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FORECLOSURE MEDIATION AS AN ENFORCEMENT MECHANISM

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INTRODUCTION

Many believe the foreclosure crisis is over, but this is far from the case, especially for minority neighborhoods. Even after federal loss mitigation programs became more effective, minorities faced greater obstacles qualifying for loss mitigation options. Mediation programs were then adopted as a leveling mechanism. These programs were designed to address servicing abuses and reduce the devastation to minority neighborhoods. While foreclosure mediation programs are still in their infancy, early quantitative and qualitative assessments suggest them to be a promising option to reduce foreclosures and the resultant blight in minority neighborhoods.

I. MORTGAGE ORIGINATION AND SURGE OF SUBPRIME LENDING

Minority communities have experienced rapidly changing relationships with financial institutions. Historically, many minority communities have lacked access to capital. Before the 1980s, lenders avoided inner-city neighborhoods largely due to fear, prejudice, and institutional discrimination.[1] Lenders were more likely to deny African American borrowers loans, especially in white neighborhoods, whereas whites were more often denied in minority neighborhoods.[2]

After decades of marginalization, minority communities were granted access to the mortgage lending process as a revenue source for mortgage originators. As investor appetite for highly rated mortgage-backed securities increased, mortgage originators viewed minority borrowers differently: they became a profit source and a market to be targeted. Soon after the loans were entered into, the mortgage originators sold their loans

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1 Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure* Crisis, 75 AM SOCIOLOGICAL REV. 629, 631 (2010).

2 *Id.*

to investment banks that were often willing to pay premiums for lucrative subprime loan revenue streams. The investment banks then securitized the loans and passed the risk on to institutional investors.[3]

Previously excluded from the mortgage market, many minority borrowers took the deals being offered. Subprime loans provide borrowers with poor credit an opportunity to obtain a mortgage but with much higher fees and interest rates. The additional costs are justified based on the increased risk and typically higher foreclosure rates. These fees and interest rates helped fuel the expansion of the subprime lending market after 1994.[4] "Simultaneously, subprime lenders expanded their mortgage product, offering to include more [adjustable rate mortgages,] . . . interest-only loans[5] [,] . . . and payment option loans[6] . . . , which previously were only available in select markets." [7]

While subprime loans allowed lenders to extend credit to those who might not otherwise qualify, such loans were often exploitative in nature and provided in a discriminatory manner. Predatory subprime lenders seeking heightened fees flooded into these markets and targeted minority neighborhoods. Even when taking into account income and neighborhood characteristics, African Americans were 64% more likely to receive a subprime loan than their white counterparts,[8] and this holds true for Asians and Hispanics as well.[9] Mortgage originations for home purchase in high-credit-risk neighborhoods significantly increased after 2000, doubling by 2004.[10] "High-cost loans were much more prevalent [in minority neighborhoods] than elsewhere: 61% of home purchases in weak-market neighborhoods closed with a high-cost loan between 2004 and 2006, a rate almost double that of other neighborhoods."[11]

A number of studies have evaluated low-income neighborhoods in the Chicago area to better understand this phenomenon. A study of Austin, a low-income neighborhood on Chicago's West Side, found that the neighborhood was the largest single mortgage market by application volume within Chicago.[12] Increased access to capital led to increased median sale prices to as low as 12% to 15% to as high as 30% to 60% in other low-income

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3 *Id.* For a description of this securitization process, see Cathy Hwang & Benjamin P. Edwards, *The Value of Uncertainty*, 110 NW. U. L. REV. ONLINE 19 (2015).

4 Jeff Crump, Kathe Newman, Eric S. Belsky, Phil Ashton, David H. Kaplan, Daniel J. Hammel & Elvin Wyly, *Cities Destroyed (Again) For Cash: Forum on the U.S. Foreclosure Crisis*, 29 URB. GEOGRAPHY 745, 759 (2008) (citing Philip Ashton, *An Appetite for Yield: The Anatomy of the Subprime Mortgage Crisis* 41 ENV'T & PLAN. A. 1420, 1429 (2009)).

5 Borrower pay interest or a percentage of the interest for a set period of time such as 5 or 10 years.

6 Borrowers can choose their monthly payment.

7 Crump et al., *supra* note 4, at 752.

8 *Id.* at 767 (citing Jeff Crump, *Subprime Lending and Foreclosure in Hennepin and Ramsey Counties: An Empirical Analysis*, 35 CURA REP. 14 (2005)).

9 *Id.*

10 *Id.* at 761 (citing Philip Ashton, & Matthew Doyle, *Weak Market Neighborhoods in Chicago: A Baseline Study*, U. ILL. CHI. CITY DESIGN CTR. (2008)).

11 *Id.*

12 *Id.*

neighborhoods between 2001 and 2005.[13] "This created incentives to refinance and drew all homeowners into a pattern of speculative market development."[14]

What is even more alarming is many minority borrowers with subprime mortgages may have been eligible for a less-costly mortgage. A study commissioned by the Wall Street Journal analyzed credit scores in 2006 and determined 60% of borrowers in a subprime mortgage may have qualified for a prime loan, which is significantly higher than Freddie Mac's estimates of 15%.[15] Beth Jacobson, one of Wells Fargo's top producing subprime loan officers, admits, along with other loan officers, that African Americans in Baltimore were systematically singled out for high-interest subprime mortgages even though they could have qualified for prime loans.[16] Wells Fargo even created an emerging-markets unit to target African American churches that could influence congregants to take out subprime loans.[17] The City of Baltimore is now suing Wells Fargo and has released data showing "that more than half the properties subject to foreclosure on a Wells Fargo loan from 2005 to 2008 now stand vacant. And 71% of those are in predominantly [African American] neighborhoods."[18]

Predatory lenders targeted similar neighborhoods nationwide. Another study of two of the poorest neighborhoods in Chicago, Englewood and Garfield, found these neighborhoods "experienced phenomenal growth of 55% in mortgage credit for home purchases from 2002 to 2005, when growth was only 27% for the rest of Chicago" despite the average incomes of the neighborhood being half that of the rest of the city and the majority of residents having a credit score below 660.[19] A review of the income reported for these two neighborhoods during this same time period shows a decline in real income.[20] After further examining similarly situated neighborhoods, the researchers concluded that the expansion of subprime mortgage lending was driven by an expansion in credit supply that was unrelated to improvements in borrower income.[21]

The impact extends well beyond new homebuyers. As subprime lenders increased their marketing to minority neighborhoods, established homeowners began refinancing at

13 *Id.*
14 *Id.*
15 *Id.* at 777.
16 *See* Michael Powell, *Bank Accused of Pushing Mortgage Deals on Blacks*, N.Y. TIMES (June 6, 2009) http://www.nytimes.com/2009/06/07/us/07baltimore.html?_r=0.
17 *Id.*
18 *Id.*
19 Atif R. Mian & Amir Sufi, *Fraudulent Income Overstatement on Mortgage Applications during the Credit Expansion of 2002 to 2005* at 1-37 (Nat'l Bureau of Econ. Research, Working Paper No. 20947, 2015), http://www.nber.org/papers/w20947.pdf.
20 *Id.* at 1.
21 *Id.* at 1–2.

low introductory or teaser rates.[22] One California study of subprime borrowers found African Americans were significantly more likely than whites (40% vs. 24%) to report lender-marketing efforts as the impetus for taking out a home equity line of credit.[23] African Americans may have responded to these marketing efforts because of a misplaced belief that the lenders recommending transactions were giving advice in their best interest.[24]

II. FORECLOSURE CRISIS

In 2008, the foreclosure crisis began. Yet its causes and subsequent impact remains speculative due to the lack of accurate, consistent data on foreclosures. State-specific variability in foreclosure processes makes the data less uniform and frustrates efforts to draw conclusions.[25] For example, it may also be difficult to determine exactly what "counts" as a foreclosure. "Foreclosure" is defined in a variety of ways, ranging from mortgage default to the sheriff's sale. Such disparate definitions are particularly problematic, as not all foreclosures proceed under the same processes. Without federal regulation requiring nationwide data-gathering, much of the work on racial disparities in lending and foreclosure relies heavily on data reported under the Home Mortgage Disclosure Act (HMDA) or the proprietary RealtyTrac, which does not make metadata available.[26]

Despite the limited available data, much has been written on the causes of the crisis, including increased market liquidity, unprepared/naïve/ambitious borrowers, securitization of mortgages reducing originator risks, little federal regulation, declining property values, interest rate resets, aggressive marketing, poor underwriting, fraud, high demand for securities, and the list goes on. Others blame the crisis on the Community Reinvestment Act of 1977, which provides low-cost mortgages for borrowers in low-income neighborhoods. However, this theory has largely been debunked. There is also the bubble theory, that the foreclosure crisis occurred because of distorted beliefs rather than distorted incentives, such that "securitization merely facilitated transactions that borrowers and investors wanted to undertake anyway."[27]

Regardless of the ultimate underlying cause or combination of causes, the foreclosure crisis has widespread and undeniable impact. "By the beginning of 2011, lenders

22 An introductory rate (also known as a teaser rate) is an interest rate charged to a customer initially but it is not permanent and after it expires a higher than normal rate will apply.

23 Mian & Sufi, *supra* note 19, at 1–2.

24 Many Americans mistakenly believe that financial intermediaries provide advice consistent with their clients' best interests. For research in the securities context, see Christine Lazaro & Benjamin P. Edwards, *The Fragmented Regulation of Investment Advice: A Call for Harmonization*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 101, 104 (2014) (explaining that "retail customers simply expect that advice given will be in their best interest")).

