

# FORECLOSURE MEDIATION IN ARIZONA

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## I. INTRODUCTION

In 2007, the Great Recession hit Arizona hard. The state's economy is tied to the housing industry, and, with the bursting of the housing bubble, Arizona experienced unusually high levels of unemployment.<sup>1</sup> In addition, all of the gains in home prices that Arizonans had experienced over the prior ten years evaporated nearly overnight.<sup>2</sup> The impact of these two factors on home foreclosures was dramatic. According to the foreclosure tracking firm RealtyTrac, Arizona had over 116,911 foreclosures in 2008, which ranked third most among the states in the U.S.<sup>3</sup> In 2009, the Federal Reserve Bank reported that the Arizona foreclosure rate was double that of the national rate and nearly ten times the state's historical rate.<sup>4</sup> By early

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1. *Local Area Unemployment Statistics: Arizona*, BUREAU OF LAB. STAT., [http://data.bls.gov/timeseries/LASST04000006?data\\_tool=XGtable](http://data.bls.gov/timeseries/LASST04000006?data_tool=XGtable) (data extracted on Feb. 18, 2013).

2. See KARL L. GUNTERMANN & ADAM NOVAK, REPEAT SALES INDEX REPORT: RESIDENTIAL, JANUARY 2011 9 (2011), available at [http://wpcarey.asu.edu/finance/real-estate/upload/Repeat\\_Sales\\_Report-0111withGraphs.pdf](http://wpcarey.asu.edu/finance/real-estate/upload/Repeat_Sales_Report-0111withGraphs.pdf).

3. *Foreclosure Activity Increases 81% in 2008*, REALTYTRAC (Jan. 15, 2009), <http://www.realtytrac.com/content/press-releases/foreclosure-activity-increases-81-percent-in-2008-4551>.

4. JAN BONTRANGER, FED. RESERVE BANK OF S.F., TRENDS OF DELINQUENCIES AND FORECLOSURES IN ARIZONA (2009), available at [http://www.frbsf.org/community/issues/assets/preservation/resources/foreclosure/arizona\\_0409.pdf](http://www.frbsf.org/community/issues/assets/preservation/resources/foreclosure/arizona_0409.pdf).

2010, there were approximately 65,000 distressed properties—properties either in foreclosure or where foreclosure was pending—in Maricopa County alone.<sup>5</sup>

Several strategies from both the private and public sector emerged to address the crisis. The federal government had a multifaceted approach to the crisis; its largest initiative was the Hardest Hit Fund, which provided \$7.6 billion to several states “to develop locally-tailored programs to assist struggling homeowners in their communities.”<sup>6</sup> Arizona’s share of these monies, nearly \$267.8 million, has been devoted to mortgage payment assistance for those who are unemployed or underemployed, payment of second liens, short sale assistance, and principal reduction payments of mortgages.<sup>7</sup> But while the Hardest Hit Program and other initiatives were being created, funded, and established, the foreclosure locomotive rolled on.

A constant complaint from homeowners caught up in the foreclosure process has been the inability to have meaningful conversations with the entities that owned or serviced their mortgages.<sup>8</sup> To address both this complaint and the broader foreclosure crisis, foreclosure mediation programs began springing up across the country, and the American Bar Association endorsed mediation as a means of addressing the crisis.<sup>9</sup> Foreclosure mediation is a confidential and informal process where a neutral third-party mediator facilitates a conversation between a homeowner-mortgagor and the lender and together they determine if there is a mutually acceptable solution to the pending home foreclosure.<sup>10</sup>

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5. MARICOPA ASS’N OF GOVERNMENTS, DISTRESSED PROPERTIES (July 2012), *available at* [http://97.74.115.108:8081/Metrics/ForeclosureMaps\\_current.pdf](http://97.74.115.108:8081/Metrics/ForeclosureMaps_current.pdf).

6. *Hardest Hit Fund*, U.S. DEP’T OF THE TREASURY, <http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/hhf/Pages/default.aspx> (last updated Dec. 11, 2012).

7. *Hardest Hit Fund Reporting*, ARIZ. DEP’T OF HOUSING, <http://www.azhousing.gov/ShowPage.aspx?ID=405&CID=11> (last visited June 24, 2013).

8. *See, e.g.*, Joe Nocera, *Shamed into Altering a Mortgage*, N.Y. TIMES (Jan. 21, 2011), [http://www.nytimes.com/2011/01/22/business/economy/22nocera.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/01/22/business/economy/22nocera.html?pagewanted=all&_r=0); Kat Aaron & Mary Kane, *Foreclosures Mount, Mediation Efforts Fail*, WHAT WENT WRONG (July 21, 2011), <http://americawhatwentwrong.org/story/foreclosures-mount-mediation-efforts-fail/>.

9. *See* HEATHER SCHEIWE KULP, RESOLUTION SYS. INST., FORECLOSURE DISPUTE RESOLUTION PROGRAM MODELS STATE-BY-STATE (2012) (detailing foreclosure mediation programs in 27 states and the District of Columbia), *available at* [http://www.aboutrsi.org/pfimages/ForeclosureMediationProgramModels\\_September2012.pdf](http://www.aboutrsi.org/pfimages/ForeclosureMediationProgramModels_September2012.pdf); *Report to the House Delegates*, 300 A.B.A. SEC. DISPUTE RES. (2009) (recommendation adopted by A.B.A. House of Delegates Aug. 4, 2009), *available at* [http://www.americanbar.org/groups/dispute\\_resolution/resources/foreclosure\\_mediation.html](http://www.americanbar.org/groups/dispute_resolution/resources/foreclosure_mediation.html).

10. *See Report to the House Delegates, supra* note 9.

This article examines the award-winning Sandra Day O'Connor College of Law's Foreclosure Mediation Unit<sup>11</sup> and its bankruptcy-based foreclosure mediation program, reporting on its conception and progress and reflecting on the lessons learned from creating and running the program. Section II discusses Arizona's trustee sale process, commonly called foreclosure, and Section III gives an account of the creation of the Foreclosure Mediation Unit. It also details how the foreclosure mediation program partnered with the U.S. Bankruptcy Court to have the court refer foreclosure cases to the program. Section IV highlights the lessons learned in designing and operating the program. In conclusion, Section V discusses the struggles of several foreclosure mediation programs and the factors we believe all successful foreclosure mediation programs share.

## II. FORECLOSURE PROCESSES

Nearly all jurisdictions in the United States utilize one of two statutory schemes for handling foreclosures related to defaulted residential mortgages. One is judicial foreclosure, where the lender must file a complaint with a court to foreclose.<sup>12</sup> The other is non-judicial foreclosure, where the mortgage documents give lenders the power to sell the property outside of judicial process in the event of a default.<sup>13</sup>

Generally speaking, the complaint in a judicial foreclosure action describes the debt, the borrower's default, and the amount owed on the debt, and asks the court to allow the lender to foreclose its lien to take possession of the property as a remedy for nonpayment.<sup>14</sup> Additionally, the lender must record a notice in the recorder of deeds' office publicizing its claim on the property.<sup>15</sup> After being served with the complaint, the borrower may file an answer offering defenses to the claimed default and may file a counterclaim against the lender.<sup>16</sup> From this point the case proceeds as any other civil claim would.<sup>17</sup> According to the Mortgage Bankers Association, "[i]n the vast majority of cases, . . . the foreclosure action is undisputed because the

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11. Press Release, CPR Institute, CPR Institute Presents its 30th Annual Awards for Outstanding Scholarship in ADR (Jan. 17, 2013), *available at* <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/773/CPR-Institute-Presents-its-30th-Annual-Awards-for-Outstanding-Scholarship-in-ADR-Press.aspx>.

12. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.11 (5th ed. 2007).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

borrower is in default and cannot offer facts to the contrary.<sup>18</sup> If the court determines there was indeed a default on the mortgage, the court will issue a judgment in favor of the lender for the amount owed on the mortgage and authorize a sheriff's sale of the property.<sup>19</sup>

Non-judicial foreclosure, on the other hand, is a creature of state statute. Once a default occurs, the lender mails a default letter to the homeowner and files a notice of default at the recorder of deeds' office.<sup>20</sup> The homeowner then has a specific amount of time to cure the default.<sup>21</sup> If it is not cured, a Notice of Sale is sent to the homeowner, recorded at the recorder of deeds office, and published throughout the area.<sup>22</sup> After the prescribed notice period has expired, the house is sold at a public auction.<sup>23</sup> Once the Notice of Sale is posted, the only way the homeowner can keep the sale from occurring is through court action to enjoin the sale.<sup>24</sup>

Arizona law permits both judicial and non-judicial foreclosure. Even though Arizona statutes permit the use of mortgages,<sup>25</sup> the basis for judicial foreclosure as well as deeds of trust,<sup>26</sup> the deed of trust is almost universally chosen by lenders to secure home mortgages.<sup>27</sup> The reason for this is because the deed of trust allows the trustee to initiate non-judicial foreclosure proceedings which are much quicker than judicial foreclosure actions.<sup>28</sup> The process to foreclose a home loan secured by a deed of trust in Arizona proceeds much like a non-judicial foreclosure described above, but there are a few idiosyncrasies worthy of mention. The trustee named in the deed of trust is generally a title company or attorney,<sup>29</sup> and the trustee may appoint a successor trustee to manage the foreclosure.<sup>30</sup> The notice period before a Trustee's Sale can occur is ninety days, and the notice of the sale must be made by each method enumerated in the statute.<sup>31</sup> The Trustee's

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18. *Judicial vs. Non-Judicial Foreclosure*, MORTGAGE BANKERS ASSOCIATION, <http://www.mbaa.org/files/ResourceCenter/ForeclosureProcess/JudicialVersusNon-JudicialForeclosure.pdf> (last visited Apr. 8, 2013).

19. NELSON & WHITMAN, *supra* note 12.

20. *Id.* at § 7.19

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at § 7.22

25. ARIZ. REV. STAT. §§ 33-701-750 (2012).

26. ARIZ. REV. STAT. §§ 33-701-715 (2012).

27. *Arizona Foreclosure Laws*, FORECLOSURE.COM, [http://www.foreclosure.com/statelaw\\_AZ.html](http://www.foreclosure.com/statelaw_AZ.html) (last visited Mar. 17, 2013).

28. *Id.*

29. ARIZ. REV. STAT. §33-803 (2012).

30. *Id.*

31. Those methods are: recording a notice in the office of the recorder of each county where the trust property is situated, giving notice as provided in section 33-809 to the extent

Sale is usually held at a courthouse or at the trustee's office.<sup>32</sup> In many cases, the lender will submit a credit bid in the amount of the outstanding principal, interest, fees, and other charges incurred related to the property.<sup>33</sup> After the trustee's sale, the trustee will record a trustee's deed transferring ownership of the property to either the high bidder or, in the case of a credit bid, to the lender.<sup>34</sup>

Also worthy of note is the fact that Arizona has significant homeowner protections in place to prevent a lender from pursuing a borrower for any difference in the amount owed and the amount recovered by the lender after foreclosure of the deed of trust.<sup>35</sup> However, these protections are not absolute and contain several exceptions regarding property type and size,<sup>36</sup> as well as use of funds.<sup>37</sup>

### III. FORECLOSURE MEDIATION IN ARIZONA

#### A. *The Program's Beginnings*

Knowing that foreclosure mediation was being used in other parts of the country, Professor Art Hinshaw organized a meeting of real estate lawyers, bankers, ADR professionals, and others familiar with the foreclosure crisis to determine the feasibility of a foreclosure mediation program in Arizona. This group, which came to be known as the Arizona Foreclosure Mediation Task Force, worked to better understand the crisis and issues surrounding foreclosure mediation.

The Task Force also looked at foreclosure mediation programs in other states such as Florida, Connecticut, and Nevada. Nevada was most interesting to the Task Force because, like Arizona, it permits non-judicial

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applicable, posting a copy of the notice of sale, at least twenty days before the date of sale in some conspicuous place on the trust property to be sold, posting a copy of the notice of sale at one of the places provided for posting public notices at any building that serves as a location of the superior court in the county where the trust property is to be sold, and publishing the notice of sale in a newspaper of general circulation in each county in which the trust property to be sold is situated. ARIZ. REV. STAT. § 33-808(A)1.

32. § 33-808(B).

33. ARIZ. REV. STAT. §§ 33-811–813 (2012).

34. § 33-811.

35. See ARIZ. REV. STAT. § 33-814 (2012).

36. § 33-814(G).

37. See *Helvetica Servicing, Inc. v. Pasquan*, 277 P.3d 198, 207 (Ariz. Ct. App. 2012) (holding that sums disbursed in a loan transaction for non-purchase money purposes may be traced, segregated and recovered in a deficiency action).

foreclosure.<sup>38</sup> Nevada's program was created during the 2009 legislative session and amended the state's non-judicial foreclosure process to give the owners of owner-occupied houses thirty days after being served with a foreclosure notice to elect to participate in mediation.<sup>39</sup>

The Task Force quickly decided, however, that legislative action for foreclosure mediation would be a non-starter in Arizona. This conclusion has subsequently been proven correct as foreclosure mediation legislation has been proposed in the last three legislative sessions and died in committee each time.<sup>40</sup> Other options, including a voluntary mediation program and working with the Arizona Department of Housing, also went nowhere. After a few months, the Task Force quietly disbanded; the information learned through the Task Force, however, soon proved fruitful.

Around the same time as the Task Force meetings, the Arizona Attorney General's Office (AGO) settled two cases for alleged deceptive loan practices<sup>41</sup> and devoted part of the settlement monies to law school programs to assist distressed homeowners.<sup>42</sup> Pursuant to the AGO's request for proposals to fund such programs, Professor Bob Dauber led the College of Law's clinical faculty in brainstorming of the various kinds of programs the law school could conceivably administer and operate. In those conversations, the idea of running a foreclosure mediation program gained traction and ultimately became a part of the law school's broader proposal, which included representation of victims of purported mortgage fraud and wrongful foreclosure.<sup>43</sup>

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38. NEV. REV. STAT. §§ 107.080–100 (2011).

39. §§ 107.015–311. *See also About the Program*, ST. NEV. FORECLOSURE MEDIATION PROGRAM, <http://foreclosure.nevadajudiciary.us/index.php/about-program> (last visited Mar. 23, 2013); *General Information*, ST. NEV. FORECLOSURE MEDIATION PROGRAM, <http://foreclosure.nevadajudiciary.us/> (last visited Mar. 23, 2013).

40. *See* H.B. 2833, 50th Leg., 2d Reg. Sess. (Ariz. 2012); H.B. 2642, 50th Leg., 1st Reg. Sess. (Ariz. 2011); H.B. 2765, 49th Leg., 2d Reg. Sess. (Ariz. 2010). Furthermore, a new foreclosure mediation bill presumably will meet a similar end. *See* H.B. 2624, 51st Leg., 1st Reg. Sess. (Ariz. 2013).

41. Evan Bedard, *Goddard Announces \$1.15 Million Settlement over Deceptive Loan Practices*, LOANSafe.ORG (Nov. 1, 2010), <http://www.loansafe.org/goddard-announces-1-15-million-settlement-over-deceptive-home-loans>; Casey Newton, *Wells Fargo, Arizona Homeowners Settle Mortgage-Loan Case*, ARIZ. REPUBLIC, Oct. 7, 2010, available at <http://www.azcentral.com/news/election/azelections/articles/2010/10/07/20101007arizona-homeowners-wells-fargo-settle-mortgage-case.html>.

