
# State and Local Foreclosure Mediation Programs

## Updates and New Developments

*January 2010*

NATIONAL
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**State and Local Foreclosure Mediation Programs: Updates and New Developments**

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## I. Introduction

In September 2009 NCLC released a Report entitled "State and Local Foreclosure Mediation Programs: Are they Saving Homes?" In that Report we examined the structure and performance of over 25 existing foreclosure mediation and conference programs around the county. We looked critically at some of the policy assumptions behind them. The Report pointed to the need for programs to include substantive requirements that demand transparency from servicers, particularly in the consideration of loan modifications. The Report emphasized the need for programs to include structures and procedures that encourage homeowners to participate. We recommended substantive standards and procedural designs that programs could adopt to meet these needs.

This Report supplements NCLC's September 2009 study of foreclosure mediation programs. It begins with updates on the implementation of the new statewide programs in Nevada and Maine, two programs we highlighted in the earlier Report as incorporating potentially stronger accountability measures than many other existing programs. Since the earlier Report, new programs were implemented in Delaware and Rhode Island. This Report will look at the strengths and weaknesses of those programs.

The September 2009 NCLC Report encouraged reevaluation of existing foreclosure mediation and conference programs to make them more effective. In two states, New York and Florida, the legislatures and courts recently took steps to improve existing programs. Here, we will look at how those changes may affect future conduct of conferences and mediations in those two states.

Regardless of the judicial or non-judicial nature of a state's foreclosure process, state courts will likely play a major role in enforcing any kind of statutory mediation or conference requirement. Homeowners will go to the courts to seek orders to stay or overturn foreclosures conducted in violation of statutory requirements. This Report will examine various litigation issues that have arisen recently regarding the enforcement of state conference statutes. The mixed results of this litigation highlight the need to draft statutes carefully to provide for simple and effective means of judicial enforcement.

A Bill now pending in Congress would provide substantial funding for state and local foreclosure mediation programs. This legislation attempts to define basic standards for an effective program. If enacted, it would certainly influence development of future programs at the state level. We will examine the provisions of this federal bill.

Finally, this Report takes a look at eight bills that were introduced into state legislatures during 2009 proposing various forms of conference and mediation requirements for residential foreclosures. While most fall short of the standards advocated in NCLC's earlier Report, some bills offer innovative approaches to addressing homeowners' needs. We will examine the ways in which these bills attempt to hold servicers accountable for a loan modification analysis and require servicers to produce meaningful documents. In a departure from the provisions of many existing programs, most proposed bills have included requirements for lenders to participate in good faith in conferences or mediation sessions. The bills vary widely in the enforcement mechanisms they create, ranging from mandated delays in foreclosure for non complying servicers to assessment of fines and penalties. Two bills have coupled a requirement for pre-foreclosure loss mitigation with provisions for conferences after a foreclosure case has been filed.

Other new bills propose features that would likely deter homeowner participation unnecessarily, such as new systems for screening out participants with little oversight and requirements that homeowners escrow funds as a condition to participation. The bills continue to grapple with the costs of these programs for financially strapped state governments and court systems. At least two bills, those in Ohio and Florida, seek to fund mediation systems through significant up-front charges to servicers who file foreclosure cases in the states' courts.

## II. Implementation of the Nevada and Maine Mediation Programs

### *Nevada*

Nevada's Assembly Bill No. 149 went into effect on July 1, 2009.[1] The new law allows homeowners to request mediation within the framework of a non-judicial foreclosure. Despite the Nevada courts' traditional non-involvement in foreclosure proceedings, the law authorizes the state's courts to supervise mediations in foreclosure cases. Unlike other foreclosure mediation programs implemented elsewhere in the country, the Nevada program places a number of significant obligations upon mortgage servicers. For example, the law requires servicers to produce certain documents for mediations, including evidence of standing to foreclose and a loan modification analysis.

The Nevada courts have approved over 150 mediators to serve in the program.[2] According to court administrators, from July 2009 through October 2009, 3,446 Nevada homeowners requested mediation after receiving a notice of default, the first step in the state's non-judicial foreclosure process. Mediations were conducted in 372 cases, 805 sessions were scheduled, and another 1402 cases have been processed and are awaiting scheduling.[3] Because the program began in July 2009 and the law allows 90 days for completion of the mediation process, significant hard evidence of the nature of outcomes is still months away.

Despite the lack of long-term historical data, there are indications that the Nevada law may be having an effect on slowing foreclosure activity in the state. *RealtyTrac*'s monthly survey of foreclosure activity tracks filings of notices of default, scheduled foreclosure sales, and completed foreclosures on a state by state basis. For Nevada, the total number of foreclosure-related filings in November 2009 was 33% lower than in November 2008. In the short term, from October 2009 to November 2009 Nevada foreclosure filings dropped by 33%.[4] Nationally, according to the same *ReatlyTrac* report, foreclosure filings in November 2009 were 18% *above* their level for November 2008. At the national level foreclosure filings dropped from October 2009 to November 2009, but by only 8% - compared to the 33% drop in Nevada. For Nevada this was the second consecutive month of decline in foreclosure activity. Even with these decreases, however, Nevada remains the state with the highest rate of foreclosure activity in the nation.

