

# **A (Mortgage) Crisis in Communication: Foreclosure Dispute Resolution as Effective Response?**

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## **I. INTRODUCTION**

As states seek ways to address the foreclosure crisis, many have implemented dispute resolution programs to provide an opportunity for borrowers and lenders to have a one-on-one meeting, facilitated by a third-party neutral. These programs vary considerably in goals, structure, funding, resources provided to borrowers, and requirements for both parties. They also vary greatly in their ability to funnel cases into the program and to reach resolution—especially retention of the home—once there. Although retention is not the only measure of success for foreclosure dispute resolution programs, available program statistics render cases completed and resolutions achieved the only measures that can currently be evaluated across multiple programs.

In this article, the authors analyze foreclosure dispute resolution program variables to determine whether any factors indicate a program's efficacy. First, the authors provide a brief overview of foreclosure dispute resolution system design and current program goals. Then, the authors enumerate the limited program statistics currently available. The article then discusses what the statistics

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mean, including the evidence that strong case management is required for high resolution rate. As there is little correlation between other program variables and program success, in large part because of insufficient data and difference in tracking it, the article calls for better, more standardized data collection and reporting. Finally, the authors make recommendations for improving foreclosure dispute resolution programs and outline best practices.

## II. FORECLOSURE DISPUTE RESOLUTION

Does it work? This is often the first question we, colleagues at Resolution Systems Institute (RSI)—a not-for-profit consulting firm that specializes in court alternative dispute resolution<sup>1</sup>—are asked when we mention that we help courts and government agencies develop foreclosure dispute resolution programs. The foreclosure crisis has significantly impacted thousands of families, neighborhoods, and cities across the country.<sup>2</sup> It has also ravaged local, state, and national economies.<sup>3</sup> Thus, conscientious stakeholders—from consumer advocacy groups, to bank lobbyists, to Members of Congress—want to know what solution will remedy the crisis. It is difficult, then, to have to answer this common question with a law school exam answer: “It depends.”

The first foreclosure dispute resolution program began in Iowa in 2007.<sup>4</sup> There, the Attorney General adapted a dispute resolution model used during the 1980s farm-lender crisis<sup>5</sup> to the new strain of foreclosure crisis—residential

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1. RESOLUTION SYSTEMS INSTITUTE, <http://www.aboutrsi.org> (last visited Jan. 9, 2013).

2. WILLIAM C. APGAR, MARK DUDA & ROCHELLE NAWROCKI GOREY, HOMEOWNERSHIP PRES. FOUND., THE MUNICIPAL COST OF FORECLOSURES: A CHICAGO CASE STUDY 55 (2005), available at [http://neighborworks.issuelab.org/research/listing/municipal\\_cost\\_of\\_foreclosure\\_a\\_chicago\\_case\\_study](http://neighborworks.issuelab.org/research/listing/municipal_cost_of_foreclosure_a_chicago_case_study).

3. Atif Mian, Amir Sufi & Francesco Trebbi, *Foreclosures, Home Prices, and the Real Economy* 30 (Nat'l Bureau of Econ. Research, Working Paper No. 16685, 2011), available at <http://www.nber.org/papers/w16685>.

4. See Press Release, Iowa Dep't of Justice, Office of the Att'y Gen., Miller Organizes Mortgage Foreclosure Project To Prevent Flood of Foreclosures (Sept. 11, 2007), available at [http://www.iowa.gov/government/ag/latest\\_news/releases/sept\\_2007/Foreclosure\\_Hotline.html](http://www.iowa.gov/government/ag/latest_news/releases/sept_2007/Foreclosure_Hotline.html).

5. See Joyce Hoelting, *Lessons Learned from 22 Years of Debt Mediation*, COMMUNITY DIVIDEND, May 2009, at 1, 1-3, available at <http://www.minneapolis>

mortgages. Soon after, non-judicial and judicial foreclosure states as diverse as Connecticut,<sup>6</sup> Nevada,<sup>7</sup> and Ohio<sup>8</sup> created their own dispute resolution models. Smaller areas, mostly court districts or counties, followed.<sup>9</sup> Finally, municipalities began to pass ordinances, developing dispute resolution programs for affected residents within their jurisdictions.<sup>10</sup>

To understand the structure of a foreclosure dispute resolution program, imagine the process as a funnel. Generally, a foreclosure dispute resolution program involves a court or government agency notifying all borrowers in foreclosure of the availability of a dispute resolution process.<sup>11</sup> The borrower then is either automatically scheduled for a dispute resolution session (called an “opt-out” program because borrowers must elect not to participate), or the borrower has the opportunity to request to participate in foreclosure dispute resolution (called an “opt-in” program). Often, the program’s managing agency will then conduct a screening to determine if the case is eligible for dispute resolution.<sup>12</sup> So,

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isfed.org/publications\_papers/pub\_display.cfm?id=4193 (discussing the farm-lender mediation program begun during the 1980s farm crisis).

6. *Judicial Branch Foreclosure Mediation Program*, CONN. JUD. BRANCH, <http://www.jud.ct.gov/foreclosure/> (last visited Jan. 12, 2013).

7. *Nevada Foreclosure Mediation Program*, NEV. JUD., <http://foreclosure.nvadajudiciary.us/index.php/index.php> (last visited Jan. 12, 2013).

8. *Foreclosure Mediation in Ohio: What You Need To Know*, SUPREME CT. OHIO, <http://www.supremecourt.ohio.gov/JCS/disputeResolution/foreclosure/FAQ.asp> (last updated July 27, 2010).

9. See HEATHER SCHEIWE KULP, RESOLUTION SYS. INST., FORECLOSURE DISPUTE RESOLUTION MODELS STATE-BY-STATE (2012) [hereinafter DISPUTE RESOLUTION MODELS], available at [http://aboutrsi.org/pfimages/ForeclosureMediationProgramModels\\_September2012.pdf](http://aboutrsi.org/pfimages/ForeclosureMediationProgramModels_September2012.pdf) (including all current foreclosure dispute resolution program models).

10. See, e.g., *id.* at 80 (Springfield, Mass.); *id.* at 86 (St. Louis, Mo.); *id.* at 116 (Providence, R.I.).

11. See, e.g., Poster of Notice of Availability of Mediation, N.J. Courts (Oct. 2012), available at [http://www.judiciary.state.nj.us/civil/forms/11284\\_fm\\_available.pdf](http://www.judiciary.state.nj.us/civil/forms/11284_fm_available.pdf); Notice to Homeowner: Availability of Foreclosure Mediation, Conn. Judicial Branch (July 2009), available at <http://www.jud.ct.gov/webforms/forms/cv094.pdf>.

12. What constitutes eligibility varies from program to program. Some programs allow any resident in foreclosure to participate; some are restricted to only those in one-to-four unit buildings; some permit anyone who is employed to participate; and others are restricted to only people who can afford a reasonable mortgage payment of thirty-one percent of their income. See, e.g., Press Release,

even if a borrower requests or is automatically scheduled for dispute resolution, the borrower may not be referred into a foreclosure dispute resolution session. Some financial paperwork may be required from the participating parties before or during the process, especially if the borrower wishes to apply for a loan modification. In the case of a loan modification application, the servicer needs to receive a complete financial packet before reviewing the borrower for a modification.<sup>13</sup>

Once in a dispute resolution session, a neutral third-party, sometimes called a mediator (though there is much debate about whether this is mediation in the statutory or traditional sense),<sup>14</sup> facilitates a discussion between the borrower and a servicer representative about the borrower's options.<sup>15</sup> At the end of a session, agreements may be reached to continue to a second session, proceed with foreclosure, exchange more paperwork, or pursue a specific alternative to foreclosure.<sup>16</sup> After the neutral or the parties determine that dispute resolution is complete, those funneled through to the end fall into a few categories. The parties may reach an agreement, a partial agreement,

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Conn. Judicial Branch, Notice Regarding the Foreclosure Mediation Program, <http://www.jud.ct.gov/external/news/press270.htm> (last visited Jan. 12, 2013) (limiting program participation to owner-occupants of one, two, three, or four family residences).

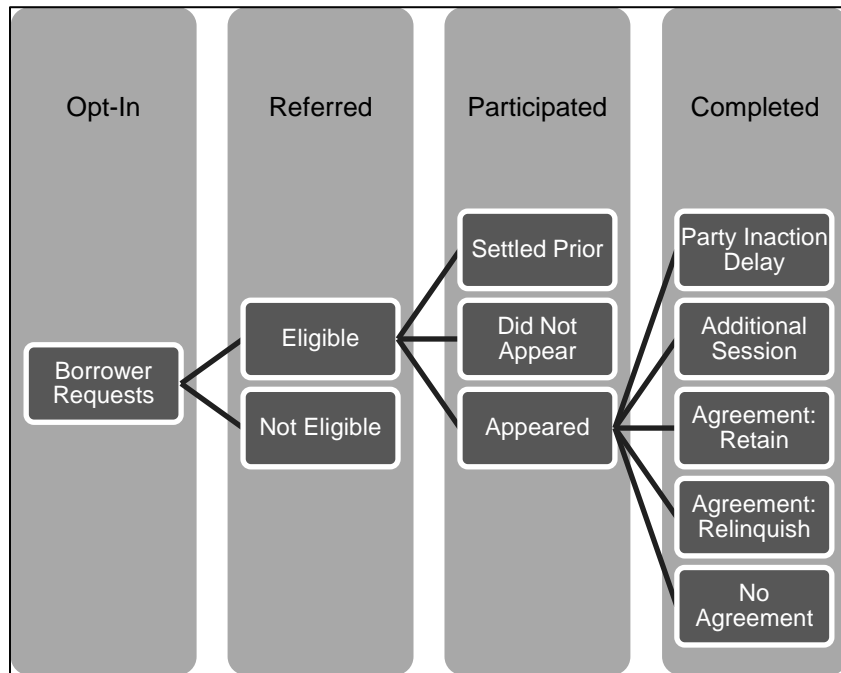
13. *Request a Home Affordable Modification*, MAKING HOMES AFFORDABLE (Dec. 28, 2011, 12:16 PM), <http://www.makinghomeaffordable.gov/get-assistance/request-modification/Pages/default.aspx>.

14. Memorandum from Heather Scheiwe Kulp, Staff Att'y, Resolution Sys. Inst., to the Unif. Law Comm. on Residential Mortg. Foreclosure, Mortgage Foreclosure Committee Meeting Re: Dispute Resolution 2-3 (May 16, 2012), available at [http://www.uniformlaws.org/shared/docs/mortgage%20foreclosure/5\\_2012may16\\_RREMPPF\\_Dispute%20Resolution%20Memo\\_Kulp.pdf](http://www.uniformlaws.org/shared/docs/mortgage%20foreclosure/5_2012may16_RREMPPF_Dispute%20Resolution%20Memo_Kulp.pdf).

15. The neutral may be very active in this discussion, sometimes even offering options for consideration. For example, Maryland's program uses administrative law judges to "hear" cases. *Foreclosure Mediation*, MD. OFFICE ADMIN. HEARINGS, <http://www.oah.state.md.us/foreclosuremediation.asp> (last visited Jan. 12, 2013). In other states, the neutral's role is more facilitative; the neutral does not offer solutions, but asks parties questions to help them determine their best options. Ohio's foreclosure mediators, for example, are instructed to be facilitative. *Foreclosure Mediation in Ohio: What You Need To Know*, *supra* note 8.

