Georgia State University Law Review

Volume 33
Issue 2 *Winter 2016-2017*

Article 4

3-9-2017

Foreclosure Diversion And Mediation In The States

Alan M. White
CUNY School of Law

FORECLOSURE DIVERSION AND MEDIATION IN THE STATES

Alan M. White*

INTRODUCTION

The recent mortgage foreclosure crisis, whose economic effects are well known,[1] transformed state legal structures governing the mortgage foreclosure process. What had been a relatively routine system of default judgments and auction sales has evolved into a negotiation and workout practice in which homeowners contest foreclosures, demand loan modifications and short sales, and propose other alternatives to foreclosures.[2]

A profusion of state laws and court orders were adopted between 2008 and 2014 with the aim of promoting negotiated foreclosure alternatives.[3] These laws have produced a variety of experiments in the "laboratories of democracy."[4] The outcomes of mortgage loan

---

*Professor of Law, CUNY School of Law. The author served as co-reporter for the Uniform Law Commission drafting committee for the Uniform Home Foreclosure Procedures Act. The author would like to thank Deema Azizi and Sarah Lamdan for research assistance, and the participants at the May 2015 Law, Property and Society conference for their comments. Additional thanks are due to Bill Breetz, chair of the Uniform Law Commission committee, Barry Nekritz, the American Bar Association advisor, Professor James Smith, my co-reporter, the members of the drafting committee and observers, and especially Elizabeth Kent, Heather Kulp and Nancy Rogers for their insights concerning foreclosure mediation programs.

1. *See* JOSEPH E. STIGLITZ, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY 26 (2010); KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE AND NEXT STEPS 10–11 (2010).

2. *See* Sharon Press, *Mortgage Foreclosure Mediation in Florida—Implementation Challenges for an Institutionalized Program,* 11 NEV. L.J. 306, 310 (2011) (explaining that prior to the crisis foreclosure cases were seen as routine and not suitable for mediation); *see generally* JOHN RAO ET AL., NAT'L CONSUMER LAW CTR., FORECLOSURE AND MORTGAGE SERVICING: INCLUDING LOAN MODIFICATIONS (5th ed. 2014).

3. *See infra* notes 27, 28, and 31; *see also* 2012 Cal. Legis. Serv. Ch. 86 (A.B. 278), Ch. 87 (S.B. 900) (West) (codified in CAL. CIV. CODE §§ 2923.4, .5, .55, .6, .7, 2924.9, .10, .11, .18, .19 (West 2013)); Perata Mortgage Relief Act, CAL. CIV. CODE § 2923.5 (West 2013); MINN. STAT. ANN. § 580.021 (West 2009); Nevada Homeowner Bill of Rights, S.B. 321, 77th Sess. (Nev. 2013) (codified in scattered sections of NEV. REV. STAT. §§ 400-560 (2013)); N.Y. REAL PROP. ACTS. § 1304 (McKinney 2010); SUP. CT. OF OHIO, FORECLOSURE MEDIATION PROGRAM MODEL 7 (2008), http://www.supremecourt.ohio.gov/JCS/disputeResolution/foreclosure/ foreclosureMediation.pdf.

4. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[A] . . . State may . . . serve as a laboratory; and try novel social and economic experiments without

defaults—whether home loans are renegotiated, defaults are cured, or homes are sold at auction—have varied tremendously among the states.[5] We can now begin to assess the desirability of these new laws and procedures, and more importantly, identify the foreclosure reforms that merit wider adoption.

One of the most effective legal innovations has been the use of mandatory pre-foreclosure mediation, introduced in about half the states during this period. The Uniform Home Foreclosure Procedures Act (UHFPA), approved by the Uniform Law Commission in 2015, incorporates permanent provisions for pre-foreclosure mediation in all residential mortgage foreclosure cases.[6] The uniform law provisions are modeled on the most successful state programs and were drafted with the aid of judges, mediators, and attorneys with experience in several state foreclosure mediation programs.[7]

This article will begin with a brief history of the foreclosure crisis and the progressive adoption of foreclosure mediation programs in various states. Next, it will summarize the empirical research and data measuring the effectiveness of those programs. Both the benefits of mediation and the costs, including delay, will be considered and compared. The article will then discuss the ways in which foreclosure mediation may or may not differ from conventional mediation standards embodied in the Uniform Mediation Act, and in particular, how and why courts enforce a duty to mediate in good faith. Finally, the mediation provisions of the new UHFPA and the case for their adoption will be presented.

I. States Adopted a Variety of Mortgage Foreclosure Mediation Programs During the Crisis

A. The Foreclosure Crisis Overwhelmed Mortgage Servicers and Led

risk to the rest of the country.").

5. *See* Alan M. White & Carolina Reid, *Saving Homes? Bankruptcies and Loan Modifications in the Foreclosure Crisis*, 65 FLA. L. REV. 1713, 1734–36 (2013).

6. UNIF. HOME FORECLOSURE PROCEDURES ACT art. 3 (UNIF. LAW COMM'N 2015).

7. *Id.* at i–ii. For access to prior drafts of the act, as well as comments from interested parties, see *Home Foreclosure Procedures Act,* UNIF. LAW COMM'N, http://www.uniformlaws.org/Committee.aspx?title=Home+Foreclosure+Procedures+Act (last visited Sep. 18, 2016).

to a Variety of Industry and Policy Responses

Historically unprecedented numbers of mortgages were foreclosed between 2007 and 2014.[8] Between five and six million homeowners were dispossessed via completed foreclosure sales, and perhaps twice that many fell behind in payments and were exposed to foreclosure threat at one point or another.[9] The story of this great foreclosure crisis of 2008–2014 includes a story of remarkable variations among states in how many homeowners eventually lost homes at foreclosure sales and how many of them were able to cure a default and save their homes.[10] Of all the home mortgages referred for foreclosure action, the likelihood of a completed foreclosure sale ranged from 76% in Arizona to 26% in New York.[11] The story behind these variations in foreclosure outcomes is a complex story of legal pluralism and industry failures.

At the onset of the foreclosure crisis, banks bemoaned their inability to get homeowners in default to respond to their generous offers of loan modifications and other foreclosure alternatives.[12] Homeowners, it seemed, were like the proverbial ostriches with their heads in the sand. Outreach efforts were launched to bring the homeowners in from the cold.[13] Foreclosure sales, banks told us,

8. Author's calculations using data from HOPE NOW, DATA REPORT: INDUSTRY EXTRAPOLATIONS AND HAMP METRICS (May 2015), http://www.hopenow.com/industry-data/HopeNow_Full_Report_ Updated_may_2015.pdf (calculations on file with author). The U.S. Department of Housing and Urban Development reported as of April 2015 that 4.1 million properties were foreclosed from 2010 to April 2015 (omitting 2008 and 2009 foreclosures). U.S. DEP'T OF HOUS. & URBAN DEV., THE OBAMA ADMINISTRATION'S EFFORTS TO STABILIZE THE HOUSING MARKET AND HELP AMERICAN HOMEOWNERS 3 (2015).

9. HOPE NOW, DATA REPORT: INDUSTRY EXTRAPOLATIONS AND HAMP METRICS 9 (May 2015), http://www.hopenow.com/industry-data/HopeNow_Full_Report_Updated_may_2015.pdf.

10. *See infra* Table 1.

11. *See infra* Table 1.

12. *See, e.g.*, *The Foreclosure Prevention and Sound Mortgage Servicing Act of 2008: Hearing on H.R. 5679 Before the Subcomm. on Hous. & Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 110th Cong. 50–51 (2008) (statement of David G. Kittle, President and Chief Executive Officer, Principle Wholesale Lending, Inc., and Chairman-Elect, Mortgage Bankers Association); *Id.* at 49 (statement of Faith Schwartz, Executive Director, HOPE NOW Alliance); *Accelerating Loan Modifications, Improving Foreclosure Prevention, and Enhancing Enforcement: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 43–45 (2007) (statement of Faith Schwartz, Executive Director, HOPE NOW Alliance).

13. *See The Foreclosure Prevention and Sound Mortgage Servicing Act of 2008: Hearing on H.R. 5679 Before the Subcomm. on Hous. & Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 110th Cong.

were the worst possible outcome, and everything should be done to avoid them.[14]

After a few years, industry complaints about those unresponsive homeowners faded away. The mortgage servicing industry, starting around 2007, was rapidly overwhelmed with homeowners seeking loan modifications and other workouts.[15] Homeowners now complained about getting no responses from mortgage servicers.[16] Diligent homeowner attorneys uncovered the robo-signing scandal, namely the widespread practice of servicers and their legal teams using falsified note endorsements, assignments, and affidavits to mass-produce foreclosure paperwork.[17] In response, courts and regulators demanded that servicers clean up their act, and foreclosure cases languished while servicers gave homeowners applying for loan modifications and short sales the runaround.[18]

Now, as the foreclosure crisis wanes, the banking industry can be heard complaining that they are now spending too much time talking to homeowners, and that long foreclosure delays resulting from homeowners coming in from the cold en masse are just wasting everyone's time and money.[19] Foreclosure delays can be traced to many causes: capacity limitations of servicers, law firms, courts and county sheriffs, banks' reluctance to sell into an already glutted market, federal and state agency enforcement actions in response to robo-signing and other servicer misconduct, and some of the state laws enacted to ameliorate the foreclosure crisis.[20]

---

49 (2008).

14. *Id.*

15. Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act, 78 Fed. Reg. 10,696, 10,700 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1024).

16. *Id.*

17. Alan M. White, *Losing the Paper—Mortgage Assignments, Note Transfers and Consumer Protection*, 24 LOY. CONSUMER L. REV. 468, 469–70 & n.4 (2012).

18. David Streitfeld, *Backlog of Cases Gives a Reprieve on Foreclosures*, N.Y. TIMES (June 19, 2011), http://www.nytimes.com/2011/06/19/business/19foreclosure.html; *see also* Lisa Prevost, *Upshot of the Foreclosure Backlog*, N.Y. TIMES (Dec. 6, 2012), http://www.nytimes.com/2012/12/09/realestate/mortgages-upshot-of-the-foreclosure-backlog.html.

19. *See* Easthampton Sav. Bank v. City of Springfield, 21 N.E.3d 922 (Mass. 2014) (bank challenging local ordinance establishing foreclosure mediation program); State-Level Guarantee Fee Pricing, 77 Fed. Reg. 58,991, 58,991 (Sept. 25, 2012) (citing high costs occasioned by lengthy foreclosure timelines).

20. *See* White, *supra* note 17, at 469–70 & n.4; Mary Ellen Podmolik, *New Rules to Govern Illinois*

The federal government's response to the foreclosure crisis relied primarily on incentives for voluntary action by mortgage servicers to reduce or mitigate foreclosure sales via the Home Affordable Modification Program (HAMP).[21] The Federal Housing Finance Agency (FHFA), the de facto manager of the nationalized mortgage funders Fannie Mae and Freddie Mac, had the power to tell servicers to rewrite loans, but the Treasury Department and FHFA have been ambivalent at best about loan modifications, and whether to encourage or discourage speedy foreclosure sales.[22]

While the federal government tacked and dithered, the states adopted a myriad of laws, regulations, and court orders to encourage workouts and minimize foreclosure sales, as well as to deal with abandoned properties in foreclosure. Literally hundreds of laws were adopted by the states between 2007 and 2013 modifying the foreclosure process in various ways: to encourage negotiated alternatives to foreclosure sales, to address responsibility for abandoned properties, to reduce redemption periods, and to protect tenants in foreclosed homes, among other issues.[23]

Foreclosures, CHI. TRIB. (Feb. 22, 2013), http://articles.chicagotribune.com/2013-02-22/business/ct-biz-0222-mortgage-rules—20130222_1_illinois-foreclosures-mortgage-servicers-foreclosure-process; Marcie Geffner, *What Delays a Mortgage Foreclosure*, YAHOO! FIN. (Jan. 19, 2011), finance.yahoo.com/news/What-delays-a-mortgage-brn-1797356472.html.

21. Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP)*, 52 ARIZ. L. REV. 727, 729 (2010); Dan Immergluck, *Too Little, Too Late, and Too Timid: The Federal Response to the Foreclosure Crisis at the Five-Year Mark*, 23 HOUSING POL'Y DEBATE 199, 199 (2013).

