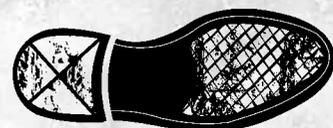
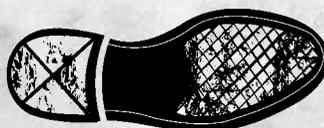
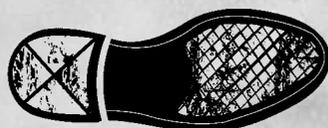
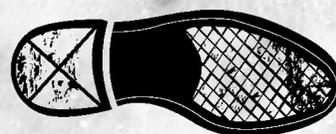
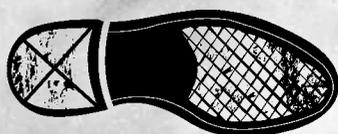
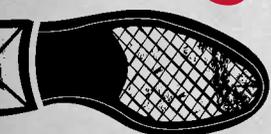


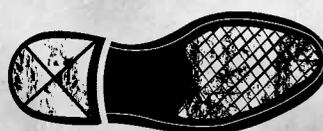
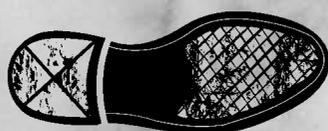
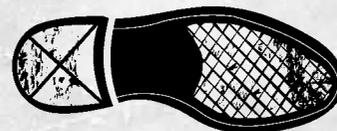
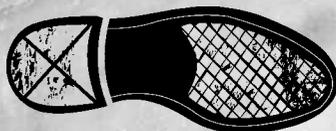
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THE
SUPREME COURT
CONTINUES ITS
MARCH TO THE
RIGHT



Child Custody Jurisdiction and Domestic-Violence Survivors

Foreclosure Mediation

Universal Voluntary Retirement Accounts

Ethical Questions Involving Unrepresented Litigants

The *Olmstead* Decision at Ten



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Foreclosure Mediations



Can They Make a Difference?

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As foreclosure rates surged over the past two years and the federal response to the growing crisis faltered, state and local governments were making their own efforts to relieve homeowners in distress. One such effort has been foreclosure mediation. These programs have taken many forms, but typically they require a lender or mortgage servicer to confer with a homeowner before a foreclosure proceeds to a sale. Between mid-2008 and mid-2009 more than twenty-five foreclosure mediation programs were opened in fifteen states.¹

The hope has been that mediation will bring homeowners and mortgage holders together, overcoming the gulf that securitization of mortgage debt created between the parties. Mediation can be a way to bridge that gap and encourage the parties to seek mutually advantageous alternatives to foreclosure; the need for such alternatives is readily apparent. For example, a national survey of mortgages in foreclosure during November 2008 indicated that lenders were incurring losses averaging \$124,000 in each foreclosure.² With the loans in foreclosure averaging \$212,000, this meant that lenders were losing 57 percent of the value of their investment each time they completed a foreclosure. Average losses on second mortgages subject to foreclosures were nearly 100 percent.³

A September 2009 update of the same study found that investors' losses from foreclosures of first mortgages had risen even higher, to 65 percent of the value of the loans.⁴ But servicers were rarely modifying loans to make payments more affordable to homeowners. In the relatively few instances when servicers agreed to write off some loan principal, the average write-off was only \$14,353, an average of just 6.4 percent of the original loan amount. In the overwhelming majority of cases lenders did not modify loans at all. Instead they pursued foreclosures and incurred average losses of \$143,987, or nearly two thirds of the value of their investments.⁵

¹See my summary of these programs in the table at the end.

²Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modification*, 41 CONNECTICUT LAW REVIEW 1107 (2009), <http://bit.ly/4ECjzg>.

³*Id.*

⁴Alan M. White, Valparaiso University School of Law, Columbia Collateral File Summary (June 25, 2009) (available along with other monthly updates at <http://bit.ly/PA76a>).

⁵*Id.*

In light of the staggering losses that foreclosures routinely cause, there must be a sizable common ground where borrowers and lenders can reach agreements that avoid foreclosures. Mediation programs appear to create the ideal structure where homeowners and servicers can come together and explore that common ground.

No one disputes that loan servicer and homeowner must communicate with each other. Yet little hard data confirm that the communication occurring so far in foreclosure mediation programs has led to a substantial number of affordable and sustainable loan modifications. Few programs have produced data on numbers of loan modifications resulting from mediations, and none of the programs has documented the nature of the resulting modifications.⁶ We do not know, for example, whether loan modifications that result from mediations are more likely to lower interest rates, loan principal, and monthly payments than loan modifications unconnected to mediation.