25 Crump et al., *supra* note 4, at 775.

26 *See Id.*

27 Christopher L. Foote, Kristohper S. Gerardi, & Paul S. Willen, *Why Did So Many People Make So Many Ex Post Bad Decisions? The Causes of the Foreclosure Crisis* 1–61 (Nat'l Bureau of Econ. Research, Working Paper No. 18082, 2012), http://www.nber.org/papers/w18082.pdf.

had completed foreclosures of 2.7 million homes with mortgages taken out during the subprime boom years from 2004 to 2008 . . . [such that by] the fall of 2011, nearly four million homes were either in foreclosure or had mortgages that were seriously in default."[28]

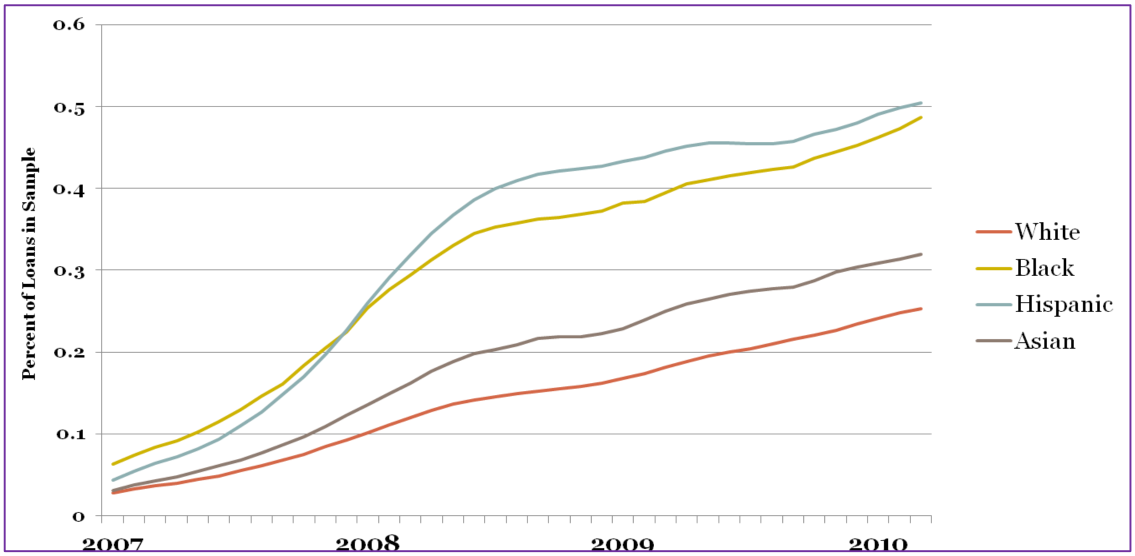
III. DEFAULT RATES HIGHER IN MINORITY NEIGHBORHOODS

The foreclosure crisis hit minority, low-income neighborhoods particularly hard with default rates in these neighborhoods spiking sharply higher than in predominantly white neighborhoods.[29] One study of Metropolitan Chicago illustrates what occurred nationwide: "Just 16 out of Chicago's 77 community areas accounted for 42% of all foreclosure filings citywide between 2000 and 2007."[30] These neighborhoods experienced foreclosure rates three to four times higher than in other neighborhoods with as many as one in three properties entering the foreclosure process.[31] These same neighborhoods had previously maintained stable owner-occupancy conditions through the 1970s and 1980s, which was the result of government-insured loan programs or with the assistance of small community banks.[32] However, the housing market boom in the 1990s passed over these neighborhoods, which negatively impacted home values.[33] Minority neighborhoods were then targeted by subprime lenders and funneled into high-cost mortgages. Then, as interest rates rose and housing prices further declined, "homeowners with unmanageable mortgages lost the capacity to get out of trouble by refinancing or selling their homes."[34] Because many of these borrowers funded home purchases with subprime mortgages, they found themselves unassisted in the first wave of defaults and foreclosures.[35] The highest delinquency rates were among Latino and African American homeowners as shown in the chart below.

28 Geoff Walsh, *Rebuilding America: How States Can Save Millions of Homes Through Foreclosure Mediation*, NAT'L CONSUMER L. CTR. (2012).
29 *See* Crump et al., *supra* note 4, at 756.
30 *Id.*
31 *Id.* at 760.
32 *Id.*
33 *Id.* at 760–61.
34 *Id.* at 755.
35 *See id.* at 771.

Figure 1

60+ Days Delinquent by Race/Ethnicity and Date[36]



A more recent study outlined in the table below shows "substantial variation across racial/ethnic types in foreclosure levels, with all-white neighborhoods having an average rate of 2.3%, but mostly-African American and mostly-Hispanic neighborhoods having rates about three times as high (8.1 and 6.2%, respectively)."[37]

Table 1

Foreclosure Levels in 2005 to 2009, by Neighborhood Racial/Ethnic Structure in 2000[38]

	Foreclosure Rate		Foreclosure Levels				
	Mean	SD	None (0%)	Low (<1%)	Moderate (1 to <5%)	High (5 to <10%)	Very High (10%+)
All Neighborhoods	4.45	6.77	.09	.24	.41	.14	.12
All White	2.31	3.38	.11	.32	.45	.09	.03
Mostly Black	8.08	9.70	.05	.11	.35	.21	.27
Mostly Hispanic	6.18	7.54	.08	.15	.36	.20	.21
White-Shared	3.39	4.77	.08	.25	.46	.14	.07
Black-White	4.40	6.71	.09	.25	.40	.15	.12
Hispanic-White	7.26	9.13	.05	.13	.37	.21	.24
Asian-White	1.99	2.62	.15	.33	.42	.08	.02
White-Mixed	5.90	7.96	.07	.18	.38	.19	.18
All Minority	6.43	7.83	.11	.16	.31	.19	.23
Integrated	8.55	9.61	.08	.15	.27	.19	.31

Note: We include block groups with total populations of at least 20 in 1990, 2000, and 2010 that were located in the 291 metropolitan areas with complete foreclosure data in 2005.

36 J. Michael Collins & Carolina Reid, *Who Receives a Mortgage Modification? Race and Income Differentials in Loan Workouts* 25 (Fed. Res. Bank S.F., Working Paper No. 2010-07, 2012), http://www.frbsf.org/community-development/files/who-receives-mortgage-modification.pdf.

37 Matthew Hall, Kyle Crowder, & Amy Spring, *Neighborhood Foreclosures, Racial/Ethnic Transitions, and Residential Divisions*, 80 AM. SOC. REV 526, 534 (2015).

38 *Id.*

IV. Loan Modification Policies

The initial attempts to address the foreclosure crisis were largely unsuccessful and focused upon refinancing, voluntary loan modifications, or counseling.[39] Many of the modifications made during 2007 and 2008 actually increased borrowers' monthly mortgage payment. [40]

Not surprisingly, the modifications completed in 2007 and 2008 quickly caused a high rate of re-default, only worsening the crisis.[41] "Over half the loans modified during 2008 were in serious default within a year of modification. By the beginning of 2010, barely one-quarter of the loans modified in 2008 were current."[42]

Policy approaches then shifted to reducing the borrowers' monthly mortgage payment, but the initial reductions in the payments were not sufficient "with only 39 percent of all modifications resulting in a monthly payment decrease of 10 percent or more by the fourth quarter of 2008."[43]

In early 2009, the Treasury launched the Making Home Affordable Program (MHA), which allocated $75 billion to support loan modification efforts, with a goal of reaching 9 million distressed borrowers by December 2012.[44] MHA offered the Home Affordable Modification Program (HAMP) loan modification as well as relinquishment options, such as a deed in lieu or short sale.[45] HAMP loan modifications capitalize the arrears, lower interest rates, extend loan terms, and forebear a portion of the balance at 0% interest and/or a principal reduction. This waterfall analysis requires servicers to follow each step until the loan meets an affordability threshold for the borrower in which the borrower's mortgage payment, including taxes and insurance, is less than 31% of the borrower's gross monthly income. A loan modification includes a Net Present Value (NPV) test—an assessment of whether or not it is more cost effective to offer a loan modification or foreclose. Once a modification is approved, there is an initial trial period plan in which the borrower must demonstrate capacity to maintain the modified terms by making three

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39 These programs included FHA Secure, refinancing program; Hope Now Alliance: counseling and voluntary loan modifications; National Foreclosure Mitigation Program: counseling; HOPE for Homeowners: foreclosure prevention, primarily through initiatives to refinance loans through the Federal Housing Administration.

40 Walsh, *supra* note 28, at 4.

41 U.S. Dep't of Treasury, Comparing the Performance of Home Affordable Modification Program (HAMP) Modifications and Non-Hamp Modifications: Early Results 2 (2014) [hereinafter U.S. Dep't of Treasury, Early Results], http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Documents/HAMP%20vs%20non-HAMP%20Performance%20Study%2002-27-2015%20-%20FINAL.pdf.

42 Walsh, *supra* note 28, at 4.

43 U.S. Dep't of Treasury, Early Results, *supra* note 41, at 2.

44 Collins & Reid, *supra* note 36, at 3, 10.

45 The relinquishment options later became known as the Home Affordable Foreclosure Alternatives Program (HAFA) pursuant to Making Home Affordable's Supplemental Directive 09-09. *Making Home Affordable, Home Affordable Foreclosure Alternatives—Short Sale and Deed-in-Lieu of Foreclosure Update*, Home Affordable Modification Program 1 (2010), https://www.hmpadmin.com/portal/programs/docs/hafa/sd0909r.pdf.

months of timely payments. After this time period, the temporary plan is to convert to a permanent loan modification.[46]

In 2009 and early 2010, demand for loan modifications was high, and servicers were ill-equipped to handle the applications.[47] "In an effort to provide assistance to struggling homeowners as soon as possible, servicers were not required to verify a homeowner's income prior to commencing a trial modification."[48] With few financial incentives for servicers, limited risk of sanctions for servicer non-compliance, and no private right of enforcement, borrowers struggled to obtain modifications.[49]

Loan modification programs have not been as successful as many had hoped. In October 2009, trial plan approvals peaked at approximately 160,000 approved for that month, but approvals steadily declined to only 31,000 in the month of April 2010.[50] "Conversions of trial plans to permanent HAMP modifications reached their highest level in April 2010" with the approval of 70,000 permanent modifications.[51] At this same point in time, 699,357 trial plans failed to convert to a permanent loan modification.[52] Servicers claim the failure to convert was because income verification was not provided after the trial modification commenced.[53] But, according to the National Consumer Law Center, "[h]undreds of thousands of borrowers whose trial plans were approved during the fall of 2009 simply had their plans canceled during the spring of 2010."[54] Without meaningful regulatory oversight and data reporting, the accuracy of these claims remains unclear.

To be sure, conversion ratios have increased somewhat. In June 2010 the MHA program started to require income documentation prior to a trial modification approval, and since that time 91,108 trial modifications have been canceled.[55] The numbers of new, permanent loan modifications also fell sharply to between 25,000 to 30,000 permanent modifications monthly, between April 2010 and September 2010, and this low monthly approval rate continued through 2011.[56] In October 2011, 3.9 million loans were at least

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46 *Handbook for Servicers of Non-GSE Mortgages*, HOME AFFORDABLE MODIFICATION PROGRAM, https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_5.pdf (last updated Jan. 6, 2016).

47 U.S. DEPT. OF TREASURY, MAKING HOME AFFORDABLE: PROGRAM PERFORMANCE REPORT THROUGH THE FOURTH QUARTER OF 2014, 5–7 (2014) [hereinafter MAKING HOME AFFORDABLE FOURTH QUARTER 2014], http://www.treasury.gov/initiatives/fInancial-stability/reports/Documents/4Q14%20Quarterly%20MHA%20Report%20Final3.pdf.

48 *Id.* at 5.

49 Clay S. Hester, *Airing Out HAMP's Dirty Laundry: Resolving* Corvello, Wigod*, and the Inherent Problems of the Home Affordable Modification Program's Trial Period Plans*, 93 N.C. L. Rev. Addendum 39, 42 (2014).

