

# MAINE STATE LEGISLATURE

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**STATE OF MAINE  
JUDICIAL BRANCH**



**FORECLOSURE DIVERSION PROGRAM**

Report to the Joint Standing Committee on  
Insurance and Financial Affairs

126<sup>th</sup> Legislature

February 15, 2013

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**JUDICIAL BRANCH  
FORECLOSURE DIVERSION PROGRAM**

**REPORT TO THE JOINT STANDING COMMITTEE  
ON INSURANCE AND FINANCIAL SERVICES  
126TH LEGISLATURE**

**February 15, 2013**

**Executive Summary**

In 2009 the Maine Legislature established the Foreclosure Diversion Program (FDP) in the Maine Judicial Branch. It affords an opportunity through mediation for parties in foreclosure to consider alternatives that might allow the homeowner to retain the home and the lender to maintain a performing loan.

Over the last three years, the FDP has seen a high level of activity. In this period 6,242 mediation sessions were held in 3,789 cases, or 26% of the 14,437 foreclosure cases filed from 2010 through 2012. The rate of participation in the FDP has increased. In 2012, parties in 43% of foreclosure cases requested mediation, up from 30% in 2010.

Mediation has achieved positive results. An increasing number of foreclosure cases in the FDP have concluded in dismissal, which generally indicates that both the home and the loan were maintained. To date, more than half of the cases mediated in 2010 and 2011 have been dismissed. Including 2012 data, 40% of all mediated foreclosure cases have been dismissed so far. Foreclosure judgments have issued in 21% of cases mediated in the last three years, but in 33% of the cases mediated in 2010.

At this time, the Judicial Branch does not recommend any legislative action. The rights and procedures established by the enabling statute have been implemented through the FDP and court rules.

The Judicial Branch submits this report on the Foreclosure Diversion Program (FDP) as required by P.L. 2009, ch. 402, § 25. This report covers three calendar years from 2010 through 2012. This report also serves as the Judicial Branch's annual report on the FDP for 2012 as required by 14 M.R.S. § 6321-A(7)(B).

**I. Introduction**

The FDP was established by the 124th Maine Legislature on June 15, 2009. Legislation directed the Maine Supreme Judicial Court to implement a statewide foreclosure diversion mediation program in response to the national foreclosure crisis. P.L. 2009, ch. 402. FDP mediation is available in all eligible mortgage foreclosure cases (those facing foreclosure of owner-occupied homes, with no more than four units) filed on or after January 1, 2010. The

Supreme Judicial Court adopted Rule 93 of the Maine Rules of Civil Procedure to govern the FDP, and the Judicial Branch continues to monitor the FDP to ensure both efficient and effective mediation service to the public. For a description of typical events in the foreclosure process generally, please see Chart 1 attached.

## **II. Statewide Mediation Services**

### *A. Informational Sessions, Mediation, and Pilot Project*

The FDP operates within a system of designated processing courts in each of the eight judicial regions. A foreclosure defendant's request for mediation triggers the scheduling of the case for an informational session. To participate in the FDP, homeowners must attend the informational session, where a judge and housing counselor provide information on foreclosure proceedings, how to complete lenders' forms for loan modification, and where to find free assistance. Within 21 days after the informational session, the homeowners and lenders must exchange and file with the court any necessary financial information, and the clerk schedules the case for mediation. Homeowners, lenders (often by telephone), lenders' counsel, and defense counsel (if any) must all attend mediation. When the FDP was created, it was anticipated that a single mediation session would be sufficient for most cases and that mediation could be completed within 90 days. That assumption has often proved to be true for cases involving local, Maine-based lenders. Large national lenders, however, are governed by ever-changing and very specific government and investor regulations that make it unlikely that the first attempt at document submission--and thus the first mediation session--will be successful. In cases where it is necessary, the parties may agree to additional mediation.<sup>1</sup>

In 2012, the FDP launched a pilot project in Bangor and Rockland to streamline the initial steps of the process. In the pilot, judges and housing counselors speak with homeowners at informational sessions as usual, and then homeowners and lenders proceed directly to mediation that day. Multiple mediators conduct short mediation sessions at the courthouse, one after another. Without waiting six to seven weeks, the parties make a plan, either for document submission and review for loan modification, to pursue another direction, or to conclude mediation. Lenders and counsel are often able to group their cases and attend mediation in many cases on the same day. This successful pilot will be expanded in 2013.

### *B. Staffing*

The governing legislation authorized the funding of positions from a surcharge imposed on each foreclosure filing. P.L. 2009, ch. 402, § 26. These positions currently include a Program Manager, an administrative and data assistant, and three foreclosure clerks. Starting in 2011, the FDP also funded two additional part-time clerk positions, using vacant positions within the Judicial Branch. The FDP plans to fund these positions as long as they are needed for FDP caseload management.