For now, it appears that faith in the salutary role of communication, much more than any objective data, has propelled the movement for foreclosure mediations. Before we create more programs based upon similar assumptions, we should examine some of our basic assumptions about the role of mediations in foreclosures.

Is This Really a Communication Problem?

Before we look at mediation programs specifically, let us consider the lending

and servicing industry's overall track record with regard to loan modifications. One fact about this record is paramount: over the past two years the industry has systematically tried to defeat and evade every type of enforceable obligation related to loan modifications that anyone has attempted to impose upon it. The industry has consistently fought to preserve a servicer's absolute discretion over whether to modify a loan. The industry spent millions of dollars lobbying against bankruptcy reforms that would have promoted affordable loan modifications.⁷ When the industry participated in national efforts to design programs to encourage modifications, such as HOPE (Homeownership and Opportunity for People Everywhere) Now and the HOPE for Homeowners legislation, it made certain that these programs maintained servicers' complete discretion over all modification decisions.⁸

HAMP Mandates—Now You See Them, Now You Don't

In March 2009 the U.S. Department of the Treasury released the guidelines for implementation of the Home Affordable Modification Program (HAMP).⁹ Unlike earlier federal initiatives, this program appeared to *require* mortgage servicers to *do* something. Loan servicers that were bailed out by the TARP (Troubled Asset Relief Program) signed, with the Treasury Department or its agents, contracts that obligate the servicers to review the circumstances of homeowners in foreclosure to determine their eligibility for an affordable loan modification.¹⁰ More

⁶A few programs, such as those in Philadelphia, Pennsylvania, and in Cuyahoga and Franklin counties, Ohio, collect general data on numbers of cases settled but do not distinguish among types of settlements, such as loan modifications. The Connecticut program tracks the number of loan modifications but not data on the extent to which modifications made terms more affordable, such as by lowering payments (as opposed to merely capitalizing arrears and leaving payments the same or higher) (see National Consumer Law Center, *State and Local Foreclosure Mediation Programs: Can They Save Homes?* 22–24 (2009), www.consumerlaw.org). The Reinvestment Fund of Philadelphia recently began a detailed analysis of case histories under that city's foreclosure-diversion program; the analysis assesses the nature of outcomes and will yield follow-up data.

⁷See generally Stephen Labaton, *Ailing, Banks Still Field Strong Lobby at Capitol*, *NEW YORK TIMES*, June 4, 2009, <http://bit.ly/AqhnU>.

⁸CONGRESSIONAL OVERSIGHT PANEL, *FORECLOSURE CRISIS: WORKING TOWARD A SOLUTION: MARCH OVERSIGHT REPORT* 38–43 (2009), <http://bit.ly/YIDoj>.

⁹U.S. Department of the Treasury, *Making Home Affordable* (updated Oct. 2, 2009), <http://bit.ly/gMONU>; see generally U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *No. GAO-09-837, TROUBLED ASSET RELIEF PROGRAM: TREASURY ACTIONS NEEDED TO MAKE THE HOME AFFORDABLE MODIFICATION PROGRAM MORE TRANSPARENT AND ACCOUNTABLE* (2009), <http://bit.ly/la8Gd>.

¹⁰Home Affordable Modification Program (HAMP) guidelines and directives, Servicer Participation Agreement, and other information are available at <http://bit.ly/UKn1n>.

important, if the homeowner qualifies for an affordable loan modification under the program's objective tests, the servicer must modify the loan terms.¹¹ Under these contracts, servicers who are responsible for over 80 percent of the home mortgages in the country must comply with HAMP guidelines before they foreclose.¹² Similar obligations apply to loans serviced on behalf of governmental and government-related entities, such as Fannie Mae, Freddie Mac, and the Federal Housing Administration.¹³

On paper the HAMP guidelines do not give servicers any significant discretion to reject a loan modification for an eligible homeowner. The guidelines require servicers to make loan modification and foreclosure decisions based on calculations recorded on a spreadsheet or similar data entry field.¹⁴ Using the homeowners' current household income, servicers first must calculate a basic-loan-term modification—capitalizing arrears, reducing the interest rate to as low as 2 percent, extending the loan term, and forbearing a portion of loan principal—that results in affordable payments, defined as no more than 31 percent of household income.

