

Effectively Resolving Home Foreclosures Through Mediation

By Robert D. Litz and Colleen O. Davis

In January, 2013, mediations of home foreclosures commenced for St. Louis County residential properties pursuant to Ordinance 25,190, as amended by Ordinance 25,239, which went into effect on November 15, 2012 requiring lenders to give homeowners an opportunity to mediate with their lender to attempt to avoid foreclosure. This article analyzes the experience of mediating forty-six of those cases, explores the similarities and differences of home foreclosure mediations from typical civil mediations, as well as discusses the foreclosure mediation experience of other jurisdictions.

I. Background of St. Louis County and City of St. Louis Ordinances

"Housing is the single most important asset for the majority of American households and a pillar of the American economy. The current housing crisis that began in 2007 is unprecedented in American history."¹ Home foreclosures have reverberating effects throughout the communities where they occur. Foreclosures impact the homeowner's credit, family stability, and the homeowner's ability to obtain employment. Foreclosures also increase crime rates and decrease property values in the surrounding areas. "The effects on state and local governments are far reaching as well, and include lost revenues from a shrinking property tax base, growth in demand for services for displaced families plus police and fire protection for abandoned properties, and potentially significant pressures on court systems—squeezing budgets

on both the revenue and spending sides."² For example, one St. Louis County woman bought her house for \$70,000 fifteen years ago, and this year her house was appraised for \$28,000 – specifically because, while her home has been well-maintained, so many other houses in her neigh-

borhood had been foreclosed upon.³

These trends should alarm lenders and homeowners, as well as neighbors, schools and government officials. Though the housing market in the St. Louis region is improving overall,⁴ albeit sluggishly, and foreclosure rates are slowly decreasing,⁵

1. Karen Tokarz, Kim Kim & Justin Vail, *Foreclosure Mediation Programs: A Critical and Effective response by States, Cities, and Courts to the Foreclosure Crisis*, 59 ST. LOUIS BAR J. 28 (Summer 2012). The authors gratefully acknowledge the assistance of Professor Karen Tokarz of Washington University School of Law for her assistance in the preparation of this article.
2. Robert Clifford, *State Foreclosure Prevention Efforts in New England: Mediation and Assistance*, NEW ENG. PUB. POL'Y CENTER RES. REP.(Sep. 2011). Mr. Clifford is Policy Analyst at the Federal Reserve Bank of Boston.
3. Mike Colombo, *St. Louis County Woman One of Thousands of Victims of Foreclosure Crisis*, KMOV.com, (Jan. 3, 2013, 6:32 PM) <<http://www.kmov.com/news/local/St-Louis-County-woman-one-of-thousands-of-victims-of-foreclosure-crisis-185602042.html>>.
4. *Experts Say Local Housing Market is Improving*, CBS St. Louis (May 31, 2013, 9:22 AM), <<http://stlouis.cbslocal.com/2013/05/31/experts-say-local-housing-market-is-improving/>>.
5. *Report: Home Foreclosure Rate Down in St. Louis Area*, KMOV.com, (July 24, 2013, 7:54 AM), <<http://www.kmov.com/news/local/Report-Home-foreclosure-rate-down-in-St-Louis-area-216741711.html>>.

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many areas of the region still struggle with the contagious depreciation of home prices – both those of homeowners and those on the market. The small amount of time and money that lenders and borrowers invest in the effort to avoid home foreclosure is worthwhile for both parties. One way to facilitate this effort is through home foreclosure mediation.

In an effort to address the devastating effects of foreclosures, in September 2012, St. Louis County, followed shortly by the City of St. Louis, passed legislation requiring lenders to offer homeowners the opportunity to mediate before foreclosing on a residential property. Under the ordinances, the lender was required to send a notice of this opportunity with the notice of foreclosure to the homeowner, and pay a \$100 fee to a neutral mediation coordinator.⁶ If the homeowner timely elected to mediate, the mediation coordinator scheduled a mediation, and the lender paid a \$350 flat fee for the mediator's services. These ordinances were predicated on successful ordinances in Providence and Cranston, Rhode Island, and Springfield, Massachusetts that had been upheld by the courts.

