ADR’s Place in Foreclosure: Remedying the Flaws of a Securitized Housing Market

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ADR’S PLACE IN FORECLOSURE:
REMEDYING THE FLAWS OF A SECURITIZED HOUSING MARKET

Lydia Nussbaum*

Millions of Americans lost their homes during the foreclosure crisis, an unprecedented disaster still plaguing local and national economies. A primary factor contributing to the crisis has been the failure of conventional foreclosure procedures to account for the new realities of securitization and the secondary mortgage market, which transformed the traditional borrower-lender relationship. To compensate for the shortcomings of conventional foreclosure procedures and stem the tide of residential foreclosure, state and local governments turned to ADR processes for a solution. Some foreclosure ADR programs, however, have greater potential to avoid unnecessary foreclosures than others. This article comprehensively examines the key components of foreclosure ADR programs and presents best practices for governments seeking to utilize ADR as a tool to mitigate the foreclosure crisis and re-energize the economy.

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INTRODUCTION

As the foreclosure crisis unfolded, causing millions of people to lose their homes and billions of dollars in real-estate investments to evaporate, much came to light about the metamorphosis of the mortgage industry between the early 1990s and 2008. Without much public attention, brand new markets and industries were born. The proliferation of new products like mortgage-backed securities that investment banks could now legally buy, sell, and repackage spawned a secondary mortgage market that never before existed. Homeowners’ mortgages were not sitting on the books of their local Savings & Loan; instead, they were bundled, sliced, and sold in slivers to unknown investors around the world.

The foreclosure crisis also exposed the inadequacy of conventional foreclosure proceedings, given how dramatically the mortgage industry had changed. Typical judicial and non-judicial foreclosure proceedings assume a direct relationship between borrower and lender that, post securitization, no longer exists for the vast majority of mortgages. This changed relationship, when combined with an unprecedented volume of cases and a collapsed housing market, compromised the integrity of the entire foreclosure process.

In response, state and local governments\(^1\) instituted a variety of

\(^1\) The federal government also instituted programs but these applied to the macro level,
public policy interventions designed to slow foreclosure rates, stop unnecessary foreclosures, and help homeowners remain in their homes. These programs were instituted because the loss of homeowners and subsequent erosion of communities posed, and continues to pose, the greatest threat to economic stability across the country. However, in order to keep homeowners in their homes and avert further economic catastrophe, the problematic relationship between homeowners, investors, and third party loan servicers had to be overcome.

To overcome this challenge, many state and local governments turned to alternative dispute resolution (ADR) processes. Foreclosure ADR programs have the potential to address the problems of securitization by establishing direct communication and ensuring foreclosure only occurs when necessary. These programs modify conventional legal procedures for residential mortgage foreclosure by incorporating an ADR process such as mediation, conciliation, or a facilitated settlement negotiation meeting. Including an ADR process as a compulsory step in foreclosure gives the homeowner a right to negotiate with the loan servicer, a third party new to the residential mortgage landscape, and also provides for some oversight of the loan servicer’s decision-making. Each jurisdiction has served as a laboratory, developing programs tailored to local needs and experimenting with different ways to use ADR processes in foreclosure proceedings. ADR programs have proven remarkably effective in many jurisdictions but some approaches have more impact than others.

This article comprehensively examines the characteristics of these state and local government programs and presents suggestions for best...
practices. Currently, many states are considering including ADR as a permanent part of foreclosure proceedings and the Uniform Law Commission is in the process of drafting model legislation to include ADR in residential mortgage foreclosure processes. This article is intended to guide lawmakers and consumer advocates toward those approaches most likely to mitigate the foreclosure crisis and re-energize the economy.

The first part of this article explains why the conventional foreclosure process proved ill equipped to respond to the foreclosure crisis. It explains how securitization changed the relationship between homeowners and lenders by introducing a new third party loan servicer. This changed relationship, compounded by an unprecedented volume of foreclosures and a collapsed housing market, overwhelmed the existing legal procedures for foreclosure, necessitating the need for an alternative process. The second part of this article examines why foreclosure ADR programs are a useful tool for state and local governments seeking to respond to the foreclosure crisis. By bringing homeowners and loan servicers together for a structured negotiation about the loan, foreclosure ADR programs can help prevent unnecessary foreclosures. The third part examines key components of foreclosure ADR programs and identifies best practices. By considering variables along which these programs differ, this article is able to present options for creating, implementing, and structuring a foreclosure ADR program and identify which options are most likely to alleviate the effects of the foreclosure crisis. The article concludes with some observations about foreclosure mediation programs and calls for more thorough and systematic assessment of their impact in resolving foreclosure cases and buoying local housing markets.

I. INADEQUACY OF CONVENTIONAL FORECLOSURE PROCEDURES

This section begins by examining conventional foreclosure procedures and their origins in the primary mortgage market. It then argues that these conventional foreclosure procedures failed to account for new players created by securitization and the secondary mortgage market. These new players changed the way in which foreclosure decisions were made. As a result, when the foreclosure crisis began, homeowners and investors lacked adequate legal protections, deepening the crisis and causing the housing market and national economy to suffer.

A. Conventional Foreclosure Procedure

Conventional legal foreclosure procedure dates from a time when there was a direct relationship between borrowers and lenders. To finance a home, a borrower would go to a local Savings & Loan and request a home loan. The Savings & Loan would issue a loan and, in return, the homeowner would sign a promissory note granting the Savings & Loan a mortgage interest in the house as collateral. The lender kept the loan on its books and took care of managing the loan, sending out monthly billing statements and collecting payments. A homeowner’s failure to make loan payments as agreed upon would enable the Savings & Loan to exercise its right to take title of the property, a legal remedy provided to lenders.

In a conventional borrower-lender relationship, when a loan became delinquent the lender had two options. A lender could decide to foreclose on the loan, take title of the property, and sell it or it could pursue a loss mitigation “workout.” A lender had to conduct a cost-benefit analysis to determine which option was more likely to yield the greatest value. While selling the property at a foreclosure sale to the highest bidder could allow the lender to get its money back quickly, a lender who foreclosed assumed full responsibility for maintaining the property and also ran the risk that the amount of the loan would not be recovered at auction. If the lender could work with the borrower to cure the delinquent loan, thereby keeping the homeowner in the home and continuing to make monthly payments, then the lender stood to recoup more money in the long run because it could collect the principal plus interest. Thus, especially in a weak housing market, a lender had to consider carefully which of these options made the most financial sense.

If a lender chose to foreclose, then it had to follow the foreclosure process codified in state statutes. States employ two types of conventional foreclosure proceedings. Some jurisdictions use a judicial foreclosure process that requires a court to review evidence and approve a lender’s foreclosure petition before the lender can proceed with a forced sale of the mortgaged property. Non-judicial foreclosure, also called power-of-sale or statutory foreclosure, does not direct foreclosure proceedings through the courts. Instead, the foreclosure happens privately between the parties. The

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6 Savings and Loan associations, unlike commercial banks, are cooperatives that hold members’ savings deposits and pay interest on them and also provide home mortgage loans. Savings and Loans became the primary source of home loans in the United States after the Great Depression through the Federal Home Loan Bank Act of 1932.

lender must satisfy statutory requirements for notice, documentation, and various waiting periods before it can take legal title of the property and proceed with sale at a foreclosure auction. Many states permit both types of foreclosure proceedings but most primarily use one type. Because judicial foreclosure requires opening a civil suit and attending a judicial hearing, the process of foreclosing on a property in a judicial foreclosure state takes longer and is more costly for lenders. Additionally, some states also provide borrowers with a statutory right of redemption, or a period of time during which the borrower can recover the property if he provides the lender with the full amount bid at the foreclosure sale plus additional costs.

If, in the alternative, a conventional lender chose to pursue loss mitigation, then it would have to determine whether, with a few adjustments, a delinquent borrower could cure the loan and continue making monthly payments. Loss mitigation includes a variety of plans to reduce borrowers’ monthly payments, allowing them to remain in their homes and continue making payments on the loan. Some examples of loss mitigation plans include: 1) forbearance, when loan payments are temporarily delayed; 2) a repayment plan, which allows homeowners to pay a little extra each month to make up for any missed payments in the past; and, in some instances, 3) permanently restructuring a loan by extending the time over which the loan must be repaid, changing the interest rate, reducing the balance of the outstanding principal, or adding the delinquent interest amount to unpaid principal balance.

A conventional lender could also explore a “non-retention” plan.

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8 Id. at 2. The auction proceeds after complying with notice requirements, typically advance notice to the homeowner and detailed advertisements in local news media.


10 National Public Radio’s Planet Money team found that, between 2006 and 2010, the time for non-judicial foreclosure increased from roughly 130 to 200 days (more than two months) and the time for judicial foreclosure increased from roughly 145 to 271 days (more than four months) (http://www.npr.org/blogs/money/2010/10/26/130833818/foreclosure).


with a borrower who was still unable to make payments under a loss mitigation plan. Under a non-retention plan, the borrower forfeits the property directly to the lender in a way that minimizes the borrower’s financial hardship and saves the lender the trouble of arranging a foreclosure sale. These non-retention plans include having the lender agree to a short sale or accept a deed in lieu of foreclosure. Of course, the borrower can always sell the home to pay off the mortgage in full. But, a weak housing market can render the current market value of the home too low to pay off the mortgage. This situation proves troublesome for both the borrower and the lender because the asset used as collateral for the mortgage loan is no longer valuable enough to allow both parties to walk away from the loan arrangement without significant loss – neither the borrower nor the lender can sell the home to pay off the loan.

In determining whether to pursue a foreclosure alternative, a financially motivated conventional lender will select the option that minimizes losses. This kind of cost-benefit analysis requires close contact with the borrower in order to assess the borrower’s financial circumstances and ability to continue making future payments. It also requires specialized knowledge of mortgage financing as well as research capabilities in order to make a sound business judgment as to which loss mitigation or non-retention plan makes the most economic sense for the lender.

**B. Foreclosure in Securitized Framework**

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13 In a short sale, the lender or loan servicer agrees to accept the proceeds from a sale of the home in satisfaction of the loan—even if the proceeds are less than the amount owed. However, some lenders may still attach a judgment lien against the borrower for the deficiency (Foreclosure Prevention: Improving Contact With Borrowers, Community Affairs Department, Comptroller of the Currency Administrator of National Banks, June 2007, at 7.).

14 A deed in lieu of foreclosure is a workout in which the borrower voluntarily conveys clear property title to the lender in return for a discharge of the debt. This is generally used when the house has been on the market unsuccessfully for a considerable time. Deeds in lieu of foreclosure and short sales may be complicated if there are secondary lien holders (Foreclosure Prevention: Improving Contact With Borrowers, Community Affairs Department, Comptroller of the Currency Administrator of National Banks, June 2007, at 8.).

15 See supra n. __ 10 on meaning of “underwater” and “overleveraged.”

16 In 2007, it was estimated that a lender could lose around $50,000 per foreclosure. “Sheltering Neighborhoods from the Subprime Foreclosure Storm, Joint Economic Committee, Mar. 2007, pg. 14, available at http://www.jec.senate.gov/archive/Documents/Reports/subprime11apr2007revised.pdf. But that dollar figure accounts only for direct costs of managing a foreclosed property and excludes the indirect loan servicing costs for investors of a securitized mortgage, such as attorneys fees to shepherd the case through the foreclosure process.

17 Cordell, Dynan, Lehnert, Liang & Mauskopf, *supra* n. __ at 15-6.
The primary mortgage market, which allowed for a direct relationship between borrowers and lenders, was replaced by a secondary mortgage market. Although this new market introduced new players, legal foreclosure procedures remained the same.\footnote{18} The secondary mortgage market developed in the late 1970s, when the baby-boom generation began to buy houses and economists worried that the Savings & Loan industry lacked sufficient capital to fund all of their mortgages.\footnote{19} To address the problem, the federal government created Freddie Mac to buy up mortgages from Savings & Loans, allowing those Savings & Loans to free up capital and make more mortgages.\footnote{20} The federal government then converted the mortgage interest into a bond, or security, that it could sell to third party investors on Wall Street.\footnote{21} Passage of federal legislation in the 1980s loosened regulations on the secondary mortgage market,\footnote{22} allowing for creation of new securities derivatives and

\footnotetext{18}{Direct, borrower-lender loans constitute the primary mortgage market while the secondary mortgage market consists of mortgage-backed securities and those who trade and invest in them. Estimates of how many first lien residential mortgages have been securitized vary but may be as high as 90% (Adam J. Levitin and Tara Twomey, \textit{Mortgage Servicing}, 28 YALE J. ON REG. 1 (2011) at 12, n.27, n.28.).}

\footnotetext{19}{Bethany McLean & Joe Nocera, \textit{All the Devils Are Here: The Hidden History of the Financial Crisis} (2010), pg. 5. At the same time it faced an increased demand to provide capital to new homeowners, the Savings & Loan industry was losing capital because of high inflation, high interest rates, newly created investment vehicles, and no way to access a broader pool of funds (Id.). Additionally, the \textit{Community Reinvestment Act} (Pub. L. 95-128, \textit{U.S. Code} 12 (1977) §2901), in an effort to combat redlining and help minority and low-income families achieve homeownership, required banks to extend credit to individuals who never before qualified for loans. This further increased the pool of borrowers in search of home loans.}

\footnotetext{20}{McLean & Nocera, \textit{All the Devils Are Here} at 7. This was not the first time the federal government rode to rescue: during the Great Depression, when property values declined by 50% and financial institutions were unable to resell foreclosed properties, the federal government produced an entire secondary mortgage market by creating new entities, like Fannie Mae and the Federal Housing Administration, to buy up and insure mortgages from struggling lenders. For a more complete history of the American mortgage market and the development of modern mortgage products, see Richard K. Green & Susan M. Wachter, \textit{The American Mortgage in Historical and International Context}, 19 J. ECONOMIC PERSPECTIVES 93 (2005).}

\footnotetext{21}{McLean & Nocera, \textit{All the Devils Are Here} at 5, 7.}

participation of private investment firms, which resulted in an explosion in the secondary mortgage market.

The shift from a primary to a secondary mortgage market changed the borrower-lender relationship in two fundamental ways. First, securitization eliminated the single lender entity that was both financially invested in the performance of a loan and able to negotiate directly with the borrower and replaced it with an array of anonymous investors. Second, once a homeowner’s mortgage was sold and repackaged on the secondary mortgage market as a security, the responsibility for managing the loan rested not with the loan originator but with a third party. This third party, called a loan servicer, was hired by the investor trust to manage the loan account in the investors’ best interests. Thus, with securitization, a

23 With securitization, lenders could sell the loan to investment banks. These banks created and marketed to investors a variety of products derived from mortgage backed securities. Now, instead of having to purchase an entire mortgage-backed security, investors could choose to buy derivatives, or slices, of the bond based on how much risk the investors wanted to assume. For a more detailed explanation of some derivative types, see Green & Wachter, *The American Mortgage in Historical and International Context*, at 107-108 (citing Frank J. Fabozzi, *The HandBook of Mortgage Backed Securities* (2001)). See also Levitin & Twomey, *Mortgage Servicing*, supra n. at 21 for a description of how tranching creates a hierarchy among investors based on default risk.

24 Bonds created from mortgages on single-family homes grew from zero to more than $350 billion between 1970 and 1981 and by the end of 2001 were worth more than $3.3 trillion. McLean & Nocera, *All the Devils Are Here* at 8.

25 Levitin & Twomey, *Mortgage Servicing*, supra n. at 11. Levitin and Twomey provide a systematic overview of the residential mortgage servicing business and how it differs from the traditional portfolio lender business. See also, Sarah Bloom Raskin, Federal Reserve Board Governor, Remarks at the National Consumer Law Center’s Consumer Rights Litigation Conference, Boston MA, Nov. 12, 2010 available at: http://www.federalreserve.gov/newsevents/speech/raskin20101112a.htm: “Before securitization became commonplace, it was much more likely for a mortgage to be serviced by the same entity that had originated the loan. This simple approach ensured that lenders knew immediately if a homeowner was having payment problems, and could take action to mitigate possible losses. A fair bit of this kind of “portfolio servicing” still takes place, but as the residential real estate market shifted from an originate-to-hold model to an originate-to-distribute model, an industry of independent third-party entities emerged to service the loans on behalf of the securitization trusts. These trusts, as a requirement for their tax-preferred status, were supposed to be passive, with the management of individual loans left to the servicer. These servicing arrangements are now commonplace in the industry: In fact, the system has matured rapidly and experienced considerable consolidation over the past twenty years.”

26 Adam J. Levitin and Tara Twomey, *Mortgage Servicing*, supra n. at 16. Securitization separates the ownership (having legal title) from the management of mortgage loans. The trust, from which investors have bought mortgage-backed securities, holds legal title to the mortgage. The loan servicer, usually a third party agent, is contractually responsible for acting on behalf of the investors by collecting payments and
triangulated relationship between borrower, investors, and third party loan servicer supplanted the direct borrower-lender relationship.

As agents of investors, loan servicers have considerable responsibility for managing a loan. The loan servicer issues monthly statements, collects the homeowner’s payments, places funds into escrow accounts for taxes and insurance, remits funds to the investors, calculates interest rate adjustments for adjustable rate mortgages (ARMs), and reports to borrower credit information to national credit bureaus. The loan servicer also serves as the homeowner’s only contact for any and all questions relating to paying back the loan. Finally, the loan servicer is responsible for conducting the cost-benefit analysis for delinquent loans and determining which option – pursuing foreclosure or working out an alternative arrangement with the borrower – minimizes the investors’ losses. If the loan servicer pursues foreclosure then it takes responsibility for adhering to the foreclosure laws of the jurisdiction, hiring an attorney to file a foreclosure action in a judicial foreclosure jurisdiction or follow the foreclosure notice and filing instructions required by statute in non-judicial foreclosure jurisdictions.

C. Problems with Securitized Loan Servicing

In theory, entrusting the responsibility for managing a loan to a third party is practical, but in practice it has proven problematic. Because of how the loan servicing industry is structured, loan servicers are incentivized to foreclose rather than engage in a cost-benefit analysis to determine the option that would most benefit investors’ financial interests. As a consequence, little communication occurs between loan servicers and borrowers. This is especially problematic when a loan is delinquent and communication is critical to determine whether foreclosure is the best passing along principal and interest payments to investors. LENDERS’ COST OF FORECLOSURE, Mortgage Bankers Association Policy Paper, Congressional Education Series Briefing, May 28, 2008, at 3.

27 The mortgagor payments are usually passed along to a trust that in turn distributes funds to investors. (Levitin & Twomey, Mortgage Servicing, supra n.__.)

28 The loan servicing industry is largely unregulated and the unfolding of the foreclosure crisis revealed many flaws, from predatory practices (padding of fees, strategic misapplication of payments, and inaccurate assessment of homeowners’ insurance) to conflicts of interest for mega-servicers that are also investors in the mortgages they manage, and the robo-signing scandal. (See Daniel K. Tarullo, Written Testimony on “Problems in Mortgage Servicing from Modification to Foreclosure Part II,” before the Senate Committee on Banking, Housing, and Urban Affairs (Dec. 1, 2010) at 2; Testimony of Thomas J. Miller, Iowa Attorney General, on “Problems in Mortgage Servicing from Modification to Foreclosure Part I,” before the Senate Committee on Banking, Housing, and Urban Affairs (Nov. 16, 2010) at 5-6; Raskin, Remarks supra n.__.)
option.