22. *See* SHEILA BAIR, BULL BY THE HORNS: FIGHTING TO SAVE MAIN STREET FROM WALL STREET AND WALL STREET FROM ITSELF 147–50 (2012); Immergluck, *supra* note 21, at 200; Nick Timiraos, *An Accidental Housing Chief Embraces the Power of "No,"* WALL ST. J. (Aug. 31, 2011), http://www.wsj.com/articles/SB10001424053111904199404576538803284685440.

23. *See* Memorandum from the Unif. Law Comm'n Staff to Bill Breetz, Chairman of the Study Comm. on Mortg. Foreclosure (May 16, 2012), http://www.uniformlaws.org/shared/docs/mortgage%20foreclosure/9_2012may16_RREMFPP_Legislation%20Survey%20and%20Introductory%20Memo_ULC%20Staff.pdf; *Survey Statistics*, UNIF. LAW COMM'N (Apr. 11, 2012), http://www.uniformlaws.org/shared/docs/mortgage%20foreclosure/2012apr11_RREMFPP_Survey%20stats.pdf.

B. Nearly Half the States Tried Some Form of Foreclosure Mediation or Settlement Conference Program

Among these new foreclosure laws were an array of mediation and settlement conference programs, both in judicial and nonjudicial foreclosure states.[24] While these programs have been a factor in slowing foreclosures,[25] foreclosure mediation has also had a clear record of success, both in getting homeowners to better communicate with mortgage servicers, and in producing default cures, voluntary sales, and other beneficial alternatives to foreclosure auctions.[26]

Seventeen states adopted statewide foreclosure mediation programs after 2008. Thirteen statewide programs were established by statute,[27] and the other four were implemented via court rule or other court or agency initiative.[28] At least eight other states have established local or county court mediation programs in some parts of their states, without statewide legislation or court action.[29] Other states, notably California, have eschewed mediation and instead enacted "meet-and-confer" statutes.[30] These laws require a 30- to

---

24. *See infra* notes 27, 28.

25. *See infra* Part III B.

26. *See infra* Part II.

27. CONN. GEN. STAT. ANN. §§ 49-31m to -31n (West 2013); D.C. MUN. REGS. tit. 26, § 2700.1 (2014); HAW. REV. STAT § 667-73 (2012); IND. CODE § 32-30-10.5-1 (2009); IOWA CODE ANN. § 654.4B (West 2016); ME. REV. STAT. tit. 14, § 6321-A (2016); MD. CODE. ANN., REAL PROP. § 7-105.1 (West 2014); MICH. COMP. LAWS SERV. §§ 600.3205e to .3206a) (LexisNexis 2013) (repealed 2014); NEV. REV. STAT. ANN. § 107.086 (LexisNexis 2009) (repealed, effective July 1, 2017); N.Y. C.P.L.R. 3408 (McKinney 2009) (effective Dec. 20, 2016); OR. REV. STAT. § 86.726 (2009); VT. STAT. ANN. tit. 12, §§ 4631-4633 (2015); WASH. REV. CODE ANN. § 61.24.163 (West 2016).

28. Automatic Residential Mortgage Foreclosure Mediation Program, No. 2012-2 (Del. Super. Ct. Jan. 13, 2012); In Re Final Report and Recommendations on Residential Mortgage Foreclosure Cases, No. AOSC09-54 (Fla. Dec. 28, 2009) (rescinded in part by In Re Managed Mediation Program for Residential Mortgage Foreclosure Cases, No. AOSC11-44 (Fla. Dec. 19, 2011)); Residential Mortgage Foreclosure Mediation Program—Rule Relaxation Order (N.J. Nov. 17, 2008); SUP. CT. OF OHIO, FORECLOSURE MEDIATION PROGRAM MODEL (Apr. 14, 2008), http://www.supremecourt.ohio.gov/JCS/disputeResolution/foreclosure/foreclosureMediation.pdf.

29. BOSTON, MASS., ORDINANCE 1592 (Dec. 14, 2010); PROVIDENCE, R.I., CODE §§ 13-213 to -218 (2008); Order of the Jefferson Circuit Court (Ky. Cir. Ct. 30th Mar. 30, 2009); In re a Foreclosure Mediation ADR Option, No. 2009-00001 (N.M. Dist. Ct. 1st July 8, 2009); Residential Mortgage Foreclosure Diversion Pilot Program, No. 2008-01, (Phila. Dist. Ct. 1st Apr. 16, 2008); Podmolik, *supra* note 20; *Foreclosure Mitigation Counseling*, DOUGLAS CTY. HOUS. P'SHIP, http://douglascountyhousingpartnership.org/foreclosure-mitigation-counseling/ (last visited Aug. 17, 2016); WIS. FORECLOSURE MEDIATION NETWORK, http://www.mediatewisconsin.com (last visited Aug. 17, 2016).

30. HEATHER SCHEIWE KULP, RESOL. SYS. INST., FORECLOSURE DISPUTE RESOLUTION PROGRAM

150-day delay before nonjudicial foreclosure, during which the servicer must attempt to contact the borrower and offer foreclosure alternatives, but do not provide a neutral third party to facilitate the negotiation.[31]

Sunset provisions are common in the state statutes, presumably based on the expectation that foreclosures will return to normal levels as the crisis wanes. For example, Connecticut's law sunsets on July 1, 2019,[32] and New York's on February 13, 2020.[33] Maine's law required a report and review by 2013.[34] States where outcomes data were collected and reported have generally found their programs successful and chosen to extend them.[35] On the other hand, mediation bills were not adopted in many states,[36] and banks have successfully challenged the right of some local governments to adopt mediation programs on the grounds that they conflict with state law or exceed local government authority.[37]

The various state and local mediation programs are by no means uniform. Homeowners must usually make an affirmative request for mediation (opt-in), but in a few programs the initial meeting is scheduled automatically (opt-out).[38] Some require the homeowner to

---

MODELS STATE-BY-STATE 84 (2012), http://www.aboutrsi.org/pfimages/ForeclosureMediation ProgramModels_ September2012.pdf.

31. CAL. CIV. CODE § 2923.5 (West 2013) (original sunset date January 1, 2013, extended to January 1, 2018); CAL. CIV. CODE §§ 2923.52 to .53 (Dearing 2009) (repealed Jan. 1, 2011) (sunsets January 1, 2011); *see* Mass. Gen. Laws ch. 244, § 35A (2016).

32. CONN. GEN. STAT. ANN. § 49-31n (West 2016).

33. N.Y. C.P.L.R. 3408 (Consol. 2016); 2009 N.Y. Sess. Laws ch. 507, § 25(e) (McKinney).

34. GEOFF WALSH, NAT'L CONSUMER LAW CTR., REBUILDING AMERICA: HOW STATES CAN SAVE MILLIONS OF HOMES THROUGH FORECLOSURE MEDIATION 41 (2012) (table with sunset dates).

35. KULP, *supra* note 30, at 101; Michelle Tuccitto Sullo, *With Thousands of Foreclosures Pending, State Extends Mediation Program*, CT. LAW TRIB. (July 9, 2015), http://www.ctlawtribune.com/ id=1202731764319/With-Thousands-of-Foreclosures-Pending-State-Extends-Mediation-Program?mcode=0&curindex=0.

36. *E.g.*, H.B. 2739, 49th Leg., 2d Sess. (Ariz. 2010); H.B. 1649, 186th Gen. Court, Reg. Sess. (Mass. 2009).

37. Mo. Bankers Ass'n v. St. Louis County, 448 S.W.3d 267, 272 (Mo. 2014); *see also* Easthampton Sav. Bank v. City of Springfield, 21 N.E.3d 922, 932 (Mass. 2014) (invalidating a municipal foreclosure mediation ordinance); Virginia Young, *Missouri Legislature Moves to Drop Mediation for Foreclosed Homeowners*, ST. LOUIS POST-DISPATCH (May 6, 2013), http://www.stltoday.com/news/local/govt-and-politics/missouri-legislature-moves-to-drop-mediation-for-foreclosed-homeowners/article_78d21a3d-daff-5d42-9ccf-3daa56a408d5.html.

38. *See* U.S. DEP'T. OF JUSTICE & U.S. DEP'T. OF HOUS. AND URBAN DEV., EMERGING STRATEGIES FOR EFFECTIVE FORECLOSURE MEDIATION PROGRAMS 4 (2010) [hereinafter EMERGING STRATEGIES];

meet with a housing counselor before mediation, and most have detailed lists of documents and information that the homeowner and mortgage servicer must submit to the mediator.[39] The mortgage servicer must send someone to participate in person in some states, while others permit telephone conference sessions.[40] The degree of data reporting and court oversight also varies from state to state.[41] Despite these variations, the defining feature of mediation or foreclosure diversion programs is the same: the presence of a neutral individual to facilitate communication between homeowner and servicer, together with a pause in the foreclosure process.[42]

The varied mediation programs launched during the foreclosure crisis have produced a wealth of data to evaluate their effectiveness. Several states have incorporated detailed data collection as part of their program to facilitate empirical studies of the outcomes.[43] States adopting mediation programs have tended to be those with the most severe foreclosure rates. As of June 30, 2009, the ten states with the highest foreclosure inventory rates were Florida, Nevada, Arizona, California, New Jersey, Illinois, Ohio, Indiana, Maine, and Michigan.[44] Of these, Arizona and California were the only states not to implement some type of mediation program; Illinois had programs only in a few counties.[45] With five years of data and large numbers of foreclosures, we have reached the point when we can usefully examine the results of this legal experiment, and compare foreclosure outcomes between states with mediation programs and those without them.[46]

see generally KULP, *supra* note 30.

39. EMERGING STRATEGIES, *supra* note 38, at 5, 7.
40. *See generally* KULP, *supra* note 30.
41. *Id.*
42. EMERGING STRATEGIES, *supra* note 38, at 3.
43. *See infra* notes 43–51.
44. MORTG. BANKERS ASS'N, NATIONAL DELINQUENCY SURVEY 3 (2009).
45. *See* KULP, *supra* note 30, at 6–7.
46. White & Reid, *supra* note 5, at 1713.

II. EMPIRICAL EVIDENCE SHOWS THAT MEDIATION AND SETTLEMENT PROGRAMS IMPROVE FORECLOSURE OUTCOMES

The available research uniformly supports the effectiveness of foreclosure mediation in achieving loan modifications and other resolutions that avoid the need for foreclosure sales.[47] Several state court systems have compiled statistics regarding their mediation programs.[48] Typically, these compilations tally the number of homeowners who elect or appear at mediation or settlement conferences, and sometimes the number and percentage of cases that are settled prior to judgment and foreclosure sale.[49] A few carefully designed empirical studies have confirmed the significant positive impact of mediation.[50] Finally, my own calculations from publicly available mortgage performance data are strongly suggestive that states with foreclosure mediation have better foreclosure outcomes.[51]

A. State Data Show High Homeowner Participation Rates and Successful Mediation Outcomes

Some state legislatures and court administrators who adopted foreclosure mediation wisely chose to incorporate data reporting from the beginning, making it possible to evaluate rigorously the impact of the programs.[52] Connecticut, for example, has each mediator prepare detailed reports on each case, which are then compiled and tabulated to allow evaluation of the program's success or failure.[53] The Ohio courts' model for mediation programs

---

47. *See id.* at 1723.
48. *See generally* KULP, *supra* note 30.
49. STATE OF NEV. FORECLOSURE MEDIATION PROGRAM, FY 2013 ANNUAL REPORT 5 (2013) [hereinafter NEV. FORECLOSURE MEDIATION 2013].
50. Memorandum from Alan White to the Unif. Law Comm'n Comm. on Home Foreclosure Procedures Act, State Foreclosure Mediation Laws: Examples and Research for a Uniform Statute 3 (May 11, 2012), http://www.uniformlaws.org/shared/docs/mortgage%20foreclosure/4_2012may11_RREMFFP_State%20Foreclosure%20Mediation%20Laws%20memo_White.pdf [hereinafter State Foreclosure Mediation Laws Memo].
51. *See* discussion *infra* Section II.C.
52. Sullo, *supra* note 35.
53. *See* CONN. GEN. STAT. § 49-31n(b)(2), (d)(1) (2016).

recommends the use of standardized outcome reporting forms.[54] Nevada also collects detailed information from its mediators.[55]

The Connecticut program reports that about 70% of all defendants in mortgage foreclosure cases appeared at automatically scheduled conferences.[56] Of those who appeared, 64% remained in their homes, 15% negotiated a "graceful exit" such as a short sale, and 21% went to foreclosure sale.[57] New York's courts report that default judgments against homeowners have declined to 10%, meaning 90% of eligible homeowners are participating in mediation.[58] Other states report similar outcomes: high participation rates, and high rates of successful negotiation for participants.[59] Mediation has thus been highly successful as a means to get homeowners to respond and participate in loss mitigation and foreclosure prevention.