16. See NEV. JUDICIARY, FISCAL YEAR 2012 STATISTICS, NEVADA FORECLOSURE MEDIATION PROGRAM 1 (2012), [hereinafter NEVADA 2012 STATISTICS], available at <http://foreclosure.nevadajudiciary.us/images/statistics/> (follow "Full Report" link under FY 2012 Statistics (July 1, 2011-June 30, 2012)).

or no agreement; those that reach agreement may have chosen either relinquishment (the borrower will sell or otherwise leave the home) or retention (the borrower will remain in the home).<sup>17</sup> Agreement results can be parsed further by types of relinquishment and retention options.<sup>18</sup> The graph below represents the phases of foreclosure dispute resolution that a program could track, though few programs gather information and report such information about each of these phases.



While some localities have modeled their programs from others already in existence, even copycat programs have had to modify certain aspects to fit local resources, contexts, or needs.<sup>19</sup> Thus, the over fifty currently existing programs across twenty-six states have nearly as many

17. *Id.* at 2.

18. *Id.* at 3-4.

19. Washington D.C., Hawaii, and Washington State modeled their programs after Nevada's program, as they share the common characteristic of being non-judicial foreclosure states. Interview with Verise Campbell, Program Manager, Nev. Foreclosure Mediation Program (June 8, 2012).

designs.<sup>20</sup> Dispute system design theory describes how these varying models will also produce varying results in need of evaluation.<sup>21</sup> Indeed, this article attempts to analyze and evaluate publicly reported data to understand why the programs have such disparate outcomes.

In analyzing a program, we do not label programs as “successful” or “unsuccessful”; each program’s unique goal makes it impossible to articulate a standardized measure for success. Instead, we analyze available data based on the articulated goals of each program. For instance, if a program purports to seek an alternative to foreclosure for every borrower in the state, then the data we expect to find includes how many borrowers in the state were referred into the dispute resolution program, how many foreclosure files were settled without foreclosure before a dispute resolution process occurred, and how many foreclosure files were settled during dispute resolution without a foreclosure occurring. If the data is available, we determine if the program is meeting its goals and, if not, what piece of the designed dispute system is blocking its success.

The importance of monitoring and evaluating alternative dispute resolution programs is incontestable.<sup>22</sup> Regularly tracking and reporting a variety of data about a program, its participants, and its outcomes allows those monitoring programs to notice trends and respond to needs efficiently.<sup>23</sup> Moreover, consistently reported data renders regular, in-depth internal evaluations much easier to conduct. Evaluations, especially when made public, make transparent the work of a court or government program.<sup>24</sup> Transparency, in turn, can lead to greater trust from stakeholders and the public and can produce important

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20. See generally DISPUTE RESOLUTION MODELS, *supra* note 9.

21. See, e.g., Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-friendly Guide To Selecting an ADR Procedure*, NEGOT. J., Jan. 1994, at 49, 53, 55; Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 132 (2009).

22. JENNIFER SHACK, RESOLUTION SYS. INST., MONITORING AND EVALUATION: AN OVERVIEW 1-2 (2008), available at <http://courtdadr.org/files/MonitoringEvaluation.pdf>.

23. *Id.*

24. *Id.*

insights about a program's efficacy, value, and optimal (potentially smaller) size.<sup>25</sup>

Yet, this fear of facing reductions—even if the program is largely ineffective and inefficient—paralyzes many alternative dispute resolution (ADR) programs designed to serve the public good. This may be a primary reason why programs do not issue comprehensive statistics. The authors made a great attempt to uncover outcome data from every program in the United States. Of the approximately sixty programs that have been established, fewer than ten have made available the percentage of foreclosure cases that completed dispute resolution and even fewer have provided the percentage of borrowers who retained their home as a result of their participation.<sup>26</sup> These statistics are the most basic that any program should gather and make public. Even fewer programs have conducted any evaluations.<sup>27</sup> Only one, Philadelphia, has conducted a full-scale, publicly available evaluation.<sup>28</sup> Thus, our analysis is far less substantial or conclusive than it could be and should be.

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25. See, e.g., Jason Hidalgo, *Metrics that Evaluate Nevada Effort Being Made Public—Slowly*, RENO GAZETTE-J., Mar. 18, 2012, at 1E, available at <http://www.rgj.com/article/20120320/BIZ02/303200002/Is-Nevada-s-foreclosure-program-effective->.

26. See JENNIFER SHACK & HEATHER SCHEIWE KULP, RESOLUTION SYS. INST., FORECLOSURE DISPUTE RESOLUTION BY THE NUMBERS 2-18 (2012) [hereinafter RESOLUTION BY THE NUMBERS], available at <http://courtdr.org/files/ForeclosureDRStats.pdf>.

27. See ROBERT CLIFFORD, NEW ENG. PUB. POLICY CTR., STATE FORECLOSURE PREVENTION EFFORTS IN NEW ENGLAND: MEDIATION AND ASSISTANCE 4 (2011) [hereinafter FORECLOSURE PREVENTION IN NEW ENGLAND], available at <http://www.bos.frb.org/economic/neppc/researchreports/2011/neppcrr1103.pdf>; THE REINVESTMENT FUND, PHILADELPHIA RESIDENTIAL MORTGAGE FORECLOSURE DIVERSION PROGRAM: INITIAL REPORT OF FINDINGS 2 (2011) [hereinafter PHILADELPHIA FORECLOSURE DIVERSION PROGRAM], available at [http://www.trfund.com/resource/downloads/policypubs/Foreclosure\\_Diversion\\_Initial\\_Report.pdf](http://www.trfund.com/resource/downloads/policypubs/Foreclosure_Diversion_Initial_Report.pdf); STATE OF ILL. CIRCUIT COURT OF COOK CNTY., CHANCERY DIVISION MORTGAGE FORECLOSURE MEDIATION PROGRAM: PROGRESS REPORT 17 fig.6 (2012) [hereinafter COOK CNTY. PROGRESS REPORT], available at <http://www.cookcountycourt.org/ABOUTTHECOURT/CountyDepartment/ChanceryDivision/MortgageForeclosureMechLien/MediationProgram/Publications.aspx>.

28. PHILADELPHIA FORECLOSURE DIVERSION PROGRAM, *supra* note 27, at 2, 4.

However, the available data and our work across the country have allowed us to present some findings and suggest further research. This study has also allowed us to develop best practices for foreclosure dispute resolution programs.<sup>29</sup> As of this writing, only Jacqueline Hagerott, manager of the Supreme Court of Ohio's Dispute Resolution Section,<sup>30</sup> the National Consumer Law Center,<sup>31</sup> and the Department of Justice with the Department of Housing and Urban Development<sup>32</sup> have published best practices; they mirror many practices proposed here. The best practices are flexible enough so programs may adapt elements to match local goals and circumstances, yet they stand for universal principles that will improve any ADR program aimed to manage residential foreclosure disputes.

This article has four primary purposes. First, it describes the statistical information currently available from foreclosure dispute resolution programs. Reference is made to RSI's report, *Foreclosure Dispute Resolution by the Numbers*, which aggregates this data into accessible graphical formats.<sup>33</sup> Where applicable, it attempts to insert such graphs into the article. Note that the states for which data is publicly available represent less than half of all states with operational dispute resolution programs.<sup>34</sup> Thus, some states' programs that readers may expect to see are not discussed.<sup>35</sup> Second, the article analyzes what the

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29. See generally HEATHER SCHEIWE KULP, RESOLUTION SYS. INST., BEST PRACTICES IN FORECLOSURE MEDIATION (2012) [hereinafter BEST PRACTICES], available at <http://aboutrsi.org/pfimages/ForeclosureMediationBestPractices.pdf>.

30. Jacqueline C. Hagerott, *Foreclosure Mediation: Responding to the Current Crisis*, 40 CAP. U. L. REV. 899, 908-32 (2012).

31. NAT'L CONSUMER LAW CTR., REBUILDING AMERICA: HOW STATES CAN SAVE MILLIONS OF HOMES THROUGH FORECLOSURE MEDIATION 20-22 (2012), available at [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/mediation/report-foreclosure-mediation.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-foreclosure-mediation.pdf).

32. U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF JUSTICE, EMERGING STRATEGIES FOR EFFECTIVE FORECLOSURE MEDIATION PROGRAMS (2010), available at <http://www.justice.gov/atj/effective-mediation-prog-strategies.pdf>.

33. RESOLUTION BY THE NUMBERS, *supra* note 26.

34. *Id.*

35. Those states or programs include: Colorado; Delaware; Hawaii (non-judicial foreclosure, as judicial foreclosure is included here); Illinois' Third and Eleventh Circuits; Indiana; Iowa; Kentucky; Springfield, Massachusetts; St. Louis County, Missouri; New Jersey; New Mexico; New York; most Ohio counties; Oregon; most Pennsylvania counties; Rhode Island; Vermont; Washington State;



limited statistics say, or do not say, about the efficacy of foreclosure dispute resolution programs. In doing so, it indicates that, though there are certainly programs that are achieving their goals, few programs have sufficiently evidenced goal achievement to recommend any one model. Third, because of this gap between actual efficacy and demonstrated efficacy, Part IV proposes systematic data collection and evaluation systems that would greatly improve the ability to analyze and improve the efficacy of foreclosure dispute resolution programs. Fourth, the article suggests foreclosure dispute system design modifications that stem from our data analysis. These suggestions are flexible enough for programs to adapt to a variety of contexts, including both judicial and non-judicial foreclosure states. The goal in providing the suggestions is that they will alleviate, or at least mitigate, current tension between borrower and servicer advocates around foreclosure dispute system design, implementation, and sustainability.<sup>36</sup>

Throughout the article, “servicer” connotes any person who, during the dispute resolution process, represents the party who originated or holds the mortgage. We use this term understanding that the original lender may no longer hold the mortgage note, the entity that holds the note may not be a lender, and the representative at the table may be servicing the mortgage for mortgage pool investors. “Borrower” is used to connote the person who signed for the original mortgage. “Dispute resolution” is a general term for any process in which borrower and lender discuss alternatives to foreclosure in the presence of a neutral third party. Some programs title this process “mediation,” though some in the mediation community challenge this

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and Wisconsin.

36. In 2012, the constitutionality of multiple foreclosure dispute resolution programs was questioned in court. *See, e.g., Easthampton Savings Bank v. City of Springfield*, 874 F. Supp. 2d 25, 31-33 (D. Mass. 2012) (holding county mediation program did not violate the Contract Clause of the U.S. Constitution); *see also* Heather Scheiwe Kulp, *Developing Mediations Programs As an Exercise of Police Power?*, JUST CT. ADR (Dec. 7, 2011), [blog.aboutrsi.org/2011/program-management/developing-mediation-programs-as-an-exercise-of-police-power/#more-575](http://blog.aboutrsi.org/2011/program-management/developing-mediation-programs-as-an-exercise-of-police-power/#more-575) (discussing pending Nevada Supreme Court case in which Wells Fargo argued that Nevada’s state mediation program violates the U.S. Constitution).

label due to the limited options available for settlement or the role of the neutral being contrary to mediation ethical standards.<sup>37</sup> Other programs are called “conciliation,”<sup>38</sup> “diversion,”<sup>39</sup> “settlement conference,”<sup>40</sup> or “dispute resolution.”<sup>41</sup> Because of this diversity, we will use the general term “dispute resolution.”

### III. THE STATISTICS

Few foreclosure dispute resolution programs have published the program’s outcome data.<sup>42</sup> Of those that have, most only provided minimal data, such as participation or settlement rates. Only Philadelphia,<sup>43</sup> Nevada,<sup>44</sup> and Cook County, Illinois,<sup>45</sup> published more comprehensive information. Even though fully evaluating an ADR program as a system is a best practice,<sup>46</sup> to date only Philadelphia’s Court of Common Pleas’ Residential Mortgage Foreclosure Diversion Program has been fully evaluated.<sup>47</sup> The outcomes available from programs vary

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37. See, e.g., Pilar Vaile, *Foreclosure Mediation More Like Facilitation*, ON BEING NEUTRAL (Oct. 23, 2012, 2:39 PM), <http://albuquerqueadr.blogspot.com/2012/10/normal-0-false-false-false-en-us-x-none.html>.