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<sup>1</sup> Rule 93(e)(4) of the Maine Rules of Civil Procedure allows the anticipated 90-day time period for mediation to be extended by party agreement.

Because not all foreclosure cases are resolved through mediation, the court has added three limited-term foreclosure law clerks to assist trial judges with the foreclosure caseload. The FDP will continue to monitor the need for these positions in 2013.

### C. *Statewide Mediator Roster and Training*

Currently, there are 32 active certified mediators on the statewide roster. Although the number of dedicated mediators has been sufficient to provide mediation, the FDP will expand the roster of mediators in 2013 to improve the delivery of mediation services in certain regions.

The FDP has provided training to the mediators annually. In 2009, the preliminary training focused on the context and reasons for the national foreclosure crisis, federal loss mitigation programs, relevant foreclosure law, mediation, and the FDIC net present value worksheet (NPV). Trainings in 2010 and 2011 provided further in-depth review of these issues. In 2012, FDP trainings addressed best use of the NPV, foreclosure law, a new FDP Policy on Mediator Conflicts of Interest and Disclosures, and Guidelines for FDP Mediators on Reports of Noncompliance. The Guidelines were based on cases in which previous reports of noncompliance had resulted in sanctions ordered by judges.<sup>2</sup>

## III. Performance of the Program

### A. *Foreclosure Filing Activity and Public Knowledge of Mediation Program*

In 2010, the first full year of the FDP, foreclosure filings in Maine peaked at 5,409.<sup>3</sup> In 2011, the number of cases filed decreased by 13% to 4,697 cases, and filings fell by another 7% in 2012 to 4,331 cases statewide. The rate of participation in the FDP has increased since 2010. Initially, mediation was requested in 30% of foreclosure cases filed, but mediation was requested in 43% of foreclosure cases filed in 2012.

### B. *Homeowner Assistance: Attorneys and Housing Counselors*

In 2012, mediators' reports indicated that 585 homeowners in the FDP obtained legal advice in conjunction with a foreclosure action, and 788 obtained assistance in preparing financial paperwork from housing counselors, legal services, or financial counselors. These totals peaked in 2011, when 721 homeowners in the FDP obtained legal advice, and 901 obtained assistance with forms. In 2010, 312 homeowners obtained legal advice, and 409 homeowners obtained assistance with forms.

### C. *Volume of Mediation*

Over the past three years, FDP mediators conducted 6,242 mediation sessions in 3,789 cases. (See Chart 2 attached.) This represents approximately 26% of foreclosure cases filed in this period, but the proportion of cases mediated has increased annually. Each year has seen an

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<sup>2</sup> Pine Tree Legal Assistance and Maine Attorneys Saving Homes collected the court orders and shared them with the FDP.

<sup>3</sup> All reported figures are based on the calendar year, not the State of Maine fiscal year.

increase in the number of cases mediated and the number of mediation sessions held, despite the decline in foreclosure filings. In 2012, FDP mediation was conducted in 1,650 cases, compared to 1,574 cases in 2011 and 993 cases in 2010. The FDP has provided an average of 1.6 mediation sessions per case over three years, although, as discussed above, multiple mediation sessions have occurred in many cases.

#### *D. Status of Cases Participating in Mediation*

The annual and cumulative data<sup>4</sup> on cases mediated from 2010 through 2012 is presented in Chart 2. After mediation, cases fall into one of four categories: dismissed, judgments entered, remaining in mediation, or returned to the civil docket for litigation.

##### 1) Cases dismissed and types of agreements

One of the most striking successes of the FDP is the rate of dismissals. Generally, dismissals indicate retention of the home and the loan. More than half of the cases mediated in 2010 and 2011 resulted in dismissals. Thus far, 40% of all cases mediated have been dismissed (or 10% of all foreclosure cases filed in this period), including 19% of the cases mediated in 2012. If the pattern demonstrated by the earlier mediated cases continues, the rate of dismissals will increase as the cases proceed to conclusion.

FDP mediation has produced several types of agreements. Loan modifications are confirmed in at least 15% of the cases mediated since the inception of the program. Regrettably, the FDP is not able to capture the reason for dismissal in most cases. Often the details of parties' agreements are not shared at the time a case leaves mediation, or the parties reach agreement after mediation. Although the FDP is able to detect a later dismissal of the case, the reason for the dismissal cannot be identified. The types of known agreements are presented in Chart 3 attached.

##### 2) Cases in which foreclosure judgments entered

As shown on Chart 2, the percentage of judgments also rises as the cases proceed towards resolution. One-third of the cases mediated in 2010 have resulted in foreclosure judgments to date.