42. Arizona Attorney General's Office, Request for Proposals, Program to Train Law Students or Attorneys to Provide Legal Representation to Arizona Borrowers, October 7, 2010.

43. *See* J. Craig Anderson, *ASU Launching 2 Programs to Offer Help in Resolving Mortgage Woes*, ARIZ. REPUBLIC, July 22, 2011, available at <http://www.azcentral.com/business/realestate/articles/2011/07/22/20110722college-law-launching-2-programs-offer-help-resolving-mortgage-woes.html>; *Distressed Homeowners to*

B. *Bankruptcy Court Foreclosure Mediation Program*

Once the grant was awarded and a program director was hired, we were back to the basic question facing the Task Force: how to get mediation referrals? Recognizing that one way to halt foreclosure proceedings is the filing of bankruptcy, we approached a recent graduate who was clerking at the United States Bankruptcy Court for the District of Arizona. Our timing could not have been better, as he and another clerk had been tasked with investigating the best method for the court to address the number of bankruptcy filers who filed solely to halt foreclosure proceedings on their homes.

In the bankruptcy court's view, the problem to be solved was one of communication—disputants were giving conflicting accounts of the status of the mortgages that were being foreclosed upon. Homeowners were saying that they were in discussions with their lenders about renegotiating their mortgages, but lenders' counsel either knew nothing of these conversations or claimed that no such negotiations were ongoing. The judges had no idea who to believe, so these cases languished until it was clear that the negotiations had resolved one way or the other. The time frame for those discussions was much longer than the judges were comfortable with, and they wanted that process sped up. After a meeting with judges and staff at the bankruptcy court, the court asked us to propose a pilot foreclosure mediation program for bankruptcy cases to be operated by the College of Law for their review. Court personnel were clear that the program would have to operate within the court's Local ADR Rules.<sup>44</sup>

1. Dispute System Design Principles

In designing the bankruptcy pilot program we used dispute system design principles. First developed in the late 1980s,<sup>45</sup> dispute system design has been described as “an amalgam of conflict theory, organizational behavior, and alternative dispute resolution”<sup>46</sup> where stakeholders play an instrumental role in the design or improvement of a system of resolving

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*Receive Assistance from Law School*, SANDRA DAY O'CONNOR C. LAW, ARIZ. ST. UNIV. (Aug. 24, 2011), <http://www.law.asu.edu/News/CollegeofLawNews.aspx?NewsId=3304>.

44. See D. ARIZ. LRBANKR 9072-1 to -9.

45. See WILLIAM T. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT 171–72 (1988).

46. Andrea Kupfer Schneider & Natalie C. Fleury, *There's No Place Like Home: Applying Dispute System Design Theory to Create A Foreclosure Mediation System*, 11 NEV. L.J. 368, 376 (2011).

disputes.<sup>47</sup> In our minds, openness, stakeholder participation, and feedback were critical.<sup>48</sup>

Our first task, however, was to research and contact other foreclosure mediation programs around the country<sup>49</sup> to learn<sup>50</sup> from their successes and challenges to create a framework for what a program would look like. Using that information, we came up with an outline of policies and procedures we thought would work in Arizona. We subsequently revised them based on comments from the bankruptcy court.

With the bankruptcy court's assistance, we organized a meeting of the program's stakeholders—lenders and their counsel, homeowner advocacy groups and their lawyers, bankruptcy lawyers from the debtors' and creditors' bars, and the United States Trustee—to discuss the proposed pilot project. We wanted to hear their reactions to the proposed pilot project and to make several key points: the mediation services would be free of charge, the mediators would be experienced mediators and have a good understanding of the process of refinancing mortgages, and the program's goal was to improve their communication so they could resolve the foreclosure issue in the way they thought most appropriate.<sup>51</sup> In the meeting most of the comments and questions focused on understanding the

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47. See, e.g., CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS 49 (1996); Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute System Design*, 14 HARV. NEGOT. L. REV. 123, 128 (2009).

48. COSTANTINO & MERCHANT, *supra* note 47, at 60; Schneider & Fleury, *supra* note 46, at 377; Smith & Martinez, *supra* note 47, at 128; Cathy A. Costantino, *Using Interest-Based Techniques to Design Conflict Management Systems*, 12 NEGOTIATION J. 207, 214 (1996).

49. Programs we extensively researched included the United States Bankruptcy Court Southern District of New York Loss Mitigation Program, the District of Rhode Island Loss Mitigation Program and the Eastern District of Wisconsin Mortgage Modification Mediation Program. Outside of the bankruptcy court sphere, we looked closely at the State of Nevada Foreclosure Mediation Program, the Supreme Court of Ohio Foreclosure Mediation Program, the Circuit Court of Cook County Mortgage Foreclosure Mediation Program, the Metro Milwaukee Foreclosure Mediation Program, the Florida Supreme Court Residential Mortgage Foreclosure Mediation Program, the New Hampshire Judicial Branch Foreclosure Mediation Program, the State of Maine Judicial Branch Foreclosure Diversion Program and the New Jersey Judiciary Foreclosure Mediation Program.

50. Special mention goes to Andrea K. Schneider, Natalie Fleury, and Debra Tuttle at the Metro Milwaukee Mediation Services, Inc., a foreclosure mediation program run out of the Marquette University Law School. See *Metro Milwaukee Mediation Services, Inc.*, <http://www.mediatemilwaukee.com> (last visited Apr. 8, 2013). Their wise counsel in setting up a law school based foreclosure mediation program was indispensable.

51. The Foreclosure Mediation Unit's bankruptcy court program's stated mission is: "To help alleviate court congestion and delay by providing impartial mediation services to facilitate a home mortgage modification, deed in lieu of foreclosure or other negotiated settlement when such agreement is in the best interests of both the debtor and the secured creditor."



program's procedures which resulted in some good suggestions. More importantly, it became clear that there was healthy skepticism about the program from representatives of both the debtors and creditors. To summarize the primary concerns of both groups, the lenders wanted to make sure that the program was truly impartial and not interested in punishing them for their alleged role in the foreclosure crisis. The homeowners' representatives wanted to make sure that lenders would participate in good faith, unlike what some homeowners experienced when trying to work with the lenders on their own.

This meeting was invaluable in the program's design as it helped us determine the appropriate amount of information to share between the parties in order to keep the disclosure process reasonable for the homeowner while making sure there would be enough information for a lender to make an informed decision about the mortgage. Another major benefit of having this meeting was that it was where we started to prove to the stakeholders that the program was truly impartial and not simply an effort to keep homeowners in their homes. Finally, the meeting indicated that the program was genuinely interested in stakeholder feedback.

## 2. Program Procedures

The bankruptcy court decided to go forward with the proposed pilot program with an initial phase consisting of twenty-five mediation referrals, at which point the court would revisit the program to determine its effectiveness, discuss any proposed revisions, and determine whether to move to a secondary phase consisting of seventy-five mediation referrals. The initial phase is completed and the program is now in its secondary phase, with minimal programmatic revisions.

### *a. Case Selection and Referral to Mediation*

Once the bankruptcy court has stayed all actions against the homeowner, including the Trustee's Sale,<sup>52</sup> the court may order the parties to mediation on its own initiative or at the request of either party. In most circumstances the court makes a mediation referral in those cases in which the court in its discretion believes the parties might benefit from mediation.<sup>53</sup> Typically this occurs during a "lift stay" hearing, which is the hearing where the lender

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52. Pursuant to 11 U.S.C. §362, a petition filed operates to stay the enforcement against the debtor or against property of the estate. *See* 11 U.S.C. § 362 (2012).

