

**JUDICIAL BRANCH
FORECLOSURE DIVERSION PROGRAM**

**REPORT TO THE JOINT STANDING COMMITTEE
ON INSURANCE AND FINANCIAL SERVICES
125TH LEGISLATURE**

February 15, 2012

I. Introduction

The Judicial Branch hereby submits its annual report on the Foreclosure Diversion Program as required by 14 M.R.S. § 6321-A(7)(B). This report covers the second year of this statewide program (January 1, 2011 to December 31, 2011).

At this time, the Judicial Branch is not requesting any legislative action. As before, the Court will continue to monitor and evaluate the Foreclosure Diversion Program and to implement internal procedural changes. Over 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, if so, will present any such requests in the next annual report and through appropriate channels.

II. 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 included a Program Manager, an Administrative Secretary, and three foreclosure clerks. All of these positions were filled during 2009 and 2010. However, since the submission of the Program's last annual report, the Program Manager resigned her duties, effective November 9, 2011. Diane E. Kenty, Director of the Court Alternative Dispute Resolution Service, served as Acting Program Manager. Following a successful hiring process, the new Manager started her duties on February 6, 2012.

As explained in last year's annual report, in addition to these five positions, in 2011 the Foreclosure Diversion Program funded the equivalent of one full-time clerk position: one part-time clerk was placed in Lewiston District Court, and another part-time clerk was placed in Augusta District Court. These part-time clerks were not newly created positions but made use of vacant position numbers within the Judicial Branch. The high foreclosure filing volume and large foreclosure mediation caseload necessitated the additional clerk support in these locations. The Foreclosure Diversion Program plans to fund these positions for as long as effectively managing the foreclosure caseload in these courts demands the added support.

Recognizing that not all foreclosure cases are resolved through mediation, the Foreclosure Diversion Program also used its funds this year to add two limited term foreclosure law clerks to assist the trial judges to review and act in a timely fashion on the growing foreclosure caseload, including motions for summary judgment and other responsibilities as needed. These law clerks work exclusively on foreclosure matters. One foreclosure law clerk was assigned to assist in Judicial Regions 1 (York County), 2 (Cumberland County), and 3 (Androscoggin, Franklin, and Oxford Counties). The other foreclosure law clerk was assigned to assist in the remaining Judicial Regions (and counties) of the State. These law clerks also filled vacant authorized Judicial Branch positions. The foreclosure law clerk term began in September 2011 and is expected to conclude in August 2012. The Program will evaluate these positions in Spring 2012 and determine whether to hire foreclosure law clerks for the next term.

B. Foreclosure Mediators

There are currently 48 certified Foreclosure Diversion Program mediators on the statewide roster. Despite concerns raised in last year's annual report, the Program did not add any new mediators to the roster. On the one occasion when a region's mediators were unavailable to provide coverage for all needed mediations scheduled during a particular month, the Program Manager worked with the court clerks to find a substitute mediator from a nearby region. Because of the infrequent need for substitute mediators from outside the region, the Program Manager determined that it was more efficient to delay additional mediator recruitment and training until the need grew more acute.

To maintain the skills of the foreclosure mediators, the Program required all mediators to attend a day-long training on June 1, 2011 in Augusta. The agenda included presentations by Judge Andre G. Janelle and Judge Rick E. Lawrence on party noncompliance in mediation and judicially imposed sanctions; a panel discussion of mediation best practices; and an overview of current federal loss mitigation programs by nationally recognized experts Geoff Walsh of the National Consumer Law Center and Jeff Gentes, a foreclosure prevention attorney with the Connecticut Fair Housing Center.

C. Performance of the Program

1. Foreclosure Filing Activity and Notification of Mediation

Foreclosure filing activity remained high during 2011, although not as high as last year. Foreclosure filings totaled 4,697 in 2011. This number includes all foreclosure actions filed, including those not eligible for mediation. The volume of foreclosure filings decreased by 13% from the total of 5,409 cases filed in 2010.

Pursuant to 14 M.R.S. § 6321-A(2), in foreclosure actions qualifying for mediation, the plaintiff must attach to the foreclosure complaint the single-page form notice developed by the Bureau of Consumer Credit Protection of the Department of Professional and Financial Regulation. Pursuant to 14 M.R.S. § 6321-A(2)(C), the form notice includes a description of the Foreclosure Diversion Program. As a result, in all qualifying foreclosure actions filed this year, the defendants were notified about the program.

