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*By Jesse D. Stewart**

I. INTRODUCTION

The collapse of the housing bubble and subsequent financial downturn of 2008 unleashed a flood of foreclosure filings in the Maine courts, threatening the fundamental aspiration of homeownership for many Maine residents. This Comment examines the significant steps Maine has taken to address increased foreclosure filings through the implementation of a foreclosure mediation program and offers concrete suggestions to further improve the program. In Part II, this Comment traces some of the relevant mortgage lending practices that preceded the present crisis and continue to affect the parties' abilities to achieve negotiated agreements in mediation. Part III examines how the Maine Legislature and Judiciary have responded to the increase in foreclosure filings, with a primary focus on the Legislature's authorization of the Foreclosure Diversion Program ("FDP"), which includes a mandate that both the borrower and lender make a "good faith effort" to mediate prior to seeking summary judgment. In examining Maine's response to the increase in foreclosure filings, this Comment reviews several recent Maine Supreme Judicial Court decisions on foreclosure issues that are illustrative of the Court's current stance toward some of the procedural aspects of foreclosure law that inevitably bear on the strength of the parties' respective bargaining positions at mediation. Part IV analyzes the results of the FDP's first full year of operation in light of the FDP's stated objective of maximizing fairness and efficiency in foreclosure actions. This Comment argues that two significant challenges to achieving the FDP objectives are (1) the documentation issues evidenced by the high incidence of unsuccessful summary judgment motions filed by the foreclosing party and (2) the overwhelming *pro se* status of foreclosure defendants. Part V argues that, given the current landscape of foreclose practices in Maine and the positive results of the mediation program, mediation can be further encouraged by broadly interpreting the good faith requirement. By strictly enforcing the good faith requirement and setting clear, reasonable expectations for the parties' conduct at mediation, the FDP can increase the incidence of negotiated agreements at mediation and contribute to avoiding the unsuccessful summary judgment motions that have plagued the foreclosing parties, threatened the integrity of the foreclosure process, and wasted court resources by unnecessarily delaying the resolution of mortgage defaults.

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II. A BRIEF BACKGROUND

A. Nicolle Bradbury and the Robo-Signer: A Snapshot of Maine's Foreclosure Landscape

On October 14, 2010, the front page of the *New York Times* displayed a picture of a modest Maine home under the title "From a Maine House, a National Foreclosure Freeze."[1] In what has now become a familiar story for many, Nicolle Bradbury purchased her home for $ 75,000 in 2003, which allowed her to move out of the trailer she had been living in with her family.[2] She financed the home with a mortgage loan she was offered by GMAC Mortgage.[3] For three years, Mrs. Bradbury made the $ 474 monthly payments on her home until she lost her job as an employment counselor in 2006.[4] Although she worked odd jobs in an attempt to make ends meet, her husband was in poor health and unable to work, and Mrs. Bradbury fell behind on her payments.[5] GMAC agreed to modify her payment obligations, but this only increased her monthly payments, and by 2008 Mrs. Bradbury had stopped making the payments altogether.[6] When GMAC attempted to foreclose on the home, Mrs. Bradbury sought a pro bono attorney.[7] Thomas Cox, an attorney for Maine Attorney's Saving Homes ("MASH"), a joint project of Pine Tree Legal Assistance ("PTLA") and the Maine Volunteer Lawyers Project ("VLP"), took Mrs. Bradbury's case.[8] MASH coordinates pro-bono referrals for low-income clients facing foreclosure.[9]

Mr. Cox's subsequent representation of Mrs. Bradbury revealed the fraudulent practices of Jeffery Stephan, the "limited signing officer" and signatory of the affidavit upon which GMAC relied in asking the Maine District Court to foreclose on the house at summary judgment.[10] Indeed, the signing officer admitted in a deposition that he had signed hundreds of similar affidavits every day without any personal knowledge of the contents of the documents he was signing although the affidavits all averred that he had personally reviewed each individual file.[11] Thus,

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1. David Streitfeld, *From a Maine House, a National Foreclosure Freeze*, N.Y. TIMES, Oct. 14, 2010, at A1 *available at* http://www.nytimes.com/2010/10/15/business/15maine.html.