53. "[A]ll controversies arising in an adversary proceeding, contested matter, or other dispute in a case are eligible for referral to the ADR Program." D. ARIZ. LRBANKR 9072-3.

asks the court to lift the bankruptcy stay to enable it to proceed with the foreclosure. The Foreclosure Mediation Unit (“FMU”) and the court agreed on a broad set of parameters for the cases the court refers to mediation: the property is owner-occupied, the property is the homeowner’s primary residence, and the homeowner is the “borrower” on the mortgage loan. Once the court selects a case for referral to the program, it issues an order directing the parties to participate in the program.

*b. Initial Telephone Conference*

Within fourteen days of receiving the mediation order, the mediator conducts an initial telephonic conference with the parties’ attorneys, or the parties themselves if they appear pro se.<sup>54</sup> The initial telephone conference is designed to explain the FMU process to the parties and to prepare them for what will happen during the mediation. Specifically, the call addresses the following issues: (a) date and place of the mediation; (b) the procedures that will be followed in the mediation; (c) who is expected to attend the mediation; (d) the material or exhibits that should be provided before the mediation; and (e) any other relevant issues or matters.<sup>55</sup>

*c. Information Exchange*

To make sure that the parties have all the relevant information needed to determine how to resolve the presenting foreclosure, the program employs a form-based information exchange protocol.<sup>56</sup> The respective forms are to be exchanged and provided to the program within ten days of the initial telephone conference. The forms include the opportunity to request additional information that would assist in making an informed decision about the mortgage at issue. Parties may object to the request for additional information, and the objection will be decided by the program’s staff.<sup>57</sup>

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54. D. ARIZ. LRBANKR 9072-8(a).

55. *Id.*

56. A copy of the Creditor Information Form is attached as Appendix A, and a copy of the Debtor Information Form is attached as Appendix B. The information required to be exchanged in the Information Forms is tailored to foreclosure and foreclosure-related issues and therefore is more narrow than that required by D. ARIZ. LRBANKR 9072-8(c).

57. The court is not involved in disputes surrounding the information exchange unless a party makes an appropriate motion to the court. In such a motion the moving party must provide a statement certifying that after personal consultation and sincere efforts to do so, the parties have been unable to resolve the matter. D. ARIZ. LRBANKR 9013-1(e). Additionally, the program’s staff may conduct a conference, either telephonically or in person, to resolve disputes concerning the information exchange. *Id.*

Presuming the request is reasonable,<sup>58</sup> another ten day period is set aside to provide the additional information.

Typically lenders need paycheck stubs, bank statements, tax returns, and relevant federal forms.<sup>59</sup> Homeowners sometimes seek clarification on the payments the lender has received.<sup>60</sup> Information exchanged through the program is not filed with the Court and is considered confidential.<sup>61</sup>

*d. Attendance at the Mediation*

Individuals with full and complete settlement authority are required to be present in person at the mediation conference, but the program's staff has the discretion to allow attendance by phone for those parties or party representatives who are outside of Arizona.<sup>62</sup>

*e. The Mediators*

The program opted to engage mediators with extensive finance, real estate, and mediation experience in order to ensure the program's success.<sup>63</sup> The mediators do not give legal, tax, or financial advice to either side. Instead, they regularly encourage parties to consult with an attorney or an accountant to discuss any potential legal, tax, or financial consequences that may result from agreements reached in mediation. College of Law students often observe the mediations for educational purposes.

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58. The program's staff is mindful that such requests must be reasonable and related to the settlement discussions at hand so that the program is not hijacked for discovery purposes or fishing expeditions. Either party may object to a request and program staff will rule on it prior to the mediation. Program staff may also disallow any patently unreasonable requests without prior objection.

59. This kind of information allows lenders to accurately analyze homeowners' ability to qualify for various federal and in-house loan programs.

60. It is not unusual for homeowners and lenders to disagree on how many payments behind the homeowners are on the mortgage. In fact, the average number of months reported to us by homeowners is 18 and the average number of months reported by lenders is 24, with a maximum discrepancy of 19 months. It appears the primary reasons for this discrepancy are that homeowners are not familiar with how lenders process missed payments and the cumulative effect of late fees and penalties associated with partial payments.

61. D. ARIZ. LRBANKR 9072-8(c), 9072-8(f).

62. See D. ARIZ. LRBANKR 9072-8(d)(1)-(2).

63. At the time of writing, the authors of this article have conducted all of the program's mediations, either alone or as a team. There have been no objections to this arrangement, but should a party object to either or both mediators for conflict of interest or other reasonable reasons, a substitute mediator will be provided.

*f. The Mediation*

In the mediation, the parties discuss the issues related to the distressed loan in an attempt to determine the best method of resolving the foreclosure issue. While the parties are ordered to participate in mediation, the parties are not required to reach an agreement. Potential settlement options may include temporary or permanent loan modification, refinancing of the loan, interest rate adjustment, forbearance, short sale, deed in lieu of foreclosure, or surrender of the property. If the parties reach an agreement, the mediator may assist in memorializing the agreement terms in a memorandum of understanding. However, the parties themselves are responsible for preparing any further documentation necessary to effectuate the agreement. If the mediation does not result in an agreement, the case is referred back to the Court to resume the bankruptcy proceeding. Regardless of the mediation's outcome, the program reports to the Court only whether the parties were able to reach an agreement. If the parties wish to disclose settlement terms to the court, they may agree to do so.

*g. Questionnaire*

To ensure that the Program receives ongoing feedback from its stakeholders, mediation participants are asked to complete a questionnaire at the conclusion of each mediation.<sup>64</sup> The collected information is also used for research, educational, and publicity purposes while protecting the confidentiality and anonymity of participants.<sup>65</sup>

*h. Confidentiality*

All mediation communications and documents prepared for and during the mediation are confidential.<sup>66</sup> The mediator(s) and the mediation participants are prohibited from disclosing any mediation communications with the following exceptions: (a) all the participants and the mediator agree to the disclosure; (b) the disclosure is required by law; (c) the communication is either a threat of violence or involves actual violence; or (d) the communication is an admission of ongoing criminal activity.<sup>67</sup> Furthermore, no mediation participants may subpoena the mediator or the program to obtain any information related to discussions held during or

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64. A copy of the questionnaire is attached as Appendix C.

65. See ARIZ. REV. STAT. § 12-2238 (2012); D. ARIZ. LRBANKR 9072-8.

66. § 12-2238; D. ARIZ. LRBANKR 9072-8(f). Information that is otherwise discoverable or admissible in evidence does not become exempt from discovery or inadmissible in court merely by being discussed or used in a mediation conference.

67. § 12-2238; D. ARIZ. LRBANKR 9072-8(f)(1)–(2).

leading up to the mediation.<sup>68</sup> However, aggregated statistical information used for reporting on and evaluating the Program, the information contained in the post-mediation report to the court, and the terms of any agreement reached in mediation are not confidential.<sup>69</sup>

#### IV. MEDIATION OUTCOMES

As of December 31, 2012, the FMU had received forty-six Mediation Orders from the court and completed twenty-eight mediations.<sup>70</sup> Twelve referrals ended with no mediation taking place.<sup>71</sup> Reasons for this included the parties settling the case on their own prior to mediation or the abandonment or withdrawal of the underlying bankruptcy case by the homeowner. Only in one instance have we sent a file back to the court due to noncompliance with the program's procedures.<sup>72</sup> Another six Mediation Orders are still winding their way through the process and mediations are scheduled in January and February, 2013.<sup>73</sup> The typical time from Order to mediation is approximately six weeks, with some occurring within three weeks and others extending out several months later. A number of files have been open for a longer time at the request of the parties as they try to work things out on their own.

Of the twenty-eight completed mediations, fifty-three percent resulted in a settlement at the mediation, and another seven percent reached a settlement after the mediation conference.<sup>74</sup> Eleven percent are being held open to provide the parties an opportunity to continue negotiations.<sup>75</sup> Typical settlements include: modification of the mortgage, surrender of the property, or specific timing for the foreclosure.

