misleadingly low. As many as 1,099 cases had yet to complete mediation and an additional 12 percent (292 cases) were settled by the parties out of court after they were referred to mediation. Adding these cases, the process could result in about 1,105 settled cases, representing 45 percent of all cases referred to mediation.

Compared to Philadelphia, Connecticut, and other foreclosure mediation jurisdictions sporting 70 percent or higher settlement numbers, Cuyahoga County's 45 percent to 53 percent settlement rate may still seem low. Yet one must take into account the extensive counseling available prior to foreclosure. It is possible that cases that go to mediation in other jurisdictions are resolved prior to foreclosure during counseling with one of the nonprofit counseling agencies. These potential settlements are "taken out of the pot" early, leading to the lower rate of settlement in mediation.

Other Ohio counties have set up programs as well. Summit County, encompassing Akron, reported as of the end of September 2009 that homeowners opt-in for mediation in 18 percent of all foreclosure cases, in line with other successful foreclosure programs.⁵⁵ Of the nearly 1,200 requests, 671 mediations have concluded, with 61 percent resulting in a settlement, including both situations in which homeowners kept their homes as well as deeds in lieu of foreclosure and short sales. Summit is to be commended for its high mediation completion rate.

In Franklin County, officials received 627 requests for mediation and held over 150 sessions.⁵⁶ Seventy-eight resulted in settlements with defendants staying in their homes, while 31 were still negotiating. As in other jurisdictions, the main obstacle appears to be resources for hearing cases, with nearly 500 mediation sessions still to be heard. In Lucas County, which encompasses Toledo, courts held 200 mediations, resolving 140 of them as of February 2009.⁵⁷ Unfortunately, more recent or detailed breakdowns of the outcomes are not available.

While these counties include some of the largest populations in the state, Ohio should extend the availability of a robust foreclosure mediation to every county. There is no reason why certain Ohioans should be given a better chance of keeping their homes thanks to their geography in a state with one of the oldest foreclosure mediation programs in the country.

Existing programs ready to go statewide

Philadelphia

Often held out as the gold standard of mediation programs, Philadelphia represents the first of two mediation models in our original report—a jurisdiction running a successful mandatory foreclosure mediation program without funding. Program participants, such as housing counselors, have since received some funding, but the city’s Court of Common Pleas is still successfully self-funding the program’s efforts.

Pennsylvania is a judicial foreclosure state. The Philadelphia program leverages the Court of Common Pleas’s case management system to automatically schedule “conciliation conferences” within 30 days to 45 days after a servicer files a complaint, beginning the foreclosure process.⁵⁸ Accompanying the notice that mediation has been scheduled is a flyer directing homeowners to call the Save Your Home Philly Hotline and speak with a housing counselor. The hotline helps connect borrowers with counselors, avoiding the need for borrowers to locate suitable counselors.

Conciliation conferences are held at the Court of Common Pleas every Thursday. Because of the volume of cases being heard, the court does not immediately assign a mediator, known as a judge pro tem, to each conference when the case is called. Instead, these informal conferences are held in small clusters arrayed around the courtroom or spilling out into the hallway. These conferences can include servicer’s counsel, the borrower, counsel for the borrower (often pro bono counsel), and a housing counselor.

Under the rules of the court, a servicer’s representative, with actual authority to enter into a settlement, must be present either in person or by telephone; failure to meet this requirement can result in postponement.⁵⁹ If a conciliation conference hits a roadblock, the court has mediators on hand to provide an immediate closed-door session. Disagreements persisting through the mediation session are heard by the judge on duty.

In our original report, we were only able to provide anecdotal evidence regarding outcomes—that one-third of all resolved cases involved loan modifications and payment plans, while the balance negotiated “graceful exits,” such as cash for keys and deeds in lieu of foreclosure. Since then, we have received more detailed statistics from a pro bono legal assistance effort assisting in the program, Philadelphia’s Volunteers for the Indigent Program. VIP attorneys are present in the courtroom during the Thursday sessions held at the Court of Common Pleas and are engaged by parties and their housing counselors as needed. While they do not get involved in every case, they provide a snapshot of program participation.

Moreover, since access to VIP’s pro bono attorneys is limited to the poor, the cases with VIP representation likely are some of the more difficult cases in which to seek common ground between the servicers and borrowers. Nevertheless, the results from the completed VIP cases are impressive, showing similar success rates to programs in Connecticut and parts of Florida.

