

**STATE OF MAINE
SUPREME JUDICIAL COURT**

ADMINISTRATIVE ORDER JB-09-3

FORECLOSURE DIVERSION PROGRAM PILOT & PILOT RULES

Effective: August 3, 2009

Pursuant to its inherent power to control its docket and to issue rules, the Supreme Judicial Court hereby issues this Administrative Order, which is in accordance with P.L. 2009, ch. 402, and applies to the diversion of all foreclosure cases of owner-occupied primary residences with four or fewer units arising out of an alleged default in a residential mortgage in York County.

I. Purpose

The purpose of this Administrative Order is to authorize the use of mandatory mediation and other diversion techniques in certain residential foreclosure cases on a pilot basis to minimize case processing time, save costs and expenses for the parties, assist the parties in finding alternatives to foreclosure and preventing the adverse social consequences of vacant and abandoned homes.

II. Pilot Project

A pilot Foreclosure Diversion Program will be conducted in York County from August 3, 2009, to January 1, 2010. This pilot project applies to the diversion of all foreclosure cases of certain owner-occupied primary residences arising out of an alleged default on a mortgaged residential property in York County. The Pilot Program may be extended by subsequent Order of this Court. It is anticipated that the Program established by this Order may be extended to other counties, by an additional Administrative Order or Orders that may issue.

III. Rules

The Pilot Rules for the Foreclosure Diversion Program Pilot, to be known as the Maine Rules of Foreclosure Diversion Program Pilot (M.R. FDP P.) or FDPP Procedural Rules, are promulgated by the Supreme Judicial Court as part of this Order and attached hereto as Appendix A.

APPENDIX A

MAINE RULES OF FORECLOSURE DIVERSION PROGRAM PILOT

RULE 1. FORECLOSURE DIVERSION PROGRAM ORGANIZATION

A. *Definitions*

(1) “Foreclosure action” means any civil action initiated pursuant to title 14, chapter 713 of the Maine Revised Statutes (14 M.R.S. §§ 6101-6325) to foreclose on a property subject to a mortgage or other note or bond secured by that property, other than a State Mortgage pursuant to 14 M.R.S. §§ 6151-6153.

(2) “Owner-occupant” means an individual who is the mortgagor of a residential property that is that individual’s primary residence. The term may include: (a) two or more individuals who are joint mortgagors of that residential property, and (b) an individual who resided at that property as that individual’s primary residence within 180 days prior to commencement of the foreclosure action and has not established primary residence at another property subject to a mortgage with that individual as the mortgagor.

(3) “Primary residence” means a residential property that is an individual’s principal place of abode.

(4) “Residential property” means a single residential real property including: (a) not more than four residential units owned by the mortgagor, or (b) a

single condominium unit owned by the mortgagor within a larger residential condominium property.

B. *Manager*

The Foreclosure Diversion Program Pilot shall be managed under the direction of the Director of Court Services.

C. *Mediators*

(1) Active Retired Justices or Judges may be assigned by the Chief Justice or Chief Judge of their courts to act as Foreclosure Diversion Program Pilot mediators after receiving the training required of Program mediators.

(2) Other persons eligible to be certified as mediators pursuant to this

Rule shall:

(a) be educated and experienced in the professions of law, accounting or banking; have work experience that includes foreclosures, credit and collections work; or have done work on behalf of creditors or debtors in actions to collect on mortgages, notes, or debts;

(b) have successfully completed training provided by the Foreclosure Diversion Program;

(c) have received certificates of qualification to serve as mediators from the Foreclosure Diversion Program Pilot subject to such terms and conditions as deemed appropriate; and

(d) have a laptop computer that is compatible with court printers for use at all mediation sessions. In the alternative, mediators may use laptops or other portable computers and portable printers. The Judicial Branch will not provide equipment or technical support.

(3) Prior to January 1, 2010, the Foreclosure Diversion Program Pilot may issue temporary certificates of qualification to serve as mediators, good for a

period of up to six months, to active retired justices and judges, as well as, other persons who demonstrate the necessary education and experience qualifications, but for whom complete training has not been available while the Program is being organized.

RULE 2. FORECLOSURE DIVERSION REQUIREMENTS

A. Foreclosure Diversion Process

(1) For cases filed on or after August 3, 2009, the Foreclosure Diversion Program is authorized to design and implement informational sessions, and the court may in its discretion schedule informational sessions and require homeowners, counsel, and others to attend.

(2) For cases filed on or after August 3, 2009, the court will schedule a mediation session pursuant to the Foreclosure Diversion Program Pilot for each foreclosure action filed against a defendant-mortgagor who is an owner-occupant of a residential property and who appears in or responds or otherwise requests mediation in the action after proper service of the complaint and notice of the action.