#### V. PARTICIPANTS' VIEWS

At the end of the mediation, each of the participants (typically homeowners, their attorney if they are represented, a lender representative, and the lender's counsel) are asked to complete a questionnaire about the

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68. D. ARIZ. LRBANKR 9072-8(f)(2).

69. § 12-2238; D. ARIZ. LRBANKR 9072-8(f)(1), 9072-9(c). Most parties prefer to keep their settlement agreements confidential, but should an agreement be part of subsequent litigation between the parties, it is not considered confidential. *See* § 12-2238.

70 Internal Records of the Foreclosure Mediation Unit (on file with the author).

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

mediation. The overall satisfaction with the Program has consistently been much higher than the settlement rate. Regardless of the outcome, eighty-two percent of the participants indicated that they were “satisfied” or “very satisfied” with their overall experience in the mediation session(s).<sup>76</sup> Eighty-five percent of participants replied that the mediator understood what was important to them/their client, and ninety percent indicated that the mediator did not favor one party over the other.<sup>77</sup> When asked if the mediator treated them with respect, ninety-four percent answered yes, and when asked if they would recommend the mediator to others, ninety-six percent indicated they would.<sup>78</sup>

At the end of the questionnaire, the participants are provided the opportunity to provide feedback in their own words about what they liked or disliked about the mediation process provided by the FMU. The following are representative of the comments received from both debtors and creditors and their respective representatives:<sup>79</sup>

#### Statements from Debtors and their Representatives

- Opportunity to speak freely.
- The opposing counsel actually answered questions.
- Explanation of process was comprehensive and mediator was compassionate and personable.
- Time taken separately was appreciated.
- Decision maker for services was on the phone and familiar with the case.
- Good forum for exchanging info and ideas. Quick and to the point.
- Effective use of time; mediator did not allow the mediation to go off topic.
- Mediator did an excellent job of having us see through the bank’s eyes. It was comfortable and not so formal or intimidating.

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

- Things were explained very clearly and mediators were patient with us.
- Every party is able to express concerns and get tough questions answered.
- Mediation was very informative.
- Ability to talk with decision maker at the bank.
- For the first time I had some communication with the bank.

#### Statements from Creditors and their Representatives

- Enable the parties to discuss long-standing issues with subject loan and reach a mutual resolution without the need for further court intervention.
- Mediator took charge and kept discussions on point.
- Mediator did not allow the mediation to go off topic.
- An opportunity to review both sides' positions in depth.
- Opportunity to flush out issues and ask opposing party questions.
- Fair and businesslike.
- Discussion of the circumstances that lead the parties to their current position.

## VI. LESSONS LEARNED

We have learned a number of lessons over the Foreclosure Mediation Unit's two years; here we present our top five lessons in no particular order. Our hope is that this section can provide guidance to others developing mediation programs, not solely foreclosure mediation programs, as they move from the idea stage to the design phases to an operational program.

*A. Meeting with Stakeholders*

Involving stakeholders in the design of a mediation program is one of the key tenets of dispute system design.<sup>80</sup> We cannot overemphasize how important this turned out to be.<sup>81</sup> We were able to enhance the program's ability to achieve its end goal—improving the litigants' communication process—by addressing stakeholder concerns before the first mediation.<sup>82</sup> Additionally, the stakeholders started to trust that we were truly impartial and that our goal was to help them instead of trying to satisfy some unstated political goals. Thus, they began buying into the process before the first mediation, although they maintained an appropriate amount of skepticism as the project got off the ground.<sup>83</sup> Within a few months after the court referred the first case to mediation, both the debtors' bar and the creditors' bar began requesting mediation referrals.<sup>84</sup>

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80. See *supra* notes 45–51 and accompanying text.

81. See generally Heather Scheiwe Kulp, *Best Practices in Foreclosure Mediation*, RESOLUTION SYSTEMS INSTITUTE, <http://www.aboutrsi.org/pfimages/ForeclosureMediationBestPractices.pdf> (last visited Apr. 2, 2013). Press reports indicate that at least two major programs created through the legislative process have been fought by the banking community, which suggests that the banking community either was ignored or not included in the design phase. In Hawaii, a state like Arizona where non-judicial foreclosure is preferred to judicial foreclosure, the banking community refused to participate in the state mandated non-judicial foreclosure mediation program, opting instead to shift all foreclosures into the courts. Andrew Gomes, *Foreclosure Fallout: Law Comes With Deluge of Problems*, HONOLULU STAR ADVERTISER, Aug. 6, 2012, [http://www.staradvertiser.com/news/20120805\\_Law\\_comes\\_with\\_deluge\\_of\\_problems.html](http://www.staradvertiser.com/news/20120805_Law_comes_with_deluge_of_problems.html). In St. Louis County Missouri, shortly after the county enacted an ordinance requiring mediation prior to a foreclosure proceeding, the banking community filed suit to enjoin the ordinance. Paul Hampel, *Bank Files Lawsuit Challenging St. Louis County Foreclosure Law*, ST. LOUIS POST-DISPATCH, Sept. 19, 2012, [http://www.stltoday.com/news/local/govt-and-politics/bank-files-lawsuit-challenging-st-louis-county-foreclosure-law/article\\_03881c2c-e3a0-56fd-be6a-a92b72edaa5d.html](http://www.stltoday.com/news/local/govt-and-politics/bank-files-lawsuit-challenging-st-louis-county-foreclosure-law/article_03881c2c-e3a0-56fd-be6a-a92b72edaa5d.html). The ordinance was upheld, but the Missouri Bankers Association plans to appeal the ruling. Jason Rosenbaum, *Judge Upholds St. Louis County Foreclosure Mediation Ordinance*, ST. LOUIS BEACON, Nov. 14, 2012, [https://www.stlbeacon.org/#!/content/28061/foreclosure\\_mediation\\_judgement](https://www.stlbeacon.org/#!/content/28061/foreclosure_mediation_judgement). Furthermore a bill is now before the Missouri Governor that is designed specifically to pre-empt mandatory city and county foreclosure mediation programs that conflict with state law. See Virginia Young, *Missouri Legislature Moves to Drop Mediation for Foreclosed Homeowners*, ST. LOUIS POST-DISPATCH, POLITICAL FIX BLOG, May 6, 2013, [http://www.stltoday.com/news/local/govt-and-politics/virginia-young/missouri-legislature-moves-to-drop-mediation-for-foreclosed-homeowners/article\\_78d21a3d-daff-5d42-9ccf-3daa56a408d5.html](http://www.stltoday.com/news/local/govt-and-politics/virginia-young/missouri-legislature-moves-to-drop-mediation-for-foreclosed-homeowners/article_78d21a3d-daff-5d42-9ccf-3daa56a408d5.html)

82. See *supra* Part III.B.1.

83. Our results from meeting with the stakeholders are consistent with the experience of the Metro Milwaukee Foreclosure Mediation Project. See Schneider & Fleury, *supra* note 46, at 396.

84. This has been reported numerous times by the Bankruptcy Court staff and are reflected in motions, pleadings, and minute entries on file with the authors.



### B. Impartiality

Impartiality is one of mediation's cornerstones.<sup>85</sup> Everything that mediation promises—improved communication, better understanding of the problems at issue, and the possibility of resolution—is premised on the fact that both the mediator and the program in which the mediator operates treat the parties impartially throughout the process. Maintaining the FMU's impartiality both in word and in deed has been paramount.

