REBUILDING AMERICA

HOW STATES CAN SAVE MILLIONS OF HOMES THROUGH FORECLOSURE MEDIATION

February 2012

NCLC®
NATIONAL CONSUMER LAW CENTER®

© Copyright 2012, National Consumer Law Center, Inc. All rights reserved.

ABOUT THE AUTHOR

Geoff Walsh is a staff attorney at the National Consumer Law Center (NCLC) who focuses on foreclosure prevention, consumer bankruptcy, and other consumer credit issues. He is a contributing author to NCLC's *Foreclosures*, *Consumer Bankruptcy Law and Practice*, *Credit Discrimination*, and *Student Loans*. He has written several other studies on foreclosure mediation programs, including a 2009 NCLC report, Foreclosure Mediation Programs, Can They Save Homes? He has provided written testimony and engaged in policy advocacy at the federal and state levels on the topic of foreclosure mediation. He has also served as an instructor at trainings and legal education seminars on foreclosure prevention and bankruptcy topics, including trainings for foreclosure mediators in a half dozen states. He is an active member of the National Association of Consumer Bankruptcy Attorneys. Geoff previously worked as an attorney with Vermont Legal Aid, Inc. and as a staff attorney with Community Legal Services, Inc. in Philadelphia, Pa., where he also specialized in housing and consumer litigation. Geoff earned his B.A. from University of Michigan and is a graduate of Temple University Law School.

ACKNOWLEDGMENTS

We thank the Open Society Institute for its support that allowed us to research and write this paper.

We also thank Sara Benjamin for her research, Carolyn Carter and Arielle Cohen for their comments on this report, Jan Kruse and Beverlie Sopiep for their significant help in organizing the content, Denise Lisio and Vivian Abraham for their editing, and Julie Gallagher for her assistance with layout and design.

NCLC®
NATIONAL CONSUMER LAW CENTER®

ABOUT THE NATIONAL CONSUMER LAW CENTER

The National Consumer Law Center®, a nonprofit corporation founded in 1969, assists consumers, advocates, and public policy makers nationwide on consumer law issues. NCLC works toward the goal of consumer justice and fair treatment, particularly for those whose poverty renders them powerless to demand accountability from the economic marketplace. NCLC has provided model language and testimony on numerous consumer law issues before federal and state policy makers. NCLC publishes an 18-volume series of treatises on consumer law, and a number of publications for consumers.

7 WINTHROP SQUARE, BOSTON, MA 02110 ■ 617-542-8010 ■ WWW.NCLC.ORG

REBUILDING AMERICA

HOW STATES CAN SAVE MILLIONS OF HOMES THROUGH FORECLOSURE MEDIATION

TABLE OF CONTENTS

Executive Summary 4

I. Introduction: The Current State of the Foreclosure Crisis 11

II. Foreclosures Remain Preventable 11
- A. *Affordable Loan Modifications as Sustainable Alternatives to Foreclosures* 11
- B. *The Need for Strict Oversight of Servicers' Loss Mitigation Reviews: The Lessons from HAMP* 12
- C. *HAMP's History Shows That Servicers Are Capable of Making Affordable Loan Modifications* 15
- D. *The Major Problems with Servicers' Loss Mitigation Reviews and How Mediation Programs Can Fix Them* 17

III. The Evidence Is In: Effective Interventions at the State and Local Level Prevent Unnecessary Foreclosures 20
- A *The Reinvestment Fund's Report on Philadelphia's Foreclosure Diversion Program* 20
- B. *The Impact of Housing Counseling on Loss Mitigation Outcomes* 22

IV. The Future of Loss Mitigation: The FHFA Alignment Guidelines 23
- A. *The FHFA Alignment Guidelines: Background* 23
- B. *Speeding Up and Standardizing Pre-Foreclosure Loss Mitigation Review* 23
- C. *Speeding Up and Standardizing the Dual Track Foreclosure Process* 23
- D. *The Impact of the Alignment Guidelines on Foreclosure Mediation and Conference Programs* 24
- E. *The Alignment Guidelines Highlight the Need for Conference and Mediation Programs* 26

V. Judicial Enforcement of Mediation Program Requirements 27
- A. *Judicial Enforcement of Mediation Rules: The Nevada Courts* 27
  - 1. Nevada Courts and Sanctions Orders 27
  - 2. The Nevada Courts Address the Limits of Sanctions 29

B. More State Courts Are Enforcing Mediation Program Rules 30
1. Connecticut 30
2. Indiana 30
3. Maine 30
4. New York 31
5. Vermont 31

VI. Mediation Programs Require Servicers to Show Authority to Foreclose 31

VII. Conference and Mediation Programs Can Be Financially Self-Supporting 33
A. The Programs Provide Substantial Benefits to States and Communities at Little or No Cost 33
B. Supporting Legal Services Attorneys and Housing Counselors through Revenues from Filing Fee Surcharges 37

VIII. Foreclosure Delays: Mediations Do Not Prolong Foreclosures 38
A. Mediation and Conference Programs Can Operate Within Existing Foreclosure Time Frames 38
B. Foreclosure Delays: The New York Experience 39

IX. Recommendations Regarding Foreclosure Mediation Goals for 2012 and Beyond 41

X. Conclusion 44

Appendix A: New Foreclosure Conference and Mediation Programs in 2011 45

Appendix B: Foreclosure Conference and Mediation Programs: Summaries of Documentation Requirements for Lenders and Borrowers 49

Endnotes 52

Tables

Table 1: Affordability of Modified Loans (2008–2011) 12
Table 2: Modified Loans Default Rate (2008–2010) 13
Table 3: HAMP vs. Other Loan Modification Redefault Rates 13
Table 4: The Impact of One Servicer on HAMP's Implementation: Bank of America 16
Table 5: Taking Stock: How Mediation Programs Reduce Home Foreclosures 19
Table 6: Foreclosure Mediation Fees, Selected States 35

 ©2012 National Consumer Law Center

SECTION BY SECTION STATE REFERENCES

I. **Introduction: The Current State of the Foreclosure Crisis** 11

II. **Foreclosures Remain Preventable** 11
- A. Affordable Loan Modifications as Sustainable Alternatives to Foreclosures 11
- B. The Need for Strict Oversight of Servicers' Loss Mitigation Reviews: The Lessons from HAMP 12
- C. HAMP's History Shows That Servicers Are Capable of Making Affordable Loan Modifications 15
- D. The Major Problems with Servicers' Loss Mitigation Reviews and How Mediation Programs Can Fix Them: *CT, DC, IN, ME, NV, NY, VT, WA* 17

III. **The Evidence Is In: Effective Interventions at the State and Local Level Prevent Unnecessary Foreclosures** 20
- A. The Reinvestment Fund's Report on Philadelphia's Foreclosure Diversion Program: *PA* 20
- B. The Impact of Housing Counseling on Loss Mitigation Outcomes: *PA* 22

IV. **The Future of Loss Mitigation: The FHFA Alignment Guidelines** 23
- A. The FHFA Alignment Guidelines: Background 23
- B. Speeding up and Standardizing Pre-Foreclosure Loss Mitigation Review 23
- C. Speeding Up and Standardizing the Dual Track Foreclosure Process: *FL, IL, MA, MD, MN, NJ, TX, VA* 23
- D. The Impact of the Alignment Guidelines on Foreclosure Mediation and Conference Programs: *NY* 24
- E. The Alignment Guidelines Highlight the Need for Conference and Mediation Programs 26

V. **Judicial Enforcement of Mediation Program Requirements** 27
- A. Judicial Enforcement of Mediation Rules: The Nevada Courts: *NV* 27
- B. More State Courts Are Enforcing Mediation Program Rules: *CT, IN, ME, NY, VT* 30

VI. **Mediation Programs Require Servicers to Show Authority to Foreclose:** *DC, HI, ME, NV, NY, VT, WA* 31

VII. **Conference and Mediation Programs Can Be Financially Self-Supporting** 33
- A. The Programs Provide Substantial Benefits to States and Communities at Little or No Cost: *AZ, CA, CT, DC, FL, HI, IL, IN, MD, ME, MI, NV, VT, WA* 33
- B. Supporting Legal Services Attorneys and Housing Counselors through Revenues from Filing Fee Surcharges: *FL, MD, ME, NV, NY, PA, WA* 37

VIII. **Foreclosure Delays: Mediations Do Not Prolong Foreclosures:** *CT, DC, FL, IL, MA, MD, ME, NJ, NV, NY, OH, PA, RI, VT, WA* 38
- A. Foreclosure Mediation and Conference Time Frames 38
- B. Foreclosure Delays: The New York Experience: *NY* 39

IX. **Recommendations Regarding Foreclosure Mediation Goals for 2012 and Beyond:** *CT, DC, FL, IL, MD, ME, NV, NY, OH, PA, RI, VT, WA* 41

X. **Conclusion** 44

Appendix A: **New Foreclosure Conference and Mediation Programs in 2011: DE, DC, FL, HI, WA** 45

Appendix B: **Foreclosure Conference and Mediation Programs: Summaries of Documentation Requirements for Lenders and Borrowers: CT, DE, DC, FL, HI, ME, MD, NV, NY, OH, VT, WA** 49

EXECUTIVE SUMMARY

When the U.S. foreclosure crisis began four years ago, analysts predicted that up to 13 million families would lose their homes before the crisis was over.[1] The predictions appear to be coming true. By the beginning of 2011, lenders had completed foreclosures of 2.7 million homes with mortgages taken out during the subprime boom years from 2004 to 2008.[2] As of the fall of 2011, nearly four million homes were either in foreclosure or had mortgages that were seriously in default.[3] Current predictions are that, in addition to the loans already foreclosed and those now facing foreclosure, another eight to ten million mortgages are likely to default and enter foreclosure before the current foreclosure crisis is over.[4]

We are now approaching the mid-point of a very prolonged crisis. Over the past four years, policymakers at the federal, state, and local levels have implemented various measures in an attempt to counteract the devastating effects of so many foreclosures. This is an appropriate time to step back and take stock of what efforts have been effective. This report looks at one strategy: foreclosure conference and mediation programs. It is now clear that these measures have worked.

Foreclosure mediation and conference programs can save homes from foreclosure. If these programs are strengthened and expanded, they can prevent millions of foreclosures that will otherwise take place over the next several years.

This report follows up on an earlier study of foreclosure mediation programs prepared by the National Consumer Law Center in 2009.[5] Our 2009 report recommended program designs and best practices for mediation programs. Recommendations from the report have since been adopted in a number of states. The report raised some questions about the lack of data supporting the effectiveness of foreclosure mediation programs. Those questions are in large part answered in this report. The National Consumer Law Center also prepared two annual updates to its 2009 report on foreclosure mediation programs.[6] These reports contain statistical data on foreclosure conference and mediation programs and are available at the National Consumer Law Center website. The same website contains detailed state by state summaries and links to state program information, including texts of current and pending legislation, guides to programs, and other publications related to foreclosure conference and mediation programs.

Servicers are capable of making affordable and sustainable loan modifications.

Loan modifications are viable alternatives to foreclosures. Looking solely at outcomes from modifications made early in the foreclosure crisis, there may have been some doubt about this point. Mortgages modified during 2008 redefaulted at an alarming rate. Over half the loans modified during 2008 were in serious default within a year of modification. By the beginning of 2010, barely one quarter of the loans modified in 2008 were current. These outcomes should not be surprising. Most modifications made in 2008 did not decrease homeowners' monthly payments at all. Instead, the majority of modifications made then either raised payments or left them unchanged.

After 2008, this trend changed. To a much greater degree than before, recent loan modifications have taken into account how much the homeowner can afford to pay. Many modifications, particularly those under the federal government's Home Affordable Modification Program (HAMP), set the homeowner's

©2012 National Consumer Law Center

monthly housing payment so that it does not exceed a certain percentage of household income. HAMP rules set the acceptable ratio of the borrower's housing payment to income at thirty-one percent.

By the end of 2011, most new loan modifications were reducing homeowners' monthly payment for principal and interest by at least one-fifth. Less than ten percent of recent modifications have increased the payment or left it unchanged. Not surprisingly, the redefault rates on more recent modifications look much different than the rates from the 2008 modifications. For modifications made during 2010, redefaults within one year of modification occurred at about one-half the rate they did under the 2008 modifications.

Even in recent years, not all modifications have been the same. In dollar terms the average HAMP modification has been reducing the borrower's monthly payment by twice the amount of the average non-HAMP modification. As a consequence, the redefault rate for HAMP modifications has been at about half the level for recent modifications overall. Despite its many problems, HAMP showed that, by applying a test that balanced affordability for the borrower with the long term financial interests of the owners of the loans, it was possible to fashion sustainable modifications for one million home mortgages.

Without effective interventions on behalf of homeowners, servicers will deny millions of modifications and foreclose instead.

The history of the HAMP program has shown two things. One is that mortgage servicers are capable of making affordable loan modifications. The other is that many servicers are simply unwilling to modify loans on a scale that will have a significant impact on long term foreclosure trends. This is particularly true for the largest servicers, including Bank of America, JP Morgan Chase, and Wells Fargo. These banks control a major share of the home mortgage servicing market. Unfortunately, their behavior tends to set the standard for the industry.

When the Obama Administration unveiled HAMP in early 2009, it predicted that the program would provide affordable modifications for three to four million households by the time the program was scheduled to end in December 2012. Instead, by the the end of 2012, it is likely that just over one million households will have been approved for permanent HAMP modifications. Another two to three million homeowners who met basic eligibility requirements and tried to obtain a HAMP modification will have been denied one.

Regrettably, these approvals and denials often had more to do with who a homeowner's servicer happened to be than with the homeowners' qualifications for HAMP. Some servicers approved HAMP modifications at rates that were two or three times higher than other servicers did. The arbitrariness of these decisions, affecting the vital interests of so many families, has been a major impetus for the creation of foreclosure mediation programs.

Foreclosure mediation programs and loan modifications

Servicers denied affordable loan modification to millions of borrowers through a process of calculated chaos. Common elements of this strategy included:

- Losing documents
- Failing to follow promised time frames
- Failing to notify homeowners of reasons for servicers' actions
- Giving invalid or blatantly false reasons for denials
- Providing ineffective review of decisions
- Foreclosing while reviewing for a modification or while the borrower was complying with a trial modification

The Treasury Department announced rules to prohibit many of these practices in the HAMP program. However, the rules were never routinely enforced.

Data now shows that mediation programs and similar interventions can increase the number of sustainable loan modifications.

Federal oversight of servicers' practices in reviewing homeowners for eligibility for loan modification has failed. This failure leaves states in the position of having to take over the task. Since early 2008, mandatory foreclosure diversion and mediation programs have been implemented in at least nineteen states. While procedures vary from program to program, they typically include mechanisms to counteract the most common deficiencies in servicers' loss mitigation reviews. The programs can establish protocols for the exchange of documents and require that servicers adhere to time frames for making decisions. Program rules can ensure that homeowners receive accurate notice of decisions and have an effective recourse for review. Most importantly, the programs can prevent servicers from moving ahead to a foreclosure sale until the review process has ended.

Do these mechanisms prevent unnecessary foreclosures? A recent study of the Philadelphia foreclosure diversion program by the Reinvestment Fund looked carefully at results obtained for homeowners participating in that program since 2008. The study found that as of March 2011 only 3.5% of homeowners who had participated in the program since September 2008 lost their homes through foreclosure sales. Borrowers who participated in the conferences were far more likely to remain in their homes than those who did not. The mediation process did not require significant use of court resources and did not slow down the overall foreclosure process for lenders.

An important feature of most foreclosure conference and diversion programs is that they connect homeowners in foreclosure with housing counselors. Another study released in 2011 documented the impact of a borrower's working with housing counselors on the likelihood that the borrower will lose the home to foreclosure. The study found that homeowners who received counseling were 1.7 times more likely to avoid a foreclosure sale than those who did not. The counseled homeowners had a forty-five percent higher probability of avoiding redefault than borrowers who obtained loan modifications without counselor assistance.

The clear lesson to be learned from these two studies is that allowing homeowners facing foreclosure to proceed alone when they interact with servicer staff and their attorneys is a recipe for disaster. Some form of third party intervention is essential to prevent unnecessary foreclosures and to keep paying borrowers in their homes.

Foreclosure mediation and conference programs have learned from past experience and continue to improve their effectiveness.

In about one-half of the states, lenders can foreclose without any court oversight at all. These are referred to as "non-judicial" foreclosures. During 2011, four jurisdictions enacted new foreclosure mediation statutes: the District of Columbia, Delaware, Hawaii, and Washington. It is noteworthy that non-judicial foreclosures are the predominant means of foreclosure in three of these jurisdictions. This brings to six the number of non-judicial foreclosure jurisdictions with mediation programs. Without the intervention from mediations, non-judicial foreclosures in these localities would take place without any third party oversight at all.

Newer foreclosure mediation initiatives have learned from the experiences of older programs. The more recent laws, such as those

©2012 National Consumer Law Center

in the District of Columbia and Washington State, provide clear authority for courts to enforce program rules. Over the past two years, courts in a number of states, including Connecticut, Indiana, Maine, Nevada, New York, Ohio, and Vermont, have sanctioned servicers for various deficiencies in their conduct in foreclosure conference and mediation programs. For example, courts imposed sanctions when servicers did not appear with an authorized representative who could make decisions on loss mitigation questions. Courts have sanctioned lenders who delayed unduly in deciding on applications for a loss mitigation option or failed to give reasonable explanations for their decisions. Sanctions have included monetary penalties, orders for servicers to bring in a qualified representative to negotiate, orders tolling accrual of interest and fees during periods of delay, and orders to modify a loan. When a servicer does not comply with program rules, a court can refuse to allow a foreclosure sale. In a non-judicial foreclosure jurisdiction, a mediation administrator can decline to permit a sale to proceed.

The question of whether servicers and lenders have authority to foreclose when they say they do has recently received much attention. Mediation and conference programs can address this issue because a representative of the true owner of the mortgage debt must be involved in negotiations. Many mediation and conference programs now have rules requiring that servicer representatives document their authority to participate on behalf of the party who owns the loan. Particularly in non-judicial foreclosure states, this oversight may be the only check on whether the appropriate party is conducting a foreclosure sale.

Many foreclosure conference and mediation programs are now self-supporting.

The costs of foreclosures for homeowners, investors, and communities can be staggering. By contrast, mediation and diversion programs often function at no cost to state and local governments. Many programs, particularly several of the more recently implemented ones, are completely self-supporting. Relatively small surcharges ranging from $40 to $400 added to court filing or recording fees cover these programs' operating costs. In several states such as Delaware, Washington, and Nevada, funds collected from filing fee surcharges also support housing counseling and legal services for homeowners in mediation. Fees collected under Nevada's foreclosure mediation law generate substantial revenues that flow to the state's general fund, reducing the state's overall budget deficit.

Conference and mediation programs do not *prolong foreclosures.*

Many lenders and servicers delayed completion of foreclosures during 2010 and 2011, building up significant backlogs of homes in foreclosure status. Foreclosure conference and mediation programs did not contribute to these backlogs. On the contrary, most programs work within the time frames for foreclosures under a state's existing laws. The recent study of Philadelphia's diversion program found that the typical case spent fifty-three days in the conference program. The average time frame for completion of an uncontested foreclosure in Philadelphia without a conference is ten months.

Recommendations Regarding Foreclosure Mediation Goals for 2012 and Beyond

This National Consumer Law Center report concludes with nine recommendations for the future of foreclosure conference and mediation programs.

1. **States that do not have a foreclosure conference or mediation program should adopt one quickly.** As of the beginning of 2012, foreclosure conference

or mediation programs are in place in nineteen states.[7] These programs require that a lender or servicer review loss mitigation options with a homeowner and neutral third party before a foreclosure can be completed. Thirteen of these states have a judicial foreclosure system, and six are non-judicial foreclosure jurisdictions. States without one of these programs should move promptly to implement one.