Nevada, a nonjudicial foreclosure state, reports much lower participation rates and lower home retention outcomes resulting from mediation.[60] Nevada reported 1,894 mediations in fiscal year 2014, resulting in 503 agreements, and also 319 foreclosures prevented because the servicer did not bring required proof of its right to foreclose.[61] Of the agreements, 274 contemplated home retention,

---

54. Jacqueline C. Hagerott, *Foreclosure Mediation: Responding to the Current Crisis*, 40 CAP. U. L. REV. 899, 909–10 (2012).

55. STATE OF NEV. FORECLOSURE MEDIATION PROGRAM, FY 2014 ANNUAL REPORT 2 (2014) [hereinafter NEV. FORECLOSURE MEDIATION 2014].

56. EMERGING STRATEGIES, *supra* note 38, at 4.

57. The Connecticut courts' data are summarized in a Boston Federal Reserve staff report. ROBERT CLIFFORD, NEW ENGLAND PUB. POLICY CTR., STATE FORECLOSURE PREVENTION EFFORTS IN NEW ENGLAND: MEDIATION AND ASSISTANCE 12 (2011), https://www.bostonfed.org/economic/neppc/researchreports/2011/neppcrr1103.pdf.

58. STATE OF N.Y. UNIFIED COURT SYS., 2011 REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 4 (2011), http://www.courts.state.ny.us/publications/pdfs/ForeclosuresReportNov2011.pdf [hereinafter N.Y. COURTS REPORT].

59. CLIFFORD, *supra* note 57, at 10; *see also* DEL. ATTORNEY GEN., DELAWARE AUTOMATIC RESIDENTIAL MORTGAGE FORECLOSURE MEDIATION: OVERALL PARTICIPATION AS OF 2ND QUARTER 2015 (2015), http://attorneygeneral.delaware.gov/fraud/cpu/automediation.shtml (under "Mortgage Foreclosure Data," select "2015"; then follow "Second Quarter 2015 Mediation Program Participation Overview" hyperlink) (reporting about 50% participation, and 50% success for participants); *The Mortgage Foreclosure Task Force and Settlement Conference Statistics*, COURTS.IN.GOV, http://www.in.gov/judiciary/admin/2364.htm (last visited Nov. 3, 2016) (reporting about 50% participation by eligible borrowers, and for participants, about 50% successful workouts).

60. NEV. FORECLOSURE MEDIATION 2014, *supra* note 55, at 1–3.

61. *Id.* at 2.

while in 229 instances the home was to be sold or surrendered.[62] During the same period, 13,040 foreclosures were permitted to proceed, either because the homes were not owner-occupied, the homeowner did not request mediation, or mediation failed.[63] Lower home retention is not entirely surprising given some unique features of the Nevada housing market.[64] Investor-owned properties account for an unusually large share of Nevada foreclosures; in fiscal year 2013 for example, 9,482 foreclosures were allowed to proceed because they were not eligible for mediation—not owner-occupied—compared with 2,752 requests for mediation received in the same period.[65]

Servicer noncompliance accounted for roughly half of the failed mediations in Nevada.[66] For example, in fiscal year 2013, about two-thirds of mediations did not result in an agreement.[67] According to mediator reports, in 41% of the Nevada cases with no agreement, the lender failed to appear, had no authority, did not produce documents, or failed to negotiate in good faith.[68]

Court reports and other research also consistently show that automatic or "opt-out" foreclosure mediation results in much higher participation than an on-request or "opt-in" program.[69] Opt-out programs with automatically scheduled mediations, such as New York, have participation rates of 70% or more, while opt-in states typically report participation rates of 25% or lower.[70] Data reports from the various states reveal that participation in mediation is impacted by the form of notice of mediation and whether the

62. *Id.* at 2–3.

63. *Id.* at 3.

64. *See* Jennifer Rachel Baumer, *Nevada's Residential Housing Market,* NEV. BUS. (Nov. 1, 2015), http://www.nevadabusiness.com/2015/11/nevadas-residential-housing-market/.

65. NEV. FORECLOSURE MEDIATION 2013, *supra* note 49, at 1, 6.

66. *Id.* at 2.

67. *Id.*

68. *Id.*

69. Andrea Kupfer Schneider & Natalie C. Fleury, *There's No Place Like Home: Applying Dispute Systems Design Theory to Create a Foreclosure Mediation System*, 11 NEV. L.J. 368, 372 (2011) (noting that 17% to 20% of defendants in Milwaukee's opt-in program request mediation); State Foreclosure Mediation Laws Memo, *supra* note 50, at 3.

70. EMERGING STRATEGIES, *supra* note 38, at 4.

mediation is automatically scheduled or held on request only.[71] The reports also reveal that significant numbers of mediation participants are able to negotiate an alternative to a foreclosure sale.[72]

B. Studies Comparing Foreclosure Cases with and Without Mediation Also Show Mediation Improves Outcomes

The state tabulations offer simple descriptive statistics on participation and outcomes.[73] They do not attempt to evaluate whether the outcomes would have been different in the absence of mediation.[74] In other words, some might argue that homeowners who opt in to mediation and achieve a workout might also have persisted and achieved the same result even without mediation.[75] Three empirical studies have tested the causal impact mediation has on foreclosure outcomes, using either a before-and-after comparison, a comparison between jurisdictions with and without mediation, or a set of variables to control for differences between participants and non-participants.[76]

Philadelphia's Reinvestment Fund study found that 70% of eligible homeowners appeared at mandatory mediation conferences, and of those, 35% achieved a settlement to remain in their home.[77] Comparing foreclosures before and after the mediation program implementation, the rate at which homes went to sale was cut in half.[78] The results appeared to be lasting: 80% of homeowners with mediated agreements were still in their homes almost two years later.[79]

---

71. State Foreclosure Mediation Laws Memo, *supra* note 50, at 3.
72. *Id.*
73. *See infra* Table 1.
74. *See infra* Table 1.
75. GEOFFRY WALSH, NAT'L CONSUMER LAW CTR., STATE AND LOCAL MEDIATION PROGRAMS: CAN THEY SAVE HOMES? 12 (2009).
76. *See infra* notes 78–80, 81–84, and 85–91.
77. THE REINVESTMENT FUND, PHILADELPHIA RESIDENTIAL MORTGAGE FORECLOSURE DIVERSION PROGRAM: INITIAL REPORT OF FINDINGS 23 (2011), https://www.reinvestment.com/wp-content/uploads/2015/12/Foreclosure_Diversion_Initial_Report-Report_2011.pdf. The research was funded by the William Penn Foundation and the Open Society Institute. *Id.*
78. *See id.*
79. *Id.* at 4.

Collins and Urban studied the mandatory mediation programs in three Florida judicial districts: Pensacola, Miami, and Daytona.[80] Controlling for a variety of factors, they found that mortgage modifications were significantly higher in localities with mediation programs than in those without.[81] They also found that re-defaults on modified loans were lower in areas with mediation programs after the programs were adopted.[82] They theorized that this resulted primarily from better information exchange between the homeowner and the mortgage servicer.[83]

The Connecticut State Justice Initiative evaluated the Connecticut statewide mediation program in a 2014 report.[84] Connecticut was the first state to adopt a statewide program, and had 31,000 participants out of 124,000 judicial foreclosures filed between 2008 and 2013.[85] The report estimates that the participants represented about one-third of eligible homeowners, excluding foreclosures on vacant and investor-owned properties.[86] Participants included all homeowners who requested mediation and attended an initial meeting.[87] For concluded mediations, 68% avoided a foreclosure, and roughly 50% achieved a home retention outcome.[88] The 32% of mediation participants whose homes went to foreclosure sale contrasts with the typical 58% of all foreclosure filings.[89] Using a multivariate regression model to compare participants and non-participants while accounting for other available variables, the study found that mediation participation reduced the likelihood of a foreclosure proceeding to judgment—a major step towards a completed sale—by

80. J. Michael Collins & Carly Urban, *Mandatory Mediation and the Renegotiation of Mortgage Contracts*, 125 ECON. J. 1734, 1739–40 (2015).
81. *Id.* at 1742, 1747.
82. *Id.* at 1736, 1738, 1754.
83. *Id.* at 1739.
84. GLORIA JEAN GONG & CARL BRINTON, CONNECTICUT JUDICIAL BRANCH MORTGAGE FORECLOSURE MEDIATION PROGRAM EVALUATION 4 (2014), http://www.jud.state.ct.us/statistics/FMP/sji_eval.pdf.
85. *Id.* at 5, 7.
86. *Id.* at 16.
87. *Id.* at 15.
88. *Id.* at 25.
89. *Id.* at 25.

13%.[90] Thus, all three empirical studies found that mediation reduced the number of foreclosure sales and increased the number of successfully negotiated outcomes.[91]

C. Available Data on Subprime Mortgage Foreclosure Outcomes Shows Fewer Foreclosure Sales, More Loan Modifications and More Default Cures in States with Effective Mediation Programs

This section contains a summary of my own findings based on tabulations of publicly available mortgage data.[92] These data also support the hypothesis that states with well-designed foreclosure mediation programs reduce the number of homes facing foreclosure that are eventually auctioned at foreclosure sales, and increase the number of successful alternatives.

The Wells Fargo Corporate Trustee Services ("CTS") data file contains records of subprime and alt-A mortgages that are purchased by private-label mortgage securitizations.[93] Using the 2000 through 2006 mortgage origination files, I constructed a set of 4 million mortgage records. The data are updated monthly with variables reflecting current loan performance, including the date of the last payment, the foreclosure status, and whether the mortgage has been modified.

I created a sample consisting only of mortgages identified as first-lien loans, containing 3,187,955 records. By compiling monthly files from December 2006 through December 2013, I calculated additional variables reflecting the final outcome: completed foreclosure sale, loan current, loan active but delinquent, loan prepaid in full, or outcome missing. The outcome-missing cases are those where the loan record ceases to appear in monthly reports some time prior to December 2013, and never appeared as paid in full or

---

90. GONG & BRINTON, *supra* note 84, at 37.

91. *Id.* at 33; Collins & Urban, *supra* note 80, at 1736–37; *see* THE REINVESTMENT FUND, *supra* note 77, at 15.

92. *See infra* Table 1, Table 2.

93. For descriptions of this dataset, see White & Reid, *supra* note 5, at 1723; J. Michael Collins & Maximilian Schmeiser, *The Effects of Foreclosure Counseling for Distressed Homeowners,* 32 J. POL'Y ANALYSIS & MGMT. 83, 86–87 (2013).

foreclosed in any prior report. For example, a loan record might reflect that the payments are current in March 2010, but not prepaid, and the same loan does not appear in any monthly files from April 2010 forward. This could occur if servicing is transferred or the loan was sold, such that the investor reporting ceases to be submitted to Wells Fargo CTS.

Of the 3.2 million loans, 828,858 entered foreclosure at some point between 2007 and 2013. This subset of records is the dataset I have used to examine the possible effect of mediation programs and other differences in foreclosure processes on outcomes. This sample selection means that I cannot capture the differences that state mediation programs or other state foreclosure laws might have on the initial servicer decision to refer a defaulted loan to foreclosure. Nevertheless, it seems reasonable to examine outcome variability in a population of mortgage loans, which all initially entered the foreclosure process.