As mentioned earlier in this article, in the program's design stages lenders were particularly concerned about the program's impartiality and asked several pointed questions about the issue.<sup>86</sup> For example, they were concerned about the program's goals, as several foreclosure mediation programs have mission statements that include keeping homeowners in their homes, indicating that the programs are not impartial.<sup>87</sup> Lenders were also concerned about fees because another indicia of a lack of programmatic impartiality is charging inequitable fees, particularly when lenders have to pay fees but homeowners do not.<sup>88</sup> The program's stated mission and the fact that it is a free service addressed these concerns. Furthermore, neither the mediators' salary nor evaluations are tied to the program's settlement rate, removing that potential incentive which could lead the mediators to exert undue settlement pressure on the parties.

In the mediation sessions themselves, the mediators have found a particular strategy to be an effective means of maintaining or proving their impartiality. Once the parties start discussing offers and counteroffers, reframing the potential refinancing of a mortgage as “a math problem” has been helpful. Do the numbers from the homeowner fit the math for any of the federal or private mortgage refinancing programs available? This phrasing puts the parties at ease because it takes accusatory causation language out of the conversation. And if the math does not work, it is easier to move on to other potential options for resolution.

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85. Art Hinshaw, *Mediators as Mandatory Reporters of Child Abuse: Preserving Mediation's Core Values*, 34 FLA. ST. U. L. REV. 271, 280 (2007).

86. See *supra* Part III.B.1.

87. See Heather Scheiwe Kulp, *Foreclosure Mediation in Depth: Articulated Purposes and Objectives for Foreclosure Mediation Programs*, RESOLUTION SYSTEMS INSTITUTE (July 28, 2011), <http://www.aboutrsi.org/pfimages/ForeclosureMediationProgramPurposes.pdf>.

88. See Jennifer Shack & Heather Scheiwe Kulp, *Foreclosure Dispute: Resolution By The Numbers (September 2012)*, RESOLUTION SYSTEMS INSTITUTE (Feb. 14, 2013), <http://www.aboutrsi.org/pfimages/ForeclosureDRStats.pdf>; see also Jennifer Shack, *Counting Up the Costs and Benefits to Lenders of Foreclosure Mediation*, JUST COURT ADR (Nov. 19, 2012, 7:00 AM), <http://blog.aboutrsi.org/2012/policy/counting-up-the-costs-and-benefits-to-lenders-of-foreclosure-mediation/>.

### C. *Subject Matter Knowledge*

Whether mediators need to be subject matter experts is a question that has been making the rounds in the mediation community for years.<sup>89</sup> We thought it was important to have someone who could understand the language of the lenders and interpret it in a way that unrepresented homeowners could understand. Plus, we thought that having a person with such expertise would help lenders feel more comfortable using the program. Our intuition on subject matter expertise proved to be correct: having staff who have worked on both legal and finance issues in real estate for years added to the program's credibility from the start. Lenders have been pleased with the mediators' level of understanding of the refinancing process and their ability to relay that information to borrowers in an understandable and unbiased way. Borrowers have been pleased to receive assistance in understanding the true value of offers and counteroffers that lenders have made.<sup>90</sup>

### D. *Information Exchange*

In the typical foreclosure mediation, the parties have been trading information, or attempting to do so, with varying degrees of success for a year or more. Homeowners complain that they are requested to submit the same documents over and over. Lenders, restricted by regulations requiring certain documents, ask for updates of documents that homeowners have previously sent. Information problems lead to a lot of frustration on both sides and usually are the biggest obstacle preventing productive communication.<sup>91</sup>

For mediation to be successful, it has to be able to overcome the fatigue associated with the parties' prior failed information exchanges. This means that the information needed to make informed decisions during the mediation must be readily available during the mediation, so the parties must exchange it before the mediation is to take place. Since the dispute is

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89. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 450–65, 475 (3d ed. 2003).

90. For example, many borrowers do not understand how amortization works and the impact of changes in the interest rate to their obligations. So an offer by a lender to reduce the interest rate might be initially rejected. An experienced mediator can explain how the change may affect the total amount owed on a mortgage in a dramatic way.

91. See PowerPoint, Heather Scheiwe Kulp, Panelist at the Arkansas Law Review Symposium: Foreclosure Dispute Resolution Overview (Nov. 9, 2012), *available at* <http://www.slideshare.net/hkulp/foreclosure-mediation-arkansas> (indicating that the sharing of documents will be a consistent problem in foreclosure mediation).

new to the mediator, programmatic information requests are not tainted by perceived prior bad behavior, and fresh supporting documents can be exchanged without too much difficulty.<sup>92</sup> Plus, staff involvement in the information exchange ensures that deadlines are met, disclosures are complete, and the information exchange is limited to what will make sure that both parties are ready to engage in settlement discussions.

### E. Screening of Cases

Not all foreclosure situations are good candidates for mediation. For example, it makes no sense to try to mediate cases about vacation homes, second homes, or those homes where homeowners have abandoned the property. This was happening in the Florida statewide foreclosure mediation program<sup>93</sup> and was one of the reasons it was discontinued.<sup>94</sup> Additionally, rental properties are not good candidates for mediation as they are not eligible for government sponsored foreclosure mitigation programs or lenders' in-house modification programs.<sup>95</sup> In the bankruptcy pilot program,

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92. Copies of the Debtors' Information Exchange Form and the Creditors' Information Exchange Form are attached hereto as Appendices A and B. Additionally, parties sometimes ask for supplemental information.

93. Less than half of the homeowners who were eligible for mediation in Florida were able to be found and contacted about the requirement to participate in the foreclosure mediation program. Heather Scheiwe Kulp, *Termination of Mandatory Statewide Foreclosure Mediation in Florida Leads to a Few Lessons*, JUST COURT ADR (Dec. 20, 2011, 3:36 PM), <http://blog.aboutrsi.org/2011/program-evaluation/termination-of-mandatory-statewide-foreclosure-mediation-in-florida-leads-to-a-few-lessons/>.

94. The Florida foreclosure mediation program was discontinued approximately two years after it was instituted. *In re Managed Mediation Program for Residential Foreclosure Cases*, No. AOSC11-44 (Fla. 2011), available at [http://www.floridasupremecourt.org/pub\\_info/documents/foreclosure\\_orders/12-19-2011\\_Order\\_Managed\\_Mediation.pdf](http://www.floridasupremecourt.org/pub_info/documents/foreclosure_orders/12-19-2011_Order_Managed_Mediation.pdf). In its recommendation to discontinue Florida's requirement that all residential foreclosures go to mediation, the Workgroup for the Managed Mediation Program for Residential Mortgage Foreclosure Cases concluded that the program mistakenly required every residential foreclosure go to mediation. If foreclosure mediation were to continue in Florida, the Workgroup recommended that homeowners affirmatively opt in to foreclosure mediation programs. Other listed reasons for the program's discontinuation included: lenders had economic incentives not to settle cases, lenders offered a narrow range of settlement options that were of little value to homeowners, homeowners were not aware of the program, and homeowners did not trust the program's legitimacy. See THE ASSESSMENT WORKGROUP FOR THE MANDATORY MEDIATION PROGRAM FOR RESIDENTIAL MORTGAGE FORECLOSURE CASES, WORKGROUP FINAL REPORT (Oct. 21, 2011), available at [http://www.floridasupremecourt.org/pub\\_info/documents/Foreclosure/10-21-2011\\_Workgroup\\_Final\\_Report.pdf](http://www.floridasupremecourt.org/pub_info/documents/Foreclosure/10-21-2011_Workgroup_Final_Report.pdf).

95. See, e.g., *Maryland's Foreclosure Mediation*, THE HOPE INITIATIVE: HOME OWNERS PRESERVING EQUITY, <http://mdhope.dhcd.maryland.gov/ForeclosureMediation/Pages/default.aspx> (last visited Mar.

we were pleased that the judges agreed to do the initial screening of cases to determine if mediation could be helpful.<sup>96</sup> They were best suited for this task having interacted with the parties and understanding their respective problems during the pendency of the bankruptcy case.