2. **States should retain foreclosure conference and mediation programs as permanent features of their foreclosure laws.** Several foreclosure and conference programs were implemented as temporary measures subject to a sunset date or future legislative review. These include the programs in Connecticut, New York, Vermont, and Maine. The laws should be made permanent additions to the states' foreclosure laws.
3. **States should fund housing counseling and legal support for homeowners through filing fee surcharges that also fund mediation and conference programs.** Foreclosure conference and mediation programs perform vital tasks that mortgage servicers' staff should be performing, but routinely do not. The programs make sure that servicers review homeowners for loss mitigation options before foreclosing. Most servicers have demonstrated their unwillingness to devote competent staff to this work. It is reasonable to pass on to servicers the costs of having others do their job for them. In states including Nevada, Washington, and Maryland, foreclosure mediation programs cover their administrative costs with revenue from surcharges added to fees servicers pay to record or file foreclosure documents. In these states the surcharges also fund important counseling and support services for the homeowners who participate in mediations. Servicers should be prohibited by state law from shifting these costs to anyone else.
4. **States should use foreclosure and conference programs to maximize HAMP modifications during 2012 and 2013.** If servicers continue to approve new HAMP permanent modifications at the current rate of 25,000 to 30,000 monthly during 2012, this will leave up to 600,000 currently eligible homeowners without HAMP modifications at the end of the year. In addition, many borrowers remain in trial plans that should be converted to permanent HAMP modifications. During HAMP's final two years, states must adopt mediation programs with strong requirements for servicers to document their compliance with HAMP rules. These programs can hold servicers accountable for the commitments they made to modify eligible loans under HAMP.
5. **States should adopt mediation and conference programs that prevent foreclosures of loans already modified under HAMP.** Servicers are already foreclosing upon loans "permanently" modified under HAMP. This is occurring even when the homeowner is complying with all terms of the modified loan. In other cases, there are disputes over whether a default on a modified loan agreement occurred. Homeowners need access to a review before a neutral third party so these disputes can be fairly resolved. There is a significant danger that, absent oversight, servicers will conduct foreclosure sales regardless of past modifications.
6. **Mediation and conference programs must monitor how servicers propose their proprietary modifications.** During 2010 and 2011, servicers who were obligated to offer HAMP modifications to all eligible homeowners often gave them one

©2012 National Consumer Law Center

of their own proprietary modifications instead. Homeowners whose HAMP applications were denied or canceled for questionable reasons were frequently placed in these proprietary modifications. The proprietary modifications routinely contained more onerous terms, such as higher interest rates and less principal forbearance, than HAMP modifications. Mediations must require full and accurate disclosure of the terms of all modification options so that borrowers can make informed choices about whether to accept them. In particular, servicers who participate in the HAMP program must offer an eligible homeowner a HAMP modification before they solicit the homeowner for a proprietary modification.

7. **Mediation and conference programs must ensure that the FHFA servicing guidelines do not lead to unnecessary foreclosures.** Fannie Mae and Freddie Mac have implemented new servicing guidelines to comply with a directive from the U.S. Federal Housing Finance Agency (FHFA). The new guidelines encourage servicers to speed up foreclosures, particularly after a case has been referred to an attorney. These guidelines will make it increasingly difficult to stop foreclosure proceedings to review for loss mitigation options once a foreclosure has begun. In many states, conference and mediation programs will be the only effective alternative to the servicers' dual track of considering loss mitigation while forging ahead to a foreclosure sale. Rules for mediations and conferences must be tightened to ensure that stays of all foreclosure actions remain in place pending a full loss mitigation review.

8. **Borrowers in mediation must have accurate information about what to expect from an increasingly less affordable rental market.** For foreclosed borrowers, renting almost invariably becomes the only available housing option. Today, renters are more than twice as likely as homeowners to spend more than half of their income for housing. The burden is particularly severe for low income families. Of low income families with children, nearly two-thirds who rent pay more than fifty percent of their income for housing. Homeowners in mediations must make decisions based on a clear understanding of what the likely future rental option means for them. Mediation programs should refer all homeowners to housing counselors who can present a realistic assessment of the rental option.

9. **Preserve minority homeownership by wiping out unfair loan terms and servicing practices.** Policymakers at the state level should see foreclosure conference and mediation programs as important tools for the preservation of minority homeownership. Minority households' gains over the past decade in home-based wealth are vanishing. Disparate targeting of minorities with unaffordable loans has led to foreclosures disproportionately affecting the same minorities. Today, African American and Latino families are facing a doubly high foreclosure rate, even when income differences are taken into account. Negotiations over loan modifications create the opportunity to change the terms of many of these loans, making them affordable—as they should have been in the first place. Minority borrowers are also steered into less affordable non-HAMP modifications more frequently than non-minority borrowers. Minorities are denied modifications more often than other borrowers for reasons such as missing documents. Mediations and conferences provide needed oversight over practices that continue to impact disproportionately upon minorities.

Foreclosure mediation and conference programs have now been operating in some localities for over three years. Where the programs were structured effectively, they reduce foreclosures and increase sustainable loan modifications. In the remaining years of the foreclosure crisis policymakers at the state level face a clear choice. One option is to give mortgage servicers free rein to pursue millions of new foreclosures, regardless of how arbitrary or unnecessary each one may be. The other option is to subject servicers' actions to reasonable scrutiny and encourage alternatives that are in the best interests of both investors in the loans and homeowners. The evidence is now in that a strong foreclosure mediation or conference program can achieve the latter goal with little or no cost to states. State policymakers who ignore this option are needlessly exposing families and communities to severe, long-term hardships that can be avoided.

Absent this form of intervention, homeowners will continue to face mortgage servicers and their attorneys alone. And tragically, millions of needless foreclosures will occur, causing severe, permanent harm to homeowners, investors, and communities while stalling economic recovery in the United States. For these reasons, it is imperative that states without foreclosure conference and mediation programs adopt them and do so quickly.

©2012 National Consumer Law Center

I. INTRODUCTION: THE CURRENT STATE OF THE FORECLOSURE CRISIS

When the U.S. foreclosure crisis began four years ago, analysts predicted that up to thirteen million families would lose their homes before the crisis was over.[8] The predictions appear to be coming true. By the beginning of 2011, lenders had completed foreclosures of 2.7 million homes with mortgages taken out during the subprime boom years from 2004 to 2008.[9] As of the fall of 2011, nearly four million homes were either in foreclosure or had mortgages that were seriously in default.[10] Current predictions are that, in addition to the loans already foreclosed and those now facing foreclosure, another eight to ten million mortgages are likely to default and enter foreclosure before the current foreclosure crisis is over.[11]

Nearing the mid-point of a very long foreclosure crisis, there is still time to implement strategies that have proven to be successful in mitigating some of the most harmful aspects of the crisis. As the crisis deepens and prolongs, simply ignoring effective countermeasures becomes a more difficult position to justify. This report will focus on one response that has proven to be an effective alternative to the unchecked drive to foreclose: foreclosure mediation and conference programs established under state and local laws.

II. FORECLOSURES REMAIN PREVENTABLE

A. Affordable Loan Modifications as Sustainable Alternatives to Foreclosures

The National Consumer Law Center released an initial report on foreclosure mediation programs in September 2009.[12] The report noted that these programs had significant potential to promote loan modifications as an alternative to foreclosures. However, we expressed concerns about the sustainability of the loan modifications that foreclosure mediation programs were producing. As of the end of September 2009, over half the loan modifications that had been approved one year earlier were ninety days or more in default.[13] Most modifications were doing little more than capitalizing arrearages and leaving homeowners with monthly payments that were higher than they had been before a default. For example, loans modified during the second quarter of 2008 either increased monthly payments or left payments unchanged in almost sixty percent of the cases.[14] Not surprisingly, by the beginning of 2010 barely one quarter of mortgages modified in 2008 were considered current.[15] If mediations were simply furthering these types of resolutions, they could be pointless exercises. Our 2009 report emphasized the need to know more about whether these programs were producing sustainable, long term solutions for homeowners.

Since 2009, the dismal pattern of unaffordable loan modifications leading to rapid redefaults changed significantly. Two events played a part in this change. One was the implementation of the Home Affordable Modification Program (HAMP) beginning in early 2009. HAMP required participating mortgage servicers to evaluate all homeowners facing foreclosure to see whether they qualified for an affordable loan modification. The program defined an affordable modification as one calculated to keep monthly housing payments at a level below thirty-one percent of household income. By the end of 2009, servicers responsible for over eighty-five percent of loans facing foreclosure were participating in the HAMP program. The other development was a general change in servicers' behavior with respect to their own proprietary loan modifications. During 2009, servicers generally began to focus more than they had before on the affordability

TABLE 1
Affordability of Modified Loans
(2008–2011)

Between 2008 and 2011, the impact of loan modifications on a typical homeowner's monthly payment changed dramatically. Instead of the modification leaving the borrower's payment the same or increasing it, most modifications after 2009 decreased the borrower's monthly principal and interest (P&I) payment by at least twenty percent.

	Mortgage modified in:			
Impact on P&I payment	April–June 2008	April–June 2009	April–June 2010	April–June 2011
20% reduction	18.1%	38.6%	56.4%	53.8%
Some reduction	40.9%	78.2%	90.1%	89.4%
Payment same or increased	59.1%	21.8%	9.9%	10.6%

of their loan modifications. This change in approach was evident in both the increased affordability of loan modifications approved after 2008 and in their improved sustainability.

While the trend toward lower, more affordable payments was evident for all loan modifications made after 2008, the payment reductions for HAMP modifications were on average much more pronounced than the average for all modifications. During 2010 and 2011, borrowers' payments dropped by at least twenty percent in nearly eighty percent of HAMP modifications. For all modifications over this period, about fifty-five percent brought comparable reductions.[17]

In dollar terms, the payment reduction for a HAMP modification has typically been twice as deep as the decrease for non-HAMP modifications. For the quarter ending June 30, 2011, the average monthly principal and interest payment reduction for a non-HAMP modification was $231. The average reduction for a HAMP modification was $577. In other words, the proprietary modifications provided less than forty-five percent of the payment reduction that borrowers received under HAMP modifications. The proprietary modifications left borrowers with payments about $300 higher than those created by HAMP modifications.

All modifications approved under the HAMP program have passed a "net present value" (NPV) test. This test compares the likely benefit to the investors in the loan from completing a foreclosure as opposed to accepting an affordable loan modification. The test factors in the likelihood that the borrower will default on the modified loan in the future and a foreclosure will proceed. Despite significant payment reductions that appear in HAMP modifications, both in dollar terms and in percentage reduction in payments, all of these modifications were determined to have been in the best interests of investors using accepted industry standards. Servicers who proceed with foreclosures without performing a net present value test, or in disregard of the test's results, inflict needless losses on investors.[18]

B. The Need for Strict Oversight of Servicers' Loss Mitigation Reviews: The Lessons from HAMP

The HAMP program had the potential to prevent several million foreclosures through sustainable loan modifications. Mortgage servicers' faulty implementation of the program prevented the achievement of this goal. An undeniable fact about HAMP is that it has shown that there are millions of borrowers facing foreclosure who want to continue paying on their mortgages. These borrowers will turn nonperforming loans into performing loans if their payments can be made affordable. Borrowers interested only in a "strategic default" have no reason to pursue loan modifications. The HAMP program has also shown that some servicers willingly engage in good faith efforts

©2012 National Consumer Law Center

TABLE 2
Modified Loans Default Rate (2008–2010)*

Modified loans were also more sustainable. After 2008, the one-year post modification default rate for modified loans dropped by over one-half.

Redefault rate (percentage of loans over sixty days behind) at twelve months after modification:

When Modified	Redefault Rate One Year Later
Second Quarter 2008	56.2%
Second Quarter 2009	43.2%
Second Quarter 2010	25.7%

**This is the most current data available. 2011 data will be available after June 2012.*

TABLE 3
HAMP vs. Other Loan Modification Redefault Rates

Loans modified under the Home Affordable Modification Program (HAMP) were the most sustainable of all, as shown in this comparison of redefault rates for HAMP modifications and all modifications.[16]

Twelve month redefault rate (over sixty days):

Quarter of Origination	HAMP	All loan modifications
4th Quarter 2009	17.7	35.5
1st Quarter 2010	19.4	31.2
2nd Quarter 2011	17.3	31.4

to make sustainable modifications. Unfortunately many servicers, and particularly those with the largest market shares, choose not to make these efforts. Therefore, intervention is essential to bring the poorly performing servicers up to the standard they are capable of reaching. A summary of borrowers' experiences with HAMP provides compelling reasons to encourage foreclosure conference and mediation programs.

According to U.S. Treasury Department reports, as of the end of September 2011, servicers had cancelled 766,203 trial HAMP modifications. Each of these cancelled modifications represented a borrower who had successfully negotiated the initial HAMP application process and qualified for a trial plan. As discussed below, servicers cancelled many of these trial plans on the basis of questionable claims of missing documents and for grounds not authorized under the program rules.

No one knows how many borrowers attempted to apply for HAMP, but were rebuffed at the initial application stage. Application data from servicers is not reliable.[19] It is impossible to know how many borrowers were turned away by a curt verbal rejection or an unanswered phone call. According to one oversight agency's calculation, as of August 31, 2010, 1.9 million borrowers had been evaluated for HAMP.[20] Of these borrowers, thirty-eight percent were denied outright, twenty-seven percent were approved for a trial plan but had the plan cancelled, and one percent redefaulted on a permanent modification. This would suggest that about one-third of the homeowners who applied received a permanent modification.[21] *ProPublica* examined data on borrowers in default who applied for HAMP and concluded that that about one in five received a permanent modification.[22]

Based on the status of the HAMP program as it enters its final years, it is likely that about 1.2 million homeowners will receive permanent HAMP modifications by the time the program ends.[23] If the percentage of applicants receiving modifications was generally as indicated above, this would point to a pool of applicants in the four to five million range, consistent with the Administration's goal

A Short History of HAMP's Implementation

The Obama Administration announced the guidelines for the HAMP program in February 2009. Servicers began reviewing applications shortly thereafter. Approval of trial plans peaked in October 2009, with approximately 160,000 approved that month. A steady decline followed. In December 2009, servicers approved 118,000 new trial plans. By April 2010, the monthly number dropped to 31,000. Thereafter, the numbers leveled off to about 25,000 new trial plans approved monthly during the second half of 2011.

Conversions of trial plans to permanent HAMP modifications reached their highest level in April 2010. Servicers approved 70,000 permanent modifications that month. The numbers of new permanent modifications fell sharply thereafter, and by September 2010 had leveled off to a rate of between 25,000 and 30,000 permanent modifications monthly. This rate continued through 2011.

During 2010 and 2011, the U.S. Treasury Department made several changes to the HAMP application procedures. Revised guidelines set time frames for servicers' decisions and required written notices to borrowers regarding eligibility determinations. As of June 2010, Treasury rules required that borrowers document their income before servicers approved trial plans. In February 2011, Treasury announced a new requirement for servicers to provide net present value test inputs to borrowers who had been denied modifications because they failed the test. The Dodd-Frank Act directed that a HAMP net present value calculator be made available online, so that borrowers and their counselors could assess eligibility for HAMP. In May 2011, after nearly a year's delay, the Treasury Department provided this online net present value test calculator.

Many of these rule changes looked helpful on paper. In practice, they had little effect. Servicers widely ignored the requirements for written notices, time frames for making decisions, and release of net present value test inputs. The requirement for verified income for trial plans, effective in June 2010, is often cited as the reason for the decline in new trial payment plans after mid-2010. However, this decline was already underway months before the new documentation change went into effect. Hundreds of thousands of borrowers whose trial plans were approved during the fall of 2009 simply had their plans canceled during the spring of 2010. This occurred through a process with no effective oversight. When servicers gave reasons for the cancellations, they typically cited claims that borrowers had not provided income documentation or that the documentation they provided had grown stale.

announced in early 2009 to modify up to four million mortgages under HAMP.

The real tragedy of the HAMP program was what happened to the three to four million borrowers who tried to obtain HAMP modifications but had their applications rejected through a grossly mismanaged system. These were individuals who obviously wanted to keep their homes, wanted to resume making payments, and have permanently lost that opportunity.

©2012 National Consumer Law Center

Despite growing evidence that affordable loan modifications are sustainable, servicers still do not engage in any loss mitigation communications with more than half of all borrowers with seriously delinquent loans.[24] The number of new loan modifications of all types has been steadily decreasing.[25] With 3.9 million loans at least ninety days delinquent or in foreclosure, servicers and lenders are proceeding at a pace of about 75,000 loan modifications monthly.[26] Roughly three percent of loans in serious default are being modified.[27] Two out of three new modifications are proprietary, and one-third are HAMP modifications.

Over the past two years, the number of both proprietary and HAMP modifications has been decreasing steadily. The U.S. Office of the Comptroller and Currency (OCC) and the U.S. Office of Thrift Supervision's (OTS) quarterly surveys review the status of sixty-two percent of the home mortgage market. According to these reports, lenders modified 233,853 mortgages during the third quarter of 2010, of which 58,790 were HAMP modifications. For the third quarter of 2011, the total number of modifications dropped to 137,539, and 53,941 of these were HAMP modifications.[28] Despite the burgeoning supply of loans in foreclosure during 2011, the quantity of new loan modifications diminished to a paltry number.

C. HAMP's History Shows That Servicers Are Capable of Making Affordable Loan Modifications

Nearly all mortgage servicers have been participants in the HAMP program. Servicers of loans owned or insured by the GSEs Fannie Mae and Freddie Mac were required to comply with HAMP rules in foreclosing upon these loans. In addition, 145 servicers, responsible for ninety percent of all non-GSE loans, entered into HAMP servicer participation agreements.[29] The four largest servicers (Bank of American, J.P. Morgan Chase Bank, Wells Fargo, and CitiMortgage) have all been HAMP participants.[30]

These four servicers controlled the application outcomes for a significant portion of homeowners eligible for HAMP. According to Treasury's monthly servicer performance report for March 2010, these four servicers were responsible for 2,142,297 HAMP eligible loans.[31] As of the end of November 2011, these same servicers had 494,398 permanent HAMP modifications in place.[32] Since the inception of the program they had canceled 569,363 trial plans. They also reported that they had offered HAMP modifications to 335,586 homeowners who simply declined the offers. Outright denials of all forms of HAMP modifications have generally exceeded the numbers of trial plans offered. Assuming that the outright denials by these servicers equaled the modifications they approved, this would mean that the servicers likely denied at least another half million applicants, giving them no form of modification. In total, the four servicers were responsible for the outcomes of well over one million homeowners who sought help under the HAMP program and ended up without a modification.

Government records reveal significant disparities in servicer performance under HAMP. For example, at the end of the program's first full year, Ocwen had converted nearly eighteen percent of its eligible delinquent loans to permanent HAMP modifications, while CitiMortgage had permanently modified only nine percent of its eligible loans. By the same point in time, Bank of America, the largest participating servicer, had permanently modified only three percent of its 1,086,512 eligible loans in default.[33]

A *ProPublica* survey concluded that a borrower whose loan was serviced by JP Morgan Chase had half the chance of getting a permanent modification compared to the chance of a borrower whose loan was serviced by a different bank, American Home Servicing.[34]

Essentially, the happenstance of who a homeowner's servicer was made it more or less likely that the homeowner would succeed in obtaining a HAMP modification.

Homeowners do not choose their mortgage servicers. After a borrower has taken out a mortgage loan, servicing rights for the loan are bought and sold, often many times. It is difficult to imagine another major industry, especially one performing tasks tied to such a basic need, that would be permitted to function so arbitrarily over captive segments of the public. An airline that repeatedly sent flights to the wrong airport or a phone service that repeatedly misdirected calls would not keep a customer base. The need for effective regulation of servicers, particularly the largest ones, has grown to be compelling.

The larger servicers such as Bank of America, Wells Fargo, and JP Morgan Chase primarily service mortgages they do not own. The loans they service are often owned by trusts managed for groups of investors. On the other hand, servicers who service their own portfolio loans, loans which they originated and continue to own, have modified more often and been more likely to modify with features such as principal cancellation.[35] The modified portfolio loans have the best rates of avoiding redefault.[36]

Bank of America's track record under HAMP presents a stark outline of the impact of one servicer's poor performance on hundreds of thousands of homeowners.

Several aspects of this summary are troubling. According to the data, 330,805 borrowers that the Bank found qualified for HAMP trial plans were never given permanent modifications. This figure breaks down to 238,839 borrowers whose trial plans were canceled and 91,966 others who the Bank claims refused to accept trial plan offers. The Bank reports lack of documentation as the major reason for the cancellations. The cancellations reflect borrowers who went through a difficult application process and satisfied the income and net present value test requirements for HAMP. In addition, another 91,966 borrowers applied for HAMP, were offered modifications that reduced their mortgage payments, but according to the Bank refused to accept the offers. As will be discussed below, oversight reports cast much doubt on the reliability of the procedures that led to the Bank's cancelations of trial plans and the claims that borrowers simply refused the Bank's offers to lower their payments.

Other mortgage servicers performed the tasks associated with HAMP eligibility review much more effectively than Bank of America. Servicers are clearly capable of performing loss mitigation reviews appropriately. However, the current system has not provided incentives for many of them, particularly the major players, to do so. For years to come, substantial regulation will be needed to ensure that all servicers meet the standards for fairness and accuracy that we know they are capable of achieving. Conference and mediation programs at the state and local level will be an important source of this accountability.

TABLE 4
The Impact of One Servicer on HAMP's Implementation: Bank of America

The Treasury Department estimated that as of March 2010 Bank of America had a pool of 1,085,894 loans eligible for HAMP.[37] Below are the numbers Treasury provided eighteen months later, summarizing Bank of America's cumulative performance under HAMP as of September 2011[38]:

- 505,416 trial plan offers made
- 413,450 trial plans started
- 91,966 borrowers declined trial plan offers
- 238,839 trial plans canceled
- 174,611 permanent modifications begun

©2012 National Consumer Law Center

D. The Major Problems with Servicers' Loss Mitigation Reviews and How Mediation Programs Can Fix Them

Many government oversight agencies and private research organizations have documented the deficiencies in servicers' implementation of the HAMP program.[39] The same faulty practices appear in the servicers' handling of all loss mitigation protocols.