It is difficult to estimate the effect that other national efforts, such as the U.S. Treasury Department's HAMP loan modification program and the home-buyer tax credit, may be having on foreclosure filings. Still, other states that have been experiencing consistently high rates of foreclosure over the past two years did not see drops in foreclosure activity of the scale that recently occurred in Nevada. For example, in California, Florida, and Michigan the foreclosure filings in November 2009 were respectively 22%, 8%, and 10% *higher* in each state than they had been for the same month a year earlier. California experienced a modest decline of 13% in foreclosure activity from October 2009 to November 2009, while in Florida and Michigan the rates did not change demonstrably from one month to the next. California, Florida, and Michigan instituted foreclosure mediation or conference requirements in various forms during 2009, either statewide or at the local level.[5] Yet, the programs in these three high-volume foreclosure states do not appear to have produced decreases in foreclosure activity similar to Nevada's. More time will tell whether the decrease in Nevada foreclosure activity is a temporary dip occasioned by servicers adapting to the new law, or a long term favorable trend driven by operation of the state's mediation law.[6]

In addition to the requirement to produce documents showing an affordable loan modification analysis, another feature of the Nevada mediation law may be affecting the foreclosure rate there. The Nevada statute requires as an initial step in the mediation process that the beneficiary of a deed of trust establish its standing to enforce the loan obligation. The Nevada Supreme Court set this requirement by a rule promulgated to implement the mediation statute.[7] Under the court rule, the beneficiary of a deed of trust must produce certified copies of the original mortgage note, deed of trust, and each assignment of the deed of trust and mortgage note by means of a statement signed before a notary public. The statement must include the identity of the verifying individual and show authorization to make the certification. The statement must indicate that the person signing it is in actual possession of the note or deed of trust. If a servicer claims that the original documents have been lost, the servicer must obtain a court order acknowledging that it has satisfied all state law requirements for establishing a lost note. A number of servicers have had difficulty complying with this requirement.

### *Maine*

Maine's foreclosure diversion program went into effect statewide on January 1, 2010. A pilot program had been in operation in one Maine county (York County) since July 2009. In anticipation of the program's statewide implementation, over 140 mediators attended a three-day training program in early December 2009. Maine's Supreme Judicial Court approved final rules to go along with implementation of the program, and these rules became effective January 1, 2010.[8] The rules set guidelines for scheduling sessions, for granting stays of proceedings, and for determining good faith participation. The rules also address how sanctions will be imposed. Under the Rule 93(j), if a plaintiff, defendant, or attorney for either party fails to attend a session or make a good faith effort to mediate, the mediator must inform the court. The court may then impose appropriate sanctions. The sanctions may include, but are not limited to, the assessment of costs and fees, including reasonable attorney fees, entry of judgment, dismissal without prejudice, dismissal without prejudice with a prohibition on re-filing the foreclosure action for a stated period of time, and dismissal with prejudice.[9] Another proposed rule implements the statutory requirement that all mediations must use the calculations, assumptions and forms established by the FDIC ("loan mod in a box") net present value calculation.[10]

## III. New Foreclosure Mediation Programs—Delaware and Providence, Rhode Island

### *Delaware*

Delaware is a judicial foreclosure state. Through an Administrative Order dated August 31, 2009 the Delaware Superior Court initiated a statewide program for foreclosure mediation.[11] Under the program, a lender must serve the homeowner with a notice of the availability of mediation upon service of the foreclosure complaint. The homeowner may then elect to participate in mediation. To implement the election, the homeowner must contact a HUD-certified housing counselor and give the counselor verified financial data. The homeowner must take these steps within fifteen days of service of the complaint. The housing counselor reviews the homeowner's financial information and determines whether the homeowner is able to propose an affordable loan modification that meets standards defined in the Administrative Order. These standards require that the homeowner be reasonably able to sustain monthly payments under a modified loan. The modification must provide for a monthly payment for principal, interest, taxes and insurance that is less than 38% of the borrower's gross monthly income. The modification may be achieved through the standard federal waterfall, which may include a modified repayment term of up to 40 years and an interest rate as low as 2%.

The Delaware program requires that the homeowner make the initial showing of the ability to make payments under a modified loan as a threshold requirement to participate in mediation. If the counselor finds that the homeowner can realistically perform under a modification meeting the applicable standards, the counselor forwards the proposal to the lender. The counselor also sends the proposal to a volunteer attorney program, which attempts to provide an attorney for the homeowner. Entry of default judgment is then stayed for 60 days. If the negotiations continue without a resolution, a mediation session is scheduled. At least one day before the scheduled session, the parties must exchange proposals. The session will not be continued unless the lender agrees to do so.

The Delaware foreclosure diversion program has some potential strengths, but also considerable deficiencies. On the positive side, the program seeks to maximize the involvement of counselors and volunteer attorneys to assist homeowners. On the negative side, homeowners, but not lenders, bear significant obligations in participating in the program. The rules impose burdensome documentation requirements on borrowers, but demand little concrete information from servicers. Borrowers must act within short time frames or they lose the right to participate. Housing counselors act as gatekeepers for the program, but there is no opportunity for review of the counselors' eligibility determinations. A single face to face meeting held one day after an exchange of proposals is not likely to set in motion the process of follow-up and review that is essential to successful foreclosure mediation. Allowing continuances of a mediation session only with the servicer's consent creates no incentive for the servicer to participate in good faith. The lack of judicial supervision further weakens the process. Volunteer attorneys, presumably working with housing counselors, facilitate the mediation sessions.

Initial sessions under the Delaware program began in late October 2009, with sessions to be held in different counties on a rotating basis. The Delaware Legal Aid Society, and not the courts, will monitor outcomes

## *City of Providence, Rhode Island*

The City of Providence, Rhode Island has approved an ordinance establishing a city-wide "Residential Mortgage Conciliation Conference Program."[12] The program went into effect at the end of August 2009. Unlike most other foreclosure diversion and mediation programs, the Providence law does not require that homeowners facing foreclosure "opt in" to participate. Instead, foreclosure cases are referred to housing counselors automatically when a lender files an initial foreclosure notice with the City land records. The program does not use true mediators. Instead, a housing counselor and a person serving as a "Conciliation Conference Coordinator" play the major roles in facilitating negotiations. The housing counselor and the conference coordinator are typically employees of a state or local housing agency. They have no direct affiliation with the courts.

As the first step in a foreclosure under Rhode Island's non-judicial foreclosure law, the lender files a "Notice to Foreclose" in the local land records and serves the homeowner with a copy.

Under Providence's mediation ordinance, a local housing agency must also be served with a copy of the Notice to Foreclose. This service triggers the settlement process managed by the conciliation conference coordinator. The housing agency schedules a conciliation conference within 21 days of the date the lender serves the Notice to Foreclose. A HUD-approved counselor functions as an advocate for the homeowner. Neither the conference coordinator nor the housing counselor may charge fees for their services.