1. Loan Servicer Preference for Foreclosure

Loan servicers prefer foreclosure for two main reasons. The first involves the automated way in which loan servicers conduct business. The transactional part of loan servicing, sending out billing statements and collecting payments, is an automated process that can be done at minimal cost and with minimal human intervention. The problem is that even managing defaulted loans is highly automated so that the cost-benefit analysis once conducted by a loan agent at the Savings and Loan is replaced by computer software. The loan servicer enters a code indicating that a loan is delinquent and the computer automatically selects a previously approved attorney, generates and uploads the documents required for filing the foreclosure, and forwards them to the attorney. Once the property is foreclosed and liquidated, the servicer automatically bills the investor entity for the cost of the foreclosure. As a result of automation, loan servicing companies have few people on the payroll with the requisite knowledge and skills to conduct loss mitigation or non-retention analysis for an individual borrower’s loan.

Secondly, loan servicers rely on foreclosure instead of other loss mitigation tactics because of the loan servicing industry’s business model. Loan servicers make their profit by maximizing the fees earned from managing the loan and minimizing associated costs, hence automation.

31 When a loan goes into delinquency, the servicer has to make advances of principal and interest to the investors, whether or not payments from the borrower are received. The servicer also covers the cost of taxes, insurance, property preservation, inspection and legal costs. These advance costs are reimbursed after the foreclosure is completed. (Foreclosure Prevention: Improving Contact With Borrowers, Community Affairs Department, Comptroller of the Currency Administrator of National Banks, June 2007, at 3; Raskin, Remarks supra n.__.  
32 Adam J. Levitin and Tara Twomey, Mortgage Servicing, 28 YALE J. ON REG. 1 (2011) at 5. Such fees include a percentage of the unpaid balance, fees charged to borrowers, interest income on borrower payments, and any business arrangements connected to the loan
Servicers rarely have an ownership interest in the loan and therefore do not stand to lose money if the loan fails. In fact, loan servicers lose money if poor performing loans are kept on their books. If a loan is delinquent, then the servicer usually has to advance interest, and sometimes principal payments, to the investor trust. The loan servicer is then reimbursed for these payment advances after the foreclosed property is liquidated. There is little room in this financial structure for the cost-benefit analysis needed for loss mitigation, which requires loan servicers to pay fixed overhead costs and out-of-pocket expenses that may not be recouped from the investor trust. As a result, servicers’ incentives are not completely aligned with investors’ interests; servicers will favor options that are less labor intensive and require little cost upfront, such as foreclosure, even if a more labor intensive option, such as modification, better preserves investors’ interests. Whether or not a specific loan servicer is incentivized to foreclose or not depends on the pooling and servicing agreement between the loan servicer and the investor trust. Therefore, each loan servicer must make a different calculation when deciding whether to foreclose or whether to consider seriously a homeowner’s request for loss mitigation analysis.

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33 Id. at 1.
34 Id. at 26, 71 (citing, e.g. Prospectus Supplement, IndyMac, MBS, Depositor, Indymac INDX Mortgage Loan Trust 2007-FLX5 (June 27, 2007).
35 These costs, estimated to be $750-$1000 go into the time required to contact borrowers, collect and verify data, obtain home value estimates, determine whether the borrower’s setback is temporary or permanent, coordinate with any second-lien holders, and estimate the net present value of the loan for each loss mitigation alternative. Generally, out-of-pocket expenses can be charged to investors, but not overhead for the loan servicer staff conducting the analysis. (See Thompson, supra n. 32 at 27 and n. 18; Cordell, Dynan, Lehnert, Liang & Mauskopf at 15-7.)
36 Cordell, Dynan, Lehnert, Liang & Mauskopf at 7, 18. Another complicating factor is that some investors with an interest in a loan may be better served by foreclosure and other investors with an interest in the same loan may be better served by loan modification. Id. at 21-2 and Edward Vincent Murphy, Could Securitization Obstruct Voluntary Loan Modifications and Payment Freeze, Congressional Research Service Report RL34386, Feb. 21, 2008, at 5.
37 Depending on the terms of the pooling and servicing agreement, loan servicers can have significant leeway or can be quite restricted as to the extent to which they can modify the homeowner’s loan agreement.
38 While many servicers are capable of making affordable loan modifications, the largest servicers (Bank of America, JP Morgan Chase, and Wells Fargo) proved unwilling to do so on a large enough scale to impact long term foreclosure trends. Among these large servicers, some approved modifications at rates two to three times higher than other servicers (National Consumer Law Center “Rebuilding America: How States Can Save Millions of Homes through Foreclosure Mediation” Feb. 2012 at 5.).
2. Communication Failures Between Borrowers and Loan Servicers

A fundamental lack of communication and transparency is an additional obstacle for borrowers seeking to avoid foreclosure. Because loan servicing is primarily automated, much of its business has been outsourced overseas, with representatives reachable only by fax or phone. The industry is notorious for its lack of customer service. Anecdotes abound of homeowners who spent over a year submitting and resubmitting loan modification applications, only to discover that the applications were lost or improperly denied, or that a foreclosure sale had already been scheduled. Homeowners requested loan modifications only to be offered a plan with higher monthly payments than the original or, after successfully completing temporary modification plans, homeowners waited in limbo for months to receive a final modification plan but then were inexplicably denied. Sometimes the reasons for the denials were not the fault of the homeowner: paperwork and documents were lost, loan servicers did not comply with their promised time frames for reviewing modification applications, or one division of the loan servicer continued to pursue foreclosure proceedings while another division was reviewing a

39 Testimony of Thomas J. Miller, supra n. ___ at 5.
40 The Attorneys General who comprise the “State Foreclosure Prevention Working Group” tried to collect empirical data but had difficulty extracting loss mitigation data from national banks. (Testimony of Thomas J. Miller, supra n. ___; for the published reports go to: http://www.csbs.org/regulatory/Pages/SFPWG.aspx.)
42 Loan servicers pursue loan modification and foreclosure simultaneously in what is called “dual tracking.” When a loan becomes delinquent the file is sent to both the loss mitigation department to be assessed for a loan modification and to the liquidation department for foreclosure. Communication failures between the departments mean that one hand does not know what the other is doing, causing intense stress and confusion for homeowners. (Testimony of Mark A. Kaufman, supra n.__.) Both Fannie Mae and Freddie Mac recently put an end to “dual tracking” for delinquent mortgages they own or guarantee so that loan servicers cannot proceed with foreclosure if they are engaged in good faith negotiations for loan modification. (“Fannie Mae and Freddie Mac to Align Guidelines for Servicing Delinquent Mortgages,” Federal Housing Finance Authority News Release, Apr. 28, 2011, available at: http://www.fhfa.gov/webfiles/21190/SAI42811Final.pdf.)
44 Thompson, Written Testimony supra n.__ at 9-11.
modification or the borrower was in the midst of a trial modification period.45

In addition to the difficulties in communicating with loan servicers, homeowners with delinquent loans tend not to take the initiative to reach out to their loan servicers to seek assistance. A poll of 2,031 adult homeowners conducted by Freddie Mac in 2005, before the foreclosure crisis, revealed that over half of borrowers in foreclosure proceedings had no contact with their lender or lender’s representative before receiving a notice of foreclosure.46 Their reasons for not contacting their lender ranged from feeling embarrassed and scared,47 to not knowing whom to call, or to being unaware of services their loan servicer could provide, such as talking with a housing counselor, entering into a forbearance agreement, or engaging in loss mitigation.48 The poll also found that, in comparison to homeowners in good standing, these delinquent homeowners were generally younger and less affluent as well as less likely to have prior experience with home ownership.49 When homeowners did contact their loan servicers, they had no single point of contact at the loan servicer. They spoke to different people at different call centers each time, and as a consequence frequently received misinformation or conflicting recommendations.50

45 Id. at 5.
47 A Harris Interactive poll asked 1,334 homeowners in the United States to describe how they would feel if foreclosure were likely for them. They answered: “scared” (38%), “depressed” (35%), “angry” (9%), “embarrassed” (8%), or “none of these” (9%). See http://www.fdic.gov/about/comein/files/foreclosure_statistics.pdf. A 2007 study conducted by the Neighborhood Housing Services of Chicago asked housing counselors to explain why borrowers fail to contact their loan servicer when they have trouble making payment: “53% responded that most borrowers do not understand that lenders can provide options and 26% suggested that borrowers are too stressed or depressed to take any action. About 10% of counselors wrote that borrowers avoid their lender because they feel mistreated or belittled during interactions with their lender.” LESSONS FROM THE FRONT LINES: COUNSELOR PERSPECTIVES ON DEFAULT INTERVENTIONS: NHS MORTGAGE DEFAULT SURVEY, Neighborhood Housing Services of Chicago, Inc. (Oct. 29, 2007) at 7, available at: http://www.nhschicago.org/images/uploads/pages/LessonsFrontLinesOct2007.pdf
48 Only with some prompting, did homeowners express awareness of other services, such as repayment plans, adding missed payments to the existing loan balance, changing the interest rate, extending the mortgage, switching from an adjustable-rate to a fixed rate mortgage, or making a lump-sum payment. Freddie Mac, Foreclosure Avoidance Research at 7, available at: http://www.freddiemac.com/service/msp/pdf/foreclosure_avoidance_dec2005.pdf.
49 Id. at 3.
50 See Joe Nocera, “Shamed into Altering a Mortgage,” supra n.__; Diane Thompson,
D. Inadequacy of Conventional Legal Procedure in the Foreclosure Crisis

The two primary problems with loan servicer behavior, the preference to foreclose and failures in communication, frequently resulted in unnecessary foreclosures or foreclosures that were not in investors’ financial interest. As discussed above, conventional legal procedures presume that a financially motivated lender is making the decision to foreclose, not a third party loan servicer with its own interests. Unfortunately, it only became evident that conventional legal procedures failed to provide an appropriate check on loan servicer behavior once a record number of homeowners began defaulting in 2008, precipitating a national foreclosure crisis.

1. Securitization and Loan Servicer Behavior Contributed to the Crisis

The national foreclosure crisis unfolded as a result of a confluence of factors, including securitization and loan servicer behavior. The record number of foreclosures that began in 2008 was related to the record number of homeowners with securitized mortgages. The rise in home values in the late 1990s made mortgage-backed securities a profitable investment in high demand. The demand for mortgage-backed securities in turn spurred a proliferation of exotic subprime mortgage products and an industry keen to sell them. With these subprime mortgage products, people who never

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51 Exotic loan products include “Hybrid adjustable rate mortgage loans,” or ARMs, which enable a borrower to pay the loan at a below-market fixed interest rate for a set period of time, after which the rate continually resets to the market rate for the life of the loan. “Option ARMs” let borrowers choose from different payment options each month – whether a minimum payment, interest-only payment, fully amortizing 30-yr. payment, or fully amortizing 15-year payment. “Balloon loans” allow borrowers to make low, fixed monthly payments for a short period of time, after which the borrower must pay the remainder in a lump sum. “Interest-only loans” allow borrowers to pay only the accrued interest on their loans for a fixed grace period, after which borrowers begin repaying the principal with significantly higher monthly payments. “Deferred interest loans” or “negative amortization loans” allow borrowers to make monthly payments that are less than what they owe in interest and principal. This often increases, rather than decreases, the size of the loan especially since these loans have payment and interest rate adjustment caps that keep payments the same even if interest rates rise. See National Governors’ Association Center for Best Practices, State Strategies to Address Foreclosures (Sept. 19, 2007) at 5.

52 Beginning in the early 2000s, the mortgage market incentivized an “originate-to-distribute” model. Under this model, mortgage brokers originated loans and then sold them to institutions that securitized them and in turn sold them to investors on the secondary mortgage market. As a consequence, brokers did not suffer any losses if the borrowers
before qualified for mortgages could obtain subprime loans to buy a home^{53} and current homeowners could convert their home equity into cash by refinancing their existing mortgages.^{54} At the time, homeownership was considered an investment that would always yield a return because no one expected housing prices to fall. Homeowners in financial difficulty would not default because they could always sell their home to pay off their loans. Nationwide, homeownership increased from 64.2% in 1994 to a record 69.2% in 2004, an additional 12 million people owning homes.^{55}

When the mortgage market began to suffer in 2006 from slowing house price appreciation and a sharp increase in defaults,^{56} largely due to resetting interest rates for subprime ARMs, a record number of homeowners found they could not keep up with payments and defaulted on their loans.^{57}


^{53} “Subprime” or “near-prime” mortgages are generally targeted to borrowers who have problematic credit history, minimal savings, and/or an inability or unwillingness to document assets or income. The number of newly originated sub-prime mortgages almost doubled between 2003 and 2005, jumping from 1.1 million to 1.9 million. (Christopher J. Mayer, Karen M. Pence & Shane M. Sherlund, The Rise in Mortgage Defaults, Working Paper No. 2008-59 (2008), at 3-4, Finance and Economics Discussion Series, Divisions of Research & Statistics and Monetary Affairs, Federal Reserve Board, Washington D.C. [hereinafter Mayer, et al., Mortgage Defaults] (detailing the attributes of subprime, near prime, and prime mortgage products and explaining why delinquency and default rose so sharply through 2008)).

^{54} Josh Rosner, Housing In the New Millennium: A Home Without Equity Is Just a Rental With Debt, June 29, 2001, at 19-21 (predicting that, as rising real estate values increased the equity value of the home, more and more American consumers would draw down their home-equity in order to maintain a particular lifestyle). See also George Packer, The Ponzi State, THE NEW YORKER (Feb. 9, 2009) for detailed reporting on the interface between the housing industry and the subprime mortgage industry in Florida leading up to the foreclosure crisis.


^{56} Between 1976 and 2006, the share of mortgage loans that were “seriously delinquent,” or 90 days or more past due or in the process of foreclosure, averaged 1.7%. By the second quarter of 2008, the share jumped to 4.5%. Mayer, et al., Mortgage Defaults, supra n._ at 2 (citing data from the Mortgage Bankers Association).

^{57} The share of seriously delinquent subprime residential mortgages increased from 5.6% in mid-2005 to over 21% in 2008. Mayer, et al., Mortgage Defaults, supra n._ at 3. In 2007, approximately 854,000 foreclosures were opened for subprime mortgages and
Due in part to the automated practices of the loan servicing industry, loan defaults translated automatically to foreclosure. This first wave of foreclosure filings and subsequent foreclosure sales flooded the housing market and caused property values to spiral downward. Many homes were now worth less than the loans and investments they secured.\textsuperscript{58} By 2008, the investment losses created by these foreclosures and the sinking housing market resulted in the collapse of a number of financial institutions and launched a Great Recession.\textsuperscript{59} With recession came unemployment and a second wave of foreclosures for homeowners unable to afford mortgage payments and unable to sell in a market already saturated with homes.\textsuperscript{60}

The quantity of foreclosures and consequent financial losses are staggering. The numbers of residential mortgage loans entering foreclosure jumped from 800,000 (2005),\textsuperscript{61} when housing prices were still rising, to 2.8 million (2009) and 2.9 million (2010). Of the nearly 8 million homes that entered foreclosure since mid-2007, loan servicers repossessed over 3

\begin{itemize}
\item approximately 553,000 foreclosures were opened for prime mortgages, totaling approximately 1,558,000 foreclosures. (Cordell, Dynan, Lehnert, Liang & Mauskopf, supra n.\textsuperscript{7} at 7 (using data from the Mortgage Bankers Association National Delinquency Survey to estimate inventory of subprime and prime mortgages from 2004-2007 and the first two quarters of 2008)).
\item When the value of a home is less than the value of the mortgage, meaning that the loan cannot be paid off by selling the home at market value, the property has no equity and is considered “underwater.” In 2011, 60% of all homes in Nevada were underwater and the percentages of homes underwater in Arizona and Florida were 48% and 45%, respectively (Geoff Walsh, \textit{Rebuilding America: How States Can Save Millions of Homes Through Foreclosure Mediation}, National Consumer Law Center (2012) at 33 (citing CoreLogic data on negative equity from Sept. 13, 2011). For many homeowners whose houses are underwater, the property is also over-leveraged, meaning that the homeowners owe so much on the mortgage that they are unable to pay the interest payments for the loan. The first wave of foreclosures occurred because homeowners were over-leveraged and they could not keep up with the ARM payments when interest rates reset. The drop in the housing market caused many more homes to be underwater because the amount owed on the loan exceeded the market value of the home.
\item To help banks survive the Great Recession, the federal government disbursed $475 billion in bailouts under the Troubled Asset Relief Program (TARP).
\item Getter et al., \textit{supra} n.\textsuperscript{7} at 11.
\item Sheila C. Bair, Written Testimony on “Problems in Mortgage Servicing from Modification to Foreclosure Part II,” before the Senate Committee on Banking, Housing, and Urban Affairs (Dec. 1, 2010) at 6 (citing an FDIC estimate based on data from the Mortgage Bankers Association data and the American Housing Survey). According to RealtyTrac estimates, in 2010, 2.23% of all U.S. housing units received at least one foreclosure filing, up from 2.21% in 2009, 1.84% in 2008, 1.03% in 2007 and 0.58% in 2006 (RealtyTrac, \textit{Record 2.9 Million U.S. Properties Receive Foreclosure Filings in 2010 Despite 30-month Low in December} (Jan. 12, 2011) available at: http://www.realtytrac.com/content/press-releases/record-29-million-us-properties-receive-foreclosure-filings-in-2010-despite-30-month-low-in-december-6309). 
\end{itemize}
million. The total losses to individual families that have been foreclosed upon are projected to exceed $2.6 trillion with additional trillions in losses to neighborhoods and communities. Foreclosures have not only harmed homeowners and communities, but also those who invested in mortgage backed securities.

2. Legal Procedures Failed to Protect Homeowners and Investors

Existing foreclosure processes in all states were simply not equipped to handle the record numbers of foreclosures, the collapsed housing market, and the triangulated relationship between borrowers, loan servicers, and investors. Securitization changed how foreclosure decisions were made. As a result, a basic presumption of conventional foreclosure laws no longer applied; millions of foreclosures occurred without a cost-benefit analysis to determine the best option for recouping the value of the loan. Borrowers and investors suffered the consequences and local and national economies suffered.

The sheer volume of foreclosures was overwhelming and

62 Adam J. Levitin, Written Testimony on “Problems in Mortgage Servicing From Modification to Foreclosure [Part I],” before the U.S. Senate Committee on Banking, Housing, & Urban Development (Nov. 16 2010) at 1 (citing HOPE Now Data Reports). The National Fair Housing Alliance studied how financial institutions care for properties on which they have foreclosed. The study, Here Comes the Bank, There Goes Our Neighborhood: How Lenders Discriminate in the treatment of foreclosed homes (Apr. 11, 2011), found that, real-estate owned properties in African-American or Latino neighborhoods were not as well maintained or marketed for sale as in areas with a large White population, making it harder for minority neighborhoods to recover. The full report is available at: http://ctfairhousing.org/wp/wp-content/uploads/2011/04/There-Goes-Our-Neighborhood-REO-report.pdf.

