January 2011

Recent Developments in Foreclosure Mediation

Court-ordered tolling of interest and fees as a means to compel good faith negotiations over loan modifications

I. Negotiations over loan modifications - a broken system

Court-supervised conferences can play a key role in ensuring that negotiations between a homeowner and a servicer over alternatives to foreclosure proceed in good faith. Absent this oversight, the negotiation process may well devolve into chaos and unnecessary foreclosures will occur. This breakdown in negotiations has been a major cause of the failure of federal loan modification initiatives to achieve their potential to prevent millions of home foreclosures. This Report will examine the remedies that some courts have recently fashioned to ensure that mortgage servicers negotiate in good faith and consider all options that may avoid a foreclosure.

Servicers' lack of good faith in negotiating with homeowners over mortgage modifications has been rampant and well documented.[1] For example, the rules for the HAMP program require that servicers inform a homeowner of a decision within thirty days of receipt of a completed application. The servicer's notice of decision must include an accurate

[1] Statement of Neil Barofsky, Special Inspector General Troubled Asset Relief Program before the House Committee on Oversight and Government Reform Jan. 26, 2011; Congressional Oversight Panel, December Oversight Report, A Review of Treasury's Foreclosure Prevention Programs, Dec. 14, 2010; *Evaluating Progress of Tarp Foreclosure Mitigation Programs: Report of Congressional Oversight Panel* April 2010 http://cop.senate.gov/reports/library/report-041410-cop.cfm; U.S. Government Accountability Office, *Troubled Asset Relief Program, Further Actions Needed to Fully and Equitably Implement Foreclosure Mitigation Programs* GAO 10-634 (June 2010); *Factors Affecting Implementation of the Home Affordable Modification Program* (March 25, 2010); and U.S. Government Accountability Office: *Troubled Asset Relief Program Home Affordable Modification Program Continues to Face Implementation Challenges* (March 2010); Testimony of Diane Thompson before the Senate Committee on Banking, Housing, & Urban Affairs: *Problems in Mortgage Servicing from Modification to Foreclosure*, November 2010 (available at NCLC website: http://www.nclc.org/issues/hamp-policy-analysis.html). *See also Pro Publica: Eye on Loan Modifications* August 16, 2010 *http://www.propublica.org/article/homeowner-questionnaire-shows-banks-violating-govt-program-rules; The Chasm Between Words and Deeds VI: HAMP is Not Working* California Reinvestment Coalition July 2010. http://www.calreinvest.org/system/assets/214.pdf

statement of the reason for a denial. Servicers rarely comply with this obligation. Instead, for many homeowners the application process extends unresolved over many months, even years. While they are purportedly reviewing the application, servicers deny receipt of documents sent to them multiple times. When they finally admit receipt of the documents, servicers claim the information is too old. New documentation must be submitted, and the entire process begins over again.

In addition to the routine mishandling of documents, a number of other obstructionist practices have characterized servicers' review of requests for loan modifications. For example, reasons for denial may change each time a homeowner rebuts a servicer's stated reason for a rejection. When modification offers are presented, the terms may be calculated under proprietary programs rather than under the more affordable HAMP guidelines that the servicers are obligated to use. These proprietary modifications often contain unaffordable terms and are structured to fail. Finally, with a practice that effectively undercuts the entire review process, servicers proceed with foreclosure sales while purportedly negotiating over alternatives to foreclosure. No rational person would consider these practices as characterizing good faith negotiations.

Court-supervised mediation and conference programs typically set rules for the conduct of negotiations between the parties. This is true for conference and mediation programs created specifically for mortgage foreclosures. In these programs the servicer's compliance with conference program rules can be an element of good faith participation. For example, nearly all foreclosure conference programs require that servicers participate through a representative who has authority to settle claims, including authority to approve or deny requests for a loan modification. Despite this requirement, many conferences are delayed interminably because attorneys appearing for servicers lack authority themselves and are unable to reach a staff person of the servicer who has authority to respond to proposals. Certain foreclosure conference programs have requirements for timely production of documents. Compliance with a rule requiring production of specific documents can also be a factor defining good faith participation under a program rule.

II. Enforcing the obligation to negotiate over loan modification in good faith: Examples

a. *The obligation to negotiate in good faith is not limited to foreclosure mediation programs*

The following section discusses recent decisions from courts in New York. A specific New York statute and court rule require foreclosing mortgage holders in New York to participate in settlement conferences in good faith.[2] Recently enacted statutes in Maine, Nevada, Vermont, and the District of Columbia similarly establish express obligations for mortgage servicers to participate in good faith negotiations with the homeowner before they can proceed to a foreclosure sale.[3] In addition, several bankruptcy courts have issued general orders that authorize individual judges to require creditors to negotiate with debtors in good faith in various proceedings, including in matters related to foreclosures. These state statutes and bankruptcy court programs with express good faith participation requirements are summarized in Appendix A to this report.

It is important to keep in mind that specific statutes and court rules requiring conferences in foreclosure cases are not the only sources of a court's authority to enforce good faith standards in negotiations over a loan modification. Courts can enforce good faith negotiation requirements and invoke similar remedies against recalcitrant servicers based on more general authorities. These include the courts' traditional power to enforce equitable standards in foreclosures and general rules authorizing courts to order parties to confer. These more general sources of authority are discussed below.

b. *Recent New York decisions sanctioning servicers for failure to negotiate over loan modifications in good faith.*

Courts need to play an active role in enforcing a requirement for good faith negotiations over a loan modification. Sanctions for failure to participate in a conference in good faith must be significant enough to force servicers and their attorneys to change ingrained patterns of conduct. During the past year, courts in New York have garnered the most experience in attempting to craft appropriate sanctions against servicers who failed to negotiate with homeowners in good faith. It is helpful for advocates

[2] N.Y. CPLR § 3408; Admin Order of Chief Judge of N.Y. Courts § 202.12-a(c)(4).
[3] Citations to and relevant excerpts from these statutes are contained in Appendix A to this Report.

nationwide to consider the options these courts explored, as there is little basis for restricting these remedies to one program in a particular state.[4]

Faced with a servicer who refuses to negotiate in good faith, a court always has the option simply to bar foreclosure. In *Wells Fargo Bank, N.A. v. Hughes*[5] the court reviewed several months of negotiations between the servicer and a homeowner. The foreclosure involved a predatory high interest loan. The servicer's final offer consisted of a modification that would increase the homeowner's monthly payment by 35%. Moreover, under the proposed modified loan the homeowner would remain subject to an abusive adjustable rate. The servicer refused to consider the court's recommendation that it fix the interest rate and lower payments by extending the repayment term. Finding the servicer's intransigent negotiation position unconscionable, the court refused to permit foreclosure and dismissed the action.

