

**JUDICIAL BRANCH
FORECLOSURE DIVERSION PROGRAM
REPORT TO THE JOINT STANDING COMMITTEE ON INSURANCE
AND FINANCIAL SERVICES
125TH LEGISLATURE**

February 7, 2011

I. Introduction

Today, the Judicial Branch submits its annual report on the Foreclosure Diversion Program as required by 14 M.R.S. § 6321-A (7)(B). This report covers the first year of the statewide program (January 1, 2010 to December 31, 2010).

The Judicial Branch is not requesting any legislative action. At this time, the Court will continue to monitor and evaluate the Foreclosure Diversion Program and to implement internal procedural changes. Over the course of the next year, the Court will again consider whether any legislative action is needed to improve the services offered to the parties in foreclosure actions, and will present any such requests in the annual report and through appropriate procedural channels.

II. Foreclosure Diversion Program Overview

On June 15, 2009, the 124th Maine Legislature enacted “An Act to Preserve Home Ownership and Stabilize the Economy by Preventing Unnecessary Foreclosures,” which authorized the establishment of a foreclosure diversion mediation program. P.L. 2009, ch 402. Chapter 402 authorized the Supreme Judicial Court to create a statewide foreclosure diversion mediation program to begin on January 1, 2010, and granted the Court the discretion to create pilot projects in advance of the statewide effort.

Pursuant to that Legislation, the Supreme Judicial Court designed and implemented the York County Pilot that operated from August 3, 2009, through December 31, 2009. Based on the Court’s experience with the pilot, evaluations conducted by the Commission on Foreclosure Diversion and the Foreclosure Diversion Program staff, and comments from stakeholders, the Judicial Branch designed and implemented the statewide Foreclosure Diversion Program on January 1, 2010, six and one-half months after the date of the enabling legislation.

The statewide program applies to all eligible mortgage foreclosure cases

filed on or after January 1, 2010. In addition, individual trial judges may order mediation for cases filed before January 1, 2010, if a homeowner requests mediation, if mediation resources are available, and if the mediation process will not unnecessarily delay the proceedings.

Consistent with the Court's Scheduling Model, the statewide program has been implemented regionally. Each of the Judicial Branch's eight judicial regions has designated one or two courts to manage foreclosure cases through the diversion process.

III. The Status of the Statewide Service

A. Staffing

The governing legislation authorized five Foreclosure Diversion Program positions to be funded from a surcharge imposed on each foreclosure filing. These positions include three clerks, who were hired over the course of 2009 and 2010 and placed in the courts in Springvale, Portland, and Bangor. These locations have consistently had the highest levels of foreclosure filings statewide. The two administrative positions were also filled, with the Program Manager beginning her duties in September 2009 and the Administrative Secretary beginning her duties in February 2010.

In addition to these five positions, the equivalent of one full-time clerk position is being funded with FDP funds; one part-time clerk has been placed in the Lewiston District Court and another part-time clerk has been placed in the Augusta District Court. These two courts have the next highest level of foreclosure filings after Springvale, Portland, and Bangor. The part-time clerk positions are filling current clerk vacancies in these courts, rather than creating new positions.

B. Foreclosure Mediators

1. Foreclosure Mediator Hiring and Training

In October 2009, relying upon criteria established by the Supreme Judicial Court in its Administrative Order for the York County Pilot, the program sought qualified foreclosure mediator candidates from the fields of law, accounting, banking, and mediation. The qualified candidates were required to participate in a mandatory three-day foreclosure mediation training, which included training by a

nationally recognized expert on the Federal Deposit Insurance Corporation's Net Present Value (FDIC NPV) worksheet. As a result of that training, seventy-one trained foreclosure mediators, including four trained active retired judges, were available to mediate statewide. These mediators were divided into regional rosters based upon geographic considerations and assigned to mediate in a designated court.

In addition to the training held in December 2009, the program required the mediators to attend a daylong training in June 2010. The training included: a refresher on the FDIC NPV model; updated information on the Making Home Affordable Program (HAMP) and related government-sponsored foreclosure prevention programs; practice in conducting mediations through "mock" exercises; an opportunity to discuss the challenges and specific issues raised in actual mediations; and a forum to ask questions and make recommendations for programmatic change. At the time of the training, most mediators had had actual foreclosure mediation experience, which permitted the focus of the training to center on practical issues.