The ordinances required the lenders provide the homeowner with certain information and documents, including a copy of a recent appraisal or Brokers Price Opinion, a proposal to resolve the foreclosure, an estimate of the "short sale" value of the property the lender may be willing to consider, as well as provide the history of any offers previously made to resolve the dispute. In the mediations conducted, the lenders usually provided the homeowner with the total principal outstanding, the amount past due and the number of months the loan was past due. This information provided the homeowner key information concerning the status of the loan.

The lender was also required to submit to the mediation coordinator a non-binding confidential settlement proposal before the mediation. The homeowner was required to submit certain financial information the lender needed to assess potential for alternatives to foreclosure, including a financial statement, as well as the U.S. Department of the Treasury

Request for Mortgage Assistance, a form lenders use to review borrowers' credit worthiness. There was no requirement that a settlement be reached – only that the representative show up and participate in good faith.⁷

A. What Happened to the St. Louis County and City Ordinances?

The St. Louis County Ordinance was in effect from November 15, 2012 until January 18, 2013. During that time, 900 homeowners received notices of foreclosure and notices of their right to request mediation. All of the involved mortgage lenders were 100% compliant throughout the brief life of the St. Louis County ordinance. The ordinance was stayed on January 18, 2013 by the Missouri Court of Appeals, Eastern District as part of pending litigation between the Missouri Bankers Association and the County. The Association contended, among other things, the ordinance was unconstitutional and added unnecessary costs and delays to inevitable foreclosures. The City ordinance was stayed four days after it went into effect in April 2013. Many larger national mortgage lenders maintain mediation departments specifically for jurisdictions that require foreclosure mediation, such as Illinois, a judicial foreclosure state.

These disputes generated legislation in the Missouri General Assembly. In August 2013, the ordinances were effectively preempted by Mo. Rev. Stat. § 443.454, which prohibits local governments from interfering with the real property lending process.⁸ It provides:

[N]o local law or ordinance may add to, change, delay enforcement, or interfere with, any loan agreement, security instrument, mortgage or deed of trust. No local law . . . may add, change, or delay any rights or obligations or impose fees or taxes of any kind or require payment of fees to any government contractor related to any real estate loan agreement, mortgage or deed of trust, other security instrument, or affect the enforcement and servicing thereof.

As a consequence, mediations required by the ordinances between lenders and homeowners have ceased. However, a number of lenders have continued to participate in mediating home foreclosure cases on a voluntary basis.

B. Was the St. Louis County Foreclosure Mediation Program Successful?

Representatives of homeowners and lenders met several times in the first months of 2013 to discuss whether or not the ordinances were achieving their purposes. This determination, of course, depends on one's definition of success. The most generous definitions include affording homeowners more time to transition into a new housing arrangement as a success, even if they did not ultimately avoid foreclosure. The strictest definition is the percentage of mediations that resulted in permanent home loan modifications.

Of course, homeowners' possibilities in the face of foreclosure are not binary. Even within the category of loan modifications, homeowners can negotiate principal forgiveness, a partial claim,⁹ interest reduction, or an amortization recalculation. Short

6. U.S. Arbitration & Mediation was selected by St. Louis County and the City of St. Louis to serve as the mediation coordinator and facilitated the home foreclosure mediation programs.

7. Failure to comply with the County ordinance resulted in a \$1000 fine and a \$500 fine in the City.

8. After the passage of Mo. Rev. Stat. § 443.454, the Missouri Court of Appeals dismissed as moot the Missouri Bankers Association's claim against St. Louis County. *Missouri Bankers Ass'n, Inc. v. St. Louis Cnty.*, 2013 WL 5629426 (Mo. Ct. App. Oct. 15, 2013).

9. In a partial claim, available only for FHA loans, the lender reduces the outstanding balance by an agreed upon amount. The borrower executes a promissory note and subordinate mortgage payable to U.S. Department of Housing and Urban Development (HUD). Currently, these promissory or "Partial Claim" notes are noninterest-bearing and are not due until the borrower either pays off the first deed of trust or no longer owns the property. A partial claim allows the lender to reduce the amount owed under the first deed of trust, thus reducing the homeowner's monthly payment.

of modification, homeowners may still negotiate a short sale, agree to a forbearance agreement or a deed in lieu of foreclosure, or file a bankruptcy petition, which at least delays foreclosure for a few months.