## VII. CONCLUSION

In 2009 foreclosure mediation was a promising strategy to help stem the nation's foreclosure crisis. Numerous states and municipalities adopted foreclosure mediation programs and the American Bar Association wholeheartedly endorsed mediation as a way of addressing foreclosure issues. But now the bloom is off the rose. Foreclosure mediation has been abandoned, or all but abandoned in some states,<sup>97</sup> foreclosure mediation programs have been tied up in the courts,<sup>98</sup> lenders have refused to participate in non-judicial foreclosure mediation programs,<sup>99</sup> and the administrator of one statewide program dissolved amid financial woes.<sup>100</sup> Foreclosure mediation is being described as “a great idea that just doesn't seem to be taking hold,”<sup>101</sup> and even a staff attorney at the leading homeowner rights watchdog, the National Consumer Law Center, has said that foreclosure mediation is “surprisingly ineffective.”<sup>102</sup> It may be that in their quest for a quick fix to the crisis, policy makers had unreasonable expectations for a consensual process. “Keeping people in their homes” may make for good politics, but not every troubled mortgage should be modified. Lenders have

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22, 2013) (“Only homeowners who are living in the foreclosed property as their primary residence can participate in the mediation program. The mediation program is not open to homeowners of foreclosed rental or commercial properties.”).

96. See *supra* Section III.B.2.a, for the minimum guidelines for court referrals.

97. See *In Re: Managed Mediation Program for Residential Foreclosure Cases*, *supra* note 94 (Florida); *Summary of the Foreclosure Mediation Program*, N.H. JUD. BRANCH (Oct. 26, 2011), <http://www.courts.state.nh.us/adrp/foreclosure/index.htm> (New Hampshire).

98. See Linda Baker, *Foreclosures Shifting to Courts*, OR. BUS. (Sept. 13, 2012), <http://www.oregonbusiness.com/linda/8146-foreclosures-shifting-to-courts> (Oregon); Rosenbaum, *supra* note 81 (St. Louis County).

99. See *Gomes*, *supra* note 81 (noting that Hawaii lenders have “balked” at the nonjudicial foreclosure procedures).

100. Elliot Njus, *Florida Administrator of Struggling Oregon Foreclosure Mediation Program Dissolves*, OREGONIAN (Feb. 6, 2013, 10:13 AM), [http://www.oregonlive.com/front-porch/index.ssf/2013/02/florida\\_administrator\\_of\\_strug.html](http://www.oregonlive.com/front-porch/index.ssf/2013/02/florida_administrator_of_strug.html) (reporting the dissolution of Oregon's foreclosure mediation administrator).

101. Ilyce Glink, *Foreclosure Mediation Programs Aren't Working Because of Net Present Value (NPV) Calculations*, CBSNEWS.COM (Sept. 23, 2009, 5:29 PM), [http://www.cbsnews.com/8301-505145\\_162-37141067/foreclosure-mediation-programs-arent-working-because-of-net-present-value-npv-calculations/](http://www.cbsnews.com/8301-505145_162-37141067/foreclosure-mediation-programs-arent-working-because-of-net-present-value-npv-calculations/).

102. *Id.*

to follow federal lending guidelines, and homeowners with drastically reduced incomes cannot reasonably expect their mortgages to be modified.

Yet, there are still several successful foreclosure mediation programs around the country. How can that be? A couple of things come readily to mind. First, we firmly believe that the goals of a foreclosure mediation program must make it clear that modification is only one possible solution to the pending foreclosure. It may not be what people want to hear, but public expectations need to be in line with reality.<sup>103</sup> Next, designing foreclosure mediation programs is best thought of as a collaborative task. Lenders are stakeholders just as much as homeowners are, and they need to be treated as such.<sup>104</sup> Refusing to consider their concerns in the design phase is a mistake that simply courts resistance, creates an unnecessarily hostile environment that compromises the program's impartiality, and results in an inability to help anyone. And finally, ongoing monitoring and evaluation brings latent problems to light so they can be addressed thoughtfully by engaging the program's stakeholders.<sup>105</sup>

The FMU's bankruptcy court pilot program has been successful for these reasons, despite the fact that the typical homeowners in bankruptcy are behind on their mortgage payments by at least two to three years. Both lenders and borrowers, their respective counsel, and the bankruptcy court have been pleased with the program's results. However, everyone affiliated with the program recognizes that our efforts are limited and have had a small impact on the state's overall foreclosure crisis. Nonetheless, for the parties the program has assisted, the impact has been significant.

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103. For example, the Connecticut foreclosure mediation program has a very high settlement rate, in part because twenty to twenty-five percent of the settlements include short sale approvals or move-out provisions. See STATE OF CONN. JUD. BRANCH, FORECLOSURE MEDIATION PROGRAM (FMP) RESULTS AS OF MAY 31, 2012, available at [http://www.jud.ct.gov/statistics/FMP/FMP\\_pie.pdf](http://www.jud.ct.gov/statistics/FMP/FMP_pie.pdf).

104. KULP, *supra* note 81, at 1.

105. *Id.* at 2.

**APPENDIX A**

**ARIZONA STATE UNIVERSITY  
COLLEGE OF LAW  
FORECLOSURE MEDIATION PROGRAM**

In re: \_\_\_\_\_,  
Debtor

Chapter \_\_\_\_\_

Case No. \_\_\_\_\_

**CREDITOR INFORMATION FORM**

The following information is required to be disclosed to Debtor prior to the Mediation Conference in the above referenced matter. Failure to timely complete and return this form may result in sanctions or other appropriate relief. If you are unable to respond completely in the allotted space, please attach separate sheets as necessary.

If you object to the requests for information contained herein, or are unable to provide such information, please attach such objections or explanations in writing on a separate sheet.

Mortgage Creditor: \_\_\_\_\_  
Designated Contact \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_

Phone No: \_\_\_\_\_  
E-mail Address: \_\_\_\_\_

**Individual with Settlement Authority on Behalf of Mortgage Creditor at Mediation**

Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_

Phone No: \_\_\_\_\_  
E-mail Address: \_\_\_\_\_

**Other Parties Expected to Attend Mediation on behalf of Mortgage Creditor**

Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_

Phone No: \_\_\_\_\_  
E-mail Address: \_\_\_\_\_

Relationship to Mortgage Creditor: \_\_\_\_\_

Attorney's Name: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 \_\_\_\_\_  
 Phone No: \_\_\_\_\_  
 E-mail Address: \_\_\_\_\_

Please describe all contacts Mortgage Creditor has had with the Debtor regarding this loan in the preceding twelve (12) months, including, but not limited to any prior loan modification contacts.

Please provide the following general information regarding this loan.

The following information reflects this account as of \_\_\_\_\_ (such date must be within thirty (30) days as of the date of this CFI).

1. Original Loan Amount	\$ _____
2. Original Amortization Term (in months)	_____
3. Original Interest Rate	_____ %
4. Interest Only Loan?	<input type="checkbox"/> Yes <input type="checkbox"/> No
5. Current Unpaid Balance (UPB)	\$ _____
6. Current Interest Rate	_____ %
7. Remaining Mortgage Term (in months)	_____
8. Months Past Due	_____
9. Advances/Escrow Past Due	\$ _____
10. Current Monthly Mortgage Payment	\$ _____
11. Current Interest Payment	\$ _____
12. Current Principal Payment	\$ _____
13. Past Due Interest	\$ _____
14. Pre-Petition Arrears	\$ _____
15. Post-Petition Arrears	\$ _____
16. Total Fees to date (late, inspection, other)	\$ _____
If known by Mortgage Creditor:	
17. Current Fair Market Value of Property	\$ _____

Additional Mortgage Creditor Documentation to be Provided

1. All available Payment History/Transcript. If the entire Payment History/Transcript is not available, state the reason why the Payment History/Transcript is not available:  
 \_\_\_\_\_  
 \_\_\_\_\_
2. Evidence that Mortgage Creditor is the holder and/or servicer of the promissory note and deed of trust if the promissory note and deed of trust do not identify you as the lender/bank/mortgagee (i.e. assignment, certificate of merger/acquisition, purchase/sale agreement, etc.). If not available, state the reason the evidence is not available: \_\_\_\_\_  
 \_\_\_\_\_
3. Copies of the Notice of Trustee’s Sale and any amendments thereto. If not available, state the reason the evidence is not available. \_\_\_\_\_  
 \_\_\_\_\_

Additional Debtor Documentation Requested

If you reasonably require any additional information from the Debtor(s) to assess whether you would be willing to re-negotiate the terms of the loan, please identify that information on the attached addendum.