Under the Providence law the housing counselor and the homeowner develop a "Pre-Conciliation Action Plan" that is submitted to the lender for review. The City's guide for the conciliation program states that if a conference does not result in a mutually acceptable plan, the conciliation coordinator can require the servicer to provide a written explanation for the rejection of a proposal, and if feasible, the servicer must offer an alternative resolution. The complete process, including the conciliation coordinator's determination of good faith participation by the lender, must be completed within 60 days of the filing of the Notice to Foreclose.

A foreclosure sale may not proceed in the City of Providence unless the lender files with the City land records an appropriate certification of the termination of the conciliation process. The lender's filing may take one of three forms: a certification of good faith participation, an affidavit of exemption, or a certification that the homeowner did not cooperate. According to the model form in the City's program guide, the "Good Faith Determination" certification by the conciliation coordinator must include, *inter alia*, proof that the lender gave the notice of conciliation; a designation of an individual from the lender's staff authorized to agree to a work out; a record of reasonable efforts to respond in a timely manner to requests for information from the homeowner or counselor; documentation that the lender analyzed and responded to proposals of the homeowner within 14 days of submission; written, detailed statements of the reasons for rejecting proposals; and a proposal by the lender in writing to enter into alternative work-out arrangements that would result in a material net financial benefit to the homeowner as compared to the terms of the mortgage. According to data from Rhode Island Housing, as of December 7, 2009 the agency had received 325 notices from services that they were commencing foreclosures. Twenty-seven conciliation conferences had been completed. Servicers were eligible to receive certifications to proceed with foreclosures in about 200 cases and about 100 cases were awaiting further action.

## IV. November 2009 Amendments to the New York Mandatory Settlement Conference Rules

As enacted in late 2008, Rule 3408 of the New York Civil Practice Laws and Rules ("N.Y.C. P.L.R.") mandated settlement conferences for residential foreclosure cases involving "high-cost," "subprime," and "non-traditional" loans.[13] The Rule became mandatory for covered foreclosure cases filed after January 1, 2009. It required the scheduling of a settlement conference within 60 days of filing of proof of service of the foreclosure complaint. Because of the limited scope of covered transactions, the conference requirement did not apply to the majority of New York foreclosure cases. However, individual judges at their discretion could order conferences for all foreclosure cases in a particular court.

Amendments to N.Y.C.P.L.R. Rule 3408 passed by the New York legislature in November 2009 and signed by the Governor the following month expanded the scope of the state's mandatory settlement conferences to include all foreclosures of loans secured by borrowers' residences. In addition, the amendments added significant new procedural and substantive requirements for the conferences. Prior to the 2009 amendments, Rule 3408 did not contain a requirement for good faith participation by the parties. Now the law specifies that the parties must "negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible." The law provides for additional outreach to homeowners through notices sent to housing counselors in later stages of the foreclosure proceeding. Lenders are now required to bring certain documents to the settlement conferences, including a payment history, an itemization of the amounts needed to cure and pay off the loan, and the mortgage and note. Lenders must disclose the identity of the current legal owner of the mortgage and note. A notice of discontinuance of the foreclosure action must be filed within 150 days after the execution of a settlement or loan modification agreement. Finally, the amendments impose important restrictions on lenders' ability to shift their fees and costs, including attorney's fees, related to participation in the settlement process.

## V. Florida Supreme Court Administrative Order of December 28, 2009: Final Report and Recommendation on Residential Mortgage Foreclosure Cases

Over the past two years Florida consistently experienced one of the highest foreclosure rates in the country, with over 350,000 foreclosure cases filed in the state each year. In 2009 a Task Force appointed by the Florida Supreme Court considered proposals for a statewide foreclosure mediation program. The Task Force released its Final Report and Recommendations on August 17, 2009.[14] The Report included a proposed administrative order to be issued by each of the state's circuit courts. The administrative order would refer all residential foreclosure cases to mediation, specifying procedures and forms for the mediations. After further hearings and after making some minor changes, the Florida Supreme Court adopted the Task Force's recommendations as its own in an Administrative Order of December 28, 2009.[15] The Supreme Court's report notes that as of the end of 2009 there were 456,000 foreclosure cases pending statewide in Florida courts.

The Florida Supreme Court's Administrative Order expands the mandatory foreclosure mediations well beyond those already underway in several Florida judicial circuits. Under the new guidelines, each circuit court will issue an administrative order conforming to the Supreme Court's recommendations. The Supreme Court's program model exempts from mediation only properties in which the borrower opts out of participation. The borrower opts out by not responding to mediator's requests for information or by failing to work with a housing counselor to prepare for a mediation session.

According to the Florida Supreme Court's report, state statutes and budget limitations prohibit the courts from collecting fees to support a foreclosure mediation program. Therefore, the model relies upon non profit "Program Managers" to collect fees from participants and administer the program. When a foreclosure case is filed, the clerk of the court sends the borrower a notice of the mediation program. The clerk's notice also goes to the organization designated as the Program Manager for the mediation program. The lender may not seek entry of judgment until the Program Manager certifies that mediation has been completed.

The mediation Program Manager plays an active role under the Florida Supreme Court's model. The manager contacts the borrower and directs the borrower to a housing counselor. In cooperation with the housing counselor the borrower then completes a financial information form and returns the form to the Program Manager. A borrower's failure to provide the specified information on the form is treated as opting out of mediation.

At his or her option the borrower may send a form to the lender listing documents the borrower wishes to receive from the lender before the mediation session. The model form lists the documents the homeowner may request. The listed items include evidence that the plaintiff is the owner and holder of the note and mortgage, a history of the application of all the borrower's payments, a "statement of the lender's position on the net present value of the mortgage loan," and the most current appraisal of the property available to the lender. There is no requirement that the lender produce these documents unless the borrower makes a timely, formal request for them using the model form. The borrower, on the other hand, must produce a substantial set of documents and financial data for the lender in all cases. The Program Manager forwards the borrower's information and the lender's documents to the opposing side prior to a scheduled mediation session. The mediation session is to be scheduled no earlier than 60 days and not later than 120 days after the filing of the foreclosure complaint.