Next, a step critical to HAMP implementation, is the “net-present-value” test. Using standard industry and lender-specific data, this calculation compares

the estimated loss to investors from modifying the loan and from completing the foreclosure. If the foreclosure produces the greater loss, the HAMP contract and guidelines *require* the servicer to modify the loan, with only limited exceptions.¹⁵

Using an approved spreadsheet or data field, the servicer must evaluate for any borrower more than sixty days in default the borrower's eligibility for an affordable loan modification.¹⁶ Servicers must also screen borrowers who are current or less than sixty days' delinquent if they inquire about a modification and appear to be at risk of imminent default. The guidelines further require stay of foreclosure sales pending review for loan modification. The stay applies during the three-month trial payment period before final confirmation of a HAMP modification.¹⁷

The Treasury Department designated servicers as the gatekeepers for HAMP to determine which homeowners will receive affordable loan modifications. Not surprisingly, the servicers have been problematic gatekeepers. Despite the mandates in the Treasury Department guidelines, servicers' implementation of the program has been wildly discretionary, and the program is serving only a small percentage of eligible homeowners.¹⁸ Government officials have thus far acceded to major servicers' demand that

¹¹See Home Affordable Modification Program Supplemental Directive 09-01 at 14 (April 6, 2009), <http://bit.ly/MLXR0>.

¹²*Stabilizing the Housing Market: Hearing Before the U.S. Senate Committee on Banking, Housing and Urban Affairs*, 111th Cong. (2009) (statement of Herbert M. Allison, Assistant Secretary for Financial Stability, U.S. Department of the Treasury), <http://bit.ly/hLcEX>.

¹³Fannie Mae guidelines are at <http://bit.ly/13524m>; Freddie Mac guidelines are at <http://bit.ly/KunC8>; the Federal Housing Administration guidelines are at <http://bit.ly/14XN74>.

¹⁴See Home Affordable Modification Program Base Net Present Value (NPV) Model Specifications (updated June 11, 2009), <http://bit.ly/33dep0>; Retrieving and Interpreting NPV Test Results (Aug. 28, 2009), <http://bit.ly/3YlRQ>.

¹⁵See *supra* note 14. The limited exceptions apply to households whose mortgage debt-to-income ratio is already less than 31 percent before considering a loan modification. Properties must be owner occupied; the amount owed must be less than \$729,750 on a mortgage that originated after January 1, 2009. A modification may not be required if a controlling pooling and servicing agreement between a servicer and an investment trust prohibits the modification. In order to claim this exemption the servicer must first negotiate “to remove those obstacles” created by the pooling and servicing agreement (see Home Affordable Modification Program Supplemental Directive, *supra* note 11, at 1–3).

¹⁶Home Affordable Modification Program Supplemental Directive 09-01, *supra* note 11, at 4.

¹⁷*Id.* at 14.

¹⁸See, e.g., Making Home Affordable Program Servicer Performance Report Through July 2009, <http://bit.ly/1xSI00> (only 9 percent of eligible homeowners who are sixty or more days' delinquent started trial modifications since inception of program); U.S. Government Accountability Office, *supra* note 9, at 43.

they be allowed to keep net-present-value calculations secret as “proprietary” information. “Rules,” as the term is generally understood in the context of federal agency law and government benefit programs, largely do not exist for the HAMP program.

Whether through design or bureaucratic inertia, servicers have evaded their obligations under HAMP contracts.¹⁹ Particular servicer practices that undermine the implementation of the HAMP program are

- soliciting eligible homeowners to waive their right to be considered for a loan modification under the HAMP guidelines;
- offering loan modifications that do not comply with HAMP affordability guidelines (e.g., modifications with unaffordable payments and impermissibly high interest rates and for short time periods not authorized by the guidelines);
- falsely informing eligible homeowners that the servicer does not participate in the HAMP program;
- proceeding with sales and commencing foreclosure actions while delaying decisions on requests for a loan modification;
- charging fees to homeowners to consider or implement loan modifications despite HAMP guidelines prohibiting such charges;
- refusing to tell homeowners why a HAMP modification was denied, how a payment level was calculated, and what net-present-value test was performed, and failing to supply any documentation related to denial decisions;

- altering terms of a trial modification when it is time to implement the permanent modification;
- demanding excessive documentation from homeowners beyond what HAMP requires and denying modifications due to borrowers’ lack of documentation;
- denying any review or appeal from denial decisions and failing to inform the homeowner of decisions;
- extensively delaying decisions on modification requests, or requiring homeowners to sign documents on short notice without a chance for review; and
- failing to coordinate modification negotiations with second lienholders.