##### 3) Cases remaining in the FDP

Of the cases mediated in 2012, 31% (512 cases) remain in the FDP. In some of these cases, parties have participated in multiple mediation sessions for a variety of reasons, including serial document requests. The FDP is now reviewing these cases to determine how to move them to resolution in a manner that does not unduly prolong the process but recognizes that the more complicated cases may require additional resources.

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<sup>4</sup> Since July, 2011, the FDP has tracked cases through a custom online database, the Alternative Dispute Resolution Information System (ADRS), which enhanced FDP data collection and analysis.

In other cases, the parties may have agreed to “stay” the case in order to allow them to enter into trial payment plans that may lead to permanent loan modification agreements. These trial payment plans generally involve a three-month period during which the homeowner must make regular payments at an amount close to the expected payment amount if a permanent modification is made. Although this arrangement prolongs the period of mediation, it is an important protection to the loan modification process, assuring the parties’ continued communication until an agreement becomes final.

#### 4) Cases returned to the civil docket

In 2012, 41% (681 cases) were returned to the civil docket for litigation following mediation, but these cases will not necessarily conclude in foreclosure judgments. Parties who engaged in mediation frequently continue to work together even after mediation has concluded, and their efforts may result in dismissal.

### **IV. Challenges**

#### *A. Recruitment*

The statewide roster of FDP mediators has experienced attrition in 2011 and 2012. The FDP will actively recruit and train additional mediators to serve in the Midcoast area and Aroostook, Penobscot, Hancock, and Washington Counties, and other regions as needed.

#### *B. Avoid Undue Delays*

Mediation provides a valuable opportunity to establish a communication channel, but delay in assessing options may work to the disadvantage of the lender and the borrower, although not necessarily to the disadvantage of the servicer of the loan. Homeowners may lose options as their defaulted loans age and arrearages accumulate, and lenders may lose revenue. The FDP strives to provide a full and fair opportunity to explore all feasible options but also recognizes that cases should not remain in mediation indefinitely and must move forward to conclusion.

### **V. Comments From Consumers of FDP Services**

Exit surveys provided at mediation and other written feedback reflect positive comments by FDP participants:

“Mediation was an essential part of this process. I do not think I could have remained in my house without it.”

“Mediation has caused [Bank X] to review the application and offer a trial mod. Without this program, my client would have lost his home and [Bank X] would have had another foreclosure.”

“My wife and I could not have saved our home without this process. This process was clearly and completely a Godsend and literally saved our world.”

“I am an attorney with 25 years experience . . . . My final comment is that I have been surprised at the percentage of meritorious modifications. The greatest majority of the borrowers are not 'deadbeats' they are good responsible citizens who found themselves in a bad situation. . . . The system is therefore beneficial but it remains inefficient, primarily due to the outstanding document requests.”

#### **IV. Conclusion**

For three years, the FDP has provided a valuable opportunity to parties in eligible foreclosure actions across Maine to resolve their cases through mediation. Many Maine homeowners have reached agreements with their lenders to retain their homes, and lenders have retained performing mortgages and avoided adding inventory to their foreclosure properties. The result is dismissal of 40% of all mediated cases to date.

The FDP remains committed to providing effective mediation services in an efficient and timely manner. A pilot project to streamline the process and recruitment of additional mediators are on the horizon for this vibrant program.

