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Legislative Hearing on MA Foreclosure Mediation Program Bills: Written Testimony to the Joint Committee on the Judiciary

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Legislative Hearing on MA Foreclosure Mediation Program Bills

Written Testimony to the
Joint Committee on the Judiciary

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Introduction

Massachusetts Office of Dispute Resolution and Public Collaboration (MODR)

The Massachusetts Office of Dispute Resolution and Public Collaboration (MODR) is a free-standing, statutory state institute of the University of Massachusetts Boston. The mission of the office is to promote, facilitate and build capacity for dispute resolution and collaborative governance within the Commonwealth. Collaborative governance means a spectrum of practices for engaging leaders, public and private institutions, and citizens across sectors in inclusive, deliberative, and consensus-oriented approaches to planning, problem-solving and policy-making. MODR serves as a neutral forum and state-level resource providing skilled assessment, systems design, process management and program evaluation services, and access to qualified mediators and collaborative practitioners for service on public contracts.¹

MODR was established in the mid-1980's to relieve congestion, costs and delays in courts and state agencies due to litigation; provide more effective forums for conflict resolution; enhance community involvement on contentious public issues; improve public decision-making processes; and build capacity within public agencies. The office has been a "field builder" in the Commonwealth, training and qualifying the first civil mediators for the Superior Court and first public policy mediators for state agency-sponsored programs. MODR provides dispute resolution services in collaboration with public agencies, courts, community-based organizations, and industry groups through on-going programs that offer mediation, facilitation, conflict resolution and collaborative negotiation training, and systems design services. The sponsors and other participants in these programs regularly refer matters and MODR provides staff and affiliate practitioners to serve as neutrals, trainers and consultants.

MODR's current public dispute resolution services include Executive Branch Dispute Resolution systems design, Public Sector Workplace Mediation Program design, Municipal Dispute Resolution Program design and implementation, Trial Court Dispute Resolution systems design, Agricultural Mediation Program design and implementation, Environmental Mediation Program design and implementation, Affordable Housing Development/Land Use Mediation Program implementation, and Child Access & Visitation Military Family Mediation Program design and implementation (in partnership with Community Mediation Centers).

USDA Funded Foreclosure Mediation through MODR

The Massachusetts Agricultural Mediation Program has been operated by the Massachusetts Office of Dispute Resolution and Public Collaboration since 2002. This program is certified and funded by United States Department of Agriculture, as one of 34 state agricultural mediation programs. It was created to provide members of the agricultural and rural communities in Massachusetts with education and resources to assist them in resolving their disputes more efficiently and therefore sustain farmlands and rural housing in the Commonwealth.

¹ MODR was formerly a statutory state agency within the Executive Office for Administration & Finance charged under G.L. Ch. 7, Section 51. In July 2005, MODR's functions and personnel were transferred to the University of Massachusetts Boston through enactment of G. L. Ch. 75, Section 46 (see [Appendix A](#)).

The program regularly mediates cases between the USDA and its borrowers (agricultural producers and rural homeowners) facing foreclosure as a result of adverse decisions by the Farm Service Agency and the Rural Development Agency (Rural Housing Service). In these mediations, the borrower and the USDA loan managers are provided the opportunity to share information and discuss each foreclosure situation and options. This sometimes results in the presentation of new information that may result in a change in the current decision of the USDA. For instance, the borrower's circumstances may have changed unbeknownst to the USDA in ways that impact the agency's current decision to foreclose. When this situation occurs, borrowers may be provided opportunities to apply for a moratorium on the foreclosure proceedings, or the USDA may be able to re-amortize, create a payment plan, or make other arrangements/workouts that could potentially keep the borrower in their homes and on their farms. Other times when there is no major change in situation or information, the end result is a better understanding of each party's position, and the borrower's rights for appeal and/or options in preparation for foreclosure.

The mediations through the MA Agricultural Mediation Program are consistently productive because the USDA loan managers and other USDA representatives participating in the mediation have the authority and the willingness to modify terms or offer loan servicing options. Additionally, they bring with them to the mediation sessions extensive loan-related documentation to promote a better understanding of the borrower's situation and facilitate exploration of options other than foreclosure.

There has been discussion at the federal level about potentially building on the local infrastructure of these USDA-certified state agricultural mediation programs, already offering farm/rural housing foreclosure mediation, to provide mediation services for a broader range of foreclosure disputes.