2. *Informational Sessions*

Informational sessions continue to be an integral component of the diversion process. In 2011, 118 informational sessions were held at several court locations across the state.

Homeowners are ordered to attend these sessions and lenders, and their counsel are notified and invited to attend. Typically, judges lead informational sessions to provide an overview of the foreclosure legal process and explain the court's expectations of the parties at mediation. Additionally, at these sessions housing counselors and legal service providers present detailed instructions to homeowners on how to prepare and submit information on lenders' financial forms and answer specific questions about various loss mitigation options. The housing counselors and legal service providers do not charge the Judicial Branch for their participation at these sessions. The depth of specialized knowledge that the housing counselors and legal services providers share with the participants at these informational sessions is valuable to the diversion process; the better prepared a homeowner is for mediation, the more productive the mediation can be both for homeowners and lenders.

The feedback gained from participants completing informational session exit surveys has been very positive. One participant wrote, "I really appreciate the question and answer part [of the informational session.] Others [asked] questions [that] I had not thought of. It was very valuable information." Another shared that as a result of attending the informational session, "I have a better understanding of what to do and how to go about the process."

Although court rule permits each judge to schedule informational sessions at his or her discretion, throughout 2011, each Judicial Region continued to hold and require defendant attendance at informational sessions before mediation would be scheduled.

3. *Homeowner Assistance: Legal Representation and Housing Counselors*

In 2011, according to reports submitted from mediation, 721 homeowners sought legal advice in conjunction with a foreclosure matter, and 901 homeowners sought assistance in preparing financial paperwork from housing counselors, legal services, or financial counselors.

4. *Mediation*

As required by 14 M.R.S. § 6321-A(13), mediators completed a report for each mediation session. Prior to the Program's launch of its online database (ADRIS) on July 1, 2011, mediators mailed a hard copy of each report to the Program; after July 1, mediators submitted the mediation information electronically through the database. This annual report includes information gleaned both from the printed copies of reports mailed before July and information from the ADRIS database about mediation after July.

As shown on the chart below, 2,410 foreclosure mediation sessions were conducted statewide in 1,611 different foreclosure actions in 2011. An average of 1.5 mediation sessions were conducted per case.¹

Of the 2,410 total mediation sessions conducted in 2011, 849 resulted in “final” reports, indicating that the parties had agreed to conclude mediation because they had reached either an agreement or an impasse. Of these final reports, 141 indicated the parties reached an agreement; 528 indicated that the parties had not reached an agreement; and 180 terminated mediation because the homeowner failed to attend the mediation session.

The remaining 1,561 mediation sessions resulted in “interim” reports, reflecting the parties’ desire to keep the case in mediation to continue to work on a mutually agreeable resolution to the foreclosure. In most interim reports, the mediation period was continued either because the parties wished to exchange additional information, or the parties entered into a loan modification with a trial period that had to run before the action could be dismissed. In such cases, the parties maintain the status quo; most often the defendant remains in the home, and the foreclosure complaint remains on the docket but is stayed. Due to the amount of time required to allow lenders to work with complex and sometimes inconsistent regulations, and to give homeowners an opportunity to demonstrate an ability to keep up with payments on a modified mortgage, interim reports that the parties are communicating about potential resolution frequently represent a potential step to a loan modification or other alternative to foreclosure.

5. *Foreclosure Case Status*

In last year’s annual report, tracking the progress of foreclosure cases participating in mediation was identified as a challenge. The Program discovered that the types of agreements that lead to foreclosure dismissals require at least several months. Typically, during this time, the homeowner must submit very specific, extensive, and time-sensitive financial information, and the lender performs careful evaluations of that material that often includes seeking additional approval from private investors or the Federal Government. Further, once the necessary information has been submitted and evaluated, if a loan modification agreement is reached, additional time may be needed to allow the homeowner to demonstrate satisfactory compliance with the new loan terms before the foreclosure action may be dismissed. Because complications can arise at any step in this process, it is difficult for the Program to track the progress of each case in mediation. The challenge is compounded by the fact that mediation has now occurred in nearly 2,500 cases.