In *BAC Home Loan Servicing v. Westervelt*[6] another New York court found similar bad faith in a servicer's negotiation tactics. The servicer had given inconsistent and inadequately documented reasons for denial of a HAMP modification. The servicer's most recent denial had cited the homeowner's failure to pass HAMP's 31% of household income test, a calculation which the homeowner disputed. The servicer failed to appear for a scheduled conference and did not respond to the homeowner's dispute within the thirty-day period required by HAMP guidelines

The *Westervelt* court recognized that dismissal of the foreclosure action was one appropriate option. However the court expressed concern about the effect a dismissal would have upon the homeowner. The court noted, "dismissal would unnecessarily delay the modification application process thus exacerbating the homeowner's frustration, anxiety and

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[4] For example, in *U.S. Bank Nat'l Ass'n v. Mathon*, 29 Misc. 3d 1228(A), 2010 WL 4910164 (Table) (N.Y. Sup Ct. Suffolk Co. Dec. 1, 2010) the servicer had accepted over twelve months of trial modification payments, which the homeowner paid in good faith reliance upon the servicer's promise to approve a permanent modification. The servicer then proceeded with foreclosure, making unspecified claims of excess household income and lost documents. The court found the servicer's conduct rife with indicia of bad faith, unclean hands, and inequitable conduct. In setting the matter down for a hearing on imposition of sanctions for bad faith the court relied on general equitable principles applicable to all foreclosures and did not mention the express good faith negotiation requirement under New York's conference statute, CPLR § 3408.

[5] 27 Misc.3d 628, 897 N.Y.S. 2d 605 (Sup. Ct. Erie Co. Jan. 13, 2010)

[6] 29 Misc.3d 1224(A), 2010 WL 4702276 (N.Y. Sup. Dutchess Co., Nov. 18, 2010)

uncertainly about whether she will eventually lose her home, and, further, during the time it would take for plaintiff to re-commence the action, arrears, including interest, fees, and penalties would continue to accrue, plunging the homeowner even further into plaintiff's debt."[7]

The *Westervelt* court emphasized that the servicer had invoked the court's equitable powers by commencing a foreclosure action. Therefore, the court had "the power to impose an equitable remedy commensurate with the Bank's bad faith regarding this loan modification."[8] The remedy the court chose to impose was a bar on collection of any arrears, including interest, costs and fees, beginning from the date of the last conference when the servicer had given the homeowner an unsupported denial of the HAMP application. The court's bar on collection would continue until the servicer gave the homeowner a decision on a final loan modification and, if the modification was denied, until the settlement process had considered all possible modifications for which the homeowner might be eligible. The court set the matter for a hearing on further sanctions to be imposed on the servicer's attorney. Potential sanctions could include "discharge of the underlying mortgage obligation, exemplary damages and loss of the privilege of appearing by local counsel in all foreclosure conferences conducted in Dutchess County."[9]

The court in *Emigrant Mortgage Co., Inc. v. Corcione*[10] took a more aggressive approach. The matter came before the court after five conference sessions conducted by a referee. The court found the servicer's negotiation positions to be rife with overreaching and unconscionability. To begin with, the servicer had delayed fourteen months in filing a foreclosure action. During this period interest accrued at an 18% default penalty rate. The servicer's forbearance offer included excessive and unexplained fees, a broad waiver of claims, and a purported consent to waive automatic stay protections in any future bankruptcy. In order to send a strong message to deter attempts to impose terms such as these in future settlement conferences the court employed its equitable powers to assess exemplary damages of $100,000 against the servicer. In addition the court forever barred accrual of interest and fees claimed since from the date of default to the date of the

[7] *Id.* 2010 WL 4702276 * 2.
[8] *Id*. * 4.
[9] 2010 WL 4702276 * 5.
[10] 28 Misc. 3d 161, 900 N.Y.S. 2d 608 (N.Y. Sup. Suffolk Co. 2010).

court's order, substantially reducing the unpaid balance claimed by the servicer.[11]

As an alternative to dismissing the action or tolling interest and fees, the New York court in *Wells Fargo Bank, NA v. Meyers*[12] simply ordered the servicer to execute the final modification it had repeatedly refused to approve without a clear explanation. This servicer had initiated foreclosure proceedings the day after the homeowners received a HAMP trial modification offer. According the court, "this conduct alone demonstrates bad faith on the part of the plaintiff which would involve the equitable powers of the court."[13] In addition, during conferences the servicer gave inconsistent reasons for refusing to approve a permanent loan modification. The servicer had recently changed its reason for denial from investor restriction to excessive household income. During the pendency of the proceeding the homeowners had made all payments required under two separate trial modifications.

The *Meyers* court eventually held a hearing to consider the servicer's conduct in the conferences. At the hearing the servicer's witness was unable to explain the calculations which led to the denial. Applying the equitable principles triggered by the servicer's filing of the foreclosure complaint, the court found a lack of good faith. The bad faith consisted of the ever-changing and undocumented reasons for denying a permanent modification as well as the decision to foreclose while still evaluating the homeowner for a final modification. As a sanction the court ordered specific performance of the conversion of the current trial modification to a permanent modification.[14]

Advocates for homeowners in several New York counties, particularly in Richmond County (Staten Island) have succeeded in obtaining a number of orders from trial courts that impose meaningful sanctions after servicers exhibited a lack of good faith in foreclosure conferences. The orders have

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[11] In an earlier decision the same trial court went substantially further in imposing sanctions for bad faith negotiation conduct. In *Indy Mac v. Yano-Horosk*, 890 N.Y.S. 2d 313 (Sup. Ct. Suffolk Co. 2009), the court not only dismissed the foreclosure action that had previously gone to judgment, but also canceled the entire note and mortgage. The original loan amount had been $292,500 with the lender claiming a current unpaid balance of over $500,000. An appellate court reinstated the mortgage, holding that the trial court's imposition of so severe a sanction *sua sponte* and without warning had been beyond the court's equitable powers. *Indy Mac v. Yano-Horosk,* 78 A.3d 895, 912 N.Y.S. 2d 239 (N.Y.A.D. 2010).

[12] 913 N.Y.S.2d 500 (Sup. Ct. Suffolk Co. 2010)

[13] *Id*. at 503.

[14] *Id*. at 504.

come about from referrals by court officials who review the status of the conferences on a regular basis. The officials keep track of servicers' receipt of documents and responses to requests for loss mitigation alternatives. In this way, despite the high volume of foreclosures, appropriate cases can be referred to a judge for consideration of sanctions.