50 Walsh, *supra* note 28, at 14.

51 *Id.*

52 *See id.*

53 *See id.*

54 *Id.*

55 The data does not specify why the cancelations occurred, which leads to the question: if income has been verified, why are trial modifications being canceled? *See* MAKING HOME AFFORDABLE FOURTH QUARTER 2014, *supra* note 47, at 5.

56 Walsh, *supra* note 28, at 14.

ninety days delinquent or in foreclosure.[57] The monthly permanent loan modification rates remained fairly steady in 2013 with an average of 22,678 and in 2014 with an average of 20,584 per month.[58] The first quarter of 2015 shows a decrease to 16,299 permanent loan modification approvals per month.[59]

Table 2
Affordability of Modified Loans (2008–2011) [60]

Between 2008 and 2011, the impact of loan modifications on a typical homeowner's monthly payment changed dramatically. Instead of the modification leaving the borrower's payment the same or increasing it, most modifications after 2009 decreased the borrower's monthly principal and interest (P&I) payment by at least twenty percent.

	Mortgage modified in:			
Impact on P&I payment	April–June 2008	April–June 2009	April–June 2010	April–June 2011
20% reduction	18.1%	38.6%	56.4%	53.8%
Some reduction	40.9%	78.2%	90.1%	89.4%
Payment same or increased	59.1%	21.8%	9.9%	10.6%

HAMP has not lived up to the Treasury's stated objectives. When the Treasury announced HAMP, it predicted 3 to 4 million households would receive reduced mortgage payments by the time the program was to end in December 2012.[61] HAMP was to become the industry standard for sustainable affordable home modifications. Instead, by December 2012, only a little over 1.2 million first lien HAMP permanent loan modifications had been

57 *LPS Mortgage Monitor: November 2011 Mortgage Performance Observations*, BLACK KNIGHT FINANCIAL SERV. 3 (Oct. 2011), http://www.bkfs.com/CorporateInformation/NewsRoom/MortgageMonitor/201110MortgageMonitor/LPSMortgageMonitorOctober2011.pdf.

58 See quarterly and monthly program performance reports in U.S. DEP'T OF TREASURY, MAKING HOME AFFORDABLE: PROGRAM PERFORMANCE REPORT THROUGH DECEMBER 2013 at 11 (2014), http://www.treasury.gov/initiatives/financial-stability/reports/Pages/Making-Home-Affordable-Program-Performance-Report.aspxDocuments/December%202013%20MHA%20Report%20Final.pdf; MAKING HOME AFFORDABLE FOURTH QUARTER 2014, *supra* note 47, at 34.

59 *See* U.S. DEP'T OF TREASURY, MAKING HOME AFFORDABLE: PROGRAM PERFORMANCE REPORT THROUGH THE FIRST QUARTER OF 2015 at 4 (2015) [hereinafter MAKING HOME AFFORDABLE FIRST QUARTER 2015], http://www.treasury.gov/initiatives/financial-stability/reports/Documents/1Q15_Quarterly_MHA_Report_Final.pdf.

60 Walsh, *supra* note 28, at 12.

61 Press Release, U.S. Dep't of Treasury, Relief for Responsible Homeowners: Treasury Announces Requirements for the Making Home Affordable Program (Mar. 4, 2009) http://www.treasury.gov/press-center/press-releases/Pages/200934145912322.aspx.

approved,[62] leaving millions of homeowners who met basic eligibility requirements and tried to obtain a HAMP modification instead being denied.[63] MHA including HAMP was set to expire in 2012 but remains in effect, with revised directives and program changes, with the hope of achieving its initial goals. As of the end of the first quarter of 2015, only around 1.8 million first lien HAMP permanent loan modifications had been approved.[64] The application deadline for MHA programs has been extended to December 31, 2016.[65]

Furthermore, more non-HAMP modifications have been offered than HAMP modifications over an extended period of time. According to the U.S. Office of the Comptroller of the Currency (OCC) and the U.S. Office of Thrift Supervision's (OTS) quarterly surveys, "lenders modified 233,853 mortgages during the third quarter of 2010, of which 58,790 were HAMP modifications."[66] This means that in 2010, only 25% of the modifications were HAMP modifications. "For the third quarter of 2011, the total number of permanent loan modifications dropped by 96,314 with only 40% being HAMP modifications."[67] The chart below shows permanent loan modifications from April 2009 to April 2013 and illustrates the prevalence of private modifications.

62 This number reflects MHA first lien modifications that were started. U.S. DEP'T OF TREASURY, MAKING HOME AFFORDABLE: HAMP APPLICATION ACTIVITY BY SERVICER AS OF DECEMBER 2012, (2012) http://www.treasury.gov/initiatives/financial-stability/reports/Documents/HAMP%20Application%20Activity%20December%202012.pdf.

63 Walsh, *supra* note 28, at 5.

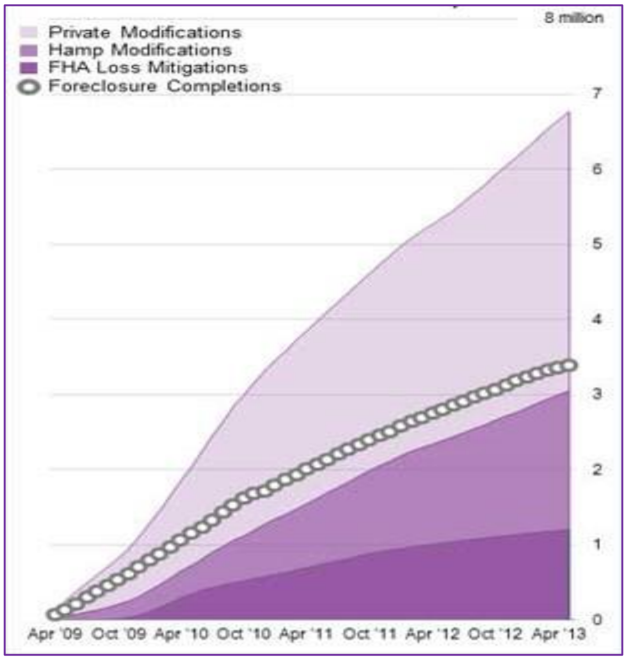
64 MAKING HOME AFFORDABLE FIRST QUARTER 2015, *supra* note 59, at 4.

65 U.S. DEP'T OF TREASURY, MAKING HOME AFFORDABLE: PROGRAM PURPOSE AND OVERVIEW, http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/default.aspx (last visited Aug. 1, 2015) [hereinafter MAKING HOME AFFORDABLE: PROGRAM PURPOSE AND OVERVIEW].

66 *See* Walsh, *supra* note 28, at 15.

67 *See Id.* at 15.

Figure 2
Permanent Loan Modifications Since April 2009[68]



In the fourth quarter of 2013, the percentage of non-HAMP modifications skyrocketed to 70%.[69] But in 2014, half of the modifications were HAMP and the other half were non-HAMP modifications.[70] During 2014, non-HAMP modifications decreased by 52.1%, but HAMP modifications only increased by 8.3%.[71]

HAMP's underutilization has significant consumer protection implications. Now "[v]irtually all HAMP modifications reduce the borrower's monthly principal and interest payment, with a median payment reduction of approximately $500, or over a third of the median monthly payment before modification."[72] HAMP also offers much more than payment reductions for borrowers. It also provides a fixed rate for the first five years, prohibits modification fees, waives late fees, and prohibits a waiver of legal rights.[73] In addition, HAMP now offers borrowers $1,000 in annual principal reductions for up to five years of consistent payments and a principal reduction of $5,000 in year six as long as the

68 MAKING HOME AFFORDABLE: PROGRAM PURPOSE AND OVERVIEW, supra note 65.
69 OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC MORTGAGE METRICS REPORT: DISCLOSURE OF NATIONAL BANK MORTGAGE LOAN DATA 6 (2014).
70 First Quarter of 2014, 50% of modifications were proprietary, Second Quarter of 2014, 43% of the modifications were proprietary, Third Quarter of 2014, 49% of the modifications were proprietary, and by the Fourth Quarter, 50% of the modifications were proprietary. *Id.* at 53 tbl.56.
71 *Id.* at 5.
72 U.S. DEP'T OF TREASURY, EARLY RESULTS, *supra* note 41, at 2.
73 Hester, *supra* note 39.

loan is in good standing.[74] These protections and incentives are significant, whereas the proprietary loan modification offers are less standardized and generally have less favorable terms. When the Office of the Comptroller of the Currency reviewed modification performance two years after the start of the review, only 17.4% of those started in 2013 were disqualified. HAMP modifications continue to exhibit lower delinquency and re-default rates than industry modifications.[75]

Table 3

# Months Post Modification	% of Disqualified Modifications[76]							
	2009	2010	2011	2012	2013	2014	2015 (Q1)	All
3	2.1	1.7	1.2	1.0	0.8	1.1	1.0	1.3
6	6.7	6.7	5.3	4.3	3.8	4.6		5.5
12	16.3	15.6	12.7	10.3	9.4	10.4		13.2
18	22.9	22.7	18.9	15.3	14.0			19.6
24	28.9	28.0	23.7	19.1	17.8			24.9
30	33.4	32.6	27.3	22.4				29.5
36	37.6	36.6	30.0	26.0				33.7
42	41.1	39.3	33.0					37.3
48	43.6	41.6	36.4					40.9
54	46.0	43.8						44.1
60	48.0	47.5						47.6

V. LOAN MODIFICATION POLICY FAILINGS

Despite the growing evidence that HAMP modifications are affordable and sustainable, borrowers continue to face significant barriers to being approved or are being offered less affordable modification options. As enumerated above, the number of HAMP permanent loan modifications has been decreasing. Servicers' reasons for denying permanent loan modifications are questionable and not supported by the data. Servicers' most cited reasons for denying borrowers are that borrowers have insufficient documentation, that there is a change in NPV analysis, or that the borrower failed to accept the modification offer.