Such pervasive servicer practices pose a genuine risk that the HAMP program will go the way of the other federal efforts that depended upon servicers’ voluntary efforts to curb the onslaught of foreclosures.

Can Foreclosure Mediation Programs Save HAMP from Servicers?

Mediation programs are ideally suited to address many of the problems plaguing implementation of the HAMP program. Mediation can lay the groundwork for a court to deny foreclosure when a servicer violated the obligations of a HAMP contract. For the overwhelming majority of homeowners who are not represented in foreclosures, these checks on servicer conduct can be critical.²⁰

Recent State Legislation Holds Servicers Accountable Through Mediation

In July 2009 statutes creating mediation and conference programs for fore-

¹⁹See generally *Preserving Homeownership: Progress Needed to Prevent Foreclosures: Hearing Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs*, 111th Cong. (2009), <http://bit.ly/6Wto3> (statement of Diane E. Thompson, Of Counsel, National Consumer Law Center); *Home Foreclosures: Will Voluntary Mortgage Modification Help Families Save Their Homes?: Hearing Before the Subcommittee on Administrative and Commercial Law of the House Committee on the Judiciary*, 111th Cong. (2009), <http://bit.ly/tzAgo> (statement of Irwin Trauss, supervising attorney, Consumer Housing Unit, Philadelphia Legal Assistance); CONGRESSIONAL OVERSIGHT PANEL, FORECLOSURE CRISIS: WORKING TOWARD A SOLUTION: MARCH OVERSIGHT REPORT 46–56 (2009), <http://bit.ly/YIDoj> (structural disincentives for servicers to modify loans and incentives to foreclose).

²⁰For more on the importance of counsel to homeowners facing foreclosure and the shortage of such counsel, see Melanca Clark & Maggie Barron, Brennan Center for Justice, *Foreclosures: A Crisis in Legal Representation* (2009), <http://bit.ly/1bYWz8>.

closures went into effect in four states: Oregon, Michigan, Nevada, and Maine. During the legislative process in each state the opportunity arose to require by statute or court rule that before every foreclosure servicers produce evidence that they had formally analyzed the feasibility of an affordable loan modification. The outcomes of these efforts say much about the servicing industry's attitude toward loan modifications, the HAMP program, and mediation systems.

As of March 2009, pending Oregon Senate Bill 628 mandated foreclosure mediation and, when the homeowner was not represented by counsel, required that the mediation produce a formal loan modification analysis using a net-present-value spreadsheet, either the Federal Deposit Insurance Corporation (FDIC) spreadsheet or "a formula that is consistent with the Making Home Affordable guidelines issued by the United States Department of the Treasury."²¹ The bill would have prevented lenders from using the state's nonjudicial foreclosure procedure if they rejected a loan modification shown to be feasible under HAMP or a similar net-present-value guideline. Oregon's financial lobby mounted a vigorous campaign in opposition and succeeded in removing all provisions that required mediators to review loan modifications under any objective or verifiable standard.²² As enacted, the bill leaves servicers with complete discretion to apply any standards they wish in evaluating a homeowner for a loan modification.²³

Similarly in Michigan a bill that passed the state's House and Senate during the first half of 2009 would have required

servicers to produce a specific, transparent loan modification model whenever the parties had not arrived at a settlement. A legislative committee later amended the bill to strike the requirement that the parties produce a specific net-present-value spreadsheet in all cases. Under the version that became law, the homeowner does not receive an assessment of the cost of modification compared to the cost of foreclosure, as the earlier version required.²⁴

Nevada is another nonjudicial foreclosure state that implemented a foreclosure mediation program in 2009.²⁵ To implement the new law, the Nevada Supreme Court promulgated a rule that the servicer must, "under confidential cover, provide to the mediator the evaluative methodology used in determining the eligibility or noneligibility of the [homeowner] for a loan modification."²⁶ The meaning of "evaluative methodology" is unclear, and limiting disclosure to the mediator is problematic particularly because typically all aspects of the mediation must be kept confidential. Whatever the servicer must disclose, the rule effectively keeps the homeowner and the homeowner's counsel from seeing it.