Court orders from conferences in Staten Island have included provisions tolling the accrual of interest until the servicer complies with directives to document the basis for denial of a loan modification. For example, in one case the court ordered tolling of interest from the date of a prior conference, with the servicer ordered to provide documentation of alleged investor restrictions to a HAMP modification and reasonable efforts to get a waiver the restrictions.[15] If the servicer did not approve a modification within the next month, the servicer would have to provide a representative with full authority to settle (not simply an attorney with phone contact to a servicer's office) in person for the next conference date. The order permanently barred collection of the tolled interest.

III. Sources of the obligation to negotiate in good faith in the absence of a specific rule for a foreclosure conference or mediation program.

Unlike in New York, where a specific state statute and court rule require participation in settlement conferences in foreclosure cases, no specific statute sets such a requirement in most jurisdictions. Nevertheless, most courts have ample authority to enforce a requirement for good faith negotiations on a case by case basis. This authority derives from the courts' general powers to control the conduct of litigation, particularly when foreclosure is at issue.

The courts' broad authority to supervise mortgage foreclosures. In the American legal system, courts have traditionally played an active role in policing the conduct of parties to a foreclosure.[16] Courts have the power

[15] Wachovia v. Moringiello, Supreme Court of State of New York County of Richmond No. 130075/2009, Order of April 9, 2010. *See also .g.* U.S. Bank National Assoc. v. Zegarra, 131205/2009 (July 21, 2010); American Home Mortgage v. Maisonet, 130444/2009 (July 21, 2009); IndyMac v. Costello No. 130302/2009 (July 14, 2010).

[16] Gelfert v. National City Bank of New York, 313 U.S. 221, 232-33 (1941); Honeyman v. Jacobs, 306 U.S. 539, 543-44 (1939); Richmond Mortgage Corp. v. Wachovia Bank, 300 U.S. 124, 129-30 (1937).

to bar the remedy of foreclosure when the party seeking this relief engaged in inequitable conduct or otherwise has "unclean hands."[17] The filing of a foreclosure action triggers the court's obligation to apply these equitable principles.[18] Courts can apply the same equitable doctrines in reviewing the propriety of a non-judicial foreclosure.[19] If there are viable alternatives to foreclosure and the lender has engaged in a pattern of bad faith negotiations to explore those alternatives, foreclosure is clearly inequitable and should not proceed.

A court's authority to require good faith negotiations under Rule 16. Nearly all state and federal courts have direct authority to order parties to a lawsuit to engage in good faith negotiations.[20] Federal Rule of Civil Procedure 16 and state court rules modeled after Rule 16 give courts wide discretion to require participation in conferences or mediation in order to facilitate settlement. On motion of a party or on its own initiative a court may impose sanctions upon a party or its attorney for improper conduct related to conferences.[21] Sanctionable conduct under Rule 16 includes: (a) a failure to appear at a scheduled conference; (b) appearing substantially unprepared to participate or participating in bad faith; and (3) failure to obey a scheduling order related to the conference.[22]

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[17] Wells Fargo Home Mortgage, Inc. v. Neal, 922 A.2d 538 (Md. 2007) (applying general equitable principles, non compliance with FHA loss mitigation guidelines can be asserted as a basis to enjoin non-judicial sale); Fleet Real Estate Funding v. Smith, 366 Pa. Super. 116, 530 A.2d 919 (1987); Heritage Bank, N.A. v. Ruh, 191 N.J. Super. 53, 465 A.2d 547 (1983); Brown v. Lynn, 392 F. Supp. 559, 563 (N.D. Ill. 1975) (loss litigation guidelines in FHA Handbook are "sensible equitable standards of conduct" and "foreclosure courts can, and in appropriate instances should, direct the parties to pursue and exhaust the alternatives to foreclosure enumerated in the Handbook."). *See also* M&T Mortgage Corp. v. Foy, 20 Misc. 3d 274, 858 N.Y.S. 2d 567 (N.Y. Sup. Ct. Kings Co. 2008) (placing upon foreclosing party the burden of proof of showing high-cost loan granted to minority borrower was not product of discriminatory landing practices).

[18] U.S. Bank National Association v. Mathon, 2010 WL 4910164 * 3 (N.Y. Sup. Suffolk Co. Dec. 1, 2010) (court sets hearing to consider sanctions in view of mortgage holder's apparent bad faith in failing to implement a promised loan modification).

[19] Ghervescu v. Wells Fargo Home Mortgage, 2008 WL 660248 (Cal. App. Mar. 13, 2008) (unpublished), *decision after remand* 2010 WL 4621734 (Cal. App. Nov. 16, 2010) (non-compliance with FHA loss mitigation rules may be ground to set aside non-judicial sale); Wells Fargo Home Mortgage, Inc. v. Neal, 922 A.2d 538 (Md. 2007).

[20] *See e.g.* Lillie-Putz Trust v. DownEast Energy Corp., 160 N.H. 716 8 A.2d 65 (N.H. 2010) (dismissing action as sanction for party's failure to appear for mediation as required under state court rule); Inmuno Vital, Inc., v. Telemundo Group, Inc., 203 F.R.D. 561 (S.D.Fla. 2001) (monetary sanction to be imposed against party who sent representative to mediation without authority to settle, contrary to court's order).

[21] F.R. Civ. P. 16(f).

[22] F.R. Civ. P. 16(f)(1). Negron v. Woodhull Hospital, 193 Fed. Appx. 772006 WL 759806 (2d Cir. 2006) (pattern of conduct that led to imposition of sanctions included failure to appear, appearance without

The court's order setting ground rules for a settlement conference is enforceable through contempt sanctions.[23] In the foreclosure context, the court clearly has the authority to direct a servicer to negotiate in good faith over a loan modification. If the court does not issue such an order on its own initiative, the homeowner entering an appearance may ask the court to do so. The court's order can set time frames for consideration of options and list documents to be exchanged. The order can require the servicer to comply with obligations to review an application under the HAMP guidelines, including the provision of timely and accurate notices.

The Court's inherent powers. While rules such as F.R. Civ. P. 16 give a court express authority to order parties to negotiate in good faith, courts may do so without such a specific directive. As part of their inherent authority to manage their caseloads, all courts may order parties to negotiate.[24] In foreclosure cases the exercise of these powers is particularly appropriate both as a case management tool and as a means of executing the court's traditional role in enforcing principles of fairness in foreclosures.

