

**STATE OF MAINE
JUDICIAL BRANCH
FORECLOSURE DIVERSION PROGRAM**

**REPORT TO
THE JOINT STANDING COMMITTEE
ON INSURANCE AND FINANCIAL SERVICES
AND
THE JOINT STANDING COMMITTEE
ON JUDICIARY**

126TH LEGISLATURE

February 13, 2014

Executive Summary

In 2009 the Maine Legislature established the Foreclosure Diversion Program (“FDP”) in the Maine Judicial Branch. It affords a valuable opportunity for homeowners and lenders to consider mutually beneficial alternatives to foreclosure.

The FDP continues to see a high level of activity. In 2013, the FDP conducted 2,518 mediation sessions in 1,697 foreclosure cases. A total of 4,756 foreclosure cases were filed in Maine in 2013, an increase from the 4,339 cases filed in 2012.

The FDP has achieved positive results. An increasing number of foreclosure cases in the FDP have concluded in dismissal, thereby saving homes from foreclosure. To date, 60% of cases mediated in 2010 and 59% of cases mediated in 2011 have been dismissed. Of cases mediated in 2013, 21% have been dismissed so far.

To streamline the FDP process, the FDP launched the First Call Pilot Program in the majority of FDP processing courts. The Pilot will be implemented statewide in 2014.

The Maine Judicial Branch submits this report on the performance of the Foreclosure Diversion Program (“FDP”) in 2013 as required by 14 M.R.S. § 6321-A (7)(B). The results of mediation are positive, based on the volume of mediation requested and the rate of dismissals of cases after mediation.

I. Introduction

The 124th Maine Legislature established the FDP in June, 2009 in response to the national foreclosure crisis. Pursuant to 14 M.R.S. § 6321-A, the Maine Supreme Judicial Court implemented a statewide foreclosure diversion mediation program and **adopted Rule 93 of the Maine Rules of Civil**

Procedure to govern the FDP.

FDP mediation is available in all eligible mortgage foreclosure cases filed on or after January 1, 2010. To be eligible, a foreclosure case must involve an owner-occupied home with no more than four units. **(For a summary of the foreclosure process including mediation, see Chart 1 attached.) The Judicial Branch continues to monitor the FDP to ensure both efficient and effective mediation service to the public.**

II. Performance of the Program

A. Foreclosure Filing Activity and Participation in FDP

In 2013, 4,756 foreclosure cases were filed in Maine. This is higher than the number of cases filed in 2012 and is surpassed only by the 5,437 cases filed in 2010. Foreclosure filings in Maine since 2010 are as follows:

2010: 5,437
2011: 4,702
2012: 4,339
2013: 4,756

The rate of participation of cases in the FDP was 30% of foreclosure cases filed in 2010. The rate rose to 43% in 2012, but fell to 36% in 2013. The percent decrease in 2013 might be due to a spike in foreclosure filings in the last quarter of the year. Many cases filed at the end of the year had not yet had time to enter the FDP as of December 31, 2013.

B. Volume of Mediation and Status of Mediated Cases

In 2013, FDP mediators conducted 2,518 mediation sessions in 1,697 foreclosure cases. (See Chart 2 attached.) This nearly matched the 2,562 mediation sessions in 1,656 foreclosure cases in 2012. On average, 1.5 mediation sessions occurred per case in 2013. This is slightly lower than the average of 1.7 mediation sessions per case from 2010-2013.

After mediation, cases move into one of four categories: (1) dismissed, (2) foreclosure judgment entered, (3) remaining in the FDP, or (4) returned to the civil docket for litigation. The 2013 data and cumulative FDP data on cases mediated from 2010 through 2013 is presented in Chart 2.¹

1) Cases Dismissed

One of the most striking successes of the FDP is the rate of dismissals. Dismissal means that the case is ended, and no foreclosure occurs. Dismissal saves time and resources for parties and for the court and indicates that the property's status is stable. Dismissal suggests that the loan is

¹ Since July, 2011, the FDP has tracked cases through a custom online database, the Alternative Dispute Resolution Information System (ADRS), which enhanced FDP data collection and analysis.

performing again or the debt has been paid by sale of the property. To date, 21% of the cases mediated in 2013 (373 cases) have been dismissed. As unresolved cases proceed to conclusion, the number and rate of dismissals for any given year increases. Of the cases mediated in 2010, 60% have now been dismissed, and 59% of the cases mediated in 2011 have been dismissed. To the extent that FDP has an ability to track them, the underlying reasons for the 2013 dismissals are presented in Chart 3 (see attached).