Foreclosure mediation and conference programs serve as effective controls over many common forms of servicer misconduct related to loss mitigation programs. Below is a list of the most frequently noted problems borrowers encounter when they attempt to access loss mitigation options through servicers. Following each item is a summary of actions that foreclosure mediation and conference programs have taken to counteract these servicer behaviors:

1. Lost Documents. In survey after survey, housing counselors report that mortgage servicers lose loan modification application documents. Counselors must constantly resend the same documents, sometimes up to six times.[40] Homeowners acting alone, without the help of experienced housing counselors, inevitably fare much worse. Servicers routinely delay application decisions, and then demand updates of financial information already sent because earlier documents are no longer current. This process repeats itself again and again. Variations of the behavior include demands for redundant and unnecessary paperwork from borrowers, such as documents not required under the rules of a particular loss mitigation program. The Government Accountability Office has noted that the documents runaround was a major reason for HAMP trial plan cancelations.[41] After foreclosures have occurred, it is often impossible to untangle what happened to these thwarted applications.

What Mediation Can Do. Mediation program rules can list specific documents borrowers and lenders must provide. They can set time frames for document exchanges. This can include transmission of documents to a third party, such as a conference coordinator, or use of a portal. For example, in New York an important function of repeated listings of cases for conference sessions has been to oversee document transfers and apply pressure when needed to ensure that documents are accounted for. Courts in Maine, Vermont, Connecticut, and Indiana have issued orders to enforce schedules for document exchanges.[42] In most programs, a foreclosure may proceed if a borrower does not comply with obligations to provide documents. Sanctions for servicers' repeated loss of documents can include monetary penalties or disallowance of foreclosure.

2. Failure to Follow Time Frames. Servicers routinely fail to adhere to time frames for review of loss mitigation applications once a borrower's application is complete. Servicers consistently delay implementation of conversions of HAMP trial plans to permanent modifications. HAMP rules require conversions of trial plans to permanent modifications after borrowers make three or four monthly trial payments. In a status survey as of September 30, 2011, the Government Accountability Office found that forty-four percent of all active HAMP trial plans had been in place for six or more months.[43] The Special Inspector General for TARP reported that ninety-six percent of counselors saw trial plans lasting longer than three months, and that seven months was typical.[44] Forty-three percent of surveyed counselors said that servicers did not disclose reasons for these substantial delays.

What Mediation Can Do. Mediation programs such as those in New York, Indiana, and Maine set time frames for servicers to respond to proposals. Courts may impose

sanctions for failure meet deadlines. In non-judicial foreclosure states, mediation administrators can refuse to approve the scheduling of a sale if a servicer acts in bad faith by failing to adhere to a schedule for deciding upon a request for a loss mitigation option.

3. Failure to Comply with Notice Requirements. Guidelines for HAMP and other major loss mitigation programs, including those for GSE-related and FHA loans, require that servicers give borrowers written notices of key changes in the status of their applications during the review process. These programs require that servicers provide written notices to coincide with actions such as the solicitation to apply for loss mitigation, receipt of an application, a decision on an application, and a claim of missing documents. The notices must specify the reasons for denials and describe review procedures. HAMP rules require that notices to applicants denied for failing the net present value test include the inputs used for the calculation. Since the HAMP program began, oversight agencies have noted the widespread failure of servicers to comply with basic notice requirements.[45]

What Mediation Can Do. A loss mitigation program's own published notice requirements provide clear benchmarks for review of a servicer's conduct at mediation and in conference sessions. Federally insured loan programs such as those of the FHA, VA, and the Rural Housing Service have published handbooks with rules that specify when notices must be sent to borrowers. Fannie Mae, Freddie Mac, and the Treasury Department (for the HAMP program) have published similar guidelines. In mediations and conferences, servicers can be required to demonstrate that they gave appropriate and timely notices to borrowers. Several mediation programs have adopted rules requiring that servicers bring to mediation records of all past loss mitigation activity, including notices sent to borrowers.[46] During the mediation process, servicers can be held accountable for failure to send notices to borrowers informing them of any significant change of status.

4. Inconsistent and Invalid Reasons for Rejections/Cancellations of Loss Mitigation Options. The Treasury Department has not collected accurate data on the facts behind servicers' denials of HAMP applications. The Government Accountability Office found this information lacking for eighty-five percent of HAMP denials.[47] Upon review, servicers' reasons for denials often turn out to be erroneous.[48] Servicers deny loan modifications for patently wrong reasons, such as claims that the servicer does not participate in HAMP or that an investor owning a loan does not permit modifications.[49] Based on these inaccurate claims of ineligibility, servicers have channeled borrowers into burdensome non-HAMP modifications or have foreclosed.

What Mediation Can Do. In conferences before third parties a servicer can be held accountable for giving inconsistent and invalid reasons for denials of a loss mitigation options. Courts have sanctioned servicers who engaged in a pattern of giving unfounded reasons for rejection of these options in mediations and conferences.[50] Mediation statutes and rules, such as those in effect in Vermont, Washington, and the District of Columbia, require servicers to document any claim of investor limitation on modifications.[51] A Connecticut court ordered a servicer to produce documentation for mediation showing its efforts to have the investor waive limits on modifications.[52] Mediators should be familiar with resources for verifying whether a loan is covered by a particular federal loss mitigation program. They can ensure that negotiations take place under the appropriate set of rules that apply to the loan.

5. Ineffective Reviews. Borrowers and housing counselors have consistently found internal

©2012 National Consumer Law Center

review and escalation procedures used by the servicers and the GSEs to be ineffective. These review procedures lack standards and benchmarks for performance.[53] According to a GAO survey, three-fourths of housing counselors found the official HAMP reviews to be ineffective or not helpful.[54] HUD oversees servicing of FHA-insured mortgages. An FHA National Servicing Center has failed to control servicers' pervasive disregard of FHA servicing guidelines. The recently announced Federal Housing Finance Agency (FHFA) alignment guidelines for GSE-related loans will likely generate a repeat of the same botched system of review that failed to rein in servicers participating in HAMP.

What Mediation Can Do. Mediation and conference programs supplement the largely ineffective servicer and federal agency review systems. Conference and mediation programs retain the ultimate leverage of being able to bar foreclosure under state laws unless the servicer complies with loss mitigation review standards defined by the program's rules. Courts with an oversight role over conferences can order servicers to comply with rules for loss mitigation review and sanction non-compliance.

TABLE 5
Taking Stock: How Mediation Programs Reduce Home Foreclosures

Foreclosure mediation and conference programs serve as effective controls to help reduce improper foreclosures. This table documents how programs can resolve some of the most common problems homeowners encounter when applying for loan modification programs, as successfully used in select states.

Servicer Problems	Foreclosure Mediation Solutions
Lost documents	Rules/orders specify documents needed and time lines for exchanges
Failure to follow time frames for reviewing applications	Set time frames and penalties for failing to adhere to deadlines
Failure to comply with notice requirements	Servicer must document all decisions in accordance with mediation rules
Inconsistent or invalid denial of loan modifications	Servicer must document basis for decisions, including calculations and borrower data used
Ineffective reviews	Servicer complies with program rules or risks ability to foreclose and penalties
Foreclosing while reviewing application (dual track)	Foreclosure is barred while negotiations are active

6. Dual Track: Foreclosure While Under Review. Foreclosures while loan modification reviews are underway or trial plans are in effect have been one of the major problems plaguing all formal loss mitigation programs. In a recent survey, ninety-four percent of counselors reported seeing this "dual track" for foreclosures.[55] The practice has been the focus of many lawsuits, citing repeated foreclosure sales scheduled while borrowers were in the application process or were complying with trial plans.[56] Under a Treasury HAMP rule effective June 1, 2010, servicers were told not to refer cases to foreclosure until after they had either determined the borrower's eligibility for HAMP or made reasonable efforts at solicitation. Servicers largely ignored the rule. New loss mitigation guidelines for the GSEs announced as part of FHFA's alignment process entrench the dual track approach for the long term future.[57]

What Mediation Can Do. Despite poorly enforced federal guidelines, state mediation and conference rules can bar lenders from moving ahead with foreclosures while negotiations and loss mitigation reviews are

underway. Effective mediation rules have controlled foreclosure activity in non-judicial states such as Nevada as well as in judicial foreclosure states such as New York and Connecticut. To maximize effectiveness, the rules should allow for retained jurisdiction in the conference program so that the matter can be brought back into the system if a servicer proceeds with a sale contrary to an agreement reached in a conference.

III. THE EVIDENCE IS IN: EFFECTIVE INTERVENTIONS AT THE STATE AND LOCAL LEVEL PREVENT UNNECESSARY FORECLOSURES

A. The Reinvestment Fund's Report on Philadelphia's Foreclosure Diversion Program

In our September 2009 Report on foreclosure mediation programs, we noted the lack of evidence as of that time showing the effectiveness of these efforts. The policy assumption behind mediation programs was that they should increase the likelihood that all parties would come to resolutions that met their best interests. Advocates for the programs hoped that settlements reached in mediations would show a pattern of increasingly frequent settlements that restored a regular cash flow to lenders and kept borrowers in their homes. However, data showing high redefault rates for loans that had been modified during 2008 raised the question of whether the mediation settlements were in fact keeping borrowers in their homes. Of loan modifications made during 2008, only twenty-seven percent were current in payments one year later.[58]

As of late 2009, the question of whether participation in foreclosure mediation programs increased the likelihood that homeowners would obtain sustainable loan modifications had not been examined in any systematic way. Since then, a research group undertook an extensive investigation of one foreclosure mediation program in order to see if these hoped-for results were in fact being achieved. The study concluded that the mediation program was very successful in achieving its objectives.

The Reinvestment Fund, a Philadelphia-based research firm, conducted this study. The Reinvestment Fund developed a methodology for a comprehensive review of the Philadelphia Common Pleas Court's Foreclosure Diversion Program. The Philadelphia program was one of the first major attempts to implement a requirement that lenders negotiate with homeowners over loss mitigation options before completing a foreclosure. The program has been underway for over three years, since mid-2008.

The Reinvestment Fund evaluated several aspects of the Philadelphia Diversion program. It looked at the magnitude of the foreclosure problem in the city, the results achieved through the program, its effect on the courts, the impact on the numbers of completed sales, the sustainability of settlements, and the evidence of racial or neighborhood disparities in patterns of access to any benefits of the program. The Reinvestment Fund released an initial report of its findings in June 2011.[59]

By way of background, the Reinvestment Fund's report noted that Philadelphia has a population of 1.5 million. Pennsylvania is a judicial foreclosure state.[60] Since 2008, lenders have commenced on average between 5000 and 6000 foreclosures of owner-occupied residential properties yearly in the city.[61]

The Administrative Judge of the Philadelphia Common Pleas Court released the outline of the Foreclosure Diversion program in April 2008. At that time he ordered a stay of pending foreclosure sales. Initially, homeowners

©2012 National Consumer Law Center

in pending cases could opt into the diversion program. Participation in the program became automatic and mandatory for all cases filed in Philadelphia after September 8, 2008.

Since September 2008, homeowners in Philadelphia have been assigned a date for a conciliation conference when they are served with a foreclosure complaint. Various nonprofit and city-funded organizations provide outreach for the diversion program and refer homeowners to housing counselors and attorneys. Although about ninety-five percent of homeowners do not have direct representation in the conferences, all have access to limited consultations with attorneys. All can receive ongoing assistance from housing counselors. Volunteer attorneys serve as mediators, called a "Judge Pro Tem," who provide oversight in instances where intervention is needed to move a case along. A supervising judge is available to provide further oversight and to intervene in the event of a party's significant noncompliance with the program's expectations.

The Reinvestment Fund examined court records of nearly 1600 cases eligible for the Philadelphia Diversion Program from its inception in mid-2008 through March 2011. The study collected data on what happened to each homeowner from the filing of a foreclosure complaint to the termination or suspension of legal action. In addition, it looked at homeowners' status one year after they participated in the diversion program and at longer intervals thereafter. The study examined data drawn from documents filed in court, including loan information and case histories. Nearly 28,000 orders had been entered in the cases. From computerized property information databases, the authors collected property and transaction histories, including loan characteristics and changes in the status of each loan. Based on this data, the authors were able to create a long term record of a participating homeowner's circumstances.

Residential foreclosures filed in Philadelphia after September 8, 2008 were assigned automatically to the diversion program. Looking at the status of these automatically assigned cases as of March 2011, the Reinvestment Fund made the following findings:

- Seventy percent of homeowners eligible to participate in the diversion program appeared for their conciliation sessions.[62]
- Of the homeowners who appeared for conferences in foreclosure cases filed since September 2008, only 3.5% have had a foreclosure sale of their home ordered.[63]
- Eligible homeowners who participated in conferences reached an agreement in thirty-five percent of the cases.[64]
- Court intervention in conference proceedings was seldom necessary. In sixty-three percent of the diversion cases the court needed to enter an order only once. In eighty percent of the cases the court intervened two or less times.[65]
- On average, cases remained in the diversion program for fifty-three days, well within the ten-month time frame typical for the completion of a foreclosure in which the homeowner never appears.[66]
- Looking at diversion-eligible cases before and after the program's inception, twenty-seven percent of these borrowers lost their homes before implementation of the diversion program, but only 5.7% during a subsequent six-month comparison period during which settlement conferences were available.[67]
- 87.5% of homeowners who reached agreements in diversion between June 2008 and June 2009 were still in their homes as of March 31, 2011 (at least twenty-one months after the dates of their agreements).[68]

- The study found no evidence of disparate treatment of homeowners based on race, home value, or neighborhood.[69]

B. The Impact of Housing Counseling on Loss Mitigation Outcomes

Mediation programs such as the Philadelphia court's diversion program help to level the playing field for homeowners and lenders. The Philadelphia diversion program, like many similar programs around the country, relies heavily upon connecting homeowners with housing counselors in order to achieve this balance. Homeowners who interact with a servicer's staff on their own fare much worse than homeowners who work with knowledgeable advocates. The benefits of housing counseling and mediation programs are related in that both take individual homeowners out of a sphere of isolation in their interactions with servicers.

An ongoing study by the Urban Institute provides clear evidence of the benefits of housing counseling.[70] As part of a congressionally mandated study, the Urban Institute has been examining data comparing a group of 180,000 borrowers who received counseling with a similar sized group of borrowers with similar loan and personal financial characteristics who did not. The study shows statistically significant positive effects from counseling:

Counseled borrowers are more likely to avoid foreclosure sale. Borrowers who received counseling were 1.7 times more likely to cure their mortgage defaults than those who did not. The study defined a cure as taking the loan out of the foreclosure process and avoiding a foreclosure. For the group of 180,000 counseled borrowers this meant that over the two-year study period 32,000 of them avoided foreclosures that occurred for those in the uncounseled group.[71]

Counseled borrowers obtain modifications that are more affordable. On average, borrowers who received loan modifications through housing counselors reduced their monthly payments by $267 more than borrowers who obtained loan modifications without the help of counselors.[72]

Counseled borrowers obtain modifications that are more sustainable. The study compared the counseled borrowers who obtained loan modifications with uncounseled borrowers who also received modifications. The study looked at the percentages of loans in each group that were at least ninety days in default after one year. The data showed that counseled borrowers who obtained loan modifications had forty-five percent better odds of avoiding renewed default than the uncounseled group.[73]

Overall, the counseled borrowers had fifty-three percent better odds of removing their loans from default through modification.[74] Significantly, borrowers who received counseling first, and then a loan modification, did best. Sixty-six percent of these borrowers sustained their modification, and only twelve percent entered redefault. Borrowers who obtained modifications without counseling sustained the modifications only eight percent of the time, and fifty-six percent of them had already ended up in foreclosure.[75]

There is a view proffered by some in the lending industry that massive foreclosures are inevitable and that the appropriate response to the foreclosure crisis is to speed up the process and allow it to run its course. The evidence from the Reinvestment Fund's study of the Philadelphia courts' diversion program and the Urban Institute's counseling study shows that this view is wrong. Properly conducted interventions on behalf of homeowners can save millions of homes from foreclosure for the long term. Without these interventions, millions of unnecessary foreclosures will take place.

©2012 National Consumer Law Center

IV. THE FUTURE OF LOSS MITIGATION: THE FHFA ALIGNMENT GUIDELINES

A. FHFA's Servicing Alignment: Background

The Federal Housing Finance Agency (FHFA) is the federal authority responsible for oversight of Fannie Mae and Freddie Mac following the entry of the two GSEs into government conservatorship. In April 2011, FHFA issued a directive for the "alignment" of the GSEs' rules for servicing delinquent home mortgages.[76] The FHFA directive required Fannie Mae and Freddie Mac to establish consistent delinquency management standards for loans they own or insure. Later in 2011, Fannie Mae and Freddie Mac amended their single family loan servicing guidelines to implement the FHFA alignment directive.[77] The GSEs new default servicing guidelines went into effect generally as of October 1, 2011.

Fannie Mae and Freddie Mac's servicing guidelines typically have a substantial impact on the entire mortgage servicing industry. It is likely that the new alignment guidelines will set an industry standard for many years to come. As will be discussed, the alignment guidelines present both opportunities and challenges for foreclosure mediation programs.

B. Speeding Up and Standardizing Pre-Foreclosure Loss Mitigation Review

Servicers have always had the capacity to review troubled borrowers for loss mitigation, both before and after they refer a case to an attorney for foreclosure. The FHFA alignment guidelines direct servicers to focus their efforts on the period of time before they refer a delinquent loan to a foreclosure attorney. According to the guidelines, promptly after a delinquency has begun servicers must solicit borrowers to complete a standardized loss mitigation application form. The servicers' solicitations are to follow a specified time frame. At prescribed intervals, servicers must review their loss mitigation efforts for each loan in default. If a loss mitigation option has not been approved or is not under consideration 120 days after the onset of a delinquency, the servicer must refer the case to foreclosure.[78]

The alignment guidelines direct the GSEs to create financial incentives for servicers to follow the new default servicing rules. The GSEs must set targets for a percentage of each servicer's delinquent borrowers who submit loss mitigation application forms. Servicers who exceed the target numbers receive financial rewards and those who fail to meet the standard can face penalties.[79] The incentive payments and penalties are not based on the implementation of loss mitigation options. Rather, the only criterion for rewards and penalties is the number of completed application forms the servicer collects from delinquent borrowers.

> Properly conducted interventions on behalf of homeowners can save millions of homes from foreclosure for the long term.

C. Speeding Up and Standardizing the Dual Track Foreclosure Process

Fannie Mae and Freddie Mac were traditionally the strongest advocates for the "dual track" system under which servicers proceed with foreclosures while they review borrowers for loss mitigation options. The alignment guidelines formalize this dual track for cases referred to foreclosure attorneys or trustees.[80] At the same time, the guidelines require servicers to adhere to new time frames in the foreclosure process once a case has been referred for foreclosure.

The new alignment rules seek to speed up dual track foreclosures in two ways. First, the guidelines provide for only one very limited

mandatory foreclosure stop once a case has been referred to an attorney. Within five working days of receipt of a foreclosure referral the attorney must send a solicitation letter with a loss mitigation application form to the borrower. If the borrower does not return the completed form within thirty days for evaluation, the foreclosure may proceed without delays to review any future loss mitigation requests from the borrower.[81] The guidelines expressly provide that in jurisdictions with foreclosure conference or mediation programs, the attorney need not send this post-referral solicitation letter to the borrower.[82]

The alignment guidelines' second method for speeding up foreclosures involves the establishment of allowable foreclosure time frames for each state. Servicers must ensure that their attorneys complete foreclosures within these time frames, or the servicer will face penalties.[83] The allowable time frame consists of two parts: a 150-day period for the pre-referral solicitation and review and a second period calculated specifically for each state. This second period represents a state-specific time from referral to the attorney to completion of a foreclosure sale. These state-specific time frames run from 120 days in some non-judicial foreclosure states such as Texas, Virginia, and Minnesota to much longer periods in some judicial foreclosure states such as Florida (450 days), New Jersey (450 days), and Illinois (330 days).[84]

The clear intent of the alignment rules is to speed up the foreclosure process for GSE loans. This is particularly true for judicial foreclosure states. For example, in the fall of 2011 the average time frame from commencement of a judicial foreclosure to completion of sale was 748 days in Florida, 974 days in New Jersey, and 527 days in Illinois.[85] However, as noted above, the allowable foreclosure time for each of these states under the alignment guidelines is several months shorter. These disparities exist for non-judicial states as well. For example, the allowable time frame to complete a foreclosure in Maryland is 205 days, and in Massachusetts it is 200 days. In the fall of 2011, the time from commencement of a foreclosure to sale was running 594 days in Maryland and 517 days in Massachusetts.[86]

The GSEs can assess penalties against a servicer for slow foreclosure performance as measured by data reports required under the alignment guidelines. In limited circumstances, when the servicer can show a delay was caused by circumstances beyond its control, the delay in a case may not be counted in assessing the servicer's overall performance. For example, delays caused by a bankruptcy filing or by operation of the servicemember protections are considered beyond the servicer's control. The guidelines also allow for delays due to participation in mediation or certain unavoidable court delays. The latter presumably would excuse servicers from delays caused solely by court backlogs. However, the servicer bears the burden of showing the absence of any fault of its own in causing a delay. As will be discussed, these criteria have a number of implications for mediation and conference programs.