The home loss rate varies tremendously among the states.[94] The percentage of homes beginning foreclosure that ultimately went to a foreclosure sale ranged from 26% in New York, to 67% in California, and 75% in Arizona.[95] Nonjudicial foreclosure states like California, Arizona, Nevada, and Michigan had very high rates of foreclosures going to sale.[96] While many mortgage loans in slower foreclosure states like New York remain unresolved and in default at the end of the study period, states with lower completed sale rates also have much higher cure rates.[97] In New York, 30% of mortgage loans having entered foreclosure at some point between 2007 and 2013 were current at December 2013, compared with only 5% in Michigan, and 6% in Arizona.[98] While economic factors, such as unemployment and home price appreciation, also vary among the

94. *See infra* Table 1.
95. *See infra* Table 1.
96. *See infra* Table 1; *see also* Stephen Elias, *Nonjudicial Foreclosures*, NOLO, https://www.nolo.com/legal-encyclopedia/how-foreclosure-works-30066-2.html (last visited Nov. 3, 2016) (listing states using nonjudicial foreclosure).
97. *See infra* Table 1.
98. *See infra* Table 1.

states,[99] it is reasonable to assume that some of the huge variation in foreclosure outcomes relates to variations in foreclosure laws and practices.

One important factor differentiating states with high home loss rates is the rate at which mortgages in the foreclosure process are renegotiated with a permanent loan modification.[100] In Connecticut, Pennsylvania, New York, and Maryland, 23% to 25% of all mortgages entering foreclosure were modified at some point.[101] Each of these are judicial foreclosure states that implemented mediation early.[102] The states with the lowest modification rates included California (15.5%), Arizona (14.8%), Florida (14%), Michigan (13.5%), and Nevada (12.5%).[103] All the latter states except Florida are nonjudicial foreclosure states.[104] Florida, Michigan, and Nevada implemented mediation programs,[105] while Arizona has not.[106] Nevada has experienced comparatively low participation rates in its program.[107] Florida terminated its statewide mediation program in 2011, although some counties continued to operate them,[108] and Michigan allowed its program to sunset in 2014.[109]

This simple descriptive analysis of state foreclosure outcomes does not account for any variables other than mediation. Foreclosure

99. Erin Carlyle, *Best Buy Cities: Where to Invest in Housing in 2016*, FORBES (Jan. 27, 2016, 10:00 AM), http://www.forbes.com/sites/erincarlyle/2016/01/27/best-buy-cities-where-to-invest-in-housing-in-2016/#5ef5192b2429.

100. *See* White & Reid, *supra* note 5, at 1718–19 (describing loan modifications in the context of the 2008 foreclosure crisis).

101. *See infra* Table 2.

102. *See infra* Table 2.

103. *See infra* Table 2.

104. Elias, *supra* note 96.

105. GEOFF WALSH, NAT'L CONSUMER LAW CTR., STATE AND LOCAL FORECLOSURE MEDIATION PROGRAMS 1–3 (2010), https://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs-update.pdf.

106. Art Hinshaw & Timothy Burr, *Foreclosure Mediation in Arizona*, 45 ARIZ. ST. L.J. 749, 754 (2013).

107. NATIONAL DELINQUENCY SURVEY, *supra* note 44, at 3; KULP, *supra* note 30, at 8.

108. In Re Managed Mediation Program for Residential Mortgage Foreclosure Cases, No. AOSC11-44 (Fla. Dec. 19, 2011); In Re Mortgage Foreclosure Procedures Update, No. 2015-015 (Fla. Cir. Ct. 6th Mar. 12, 2015); Order Governing Residential Foreclosure Mediation Procedures, Orange County, No. 2012-06 (Fla. Cir. Ct. 9th Apr. 12, 2012).

109. 2014 Mich. Pub. Acts 125 (enacting section 1, repealing MICH. COMP. LAWS § 600.3205e (2014)).

timelines, home price changes, and other state-specific factors likely explain much of the interstate differences in completed foreclosure sales. A few states with mediation programs, notably Ohio and Indiana, had relatively high sale rates and low cure and modification rates.[110] Still, the fact that New York homeowners in default had five times as many cures as those in Arizona, nearly twice as many modifications, and one-third the rate of completed foreclosure sales, tells us something about New York's aggressive foreclosure mediation program.[111] Further research in this area should include multivariate modeling to exploit the available nationwide mortgage performance data and test the independent effect that mediation program implementation has on foreclosure outcomes. These descriptive data are consistent with the results of prior empirical studies concluding that mediation reduces foreclosure sales and helps achieve better outcomes.[112]

D. The Economic and Other Benefits of Foreclosure Sale Avoidance Are Substantial

Preventing a foreclosure sale saves money.[113] Homes sold at foreclosure auctions are sold at a large discount from market value, and the costs of the foreclosure process add to the loss.[114] The deadweight losses from home foreclosure sales can amount to $100,000 or more.[115] Mortgage servicers ordinarily will modify a loan by reducing the interest rate or extending the payment schedule only if the result is "net present value positive" for the investor.[116]

---

110. *See infra* Table 1, Table 2.
111. *See infra* Table 1, Table 2.
112. *See generally* KULP, *supra* note 30.
113. *Banks Pay Borrower Bonuses to Avoid Foreclosures*, NUWIRE (July 14, 2011), http://www.nuwireinvestor.com/banks-pay-borrower-bonuses-to-avoid-foreclosures/.
114. MORTG. BANKERS ASS'N, LENDER'S COST OF FORECLOSURE 2, 4–5 (2008), http://www.sandiegohousingsolutions.com/MortgageBankersAssocationLenderCosttoForecloseCongressionalBriefing.pdf.
115. Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications*, 41 CONN. L. REV. 1107, 1119 (2009).
116. Amy Loftsgordon, *Net Present Value (NPV) and Your Mortgage Loan Modification*, ALLLAW, http://www.alllaw.com/articles/nolo/foreclosure/net-present-value-npv-mortgage-loan-modification.html (last visited Aug. 24, 2016).

This means that the expected cash flow from the modified loan, accounting for the probability of another default and any reduction in interest or principal, is greater than the expected cash flow from not modifying the loan, accounting for the probability of a completed foreclosure sale and the expected loss.[117] The net present value of a successful modification will almost invariably exceed the modest cost of mediation.[118] The average net present value for approved permanent modifications under the federal HAMP program was around $20,000.[119]

The economic benefits of preventing a foreclosure sale extend far beyond the savings to banks and other mortgage investors.[120] First and foremost, a family avoids losing a home.[121] A foreclosure sale and forced relocation can mean the disruption of neighborhood and social ties, children's education, and families' mental stability.[122]

Foreclosure sales also have a uniquely harmful effect on neighborhoods and communities.[123] Property abandonment and blight, and the depressing effect of concentrated distress sales on home prices, sap the wealth of the impacted communities, which are often low-income communities of color.[124] Cities and towns experiencing large numbers of foreclosure sales face mounting costs for policing, demolition, and lost tax revenue.[125] The cumulative costs of even a single foreclosure sale may far exceed the entire amount of a typical $200,000 mortgage loan.[126] If foreclosure

---

117. Alexandra Andrews & Emily Witt, *The Secret Test that Ensures Lenders Win on Loan Mods*, PROPUBLICA (Sept. 15, 2009 2:18 PM), http://www.propublica.org/article/the-secret-test-that-ensures-lenders-win-on-loan-mods-915.

118. Author's calculations using data from *Making Home Affordable Data File*, U.S. DEP'T OF TREAS., http://www.treasury.gov/initiatives/financial-stability/reports/Pages/mha_publicfile.aspx (calculations on file with author).

119. *Id.*

120. *Banks Pay Borrower*, *supra* note 113.

121. DAN IMMERGLUCK, FORECLOSED: HIGH-RISK LENDING, DEREGULATION, AND THE UNDERMINING OF AMERICA'S MORTGAGE MARKET 145–47 (2009).

122. *Id.* at 149–52.

123. *Id.*

124. *Id.*

125. *Id.* at 152.

126. *See id.*

mediation is even modestly successful in preventing foreclosure sales, the benefits should easily outweigh the costs.

III. COSTS AND DELAYS CAUSED BY MEDIATION AND DIVERSION PROGRAMS ARE MODEST

Foreclosure mediation and diversion programs impose two categories of costs. The direct costs for the personnel administering and conducting the mediation sessions are relatively modest, as are the incremental cost to the servicer and its attorneys.[127] Of greater concern are the indirect costs that result from delaying foreclosure in order to conduct mediation.[128] Evidence from the past five years strongly suggests that long foreclosure delays are not primarily the result of mediation programs, and that the marginal delay for well-run mediation programs imposes costs that are also modest, particularly when compared to the benefits of successful mediation.[129]

A. The Costs of Existing Mediation Programs Are Modest, Paid Either by Users or State Appropriations

Statewide foreclosure mediation and diversion programs are funded through state appropriations, fees charged to the lender or homeowner when mediation is scheduled, or foreclosure filing fees.[130] Delaware charges a $300 mediation fee to the foreclosure plaintiff.[131] The District of Columbia charges a $300 fee to the foreclosing lender, a $50 fee to the homeowner, and funds the program with noncompliance fines.[132] Hawaii charges $300, and Nevada charges $200 to each party.[133]

127. *See* discussion *infra* Section III.A.
128. *See* discussion *infra* Section III.B.
129. *See* discussion *infra* Section III.B.
130. *See generally* KULP, *supra* note 30.
131. DEL. CODE ANN. tit. 10, § 5062C(e)(3) (West 2013); Automatic Residential Mortgage Foreclosure Mediation Program, No. 2013-2 (Del. Super. Ct. May 28, 2013).
132. D.C. Code § 42-815.03 (2010); 57 D.C. Reg. 12408, 12410 (Dec. 31, 2010).
133. NEV. FORECLOSURE MEDIATION 2014, supra note 55, at 1; WALSH, *supra* note 34, at 36.

Connecticut's statewide program is run by the judiciary and employs twenty-five full-time mediators.[134] Connecticut's legislature elected to fund the program from general revenues, appropriating $2 million in the program's first year (2008).[135] As noted earlier, Connecticut's program served more than 30,000 homeowners between 2008 and 2013, more than 5,000 per year, meaning the cost per mediation was roughly $400.[136] Washington State combined two funding mechanisms.[137] It imposed a $250 fee on each filed notice of a nonjudicial foreclosure sale.[138] This filing fee approach yielded $15 million over a three-year period, and those funds were used for program administration, housing counseling, and other related services.[139] Washington also charges each party $200 and the mediator receives a mediation fee of $400.[140]

The Boston Federal Reserve's foreclosure mediation study canvassed the different funding strategies used in various New England mediation programs,[141] and Resolution Systems, Inc. provides a summary of foreclosure mediation funding approaches on its website.[142] The costs of foreclosure mediation are quite modest, whether funded by user fees for lenders and homeowners or by state appropriations.

134. GONG & BRINTON, *supra* note 84, at 13.

135. 2008 Conn. Acts 08-176 § 20 (Reg. Sess.). The Connecticut General Assembly's Office of Fiscal Analysis estimated the program's cost for FY 2014 as $5.5 million. An Act Extending the Foreclosure Mediation Program, H.B. 6419, Fiscal Note, OFF. OF FISCAL ANALYSIS, https://www.cga.ct.gov/2013/FN/2013HB-06419-R000214-FN.htm (last visited Aug. 25, 2016).

136. *See* GONG & BRINTON, *supra* note 84, at 4.

137. *See infra* notes 138, 140.

138. WASH. DEP'T OF COMMERCE, FORECLOSURE FAIRNESS PROGRAM: ANNUAL REPORT ON PROGRAM PERFORMANCE 4 (2014), http://classic.commerce.wa.gov/Documents/Commerce-Foreclosure-Fairness-2014.pdf.

139. *Id.* at 5.

140. WASH. REV. CODE ANN. § 61.24.163(17) (LexisNexis 2016); WASH. DEP'T OF COMMERCE, FORECLOSURE FAIRNESS GUIDELINES 26 (2015).

141. CLIFFORD, *supra* note 57, at 4.

142. HEATHER SCHEIWE KULP, RESOL. SYS. INST., FORECLOSURE MEDIATION PROGRAMS FUNDING 1–16 (2011), http://aboutrsi.org/pfimages/ForeclosureMediationFunding.pdf.