63 Diane Thompson, Written Testimony supra n.__ at 4 (citing Report of the Staff of the Joint Economic Committee, 110th Cong., 2d Sess., State by State Figures: Foreclosure and Housing Wealth Losses (Apr. 10, 2008). Communities suffer from foreclosure because vacant, foreclosed properties lower the value of neighboring properties. Local governments lose tax revenue and also have increased costs associated with unpaid sewer and water bills and handling building code violations from unmaintained properties (United States Government Accountability Office, Vacant Properties: Growing Number Increases Communities’ Costs and Challenges (Nov. 2011) GAO-12-34 at 27-48).

64 Foreclosing on a home with a loan balance at the national median in 2008 resulted in around an average loss to investors of $145,000 per home foreclosure. See Geoff Walsh, Rebuilding America: How States Can Save Millions of Homes Through Foreclosure Mediation, National Consumer Law Center (2012) at 33 (citing Alan M. White, Deleveraging the American Homeowner: The Failure of the 2008 Voluntary Mortgage Contract Modifications, 41 Conn. L. Rev. 1107 (2009)). All types of investors have interests in mortgage backed securities, from the big banks to pension funds to private endowments. (Robert Lenzer, Lessons Learned A Year After Lehman’s Demise, Forbes (Aug. 21, 2009)).
compromised the integrity of foreclosure proceedings. For example, Florida’s state courts were flooded with cases: during the month of April, 2009, one in every 135 housing units received a foreclosure filing notice. In Florida’s 20th Judicial Circuit, the court created a “rocket docket” and called judges out of retirement to assist with a docket deluged by more than 1,000 cases per day. Most hearings lasted for less than one minute because judges asked homeowners only two questions: “Are you current on your mortgage?” and “Are you living in your home?” If the answers were “no” and “yes,” then homeowners were given sixty days to vacate the premises. Little to no time was spent by the judge assessing the merits of the foreclosure petition, such as whether the entity seeking foreclosure had the legal right to do so and whether it had complied with state law.

The conventional foreclosure process does not require a cost-benefit analysis of whether the securitized loan is performing in accordance with the investors’ financial interest. It lacks this assessment step because it dates to a primary mortgage market era when a lender and borrower had the ability to interact closely. Borrowers and investors in a secondary mortgage market lack this close relationship and therefore cannot respond to market changes that negatively impact the value of the collateral and that were not anticipated at the time the mortgage originated. For example, loan servicers

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65 Florida, a judicial foreclosure state, was one of the states hit earliest and hardest by the foreclosure crisis. In April of 2009, three of the ten metropolitan areas in the United States with the highest foreclosure rates were in Florida. Jakabovicz & Cohen, It’s Time We Talked: Mandatory Mediation in the foreclosure process, supra n. ___ at 22 (citing RealtyTrac “Foreclosure Activity Remains at Record Levels in April” available at http://www.realtytrac.com/content/press-releases/foreclosure-activity-remains-at-record-levels-in-april-4883). The percent increases in foreclosure filings in Florida’s judicial circuits between 2006-2008 is astounding: 230% (1st Circuit), 444% (9th Circuit), 474% (11th Circuit), 631% (12th Circuit), 496% (15th Circuit), 387% (18th Circuit), 550% (19th Circuit), and a whopping 788% (20th Circuit). Id. at 24-5.

66 Jakabovicz & Cohen, It’s Time We Talked: Mandatory Mediation in the foreclosure process, supra n. ___ at 22.

67 Michael Corkery, A Florida Court’s ‘Rocket Docket’ Blasts Through Foreclosure Cases, Wall St. Journal (Feb. 18, 2009) available at http://online.wsj.com/article/SB123491755140004565.html. There are accounts of loan servicer lawyers using hand trucks to exchange boxes of legal documents from the morning cases with the boxes of afternoon cases (Jakabovicz & Cohen, It’s Time We Talked: Mandatory Mediation in the foreclosure process, supra n. ___ at 22).

68 Corkery, supra n. ___.

continued to foreclose even after the flood of homes on the market decreased the value of homes markedly and eviscerated the value of investors’ interests.

Although conventional foreclosure proceedings failed to protect borrowers or investors, it proved difficult for states to find a solution to the problem. Securitization made foreclosure a national economic activity difficult for individual states to regulate. There was no blanket legislation that could be passed to end foreclosures entirely and reset mortgages to reflect market realities. Foreclosure is a contractual remedy for lenders when a loan is delinquent and, although state governments could delay foreclosure, they could not deny lenders the right to foreclose. Furthermore, the financial situation of each homeowner and the reasons for being in default were highly individualized, making it extremely difficult for a legislature to develop a law tailored narrowly enough to achieve its compelling interest to protect homeowners by the least restrictive means possible. Thus, state and local governments focused on ways to restructure foreclosure procedures for homeowners who were either struggling with making mortgage payments or were already delinquent. One way in which governments restructured foreclosure procedure was to include ADR as a step in the foreclosure process.

II. AN ADR RESPONSE TO CRISIS

The use of ADR can restore integrity to foreclosure procedure by ensuring that only necessary foreclosures take place, ultimately averting further crisis and stabilizing the economy. Incorporating an ADR-based negotiation step in conventional foreclosure proceedings counteracts the automated practices of the loan servicing industry by making the loan servicer consider the value of the loan based on the local housing market and the borrower’s ability to make future payments. Through a structured negotiation process, the borrower and loan servicer together create a solution that considers new market realities and provides a plan of action that satisfies the needs of homeowners and investors.

State and local governments established foreclosure ADR programs

70 Many states passed moratoria on foreclosure after the robo-signing scandal was uncovered. Bank of America also put a moratorium on housing foreclosures in all 50 states so that it could investigate the documents being used to justify homeowner evictions.

71 At the very least, the Contracts Clause and the Takings Clause of the United States Constitution restrict the extent to which federal and state governments can enact laws controlling mortgage foreclosures. See Geoff Walsh, The Finger in the Dike: State and Local Laws Combat the Foreclosure Tide, 44 SUFFOLK U. L. REV. 139 (2011) (an historical survey of the constitutionality of state moratoria on foreclosure as well as an analysis the constitutionality of state foreclosure mediation programs).
with clear objectives that directly respond to the problems associated with securitized loan servicing that contributed to the foreclosure crisis.\textsuperscript{72} To further these objectives, programs target homeowners with delinquent loans and give them an opportunity to sit down with the loan servicers\textsuperscript{73} and negotiate alternatives to foreclosure.

### A. Foreclosure ADR Program Objectives

There are five primary objectives of foreclosure ADR programs that attempt to respond to the problems associated with securitized loan servicing and the foreclosure crisis. They are to 1) resolve communication barriers caused by securitization, 2) provide oversight of loan servicers’ conduct, 3) educate homeowners about their rights in foreclosure, 4) assist with a high volume of cases, and 5) alleviate community blight. Frequently, a particular ADR program works to further several of these objectives simultaneously.

In order to overcome communication barriers, a fundamental problem at the heart of the foreclosure crisis, foreclosure ADR programs physically bring borrowers and loan servicers together for a conversation about the loan. Some programs assemble parties and expressly instruct them to talk about the possibility of modifying or restructuring of the loan so that unnecessary foreclosures do not occur.\textsuperscript{74} Where loss-mitigation is not an option, the parties are directed to explore non-retention plans that allow the lender to take title of the property without having to foreclose. Connecticut’s foreclosure mediation program, the first, state-wide program

\textsuperscript{72} Using ADR as a way for parties in conflict to develop solutions tailored to their interests is not a novel concept; however, these programs are unique in that they are being employed as a public policy initiative to respond where existing laws have proven inadequate. Courts have encouraged ADR to help manage crowded dockets and also to make it possible for parties to settle disputes themselves, rather than by relying on a judge. It is increasingly common for parties to elect to use an ADR process to resolve conflicts privately, rather than going to court. However, parties usually turn to an ADR process because the default, going to court, is public, more expensive, and time intensive, not because the default lacks integrity, which is what happened to foreclosure proceedings in the foreclosure crisis.

\textsuperscript{73} For these programs, lender and loan servicer are interchangeable. Where program rules or statutory language refer to the obligations of a lender entity, it is understood that, for securitized loans, it is the loan servicer who will be required to comply.

\textsuperscript{74} See, e.g., MD Code Real Property § 7-105.1(j)(2) (“parties and the mediator shall address loss mitigation programs that may be applicable to the loan secured by the mortgage or deed of trust that is the subject of the foreclosure action”); Supreme Court of Nevada, Amended Foreclosure Mediation Rule 1.1 (the general purpose of Nevada’s foreclosure mediation program is to “[encourage] deed of trust beneficiaries (lenders) and homeowners (borrowers) to exchange information and proposals that may avoid foreclosure”).
in the country, provides a good illustration. Of primary concern to the Connecticut legislature was the fact that individuals and communities would suffer because many homeowners were failing to take the initiative to reach out to lenders and engage in negotiations around a loan modification or alternative to foreclosure. Connecticut’s mediation program empowers the state and the judiciary to direct homeowners and borrowers to have a structured conversation, presided over by a neutral mediator, about whether there are any alternatives to proceeding with a foreclosure. The legislature outlined the topics to be addressed during mediation: “all issues of foreclosure, including, but not limited to, reinstatement of the mortgage, assignment of law days, assignment of sale date, restructuring of the mortgage debt and foreclosure by decree of sale.”

In creating foreclosure ADR programs, state and local governments also tried to create a mechanism to overse loan servicers’ compliance with federal loan modification programs and to ensure that loan servicers

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75 Connecticut House Bill 5577 “An Act Concerning Responsible Lending and Economic Security” was a large consumer protection bill that, in addition to creating a foreclosure mediation program, gave the CT Banking Department the regulatory tools to more closely supervise mortgage lenders and crack down on predatory lending as well as an Emergency Mortgage Assistance Program.

76 The comments of Representative Barry (12th), chair of the Banks Committee, convey the real fears, shared by many people around the country, that the foreclosure crisis would bring poverty, homelessness, blight, and further economic damage. Transcript CT General Assembly debate HB 5577, May 5, 2008.

77 Rep. Barry (CT 12th district): “No amount of marketing is going to get a borrower . . . to reach out to the lender to discuss their [sic] options. The mediation program will serve the purpose of identifying people who can be helped and directing them to the right resources to keep them in their home. . . . But I think this is the best way to put people who are in foreclosure, who have been given foreclosure notices. They oftentimes don’t respond to their mail. They have a pride issue, maybe sometimes their dignity doesn’t allow them to respond to a complaint in the mail and the clock’s ticking.” Transcript CT General Assembly debate HB 5577, May 5, 2008.

78 Transcript CT General Assembly debate HB 5577, May 5, 2008.

79 Conn. Gen. Stat. § 49-31m.

80 Many loan servicers failed to comply with HAMP requirements. Homeowners around the country reported difficulty in working with their loan servicers because information was inconsistent and confusing, loan servicers lost documents or made repeated requests for documents already submitted, and improperly calculated borrowers’ income or misapplied HAMP guidelines. (United States Government Accountability Office, Troubled Asset Relief Program: Results of Housing Counselors Survey on Borrowers’ Experiences with the Home Affordable Modification Program (May 2011) GAO-11-367R at 5-6, 8.) Homeowners often waited four to six months for a decision from a loan servicer about a HAMP application. (Id. at 6.) During this waiting period, penalties and late fees on the delinquent loan accrued and made it harder to cure the delinquent loan. Where a trial modification was granted, many homeowners were still denied permanent modifications even after successfully completing the trial modification period. (Id. at 8.)
Indeed have the legal right to foreclose on the property. Federal loan modification standards are established by the Home Affordable Modification Program (HAMP); many state and local programs fold HAMP analysis into the ADR process. HAMP creates incentives for loan servicers to restructure or refinance home mortgages for eligible homeowners who are behind in their payments or on their way to imminent default. The intended effect of restructuring these loans is for homeowners to stay in their homes with lower, sustainable monthly mortgage payments. Under HAMP, participating loan servicers must modify the loan so that a homeowner’s monthly payments are no greater than 31% of her gross monthly income. HAMP also demands that participating loan servicers establish a single point of contact for borrowers so that they can communicate with the same individual about the particulars of their case, reducing the confusion of mixed messages. To ensure homeowners are

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81 As part of the federal response to the foreclosure crisis, President Obama rolled out a “Homeowner Affordability and Stability Plan.” The plan has three parts: refinancing, loan modification, and strengthening of Fannie Mae and Freddie Mac. A primary component of the plan, the Making Home Affordable Program, which took effect in late February, 2009, focused on helping homeowners at risk of foreclosure secure refinancing or modification of loans through either the Home Affordable Refinance Program (HARP) or the Home Affordable Modification Program (HAMP). (Obama Administration’s Home Mortgage Crisis Fact Sheet, Washington Post (Feb. 18, 2009)). Both HAMP and HARP give incentives for loan servicers to either modify or refinance mortgages for people whose homes have lost value (http://www.makinghomeaffordable.gov/programs/lower-rates/Pages/harp.aspx; Fannie Mae’s Home Affordable Refinance FAQs available at https://www.efanniemae.com/sf/mha/mharefi/pdf/refinancefaqs.pdf).

82 https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_30.pdf. For example, Supplemental Directive 11-06 increased the dollar amount loan servicers are eligible to receive for permanently modifying loans and created a sliding scale so that servicers receive more money if they provide a permanent modification for loans that are less than 120 days delinquent. See https://www.hmpadmin.com/portal/news/docs/2011/hampupdate070611.pdf.

83 Homeowners eligible for a loan modification under HAMP must occupy the property as a primary residence, owe up to $729,750 on the current mortgage, and have a first mortgage issued before January 1, 2009 with a monthly payment greater than 31% of the gross monthly household income. http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/hamp.aspx

84 Borrowers who are eligible for HAMP must complete a 90-day trial modification period before the modification becomes permanent. See United States Government Accountability Office, Troubled Asset Relief Program: Results of Housing Counselors Survey on Borrowers’ Experiences with the Home Affordable Modification Program (May 2011) GAO-11-367R at 3.

85 All loan servicers that received TARP (troubled asset relief program) funds must participate in HAMP. Federal GSEs like Fannie Mae and Freddie Mac also participate in HAMP.

86 HAMP handbook v. 3.4 for non-GSE servicers at 176.

87 Supplemental Directive 04-11 available at
considered for HAMP, some foreclosure ADR give the parties explicit instructions for HAMP analysis. For example, one program requires lenders to conduct a net-present-value calculation as a precursor to mediation so that the parties enter the mediation ready to discuss the homeowners’ eligibility for modification. 88 Many programs established after the robo-signing scandal and loan servicer misconduct came to light, provide even more oversight of loan servicers because they introduce additional instructions, such as requiring loan servicers to confirm that the foreclosing party has possession of the note and therefore the legal right to foreclose, as part of a comprehensive oversight machinery. 89

State and local governments also rely on foreclosure ADR programs to educate homeowners about the foreclosure and loan modification process. As discussed earlier, many homeowners facing foreclosure delinquent homeowners are generally younger, less affluent, and less likely to have prior experience with home ownership than homeowners whose loans are in good standing. 90 Furthermore, communicating with loan servicers can be problematic, paperwork is lost and telephone calls are not returned, the instructions for applying for a modification can be diffuse, and the modification review process is often opaque. Almost all foreclosure dispute resolution programs integrate HUD-approved housing counseling as a free service for borrowers delinquent on their loans and facing

88 For example, Vermont’s foreclosure mediation statute requires lenders to calculate NPV in accordance with HAMP guidelines and to produce, for the homeowner and the mediator, the NPV inputs and outputs. 12 V.S.A. § 4633.
89 See more on required document exchanged below, infra __.
90 Supra n.__ [Freddie Mac, Foreclosure Avoidance Research].
91 The United States Department of Housing and Urban Development has had a Housing Counseling Assistance Program since the 1970s. HUD housing counselors educate millions of people on a variety of housing related issues, from educating potential buyers about homeownership and mortgages, to foreclosure prevention, budgeting, maintenance of mortgage payments post-purchase, and counseling about reverse mortgages, rental, and homelessness. The number of homeowners seeking assistance with foreclosure from HUD housing counselors jumped by 36% from 2006 to 2009. For a full description of the Program and its involvement in responding to the foreclosure crisis, see Deborah C. Holston, Written Testimony on “Housing Counseling Program” before the House Financial Services Subcommittee on Insurance, Housing, and Community Opportunity (Sept. 14, 2011). Congress recently recognized the importance of housing counseling in allaying the foreclosure crisis by calling for the creation of an Office of Housing Counseling as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203, § 1442, “Establishment of Office of Housing Counseling,” approved July 21, 2010).
foreclosure. Supra at ____. NCLC Rebuilding America at 5. Washington, for example, created its statewide foreclosure mediation program in order to “encourage homeowners to utilize the skills and professional judgment of housing counselors as early as possible in the foreclosure process” and “provide a process for foreclosure mediation when a housing counselor or attorney determines that mediation is appropriate” (2011 Wash. Sess. Laws 580 at Sec. 1 (2)(a),(c)).

93 For example, Ohio’s model foreclosure mediation program is designed to “assist courts in managing the explosion of foreclosure cases on their dockets for a more efficient administration of justice while assisting Ohio’s most vulnerable homeowners facing the prospect of losing their homes” (http://www.supremecourtofohio.gov/PIO/news/2008/foreclosure_020708.asp). See also First Judicial District Court, State of New Mexico, Counties of Los Alamos, Rio Arriba, and Santa Fe, July 13, 2009, Administrative Order No. 2009-00001 (Foreclosure Mediation Pilot program intended “to minimize case processing time, save costs and expense for the parties, and assist the parties in resolving the issues by working out new mortgage terms where possible or other agreements mutually acceptable to both parties.”).

94 Providence, RI, Code of Ordinances, part II, chapter 13, art. X, Sec. 13-214. The full policy statement is compelling and illustrates the real sense of crisis gripping the community:

“It is hereby declared that residential mortgage foreclosure actions, caused in part by so called sub-prime mortgage lending and predatory lending practices as well as rising interest rates, unemployment and underemployment, have negatively impacted a substantial number of homeowners in the city, creating a foreclosure crisis which endangers the economic stability of the city and the health and safety of its citizens, as the increasing numbers of foreclosures lead to increases in unoccupied and unattended buildings in the city and give impetus to the continuation, extension and aggravation of urban blight and decay. More importantly, foreclosures cause the unnecessary and unwanted displacement of a
city ordinance explains that the purpose of the foreclosure mediation program is:

[T]o protect the public health, safety and welfare by providing early, HUD-approved independent counseling agency-supervised intervention in residential owner-occupied mortgage foreclosure cases which will assure timely determination of eligibility under various federal, state and local programs established to facilitate loan work-out and other solutions to permit residential homeowners, where possible, to retain their properties and permit lenders to move forward to auction/sale of the properties and recordation of a foreclosure deed upon conclusion of the process. 95

B. Vital Characteristics Furthering ADR Program Objectives

In order to accomplish the aforementioned objectives, state and local foreclosure ADR programs requiring borrowers and loan servicers to negotiate a looming foreclosure action share two essential characteristics. First, to be eligible for these programs borrowers must be owner-occupiers of the property in jeopardy and that property must be the borrower’s primary residence.96 Second, the programs require direct communication about the loan between the borrower and the lender or loan servicer. In general, a representative of the lender, usually an attorney hired by the loan servicer, must appear in person and must have the authority to negotiate and modify the loan secured by the mortgage.97 Some programs allow the lender to engage in the foreclosure negotiation by phone.98

Limiting these programs to borrowers who are owner-occupiers facing foreclosure allows state and local governments to reach the demographic most negatively affected by the foreclosure crisis. The number of residential foreclosures has been unprecedented. The loss of homeowners due to residential foreclosure and subsequent depletion of

considerable number of homeowners and tenants who desire to live and work in the city.” Id. 96

Id. at Sec. 13-215.