38. See, e.g., KY. EQUAL JUSTICE CTR., JEFFERSON COUNTY FORECLOSURE CONCILIATION PROGRAM (2009), available at [www.kyequaljustice.org/file/view/FCP--pro+bono+overview.doc](http://www.kyequaljustice.org/file/view/FCP--pro+bono+overview.doc).

39. See *Foreclosure Diversion Program*, ME. COURTS, [http://www.courts.state.me.us/maine\\_courts/fdp/index.html](http://www.courts.state.me.us/maine_courts/fdp/index.html) (last visited Jan. 12, 2013).

40. See Kevin Purcell & Rebecca Case-Grammatico, *New York Foreclosure Settlement Conferences*, EMPIRE JUST. CENTER (May 14, 2010), <http://www.empirejustice.org/issue-areas/consumer/mortgage-lending--foreclosure-prevention/foreclosure-prevention-scams/new-york-foreclosure.html>.

41. Lisa Teichner, *What the New Mortgage Foreclosure Bill Means for Hawaii Homeowners*, MAUI NOW (May 12, 2011), <http://mauinow.com/2011/05/12/hawaii-homeowners-and-the-new-mortgage-foreclosure-bill/>.

42. For a summary of the publicly available statistics, see RESOLUTION BY THE NUMBERS, *supra* note 26.

43. See PHILADELPHIA FORECLOSURE DIVERSION PROGRAM, *supra* note 27.

44. *Nevada Foreclosure Mediation Program: Statistics*, NEV. JUD., <http://foreclosure.nevadajudiciary.us/index.php/statistics?format=pdf> (last visited Jan. 12, 2013).

45. COOK CNTY. PROGRESS REPORT, *supra* note 27, at 17 fig.6.

46. See CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* 168 (1996).

47. See PHILADELPHIA FORECLOSURE DIVERSION PROGRAM, *supra* note 27, at 2-4.

significantly, from how many eligible homeowners participate to how many participants retain their homes.

#### A. Participation Rates

For those programs that have reported referral rates, the rates of foreclosure cases being referred to dispute resolution range from five percent in Cook County, Illinois, to ninety-seven percent in Philadelphia.<sup>48</sup> As seen in Figure 1, the percent of eligible foreclosure cases that complete mediation varies from four percent to sixty-nine percent, with the same programs representing the low and high points of the range. Philadelphia far outpaces any other program in participation rates, in part because every eligible foreclosure case is referred directly to conciliation.<sup>49</sup> Will County, Illinois (a program which schedules all borrowers for a pre-mediation session), and Connecticut (a program which schedules only borrowers who file a court appearance for mediation) follow at twenty-five and twenty-two percent, respectively.<sup>50</sup>

These statistics show that eligible borrowers are sometimes not referred to mediation or do not participate for other reasons. Of those borrowers who are deemed eligible for a program, drop-off rates are twenty-eight percent for Philadelphia, twenty-seven percent for Florida, twenty-one percent for Connecticut, and sixteen percent for Will County, Illinois.<sup>51</sup> Only Cook County, with its very low participation rate, and the programs in Franklin County, Ohio, and Cuyahoga County, Ohio, had little difference between referral and participation rates. Franklin County had a drop-off rate of seven percent, and Cuyahoga County had a drop-off rate of eight percent.<sup>52</sup>

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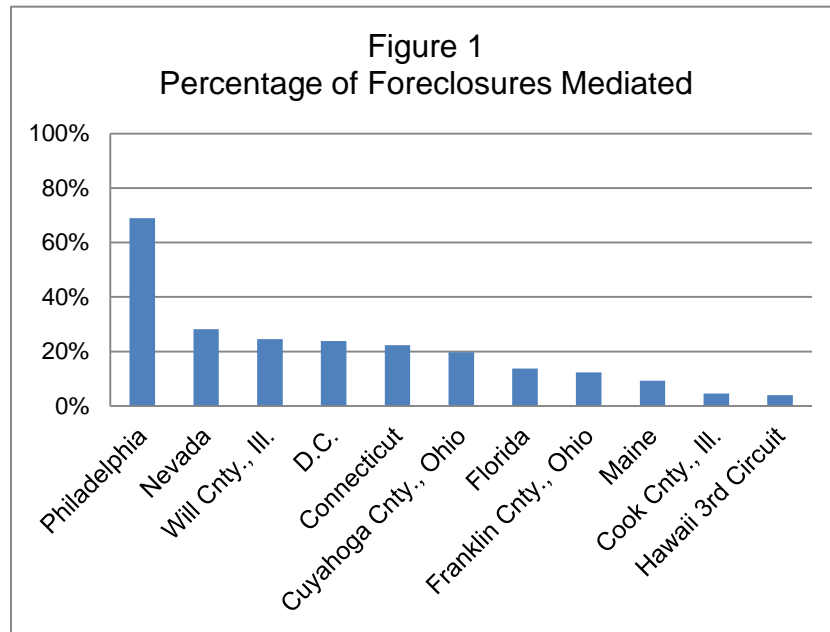
48. RESOLUTION BY THE NUMBERS, *supra* note 26, at 8, 14.

49. PHILA. COURTS, JOINT GENERAL COURT REGULATION NO. 2008-01 RESIDENTIAL MORTGAGE FORECLOSURE DIVERSION PILOT PROGRAM 1 (2008), available at <http://www.courts.phila.gov/pdf/regs/2008/cpjgcr-2008-01.pdf>.

50. RESOLUTION BY THE NUMBERS, *supra* note 26, at 3, 7.

51. *Id.* at 3, 5, 7, 14. “Drop-off rate” refers to the percentage of cases referred to mediation that are not in fact mediated.

52. *Id.* at 12-13.



This difference between referral and participation rates is a result of one party—either the lender or borrower—not completing the requirements to participate, the borrower being deemed ineligible to participate, or an agreement being reached prior to the dispute resolution session. Of the programs providing outcome and process data, only Nevada has analyzed all of the reasons that referred cases do not complete mediation, with breakdowns of homeowner and lender non-compliance and the numbers of cases reaching agreement prior to mediation.<sup>53</sup> The analysis of Nevada’s program shows that fourteen percent of borrowers that are referred to mediation reach an agreement with lenders prior to mediating.<sup>54</sup> In thirty-seven percent of all referred cases, lenders failed to provide required documents.<sup>55</sup> When this happens, the outcome of mediation is deemed to be a non-agreement.<sup>56</sup> It is not clear whether these cases proceeded to mediation at a later

53. NEVADA 2012 STATISTICS, *supra* note 16, at 4-7.

54. *Id.* at 1.

55. *Id.* at 5.

56. *Id.* at 2 n.2, 5.

date and therefore are also included in mediation-completion statistics.

Florida and Washington, D.C., have also provided some information about those who drop off between referral and participation. Florida reported that between March 2010 and March 2011, 8.3% of scheduled mediations did not take place because the servicer (5.5%), the borrower (2.4%), or both (0.4%) failed to appear.<sup>57</sup> In Washington, D.C., one in three cases that was referred to mediation was not allowed to proceed to mediation because the Notice of Default package that the servicer is required to submit was incomplete or inaccurate beyond harmless error.<sup>58</sup>

Some variability across programs in the number of borrowers referred into mediation and those who actually participated in and completed mediation is based on program goals and structure, while some variability is due to how participation is counted. In Cook County, Illinois, borrowers proceed through many stages—including housing counseling, screening for legal defenses, and pro bono legal representation—designed to help them understand the foreclosure process and their options before ever participating in a dispute resolution session.<sup>59</sup> Many more borrowers have availed themselves of those services than have participated in mediation, with more than 19,000 housing counseling appointments (the first step in the process) scheduled in the program's first two years, compared with 3434 mediations completed (the last step in the process) in that time.<sup>60</sup> This means that diverting cases into the program is likely assisting many more borrowers than the completed mediation numbers suggest.

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57. *Foreclosures: Backgrounds and Trends: Presentation Before the H. Subcomm. on Civil Justice* (Fla. 2011) (statement of Lisa Goodner, State Courts Admin.) (on file with author).

58. D.C. DEPT OF INS., SEC. & BANKING, FORECLOSURE MEDIATION PROGRAM STATISTICS MAY 25, 2011-AUGUST 31 (2012) [hereinafter D.C. STATISTICS], available at <http://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Mediation%20Statistics%20as%20of%20August%20%202012%20Final.pdf>; see D.C. MUN. REGS. tit. 26, § 2703.6 (2013).

59. COOK CNTY. PROGRESS REPORT, *supra* note 27, at 9-11.

60. *Id.* at 13.

### B. Agreement Rates

As with participation rates, agreement rates once a borrower participates in a dispute resolution session, represented in Figure 2, vary considerably from program to program, from a low of less than fourteen percent in New Hampshire (this figure is not pictured in Figure 2 as the program was terminated soon after not producing beneficial results)<sup>61</sup> to a high of approximately eighty percent in Connecticut.<sup>62</sup> For the fourteen programs that provided this information, the average rate at which borrowers and lenders achieved agreement at the end of dispute resolution was forty-seven percent, with six programs above fifty percent and eight programs below fifty percent.<sup>63</sup>

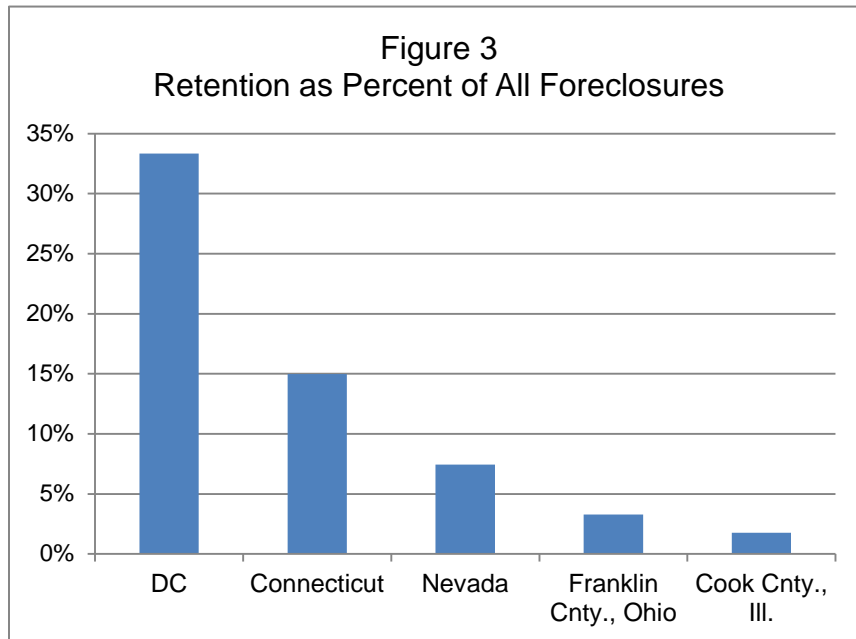
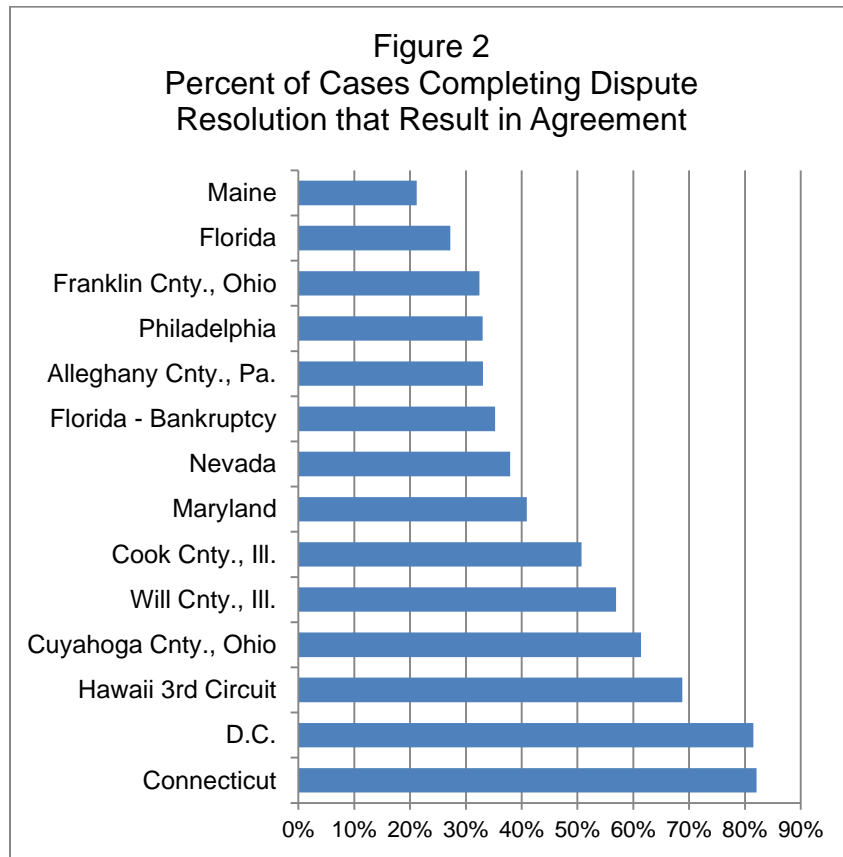
Only five programs provided information on the percentage of all eligible homeowners facing foreclosure who were able to retain their homes through dispute resolution. Those five, represented in Figure 3, varied from two percent in Cook County, Illinois, to seventeen percent in D.C. The following section discusses possible causes for the variation in agreement and retention rates.