74 U.S. DEP'T OF TREASURY, MAKING HOME AFFORDABLE PROGRAM, HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES: VERSION 4.5, 137-38 (2015) [hereinafter HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES], https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_45.pdf.
75 MAKING HOME AFFORDABLE FIRST QUARTER 2015, *supra* note 59, at 8.
76 *Id.*

On the other hand, consumer advocates cite a process of "calculated chaos" including servicers losing documents, failing to follow promised time frames, failing to notify homeowners of reasons for servicers' actions, giving invalid or blatantly false reasons for denials, providing ineffective review of decisions, and pursuing foreclosure while reviewing for modifications or during active trial modifications.[77] In October 2009, a congressional oversight panel reported "evidence of eligible borrowers being denied HAMP modifications incorrectly, misinterpretations of program guidelines, and difficulties encountered by borrowers and housing counselors in understanding the NPV models, as well as the reasons that HAMP applications were being denied."[78]

A. *Insufficient Documentation*

Insufficient documentation is the most common reason loan servicers give for borrower denials and accounts for 20% of all loan modification request denials in California.[79] However, consumer advocates and housing counselors state the real reason behind such denials is that the servicers lost the documents or failed to timely review the information which in turn results in unnecessary and redundant requests. If an application is not timely reviewed, the application materials become "stale" often requiring the borrower to submit new paycheck stubs, bank statements, and utility bills. While the borrower is gathering and submitting these documents, the modification request documents then become stale, requiring the borrower to start the application anew. This often frustrates the borrower to the point of giving up on his or her application entirely. Servicers then deny the application, claiming insufficient documents, even though servicer-driven delays cause the documents to go stale. Indeed, "[m]ost housing counselors report that the large loan servicers 'always' or 'almost always' lose documents."[80]

The Treasury has made some attempts to address these failings. During 2010 and 2011, the U.S. Treasury Department made several revisions to the federal guidelines, setting time frames for servicers' decisions and requiring written notices to borrowers.[81] Specifically, servicers were required to review initial application packages for completeness

77 Walsh, *supra* note 28, at 5.

78 SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, THE NET PRESENT VALUE TEST'S IMPACT ON HOME AFFORDABLE MODIFICATION PROGRAM 4 (2012), https://www.sigtarp.gov/Audit%20Reports/NPV_Report.pdf.

79 *Race to the Bottom: An Analysis of HAMP Loan Modification Outcomes by Race and Ethnicity for California*, CAL. REINVESTMENT COALITION 18 (2011) [hereinafter CAL. REINVESTMENT COALITION], http://calreinvest.org/system/resources/W1siZiIsIjIwMTEvMDcvMTIvMTFfMTBfMjdfOTg3XohBTVBfUkVQT1JUXoZJTkFMLnBkZiJdXQ/HAMP%20REPORT%20FINAL.pdf.

80 *Id.* at 2.

81 Walsh, *supra* note 28, at 14.

within thirty days.[82] However, the MHA regulations provided no private right of enforcement to the borrowers and the problems continued.

"On February 9, 2012, the [United States] Attorney General announced that the federal government and forty-nine states had reached a settlement agreement with the nation's five largest mortgage servicers to address mortgage servicing, foreclosure, and bankruptcy abuses (the 'National Mortgage Settlement')."[83] The agreement settled state and federal investigations into the country's five largest mortgage servicers and the investigations found that servicers routinely signed foreclosure related documents outside the presence of a notary public and without really knowing whether the facts they contained were correct.[84] The settlement established the first ever nationwide reforms to servicing standards requiring "single point of contact, adequate staffing levels and training, better communication with borrowers, and appropriate standards for executing documents in foreclosure cases, ending improper fees, and ending dual-track foreclosures for many loans."[85]

The Consumer Financial Protection Bureau (CFPB) issued regulations, which became effective in January 2014 to address the continuing servicing abuses. These regulations included requirements related to accessing and providing timely and accurate information,[86] properly evaluating loss mitigation applications,[87] facilitating oversight of and ensuring compliance with the rules by service providers,[88] facilitating transfer of information when servicing is transferred to a different servicer,[89] and informing borrowers of error resolution and information request procedures.[90] Specifically, the CFPB regulations require servicers to provide written acknowledgement detailing what additional information must be submitted and a reasonable deadline to do so, within five days of the servicers' receipt of an application.[91] The CFPB regulations, similar to the HAMP regulations, require a decision on the complete application to be made within thirty days of receiving all information from the borrower.[92]

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82 U.S. DEP'T OF TREASURY, HOME AFFORDABLE MODIFICATION PROGRAM—PROGRAM UPDATE AND RESOLUTION OF ACTIVE TRIAL MODIFICATIONS 3 (2010), https://www.hmpadmin.com/portal/programs/docs/hafa/sd0909r.pdf.

83 *National Mortgage Settlement*, U.S. DEP'T JUSTICE, http://www.justice.gov/ust/national-mortgage-settlement (last visited August 1, 2015).

84 *About the Settlement*, JOINT ST.-FED. NAT'L MORTGAGE SERVICING SETTLEMENTS, http://www.nationalmortgagesettlement.com/about (last visited on August 1, 2015).

85 *Id.*

86 *See* 12 C.F.R. § 1024.38(b)(1)(iv) (2016).

87 *Id*. § 1024.38(b)(2).

88 *See id*. § 1024.38 (b)(3).

89 *See id*. § 1024.38 (b)(4).

90 *See id*. § 1024.38 (b)(5).

91 *See id*. §§ 1024.41(b)(2)(i)(B), (b)(2)(ii). The application must be received forty-five days prior to the foreclosure sale for the timelines to apply. *Id*. § 1024.41(b)(2)(i).

92 *See id*. § 1024.41(c)(1)(i).

B. *Denials Based Upon the NPV Calculation*

As discussed above, the HAMP eligibility analysis requires servicers to run a NPV test to determine whether it is more economical for the investor to modify the loan or foreclose on the property.[93] Servicers claim negative NPV outcomes to be responsible for a sizeable percent of modification denials. "Curiously, a significant share of canceled trial modifications with a positive NPV were canceled due to 'negative NPV,' suggesting the servicer later changed its NPV analysis for some reason (or that there was an error in data reporting)."[94] The Government Accountability Office reported in June 2010 that "15 of the 20 largest servicers were not running the NPV test in compliance with HAMP guidelines," and half of the servicers sampled had at least a 20% error rate for income calculations which is just one of the NPV factors.[95] A 2012 report by the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) found in a sample of 149 HAMP applications, "servicers could provide both accurate inputs and documentation for only 2 of the HAMP applications."[96] "Based on Treasury data as of March 2012, approximately 5% of 3.2 million homeowners denied for HAMP were denied based on the NPV test" and more than 160,000 HAMP-eligible homeowners have been turned down based on the results of the NPV test.[97]

These reports led to the adoption of Section 1482 of the Dodd-Frank Act, which requires a publicly available web-based NPV calculator to assist borrowers in understanding the NPV evaluation process under HAMP and conducting their own estimated NPV evaluation.[98]

C. *Failure to Accept a Loan Modification Offer*

The borrower failing to accept a modification offer is the most perplexing reason for modification denials. As discussed above, the application process for a loan modification is very time consuming. Even the most straightforward application requires borrowers to provide two years of signed and dated tax returns, two current paystubs with year-to-date figures, two months of bank statements, current documentation of utility bills and expenses, and numerous loss mitigation application forms, such as the Request for Modification Assistance form or Uniform Borrower Assistance form, 4506T form or 4506EZ form, Dodd Frank Certification, and a hardship letter.[99] Depending upon the borrower's circumstances, the borrower might also have to provide a divorce judgment, death certificate, quarterly profit and loss statement, signed and dated contribution letter, lease agreement, quitclaim deed, current benefit award letters, and the list goes on. It thus seems

93 CAL. REINVESTMENT COALITION, *supra* note 79, at 20.
94 *Id.*
95 SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, *supra* note 78, at 5.
96 *Id.* at 10.
97 *Id.* at 1.
98 *See id.* at 6.
99 *See* HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES, supra note 74, at 81–82, 85, 90–96.

improbable that, after all of this effort to achieve a loan modification, a borrower would simply turn an offer down.

One plausible explanation for the apparent frequency of borrowers turning down loan modifications is that these borrowers are offered proprietary modifications with less favorable terms than the anticipated HAMP modification. Indeed, "88% of housing counselors report that servicers are steering borrowers into generally less favorable non-HAMP modifications."[100] As discussed above, HAMP typically provides more affordable modification rates and principal reduction incentives, which results in an overall lower re-default rate than proprietary modifications.

It may also be that borrowers are actually executing and returning their permanent loan modification documents but the servicers are then rejecting the executed documents. Several cases have been reported of borrowers' permanent loan modification documents being rejected and payments returned based upon a perceived technical error. For example, in one case the offer required both borrowers to sign the modification but only provided one place for the signatures to be notarized. One borrower was working temporarily out of state, so the borrowers were unable to sign simultaneously before a notary. The borrowers each signed the agreement and had their signatures notarized separately as they were signed at different times. The servicer rejected the permanent loan modification stating that the borrowers must have the same notary acknowledging their signatures on the same date. A new agreement was sent to the borrowers who again notarized the new copy of the permanent loan modification and sent it to the servicer in the envelope provided by the servicer. After doing so, they received a letter rejecting their last two payments and stating the case had been referred back to foreclosure. For reasons that remain unclear, the servicer was unable to locate the documents. A new offer was then sent out two months after the revised one had been submitted, and the new offer still required the borrowers to sign simultaneously. The borrowers again submitted the documents with a single notarization but shortly thereafter received a letter stating the terms of their modification had been revised and they needed to sign the revised modification. The revisions included an increase in the principal balance and monthly payment due to the servicer's delays in finalizing the permanent loan modification. It took five months to finalize the modification paperwork and for the borrowers to secure a fully executed permanent loan modification.[101]

In another case, the borrower's signature was rejected because the servicer claimed the notary's signature was illegible. In another instance, the paperwork was rejected because the notary failed to include the notary's middle initial when the middle initial was included in the notary's seal.[102]

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100 CAL. REINVESTMENT COALITION, *supra* note 79, at 3.
101 The example case is a case from the Illinois McLean County Foreclosure Mediation Program.
102 Cases from the Illinois McLean County Foreclosure Mediation Program.

The large discrepancies of reported servicer performance seem to support the reasons cited by consumer advocates. By the end of HAMP's first year, the percentage of eligible loans that servicers had actually modified varied significantly, with Ocwen converting nearly 18%, CitiMortgage only 9%, and Bank of America, the largest participating servicer, had permanently modified only 3%.[103] These significant disparities led the Treasury, in June 2011, to publish quarterly servicer assessments on three major compliance categories and seven quantitative metrics.[104] These servicer assessments were further enhanced to present new compliance metrics and related benchmarks in the third quarter of 2013.[105] As of the fourth quarter of 2014, Bank of America and JP Morgan Chase Bank were found to need minor improvement, with CitiMortgage, Nationstar, Ocwen Loan Servicing, Select Portfolio Servings, and Wells Faro needing moderate improvement.[106]

D. Racial Disparity in Loan Modifications

Racial disparities in loan modifications remain uncertain. J. Michal Collins and C.K. Reid studied a sample of subprime loans made in 2005 among borrowers in Oregon, California, and Washington,[107] and "[did] not find any racial or ethnic differences in who receives a loan modification. In fact, African Americans were slightly more likely to receive a loan modification than whites." [108] However, they did not find the same effect for Latinos. This finding persists when Collins and Reid controlled for borrower, loan, and other factors that might influence loan modification rates.