VIP closed 309 cases through October 2009, with 111 of those in the year between October 2008 and 2009. When VIP was involved, over 70 percent of homeowners kept their homes after an informal conciliation conference or formal mediation. Fifty-eight percent of the total did so through loan modification. Of those that did not keep their homes, 14 percent proceeded to foreclosure and nearly 8 percent succeeded in a short sale of the property.⁶⁰

These modifications are sustainable. The Philadelphia Unemployment Project tracked the long-term performance of 154 homeowners who worked with the Unemployment Information Center, a Department of Housing and Urban Development-approved housing counseling agency affiliated with the Philadelphia Unemployment Project, to help them avoid foreclosure through this program. These 154 homeowners sought assistance from the Unemployment Information Center between June 2008 and February 2009, and their current status was reported as of November 2009, putting them between nine months to 17 months postcounseling.

Of the 154 homeowners, only 19 (12 percent) are no longer in their homes, with six sales by owner and 13 sheriff sales. Another 28 percent remain in their homes waiting for a final outcome. The remaining 60 percent of borrowers are still in their homes as the result a successful mediation, including 45 percent who negotiated a loan modification.⁶¹

There has been replication of the Philadelphia program in Allegheny County, which includes the city of Pittsburgh. Considering the program's success in preventing foreclosures, it is critical to expand the program statewide.

Providence and Cranston, Rhode Island

Rhode Island is a special case because it is the city of Providence, rather than the state or state court, which is requiring foreclosure mediation via an ordinance. The original ordinance, passed in July 2009, created an opt-in program. A similar ordinance was passed in Cranston in November, over the mayor's veto. By January 2010, the Providence City Council amended the ordinance to automatically schedule mediation in every case.⁶² The ordinance requires lenders to participate in mediation or face fines of up to \$2,000. It is more onerous than state law, which merely requires that servicers provide homeowners with written notice of the availability of counseling and related services as part of initiating a foreclosure.⁶³

In March, Deutsche Bank, Bank of New York Mellon, and Wells Fargo each sued Providence, claiming that the ordinance went beyond the city's power and contradicted the requirements set out by a new state law passed in January of this year.⁶⁴ The litigation had a chilling effect, as the mayor of Warwick vetoed a similar ordinance by that city's council, citing the lawsuits and the concerns they raise.⁶⁵

On May 17, the Superior Court upheld the Providence ordinance requiring mediation.⁶⁶ The ruling left in place the mediation requirement with the threat of a \$2,000 fine, but struck down a provision that prevented servicers from filing the foreclosure deed (a required step in foreclosure) unless they entered mediation. The result is an ordinance that does not absolutely mandate foreclosure mediation, but rather charges servicers a \$2,000 fine for non-compliance.

Louisville, Kentucky

Jefferson County, encompassing the city of Louisville, implemented a program effective July 1, 2009 modeled on Philadelphia's program.⁶⁷ Data is not available on this program yet, but if response is anything like that in Philadelphia, we encourage Kentucky as we do Pennsylvania to expand the program statewide.

Illinois

Cook County, Illinois, encompassing Chicago, announced a program in July 2009 that makes housing counselors and attorneys available to borrowers who receive foreclosure summonses and uses the scheduled foreclosure hearing as a mediation session.⁶⁸ Newly funded with \$3.5 million from the Cook County board, program counselors and attorneys help prepare a homeowner for a court date to determine whether the case “can be mediated with a lender.”⁶⁹ The counselors and attorneys are present at the courthouse, providing troubled homeowners with what has been described as a “one-stop triage for housing ills.”⁷⁰

The existence of the program and availability of some funding is encouraging. We hope that early experience will prove the worth of the program to Illinois and make clear the benefits of replacing an eligibility hearing in every case with a clear eligibility standard that lets parties jump right into mediation. The hearings let the court determine mediation eligibility with a greater degree of certainty, but they create an additional burden on the judiciary when a central tenet of foreclosure mediation has typically been to reduce the strain on an already-taxed court system. The \$3.5 million is a good start, but counselors report that Cook County’s need is such that this represents funding for two hours of counseling per borrower when most cases require 8 to 10 hours of attention from a counselor.