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61. FORECLOSURE PREVENTION IN NEW ENGLAND, *supra* note 27, at 12.

62. See RESOLUTION BY THE NUMBERS, *supra* note 26, at 1.

63. *Id.* at 3-15.



## IV. RESEARCH RESULTS

## A. Programs That Are Achieving at Least Some of Their Goals

## 1. Philadelphia

The Reinvestment Fund's 2011 examination of Philadelphia's Foreclosure Diversion Program found the program to be successfully achieving some of its goals.<sup>64</sup> The program's articulated goals include the following:

- (1) Keeping homeowners facing foreclosure in their homes;
- (2) Preserving and protecting neighborhoods from the disadvantages stemming from foreclosed properties;
- (3) Intervening earlier in foreclosure-case processing to improve judicial efficiency; and
- (4) Improving case management of the foreclosure docket, in which ninety percent of cases involve a pro se party, by providing a mechanism to support homeowners and servicers to have substantive discussions about resolution long before a case progresses to trial.<sup>65</sup>

The court has customized a program to achieve these goals.<sup>66</sup> To intervene early in a case, the court automatically sends all residential foreclosures filed to the diversion program, in which lenders and borrowers attend a conciliation conference together.<sup>67</sup> The program partners with a community organization to connect in person with borrowers who have recently had a foreclosure case filed against them.<sup>68</sup> The outreach workers inform the borrowers of the conciliation conference and urge them to appear.<sup>69</sup> To provide support for pro se borrowers, housing counselors and pro bono attorneys assist borrowers

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64. See PHILADELPHIA FORECLOSURE DIVERSION PROGRAM, *supra* note 27, at 24.

65. *Id.* at 2.

66. THE REINVESTMENT FUND, MODEL METHODS TO EVALUATE FORECLOSURE DIVERSION PROGRAMS 1 (2011), [hereinafter MODEL METHODS], available at <http://www.trfund.com/diversionstudymethods.pdf>.

67. *Id.* at 2.

68. *Id.* at 3.

69. *Id.*



throughout the conciliation conference.<sup>70</sup> If needed, a neutral—generally a judge pro tem, civil case manager, or other judge—may offer a recommendation.<sup>71</sup> Often, another session is scheduled to follow up on commitments made in the initial session.<sup>72</sup>

The program appears to have achieved its first goal—keeping homeowners in their homes. The Reinvestment Fund's evaluation found that between April 2008 and March 2011, about two-thirds of all borrowers against whom a foreclosure case had been filed appeared at the initial conference and were determined to be eligible for the program.<sup>73</sup> Of those who were eligible, approximately thirty-three percent of cases ended with an agreement, with another thirty percent of cases still waiting for resolution.<sup>74</sup> Most impressively, of those who reached agreement, eighty-five percent were still in their homes after one year.<sup>75</sup> Of those not participating in the program, only fifty percent were still in their homes after one year.<sup>76</sup> Between the end of 2007 and the end of 2009, the percent of foreclosures filed that ended in a foreclosure sale dropped from 23.4% to 7.9%,<sup>77</sup> although it is not clear how much the program contributed to the drop in foreclosure sales compared to other factors, such as changes in lender practices or market conditions.

The program also appears to have achieved its last goal—improving case management by providing borrowers support. Though diversion does not appear to reduce the number of court orders per case,<sup>78</sup> adding volunteer borrower advocates to the court process does not prolong the foreclosure process.<sup>79</sup> Instead, the court continued to move cases through the system at an average pace but with

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70. *See id.* at 2-3.

71. MODEL METHODS, *supra* note 66, at 3.

72. *See id.* at 14-15.

73. PHILADELPHIA FORECLOSURE DIVERSION PROGRAM, *supra* note 27, at 7 tbl.1.

74. *Id.* at 10.

75. *Id.* at 15.

76. *Id.* at 24.

77. *Id.* at 14.

78. PHILADELPHIA FORECLOSURE DIVERSION PROGRAM, *supra* note 27, at 11-12.

79. *Id.* at 12-13, 23.

better-than-average outcomes.<sup>80</sup> These data points are of particular interest to courts, government agencies, and other stakeholders that are concerned about foreclosure dispute resolution programs extending the timeline of foreclosure.<sup>81</sup> The program's attainment of other goals is less clear, in part because of the difficulty in obtaining good data on factors outside of the court's control, such as neighborhood preservation projects and pre-foreclosure interventions from servicers or borrower advocates.

## 2. Connecticut

Connecticut's program has been effective at encouraging borrowers to elect to mediate and helping "lenders and homeowners achieve a mutually agreeable resolution of a mortgage foreclosure action through the mediation process."<sup>82</sup> Of eligible borrowers, forty-three percent have completed mediation since the program began;<sup>83</sup> this is the highest rate of any program that does not automatically schedule a borrower for dispute resolution. Borrowers who do complete mediation are very likely to come to an agreement; eighty-two percent of

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80. *Id.* at 12, 24.

81. See Univ. of Cal. Berkley Inst. of Governmental Studies, *The Importance of Foreclosure Mediation Programs*, U. CAL. BERKLEY (Oct. 18, 2011), <http://brr.berkeley.edu/2012/10/the-importance-of-foreclosure-mediation-programs/>.

82. See *Judicial Branch Statistics: Foreclosure Mediation Program*, CONN. JUD. BRANCH, <http://www.jud.ct.gov/statistics/FMP/default.htm> (last visited Jan. 12, 2013).

83. See *id.* (providing detailed graphs for FYs 2008-2012 and reporting that of 62,118 eligible cases, only 26,984 cases have completed mediation). Effective July 31, 2009, Connecticut changed its program from one in which homeowners had to affirmatively request mediation to one in which homeowners must attend mediation once they have filed an appearance. See Act of July 31, 2009, Conn. Pub. Act No. 09-209, Substitute S. Bill No. 948, § 33, available at <http://cga.ct.gov/2009/act/pa/2009pa-00209-R00sB00948-pa.htm>. This Act only slightly increased the participation rate from thirty-seven percent in FY 2009 to a high of fifty percent in FY 2011, before declining to forty-three percent in FY 2012. See CONN. JUDICIAL BRANCH, FORECLOSURE MEDIATION PROGRAMS STATISTICS JULY 1, 2008 THROUGH JUNE 30, 2009 (2009), available at [http://www.jud.ct.gov/statistics/FMP/FMP\\_graph\\_2009.pdf](http://www.jud.ct.gov/statistics/FMP/FMP_graph_2009.pdf); CONN. JUDICIAL BRANCH, FORECLOSURE MEDIATION PROGRAM STATISTICS JULY 31, 2010 THROUGH JUNE 30, 2011 (2011), available at [http://www.jud.ct.gov/statistics/FMP/FMP\\_graph\\_2011.pdf](http://www.jud.ct.gov/statistics/FMP/FMP_graph_2011.pdf); CONN. JUDICIAL BRANCH, FORECLOSURE MEDIATION PROGRAM STATISTICS JULY 31, 2011 THROUGH JUNE 30, 2012 (2012), available at [http://www.jud.ct.gov/statistics/FMP/FMP\\_graph\\_2012.pdf](http://www.jud.ct.gov/statistics/FMP/FMP_graph_2012.pdf).

borrowers and servicers who completed mediation fulfilled Connecticut's goal of achieving a mutually agreeable resolution.<sup>84</sup> Even more, borrowers who participate in mediation are likely to retain their homes; two-thirds of those who completed mediation reached an agreement that allowed them to stay in the residence.<sup>85</sup> This has led to a home retention rate of fifteen percent for all borrowers in foreclosure—the highest of any program except D.C., which has a much smaller volume.

### 3. *Washington, D.C.*

The District of Columbia's foreclosure dispute resolution program contains its goal in its title: the Saving D.C. Homes from Foreclosure program.<sup>86</sup> It appears to be meeting this goal. It boasts the second-highest rate of agreements per mediation outcome; eighty-one percent of all completed mediations resulted in agreement.<sup>87</sup> Even more significantly, ninety-five percent of those agreements include a provision that allows the borrower to remain in the home, leading to a twenty-two percent retention rate for all foreclosure cases filed in the District of Columbia.<sup>88</sup> Certainly, this is cause for in-depth examination into how the program is constructed and managed.

However, publicly available statistics show a limited sample size: since Saving D.C. Homes from Foreclosure Act passed in 2010, only ninety-five eligible foreclosures were filed, with thirty-two rejected by the Mediation Administrator for being inaccurate or incomplete.<sup>89</sup> Of the remaining sixty-three cases, thirty-six borrowers elected

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84. CONN. JUDICIAL BRANCH, FORECLOSURE MEDIATION PROGRAM 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).

85. *Id.*

86. Saving D.C. Homes from Foreclosure Amendment Act of 2010, D.C. Act of 18-635, Law 18-314 (codified at D.C. CODE § 42-815 (2012)), *amended by* Saving D.C. Homes from Foreclosure Enhanced Temporary Amendment Act of 2012, *available at* <http://dcclims1.dccouncil.us/images/00001/20120724122738.pdf>.