Foreclosure Mediation

Why We Need Foreclosure Mediation

Investors and homeowners lose substantial amounts of money in foreclosures. Up to two-thirds of the value of the investment may be lost when the foreclosure is completed. But loan modifications only cost investors 5 to 10 percent of their investment. Therefore they should have an interest in preventing foreclosures. It is better for investors, lenders and homeowners to do a fast loan modification than allow a home to join a few million other foreclosed homes on the market.

This was the basis for new Federal Government subsidized programs aimed at foreclosure prevention and loan modification such as HOPE NOW (2007), Hope for Homeowners (2008) Home Affordable Modification Program (HAMP) and Home Affordable Refinance Program (2009). In all three programs it was the loan servicers who play the key role in admitting homeowners. This has led to wide criticism regarding their effect on foreclosure prevention.

Despite criticism, the Obama Administration recently reaffirmed its faith in loan modification programs as a potential solution to foreclosures. Speaking at a House Financial Services Committee hearing in September, Treasury Secretary Timothy Geithner said that the Federal Government does "not have the ability to prevent foreclosures, but we are bringing a lot of stability to the housing market and making sure that people can take advantage of government-modification programs. We

expect in the next several weeks that one-half million households will take advantage of government-modification programs.”

The inability of homeowners to communicate with holders of securitized mortgage obligations has been a significant barrier to completing affordable loan modifications that might prevent foreclosures or minimize losses and keep more homeowners in their homes. Increasingly, legislators and the courts are looking at mediation as a potential solution to the problem.

In a little over a year, from mid-2008 to mid-2009, more than 25 distinct foreclosure mediation programs were launched in fourteen different states. State legislatures, state supreme courts, and local courts played roles in creating these programs. Mediation is being favored over litigation due to concerns such as those raised at a recent Senate hearing about Legal Aid groups as to whether more federally subsidized foreclosure lawsuits by low-income borrowers are the best method of representing their interests².

Many housing counselors believe mediation programs provide a structure for negotiations. This structure saves time in establishing lines of communication with loan servicers. Even attorneys have endorsed mediation saying they found foreclosure mediation programs helpful for providing them and the homeowner-clients much needed time to investigate the facts of a client’s case, and that this respite led to more informed decisions about potential legal claims.

Analysis of available data, however, indicates that foreclosure mediation programs, either court connected or independent, have little chance of delivering on their full potential. Interestingly, this failure has more to do with federal and state legislation on foreclosure mediation than the actual design of the respective foreclosure mediation programs in operation.

Problems with Existing State Models

A recent analysis of 25 state-level foreclosure mediation programs by the National Consumer Law Center in a special report in September 2009 entitled *State and Local Foreclosure Mediation Programs: Can They Save Homes?* found that there were significant, previously unaddressed barriers that preclude homeowners from participating in foreclosure mediations:

Under most of the foreclosure mediation programs, loan servicers have all the discretion and homeowners have no power. According to the NCLC report, if the programs demand little or no accountability from loan servicers, it is likely that foreclosure mediation programs will go the way of the federal foreclosure prevention program and fail.

Foreclosure mediation programs place few meaningful obligations on loan servicers. Many do little to hold servicers accountable for decisions to foreclose. They do not require that servicers demonstrate that they considered loan modifications under a reasonable and objective standard. Servicers effectively control the terms of discussion in most programs. For example, the Net Present Value (NPV) - calculations lenders use to decide whether loan modifications or foreclosures will be more profitable to the lender – are not being disclosed to the borrower.

² Legal Aid Groups Struggle to Meet Low-Income Need. The Washington Times, May 23, 2008. A11.

What foreclosure mediation programs require are enforceable obligations, structures and duties that few have implemented so far. Such accountability can be obtained from the loan servicers as they have an interest in preventing foreclosures.

The obligations placed on loan servicers need to be clear and objective. They should not be dependent of the predilections of an individual judge or mediator. They should be straightforward enough so that they can be enforced in cases in which the homeowner has no attorney.

The National Consumer Law Center Report

The National Consumer Law Center proposes the following considerations in the establishment of foreclosure mediation programs.³

Basic Requirements

- The foreclosure mediation program must require loan servicers to give homeowners the affordable loan modification calculations they made and the results of the NPV tests. Only Maine's foreclosure mediation programs require this.
- The foreclosure mediation programs should require servicers to produce all related documentation, including pooling and servicing agreements, appraisals, and loan payment histories that would facilitate options other than foreclosure.
- The foreclosure mediation program must require servicers to meet these foreclosure mediation obligations in good faith or otherwise be subject to sanctions. Loan servicers have received substantial benefits from the federal government and cash incentives to do loan modifications rather than foreclosures and so should operate in good faith, as a defined legal standard.
- Loan servicers should prove they have the standing to close on loan modifications and have the authority to negotiate loan modifications.
- Loan servicers should document that they have looked at alternatives to foreclosure, including loan modifications, other state or federal workouts, and short sales.