To obtain a deed in lieu of foreclosure, the borrower transfers title to the property to the lender and avoids the foreclosure. "Cash for Keys" programs fall into this category, whereby the borrower is paid by the lender to transfer the title, thus avoiding foreclosure. In a short sale, the lender consents to the borrower's sale of the property for less than the outstanding balance. The lender usually agrees writes off the balance of the loan. A forbearance agreement is an agreement in which the lender agrees not to foreclose, and the borrower agrees to a mortgage plan that will bring him or her current on payments. Forbearance agreements are designed for borrowers with temporary financial problems; they are not long-term solutions. Reinstatement, a process in which the homeowner pays off the outstanding past due amount owed and the foreclosure is cancelled, is also an option.

In theory, these alternatives to foreclosure are successes for both lenders and homeowners. When the lender is the highest bidder at a foreclosure sale based on their credit bid, as is

often the case, recording a foreclosure deed transfers title to the lender. Thereafter, the lender is responsible to insure, maintain, and pay property taxes for an uninhabited home until it is sold.¹⁰ In such situations, the lender also bears the costs of reselling the property, including sales commissions and costs to prepare the property for sale. In areas affected by foreclosure, the resale value will inevitably be lower than the previous homeowner's sale price. Facilitating a way for homeowners to keep their homes—and keep paying their lenders—is mutually beneficial, and certainly worth the \$450 the lender paid for each mediation under the ordinances.¹¹

Forty-six residential foreclosure cases were mediated at USA&M in the first six months of 2013. The data is incomplete because homeowners are often difficult to reach, since they may lack a working telephone, may have left their home, or other circumstances. The records reflect sixteen modifications, two short sales, one homeowner kept her house at least temporarily through a bankruptcy proceeding, one forbearance agreement, and fifteen foreclosures. There are eleven cases for which the final outcome is unknown since the county records indicate a foreclosure deed has not been recorded. In those

eleven cases, a foreclosure sale may have either been cancelled or actually held, but the lender did not record a foreclosure deed.

C. What Are the Costs of Not Mediating Home Foreclosures?

In 2007, the Congressional Joint Economic Committee determined that the average cost of a foreclosure is \$77,935, while the cost to prevent a foreclosure is a mere \$3,300.¹² This cost of foreclosure includes \$50,000 loss for the lender, nearly \$20,000 for the local government, and the remainder is borne by the homeowner and her neighbors (in the depreciation of their home values). As of February 2012, losses for lenders were roughly fifteen percent lower on short sales than on foreclosures.¹³ Whether or not foreclosure mitigates lenders' losses in the short term, foreclosures impact the value of future loans for foreclosed homes when (and if) they are eventually sold. Lenders have an interest in keeping home prices high to make a greater return on their loans. Foreclosure avoidance efforts—including foreclosure mediation—is one way to work toward this end.

Some mortgage lenders have incorporated into their policies the fact that foreclosures are usually not economically prudent. Banks are increasingly offering short sales and forgoing their right to pursue the deficiency balance. Tom Kelly, a JPMorgan spokesman, said in an e-mail to Bloomberg News, "When a modification is not possible, a short sale produces a better and faster result for the homeowner, the investor and the community than a foreclosure."¹⁴

Other incentives for lenders to grant modifications include federal laws and programs such as the Home Affordable Modification Program (HAMP), a federal program that provides additional financial incentives to servicers and investors to modify mortgages at risk of ending in foreclosure. For whatever reason, lenders have failed to fully take advantage of HAMP. This is somewhat surpris-

10. *But see*, for example, Sam DeBord, *Zombie Titles: When Foreclosures Become Walking Dead Homes*, Realtor.com (Jan. 18, 2013), <<http://www.realtor.com/advice/zombie-titles-when-foreclosures-become-walking-dead-homes/>>, for a discussion of the occurrence whereby lenders initiate foreclosure proceedings but fail to transfer title. This forces the homeowners out of their homes, but leaves them liable for taxes and duties to maintain the property.

11. USA&M will continue to offer home foreclosure mediation on the reduced fee structure as provided in the ordinances.

12. *Sheltering Neighborhoods from the Subprime Foreclosure Storm: Report by the J. Economic Comm.*, 110th Cong. (Apr. 11, 2007), available at <<http://www.jec.senate.gov/archive/Documents/Reports/subprime11apr2007revised.pdf>>. Granted, the article on which the Committee bases its \$3,300 figure was written in 1995. We may reasonably assume that the cost of preventing a foreclosure is now higher than \$3,300. The \$77,935 figure is based primarily on data from 2005 and 2006.