98 Nevada’s program allows lenders to participate by phone only if they can show good cause (Nevada Foreclosure Mediation Rule 10(1)(a)).
communities continues to pose the greatest threat to economic stability in the United States. By targeting homeowners who are actively living in their homes under threat of foreclosure, jurisdictions further their objectives of clearing court dockets, educating borrowers, and stabilizing communities.

Additionally, the requirement that a representative of the lender appear in person at the negotiation is a crucial component in helping programs achieve the other two objectives, overcoming barriers to communication and monitoring loan servicer conduct. The secondary mortgage market, with its array of anonymous investors, makes it impossible for a homeowner to negotiate with the entity or entities that have a secured interest in the borrower’s home. Compelling a single individual, with a name, phone number, email address, and the authority to negotiate the terms of the loan, to materialize and assess foreclosure alternatives is perhaps the most powerful and effective tool that these programs provide to homeowners.

III. FORECLOSURE ADR PROGRAM BEST PRACTICES

State and local governments have important decisions to make about how to create, structure, and implement foreclosure ADR programs so that they reach their primary objectives. When making these decisions, it is useful to compare key components of existing foreclosure ADR programs and identify best practices. By relying on best practices, state and local governments are more likely to avoid unnecessary foreclosures and have a maximum impact on allaying the foreclosure crisis. In creating, structuring, and implementing foreclosure ADR programs, state and local governments must consider key program components ranging from how a program is created to when the negotiation opportunity is introduced in the foreclosure timeline and how homeowners become enrolled. They must also consider who presides over the negotiations, whether they include housing counseling and legal services, what information the program requires from homeowners and loan servicers, whether there are sanctions and judicial oversight, and how the program is funded.

In examining key components of existing foreclosure ADR programs, a number of themes emerge to guide governments crafting programs while trying to account for local realities. For example, state and local governments must ensure both efficiency of process and a meaningful opportunity for informed negotiation between the parties. They also have to

balance the scale of the program with the resources available to administer it. Finally, the difference in sophistication between homeowners and loan servicers can create a power imbalance between the parties and raises concerns about how to best protect homeowners in an ADR process.  

A. Program creation and implementation

State and local governments can choose to create foreclosure ADR programs by state statute, local ordinance, or judicial rule. Whether the program was created by the state legislature, local government, or courts is a function of factors such as the political will in the state, the authority of the municipal governments, and the statutory power granted to the judiciary. Nevertheless, there are some clear advantages to creating a foreclosure ADR process through legislative action, rather than judicial rule, in both judicial and non-judicial foreclosure states.

100 Scholars have written extensively on the dangers of “power imbalance” between parties in litigation, mediation, and other ADR processes. For example, see Jean R. Sternlight, ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice, 3 Nev. L.J. 289 (2003); Jean R. Sternlight, Is ADR Consistent with Rule of Law? Lessons from Abroad, 56 De Paul L. Rev. 569 (2007); Carrie Menkel-Meadow, Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases), 83 Geo. L.J. 2663 (1995); Laura Nader, Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology, 9 Ohio St. J. Disp. Res. 1 (1993); Laura Nader, Disputing Without the Force of Law, 88 Yale L.J. 998 (1979); and Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc. Rev. 95 (1974). There has been some attention to the use of ADR in foreclosure proceedings, but the focus has been on whether mediation, in its most essentialized form, can protect borrowers (Shana H. Khader, Mediating Mediations: Protecting the Homeowner’s Right to Self-Determination in Foreclosure Mediation Programs, 44 Colum. J.L. & Soc. Probs. 109 (2010)). A question for further examination is whether fundamental principles of mediation align with those of consumer protection.

101 Two programs were created through a partnership between a local law school and either the judiciary or the Attorney General. In Milwaukee, Wisconsin, a judicial foreclosure state, Chief Justice Jeffrey A. Kremers signed directive 09-14 to start a foreclosure mediation program run and coordinated by the Marquette Law School. In Arizona, a non-judicial foreclosure state, the Arizona State University Sandra Day O’Connor School of Law established a mediation program for non-judicial foreclosures that are part of bankruptcy proceedings.

102 A number of bills were introduced in state legislatures to create foreclosure mediation programs but they have not passed: Wisconsin Senate Bill 255, introduced in August 2009; Massachusetts House Bill 4003, introduced in February, 2009; Texas Senate Bill 1475 and House Bill 3426, introduced in March 2009. Geoff Walsh, State and Local Foreclosure Mediation Programs: Updates and New Developments, National Consumer Law Center (Jan. 10) at 11-14.

103 While there is variation among the programs, generally the branch of government that created the program is related to the dominant form of foreclosure used in the state (judicial or non-judicial) as well as the objectives of the program.
Judiciaries have the authority to create foreclosure ADR programs by passing rules that regulate how foreclosure cases proceed through the courts. Establishing a program by judicial rule may be more expedient than the political process. However, when it comes to implementing a foreclosure ADR program, judiciaries face limitations. First, the program will apply exclusively to judicial foreclosure; eliminating homeowners facing non-judicial foreclosure may be a problem for states that allow both forms of foreclosure. Second, the application of judicial rules is usually left to decentralized local courts so there may be program inconsistencies within the state. Given these realities, many state judiciaries have created a model framework of best practices for each local court to adopt. Compare, for example, the different experiences of the foreclosure mediation programs created by state judiciaries in Ohio and Florida, both of which created a model foreclosure program for local courts to adopt. While Ohio allowed local courts to modify the model according to available resources and local needs, Florida required all local courts to implement the same model. However, after a little less than two years, the Supreme Court of Florida terminated the statewide program, due in large part to problems with local courts’ ability to implement the model program. In light of the

104 The Supreme Court of Ohio, for example, developed an eleven-step model framework for a foreclosure mediation program but left the decisions regarding program implementation to each local jurisdiction. This framework approach proved successful because not every county had enough mediators for all the cases, or the money to pay them. Kevin Kemper, Courts Trying Foreclosure Mediation, Columbus Business Journal, (Dec. 24, 2007). http://www.bizjournals.com/columbus/stories/2007/12/24/story1.html?page=all


106 The uniform, statewide managed mediation program attempted to impose basic standards for the multiple foreclosure diversion programs that had previously sprung up around the state with widely varying structures and rules (Jakabovicz & Cohen, It’s Time We Talked: Mandatory Mediation in the foreclosure process, supra n. ___ at 22; Administrative Order 2008-15.1, “Administrative Order Establishing Circuit-Wide Homestead Foreclosure Conciliation Program,” FL 11th Jud. Cir. (November 25, 2008)).

107 In re: Managed Mediation Program for Residential Mortgage Foreclosure Cases, Supreme Court of Florida Administrative Order No. AOSC11-44, Dec. 19, 2011. The Supreme Court of Florida, in issuing its Administrative Order, cited the Task Force’s report that “identified lack of communication between plaintiffs and borrowers as the most significant issue impeding early resolution of foreclosure cases, and concluded that effective case management and mediation techniques are the best methods the courts can employ to ensure that such communications occur early enough in the case to avoid wasted time and resources for the courts and the parties.” Id. Geoff Walsh, National Consumer Law Center, State and Local Foreclosure Mediation Programs: Updates and Developments, Jan. 2010 at 63.

108 Implementation problems include lack of loan servicer compliance with the requirements of the model program and insufficient publicity. William D. Palmer, Chair of Assessment Workgroup, 2011 Report Assessing the Florida Managed Mediation Program
experiences in Ohio and Florida, a strong model program should be provided to local courts but there should be some flexibility to allow for successful implementation. And third, when a judiciary creates a program, its choices for administering the program are limited either to pre-existing judicial infrastructure or third party vendors.\textsuperscript{109} Judiciaries, unlike legislatures, cannot draw in other government entities to help with collecting statistics for program evaluation,\textsuperscript{110} or handle payments (due to statutory restrictions on the judiciary’s ability to collect fees from ADR).\textsuperscript{111}

State legislatures or city councils\textsuperscript{112} have a lengthy political process but, because legislatures control the purse strings and have the power to deploy more state resources than the judiciary, programs created by the legislature have the potential to be much more expansive and perhaps more

\textsuperscript{109} In Delaware, the judiciary oversees the administration of the foreclosure mediation program itself, relying on pre-existing court personnel to handle scheduling of mediation sessions and to determine who is qualified to mediate. Although the Delaware legislature recently codified the state judiciary’s Administrative Directive 2011-2, the judiciary still administers the program (10 Del.C. § 5062C). In Florida, the judiciary contracted out the responsibility of administering and implementing the statewide managed mediation program to third party providers. Qualifying providers included non-profit organizations “independent of the judicial branch, capable of sustained operation without fiscal impact to the courts, politically and professionally neutral, and . . . a demonstrated ability to efficiently manage the extremely high volume of foreclosure actions.” (In re: Guidance Concerning Managed Mediation Programs for Residential Mortgage Foreclosure Cases, Supreme Court of Florida Administrative Order No. AOSC10-57 (Nov. 5, 2010) (citing In re: Final Report and Recommendations on Residential Mortgage Foreclosure Cases, Supreme Court of Florida Administrative Order No. AOSC09-54, Dec. 28, 2009 at 3-5)).

\textsuperscript{110} See, e.g., Administrative Directive of the President Judge of the Superior Court of the State of Delaware, No. 2011-02 Residential mortgage Foreclosure Mediation Program (Jan. 20, 2011) (replacing rescinded Administrative Directive No. 2009-03 and charging the Community Legal Aid Society, Inc. (CLASI) with maintaining statistics on how many workouts occur in mediations and the numbers of qualified homeowners who participate). \textit{Id.} at 6. Florida also had third party providers collect limited information about the mediation session outcomes and report back to the Court. (In re: Guidance Concerning Managed Mediation Programs for Residential Mortgage Foreclosure Cases, Supreme Court of Florida Administrative Order No. AOSC10-57 (Nov. 5, 2010) (citing In re: Final Report and Recommendations on Residential Mortgage Foreclosure Cases, Supreme Court of Florida Administrative Order No. AOSC09-54, Dec. 28, 2009 at 3-5) at 4-5).

\textsuperscript{111} West’s Flor. Stat. Ann. § 44.108 (2012). The Florida judiciary can only charge fees for mediation in family law cases and county court cases involving $15,000 or less. Foreclosure mediation falls outside of these two categories and therefore the judiciary could not collect fees for mediations conducted in foreclosure cases nor could it receive such funds from a third party provider.

\textsuperscript{112} See, e.g., Washington DC and Providence, RI, which both created programs by city ordinance.
Legislatures in both non-judicial foreclosure jurisdictions and judicial foreclosure jurisdictions have included an ADR process in state foreclosure proceedings. Programs created by legislatures can utilize other parts of the state apparatus to administer the program, conduct homeowner outreach, provide housing counseling and legal assistance, and also regulate loan servicer conduct, as will be discussed in subsequent sections.

Thus, the branch of government that creates the foreclosure ADR program impacts both the scope and the implementation of the program. Certainly, in judicial foreclosure states, a judiciary may be able to move

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113 Interestingly, Hawaii’s foreclosure dispute resolution program, reserved for non-judicial foreclosures only, created such extensive oversight of the non-judicial foreclosures (e.g. it required lenders to provide mediators with proof and documentation of their right to foreclose and gave borrowers a right to sue under the law if the lender did not comply with the foreclosure mediation process) that Fannie Mae and Freddie Mac took advantage of a recent non-judicial to judicial foreclosure conversion law and converted all of its foreclosures to judicial foreclosure proceedings, thereby avoiding the mediation process entirely. See Hawai’i State Judiciary, Nonjudicial Foreclosure Conversion Frequently Asked Questions available at http://www.courts.state.hi.us/self-help/foreclosure/foreclosure_conversion_faqs.html.

114 Only two primarily non-judicial foreclosure jurisdictions established foreclosure mediation programs through the judiciary. One, in the First Judicial District of New Mexico, applies only to owner-occupied, residential foreclosures before the court (Administrative Order No. 2009-00001 July 13, 2009). The other, New Hampshire’s Judicial Branch Mediation Program to Reduce Foreclosures was a purely voluntary program that made trained court mediators available to all parties who wanted to participate in a mediation session, even if the foreclosure was not before a court. The program was discontinued in October, 2011. (http://www.courts.state.nh.us/adrp/foreclosure/structure.htm).

115 Connecticut, for example, a judicial foreclosure state, was the first state to pass legislation establishing court-annexed mediation in foreclosure proceedings. The decision to use mediation as the medium for negotiations between homeowners and loan servicers was made for practical reasons. A pre-existing judicial mediation program for resolving landlord-tenant disputes had been effective in the state’s Housing Courts because it created an opportunity for a fair and informed negotiation between the parties with the assistance of a neutral third party (Connecticut Chapter 834 “Court Proceedings on Housing Matters” Sec. 47a-69 ). Because Connecticut’s Judiciary was already familiar with the mediation model from the Housing Courts, it was not difficult to replicate in the foreclosure context. The program began operating in a matter of months (legislation creating the program passed on May 5, 2008 and the first mediations occurred two months later on July 1).

116 Programs created by state statute can be administered and implemented by administrative agencies, courts, their delegates, or a combination thereof. For example, Maryland’s foreclosure mediation program is run by the Office of Administrative Hearings, an independent executive state agency that conducts administrative hearings (MD REAL PROP § 7–105.1) and Hawaii’s ADR program is run by the Department of Commerce and Consumer Affairs in conjunction with the state judiciary’s Center for Alternative Dispute Resolution (Haw. Rev. Stat. § 667-73 (a)-(c) (2012)).
more quickly than the state legislature to put in place a program that will be available to all homeowners facing foreclosure and that utilizes existing infrastructure. The judiciary already controls the foreclosure process through the courts and need not rely upon the political will of the legislature if changes or adjustments need to happen quickly. Without the support and funding of the legislature, the judiciary may not have the resources at hand to create and administer an effective mediation diversion program.

B. Mediation and the foreclosure timeline

Although foreclosure ADR programs should provide sufficient time and opportunity for negotiation, they must also maintain efficiency and appreciate their impact on the regular foreclosure process. It is crucial for state and local governments to consider the point at which foreclosure ADR programs introduce negotiation, the duration of negotiations, and the impact of negotiation on the conventional foreclosure process. A single mediation session can last two hours\(^\text{117}\) or up to half a day\(^\text{118}\) and some jurisdictions allow parties to negotiate for months over multiple mediation sessions\(^\text{119}\). If the goal of the program is to maximize the likelihood of a homeowner retaining the home, negotiations should begin before the loan servicer has passed a point of no-return on the road to foreclosure. Programs should also set a finite period of time for negotiations during which time the foreclosure process is suspended.

The point at which foreclosure mediations occur along the default-to-foreclosure timeline varies from jurisdiction to jurisdiction. Programs can bring loan servicers and borrowers to the negotiation table before a foreclosure has been filed, while the foreclosure action is pending, or during the redemption period after the foreclosure but before the foreclosure sale. Some programs prohibit lenders and loan servicers from initiating foreclosure until they have attempted to negotiate in mediation\(^\text{120}\), while others will stay foreclosure proceedings so that a foreclosure sale cannot be pursued as the parties concurrently negotiate potential foreclosure alternatives.

1. When mediation occurs in the foreclosure timeline

Some jurisdictions introduce foreclosure mediation early, after the

\(^{117}\) See, e.g., Maryland’s foreclosure mediation program.

\(^{118}\) See, e.g., Maine’s foreclosure diversion program.

\(^{119}\) See, e.g., Cook County, IL, mortgage foreclosure mediation program, which requires all parties to attend a minimum of two mandatory mediation sessions.

borrower is in default and before the lender has taken steps to initiate the foreclosure process. In Washington, a non-judicial foreclosure state, before a loan servicer can proceed with foreclosure, the lender must make efforts to contact the homeowner by letter and by telephone\(^{121}\) to inform him that the opportunity exists to meet and confer and he should contact a housing counselor or attorney.\(^{122}\) Homeowners in Washington can also request mediation after receiving the loan servicer’s notice of default.\(^{123}\) If no mediation request is made, then the lender proceeds with scheduling the foreclosure sale and providing the homeowner with notice of the sale date.\(^{124}\) If the homeowner does request mediation, then the recording of the foreclosure sale is postponed until after the mediation process concludes and the mediator issues a certificate stating the mediation has been completed.\(^{125}\) In a non-judicial foreclosure state, the timeline for a foreclosure proceeding with an ADR component is the same as the timeline for a conventional foreclosure because the mediations must be completed in the regular notice period. The primary difference in Washington is that the loan servicer has an obligation under the new law to contact the borrower thirty days before issuing a notice of default, the event which triggers the homeowner’s eligibility for housing counseling and mediation.\(^{126}\)

There are advantages to having the ADR option early in the foreclosure process. First, the loan servicer may not be so invested in the foreclosure process because it has not yet had to pay the upfront costs involved in servicing a delinquent loan and preparing the foreclosure (costs that, depending on the pooling and servicing agreement with the investor trust, the servicer may only be able to recoup upon foreclosure sale and that


\(^{122}\) Washington’s mediation program is only available to homeowners who have been referred to mediation by a housing counselor. If the homeowner fails to respond within thirty days, then the servicer may proceed with sending the notice of default that triggers the foreclosure process. (Rev. Code Wash. Ann. 61.24.031(1)(d) (West 2012)) If the homeowner does respond to the loan servicer and requests a meeting or is referred to mediation by a housing counselor, then the borrower and loan servicer have ninety days from the time initial contact is mailed to attempt to reach a resolution. (Rev. Code Wash. Ann. 61.24.031(4) (West 2012.) Housing counselors have a duty under the law to attempt to reach resolution within the ninety day period between the date of the lender’s initial contact and the date the notice of default is issued. (West’s RCWA 61.24.160(1)(a).)

\(^{123}\) Rev. Code Wash. Ann. 61.24.030(8) (West 2012). In these situations, the borrower has thirty days after receipt of a notice of default to request mediation.

\(^{124}\) Id.


it will not be able to recoup if the loan instrument is modified.\textsuperscript{127}

Furthermore, the penalties and late fees that attach to a borrower’s delinquent loan likely will not have accumulated to such an extent that the loan cannot be cured. Thus, the sooner the borrower and loan servicer are brought together, the more likely it is that the loan servicer’s interest in being reimbursed for its servicing costs via foreclosure will not be in conflict with the investors’ interest in restoring the loan as a performing investment and the borrower’s interest in remaining in the home.