As we went to press on this report, a mediation program was announced for Will County as well. It is slated to begin this summer.⁷¹

New Mexico

New Mexico’s First Judicial District Court, covering the cities of Los Alamos, Rio Arriba, and Santa Fe, created an opt-in mediation program at the end of April 2009.⁷² The program is administered under the court’s general ADR, or Alternative Dispute Resolution, Program Pilot Project, and is free to participants. Mediation is held if *either* party requests it, the servicer must designate an agent with power to appear and settle the case, and the first mediation session must be held within 30 days of the request. Servicers must provide the mediator with a clear chain of title to the note and mortgage 10 days before the mediation; homeowners must meet with a housing counselor within the same time limits.

The program has a solid foundation, particularly for a state that has a relatively low per-capita foreclosure rate (ranked 32 out of 50 in 2009 according to RealtyTrac),⁷³ and should be adopted statewide. The inclusion of the program within the existing judicial ADR infrastructure should minimize the organizational impact.

Wisconsin

Milwaukee has an opt-in mediation program that was established by the First Judicial District's Chief Judge in July 2009. Results from the Milwaukee program, run by the Marquette University Law School, are encouraging. As of November 2009, the program had 313 requests for mediation, with around 50 completed cases and a reported 97 percent mortgage modification rate.⁷⁴ As of February 22, 2010, 550 foreclosures had entered mediation, with 107 homeowners able to keep their homes following mediation and only 12 failed mediations.⁷⁵ As with most other mediation programs, the unreported outcomes reflect ongoing cases.

Milwaukee's success is due in part to the efforts of the Mortgage Foreclosure Project Initiative, which publishes a list and maps of homes in foreclosure, permitting housing counselors and volunteers to go door-to-door and engage homeowners.⁷⁶ Door-to-door outreach is also cited as a reason for the high participation rates in Philadelphia. Even with sustained outreach, however, Milwaukee's program's participation rates may be affected by three limitations in its structure.

First, the program is opt-in, not automatic. So despite the high success rate of cases that go to mediation, homeowners are opting for mediation in only about 20 percent of the foreclosures filed since the program went into effect. Second, the homeowner has just 15 days to request mediation after being served with a notice of foreclosure. This may be insufficient time for borrowers to understand their legal rights and their options to make a decision to participate. Third, the homeowner, having just been sued, must pay a \$100 fee for mediation, which may deter some homeowners from opting in.

Taken together, these factors bolster the argument for automatic scheduling and expansion of the program from a local to a statewide initiative. Already, the high success rates of the Milwaukee program have led other neighboring county circuit courts to work closely with Marquette University Law School. While the Outagamie and Waukesha County programs remain voluntary, with lenders able to opt out of

participating,⁷⁷ the programs in Buffalo and Pepin Counties are opt-in programs, mandating servicer participation when homeowners request mediation.⁷⁸

This past legislative session, the Wisconsin legislature considered a bill that would create a statewide opt-in foreclosure mediation program.⁷⁹ The bill stands out because unlike legislation in many other states a mediation request would stay foreclosure proceedings and the mediator would be charged with determining the parties' subjective good-faith participation. While we are agnostic regarding stays of proceedings, we discourage requiring the mediator to make a determination of good faith. Under the current programs, the application for mediation does not constitute a response to the foreclosure complaint.

Indiana

Indiana deserves a special mention here as well. The state legislature established a statewide program in March 2009 with little success, so the judiciary created pilot incentive programs in certain counties to restart the effort. Homeowners receive an opt-in form with the notice of the foreclosure action and must respond within 30 days. By October 2009, the state had trained 1,000 judges, mediators, and attorneys to conduct foreclosure mediations, but only 2 percent of eligible homeowners had requested mediation through the end of 2009.⁸⁰ This would represent an approximate maximum of 500 mediation requests.⁸¹

One year into the program, the Indiana judiciary has created a pilot program to sweeten the deal. Beginning with a pilot in Allen County, which incorporates Fort Wayne, courts have enlisted the help of "facilitators," paying them to coordinate between homeowners, counselors, and the servicers' representatives.⁸² Facilitators are reported to earn \$37.50 per case.⁸³

In addition, the program will pay \$150 to those involved in settlements that successfully delay foreclosure filings by at least six months. The program has seen success in Allen County and is being rolled out shortly in Marion (Indianapolis), Monroe (Bloomington), and Saint Joseph (South Bend) counties.

We hope the programs prove successful and, if so, are adopted statewide. More importantly, however, automatic mediation would obviate this by doing away with the need for homeowners to opt in.