13. Prashant Gopal, *Banks Paying Homeowners to Avoid Foreclosures*, BLOOMBERG NEWS (Feb. 6, 2012, 11:00 PM), <<http://www.bloomberg.com/news/2012-02-07/banks-paying-homeowners-a-bonus-to-avoid-foreclosures-mortgages.html>>.

14. *Id.*

ing given that “over 80% of HAMP-compliant modifications are still performing a year after they have been made, and have substantially lower re-default and foreclosure rates than non-HAMP modifications.”¹⁵

Considering lenders’ costs of foreclosure and benefits that come with modifications, it is surprising that lenders have not made stronger efforts to avoid foreclosures when possible.

II. Similarities of Home Foreclosure Mediation to Mediation of Civil Disputes

In some ways, home foreclosure mediations are similar to that of other civil mediations. Perhaps most importantly, the mediation process requires both parties to focus on their own goals and the interests of the other party, as well as where their interests intersect, if at all.

First, there are human factors. When one party is a corporation, it is often humanizing for the borrower to meet a representative of the lender, and it helps put the case in perspective. One real estate lawyer from Chicago recounted how foreclosure mediation helped his client even though she ultimately had to reject the modification she was offered: “She feels like she had an opportunity to be heard and to hear what the mortgage company said, and [that] she was treated with some dignity and respect At the end, she understood and she accepted it, and she can learn from it and move on.”¹⁶

Mediations require the lender to pause the foreclosure process and look at the homeowner’s finances to determine if a loan modification is possible. Without such a requirement, particularly in Missouri where the foreclosure process is among the fastest in the nation,¹⁷ the usual procedures lend themselves to unnecessary foreclosures. The homeowner in turn is required to thoroughly review their own finances and housing alternatives. Based on these facts, they must determine the most viable option for themselves and for their families. They are forced to consider each alternative and its long-term

viability. As with civil mediations, the parties in foreclosure mediation should explore all their alternatives, including their BATNA, “best alternative to a negotiated agreement” and WATNA, “worst alternative to a negotiated agreement.”

Another similarity is the impact of representation at the mediation. Foreclosure mediation is no exception to the general principle that being represented will heavily affect the outcome of a negotiation. In fact, homeowners who received counseling are 1.7 times more likely to avoid a foreclosure sale than those who did not, and 45% more likely to avoid re-default than homeowners who obtained loan modifications without counselor assistance.¹⁸ Furthermore, “borrowers who received loan modifications through housing counselors reduced their monthly payments by \$267 more than borrowers who obtained loan modifications without the help of counselors.”¹⁹ For the mediations that took place at USA&M, homeowners with housing counselors had an 85% chance of avoiding foreclosure, whereas homeowners without representation had only a 50% chance.²⁰

III. Differences in the Foreclosure Mediation Process From Mediation of Other Types of Cases

Similarities notwithstanding, the home foreclosure mediation process is probably more dissimilar to regular mediations than it is similar. The process is much more structured, and little discretion is left to the lender’s representative. They are truly more representatives than agents; the parameters in which they work is limited.

Most lenders have rigid standards that dictate which alternatives to foreclosure, if any, are possible given the homeowner’s financial information and the availability of federal or lender’s programs to modify the borrower’s type of loan. “Mediation” connotes a give and take by both parties. In foreclosure mediation, the purpose is the same—to reach a solution that leaves both parties in a better position than they would be otherwise—but the process is considerably different. It is appropriate to conceptualize the process as a systematic checking of boxes on the lender’s checklist based on