Under the Florida procedures, the borrower must appear in person for a mediation session. If the borrower has an attorney, the attorney must appear as well. The lender's attorney must be present, but the Administrative Order allows the lender to request an appearance by means of "communication equipment." Upon filing a foreclosure complaint, the lender must complete a form designating an individual authorized to negotiate and approve a settlement. The designated individual must be available by phone or computer for the duration of a mediation session. The program rules strictly enforce this requirement, with non-compliance to be reported to the Program Manager. The court may dismiss the foreclosure action, require only in-person appearances by the lender in the future, or impose other sanctions if the designated representative does not appear.

A form "Order to Show Cause" incorporated into the administrative order specifies conduct for which a court may sanction a lender. Grounds for sanctions include failure to designate an authorized representative on the court's form, failure to give the form to the Program Manager, nonpayment of fees, failure to file certification of the designated individual's settlement authority, non attendance of counsel or the designated representative at a mediation, and failure to have the representative present for the duration of the mediation session. In addition, lenders who have filed five or more foreclosure actions in a circuit while the administrative order is in effect must designate a "liaison" for the court. This liaison must be available generally to communicate with the court staff about the lender's non-compliance with mediation rules.

Under the Florida Administrative Order lenders are required to pay up to $750 in costs related to an initial mediation session. The lender must pay these costs in full upon filing the action. Of the $750, up to $400 covers administrative costs of the program, including outreach and counseling fees. Up to $350 goes to pay the mediator. The program is designed for a single mediation per case, but the allotted costs may cover a second session as needed. The lender must pay an additional $350 if a third session is required. If a session becomes unnecessary, mediator fees already paid may be refunded to the lender. The Administrative Order specifically allows a presiding judge to assess program fees as a cost imposed on the borrower in a final judgment.

Certain procedural features of the new Florida program may facilitate settlements. For example, the program automatically includes all borrowers subject to foreclosure. Homeowners need not "opt in." Instead, they may "opt out" by not responding to the Program Manager, not completing forms, not working with a housing counselor, or not appearing for a mediation session. The rules stay entry of judgment for a reasonable period of time, up to 120 days, to allow for the exchange of information and review of proposals. The model program provides for court supervision when appropriate, such as when sanctions may be imposed. The charges for mediation recognize the budget shortfalls facing many courts and allow for payment commensurate with recognized costs associated with professional mediation services. The rules direct the compilation of statistical reports of the number of cases referred to mediation, how many homeowners participate, and the number of full or partial settlements achieved through mediation.

Weaknesses of the model Florida program include the absence of obligations for lenders to produce documents or other loan modification calculations. Rather than mandate production of essential documents in all cases, the rules require use of a model form which lists four very general types of documents the borrower may request from a lender. The categories listed are incomplete and vague. The form's language leaves open what the appropriate "documentary evidence" of the plaintiff's ownership interest in the note and mortgage might be.[16] Significantly, rather than requiring a HAMP or similar net present value analysis with supporting documents, the form requires the lender to give a "statement" of its "position on the present net value of the mortgage loan." This incomprehensible statement will likely be of little use in facilitating settlements and encouraging loan modifications. Finally, while the order does create a role for the courts to enforce mediation standards, the focus is almost exclusively on enforcing lender appearances. There are no standards mandating what the lender must do when it does appear. The rules do not require disclosure of loan modification data consistent with HAMP and other recognized loan modification programs. There is no requirement that the lender consider a loan modification option in good faith.

## VI. Issues in litigation: Judicial Enforcement of Conference Statutes: New York and California

State laws mandating foreclosure mediations, conferences, or settlement discussions will benefit homeowners facing foreclosure so long as lenders know that courts will enforce the requirements. At a minimum, courts must be willing to enter orders that prohibit foreclosures when lenders fail to comply with applicable conference statutes or program rules. If statutes are drafted without express language prohibiting foreclosures in the event of non-compliance with program rules, courts must decide whether the legislature intended that the statutes be judicially enforceable. In judicial foreclosure states, questions of enforceability arise in the context of opposition to entry of judgment or a motion to a dismiss foreclosure action. In non-judicial foreclosures the homeowner will be forced to file an action for injunctive relief to stop or set aside a foreclosure sale, or possibly to recover monetary damages after an improperly conducted foreclosure. Over the past year courts in New York, a judicial foreclosure state, and California, where non-judicial foreclosures predominate, addressed some of these issues, with conflicting results.

### *New York*

Rule 3408 of the New York Civil Practice Rules and Laws, effective October 1, 2008, mandates that courts hold settlement conferences in residential mortgage foreclosure cases within 60 days after service of the summons and complaint. The purpose of the conference is to consider options to avoid loss of the home through foreclosure. The law as originally enacted applied only to high cost, subprime, or "nontraditional" loans as defined by New York Banking Law, RPAPL § 1304. Amendments to Rule 3408 enacted in late 2009 expanded the conference requirement to apply to all foreclosures of borrowers' residences.