2. Current Roster of Foreclosure Mediators

Over the course of the first year of the FDP, the program experienced some mediator attrition. Some mediators withdrew from the program voluntarily due to competing commitments, among other reasons, and several others lost their certification after failing to attend the mandatory, daylong training held in June. There are now fifty-six certified Foreclosure Diversion Program mediators, including five active retired judges.

C. Performance of the Program

1. Foreclosure Filing Activity and Notification of Mediation

Foreclosure filing activity remained high during the first year of the statewide program, totaling 5409 filings. This number includes all foreclosure action filings, including those not eligible for mediation.

As provided in 14 M.R.S. § 6321-A(2), in foreclosure actions qualifying for mediation, the lender must attach to the foreclosure complaint the single-page form notice developed by the Department of Professional and Financial Regulation, Bureau of Consumer Credit Protection. In accordance with 14 M.R.S. § 6321-A(2)(C), the form notice includes a description of the Foreclosure

Diversion Program. Therefore, in all qualifying foreclosure actions filed after January 1, 2010, the homeowners were notified about the program.

2. *Informational Sessions*

Anticipating a low rate of legal representation for homeowners in foreclosure actions, the Judicial Branch designed informational sessions to make the mediation sessions more productive for both parties. Homeowners are required to attend and lenders are invited to attend these sessions. At the informational sessions, held before mediation, judges educate participants about the mediation process in general, and homeowners are offered information about outside resources that will provide assistance in completing financial paperwork.

Throughout 2010, a HUD-certified housing counselor or legal services representative attended almost every informational session. The housing counselors provided guidance on how to prepare for mediation, including an overview of what financial information would be needed, and invited homeowners to make a one-on-one appointment with a housing counselor before mediation. A representative from Pine Tree Legal Assistance explained what legal services might be available to homeowners and answered general legal questions on an individual basis.

During the first year of the statewide Foreclosure Diversion Program, a total of ninety-seven informational sessions were held throughout the eight regions. Each region offered these sessions at a different frequency, varying from an as-needed basis in the regions with lower foreclosure activity to three per month in the highest volume court.

3. *Legal Representation and Preparation for Mediation*

As was anticipated by the Judicial Branch, the majority of homeowners participating in foreclosure mediation did not have legal representation at mediation. Data collected by the program demonstrates that only thirty-nine percent of the homeowners had legal representation at mediation. However, forty-nine percent of the homeowners sought and obtained assistance with the preparation of their financial paperwork. Outside entities, such as attorneys, legal services employees, housing counselors, and financial counselors provided this assistance.

4. *Mediations*

As is required by 14 M.R.S. § 6321-A(13), mediators completed a report for each mediation session conducted and sent a copy to the program. The mediator issued either an “interim” report if the parties asked for more time to explore settlement, or a “final” report if the parties intended the mediation period to be over. The program used these reports as the basis for its collection of mediation data.

During the first year of the statewide FDP, the program provided mediation in 983 different foreclosure cases and conducted a total of 1243 mediations. The number of total mediations conducted is greater than the number of cases because some cases required more than one mediation session. Of the 1243 mediations, 505 resulted in final reports. A review of the final reports reveals that mediation was concluded most often—277 of 505 reports—because the parties were unable to reach an agreement. It was reported that the parties reached agreement at mediation in 107 reports. The 121 remaining reports show that mediation was concluded because the homeowner failed to attend the mediation session. Standing alone, this information would represent an approximately 21 percent success rate.

More than half of the mediator’s reports received by the program—738 of 1243 reports—were interim reports. In most interim reports, the reason for continuing the mediation period was either because the parties wanted to exchange additional information or because the parties entered into a loan modification with a trial period that had to run successfully before the lender would agree to dismiss the action. In such cases, the parties maintain the status quo; most often the homeowner remains in the home and the foreclosure complaint remains on the docket, but stayed. Due to the amount of time needed to allow lenders to work with often complex and competing regulations, and to give homeowners an opportunity to demonstrate an ability to keep up with payments in a modified mortgage, interim reports indicating that the parties are communicating about potential resolution demonstrate one of the program’s successes.