D. The Impact of the FHFA Alignment Guidelines on Foreclosure Mediation and Conference Programs

New standardized loss mitigation standards. As part of the FHFA realignment process, Fannie Mae and Freddie Mac revised their substantive loss mitigation guidelines, particularly in the area of loan modifications. Loans owned or insured by Fannie Mae and Freddie Mac will continue to be eligible for HAMP modifications through 2013. However, after the expiration of the HAMP program at the end of 2013, the GSEs' only loan modification option will be the one described in the new guidelines. This loan modification model could become the industry standard.

©2012 National Consumer Law Center

Unfortunately, the non-HAMP loan modification model included in the new FHFA alignment guidelines offers borrowers an option that is much less flexible and affordable than a modification under HAMP. The new modification guidelines are not driven by a case-by-case assessment of affordability.[87] Instead they allow for capitalization of arrearages, a fixed interest rate generally at five percent, and a term extension to 480 months from the modification date. The new formula allows for only very limited principal forbearance for certain underwater mortgages.

The GSEs new loss mitigation guidelines also require that servicers consider various non-modification options, such as repayment and forbearance plans, before they review a borrower for a loan modification.[88] As before, the GSEs' published guidelines set the terms for the conduct of short sales and the acceptance of deeds in lieu of foreclosure. Mediators and those presiding over foreclosure conferences will need to become familiar with these new loss mitigation rules and hierarchies. They will likely play an important role in many future settlement discussions.

The dual track and the threat of penalties. Several aspects of the FHFA alignment guidelines contribute to an environment in which servicers will be less inclined than before to take time to review loss mitigation options once foreclosure has begun. In particular, the guidelines expressly authorize a dual track once the case has been referred to a foreclosure attorney and impose financial penalties upon servicers who fail to meet foreclosure time frames.

The alignment guidelines' emphasis on pre-foreclosure loss mitigation review, rather than review after a case has been referred to foreclosure, is problematic. Homeowners tend to consult with attorneys or housing counselors after foreclosure proceedings have begun. Homeowners often seek this help for the first time when they receive a foreclosure complaint in a judicial foreclosure state or notice of a scheduled sale in a non-judicial foreclosure jurisdiction. Under the FHFA alignment guidelines, any requirement that a servicer stop foreclosure proceedings to review for loss mitigation ends once the borrower has not responded within thirty days to a solicitation form sent by the servicer's attorney. The servicer's attorney sends this form to the borrower five days after receiving the foreclosure referral. In most cases, by the time a homeowner receives a court complaint or notice of foreclosure sale, this thirty-day period will have passed. Thus, when homeowners consult with attorneys or housing counselors and learn about their legal rights for the first time, the foreclosure process will be locked in place. Servicers and their attorneys will be unwilling to stay proceedings during any later loss mitigation review.

It is unlikely that the pre-foreclosure referral loss mitigation protocol under the alignment rules will have any real effect. Fannie Mae and Freddie Mac oversee the servicers' compliance with these guidelines. These same GSEs were charged with similar oversight of servicers for the HAMP program. HAMP had similar requirements for a loss mitigation eligibility review before a referral to an attorney for foreclosure. The GSEs' track record for enforcement of the HAMP guidelines has been notoriously poor. It is unlikely that the GSEs will be any more effective in enforcing the new alignment rules. As occurred under HAMP, many cases will enter mediation and conferences without any loss mitigation review having been conducted.

Two provisions of the FHFA alignment rules refer specifically to foreclosure mediation programs. One states that in jurisdictions with mediation or conference programs the foreclosure attorney need not send homeowners the

post-referral loss mitigation solicitation form.[89] Since returning this form is the only way to trigger a mandatory foreclosure stop after referral to foreclosure, this means that in jurisdictions with mediation or conference programs the dual track will be in place as soon as the case is referred to a foreclosure attorney.

The rationale for this exception for jurisdictions with mediation and conference programs is presumably that these programs create an independent basis under state law to stop foreclosure proceedings. This assumption is not accurate. Some foreclosure and conference programs do not automatically stay foreclosure proceedings or do so in very limited ways. More significantly, in many jurisdictions with mediation and conference programs, only a small percentage of eligible homeowners participate in them, often as low as ten or twenty percent.[90] The exception in the alignment rule sweeps broadly and can preclude the opportunity for a post-referral stay in all cases in jurisdictions that have conference and mediation programs.

A different alignment guideline refers specifically to mediation and conference programs. According to this provision, a requirement to participate in a mediation or conference program may be a ground for a servicer to avoid penalties for delaying foreclosures beyond the otherwise applicable state time frame.[91] The alignment rule absolves the servicer of consequences of a mediation-related delay if the servicer shows that the delays were not within its control.

The authority to excuse delays due to mediation could potentially promote more efficient use of foreclosure conference and mediation programs. The rule encourages a servicer's counsel to comply with mediation rules in order to show that any delays were not the servicer's fault. In states such as New York, conferences are often continued five or six times due to servicers' lack of preparation. The new rule could be used to hold servicers accountable for these delays. On the other hand, particularly if the mediation program does not hold servicers to clear standards of performance, the rule could encourage a cursory approach to mediation, one in which servicers go through the motions of participation in order to beat the clock and minimize the likelihood of sanctions.

E. The Alignment Guidelines Highlight the Need for Conference and Mediation Programs

The main impact of the new GSE servicing guidelines will be to combine a pre-foreclosure loss mitigation review with a foreclosure process geared to move quickly and without interruption once the case has been referred to an attorney for foreclosure. Unfortunately, the pre-foreclosure review is unsupervised and completely within the servicer's control. With the phasing out of HAMP, even the pretext of a formal obligation to stop foreclosures while considering borrowers for loss mitigation after referral to an attorney will cease to exist. The mediation and conference programs created under state and local law will then be the only counterweight against the drive to speed up foreclosures. Homeowners in jurisdictions without these protections will be particularly vulnerable to these new servicing mandates. Existing programs need to ensure that requirements for a stay of legal proceedings and prohibitions on scheduling sales are part of a mediation or conference program's rules.

©2012 National Consumer Law Center

V. JUDICIAL ENFORCEMENT OF MEDIATION PROGRAM REQUIREMENTS

As mediation programs have become more established, the courts have been more involved in enforcing program rules. This has occurred in the context of both non-judicial and judicial foreclosures. In particular, some courts in Nevada, New York, Connecticut, Maine, and Vermont have been active in enforcing conference and mediation rule.

A. Enforcement of Mediation Rules: The Nevada Courts

1. Nevada Courts and Sanctions Orders

Since the inception of the foreclosure crisis, Nevada has consistently ranked at the top of any listing of states with the highest foreclosure rates. Property values have plummeted there, leaving many residents with homes deeper underwater than anywhere else in the country. Nevada enacted a foreclosure mediation statute in 2009.[92] Although Nevada is a non-judicial foreclosure jurisdiction, the state's law created a mechanism for court oversight of mediations.

Nevada's non-judicial foreclosures follow procedures similar to those of many states. A trustee authorized to enforce a deed of trust serves and records a Notice of Default.[93] Three months later, the trustee may record a notice of sale.[94] After notices have been published once per week for three weeks, the foreclosure sale can take place.[95] These procedures are the actions of private parties and occur without judicial supervision or control.

The Nevada foreclosure mediation statute superimposed new requirements on this process. Now, with service of the Notice of Default the trustee must provide a form allowing the homeowner to elect mediation.[96] If the homeowner chooses to participate in mediation, the trustee must obtain a certificate from a Mediation Administrator before proceeding to a sale. The certificate must state that the beneficiary of the deed of trust participated in good faith in mediation or that the homeowner declined to participate. The mediation certificate must be recorded before the trustee exercises the power of sale contained in a deed of trust.

Nevada's mediation statute contains two provisions designed to ensure that the party purporting to negotiate on behalf of the owner of a mortgage loan has the authority to do so. The statute mandates that "the beneficiary of the deed of trust shall bring to the mediation the original or a certified copy of the deed of trust, the mortgage note and each assignment of the deed of trust or mortgage note."[97] In addition, the foreclosing party must participate in mediation through a person authorized by the beneficiary to settle. According to the statute, "[i]f the beneficiary of the deed of trust is represented at the mediation by another person, that person must have authority to negotiate a loan modification on behalf of the beneficiary of the deed of trust or have access at all time during the mediation to a person with such authority."[98]

During the first year of the Nevada program's operation, mediators and lower courts enforced these requirements unevenly. However, in two *en banc* decisions decided in 2011, the Nevada Supreme Court flatly rejected this approach of casual enforcement.[99] Instead, the court set the terms for robust implementation of the mediation statute.

The *Pasillas* and *Leyva* decisions are significant for two reasons. First, they send a message to mediators and lower courts that the requirements of a mediation statute mean something. Second, and primarily in *Leyva*, the court emphasized that in order to conduct a valid power of sale foreclosure under state law the party seeking to foreclose must have a proper assignment of the deed of trust and the right under the Uniform Commercial Code

to enforce the promissory note. In the court's view, proof of authority to foreclose was not a hyper-technical formality. It was directly related to the goal of mediation: to minimize foreclosures by ensuring that the borrower negotiated with a person who had authority to modify the loan.

In *Pasillas* a representative of a mortgage servicer appeared at mediation with copies of the deed of trust and note signed by the homeowner and the original lender.[100] Two pages of the note were missing. The representative failed to bring any documents showing assignment of the deed of trust to HSBC, alleged to be the current assignee. Nor did the representative produce any record of negotiation or transfer of the promissory note to HSBC. The representative stated that he did not have authority to modify the loan and would need authorization from investors to do so. He did not have access to these investors at mediation.

In *Leyva,* a servicer representative similarly came to mediation with copies of the deed of trust and promissory note. He did not bring documents showing an assignment of the deed of trust or transfer of the note to Wells Fargo, the entity he claimed had the right to enforce the obligation. Instead the representative brought a notarized statement from a Wells Fargo employee stating that Wells Fargo was in possession of the deed of trust and mortgage note and all assignments of the documents.[101] Wells Fargo contended that it had substantially complied with the mediation statute, and substantial compliance was all the statute required.

In both cases the servicers argued that they had negotiated in good faith, but were unable to modify the loans or offer other loss mitigation alternatives. The district courts found sanctions unwarranted and directed that the mediation program administrator give certificates allowing the foreclosure sales.

The Nevada Supreme Court held in related appeals that the district courts improperly allowed foreclosures to proceed without strict compliance with the mediation statute. Significantly, the Nevada Supreme Court ruled that the lower courts erred in not imposing appropriate sanctions given the lenders' clear violations of the statute.[102]

The *Leyva* court concluded that Article 3 of the Uniform Commercial Code governed enforcement of the promissory note secured by the deed of trust.[103] A borrower had the right to know that the party foreclosing was an entity "entitled to enforce" the note in accordance with U.C.C. § 3-301. According to the *Leyva* court, because Wells Fargo could not provide documentation that it was a party entitled to enforce the note, "it has not demonstrated authority to mediate the note."[104]

In *Leyva, Pasillas,* and subsequent decisions, the Nevada Supreme Court emphasized the mandatory nature of sanctions when a lender fails to satisfy the mandates of the mediation statute. According to the court, violations of any one of four basic requirements of the law must result in the mediator's recommendation that sanctions be imposed. The four occurrences that trigger sanctions are: (1) failure to attend the mediation; (2) failure to participate in the mediation in good faith; (3) failure to bring to mediation the documents required by statute and court rules; and (4) failure to demonstrate that the lender's representative has authority to modify the loan or direct access to a person with this authority.[105]

Notably, these violations of the Nevada statute mandate not only denial of a certification allowing foreclosure, but also obligate the court to determine an appropriate sanction. The statute addresses the court's role in the event of non-compliance with the statutory requirements. It provides that, "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

©2012 National Consumer Law Center

proper by the court."[106] The *Pasillas* court interpreted this language to mandate that a court determine an appropriate sanction when a lender failed to satisfy any one of the four enumerated requirements. Later decisions by the Nevada Supreme Court have reiterated this view.[107] In determining the appropriate sanction, the Nevada Supreme Court directed lower courts to consider factors such as "whether the violations were intentional, the amount of prejudice to the non-violating party, and the violating party's willingness to mitigate any harm by continuing meaningful negotiations."[108]

2. *The Nevada Courts Address the Limits of Sanctions*

The Nevada courts have yet to explore the full extent of the sanctions that may be imposed for violation of mediation rules. The state's Supreme Court has held that it would not be an appropriate sanction to bar all future efforts by the lender to foreclose the same deed of trust.[109] At the same time the court noted, "While sanctions conceivably could be imposed that would wipe out the lender's security—we do not decide this issue since it is not presented—it would be up to the petitioner to allege and establish the propriety of such drastic sanctions."[110] A less drastic sanction, ordering a loan modification, is expressly authorized by the Nevada mediation statute.[111] In a pending appeal, *Renslow v. Wells Fargo Bank*, the Nevada Supreme Court will be addressing the propriety of this sanction.[112]

The homeowners in *Renslow* entered into a HAMP trial payment plan with Wells Fargo. The borrowers had been told by a Wells Fargo agent not to make three payments in order to qualify for HAMP. The borrowers acted on this instruction and were approved for a trial plan agreement. They eventually made seven monthly HAMP trial plan payments. Despite the borrowers' compliance with the HAMP trial plan, Wells Fargo refused to implement a permanent modification, claiming later that an investor restriction barred modification. In the course of mediation, Wells Fargo's representative discovered that Wells Fargo did not own the loan, but was only the servicer. The Wells Fargo representative did not know who owned the loan.

The homeowners sought judicial review of Wells Fargo's conduct in mediation. After hearings, the Nevada District Court imposed a series of sanctions against Wells Fargo. First, the court imposed a $7500 sanction against Wells Fargo because it failed to comply with the mediation requirement to provide documents accurately reflecting the ownership of the loan. The court assessed a further sanction of $10,000 due to Wells Fargo's appearance at mediation through a representative who had no authority to modify the loan. According to the court, Wells Fargo harmed the borrowers by offering a modification, encouraging them to default in order to qualify for the modification, and then denying the modification because of an alleged investor restriction. The same conduct harmed the mediation process by wasting time on sessions attended by a lender representative without authority.

As a sanction for the lender's bad faith, the court ordered the loan modified along the lines of a permanent HAMP modification incorporating the terms of the proffered trial modification. This modification effectively reduced the borrowers' monthly payment by $268. The court assessed an additional $10,000 sanction for Wells Fargo's bad faith participation in mediation. According to the court, it had the power to modify the loan on the basis of its equitable powers, powers the court had regardless of the mediation statute. Finally, the court noted that, as the HAMP modification did not reduce the note principal, the modification did not violate any constitutional limitations under the Contracts Clause or amount to an improper regulatory taking of property.

In appealing the Nevada District Court's ruling in *Renslow,* Wells Fargo has raised broad challenges to constitutionality the Nevada mediation statute. Wells Fargo argues that the provisions of the statute authorizing sanctions and barring non-judicial foreclosure violate the Contracts Clause and the Takings Clause of the United States and the Nevada constitutions. Wells also contends that the structure of the mediation program violates the state constitution's separation of powers doctrine. According to Wells, the legislature could not delegate to the courts the authority to administer a mediation program that involved disputes that were not "cases and controversies." Wells argues for a definition of "case and controversy" limited to formal legal actions initiated in a court.

In response, the borrowers have noted that far more significant contract impairments and regulatory takings have been found consistent with the Contracts and Takings clauses.[113] The HAMP modification at issue in *Renslow* had been proposed by Wells Fargo and complied with a formula that ensured that it met the best interests of investors in the loan. With respect to the separation of powers claim, courts have traditionally exercised broad equitable authority to review all foreclosures of redemption rights arising out of mortgages and deeds of trust. Under Nevada's statute, the courts exercise this authority upon the petition of one of the parties affected by the foreclosure. According to the homeowners, a proceeding initiated on this basis satisfies the case and controversy requirement.

B. More State Courts Are Enforcing Mediation Program Rules

1. *Connecticut*

Trial courts enforcing Connecticut's foreclosure mediation statute have entered orders that *inter alia*: direct the servicer to request a waiver of investor restrictions on modification; order a lender to extend a previously offered loan modification; toll accrual of all or partial interest; and impose monetary sanctions that reduce the outstanding loan principal.[114]

2. *Indiana*

When directives to appear for conferences and to produce documents are issued in the form of court orders, this sets the stage for effective enforcement. For example, some courts overseeing conferences under Indiana's pilot program for supervised conferences regularly incorporate conference obligations into form court orders. On this basis the court can impose monetary sanctions in the event that a lender fails to appear with an authorized representative as required by its order. The court's order can direct dismissal of the foreclosure action if appropriate documentation, such as a properly endorsed note, is not produced by a specific conference date.[115]

3. *Maine*

Maine's foreclosure mediation statute authorizes courts to impose sanctions upon finding that a party did not mediate in good faith.[116] A mediator may refer a matter to court for consideration of sanctions.[117] The sanctions can include assessment of costs and fees or dismissal of the foreclosure action with or without prejudice.[118] Maine courts have found lack of good faith in a number of instances, including a servicer's refusal to provide guidance on its standards for review of a loan modification request,[119] assertion of inconsistent positions on whether or not the homeowner qualified for a HAMP modification,[120] and failure to disclose an investor restriction allegedly barring a HAMP modification.[121] Sanctions have included tolling of interest and costs, and requiring the lender to pay the homeowner's attorney fees and lost wages due to unnecessary mediation appearances.[122]

©2012 National Consumer Law Center

4. *New York*

In a prior National Consumer Law Center report, we summarized decisions by New York trial courts that enforced requirements for foreclosing lenders to negotiate with borrowers in good faith.[123] The sanctions the New York courts imposed upon lenders included barring foreclosure, tolling accrual of interest and fees, imposing substantial monetary penalties, and ordering conversion of a trial modification to a permanent modification.[124] New York courts have continued to apply various sanctions against noncompliant lenders and servicers. These include orders requiring decisions on loan modification applications according to a fixed time frame, orders that lender representatives appear personally to explain loss mitigation decisions, and suspension of the accrual of interest.[125] For example, in *JP Morgan Chase Bank v. Berrio*,[126] the court found that the lender failed to negotiate in good faith as required by the conference statute[127] and ordered the forfeiture of interest for the nine month period during which the lender had caused conference sessions to be continued eight times. The lender had demanded unnecessary documents, had lost documents, and had allowed a HAMP trial payment plan to remain unconverted throughout this time without explanation.

5. *Vermont*

Trial courts in Vermont have enforced the requirements of that state's mediation statute through a variety of sanctions. Finding that the lender appeared at mediation through a servicer representative who negotiated without authority, a Vermont trial court ordered the lender to implement a loan modification consistent with the terms that had been proposed earlier in negotiations.[128] The court then dismissed the foreclosure action. In *Citibank v. Mumley*, a Vermont trial court imposed sanctions of a different kind.[129] An attorney for the lender appeared for mediation, but a representative of the lender authorized to modify the loan was not available. The lender failed to provide HAMP net present value test inputs during mediation as required by the mediation statute. The failure to provide required documentation and appear through an authorized representative violated the statute's express requirements for good faith participation.[130] The court rejected the lender's argument that federal HAMP guidelines somehow preempted state mediation programs' enforcement of HAMP guidelines. On the contrary, the court noted that the state's mediation law provided an effective means to enforce federal HAMP guidelines. As a sanction the court ordered a tolling of interest, fees, and costs for the year that had passed since the lender representative failed to participate as required in mediation. The court directed the mediation to continue while staying the expiration of the post-judgment redemption period.

VI. MEDIATION PROGRAMS REQUIRE SERVICERS TO SHOW AUTHORITY TO FORECLOSE

In most foreclosures, no one routinely looks at the documents lenders file in courts and land records. This lack of oversight has been a major factor contributing to the pervasive use of defective paperwork in foreclosures. In non-judicial foreclosure states it is common for there to be no oversight at all. Courts in judicial foreclosure states rely heavily upon the overwhelming majority of foreclosures passing through as uncontested defaults. The lack of eyes on the papers encourages the omission and misrepresentation of key documents. Conferences can provide a counterbalance to this lax oversight. While foreclosure conferences tend to focus on loss mitigation issues, the question

of who has authority to foreclose clearly has a place in these discussions. By statute or rule, nearly all conference and mediation programs require the participation of an individual authorized by the owner of the loan to decide questions related to loss mitigation questions.