However, the study only looked at permanent loan modifications and was unable to determine the number who applied or failed to complete the application process.[109] This is significant given the loss mitigation process and issues outlined above, particularly for non-English speaking minority borrowers. "Race or perceived race could serve as a proxy [that] servicers use for decision making on modifications, especially if these borrowers are deemed less sophisticated, more time consuming and therefore more costly to serve."[110]

The California Reinvestment Group utilized data from the Treasury Department on HAMP loan modification applications and a 2011 survey of fifty-five housing counselors working at forty-eight different non-profit agencies.[111] Though the HAMP data was limited,

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103 *See* Walsh, *supra* note 28, at 15 (citing U.S. DEP'T OF THE TREASURY, MAKING HOME AFFORDABLE PROGRAM: SERVICER PERFORMANCE REPORT THROUGH MARCH 2010 at 7 (2010)).

104 *See* MAKING HOME AFFORDABLE FOURTH QUARTER 2014, *supra* note 47, at 17.

105 *See id.*

106 *Id.* at 18.

107 Collins & Reid, *supra* note 36, at 18. The study analyzed "a unique dataset that merges data on the loan performance of subprime home mortgages that are managed by Corporate Trust Services (CTS) of Wells Fargo Bank with data on borrowers reported as part of the Home Mortgage Disclosure Act (HMDA). *Id.* at 2.

108 *Id.* at 11.

109 *See id.* at 12.

110 *Id.* at 5.

111 *See* CAL. REINVESTMENT COALITION, *supra* note 79, at 1. Loan modification activity through November 31, 2010. *Id*. at 8.

the study found disparities in the experiences of borrowers along racial and ethnic lines.[112] The housing counselors felt overall that loan modification outcomes were poor, but "42% of housing counselors reported that borrowers of color [were] receiving worse outcomes than white borrowers."[113] Though there are disparities in the factors leading up to foreclosure such as unemployment, predatory lending, and lower equity, the modification data itself seems to support the housing counselors' perspective.

Rationales for trial cancelations differ across racial groups. In Fresno, 47% of trial cancelations for Latinos and 44% for African Americans were due to "incomplete requests," compared to 37% for white borrowers.[114] The same pattern was found in Los Angeles and San Francisco/Oakland, whereas in Sacramento 41% of Asian borrowers were denied for "incomplete requests."[115]

African Americans in Los Angeles and Sacramento had the highest share of borrower non-acceptance: 5.2% (Los Angeles) and 7.2% (Sacramento) of all African American trial modification cancelations, compared to 3.9% and 5.1% for white borrowers. In Fresno, Asian borrowers had the highest share, representing 7.5% of Asian borrower cancelations and in San Francisco/Oakland, Latinos had the highest share at 5.8% of trial modification cancelations.[116] Trial modification plans for Latinos and Asians were also disproportionately canceled for failing the NPV test with 34% for Latinos and 28% for Asians, compared to 22% and 23% for African Americans and whites, respectively.[117]

Further, the California Reinvest Coalition found that

> White borrowers had a noticeably larger share of loan modifications that more dramatically reduced the amount of income needed to cover mortgage payments. Approximately 45% of white borrowers receiving official modifications had a change in front-end [debt to income ratio] of more than 20%, whereas only 33% of Asian borrowers, 32% of Latino borrowers and 37% of African American borrowers saw similar decreases in mortgage debt burdens after active loan modifications.[118]

Whereas, J. Michael Collins and C.K. Reid's earlier study found there were no disparities in the types of the loan modifications received.[119] This seems to indicate a need to further evaluate the affordability components of a loan modification, which is a more individualized assessment of the borrowers' debt-to-income ratio than simply comparing loan modification terms themselves.

112 *See id.* at 2.
113 *Id.* at 3.
114 *Id.* at 2.
115 *Id.* at 19.
116 *See id*.
117 *Id.* at 20.
118 *Id.*
119 Collins & Reid, *supra* note 36, at 1.

VI. ROLE OF FORECLOSURE MEDIATION

Mediation has been proposed as a means to address servicing abuses. The 2012 SIGTARP report found the number of servicer errors with the NPV test and failure to comply with HAMP guidelines raised serious questions about the effectiveness of the Treasury's oversight of servicers.[120] Borrowers cannot enforce the regulations because MHA does not provide a private right of action. Only recently, under the Consumer Financial Protection Bureau regulations, borrowers obtained the right to enforce the loss mitigation rules in 12 C.F.R. 1024.41 under the Real Estate Settlement Procedures Act,[121] which provides for damages, costs and attorney's fees. Though, these rules provide only general servicing guidelines, not a private right of action under any specific loss mitigation program guidelines.[122] Foreclosure mediation programs can provide for the necessary additional oversight and enforcement of the regulations by monitoring the document exchange, evaluating basis for denials, and acceptance of the permanent loan modification.[123]

Many states have created mediation programs to reduce burdens on their justice systems, finding that the parties can resolve such issues efficiently without litigation. By 2014, there were fifteen statewide programs and 158 programs serving limited jurisdictions such as cities, counties, or judicial districts.[124] On April 25, 2013, Illinois Attorney General Lisa Madigan awarded $5 million in grants from the national foreclosure settlement to fund the creation and implementation of new mortgage foreclosure mediation programs.[125] As of the end of 2014, six new foreclosure mediation programs had been implemented in Illinois with two additional programs seeking approval from the Administrative Office of the Illinois Courts. The six newly implemented mediation programs vary in their structure and resources provided.[126] Each program reports information into a statewide database maintained by Resolution Systems Institute to better quantify the impact of foreclosure mediation programs and how program design may influence loss mitigation outcomes.

120 *See* SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, *supra* note 78, at 18.

121 12 U.S.C. 2605(f) (2012).

122 *See id.*; 12 C.F.R. § 1024.41(a) (2016).

123 U.S. Bank Nat. Ass'n v. Sarmiento, 121 A.D.3d 187 (N.Y. App. Div. 2014).

124 OFFICE OF THE ATTORNEY GEN. OF MASS., FINAL REPORT OF THE FORECLOSURE IMPACTS TASK FORCE 15 (2014), http://www.mass.gov/ago/news-and-updates/initiatives/addressing-the-foreclosure-crisis/foreclosure-impacts-task-force/final-fitf-report.pdf.

125 Press Release, Illinois Attorney General, Madigan Announces $5 Million Grant For Foreclusure Mediation Programs (Apr. 25, 2013), http://www.illinoisattorneygeneral.gov/pressroom/2013_04/20130425.html. The Illinois Attorney General, in conjunction with other state attorney generals, the U.S. Department of Justice, and the U.S, Department of Housing and Urban Development, secured a national settlement in 2012 with five of the nation's largest servicers. *See Bank Foreclosure Settlement Overview*, OFF. ATT'Y GEN. ST. ILL., http://www.illinoisattorneygeneral.gov/consumers/settlementpdfs/Bank_Foreclosure_Settlement_Overview.pdf (last visited on August 1, 2015).

126 Jennifer Shack, *Six Programs, Six Models: An Evaluation of the Foreclosure Mediation Programs Funded by the Office of the Illinois Attorney General,* RES. SYS. INST. 19 (2015), http://www.aboutrsi.org/pfimages/SixProgramsSixModels.pdf?pdf=Six-Programs-Evaluation.

This data enhances the statewide data collected by the Administrative Office of the Illinois Courts.

Though mediation programs vary from county to county and state to state, the purpose of the various mediation programs remains unified. As stated by Attorney General Madigan, "[t]he goal of a foreclosure mediation program is to connect homeowners in crisis with legal assistance and housing counseling services so they can accurately assess their options and pursue the best plan."[127] Madigan further propounded, "[b]ecause mediation has been proven to give homeowners a greater chance to save their homes, these grant funds will help both families and communities that have been devastated by the foreclosure crisis."[128] The mediation programs also provide additional oversight through the loss mitigation process. Many of the mediation programs establish protocols for the exchange of documents, require that servicers adhere to time frames for making decisions, ensure that homeowners receive accurate notice of decisions, have an effective recourse for review of those decisions, and prevent servicers from moving ahead to a foreclosure sale until the review process has ended.[129] Borrowers are then given an opportunity to meet with their servicer to further discuss their options and the decisions made upon their loss mitigation applications. These mediation program rules largely parallel or supplement the MHA and CFPB guidelines.

A 2012 study of recently implemented mandatory foreclosure mediation programs in Florida provided empirical evidence that mandatory mediation increased the probability of lenders modifying the mortgage.[130] The study analyzed loans in three metropolitan statistical areas before and after a mandatory mediation program was adopted. The study was also able to compare loans in the same statistical area in which one sub-part had adopted a program and the other sub-part had not. The study found that "mandated mediation appears to boost modifications, in some cases significantly."[131]

A final benefit of the foreclosure mediation process is that the borrowers are given advice as to their options, which may, in the long term, provide better loan modification performance. As of March 2014, more than 28% of HAMP modifications had been disqualified because the borrower missed three consecutive monthly payments on the modified loan.[132] Six years into the Connecticut mediation program the data showed only approximately 10% of homeowners reentering the program, with many of those

127 Press Release, Illinois Attorney General, Madigan Announces $5 Million Grant For Foreclusure Mediation Programs (Apr. 25, 2013), http://www.illinoisattorneygeneral.gov/pressroom/2013_04/20130425.html.

128 *Id.*

129 *See* Walsh, *supra* note 28, at 6.

130 J. Michael Collins & Carly Urban, *Mandatory Mediation Laws and the Renegotiation of Mortgage Contracts*, 125 ECON. J. 1734, 1735–36 (2015).

131 *Id.* at 1755.

132 U.S. DEP'T OF TREASURY, EARLY RESULTS, *supra* note 41 at 3.

homeowners continuing an ongoing case, "which means that program reentry rates are fairly low and that positive effects for homeowners appear to be sustainable over time."[133]

A. General Foreclosure Mediation Outcomes

Unfortunately, many programs do not maintain or track the same statistics. But what is reported shows that mediation does seem to reduce foreclosure. Connecticut has a high success rate with 82% of cases mediated resulting in an agreement.[134] In the District of Columbia, 72.5% of the mediations resulted in a loan modification, reinstatement, or graceful exit.[135] Delaware's statewide program reports 60.66% of homeowners either achieved a non-foreclosure resolution or are still actively engage in mediation.[136] In Maine, since its launch in 2009 through February 2014, "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."[137] "Dismissal" means that the case is ended, and no foreclosure occurs. In Cook County, Illinois, the mediation programs have a "steady 51% rate of success in reaching agreements with banks through the mediation process."[138] Ohio's limited jurisdictions range from 61% to 32% of mediations ending in agreement.[139] On the lower end, agreement rates are 41% for Maryland, 33% Pennsylvania, and 31% for Nevada. Florida's statewide program has the lowest success rate with 25% of mediations resulting in an agreement though the foreclosure mediation program within bankruptcy has 35% of cases reaching an agreement.[140]

Mediation has also delivered improved results. In Connecticut a review of the 31,000 foreclosure cases between 2008 and 2014, found that, of the cases completed in the mediation program only 32% ended in foreclosure and out of the 68% that avoided foreclosure, 72% of the homeowners retained their home with 85% of those borrowers receiving a loan modification.[141] These results were obtained even though the program primarily services low and middle-income borrowers.[142] In Connecticut, borrowers who

133 Gloria Jean Gong & Carl Brinton, *Connecticut Judicial Branch Mortgage Foreclosure Mediation Program Evaluation*, ST. JUST. INST. 33 (Oct. 2014), http://www.jud.ct.gov/statistics/FMP/sji_eval.pdf.