As of December 31, 2011, the status of the cases that participated in foreclosure mediation in 2011 and in the two-year period (2010-2011) of the Program is as follows:

¹ The two-year total for the Program is 3,671 mediation sessions conducted in 2,441 cases. In 10 of these cases, mediation sessions were held both in 2010 and 2011. The overall average for both years was also 1.5 mediation sessions per case.

	2011	Total (2010-2011)
Total cases participating in mediation	1,611	2,441
Total mediation sessions held	2,410	3,671
Cases scheduled for additional mediation	274	282
Cases pending further action/possible additional mediation/stayed	317	317
Cases returned to civil docket	609	829
Cases dismissed	299	681
Cases in which foreclosure judgments entered	111	325
Other (e.g., cases removed to federal court, transferred to the Business and Consumer Docket, etc.)	1	7

From these numbers, it is clear that the majority of cases in which mediation was held in 2011 have not concluded yet in either dismissal or foreclosure judgment. At the end of 2011, approximately 19% of the cases that participated in mediation had been dismissed so far, and approximately 7% of the cases had proceeded to foreclosure judgment. Additional mediation is scheduled in approximately 17% of the cases. In approximately 20% of the cases mediated in 2011, further action is pending, including possible additional mediation, or the case is “stayed,” meaning that the parties have asked the court not to take any action in the matter. Approximately 38% of the cases were returned to the civil docket after mediation for further litigation.

For the years 2010 and 2011, it appears that in approximately 28% of cases that participated in mediation, foreclosure was avoided because the plaintiff dismissed the action. Because nearly 300 cases remain in mediation, and more than another 300 are currently pending further action, including possible additional mediation, or are “stayed,” the rate of dismissals could increase. To date, foreclosure judgments have been entered in approximately 13% of the cases that participated in mediation. In some of the nearly 800 cases that were returned to the civil docket after mediation and remain in the litigation process, it is possible that an agreement may still be worked out before judgment is entered, but it is anticipated that the majority will result in foreclosure judgments.

The Program will continue to monitor the progress of all cases that participated in mediation and will report the status annually to the Committee.

6. Types of Agreements Reached

For foreclosure cases that have been dismissed by the lender after mediation, the Program infers the kinds of agreements reached by reviewing the agreement details recorded in the last mediator’s report issued. The Program acknowledges that the negotiations could have changed between the parties after mediation, but that is unlikely. There is no current capacity to follow up with the parties in these cases after mediation.

A review of the reports in all cases dismissed to date reveals the following breakdown of agreement types:

Type of Agreement Reached In Dismissed Cases	2011 Cases in Mediation (299 Dismissals)	Total Cases in Mediation 2010-2011 (679 Dismissals)
Loan Modification	177	398
Reinstatement	12	23
Repayment/Forbearance Plan	4	19
Deed in Lieu of Foreclosure	5	20
Short Sale	15	42
Other	8	24
Unknown	78	155

By far, the most common option leading to dismissal of foreclosure cases is a loan modification. Almost two-thirds of the agreements in 2011, as well as over the two-year period, involved options that resulted in homeowner retention of the home. These included loan modifications, reinstatements and repayment or forbearance plans. Regrettably, the reason for dismissal was not reported in a substantial number of cases.

7. *ADRIS*

On July 1, 2011, the Program launched the Alternative Dispute Resolution Information System (ADRIS), an online database intended to streamline the process of collecting mediation information and paying for mediation services. The Program Manager is also able to utilize ADRIS to manage mediator contact information.

In replacing the former system of receiving mediators' reports and invoices by mail and manually entering data from these documents into separate databases, ADRIS has enhanced the efficiency of program operations and has allowed Program staff to spend time on other tasks. For example, the efficiency gained in just the first six months allowed staff to complete the in-depth status review of all cases participating in mediation. (See section 5 above for a summary of that information.) ADRIS also provides Program staff with ready access to statistical information, which will aid in more frequent program evaluation and inform policy decisions.

The Program anticipates the need to make modifications to the ADRIS database to increase functionality for mediators. Many of the mediators have embraced the new database despite the increased burden of entering quite a bit of data that must still be recorded on paper for court files as well. It is hoped that modifications to the database will be possible in the near term to allow mediators to print documents for court files from data entered into the database. Because these modifications must be weighed against other Judicial Branch technology initiatives, it is unclear when these upgrades will be undertaken.