15. Alys Cohen, Ariel Cohen, & Diane E. Thompson, *At a Crossroads: Lessons From the Home Affordable Modification Program (HAMP)*, National Consumer Law Center at 4, (Jan. 2013), available at <http://www.nclc.org/images/pdf/foreclosure_mortgage/loan_mod/hamp-report-2013.pdf>. The authors argue that the program is mutually beneficial for lenders and homeowners, but that enforcement mechanisms must be incorporated into national loan modification standards because of “massive servicer noncompliance.”
16. Maria Kantzavelos, *Housing Crisis Intervention: Foreclosure Mediation in Illinois*, 100 ILL. BAR J. 296 (June 2012), available at <<http://www.isba.org/ibj/2012/06/housingcrisisinterventionforeclosur>>.
17. For an easily digestible explanation of Missouri law governing foreclosure, see *Foreclosure Laws*, Foreclosure.com, <http://www.foreclosure.com/statelaw_mo.html> (last visited Sep. 13, 2013). See also *Foreclosure Process and Procedure* by Daniel West and Jennifer West in this issue of the St. Louis Bar Journal.
18. Geoff Walsh, *Rebuilding America: How States Can Save Millions of Homes Through Foreclosure Mediation* at 22, National Consumer Law Center (Feb. 2012), available at <http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-foreclosure-meditation.pdf>.
19. *Id.*
20. This figure includes cases in which a settlement was not finalized in mediation, but when public records indicated that no transfer of title had taken place.

the homeowner's financial information, including income, expenses, principal balance of the loan, and parameters required by the investor or government program. The combination of boxes checked dictates the possibilities for a settlement.²¹ There is no bargaining, and as such, no bargaining power to speak of. However, the checklist varies between servicers. For example, in December 2010, American Home Mortgage Servicing was 60% more likely to approve a loan modification than Bank of America for similarly-situated homeowners.²²

In typical mediations, both or all parties have experienced lawyers to guide the process. This is helpful for novice parties both in terms of understanding how the law applies to their case, but also to provide them with a sense of security, that someone is looking out for their interests. In foreclosure mediation, the homeowner may not have an attorney or housing counselor. Homeowners were represented by a housing counselor in twenty-five of USA&M's forty-six foreclosure mediations. For many homeowners, this is their first legal dispute, and the atmosphere can be highly intimidating, whether or not they are represented, given that everyone else participating is either a legal or lending professional.

It is important for the mediator to caucus with the homeowner before a

joint session with the lender because homeowners are novices and likely to be intimidated by it and because of the formulaic process. Explaining the process to the homeowner may ease some of their apprehension and help make them more prepared to speak for themselves. The unrepresented homeowner is the only person participating in the mediation who is not familiar with the process or procedure. In addition, the homeowner is the one in the room who is at risk of losing their home, which adds a significant pressure point to the discussions.

In typical mediations of civil cases, the parties' interests are generally simple and obvious: the plaintiff wants as much money as possible, and the defendant wants to give up as little as possible. In foreclosure mediations, the options are more varied, homeowners' goals are not always the same, and not always intuitive. In one of the mediations at USA&M, the homeowner did not want to keep her house; she wanted a short sale, and obtained one through the mediation process. The lender, for whom a short sale was also ideal, did not know what the homeowner wanted until the parties sat down together during the mediation. In another case, the homeowner owed approximately \$90,000 on a home estimated to be worth \$25,000. Her lender agreed to reduce the first

deed of trust from \$90,000 to \$65,000 and re-amortized the loan for another 30 years. The remaining principal balance of \$25,000 was converted to a noninterest-bearing second deed of trust.²³ The lender agreed to reduce her interest rate from about 8% to about 3%. The mediator explained to the homeowner that even with the proposed modification, she would pay roughly three times the current value of the home. The homeowner explained that she wanted to keep her son at his current school and that her only alternative to the modification was to rent. She said the modification still made the most financial sense because her monthly payment was reduced to less than her cost to rent. She remained in her home, and the lender received a market rate of interest on the principal balance, which exceeded the value of the property by \$40,000. When the mediator knows what alternatives each party is considering, he or she can more easily focus the mediation towards meeting those objectives. Two key factors played an important role in this win-win result: first was the fact that the homeowner was assisted by a very experienced housing counselor, and second, the loan qualified for a HUD modification under the HAMP guidelines.