Sanctions in federal proceedings under 28 U.S.C. § 1927. A federal statutory provision is another source of authority for a court to sanction attorney conduct that obstructs good faith negotiations. 28 U.S.C. § 1927

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settlement authority, and non-compliance with court's orders related to conferences); Nick v. Morgan's Foods, Inc., 99 F.Supp.2d 1056 (E.D. Mo. 2000), *affirmed* 270 F.3d 590 (8th Cir. 2001) (violation of court's conference order in failing to prepare mediation memorandum and failure to send party with settlement authority); Metcalf v. Lowe's Home Center, Inc., 2010 WL 985293 (E.D. Mo. Mar. 15, 2010) (show cause on sanctions for failure to have corporate official authorized to settle present at mediation); Fisher v. SmithKline Beacham Corp., 2008 WL 4501860 (W.D.N.Y. Sept. 29, 2008)(party's service of summary judgment motion day before mediation and fixing nominal settlement offer before session violated good faith requirements of Rule 16, warranting sanctions); Hughes v. Lillian Golman Family , LLC, 2000 WL 1228996 * 2 (S.D.N.Y. Aug. 30, 2000) ("Where, as here, a party is represented at a settlement conference by an attorney who knows nothing about the case and who has not brought his client with him, the settlement conference is doomed to failure. In addition to multiplying the proceedings for the counsel who do appear at the settlement conference and are prepared to discuss the case, the failure of [defense counsel] to comply with my rules for settlement conferences also places an unnecessary burden on the Court itself.")

[23] F.R. Civ. P. 16(f)(2). *See generally In re* A.T. Reynolds & Sons, Inc., 424 B.R. 76 (Bankr. S.D. N.Y. 2010) (imposing sanction for violation of terms of court's conferencing order).

[24] Link v. Wabash Railroad Co., 370 U.S. 626, 630-31 (1962); *In re* Atlantic Pipe, 304 F.3d 135, 143 (1st Cir. 2002); *In re* Sosa, --B.R. --, 2011 WL 258673 (Bankr. D. R.I. Jan. 28, 2011); Fuchs v. Martin, 845 N.E. 2d 1038, 1042-43 (Ind. 2006) (court needs no general rule to require parties to participate in mediation). *But see* Hansen v. Sullivan, 886 S.W. 2d 467 (Tex. App. 1994) (court cannot set and enforce a requirement that parties negotiate settlement in good faith).

applies in federal courts, including bankruptcy proceedings.[25] The statute provides.

> *Counsel's liability for excessive costs.* Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Certain foreclosure mill attorneys show up repeatedly for conferences unprepared, without knowledge of the status of a case, and without authority to settle. In doing so, they inflict unnecessary costs on cash-strapped courts and homeowners. These foreclosure mill attorneys perform an essential role in enabling abusive servicer conduct. They should not be permitted to interject these tactics into federal proceedings and should be sanctioned under 28 U.S.C. § 1927 when they do.

IV. The meaning of "good faith."

Statutes and rules for certain foreclosure conference programs define elements of "good faith" participation. These elements may include appearance by a representative with appropriate authority or the timely production of specific documents.[26] Defining specific tasks or conduct as constituting good faith or bad faith obviously works most effectively in setting an enforceable standard. However, clearly defined standards are not always available. This does not mean that there are no standards to enforce.

Rule 16 and similar rules authorizing settlement conferences may expressly or implicitly require good faith participation without defining "good faith." However, the term is defined in many other contexts. Referencing examples from those contexts should be helpful in fashioning standards to apply in mortgage foreclosure settlement negotiations.

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[25] *See e.g. In re* A.T. Reynolds & Sons, Inc., 424 B.R. 76 (Bankr. S.D.N.Y. 2010) (28 U.S.C. 1927 is alternative grounds besides Rule 16 for sanctioning party who failed to participate in settlement conferences in good faith); Fisher v. SmithKline Beecham Corp., 2008 WL 4501860 (W.D.N.Y. Sept. 29,2008) (same).

[26] *See e.g.* Nev. Rev. Stat. § 107.086(5), text quoted in Appendix A.

The U.C.C., for example, offers both subjective and objective definitions of good faith. The general definition applicable to all articles is a subjective one: "good faith" means "honesty in fact in the conduct or transaction concerned."[27] Article 3 of the U.C.C. adds to this an objective standard for good faith: "honesty in fact and the observance of reasonable commercial standards of fair dealing."[28] Article 2, applicable to sales, applies a similar objective standard of commercial reasonableness to transactions involving merchants.[29] The implied "duty of good faith and fair dealing," based on the U.C.C. and the common law, also incorporates similar criteria such as standards of decency, fairness and reasonableness, and refraining from abuse of power.[30]

Finally, Black's Law Dictionary defines "good faith" to consist of both a subjective honesty and an adherence to objective industry standards The Dictionary defines "good faith" as:

> A state of mind consisting in (1) honesty in the belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage. (Black's Law Dictionary (7th ed. 1999).

In view of these commonly accepted definitions, it is not difficult to set some basic standards for a mortgage servicer's good faith participation in settlement conferences. At a minimum, the servicer must meet a basic threshold of honesty in dealing with the homeowner. Many practices that

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[27] U.SC.C. § 1-201(19)
[28] U.C.C. § 3-301(1)(d).
[29] U.C.C. § 2-103(1)(b).
[30] *See generally* Restatement (2d) of Contracts § 205. The standard has been applied to mortgage servicers. *In re* Thorian, 2008 WL 76024 (Bankr. D. Idaho Mar. 21, 2008) (foreclosure despite forbearance agreement); Monahan v. GMAC Mortgage Corp., 893 A.2d 298 (Vt. 2005) (duty applies to mortgagee's maintenance of insurance coverage and decision to foreclose); Whitingham v. MERS, 2007 WL 1456196 (D.N.J. May 15, 2007) (duty applies to servicer's attorney). Recent decisions have found the implied covenant of good faith and fair dealing applicable to mortgage holders considering homeowners for a loan modification. *In re* Cruz, 2011 WL 2852229 * 3 (Bankr. D. Mass. Jan. 26, 2011) (likelihood of success prong met for preliminary injunction to enjoin non judicial sale while loan modification under review); Warden v. PHH Mortgage Corp., 2010 WL 3720128 * 5-6 (N.D.W.Va. Sept. 16, 2010) (homeowner sufficiently alleged that servicer exercised its discretion in bad faith in denying loan modification and proceeding with non judicial foreclosure sale).
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servicers routinely engage in during foreclosure conferences clearly do not satisfy this standard. These practices include: changing the reason for a loan modification denial each time the homeowner disproves a servicer's stated reason; claiming that a homeowner's documents were never received when in fact they were received many times; and claiming an investor restriction on modification when none exists. These practices evidence plain dishonesty, and servicers who resort to them in court-supervised conferences are not participating in good faith.

Similarly, there are well-established industry standards for loss mitigation in foreclosures. The guidelines under the HAMP program are the most widely applicable, mandatory for nearly 90% of residential mortgages in foreclosure.[31] Congress has provided by statute that the loan modification analysis required under HAMP is the standard industry practice for purposes of all federal and state laws.[32] Similar guidelines for consideration of loss mitigation options apply to loans owned or guaranteed by Fannie Mae and Freddie Mac, as well as to loans insured or guaranteed by the Federal Housing Administration (FHA), the Veterans Administration (VA), and the Rural Housing Service (RHS/USDA). All of these entities publish guidelines for the consideration of well-defined loss mitigation options in a specific order of priority and within general timeframes.