New York courts strictly enforced the pre-amendment version of Rule 3408. For example, one court refused to allow entry of a foreclosure judgment and *sua sponte* dismissed the lender's action because the application for a judgment did not include an affirmation detailing the basis for the lender's claim that the loan was exempt from the conference requirement. *Indymac Federal Savings Bank FSB v. Black*, 22 Misc.3d 1115(A), 2009 WL 211787 (Sup. Court Rensselaer County, Jan. 23, 2009). The *Black* court viewed Rule 3408 as a remedial statute to be liberally construed to carry out its purpose. Accordingly, a borrower should be deemed to qualify for a conference absent conclusive evidence to the contrary. Similarly, in *Butler Capital Corporation v. Cannistra*, — N.Y.S. 2d —, 2009 WL 3834395 (Sup. Court Suffolk County, Oct. 8, 2009) the court refused to allow a foreclosure sale and ordered a settlement conference where the lender's application to proceed to sale did not include "evidentiary proof" that the loan in question was not subprime and that the property was not the borrower's residence. According to the court, conclusory statements from the lender's attorney that the loan was exempt would not suffice. The clear legislative intent favored denial of foreclosure and ordering a conference: "In keeping with the obvious homeowner-protective legislative intent of the relevant foreclosure statutes, the Court errs on the side of those protections." *Cannistra*, at * 5. Another New York court expressed a similar preference in *GRP Loan, LLC v. Ivery*, 25 Misc.3d 460, 886 N.Y.S. 2d 317 (Sup. Court Kings County July 21, 2009) (noting the benefits to courts and the community from the conferences, holding that a request for a conference in a foreclosure action "should be carefully considered on its merits regardless of whether it falls within the ambit of the Subprime Lending Reform Act."[17]

## California

In the non-judicial foreclosure context California Civil Code § 2923.5 requires that a lender attempt to contact a defaulted borrower prior to foreclosure and explore alternatives that might avoid the loss of the home. Specifically, the "mortgagee, beneficiary or authorized agent" must "contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure."[18] The statute goes on to require that the lender's notice of default filed in land records include a declaration "from the mortgagee, beneficiary, or authorized agent" of compliance with § 2923.5, including that the lender attempted "with due diligence to contact the borrower as required by this section."[19]

The California courts, unlike those in New York, have divided over the question of whether a homeowner may assert non compliance with the conference statute as a ground to prevent or overturn a foreclosure sale.[20] The court in *Nool v. HOMEQ Servicing*, — F. Supp.2d —, 2009 WL 2905745 (E.D. Cal. Sept. 4, 2009) suggested an alternative that may offer an appropriate option for accomplishing judicial enforcement of the conference requirement. While the *Nool* court held that the statutory provisions standing alone were not enforceable through a private right of action, the court appropriately pointed out that the borrower could have brought an action under Cal. Business and Professions Code § 19200, which supports a private right of action for "any practices forbidden by law." *Nool, supra* at note 2.

Some California courts have placed further limits on enforcement of the conference requirement of § 2923.5, holding that California's tender rule applies to any action to enforce the conference statute. *Delgada v. bank of America Corp*., 2009 WL 4163525 (E.D. Cal. Nov. 23, 2009); Keen *v. American Home Mortgage Servicing,* —F. Supp. 2d —, 2009 WL 3380454 (E.D. Cal. Oct. 21, 2009). The tender rule requires that borrowers challenging a non-judicial foreclosure sale in California must allege tender in the amount of the lender's secured indebtedness in order to maintain a cause of action asserting any irregularity in sale procedures. Another California court improperly held that the Home Owner's Act of 1933 ("HOLA") preempts § 2923.5 as to federal savings associations regulated by the Office of Thrift Supervision. *Murillo v. Aurora Loan Services LLC,* 2009 WL 2160579 (N.D. Cal. July 17, 2009). Section 2923.5 clearly deals with foreclosure procedures. It does not mandate changes to loan terms. As part of the state's traditional regulation of mortgage foreclosures, the statute is not preempted by federal statutes or by actions of agencies acting under federal banking laws.

## VII. Federal Developments: Senate Bill 1731

At the federal level, legislation and administrative actions have done little to limit mortgage servicers rush to foreclose against homes at an unprecedented rate. One attempt to create a federal role in reducing foreclosures has come in the form of Senate Bill 1731, the "Preserving Homes and Communities Act of 2009" sponsored by Senator Jack Reed of Rhode Island and introduced on September 30, 2009. The Bill has been referred to the Senate Committee on Banking, Housing, and Community Affairs.

Section 4 of Senate Bill 1731 authorizes the Secretary of HUD to provide grants to state and local governments for "mediation initiatives." The Bill lists features that a state or local mediation program must have in order to qualify for one of the federal grants. The required features include (1) mandatory participation by mortgagors and foreclosing mortgagees; (2) a requirement that the parties participate in good faith; (3) the opportunity for the mortgagor to participate until the time of foreclosure sale; (4) supervision and enforcement of mediation requirements by a state court or a state or local governmental agency; (5) a prohibition on shifting of fees and costs related to mediation from the mortgagee to the mortgagor; (6) notice and an opportunity for participation for junior lienholders (7) referral of mortgagors to housing counselors; and (8) no program cost to the mortgagor or mortgagee. In addition to these procedural features, an eligible program must require that the mortgagee produce specified documents for mediation. These documents include a loan modification or net present value calculation in a form developed or provided by the Departments of Treasury or HUD; the original loan documents, including the note and all assignments; any pooling and servicing agreement that allegedly prevents approval of a loan modification; payment history records, including accounting for fees and costs; and documentation showing consideration of other alternatives to foreclosure beyond a loan modification.

Bill 1731 anticipates that the federal contributions will not exceed 50 percent of the cost of the state or local program. It authorizes appropriations of $80,000,000 for the first fiscal year in which the statute is in effect.[21]

## VIII. Pending State Legislation

### *New Mexico*

New Mexico Senate Bill 651, designated the "Mortgage Fair Foreclosure Act," has been referred to the state's Senate Judiciary Committee. In addition to creating a statewide foreclosure mediation program, the Bill would require service of new notices of the right to cure a default and reinstate a mortgage, both before and after the lender files a foreclosure complaint.[22]

Senate Bill 651 would create a two-step system to encourage settlement of foreclosure cases in New Mexico. First, the legislation lists loss mitigation actions a lender must consider before it may file a foreclosure complaint. The options include loan modification, reinstatement and forbearance plans, short sale and a deed in lieu of foreclosure. The lender must certify that it considered all appropriate options before filing a foreclosure complaint. As a second device to encourage settlements, the Bill authorizes courts to order alternative dispute resolution (ADR) after the lender has filed a foreclosure complaint. The ADR option would be available to the parties without cost.