B. Mediation Need Not Significantly Delay Foreclosures

By design, mediation programs delay the judicial or nonjudicial foreclosure process to permit parties to exchange information and meet with a mediator.[143] Foreclosure delays impose costs on lenders and borrowers.[144] Unpaid interest continues to accrue, and mortgage servicers advance funds for property inspections and maintenance, attorney's fees, insurance, and taxes, if the homeowner is not paying.[145] If the mediation succeeds, these costs may be added to the debt or may be written off, depending on the terms of the workout, loan modification, or short sale.[146] If the mediation fails, these amounts are added to the debt, and in all probability, to the investor loss at the foreclosure sale.[147] One might think that scheduling and holding a mediation session could be accomplished in thirty to sixty days, but in practice foreclosure mediations between 2008 and 2012 took much longer.[148]

During the same 2008 to 2012 period, overall foreclosure timelines—the time elapsed between referral for foreclosure and the completed sale and liquidation of a foreclosed home—grew dramatically.[149] By 2011, in New York, the average foreclosure reportedly took 820 days to complete.[150] Similarly unusual delays were reported in many other states, including Connecticut, Florida, Illinois, and New Jersey.[151] The reasons for the foreclosure delays are numerous and interrelated.[152] These unprecedented foreclosure

143. Larry Cordell & Lauren Lambie-Hanson, *A Cost-Benefit Analysis of Judicial Foreclosure Delay and a Preliminary Look at New Mortgage Servicing Rules* 2 (Fed. Reserve Bank of Phila., Working Paper No. 15-14, 2015), https://www.philadelphiafed.org/research-and-data/publications/working-papers/2015/.

144. *Id.* at 7–8, 11–12.

145. *Id.* at 8; Larry Cordell et al., *The Cost of Delay* 13 (Fed. Reserve Bank of Phila., Working Paper No. 13-15, 2013), https://www.philadelphiafed.org/research-and-data/publications/working-papers/2013/.

146. Cordell, *supra* note 145, at 13–15

147. *Id.*

148. *See* N.Y. COURTS REPORT, *supra* note 58, at 2 (noting that cases often require four to eight settlement conferences to be resolved); *see also infra* notes 163–69 (reporting on New York, Connecticut, Florida, Illinois, and New Jersey delays).

149. Cordell & Lambie-Hanson, *supra* note 143, at 2–3.

150. State-Level Guarantee Fee Pricing, 77 Fed. Reg. at 58,993.

151. *Id.* at 58,991.

152. *See infra* text accompanying notes 153–156.

delays coincided with the advent of foreclosure mediation programs, but also coincided with (1) other federal and state programs to mitigate the crisis and (2) the robo-signing scandal—the discovery of widespread assembly-line signing of foreclosure affidavits with false or unverified statements and improper notary practices for note and mortgage assignments.[153] Other factors contributing to foreclosure delays included (1) widespread mortgage servicer failures and incompetence, as reported by banking regulators,[154] (2) the abandoned foreclosure phenomenon—large numbers of foreclosures started and then dropped by servicers,[155] and (3) lenders' failures to dispose of foreclosed properties in the face of a historic plunge in home prices.[156]

States with mediation programs experienced significant and—in a few cases—extreme delays in completing mortgage foreclosures; however, according to the available evidence, mediation programs were not the primary cause of those delays.[157] Some evidence is available on the impact that mediation programs, as distinct from other state law changes and non-legal factors, have had on foreclosure timelines.[158] Somewhat simplistic analyses have been offered on both sides of the debate. On one hand, advocates point out that mediations can speed up the loss-mitigation process by focusing the parties' attention, accelerating information exchange, and getting

153. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-433, MORTGAGE FORECLOSURES: DOCUMENTATION PROBLEMS REVEAL NEED FOR ONGOING REGULATORY OVERSIGHT 8 (2011), http://www.gao.gov/assets/320/317923.pdf; CONG. OVERSIGHT PANEL, 61-835, EXAMINING THE CONSEQUENCES OF MORTGAGE IRREGULARITIES FOR FINANCIAL STABILITY AND FORECLOSURE MITIGATION 1, 34, 36 (2010), https://www.gpo.gov/fdsys/pkg/CPRT-111JPRT61835/pdf/CPRT-111JPRT61835.pdf; OFF. OF THRIFT SUPERVISION, FED. RESERVE SYS., INTERAGENCY REVIEW OF FORECLOSURE POLICIES AND PRACTICES 3 (2011), http://www.federalreserve.gov/boarddocs/rptcongress/interagency_review_foreclosures_20110413.pdf.

154. Clifford J. White III & Ramona D. Elliot, *$25 Billion Mortgage Servicer Settlement—Implications for the United States Trustee Program and the Bankruptcy System*, 31 AM. BANKR. INST. J. 18, 18 (2012).

155. Judith Fox, *How to Kill a Zombie: Strategies for Dealing with the Aftermath of the Foreclosure Crisis* 7–8 (Notre Dame Law Sch. Legal Studies Research, Paper No. 1519, 2015), http://ssrn.com/abstract=2622507.

156. *See* Daniel Immergluck, *The Accumulation of Lender-Owned Homes During the U.S. Mortgage Crisis: Examining Metropolitan REO Inventories*, 20 HOUSING POL'Y DEBATE 547, 619 (2010).

157. Judith Fox, *The Future of Foreclosure Law in the Wake of the Great Housing Crisis of 2007-2014*, 54 WASHBURN L.J. 489, 515 (2014); GONG & BRINTON, *supra* note 84, at 33.

158. Gong & Brinton, *supra* note 84, at 33.

to a definitive answer.[159] On the other hand, opponents assume that the mediation process is added to existing timelines, and in the case of unsuccessful mediation, needlessly increases delay.[160]

The Connecticut study found that participation in mediation extended the time in foreclosure by an average of 255 days.[161] However, the study also found that in cases where the plaintiff (mortgage servicer) complied fully and promptly with program rules, cases took only thirty days longer than non-mediated cases.[162] The Connecticut mediation program data includes questions about the servicer and the homeowner's participation, including whether they attended conferences, requested delays, were prepared with necessary documents, and had authority to settle.[163] The study also found that two large mortgage servicers were consistently the least prepared, and contributed significantly to average foreclosure delays.[164] A more recent Connecticut report notes that homeowners furnish required forms and documentation before the first meeting in 71% of cases, while servicers furnished required forms and documentation in 49% of cases.[165] The Philadelphia study found the mean time spent in the mediation diversion program was fifty-four days.[166]

Mediation programs per se contributed much less to foreclosure delays than servicer capacity problems combined with the robo-signing crisis's aftermath; the continuing inability of servicers and foreclosure attorneys to verify basic elements in foreclosure pleadings such as the amounts due and the parties' identities; and the large number of contested cases.[167] Additionally, while the unusual

159. *Id.*
160. *Id.* at 25.
161. *Id.* at 24.
162. *Id.* at 30.
163. *Id.*
164. Gong & Brinton, *supra* note 84, at 31.
165. CONN. CHIEF COURT ADM'R, FORECLOSURE MEDIATION PROGRAM: REPORT TO THE BANKS COMMITTEE OF THE GENERAL ASSEMBLY 16–17 (2015) [hereinafter CONN. FORECLOSURE MEDIATION PROGRAM].
166. THE REINVESTMENT FUND, *supra* note 77, at 23.
167. Memorandum from Alan White to the Unif. Law Comm'n Comm. on Home Foreclosure Procedures Act, Foreclosure Delays in Judicial Foreclosure States (Feb. 11, 2013), http://www.uniformlaws.org/shared/docs/Residential%20Real%20Estate%20Mortgage%20Foreclosure%20Process%20and%20Protections/2013feb11_RREMFPP_White%20Memo_Delays.pdf [hereinafter

delays may not be primarily a function of permanent state foreclosure laws or court rules, they have been affected by temporary court measures.[168] Atypically long foreclosure delays in many states characterized the period from the fall of 2010, when the robo-signing scandal gained nationwide attention, through the end of 2012, when various state and federal reviews of foreclosure processes began winding down.[169]

Factors that seem to vary among states include: state court efforts to correct robo-signing errors and fraud; servicers deciding not to add real estate owned (REO) inventory in certain areas; and the time needed to submit and act on borrower requests for modifications and other foreclosure alternatives.[170] The following is a detailed discussion of the court response to robo-signing in one state (New Jersey) and the impact it has had on delays.

New Jersey is reported by FHFA as having a foreclosure timeline of 750 days.[171] The actual average time required for a judicial foreclosure case filed calendar year 2012, on the other hand, was 270 days, according to Kevin Wolfe, Assistant Director, Civil Practice Division, New Jersey Administrative Office of the Courts.[172] The 750-day figure is largely a result of fallout from the robo-signing crisis in 2010 and 2011.[173] In December 2010 the New Jersey Supreme Court amended its court rules to require foreclosure plaintiffs to file a Certificate of Diligent Inquiry (CODI).[174] Similar

---

Foreclosure Delays Memo]. The discussion of foreclosure delays contained within the remainder of Part III is derived from this Memorandum.

168. *Id.*

169. *Id.*

170. Streitfeld, *supra* note 18; *see also* Foreclosure Delays Memo, *supra* note 167.

171. State-Level Guarantee Fee Pricing, 77 Fed. Reg. at 58,993.

172. Prevost, *supra* note 18. Note that the time from court filing through completed foreclosure sale would not include the period between referral for foreclosure and the initial filing, a period that would be included in the FHFA measure.

173. Foreclosure Delays Memo, *supra* note 167.

174. N.J. SUP. CT. R. 1:5-6(c)(1)(E); N.J. SUP. CT. R. 4:64-1(a)(2). The December 20, 2010, amendments to N.J. Rule 1:5-6(c)(1)(E) and Rules 4:64-1(a)(2) and (3) require that plaintiffs' attorneys affix to foreclosure complaints a certification of diligent inquiry as to the accuracy of foreclosure documents and factual assertions, specifically, (1) that the attorney has communicated with employee(s) of the plaintiff who (a) personally reviewed the documents being submitted and (b) confirmed their accuracy, (2) the name(s), title(s) and responsibilities in those titles of the plaintiff's employee(s) with whom the attorney communicated, and (3) that the complaint and all annexed documents comport with

to the New York attorney affirmation,[175] the CODI called for servicers' attorneys to confirm the accuracy of the allegations in, and the documents attached to, their foreclosure complaints.[176] Foreclosure attorneys in both states were reluctant to certify the accuracy of their clients' foreclosure pleadings, leaving many pending foreclosure cases in limbo.[177] The resulting backlog of 2010 and 2011 cases greatly increased the average foreclosure timelines for New York and New Jersey.[178]

In addition, on December, 20, 2010, the New Jersey courts issued show cause orders demanding why uncontested foreclosures by the six largest mortgage servicers should not be suspended.[179] This led to a March 2011 appointment of a special master to review the servicer procedures,[180] and, finally, in August 2011, a series of special master's reports that permitted uncontested foreclosures to proceed.[181] The servicers voluntarily ceased prosecuting all pending foreclosures during this court proceeding.[182]

The discovery that notices of intent to foreclose sent prior to 2010 regularly violated New Jersey's Fair Foreclosure Act further complicated the situation.[183] The New Jersey law requires that a notice of intent to foreclose identify both the mortgage owner and the servicer.[184] Servicers had developed a routine practice of identifying

the provisions of Rule 1:4-8(a). N.J. SUP. CT. R. 1:5-6(c)(1)(E); N.J. SUP. CT. R. 4:64-1(a)(2)-(3).

175. Andrew Keshner, *New Court Rule Says Attorneys Must Verify Foreclosure Papers*, N.Y. L.J., Oct. 21, 2010, at 1.

176. N.J. SUP. CT. R. 4:64-1(a)(2)-(3).

177. *See* Streitfeld, *supra* note 18.

178. *See id.*

179. *In re* Residential Mortg. Foreclosure Pleading and Document Irregularities, No. F-059553-10 (N.J. Super. Ct. Ch. Div. Dec. 20, 2010), http://www.judiciary.state.nj.us/notices/2010/n101220c.pdf (order directing the named foreclosure plaintiffs to show cause).

180. *In re* Residential Mortg. Foreclosure Pleading and Document Irregularities, No. F-059553-10 (N.J. Super. Ct. Ch. Div. Mar. 29, 2011), http://www.judiciary.state.nj.us/superior/order_approving_stipulation.pdf (order approving the recommended stipulation and appointing special master).