In a recent decision a New York bankruptcy court reviewed conduct of a creditor during a settlement conference and articulated standards of good faith that were more subtle than those discussed above. The court in *In re Reynolds*[33] recognized that both the general court rule in effect in its district and F.R. Civ. P 16 required good faith participation in a court-ordered settlement conference. In imposing sanctions, the court found two major faults with creditor Wells Fargo's conduct. First, Wells Fargo came to the conference with a pre-conceived "mantra" to the effect that it would not agree to a settlement requiring it to pay any money. This posture was inconsistent with a good faith mediation obligation to evaluate risks and consider options as they were proposed. Second the representative that Wells Fargo sent to the mediation, although designated as a "vice president," came with such strict restraints on his settlement authority that he could not satisfy

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[32] Helping Families Save their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632 (2009): "Standard industry practice -- The qualified loss mitigation plan guidelines issued by the Secretary of the Treasury under the Emergency Economic Stabilization Act of 2008 shall constitute standard industry practice for purposes of all Federal and State laws."

[33] *In re* A.T. Reynolds & Sons, Inc., 424 B.R. 76 (Bankr. S.D.N.Y. 2010).

the court's requirements for participation by an individual with full authority to settle. In addition to entering monetary sanctions against Wells Fargo under Rule 16(f), the court imposed sanctions on Wells Fargo's counsel for vexatious litigation conduct under 28 U.S.C. § 1927. The court held Wells Fargo in contempt of the court's own mediation order for the case, which incorporated terms of the court's general mediation order.

V. Summary: Fashioning appropriate sanctions upon a finding that a mortgage servicer failed to negotiate over loss mitigation in good faith.

The courts have significant authority to review conduct of servicers who participate in court-ordered negotiations over loss mitigation. To ensure the effectiveness of these negotiations, courts must send clear messages that certain servicer practices will not be tolerated. Courts are now beginning to fashion appropriate sanctions that convey this message. In non-judicial foreclosure jurisdictions, a state agency or similar body may supervise conferences and refer instances of non-compliance with good faith requirements to the courts for consideration of sanctions. Under various statutes, court rules, and under their inherent powers, courts in appropriate cases should consider the following sanctions:

Tolling of accrual of interest and fees. When servicers routinely delay decisions on a final loan modification for many months beyond any reasonable review period, tolling of interest and fees makes a great a deal of sense. Servicers may be content to wrack up fees for as long as they can, knowing that they will be reimbursed when a foreclosure is eventually completed. Allowing interest to accrue makes a future loan modification less likely, as the accrued interest will only be added to a modified principal balance. For tolling to be effective as a sanction, interest and fees subject to tolling must be permanently wiped out. For example, where interest is $1,500 monthly, loss of six months' interest is a sum likely to attract a servicer or investor's attention. An order should place the ability to end tolling squarely within the control of the servicer.[34] There can be little basis

[34] *See e.g.* BAC Home Loan Servicing v. Westervelt, 29 Misc. 3d 1224(A); 2010 WL 4702276 (N.Y. Sup. Ct. Dutchess Co. 2010) (tolling of interest ordered until servicer gave final decision on loan modification application and, if modification denied, considered homeowner for other available loss mitigation alternatives).

for arguing that this form of sanction is excessive or unfair. This is particularly true when the servicer has an existing contractual duty to perform a loss mitigation review in the first place.

Monetary sanctions. Based on a number of authorities, discussed above, courts can impose monetary sanctions upon a party for failing to negotiate in good faith. In *Emigrant Mortgage Co., Inc. v. Corcione*, for example, the court found that the servicer had employed blatantly bad faith negotiation tactics.[35] The court sanctioned the servicer by requiring that it pay $100,000 punitive damages to the homeowner. Often sanctions for negotiating in bad faith take the form of requiring the offending party to pay the costs of conferences and mediations, and reimburse the opposing party's costs.[36] However, advocates for homeowners should consider requesting other forms of monetary compensation for the harm homeowners suffer as a result of unnecessarily protracted negotiations. Sanctions should include compensation for lost wages, travel expenses, and attorney's fees for the homeowner's counsel.

Orders to execute a loan modification agreement. Ordering a servicer to execute a loan modification document is a appropriate sanction when a servicer has approved a homeowner for a trial modification and agreed to make the modification permanent upon the homeowner's making a specified number of payments. Where the mortgage holder is unable to maintain a consistent or clear basis for continued delay, or when the delay has been due to the servicer's repeated mismanagement of paperwork, the court should exercise its equitable powers to order the servicer to complete the modification process.[37]

Orders directing the servicer's representative with full settlement authority to appear. Many conference programs generously allow servicer representatives to appear by phone so long as the servicer's attorney appears in person for the conference. This leniency can be revoked when a servicer abuses the conference system by failing to decide applications in a timely way or by failing to provide reasonable explanations for decisions already

[35] Emigrant Mortgage Co., Inc. v. Corcione. 28 Misc. 3d 161, 900 N.Y.S. 2d 608 (N.Y. Sup. Ct. Suffolk Co. 2010).
[36] *In re* A.T. Reynolds & Sons, Inc., 424 B.R. 76 (Bankr. S.D.N.Y. 2010).

[37] *See e.g.* Wells Fargo Bank, NA v. Meyers, 913 N.Y.S. 2d 500 (Sup. Ct. Suffolk Co. 2010) (servicer ordered to execute permanent loan modification after it repeatedly changed reason for refusing to execute document and attempted to foreclose while modification under review).

made. Requiring the personal appearance of a servicer representative familiar with the case and with full authority to make a binding decision can be an appropriate remedy for this type of obstruction.[38] However, orders should be clear in requiring that the servicer alone, and not the homeowner, ultimately bears the full cost of this expense.

Dismissal of the foreclosure action. Under most alternative dispute resolution programs, dismissal of the offending party's legal claims is a permissible sanction for bad faith participation in settlement negotiations.[39] Dismissal of a lawsuit, however, is often considered a severe sanction.[40] Still, in some situations the delay resulting from a dismissal may be helpful to the homeowner. More often, the dismissal without some formal resolution of the default leaves the homeowner with a running tab for interest, fees, and costs and no concrete plan for reinstating the loan. As a result, the homeowner may grow discouraged and eventually abandon a homeownership opportunity that could have been preserved.