D. Challenges

The Program has identified the trend of multiple mediation sessions in each case as a challenge this year. Initially, the Program was designed so that, at the start of the foreclosure process, the lender's attorney would send to each homeowner the financial forms used by the lender to consider alternative options for homeowners. At the informational session, the court set a deadline for the homeowner to complete and return the financial forms to the lender. The deadline was set far enough in advance of mediation so that the lender had time to review the information and come to the mediation prepared to negotiate any possible agreements.

In practice, this upfront exchange of information does not routinely occur, and the parties arrive at the first mediation not ready to discuss options that may be an alternative to foreclosure. Some of the reasons for this situation include: (1) the homeowner has not provided the lender with documents necessary in the specific situation; (2) the financial information provided by the homeowner was not current enough to allow the lender to conduct an analysis; (3) the lender did not receive any information the homeowner had reportedly sent; (4) the lender requests additional information from the homeowner; and (5) the lender has not yet conducted a review of the homeowner's information, despite timely receipt. When this happens, frequently the mediator will set a date for an additional mediation session so that the parties can exchange the identified, necessary information and return to the second mediation session prepared to work on an agreement if possible.

Unfortunately, in some cases, the same reasons persist at the second mediation session, or the requirements of the specific investor or Federal regulations are not met. Consequently, a third mediation session might be set.

A protracted mediation process is an inefficient use of the court's resources and imposes delay in resolution that negatively impacts both parties. It is important to recognize that some delay is inevitable, given the volume of foreclosure actions, extensive paperwork, and the difficult economic circumstances of homeowners in these actions. The Program is responding to the need for clarity about timing, necessary documents, and specific "next steps" in the mediators' reports. However, when delay was preventable and foreseeable by one or both parties, the mediators have reported any acts of noncompliance or lack of good faith to the court. The court then decides whether to exercise its inherent authority to sanction.

In 2011, the courts imposed a variety of sanctions in these matters. Sanctions have included the imposition of monetary fees payable to the Foreclosure Diversion Program, the reimbursement of a homeowner's attorney fees, and the prohibition of a lender from charging the homeowner for accrued interest and fees while the foreclosure action remains in mediation. In general, when a homeowner has been in noncompliance with the requirements of mediation, mediation has been terminated, and the case has been restored to the active trial docket. This consequence is usually written directly into the mediation report, allowing the case to proceed toward judgment without delay and without requiring court action.

In response to the expense and delay associated with multiple mediation sessions in many cases, the Program implemented a pilot at one court that limits each case to two sessions. The

mediators were asked to announce the limit to the parties at the first mediation and to encourage them to find ways to communicate outside of mediation about whether they were properly prepared before returning to the second mediation. If the parties were still in need of mediation after two sessions, the mediator could ask the court to schedule a third session and explain the need. In conjunction with deciding whether to grant the request, the court would also have the opportunity to impose sanctions, if appropriate.

This pilot was put into effect on July 1, 2011 and is currently under review to determine its effectiveness. If successful, the Program will consider implementing the pilot more broadly. If unsuccessful, the Program will consider utilizing alternative internal procedural changes to improve the efficiency of the mediation process, especially at the first mediation session.

Careful tracking of cases that have entered into mediation is critical to ensure that delays do not occur and that cases move forward to dismissal or judgment. As the number of cases that have been referred to mediation increases, the need to monitor progress is also heightened. As noted, it is hoped that increased efficiencies gained through the online ADRIS database will permit the Program Manager to continue an in-depth review of mediation cases.

III. Conclusion

After a formative and productive first year, Program staff spent the second year of the Foreclosure Diversion Program reinforcing program strengths, such as the informational sessions, and addressing areas that need improvement, such as data management and the trend of holding multiple mediation sessions in each case.

In the next year, Program staff will continue to focus attention on improving the delivery of valuable foreclosure mediation services to all parties. At this time, however, the Judicial Branch does not recommend any legislative change to the Foreclosure Diversion Program. Any needed improvements can be accomplished through training, pilot efforts, management controls and internal program procedure.

Respectfully Submitted,

Diane E. Kenty

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