Another crucial difference between typical mediations and foreclosure mediations is the necessity of "discovery." Many mediations can occur before a great deal of discovery is completed. This takes into account the realities that attorneys' fees, publicity concerns, or parties' desires to end litigation can be as important as the merits of the case. A foreclosure mediation, on the other hand, requires the exchange of financial information from the homeowner, including but not limited to evidence of employment, income, and banking information. The lender cannot offer a settlement proposal unless the homeowner submits all information and documentation required by the investor or government program and the lender can complete the appropriate credit analysis. It is equally

21. Readers may justifiably wonder, if the process is so straightforward, why is mediation necessary? Why can't homeowners and lenders go through this process by themselves? The answer is that, for whatever reason, communication has proven much more difficult without a neutral third party. Several surveys conclude "that mortgage servicers lose loan modification application documents. [Housing] counselors must constantly resend the same documents, sometimes up to six times. Homeowners acting [without counselors] inevitably fare much worse. Servicers routinely delay application decisions, and then demand updates of financial information already sent because earlier documents are no longer current. This process repeats itself again and again." Some see this occurrence as malicious, but there are less accusatory explanations as well, such as understaffing. The unprecedented levels of foreclosures in recent years could also help to explain the inadequacy of servicers' handling of loss mitigation claims. *Id.* at 17.

22. Olga Pierce & Paul Kiel, *By the Numbers: A Revealing Look at the Mortgage Mod Meltdown*, ProPublica (Mar. 8, 2011, 12:37 PM), <<http://www.propublica.org/article/by-the-numbers-a-revealing-look-at-the-mortgage-mod-meltdown#chances>>.

23. The second deed of trust is known as a partial claim, discussed *supra* at note 9.

important that the homeowner understands the obligations in any new agreement, and has a precise awareness of whether or not they can manage the terms in a given offer.

The documents required by the St. Louis County and City ordinances, we learned, were often insufficient for the lender to fully review for a possible modification. Several "settlements" reached during mediation were merely agreements to delay foreclosure while the homeowner submitted more financial information for review. This removes the negotiations from the mediator's oversight. It can place the homeowner back into the darkness of not knowing the status of the lender's review, or who to turn to for help. Some might argue that this defeated the very purpose of the programs. This is another reason housing counselors were effective in mediation: they knew to come prepared with information required by lenders to avoid having their client leave empty-handed.

IV. Foreclosure Mediation in Other Jurisdictions and Potential for Success in St. Louis County and City

Foreclosure mediation programs have been implemented on state and local levels in at least twenty-four states and the District of Columbia.²⁴ Some programs are judicial (based on a court rule), some are statutory, and some are voluntary. What they have in common is that the vast majority of them work to avoid foreclosures. This section details two of those programs and their results. Several counties in Illinois have foreclosure mediation programs, including Madison and Bond Counties. The geographic proximity to St. Louis and comparable costs of living gives reason to believe the results of the program might be similar in St. Louis City and St. Louis County, notwithstanding the fact that Illinois is a judicial foreclosure state. In Rhode Island, the legislature created a statute requiring foreclosure mediation in response to the successes

produced by local ordinances in Providence, East Providence, Cranston, Warwick, and Warren.²⁵ Looking at what might have been for St. Louis City and County can speak to the potential for success here, even if foreclosure mediations continue on a voluntary basis.

A. Madison and Bond Counties, Illinois

Madison and Bond Counties in Illinois have a single judicial mediation program that covers both counties. Homeowners sued for foreclosure receive a notice about the program, a Request for Mediation, and a financial questionnaire with their summons and complaint. Homeowners must opt in by filing the Request for Mediation and financial questionnaire with the Circuit Clerk's office within 30 days of being served.²⁶ A program administrator evaluates the homeowner's eligibility for mediation. The homeowner is eligible if they have sufficient income to pay their other expenses when their mortgage payment is lowered to 31% of their gross income. This is a unique aspect of the program; not all homeowners facing foreclosure are eligible. Having the program administrator determine whether or not a mediation is worthwhile

may be part of the program's success. A mediation with no possibility of settlement may be considered a waste of resources and unnecessary emotional strain. On the other hand, some might argue that the program unfairly precludes homeowners that do not meet the criteria from making their case for foreclosure avoidance, including a short sale or deed in lieu of foreclosure. The program is run by voluntary mediators. Lenders are charged a \$150 filing fee with their complaint to defray the cost of the program. According to the former program administrator, 80% of homeowners facing foreclosure are eligible for mediation. The vast majority of cases are resolved before mediation, and 36% of homeowners kept their homes.²⁷

In February 2013, the Supreme Court of Illinois strengthened the state's local foreclosure mediation programs by adding new requirements. "These include the identification of resources for government-certified counseling, for free legal representation to eligible homeowners, interpretive services, and sworn assurances that all loan modification efforts have been made by the lender."²⁸ The rules became effective in March, 2013.