The New Mexico Bill does not mandate a particular form of ADR. The court itself may supervise negotiations, approve a special master, or allow a housing agency or private mediator to oversee settlement proceedings. If a court finds that a lender failed to negotiate in good faith during either the pre-complaint loss mitigation review or during a post-complaint ADR proceeding, the court may dismiss the foreclosure action.

The Bill's requirements for certification of pre-foreclosure loss mitigation actions are very general. For example, the law does not require documentation of any specific loan modification analysis. Significantly, the referral to ADR after a foreclosure lawsuit has been filed is not mandatory. The legislation appears to allow courts complete discretion to order ADR on a case by case basis.

## *California*

Recent California legislation created limited and weak incentives for lenders to consider loan modifications before they foreclose. First, California Civil Code § 2923.5, enacted in late 2008, mandates a thirty-day delay before a lender may initiate a non–judicial foreclosure. Lenders who start a foreclosure proceeding must file a certification that they attempted to contact the borrower during the 30-day period in order to try to negotiate a loan workout. A second statute, California Civil Code § 2923.52-53, enacted in 2009, imposes a 90-day delay after the filing of a notice of intent to foreclose and before a foreclosure sale may be scheduled. During the 90-day delay the lender must again attempt to implement a loan modification as an alternative to foreclosure. Neither statute has had any significant impact in abating the epidemic of California foreclosures. The pre-foreclosure delay imposes no enforceable duties beyond requiring that servicers try to contact the homeowner. A generous exemption provision excludes most mortgage servicers from the ninety-day delay before a foreclosure sale.

Introduced in September 2009, California Assembly Bill No. 1588 would authorize the California Housing Finance Agency to set up a "Monitored Mortgage Workout Program." Under the program, when a lender records a notice of default it would be required to send the borrower a notice of the opportunity to participate in the Workout Program. The borrower has thirty days to elect to participate. The borrower's election to participate triggers a stay of foreclosure proceedings. However, as an additional requirement to secure the right to participate in negotiations, the borrower must escrow a sum equal to 60% of the current mortgage payment. The borrower must then escrow ongoing future payments in the same amount in order to keep the stay of proceedings in effect while pursuing settlement negotiations.

Under the proposed California program, when a case qualifies for the monitored workout program, the Housing Finance Agency appoints a monitor to supervise negotiations over a loan modification. The monitor develops an affordable loan modification proposal and submits it to the lender and the borrower. If the borrower agrees to the modification proposal but the trustee/lender does not, the borrower may institute an action in the superior court to enforce the modification. The borrower can also bring an action to enforce the proposed modification if the monitor found the trustee did not negotiate in good faith. The Bill provides that, once the borrower files such an action, and provided the borrower has made the required escrow payments, "[t]he court shall enforce the term of the loan modification proposal in an expedited proceeding."

The loan modification proposal under Bill 1588 may include principal reduction or deferral, interest rate reduction, and term extension. An appropriate modification may also consist of "[c]ompliance with a federally mandated loan modification program." Under the law, California courts should be able to order loan modifications with principal reductions. A servicer's participation in the HAMP program should not shield it from the court's authority to modify the loan, even to the extent of principal reduction. The HAMP Supplemental Guidance makes clear that "each servicer . . . must be aware of, and in full compliance with, all federal state, and local laws.[23]. However, despite the broad authority this legislation would give courts to require servicers to implement loan modifications, the escrow requirement, unless changed, may prove cumbersome to administer and will unnecessarily deter many participants who could benefit significantly from the program.

## *Ohio*

In late 2008 the Ohio Supreme Court promulgated guidelines for a model foreclosure mediation program and authorized the state's 88 county common pleas courts to implement programs based on the model. A number of counties proceeded to do so, including the courts serving major metropolitan areas such as Cleveland, Columbus, Akron, and Toledo. Ohio House Bill 306, introduced in November 2009, would require all Ohio counties to set up foreclosure mediation programs.

The mediation system outlined in Ohio House Bill 306 resembles the state Supreme Court's model program. Notice of the right to participate in mediation would be served upon a homeowner along with the summons and complaint. The homeowner must answer the complaint within 28 days of service in order to be eligible for the program. Foreclosure proceedings would then be stayed pending mediation. Under procedures outlined in the Bill, a session should be held within 60 days of the date an answer is filed. A mediator may require that the lender produce documents, and a mediator certifies whether the lender participated in good faith. A county common pleas court could dismiss a foreclosure case if the lender did not appear for a duly scheduled mediation.

In order to fund the program, House Bill 306 authorizes county clerks to assess an additional filing fee of up to $500 for residential foreclosure cases. Funds collected from these fees would be designated for a "residential foreclosure mediation fund." The court clerk may appoint volunteer mediators or mediators who require a fee to supervise the sessions.

Although the Ohio Bill on its face provides the potential for substantial court control over mediations, including scheduling and the production of documents, it contains no guidelines describing basic documents that must be produced. Nor does the legislation define what alternatives to foreclosure must be considered in mediations.

## *Wisconsin*

Wisconsin Senate Bill 255, introduced in August 2009, would establish a statewide system of mandatory mediation in foreclosure cases.[24] Bill 255 requires a lender to make a good faith effort to resolve a mortgage default before filing a foreclosure complaint with the court. A court would have authority to dismiss a foreclosure action filed without complying with this requirement.

Under the Wisconsin Bill, when the mortgagee files a foreclosure action it must serve the borrower with a notice of the right to request mediation. The borrower must request mediation within ten days in order to obtain a stay of proceedings pending mediation. Upon receipt of the borrower's request for mediation, the director of the state courts refers the borrower to a housing counselor. Cooperation with the counselor would be mandatory for homeowners in the state's more populous counties. The director of courts appoints mediators who schedule sessions and supervise the formulation of proposals. The law does not obligate the parties to participate in the mediation process for longer than 60 days after the first session.

A lack of good faith in mediation under the Bill may be found when a party fails to attend sessions (although appearance by "telecommunications" is allowed). A mediator may also find bad faith when a party fails to provide financial information, fails to designate a lender representative with authority to settle, or fails "to consider debt restructuring alternatives and to provide a written statement as to why debt restructuring alternatives are unacceptable."