Improve and pass pending legislation to create real foreclosure mediation programs

Wisconsin (discussed above) and California (discussed below) have built on previous efforts and are considering statewide mediation programs. Arizona, Massachusetts, Tennessee, Texas, Vermont, and Washington, D.C.—none of whom currently have any mediation programs in place—also have pending legislation. Finally, there is the strange case of Iowa, whose voluntary mediation program operates so closely to an opt-in program that it should be both beneficial and relatively simple to formalize it.

California

In the June 2009 report, we noted that California’s 90-day “moratorium” on foreclosures, passed June 15, 2009, would have little effect because it permitted servicers with a “comprehensive loan modification” program to obtain an exemption.⁸⁴ That is, in fact, what has happened.⁸⁵ Every one of the major servicers, including Bank of America, CitiMortgage, and Wells Fargo obtained an exemption. It is not clear what California’s legislature hoped to achieve with this bill, as these servicers already had loan modification programs in place, so the bill did not encourage most servicers to do anything they were not already doing.

In September 2009, Los Angeles Mayor Antonio Villaraigosa teamed up with State Assembly Speaker Karen Bass and assembly members Ted Lieu and Pedro Nava to introduce State Assembly Bill 1588. The original version of the bill created an opt-in mediation system styled the “Monitored Mediation Workout Program.”⁸⁶ The stand-out feature of this program was the power granted to a monitor who, unlike a mediator, could actively participate in negotiations and propose a loan modification scenario to the parties. If the servicer did not participate in the process in good faith, the homeowner could seek to enforce the monitor’s loan modification proposal in court. The neutral third party in the program is called a “monitor “ rather than a “mediator “ because the latter term implies very specific and narrow legal powers under California law.

Having been referred to committee without action prior to the close of 2009, that bill died.⁸⁷ A significantly revised version was introduced on February 11, 2010 that would establish a “facilitated mortgage workout program.”⁸⁸ The new version echoes the mechanics of other opt-in mediation programs and includes substantial documentation requirements for both parties. But concerns over program costs led to amending the legislation to stipulate that the program would only be implemented if fully funded by the federal government. Given the lack of federal funding for mediation programs at the current time, even if the bill were to pass (it was kept alive by a single vote in the assembly),⁸⁹ the current weak negotiation system with its broad exemptions would remain for the foreseeable future.

The benefit of automatic mediation, even in nonjudicial foreclosure states such as Nevada, has been well established. California should move directly from its failed attempt at negotiation to automatic mediation.

Arizona

A bill introduced in the House of the Arizona State Legislature is pending and would postpone foreclosures by 60 days, during which the “owner shall have the opportunity to negotiate a revised payment or other revised terms of the loan.”⁹⁰ The legislation provides no other structure or requirements for the negotiation, so it is unclear whether the language even manages to create a true mandate. Moreover, Arizona’s classically conservative legislature is not expected to successfully pass any such measure.

Massachusetts

As of the writing of this report, the Massachusetts legislation has much in common with the existing California code that does little to change current foreclosure practices of servicers. The proposed legislation would extend the existing 90-day statutory period in which a borrower has a right to cure a default prior to the initiation of foreclosure proceedings to 150 days, but would return to the 90-day timetable for foreclosure where the servicer can show a good-faith effort to mediate the dispute.⁹¹

The right to cure exists in many states and is simply the homeowner’s right to halt or prevent a foreclosure by paying the current overdue payments on the mortgage. When a homeowner stops making payments on a loan, known as “default,” the

servicer has the right to “accelerate” the loan, making the rest of the principal and interest due immediately, instead of over the original term of months or years. The right to cure is granted by state law for a period of time; if a homeowner can make all the overdue payments during the cure period, the servicer cannot accelerate the debt or foreclose, and must instead go back to treating the loan like any other.

Unfortunately, the extension of the foreclosure period by two months is likely to do little to encourage servicers to choose modification over foreclosure, especially when one considers that servicers often don’t file immediately or they otherwise drag out the process to avoid taking title on the property and with it the costs of taxes and upkeep.

In such an environment, a swing of two months isn’t going to force servicers to move much slower than they already are, or introduce additional delays into the system. The bill could be improved through a more significant extension of the right to cure, and thus the foreclosure process, to a full year, but also concurrently provide for eliminating the waiting period entirely (removing even the existing 90-day right to cure) for mediations that fail after a good-faith effort by the servicer or failure to appear by the borrower. That would give the bill real teeth for nonparticipation but also give something back to the servicers for complying.