Second, a homeowner’s circumstances may be such that she cannot produce enough income to make regular loan payments under a modified loan structure. In this case, non-retention options that are alternatives to foreclosure, such as a deed in lieu of foreclosure or a short sale, can be discussed in mediation. It is unlikely that a loan servicer would entertain these alternatives after it has already paid the out-of-pocket expenses involved in initiating foreclosure; the earlier the homeowner can sit down with a lender for a frank and realistic assessment of the likelihood of retaining the home, the better.

However, one potential disadvantage to having the mediation early is that the homeowners have less time to consult an attorney or housing counselor who can help evaluate the borrower’s options, identify federal and state assistance programs, estimate the current value of the house, and explore other ways to boost the homeowner’s income. Some mediation programs with an early mediation option overcome this potential disadvantage by requiring homeowners to meet with housing counselors prior to mediation.\textsuperscript{128}

Other jurisdictions introduce ADR as an option only after the foreclosure process has begun. Illinois’ Cook County, which includes Chicago and the surrounding metropolitan area, is a judicial foreclosure jurisdiction that created its foreclosure mediation program by judicial rule. According to the rule, when a lender files a Complaint for Mortgage Foreclosure, it receives a date for a special “Initial Case Management Conference.”\textsuperscript{129} Before this Initial Case Management Conference, scheduled for two months after the lender files, homeowners are connected with housing counselors and volunteer attorneys who review the

\textsuperscript{127} Diane E. Thompson, \textit{Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior}, National Consumer Law Center, Inc. (Oct. 2009) at 16-8, 25-9. These costs include title searches, drive-by inspections, and principal or interest payments that the loan servicer must advance to the trustees even if the loan is delinquent.

\textsuperscript{128} For example, Maryland recently changed its laws to include a pre-filing mediation option. Under this law, homeowners that elect to participate in early mediation must consult a housing counselor (2012 Maryland Laws Ch. 156 (H.B. 1374) Maryland Real Property 7–105.1(d)).

\textsuperscript{129} Cook County Chancery Division General Administrative Order No0. 2010-01.
homeowner’s case and help the homeowners complete, if appropriate, a Motion for Referral to Mortgage Foreclosure Mediation. When the homeowner appears in court for the sixty-day Case Management Conference, the court reviews the motion and, if it refers the case to mediation, then the parties have twelve weeks before they have to reappear before the court for a Post Mediation Status hearing. During this twelve week period, a minimum of two mediation sessions are scheduled and all parties (the mediator, the homeowner, the homeowner’s pro bono attorney, the loan servicer or lender representative, and lender attorney) must attend. If an agreement is reached in mediation, then the agreement is presented to the court and the foreclosure action is dismissed according to the agreed terms. If no agreement is reached, then the foreclosure proceeds along the normal litigation track.

Jurisdictions that have a lengthy right of redemption period also give borrowers the right to request mediation with their lender even after the foreclosure has been finalized. In Vermont, for example, a lender is not permitted to sell a foreclosed residential property immediately after foreclosing and taking legal title to the property. Rather, the lender must hold off selling the property for a six month redemption period, during which time the homeowner can recover the property by paying the full amount owed on the loan. Homeowners in Vermont may request mediation with the loan servicer during this six month period; however, the program rules state explicitly that a court has the right to shorten the redemption period or deny the mediation request if it believes the request is being made as a delaying tactic.

The time it takes for a foreclosure to run from default notice to sale is important for lenders and borrowers. For homeowners, the time between default notification and sale is important because the longer the delay, the more interest, fees, and penalties will accrue, making it difficult to achieve a sustainable modification. If foreclosure is unavoidable, the additional costs

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131 Id. at 14-16.
132 Id. at 17.
133 Id. at 17.
135 Vt. Stat. Ann. tit. 12, §4632(b) (2012) (“all mediation shall be completed prior to the expiration of the redemption period. The redemption period shall not be stayed on account of pending mediation”).
will ultimately be deducted from the proceeds of the foreclosure sale or attached personally to the foreclosed homeowner as deficiency judgments. For lenders, the picture is more complicated. A lender foreclosing on a house that is likely to sell for the full value of the loan has an incentive to move the foreclosure process along quickly. A lender foreclosing on a house that is overleveraged or unlikely to sell may have an incentive to delay the foreclosure process and put off responsibility for maintaining and securing a vacant home for as long as possible.\footnote{Including foreclosure mediation in the foreclosure process does not negatively impact one party or another by extending the overall foreclosure timeline by any considerable amount of time. Mediations occurring before or concurrently with foreclosure filing will more likely lead to modification since the smaller the delinquency period the greater the chance of curing the loan. There appears to be no disadvantage to permitting foreclosure mediation during the redemption period. However, by the time the redemption period begins, a home retention agreement is unlikely to occur because the loan servicer has expended resources to foreclose—resources that can only be recouped from the investor trust through foreclosure.}

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2. Does mediation stay or prevent foreclosure?

Jurisdictions must also determine what impact, if any, an ADR process will have on the conventional foreclosure proceeding. Some jurisdictions prevent loan servicers from initiating foreclosure until they have participated in mediation and the mediation process has concluded.\footnote{Jurisdictions must also determine what impact, if any, an ADR process will have on the conventional foreclosure proceeding. Some jurisdictions prevent loan servicers from initiating foreclosure until they have participated in mediation and the mediation process has concluded.}

Others jurisdictions place a stay on the foreclosure process while the parties are in mediation by preventing servicers from recording the foreclosure sale

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\footnote{The Federal Housing Finance Agency’s “REO to Rental” program attempts to move real estate owned properties held by Fannie Mae, Freddie Mac, and the Federal Housing Administration to qualified, private investors. See Federal Housing Finance Agency News Release, \textit{FHFA Announces Interested Investors May Pre-Qualify For REO Initiative} (Feb. 1, 2012) \textit{available at:} \url{http://www.fhfa.gov/}.}

\footnote{The National Consumer Law Center (NCLC), citing RealtyTrac, reports that foreclosures nationwide took an average of 336 days to complete, with states like New York, New Jersey, and Florida taking over two years. NCLC points out in its white paper “Rebuilding America” that the unprecedented foreclosure delays in 2010 and 2011 had little, if anything, to do with the foreclosure conference and mediation programs. See, \textit{e.g.}, 2012 Oregon Laws Ch. 112 (S.B. 1552) at Section 6 [Or.Rev.Stat. 86.735]. The Foreclosure Avoidance Mediation Program in Oregon, a non-judicial foreclosure state, prohibits lenders from initiating foreclosure until they have participated in the program and can show either that the borrower is ineligible for any foreclosure alternatives or “is not in compliance with the foreclosure avoidance agreement.” \textit{Id.}}
until the parties complete mediation.\textsuperscript{140} A third group of jurisdictions is silent as to whether a loan servicer may pursue foreclosure while negotiating foreclosure alternatives.\textsuperscript{141} If the purpose of mediation is for parties to commit to a serious discussion about alternatives, it is inconsistent to allow a loan servicer simultaneously to pursue foreclosure and negotiate an alternative. Loan servicers appear disingenuous and erode borrower confidence that the loan servicer is participating in mediation in good faith.\textsuperscript{142}

A related question is what happens to the foreclosure timeline if a contingent or temporary modification agreement is reached during a foreclosure mediation or settlement. A contingent agreement might be one in which the loan servicer agrees to modify the homeowner’s loan if the homeowner resubmits a completed loan modification application or if the homeowner successfully completes a three month trial modification period. Contingent agreements prove problematic because parties exit the mediation process without final resolution and may not be able to conclude negotiations without the structure of a mediation program. Jurisdictions handle the challenge of contingent or temporary agreements differently. In Connecticut, some judges hold the case in mediation until the contingency is met and a final loan modification is executed.\textsuperscript{143} This means a case may be stalled and unresolved for weeks or sometimes months. In Maryland, administrative law judges have the authority as mediators to continue the mediation for a second session so that the parties have an opportunity to return to the negotiating table and finalize an agreement; however, that second session has to occur within the sixty day statutory time period for mediation.\textsuperscript{144} Beyond that time, the mediation program cannot provide oversight for any continuing negotiations. Nevada’s foreclosure mediation program, which also restricts the entire mediation process to a statutory timeframe, resolves this problem by requiring all contingent or temporary

\textsuperscript{140} See, e.g., Rev. Code Wash. Ann. 61.24.031(16)(a) (West 2012) (prohibiting lender from recording a notice of foreclosure sale until lender receives a certificate from the mediator stating that mediation has been successfully completed).
\textsuperscript{142} Alon Cohen, Walk the Talk: Best Practices on the Road to Automatic Foreclosure Mediation, Center for American Progress (Nov. 2010).
\textsuperscript{144} Foreclosure Mediation, Maryland Office of Administrative Hearings http://www.oah.state.md.us/foreclosuremediation.asp (last accessed July 14, 2012).
agreements to include an expiration date certain.\textsuperscript{145} Therefore, if a loan servicer fails to grant the permanent modification after the borrower successfully completes the trial period or a homeowner fails to provide necessary documentation by the agreed upon date, the other party has a cause to petition for judicial review.\textsuperscript{146}

Parties should be given adequate time and opportunity to engage seriously in discussions about alternatives to foreclosure and to come to a resolution. Prohibiting loan servicers from pursuing foreclosure while they are in negotiations with borrowers is one way to ensure that loan servicers do not turn automatically to foreclosure without first taking the time to evaluate other loss mitigation or non-retention options with the borrower. However, once parties enter mediation, the stay on foreclosure should not be indefinite. Allowing parties to meet as often as necessary within a strict timeframe discourages both parties from using the mediation process as a delay tactic. Furthermore, restricting contingent or temporary agreements promotes a final settlement of the delinquent loan. Contingent agreements should have expiration dates, or a date certain by which the parties shall have complied with their obligations, and contingent agreements should include language making them permanent upon satisfaction of the contingency.

\textbf{C. Homeowner enrollment}

There are three different models for enrolling homeowners in foreclosure ADR programs. Some jurisdictions automatically send all parties to a foreclosure action to a mediation or settlement program, some require the borrower to affirmatively request to participate in a program, and yet others use housing counselors as gatekeepers to screen borrowers and refer those who are eligible to the program. There are advantages and challenges to consider in each approach. Nevertheless, no matter the trigger for homeowner enrollment, programs that make concerted efforts to reach borrowers and educate them about the foreclosure process and mediation will likely have greater impact.

Programs with automatic enrollment send parties to a foreclosure proceeding directly to mediation. Automatic enrollment has the effect of boosting homeowner participation. New York’s statewide program


\textsuperscript{146} The foreclosure settlement program in Cook County, Illinois, requires agreements for a trial modification to contain language that, upon successful payment, the trial mod automatically becomes permanent. Report to the Commissioners (May 2011) at 22-3.
automatically sends homeowners with mortgages and lenders to an early, mandatory settlement conference presided over by judges, hearing officers, or a court attorney “referee.” Once a foreclosure action is filed in the court, the court sends the homeowner a court summons with the date, time, and place of the settlement conference as well as the date, time, and place of a required meeting with a court housing counselor.

In contrast, opt-in programs require that the borrower first request to participate in a foreclosure mediation or settlement conference. However, borrower participation in an opt-in program hinges upon whether the borrower has been properly notified about the possibility of participating in the first place. Many jurisdictions publicize foreclosure mediation to borrowers by requiring loan servicers to include information about mediation in official notices sent to borrowers about the delinquent loan and impending foreclosure proceedings. Other jurisdictions do not rely solely upon the lenders’ communications to get the word out to borrowers but also have a third party, either a government agency or a housing counselor, contact homeowners about participating in mediation.

Yet a third category of programs uses court administrators or designated housing counselors to screen homeowners for program participation.

148 For a sample notice from the court, see id. at Appendix 2. Providence, Rhode Island, which uses a non-judicial foreclosure procedure, also requires all parties to a residential mortgage foreclosure to attend, or at least attempt to attend, mandatory conciliation conferences with approved housing counselors before a foreclosure deed can be recorded (City of Providence, Ord. 2010, ch. 2010-2, Sec. 13-216). The original ordinance (Ordinance No. 340, Chapter 2009-41 (July 27, 2009)) denied lenders the ability to record a foreclosure deed in the land evidence records until they could present a certificate showing they had attended the conciliation conference and negotiated in good faith. (Id. Sec. 13-217 Penalties) This section of the ordinance was struck down by the State of Rhode Island Superior Court in Deutsche Bank National Trust v. City of Providence (Providence Sup. Ct. 2010) and a new ordinance with a revised penalty was issued (Ord. 2010, ch. 2010-2, Sec. 13-217).
149 In Vermont, for example, servicers must “state the importance of participating in mediation even if the homeowner is currently communicating” with the lender or loan servicer in the notice of the foreclosure action (12 Vermont.Stat.Ann. § 4632(c), (d)).
150 For example, Hawaii’s non-judicial foreclosure dispute resolution program requires loan servicers to include in their foreclosure notices an explanation that the lender has a duty under the law “to attempt to avoid foreclosure or to mitigate damages where foreclosure is unavoidable” and that the lender is required, upon election by the homeowner, to participate in the foreclosure dispute resolution program (Haw. Rev. Stat. § 667-75(1)). The servicer must also send a copy of the foreclosure notice to state’s Department of Commerce and Consumer Affairs, which then independently mails information regarding the availability of the dispute resolution program to the borrower along with the forms to elect or waive participation in the program (Haw. Rev. Stat. § 667-76(a), 667-77).
eligibility. Ohio’s model mediation program suggests that the local court’s mediation department screen all mediation requests for borrower eligibility before referring the case to foreclosure mediation. Although the model suggests criteria for borrower eligibility, each local court can determine its own eligibility standards depending on its available resources. Another screening approach uses housing counselors to triage ineligible borrowers and refer eligible borrowers to mediation. For example, Washington’s statewide program requires loan servicers to send a Notice of Pre-foreclosure Options informing delinquent borrowers of the availability of housing counselors and also that, if they do not contact a housing counselor or attorney, then they may lose the opportunity to participate in mediation. Once a homeowner contacts a housing counselor, the counselor must review the homeowner’s circumstances and assess eligibility for mediation. If a housing counselor concludes that a homeowner is eligible for mediation, the housing counselor sends a notice to the borrower and Washington’s Department of Commerce stating that mediation is appropriate. From there, the Department selects a mediator and notifies the parties.

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152 The model suggests that, at a minimum, homeowner eligibility for foreclosure mediation should depend on whether the borrower filed an answer or alternative pleading with the court, sent a request for mediation to the program administrator, and indicated that the homeowner is currently residing, and would like to remain, in the property subject to foreclosure. Supreme Court of Ohio, Foreclosure Mediation Program Model, (Oct. 2010), Steps Six and Seven available at: http://www.nclc.org/images/pdf/foreclosure_mortgage/foreclosure_med_prog_by_state/ohio_prgm_model.pdf.
154 Rev. Code Wash. Ann. 61.24.160(1) (West 2012). Eligibility criteria include that the property is currently owner-occupied, the lender is not exempt under the Foreclosure Fairness Act, the homeowner has received notice either of the pre-foreclosure options or of default, and that, if the homeowner is in bankruptcy, then bankruptcy has been stayed or the homeowner has consented to negotiate a modification of the mortgage (Foreclosure Fairness Act, Program Eligibility Criteria available at http://www.commerce.wa.gov/site/1367/default.aspx). Compare these to Delaware’s initial program eligibility criteria, which require homeowners to show they could reasonably sustain monthly mortgage payments (including taxes, principal, interest, insurance, homeowner association dues, and other fees typically placed in escrow) that were 38% or less than the homeowner’s gross (pretax) monthly income (Delaware Administrative Directive of the President Judge of the Superior Court of the State of Delaware No. 2011-2 “Residential Mortgage Foreclosure Mediation Program” at 4).
There are advantages and challenges in all three options. Programs that automatically send parties to foreclosure mediation have a far higher percentage of participating borrowers. That means many more homeowners are being evaluated for loan modifications or non-retention alternatives to foreclosure. Even if parties automatically sent to mediation do not come to an agreement in mediation, at least the homeowner now has the contact information for a person who works for the loan servicer and has the authority to settle the case. However, programs with such a high volume of cases have the potential to be more costly because they require more administrative oversight and may not be able to filter out those cases that are not appropriate for mediation, wasting resources as a consequence. Conversely, opt-in programs that require borrowers to affirmatively request mediation have many fewer cases, thereby requiring less administrative oversight, but they may not be reaching those homeowners who are not already proactively engaged in reaching out to their loan servicer. If lack of initiative on the part of homeowner and lack of communication on the part of the loan servicer is one of the problems foreclosure mediation seeks to resolve, then it does not make sense for participation in foreclosure mediation to require the same initiative and communication that has been lacking from the start.

The third alternative, which uses housing counselors as gatekeepers for mediation, appears to be the best way to maximize the advantages and minimize the challenges of the other two approaches. Attaching housing counseling as a precursor to mediation ultimately makes negotiations more efficient and equitable because the homeowners head into mediation informed about their options and equipped with knowledge that can help level the playing field at the negotiation table. An educated borrower may not waste time seeking outcomes that are unrealistic or economically unfeasible. Loan servicers also stand to benefit when borrowers work with housing counselors before entering negotiation because it is more likely that the borrower will properly complete and submit completed loan modification applications that the loan servicer can review prior to the mediation and allow for an actual negotiation. Lenders also benefit if a profitable loss-mitigation option is put in place and the mortgage continues to provide a profitable return on their investment as a result of informed negotiations. Finally, courts in judicial foreclosure states benefit from using

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157 The Center for American Progress reports that programs with automatic mediation have close to 75% of homeowners facing foreclosure participate while opt-in programs rarely have more than 20% of homeowners facing foreclosure participating. Alon Cohen and Andrew Jakabovics, Now We’re Talking: A Look at Current State-Based Foreclosure Mediation Programs and How to Bring them to Scale, Center for American Progress (June 2010) at 7.
housing counselors instead of court administrators to screen cases, saving the court from additional administrative burdens.\textsuperscript{158}

No matter how homeowners are enrolled in a foreclosure ADR program, reaching homeowners and informing them in terms they can understand about opportunities for a facilitated negotiation with their loan’s servicer or lender is crucial to a program’s success. Many homeowners do not open and read through the stacks of materials sent by lenders and many may be suspicious about loan servicers’ overtures to mediate.\textsuperscript{159} Therefore, communications from neutral third parties, such as the courts or another administrative agency, in addition to the notices borrowers receive from lenders, may be an effective way to engender trust in borrowers. Some of the more successful mediation and settlement programs have engaged in extensive public outreach campaigns to reach borrowers.\textsuperscript{160} In Philadelphia, for example, an outreach team of volunteers from grass roots organizations went door to door to homeowners who had received notices of foreclosure but had not yet called the program hotline. Equipped with cellular mobile phones, the volunteers would explain the program in person to the homeowners and then had the homeowner call the hotline while the volunteer waited at the front door.\textsuperscript{161} As a result, 90% of homeowners facing foreclosure participated in the city’s settlement program.\textsuperscript{162}

\section*{D. Third party facilitator, qualifications, responsibilities, and confidentiality}

\textsuperscript{158} Alon Cohen, \textit{Walk the Talk: Best Practices on the Road to Automatic Foreclosure Mediation}, supra n.\textsuperscript{__} at 16.