The requirements to document authority to foreclose vary significantly from program to program. For example, the state of Washington, a non-judicial foreclosure jurisdiction, recently attempted to incorporate a standing requirement into its mediation statute. The result was not particularly effective. On the one hand, the new statute defines a failure to mediate in good faith to include the lender's failure to provide "proof that the entity claiming to be the beneficiary is the owner of any promissory note or obligation secured by the deed of trust."[131] However, the section goes on to allow a lender to satisfy this requirement by producing its own affidavit stating that it is the actual holder of the promissory note.[132]

In Maine and Vermont, both judicial foreclosure states, recent amendments to general foreclosure pleading rules created requirements to show authority to foreclose that should carry over into mediations. The Maine foreclosure statute now provides that the foreclosing party must "certify proof of ownership of the mortgage note and produce evidence of the mortgage note, mortgage and all assignments and endorsements of the mortgage note and mortgage."[133] Under amendments to Vermont's foreclosure rule the plaintiff must "attach to the complaint copies of the original note and mortgage deed and proof of ownership thereof, including copies of all original endorsements and assignments of the note and mortgage deed . . . and shall plead in its complaint that the originals are in the possession and control of the plaintiff or that the plaintiff is otherwise entitled to enforce the mortgage note pursuant to the Uniform Commercial Code."[134] The new Maine and Vermont provisions set a framework for rigorous enforcement by the courts, but do not specifically address enforcement through the mediation process. However, failure to comply with these rules, coupled with a servicer representative's inability to render decisions on loss mitigation options, should build a record for the determination that a lender did not participate in mediation in good faith.

New York is another judicial foreclosure state with a conference law. In response to the robo-signing scandal, the New York court system issued an administrative order in October 2011 requiring lenders' attorneys to file certifications that they had taken reasonable steps to verify the accuracy of documents relied upon to foreclose.[135] Because the order carries implications for attorney disciplinary action, it has had a significant effect on foreclosure practice. Upon the issuance of the order, foreclosure filings in New York dropped dramatically. It is not clear to what extent the foreclosure conferences may have contributed to the slowing of new foreclosure actions during 2011. The likelihood that eighty percent of defendants will appear in court for a conference session likely had an impact on lenders' attorneys faced with preparing these certifications.

The laws in effect in Nevada, Hawaii, and the District of Columbia have set the strictest requirements for lenders to show authority to foreclose. All three are primarily non-judicial foreclosure jurisdictions that recently enacted foreclosure mediation statutes. Nevada's mediation statute provides that: "the beneficiary of the deed of trust shall bring to the mediation the original or a certified copy of the deed of trust, the mortgage note and each assignment of the deed of trust or mortgage note. If the beneficiary of the deed of trust is represented at the mediation by another person, that person must have authority to negotiate a loan modification on behalf of the beneficiary of the deed of trust or have a access at all times during the mediation to a person with such authority."[136]

©2012 National Consumer Law Center

The Nevada Supreme Court's foreclosure mediation rule set out additional requirements to show authority to foreclose. The rules require that the foreclosing party provide a statement under oath certifying a copy of and actual possession of the original mortgage note, deed of trust, and each assignment of the deed of trust and each endorsement of the mortgage note.[137] Conclusory affidavits of compliance with the Uniform Commercial Code's "lost note" rule[138] will not be accepted. Instead, the lender must obtain a court order stating that it has complied with the U.C.C.'s requirements for proof of a lost note.[139] The Nevada statute effectively combines an explicit documentation requirement with the relevant inquiry for mediation—is the lender's representative authorized to act on behalf of the owner of the mortgage loan?

Two recent developments have made it more likely that lenders who cannot establish authority to foreclose in Nevada will find their path to sale barred at mediation. First, two decisions by the Nevada Supreme Court in July 2011 mandated strict enforcement of the mediation statute's "authorized representative" requirement.[140] These decisions are discussed in Part V of this Report. The other development is a 2011 amendment to Nevada's non-judicial foreclosure statute.[141] The statute now requires, as a condition to exercise of a valid power of sale, that the assignments of mortgages and beneficial interests under a deed of trust be recorded. In commencing a foreclosure, the beneficiary or trustee must record a notarized affidavit describing the prior beneficiaries, the status of possession of the note, the authority of the trustee to exercise the power of sale, and the chain of title and recordings of beneficial interests. While these changes are recent, there has been some indication that lenders are moving to the alternative of judicial foreclosures as a means to avoid the requirement to file an affidavit (required only in non-judicial foreclosures) showing authority to foreclose. Ultimately this option may not provide an escape for lenders, as courts could easily require a similar affidavit in judicial proceedings.

In foreclosing on a home with a loan balance at the national median in 2008, investors lost an average of $145,000 per home foreclosure.

VII. CONFERENCE AND MEDIATION PROGRAMS CAN BE FINANCIALLY SELF-SUPPORTING

A. The Programs Provide a Substantial Benefit to States and Communities at Little or No Cost

Analysts have produced estimates for the direct and indirect costs of foreclosures during the current crisis. These costs fall into several categories. First, the owners of the mortgage debt invariably lose out every time a foreclosure is completed. Today, 22.5% of homes nationally are worth less than the mortgages they secure and another five percent are considered in the "near negative equity" category.[142] In some states the proportion of homes that are completely underwater is much higher: Nevada (sixty percent), Arizona (forty-eight percent), Florida (forty-five percent), Michigan (thirty-five percent), and California (thirty percent).[143] Losses incurred with each foreclosure in these states will be particularly steep.

Even when a property is not underwater, lenders suffer substantial losses from each foreclosure. The owners of mortgage debt typically lose over fifty percent of the value of the debt when a first mortgage is foreclosed. In foreclosing on a home with a loan balance at the national median in 2008, investors lost an average of $145,000 per home foreclosure.[144]

Public and non-profit institutions have been major investors in mortgage-backed securities. It is not surprising that these investors have been among the most vocal critics of mortgage servicing practices that promote speedy foreclosure sales at the expense of careful reviews of loss mitigation options.[145]

The decrease in the property's value once it enters REO status[146] is one direct cost of a foreclosure. The indirect costs can be more extensive. These indirect costs include loss in value to neighboring properties, lost tax revenue from the depreciated property values, and the costs governments incur in inspecting and maintaining foreclosed properties. Local governments incur costs ranging from unpaid water and sewer bills to police services related to foreclosed properties.

Studies have attempted to quantify the aggregate direct and indirect costs associated with the foreclosure crisis.[147] Using methodologies developed by the Joint Economics Committee, the California Reinvestment Coalition recently estimated these costs for California.[148] The study concluded that an average foreclosure caused a drop in a home's value of twenty-two percent. On a statewide basis this came to an aggregate loss of $207 billion in values of foreclosed properties since the crisis began. These foreclosures impacted neighboring properties to cause an additional statewide loss of $424 billion in real estate values. As a result, governmental entities lost $3.8 billion in property tax revenue. Local government costs for added services to care for these properties cost the state another twenty to thirty billion dollars. If even a small portion of these foreclosures could have been avoided, the state could have saved billions of dollars.

Given their own stake in the foreclosure crisis, state and local governments are looking more and more to lenders and servicers to support the costs of finding viable alternatives to foreclosure. How much do mediations cost? The answer depends on many variables, including the costs of mediators, the number of sessions required per case, and the overall number of mediations occurring in a particular program. The New York State conferences and the Philadelphia diversion program rely upon existing court personnel and volunteer attorneys. Both programs are highly effective, but strain court resources. A few mediation programs receive direct or indirect government funding. For example, Connecticut has provided five million dollars in funding for its program over the past three years. Cook County, Illinois funded its mediation program with a three million dollar appropriation in 2011. Cook County's funding is directed heavily toward legal assistance and outreach related to foreclosure mediation. The State of New York has similarly funded counseling and legal assistance related to foreclosure conferences.

Recently, the trend has been to design foreclosure conference and mediation programs to be financially self-sufficient. Programs in seven states and the District of Columbia were set up with this goal.[149] So far they appear to be achieving the objective. In fact, several mediation programs not only cover their own costs, but also generate funds to support other housing preservation efforts, such as housing counseling and legal services.

Mediation programs have achieved financial self-sufficiency by assessing surcharges to the fees that lenders pay to file foreclosure-related documents with public offices. These are typically surcharges to a court filing fee or to a recording fee related to a non-judicial foreclosure. In existing foreclosure mediation and conference programs, these assessments range anywhere from $40 to $400 per foreclosure.

The sums collected from these filing fee surcharges typically fund mediation program administration costs. In addition, most programs pay mediators. Mediators may be paid per session or for a partial day's service. For example, in Maine mediators are paid $175 for a half-day's services and $300 for a full day.

©2012 National Consumer Law Center

Under Florida's mandatory program, mediators charged $350 for up to two sessions. Some programs, such as Indiana and Maine, are able to pay all costs for mediators out of filing fee surcharges. In other jurisdictions, a second fee in addition to the filing fee surcharge is assessed when a borrower elects to participate in mediation. The District of Columbia and Maryland require that borrowers pay a $50 mediation fee when they submit a request for mediation. In Hawaii, Nevada, and Washington the borrower and lender split a fee ($400 in Washington and Nevada and $600 in Hawaii) when the borrower elects mediation. The intent behind the two-tier fee approach is to generate sufficient income based on all foreclosure filings to maintain the program while allocating additional costs to the parties who actually participate in mediation.

The terms of loan documents and state laws typically allow the lender to shift its foreclosure-related costs to the borrower. These costs may be included in the amount of a foreclosure judgment or added to a deficiency claim. Of the jurisdictions listed above, only Vermont has enacted an express statutory prohibition restricting assessment of the lender-paid mediation costs against the borrower.[150] Under Vermont's law, half of the mediator's costs may be shifted to the borrower by inclusion in a foreclosure judgment, but may be collected only if there is a foreclosure sale surplus.[151]

Maryland, Maine, Indiana, Florida, Washington, Nevada, and the District of Columbia implemented financially self-sustaining conference and mediation programs. Nevada's funding example has served as the model for the similarly structured programs in Washington and Hawaii. Nevada collects a $200 surcharge from each filing of a notice of default in land records. Between $43 and $45 of each $200 fee covers the costs of the mediation program. Of the remaining $155, $150 goes to the state's general fund and $5 is designated for legal services to the indigent.

TABLE 6
Foreclosure Mediation Fees, Selected States

State	Filing Fee Surcharge	Other Charges
District of Columbia	$300	$50 borrower fee upon election
Florida	$400	$350 by lender if mediation conducted
Hawaii	$350	$600 split by borrower and lender
Indiana	$50	no charge
Maine	$200	no charge
Maryland	$300	$50 by borrower upon election
Nevada	$200	$400 split by parties upon election
Vermont	None	Lender pays mediator
Washington	$250	$400 split by parties upon election

In the first year of its implementation, Nevada's recording fee surcharge brought in between six and eight million dollars. A substantial portion of these funds went to the general state revenues, reducing the state's deficit. In Washington, officials anticipate that the $250 recording fee surcharge will generate about eight million dollars per year. The state intends to use about eighty percent of these funds to support housing counselors. In both Nevada and Washington the $400 fee assessed to the parties upon an election to participate in mediation adequately compensates mediators, and the programs have not experienced any shortage of mediators willing to serve at these rates.

Foreclosure and Conference Programs Pay Their Own Way

District of Columbia: The lender pays $300 for each notice of default recorded against a residential mortgage. The fees go toward Foreclosure Mediation Fund that pays for the costs of administration of the program. This is a dedicated fund, and does not revert to general fund. Penalties for non-compliance with mediation rules go into the fund. The borrower must pay $50 when it elects mediation.

Florida: Under the former statewide program, the lender paid $400 upon filing the complaint ($275 non-refundable to the program and $125 to support counseling services). The counseling portion was refundable if not used. Lender paid an additional $350 if mediation took place. Lender's fees could be taxed as a cost in final judgment.

Hawaii: The borrower must submit a $300 fee with the election of mediation form. Within fourteen days of notification of the borrower's election, the lender must submit a $300 payment for its share of mediation costs. A mortgage foreclosure dispute resolution special fund was established with fees and fines collected. In addition, lenders pay $100 to record documents in Bureau of Conveyances and $250 to file a copy of a foreclosure notice. These funds go to Department of Commerce and Consumer Affairs toward the mediation fund. Fines of up to $1000 for any program violation are deposited with the fund.

Indiana: Fifty dollars is added to the complaint filing fee for costs to the court for running the program, with a portion to pay mediators in counties where mediations are supervised. Mediators are paid for various tasks, up to a maximum of $135 per mediation. The $50 fee is covering costs of the program.

Maine: A $200 administrative fee is added to charges for filing all foreclosure complaints. The fees fund the foreclosure diversion program.

Maryland: A new $300 charge is assessed to the lender at the filing of an order to docket a complaint to foreclose on a residential mortgage. This pays for program costs, counseling, outreach, and foreclosure prevention services. The borrower must submit a $50 filing fee with a request for mediation. These fees generate revenue over mediation program costs to pay for homeowner support programs. In its first year, it was estimated that the program would produce $2.7 million in revenue, but would need only $800,000 for its own operation.

Nevada: A $200 filing fee surcharge is assessed for each recording of a notice of default and election to sell. Approximately $150 goes to the state general fund, $45 goes to pay mediation program costs, and $5 goes to support legal aid for the indigent. If the borrower elects mediation, the lender and borrower split a $400 flat mediator fee.

Vermont: The lender pays the costs of mediation at a rate agreed upon by parties and the mediator. The lender can recover all its mediation costs from a sale surplus, including its attorney fees. If there is no surplus, no attorney fee shifting is allowed, but the lender may shift one-half of mediator costs.

Washington: Two hundred fifty dollars are added to the recording fee to cover mediation program costs. Fees cover costs of the mediation program and the surplus goes to support housing counselors. The lender and borrower evenly split a $400 mediator fee that covers up to three hours of mediator time.

Six statutes operate under a general framework: the lender pays a surcharge for filing a foreclosure-related document. This funds the mediation program's operating expenses. The surcharge is collected for all foreclosures, whether or not mediation takes place. For the cases in which mediation does take place, an additional charge to pay for the mediator is assessed. The lender and the borrower typically share this mediator cost. This has been the basic funding model for the programs in the District of Columbian, Florida, Hawaii, Maryland, Nevada, and Washington.

©2012 National Consumer Law Center

B. Supporting Legal Services Attorneys and Housing Counselors through Revenues from Filing Fee Surcharges

Lenders invariably participate in conference and mediation programs through attorneys. Yet, in most instances, nearly all homeowners appear in these programs without attorneys. Even in states requiring foreclosures to proceed through the courts, it is not unusual for eighty to ninety percent of homeowners to be unrepresented in conferences and mediations.[152] Leaving borrowers to interact directly with servicers' staff and their attorneys leads to unnecessary foreclosures and redefaults.

Given the scarcity of attorney assistance for homeowners, housing counselors play an essential role in preparing homeowners for mediations. As discussed, participation in counseling has been shown to have a significant impact both on the likelihood that a borrower will avoid foreclosure and on the sustainability of the non-foreclosure alternative.[153] Housing counselors, in effect, do the work that competent servicer staff should be doing. It is not unreasonable to require mortgage servicers to pay some of the cost of providing housing counselors for mediations. Counselors are alleviating a harm caused by servicers' decisions to under-staff and poorly train their loss mitigation staff.

States have explored a number of options for funding legal services for homeowners related to foreclosure mediation and conference programs. For example, the Nevada law specifically directs that $5 from each $200 fee for recording a notice of default be allocated to legal services programs. The $5 charge is expected to generate $200,000 of funding for legal services programs in its first year. A $25 surcharge to the same Nevada filing fee could provide one million dollars annually for legal services. Funding at such a level could fund a legal services unit set up specifically to support a foreclosure mediation or conference program. Support from specialized legal services staff is the most effective way to equalize the positions of homeowners and servicers in mediation.

Funding for full time attorney staff to assist homeowners in mediation programs must be a high priority. Legal services in some states, such as Nevada, Maine, and New York, provide organized support for mediation programs. These services include limited screening and referral of the most appropriate cases to pro bono counsel. While over ninety-five percent of homeowners proceeding through Philadelphia's program do so without direct attorney representation, most have had their case reviewed by an experienced legal services attorney.

New York programs have developed the most extensive attorney support systems for conferences. In many New York counties, local legal services attorneys conduct group sessions for homeowners and represent a high proportion of individuals through the conference process. Statewide in New York, thirty-three percent of homeowners appear for conferences with attorney representation.[154] In the counties in and around New York City, forty-one percent of homeowners were represented in conferences in 2011. In Richmond County (Staten Island), the percentage of conferences in which the borrower was represented has reached eight-five percent.[155] Unfortunately, attorney representation in other programs around the country does not approach the levels in New York. Instead, in most programs homeowners appear without attorney representation in the overwhelming majority of cases.[156]

A number of state programs fund housing counseling for mediation participants directly from filing fee surcharges. States that have funded counselors in this way include Washington, Nevada, Maryland, and Florida. States should also consider funding counseling and attorney support for borrowers out of penalties assessed against lenders for bad faith

participation in conferences and mediation sessions. The statutes in the District of Columbia and Hawaii authorize penalties collected from lenders to be directed toward general program operations. However, statutes could easily be drafted to direct that these penalties be allocated to homeowner support services.

Servicers have shown their unwillingness to allocate sufficient resources to conduct adequate loss mitigation reviews. Therefore, as a condition to exercise of remedies under state foreclosure laws, servicers must be assessed the costs necessary to ensure that others who are qualified to do so perform this essential work.

VIII. FORECLOSURE DELAYS: MEDIATIONS DO NOT PROLONG FORECLOSURES

During 2011, the time to complete foreclosures grew to unprecedented lengths.[157] According to RealtyTrac, as of the end of September 2011, foreclosures nationwide were taking an average of 336 days to complete.[158] In New York, New Jersey, and Florida it was taking over two years to complete the foreclosure process.[159] In Maryland, Connecticut, and Pennsylvania the typical foreclosure time exceeded eighteen months. According to the lending industry, as of September 2011 almost forty-percent of borrowers in foreclosure had not made a payment in two years.[160]

Foreclosure conference and mediation programs had little, if anything, to do with these delays. Florida, Maryland, and New Jersey have been cited as examples of states where foreclosure timelines have grown to disturbing lengths. In Florida there were 456,000 foreclosures pending when the state's Supreme Court recommended mandatory foreclosure conferences in December 2009.[161] Yet, during 2010 and 2011, only three to five percent of cases eligible for mediation completed the process. This low participation rate eventually led the Florida Supreme Court to suspend the conference program.[162] In Maryland fewer than 300 cases were mediated during 2010. In New Jersey less than twenty percent of eligible cases went through mediation. It is highly unlikely that participation in mediations or conferences at these levels had an effect on slowing the overall foreclosure time frames in these states. In Pennsylvania and Illinois, two other states with long average foreclosure times, mediation programs operated only in selected counties. On the other hand, Massachusetts, considered the state with the eighth longest foreclosure time, is a non-judicial foreclosure jurisdiction without a mediation program.

The Reinvestment Fund's study of the Philadelphia foreclosure diversion program, previously discussed, provides an accurate analysis of the effect of a foreclosure mediation program on existing foreclosure time frames.[163] The Reinvestment Fund concluded that the conferences in Philadelphia did not delay foreclosures. A case typically stayed in the diversion process for fifty-three days. The standard duration for a foreclosure in Philadelphia, from filing a court complaint to sale and assuming a default judgment, no litigation and no mediation, had been ten months. Thus, the diversion process could begin and end easily without extending the pre-existing foreclosure time frame.

A. Mediation and Conference Programs Can Operate Within Existing Foreclosure Time Frames

Most other mediation and conference programs have been structured in a similar way to fit within pre-existing foreclosure time frames, as demonstrated in this summary of the time frames of typical programs.

A substantial delay in the foreclosure process without an intervention that directs the parties to effective loss mitigation solutions

©2012 National Consumer Law Center

does not help homeowners. As homeowners sit in limbo, interest, costs, and fees accrue. Sustainable modifications become more difficult to achieve. During 2010 and 2011 many mortgage servicers, for reasons of their own, delayed the completion of many foreclosures. This may have been due in part to servicers' concerns about defective documentation of their authority to foreclose. However, there is no evidence that state and local programs requiring review of loss mitigation options caused the widespread pattern of foreclosure delays.