5. *Challenges*

a. *Data Collection*

During its first year, the program attributes at least ninety-eight foreclosure action dismissals to the mediation process. Tracking case dismissals that are attributable to the program has been a logistical challenge. In some instances, the

challenge is due to the time involved in reaching resolution. The resolved cases typically involve loan modifications that start with a trial period, or involve short sales that require coordinated action by several entities. Most trial modifications are required to last at least three months but often take much longer before the lender is ready or authorized to agree that the trial arrangement will be converted to a permanent modification and the foreclosure action will be dismissed. In other instances, tracking dismissals is complicated because the resolution, although preliminarily negotiated at mediation, occurs only after the parties agree to return the case to the trial docket. Overall, the program has discovered that the agreements that lead to foreclosure dismissals require months of negotiation by the parties. Therefore, the program expects that the true impact of foreclosure mediation on the court's foreclosure docket will take longer to discern.

Nonetheless, the program has been devising methods to monitor the progress of all of the cases participating in mediation and to collect information about the agreements that lead to dismissals. Currently, the program relies upon the mediators to capture the details of any agreement reached in their reports. It should be noted, however, that some agreement details may change or only become known after mediation. Therefore, it is possible that the agreements described below changed before the action was dismissed.

The data collected to date reveals that of the ninety-eight foreclosure actions that have been dismissed during the program's first year, sixty-two involved loan modification agreements. The reports suggest that the rest of the agreements resulting in dismissal break down as follows: seven dismissals involved a combination of repayment and forbearance plans; six dismissals involved a deed in lieu of foreclosure; five dismissals involved short sales; four dismissals involved mortgage reinstatements; three dismissals involved the homeowner selling the home; and one dismissal involved a cash for keys agreement. Six dismissals had unknown agreements. Additionally, four dismissals were the result of a court's sanction against the lenders.

The program does not have the ability to track the status of the cases beyond dismissal, and therefore, will not be able to report on the number of homeowners who default on their mortgages within a year after restructuring as requested by 14 M.R.S. § 6321-A(7)(B)(2).

In addition to the challenges of determining mediation outcomes, the program is currently tracking data from paper invoices and mediator reports. Beginning in 2011, the program will be utilizing a database to collect mediation

data. As discussed in the program's last annual report, the FDP has been working with programmers to design and build an online database. When complete, the database will permit the mediators to input their mediation data electronically and provide the program staff with ready access to statistical data. Additionally, the database will also be used to process the payment requests for the mediators' services. It is anticipated that the database will be complete sometime in 2011. Until then, the program will continue to receive paper copies of each mediator's payment request and mediation report. The information contained in those documents will be used to monitor program costs, evaluate program strengths and weaknesses, and to track trends.

b. Inadequate Number of Mediators in Certain Regions

Although there is no immediate need to recruit and train additional FDP mediators at this time in most regions, the FDP does not have an adequate number of mediators who live in the Midcoast, and in Washington, Hancock, and Aroostook Counties. The FDP has been able to provide timely foreclosure mediation services in these regions to date, but the program will continue to monitor these regions and will create a hiring and training schedule according to regional needs.

c. Lack of Clerk Resources

After the program had been in operation for several months, the program learned from the mediators that the mediation process could be improved if information from the case file was sent to them in advance of the mediation. Such a process would allow the mediator to complete conflict checks, review and input available data into the FDIC NPV worksheet, and identify issues before mediation. However, because the clerk's offices in most regions do not have dedicated FDP clerks and the Judicial Branch is maintaining a six to ten percent vacancy rate in clerk's offices, the clerks are unable to take on these additional responsibilities.

The program is working with clerks and mediators to develop a plan for the implementation of a pilot that would allow for use of non-clerk resources to help mediators get the needed information from court files before mediation. If successful, the pilot could be expanded to other courts.