Moreover, there is no formal foreclosure mediation program set out in the bill, making the efforts effectively voluntary. The involvement of a neutral, educated third party with the authority of the state behind him or her is what lends the mediation process the necessary gravity to succeed—both in getting homeowners to take it seriously and show up, and in motivating servicers to participate effectively. Similarly, face-to-face communication between borrower and servicer is an important component in effective mediation, as we noted in our original report. Instead, the proposed Massachusetts legislation allows servicers to meet participation requirements by phone and without the presence of a neutral third party.

Tennessee

Tennessee has legislation pending before both houses to create a pilot program in Shelby County, which includes the city of Nashville.⁹² The bill would create a pilot program in any county with a population of over 800,000 in any census, 2000 or later. Only Shelby County qualifies under the 2000 census. The bill is a single page and permits either party to request mediation, but provides virtually no other guidance.

Texas

Texas presents a similar scenario. The Texas House and Senate both have bills that have been sitting in committee for at least nine months without movement.⁹³ What's more, the one- to two-page bills provide what can best be described as the skeleton of foreclosure mediation. The best part of the legislation is that mediation would happen very early in the process; the servicer would be required to send the homeowner notice that mediation is available between 60 days and 90 days *prior* to accelerating the debt or initiating foreclosure.

Unfortunately, the remainder is lacking. The bills provide homeowners 30 days to respond, but unlike other states, the 30 days start on the postmark date, not the date of receipt. Second, the bill only requires in-person mediation if both parties consent. Otherwise, sessions are held by telephone. Finally, the bills provide no description of the mediation itself—the mediator's qualification, the form of the notice, and document requirements are all missing. The legislation should at least empower the judiciary explicitly to administer the program and fill in these gaps.

Vermont

In Vermont, House Bill 590 passed March 18, 2010, and it has been introduced and referred to the judiciary committee in the Senate.⁹⁴ The bill gives the homeowner 20 days to opt-in to mediation and mediation must take place before the expiration of the sale period. The legislature provided the court with discretion to extend this time if the homeowner makes the request to extend in good faith within a reasonable time.

The law also requires the servicer to have someone present at mediation with access to the borrower's real-time data. Finally, the servicer is responsible for the cost of mediation, and does not provide for the recovery of those costs in subsequent foreclosure actions.

Washington, D.C.

The District Council is considering an opt-in mediation bill that would provide the homeowner notice that mediation is available and give him or her 30 days to respond and request mediation. A request for mediation would prevent the ser-

vicar from advancing foreclosure proceedings until the mediation is complete. A servicer's representative attending must have authority to make a deal or must "have access at all times during the mediation to a person with such authority."⁹⁵ The mediator in the proposed legislation would have the power to determine the parties' good faith and recommend sanctions for violations. The cost of the program would be \$1000 and shared equally by the servicer and homeowner, which, as we have noted previously,⁹⁶ runs contrary to standard American civil practice where the party initiating the legal action pays the court fees.

Iowa

Iowa's foreclosure mediation program is, well, odd. It's a voluntary mediation program with the trappings of opt-in mediation. As of April 2009, Iowa state law required lenders and mortgage servicers to provide homeowners with notice that counseling and mediation were available and stayed the foreclosure sale for 60 days upon such request.⁹⁷ The state's foreclosure mediation notice, sent to delinquent borrowers and those in foreclosure, instructs homeowners to reach out to Iowa Mortgage Help counselors.⁹⁸ Homeowners who receive counseling can request mediation or the housing counselor can refer them to mediation. Iowa Mortgage Help employs Iowa Mediation Services, Inc. to provide mediation, but the mediation only occurs where both parties agree to it.⁹⁹

The opt-in portion of the program—the request for counseling—registered a 20 percent participation rate, with about 1,100 homeowners applying for help in 2009.¹⁰⁰ Of those, 77 percent entered mediation, while the rest just received counseling. Of the 77 percent that entered mediation, 29 percent (321) modified their mortgage, 15 percent (116) lost their homes (this includes workouts where the homeowner lost his or her home), and 35 percent (385) are ongoing.

Iowa's program is the strongest of the voluntary programs we examined. Nonetheless, it lags in both participation rates on the front end (20 percent versus more than 50 percent in automatic mediation programs in other states), as well as the number and quality of settlements on the back end (29 percent of homeowners keeping their homes versus 59 percent in an automatic mediation state such as Connecticut).¹⁰¹ With most of the processes already in place and operating, it should be relatively simple for Iowa to convert its voluntary foreclosure mediation program into an automatic one.