B. Foreclosure Delays: The New York Experience

With an unprecedented average foreclosure time of 987 days and a law mandating foreclosure conferences for all cases, New York would appear to be the prime example of a state with pro-consumer laws that unduly delay foreclosures to the detriment of all parties involved. However, the facts do not bear out this characterization.

Conferences in New York foreclosure cases take place under a law enacted in 2008 and amended in 2009 to apply to all residential foreclosures.[164] Settlement conferences are now to be scheduled in all foreclosure cases involving residential properties in New York. However, the event that triggers the scheduling is the plaintiff-lender's filing of a proof of service of the foreclosure complaint together with a special form called a "Request for Judicial Intervention."[165] The filing of the Request for Judicial Intervention initiates not only the scheduling of a conference, but also the referral of the homeowner to housing counseling and legal assistance. If the lender serves a foreclosure complaint but does not file the Request for Judicial Intervention, a conference will not be scheduled and the homeowner will not be directed to counseling and legal assistance.

New York City boroughs, such as Brooklyn and Queens, have some of the highest foreclosure rates in the state. Yet, court records indicate that the process of scheduling new cases for conferences virtually came to a standstill in these two boroughs during 2011. This did not happen because borrowers were somehow using the system for delay. It occurred because attorneys for lenders consistently refused to file the Request for Judicial Intervention forms after they served complaints. During 2011, no requests for judicial intervention were filed in almost ninety percent of the foreclosures filed in Brooklyn and Queens.[166] This left the homeowners named as defendants in these cases in a state of limbo, with interest, costs, and fees accruing for over a year. Their cases were not referred to loss mitigation conferences or to housing counselors and legal services attorneys.

In late 2011, legal services attorneys in New York filed a class action lawsuit in federal court seeking redress from the lenders' failure to move foreclosure cases along into the conferences. The proposed class of homeowners asserts claims against the well-known Baum law firm, a firm that represented lenders in forty percent of the foreclosure cases pending in the New York City courts.[167] The homeowners raise claims under the Fair Debt Collection Practices Act and the New York consumer fraud statute. Their complaint challenges the law firm's practice of filing foreclosure complaints, but refusing to file the paperwork required to send the cases to conferences. These conferences could produce modified loans that would restore cash flows to the owners of the loans. Instead, the actions of the servicers and their attorneys have made these favorable outcomes much less likely.

Foreclosure Mediation and Conference Time Frames in Selected Jurisdictions

Connecticut: The court sends out notice of a mediation session within five days of when the answer to the complaint is due. The first session should be thirty-five days from notice, and parties then have sixty days to complete mediation (with thirty days more if the court so orders or the parties agree).

District of Columbia: The first mediation session is no later than forty-five days from the mailing of the notice of default. Mediation is to be completed within ninety days of mailing of the notice of default, plus thirty more days upon mutual consent.

Florida: Under the former statewide program, mediation was to be completed within 60 to 120 days of filing of the foreclosure complaint. The lender was to comply with mediation obligations before obtaining default, summary judgment, or proceeding to trail (unless limitation waived by the homeowner).

Illinois (Cook County): A case management conference is to be held sixty days after the complaint is filed. The program is "designed to work within the time frames set forth in the Illinois Mortgage Foreclosure Law, and not interfere with the statutorily available time limits (e.g. redemption date, etc) for minimal impact to both sides in the foreclosure action)."

Maine: The case is sent for mediation upon the defendant's filing of an answer or entering an appearance. No judgment may be entered until the lender has obtained a certification that mediation has been completed.

Maryland: Mediation may be requested when the order to docket (the document commencing a foreclosure action) is filed. If mediation is requested, it must be completed within sixty days from the date the Office of Hearings and Appeals receives the borrower's request for mediation. For cause, the Office of Hearings and Appeals may extend the mediation period for thirty more days.

Nevada: State law requires a ninety-day period between recording a notice of breach and the exercise of power of sale. Mediation must take place within this ninety-day period.

New York: When filing proof of service of the complaint, lender must file a special request for court action that refers the case to a conference. An initial conference is to be held within sixty days of the filing of the request for judicial intervention. The court will then schedule further conferences as appropriate. Because of lenders' failure to file timely requests for judicial intervention, this time frame has not been followed in practice.

Ohio (Cuyahoga County): The court must approve a referral to mediation. A pre-mediation conference will be scheduled and held within thirty days of the referral. A full mediation should be scheduled and held within ninety days of the pre-mediation conference. The program rules provide, "In total, a file should be in the Foreclosure Mediation Program for a total of 120 days, unless good cause can be shown otherwise."

Rhode Island: A conference must be scheduled no later than twenty-one days after issuance of a notice of intent to foreclose. The conference must be completed within sixty days of the notice of intent to foreclose.

Vermont: State law provides a six-month redemption period after entry of a judgment, and this period must expire before a sale can take place. Mediation can be requested up to four months after entry of judgment, but the mediation does not stay the running of redemption period.

Washington: Under pre-mediation law, the borrower could request a ninety-day period for an informal conference with the lender before a notice of default could be served. Under the 2011 mediation law, the case can be referred to mediation before the conference period ends. The lender may serve a notice of default, but may not record a notice of sale the during mediation period. Mediation sessions must be held within forty-five days of referral to mediation, unless the parties agree otherwise.

©2012 National Consumer Law Center

IX. RECOMMENDATIONS REGARDING MEDIATION GOALS FOR 2012 AND BEYOND

In our 2009 report on foreclosure mediation, National Consumer Law Center recommended a number of practices and structures to strengthen the programs. Below are additional recommendations based on developments since the 2009 report.

1. States that do not have foreclosure conference or mediation programs should adopt them quickly. As of the beginning of 2012, foreclosure conference or mediation programs are in place in nineteen states.[168] These programs require that a lender or servicer review loss mitigation options with a homeowner and neutral third party before a foreclosure can be completed. Thirteen of these states have a judicial foreclosure system, and six are non-judicial foreclosure jurisdictions. States without programs should move promptly to implement them.

2. Ensure that foreclosure conference and mediation programs are retained as permanent features of state foreclosure laws. Several foreclosure and conference programs were implemented as temporary measures subject to a sunset date or future legislative review. These include the programs in Connecticut, New York, Vermont, and Maine. The implementation dates and sunset provisions for the larger mediation and conference programs are summarized.

Aspects of some of these programs could certainly be improved through amendments or rule changes. However, these laws perform an essential function in correcting an imbalance that otherwise exists in these critically important proceedings. All should become permanent additions to the states' statutes and court rules.

Timelines for Implementation and Sunset of Foreclosure and Conference Programs

Connecticut: Effective July 1, 2008. Sunset July 1, 2014.

District of Columbia: Effective March 12, 2011. No sunset.

Florida: Effective with State Supreme Court order of December 28, 2009. Program suspended December 2011.[169]

Illinois (Cook County): Effective April 12, 2010. No sunset.

Maine: Effective statewide January 2010. Report and legislative review by February 15, 2013.

Maryland: Effective July 1, 2010. No sunset.

Nevada: Effective July 1, 2009. No sunset.

New York: Effective statewide February 13, 2010 until February 13, 2015.

Ohio (Cuyahoga County): Effective June 2008. No sunset.

Pennsylvania (Philadelphia County): Applicable automatically to all residential foreclosures beginning September 2008. Made permanent by December 17, 2009 by order of court.

Rhode Island (City of Providence): Effective September 2009. No sunset.

Vermont: Effective July 1, 2009. Scheduled to sunset with expiration of HAMP program on December 31, 2012.

Washington: Effective July 2010. No sunset.

3. States should fund housing counseling and legal support for homeowners through filing fee surcharges that also fund mediation and conference programs. Foreclosure conference and mediation programs perform vital tasks that mortgage servicers' staff should

be performing, but routinely do not. The programs make sure that servicers review homeowners for loss mitigation options before foreclosures. Most servicers have demonstrated their unwillingness to devote competent staff to this work. It is reasonable to pass on to servicers the cost of having others do their job for them. In states including Nevada, Washington, and Maryland, foreclosure mediation programs cover their administrative costs with filing fee surcharges, and these surcharges also fund important counseling and support services for the homeowners who participate in mediations. Servicers should be prohibited by state law from shifting this cost to anyone else.

4. Maximize HAMP modifications during 2012. The HAMP program is scheduled to expire at the end of 2013. The Treasury Department has estimated that as of the end of 2011 there were 992,968 loans eligible for HAMP. If servicers continue to approve new HAMP permanent modifications at the current rate of 25,000 to 30,000 per month during 2012, this will leave up to 600,000 currently eligible homeowners without HAMP modifications at the end of this year. Servicers have joined the chorus of those proclaiming the HAMP program's failure. Yet, this was a failure that the servicers themselves engineered. During HAMP's final year, servicers must be held accountable for the commitments they made to modify eligible loans under the program.

5. Prevent foreclosures of loans already modified under HAMP. Advocates have already noted a trend for servicers to foreclose upon loans already modified under HAMP.[171] These are loans subject to permanent modifications and with borrowers in compliance with the modified terms. Servicers attempt to pass off these foreclosures as recordkeeping mistakes. However, given the large portion of borrowers without access to legal counsel, there is a significant danger that, absent oversight, servicers will complete foreclosure sales regardless of past modifications.

6. Monitor proprietary modifications. During 2010 and 2011, servicers who were contractually obligated to offer HAMP modifications to all eligible borrowers often gave borrowers one of their proprietary modifications instead. Borrowers whose HAMP applications were denied or canceled were frequently placed in these proprietary modifications as an alternative.[172] In many cases the denials and cancelations themselves were improper. The proprietary modifications routinely contained more onerous terms, such as higher interest rates and less principal forbearance, than HAMP modifications.[173] Borrowers often agreed to more burdensome proprietary modifications based upon misrepresentations that they were more beneficial or faster to implement than HAMP modifications. Once HAMP expires, the servicers' proprietary modifications will become even more prevalent. Therefore, mediations must require full and accurate disclosure of the terms of all modifications so that borrowers can make informed choices about whether to accept them.

7. Ensure that the FHFA servicing guidelines do not lead to unnecessary foreclosures. Fannie Mae and Freddie Mac are implementing new servicing guidelines to comply with a directive from the Federal Housing Finance Agency (FHFA).[174] These guidelines will likely have a significant impact on the entire servicing industry. The new guidelines encourage servicers to speed up foreclosures, particularly after a case has been referred to an attorney. The new guidelines will make it increasingly difficult to stay foreclosure proceedings to review for loss mitigation after a foreclosure has begun. Conference and mediation programs will be the only effective alternative to the servicers' dual track of considering loss

©2012 National Consumer Law Center

mitigation while forging ahead to foreclosure sales. Rules for mediations and conferences must be tightened to ensure that stays of all foreclosure actions remain in place pending loss mitigation review.

8. Borrowers in mediation must have accurate information about what to expect from an increasingly less affordable rental market. As a result of their own business decisions, servicers are now facing enormous backlogs of foreclosures. The lending industry will be pushing with increased vigor for changes to state laws that speed up resolution of what it sees as inevitable foreclosures. In the industry's view, necessary "corrections" in the homeownership landscape need to take place. Several aspects of these "corrections" are worth noting. For foreclosed borrowers, the only real housing option is renting. Renters are more than twice as likely as homeowners to pay more than half of their income for housing.[175] The burden is particularly severe for low income families. Of low income families with children, nearly two-thirds pay more than fifty percent of their income for housing.[176] For Americans who can obtain a new mortgage or refinance an existing one, homeownership has never been so affordable. However, a dual housing market is growing, with those lower on the income scale forced into increasingly more expensive rental housing. Government support for affordable rental housing has been declining. More than ever before, achieving a housing payment based on an affordable percentage of household income is critically important. Homeowners in mediations must make decisions based on a clear understanding of what the rental option means for them.

9. Preserve minority homeownership by wiping out unfair loan terms. As the homeownership rate in America declines, minority households' gains over the past decade in home-based wealth are evaporating.[177] During the subprime housing boom, the industry pushed loans with bad terms disproportionately on minorities. These loans, with high interest rates and other unfair terms, are now disproportionately subject to foreclosure. Disparate targeting of minorities with unaffordable loans has led to foreclosures disproportionately affecting the same minorities. Today African American and Latino families are facing a doubly high foreclosure rate, even when we account for income differences.[178] Negotiations over loan modifications create the opportunity to change the terms of many of these loans, making them affordable—as they should have been in the first place. The stakes are high. Minority families that lose homeownership during the current crisis are likely to be relegated to decades of unaffordable and less stable rental housing.

Minority families that lose homeownership during the current crisis are likely to be relegated to decades of unaffordable and less stable rental housing.

Unfortunately, data from HAMP has not been encouraging. Minority Americans are steered into non-HAMP modifications more frequently than non-minority borrowers.[179] Minorities are denied modifications more often than other borrowers for reasons such as missing documents. Efforts such as the Philadelphia diversion program have shown that mediation programs can ensure that minority homeowners are treated equitably.[180] Conferences can provide needed oversight over practices that continue to impact disproportionately upon minorities.

X. CONCLUSION

Foreclosure mediation and conference programs have now been operating in some localities for over three years. Where the programs have been structured effectively, they reduce foreclosures and increase sustainable loan modifications. In the remaining years of the foreclosure crisis policymakers at the state level face a clear choice. One option is to give mortgage servicers free rein to pursue millions of new foreclosures, regardless of how arbitrary or unnecessary each one may be. The other option is to subject servicers' actions to reasonable scrutiny and encourage alternatives that are in the best interests of both investors in the loans and homeowners. The evidence is now in that a strong foreclosure mediation or conference program can achieve the latter goal. State policymakers who ignore this option are needlessly exposing families and communities to severe, long-term hardships that can be avoided.

Additionally, foreclosure conference and mediation programs have proven their effectiveness with little or no cost to states. States that have not done so need to learn from the experiences of other jurisdictions that have developed these programs. Creativity and hard work at the state and local level has produced an invaluable body of experience from which others can now learn, and the benefits of foreclosure conference and mediation programs are documented. Absent this form of intervention, homeowners will continue to face mortgage servicers and their attorneys alone. And tragically, millions of needless foreclosures will occur, causing severe, permanent harm to homeowners, investors, and communities while stalling economic recovery in the United States.

For these reasons, it is imperative that states without foreclosure conference and mediation programs adopt them and do so quickly.

©2012 National Consumer Law Center

APPENDIX A

NEW FORECLOSURE CONFERENCE AND MEDIATION PROGRAMS IN 2011

Delaware

Statute: House Bill No. 58, adding Del. Code Title 10 § 5062C, effective January 2012. Delaware is a judicial foreclosure state. This legislation replaces a superior court foreclosure mediation system in effect since 2009 with an "Automatic Residential Foreclosure Mediation Program." Under the new law, the courts maintain authority to establish additional procedures and prescribe forms for the program. The new statute requires that all residential foreclosure cases be treated as assigned to mediation. The borrower receives notice of the mediation process with the complaint. The initial notice directs the borrower to complete a certificate of participation and meet with a housing counselor in thirty days. A judgment of foreclosure may not be entered until after the mediation date, even if the borrower did not file a timely answer. After a session, the mediator and the parties sign a mediation record. The mediator may make recommendations. However, the mediator may only dismiss an action if the lender failed to appear twice. A mediator may not continue sessions beyond a date seventy-five days from the notice of mediation without the lender's consent. When the borrower files a certificate of participation, or when a continued session is scheduled after a borrower has initially appeared, the lender must pay a $300 program fee. These fees pay for the projected cost of the mediation program, with any funds remaining at the end of a quarter to be given to housing counselors and legal services organizations that work with the mediation program.

Notable Features: The statute directs borrowers to work with housing counselors and complete forms at various times. However, participation in the program remains automatic regardless of the borrower's compliance with these directives. So long as the borrower appears for a scheduled session, the mediation can proceed with the mediator taking into account the borrower's failure to comply with any program rules in making recommendations. The statute allows for oversight over entry of judgment, transfer of documents, and implementation of trial agreements. The law does not specifically authorize findings of good faith or allow mediators to impose sanctions. Presumably borrowers can raise issues related to the lender's loss mitigation performance as demonstrated in mediation as a defense to foreclosure when appropriate.

Recent Developments: As of the end of 2011, the procedures and forms were being finalized for implementation of the program beginning in January 2012.

District of Columbia

Statute: D.C. Code § 42-815, et seq. ("Saving D.C. Homes from Foreclosure Act"), effective March 12, 2011. The District of Columbia is a non-judicial foreclosure jurisdiction. The new law directed the D.C. Department of Insurance, Securities and Banking to implement a foreclosure mediation program. Under the program rules, a borrower receives notice of the right to opt in to mediation along with the notice of default (the initial step in a non-judicial foreclosure). The borrower has thirty days to elect mediation by submitting a loss

mitigation application and a fifty dollar fee. Absent an agreement for extension, mediation must be completed within ninety days of service of the notice of default. A Mediation Administrator issues a mediation certificate if the lender participated in good faith or the borrower failed to elect mediation. The lender must record the mediation certificate in order to conduct a valid non-judicial sale. The program is funded through a $300 fee assessed upon filing a notice of default.

Notable Features: The D.C. law authorizes penalties of $500 for a lender's failure to produce required documents. The documents the lender must provide include evidence of standing, documentation of consideration of loss mitigation options, and a loan modification analysis including data inputs and results of the FDIC loan modification calculation. Good faith participation in mediation is defined as evaluation of the borrower's eligibility for all alternatives to foreclosure and offering the borrower a loan modification with the best terms for which the borrower is eligible. The lender must provide a written explanation of any rejected proposal.

Recent Developments: Amendments to the law passed in early 2011 clarified when a foreclosure sale is "void" as conducted without compliance with the mediation procedures. Very few cases went through the D.C. mediation program in 2011.

Florida's Termination of its Mandatory Mediation System

In December 2009, the Florida Supreme Court directed the state's twenty circuit courts to implement a uniform program for foreclosure mediation.[181] The program model called for courts to refer all residential foreclosures to mediation. Each judicial circuit contracted with a private non-profit organization to manage mediations. Circuit courts implemented these programs gradually during 2010. Homeowner participation rates were consistently low, often with less than fifteen percent of eligible homeowners participating. The record of settlements reached in mediations was poor. In some circuits settlements were reached in less than four percent of the cases that went through mediation. In certain circuits the rate was lower.[182]

In September 2011, the Florida Supreme Court directed a workgroup to make recommendations about the future of the statewide foreclosure mediation model.[183] Based on this workgroup's assessment, the Supreme Court terminated the mediation program by an order dated December 19, 2011.[184] The workgroup's assessment confirmed what many consumer advocates had been observing about the program: mediators seldom enforced program rules and sessions were marked by a "take it or leave it" stance from lenders' representatives. The Supreme Court's workgroup summarized the program's deficiencies as follows:

> A number of factors skewed the success rate of the program downward. The public comments received provided evidence that servicers on a broad scale resisted providing representatives at mediation with full authority to settle and refused to consider more than a narrow range of settlement options, most of which were of little value to borrowers. Servicers had economic incentive not to settle and to keep foreclosure cases in limbo to avoid the expenses that accompany home ownership. An analysis of a sample of Eleventh Circuit foreclosure cases that ended in impasse at mediation showed that 78.5% of the cases remained open up to two years after impasse . . . . In addition because the managed mediation program was not well publicized as a court referred program, borrows mistrusted the program and were uncertain about its legitimacy. These factors contributed to the low rate of borrower contact.[185]

©2012 National Consumer Law Center

In terminating the program, the Supreme Court recognized that the circuit courts retained authority under state court rules to refer cases to mediation on a case by case basis.

The Florida experience provides a number of lessons for mediation programs generally. The lack of enforceable standards to compel servicers to negotiate in good faith left servicers in control of the program. Borrowers lacked a simple and effective means to access the courts to compel enforcement of program rules. Although some of the non-profit mediation administrators engaged in concerted outreach efforts, these appear not to have been comprehensive enough to overcome borrower's suspicions about the official nature of the program.

Hawaii

Statute: Act, S.B. No. 651, amending Haw. Rev. Stat. § 667-1, operative October 1, 2011. The new law applies to the state's non-judicial foreclosures. The mediation program is to be run by the Hawaii Department of Commerce and Consumer Affairs with assistance from state's judiciary. Under the new law, the Department receives a copy of each notice of default served by lenders. Upon receipt of the notice of default, the Department serves the borrower with a notice of election to participate in mediation. The borrower has thirty days to elect to participate and pay a $300 fee. Upon the borrower's election, the lender must also pay a $300 mediation fee. A timely request for mediation stays foreclosure proceedings. The opening of a mediation case may be recorded in land records. Mediation is to conclude sixty days from the first scheduled session, but a mediator may keep the stay in effect upon a lender's unjustified non-compliance with mediation rules. Sanctions for unjustified non-compliance can be a penalty of up to $1500 or continuation of the stay on foreclosure.