If the mediator certifies to the court that the mortgagee did not participate in mediation in good faith, the borrower may move to have the court supervise mediation between the parties. The court may order the parties to mediate under the court's supervision for an additional 60 working days. If the court then finds that the mortgagee is not participating in good faith, the court can prohibit the mortgagee from continuing any action to foreclose for 180 days. The court may also assess costs and attorneys fees against the mortgagee who does not participate in good faith.

Finally, Bill 255 contains a provision which shortens the redemption period after entry of a judgment from twelve to six months if mediation ends without a mutual agreement. In effect, this provision would punish homeowners who participate in mediation, but due to no fault of their own are unable to have their cases resolved without foreclosure.

## Massachusetts

The foreclosure mediation bill introduced into the Massachusetts legislature in February 2009 (Mass. House Bill 4003) incorporates many provisions from the current Connecticut foreclosure mediation statute and builds upon foreclosure reforms enacted in Massachusetts the previous year. In 2008 Massachusetts implemented a statute requiring a ninety-day pre-foreclosure notice prior to initiation of a non judicial foreclosure proceeding in the state. Lenders must serve a copy of this notice on the state's Commissioner of Banks before beginning a foreclosure. Massachusetts House Bill 4003 would direct the Commissioner of Banks to notify a court of receipt of the pre-foreclosure notices. The court would then send the borrower a notice of the availability of mediation.

Because foreclosures in Massachusetts would otherwise proceed without any significant judicial oversight, House Bill 4003 directs the chief justice for administration and management of the courts to create mediation programs to operate under the auspices of the local courts. As under the Connecticut foreclosure mediation program, mediators would be selected by the courts. A court official would establish policies and procedures for mediation.

Under the Massachusetts Bill, the borrower would have fifteen days from receipt of notice of the mediation program to indicate an election to participate. The mediation period would last 60 days from return of the notice. Presumably this would not create any additional delay beyond the 90-day pre foreclosure notice period already established by the 2008 legislation.

At a minimum the Massachusetts Bill would require mortgage servicers to consider a homeowner's eligibility for a loan modification under major federal initiatives such as HAMP. The Bill would permit a foreclosure to proceed only after a lender has made "a good faith review of the borrower's financial situation and offered, whenever feasible, a loan modification, or other option to assist the borrower in bringing the arrears current." The good faith review must include "an evaluation of the borrower's eligibility for all loan modification programs established by the federal government or the mortgage industry." Under the Bill, a lender must file of record an affidavit indicating compliance with the mediation provisions before it could proceed with a foreclosure sale. The legislation expressly provides that the lender's "failure to comply with the mediation requirements is a defense to foreclosure."

## Pennsylvania

During 2008 and 2009 courts of common pleas in several Pennsylvania counties implemented special diversion or conference programs for residential foreclosure cases. The local courts established these programs pursuant to general state statutes and state court rules which give county common pleas courts substantial authority over local court administration. Over the past two years foreclosure diversion programs have been in operation in courts serving some of Pennsylvania's major population centers, including Philadelphia, Pittsburgh, Scranton, Bethlehem, and counties in suburban Philadelphia.

Pennsylvania House Bill No. 1042, introduced in March 2009, would direct each county court in the state to establish a conciliation conference system for residential foreclosure cases. The Bill directs the Pennsylvania Supreme Court to develop model guidelines for these programs. The guidelines would require conferences in all foreclosures of owner-occupied properties prior to entry of a judgment. Homeowners would receive notice of the scheduled conference when served with a summons and complaint. A judge, case manager, or a "judge pro tempore" would preside over the conciliation process. Parties must address eight enumerated issues in conciliation, including restructuring of the mortgage debt and application for state financial assistance programs. If the homeowner does not appear for a scheduled conference, the case may proceed to judgment and foreclosure sale. If the lender does not appear, "the case shall not proceed until a rescheduled conference is held."

## *Texas*

Introduced in March 2009 as Texas Senate Bill 1475 and House Bill 3426, this legislation would apply to non-judicial foreclosures by lenders and servicers who "requested and received funds from the federal government as provided by the Emergency Economic Stabilization Act of 2008." It would require that the servicer give the homeowner notice of the availability of mediation and attempt to negotiate with the homeowner before acceleration of a mortgage or before posting a property for foreclosure sale. The lender must serve the notice at least 90 days before loan acceleration or posting for sale. Foreclosure proceedings would be stayed pending negotiations so long as the homeowner sent a notice of election to participate within thirty days of receiving notice of the option. Both the servicer and the homeowner must consent to formal in-person mediation. Otherwise, the conferences may take place by telephone.

The Bill does not set any parameters for the negotiations. However, it expressly provides for an action for equitable relief and damages against a lender who violates the law, including civil penalties of up to $2,000.

## *Florida*

As occurred in Pennsylvania during 2008 and 2009, several local Florida courts issued administrative orders establishing mandatory mediation programs for residential foreclosures. Early in 2009 the Florida Supreme Court appointed a task force to recommend a uniform statewide foreclosure mediation program. The Supreme Court released a report and administrative order adopting most of the task force's recommended procedures on December 28, 2009. The Supreme Court's report and procedures are discussed above.

Proceeding along a different track, a Bill creating a Mortgage Foreclosure Diversion Pilot Program was introduced in early 2009 in identical forms in Florida's House (Florida House Bill No. 205) and Senate (Bill Nos. 1058 and 2022). The bills were withdrawn from consideration in May 2009.

The Florida bills would have authorized circuit courts to establish mandatory foreclosure diversion pilot programs. A conciliation conference would have to be held before a foreclosure judgment could be entered. The legislation mandated homeowner cooperation with housing counselors. A judge, case manager, or other person designated by the court would preside over conferences. The bills did not mandate consideration of specific foreclosure alternatives, but listed a number of procedural requirements for each session.