181. *See In re Residential Mortgage Foreclosure Pleading and Document Irregularities*, N.J. COURTS, http://www.judiciary.state.nj.us/superior/f_59553_10.html (last visited Sept. 2, 2016) (listing the Special Master's reports and orders).

182. Foreclosure Delays Memo, *supra* note 167.

183. *Id.* at 3.

184. Fair Foreclosure Act, N.J. STAT. ANN. § 2A:50-56(c)(11)(West 2016).

only the servicer and not the loan owner.[185] The New Jersey Supreme Court decided in the *Guillaume* case that pending foreclosures with defective notices need not be dismissed, but that courts could direct the plaintiff to serve a corrected notice of intent.[186] Servicers then re-sent tens of thousands of notices in foreclosure cases that were filed prior to 2012 in order to comply with New Jersey law.[187]

Legal services advocates in New Jersey maintain that servicers were responsible for the delays.[188] They argue that servicers could have responded much more promptly to the December 2010 court actions, and could have resumed foreclosures in early 2011, either by promptly sending corrected notices of intent and filing certifications of diligent inquiry in support of foreclosure documents, or dismissing and refiling pending cases.[189] A motion by legal services to reduce the interest charged on all mortgages involved in delayed, uncontested foreclosures was recently rejected by the Superior Court.[190]

New York and Illinois judges also took action to stay foreclosures and review robo-signing defects.[191] In nonjudicial states, courts were not directly affected by robo-signing.[192] As a result, there have not been court initiatives in those states to delay foreclosures in order to correct affidavits or insure that foreclosures are otherwise properly documented.[193] The April 2012 national settlement among state attorneys general, the Department of Justice, and five major servicers

185. Foreclosure Delays Memo, *supra* note 167, at 3.

186. U.S. Bank Nat'l Ass'n v. Guillaume, 38 A.3d 570, 574 (N.J. 2012).

187. Foreclosure Delays Memo, *supra* note 167, at 3.

188. *Id.*

189. *Id.*

190. *Id.*; *In re* Application of Wells Fargo Bank NA to Issue Corrected Notices of Intent to Foreclose on Behalf of Identified Foreclosure Plaintiffs in Uncontested Cases, No. F9564-12 (N.J. Super. Ct. Jan. 7, 2013).

191. Foreclosure Delays Memo, *supra* note 167, at 3; Mary Ellen Podmolik, *Altered Documents halt Some Cook County Foreclosures*, CHI. TRIB. (Mar. 25, 2011), http://articles.chicagotribune.com/2011-03-25/business/ct-biz-0326-altered-foreclosures-20110325_1_foreclosure-affidavits-foreclosure-procedures-foreclosure-pipeline.

192. Foreclosure Delays Memo, *supra* note 167, at 3.

193. *See, e.g.*, Purva Patel, Nancy Sarnoff, & Jennifer Hiller, *Foreclosures Go Forward Despite Texas AG's Moratorium Push*, HOUS. CHRON. (Oct. 5, 2010, 5:30 AM), http://www.chron.com/business/real-estate/article/Foreclosures-go-forward-despite-Texas-AG-s-1698374.php.

did not require any corrective action for pending foreclosures; the measures to correct the robo-signing problem were prospective only.[194] As a result, each state was left to decide what, if any, action should be taken to review pending or recently completed foreclosures.[195]

The states' varying approaches to remedying robo-signing help explain interstate variation in foreclosure timelines from 2010 to 2012.[196] Mediation's small contribution to delay was primarily caused by servicers' tardiness in producing information and the consideration of loss mitigation alternatives.[197] Effective mediation need not impose extensive delays.[198] The cost of a few hundred dollars and two or three months' delay is far outweighed by the thousands of dollars lenders, homeowners, and communities save in a successful foreclosure mediation.[199]

IV. Foreclosure Mediation Requires Court Enforcement and Some Mediator Reporting Not Found in Conventional Mediation, but an Enforceable Duty to Mediate Need Not Depend on a Problematic Good Faith Standard

A. Foreclosure Mediation Is Different

Foreclosure mediation yields greater societal benefits than mediation in other civil disputes, and it helps to break through an agency problem unique to the mortgage industry. In other civil litigation, the societal interest in encouraging mediation is mostly to unburden the courts.[200] Successful foreclosure mediation, however,

194. *See, e.g.*, U.S. v. Bank of America, Corp., No. 12-0361, 2012 U.S. Dist. LEXIS 188892 (D.D.C. Apr. 4, 2012). The February 9, 2012, settlement agreements between the federal government, 49 states, and the various bank servicers are available on the settlement monitor's web site. *About the National Mortgage Settlement*, JASMITHMONITORING.COM, https://www.jasmithmonitoring.com/omso/about-the-national-mortgage-settlement/ (last visited Nov. 5, 2016).

195. Foreclosure Delays Memo, *supra* note 167, at 3–4.

196. *Id.* at 4.

197. *See id.* at 3.

198. Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. 5, 10 (1989).

199. *See id.*

200. *See What is Mediation?*, CIVIL MEDIATION COUNCIL, http://www.civilmediation.org/about-

has many positive externalities. For the reasons discussed above: families remain in their homes, housing markets are improved, and local governments avoid the costs of property vacancy.[201] Thus, there is a stronger social policy interest in imposing mediation even on reluctant mortgage servicers; an interest that is absent in ordinary civil mediation, where respecting party autonomy plays a greater role.

The interests of mortgage servicers, who actually conduct foreclosure cases, are not well aligned with the lenders and investors whose economic interests are at stake in the mortgage loan.[202] Servicers benefit economically from loan defaults and foreclosures even if their principals do not.[203] In particular, mortgage servicer compensation structures incentivize servicers not to negotiate loan modifications that are net present value positive for the mortgage investor.[204] Servicers make the most money when they either collect on-time payments, or foreclose and sell homes quickly.[205] The staffing and training required to implement good loan modifications and other workouts are unprofitable for servicers.[206] Mediation, therefore, can play an important role in overcoming this structural barrier by compelling servicers to fully evaluate foreclosure alternatives.

The effectiveness of foreclosure mediation and diversion programs is partly attributable to the programs' success in prodding mortgage servicers to fully evaluate loan modification, short sales, and other alternatives before proceeding to a foreclosure sale.[207] The programs compel the homeowner to submit necessary financial information,

---

mediation/29/what-is-mediation- (last visited Nov. 5, 2016).

201. *See supra* Part II.

202. Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers*, 15 HOUSING POL'Y DEBATE 753, 769, 771 (2004); Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 5 (2011).

203. Levitin & Twomey, *supra* note 202, at 5.

204. *Id.* at 1; Patricia A. McCoy, *Barriers to Foreclosure Prevention During the Financial Crisis*, 55 ARIZ. L. REV. 723, 756 (2013).

205. DIANE E. THOMPSON, NAT'L CONSUMER LAW CTR., WHY SERVICERS FORECLOSE WHEN THEY SHOULD MODIFY AND OTHER PUZZLES OF SERVICER BEHAVIOR: SERVICER COMPENSATION AND ITS CONSEQUENCES (2009), https://www.nclc.org/images/pdf/pr-reports/report-servicers-modify.pdf.

206. *Id.* at vii.

207. WALSH, *supra* note 34, at 11.

and compel the servicer to specify what information it needs; to identify all available loss mitigation programs; decide whether the homeowner is eligible for any of them, and justify its decision.[208] This combination of information exchange and compelled attention is key to the programs' success.[209]

In judicial foreclosure states, the court will prevent servicers from obtaining a judgment if they fail to persuade the court mediator or facilitator that a homeowner's case has been thoroughly evaluated, or will deny them permission to proceed with a nonjudicial sale.[210] Increasingly, courts have imposed significant sanctions on mortgage servicers for failing to comply with mediation program requirements, including failing to negotiate in good faith.[211] In addition to denying servicers the right to foreclose, courts have relieved homeowners of interest payments due during servicer delays and, in extreme cases, permanently prohibited foreclosure.[212]

These court-imposed repercussions conflict with accepted principles of mediation. To preserve their neutrality and the confidentiality of mediation, mediators normally do not assess the negotiating parties' good faith or quality of participation, nor do they report what happened, other than whether an agreement was reached.[213] However, program rules require foreclosure mediators to provide detailed reports on the compliance of servicers and homeowners.[214] Nevertheless, an effective foreclosure resolution program is possible which both preserves confidentiality and the

---

208. *Id.* at 17–18.

209. Collins & Urban, *supra* note 80, at 1734–35; Schneider & Fleury, *supra* note 69, at 377–79.

210. *See, e.g.*, CONN. GEN. STAT. ANN. § 49-31l(b)(6) (West 2015); NEV. REV. STAT. ANN. § 107.086(2)(d) (West 2015).

211. *See infra* Part IV.C.

212. U.S. Bank Nat'l Ass'n v. Sawyer, 95 A.3d 608, 612 (Me. 2014) (dismissing complaint with prejudice); U.S. Bank Nat'l Ass'n v. Williams, 121 A.D.3d 1098, 1102 (N.Y. App. Div. 2014) (approving the denial of interest to lender during servicer's failure to negotiate in good faith). *But see* IndyMac Bank, F.S.B. v. Yano-Horoski, 78 A.D.3d 895, 896 (N.Y. App. Div. 2010) (holding that dismissing foreclosure was appropriate but cancellation of the mortgage debt was not an allowable sanction).

213. MODEL STANDARD OF CONDUCT FOR MEDIATORS Standard V(A)(2) (AM. BAR ASS'N 2005) ("A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.").

214. *See infra* text accompanying notes 239-41.

mediator's neutrality while enforcing the program's rules of participation and requiring servicers to respond to homeowner loss mitigation applications before being allowed to foreclose.

B. The Uniform Mediation Act Protects Confidentiality and Restricts Mediators from Making Reports on Party Behavior

The Uniform Mediation Act (UMA) has been adopted in twelve states: the District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington.[215] Seven of these states, the District of Columbia, Hawaii, Illinois, New Jersey, Ohio, Vermont, and Washington also have existing foreclosure mediation programs.[216] The Ohio program was intentionally designed to be as consistent as possible with UMA.[217] The other UMA states do not seem to have explicitly referenced UMA in designing their foreclosure mediation or settlement conference programs.

The primary goal of UMA is to preserve confidentiality of mediation discussions.[218] To balance the party autonomy and communication privilege, UMA also addresses the integrity and impartiality of the process by requiring mediators to disclose conflicts of interest.[219] UMA's conflict of interest provisions are consistent with foreclosure mediation and readily applicable.[220] The policy challenge is how and whether to extend confidentiality and privilege protections to foreclosure mediation while permitting mediators to make reports needed for judicial oversight.[221]

215. *Enactment Status Map*, UNIF. LAW COMM'N, http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act (last visited Aug. 31, 2016).

216. *See generally* KULP, *supra* note 30.

217. Hagerott, *supra* note 54, at 903.

218. *Mediation Act Summary*, UNIF. LAW COMM'N, http://www.uniformlaws.org/ActSummary.aspx?title=Mediation%20Act (last visited Aug. 31, 2016).

219. UNIFORM MEDIATION ACT § 9 (UNIF. LAW COMM'N 2003).

220. *See id.*

221. For an excellent discussion of the tension between the UMA and foreclosure mediation models, see Heather Scheiwe Kulp, *A Tightrope over Both Your Houses: Ensuring Party Participation and Preserving Mediation's Core Values in Foreclosure Mediation*, 14 PEPP. DISP. RESOL. L.J. 203 (2014) [hereinafter Kulp, *Tightrope*].