Notable Features: The statute requires that lenders show a loan modification analysis using the FDIC net present value calculation. At mediation the lender must provide copies of the note, mortgage, and related endorsements and assignments. A violation of the mediation statute constitutes a violation of the state's unfair and deceptive acts and practices statute. Lenders serving a notice of default must pay $250 to a dedicated dispute resolution fund.

Recent Developments: Shortly after enactment of the statute containing the mediation law, Fannie Mae and Freddie Mac directed their servicers to cease all non-judicial foreclosures in Hawaii and proceed only by judicial foreclosure. Most services followed suit. The mediation provisions do not apply to judicial foreclosures. It is not clear which aspects of the 2011 legislation triggered this action. The legislation that created the mediation program required that foreclosing parties record specific documentation indicating the party's authority to foreclose. Designating a violation of the mediation statute as an unfair and deceptive practice may also have contributed to the lenders' decisions to avoid non-judicial foreclosures and bypass the entire mediation process.

Washington

Statute: SSHB 1362 ("Foreclosure Fairness Act") amending Wash. Rev. Code § 61.24 et seq., effective July 22, 2011. Washington is a non-judicial foreclosure state. The state's Department of Commerce administers the new mediation program. Prior to enactment of the mediation law, borrowers were entitled to request a ninety-day delay to confer with the lender before the lender could record a notice of default to begin a foreclosure. The conferences during this ninety-day period were informal and not supervised by a third party. The new law adds a supervised mediation

process to the existing conference option. At the conclusion of the ninety-day conference period any housing counselor or attorney may refer the case to mediation. The lender may not record a notice of sale (the step in the foreclosure process after recordation of a notice of default) until the mediator has issued a report. A session is to be scheduled within forty-five days of a referral to mediation unless the parties agree otherwise. In the report, the mediator indicates whether the lender conducted a loss mitigation review in good faith. The law gives the borrower the right to enjoin a non-judicial foreclosure if the lender did not participate in mediation in good faith. Good faith is defined to include disclosure of data from loan modification guidelines, such as those under HAMP or the FDIC net present value calculation.

Notable Features: The law requires that the referral of a case to mediation be made by an attorney or housing counselor. Borrowers who have not consulted with a counselor or attorney cannot request mediation on their own. However, the law does not impose any significant limitations on the counselor or attorney's discretion in referring a case to mediation. The parties in mediation must conduct a net present value test comparing the benefit to investors from foreclosure with the likely benefit from an affordable loan modification. The lender's proceeding to foreclose despite a net present value test result favoring modification constitutes a basis to enjoin non-judicial foreclosure. The statute defines what constitutes a lenders' good faith participation in mediation. The lender's failure to comply with these standards is a violation of the state's unfair and deceptive practices act. A $250 assessment added to the charge for recording a notice of default has funded the program's costs, plus provided funds for housing counselors and legal services.

Recent Developments: Fees collected from the recording surcharges have created a surplus that will assist in funding housing counseling.

©2012 National Consumer Law Center

APPENDIX B

FORECLOSURE CONFERENCE AND MEDIATION PROGRAMS: SUMMARIES OF DOCUMENTATION REQUIREMENTS FOR LENDERS AND BORROWERS

Connecticut

Lender: Fifteen days before the first session, must provide authorized representative contact information and twelve-month account history.

Borrower: Must complete Mediation Information Form (revised as of August 2011, listing income and expenses, hardship statement) and send documents: proof of income (pay stubs, bank statements for two months), two years' tax returns, proof of occupancy, and IRS Form 4506T-EZ.

Delaware

Rules under development, program to go into effect in January 2012.

District of Columbia

Lender: Five days before mediation must provide payment history, itemization of amounts claimed, results of loss mitigation analysis, copy of mortgage, note, every assignment of mortgage, and evidence lender has standing to commence foreclosure. Also, information on the location of the note, copy of pooling and servicing agreement, and documents substantiating any clam the borrower is not eligible for a loss mitigation option. Under Rule 2714.1, must provide: itemization of cure and payoff amounts, payment history records with fees and costs, and documentation of consideration of loss mitigation options including FDIC loan modification analysis.

Borrower: Borrower must provide tax returns and income information,
loss mitigation application, most recent tax return, W-2s, last two pay stubs and documents of non-wage income.
Florida (Collins Center-managed circuits; program terminated December 2011)
Lender: Twenty-five days before session borrower may request: "documentary evidence that the Plaintiff is the owner and holder in due course of the note and mortgage sued upon," a "statement of the plaintiff's position on the net present value of the mortgage loan," payment history, and the most recent appraisal available to lender.

Borrower: Must complete income and expense statement, hardship statement.

Hawaii

Lender: At least fifteen days before the session must provide "copy of the promissory note signed by the mortgagor, including endorsements, allonges, amendments, or riders to the note evidencing the mortgage debt," copies of the mortgage and other documents evidencing the mortgagee's right to foreclose, financial records, and correspondence that confirm the mortgage loan is in default.

Borrower: At least fifteen days before the session must provide: financial and income documentation (pay stubs), records of past loan modification activity, and certification of housing counseling.

Maine

Lender: Must provide borrower with loss mitigation application information, completed form with net present value inputs, copies of the mortgage note, the mortgage deed, and all assignments and endorsements of the mortgage note and the mortgage deed or statement of why copies cannot be produced.

Borrower: Must complete lender's financial application form or provide an explanation of why missing information could not be provided.

Maryland

Lender: Dept. of Labor, Licensing, and Regulation Real Property Law § 7-105 Rule .09 requires: the Final Loss Mitigation Affidavit, the borrower's loss mitigation application, any documents relied on in performing loss mitigation analysis, summary of reasons for denial of loan modification or loss mitigation, relevant sections of investor guidelines if the denial of a loan modification or other loss mitigation program was based on investor guidelines, payment history, escrow activity history if applicable, property valuation documentation, correspondence log of account activities from time of first contact with borrower after loan went into default, and contact information for representative.

Borrower: Signed federal tax returns for last two years, proof of income, budget and expenses, second lien status, and previous loan modification data if applicable.

Nevada

Lender: Under Nevada Supreme Court Foreclosure Mediation Rule 11, at least ten days prior to mediation lender must at a minimum provide: (a) the original or a certified copy of the deed of trust, the mortgage note, and each assignment of the deed of trust and each endorsement of the mortgage note; (b) the evaluative methodology used to determine eligibility or lack of eligibility of the homeowner for a loan modification; (c) a confidential proposal to resolve the foreclosure; (d) an appraisal (or BPO at mediator's discretion) done no more than sixty days before the commencement date of the mediation; and an estimate of the ''short sale'' value of the residence that lender may be willing to consider as a part of the negotiations if a loan modification is not agreed upon.

The requirement for a certified copy of the original mortgage note, deed of trust, and each assignment of the deed of trust and each endorsement of the mortgage note is only satisfied when the mediator receives a statement under oath signed before a notary public which provides: (a) the name, address, capacity, and authority of the person making the certification; (b) the person making the certification must be in actual possession of the original mortgage note, deed of trust, and each assignment of the mortgage note and deed of trust; and (c) the attached copies of the mortgage note, deed of trust, and each assignment of the mortgage note and deed of trust must be true and correct copies of the originals in the possession of the person making the certification; (d) the certification must contain the original signature of the certifying party and the original seal and signature of the notary public. Each certified document must contain a separate certification. In the event of the loss or destruction of the original mortgage note, deed of trust, or assignment of the mortgage note or deed of trust, the mediator will recognize a judicial order entered pursuant to Nev. Rev. Stat. § 104.3309 providing for the enforcement of a lost, destroyed, or stolen instrument.

Borrower: Must provide (a) a financial statement form; (b) a housing affordability form; and (c) a confidential proposal document to resolve the foreclosure.

©2012 National Consumer Law Center

New York

(County courts may set their own requirements. Listed below are the requirements under state statute and rule.)

Lender: As recommended under N.Y. C.P.L.R. 3408 and Rules for New York Supreme Courts § 202.12-a (c), must provide the lender's workout application forms or packet, payment history, an itemization of cure and payoff amounts, copies of recent paperwork regarding reinstatement, settlement offers, and loan modifications, and the mortgage and note.

Borrower: As recommended under N.Y. C.P.L.R. 3408, must provide current income and expense documentation, tax return, documents from previous workout attempts, settlement proposal, and property tax statement.

Ohio (Cuyahoga County)

Lender: Must provide completed lender questionnaire, payment history, documentation of past settlement efforts, correspondence with borrower, and itemized reinstatement and payoff amounts.

Borrower: Must provide completed owner questionnaire, documentation including any lender-specific financial worksheet, a monthly budget, pay-stubs or proof of income for the two most recent and consecutive months, the last two months' bank statements, the last two years' tax returns, a hardship letter and a loss mitigation worksheet (based upon the Foreclosure Mediation Case Management Directive).

Vermont

Lender: Must provide documentation of consideration of all applicable loss mitigation options, including data used in and outcome of any HAMP-related net present value calculation, and a copy of the pooling and servicing agreement if lender claims terms prohibit modification.

Borrower: Twenty days before session, must provide information on household income and other information required by HAMP.

Washington

Lender: Fifteen days before session, must provide account status records (current loan balance, itemized statement of arrearage, fees and charges, last twelve months payment history), copies of the note and deed of trust, proof of authority to foreclose, all borrower-related and mortgage-related input data used for any net present value analysis under HAMP or the FDIC calculation, any loss mitigation analysis applicable to federally insured loans, an explanation regarding any denial of a loss mitigation option, the most recent appraisal, the portion of any pooling and servicing agreement alleged to restrict loan modifications, a statement detailing efforts to obtain waiver of such restriction, and the most recent available appraisal or other broker price opinion relied upon.

Borrower: Must provide documentation of all current and future income, debts and obligations, and tax returns for the past two years.

ENDNOTES

1. Goldman Sachs Global ECS Research, Home Prices and Credit Losses: Projections and Policy Options 16 (Jan. 13, 2009). *See also* Credit Suisse Fixed Income Research, Foreclosure Update: Over 8 Million Foreclosures Expected 1 (Dec. 4, 2008).
2. Center for Responsible Lending, *Lost Ground: Disparities in Mortgage Lending and Foreclosure* (Nov. 2011).
3. Lender Processing Services, LPS Mortgage Monitor, November 2011 Mortgage Performance Observations (data as of October 2011).
4. Amherst Securities Group LP, Testimony of Laurie S. Goodman Before Subcomm. on Housing, Transportation and Community Development, S. Comm. on Banking, Housing & Urban Affairs (Sept. 30, 2011).
5. National Consumer Law Center, *State and Local Foreclosure Mediation Programs: Can They Save Homes?* (September 2009) *available at* **www.nclc.org/foreclosures-and-mortgages/foreclosure-mediation-programs.html**.
6. The 2010 and 2011 updates are available on the National Consumer Law Center website at **www.nclc.org/foreclosures-and-mortgages/foreclosure-mediation-programs.html**.
7. Links to all state laws are available on the National Consumer Law Center website, at **www.nclc.org/issues/foreclosure-mediation-programs-by-state.html**.
8. Goldman Sachs Global ECS Research, Home Prices and Credit Losses: Projections and Policy Options 16 (Jan. 13, 2009). *See also* Credit Suisse Fixed Income Research, Foreclosure Update: Over 8 Million Foreclosures Expected 1 (Dec. 4, 2008).
9. Center for Responsible Lending, *Lost Ground: Disparities in Mortgage Lending and Foreclosure* (Nov. 2011).
10. Lender Processing Services, LPS Mortgage Monitor, November 2011 Mortgage Performance Observations (data as of October 2011).
11. Amherst Securities Group LP, Testimony of Laurie S. Goodman Before Subcomm. on Housing, Transportation and Community Development, S. Comm. on Banking, Housing & Urban Affairs (Sept. 30, 2011).
12. National Consumer Law Center, *State and Local Foreclosure Mediation Programs: Can They Save Homes?* (Sept. 2009), *available at* **www.nclc.org/foreclosures-and-mortgages/foreclosure-mediation-programs.html**.
13. Office of Comptroller of the Currency and Office of Thrift Supervision, OCC and OTS Mortgage Metrics Report 32 (Third Quarter 2009).
14. Office of Comptroller of the Currency and Office of Thrift Supervision, OCC and OTS Mortgage Metrics Report 33 (First Quarter 2010). According to this OCC/OTS report, during the same period in 2008 lenders reduced payments by more than 20% in only 18.1% of the modifications.
15. *Id.* at 46.
16. HAMP modifications have been making up about one-third of all modifications. The OCC/OTS reports do not report a default rate only for all non-HAMP modifications. Instead, the reports include HAMP modifications with all non-HAMP modifications. Therefore, the actual redefault rate solely for non-HAMP modifications is likely higher than the figures given above reflect.
17. Office of Comptroller of the Currency and Office of Thrift Supervision, OCC and OTS Mortgage Metrics Report 31 (Second Quarter 2010); Office of Comptroller of the Currency and Office of Thrift Supervision, OCC and OTS Mortgage Metrics Report 33 (Second Quarter 2011).
18. *See generally* Diane Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications,* 86 Wash. L. Rev. 755 (Dec. 2011).
19. Government Accountability Office, *Troubled Asset Relief Program Treasury Continues to Face Implementation Challenges and Data Weaknesses in its Making Home Affordable Program* 31, GAO Report 11-288 (Mar. 2011)
20. Troubled Asset Relief Program Actions Needed by Treasury to Address Challenges in Implementing Making Home Affordable Programs, United States Government Accountability Office Testimony Before the Subcomm. on Insurance, Housing and Community

©2012 National Consumer Law Center

Opportunity, H. Committee on Financial Services 13 (Mar. 2, 2011).
21. In the same testimony, the Government Accountability Office estimated that one-third of HAMP applicants were current in their payments when they applied. It is possible that a survey of the results obtained only by homeowners who applied for HAMP while in foreclosure would show a smaller portion succeeding in obtaining modifications.
22. Olga Pierce and Paul Kiel, "By the Numbers: A Revealing Look at the Mortgage Mod Meltdown," *ProPublica*, Mar. 8, 2011 (Based on servicers' data, *ProPublica* estimates that through 2010 servicers responded in some way to 2.7 million borrowers seeking HAMP modifications. Servicers denied 1.3 million requests outright without entering into trial plans. Servicers had cancelled another 700,000 trial plans.)
23. The Treasury Department reports that 883,076 loans were modified under HAMP through October 2011. U.S. Department of Treasury Making Home Affordable Program Report (Dec. 7, 2011). Assuming rates of new modifications continue through 2012 at approximately the 25,000 per month rate at which they were modified during the latter half of 2011, 1.2 million permanent modifications appears to be a fair prediction of where the program will stand when it expires on December 31, 2012.
24. State Foreclosure Prevention Working Group, Memorandum on Loan Modification Performance (Aug. 2010) (consisting of representatives of twelve states' attorneys general and Conference of Bank Supervisors), *available at* **www.coloradoattorneygeneral.gov/sites/default/files/SFPWG%20Report%205%20final.pdf**.
25. According to HOPE NOW's industry data, the number of proprietary mortgage modifications made in October 2011 was fifty-three. In October 2010, the monthly total had been 100,850. HOPE NOW Industry Extrapolation and Metrics October 2010, October 2011.
26. Lender Processing Services, LPS Mortgage Monitor, November 2011 Mortgage Performance Observations (data as of October 2011); HOPE NOW November 2011 Data (Dec. 7, 2011), *available at* **www.hopenow.com/news/Hope_Now_servicers_modify.pdf**.
27. Paul Kiel, "Banks Modifying Tiny Percentage of Mortgages in Need," *ProPublica*, Nov. 22, 2010.
28. Office of Comptroller of the Currency and Office of Thrift Supervision, OCC and OTS Mortgage Metrics Report 54, tbl. 49 (Third Quarter 2011); Office of Comptroller of the Currency and Office of Thrift Supervision, OCC and OTS Mortgage Metrics Report 53, tbl. 48 (Third Quarter 2010).
29. Office of the Special Inspector General for the Troubled Asset Relief Program, SIGTARP, Quarterly Report to Congress 67 (Jan. 26, 2011).
30. Office of the Special Inspector General for the Troubled Asset Relief Program, SIGTARP, Quarterly Report to Congress 163 (Oct. 26, 2010).
31. U.S. Treasury Dept., Making Home Affordable Program, Servicer Performance Report Through March 2010.
32. U.S. Treasury Dept., Making Home Affordable Program, Servicer Performance Report Through November 2011.
33. U.S. Department of the Treasury, Making Home Affordable Program, Servicer Performance Report Through March 2010, at 7.
34. Olga Pierce and Paul Kiel, "By the Numbers: A Revealing Look at the Mortgage Mod Meltdown," *ProPublica*, Mar. 8, 2011.
35. Office of Comptroller of the Currency and Office of Thrift Supervision, OCC and OTS Mortgage Metrics Report 26 (Third Quarter 2011); Congressional Oversight Panel, April Oversight Report: Evaluating Progress on TARP Foreclosure Mitigation Programs 50–53 (Apr. 14, 2010).
36. *Id*. at 35.
37. U.S. Department of the Treasury, Making Home Affordable Program, Servicer Performance Report Through March 2010, at 7.
38. U.S. Department of the Treasury, Making Home Affordable Program, Servicer Performance Report Through September 2011.
39. United States Government Accountability Office, *Troubled Asset Relief Program: Results of Housing Counselor Survey of Borrower Experiences in the HAMP Program GAO Report 11-367R* (May 26, 2011); United States Government

Accountability Office, GAO Report to Congressional Committees, *Troubled Asset Relief Program, Treasury Continues to Face Implementation Challenges and Data Weaknesses in Its Making Home Affordable Program* (Mar. 2011) (GAO 11-288); United States Government Accountability Office, GAO Report to Congressional Committees, *Troubled Asset Relief Program, Further Action Needed to Fully and Equitably Implement Foreclosure Mitigation Program 14–28* (June 24, 2010) (GAO 10-634); Office of the Special Inspector General for the Troubled Asset Relief Program, SIGTARP, Quarterly Report to Congress (Oct. 26, 2010); California Reinvestment Coalition, *Race to the Bottom An Analysis of HAMP Modification Outcomes by Race and Ethnicity for California* (July 2011); California Reinvestment Coalition, *The Chasm Between Words and Deeds VI: HAMP Is Not Working* (July 2010); Paul Kiel and Olga Pierce, "Homeowners Questionnaire Shows Banks Violating Government Program Rules," *ProPublica*, Aug. 16, 2010.