IV. Procedural Changes

After providing an opportunity for public comment, the Court recently made two amendments to Maine Rule of Civil Procedure 93, the court rule governing the operation of the Foreclosure Diversion Program. These amendments were made effective on January 14, 2011.

The first amendment altered eligibility requirements for cases automatically referred to the FDP. Originally, Rule 93 defined “owner-occupant” to include homeowners who had moved out of the property in foreclosure, but who had lived in that property as a primary residence within 180 days of the start of the foreclosure action. This definition, which was not required by statute¹, was designed to include in mediation those homeowners who had moved out of their homes when it became apparent that the home was no longer affordable. After working with this definition for over a year, however, our experience demonstrates that, almost exclusively, if the homeowner is not living in the home when the foreclosure is commenced, it is because the Maine property in foreclosure is a vacation home. Vacation homes are not eligible for mediation and identifying and excluding these cases requires significant administrative clerk work. Furthermore, traditional loss mitigation options are limited when the homeowner is not living in the home, which makes mediation less productive. Therefore, the newly amended provision limits diversion-eligibility to cases involving homeowners who live in the property in foreclosure as a primary residence.

The second amendment changed the provision requiring the court to schedule mediation for cases in which the homeowner failed to appear at the informational session. The intent behind the original provision was to offer mediation to any homeowner who filed the required paperwork by the court’s deadline, even if that homeowner had failed to attend an informational session. However, in practice, the program discovered that homeowners who failed to

¹ The statutory provision governing eligibility for foreclosure mediation is 14 M.R.S. § 6321-A(3). That section provides, in part:

Under the authority granted in Title 4, section 18-B, the court shall adopt rules to establish a foreclosure mediation program to provide mediation in actions for foreclosure of mortgages on owner-occupied residential property with no more than 4 units that is the primary residence of the owner-occupant.

14 M.R.S. 6321-A(3) (2009).

appear at the informational session rarely produced the required paperwork or attended mediation. Because the program concluded that continuing to automatically schedule mediation for these cases was an inefficient use of resources, the Rule amendment was proposed to the Court. The newly amended provision now permits courts to use discretion in deciding how to manage cases in which the homeowner fails to appear at the informational session.

V. Status of York County Pilot

The current status of the cases that were mediated during the York County Pilot Project is summarized in Attachment A.

VI. Conclusion

The first year of the statewide Foreclosure Diversion Program has provided a firm basis for the program's operation going forward. Through conducting nearly one hundred informational sessions and over one thousand mediations, the program has gained the experience needed in order to determine what practical and administrative methods work best in delivering effective mediation services to the parties in foreclosure actions. Through the use of trainings, pilot efforts, and the monitoring of internal program procedure, the program expects to reinforce the practices that have worked well and address areas needing improvement. The program is also anticipating the utilization of the upcoming database, which will provide easier access to mediation data that will inform program policy. Therefore, at this time, the Judicial Branch does not recommend any legislative change to the Foreclosure Diversion Program. The Court will continue to evaluate and monitor the progress of the program.

Respectfully Submitted,

Lauren Blake Weliver, Manager
Foreclosure Diversion Program

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ATTACHMENT A

York County Pilot Project

During the York County Pilot Project (August 3, 2009 – December 31, 2009), the trained Active Retired Judge mediators conducted eighteen mediations. At the end of the pilot, the status of these cases were as follows:

- Seven cases resulted in homeowners being offered temporary, trial loan modification agreements;
- Five cases were continued in mediation;
- Three cases resulted in no agreement and those cases were returned to the trial docket;
- Two cases were returned to the trial docket after it was determined that the homeowners were not owner-occupants; and
- One case returned to the trial docket after the homeowner failed to appear at mediation.

At the end of the December 2010, in an effort to provide some follow-up, the program tracked the status of the fifteen cases that actually participated in mediation. By the end of December 2010, the status of the fifteen cases were as follows:

- Five cases had been dismissed without prejudice;
- Two cases were awaiting hearing after being returned to the trial docket;
- Five cases had foreclosure judgments entered;
- Two cases were operating under trial loan modification agreements; and
- One case had been stayed during bankruptcy