87. D.C. STATISTICS, *supra* note 58.

88. *Id.*

89. *Id.*

mediation, and twenty-seven mediations were completed between the first case in May 2011 and August 2012.<sup>90</sup> This small number is not representative of the number of D.C. mortgages in default; as of the third quarter of 2012, nearly 3.5% of all D.C. mortgages (there appear to be more than 2700 mortgages total in D.C.) were ninety days or more past due.<sup>91</sup> Rather, the mortgage title companies nearly halted insuring residential mortgage titles after the program was created. The companies were concerned that if the program managers found that servicers participated in mediation in bad faith, which could result in penalties against the servicer, a foreclosure sale after mediation may not quiet title.<sup>92</sup> The program has worked with the title companies to clarify the rule in light of this concern.<sup>93</sup>

Although limited in the number of cases involved, D.C.'s program demonstrates a high rate (thirty-eight percent) of borrowers in foreclosure electing mediation and a high rate of mediation completion once a borrower has elected to mediate (seventy-five percent).<sup>94</sup> This indicates that for D.C.'s program, early intervention and completion with mediation increases the likelihood of a favorable resolution. Of the sixty-one cases in which mediation had not been completed, thirty-two were cancelled because the servicer failed to comply with notice of default requirements (resulting in the borrowers homes being

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90. *Id.*

91. JAMIE FEIK, LISA HEARL & SONYA RAVINDRANATH WADDELL, FED. RESERVE BANK OF RICHMOND, HOUSING MARKET AND MORTGAGE PERFORMANCE IN MARYLAND AND THE DISTRICT OF COLUMBIA 8 tbl.3 (2012), available at [http://www.richmondfed.org/community\\_development/resource\\_centers/foreclosure/research\\_and\\_pubs/mortgage\\_performance\\_summaries/md\\_dc/pdf/mortgage\\_performance\\_mddc\\_20123q.pdf](http://www.richmondfed.org/community_development/resource_centers/foreclosure/research_and_pubs/mortgage_performance_summaries/md_dc/pdf/mortgage_performance_mddc_20123q.pdf).

92. Cezary Podkul, *District Effort To Help Distressed Homeowners Could Halt Foreclosure Sales*, WASH. POST, July 7, 2011, [http://articles.washingtonpost.com/2011-07-07/business/35268202\\_1\\_foreclosure-market-foreclosure-sale-distressed-homeowners](http://articles.washingtonpost.com/2011-07-07/business/35268202_1_foreclosure-market-foreclosure-sale-distressed-homeowners).

93. See, e.g., Saving D.C. Homes from Foreclosure Temporary Amendment Act of 2011, D.C. Act 19-156, available at [http://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Saving\\_DC\\_Temporary\\_Amendment\\_Act\\_2011.pdf](http://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Saving_DC_Temporary_Amendment_Act_2011.pdf) (clarifying that issuance of the foreclosure mediation certificate was sufficient evidence to quiet title).

94. D.C. STATISTICS, *supra* note 58.

“saved” until the servicer is able to refile the foreclosure); two were cancelled by the borrower; two resulted in election but have not yet been scheduled; and seven case outcomes were pending.<sup>95</sup>

#### 4. Will County, Illinois

Will County’s Mandatory Mediation Program schedules all borrowers for a pre-mediation conference, at which borrowers and servicers discuss what is needed to complete a loan modification packet.<sup>96</sup> “The program’s goal is to reduce homeowner, lender and taxpayer’s cost as well as reduce court case backlog.”<sup>97</sup> Of the borrowers who received a mailed notice from the court scheduling them for a mandatory hearing,<sup>98</sup> forty-one percent appeared.<sup>99</sup> The percentage of borrowers participating is much higher than in opt-in programs and gives finality to the parties; they cannot request mediation if they do not appear at this conference, thus reducing costs and shifting cases immediately onto the regular foreclosure track after the conference date. The program has both a relatively high rate of mediation completion (twenty-five percent) and a high rate of completed mediations resulting in agreement (fifty-seven percent).<sup>100</sup> The program does not track retention as compared to relinquishment agreements.

#### 5. Cook County, Illinois

Cook County, Illinois, has one of the highest foreclosure volumes per year of any area in the country,

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95. *Id.*

96. ILL. 12TH JUD. CIR. CT. R. 17.06, available at <http://www.willcountycourts.com/images/stories/WillCounty/will%20rules%20v08.pdf>.

97. *Illinois Court ADR Sourcebook: Will County Foreclosure Mediation Program*, RESOLUTION SYSTEMS INST. CT. ADR RESOURCE CENTER, <http://courtdr.org/sourcebook/programs.php?ID=89&from=rules> (last visited Jan. 12, 2013).

98. Notice of Mandatory Mediation, Clerk of the Circuit Court of Will Cnty. (July 2010), available at <http://willcountycircuitcourt.com/forms/mediation/116.pdf>.

99. RESOLUTION BY THE NUMBERS, *supra* note 26, at 7.

100. *Id.*

with an estimated residential foreclosure docket of nearly 78,000 cases.<sup>101</sup> Therefore, its foreclosure mediation program had to take into consideration capacity when it designed its model. It likely could not have adopted and achieved the goal of saving all homes. Instead, it chose a more achievable, though more difficult to measure, goal—to assist borrowers.<sup>102</sup>

Though those who mediate are a very small portion (four percent) of the overall number of borrowers in foreclosure and only about half of borrowers who elect mediation actually complete a mediation agreement,<sup>103</sup> the program has provided significant assistance to borrowers. The program requires borrowers who elect mediation to work with both a housing counselor and at least one pro bono attorney.<sup>104</sup> By design, then, the borrower is educated about the foreclosure process, screened for legal defenses, and aided in both completing a financial disclosure packet and communicating with the servicer about the packet before mediation occurs. Indeed, between the program's inception in 2010 and spring of 2012, 53,264 housing counseling sessions were completed, and 57,261 borrowers received assistance from pro bono legal services.<sup>105</sup>

### 6. Cuyahoga County, Ohio

The Supreme Court of Ohio articulated a clear goal for its foreclosure dispute resolution program: “to determine if a mutually acceptable agreement that is commercially reasonable and sustainable is possible.”<sup>106</sup> The court understood this to mean that a successful outcome is not always one in which the borrower retains the home.<sup>107</sup> The

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101. *Id.* at 8.

102. Circuit Court of Cook Cnty., Ill., Cnty. Dep't, Chancery Div., General Admin. Order No. 2010-01 (2010), available at <http://suffredin.org/pdfs/Foreclosure.AdministrativeOrder.2010-01.pdf>.

103. RESOLUTION BY THE NUMBERS, *supra* note 26, at 8.

104. *Id.*

105. COOK CNTY. PROGRESS REPORT, *supra* note 27, at 13.

106. See, e.g., *Foreclosure Mediation in Ohio: What You Need To Know*, *supra* note 8.

107. *Foreclosure Mediation Program Model Overview*, SUPREME CT. OHIO,

court also understood that a successful outcome—one that is most commercially reasonable and sustainable for both parties—could be litigation.<sup>108</sup> With this goal in mind, Ohio's court developed a model that is flexible enough for each county to adapt for local needs.<sup>109</sup> Thus, all eighty-eight counties are able to offer foreclosure mediation based on their particular goals and resources.<sup>110</sup>

Cuyahoga County, Ohio, is an opt-in program in which a judge can refer cases to mediation or the borrower can request mediation.<sup>111</sup> Between the program's inception in June 2008 and the end of 2011, eighty-two percent of all borrowers that requested mediation were found to have sufficient income and residential status to participate.<sup>112</sup> Of cases eligible for mediation, twenty-five percent did not reach the first pre-mediation session due to the borrower not appearing, two percent because of servicer non-compliance, and three percent due to bankruptcy.<sup>113</sup> The final stage before mediation is a pre-mediation session in which the program manager reviews borrower documents and facilitates a discussion with the servicer about what is needed next.<sup>114</sup> During this time, borrowers have the opportunity to work with housing counselors to better understand their options; about one-fifth of borrowers utilize this resource.<sup>115</sup> Of cases that reach this point, seventy-one percent are passed on to mediation.<sup>116</sup> These

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<http://www.supremecourt.ohio.gov/JCS/disputeResolution/foreclosure/overview.asp> (last visited Jan. 12, 2013). See an example of this model enacted in C. Eileen Pruett, *If You Build It, Will They Come? Foreclosure Mediation in Franklin County, Ohio*, 40 CAP. U. L. REV. 935, 935 (2012).

108. *Foreclosure Mediation Program Model Overview*, *supra* note 107.

109. *Foreclosure Mediation Resources*, SUPREME CT. OHIO, <http://www.supremecourt.ohio.gov/JCS/disputeResolution/foreclosure/default.asp> (last visited Jan. 12, 2013).

110. *Foreclosure Mediation Program Model Overview*, *supra* note 107.

111. KATHRYN WERTHEIM HEXTER & MOLLY S. SCHNOKE, CLEVELAND STATE UNIVERSITY: CTR. FOR CMTY. PLANNING & DEV., RESPONDING TO FORECLOSURES IN CUYAHOGA COUNTY 2011 EVALUATION REPORT 30 (2011), available at [http://urban.csuohio.edu/publications/center/center\\_for\\_community\\_planning\\_and\\_development/ccfpp\\_final\\_2011\\_report.pdf](http://urban.csuohio.edu/publications/center/center_for_community_planning_and_development/ccfpp_final_2011_report.pdf).

112. *Id.* at 30, 33 tbl.16.

113. *Id.* at 33 tbl.16.

114. *Id.* at 32.

115. *Id.* at 34.

116. HEXTER & SCHNOKE, *supra* note 111, at 33 tbl.17.

three points of screening and filtering serve the program's interest by channeling cases into mediation in which the borrower evidences a likelihood of taking actionable steps to create a sustainable outcome.

Once cases reach mediation, the program requires a servicer, and sometimes an investor, to be present either in person or telephonically at all sessions.<sup>117</sup> About sixty-six percent of those that reach mediation come to an agreement.<sup>118</sup> This is a high rate of agreement, which suggests that the extensive screening keeps cases in the system that have the best chance of finding a mutually beneficial outcome in mediation.

### 7. Hawaii's Third Circuit

Though Hawaii's Third Circuit Court foreclosure mediation program appears to have a high rate of agreement for the cases that have participated in mediation (sixty-nine percent),<sup>119</sup> the sample size of cases that actually completed mediation (sixteen, with eleven reaching agreement) is too small to conclude that the program is achieving its goal to "get the parties together."<sup>120</sup> The statistics also paint a more nuanced picture of the program's effectiveness at getting parties together. In 2011, 409 cases were deemed eligible for foreclosure mediation.<sup>121</sup> Of those, 205 borrowers, or about fifty percent of those eligible, requested mediation; yet without explanation, the court only referred thirty-seven of those 205 cases (eighteen percent) to mediation.<sup>122</sup> Of this small sample that was

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117. *Id.* at 30.

118. *Id.* at 33.

119. HAW. THIRD CIRCUIT COURT, FORECLOSURE MEDIATION PILOT PROJECT REPORT FOR THE THIRD CIRCUIT (2012) [hereinafter HAWAII MEDIATION PILOT PROJECT], available at [http://www.courts.state.hi.us/docs/news\\_and\\_reports\\_docs/foreclosure\\_pilot\\_project\\_report\\_2012.pdf](http://www.courts.state.hi.us/docs/news_and_reports_docs/foreclosure_pilot_project_report_2012.pdf).

120. Ron Margolis, *Foreclosure Thoughts on New Hawaii Law Act 182—Hawaii's Reparations and the Foreclosure Mediation Program*, HAWAII LIFE (July 26, 2012), <http://www.hawaiilife.com/articles/2012/07/hawaii-law-act-182/> (last visited Jan. 12, 2013) (noting Judge Ibarra's stated purpose for the program).

121. HAWAII MEDIATION PILOT PROJECT, *supra* note 119, at 3.

122. *Id.*



referred to mediation, only thirty percent reached agreement.<sup>123</sup>

Perhaps this strict referral system—by far the narrowest funnel of any foreclosure mediation program—is necessary because of capacity or other program limitations, but the court itself indicates that it wants more cases to go to mediation.<sup>124</sup> A February 2012 report from the court suggests a way the program may improve the number of borrowers who participate in mediation: to require all servicers to notify borrowers of the option, as no standard notice is currently issued from either the court or the servicer.<sup>125</sup> The court also may wish to focus on how it refers borrowers who request mediation, as that seems to be the narrowest part of the funnel.

