



# Now We're Talking

## A Look at Current State-Based Foreclosure Mediation Programs and How to Bring Them to Scale

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# Introduction and summary

There is a growing recognition in states across the country of the value of requiring foreclosure mediation when homeowners and their lenders and mortgage service companies enter the foreclosure process. A year ago, the Center for American Progress was one of the first organizations to highlight the need for these foreclosure mediation services at the federal level, pointing out the effectiveness of several of these programs at the state level.<sup>1</sup> Required mediation prior to foreclosure is not yet a part of federal efforts to prevent unnecessary foreclosures, either within the suite of Making Home Affordable programs, or as part of loss mitigation efforts for federally backed mortgages.<sup>2</sup> Still, there are encouraging signs; the number of states and municipalities that are in the process of implementing these kinds of mediation programs—joining other states that already boast such programs—are significantly on the rise since we completed our last report.

Today the number of jurisdictions with foreclosure mediation programs is nearly double the number a year ago, with jurisdictions in 21 states now offering foreclosure mediation or negotiation programs, up from 11 in our report last June. And we expect the list to continue to grow as legislation already introduced in additional states becomes law. What's more, the promise and practicality of foreclosure mediation is garnering support nationwide, including that of the American Bar Association.<sup>4</sup>

Based on our in-depth analysis of existing foreclosure mediation programs and their successes (and failures) at bringing homeowners and their mortgage servicers together to settle claims without resorting to losing/taking the property in foreclosure, we find that the optimal programs are those in which the first mediation session is automatically scheduled by the state once the mortgage servicer initiates the foreclosure process. We recommend that automatic mediation programs should be available wherever a borrower lives in a state, and, to that end, local pilot programs in some states should be expanded statewide. Specifically, we recommend that:

- States with so-called opt-in mediation programs, which require the homeowner to ask for mediation services, should evolve to automatically scheduled mediation, which is often called mandatory mediation. This step would promote greater participation while resulting in the same high percentage of win-win settlements for homeowners and mortgage servicers.
- States with mature pilot programs in selected jurisdictions now have foreclosure mediation as a proven solution to minimize foreclosures and should formalize them statewide.
- In states with pending legislation that would implement robust mediation programs, we recommend swift passage of the legislation.
- States with no mediation program and no plans for one should work through the state legislature and/or judiciary to put one in place.

In the body of our report we run through these key points, providing an update on the applicable states in greater detail along the way. (See table for a brief rundown of the various foreclosure mediation programs now operating in 21 states.)

## Use of “servicers” in this report

Please note that for ease of reading we refer to lenders and mortgage servicers collectively as “servicers” throughout this report. Practically, this is because the vast majority of foreclosures are undertaken by servicers on behalf of lenders. In many instances the servicers are divisions or subsidiaries of large lenders but nonetheless operate as separate entities. While this distinction may seem small, as discussed in our previous report, the servicing agreement, the fees paid to servicers, and the consequent incentives have a major impact on foreclosure. See “It’s Time We Talked: Mandatory Mediation in the Foreclosure Process” for a more complete discussion.<sup>3</sup>

# Existing mediation programs

Most states have a single method of foreclosure used the vast majority of the time

## Predominant type of foreclosure

State foreclosure law is set by state statute. Most states permit both judicial and nonjudicial foreclosure, described below, but they have a single method that is used the vast majority of the time, usually because it has the simpler process under that state’s law.

**Judicial:** The servicer sues the homeowner in court to foreclose on the property. Proceedings resemble standard civil cases, so notice will come on a court form.

**Nonjudicial:** The servicer issues a notice to the homeowner that they intend to put the property up for foreclosure sale at the end of a waiting period set by statute. The state court is not involved in any way.

## Opt-in vs. automatic

**Opt-in:** Opt-in programs require that the homeowner be sent a notice that mediation (or, in a few cases below, negotiation) is avail-

able, but program administrators do not schedule a session unless the homeowner responds to the notice and requests one.

**Automatic:** Automatic mediation, also known as mandatory mediation, is automatically scheduled by the program administrator when foreclosure is initiated either through notice of a foreclosure sale in nonjudicial foreclosure jurisdictions or through filing a judicial foreclosure in others.

## Program initiator

This refers to the state government body that put the program into effect. Legislatures create programs through state law. Judiciaries create programs under the auspices of their powers under state law, a state constitution, or common law equity. While a number of individual judicial circuits have independently created programs in the absence of state action, the only instances in which municipal legislatures have created programs have been in Rhode Island’s cities, where the city councils have done so by ordinance.

| State <sup>5</sup>  | Predominant type of foreclosure | Opt-in vs. automatic | Date       | Program initiator   |
|---------------------|---------------------------------|----------------------|------------|---------------------|
| 1 CA                | Nonjudicial                     | Automatic*           | 9/6/2008   | Legislature         |
| 2 CT                | Judicial                        | Automatic†           | 7/1/2008   | Legislature         |
| 3 DE <sup>6</sup>   | Judicial                        | Opt-in               | 9/15/2009  | Judiciary           |
| 4 FL                | Judicial                        | Automatic†           | Early 2009 | Judiciary           |
| 5 HI <sup>7</sup>   | Nonjudicial                     | Opt-in               | 11/1/2009  | Judiciary           |
| 6 IL                | Judicial                        | Opt-in               | 7/1/2009   | Judiciary           |
| 7 IN <sup>8</sup>   | Judicial                        | Opt-in               | 7/1/2009   | Legislature         |
| 8 KY (Single jur.)  | Judicial                        | Opt-in               | 3/30/2009  | Judiciary           |
| 9 MD <sup>9</sup>   | Nonjudicial                     | Opt-in               | 4/13/2010  | Legislature         |
| 10 ME               | Judicial                        | Opt-in               | 1/1/2010   | Legislature         |
| 11 MI               | Nonjudicial                     | Opt-in*              | 7/5/2009   | Legislature         |
| 12 NV               | Nonjudicial                     | Opt-in               | 9/1/2009   | Legislature         |
| 13 NJ               | Judicial                        | Opt-in               | 10/16/2008 | Judiciary           |
| 14 NH               | Judicial                        | Opt-In               | 6/29/2009  | Legislature         |
| 15 NM (Single jur.) | Judicial                        | Opt-in               | 4/30/2009  | Judiciary           |
| 16 NY               | Judicial                        | Automatic†           | 6/1/2008   | Legislature         |
| 17 OH (mult. jur.)  | Judicial                        | Opt-In               | 11/1/2008  | Judiciary           |
| 18 OR               | Nonjudicial                     | Opt-in*              | 9/28/2009  | Legislature         |
| 19 PA (mult. jur.)  | Judicial                        | Automatic            | 4/16/2008  | Judiciary           |
| 20 RI (mult. jur.)  | Nonjudicial                     | Automatic†           | 8/7/2009   | Legislature (local) |
| 21 WI               | Judicial                        | Opt-in               | 7/1/2009   | Legislature         |

<sup>\*</sup> Negotiation program; no requirement for presence of a neutral third party.  
<sup>†</sup> Changed from an opt-in to automatic program since our previous report.  
Source: Authors’ analysis of state programs.

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