Unlike the three states described above, Maine recently enacted a foreclosure mediation statute that expressly requires documentation of a complete loan modification analysis prior to foreclosure.²⁷ The Maine law requires parties to a mediation to complete the FDIC's net-present-value spreadsheet.²⁸ The mediator's report must show that the parties did so and must include the positive or negative result of the net-present-value test.

²¹Engrossed S.B. 628-A § 6, 75th Legis. Assemb., Reg. Sess. (Or. 2009), <http://bit.ly/1PmlkV>.

²²Ryan Frank, *Foreclosure Relief Bill Stalls in Oregon Senate*, OREGONIAN, June 18, 2009, <http://bit.ly/4dFhVs>; *Oregon Legislation: Mandatory Mediation Compromise to Emerge*, UTA ENEWS (United Trustee Association, Irvine, Cal.), June 5, 2009, <http://bit.ly/RZi4J>.

²³Enrolled S.B. 628, *supra* note 21, <http://bit.ly/JdiKL>.

²⁴Enrolled H.B. 4453, 4454, 4455, 95th Leg., Reg. Sess. (Mich. 2009) (signed by Governor May 20, 2009; effective July 5, 2009).

²⁵Assemb. B. 149, 75th Leg. (Nev.2009) (signed by Governor May 29, 2009; effective July 1, 2009).

²⁶Nevada Supreme Court Rule 7(3), effective July 1, 2009.

²⁷L.D. 1418 §§ 3, 13, 124th Leg., 1st Reg. Sess. (Me. 2009), amending ME. REV. STAT. ANN. tit. 14 § 6231-A.

²⁸The Federal Deposit Insurance Corporation loan modification model is similar but not identical to the standard HAMP spreadsheet calculation (see <http://bit.ly/2LXHBA>).

How Can Mediations Make Servicers Accountable for HAMP Compliance?

Few foreclosure mediation programs have imposed significant obligations on servicers, but this can change. To the extent that mediation forces transparency on servicers, court-supervised mediation programs can benefit homeowners. Ongoing problems with HAMP implementation create a new impetus to demand this transparency. To further this goal mediation programs should require servicers to

- give the homeowner a document showing the affordable loan modification and net-present-value calculations;
- produce specified documents, such as a pooling and servicing agreement, loan origination documents, an appraisal, and payment history;²⁹
- comply with mediation obligations in good faith and negotiate in good faith; programs should mandate sanctions against servicers that fail to do so;³⁰
- establish proof of the mortgage holder's standing and status as a real party in interest;³¹ and
- document servicers' consideration of specific alternatives to foreclosure, such as loan modifications, workout agreements, and short sales.

Programs should authorize the mediator to refuse to terminate a referral to mediation unless the servicer complies with the five points above. Programs should also document all mediation outcomes, such as the nature of agreed-upon loan modifications.³²

Mediation programs should establish these minimal requirements for all servicers, and the requirements should apply in both judicial and nonjudicial foreclosures. In the latter the mediation rules should require filing of a certification of compliance before transfer of title following a foreclosure sale is valid.

Once meaningful servicer obligations are in place, programs should consider how to bring as many homeowners as possible into mediation. The following procedural devices can help maximize this number:

- Make participation automatic for homeowners who are subject to foreclosure proceedings.³³
- Allow mediation to be requested up to the time of a foreclosure sale.
- Stay foreclosure proceedings until a mediator or court determines that the servicer has complied in good faith with its obligation to participate in mediation.³⁴

²⁹The pooling and servicing agreement is relevant in the event that a servicer claims to be exempt from modifying a loan under the HAMP guideline that excuses modifications prohibited by a pooling and servicing agreement (see *supra* note 15). Mediation program rules in several Florida judicial circuits require production of the pooling and servicing agreement. Copies of administrative orders for the first, eleventh, and nineteenth judicial circuits can be found at <http://bit.ly/4DWic7>.

³⁰Good-faith provisions are included in the recent statutes enacted in Nevada, *supra* note 25, and Maine, *supra* note 27.

³¹Under the Nevada statute, *supra* note 25, the beneficiary of a deed of trust must bring to the mediation the originals or certified copies of the deed of trust, the mortgage note, and each assignment of the deed of trust or mortgage note. In many recent decisions courts denied foreclosure to servicers and lenders who were involved in securitized debt transactions and could not establish standing (see, e.g., *In re Jacobson*, 2009 WL 567188, at * 5 (Bankr. W.D. Wash. March 10, 2009); *Wells Fargo Bank N.A. v. Jordan*, 2009 WL 625560 (Ohio Ct. App. March 12, 2009), review denied, 2009-Ohio-5031U; *In re Kang Jin Hwang*, 396 B.R. 757, 770–71 (Bankr. C.D. Cal. 2008); *HSBC Bank USA NA v. Yeasmin*, 866 N.Y.S.2d 92 (Table) (N.Y. Sup. Ct. Kings County 2008); *In re Foreclosure Cases*, 521 F. Supp. 2d 650 (S.D. Ohio 2007)).