### B. No Universal Structure Guarantees Effectiveness

If program success was based on following a certain core program structure, the statistics for programs that grew from the same model should be relatively consistent. Programs in non-judicial foreclosure states like Washington, D.C., Washington State, Hawaii (which has both the Third Circuit judicial program and a statewide non-judicial program), and Oregon were modeled in large part on Nevada's non-judicial foreclosure mediation program. Yet, Hawaii's program has had no case referrals or agreements,<sup>126</sup> Oregon's program has had only a "handful,"<sup>127</sup> Washington's program has seen nineteen percent of its mediations result in retention of the home,<sup>128</sup> and D.C.'s program has generated a greater percentage of agreements and homes retained than nearly every other program.<sup>129</sup>

These statistics demonstrate that program success cannot be based on a particular universal program

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123. *Id.*

124. *Id.* at 5.

125. *Id.* at 5-6.

126. Margolis, *supra* note 120.

127. Elliot Njus, *Legislature, Supreme Court Face Key Foreclosure Decisions in New Year*, OREGONLIVE.COM (Dec. 22, 2012, 8:46 PM), [http://www.oregonlive.com/frontporch/index.ssf/2012/12/legislature\\_supreme\\_court\\_face.html](http://www.oregonlive.com/frontporch/index.ssf/2012/12/legislature_supreme_court_face.html).

128. RESOLUTION BY THE NUMBERS, *supra* note 26, at 15.

129. *Id.* at 16-17.

structure. In a 2010 report, the Center for American Progress (the Center), a consumer advocacy group, recommended that all foreclosure dispute resolution programs be mandatory—that is, that borrowers as well as lenders be sent automatically to diversion programs.<sup>130</sup> The Center’s recommendation was based on statistics showing that certain “automatic,” i.e., opt-out, programs like Philadelphia and Connecticut (which, strangely, was never an opt-out program) had higher participation rates.<sup>131</sup> The Center found that the rate of agreement was unaffected by whether a program was opt-in or opt-out; therefore, the Center concluded that an opt-out program would enhance foreclosure dispute resolution’s impact by increasing the pool of people who could potentially reach agreement.<sup>132</sup>

However, in the past three years the data has not borne out the promise of opt-out programs. If all foreclosure cases filed in New York State or Cook County, Illinois, both of which have well over 50,000 foreclosure cases filed per year, were scheduled for dispute resolution, the foreclosure process would extend well beyond its current 1019 days in New York and 567 in Cook County.<sup>133</sup> This would significantly decrease the likelihood that any case would settle in a retention agreement.

Also, though programs that automatically assign borrowers to dispute resolution processes result in a greater percentage of all borrowers participating in dispute resolution, the percentage of those participating who reach agreement in opt-out programs versus opt-in programs is not necessarily higher. For instance, Maine is an opt-out program, while D.C. is an opt-in program; these programs have a nearly sixty-percentage-point difference in agreement rates, with D.C.’s program yielding a higher

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130. ALON COHEN & ANDREW JAKABOVICS, CTR. FOR AM. PROGRESS, NOW WE’RE TALKING: A LOOK AT CURRENT STATE-BASED FORECLOSURE MEDIATION PROGRAMS AND HOW TO BRING THEM TO SCALE 2 (2010), available at [http://www.americanprogress.org/wpcontent/uploads/issues/2010/06/pdf/foreclosure\\_mediation.pdf](http://www.americanprogress.org/wpcontent/uploads/issues/2010/06/pdf/foreclosure_mediation.pdf).

131. *Id.* at 7.

132. *Id.* at 8.

133. *How Fast Does Your State Foreclose?*, NPR (Mar. 16, 2012), <http://www.npr.org/2012/03/15/148696260/how-fast-does-your-state-foreclose> (last visited Jan. 12, 2013).

percentage of agreements.<sup>134</sup> Even more, D.C.'s agreements result in retention more frequently than any other program. The Center's study praised Maine for instituting an opt-out program from its inception. Yet, two years later, Maine has the lowest percentage of mediations that reach agreement.<sup>135</sup>

One explanation for the comparable agreement rates between opt-in and opt-out programs is that those borrowers who choose to participate in dispute resolution have already taken an active step toward seeking an alternative to foreclosure, and, therefore, borrowers in opt-in programs are more invested in producing required documents and attending dispute resolution sessions. Thus, localities that may not have the resources to dedicate to the flood of cases that an opt-out program generates can still see a similar percentage of dispute resolution cases result in a favorable outcome.

Of course, this is not to say that other borrowers who do not choose dispute resolution are not deserving of a chance to access its benefits. Certainly, an opt-out program results in more borrowers having the opportunity to discuss alternatives with a servicer. However, the statistics do not show a preference between an opt-in or opt-out model. Factors other than opt-out, such as highly-skilled neutrals and substantial institutional support, have contributed to the success of programs in Connecticut and Philadelphia.

Simply stated, the overall success of a program is a result of a number of factors that should be viewed within a larger context that includes contributions from inside and outside the actual dispute system structure. For example, whether or how outreach efforts present the program to borrowers may affect the borrowers' decision to participate in dispute resolution and even how they approach the process. The framing of the program likewise affects servicers. Whether servicers sense the dispute resolution process includes and furthers their interests impacts a system's efficiency. In two states, Hawaii and Oregon, few cases have gone through the mediation programs for non-

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134. RESOLUTION BY THE NUMBERS, *supra* note 26, at 18.

135. *Id.*

judicial foreclosures because the servicers, who were not included in designing the programs, moved the cases into the judicial foreclosure process once the mediation program was put in place.<sup>136</sup> Servicers also contested the foreclosure mediation process in Nevada, in part due to what they believed were unnecessary documentation requirements (with which the servicers themselves were not complying in thirty-seven percent of all cases referred to mediation).<sup>137</sup> Whether or not the servicers are correct, their lack of buy-in makes the Nevada program less effective; only a small percentage of cases (twenty-one percent) that begin mediation complete it.<sup>138</sup> Because of these types of issues, merely presenting data on participation and dispute resolution outcomes is not always sufficient to understanding why programs are more or less successful.

#### V. THE NEED FOR BETTER STATISTICS

The programs with statistics presented here represent only a portion of the foreclosure dispute resolution programs in the United States, and their statistics represent an even smaller portion of the data needed to determine whether foreclosure dispute resolution is achieving its goals. Some programs have committed resources to monitoring the outcomes of their programs, but many have only tracked one or two statistics. Which statistics programs choose to track often differ from program to program.

An additional obstacle to understanding the effectiveness of foreclosure dispute resolution programs is the lack of uniformity in defining a desirable outcome. This is particularly true for agreements. For some programs, an agreement is any outcome that does not return a case to the jurisdiction's foreclosure process, whether judicial or non-

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136. Njus, *supra* note 127; *see also* DEP'T OF COMMERCE & CONSUMER AFFAIRS, ANNUAL REPORT TO THE LEGISLATURE: MORTGAGE FORECLOSURE DISPUTE RESOLUTION PROGRAM 9 (2011), *available at* <http://hawaii.gov/dcca/oah/mfdr/Mortgage-Foreclosure-Dispute-Resolution-Program-Report-2011.pdf>.

137. *See* David McGrath Schwartz, *Nevada Foreclosures Could Skyrocket If Law That Handcuffed Banks Is Changed*, LAS VEGAS SUN, Dec. 9, 2012, at 1, *available at* <http://www.lasvegassun.com/news/2012/dec/09/banks-press-changes-strict-2011-foreclosure-law/>; *see also* NEVADA 2012 STATISTICS, *supra* note 16, at 1.

138. NEVADA 2012 STATISTICS, *supra* note 16, at 2.

judicial. Others may consider only retention agreements to be successful agreements. More confusingly, some programs may count partial agreements, agreements to next actions, or borrowers staying in their homes awaiting dispute resolution in their measures of successful agreements.<sup>139</sup>

Incomplete and inconsistent monitoring has consequences for a program's quality and its policies. If a program does not monitor all stages of the dispute resolution process, it cannot make fully informed decisions about program modifications. Either the program will not know about inefficiencies, or the program will know about inefficiencies but have difficulty identifying the source or the solution. For example, if a program does not track the amount of time it takes for cases to move through the mediation process, administrators cannot determine whether the dispute resolution program should run alongside the foreclosure process or whether the foreclosure should be stayed. Similarly, if a program does not track who it is serving—where the participating borrowers reside, what their income level is, and related information—it cannot determine if it is impacting the populations most in need of assistance.

Lack of monitoring also has consequences for policies to address foreclosure across the United States. As states adopt foreclosure programs or strive to assess and improve an existing program, most look to what other programs have done.<sup>140</sup> Yet, without uniform data across programs, policymakers have limited capacity to compare programs and understand which program characteristics make an individual program successful. It can lead policymakers to make jumps in logic and recommend structures or goals

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139. *See, e.g.*, Final Report & Recommendations on Residential Mortgage Foreclosure Cases, Admin. Order No. A0SC09-54, at A-11 (Fla. 2009) (allowing partial agreements to be counted among the total agreement statistics reported by the court), available at [http://www.floridasupremecourt.org/pub\\_info/documents/A0SC09-54\\_Foreclosures.pdf](http://www.floridasupremecourt.org/pub_info/documents/A0SC09-54_Foreclosures.pdf).

140. Program managers regularly take calls from states wanting to learn how to construct and start their own program. Interview with Roberta Palmer, Conn. Program Manager & Verise Campbell, Nev. Program Manager (June 8, 2012).

that are not practicable, like an opt-out program for every state.<sup>141</sup>

In its report on best practices for research and evaluation of foreclosure dispute resolution programs, the Department of Justice's Access to Justice Initiative provided a guide for evaluating these programs.<sup>142</sup> As the report notes, it is not enough to report outcomes alone.<sup>143</sup> Understanding the process required to achieve the outcomes involves a full articulation of the program's characteristics in terms that are common to all programs.<sup>144</sup> Such characteristics include, among others, how borrowers elect or are assigned to participate, how a case is referred to dispute resolution, the timeframe in which the case progresses through the program, and whether the program provides services such as housing counseling and pro bono legal representation. Providing information on the scope of the program is important as well. How many homes are affected by foreclosure? What personnel are in place to administer the program and provide services? What is the source of revenue for the program?<sup>145</sup> Currently, programs that potentially involve a few thousand cases inappropriately look to models that involve tens of thousands of cases. Reporting scope information, as well as outcome and program characteristic data, will not only help programs adapt to their own changing needs, but will also help start-up programs evaluate what is most effective in a context similar to their programs.

How should programs conform their tracking and reporting to a common set of definitions? Participation rates should be based on a standard set of variables, perhaps using the funnel idea as a guide.<sup>146</sup> How many cases are eligible for the program? How many of those eligible requests are assigned to the program? How many

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141. See COHEN & JAKABOVICS, *supra* note 130, at 7.

142. MELANCA CLARK & DANIEL OLMOS, ACCESS TO JUSTICE INITIATIVE, U.S. DEP'T OF JUSTICE, FORECLOSURE MEDIATION: EMERGING RESEARCH AND EVALUATION PRACTICES 1-2 (2011), available at <http://www.justice.gov/atj/foreclosure-mediation.pdf>.

143. *Id.*

144. *Id.* at 9.

145. *Id.*

146. See *supra* text accompanying notes 11-18.

of those are then referred into dispute resolution? How many are deemed ineligible for dispute resolution? At what point are they deemed ineligible and for what reason? How many borrowers and servicers comply with requirements to enter dispute resolution, and what are those requirements? What, if any, other beneficial services like housing counseling are borrowers offered? How many borrowers take advantage of these services, and what benefits do they experience? How many borrowers and servicers reach an agreement prior to attending the dispute resolution session? How many participate in dispute resolution?