The remaining states have no foreclosure mediation programs

The remaining states have no foreclosure mediation programs. These missing jurisdictions accounted for fewer than half of all foreclosures last year, indicating that those states with the biggest foreclosure problems are already working to put an ADR—Alternative Dispute Resolution, which encompasses arbitration, negotiation, and mediation—solution in place for foreclosures.

The notable states are Utah and Idaho, ranked fifth and eighth respectively in per-capita foreclosures for the first quarter of 2010, as well as Minnesota, where Gov. Tim Pawlenty has already vetoed such legislation once. Here's a quick look at these three states.

Utah

Utah has no existing or proposed foreclosure mediation or negotiation programs.¹⁰² The state's governor has worked with a task force to create homeowner resources, such as websites and counseling hotlines. These, however, have focused on fraud and predatory lending prevention, and there are no measures in place requiring, for example, that a servicer's notice of foreclosure include the state hotline (211) information necessary to reach housing counselors.

Idaho

Proposed legislation in Idaho did not get even as far as Arizona's; the bill did not receive sufficient support in committee to merit a hearing.¹⁰³ State Rep. Wendy Jaquet's proposal would have required notice to the homeowner to include the name and contact information of the trustee, contact information for housing counseling services, and an opt-out mediation program.

Minnesota

Efforts to provide foreclosure mediation in Minnesota were stymied by Gov. Tim Pawlenty. Last May, he vetoed an opt-in mediation measure passed by the state's legislature, and the vote to override the veto failed. Subsequently, the Homestead-Lender Mediation Act was re-introduced in amended form. The House has supported its passage, and it was recently approved by the Finance Committee in the Senate.¹⁰⁴

Conclusion

Foreclosure mediation boasts a short but proven track record in preventing foreclosures, and it does so only because it permits both parties to see that there is a better deal to be had instead of foreclosure. We believe servicers foreclose because in the chaos of the housing crisis connecting with a homeowner is complex and mediation is new on the scene. The path to foreclosure without mediation, however, is well trodden. What's more, foreclosure provides mortgage service companies—rather than lenders or investors—with guaranteed fees and immediate returns—even if they represent a fraction of what could be had in settlement.

States have it in their power to mitigate foreclosure and the accompanying blight through foreclosure mediation. The simple act of participating in mediation consistently yields solutions short of foreclosure that are acceptable to both sides. We have found that automatic scheduling is the key to participation. Community support is critical in the form of awareness campaigns, counseling, and so on. We are proud of the efforts communities all over America have made to dig us out of the housing crisis. The best way to leverage their efforts is to put in place a system that effectively facilitates settlement, and that system is automatic foreclosure mediation.

Even the programs with the highest success rates are continuously evaluating themselves and looking to make improvements. Program administrators, borrower advocates, servicers, attorneys, judges, and legislators all stand to gain from knowing what works where, and why. We hope this report is of use to practitioners and supporters of mediation programs in helping shed light on how existing programs are doing, in addition to providing useful guidance on where to go from here. We hope it can foster conversations not only within each state, but also across state lines as the community of practice expands.

Endnotes

- 1 Andrew Jakabovics and Alon Cohen, "It's Time We Talked: Mandatory Mediation in the Foreclosure Process" (Washington: Center for American Progress, 2009), available at http://www.americanprogress.org/issues/2009/06/time_we_talked.html.
- 2 The first potential federally backed foreclosure mediation program is rumored in Broward County, Florida. Fannie Mae is considering a program there, though details are not yet available. Harriet Brackey, "Mortgages: New Help coming for South Florida's troubled homeowners" *The Sun Sentinel*, May 14, 2010, http://blogs.trb.com/business/columnists/brackey/blog/2010/05/mortgages_new_help_coming_for.html. Broward is currently and separately deploying the mediation program mandated for all judicial circuits by the state Supreme Court.
- 3 For more on the financial incentives behind servicer actions, see Diane K. Thompson, "Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior: Servicer Compensation and its Consequences" (Boston: National Consumer Law Center, 2009), available at http://www.consumerlaw.org/issues/mortgage_servicing/content/Servicer-Report1009.pdf. For a rebuttal to those arguments, see Paul Koches, "Mods Make Sense," *DSNews*, February 25, 2010, available at <http://www.dsnews.com/articles/mods-make-sense-2010-02-25>.
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