24. *Foreclosure Mediation Programs by State*, National Consumer Law Center, <<http://www.nclc.org/issues/foreclosure-mediation-programs-by-state.html>> (last visited Sep. 18, 2013). The site appears to have been last updated in late 2011 or early 2012.
25. Patricia Antonelli, Brian P. Gallogly, & David J. Pellegrino, *Changes to Rhode Island Foreclosure Statute Require Mediation for Certain Foreclosures*, Partridge Snow & Hahn (Sep. 2013), <<http://www.psh.com/ri-foreclosure-statute-require-mediation>>.
26. Robert Clifford and others feel that foreclosure mediation programs should be opt-out rather than opt-in because opt-in programs have participation rates "of no more than twenty percent," while automatic or opt-out programs have rates between sixty and seventy percent. Robert Clifford, *The Role of Mediation in Foreclosures*, COMMUNITIES & BANKING (Fall 2012) at 22.
27. Kantzavelos, *supra* note 16.
28. Joseph R. Tybor, *Press Release: Illinois Supreme Court Adopts New Rules to Ease Burden of Home Foreclosure Process*, Supreme Court of Illinois (Feb. 22, 2013), available at <<http://www.state.il.us/court/media/PressRel/2013/022213.pdf>>.

B. Rhode Island

Like Missouri, Rhode Island is a non-judicial foreclosure state. The programs in Providence and Cranston are similar to the now-preempted St. Louis City and County ordinances in that they were initiated by local governments. The towns of East Providence, Warwick, and Warren followed suit upon seeing the programs' successes – for homeowners, lenders, and the community. These ordinances were also preempted by a state statute that went into effect September 13, 2013, but not because of concern over contract interference. Rather, the state legislature decided that the ordinances were effective, worthwhile, and that a state statute would improve their efficiency. The purpose of the statute provides:

[I]t is important for the state to develop a standardized, statewide process for foreclosure mediation rather than a process based on local ordinances that may vary from municipality to municipality. By providing a uniform standard for an early HUD-approved independent counseling process in owner-occupied principal residence mortgage foreclosure cases, the chances

of achieving a positive outcome for homeowners and lenders will be enhanced.²⁹

Under the law, lenders must provide homeowners notice that the lender “may not foreclose on the mortgaged property without first participating in a mediation conference.” The mediation must take place within sixty days of service of the notice. Mediations can occur in person or over the phone, and the mediation coordinator must be a person employed by a HUD-approved counseling agency. The homeowner must provide any financial and employment information “deemed appropriate by the mediation coordinator.” The mediation is free for the homeowner; the lender must compensate the counseling agency “up to \$500.” If, after two attempts to mediate, the homeowner has not responded or complied, foreclosure can proceed. The lender is deemed to have satisfied its obligation under the law by participating in good faith, even if the parties cannot reach a resolution. All agreements must be reduced to writing.³⁰

Conclusion

In Illinois, Rhode Island, and Missouri, local foreclosure mediation programs were established to mitigate the rippling detrimental effects of the foreclosure crisis. The Illinois programs, judicially implemented, still operate. The Rhode Island and Missouri legislatures saw very similar local ordinances within their states, and reacted in opposite ways. Rhode Island streamlined and consolidated the programs, and Missouri ended them. The wisdom of the new Missouri law is a subject for another article. Home foreclosure mediation has the potential to significantly reduce unnecessary foreclosures based on the lessons learned in St. Louis County and from mediation programs around the country. Taking the best parts of programs in other jurisdictions will make mediation even more attractive to lenders. If homeowners were pre-screened for eligibility and if more homeowner documents were required before mediation, foreclosure mediation in St. Louis could become a well-oiled machine, independent of legislation. Because foreclosure avoidance is in the lenders' interests, they should make reasonable efforts to mediate cases voluntarily in St. Louis going forward.

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29. R.I. Stat. § 34-27-3.2.

30. For a cautionary tale warning of the hazards of failing to execute a contract in foreclosure mediation, see *Addington v. Bank of Am., N.A.*, 2013 WL 4040735 (D. Nev. Aug. 6, 2013).