2) Foreclosure Judgments Entered

A judgment means that the case ended with a foreclosure of the property. The number of foreclosure judgments in mediated cases increases over time. To date, 13% of cases mediated in 2013 (213 cases) have resulted in foreclosure judgment. However, 36% of cases mediated in 2010 and 35% of the cases mediated in 2011 have concluded in foreclosure judgments so far.

3) Cases Remaining in the FDP

Of cases mediated in 2013, 28% (473 cases) remain in the FDP. In general, mediators aim to complete mediation within three mediation sessions, and, even if the parties agree to extend the time, to conclude mediation within nine months. This is not always possible, and mediators must exercise both good judgment and common sense to respond to the needs of the parties and the case. A complicated case may require additional mediation. If a case does require more than three sessions or nine months, some form of noncompliance might be involved. An FDP mediator is required to report noncompliance to a judge pursuant to Rule 93(j) of the Maine Rules of Civil Procedure.

Sometimes cases are partially resolved but stay in the FDP for monitoring of a trial payment plan (generally three months) that may lead to permanent loan modification agreements. This is an important protection, assuring the parties' continued communication until a modification becomes permanent and preventing any possibility that a loan servicer will impermissibly pursue both a foreclosure judgment and a loan modification simultaneously ("dual tracking").

4) Cases Returned to the Civil Docket

Returning to the civil docket means that further litigation takes place in a case after mediation, possibly leading to trial. To date, 38% of the cases mediated in 2013 (638 cases) were returned to the civil docket following mediation. The ultimate conclusion of these cases cannot be predicted; parties who complete mediation frequently continue to work together, and their efforts may yet result in dismissal.

III. Statewide Mediation Services

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

The FDP operates with a system of designated processing courts in each of the eight judicial regions. Informational Sessions and mediation are held at designated courts: Springvale, Portland, Bridgton, Augusta, Lewiston, Farmington, West Bath, Rockland, Bangor,

Ellsworth, and Caribou. A foreclosure defendant's request for mediation² triggers scheduling of the case for an FDP Informational Session, at which a judge and housing counselor provide information on foreclosure, lenders' requirements, and where to find free assistance. In 2013, the Judicial Branch held 136 Informational Sessions for homeowners at courthouses across the state.

Within 21 days after the Informational Session, parties must exchange and file with the court required financial documents. In the standard procedure—now varied by a pilot project in some courts—the clerk schedules the case for mediation at least 21 days after receipt of documentation to allow lenders time to review the loan for modification. Homeowners, lenders (often by telephone), lenders' counsel, and defense counsel (if any) must all attend mediation.³

Completing loan review by the first mediation session proved to be challenging. For borrowers, determining what to send and compiling it in the correct form turned out to be a complex task that very few could accomplish without direct communication with their lenders. In addition, the financial forms provided by plaintiffs with service of the complaint were inconsistent, and the forms changed so frequently that some were replaced by the time of mediation, disqualifying whatever submission a borrower had made. Because the first mediation session occurred six or seven weeks after the Informational Session, an unproductive first mediation session could delay the resolution of a case by that same period.

To eliminate delays and expedite mediation, the FDP designed a pilot project. In the First Call Pilot (the "Pilot"), a request for mediation triggers scheduling of both an Informational Session and first mediation **on the same day**. On that day, after the Informational Session, multiple mediators conduct short mediation sessions at the courthouse. The parties meet for 30-45 minutes, assess the situation, make a plan for document submission and loan review, choose another option (e.g., short sale), or conclude mediation. Lenders and counsel are often able to attend mediation in many cases in a half-day. The mediator records any agreed-upon next steps in a written report to remind the parties of their agreed tasks and to provide accountability for those agreements.

In July, 2012, the FDP launched the Pilot in Bangor and Rockland. In 2013, the Pilot was expanded to courts in Ellsworth, Portland, West Bath, and Caribou. The FDP will implement the Pilot statewide in 2014.

To evaluate the Pilot, the FDP has compiled data from control groups of pre-Pilot FDP cases in Bangor, Rockland, and Ellsworth for comparison to Pilot FDP cases. This data shows that, since the Pilot was implemented, the average number of days cases stay in the FDP has dropped. (See Chart 4 attached.) The Pilot is helping to achieve the goal of streamlining the mediation process.

² Pursuant to 14 M.R.S. § 6321-A (2)(C), every complaint in a foreclosure action must be served with a single page form answer that provides all defendants with notice of the option to mediate.

³ According to mediators' reports, in 559 of the 1,697 cases mediated in 2013 (33%), homeowners had legal counsel. In 800 (47%) of those cases, homeowners reported receiving help with forms needed for mediation.