\textsuperscript{159} Florida’s program was also poorly publicized and borrowers were unsure of its legitimacy (2011 Report Assessing the Florida Managed Mediation Program, (Oct. 21, 2011) available at http://www.floridasupremecourt.org/pub_info/documents/Foreclosure/10-21-2011_Workgroup_Final_Report.pdf).

\textsuperscript{160} Judges and court staff in Queens County, New York, participated in evening and weekend programs to inform the public about court procedures under the legislation as well as the availability of housing counseling and legal services (State of New York Unified Court System, 2010 \textit{Report of the Chief Administrator of the Courts} at 8, 9). The Ohio Department of Commerce launched “Save the Dream” as a public awareness campaign with advertisements on radio and television, a user-friendly website, and a free telephone hotline with information and access to an approved housing counselor (Foreclosure Mediation, Cuyahoga County Common Pleas Court, http://cp.cuyahogacounty.us/internet/ForeClosureMediation.aspx).


\textsuperscript{162} Alon Cohen, \textit{Walk the Talk: Best Practices on the Road to Automatic Foreclosure Mediation}, supra n.\textsuperscript{__} at 20.
State and local governments seeking to effectively and efficiently resolve communication barriers, educate borrowers, and provide oversight of loan servicers’ conduct should have a third party facilitator involved in the negotiations. Indeed, almost all existing foreclosure ADR programs include a third party facilitator. Sometimes this person is called a “mediator” and sometimes the person is given a different label, such as, conciliation conference coordinator or a neutral dispute resolution specialist. Third party facilitators can play a central role in foreclosure negotiations and, therefore, programs that utilize facilitators should ensure those individuals are qualified, appropriately trained, and clear on their role and responsibilities in the process. One responsibility that many programs give their facilitators is to monitor parties’ behavior and report on the outcomes of mediation sessions, information that is invaluable in determining whether a program is fulfilling its purpose. Programs need to make sure that requiring facilitators to report does not conflict with state laws regarding confidentiality of mediation or settlement communications.

163 A few programs do not have a third party facilitator. New York automatically requires all borrowers and lenders that are parties to a residential foreclosure action to attend mandatory settlement conferences (N.Y. C.L.P.R. 3408 (McKinney 2010)). Indiana gives borrowers who are the owner-occupiers of a residential property in foreclosure, and who have not had a prior loan modification, the option of requesting a settlement conference with the lender (Ind. Code §32-30-10.5-8 (2012)). Philadelphia’s program has borrowers and lenders meet in court to negotiate alternatives to foreclosure and only when no agreement can be reached is a judge pro tem called in to preside over the case in a closed door session (First Judicial District of Philadelphia Court of Common Pleas of Philadelphia County, Joint General Court Regulation No. 2008-01 (Apr. 16, 2008)). California and Massachusetts have no formal program but require lenders to make contact with borrowers and assess foreclosure alternatives before proceeding with a foreclosure sale (Cal. Civ. Code §2923.5 (West 2012); Mass. Gen. Laws Ann. 244 §35A(c) (West 2012)). California’s law was challenged successfully in federal court and found to be preempted by federal Homeowner’s Loan Act (Rodriguez v. J.P. Morgan Chase, 809 F.Supp.2d 1291 (S.D.Cal. Aug 25, 2011)).

164 City of Providence, Ord. 2010, ch. 2010-2, Sec. 13-213.


166 Connecticut was the first state to use mediators to facilitate foreclosure settlement negotiations. There had been a judicial mediation program in Connecticut’s Housing Courts since 1978 that proved effective in resolving landlord-tenant disputes because it created the opportunity for a fair and informed negotiation between the parties with the assistance of a neutral third party. These housing specialists, later called mediators, were required to have particular knowledge of applicable laws and could also advise parties regarding availability of financial assistance. When the foreclosure crisis hit Connecticut, the judiciary lifted the pre-existing Housing Court mediator model and applied it to foreclosure cases. See Conn. Gen. Stat. Ann. § 47a-69 (b), (c) (West 2012) allowing mediators to recommend settlements).
1. Facilitator qualifications and training

Some programs require facilitators to be attorneys or judges, retired judges, or administrative law judges with mediation training. A number of programs additionally require that attorneys also have mediation training and/or have subject matter expertise in foreclosure law. Some facilitators have to be experienced mediators on the staff of a court’s mediation office, serve on a roster of court-approved mediators, or be independent mediators. Only one program, the foreclosure conciliation program in Providence, Rhode Island, uses housing counselors as facilitators. Some programs also want their facilitators to have knowledge of local, community-based resources and mortgage assistance programs or previous work experience in foreclosures, credit, and collections work. Maine and Vermont further require their foreclosure mediators to know how to utilize Federal Deposit Insurance Corporation (FDIC) net present value worksheets for determining the viability of a HAMP loan modification.

Almost all programs require training, but the training ranges in content and duration. Ohio requires those mediators with prior mediation

167 12 Vermont Stat. Ann. § 4631(c). Vermont’s foreclosure mediation program, which exists primarily as a means to assure that lenders are evaluating homeowners for HAMP eligibility, requires mediators to be attorneys licensed in the state who have completed continuing legal education courses approved by the Vermont Bar.

168 For example, administrative law judges who preside over foreclosure mediations in Maryland are trained mediators.

169 See, e.g., foreclosure mediator qualifications in Philadelphia and Delaware (Consumer Protection Unit of the Department of Justice).


171 Nevada defines “experienced mediator” as someone who has “participated in a mediation training program consisting of at least 40 hours of classroom and role playing and has conducted 10 mediations as a co-mediator or sole mediator” (NV Amended Foreclosure Mediation Rule 3.4(a)(2)).


173 State of Maine Judicial Branch, What is required to become a mediator in this program? http://www.courts.state.me.us/maine_courts/fdp/mediators.html.


175 For example, Florida’s statewide managed mediation program provided an extensive curriculum for training foreclosure mediators. The curriculum and training standards were attached as an exhibit to the Supreme Court of Florida Administrative Order establishing the statewide managed mediation program. See Supreme Court of Florida, Administrative Order No. AOSC9-54 (Dec. 28, 2009) at A58 – A66.
training to take a four-and-a-half hour training on foreclosure mediation\textsuperscript{176} whereas Oregon’s Foreclosure Avoidance Mediation Program training consists of three, full 8-hour days.\textsuperscript{177} Most training includes basic mediation skills as well as information on mortgages, deeds of trust, promissory notes, and how to work through loan modifications and non-retention alternatives.\textsuperscript{178} Some jurisdictions offer follow-up trainings to keep facilitators up-to-date on developments in the law, mortgage assistance programs, and program policies.\textsuperscript{179}

Because foreclosure negotiations can be both highly technical and highly emotional, and there is often a stark contrast in sophistication and experience between the parties, it is crucial that third party facilitators have appropriate skills and training to run a fair process. Homeowners generally have only one chance to participate in a foreclosure settlement program and have little prior experience with negotiating eligibility for loan modifications or non-retention plans. Loan servicers, on the other hand, are represented in these programs by the same attorneys who negotiate on their behalf in dozens, if not hundreds, of foreclosure cases.

2. Facilitator role and responsibilities

\textsuperscript{176} The Supreme Court of Ohio, Foreclosure Mediation Trainings and Roundtables, available at http://www.sconet.state.oh.us/JCS/disputeResolution/foreclosure/Training.pdf. Individuals eligible for the training must have previously completed at least twelve hours of mediation training. Nevertheless, for those mediators new to foreclosure, the foreclosure mediation training addresses quite a range of issues: the history and scope of the foreclosure crisis; relevant terminology; players and the dynamics of the foreclosure servicing industry; limitations, advantages and disadvantages for the parties in foreclosure cases and the information required from the parties to come to an agreement under a range of settlement options; analysis of the possibilities and limitations of mediation between pro se homeowners and lenders in foreclosure cases; relevant statutes and rules; the local court foreclosure mediation program processes and procedures; and, if applicable, the Supreme Court Foreclosure Mediation Program Model. \textit{Id.}

\textsuperscript{177} The training includes eight hours of foreclosure law basics, eight hours of foreclosure law for mediators, and eight hours about foreclosure avoidance mediation in practice. Oregon Foreclosure Avoidance Mediator Training, available at http://www.doj.state.or.us/consumer/foreclosure_mediation.shtml#training.

\textsuperscript{178} See, \textit{e.g.}, Nevada’s Amended Foreclosure Mediation Rule 3.4(b) (http://www.nevadajudiciary.us/images/foreclosure/adkt435_amendedrules.pdf). In New Jersey, the foreclosure mediators are volunteers with 18 hours of mediation training who are required to complete a free, one-day training on working out foreclosure alternatives.

Programs should also clarify the roles and responsibilities of the third party facilitator to ensure that there is as much uniformity as possible across mediations. At base, programs charge the facilitator with overseeing the negotiation process between the borrower and the lender and helping them work toward a mutually acceptable resolution. The facilitator can be present throughout the process or can be called in by the parties when needed.\textsuperscript{180} The way in which the facilitator runs the process is sometimes specified. For example, Ohio’s foreclosure mediators use a facilitative style\textsuperscript{181} of mediation to guide the parties through a “party self-determination process” in which the mediators provide resource information but do not give advice or advocate for either party.\textsuperscript{182} The conciliation coordinators in the City of Providence, on the other hand, function impartially but are responsible for leading the parties through an exploration of foreclosure work-out or modification options.\textsuperscript{183}

Some programs provide explicit instructions to mediators on what topics should be discussed in mediation. In Maine, for example, Foreclosure Diversion Program mediators are expected to lead the homeowner and lender through all issues of foreclosure including: 1) proof of ownership of the note and any assignments of the note, 2) calculation of the sums due on the note for principal, interest, and any costs or fees, 3) reinstatement of the mortgage, 4) modification of the loan, and 5) restructuring of the mortgage debt.\textsuperscript{184} In the alternative, Washington’s foreclosure mediators help the parties address foreclosure alternatives by having the parties consider the borrower’s current and anticipated financial

\textsuperscript{180} In Delaware, a mediator can step out of the mediation if there are multiple mediation sessions occurring simultaneously and the mediator determines that his or her presence is not required for the entire mediation session. Del. Code Ann. 10, §5062C(i)(1) (2012). See also, Philadelphia’s conciliation conferences, supra n. ___

\textsuperscript{181} There are many mediation “styles” (e.g. evaluative, transformative, facilitative, to name some of the major ones). A mediator’s style refers primarily to how the mediator orients him or herself toward the parties’ problem-solving. See Leonard L. Riskin, \textit{Mediator Orientations, Strategies, and Techniques}, 12 Alternatives 111, 111-4 (1994); and Leonard L. Riskin, \textit{Decision-Making in Mediation: The New Old Grid and the New New Grid System}, 79 Notre Dame L. Rev. 1 (2003).

\textsuperscript{182} Jacqueline C. Hagerott, \textit{Foreclosure Mediation: An Overview}, Presentation to the Dispute Resolution Section of Ohio (2011). Nevada also explains that the mediator’s role is not that of a judge or a lawyer because they do not decide how to resolve the case nor give legal advice (State of Nevada Foreclosure Mediation Program, Mediator documents available at http://foreclosure.nevadajudiciary.us/index.php/documents-and-forms/mediator-documents).


\textsuperscript{184} State of Maine Judicial Branch, \textit{What are the responsibilities of a Foreclosure Diversion Program Mediator?} available at http://www.courts.state.me.us/mainecourts/fdp/mediators.html.
circumstances, compare the anticipated net recovery following foreclosure versus the value of payments under a modified mortgage loan, and run calculations under all federal mortgage relief programs.  If programs expect mediators to facilitate this kind of discussion, then the mediators must have special training and expertise.

In addition to running the foreclosure settlement process, some programs require facilitators to prepare mediation reports and perform administrative tasks. These tasks can include scheduling the mediation session with the parties, collecting documents, and referring the borrower to housing counseling. Mediation reporting requirements vary widely. Some states require a report from the third party facilitator. Depending on the jurisdiction, this report is sent directly to the court or dispute resolution program administrator and can be more or less detailed. In Vermont, for example, mediators report the results of each mediation session (including all HAMP-related net present value calculations and other foreclosure avoidance calculations performed for the mediation) as well as whether a full or partial settlement was reached. Mediators must also provide a copy of that agreement. Some programs also have mediators issue a mediation certification that the lender must either present to the Court in order to

186 See, e.g., Conn. Gen. Stat. § 49-31n (requiring the mediator to determine whether parties to a foreclosure proceeding will benefit from further mediation and, if so, file a report with the court describing the proceedings, any issues resolved, and any issues unresolved).
188 Cayuhoga County, Ohio has mediators refer homeowners to housing counseling prior to mediation. The housing counselor attempts to work out a foreclosure alternative between the lender and borrower and reports back to the mediator. The mediator can help the parties finalize any agreements reached. If a borrower fails to go to housing counseling, then the borrower’s right to mediation ends and the case proceeds in court. (“Foreclosure Action Coalition: Cuyahoga County “foreclosure time out” plan, available at: http://www.nclc.org/images/pdf/foreclosure_mortgage/foreclosure_med_prog_by_state/ohio_alt_proposal.pdf.)
189 In Maine, for example, a mediator must complete a report for each mediation. The report must indicate that the parties completed the Net Present Value Worksheet in the Federal Deposit Insurance Corporation Loan Modification Program Guide. If the mediation did not result in the settlement or dismissal of the action, the report must include the outcomes of the Net Present Value Worksheet. As part of the report, the mediator may notify the court if, in the mediator’s opinion, either party failed to negotiate in good faith (14 Maine Rev. Stat. Ann. tit. 14 § 6321-A (2011)).
ADR’s Place in Foreclosure

proceed with the judicial foreclosure proceeding or file with land records in a non-judicial foreclosure jurisdiction. Other programs created standard report forms for mediators to complete after a mediation session. These forms identify whether an agreement was reached, whether and under what terms the homeowner is retaining or relinquishing the property, and the specifics of any loan modification or agreement regarding the deficiency.

Another responsibility sometimes placed on the mediator is to monitor the parties and assess whether they have negotiated in good faith and, if not, to suggest what sanctions to impose. This assessment of good faith occurs primarily in non-judicial foreclosure states where there is no direct court supervision of foreclosure proceedings, although some judicial foreclosure states also require mediators to report whether the parties mediated in good faith. As is discussed in greater detail below, using the mediator to report on party behavior can be an effective way for a program to provide oversight but the reporting should involve objective criteria, with checklist forms provided by the program, not a subjective evaluation by the mediator of the parties’ good faith participation.

There are clear benefits to having a third party facilitator present in foreclosure mediations and settlement conferences. Simply bringing the parties together and relying on them to reach resolution on their own is unlikely to work, given the problematic nature of the relationship between loan servicers and homeowners. Mediators can help adjust for any

193 DC Code § 42-815.02(e)(3) (2012).
195 Nevada mandates foreclosure mediators to prepare and submit to the program a recommendation for sanctions on a lender or its representative who fails to attend the mediation, participate in good faith, or exchange required documents (Nev. Rev. Stat. §107.086(5) (2011)). If the borrower does not appear for the mediation session, then the lender receives a certificate and can proceed with the foreclosure process (Nev. Rev. Stat. §107.086(6) (2011)).
196 Some states, like Washington, started out with a “meet and confer” program similar to California’s but found that it did not sufficiently change loan servicer behavior. (Washington State Housing Finance Commission newsletter (June 2011)).
198 Some states, like Washington, started out with a “meet and confer” program similar to
imbalance of power between the lender representative and the homeowner. Not all homeowners have the assistance of legal counsel and not all homeowners going to mediation have met with a housing counselor. The mediator can help create a structure to the negotiations so that all alternatives to foreclosure are systematically explored. A properly trained mediator can help the parties work through the borrower’s financial documents and apply the loan servicer’s loan modification evaluation methods. Additionally, programs that give mediators the power to report on parties’ behavior send the clear message to lenders that these mediation sessions are to be taken seriously. An ADR program not just another procedural hoop through which the lender must pass but is designed to make parties assess whether foreclosure really is the best way to proceed.

3. Confidentiality

The requirement that third party facilitators provide a detailed report on the mediation session or settlement conference is controversial because of confidentiality. Mediation is a confidential process; information shared during a foreclosure mediation that is not otherwise discoverable cannot be used in other court proceedings. Many programs explicitly state that discussion during foreclosure mediation is confidential or that mediators are protected from having to testify in court, although some make no mention of confidentiality at all. When confidentiality is mentioned, it is usually in reference to the documents exchanged in mediation and any personal financial information discussed in mediation.

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198 See “Assistance of Legal and Housing Counsel” infra __.

199 While there are many visions of what a process called “mediation” looks like, all consider confidentiality to be one of mediation’s core principles. (See, for example, the Uniform Mediation Act §8 (2003), the American Bar Association’s General Mediation Guide, and Lela P. Love & Joseph B. Stulberg, Understanding Dispute Resolution Processes, Michigan Mediator Skill-Building Manual (1997)). Most states have laws with confidentiality provisions that protect mediation communications. A few state foreclosure mediation statutes, like Washington’s, have confidentiality clauses in them.

200 The foreclosure mediation programs in Connecticut, Oregon, Tuscarawas County, Ohio, and Wisconsin’s Sheboygan County all state that mediation sessions are confidential. Nevada’s foreclosure mediation program rules state: “All mediation documents and discussions presented during the mediation shall be deemed confidential and inadmissible in any subsequent actions or proceedings except in an action for judicial review . . . In that case, non-privileged evidence submitted for mediation is discoverable to the extent that it is relevant to a determination of bad faith, enforceability of agreements, . . . and appropriate sanctions.” Nev. Rev. Stat. Ann. Nevada Foreclosure Mediation Rule 19.1 (West 2012).


have already adopted the Uniform Mediation Act (UMA), confidentiality may automatically apply to these sessions or there may be other state law regulating the confidentiality of mediation sessions.\textsuperscript{203}

On the one hand, it is important for jurisdictions to be able to evaluate whether mediation sessions are in fact accomplishing what they promise. Because mediations and settlement conferences are private and there is no public record of the discussion, it is difficult to know if the parties and the facilitator are systematically assessing each variation on a loan modification and each non-retention alternative. Without a mediator’s report, the only information available to a program administrator is the written agreement reached in mediation and what the administrator might hear anecdotally. On the other hand, placing the mediator in the position of completing a report or recommending sanctions on a party fundamentally changes the role of the mediator from neutral facilitator to evaluator.\textsuperscript{204} The Uniform Mediation Act prohibits mediators from making reports, assessments, evaluations, recommendations, findings, or other communications ‘regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.’\textsuperscript{205}

Confidential foreclosure ADR processes raise additional concerns for self-represented homeowners. Mediation, because it is confidential, may fail to bring to light loan servicers’ misconduct or fraudulent business practices, such as robo-signing, failure to provide proper notice, and failure to comply with federal requirements for considering homeowners’ HAMP applications. Because of the mediator’s neutral role, the mediator may not be in a position to raise these problems and hold the loan servicer accountable. And, unless the borrower is exceptionally sophisticated, she or he will not know how to take action either. Another concern for self-represented homeowners is if the mediator fails to follow the prescribed mediation process, behaves inappropriately, or lacks competence. In both
circumstances, if the borrower has legal counsel, then that lawyer can apply appropriate pressure on the lender representative, inform the borrower of his or her legal rights, and protect the borrower from agreeing to something that may not be in his or her best interest.\textsuperscript{206}

Using mediation and settlement conferences as the forum for foreclosure negotiations rather than a judicial process in open court does have the potential to hide loan servicer misconduct from public view. Consumer advocates, if they had access to the contents of mediation conversations, would not have to rely on anecdotal evidence and would be in a better position to educate borrowers and advise policy makers about what lenders and loan servicers are doing. Thus, there is a tension between providing a safe environment that fosters candid conversation and allows for individualized problem-solving, and protecting consumers on a wide scale. One way in which programs can strike a balance between these two competing interests is to make the reporting responsibility of third party facilitators known to all parties and to provide facilitators with standard forms that capture the topics discussed and objective outcomes.