40. *See, e.g.*, California Reinvestment Coalition, The Chasm Between Words and Deeds VI: HAMP Is Not Working (July 2010); Olga Pierce and Paul Kiel, Loan Mod Program Left Homeowners' Fate in Hands of Dysfunctional Industry, *ProPublica*, Feb. 17, 2011.
41. United States Government Accountability Office, GAO Report to Congressional Committees, *Troubled Asset Relief Program, Results of Housing Counselors Survey on Borrowers Experience with the Home Affordable Modification Program* (May 26, 2011) (GAO 11-367R).
42. *See* Part V. C, *infra* and related web posting of court orders.
43. United States Government Accountability Office, GAO Report to Congressional Committees, *Troubled Asset Relief Program, Results of Housing Counselors Survey on Borrowers Experience with the Home Affordable Modification Program 8* (May 26, 2011) (GAO 11-367R).
44. Office of the Special Inspector General for the Troubled Asset Relief Program, SIGTARP, Quarterly Report to Congress 165 (Oct. 26, 2010).
45. United States Government Accountability Office, *Troubled Asset Relief Program: Results of Housing Counselor Survey of Borrower Experiences in the HAMP Program GAO Report 11-367R at 8* (May 26, 2011); Congressional Oversight Panel, April Oversight Report: *Evaluating Progress on TARP Foreclosure Mitigation Programs* 54–57 (Apr. 14, 2010).
46. *See* Part IV, *infra*.
47. United States Government Accountability Office, GAO Report to Congressional Committees, *Troubled Asset Relief Program, Treasury Continues to Face Implementation Challenges and Data Weaknesses in Its Making Home Affordable Program 31* (Mar. 2011) (GAO 11-288).
48. Paul Kiel and Olga Pierce, "Government's Loan Mod Program Crippled by Lax Oversight and Deference to Bank," *ProPublica*, Feb. 17, 2011.
49. Karen Weise, "When Denying Loan Mods, Loan Servicers Often Wrongly Blame Investors," *ProPublica* July 23, 2010.
50. *See* National Consumer Law Center, *Recent Developments in Foreclosure Mediation* (Jan. 2011) (discussing recent trial court decisions from New York), *available at* **www.nclc.org/foreclosures-and-mortgages/foreclosure-mediation-programs.html**.
51. Vt. Stat. Ann. tit. 12, § 4633(a)(5); Wash. Rev. Code § 61.24, *et seq.*; D.C. Code § 42-815 *et seq.*
52. *See* Part V. C. 4, *infra.*
53. Office of the Special Inspector General for the Troubled Asset Relief Program, SIGTARP, Quarterly Report to Congress 163–77 (Oct. 27, 2011); Paul Kiel, "Secret Docs Show Foreclosure Watchdog Doesn't Bark or Bite," *ProPublica*, Oct. 4, 2011.
54. United States Government Accountability Office, *GAO Report to Congressional Committees, Troubled Asset Relief Program, Results of Housing Counselors Survey on Borrowers Experience with the Home Affordable Modification Program* 9 (May 26, 2011) (GAO 11-367R).
55. California Reinvestment Coalition, The Chasm Between Words and Deeds VI: HAMP Is Not Working (July 2010).
56. *See, e.g.,* Bosque v. Wells Fargo, 762 F. Supp. 2d 342 (D. Mass. 2011); *In re* Bank of America Home Affordable Modification Litigation, 2011 WL 2637222 (D. Mass July 6, 2011); Koontz v. Wells Fargo, 2011 WL 1297519 (S.D. W. Va. Mar. 31, 2011).
57. The FHFA Servicing alignment initiative for

©2012 National Consumer Law Center

Fannie Mae and Freddie Mac is discussed in more detail in Part IV, *infra.*

58. Office of Comptroller of the Currency and Office of Thrift Supervision, OCC and OTS Mortgage Metrics Report (FirstQuarter 2010).
59. The Reinvestment Fund, Philadelphia Residential Mortgage Foreclosure Diversion Program: Initial Report and Findings (June 2011), *available at* **www.trfund.com/resource/downloads/policypubs/Foreclosure_Diversion_Initial_Report.pdf**.
60. *Id.* at 1.
61. *Id.* at 7.
62. *Id.* at 9.
63. *Id.*
64. *Id.* at 9–10.
65. *Id.* at 11.
66. *Id.* at 12.
67. *Id.* at 13–14.
68. *Id.* at 15.
69. *Id.* at 17–20.
70. Urban Institute, Neil Mayer, Peter A. Tatian, et al., *National Foreclosure Mitigation Counseling Program Evaluation: Preliminary Analysis of Program Effects* (Sept. 2010 update).
71. *Id.* pp. 34-35.
72. *Id. at* 38.
73. *Id.* at 42.
74. *Id.* at 43.
75. *Id.* at 46.
76. New Release, Federal Housing Finance Agency, Fannie Mae and Freddie Mac to Align Guidelines for Servicing Delinquent Mortgages (April 28, 2011), *available at* **www.fhfa.gov/webfiles/21190/SAI42811.pdf**; New Release, Federal Housing Finance Agency, Fannie Mae and Freddie Mac to Align Guidelines for Servicing Delinquent Mortgages, Frequently Asked Questions (Apr. 28, 2011), *available at* **www.fhfa.gov/webfiles/21191/FAQs42811Final.pdf**.
77. Fannie Mae, Servicing Guide Announcement SVC-2011-08R, Delinquency Management and Default Prevention (Reissued) (Sept. 2, 2011); Freddie Mac, Bulletin No. 2011-16 (Sept. 12, 2011); Freddie Mac, Bulletin No. 2011-11 (June 30, 2011).
78. Fannie Mae, Servicing Guide Announcement SVC-2011-08R, Delinquency Management and Default Prevention (Reissued) 8–16 (Sept. 2, 2011); Freddie Mac, Bulletin No. 2011-11 (June 30, 2011).
79. Fannie Mae, Servicing Guide Announcement SVC-2011-08R, Delinquency Management and Default Prevention (Reissued) 16 (Sept. 2, 2011); Freddie Mac, Bulletin No. 2011-11, at 7 (June 30, 2011).
80. Fannie Mae, Servicing Guide Announcement SVC-2011-08R, Delinquency Management and Default Prevention (Reissued) 17–19 (Sept. 2, 2011); Freddie Mac, Bulletin No. 2011-16, at 5 (Sept. 12, 2011).
81. Fannie Mae, Servicing Guide Announcement SVC-2011-08R, Delinquency Management and Default Prevention (Reissued) 17–19 (Sept. 2, 2011).
82. Fannie Mae, Servicing Guide Announcement SVC-2011-18, Updates to Delinquency Management and Default Prevention Requirements (Oct. 26, 2011).
83. Fannie Mae, Servicing Guide Announcement SVC-2011-08R, Delinquency Management and Default Prevention (Reissued) 32 (Sept. 2, 2011); Fannie Mae, Servicing Guide Announcement SVC-2011-07, Updates to Foreclosure Time Frames and Imposition of Compensatory Fees (June 6, 2011).
84. The state specific time frames are listed on the GSE website at **www.efanniemae.com/sf/guides/ssg/relatedservicinginfo/exhibits/index.jsp**.
85. Press Release, Realty Trac, Foreclosure Activity on Slow Burn (Oct. 11, 2011), *available at* **www.realtytrac.com/content/press-releases/third-quarter-and-september-2011-us-foreclosure-market-report-6880**.
86. *Id.*
87. Fannie Mae, Servicing Guide Announcement SVC-2011-18, Updates to Delinquency Management and Default Prevention Requirements (Oct. 26, 2011); Fannie Mae, Servicing Guide Announcement SVC-2011-08R, Delinquency Management and Default Prevention (Reissued) 25 (Sept. 2, 2011); Freddie Mac, Bulletin No. 2011-16, at 5 (Sept. 12, 2011); Freddie Mac, Single Family Seller/Servicer Guide, Exhibit 83A: Determining State Foreclosure Time Line Performance Compensatory Fees (Oct. 1, 2011).
88. Loan Workout Hierarchy for Fannie Mae Conventional Loans, available at **www.efanniemae**

.com/sf/servicing/pdf/loanworkoutfactsheet.pdf#nameddest=Modification.

89. Fannie Mae, Servicing Guide Announcement SVC-2011-18, Updates to Delinquency Management and Default Prevention Requirements 2 (Oct. 26, 2011); Freddie Mac Bulletin 2011–17 (Sept. 30, 2011).
90. *See* National Consumer Law Center, *Recent Developments in Foreclosure Mediation* (Jan. 2011), Appendix. Available at **www.nclc.org/foreclosures-and-mortgages/foreclosure-mediation-programs.html**.
91. Fannie Mae, Servicing Guide Announcement SVC-2011-08R, Delinquency Management and Default Prevention (Reissued) Frequently Asked Questions No. 45 (Sept. 28, 2011).
92. Nev. Rev. Stat § 107.086.
93. Nev. Rev. Stat. § 107.080.
94. *Id.*
95. *Id.*
96. Nev. Rev. Stat. § 107.086(2)(a)(3).
97. Nev. Rev. Stat. § 107.086(4).
98. *Id.*
99. Pasillas v. HSBC Bank USA, 255 P.3d 1281 (Nev. 2011); Leyva v. National Default Servicing Corp., 255 P.3d 1275 (Nev. 2011).
100. Pasillas v. HSBC Bank USA, 255 P.3d 1281, 1283 (Nev. 2011).
101. Leyva v. National Default Servicing Corp., 255 P.3d 1275, 1277 (Nev. 2011).
102. *Pasillas*, 255 P.3d at 1281; *Leyva*, 255 P.3d at 1287.
103. *Leyva*, 255 P.3d at 1279.
104. *Leyva*, 255 P.3d at 1281.
105. *Pasillas*, 255 P.3d at 1286 (referencing Nev. Rev. Stat. § 107.086(5)).
106. Nev. Rev. Stat. § 107.086(5).
107. Heredia-Bonnet v. First Am. Loanstar Trustee Services, L.L.C., 2011 WL 5006303, at *1 (Nev. Oct. 18, 2011) (sanctions imposed for failure to produce deed of trust and assignment; court states "a violation of one of the four statutory requirements must be sanctioned"); Malloy v. Wells Fargo Bank, 2011 WL 5009421 (Nev. Oct. 18, 2011) (same; failure to produce certified copy of mortgage note and failure to provide appraisal).
108. *Pasillas*, 255 P.3d at 1287.
109. Holt v. Regional Trustee Services Corp., ___ P.3d ___, 2011 WL 6268239 (Nev. Dec. 15, 2011) (sanctions order cannot bar lender from commencement of new foreclosure by issuing new notice of default after withdrawing prior notice).
110. *Id.* at *4.
111. Upon violation of the statutory mediation requirements, "[t]he 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." Nev. Rev. Stat. § 107.086(5).
112. Renslow v. Wells Fargo Bank, Appeal No. 58283 (filed May 5, 2011) (appeal of Washoe County District Court Order Mar. 29, 2011 Flanagan J.).
113. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978) (takings clause); Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (contracts clause).
114. Copies of the orders from Connecticut trial courts are available on the National Consumer Law Center website at **www.nclc.org/foreclosures-and-mortgages/foreclosure-mediation-programs.html**.
115. Copies of two redacted orders from Indiana trial courts incorporating these terms are available on the National Consumer Law Center website at **www.nclc.org/foreclosures-and-mortgages/foreclosure-mediation-programs.html**.
116. Me. Rev. Stat. tit. 14, § 6321-A(12).
117. Me. R. Civ. P. 93(j).
118. *Id.*
119. JP Morgan Chase v. Bouchles, Docket No. Re-11-031 (Androscoggin Dist. Ct. Oct. 26, 2011) (order on mediator's report of noncompliance).
120. Citimortgage, Inc. v. Dente, No. Biddc Re-10-215 (York Dist. Ct. May 19, 2011) (order).
121. HSBC Bank USA v. Bowie, No. Re-09-080 (York Dist. Ct. Feb. 10, 2011) (order).
122. JP Morgan Chase v. Bouchles, Docket No. Re-11-031 (Androscoggin Dist. Ct. Oct. 26, 2011) (order on mediator's report of noncompliance) (tolling of interest and fees for period between mediation sessions); Bank of New

©2012 National Consumer Law Center

York Mellon v. Barden, No. Re 10-384 (Cumberland Dist. Ct. Apr. 2, 2011) (order on report of noncompliance) (tolling of interest, costs and fees from date of receipt of complete loan modification packet five months earlier and continuing to final mediation report); Chase Home Finance, L.L.C. v. Sargent, No. RE-09-79 (York Dist. Ct. May 5, 2011) (order on defendant's motion for sanctions) (tolling of interest, costs and fees from date of first session to submission of final report, attorney fees and lost wages of debtor to be paid by lender).

123. National Consumer Law Center, *Recent Developments in Foreclosure Mediation* (January 2011) available at **www.nclc.org/foreclosures-and-mortgages/foreclosure-mediation-programs.html**.
124. Wells Fargo Bank, NA v. Myers, 913 N.Y.S.2d 500 (N.Y. Sup. Ct. 2010) (ordering conversion of trial plan to permanent modification); Emigrant Mortgage Co., Inc. v. Corcione, 900 N.Y.S.2d 608 (N.Y Sup. Ct. 2010) ($100,000 penalty and barring accrual of interest and fees for past period of bad faith negotiations); Wells Fargo Bank, N.A. v. Hughes, 897 N.Y.S.2d 605 (N.Y. Sup. Ct. 2010) (dismissing foreclosure action); BAC Home Loan Servicing v. Westervelt, 2010 WL 4702276 (N.Y. Sup. Ct. Nov. 18, 2010) (tolling of interest and costs).
125. U.S. Bank v. Bunyaka, No. 13110P/09 (Richmond Cty. Supreme Court May 31, 2011) (directing lender to make personal appearance to explain delay in modification decision), subsequent decision (June 10, 2011) (tolling interest); Citimortage v. Mendez, No. 102157/08 (Richmond Cty. Supreme Court Dec. 6, 2011) (directing lender personal appearance), copy of decision/order available on the National Consumer Law Center's foreclosure mediation website at www.nclc.org.
126. No. 31466/2009 (N.Y. Sup. Ct. Queens Cty. Oct. 31, 2011) (decision/order); Culley A.J.S.C., copy of decision/order available on the National Consumer Law Center's website at **www.nclc.org/foreclosures-and-mortgages/foreclosure-mediation-programs.html**.
127. N.Y. C.P.L.R. 3408 (McKinney).
128. LaSalle Bank Nat'l Ass'n v. Delaney, No. S 452-09 FC (Franklin Sup. Ct. Aug. 17, 2011) (Mello J.).
129. Citibank, N.A. v. Mumley, Docket No. S 1087-09 CnC (Chittenden Sup. Ct. Sept. 1, 2011) (Toor, J) (ruling on motion to vacate judgment and on motion for sanctions).
130. Vermont. Stat. Ann. tit. 12, §§ 4635(b), 4634(b)(6).
131. Wash. H.B. 1362 (2011).
132. Referencing Wash. Rev. Code § 61.24.030(7)(a).
133. Me. Rev. Stat. tit. 14, §§ 6321, 6321-A.
134. 2010 Vt. H.B. 590, *amending* Vt. R. Civ. P. 80.1.
135. Administrative Order No. 548-10, *modified* March 2011 Admin Order No. 431-11, *available at* **www.nycourts.gov/attorneys/pdfs/AdminOrder_2010_10_20.pdf**.
136. Nev. Rev. Stat. § 107.086.
137. Nevada Supreme Court Mediation Rule 11.4.
138. U.C.C. § 3-309.
139. Nevada Supreme Court Mediation Rule 11.5.
140. Pasillas v. HSBC Bank USA , 255 P.3d 1281 (Nev. 2011); Leyva v. National Default Servicing Corp., 255 P.3d 1275 (Nev. 2011).
141. Nevada A.B. 284 (2011).
142. CoreLogic, New Corelogic Data Reveals Q2 Negative Equity Declines in Hardest Hit Markets and 8 Million Negative Equity Borrowers Have Above Market Rates (Sept. 13, 2011).
143. Id.
144. Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications*, 41 Conn. L. Rev. 1107 (2009).
145. American Association of Mortgage Investors, White Paper, The Future of the Housing Market for Consumers After the Housing Crisis: Remedies to Restore and Stabilize America's Mortgage and Housing Markets (Jan. 2011) *available at* **http://the-ami.com/wp-content/uploads/2011/01/AMI_State_AG_Investigation_Remedy_Recommendations_Jan_2011.pdf**.
146. A property that is "Real Estate Owned" by the investor once foreclosure has been completed carries a recognized depreciated value.
147. Joint Economic Committee, Special Report, Sheltering Neighborhoods from the Subprime Foreclosure Storm (Apr. 2007); Urban Institute, Center on Metropolitan Housing and Communities: a Primer, G. Thomas Kingsley, Robin E. Smith, and David Price, The Impact

of Foreclosure on Families and Communities: A Primer (July 2009).
148. California Reinvestment Coalition, *Home Wreckers: How Wall Street Foreclosures re Devastating Communities* (2011).
149. Florida, Hawaii, Indiana, Maine, Maryland, Nevada, Vermont, and Washington.
150. Vt. Stat. Ann. tit. 12, § 4637 .
151. A distinct but related issue involves shifting of the lender's mediation-related attorney fees to the borrower. These fees need to be scrutinized carefully, as courts should not permit attorney fees shifting related to lender-caused continuances. The better approach, as expressly codified under the New York and Vermont laws, is to explicitly bar lenders from any attorney fees shifting related to their participation in conferences or mediation.
152. Nabanita Pal, Brennan Center for Justice, Facing Foreclosure Alone, The Continuing Crisis in Legal Representation (Nov. 4, 2011); Melanca Clark and Maggie Barron, Brennan Center for Justice, Foreclosures: A Crisis in Legal Representation (Oct. 6, 2009).
153. *See* Part III. B, *supra*.
154. State of New York Unified Court System, 2011 Report of the Chief Administrator of the Courts, Pursuant to Chapter 507 of the Laws of 2009, at 4.
155. Based on 3,016 conferences held from January 2011 through November 2011, at which borrowers appeared with counsel for 2,561 of the conferences. Information provided by Jane Lincoln of the Richmond Supreme Court Nov. 30, 2011.
156. *See* Nabanita Pal, Brennan Center for Justice, Facing Foreclosure Alone, The Continuing Crisis in Legal Representation (Nov. 4, 2011); Melanca Clark and Maggie Barron, Brennan Center for Justice, Foreclosures: A Crisis in Legal Representation (Oct. 6, 2009).
157. RealtyTrac, U.S. Foreclosure Activity Hits 7-Month High in October 2011 (Nov. 9, 2011) ("[R]ecent state court rulings and new state laws keep changing the rules of the foreclosure game on the fly, creating more uncertainty in the housing market and threatening to prolong the road to a robust real estate recovery.").
158. RealtyTrac, Foreclosure Activity on Slow Burn (Oct. 11, 2011). For the third quarter of 2011, RealtyTrac lists the ten states with the longest foreclosure time frames as: New York (986 days), New Jersey (974 days), Florida (749 days), Maryland (594 days), Connecticut (584 days), Pennsylvania (535 days), Illinois (527 days), Massachusetts (517 days), New Mexico (472 days), and Ohio (458 days). States with the shortest foreclosure times were Texas (86 days), Kentucky (94 days), and Virginia (102 days).
159. RealtyTrac, Foreclosure Activity on Slow Burn (Oct. 11, 2011).
160. Lender Processing Services, LPS Mortgage Monitor, October 2011 Mortgage Performance Observations (data as of September 2011).
161. Supreme Court of Florida, Final Report and Recommendations on Residential Mortgage Foreclosure Cases Admin Order AOSC 09-54, at 1 (Dec. 28, 2009).
162. "Slow Start to Florida's Foreclosure Mediation," *Miami Herald*, April 27, 2011.
163. Discussed in Part III, *supra*.
164. N.Y. C.P.L.R. § 3408 (McKinney).
165. N.Y. C.P.L.R. § 3408(d); N.Y. Uniform Rule 202.12-a.
166. *See* survey of filings outlined in complaint in Cole *et al*. v. Baum, No. CV-11-3779 (E.D.N.Y. 2011).
167. Cole *et al*. v. Baum, No. CV-11-3779 (E.D.N.Y. 2011).
168. Links to all state laws are available on the National Consumer Law Center's website at **www.nclc.org/issues/foreclosure-mediation-programs-by-state.html**.
169. *See* Appendix A, attached (discussing Florida Supreme Court action terminating state's mandatory foreclosure mediation program).
170. Office of the Special Inspector General for the Troubled Asset Relief Program, SIGTARP, Quarterly Report to Congress 163 (Oct. 26, 2010).
171. Paul Kiel, "Even After Mortgage Modification, Shoddy Bank Practices Hurt Homeowners," *ProPublica*, June 2, 2011.
172. Government Accountability Office, *Troubled Asset Relief Program, Actions Needed by Treasury to Address Challenges in Implementing Making Home Affordable Programs, Testimony*

©2012 National Consumer Law Center

Before Subcommittee on Insurance, Housing, and Community Opportunity, H. Committee on Financial Affairs (Mar. 2, 2011).

173. Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) Quarterly report to Congress 169 (October 26, 2010).
174. *See* Part IV, *supra*.
175. Joint Center for Housing Studies of Harvard University, *The State of the Nation's Housing 2011*, at 27 (2011).
176. *Id* at 28.
177. *Id.* at 19.
178. Debbie Gruenstein Bocian, Wei Li, Carolina Reid, Center for Responsible Lending, *Lost Ground, 2011 Disparities in Mortgage Lending and Foreclosures 4* (Nov. 2011).
179. California Reinvestment Coalition, *Race to the Bottom: An Analysis of HAMP Modification Outcomes by Race and Ethnicity for California* (July 2011); Debbie Gruenstein Bocian, Wei Li, Carolina Reid, Center for Responsible Lending, *Lost Ground, 2011 Disparities in Mortgage Lending and Foreclosures* (Nov. 2011).
180. *See* Part III. A, *supra* (discussing Philadelphia Diversion Program).
181. *In re* Final Report and Recommendations of the Task Force on Residential Mortgage Foreclosure Cases, AOSC09-54 (Dec. 28, 2009).
182. The courts' data did not record settlements reached before and after mediation sessions, perhaps leaving the official settlement rates unduly low.
183. *In re* Assessment Workgroup for the Managed Mediation Program for Residential Mortgage Foreclosure Cases, AOSC11-33 (Sept. 26, 2011).
184. *In re* Managed Mediation Program for Residential Mortgage Foreclosure Cases No. AOSC11-44 (Dec. 19, 2011).
185. William D. Palmer, Chair Assessment Workgroup for the Managed Mediation Program for Residential Mortgage Foreclosure Cases Report to Florida Supreme Court 4 (Oct. 21, 2011).

NCLC®

NATIONAL CONSUMER LAW CENTER®

Advancing Fairness in the Marketplace for All

Boston Headquarters:
7 Winthrop Square
Boston, MA 02110-1245
Phone: 617/542-8010
Fax: 617/542-8028
www.nclc.org

Washington Office:
1001 Connecticut Ave, NW
Suite 510
Washington, DC, 20036
Phone: 202/452-6252
Fax: 202/463-9462