(3) A defendant-mortgagor may use the one-page form approved and developed by the Department of Professional and Financial Regulations, Bureau of Consumer Credit Protection to answer a foreclosure complaint. One copy of the form must be filed with the court, and the other must be sent to the plaintiff.

B. *Timing*

The court may require a homeowner or other party to attend an informational session prior to mediation. When the court schedules an informational session, the clerk shall issue a notice scheduling the informational session. The clerk shall send notice of mediation to the parties not more than 7 days after the homeowner attends the informational session. When the court does not require the homeowner to attend an informational session, the clerk shall send notice of mediation to the parties so as to not delay the start of the mediation process. Unless the parties agree otherwise, mediation shall be completed not later than 90 days after the clerk sends notice of mediation to the parties.

C. *Mediation Issues*

The mediation shall address all issues of foreclosure, including but not limited to: (1) proof of ownership of the note and any assignments of the note; (2) calculation of the sums due on the note for principal, interest, and any costs or fees, reinstatement of the mortgage, modification of the loan; and (3) restructuring of the mortgage debt. Mediations conducted pursuant to the Program shall utilize the calculations, assumptions and forms that are established by the Federal Deposit Insurance Corporation and published in the Federal Deposit Insurance Corporation Loan Modification Program Guide as set out on the Federal Deposit Insurance Corporation's publicly accessible website.

D. *Participation in Mediation*

(1) A mediator shall include in the mediation process under this section any person the mediator determines is necessary for effective mediation, including a property lien holder, other creditor or party-in-interest whose participation is essential to resolution of issues in the foreclosure. Mediation and appearance in person is mandatory for:

- (a) the defendant-mortgagor;
- (b) counsel for the plaintiff;
- (c) counsel for the defendant, if represented; and
- (d) a representative of the mortgagee who has the authority to agree to a proposed settlement, loan modification, or dismissal of the loan. With the permission of the court, however, the mortgagee may participate by telephone or video when the mortgagee is represented by counsel who appears in person. When a mortgagee participates by telephone or video, mortgagee's counsel shall ensure the quality of the connection is sufficient to allow clear communication for the duration of the session. Mortgagee's counsel may be required to furnish a speakerphone for use in the mediation room, or elsewhere. When telephone equipment is available, the mortgagee's counsel will make arrangements at plaintiff's expense for reaching the mortgagee at a toll free number or through the use of automated conference call services. Mortgagee will comply with all requests contained in the mediation notice, including requests for information about telephone participation.

For persons who are not parties to the pending civil action, participation is voluntary and the mediation shall proceed in the absence of such a person if that person declines to participate in the mediation.

E. *Mediation Notice*

Notice of a mediation session will be sent to the parties and counsel of record by the court in the same manner as a trial notice or by the Foreclosure Diversion Program on a form designed for this purpose and approved by the Foreclosure Diversion Program. The scheduling notice shall contain a list of information that the parties are required to submit to the mediator or exchange with another party in advance of, or that the parties must bring to the mediation session(s).

F. *Multiple Sessions*

Mediators are authorized to schedule additional or follow-up sessions, if necessary. Such sessions will be conducted in the same manner as the original session.

G. *Good Faith Effort*

If any party or attorney fails to attend or to make a good faith effort to mediate, the mediator shall inform the court, and the court may impose appropriate sanctions. Sanctions may include the assessment of costs and fees, assessment of reasonable attorney fees, entry of judgment, dismissal without prejudice, dismissal without prejudice with a prohibition on refiling the foreclosure action for a stated period of time, and dismissal with prejudice.

H. *Schedule Changes*

If either party needs to have a mediation session rescheduled, that party shall file a motion requesting such change with the court and serve a copy upon all opposing parties. If the motion is granted, the party requesting a schedule change or cancellation shall inform all other parties and the mediator of any change approved by confirming letter. Counsel or an unrepresented party shall inform the clerk promptly of any early settlements. If the another party or the mediator appears at the original mediation date and time because the party requesting the continuance or cancellation failed to timely advise all other parties or the mediator, the offending party or counsel may be sanctioned.

I. *Location of Mediation Sessions*

Mediation sessions will be held at court locations, whenever possible or, with prior agreement of the parties and the mediator, the Foreclosure Diversion Program may designate an alternate site. However, the original case file shall not leave Judicial Branch buildings.

J. *Waiver of Mediation*

Once scheduled, mediation pursuant to the Foreclosure Diversion Program Pilot may be waived only upon request of the defendant and a finding by the court that:

- (1) there is good cause to waive mediation, and

(2) the defendant is making a free choice to waive mediation after being informed of the options and services that may be available through mediation.