\textbf{E. Legal counsel and housing counselors}

One important way in which state and local governments can help borrowers prepare for, and engage in, foreclosure negotiations is to incorporate free, HUD-approved housing counseling\textsuperscript{207} and legal assistance into their foreclosure ADR programs. To have the greatest impact, borrowers should meet with counselors and attorneys well in advance of a mediation or settlement conference. Programs can pay for housing counseling and legal assistance with funds generated by the program. Navigating the complex process of applying for a loan modification, let alone overcoming the challenge of communicating effectively with a loan servicer, is difficult for all homeowners. These challenges are one reason the foreclosure crisis unfolded in the first place. Housing counselors provide vital assistance to homeowners faced with foreclosure by explaining the foreclosure timeline, working with homeowners to create sustainable household budgets and reduce debt, helping assemble loan modification applications or advising on non-retention options, and

\textsuperscript{206}The importance of legal counsel in informal processes like mediation has been noted by scholars. Not only do lawyers provide knowledge of the substantive law and legal procedure, but they can leverage that knowledge strategically. Lawyers can also empower their clients, balance power inequalities and provide emotional support. \textit{See}, Jean R. Sternlight, \textit{Lawyerless Dispute Resolution: Rethinking a Paradigm}, 37 Fordham Urb. L.J. 381 (2010); Stephen Landsman, \textit{Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings}, 37 Fordham Urb. L.J. 273 (2010).

\textsuperscript{207}See supra n. ___.
negotiating with the lender’s points of contact on the homeowners’ behalfof

Programs take one of three approaches for linking homeowners to housing counselors. One is to have lenders simply inform homeowners about the existence of housing counselors and to provide lists and contact information for local, HUD-approved counselors and local, community-based resources. The responsibility for initiating contact with the housing counselor then rests on the homeowner. A second approach is to make meeting with a housing counselor a precondition for participating in a foreclosure ADR program. The homeowner may be required to present a certificate verifying meeting with the housing counselor as a prerequisite to the mediation. The third approach uses housing counselors as gatekeepers to the mediation process itself. Homeowners are either automatically scheduled to meet with a housing counselor or must take

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208 The Urban Institute conducted a two-year study of the impact of the National Foreclosure Mitigation Counseling program, the federally funded program, overseen by Neighborworks® America, designed to increase the role of foreclosure intervention counseling in the response to the foreclosure crisis. In its 2010 report, the Urban Institute found that homeowners who worked with housing counselors where 1.7 times more likely to cure an existing foreclosure than if they had not received counseling. On average, homeowners who received counseling reduced their monthly payments by $267 more than those homeowners who did not have counseling and therefore were more likely to remain current on the modified loan. Neil Mayer, Peter A. Tatian, Kenneth Temkin, Charles A. Calhoun, Randy Rosso & Kaitlin Franks, Preliminary Analysis of Program Effects: September 2010 Update, Urban Institute (Dec. 2010) at vii-viii.

209 See, e.g., Conn. Gen. Stat. Ann. § 49-311 (c)(3) (West 2012) (requiring lenders to include in the notice of foreclosure mediation materials from the Department of Banking that describe community-based resources available to the mortgagor as well as approved housing counseling agencies).

210 See, e.g., First Judicial District of New Mexico Administrative Order No. 2009-00001 (July 13, 2009) (requiring homeowner to consult with a counselor from a HUD-certified housing counseling agency no less than twenty business days before the scheduled mediation); and S.B. 1552, 76th Leg. Assemb., Reg. Sess. (Or. 2012) (requiring homeowners to consult with a HUD-approved housing counselor before the scheduled date of the mediation and also requiring lenders to include a statement in its foreclosure notice informing the borrower of the requirement to consult with an approved housing counselor).

211 See, e.g., H.B. 1374, 430th Leg. Assemb., Reg. Sess. (Md., 2012) (requiring homeowners seeking to obtain a certification of participation in housing counseling as a precondition to mediation); and Haw. Rev. Stat. §667-80(c)(2)(F) (2012)(requiring the homeowner to produce a verification of counseling by an approved housing counselor or approved budget and credit counselor).

the initiative to make an appointment, after which the housing counselor determines whether to refer the homeowner for foreclosure mediation.

Free legal assistance for homeowners facing foreclosure is an extremely valuable resource. Most homeowners in foreclosure are self-represented primarily because they are not financially able to hire a lawyer. Without legal assistance, homeowners are unlikely to be aware of their legal protections under local, state, and federal laws, let alone appropriate legal defenses to foreclosure. In addition, homeowners in judicial foreclosure states must contend with court filings and the intricacies of judicial procedure as self-represented litigants. Because of these concerns surrounding alternative dispute processes and foreclosure, some jurisdictions attach pro bono legal assistance to their foreclosure mediation programs. Other programs, like the one in Cook County, provide homeowners with a free consultation with a pro bono attorney.

Other states leveraged new professional responsibility rules to encourage attorneys to provide pro bono services to homeowners in foreclosure ADR by permitting forms of limited representation. States launched state-wide programs to train attorneys who could volunteer to help distressed homeowners in foreclosure mediation. Training covers the basics of foreclosure procedure, available state and federal assistance programs, and expectations for foreclosure ADR. Homeowners going into a foreclosure ADR session and seeking legal assistance are matched with trained pro bono attorneys who can review borrowers’ documents, research available options, and negotiate during the mediation session. In Maryland,

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213 See, e.g., Wash. Rev. Code. Ann. §§61.24.163(1), 61.24.160(3) (West 2012) (reserving the state foreclosure mediation program only for borrowers who have been referred to mediation by a housing counselor or attorney and also requiring housing counselors to refer homeowners to mediation based on the individual circumstances).
215 New York and Philadelphia make attorneys available, free of charge, to eligible homeowners. David Streitfeld, New York Courts Vow Legal Aid in Housing, N.Y. TIMES (Feb. 15, 2011) available at: http://www.nytimes.com/2011/02/16/business/16housing.html?ref=davidstreitfeld (“…by the end of the year, any homeowner in foreclosure who does not have a lawyer will be supplied one by legal aid groups or other pro bono groups”)
217 In fact, it was by participating in Maryland’s attorney training program that I first became involved in foreclosure mediation work. I taught my students about foreclosure mediation and folded counseling at foreclosure workshops into the work of the Mediation Clinic for Families at the University of Baltimore School of Law.
attorneys who completed foreclosure prevention training also provided brief advice during foreclosure solutions workshops held around the state.

F. Exchanging of documents

Two primary objectives of state and local governments responding to the foreclosure crisis are to create open, transparent communication between the parties and provide oversight of loan servicer behavior. An essential tool for reaching these objectives is to require parties to exchange key documents prior to, or during, the mediation or settlement conference. The specific documents required may be included in the statutory language itself or determined by the entity in charge of administering the mediation program. Homeowners and loan servicers can either mail the information directly to each other, submit documents to a third party or they can upload the documents onto a secure, online platform. Failure to comply with the mandated document exchange should be considered a violation of applicable good faith requirements and subject the violator to sanctions.

Homeowners’ required documents should relate to their financial status and eligibility for loan modification programs. To show their financial status, borrowers can produce proof of current and anticipated income, debts, and assets; tax returns for the past two years; hardship information; and a detailed budget of monthly expenses. They should provide information about the mortgage and payment history, including records or correspondence relating to the default or loan modification; verification of counseling from an approved housing counselor including


\[219\] See, e.g., H.B. 1374, 430th Leg. Assemb., Reg. Sess. (Md., 2012) at §(h)(1) (requiring Maryland’s Commissioner of Financial Regulation to determine which documents lenders must provide to the borrower prior to mediation).

\[220\] The third party can be either a housing counselor, the entity in charge of administering the mediation or settlement program, or sometimes the mediator.

\[221\] For example, Indiana created a secure, online portal that borrowers and lender representatives can access to upload required documents. Borrowers and lenders, as well as their attorneys and housing counselors, can create accounts through the portal and invite other parties to access the specific loan information by sharing a unique invitation code. The portal can be found at: https://www.dclmwp.com/. Other jurisdictions, like Maryland and Hawaii, created online portals to allow borrowers to submit home retention applications to their lenders. The online portals avoid the delay and risk of lost paperwork that come with mailing and faxing.

\[222\] See, e.g., Wash. Rev. Code, Ann. §61.24.163(10)(a) (West 2012). But, not all programs include a good faith requirement.

\[223\] Proof may be in the form of copies of pay stubs, W-2 forms, social security or disability income, retirement income, child support income, or any other income relevant to the homeowner’s ability repay the mortgage. (See, e.g., Haw. Rev. Stat. § 667-80(c)(2)(a) (2012)).
the counselor’s contact information; and a complete modification package for all applicable federal loan modification programs.

Homeowners should submit these documents in advance of the mediation or settlement conference to maximize efficiency. Usually, the person physically present at the mediation representing the lender is a lawyer hired by the loan servicer and the person with decision-making authority participates in the mediation by phone. The attorney in the room may not know how to extract the right information from the financial documents, run a NPV analysis, or evaluate a borrower’s loan modification package and the loan servicer on the phone cannot see the documents that the borrower brings to the mediation. By having the borrower submit her documents before the mediation, the loan servicer can make the necessary assessment of whether it is best to pursue the foreclosure or whether an alternative, such as a modification under HAMP or a non-retention option, is more appropriate. With this assessment complete, the scope of the settlement negotiation can be clarified for all parties.

Many programs require documents from servicers and lenders that are necessary to determine whether there is legal standing to pursue foreclosure and, if so, whether a proper assessment has been completed to determine if foreclosure really is the proper remedy. To prove proper legal standing, loan servicers may have to produce a copy of the promissory note signed by the mortgagor that also includes endorsements, amendments, or riders; a copy of the mortgage document evidencing the lender’s legal interest in the property and the right to foreclose; and payment history and correspondence confirming the loan’s default status. Loan servicers may also need to provide a sufficiently detailed explanation of why previous requests for loan modification, forbearance, or other foreclosure alternatives were denied; an itemized list of the best estimate of arrearages, fees, and outstanding charges; a recent appraisal of the property; and borrower-related and mortgage-related input used in any net present value analysis. Some programs also require loan servicers to produce any provisions in the pooling and servicing agreement that prohibit the loan servicer from modifying the loan or forgiving a deficiency upon short sale, along with proof that the servicer has attempted to obtain a waiver of those provisions. This last piece of information is extremely important for understanding what obligations the loan servicer has to the investor trust and whether these obligations can be waived in certain situations.


\[\text{In one foreclosure mediation I observed, the loan servicer was unable to provide the homeowner with a loan modification because the pooling and servicing agreement between the loan servicer and the investor trust prohibited the mortgage interest from dropping}\]
A document exchange requirement proves efficient and opens lines of communication early. Parties have the essential information up front, are spared the need to request and then wait for information, and can come to the mediation sessions prepared. Compelling parties to provide specific pieces of information, such as the pooling and servicing agreement governing the loan or the homeowner’s financial statements, makes the parties’ respective positions transparent. The loan servicer can begin assessing the borrower for a loan modification or other retention plan before the mediation begins. The borrower can know, before walking into a negotiation, whether keeping the house is an option on the negotiation table or whether to focus on non-retention foreclosure alternatives, like a short sale or a deed in lieu of foreclosure. Furthermore, requiring loan servicers to show their analysis for a loan modification forces them out of automation, the way of doing business that contributed to the foreclosure crisis in the first place. To show their analysis, they must in fact compare the costs and benefits of foreclosure and determine which outcome, foreclosure or some alternative, will maximize recovery for the investors with mortgage backed securities. Finally, as will be discussed in greater detail in the next section, programs can ensure party compliance with document exchange by issuing sanctions. For the loan servicer or lender, the foreclosure may be dismissed in a judicial foreclosure jurisdiction or they may not be granted the mediation certification necessary for moving forward with foreclosure. For the borrower, the opportunity to participate in the ADR program may be lost.

below 10.5%. HAMP does not, and cannot, force loan servicers to break the terms of their servicing contract in order to modify a loan; however, it would have been interesting to see whether the loan servicer might have appealed successfully to the investor trust in seeking a waiver of this provision, proof of which is required by Hawaii and Washington’s programs.

Pre-mediation exchange of information has proved a challenge for Maine’s foreclosure mediation program. Parties arrive at the first mediation unprepared to negotiate because: (1) the homeowner has not provided the lender with necessary documents; (2) the financial information provided by the homeowner was incomplete or not current; (3) the lender did not receive information the homeowner reportedly sent; and (4) the lender has not reviewed the homeowner’s information, despite timely receipt. When this happens, frequently the mediators set a date for an additional mediation session so that the parties can exchange the identified, necessary information and return to the second mediation session prepared to work on an agreement. (Report to the Joint Standing Committee on Insurance and Financial Services, 125th legislature (Feb. 15, 2012) at 4-5. available at: http://www.courts.state.me.us/reports_pubs/reports/pdf/fdp_ar_2011.pdf.)

State and local governments are more likely to reach their objectives if foreclosure ADR program rules are enforced. Almost all existing foreclosure ADR programs built sanctionable offenses and corresponding penalties into the program rules. As discussed above, many programs rely upon mediators to report when a party fails to comply with rules. Thus, jurisdictions that enumerate each sanctionable offense are more likely to have accurate reporting than those jurisdictions that have a blanket good faith requirement. Upon receiving reports of misconduct, courts in both judicial and non-judicial foreclosure jurisdictions should consistently enforce program rules by ordering sanctions against offending parties.

Common sanctionable offenses for both borrowers and lenders exist to compel parties to come to the negotiation table prepared to work out viable alternatives to foreclosure. For example, borrowers and lenders that fail to appear at the mediation session, fail to cooperate and participate in it, or fail to exchange required documents before deadline are subject to sanctions. Additionally, failure to have someone with authority to make decisions about the loan present at the mediation session, or connected via teleconference, exposes a party to sanctions. Both parties can be sanctioned for failing to take the negotiation seriously, but some sanctions only target loan servicer behavior; for example, proceeding with foreclosure even though it is not in investors’ best interest.

228 Supra at ___.
229 Supra n. ___ (Delaware, Vermont, and Maine require mediators to report lack of good faith but do not provide objective criteria for what that might look like). For more on good faith requirement in foreclosure mediation, see Geoff Walsh, Recent Developments in Foreclosure Mediation, National Consumer Law Center (Jan 2011); and Melanca Clark and Daniel Olmos, Foreclosure Mediation: Emerging Research and Evaluation Practices, U.S. Department of Justice Access to Justice Initiative (Dec. 2011).
230 See, e.g., D.C. Code §42-815.02(e) (2012). Failures to pay mediation fees can also generate sanctions but those sanctions target the sustainability of the program rather than impressing upon parties the importance of the opportunity to negotiate.
231 See, e.g., Wash. Rev. Code Ann. §61.24.163(10)(c) (West 2012) (considering it a violation of the duty of good faith to fail to designate representatives with adequate authority to settle, compromise, or otherwise reach resolution in mediation); Me. Rev. Stat. Ann. tit. 14, §6321-A (2012) (requiring the mortgagee who has the authority to agree to a proposed settlement, loan modification or dismissal of the action, to appear in person or participate by telephone with a representative present; and also requiring the presence of the borrower, counsel for the lender, and counsel for the borrower, if represented).
232 For example, Washington gives borrowers a right to enjoin, or set aside, a foreclosure proceeding if the net-present-value of a proposed modified loan exceeds the anticipated net recovery at a foreclosure sale. (Wash. Rev. Code. Ann. 61.24.163(14)(c) (West 2012).) A loan servicer in Washington also violates its duty to mediate in good faith by asking a borrower to waive any potential future claims connected with the mortgage as a
Borrowers and lenders that commit sanctionable offenses face a range of penalties. Borrowers may be fined or may lose their opportunity to mediate. Any stay on the foreclosure proceeding can be lifted to enable a foreclosure sale to proceed.\(^{233}\) Lenders who violate program rules face case dismissals in judicial foreclosure states and, in non-judicial states, either a stay of foreclosure proceedings or prohibition on recording foreclosure sale notices.\(^{234}\) Dismissals and stays do not prevent the lender from initiating foreclosure in the future. Additionally, delaying foreclosure while a borrower is in default ultimately harms the borrower. The longer the loan delinquency remains un cured, the more mortgage penalties and late fees accrue and the harder it becomes for a borrower to workout foreclosure alternatives.\(^{235}\) Thus, financial penalties against lenders are effective and do not carry unintended, negative consequence for borrowers. In addition, financial penalties can include fines paid to the mediation program administrator or directly to the borrower.\(^{236}\)

Courts in judicial and non-judicial jurisdictions oversee foreclosure mediation and settlement programs, ordering sanctions against parties for violating rules. Judicial oversight may be triggered by a mediator’s report or a parties’ petition for sanctions.\(^{237}\) In Nevada, even though courts have the power to impose sanctions on parties,\(^{238}\) sanctions were at the discretion

precondition to the lender agreeing to a modification. (State of Washington, Department of Commerce, “Scheduling of Mediation Session Notification Form: Acting in Good Faith” at 6 (June 7, 2012), available at http://www.commerce.wa.gov/site/1367/default.aspx.)

\(^{233}\) Haw. Rev. Stat. §667-L (b)(2) (West 2012) (authorizing sanctions against an owner-occupant for unjustified noncompliance with the program that include removing the stay of the foreclosure and maximum $1500 payment to the mortgagee).


\(^{235}\) Letter from Geoff Walsh, Staff Attorney, Consumer Law Center, to Supreme Court of Illinois Mortgage Foreclosure Committee (May 23, 2012) available at http://www.state.il.us/court/SupremeCourt/Public_Hearings/Mortgage_Foreclosure/Practice_Procedures/2012/060812_Submission_NCLC_Walsh.pdf.