Geoff Walsh
Staff Attorney
National Consumer Law Center
7 Winthrop Square, 4th Floor
Boston, MA 02110
(617) 542-8010
gwalsh@nclc.org

[38] *See e.g.* BAC Home Loan Servicing v. Westervelt, 29 Misc. 3d 1224(A); 2010 WL 4702276 (N.Y. Sup. Ct. Dutchess Co. 2010) (refusing to allow appearance by local counsel at next conference and ordering that "a bank representative fully familiar with the file and with full authority to settle the matter appear at the next conference").
[39] *See e.g.* Wells Fargo Bank, N.A. v. Hughes, 27 Misc.3d 628, 897 N.Y.S. 2d 605 (N.Y. Sup. Ct. Erie Co. 2010) (dismissing foreclosure action after servicer refused to alter unconscionable negotiation position).
[40] Nick v. Morgan' Foods, Inc., 99 F. Supp. 2d 1056 (E.D. Mo. 2000) *affirmed* 270 F.3d 590 (8th Cir. 2001) (dismissal as sanction for non compliance with conference rules not appropriate, but upholding other sanctions). Dismissal may be a particularly harsh sanction when a statute of limitations will bar re-filing an action. This is seldom a serious concern for foreclosure actions.

APPENDIX A

State statutes and court rules specifying an obligation to negotiate in good faith

1. State Statutes and Local Ordinances

New York. New York has enacted legislation that as of February 2010 mandates settlement conferences in all residential foreclosure cases.[41] The statute provides that "[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible."[42] The Administrative Judge of the New York court has issued a rule to implement this statutory provision:

> The parties shall engage in settlement discussions in good faith to reach a mutually agreeable resolution, including a loan modification if possible. The court shall ensure that each party fulfills its obligation to negotiate in good faith and shall see that conferences are not unduly delayed or subject to willful dilatory tactics so that the rights of both parties may be adjudicated in a timely manner.[43]

Maine. In 2009 Maine enacted a statute giving homeowners the option to request mediation in foreclosure cases.[44] The law went into effect statewide in January 2010. Under the statute, "[e]ach party and each party's attorney, if any, must be present at mediation as required by this section and shall make a good faith effort to mediate all issues. If any party or attorney fails to attend or to make a good faith effort to mediate, the court may impose appropriate sanctions."[45]

Nevada. Nevada, a non judicial foreclosure state, implemented a statute requiring foreclosure mediation at the homeowner's option in 2009.[46] The statute's provisions requiring good faith participation are quite detailed.

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[41] N.Y. CPLR § 3408.
[42] N.Y. CPLR § 3408(f).
[43] Administrative Order of the Chief Administrative Judge of the Court § 202.12-a (c)(4), Jan. 12, 2010.
[44] 14 Maine Rev. Stat. Ann. § 6321-A.
[45] 14 Maine Rev. Stat. Ann. § 6321-A(12).
[46] Nev. Rev. Stat. § 107.086.

The pertinent section of the statute provides: "If the beneficiary of the deed of trust or the representative fails to attend the mediation, fails to participate in the mediation in good faith or does not bring to the mediation each document required by subsection 4 [specifying a set of documents establishing authority to enforce the deed of trust and note] or does not have the authority or access to a person with the authority required by subsection 4 [a person with authority to negotiate a loan modification], the mediator shall prepare and submit to the mediation Administrator a petition and recommendation concerning the imposition of sanctions against the beneficiary of the deed of trust or the representative. The court may issue an order imposing such sanctions against the beneficiary of the deed of trust or the representative as the court determines appropriate, including, without limitation, requiring a loan modification in the manner determined proper by the court."[47]

Vermont. The Vermont foreclosure mediation statute,[48] which went into effect in mid-2010, contains a good faith participation section which states: "The parties to a mediation must cooperate in good faith to produce information required by subsections (a) and (b) of this section in a timely manner so as to permit the mediation process to function effectively."[49] In addition, the mediator's report must state whether any party failed to mediate in good faith.[50]

District of Columbia. The District of Columbia is a non-judicial foreclosure jurisdiction. However, provisions added to the District of Columbia Code in late 2010 authorize courts to enforce good faith participation in mediation and impose civil penalties upon a lender who does not participate in good faith.[51]

Rhode Island. Rhode Island is also a non-judicial foreclosure jurisdiction. Ordinances implemented in the City of Providence and other municipalities in the state during 2009 now require that servicers enter into a conciliation process with homeowners before a foreclosure sale takes place. A state housing agency must certify that a servicer made a good faith effort to reach settlement, including renegotiating loan terms, before the

[47] Nev. Rev. Stat. § 107.086(5).
[48] 12 Vt. Stat. Ann § 4631, *et seq.*
[49] 12 Vt. Stat. Ann § 4633(c).
[50] 12 Vt. Stat. Ann. § 4634.
[51] D.C. Code § 42-815(e).

conciliation process is considered complete.[52]

2. Rules under bankruptcy court conference programs

Several bankruptcy courts have issued general orders creating mediation programs. General orders such as these can provide the authority for a bankruptcy court to direct parties to confer and consider loss mitigation in connection with a mortgage foreclosure. Such a program has been in effect in the bankruptcy courts for the Southern District of New York since 1993.[53]

Under the Southern District of New York Bankruptcy Court's General Order, the presiding judge may direct parties to mediation in "any adversary proceeding, contested matter or other dispute."[54] Thus, the procedures can apply to a mortgage lender's motion for relief from the automatic stay, an objection to confirmation of a chapter 13 plan, or a proof of claim dispute. At a mediation conference the parties must appear with complete authority to negotiate all disputed issues.[55] The mediator must report to the court any willful failure to attend or participate in good faith.[56] The court may impose sanctions upon finding a party did not participate in good faith in mediation or a conference.[57]

By general order the Rhode Island bankruptcy court set up a program specifically to deal with loss mitigation issues in residential foreclosures.[58] In a recent opinion rejecting a lender's challenge to the court's authority to create such a program the court found ample support for its general order.[59] The Bankruptcy Code and Bankruptcy Rules, as well as the court's inherent authority to control its dockets, support creation of the program. Under the

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[52] *See* City of Providence Code § 13-213, *et seq*.
[53] United States Bankruptcy Court Southern District of New York, *In re Adoption of Procedures Governing Mediation of Matters in Bankruptcy Cases and Adversary Proceedings*, General Order Nov. 12, 1993, most recently amended General Order M-390 Dec. 1, 2009.
[54] *Id*. at § 1.3.
[55] *Id*. at § 3.2.
[56] *Id*.
[57] *Id*. *See generally In re* A.T. Reynolds & Sons, 424 B.R. 76 (Bankr. S.D.N.Y. 2010) (finding secured creditor failed to participate in settlement conference in good faith)
[58] Current version set forth in United States Bankruptcy Court District of Rhode Island, *Third Amended Loss Mitigation Program and Procedures.*
[59] *In re* Sosa, --B.R. --, 2011 WL 258673 (Bankr. D. R.I. Jan. 28, 2011) upholding *Second Amended Loss Mitigation Program and Procedures* of U.S. Bankruptcy Court District of Rhode Island., April 1, 2010. A substantially similar Third Amended Order was effective August 23, 2010.