Enforcing Compliance with Servicer Obligations

Programs should document and enforce compliance with these obligations by:

- Not permitting a judicial or non-judicial foreclosure to proceed unless a mediator or court has certified the servicer's compliance with the five basic requirements set forth above;
- Requiring documentation of all outcomes, including the nature of loan modifications arrived at through mediation.

Improving Homeowner Participation and Procedural Aspects of Programs

Additionally, programs should:

- Establish procedures for automatic (mandatory) participation by homeowners subject to foreclosure proceedings;

³ The NCLC report is available at http://www.consumerlaw.org/issues/foreclosure_mediation/content/ReportS-Sept09.pdf. The report contains, in pages 4-5, a brief description of the 25 state foreclosure mediation programs surveyed. For more information on the leading foreclosure mediation models in other states, please see the Additional Resources on Foreclosure Mediation section of this document. (See [Appendix B](#) for NCLC report.)

- If participation is not automatic, allow requests for mediation to be made up to the time of a foreclosure sale;
- Stay all foreclosure proceedings until a mediator or court determines that the servicer has complied in good faith with all participation obligations;
- Provide for direct court supervision over the enforcement of servicer obligations to mediate, including the imposition of sanctions when necessary. Sanctions must include dismissal of judicial foreclosure actions and orders barring non-judicial proceedings;
- Provide funding for outreach, housing counselors, and qualified counsel for homeowners;
- Prohibit the loan servicer from shifting to the homeowner its attorney's fees or other costs of participating in the mediation process; and
- Require junior lien holders to be notified.

Massachusetts' Proposed Foreclosure Mediation Bills: An Overview

Massachusetts has three specific bills pending which are focused on the establishment of a Foreclosure Mediation Program in the Trial Court. These are as follows:

1. House Bill No. 1649 by Rep. Vincent A. Pedone titled "An Act Regarding Massachusetts Foreclosure Mediation Program"
2. House Bill No. 4003 by Rep. Vincent A. Pedone titled "An Act Relative to Foreclosure Mediation Program"
3. Senate Bill No. 1805 by Sen. Karen E. Spilka titled "An Act to Establish a Foreclosure Mediation Program"

A fourth Bill, House No. 3522 by Rep. Elizabeth A. Malia titled "An Act to protect and preserve neighborhoods" is designed to Protects tenants in foreclosed properties from evictions while House Bill No. 3569 titled "An Act regulating homeowners in common interest communities" also mentions mediation as a solution.

The three bills that deal specifically with the establishment and administration of a foreclosure mediation program in Massachusetts are fairly similar in the programmatic aspects of the proposed foreclosure mediation program. There is however a significant difference between Bills H. 1649 and H. 4003 by Rep. Pedone and S. 1805 by Sen. Spilka in terms of program administration – Rep. Pedone has recommended that the program be administered under the Chief Justice for Administration and Management of the Trial Court and Sen. Spilka has recommended that the program be administered under the Office of the Attorney General.

All three bills propose the amendment of Chapter 244 of the Massachusetts General Laws to offer homeowners the opportunity to participate in a court-supervised foreclosure mediation program. Homeowners will have the opportunity to sit down face-to-face with the Mortgage Company or loan servicer and work out the best plan to save their home.

Once the lender files a copy of the "right to cure" notice with the state, the court will send the homeowner a notice offering them the opportunity to participate in a court supervised foreclosure mediation program. The notice will encourage homeowners to meet with a housing counselor or attorney prior to mediation. Mediation will be considered if the mortgagor/homeowner submits a

foreclosure mediation request form to the court within 15 days after the receipt of the notice for foreclosure.

If the homeowner chooses to participate, the mediation will be conducted by a mediator trained in all aspects of foreclosure and lending law. This mediation process is designed to occur within a 50-60 day period prior to the return day of the foreclosure action.

The proposed Massachusetts legislation, though largely in-line with the majority of the legislation introduced and implemented elsewhere in the United States, has not met the essential components outlined by the NCLC for the successful formulation and administration of a foreclosure mediation program (See table below).