\(^{236}\) See, e.g. D.C. Code §42-815.02(e)(2)(A) (2012); Haw. Rev. Stat. §667-L (b)(1) (West 2012); 2012 Oregon Laws Ch. 112 (S.B. 1552) at Section 4(5) [Or.Rev.Stat. 86.735] (requiring lenders to pay the borrower for actual damages incurred from the lender’s failure to comply with the statutorily mandated provisions); and Del. Code. Ann. tit. 10, §5062C(k) (West 2012) (preventing lenders from claiming attorneys’ fees if the lender does not appear at mediation prepared or fails to comply with any other program rule).

\(^{237}\) For example, Maryland gives borrowers three years from the date of the order ratifying sale to bring an action against a lender for failing to comply with the statutorily mandated foreclosure rules (2012 Md. Laws Ch. 156 (H.B. No. 1374) at §7-105.1(q)). In Nevada, if either party does not fulfill the obligations of a temporary agreement, the aggrieved party may file a petition for judicial review (Nev. Rev. Stat. Ann. Nevada Foreclosure Mediation Rule 16.3 (West 2012)).

of local courts until the Nevada Supreme Court interpreted judicial oversight of foreclosure mediation programs as a statutory mandate. The Nevada Supreme Court now issues a report detailing lender compliance with the program’s statutory requirements. Courts in Connecticut and Maine, both judicial foreclosure states, also have judicial guidelines to sanction lenders and loan services for failure to comply with program rules. Maine’s courts, for example, have required lenders to reimburse homeowners’ attorney’s fees and prohibited lenders from charging the homeowner for accrued interest and fees while the foreclosure action remains in mediation.

Florida’s statewide managed mediation program demonstrates what happens when there is inadequate or inconsistent judicial oversight. The statewide program contained provisions for a local court to impose sanctions against parties present without the authority to settle cases, exchange documents, or otherwise comply with program rules; however, lack of consistency in judicial oversight across all circuit courts resulted in the Florida supreme court’s decision to terminate the program altogether.

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239 Pasillas v. HSBC Bank USA 255 P.3d 1281 (Nev. 2011) (district courts must sanction parties that violate requirements of the foreclosure mediation statute and courts may not certify completion and permit continuation of foreclosure; in determining the sanctions to be imposed, district courts should consider, among other things, “whether the violations were intentional, the amount of prejudice to the nonviolating party, and the violating party’s willingness to mitigate any harm by continuing meaningful negotiation”). See also, Levy v. National Default Serving Corp. 255 P.3d 1275 (Nev. 2011) (failure to bring required documents to mediation is a sanctionable offense and district courts should determine and order appropriate sanctions).

240 See, e.g., Foreclosure Mediation Program Beneficiary Compliance Outcomes: July 1, 2011 – December 31, 2011, State of Nevada Foreclosure Mediation Program available at http://foreclosure.nevadajudiciary.us/index.php/component/content/article/1-latest-news/90-foreclosure-mediation-program-releases-beneficiary-report-card (detailing the extent to which the six primary loan servicers in Nevada (Bank of America, Wells Fargo, JP Morgan Chase, Ally/GMAC, US Bank, CitiGroup) and others complied with statutory requirements of the state foreclosure mediation program, such as attendance at mediation, production of required documents, authority to negotiate, and good faith participation).


243 Supreme Court of Florida Administrative Order No. AOSC09-54 at 3, 7, A8-A12 (Dec. 28, 2009).

244 The Assessment Workgroup for the Managed Mediation Program for Residential Mortgage Foreclosure Cases reported that public comments demonstrated that servicers widely resisted providing their representatives at mediation full authority and refused to consider more than a narrow range of foreclosure alternatives of little value to borrower.
Sanctioning violating parties demonstrates the importance of the program. Judicial oversight only has to occur a few times, to make an example of unacceptable loan servicer or borrower behavior, in order to send a clear message that compliance will be taken seriously. Likewise, a lack of judicial enforcement of program rules through authorized sanctions communicates to parties that mediation and settlement conferences need not to be taken seriously, ultimately undermining the point of these programs in the first place.

**H. Program costs and funding**

Cost and funding of ADR foreclosure programs are extremely important in determining whether foreclosure ADR programs can become permanent fixtures in the foreclosure landscape. Programs that are self-sustaining or that even generate additional revenue for the state are far more likely to endure than those paid for by grants or state budgets already stretched-thin. Another important consideration is who, between the loan servicer and the borrower, ultimately bears the cost of participating in a foreclosure ADR process. Programs that require both loan servicers and borrowers to pay a fee ensure that both parties are invested in the negotiation process; however, it is important to place restrictions on the ability of loan servicers to shift the costs of an alternative process to an already financially distressed borrower.

The cost of a program depends on variety of factors, such as the volume of cases, the number of mediation sessions held in each case, whether support services like housing counseling and legal assistance are included, and how much mediators are paid. Additional, pre-
medication screening overseen by program administrators also impacts the overall cost of a program.

Jurisdictions across the country use inventive approaches to pay for their foreclosure mediation programs. Some rely on existing salaried personnel and volunteers. Others use direct or indirect government funding. An increasing number of foreclosure mediation programs are self-supporting. In these programs, either the lender or the borrower, or sometimes both, bears the cost of the mediation through filing surcharges, mediation participation fees, and penalties for failure to comply with program requirements. The collected fees and penalties go into a mediators, especially if the time spent in mediation is 7-8 hours. (Performance Oversight Questions, Department of Insurance, Securities, and Banking, for FY 2011 and 2012 (Feb. 2012) available at: http://www.dccouncil.us/files/user_uploads/budget_responses/fy11_12_agencyperformance_-_disb_responses.pdf).

Both Philadelphia and Cook County, Illinois, use both volunteers and existing court personnel (http://www.trfund.com/resource/downloads/policypubs/Foreclosure_Diversion_Initial_Report.pdf; State of Illinois Circuit Court of Cook County, Mortgage Foreclosure Mediation Program: Report and Update Prepared for the Cook County Board of Commissioners (May 3, 2011)).

New York’s Division of Housing and Community Renewal provides funding for housing counselors, attorneys, and court programs; its budget was increased by $25 million for 2010. In Cook County, Illinois, the Board of Commissioners designated $3.5 million for its program. Iowa’s Attorney General gave Iowa Mediation Services $4500 won in a fraud settlement against Ameriquest. Iowa’s program received an additional $1.5 million in federal stimulus money but is currently seeking alternative funds to continue the program. Kentucky had a grant from the Annie E. Casey Foundation for its mediation program in Jefferson County as well as state and federal grants. (Heather Scheiwe Kulp, Foreclosure Mediation and Mitigation Program Models (May 17, 2011) available at: http://www.americanbar.org/groups/dispute_resolution/resources/foreclosure_mediation.html).

For example, Connecticut’s program is funded by the State Banking Fund, which is funded by bank and credit union assessments, securities registration, and registration, application, license, and examination fees for investment brokers and dealers. Thus, entities participating in the banking industry pay for the foreclosure mediation program rather than Connecticut’s individual tax payers (Auditors’ Report Department of Banking available at http://www.cga.ct.gov/apa/pdf2005/Banking%2024020-04.pdf).

For example, in Delaware, foreclosure mediation is free for borrowers but lenders must pay a $500 fee. 10 Del. C. § 5062 (e)(3), (i)(8) & (q) and Delaware Administrative Directive No. 2012-2 at 13.1.

In the District of Columbia, borrowers pay a fee for mediation but not lenders. Foreclosure Mediation, DC ST § 42-815.02(d)(1). Borrowers who elect to participate in mediation must pay $50.

Lenders in the District of Columbia pay $300 fee for filing a Notice of Default and, if a borrower requests mediation, they are potentially subject to a $500 civil penalty for failing to attend the mediation, to provide the documents required for the mediation, or to participate in good faith. Lenders are further subject to a $1000 civil penalty for breaching
separate operating fund to pay for mediators, administrative costs, and operating expenses.\textsuperscript{254} Surplus in the operating fund can be distributed to housing counselors and non-profit agencies that assist with the program.\textsuperscript{255}

Some programs actually generate additional revenue for the state. In Nevada and Washington, both of which are non-judicial foreclosure states that created foreclosure mediation programs through legislative statute, mediators are paid directly by the borrower and lender.\textsuperscript{256} However, when lenders file notices of default they must pay state fees, which are collected by and redistributed. In Nevada, recording a notice of default and an election to sell costs the lender $200, of which $45 goes into the Account for Foreclosure Mediation, $5 goes into an account to provide legal services for the indigent, and the remaining $150 is deposited into the State General Fund. According to the National Consumer Law Center, in only one year after it was implemented, the $200 notice surcharge generated between six and eight million dollars, which was used to reduce the Nevada’s deficit.\textsuperscript{257} Washington takes a slightly different approach and channels its surplus funds to homeowner assistance programs rather than into the general revenue fund.\textsuperscript{258} Generating revenue from lenders and diverting that revenue into state coffers is a creative way to fund consumer protection and

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\item See, e.g., Delaware Administrative Directive No. 2012-2 at 13.7.
\item 10 Del. C. §5062 (q); cf. Washington D.C.’s program prohibits reverting monies from the Foreclosure Mediation Fund for general use by the District (Establishment of Foreclosure Mediation Fund, DC ST § 42-815.03).
\item National Consumer Law Center “Rebuilding America: How States Can Save Millions of Homes through Foreclosure Mediation” Feb. 2012 at 35.
\item Washington’s Foreclosure Fairness Act created a “foreclosure fairness account” into which lenders must pay $250 for each property issued a notice of default. (West’s Rev. Code. Wash. Ann. 61.24.174 (2).) Lenders that are FDIC insured and have issued fewer than 250 default notices in the preceding year are exempt from this fee. (West’s Rev. Code. Wash. Ann. 61.24.174 (4).) Expenditures from the account are made as follows: up to 13% goes to the state Commerce Department for implementation of the Foreclosure Fairness Act, which includes the foreclosure mediation program; no less than 76% must be used for housing counseling for borrowers; up to 6% is to be used by the consumer protection division; up to 2% goes to the office of civil legal aid to provide homeowners with legal representation; and up to 3% goes to the Department of Financial Institutions for homeowner pre-purchase and post-purchase outreach and education programs. Monies given to civil legal aid out of the foreclosure fairness account must be used to supplement, not supplant, federal, state, and local dollars received by the state’s civil legal aid. (West’s RCWA 61.24.172(3)).
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legal services programs.

However, while many of these costs appear to be paid by the lender, it is important to note that, in most jurisdictions, lenders are permitted to shift foreclosure-related costs to the borrower by including those costs in the total amount the borrower owes. The lender can recoup those foreclosure-related costs from the proceeds of the sale of the house or include them in a deficiency judgment that attaches to the borrower. These foreclosure-related costs include the cost of participating in mediation. Therefore, even though a program may require a lender to pay for the mediation, if the mediation does not result in an agreement that would permit the borrower to stay in the home, then the borrower ultimately pays the costs when they are subtracted from the proceeds of the foreclosure sale or added to the deficiency. Vermont is one of the few states to take affirmative steps to prevent this fee-shifting from lender to borrower in situations where the foreclosure sale results in a deficiency.259

**CONCLUSION**

As existing foreclosure ADR programs continue to operate and as new ones emerge, a crucial next step for foreclosure ADR programs is a systematic evaluation of every program according to the same metrics. Although a few programs have collected data, meaningful comparison across programs remains difficult. First, these programs are fundamentally different, with varying objectives, structures, jurisdictional capabilities and local needs.260 Second, for those programs that are sufficiently similar to

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259 12 Vermont Stat. Ann. § 4637 (c): “If the foreclosure action results in a sale with a surplus, the mortgagee may recover the full cost of mediation to the extent of the surplus. Otherwise, the mortgagee may not shift to the mortgagor the costs of the mortgagee’s or the servicing agent’s attorney’s fees or travel costs related to mediation but may shift up to one-half of the costs of the mediator.” See also the District of Columbia foreclosure mediation program, which prohibits lenders from recovering the $300 notice of default filing fee if there is a deficiency upon the sale of the foreclosed property (DC ST § 42-815.02 (f)).

260 Compare, for example, programs in Philadelphia and Nevada. Since Philadelphia’s diversion program began in 2008, 70% of all eligible households participated in foreclosure conciliation conferences. Of those who participated, over 97% averted foreclosure: 26% resolved with the lender (stayed or ended agreement), 11% averted foreclosure by bankruptcy, and 63% remain in housing counseling. (Redevelopment Authority of the City of Philadelphia, The Residential Mortgage Foreclosure Diversion Program, Program Effectiveness, available at http://www.phila.gov/rda/residential%20mortgage%20foreclosure%20diversion%20program.htm.) Meanwhile, Nevada’s foreclosure mediation program, from September 2009 through December 2011, held 15,274 mediations. Forty percent of those cases resulted in an agreement to a foreclosure alternative: 26% resulted in an agreement that allowed the homeowner to remain in the home and 14% resulted in a non-retention agreement that allowed the homeowner to vacate the home without a
lend themselves to theoretical comparison, data collected often are compiled using different metrics.\textsuperscript{261} To assist programs with assessment, the Access to Justice Commission at the U.S. Department of Justice convened a working group to develop suggestions for how programs should gather data for evaluation purposes.\textsuperscript{262} The working group’s suggestions include tracking important program characteristics. However, to compare outcomes, variations in local housing markets and local economies (e.g. unemployment or overleveraging) need to be controlled for because they impact whether a foreclosure is avoidable. Until a thorough evaluation of

\footnotesize{\textsuperscript{261} Compare foreclosure mediation and settlement programs in Cook County, Illinois and New Jersey. While Cook Co. tracked settlement rates and outcomes, New Jersey only tracked settlement rates, making it impossible to know what the parties agreed to. (State of Illinois, Circuit Court of Cook County, \textit{Mortgage Foreclosure Mediation Program: Report and Update}, Prepared for the Cook County Board of Commissioners (May 2011) at 23 (providing statistics from the program’s first year that show that, of the 627 mediations conducted, 34% of homeowners remained in their homes with permanent loan modifications, 30% negotiated alternative agreements with the lender, and 36% came to no agreement and foreclosure proceeded along the traditional litigation track); cf. New Jersey Legislature, Department of Community Affairs Responses to Office of Legislative Services Questions, Report for FY 2011-2012 at 17 (reporting that between January, 2009 and January, 2011, 5,300 cases completed mediation with 26% resulting in permanent settlement, 23% receiving provisional settlement, and 50% ending in no settlement)). Connecticut and Maine have also collected detailed records on the terms of the mediated agreements (Maine’s Report to the Joint Standing Committee on Insurance and Financial Services, 125th legislature (Feb. 15, 2012) at 4-5 available at: http://www.courts.state.me.us/reports_pubs/reports/pdf/idp_ar_2011.pdf (explaining that foreclosure was avoided in at least 28% of cases participating in the program and that, for the cases in which an agreement was reached in mediation and the lender subsequently dismissed the foreclosure proceeding, 59% of cases resulted in an agreement to modify the loan, 4% of cases the lender agreed to reinstate the loan, and 1% of cases the parties agreed to a repayment/forbearance plan. Parties also agreed to a range of non-retention agreements: 5% agreed to short sale, 1.7% deed in lieu of foreclosure); and State of Connecticut Judicial Branch Statistics, Foreclosure Mediation http://www.jud.ct.gov/statistics/FMP/FMP_pie.pdf (showing that between July 1, 2008 and December 31, 2011, 12,805 cases completed mediation through its Foreclosure Mediation Program and, of those cases, 67% resulted in the borrower staying in the home (55% loan modification, 5% reinstatement of the loan, 7% forbearance/repayment plan), 18% were not settled, and 15% resulted in the borrower moving from the home (this percentage includes agreements for a sale, a short sale, a deed in lieu of foreclosure, or an extension of the law day or sale date)).

these programs has been completed and it is possible to connect a program’s outcomes to its structure and local economy, it seems premature to unequivocally declare one program’s model as superior. In addition, because the local economy is such an important variable to consider when constructing a foreclosure ADR program, jurisdictions should be given requisite flexibility to design programs that best respond to local needs.

Nevertheless, foreclosure ADR programs developed by state and local governments are a creative solution to problems that lie at the heart of the foreclosure crisis. By introducing facilitated negotiation as a compulsory step in foreclosure proceedings, these programs reconstruct important aspects of the borrower-lender relationship lost by securitization. Specifically, they establish clear lines of communication and require the third party loan servicer to behave as a traditional lender might, assessing whether foreclosure in fact makes the most financial sense for investors or whether an alternative might yield a greater return on the investment.

Since securitization has become a fixture in the residential mortgage landscape, states should incorporate foreclosure ADR programs as a permanent part of their residential foreclosure procedures.263 State legislatures in both judicial and non-judicial jurisdictions have the power to create foreclosure ADR programs that pay for themselves and that even generate revenue for government coffers. Programs can maximize the probability that a delinquent loan will be cured if they introduce the opportunity to negotiate early in the process and also create a finite negotiation timeframe during which the foreclosure cannot move forward. Programs that enroll homeowners automatically, rather than relying on homeowner initiative to self-enroll, are more likely to reach those homeowners in greatest need of assistance. Negotiations facilitated by a trained, neutral third party ensure that the problem-solving process is structured, balanced, and well-informed. Folding in housing counseling and legal assistance to educate homeowners further empowers and protects homeowners during negotiations. Programs that demand an exchange of documents, similar to a pre-settlement discovery that parties do not have to affirmatively request, builds efficiency and transparency into the negotiation process and also guarantees that the loan servicer has proper legal standing to foreclose. Finally, enumerating sanctionable offenses and corresponding penalties gives parties recourse to request judicial oversight

and helps enforce program rules.

Foreclosure ADR programs are unprecedented for a variety of reasons. While this article takes a first step in providing a comprehensive analysis of existing programs’ key components, further study of their legal implications is warranted. For instance, these programs raise questions about the specificity with which some ADR programs regulate loan servicers’ behavior. Although there is nothing new about ordering parties in a legal dispute to settlement conferences or mediation, it is unusual to prescribe the content of negotiations and then require one of the parties to justify its decision-making. This micromanaging of loan servicer conduct by many ADR programs reveals a deep mistrust and lack of deference to loan servicers on the part of state and local governments. In a sense, when it comes to making decisions about foreclosure, governments are overriding loan servicers’ private business judgment and replacing it with one that in their estimation better serves the public’s interest.

An additional question these programs raise is how to ensure ADR processes are appropriately used as a vehicle for regulating an industry and protecting consumers. ADR processes like mediation and conciliation are designed for parties that have autonomy and equal bargaining power. But homeowners in foreclosure ADR come to the negotiation table on unequal footing because, assuming the loan servicer has the legal authority to foreclose, they have no real power over whether their loan can be modified. Even the loan servicer’s power to modify loans is restricted by the pooling and servicing agreements, which are imposed on homeowners’ loans long after the loan is granted and without homeowner knowledge or consent. An additional defining feature of ADR processes is that they come covered with a blanket of confidentiality that can be removed only in exceptional circumstances. If the goal of lawmakers is to police loan servicers and protect consumers from loan servicer misconduct, then they need to be aware not only of ADR processes’ potential benefits but also of their limitations. As policymakers continue to rely on the ADR process to address the foreclosure crisis, they must consider how to answer these questions.

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