Dispute resolution outcomes should also be standardized. Policymakers and stakeholders want to know not only whether cases were settled through the program, but also what general parameters the settlement entailed. Did the agreement allow the homeowner to retain the home? If so, was it through a loan modification, forbearance, repayment, or other type of retention option? If not, was an alternative to foreclosure agreed upon, such as a short sale or deed in lieu of foreclosure? Were there agreements made that were neither a retention nor a relinquishment agreement?

How statistics are calculated can also affect a program's perceived effectiveness. Although this article standardizes statistical calculations when possible, available information did not allow for all statistics to be calculated the same way. For instance, in Cook County, the borrower is generally not counted as being referred to mediation until the borrower has met with housing and legal counselors.<sup>147</sup> This means that the two-year reported rate of referral to mediation—only 5000 of the more than 100,000 eligible cases—is much lower than the percent of borrowers who benefit from one of the program's services. This difference in reporting makes Cook County's program appear unsuccessful, even though it has provided assistance to more than 80,000 borrowers.<sup>148</sup> This demonstrates the need

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147. See COOK CNTY. PROGRESS REPORT, *supra* note 27, at 9, 13.

148. *Id.* at 13.

for standardized calculations as well as standardized definitions.

Another challenge to uniform data collection is that each program has a different stated or unstated purpose. Because the needs of communities and stakeholders differ, programs should set goals that fit those needs. Therefore, while some data points should be uniform across programs, some data points should be specific to each program. For example, one program may have the goal of reducing the burden of foreclosures on the court. This program should collect data on the number of court hearings or court orders per case, then compare cases going through the dispute resolution program to cases not going through the program. It should also collect timeframe data, such as how long it takes a case to go through the foreclosure process with the program in place, as compared to before program implementation. Another program may have a goal of helping homeowners stay in their homes. That program should collect data on the number and percentage of cases in which the borrower's participation in the program results in a retention agreement, whether in a dispute resolution session or at some other point after the borrower requests dispute resolution. Such a program should also track whether the agreement was sustained—that is, whether the homeowner was able to comply with the terms of the agreement over a one-year or two-year period.

#### VI. LESSONS FROM EFFECTIVE PROGRAMS: SYSTEM DESIGN MODIFICATIONS TO IMPROVE FORECLOSURE DISPUTE RESOLUTION

Though it is clear that no universal foreclosure dispute resolution model produces success and that more data is needed to evaluate what exactly leads to success, do programs that have demonstrated at least some goal achievement share any common characteristics?

- These programs have clear goals and objectives. They can more easily set up monitoring and evaluation systems that allow for public reporting of data.



- These programs are efficient at moving appropriate cases through the process with clear document exchange expectations for both parties based on the stated needs of relevant loan modification programs.
- These programs appear to be effective in helping borrowers retain their homes by employing or contracting with neutrals who actively manage each case between dispute resolution sessions.
- These programs want to assist the most borrowers, whether through dispute resolution or supplemental services like housing counseling and pro bono assistance, so they conduct extensive outreach.

### A. Goal and Objective Articulation

At first, foreclosure dispute resolution programs grew out of an urgent need to do something to stop the foreclosure crisis, which was thought to be a temporary crisis dependent on small-scale lender misconduct.<sup>149</sup> But creating a stopgap rarely results in an effective program. Indeed, Connecticut and Philadelphia have made substantial changes to their programs since the first dispute resolution session.<sup>150</sup>

By examining the articulated goals of other foreclosure dispute resolution programs against their outcomes, as we did above, one can see the importance of realistic goal articulation to the overall success of a program.<sup>151</sup> From there, a program can design a system with stakeholders, processes, and evaluation protocols that facilitates and evaluates that goal. While some states have seen design

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149. See Press Release, Iowa Dep't of Justice, Office of the Att'y Gen., *supra* note 4.

150. Connecticut changed from requiring an extensive borrower application to enter the program to requiring the borrower simply to file a form answer. See *supra* notes 82-84 and accompanying text. Philadelphia added pro bono attorneys and financial counseling for borrowers. Interview with Judge Annette Rizzo, Phila. Residential Mortg. Foreclosure Diversion Pilot Program (June 8, 2012).

151. SUSAN M. YATES, RESOLUTIONS SYS. INST., ELEMENTS OF A SUCCESSFUL COURT MEDIATION PROGRAM 1-2 (2008), <http://courtdr.org/files/Elements.pdf>; see also Tony Humphreys, *Evaluation Framework for an Alternative Dispute Resolution (ADR) Program*, FMI J., Winter 2006, at 15, 19, available at [http://www.fmi.ca/uploads/1/humphreys\\_e.pdf](http://www.fmi.ca/uploads/1/humphreys_e.pdf).

diversification within a unified foreclosure dispute resolution goal as a daunting, unachievable task,<sup>152</sup> Ohio developed a model that allowed for customization while maintaining the integrity of the process.<sup>153</sup> In Ohio, all mediators are required to comply with the same ethics,<sup>154</sup> and all programs may use a standardized set of forms, including evaluation forms, created by the state Supreme Court.<sup>155</sup> Counties can then adjust the process to account for the number of foreclosures, resources available, and regional demographics.

A stakeholder group comprised of a variety of impacted individuals and entities—including representatives from the borrower, the servicer, and the dispute resolution community—can determine the goal.<sup>156</sup> Considerations for setting a goal may include: the number of foreclosures in a region, the number of neutrals or borrower-support personnel available, the capacity of a managing entity or contracted entity to conduct outreach and schedule sessions, the public impact of foreclosures in the region, and the involvement of a referring agency, whether the court or another government entity. Does the program want to have all people in foreclosure participate

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152. During discussions about how to use the forty-nine state attorneys general settlement funds, the Illinois Supreme Court Mortgage Foreclosure Committee declined to adopt a uniform court rule for mortgage foreclosure mediation, citing challenges with individual counties or circuits adopting a uniform rule. Though it was created in part to develop such rules, the proposal for such a rule was not included in the committee's recommendations. Michelle Silverthorn, *Like A Rolling Stone*, ILL. SUPREME CT. COMMISSION ON PROFESSIONALISM BLOG (July 25, 2012), <http://blog.ilscpc.org/2012/07/1> ike-a-rolling-stone/; see also Steven B. Bashaw, *The Supreme Court Mortgage Foreclosure Committee Recommendations*, 100 ILL. B.J. 380, 380-81 (2012).

153. See *supra* notes 106-10.

154. See generally MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arb. Ass'n, Am. Bar Ass'n, Ass'n of Conflict Resolution 2005), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf) (describing the core values of mediation).

155. SUPREME COURT OF OHIO, FORECLOSURE MEDIATION PROGRAM MODEL 139-49 (2008), available at <http://www.supremecourt.ohio.gov/JCS/disputeResolution/foreclosure/foreclosureMediation.pdf>.

156. YATES, *supra* note 151, at 1. Though a program may be hesitant to involve a stakeholder group that includes those who may dissent to having a program in the first place, such as Philadelphia's and Cook County's programs have been successfully created with servicer and borrower input.

in dispute resolution? Or should participants be screened based on certain criteria? Does the program want to focus only on those people who may be most assisted by the program? Is the goal to provide support to affected borrowers, save homes, or accelerate a lagging foreclosure process? Though it may be easier for programs to copy what has already been designed, each of these goals should produce distinctive program characteristics with distinctive measures of success.

### B. Document Exchange Management

Although some customization of programs may lead to greater efficacy, some processes demand standardization. Federal and in-house bank loan modification programs require that borrowers submit certain financial and other paperwork before the borrower's loan can be considered for a modification.<sup>157</sup> Required paperwork varies considerably, and even the same loan modification program changes its requirements regularly.<sup>158</sup> However, meeting the documentation requirements is a necessary step for borrowers to obtain a mortgage-modification alternative to foreclosure.

Because of the necessity and regularity of document exchange, those who manage foreclosure dispute resolution programs report that managing this exchange is the primary challenge of these programs. Two primary categories of problems arise from the document exchange process. First, there is no standardized list of documents that is required of all borrowers or for all types of loans. Though servicers and programs have attempted to compile a uniform list of required documents,<sup>159</sup> few cases are so uniform that the list

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157. See U.S. DEP'T OF HOUS. & URBAN DEV., LOAN MODIFICATION OPTION (2011), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=nsclmfaq.pdf>; *Request a Home Affordable Modification*, *supra* note 13.

158. *Home Affordable Modification Program: Overview*, MAKING HOME AFFORDABLE, <https://www.hmpadmin.com/portal/programs/hamp.jsp> (last visited Jan. 17, 2013) (listing more than twenty supplemental directives in version 4.1 of the handbook).

159. After Maryland's neutrals receive a borrower's case file, they send a list of documents for the borrower to bring to mediation. This is after the lender is required to have the borrower complete a loss mitigation application, which includes a document requirement. *Maryland's Foreclosure Mediation Program, Foreclosure*

is sufficient to complete a loan modification package. So delays in the completion and review of a package occur when servicers do not examine the particulars of a borrower's circumstances—e.g., divorce, self-employment, military service—and do not inform them about what documents beyond a standardized package are needed to account for those circumstances.

The second category of problems surfaces soon after the first communication between borrower and servicer about paperwork, whether that discussion occurs prior to dispute resolution, during a pre-mediation conference, or during a dispute resolution session.<sup>160</sup> Though the list of documents needed to consider a specific borrower for loan modification may have been articulated, the packet on record with the servicer is not complete or up-to-date. Almost always, this results in automatic denial of modification.

In some cases, borrowers simply did not submit the information requested. In most instances, however, dispute resolution program managers describe a different process breakdown. The servicer's system may require a document to have a particular format to be accepted. For instance, servicers often require an individual's tax return to include an actual signature on the last page. However, if a borrower submitted a tax return electronically, the borrower's signature is likely not included on a print out of such submission. Thus, a borrower may be denied because the document lacked a signature that the borrower did not know was needed.

Often, if someone recognizes that a borrower has a particular circumstance that requires additional documentation, the servicer representatives provide conflicting information about how to document the circumstance appropriately. For instance, a borrower may have a live-in significant other who is not named in the mortgage but is contributing to the household income. In an initial contact with the servicer, the borrower may be

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*Mediation FAQs*, THE HOPE INITIATIVE, <http://mdhope.dhcd.maryland.gov/ForeclosureMediation/Pages/ForeclosureMediationFAQ.aspx> (last visited Jan. 12, 2013).

160. *DRCs Statewide Receive \$2.1 Million in National Mortgage Settlement Funds*, DRC NEWS (Dec. 5, 2012).

instructed to create a rental contract with the significant other, indicating how much of the monthly mortgage payment the significant other contributes. During a dispute resolution session, the borrower may learn that the servicer did not review the loan modification packet because there were paychecks (the significant other's paychecks) deposited in the borrower's account that were not included in the proof of income. The borrower explains the deposit, and the servicer requests that all contributions from the significant other be enumerated in a letter from the significant other to the servicer. The borrower asks if the rental agreement is still needed; the servicer says no. During a third meeting, the servicer indicates that it was unable to review the packet because there was not a rental contract included from a non-owner tenant living in the home. By this point, the original packet is out-of-date (most documents have to be current as of the past sixty days), and the borrower must resubmit all documentation to remain under review for a loan modification.

This inconsistent communication from servicer to borrower and back again leads to failed reviews or denials of many loan modification applications, even when the borrower's income appears to qualify the borrower for a loan modification. Herein lies a paradox of foreclosure dispute system design: servicers need a complete packet to review borrowers for a foreclosure alternative, yet the servicer is often the reason for an incomplete packet.