134 *Id.* at 20.

135 *Foreclosure Mediation Program Statistics: May 25, 2011 - May 9, 2013*, D.C. DEP'T INS., SEC., & BANKING (MAY 9, 2013), http://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/MediationStatisticsasofMay92013.pdf.

136 Letter from Matthew F. Lintner, Del. Att'y Gen., to Hon. Jan R. Jurden, Hon. Patricia M. Belvins & Hon. Peter C. Schwartzkopf (May 27, 2015), http://attorneygeneral.delaware.gov/fraud/cpu/documents/mediation/2015/Q1_2015_Letter.pdf.

137 STATE OF ME. JUDICIAL BRANCH FORECLOSURE DIVERSION PROGRAM, REPORT TO THE JOINT STANDING COMM. ON INS. AND FIN. AFFAIRS AND THE JOINT STANDING COMM. ON JUDICIARY, 126th Legislature, at 1 (2014).

138 ILL. CIRCUIT COURT OF COOK CNTY., CHANCERY DIVISION MORTGAGE FORECLOSURE MEDIATION PROGRAM PROGRESS REPORT, at 13 (Jun. 27, 2012).

139 OFFICE OF THE ATTORNEY GEN. OF MASS., *supra* note 124, at 23.

140 *Id.* at 21.

141 Gong & Brinton, *supra* note 133, at 24.

142 *Id.* at 4.

chose to participate in mediation avoided foreclosure at a rate 13% higher than borrowers who chose not to participate in mediation.[143]

Foreclosure mediation in Washington, D.C. also showed a high success rate with homeowners retaining their property in 78% of the mediations and 4% arranging a graceful exit.[144] In Philadelphia, a five-year study showed there were about 2,400 successful loan resolutions[145] and "85% of homeowners who reached an agreement remained in their homes after one year."[146] However, Maine reports that only 21% of mediations resulted in agreement.[147]

The value of the mediated agreements can be significant not only for the borrowers but also for the communities themselves. Over one year, at the University of Illinois College of Law Community Preservation Clinic in McLean County, the Illinois foreclosure mediation program helped borrowers and the community to save sixty-two homes through a loan modification or other retention options.[148] The Clinic was able to arrange a graceful exit such as a short sale or deed in lieu in twenty-one cases allowing clients to transition into alternative housing, rebuild their credit faster, and in some instances secure relocation assistance. These agreements resulted in principal reductions in the amount of $65,010.20, secured $51,105.59 in Hardest Hits Funds, reduced interest rates in loan modifications and refinancing by 91.117% points, reduced the monthly payment amount by $7,034.70, waived $454,264 in deficiency in short sale transactions with $4,000 in relocation assistance, and waived $30,526.81 in deficiency through consent judgments. The total value of homes saved was $7,490,405.[149]

B. Opt in vs. Opt Out

The impact of the foreclosure mediation program is significantly influenced by the way in which borrowers enter in the program. In many situations, opt-out regimes improve participation rates. For example, behavioral economists have found that in voluntary retirement plans, automatic enrollment can increase participation significantly. In one study, opt-in participation rates were barely 20% after three months of employment, gradually increasing to 65% after three years of employment compared to the opt-out

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143 *Id.*

144 OFFICE OF THE ATTORNEY GEN. OF MASS., *supra* note 124, at 20.

145 Michael McKeever, *Pennsylvania Mortgage Foreclosure Diversion Program Benefits Servicers*, HOUSINGWIRE (Dec. 12, 2013), http://www.housingwire.com/blogs/1-rewired/post/28293-pennsylvania-mortgage-foreclosure-diversion-program-benefits-servicers.

146 OFFICE OF THE ATTORNEY GEN. OF MASS., *supra* note 124, at 24.

147 *Id.* at 22.

148 These statistics come directly from Author's clinic case outcomes and grant reports and are contained within Author's notes.

149 *Id.*

participation rates of new employees, which began at 90% and increased to more than 98% within three years.[150]

Opt-out programs may be a particularly important choice for architectures when early non-participation creates a substantial penalty. In the retirement context, early non-participation causes the saver to forgo years of potential interest. In the foreclosure context, early loss mitigation matters a great deal because a borrower's options decrease as the arrearage increases. "Thirteen of the statewide programs use an opt-in method for enrolling borrowers, and two use an opt-out method."[151] In the limited jurisdiction programs, thirty-nine of the programs are opt-in and twenty-nine are opt-out.[152]

The recent analysis of the six new programs adopted in Illinois further demonstrates this pattern in the foreclosure mediation setting. The opt-out programs in the Sixth and Twenty-First Circuits each helped more than 60% of homeowners, whereas the other circuits with opt-in programs had 7 to 25% of eligible homeowners entering the program.[153] The opt-out programs have a one-step entry into the program whereas the opt-in programs often have multi-steps to participate, such as completing a detailed financial questionnaire or attending an informational session and calling a housing counseling agency.[154]

Other opt-in programs show similar results. Data on Maine's program, which is an opt-in program, shows the participation rate "was 30% of foreclosure cases filed in 2010. The rate rose to 43% in 2012, but fell to 36% in 2013."[155] Delaware's statewide automatic foreclosure mediation program seems to have the highest participation rate of 53.66%.[156]

One particular concern with opt-in programs is when the servicers are required to send notice of the mediation. When Hawaii first launched its Third Circuit Foreclosure Mediation Pilot Program it found that in nearly 50% of the cases the servicer failed to attach the notice.[157]

Other foreclosure mediation opt-out programs continue to demonstrate higher levels of participation rates. "A [five-year] study of the Philadelphia diversion program

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150 *See* Richard H. Thaler & Shlomo Benartzi, *The Behavioral Economics of Retirement Savings Behavior*, AARP 2 (2007), http://www.retirementmadesimpler.org/Library/The%20Behavioral%20Economics%20of%20Retirement%20Savings%20Behavior%20-%20Full.pdf.

151 OFFICE OF THE ATTORNEY GEN. OF MASS., *supra* note 124, at 15.

152 "Ohio's 88 counties, all of which have adopted foreclosure mediation, have the option of selecting an opt-in or opt-out enrollment model. At the time of researching this issue, a specific breakdown of which counties have adopted opt-in and opt-out enrollment was not available." OFFICE OF THE ATTORNEY GEN. OF MASS., *supra* note 124, at 15.

153 *See* Shack, supra note 126, at 20.

154 *See id.*

155 STATE OF ME. JUDICIAL BRANCH FORECLOSURE DIVERSION PROGRAM, *supra* note 137, at 2.

156 *See* Letter from Matthew F. Lintner, *supra* note 136.

157 *See* Memorandum from Comm. on Initiatives to Enhance Civil Justice & Hawaii Access to Justice Comm'n to Chief Justice Mark E. Recktenwald, Supreme Court of Hawaii 5 (Dec. 22, 2010) http://www.courts.state.hi.us/docs/news_and_reports_docs/foreclosure_access_to_justice_response.pdf.

found that 70% of homeowners appeared for the mandatory conferences and were assigned free housing counselors."[158]

Indiana, however, best demonstrates the value of the opt-out program model. When Indiana first adopted foreclosure mediation in 2009 it was an opt-in program in which servicer attorneys sent the notices to borrowers. The initial participation rates were less than 5%.[159] When courts began mailing the notices and included a date and time for mediation, the participation rates rose to 50%.[160]

C. Borrower Resources: Legal Assistance and Housing Counselors

Foreclosure mediation programs have the potential to address the common failings of the loss mitigation process. One issue is the power and information disparity between participants. Borrowers often come into the process feeling helpless with no idea what their options are. Notably, the borrowers are not repeat players and often do not understand the system. Foreclosure mediation programs address this by providing resources to guide borrowers through the loss mitigation application process. These resources include HUD certified housing counselors who are sponsored by the U.S. Department of Housing and Urban Development (HUD) to provide free foreclosure prevention counseling.[161] Foreclosure mediation programs also often provide access to legal representation. For example, as part of the national foreclosure settlement, Illinois Attorney General Lisa Madigan distributed $20 million for legal aid services for homeowners and renters in distress and $70 million for housing counseling and community redevelopment projects.[162] One consideration for these grant applications was the provision of resources within foreclosure mediation programs. In Illinois' Twentieth Judicial Circuit of St. Clair County, homeowners who received assistance from a housing counselor or a legal services attorney were more likely to avoid foreclosure than those who did not, as detailed in the chart below.[163]

158 McKeever, *supra* note 145.

159 Alan White, *State Foreclosure Mediation Laws: Examples and Research for a Uniform Statute*, UNIFORM L. COMMISSION 3 (May 11, 2012), http://www.uniformlaws.org/shared/docs/mortgage%20foreclosure/4_2012may11_RREMFFP_State%20Foreclosure%20Mediation%20Laws%20memo_White.pdf.

160 *Id.*

161 *HUD Office of Counseling HUD Approved Housing Counseling Agencies*, U.S. DEP'T HOUSING & URB. DEV., http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm (last visited May 10, 2016). For free counseling see Shack, *supra* note 126, regarding the provision of HUD certified counselors specifically within IL.

162 *See* Press Release, Illinois Attorney General, Madigan Announces $5 Million Grant For Foreclusure Mediation Programs (Apr. 25, 2013), http://www.illinoisattorneygeneral.gov/pressroom/2013_04/20130425.html.