Perhaps in recognition of the Florida state constitution's delegation of authority to the judiciary to regulate court procedures, the proposed legislation was styled in the alternative as a request to the Florida Supreme Court for rulemaking. As discussed above, the Florida Supreme Court has exercised its rulemaking authority by its December 28, 2009 administrative order mandating a statewide foreclosure mediation program.

## Notes

[1] The text of the Bill can be viewed at: http://www.leg.state.nv.us/75th2009/Bills/AB/AB149_EN.pdf.
[2] Nevada Judiciary site at http://www.nevadajudiciary.us/index.php/foreclosuremediation.
[3] *Id*. at http://www.nevadajudiciary.us/index.php/foreclosuremediation/575-3400requests2
[4] *RealtyTrac U.S. Foreclosure Market Report* November 2009 at http://www.realtytrac.com/contentmanagement/pressrelease.aspx?channelid=9&accnt=0&itemid=8116
[5] These programs are discussed in detail in NCLC's Report *State and Local Foreclosure Mediation Programs: Are They Saving Homes?* (September 2009) available at consumerlaw.org.
[6] The difficulty in cross state comparisons and attribution of a single factor to a decline or increase in foreclosure activity can be gathered from considering Massachusetts, another non judicial foreclosure state. Massachusetts experienced a 26% drop in foreclosure filings from October to November 2009. No new state laws to protect homeowners in foreclosure were implemented in Massachusetts during 2009. Similar decreases occurred in Rhode Island (27% decrease) and South Carolina (23% decrease) over the same period. Rhode Island's largest city, Providence, initiated a foreclosure mediation program in August 2009. South Carolina's Supreme Court entered an administrative order requiring certification of compliance with the HAMP program as a condition to judicial foreclosures in the state in May 2009. It is hard to discern any relationship between the decreases in foreclosures and changes of laws in these three states.
[7] Rule 7(d) Nevada Supreme Court Foreclosure Mediation Rules, as amended November 2009 at http://www.nevadajudiciary.us/images/foreclosure/adkt435_amendedrules.pdf.
[8] The text of Maine Rules of Civil Procedure Rule 93 can be found at: http://www.courts.state.me.us/court_info/services/foreclosure/index.html
[9] Maine Rule 93(i), (j).
[10] Maine Rule 93(g), (n).
[11] http://courts.delaware.gov/Courts/Superior%20Court/pdf/?Administrative_Directive_2009-3.pdf
[12] Providence City Code §§ 13-213 to 13-217. The text of the Providence ordinance can be found at http://www.psh.com/stuff/contentmgr/files/0/c86431439116cc27543693ca686b2082/formdocs/prov_foreclosure_and_eviction_odinances.pdf.
The City's program guide for the conciliation conferences along with forms appears at http://providenceri.com/deeds/ForeclosureOrdinance%20Implementation.rtf.
[13] Defined in N.Y. Real Property Actions and Procedures Law § 1304.
[14] http://www.floridasupremecourt.org/pub_info/documents/Filed_08-17-2009_Foreclosure_Final_Report.pdf
[15] Florida Supreme Court Administrative Order No. AOSC09-54, at http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-54.pdf
[16] The form states that the servicer must provide "[d]ocumentary evidence the plaintiff is the owner and holder in due course of the note and mortgage sued upon." This language suggests, incorrectly, that a holder of a note must be a holder in due course in order to have standing to foreclose.
[17] For a contrary view, see *Onewest Bank FSB v. Berry*, 25 Misc.3d 12189A, 2009 WL 3417852 (Sup Court Suffolk County Oct. 23, 2009) (declining to vacate default judgment based on homeowner's request for conference in case involving non subprime/high cost loan).
[18] Cal. Civ. Code § 2923.5(a)(2).
[19] Cal. Civ. Code § 2923.5(b).
[20] Compare *Ortiz v. Accredited Home Lenders, Inc.,* 639 F. Supp.2d 1159, 1166 (S.D. Cal. 2009) (refusing to dismiss borrower's action for monetary damages, agreeing with borrower that "the California legislature would not have enacted this 'urgency' legislation, intended to curb high foreclosure rates in the state, without any accompanying enforcement mechanism.") with *Kuoha v. Equifirst Corp.*, 2009 WL 3248105 (S.D. Cal. Oct. 7, 2009) (no private right of action for damages resulting from alleged violation of § 2923.5); *Gaitan v. MERS*, 2009 WL 3244729 (C.D. Cal. Oct. 5, 2009) (rejecting claims for monetary damages and an order setting sale aside, holding statute "contains no language that indicates any intent whatsoever to create a private right of action."); *Nool v. HOMEQ Servicing*, — F. Supp.2d —, 2009 WL 2905745 (E.D. Cal. Sept. 4, 2009) (dismissing claim for money damages); *Anaya v. Advisors lending Group*, 2009 WL 2424037 (E.D. Cal. Aug. 5, 2009) (rejecting claims for damages and order enjoining sale).
[21] In addition to provisions designed to promote state and local foreclosure mediation programs, Senate Bill 1731 would require consideration of HAMP loan modifications as a condition to foreclosures. The Bill prohibits a covered mortgagee from initiating or continuing a foreclosure proceeding unless the mortgagee has determined whether the homeowner is eligible for a loan modification and offered the modification to an eligible homeowner. Consistent with current HAMP directives, a loan modification would be mandatory when a net present value test produced a result favoring modification. The Bill authorizes funding for state programs that provide grants to homeowners to prevent foreclosures. It requires foreclosing entities to establish their right to foreclose based on a note and deed of trust. Finally, the Bill directs the Secretary of HUD to create a system for monitoring foreclosure data from around the country. One purpose of the database is to evaluate the effectiveness of public efforts to reduce foreclosures.
[22] Separate and distinct from this proposed legislation, New Mexico's First Judicial District, which includes the City of Santa Fe, implemented a local foreclosure mediation program in mid 2009.
[23] HAMP Supplemental Directive 09-01 p.12 (April 6, 2009).
[24] In 2009 the Wisconsin attorney general authorized a system of foreclosure mediations to be coordinated through the Marquette Law School in Milwaukee. Participation in this program requires consent of the lender and the borrower.