Section 7 of UMA prohibits mediators from making any reports to a court or agency except to report whether a session was held and whether an agreement was reached.[222] On the other hand, existing foreclosure mediation programs require the mediation agency to determine whether mediation should continue, or if the parties have reached an impasse such that foreclosure should proceed.[223]

A mediator governed by UMA must keep mediation communications confidential; may not report on the mediation except for basic outcomes such as attendance and whether a settlement was reached; and is not empowered to impose sanctions, delay or accelerate foreclosure, or otherwise twist arms.[224] A mediator cannot report that a party to the mediation does not have full settlement authority or failed to negotiate in good faith, but can report a party's failure to attend.[225] On the other hand, a special master or similar court-appointed referee may hold on-the-record discussions, report to the court on the proceedings, and impel the parties to settle in a variety of ways, including imposing sanctions or controlling the litigation process.[226]

The advantage of confidential UMA mediation is that the parties can more freely discuss settlement alternatives.[227] Mortgage servicers in particular might be less reluctant to make offers that would otherwise set precedent for other homeowners, and confidentiality should encourage candor and informality. Homeowners and mediators in existing foreclosure mediation programs oppose the confidential mediation model because it prevents mediators from reporting misconduct to the court, recommending sanctions, or recommending continuation of the mediation or settlement

---

222. UNIFORM MEDIATION ACT § 7 (UNIF. LAW COMM'N 2003).

223. *In re* Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, No. 10-03 A1 (Fla. Cir. Ct. Mar. 17, 2010).

224. UNIFORM MEDIATION ACT § 7 (UNIF. LAW COMM'N 2003).

225. *Id.*

226. *See generally* Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269 (2005).

227. *See Why States Should Adopt UMA*, UNIF. LAW COMM'N, http://uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UMA (last visited Sept. 1, 2016).

conference process.[228] Some advocates also see the duty to mediate in good faith as critical to the success of foreclosure mediation.[229]

C. The Much-Litigated Duty to Mediate in Good Faith Can Be Adequately Defined

At least six states impose a legal duty to participate in good faith on parties to foreclosure mediation.[230] Proponents assert that a duty of good faith is essential to achieve the prodding function that impels servicers to offer foreclosure alternatives.[231] Opponents argue that a general duty of good faith in mediation creates uncertainty and unnecessary litigation.[232] Courts in many of these states have struggled both to define the duty of good faith and to offer guidance to parties and mediators as to what the duty requires.[233]

Mediation experts are highly critical of good faith obligations in other contexts, particularly when they require or imply that a mediator must pass judgment on the parties' good faith.[234] The chief objections to a general duty of good faith include: (1) the participants, especially financial institutions, are reluctant to participate without knowing the contours of the duty and wish to preserve the right not to settle, and (2) if mediators must evaluate and report on the parties' good faith they will lose their neutrality, the

---

228. *See generally* WALSH, *supra* note 34 (arguing the need for good faith standard in foreclosure mediation).

229. Scott Kennedy, The Good Faith Approach to Foreclosure Mediation: An Assessment of Washington's Foreclosure Mediation Program 26 (Aug. 29, 2012) (unpublished paper), http://works.bepress.com/scott_kennedy/1/.

230. D.C. CODE § 42-815.02(e)(2)(A)(iii) (2012); ME. REV. STAT. ANN. tit. 14 § 6321-A(12) (2016); NEV. REV. STAT. § 107.086(6) (2015); N.Y. C.P.L.R. § 3408(f) (McKinney 2016); VT. STAT. ANN. tit. 12, § 4633(c) (2015); WASH. REV. CODE § 61.24.163(7)(b)(iii) (LexisNexis 2016).

231. *E.g.*, Jesse D. Stewart, Comment, *Maine's Foreclosure Mediation Program: What Should Constitute a Good Faith Effort to Mediate?*, 64 ME. L. REV. 249, 280 (2011).

232. *See generally* John Lande, *Why a Good-Faith Requirement Is a Bad Idea for Mediation*, 23 ALTS. TO HIGH COST LITIG. 1 (2005); Kulp, *Tightrope*, *supra* note 221, at 230.

233. Hannah Costigan-Cowles, *Negotiations for the Home: A Balanced Approach to Good Faith in Foreclosure Mediation*, 2013 U. ILL. L. REV. 1571, 1591 (2013).

234. *See* Roger L. Carter, *Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367, 372 (2002); Carol L. Izumi & Homer C. La Rue, *Prohibiting Good Faith Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel out of the Mediation Tent*, 2003 J. DISP. RESOL. 67, 83 (2003).

parties' trust, and be seen as adjudicators rather than facilitators. Most of the cases reported thus far involve breaches of good faith or some form of misrepresentation that also amount to clear violations of objective program rules.[235] These breaches include not providing accurate and timely information about loss mitigation programs, and not making accurate and timely decisions.[236]

Mediators or referees in many state programs file a report with the court on the outcome of mediation.[237] For example, mediators in Connecticut submit detailed reports including answers to the following questions:

1. Did the parties engage in "conduct consistent with the goals of the mediation program"?
2. Did the parties possess the ability to mediate?
3. Has the mortgagor supplied, on a reasonably timely basis, additional information reasonably requested by the mortgagee?
4. Has the mortgagee provided a reasonable explanation of a denial for the foreclosure alternative requested?
5. Has the mortgagee complied with the statutory time frames for responding to requests for decisions?[238]

Mediators appointed by the Nevada judiciary submit a mediation report that details compliance by the mortgage servicer (deed of trust beneficiary), homeowner participation, recommendations for sanctions, and outcome of the mediation.[239] The Washington state mediation statute requires homeowners and servicers referred to mediation to participate in good faith and makes failure of the lender to participate in good faith grounds for the homeowner to obtain an injunction of a nonjudicial foreclosure sale.[240] For example, one mediator reported in a Washington state case that the servicer failed to mediate in good faith because it refused to explain or explore the

---

235. *See, e.g.*, Kulp, *Tightrope*, *supra* note 221, at 220.
236. *Id.*
237. *E.g.*, Hagerott, *supra* note 54, at 907.
238. CONN. FORECLOSURE MEDIATION PROGRAM, *supra* note 165, at 48–49.
239. NEV. FORECLOSURE MEDIATION 2013, *supra* note 49, at 2.
240. WASH. REV. CODE ANN. § 61.24.163(14)(a) (West 2014).

difference between the opposing parties' principal and interest calculations.[241] Court employed referees to conduct New York's mandatory settlement conferences and make reports and recommendations to the court in which the judicial foreclosure is pending.[242] In all of these programs, the nearly absolute bar in UMA on mediator reporting would be an obstacle to the supervision and enforcement that these states have found necessary to secure the benefits of foreclosure mediation.[243]

The Consumer Financial Protection Bureau's new mortgage servicing regulations address many of the homeowner advocate concerns about servicer misconduct that motivate a broad definition of good faith in foreclosure mediations.[244] Effective in January 2014, the new mortgage servicing rules set clear standards for how and when servicers should inform homeowners of available loss mitigation programs, request homeowner financial information, and act on the homeowner's application.[245] The rule restricts servicers from foreclosing until loss mitigation requests have been evaluated.[246] The CFPB servicing rules provide a template for foreclosure mediation programs to apply in deciding whether a servicer has fully explored alternatives to foreclosure, and whether a servicer should be permitted to proceed with a foreclosure sale or should be sanctioned.[247]

New York and Nevada are the two states with the most reported cases applying a broad duty to negotiate in good faith.[248] Those

241. Wheeler v. Wells Fargo Home Mortg., Inc., No. C14-117RSL, 2014 WL 442575, at *3 (W.D. Wash. Feb. 4, 2014) (denying injunction of nonjudicial foreclosure sale because homeowner had not tendered monthly payments due, but holding that homeowner was likely to prevail on the merits due to mediator's report); *see also, e.g.*, Krusee v. Bank of Am., N.A., No. C13-824 RSM, 2013 WL 3973966, at *3 (W.D. Wash. July 30, 2013) (finding that servicer's alleged failure to bring required information to mediation and consequent delays could amount to failure to participate in good faith).

242. *See* N.Y. C.P.L.R. § 3408(i) (McKinney 2013); HSBC Bank USA, N.A. v. McKenna, 952 N.Y.S.2d 746, 748 (N.Y. Sup. Ct. 2012).

243. Kulp, *Tightrope*, *supra* note 221, at 208–09.

244. Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act, 78 Fed. Reg. at 10,730, 10,739.

245. *Id.* at 10,708, 10,742.

246. *Id.* at 10,698.

247. *Id.* at 10,696.

248. *See* Costigan-Cowles, *supra* note 233, at 1572.

state's decisions reveal that in virtually all cases, servicer misconduct can be tied either to violations of specific program requirements, such as timely participation, timely action on, and accurate communication regarding homeowner loss mitigation applications, or to some type of misrepresentation.[249] In virtually all of the New York and Nevada cases, when servicers are sanctioned for violating the duty of good faith, the conduct at issue violated clear rules of the mediation program, or would violate the federal mortgage servicing rules now in effect, or both.[250]

The New York referees and courts have invoked the duty of good faith in the face of various servicer delays and refusals to consider loss mitigation alternatives.[251] Courts have found good faith lacking when a lender refused to approve a short sale at what appeared to be the current market value,[252] and when a lender failed to review a modification request promptly, and gave inconsistent and invalid reasons for denying it.[253] A servicer violated the duty of good faith when they flatly refused to consider any loan modification or short sale and gave widely inconsistent statements of the amount due,[254] as was a servicer who repeatedly asked the homeowner for the same documents and delayed deciding the loss mitigation application.[255] One Appellate Division panel described lack of good faith as including the following conduct: failure to expeditiously review submitted financial information, sending inconsistent and contradictory communications, denying requests for a loan modification without adequate grounds, and failure of the homeowner to provide requested financial information or providing incomplete or misleading financial information.[256] Other servicer

249. *Id.* at 1597–1602.
250. *See id.* at 1611–13.
251. GEOFF WALSH, NAT'L CONSUMER LAW CTR., RECENT DEVELOPMENTS IN FORECLOSURE MEDIATION 1–2 (2011), https://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/rpt-mediation-2011.pdf.
252. HSBC Bank USA, N.A. v. McKenna, 952 N.Y.S.2d 746, 764–65 (N.Y. Sup. Ct. 2012).
253. U.S. Bank, N.A. v. Sarmiento, 991 N.Y.S.2d 68, 79–80 (N.Y. App. Div. 2014).
254. IndyMac Bank v. Yano-Horoski, 890 N.Y.S.2d 313, 316 (N.Y. Sup. Ct. 2009), *reversed on other grounds*, 912 N.Y.S.2d 239 (2010).
255. U.S. Bank, N.A. v. Thomas, 977 N.Y.S.2d 670, 670 (N.Y. Sup. Ct. 2013).
256. *Sarmiento,* 991 N.Y.S.2d at 79–80.

misconduct cited as failure to negotiate in good faith included refusal to honor agreements made before or during mediation,[257] and refusal to implement a signed modification agreement for five months because of a non-material notarization problem, combined with failure to account for payments made under a temporary agreement and making misrepresentations to the homeowner and the court.[258]

The Nevada Supreme Court found in *Pasillas v. HSBC Bank USA* that sanctions were warranted when a servicer failed to have a person with authority to modify the mortgage available, and failed to produce required documents including the mortgage note and an appraisal of the home.[259] Although the mediator in that case also opined that the servicer had failed to negotiate in good faith, that finding was unnecessary to the court's decision to sanction the servicer and delay the foreclosure.[260] The court listed four statutory requirements for mediation participants: to attend, to participate in good faith, to bring required documents, and to have authority or access to a person with authority to settle.[261] The servicer violated three of these four requirements.[262] Other Nevada cases have also resulted in sanctions because servicers failed to bring required documents or failed to have a person with appropriate negotiating authority available.[263]

Some of the servicer misconduct cited as violating the duty of good faith amounts to misrepresentation, whether deliberate or unintentional. For example, homeowners assert that some servicers misrepresent the result of their net present value calculations to deny meritorious loan modification requests.[264] A duty of good faith, in

257. Wells Fargo Bank, N.A. v. Meyers, 966 N.Y.S.2d 108, 113 (N.Y. App. Div. 2013).

258. Citimortgage, Inc. v. Sultan, 6 N.Y.S.3d 393, 407–08, 415, 425–26 (N.Y. Sup. Ct. 2014), *vacated*, 2015 WL 4919899 (N.Y. Sup. Ct. 2015).

259. Pasillas v. HSBC Bank USA, 255 P.3d 1281, 1285, 1287 (Nev. 2011).

260. *Id.* at 1286–87.

261. *Id.* at 1284.

262. *Id.* at 1285.