163 Shack, *supra* note 126, at 176.

Table 4

Outcomes by Service Received[164]								
	Retention		Relinquishment		No Agreement		Program Not Completed	
Housing Counseling	8	38.1%	3	14.3%	6	28.6%	4	19.0%
Land of Lincoln	12	57.1%	1	4.8%	7	33.3%	1	4.8%
Neither	8	29.6%	0	0%	11	40.7%	8	29.6%

D. Legal Representation

Evaluating just the impact of legal representation is difficult given the wide range of other factors which impact whether or not a borrower utilizes legal representation. In Illinois' Eleventh Judicial Circuit Program in McLean County, borrowers are provided free legal representation without an eligibility screening.[165] The University of Illinois College of Law Community Preservation Clinic provides representation in over 93% of the cases.[166] Whereas Illinois' Sixth Judicial Circuit program in Champaign County provides borrowers access to free legal services through Land of Lincoln Legal Assistance Foundation, Inc. (LOLAF), which has income and asset limitations as well as other restrictions such as citizenship.[167] Under this program LOLAF typically does not provide representation to borrowers looking to relinquish the home. LOLAF provides similar assistance and eligibility screening in St. Clair County, Illinois, as shown in the figure above. In St. Clair County, LOLAF has provided representation to 26% of the homeowners facing foreclosure.[168] The retention rates for borrowers represented by LOLAF are significantly higher than for borrowers who only work with housing counseling or neither housing counselors nor LOLAF.[169] LOLAF's prioritization of helping homeowners retain their housing may explain why there was a higher percentage of relinquishment agreements for borrowers working with a housing counselors. Also, having access to legal services seems

164 *Id*. at 177. "The difference in outcomes between those who received assistance and those who did not is not statistically significant. However, this is most likely due to the small sample size. When the outcomes from cases with housing counseling assistance and legal services assistance are combined, the difference does become statistically significant." *Id*.

165 The University of Illinois College of Law is bound by the Illinois Rules of Professional Conduct and the University conducts a thorough conflict of interest assessment before engaging in representation.

166 Private counsel represents three percent and less than one percent are represented by Prairie State Legal Services. In two percent of cases the borrower chooses to represent themselves. These statistics are from the program launch on March 1, 2012 until July 2015.

167 *About Our Services*, LAND LINCOLN LEGAL ASSISTANCE FOUND., INCORPORATED, http://lollaf.org/wp-content/uploads/2015/11/About-Our-Services.pdf (last visited May 10, 2016); *see also* Legal Services Corporation Act, 42 U.S.C. §§ 2996–2996l (2012).

168 Shack, *supra* note 126, at 168.

169 *Id.* at 177.

to significantly reduce the number of borrowers not completing the program. In McLean County, Illinois, where all borrowers have access to free legal representation, only 13% of borrowers represented by the Community Preservation Clinic, over a two-year period, withdrew from the program. Given the limited data set in this sample, further evaluation will be done to determine the significance of representation in borrower completion of the mediation process.

Still, other borrowers retain their own private counsel. For example, in Illinois' Sixteenth Judicial Circuit of Kane County, 16% of homeowners were represented by private counsel, with only a little over 10% of those homeowners receiving free legal services.[170] However, the Kane County program, in contrast to the McLean County program, does not provide free representation to all borrowers. In this program, law students from Northern Illinois University College of Law staff a foreclosure desk and represent a few selected homeowners. Prairie State Legal Services, Inc. (PSLS), a legal services organization with eligibility criteria similar to LOLAF, has also represented a few homeowners in mediation.[171]

The programs also vary in their structure, which makes it difficult to identify the impact of any particular factor. For example, income level of the borrowers has been found to directly impact the mediation outcomes, making it difficult to determine the impact of legal representation. "Personal economic factors were among the most statistically significant correlations with [Connecticut foreclosure mediation program outcomes in which] higher income statistically significantly tracked onto higher likelihood of home retention, loan modification, and a lower likelihood of being foreclosed on."[172] If borrowers have to be below low-income guidelines to receive legal assistance, the success rate for legal service cases may be decreased due to correlation between higher income and lower likelihood of foreclosures.

Still, some rough comparisons can be made. The McLean County foreclosure mediation program rules are similar to those of the programs in Champaign County. One distinguishing characteristic between the two programs is the amount of available resources. The Illinois Attorney General funding has enabled the University of Illinois College of Law Community Preservation Clinic to provide free legal representation to borrowers participating in the McLean County Foreclosure Mediation program in the Eleventh Judicial Circuit, regardless of borrower income. Under this program, 97% of borrowers have legal representation. Whereas in Champaign County, LOLAF provides representation based upon financial eligibility with priority given to borrowers wanting to remain in the home. LOLAF has provided representation to 38% of borrowers and 5% of those borrowers retained private counsel for a total of 43% of the borrowers having legal

170 *Id.* at 58.
171 *See Eligibility Factors*, PRAIRIE STATE LEGAL SERV., http://pslegal.org/psls-apply-online.asp#eligible (last visited May 10, 2016); *see also* Legal Services Corporation Act, 42 U.S.C. §§ 2996–2996l (2012).
172 Gong & Brinton, *supra* note 133, at 28.

representation. Since each program has very similar rules with only slight variations differentiating them, a comparison of these programs may eventually provide a more accurate assessment but their recent implementation provides limited data for analysis.

E. Housing Counseling

Without the help of experienced housing counselors, homeowners acting alone fare much worse.[173] A 2009 Counseling Program Evaluation revealed that homeowners are 1.6 times more likely to cure foreclosure when they received counseling; borrowers with counseling received an increased loan modification payment reduction of $454 if they received counseling.[174] It was also found that housing counseling increased the sustainability of modifications with 64% of counseled modifications remaining current compared to 51% of uncounseled modifications.[175]

This may be in part because housing counselors are better able to explain the process and guide homeowners through the application process. A survey of borrowers conducted as part of the Illinois Attorney General funded foreclosure mediation programs found that 70% of borrowers understood their options and how to work with their lenders much better after meeting one-on-one with a housing counselor, as compared to borrowers only gaining a somewhat better understanding when the pre-mediation sessions were facilitated by a mediator and included the lender attorney.[176] As shown in the figure above, the Illinois Twentieth Circuit shows a difference between outcomes for those who went to housing counseling and those who did not.[177] In Illinois' Sixteenth Circuit, there was a difference in outcomes, but this could be because "about 30% of homeowners who did not receive housing counseling were represented by private attorneys, while homeowners receiving housing counseling were unrepresented. Further, few homeowners who were looking to relinquish their homes sought housing counseling."[178]

In addition to providing counseling, the HUD-certified counselors can streamline the application submission process by utilizing a loss mitigation web portal accessed by loan servicers. This secure electronic interface enables the parties to communicate more effectively and efficiently by clearly delineating servicer required documentation, acknowledging that submissions have been received, and utilizing dynamic

173 *See* Walsh, *supra* note 28, at 22.

174 Neil Mayer, Peter A. Tatian, Kenneth Temkin, & Charles A. Calhoun, *National Foreclosure Mitigation Counseling Program Evaluation: Preliminary Analysis of Program Effects*, URB. INST. vii–ii, 38, 41 (Nov. 2009), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411982-National-Foreclosure-Mitigation-Counseling-Program-Evaluation-Preliminary-Analysis-of-Program-Effects.PDF.

175 Melanca Clark & Daniel Olmos, *Foreclosure Mediation: Emerging Research and Evaluation Practices*, U.S. DEP'T JUSTICE 30 (Mar. 7, 2011), http://www.justice.gov/sites/default/files/atj/legacy/2012/01/05/foreclosure-mediation.pdf.

176 *See* Shack, *supra* note 126, at 31.

177 *Id.* at 177.

178 *Id.* at 67.

communications through messaging and notifications. The paperwork requirements for each servicer and type of loan can vary. The portal can generate a customized list of forms and documents required by each servicer. However, in Kane County, Illinois, packets were initially being submitted by housing counselors via the Hope LoanPort, but the servicers were not giving the information to their attorney or even making them aware that the packets had been received.[179] In order to address this problem, housing counselors now submit packets to both the servicer and the Plaintiff's representation.[180]

F. Foreclosure Mediations Oversight Mechanisms

Mediation provides a structure to manage chaos and resolve disputes. Most mediation programs require good-faith participation, which helps to address the inherent oversight problems of the loan modification process. By requiring good faith, the courts can enforce the program rules and further the purpose of the foreclosure mediation programs. A New York court recently ruled "[t]he court has an affirmative obligation to ensure that the primary statutory goal of keeping homeowners in their homes, and the concomitant obligation of ensuring that the parties act in good faith, are met."[181] In fact, when New York enacted the Mandatory Settlement Conference in residential foreclosure actions, good faith was not an enumerated requirement. However in 2009 the state legislature amended the act to expressly require good-faith negotiation. As stated in a subsequent court decision, "[a]s the mortgage crisis has worsened . . . it has become evident that more must be accomplished to protect New Yorkers in these difficult times and beyond."[182]

Courts in a number of states[183] have sanctioned servicers for their bad faith in foreclosure mediation programs, such as not appearing with an authorized representative who could make decisions on loss mitigation questions, unduly delaying application decisions, or failing to give reasonable explanations for their decisions.[184] "Sanctions have included monetary penalties, orders for servicers to bring in a qualified representative to negotiate, orders tolling accrual of interest and fees during periods of delay, and orders to modify a loan."[185] Some courts have gone as far as prohibiting a foreclosure sale or dismissing a judicial foreclosure case with prejudice, thus preventing the servicer from re-

179 *See id.* at 55.
180 *See id.*
181 Deutsche Bank Nat'l. Trust Co. v. Husband, 13 N.Y.S.3d 849 (Sup. Ct. 2015).
182 Wells Fargo Bank v. Hughes, 897 N.Y.S.2d 605, 608 (Sup. 2010) (citing Sponsor's Memorandum, Assemb. 8917A, 232nd Leg., Reg. Sess. (N.Y. Assembly Mem. in Support, Bill Jacket, L 2009, ch 507; Senate Introducer Mem. in Support of L 2009, ch 507, 2009 McKinney's Session Laws of NY, at 1839).
183 Including Connecticut, Indiana, Maine, Nevada, New York, Ohio, and Vermont.
184 *See* Walsh, *supra* note 28, at 7.
185 *Id.*

filing the claim.[186] One example of this is in *Bayview Loan Servicing LLC v. Bartlett* in which the Maine Supreme Court upheld the lower court's dismissal of the case with prejudice, as it was "'the only appropriate sanction' in light of Bayview's 'pattern of disruptive behavior,' its failure to respond to lesser sanctions, and the court's 'strong warning' that future noncompliance could result in dismissal with prejudice."[187]

G. Insufficient Documentation

Both the Government Accountability Office and housing counselors cite lost documents, requests for unnecessary paperwork, and repeated requests to replace lost documents, sometimes up to six times, as a possible reasons for HAMP denials.[188] Foreclosure mediation programs work to address this issue in a wide variety of ways, including mediation status sessions to facilitate the document exchange, requiring the servicer to file a checklist, or setting deadlines for the document exchange under the program rules.