³²HAMP rules and Office of the Comptroller of the Currency and Office of Thrift Supervision guidelines already require servicers to track this type of data systematically.

³³Some programs, such as those in New Jersey and Ohio, require homeowners to opt in or be excluded. Other programs, such as those in Philadelphia and in several Florida circuits (the first, eleventh, and nineteenth circuits), set cases automatically for mediation.

³⁴Nevada, e.g., refers cases to mediation until the mediator certifies good-faith compliance by the parties (see *supra* note 25).

- Require direct court supervision over the obligation to mediate; when necessary, the court should impose sanctions, such as dismissing judicial foreclosure actions and barring nonjudicial proceedings.³⁵
- Fund outreach, housing counselors, and qualified counsel for homeowners.³⁶
- Prohibit the servicer from shifting to the borrower its attorney fees and other costs of participating.
- Require junior lienholders to be notified of and allowed to participate in mediation.

What Is Mediation's Role in Enforcing Bars on Foreclosures?

The states have authority to impose the servicer obligations and procedural requirements outlined above. Doing so is well within the scope of a state's police power, particularly during a period of economic crisis.³⁷

In considering the roles of mediation programs and courts in enforcing the HAMP guidelines, remember the past role of courts in mandating lenders' compliance with the foreclosure-mitigation rules of various federal housing programs. Multiple federal agencies—e.g., the Federal Housing Administration; the Rural Housing Service, a subdivision of the U.S. Department of Agriculture; and the De-

partment of Veterans Affairs—insure or originate home loans. The agencies may hold the loans themselves, or they may supervise certain actions of private mortgage holders who own the insured loans. The federal agencies often promulgate regulations that require mortgage holders and servicers to engage in specific loss-mitigation activities before foreclosing on a government-insured mortgage.³⁸

For thirty-five years, courts have barred foreclosures when a government agency or a private mortgage holder owning a government-related loan seeks to foreclose without complying with the federal agency's loss-mitigation rules.³⁹ The HAMP guidelines impose upon servicers obligations that are at least as pervasive as those that apply to servicers of Federal Housing Administration-insured and similar government-related loans.

For loans that are not directly subject to governmental loss-mitigation rules, mediation can still help deter unfair foreclosures. Courts' exercise of their supervisory role over foreclosures is a well-established tradition. When they deemed it appropriate, courts denied the harsh remedy of forfeiture in order to prevent unfairness and overreaching by lenders.⁴⁰ The U.S. Supreme Court's decisions upholding state laws that restricted foreclosure remedies repeatedly emphasized that in enacting these statutes the state legislatures did not-

³⁵Most courts have rules for enforcement of alternative-dispute-resolution procedures, such as under Rule 16 of the Federal Rules of Civil Procedure (see, e.g., *Nick v. Morgan's Foods*, 99 F. Supp. 2d 1056 (E.D. Mo. 2000), affirmed, 270 F.3d 590 (8th Cir. 2001); Richard D. English, *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement made in, Mediation*, 43 A.L.R. 5th 545 (1996)).

³⁶The foreclosure diversion program in Philadelphia has produced large homeowner participation rates by organizing outreach through local community groups.

³⁷See, e.g., *Energy Reserves Group Inc. v. Kansas Power and Light Company*, 459 U.S. 400 (1983); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945); *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1934).

³⁸See, e.g., 24 C.F.R. §§ 203.501, .508, .604 (2009) (Federal Housing Administration loss-mitigation rules); 42 U.S.C. § 1475; 7 C.F.R. § 3550.207 (2009) (Rural Housing Service moratorium program).