Conformity of MA Foreclosure Mediation Bills to NCLC Recommendations

| Recommendation | H. 1649 | H. 4003 | S. 1805 | H. 3569 | H. 3522 |
|--|---------|---------|---------|---------|---------|
| Requires servicers to produce all related documentation facilitating options other than foreclosure | NO | NO | NO | NO | NO |
| Require servicers to meet these foreclosure mediation obligations in good faith or otherwise be subject to sanctions/Stay all foreclosure proceedings until a mediator or court determines that the servicer has complied in good faith with all participation obligations | PARTIAL | PARTIAL | PARTIAL | NO | NO |
| Servicers should prove they have the standing to close on loan modifications and have the authority to negotiate loan modifications | NO | NO | NO | NO | NO |
| Loan servicers should document that they've looked at alternatives to foreclosure | NO | NO | NO | NO | NO |
| Not permitting a judicial or non-judicial foreclosure to proceed unless a mediator or court has certified the servicer's compliance with the five basic requirements set forth above | NO | NO | NO | NO | NO |
| Requiring documentation of all outcomes, including the nature of loan modifications arrived at through mediation | NO | NO | NO | NO | NO |
| Establish procedures for automatic participation by homeowners subject to foreclosure proceedings | NO | NO | NO | NO | NO |
| If participation is not automatic, allow requests for mediation to be made up to the time of a foreclosure sale | NO | NO | NO | NO | NO |
| Provide for direct court supervision over the enforcement of servicer obligations to mediate, including the imposition of sanctions when necessary | NO | NO | NO | NO | NO |
| Provide funding for outreach, housing counselors, and qualified counsel for homeowners | NO | NO | NO | NO | NO |
| Prohibit the servicer from shifting to the homeowner its attorney's fees or other costs of participating in the mediation process | NO | NO | NO | NO | NO |
| Require junior lien holders to be notified | NO | NO | NO | NO | NO |

Observations and Recommendations

Building on Existing Infrastructure

1. The three bills proposing the establishment of a foreclosure mediation program for Massachusetts and other related bills are much welcome in the field of mediation. There are existing Massachusetts mediation resources/service providers interested and available to participate in such a program should adequate funding be appropriated.
2. Training in foreclosure laws and issues for mediators serving in the foreclosure mediation program should be required.

Strengthening State Legislation

3. Bills H. 1649, H. 4003 and S. 1805 focus more on the programmatic aspects of the proposed foreclosure mediation program than on the legislative requirements and legal environment that could guarantee the success of the program.
4. As found in the NCLC report, creation of proper state legislation prior to the launching of a foreclosure mediation program is critical to the eventual success of the program, particularly in the absence of appropriate federal legislation.
5. The basic legislative framework of the proposed bills should be addressed and strengthened through review of the bills in light of the recommendations set forth in the NCLC report, which is the only holistic evaluation of the existing state-level foreclosure mediation program models.

Collaborative Policy-Making and Programming

6. There is a difference of opinion among the proposed bills as to who would administer the program. Decisions about the nature and design of the foreclosure mediation program should involve input from potential administrators, hosts and users and other stakeholders, with guidance from dispute resolution systems design experts.
7. There are multiple stakeholders driving the foreclosure mediation program legislation and still others who will be affected by it. Stakeholders could achieve more by collaborating with each other to integrate their interests and produce a sustainable program supported by all.
8. Convening a working group of bill sponsors and stakeholders, with the assistance of knowledge-based resources, would facilitate consensus-building on proposed legislation and collaborative program design and implementation.

Additional Resource on Foreclosure Mediation Programs

The National Conference of State Legislatures has a comprehensive list of legislation dealing with state foreclosure bills/acts, including foreclosure mediation program legislation.

<http://www.ncsl.org/?tabid=17229>

The American Bar Association website with information on state foreclosure mediation programs:

<http://www.abanet.org/dispute/mediation/resources.html>

Information on foreclosures in MA:

<http://www.mhp.net/vision/news.php>

<http://www.foreclosuresmass.com/>

http://www.chapa.org/?q=foreclosure_view_details/22#

<http://www.thewarrengroup.com/portal/PressRoom/PressReleases/tabid/157/Default.aspx>

<http://www.bos.frb.org/economic/dynamicdata/module1/bmap.html#>

<http://staff.supportunitedway.org/wiki/statistics-housing-and-homelessness>

<http://www.massbenchmarks.org/publications/issues/vol11i1/5.pdf>

Information on foreclosures nationwide:

<http://www.realtytrac.com/ContentManagement/pressrelease.aspx?channelID=9>

Efforts to address foreclosure in MA:

<http://www.bos.frb.org/commdev/necd/2008/issue3/foreclosure-efforts.pdf>

http://www.boston.com/business/ticker/2008/06/new_law_creates.html

<http://www.cutimes.com/Issues/2009/February%204%202009/Pages/State-Foreclosure-Limits-Have-Had-Limited-and-Temporary-Impact.aspx>

Other state models:

<http://www.supremecourt.ohio.gov/JCS/disputeResolution/foreclosure/FAQ.asp>

<http://courts.phila.gov/pdf/forms/civil/Residential-Mortgage-Foreclosure-Diversion-Pilot-Program-Materials.pdf>

<http://www.nycourts.gov/whatsnew/pdf/ResidentialForeclosure6-08.pdf>

<http://www.judiciary.state.nj.us/civil/foreclosure/>

<http://www.legislature.mi.gov/documents/2007-2008/billintroduced/House/htm/2008-HIB-6615.htm>

<http://www.collinscenter.org/?page=PAMediationFAQ>

<http://www.iowamediationservice.com/index.asp>

<http://www.ag.state.mn.us/Consumer/PressRelease/081120HomeOwnerLender.asp>

<http://www.jud.ct.gov/external/news/press270.htm>

<http://www.azlawhelp.org/>

<http://indylaw.indiana.edu/clinics/housingconf/index.htm>

<http://www.leg.state.nv.us/75th2009/Bills/AB/AB149.pdf>

<http://www.nj.gov/governor/news/news/2008/approved/20081201.html>

<http://www.nj.gov/foreclosuremediation/>

<http://www.providenceri.com/press/article.php?id=483>

<http://www.jsonline.com/business/36025844.html>

http://www.ci.mil.wi.us/ImageLibrary/Groups/MayorAuthors/PDFsNewsReleases/2008/120408_MFI_recos_release.pdf

Appendices

Appendix A: MODR Enabling Statute

Appendix B: National Consumer Law Center Report

Appendix A: MODR Enabling Statute

MODR Enabling Statute (G. L. Ch. 75, Section 46)

PART I. ADMINISTRATION OF THE GOVERNMENT.

TITLE II. EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH.

CHAPTER 75. UNIVERSITY OF MASSACHUSETTS.

SECTION 46. Office of dispute resolution; director; advisory council; powers and duties.

There shall be at the University of Massachusetts at Boston an office of dispute resolution under the supervision and control of a director who shall be appointed by the provost with the approval of the chancellor and concurrence of the board of trustees. The director shall be a person with substantial training and professional experience in dispute resolution, shall maintain complete impartiality with respect to the matters coming before the office of dispute resolution, and shall devote full time to the duties of the office.

The office of dispute resolution shall be available to assist agencies and offices of the executive, legislative, and judicial branches of the commonwealth, as well as any political subdivision or public instrumentality created by the commonwealth or any county, city, or town, hereafter referred to as public agencies, to improve the resolution of disputes that arise within their respective jurisdictions. The office may: (a) facilitate the resolution of disputes through provision of impartial mediation and other dispute resolution services; (b) establish standards for the selection, assignment, and conduct of persons acting on behalf of the office in the resolution of disputes; (c) conduct educational programs and provide other services designed to reduce the occurrence, scope, complexity, or cost of disputes; (d) design, develop, or operate dispute resolution programs or to assist public agencies to improve or extend their existing dispute resolution programs; and (e) take other action to promote and facilitate dispute resolution by public agencies in the commonwealth.

The director may establish reasonable fees to be charged to parties, litigants, or public agencies for the provision of the educational, consultation, dispute resolution, or other services authorized herein and may apply for and accept on behalf of the commonwealth any federal, local, or private grants, bequests, gifts, or contributions to aid in the financing of any of the programs or activities of the office. Fees, grants, bequests, gifts, or contributions shall be received by the University of Massachusetts at Boston and deposited in a separate account and shall be expended, without further appropriation, at the direction of the director, with the approval of the provost, for the cost of operation of the office, including personnel.

The office may make agreements with public agencies and officers and may contract with other persons, including private agencies, corporations, or associations, to carry out any of the functions and purposes of this section.

The office shall annually prepare a report on the activities of the office, including all income and expenditures, and file the report with the house and senate committees on ways and means on or before December 31.

Appendix B: National Consumer Law Center Report