For example, in Kane County, Illinois, the program coordinator and a survey of mediation reports showed that lenders often lost loss-mitigation applications, which lengthened the review stage. Realizing this was an issue, the program adapted by requiring lenders' attorneys to be more accountable in their reporting. This resulted in more timely responses and readiness to mediate sooner.[189]

Mediation programs also collect information and provide benchmarks. Under the Illinois Sixth Circuit and McLean County Foreclosure Mediation Programs, there are set deadlines by which the plaintiffs are required to respond to initial loss mitigation applications. Both programs allow the plaintiff fourteen days to respond, which is far more generous than the five-day requirement under the CFPB regulations. Still, servicers routinely miss these deadlines. In Connecticut, the research found "plaintiffs (or their attorneys) were more likely to be unprepared, to file a continuance, to engage in conduct inconsistent with the objectives of the mediation program, not to possess the ability to mediate, or not to make an appearance."[190] When these instances happen, the borrower can bring such issues to the court's attention and seek sanctions. The court then acts as monitor of these issues and holds the servicers accountable.

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186 *See id.* at 7; *see also*, *e.g.*, *id.* at 30.

187 87 A.3d 741, 745 (Me. 2014).

188 *See* Walsh, *supra* note 28, at 17 (citing *The Chasm Between Words and Deeds VI: HAMP Is Not Working*, CAL. REINVESTMENT COALITION, (July 2010), http://www.calreinvest.org/system/resources/W1siZiIsIjIwMTEvMDQvMTgvMTdfNTRfNDRfODM0X0hhbXBfaXNfbm90X3dvcmtpbmcucGRmIl1d/Hamp_is_not_working.pdf; Olga Pierce & Paul Kiel, *Loan Mod Program Left Homeowners' Fate in Hands of Dysfunctional Industry*, PRO PUBLICA (2011), http://www.propublica.org/article/loan-mod-program-left-homeowners-fate-in-hands-of-dysfunctional-industry.

189 *See* Shack, *supra* note 126, at 55.

190 Gong & Brinton, *supra* note 133, at 30.

> Where a plaintiff fails to expeditiously review submitted financial information, sends inconsistent and contradictory communications, and denies requests for a loan modification without adequate grounds, or, conversely, where a defendant fails to provide requested financial information or provides incomplete or misleading financial information, such conduct could constitute the failure to negotiate in good faith.[191]

In one court's decision, the judge outlined his own perceptions of the servicer's activities, which were taken into consideration in ordering sanctions against the servicer.

> The court notes that on numerous occasions during the settlement conferences, homeowners have, among other ways, faxed, emailed, mailed by certified mail, return[ed] receipt request[s], mailed in envelopes provided by the bank, mailed by federal express or overnight delivery, modification applications, financial documents, updated pay stubs and bank statement[s], which the banks invariably claim they never received despite contradictory proof that the documents were sent and even received . . . . [T]he banks have consistently refused to accept proof of delivery and receipt, making homeowner[s] re-send the documents, in many instances on multiple occasions, the court finds it interesting that plaintiff's counsel requests that the court excuse its default in appearance by accepting counsel's bald assertion, in the face of overwhelming support to the contrary, that the order was not received.[192]

H. Denials Based Upon the NPV Calculation

To address the issue of denials based upon the NPV calculations, some foreclosure mediation programs require servicers to provide NPV-related information prior to the scheduled mediation date. For example, the McLean County, Illinois program requires servicers to complete a Plaintiff's Questionnaire within thirty days of scheduling the mediation, and the questionnaire requests the NPV inputs.[193] This way the borrower can run their own NPV calculations using the online calculator and can dispute any of the inputs in the mediation.

If the parties are unable to resolve the matter in mediation, the decision can then be administratively appealed or brought to the court's attention. In *BAC Home Loan Servicing v. Westervelt*, a New York court found "the Bank [had] not acted in good faith in negotiating a settlement with this homeowner. Indeed, the homeowner's representation that plaintiff inexplicably refused to re-examine her income—which the bank must do under HAMP directives—stands uncontradicted."[194] The court then barred the collection of any arrears, including interest, costs, and fees, during the time in which the servicer had acted in bad faith as part of the mediation process.[195] In enforcing mediation, the courts

191 U.S. Bank Nat'l Ass'n v. Sarmiento, 121 A.D.3d 187 (N.Y. App. Div. 2014).

192 BAC Home Loan Servicing v. Westervelt, 920 N.Y.S.2d 239 (Sup. 2010).

193 *See Residential Mortgage Foreclosure Mandatory Mediation Program Rules "Exhibit D"* MCLEAN COUNTY CIR. CT., http://www.mcleancountyil.gov/DocumentCenter/View/1691 (last updated Oct. 9, 2012) (providing a copy of the program rules and Plaintiff's Questionnaire).

194 920 N.Y.S.2d 239 (Sup. 2010).

195 *Id.*

have used the HAMP provisions as a benchmark of good-faith negotiations, enabling the banks to abide by both state and federal regulations.[196] "Conduct such as providing conflicting information, refusal to honor agreements, unexcused delay, unexplained charges, and misrepresentations have been held to constitute 'bad faith.'"[197] In determining the remedy for violation of the good-faith negotiation requirements, the courts cannot rewrite the contract at issue or impose contractual terms, but they can cancel certain interest.[198]

I. Failure to Accept a Loan Modification Offer

As outlined above, housing counselors have long believed servicers have purposely pushed borrowers into less favorable loan modifications rather than offering them a HAMP modification. The Permanent Loan Modification chart above also shows a significant number of private modifications over HAMP. Recently, a New York court identified this practice of servicers purposely pushing borrowers into less favorable loan modifications and sanctioned the servicer for the behaviors:

> The court has concluded that the appropriate sanction to impose herein is to reduce the interest rate to 2% on the balance which has accrued subsequent to August 1, 2010, the date that plaintiff should have approved defendant's HAMP application, instead of delaying until December 11, 2011 and then offering him an in-house modification which verged upon the unconscionable and which was designed to be rejected. The court has thus determined that had the modification been completed timely, the interest rate after August 1, 2010 would have been 2% and the large sum which has accrued at 6.275% was directly caused by plaintiff's bad faith and that plaintiff should not be rewarded for their delays, which went on for almost five more years.[199]

In *Wells Fargo Bank, N.A. v. Hughes*, a New York court became so frustrated with the servicer's attempts to funnel the borrowers into an unaffordable loan modification that the court dismissed the case finding:

> The terms of the proposed modification agreement, particularly but not exclusively the inclusion of an adjustable rate component, are unacceptable to this court. The proposed modification agreement flies in the face of the . . . legislation . . . which was designed to assist

196 Flagstar Bank, FSB v. Walker, 946 N.Y.S.2d 850 (Sup. Ct. 2012)

197 *Id.* at 854 n.6; *see also* One W. Bank, FSB v. Greenhut, 957 N.Y.S.2d 265 (Sup. Ct. 2012) (finding no violation of duty of good faith on behalf of the plaintiff where there were no misrepresentations, delays, unexplained charged, or conflicting information and a residency requirement argument was put forth by the plaintiff in good faith); Wells Fargo Bank, N.A. v. Ruggiero, 972 N.Y.S.2d 147 (Sup. Ct. 2013) (citing plaintiff's lack of good faith, unexcused delay, unexplained charges, and misrepresentations, as evidence plaintiff's of lack of good faith).

198 *See* U.S. Bank Nat'l Ass'n v. Sarmiento, 121 A.d.3d 187, 207-08 (N.Y. App. Div. 2014) (upholding sanctions imposed on the plaintiff, which barred the plaintiff's interest that accrued on the loan, because of lack of "good faith" during negotiations with the defendant); *see also* U.S. Bank Nat'l Ass'n v. Williams, 121 A.d.3d 1098, 1102-03 (N.Y. App. Div. 2014) (holding that U.S. Bank was not entitled to collect accrued interest due to lack of good faith negotiations with the defendant).

199 Deutsche Bank Nat'l. Trust Co. v. Husband, 13 N.Y.S.3d 849 (Sup. 2015).

> borrowers in foreclosure cases to remain in their homes and to prevent a foreclosure crisis like the one currently gripping this state and the nation from reoccurring in the future.[200]

J. *Racial Disparity in Mediation Programs*

In looking at four of the circuits in Illinois funded by the Attorney General grant and in the Connecticut Foreclosure Mediation Program, the racial and ethnic demographics broadly reflect the makeup of the communities in which they serve.[201] Although, in Illinois' Seventeenth Circuit in the Winnegabo County, Boone County, and St. Clair County programs, "non-Hispanic Whites were slightly underrepresented and Latinos and Black/African-Americans were over-represented."[202] In McLean County, Illinois 9.8% of African Americans participate in the program in comparison to the county's African American population of 7.7%.[203] Similarly in Connecticut, "[African American] homeowners are overrepresented and white homeowners are underrepresented relative to the general population."[204] As noted before, there is no reliable data on the race or ethnicity of homeowners in foreclosure, so it cannot be determined if mediation program participants are reflective of the larger population.

"Interestingly, in [three out of the four Illinois Attorney General funded programs], the ratio of minority homeowners increased as the cases moved through the programs. That is, Black/African-Americans and Latinos made up a greater proportion of homeowners who entered the programs than who contacted them and made up a greater proportion of homeowners who completed the programs than entered them."[205] The other remaining program showed that "fewer Latinos who made first contact with the program completed the steps to participate," which may be a reflection of the language barriers.[206]

In an evaluation of the Connecticut foreclosure mediation program, "controlling for all observed factors, such as personal economic factors and loan characteristics, there were also no statistically significant racial/ethnic differences, except that minority status was statistically significantly correlated with a 7.76% increase in likelihood of loan modification."[207]

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200 Wells Fargo Bank v. Hughes, 897 N.Y.S.2d 605, 634 (Sup. Ct. 2010)

201 *See* Gong & Brinton, *supra* note 133, at 33; Shack, *supra* note 126, at 34.

202 Shack, *supra* note 126, at 34.

203 *Quick Facts: McLean County, Illinois*, U. S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/17/17113.html. (last updated Oct. 14, 2013) (providing the 2010 census results for McLean County, Illinois). The percentage participating in the McLean County, Illinois program is the percentage of cases in which race was reported. In 100 cases, no race information was captured.

204 Gong & Brinton, *supra* note 133, at 33.

205 Shack, *supra* note 126, at 34.

206 *Id.*

207 Gong & Brinton, *supra* note 133, at 28.

CONCLUSION

Though foreclosure mediation programs are still in their infancy, the program structures are designed to address the loss-mitigation policy failings and may provide a remedy. These programs can also closely monitor servicers and their adherence to established loss-mitigation policies. Most importantly these programs can work to level the playing field for minority borrowers by giving them equal access to assistance, as well as tracking loss mitigation outcomes for any disparate impact.