Rhode Island court's loss mitigation program either a creditor or a debtor may request a settlement conference, or the court on its own may order to parties to confer. Parties must negotiate in conferences in good faith. A participating party may compel compliance with conference deadlines. The program rules provide that "[a] party failing or refusing to participate in loss mitigation in good faith may be subject to sanctions."[60]

[60] United States Bankruptcy Court District of Rhode Island, *Third Amended Loss Mitigation Program and Procedures* Part VII.A.

APPENDIX B

Update: Summary of State/Local Foreclosure & Mediation Program Data

New York

New York is a judicial foreclosure state. Legislation enacted in 2008 required court-supervised conferences for foreclosures of certain high-cost loans in New York. Effective February 2010, amendments to the statute expanded the scope of the conference requirement to cover all residential foreclosures in the state.[61] According to Realty Trac 43,913 properties in New York had foreclosure filings in 2010.

N.Y. Statewide data:

The following data is from the Report of the Administrator of the New York Courts for cases filed from January 1, 2010 through October 20, 2010:[62]

89,536 conferences held (includes multiple conferences for same case)
42,536 cases conferenced (number of individual cases in which a conference was held)

Of the 42,536 cases conferenced:
10,866 were defaults (homeowner did not appear for conference)
11,801 homeowners appeared represented by attorney
19,869 homeowners appeared unrepresented by attorney
This represents default rate statewide of approximately 25%
Approximately 27% of homeowners who appeared for conferences appeared with counsel.

Richmond County (Staten Island) data only

Richmond County New York data for calendar year 2010 provided by court clerk on January 25, 2011:
4,243 conferences held (includes reschedulings of same case)
2,659 appeared with attorney (does not include homeowners who only consulted w/ atty)
1,324 appeared without attorney
260 defaulted (homeowner did not appear)

[61] N.Y. CPLR § 3408.
[62] State of New York Unified Court System, *2010 Report of the Chief Administrator of the Courts* November 2010 at http://www.nylj.com/nylawyer/adgifs/decisions/112910foreclosurereport.pdf.

Richmond County data for 2010:
1,329 new cases filed in county
260 defaults - homeowner did not appear (19% of cases filed)
504 cases went ahead to foreclosure
338 homeowner obtained modification
The remainder are pending
Of the 1069 who appeared and completed conferences, 31.6% obtained loan modifications

Richmond County percentage of eligible homeowners who failed to appear for conference:
2008 - 52%
2009 - 33%
2010 - 19%
2011 - 6.7% (January 2011 only)

Comment: The New York Office of Court Administration estimates that statewide between 75% and 80% of homeowners appear for the conferences that are scheduled automatically in their cases. In certain New York City boroughs these rates are significantly higher. For example, in Richmond County over 80% of homeowners appear for conferences, and over half are represented by attorneys. Many who appeared unrepresented had been able to confer with legal services and other pro bono attorneys through regular walk-in clinics. Attorneys are generally available when cases are called for conferences at the courts. Statewide data is not yet available on outcomes of the conferenced cases.

The data from Richmond County indicates that most (more than half) of the conferenced cases are not proceeding to foreclosure. About one-third of the homeowners who appear for conferences obtain loan modifications. Attorneys representing homeowners report that they must attend sessions on average four to five times before a loan modification agreement can be reached. Courts in the New York boroughs have begun to issue sanctions, including tolling of accrual of interest and fees, when servicers do not negotiate in good faith. This has facilitated the favorable conclusion of many negotiations over loan modifications. Because many cases remain pending, an assessment of final outcomes is still premature.

Florida

Various Florida judicial circuits instituted foreclosure mediation programs on their own during 2008 and 2009. In December 2009 the Florida Supreme Court issued an administrative order directing all circuits to develop foreclosure mediation programs.[63] The Supreme Court's order requires courts to allow homeowners to participate automatically in these programs. There are twenty circuit courts in Florida, and each one may select an entity of its choice to administer its mediation program. Circuit courts

[63] Florida Supreme Court Administrative Order 09-54 Dec. 28, 2009.

throughout the state implemented mandatory mediation programs during 2010.

According to Realty Trac there were 485,286 properties in Florida subject to a foreclosure filing during 2010.

The Collins Center, a state non profit organization, is the mediation manager for six Florida circuits. The data below is from the Eleventh Judicial Circuit, comprising Miami-Dade County. The Eleventh Circuit has by far the highest volume of foreclosures of any circuit in Florida. All foreclosure cases filed in the Eleventh Circuit are automatically eligible for mediation and referred to Collins Center for mediation. Collins Center attempts to contact all homeowners and refer them to housing counselors to prepare for mediation session

Fla. 11th Judicial Circuit (Miami-Dade County)

The Clerk of the Court reports that there were 34,400 foreclosure filings in Miami-Dade Country during 2010.
The following Collins Center data reported for Miami-Dade County only, is for the six months from June 2010 through December 2010:
13,265 cases received (cases referred to mediation upon filing)
6681 unable to contact homeowner
6044 homeowner successfully contacted
2178 mediations conducted

Of the 2178 mediations conducted:
1392 reached impasse - foreclosure allowed to proceed
745 homeowner reached written agreement (could be modification or vacate)
219 settled before mediation session

Miami-Dade summary:
44% of cases established contact with homeowner
66% of cases were unable to establish contact with homeowner
16.4 % of cases received had mediation
5.6 % of cases received had mediation and reached agreement
7.3% of cases received settled through mediation or before mediation

Of cases in which made contact with homeowner:
36% had mediation
15.9 % settled at or before mediation

Comment: In both New York and Florida cases are also automatically referred for conferences. The Florida courts do not report significant legal services and pro bono attorney involvement in the conferences, as occurs in New York. It is unclear what effect Florida's drastic fall in property values may have on participation. Given that prevalent loan modification programs do not waive principal on loans, homeowners in Florida may have less interest in maintaining loans on homes that are significantly underwater.

Connecticut

Connecticut is a judicial foreclosure jurisdiction with a statewide foreclosure mediation program in effect since July 1, 2009.[64] As of July 2010, cases are automatically listed for mediation, although homeowners must timely enter appearance to preserve participation right. Realty Trac data indicates that in 2010 there were 21,705 properties in Connecticut with foreclosure filings.