³⁹See e.g. *Ghervescu v. Wells Fargo Home Mortgage*, 2008 WL 660248 (Cal. Ct. App. Mar. 13, 2008); *Wells Fargo Home Loan Mortgage v. Neal*, 922 A.2d 538 (Md. 2007); *United States v. Shields*, 733 F. Supp. 776 (D. Vt. 1989); *Fleet Real Estate Funding Corp. v. Smith*, 530 A.2d 919 (Pa. Super. 1987); *Federal National Mortgage Association v. Moore*, 609 F. Supp. 194 (N.D. Ill. 1985); *Associated East Mortgage Co. v. Young*, 394 A.2d 899 (N.J. Super. 1978); *Federal National Mortgage Association v. Ricks*, 372 N.Y.S. 2d 485 (1975).

⁴⁰See, e.g., Herbert T. Tiffany & Basil Jones, 5 TIFFANY REAL PROPERTY § 1556 (2008); 55 AM. JUR. 2d *Mortgages* § 676 (2008); Milton R. Friedman & James Charles Smith, FRIEDMAN ON CONTRACTS AND CONVEYANCES OF REAL PROPERTY § 3:6.5 (2008); 59 C.J.S. *Mortgages* § 512 (2009); see also David A. Super, *Defending Mortgage Foreclosures: Seeking a Role for Equity*, 43 CLEARINGHOUSE REVIEW 104 (July–Aug. 2009).

ing more than formalize state courts' centuries-old practice of reviewing the fairness of foreclosures.⁴¹

In nonjudicial foreclosure states, statutes can set standards for mediation in similar ways. For example, a statute may require servicers to proceed under the state's judicial foreclosures procedure if a mediator finds that the servicer did not comply in good faith with its obligations under the mediation program. The law may also require the servicer to file in land records a certification of compliance with the mediation rules as a condition to a valid foreclosure sale.

Court oversight or more explicit legislative directives may ultimately be needed to bar unreasonably destructive foreclosures. However, mediations can be the framework for successful implementation of these policies. The overwhelming majority of homeowners facing foreclosure will never have attorneys who can develop these issues in litigation for them. Mediations using simple and

quick net-present-value calculations can identify cases that are clearly inappropriate for foreclosure because of the overwhelming loss of value that they will cause.

Even the best state or local foreclosure mediation program is ultimately a poor substitute for a federal law that mandates loan modifications or that holds servicers accountable for compliance with HAMP rules. However, unless national policies change, servicer discretion will likely continue to prevail under the federal initiatives. In light of what has been occurring so far at the state level, servicer discretion will likely continue to dominate there as well. The adoption of the proposals outlined here would mark a shift from the structure of state and local foreclosure mediation programs. However, unless we demand much more of these programs, they are not likely to stem the catastrophic losses resulting from the ongoing foreclosure crisis.

COMMENTS?

We invite you to fill out the comment form at www.povertylaw.org/reviewsurvey. Thank you.

—The Editors

⁴¹See *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 446–47 (1934); *Richmond Mortgage Corporation v. Wachovia Bank*, 300 U.S. 124, 129–30 (1937); *Honeyman v. Jacobs*, 306 U.S. 539, 543–44 (1939); *Gelfert v. National City Bank of New York*, 313 U.S. 221, 231–33 (1941).

Foreclosure Mediation Programs in 16 States

State	Authority	Structure	Eligibility	Net-Present-Value Data Requirement
California	CAL. CIV. CODE § 2923.5	Servicer and homeowner confer unsupervised before filing notice of default in nonjudicial foreclosure	Servicer must attempt to initiate conference in all residential foreclosures	None
Connecticut	CONN. GEN. STAT. ANN. § 8-265e	Court sponsors mediation in judicial foreclosures	Homeowner must file appearance after receiving summons and complaint	None
Delaware	Statewide administrative directive of superior court, August 31, 2009	For eligible homeowners, servicer must negotiate, attend court-supervised mediation if no agreement is reached	Homeowner elects to enter program by meeting with housing counselor and completing intake forms and to propose an affordable loan modification	None
Florida: First, Eleventh, and Nineteenth Judicial Circuits	Administrative orders by circuit chief judges	Foreclosures are judicial; formal mediations are managed by private nonprofit Collins Center	Residential foreclosures are automatically referred to mediation	None
Florida: Ninth Judicial Circuit	Administrative order by circuit chief judge	Servicer must schedule formal mediation with certified mediator	Foreclosure is judicial; mediation is automatic unless servicer exempts itself	None
Florida: Twelfth Judicial Circuit	Administrative order by circuit chief judge	Servicer attempts phone conference with homeowner	Mediation is automatic; homeowner need not formally request it	None
Florida: Eighteenth Judicial Circuit	Administrative order by circuit chief judge	Mediation is formal with court or parties choosing mediator	Residential foreclosures are referred automatically to mediation	None
Indiana	Senate Enrolled Act 492 effective July 1, 2009	Homeowner asks to participate in conference with servicer after homeowner is served with summons and complaint in judicial foreclosure; mediator is optional, not required	Homeowner must notify court if homeowner intends to request conference	None
Kentucky: Jefferson County (Louisville)	Local court's general alternative-dispute-resolution authority	Notice of settlement conference with court is issued with each judicial foreclosure	Mediation applies automatically to residential foreclosures	None
Maine	14 MAINE REV. STAT. ANN. § 6321-A	Court sponsors mediations in judicial foreclosure	Case is referred to mediation upon homeowner's request	Mediations must use Federal Deposit Insurance Corporation loan-modification calculation