K. *Report*

A mediator shall complete and file with the court a report for each mediation session, including follow-up sessions, conducted pursuant to this Rule no later than 7 days following the mediation session. The mediator shall send a copy of each mediation report to the Foreclosure Diversion Program and to the parties at the time of filing. The mediator's report shall indicate that, pursuant to these Rules, the parties fully completed the Net Present Value Worksheet found in the Federal Deposit Insurance Corporation Loan Modification Program Guide or the reasons why the parties were unable to complete this worksheet. If the report indicates a failure to reach agreement or any result other than a settlement or dismissal of the case, the report shall include the outcomes of the Net Present Value Worksheet and must note any points of agreement reached during the mediation.

L. *No Waiver of Rights*

No party waives any rights in the foreclosure action by participating in the Foreclosure Diversion Program.

RULE 3. OPTIONAL AVAILABILITY OF MEDIATION

A. In addition to those foreclosure actions for which mediation is mandatory pursuant to this Rule and 14 M.R.S. § 6321-A, a defendant in any foreclosure action involving residential property that was pending but had not yet resulted in final judgment on August 3, 2009, may request the court to order mediation pursuant to this Rule. The court may order mediation pursuant to this Rule if:

- (1) the action is pending in a county in which the Foreclosure Diversion Program is operating;
- (2) the Foreclosure Diversion Program certifies that mediation resources are available to perform the mediation; and
- (3) the court finds that mediation will not unduly delay the proceedings or result in prejudice to the plaintiff.

B. When optional mediation is ordered pursuant to this subdivision (A):

- (1) the court may order the parties to attend informational sessions prior to mediation;
- (2) further proceedings in the foreclosure action shall be stayed pending filing a report of the mediation from the mediator; and
- (3) in any action filed prior to June 15, 2009, the plaintiff shall pay the \$200 Foreclosure Mediation Program Fee established in the Court Fees Schedule.

RULE 4. INFORMATION AND CONFIDENTIALITY

A. Parties shall submit all information required by the Foreclosure Diversion Program or Foreclosure Diversion Program mediator.

B. Admissibility of evidence of statements made or discussions occurring during mediation is subject to M.R. Evid. 408(a).

C. Disclosures by a mediator of statements or actions occurring during mediation or of information acquired during mediation shall be subject to the same limitations as are stated in M.R. Civ. P. 16B(k).

D. Except for financial information included as part of the foreclosure complaint or any answer or response filed by the parties, any financial statement or information provided to the court or to the parties during the course of mediation is confidential and is not available for public inspection. Any financial statement or information shall be made available, as necessary, to the court, the attorneys whose appearances are entered in the case, and the parties to the mediation. Any financial statement or information designated as confidential under this subsection, if filed with the court, shall be sealed and kept separate from other court papers in the case and may not be used for any purposes other than mediation.

E. Information needed for statistical purposes, and for the evaluation and improvement of the Foreclosure Diversion Program Pilot will be collected.

RULE 5. ADDITIONAL REQUIREMENTS FOR THE PARTIES

A. In addition to the pleading requirements provided by statute and existing Court Rules, plaintiffs must file and serve with the Foreclosure Complaint the following: (1) a set of financial forms or questionnaires requesting information from the defendant/homeowner that would allow the plaintiff to consider or develop alternatives to foreclosure or otherwise facilitate mediation of the action;

and (2) the name and address of an attorney who represents the plaintiff to whom the information in item (1) shall be sent; and (3) an envelope large enough to contain the forms addressed to the attorney mentioned in item (2). These forms may be forms designed by individual lenders or standardized forms developed by the federal government, state agency, or other group. The purpose of the forms is to allow the lender to collect the information it requires to determine if alternatives to foreclosure are possible. When the court selects a foreclosure action filed before August 3, 2009, to be referred to mediation, the court may require plaintiff to file and serve such financial forms or questionnaires promptly.

B. The defendant/homeowner shall return the requested information (referred to in subdivision (A) to the plaintiff/lender's attorney in the envelope provided and file a copy with the court no later than 21 days after the informational session.

C. The defendant/homeowner may be required to meet with an appropriate community resource agency.

RULE 6. STAY OF PENDING ACTIONS

Any further proceedings in the action, including all deadlines in the any scheduling order, shall be stayed until mediation is completed and a mediation report is filed with the court. This shall not apply to efforts to enforce the production of information required by the mediator and service of pleadings upon other parties-in-interest.

RULE 7. REFERENCE TO AUGUST 2009 AMENDMENTS TO RULES

A. *Maine Rule of Civil Procedure 55*

Rule 55 has been amended to assure, that prior to entry of any default in a foreclosure action, the trial court reviews the record and determines that, as required by statute, the notice and service requirements have been complied with.

B. *Maine Rule of Civil Procedure 56*

Rule 56 has been amended to assure that, prior to entry of any summary judgment in a foreclosure action, the trial court reviews the record and determines that, as required by statute, the notice and service requirements have been complied with and that any available mandatory Diversion Program has been completed or waived. In addition, it establishes a deadline for oppositions for motions for summary judgment.