B. *FDP Staffing*

The governing legislation authorized the funding of FDP positions through a fee imposed on each foreclosure filing. **P.L. 2009, ch. 402, § 26.** FDP positions currently include the Program Manager, Administrative/Data Assistant, and three full-time foreclosure clerks. The FDP also funds two part-time clerk positions, using vacant positions within the Judicial Branch, and three law clerk positions to facilitate review of summary judgment motions. The FDP plans to fund these positions as long as they are needed for FDP caseload management but will reduce the number of positions when the foreclosure caseload decreases.

C. *Statewide Mediator Roster and Continuing Education*

By early 2013, only 32 active FDP mediators provided statewide mediation services, and the FDP determined that it was time to increase the number of mediators. FDP recruited and certified new FDP mediators in the Spring and Summer of 2013. A two-day mandatory orientation for new FDP mediators in June covered foreclosure law and procedure, mortgage assistance programs, mediation skills, and the FDIC Net Present Value worksheet. New FDP mediators were required to observe experienced FDP mediators conduct foreclosure mediation, and the FDP Manager co-mediated with all new mediators as they tackled their first FDP cases. The statewide roster now stands at 43 active FDP mediators who are available across Maine from York County to Aroostook County.

The FDP has provided numerous continuing education opportunities for discussion of foreclosure law, mediation procedures, loan servicing, and workouts. For example, the following issues were addressed in 2013: (1) best use of the FDIC Net Present Value worksheet; (2) FDP Policy on Mediator Conflicts of Interest and Disclosures; (3) Guidelines for FDP Mediators on Reports of Noncompliance and the good faith requirement; (4) mortgage assistance programs; (5) the intersection of bankruptcy law and foreclosure; and (6) transfer of mortgage servicers during mediation and loan review. FDP mediators must be conversant with many aspects of law, regulation, and mortgage assistance programs to be effective.

IV. Challenges

A. *Providing Up-To-Date Information on Relevant Regulations to Mediators*

Mediators are required to have knowledge of mortgage assistance programs pursuant to 14 M.R.S. 6321-A 7.A (3). As the foreclosure crisis has unfolded, mortgage assistance programs have changed and evolved. The action brought by 48 state attorneys general for mortgage servicer misconduct resulted in the National Mortgage Settlement, which requires that loan servicers meet detailed standards that will be monitored for years to come. The Consumer Financial Protection Bureau issued new loan servicing regulations effective January 10, 2014. FDP mediators must maintain the technical expertise to facilitate agreements within the context of applicable regulations, and the FDP's challenge is to follow and provide guidance about changes in the national regulatory landscape. The FDP leads discussion of legal and regulatory issues at periodic meetings and presents continuing education programs for FDP mediators.

B. *Avoid Undue Delays*

The channel of communication between homeowners and lenders afforded by mediation has proven to be invaluable, and the FDP is committed to providing a full and fair opportunity for discussion. Delay in assessing options and completing loan review continues to create a challenge, however. Exacerbating the challenge is the frequent transfer of loan servicing contracts and changes of plaintiffs' counsel.

As described above, the FDP is expanding the Pilot statewide to bring parties together earlier in the foreclosure diversion process, to increase accountability, and to help ensure that mediation is completed in a timely manner without unnecessary delay.

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

Exit surveys provided at mediation in 2013 reflect positive comments by FDP participants:

- "This program is wonderful and essential to Maine's people. We are lucky to live in a state with this program. It is a pleasure to work with all of the mediators involved."
- "My experience was extremely positive and productive. Personally, I could not have navigated the foreclosure process without the help of the mediation team. I'm so grateful for all the help they all provided."
- "The entire diversion process has been exceptionally helpful to decoding just what the bank is looking for – requirements and deadlines. Thank you."
- "[Mediator] did an excellent job interfacing with my client and explaining difficult concepts in a way that was easily understood by my client. He has my highest recommendation as a mediator in this program."

IV. **Conclusion**

The FDP continues to provide a valuable and productive opportunity for parties in eligible foreclosure actions across Maine to resolve their cases through mediation. Many Maine homeowners have reached agreements with their lenders to retain their homes, and lenders have retained performing mortgages and avoided adding inventory to their foreclosure properties. The FDP remains committed to a high level of service to homeowners and lenders. FDP mediators work to facilitate timely, mutually-beneficial resolution for all parties in foreclosure cases across the state.

Respectfully Submitted,

Laura S. Pearlman
Manager, Foreclosure Diversion Program
Maine Administrative Office of the Courts

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The Foreclosure Process