Some programs initially attempted to mitigate these documentation challenges by requiring borrowers to submit a standardized package of information prior to dispute resolution. For its first three years, Nevada's program, which has a goal of providing for "the orderly, timely, and cost-effective mediation of owner-occupied residential foreclosures," required the borrower to submit three extensive forms and the servicer to submit the mortgage note, appraisal, calculations, and other documents before mediation.<sup>161</sup> Perhaps because of this extensive pre-mediation documentation requirement, which often takes

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161. Approving Foreclosure Mediation Program Rules, Admin Order ADKT 435, at Exhibit A, R. 1, R. 11 (Nev. 2009).

“an average of 85 email communications [and] an entire ream of copy paper,”<sup>162</sup> servicers were non-compliant with Nevada’s requirement thirty-six percent of the time, thus delaying mediation.<sup>163</sup>

Because of this extended timeline and the reduced likelihood of timely resolution, most programs have abandoned the practice of gathering borrower’s documents prior to an initial meeting with the servicer. D.C.’s program dropped its original extensive pre-mediation borrower documentation requirement in favor of a simple request form only one year after inception. The work of information exchange now happens during the mediation itself. Not inconsequentially, D.C.’s resolution rate is also significantly higher than Nevada’s.<sup>164</sup> Seeing the benefit of shifting the document exchange process from extensive mailed submissions to an in-person pre-mediation conference, in December 2012, Nevada followed D.C.’s example and passed new rules setting a pre-mediation “exchange of documents conference.”<sup>165</sup>

Frustrated dispute resolution program managers have developed other creative solutions to better facilitate the document exchange process. In place of a mailed list of required documents, some programs, like that in Will County, Illinois, have adopted a pre-mediation conference.<sup>166</sup> No negotiation takes place at the conference, but the parties have the opportunity to review the particular circumstances of the borrower to determine what paperwork is needed for the borrower to be considered for a loan modification.<sup>167</sup> Will County’s program does not allow mediation to proceed until the servicer has reviewed the packet.<sup>168</sup> Thus, while Will County’s program only mediates twenty-five percent of all

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162. *Id.*

163. NEV. SUPREME COURT, FORECLOSURE MEDIATION PROGRAM BENEFICIARY COMPLIANCE OUTCOMES REPORT 1, Mar. 1, 2012, available at <http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/funcstartdown/8318/>.

164. RESOLUTION BY THE NUMBERS, *supra* note 26 at 4, 11.

165. Admin. Order ADKT 435, *supra* note 161, at Exhibit A, R. 11.

166. RESOLUTION BY THE NUMBERS, *supra* note 26, at 2.

167. *See id.*

168. *Id.*

foreclosures in the county, the cases that participate in mediation settle over half of the time. Pre-session preparation seems to improve the likelihood of a case concluding in an alternative to foreclosure.

Connecticut's statewide program hired more than twenty full-time mediators, who are required to contact borrowers and servicers between mediation sessions to ensure the servicers have everything needed to conduct a complete review. Moreover, the mediator confirms that the review is completed in a timely manner. The case remains open until a full review is completed. Though some other programs suggest their contracted mediators communicate with parties between sessions, very few other programs have full-time mediators.

Similar to Connecticut's mediators, D.C.'s mediators manage document exchange between sessions.<sup>169</sup> Once again, though, the program's goals impact the design. D.C.'s goal is to save homes, while Connecticut's goal is to secure a desirable outcome for both parties. Thus, D.C.'s mediators are required to manage the document exchange process differently; D.C.'s mediators report behavior to a District dispute resolution agency that may then sanction the servicer.<sup>170</sup> If the servicer does not supply a complete list of documents needed for the particular borrower to submit a loan modification packet, the mediator completes a report stating that the servicer did not comply with program requirements.<sup>171</sup> The dispute resolution program manager then determines whether, as a consequence, the foreclosure will be cancelled.<sup>172</sup> This sanctioning power is controversial within the mediation community, as the Model Standards of Conduct for Mediators suggests that mediators should not report on party behavior.<sup>173</sup> However, this focused, third-party attention to the document exchange process seems to contribute significantly to Connecticut and D.C. foreclosure dispute

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169. *See id.*

170. *See* D.C. MUN. REGS. tit. 26 §§ 2717, 2724.

171. *Id.* §§ 2714, 2717.

172. *Id.* § 2714.6.

173. MODEL STANDARDS OF CONDUCT FOR MEDIATORS V.A.2 (Am. Arb. Ass'n., Am Bar Ass'n., Ass'n of Conflict Resolution 2005).

resolution programs' high rate of home retention. More research is necessary to understand the connection between the mediator's role and program efficacy.

If programs cannot afford to invest resources in full-time mediators, other third-party entities may serve a similar case management role. Some programs have created an option for borrowers to meet with a housing counselor prior to the dispute resolution session. In these meetings, trained counselors experienced in communicating with servicers assist borrowers in preparing loan modification packets. One program, in Cook County, Illinois, requires such meetings and expects housing counselors to guide borrowers from the time of referral to mediation until the case is resolved.<sup>174</sup> Though Cook County has the lowest rate of foreclosure cases that eventually attend a dispute resolution session of any studied, the program provides a significant number of borrowers additional information and support during the foreclosure process.<sup>175</sup> This is in line with Cook County's goal of assisting borrowers.

### C. Outreach To Inform and Encourage Borrowers To Elect Mediation

Additional third-party personnel may increase the number of borrowers in foreclosure who participate in dispute resolution. Some foreclosure dispute resolution programs are intended to "get as many people as possible under the conciliation umbrella."<sup>176</sup> This often leads to a system design that is opt-out, not opt-in. As explored in previous sections and as demonstrated by Philadelphia's and Will County's programs, opt-out programs produce a far higher rate of participation than opt-in programs.

Still, both opt-in and opt-out programs face the challenge of informing borrowers of the availability of the program and encouraging them to appear for the first session. Borrowers in opt-out programs must explicitly waive their participation in a dispute resolution session,

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174. COOK CNTY. PROGRESS REPORT, *supra* note 27, at 9-11.

175. *Id.*

176. Rizzo Interview, *supra* note 150.



either by not appearing for such session or by notifying the program that the borrower chooses not to participate. Borrowers in opt-in programs must request to participate in dispute resolution, often by returning a notice to the dispute resolution management agency. Few borrowers in foreclosure open their mail or answer their phones, so few borrowers know they have to take action to request this process.

The Supreme Court of Florida ended its statewide foreclosure mediation program at the end of 2011, citing lack of participation as the reason. Certainly, there are enough people in foreclosure—and seeking alternatives to it—in Florida such that the program should have been booming.<sup>177</sup> However, statistics indicate that program managers did not contact over half (fifty-six percent) of eligible borrowers to alert them to the program's availability.<sup>178</sup> Of those borrowers that outreach workers contacted, less than twenty percent requested mediation.<sup>179</sup> Only thirty-six percent of those that participated reached an agreement.<sup>180</sup>

To ensure maximum achievement of a program's goal of gathering as many borrowers as possible to participate in the program, a program may need to employ additional outreach to affected borrowers. Indeed, Philadelphia's program, which has the "umbrella" goal, hired a community organization to knock on the doors of people whose homes were in foreclosure. The organization representatives helped borrowers understand the program and walked them through what they needed to do to participate. Appearance at the first conciliation session in Philadelphia increased.<sup>181</sup>

This face-to-face outreach is not exclusive to opt-out programs. Cook County's program, which would be

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177. See RESOLUTION BY THE NUMBERS, *supra* note 26, at 5.

178. Memorandum from Lisa Goodner, State Courts Admin., to Chief Justice Canady, Report and Recommendations Relating to the Residential Mortgage Foreclosure Mediation Program 12 (Dec. 28, 2010), *available at* [http://www.floridasupremecourt.org/pub\\_info/documents/Foreclosure/12-28\\_2010\\_Foreclosure\\_Mediation\\_Report\\_1.pdf](http://www.floridasupremecourt.org/pub_info/documents/Foreclosure/12-28_2010_Foreclosure_Mediation_Report_1.pdf).

179. *Id.*

180. *Id.* at 13.

181. Rizzo Interview, *supra* note 150.

overburdened if it had the goal of getting all of the 78,000 people in foreclosure into a mediation session, still aimed to offer as many people as possible some support through the foreclosure process. Similar to Philadelphia, Cook County's program contracts with community outreach workers, but the goal of its door-knocking campaign is different. Instead of informing people about a conciliation date, the Cook County door-knockers hand borrowers a cell phone and ask them to call a hotline, where they are scheduled for a housing counseling appointment.<sup>182</sup>

Outreach can also help borrowers receive assistance earlier in the foreclosure process, thus increasing the likelihood that the borrower will negotiate an alternative to foreclosure. Maine's program, which originally referred parties to mediation once the homeowner filed an answer and completed a one-page form, had a low participation rate in its first year and an agreement rate of twenty-one percent.<sup>183</sup> Maine is now conducting a pilot program in which the borrowers who attend their first foreclosure hearing are presented with the option of mediating. If the borrower chooses mediation, they are immediately sent to an informational session with a court representative and the servicer to begin the process.<sup>184</sup> Earlier, face-to-face, informational outreach seems to lead to greater borrower investment and participation.

## VII. CONCLUSION

As the above statistics and examples suggest, the volume of foreclosures and delays in the process are often the result of poor communication between borrower and servicer. Dispute resolution processes are intended to address this breakdown in communication.<sup>185</sup> Foreclosure

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182. See COOK CNTY. PROGRESS REPORT, *supra* note 27, at 14-16.

183. RESOLUTION BY THE NUMBERS, *supra* note 26, at 9. The exact participation rate is unknown because the number of eligible foreclosures was not reported. Of all foreclosures, eighteen percent participated. *Id.* In general, the majority of foreclosures are eligible. *Id.*

184. *First Call Pilot in Bangor and Rockland Courts*, ME. JUD. BRANCH, [http://www.courts.state.me.us/maine\\_courts/fdp/first\\_call/index.html](http://www.courts.state.me.us/maine_courts/fdp/first_call/index.html) (last visited Jan. 12, 2013).

185. Susan M. Yates & Heather Scheiwe Kulp, *Reimagining ADR in the Midst of Crisis: Neutrals Responding to the Foreclosure Dilemma*, ACRESOLUTION,

dispute resolution programs increase the percentage of borrowers who receive assistance during the foreclosure process. But are dispute resolution programs' benefits felt to the fullest extent possible?

The failure of foreclosure dispute resolution is not that it fails to assist borrowers in retaining their homes (almost all programs result in greater retention of homes than if there was not a program at all) or that it leads borrowers intentionally to extend the time in their homes (in fact, few cases of intentional delay have surfaced; the delays are usually due to servicer error). Rather, the failure of foreclosure dispute resolution is that such processes have not sufficiently tracked, evaluated, and reported their own goal achievement. The limited statistics we, who have studied and participated in the foreclosure dispute resolution field for nearly five years, found show a significant gap between the message of foreclosure dispute resolution ("this process will help resolve a major national crisis") and its reality ("we actually don't know much about whether it is achieving the goals for which we created it").

To effectively employ the dispute resolution process, foreclosure dispute resolution programs need to focus on goal creation, system design, and regular data collection and evaluation. With a shift in attention from vague platitudes like "helping borrowers" to specific goal adoption and assessment, programs will be able to detect the weak links in the dispute resolution system, develop creative solutions to address those links, and continuously improve the system. Moreover, a program that publicly states its specific goal and releases data that speaks to that goal cannot justly be accused of failing to achieve an unintended goal. With goal articulation and evaluation systems in place, a program can focus on increasing its efficacy instead of defending its existence. Then, its creators, managers, and defenders can confidently state, "Yes, it does work, and here's why."