263. Wells Fargo Bank v. Renslow, No. 58283, 2015 WL 3368883, at *5–6 (Nev. May 21, 2015); Latham v. Aurora Loan Servs., LLC, No. 60353, 2014 WL 495270, at *2–3 (Nev. Jan. 24, 2014); Jacinto v. PennyMac Corp., 300 P.3d 724, 727 (Nev. 2013).

264. Costigan-Cowles *supra* note 233, at 1590.

these cases, really means a duty not to misrepresent material information to the mediator or the other party.

It would rarely have been necessary for a mediator to make a subjective judgment about good faith in these cases. The mediator report needs to cover more than attendance and outcome; it should include objective facts that do not undermine the impartiality of the mediator or the confidentiality of the process. For example, if mediation agency rules require the servicer to respond to a completed homeowner application for loss mitigation within the time specified in the CFPB regulations—30 days, ordinarily—the report could include the dates when a completed application was submitted and whether the servicer made and communicated a timely decision. Indeed, mediator reports can track the parties' compliance with each step of information exchange and servicer action on applications so that the conduct can be measured against the federal regulations and the mediation program rules.

A well-designed foreclosure mediation program ought to have clear rules for homeowners to appear, provide required information, and respond to any offers of loss mitigation by the servicer. Similarly, the rules should require the servicer to appear, to have the ability to specify definitively what information is needed from the homeowner, to evaluate the information, and to make and truthfully explain its decisions, based on correct information and in compliance with CFPB rules.[265] Mediators can then report to a court or supervising agency whether parties complied with these objective conduct standards, rather than having to answer subjective questions such as whether the parties negotiated in good faith or complied with the spirit of the program. Principles of mediator impartiality, as well as the need for both parties to have confidence in the mediation system, can be preserved while fully policing misconduct that results in needless foreclosures.

265. Kulp, *Tightrope*, *supra* note 221, at 218–21 (identifying accountability principles for mediation participants).

D. The Uniform Home Foreclosure Procedures Act Incorporates Mandatory Mediation with a Robust Duty to Participate

The Uniform Home Foreclosure Procedures Act project was launched in 2012, in the midst of the nationwide foreclosure crisis.[266] The drafting committee was charged with addressing a range of issues that were being litigated in state courts and debated in state legislatures.[267] The HFPA identifies the party with standing to foreclose;[268] specifies the content of notices, including the pre-foreclosure notice of default and the notice of foreclosure sale;[269] describes the homeowners' right to cure a default and terminate a foreclosure;[270] spells out the requirements for foreclosure, including how to enforce lost notes;[271] authorizes a voluntary surrender of the property with cancellation of junior liens;[272] permits expedited foreclosure of abandoned properties;[273] and specifies remedies and defenses for homeowners.[274]

The HFPA also authorizes permanent and mandatory mediation while preserving considerable flexibility for state implementation.[275] The HFPA uses the term "foreclosure resolution" rather than "mediation" to highlight the difference between foreclosure mediation and classic mediation under the UMA.[276] The Uniform Law Commission, as author of the UMA, is committed to the principles of that Act.[277] For example, the HFPA carries over the

266. WILLIAM R. BREETZ & BARRY NEKRITZ, THE UNIFORM FORECLOSURE PROCEDURES ACT ('UHFPA' OR '*YOU-HUFF-PA*')—NO ONE SEEMS TO LOVE IT (YET) 2 (2014), http://files.ali-cle.org/thumbs/datastorage/skoob/articles/BKAC1403%20TAB18%20Breetz_Nekritz_thumb. pdf.

267. *Id.* at 1–2.

268. UNIF. HOME FORECLOSURE PROCEDURES ACT § 104 (UNIF. LAW COMM'N 2015).

269. *Id.* §§ 201, 405.

270. *Id.* § 203.

271. *Id.* art. 4.

272. *Id.* art. 5.

273. *Id.* art. 6.

274. UNIF. HOME FORECLOSURE PROCEDURES ACT art. 7 (UNIF. LAW COMM'N 2015). Article 7 includes a provision permitting homeowners to assert certain defenses against subsequent mortgage note holders, notwithstanding the holder-in-due-course doctrine of Uniform Commercial Code § 3-305. *Id.* § 705.

275. *Id*. art. 3.

276. *Id.* § 301 cmt. 3.

277. *See id.* app. 25

confidentiality principle.[278] Any financial information exchanged by the parties in the foreclosure resolution process is privileged and protected from discovery in other litigation.[279] On the other hand, the neutral person conducting foreclosure resolution is not prohibited from reporting on the results of the process, and such reports are implicitly required.[280] Foreclosure is stayed for ninety days if a homeowner requests a meeting, unless the supervising agency determines the resolution process should continue for longer or be cut short.[281] The agency needs information from the neutral person to decide whether the parties require additional time for the foreclosure resolution process, just as foreclosure mediators in existing programs report on parties' compliance with program rules.

Unlike states such as New York, the HFPA does not impose an explicit duty to mediate in good faith.[282] Instead, it requires the foreclosing party and homeowner to attend and participate in the resolution process.[283] Failure to participate includes not only failing to attend, but also failing to exchange required information; failing to designate a person with authority to settle; and failure of a creditor or servicer to inform the homeowner of available loss mitigation options and to consider the homeowner for all appropriate options.[284] The HFPA requires good faith compliance with all specific statutory requirements[285] and prohibits servicers from misrepresenting all aspects of foreclosure, including the homeowner's eligibility for loss mitigation.[286] Thus, while the Act does not create an unmoored duty of good faith, it does prohibit servicer dishonesty in following the resolution process rules. These provisions should reach most, if not all, of the misconduct that has prompted court findings of servicer bad faith in existing foreclosure mediation programs.

---

278. *Id.* app. 25.
279. UNIF. HOME FORECLOSURE PROCEDURES ACT § 304(f) (UNIF. LAW COMM'N 2015).
280. *Id.* app. 22.
281. *Id.* § 305(c).
282. *Compare* UNIF. HOME FORECLOSURE PROCEDURES ACT § 303(b), *with* 2009 N.Y. Sess. Laws c. 507, § 10-a(1) (McKinney).
283. UNIF. HOME FORECLOSURE PROCEDURES ACT § 303(b) (UNIF. LAW COMM'N 2015).
284. *Id.*
285. *Id.* § 105.
286. *Id.* § 106.

Although the Act creates a structure for foreclosure resolution and addresses some basic policy choices, including its objective rules-based approach to the good faith problem, it recognizes the variety of resolution and mediation programs that exist and gives states the freedom to define the contours and details of their programs.[287]

CONCLUSION

At its best, foreclosure mediation removes roadblocks to mutually beneficial solutions, including loan modifications, short sales, and other alternatives to foreclosure sales and evictions. The evidence from the laboratories of democracy is compelling: although mediation slows the foreclosure process, it significantly increases the likelihood of better outcomes.[288] Foreclosure mediation will thus promote housing tenure stability, minimize investor losses, and reduce harms to families and communities that otherwise result from foreclosure auctions and sales. The Uniform Home Foreclosure Procedures Act offers a useful legislative framework to make foreclosure mediation permanent. It may be that in the future, mortgage-servicing improvements will make the added step of foreclosure mediation unnecessary by ensuring that servicers fully consider foreclosure alternatives in every case before beginning foreclosure. But until that day comes, the case for making mediation a permanent feature of state foreclosure laws is compelling.

287. *Id.* § 301 cmt. 2.
288. *See supra* Part II.

Table 1: outcomes for home mortgages in foreclosure by state

	Mediation	Foreclosed	Current	Prepaid in full	Active Delinquent	Missing Data
AZ		74.10%	6.10%	8.10%	5.10%	10.40%
NV	Y	73.30%	7.60%	5.90%	9.00%	12.30%
MI	Y	70.20%	5.00%	4.80%	9.00%	17.30%
MN	*	67.20%	8.60%	6.80%	1.30%	14.70%
CA		67.00%	8.90%	7.40%	1.30%	15.40%
MO		65.00%	7.30%	7.20%	2.40%	15.00%
CO	*	64.60%	7.40%	10.40%	6.90%	15.10%
VA		62.80%	9.40%	10.20%	5.30%	14.40%
IN	Y	62.10%	8.70%	6.20%	9.00%	17.30%
OH	Y	62.10%	8.70%	4.70%	2.80%	18.90%
WI		60.20%	10.60%	6.80%	4.90%	17.00%
ID		59.90%	10.60%	11.40%	3.40%	15.10%
KS		59.60%	9.70%	7.60%	7.30%	16.70%
GA		59.30%	9.30%	8.80%	3.00%	17.70%
TN		58.60%	10.10%	7.90%	5.50%	16.00%
NE		58.10%	10.50%	9.20%	5.70%	14.40%
SD		58.10%	9.70%	12.40%	6.50%	15.20%
IA	Y	57.30%	10.70%	8.30%	7.50%	16.40%
KY		56.40%	9.70%	7.40%	14.40%	19.00%
WV		56.20%	11.70%	7.50%	5.20%	14.00%
RI	Y	55.60%	11.40%	6.00%	6.00%	23.00%
NH		54.80%	10.80%	7.60%	6.80%	22.20%
IL	*	54.50%	13.10%	6.20%	2.80%	20.70%
FL	*	54.40%	15.30%	5.80%	2.60%	21.60%
OK		54.20%	12.20%	9.20%	5.50%	16.90%
AL		53.30%	8.30%	10.70%	11.00%	18.70%
AR		53.10%	12.40%	9.60%	4.30%	15.80%
TX		53.10%	11.50%	9.60%	7.70%	18.50%
MS		52.80%	11.00%	8.30%	7.50%	17.00%
NC		52.30%	11.00%	9.40%	7.80%	19.70%
WA	Y	51.30%	15.40%	12.30%	4.60%	16.60%
SC		51.20%	12.30%	7.90%	8.40%	19.60%
AK		50.50%	12.00%	14.90%	7.80%	17.50%

OR	Y	50.30%	18.40%	11.80%	0.90%	15.80%
UT		50.20%	10.50%	19.10%	10.80%	15.80%
MA		49.90%	13.40%	7.60%	5.60%	23.90%
MD	Y	48.20%	19.80%	7.20%	7.50%	18.80%
WY		46.50%	12.70%	17.00%	3.70%	18.40%
MT		45.80%	13.30%	20.20%	11.20%	16.50%
ME	Y	45.40%	13.60%	7.00%	3.60%	27.20%
ND		43.30%	16.30%	17.50%	3.90%	15.40%
DE	Y	43.10%	19.70%	10.40%	9.00%	17.70%
NM		42.70%	17.30%	13.50%	4.60%	18.70%
LA		42.00%	14.50%	10.40%	7.30%	18.60%
CT	Y	41.40%	19.80%	8.30%	7.40%	23.60%
PA	*	41.30%	17.60%	8.60%	4.40%	21.20%
DC	Y	39.90%	22.10%	11.60%	3.20%	21.00%
HI	Y	37.50%	21.40%	9.70%	16.70%	28.00%
NJ	Y	30.70%	29.80%	7.90%	7.40%	23.20%
VT	Y	29.50%	16.50%	9.60%	4.50%	37.00%
NY	Y	26.30%	29.40%	8.90%	5.40%	24.70%
US		58.20%	12.20%	7.60%	4.20%	17.80%

*Mediation only in some counties.

Table 2 rate of mortgages in foreclosure being modified

State	Modified
DE	26.90%
CT	25.20%
PA	24.90%
VT	24.80%
LA	24.10%
NY	23.30%
MD	23.00%
AK	22.80%
WV	22.30%
MS	22.00%
WY	21.90%
NJ	21.30%
NC	21.20%
WI	21.20%
NH	20.90%
TX	20.80%
ME	20.50%
IL	20.10%
NE	20.00%
SC	19.80%
TN	19.70%
IA	19.40%
MA	19.40%
MT	19.10%
AL	18.90%

State	Modified
WA	18.90%
AR	18.80%
ND	18.80%
RI	18.70%
DC	18.60%
MO	18.60%
NM	18.40%
OK	18.20%
OR	18.20%
KS	18.00%
GA	17.70%
HI	17.60%
KY	17.60%
UT	17.60%
ID	16.50%
OH	16.20%
MN	15.80%
VA	15.80%
IN	15.70%
CA	15.50%
AZ	14.80%
FL	14.00%
CO	13.90%
MI	13.50%
NV	12.50%
US	17.20%