Foreclosure Mediation Programs in 16 States (Continued)

State	Authority	Structure	Eligibility	Net-Present-Value Data Requirement
Michigan	MICH. COMP. LAWS §§ 3205, 3205a-3205e	Homeowner has opportunity to engage in unmediated conference with servicer	Borrower may request conference and have ninety-day preforeclosure negotiation period before nonjudicial foreclosure may begin	Servicer must supply a loan-modification calculation but does not include net-present-value analysis
Nevada	Assembly Bill 149 effective July 1, 2009	Nonjudicial foreclosures are referred to court-supervised mediation	Homeowner must elect participation	Servicer must provide mediator with "evaluative methodology" to determine eligibility for loan modification
New Jersey	Program of New Jersey judiciary January 2009	Court supervises mediation in judicial foreclosures	Homeowner must make timely election to participate	None
New Mexico	Administrative order of county court	Formal mediation of judicial foreclosures is administered as part of court's alternative-dispute-resolution system	Homeowner must return a request-for-mediation form	None
New York	N.Y. C.P.L.R. § 3408 (2008)	Court-supervised settlement conferences are mandatory in judicial foreclosures	Mediation is applicable automatically to foreclosures involving "high-cost," subprime, and "nontraditional" loans	None
Ohio: Cuyahoga County (Cleveland)	County program adopted under state supreme court guidelines	Court and county organize mediations with certified mediators	Homeowner must request mediation during limited time frame	None
Ohio: Franklin County (Columbus)	County program adopted under state supreme court guidelines	Mediation is with court-approved mediator	Homeowner timely requests mediation and may request it before judicial foreclosure begins	None
Ohio: Lucas County (Toledo)	County program adopted under state supreme court guidelines	Magistrate and court supervise mediation in judicial foreclosures	Homeowner may request mediation after receiving summons and complaint	None
Ohio: Summit County (Akron)	County program adopted under state supreme court guidelines	Court reviews, refers for alternative dispute resolution supervised by magistrate	Mediation is applicable to cases with answers filed	None
Oregon	Senate Bill 628 effective July 1, 2009	Homeowner may have unsupervised meeting with lender representative to discuss loan modification	Homeowner must timely request meeting	None

Foreclosure Mediation Programs in 16 States (Continued)

State	Authority	Structure	Eligibility	Net-Present-Value Data Requirement
Pennsylvania: Allegheny County	Administrative order of local court acting under state statute authorizing local courts to make administrative rules	Court supervises conciliation conferences in judicial foreclosures	Homeowner must make timely request for conference	None
Pennsylvania: Bucks County (suburban Philadelphia)	Administrative order of local court acting under state statute authorizing local courts to make administrative rules	Conciliation conferences are held before court-appointed mediators	Homeowner must timely request conference	None
Pennsylvania: Northampton County (Easton/ Bethlehem)	Local court acting under state law authorizing local courts to make administrative rules and regulations	Court supervises conciliation conferences	Case management order is set automatically; homeowner must certify meeting with housing counselor	None
Pennsylvania: Philadelphia County	Administrative order of local court acting under state statute authorizing local courts to make administrative rules	Court supervises conciliation conferences in judicial foreclosures	Residential properties are automatically scheduled for conciliation conference	None
Rhode Island: City of Providence	Sections 13-213 through 13-217 Code of Providence Ordinances, effective August 25, 2009	Counseling agency schedules conciliation conference with servicer and homeowner; conference may be held over the phone; counselor certifies completion before nonjudicial foreclosure may proceed	Housing counselor attempts to set up conference for all owner-occupied residences for which servicer files, with city, notice of intent to foreclose	None

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