Appearance by Telephone

The Mortgage Creditor or the representative of the Mortgage Creditor identified above who has the authority to agree to a proposed settlement, loan modification, or dismissal of the action may participate in the mediation by telephone, with prior approval by the mediator. This person may do so only if the Mortgage Creditor is represented at the mediation conference by counsel with authority to sign a proposed settlement on behalf of the Mortgage Creditor.

Please indicate if the Mortgage Creditor, or its representative with proper settlement authority, requests to participate by phone and provide their name and contact information.

\_\_\_\_\_  
\_\_\_\_\_

Dated: \_\_\_\_\_

MORTGAGE CREDITOR

\_\_\_\_\_  
(Printed Name)

By: \_\_\_\_\_

Its: \_\_\_\_\_



ADDENDUM  
ADDITIONAL INFORMATION REQUIRED OF DEBTOR

Creditor requests copies of the following information from Debtor. Debtor shall deliver copies of the requested information to Mortgage Creditor and the mediator on or before ten (10) days from the date of this form.

Form Attached.

OR

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_
6. \_\_\_\_\_
7. \_\_\_\_\_
8. \_\_\_\_\_
9. \_\_\_\_\_
10. \_\_\_\_\_

**APPENDIX B****ARIZONA STATE UNIVERSITY  
COLLEGE OF LAW  
FORECLOSURE MEDIATION PROGRAM**In re: \_\_\_\_\_  
Debtor

Chapter \_\_\_\_\_

Case No. \_\_\_\_\_

**DEBTOR INFORMATION  
FORM**

The following information is required to be disclosed to counsel for Mortgage Creditor prior to the Mediation Conference in the above referenced matter. Failure to timely complete and return this form may result in sanctions or other appropriate relief. If you are unable to respond completely in the allotted space, please attach separate sheets as necessary.

If you object to the requests for information contained herein, or are unable to provide such information, please attach such objections or explanations in writing on a separate sheet.

Your Name(s): \_\_\_\_\_

Address: \_\_\_\_\_

Phone No: ( ) \_\_\_\_\_ (day)

( ) \_\_\_\_\_ (evening)

E-Mail Address: \_\_\_\_\_

Attorney's Name: \_\_\_\_\_

Firm Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone No: ( ) \_\_\_\_\_

E-Mail Address: \_\_\_\_\_

Will your attorney be attending the mediation? Yes No

Please describe all contacts you have had with the Mortgage Creditor regarding this loan in the preceding twelve (12) months, including, but not limited to any prior loan modification contacts.

Please provide the following information.

1. Yes No Is this property your only residence?
2. Yes No Are you currently living in this property?
3. Yes No Are you interested in trying to remain in this property?
4. Yes No If you are not interested in trying to remain, are you interested in discussing other options with your lender?
5. Yes No Are you and/or your spouse presently employed? If yes, how long have you and/or your spouse been employed by your current employer(s)?

You: \_\_\_\_\_ year(s) Spouse \_\_\_\_\_ year(s)

6. Yes No Do other mortgages or liens exist on this property? Examples of other mortgages and liens are home equity loans, tax liens, child support liens, judgments from lawsuits. List them below:

Who is owed?	How much is due?	Past due? (yes/no)
_____	_____	_____
_____	_____	_____

7. Check all items that have made you miss your mortgage payments:

Unemployment/loss of employment

Underemployment

Injury or illness

Divorce or separation

Adjustable Rate Mortgage (ARM) resulting in higher payment amounts

Balloon Payment became due

My expenses are more than my income

Other (please describe): \_\_\_\_\_

- 8. \_\_\_\_\_ How many payments have you missed?
- 9.     Yes     No    Have you signed any documents or agreements regarding your mortgage? If yes, please attach them.  
  
                                  Documents/Agreements Attached             Yes     No
- 10. \$ \_\_\_\_\_ What is the amount of your monthly mortgage payment?  
  
      \$ \_\_\_\_\_ If your property tax and property insurance are not included in the monthly payment, what is the amount of your monthly property taxes and insurance?
- 11. \$ \_\_\_\_\_ What is your gross monthly income (“gross income” means all income from whatever source).
- 12.     Please provide proof of your last three months of income. If self employed, please provide your most recent tax returns.
- 13.     Has any information contained on the schedule of assets and liabilities previously submitted to the Court changed since you filed for Bankruptcy? If so, please describe in detail those changes and provide any proof you have of those changes.

If you reasonably require any additional information from the Creditor(s) to assess whether you would be willing to re-negotiate the terms of the loan, please identify that information on the attached addendum.

I state that I am of lawful age, that I have personal knowledge of the information noted above and that it is true.

\_\_\_\_\_  
Debtor (Please Sign)  
Dated: \_\_\_\_\_

\_\_\_\_\_  
Debtor (Please Sign)  
Dated: \_\_\_\_\_

ADDENDUM  
ADDITIONAL INFORMATION REQUIRED OF CREDITOR

Debtor requests copies of the following information from Mortgage Creditor. Mortgage Creditor shall deliver copies of the requested information to Debtor and the mediator on or before ten (10) days from the date of this form.

Form Attached.

OR

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_
6. \_\_\_\_\_
7. \_\_\_\_\_
8. \_\_\_\_\_
9. \_\_\_\_\_
10. \_\_\_\_\_

**APPENDIX C****ARIZONA STATE UNIVERSITY  
COLLEGE OF LAW  
FORECLOSURE MEDIATION PROGRAM****Participant Survey – Confidential**

To help us to maintain the quality of the mediation program, please answer all of the questions below. Your responses will be kept confidential and will be used to evaluate our services. No identifying information about you will be released. Thank you in advance for your assistance.

Case Number: \_\_\_\_\_ Date(s) of Mediation: \_\_\_\_\_

1. What is your role in the case?

- Debtor/Borrower
- Debtor's Attorney
- Creditor (Bank/Service)
- Creditor's Attorney
- Observer
- Other: \_\_\_\_\_

2. Were you able to talk about the issues and concerns that were most important to you/your client?

- All of them
- Most of them
- Some of them
- None of them

3. How well did the mediator understand what was important to you/your client?

- Very well
- Somewhat
- Not at all

4. Did the mediator treat you with respect?

- Very much
- Somewhat
- Not at all

5. Did the mediator treat you fairly?

- Very much
- Somewhat
- Not at all

6. Did you feel that the mediator favored one party over the other?

- Yes
- Not sure
- No

7. Did the mediator help you/your client understand the other party's views better?

- Yes
- Not sure
- No

8. Would you recommend this mediator to others?

- Yes
- No

**If you REACHED AGREEMENT, please answer the following question:**

9. Is the agreement fair?

- It is fair to both parties.
- It is only fair to me/my client.
- It is only fair to the other party.

10. Regardless of the outcome, how satisfied are you with your overall experience in the mediation session(s)?

- Very Satisfied
- Satisfied
- Neither Satisfied or Unsatisfied
- Unsatisfied
- Very Unsatisfied

**Please let us know more about your experience:**

11. Things I liked about the mediation:

12. Things I did not like about the mediation:

13. What is the best way to improve the process?