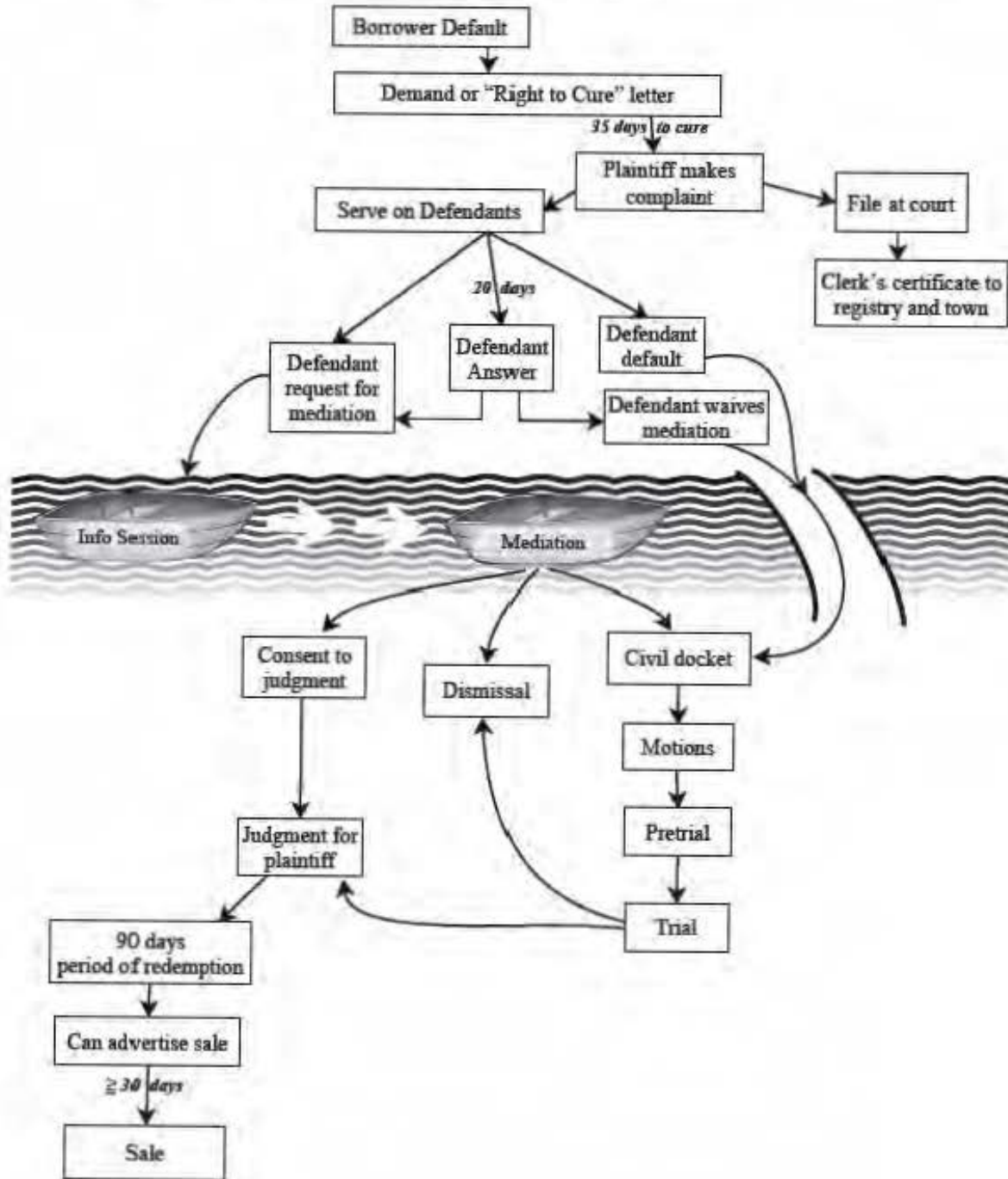
Respectfully Submitted,

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Date: February 15, 2013



# The Foreclosure Process



**Chart 2 – Status of Cases Participating in Mediation**

| Foreclosure Diversion Program Cases           | 2012 Cases | %   | 2011 Cases | %   | 2010 Cases | %   | Total Cases | %   |
|---|------------|-----|------------|-----|------------|-----|-------------|-----|
| <b>Total Mediation Sessions Held</b>          | 2,546      | -   | 2,435      | -   | 1,261      | -   | 6,242       | -   |
| <b>Total Cases Participating in Mediation</b> | 1,650      | -   | 1,574      | -   | 993        | -   | 3,789       | -   |
| <b>Average Mediation Sessions per Case</b>    | 1.5        | -   | 1.5        | -   | 1.3        | -   | 1.6         | -   |
| <b>Cases Dismissed</b>                        | 315        | 19% | 812        | 52% | 567        | 57% | 1,499       | 40% |
| <b>Foreclosure Judgments Entered</b>          | 142        | 9%  | 379        | 24% | 323        | 33% | 786         | 21% |
| <b>Cases Remaining in FDP</b>                 | 512        | 31% | 46         | 3%  | 12         | 1%  | 529         | 14% |
| <b>Cases Returned to Civil Docket</b>         | 681        | 41% | 337        | 21% | 91         | 9%  | 975         | 26% |

**Chart 3 – Types of Dismissal Agreements Reached**

| Type of Agreement Reached In Dismissed Cases | 2012 Cases Mediated |             | Cases Mediated 2010-2012 |             |
|--|---------------------|-------------|--------------------------|-------------|
| <b>Loan Modification</b>                     | 82                  | 26%         | 221                      | 15%         |
| <b>Reinstatement</b>                         | 13                  | 4%          | 23                       | 2%          |
| <b>Repayment/Forbearance Plan</b>            | 1                   | <1%         | 12                       | 1%          |
| <b>Deed in Lieu of Foreclosure</b>           | 7                   | 2%          | 15                       | 1%          |
| <b>Short Sale</b>                            | 9                   | 3%          | 34                       | 2%          |
| <b>Other</b>                                 | 12                  | 4%          | 60                       | 4%          |
| <b>Unknown</b>                               | 191                 | 61%         | 1,134                    | 76%         |
| <b>TOTAL</b>                                 | <b>315</b>          | <b>100%</b> | <b>1,499</b>             | <b>100%</b> |