Data provided by the Connecticut Judiciary covering the period from July 2008 to October 31, 2010 indicates as follows:
8,266 completed mediations
49% received permanent loan modification in mediation cases
15% settled with agreement to move from home
5% settled with reinstatement agreement
9% settled with forbearance plan
22% did not settle, foreclosure action continued

This converts to:
63% of participating homeowners stayed in home
15% agreed to move from home
22% not settled

Data released by the Connecticut Judiciary in March 2010 indicated the following:
43,556 foreclosures were filed statewide from July 2008 through March 2010
34,891 cases were eligible for mediation (owner occupied, not investment properties)
13,823 homeowners requested or entered mediation program (40% of those eligible)
5629 mediations completed, plus 9,610 were then pending in system
Approximately 60% of completed mediations resulted in homeowner staying in home
42% of completed mediations resulted in loan modifications

Nevada

Nevada is a non-judicial foreclosure state. By statute the state created a foreclosure mediation program that became fully effective in September 2009.[65] Under the program, the lender must receive a certification of good faith participation in mediation before it can proceed with a non judicial foreclosure sale. Realty Trac indicates that there were 106,160 properties with foreclosure filings in the Nevada in 2010.

[64] Conn. Gen. Stat. Ann. § 8-265ee.
[65] Nev. Rev. Stat. § 107.086.

The Nevada Judiciary has released the following figures for foreclosure mediations during the period from September 14, 2009 through June 3, 2010 (approximately the first nine months of the program's operation):
4,212 mediations held
3,767 mediation cases in which no foreclosure certification issued (89% of cases)

Of the 3,767 cases with no foreclosure certification:
61% - no certification for foreclosure issued because of an agreement reached
28% - no certification issued because of non compliance with rules or case withdrawn

Nevada Judiciary's update covering period from July 1, 2010 through Sept. 30, 2010:
1809 mediations completed
1373 reached agreement (76% of completed mediations)
436 no agreement (24% of completed mediations)

Of the 1373 agreements:
816 homeowner remains
457 homeowner vacates
349 no certification (non compliance with rules or case withdrawn)

For first year of Nevada program (Sept. 2009-Sept. 2010), 6,021 mediations were completed

Rhode Island

Rhode Island is a non judicial foreclosure state. The City of Providence and two other municipalities in the state have enacted ordinances requiring diversion of foreclosures to a conference program.[66] The City of Providence has the bulk of the state's foreclosures, and its program has been in effect since September 2009. The state's housing agency runs the Providence program. All homeowners given an initial notice of foreclosure are automatically eligible for a conference. The conference coordinator issues a certification to the lender that it has complied with the mediation program requirement.

Realty Trac reports that in 2010 there were 5,246 properties in Rhode Island subject to a foreclosure filing.

Rhode Island Housing reports the following data covering the period from September 3, 2009 through Nov. 30, 2010:
1780 notices to participate sent by the diversion coordinator to homeowners
165 conferences held
152 workouts
77 foreclosures cancelled
1117 certificates of compliance given to lender due to no response from homeowner

[66] *See e.g.* City of Providence Code § 13-213, *et seq*.

New Jersey

New Jersey is a judicial foreclosure state. The state's judiciary and various state agencies created a mediation program for residential foreclosures that went into effect in January 2009. Under the program homeowners served with a foreclosure complaint may request mediation with a court approved mediator. Realty Trac reports that during 2009 a total of 64,808 properties in New Jersey received a foreclosure filing.

The State of New Jersey's data for the period from January 2009 through October 2010 indicates:
3,831 mediations completed:
- 932 permanent settlements
- 923 provisional settlements
-1976 no settlement

9841 mediations pending

Comments: According to the State's data, of the homeowners who reach settlements through mediation, 90% remain in their homes as opposed to agree to vacate by deed in lieu or short sale.

Indiana

Indiana is a judicial foreclosure state. By statute effective July 1, 2009 the state required that some form of unsupervised conference take place in a foreclosure case upon a homeowner's request.[67] In Marion County (Indianapolis) some courts have required conferences in all cases since 2009.

As part of an effort supported by the State's Supreme Court, several counties implemented pilot programs with supervised mediations. These programs began in selected counties in early 2010 and are being implemented statewide during 2011.

Realty Trac data reports there were 44,172 properties subject to a foreclosure filing in Indiana during 2010. Approximately 10,000 foreclosure actions were filed in Marion County during 2010.

Indiana pilot programs: supervised mediation

Indiana pilot programs began in five counties starting in early 2010.
In the pilot programs all cases are eligible for an initial phone conference scheduled through the court. At the initial phone conference cases are referred to mediation.

[67] Indiana Senate Enrolled Act No. 492 (2009).

The state Supreme Court's data for all five pilot programs from March 1, 2010 through Nov. 22, 2010:
1547 initial phone conferences scheduled
- 786 initial phone conferences held
- 761 initial phone conference homeowner failed to appear

For the 786 homeowners who participated in initial phone conference:
668 homeowner requested mediation at initial phone conference
577 had a conference
275 reached workouts
183 did not reach agreement, foreclosure may continue
121 in follow-up

Marion County Pilot Program

In the Marion County program all homeowners named defendants in foreclosure actions are automatically included in program.
30-40% of eligible homeowners participate in the initial mediation phone conference
60-70% of eligible homeowners do not participate in initial phone conference
10-15% of homeowners who participate have an attorney

Comment: During 2010 pilot programs were initiated at different times in different counties in Indiana, and sometimes with only particular judges' caseloads. For the Marion County program two to three of twelve county judges participated in the mediation program during 2010, leading to 179 conferences. In 2011, all judges in the County will be participating.

Philadelphia County Diversion Program

The Philadelphia County court implemented a foreclosure diversion program in June 2008. Conferences are scheduled automatically for all residential foreclosure cases filed in the county.

The court released the following data reflecting the first year of the program's operation:
6000 foreclosure filed in county for year
4690 homeowners participated in diversion program
1400 foreclosures prevented through program.

Comment: The number for outcomes for foreclosures prevented through the program may be higher when more cases that were pending at the time have completed the process.

Maryland

Under Maryland's statutory program, homeowners may request mediation if they are dissatisfied with an initial loss mitigation review that must take place before a non-judicial foreclosure sale.[68] The law applies to foreclosures commenced in the state after July 1, 2010. Mediations are conducted through a state administrative hearing agency. Realty Trac data indicates that during 2010 there were 42,446 properties in Maryland subject to a foreclosure filing.

Early data covering the period from July 2010 through December 2010 shows the following:

272 cases mediation initiated
- 100 no settlement, unresolved.
- 44 homeowner did not appear/defaulted
- 23 cancelled or dismissed
- 6 homeowner agreed to vacate
- 99 various settlements including loan modifications, forbearance and dismissal of foreclosure

Comment: The data from Maryland does not track what occurs in earlier unsupervised loss mitigation review, where results could be better or worse than in mediation.

[68] Maryland House Bill No. 472 (Chapter 485 (2010)