2. *Id.*

3. *Id.* GMAC Mortgage is a wholly owned subsidiary of Ally Financial, Inc. *About GMAC Mortgage*, GMAC MORTGAGE, http://www.gmacmortgage.com/about.html (last visited Sept. 6, 2011). GMAC started out financing consumer auto loans but has since diversified to include home mortgages, among other financial services. *See The Ally Story*, ALLY FIN., http://www.ally.com/about/ally-story (last visited Sept. 6, 2011).

4. Streitfeld, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Foreclosed Justice: Causes and Effects of the Foreclosure Crisis (Part I & II): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 293 (2010) [hereinafter *Foreclosed Justice*], *available at* http://judiciary.house.gov/hearings/printers/111th/111-158_62935.PDF (statement by Thomas Cox, Esquire, Volunteer Program Coordinator, Maine Attorneys Saving Homes Project).

9. *Me. Atty's Saving Homes*, ME. VOLUNTEER LAWYERS PROJECT, http://www.vlp.org/maine-attorneys-saving-homes-mash (last visited Sept. 6, 2011).

10. *See* Streitfeld, *supra* note 1.

11. *See* Fed. Nat'l Mortg. Assoc. v. Bradbury, No. RE-09-65, at 4 (Me. Dist. Ct., Bridgton, Sept. 24, 2010) (Powers, J.), *available at* http://graphics8.nytimes.com/packages/pdf/business/FourMotionsOrder.

as Mr. Cox later stated in testimony to the House Judiciary Committee: “When [the signing officer] says that he has custody and control of the loan documents, he doesn’t. When he says that he is attaching ‘a true and accurate’ copy of a note or a mortgage, he has no idea if that is so because he does not look at the exhibits.”[12] The Maine District Court (Bridgton, *Powers, J.*) found that this “unlawful conduct” was not isolated but rather had persisted for years and was a “serious and troubling matter.”[13] As a result, the court reversed summary judgment for the foreclosing party and granted Mrs. Bradbury’s motion for sanctions, awarding Mrs. Bradbury attorney’s fees.[14] The Bradbury case triggered national media attention, and within a month major mortgage holders such as GMAC, Bank of America, JP Morgan Chase, and others announced a temporary foreclosure freeze based on potential documentation problems in twenty-three states where the foreclosing party must go to court to prove foreclosure.[15]

Mrs. Bradbury’s case is quite unusual in the national media attention it garnered, and in her ability, through assistance from *pro bono* counsel, to remain in her home long after default and the mortgagee’s motion for summary judgment. Indeed, over ninety percent of Maine homeowners facing foreclosure and in need of legal assistance are unable to retain counsel,[16] and seventy percent of homeowners fail to contest the foreclosing party’s motion for summary judgment, which only increases the likelihood that the foreclosing party will obtain the property absent the full rigor of the adversary system at summary judgment.[17] Thus, it is quite possible that had Mrs. Bradbury failed to contact legal assistance and Mr. Cox, she would have been just another victim of foreclosure.

Mrs. Bradbury’s case symbolizes the upswing in foreclosures in Maine over the last several years.[18] In fact, in June 2009, the Maine Judicial Branch Commission on Foreclosure Diversion (the Commission)[19] released a report noting

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pdf. For a thorough explanation of the sorts of practices in which these signing officers engaged, see Onewest Bank, F.S.B. v. Drayton, 910 N.Y.S. 2d 857, 861-66 (N.Y. Sup. Ct. 2010).

12. *Foreclosed Justice, supra* note 8, at 297.

13. *Bradbury*, RE-09-65, at 5.

14. *Id.* at 2, 5. On appeal, the Law Court rejected Bradbury’s contention that the trial court should have held GMAC in contempt in addition to imposing sanctions. Fed. Nat’l Mortg. Assoc. v. Bradbury, 2011 ME 120, ___A.3d ___.

15. Streitfeld*, supra* note 1. However, the banks have since resumed processing foreclosures despite investigations into improper practices in mortgage servicing by all fifty state attorneys general. *See* Nelson D. Schwartz & Andrew Martin, *Largest Bank will Resume Foreclosure Push in 23 States*, N.Y. TIMES, Oct. 18, 2010, at A1, http://www.nytimes.com/2010/10/19/business/ 19mortgage.html. A number of major lending institutions have also reached a settlement agreement with federal investigators in relation to lender misconduct. *See* Dina ElBoghdady, *Regulators, Mortgage Servicers Agree on Reforms*, WASH. POST, Apr. 13, 2011, http://www.washingtonpost.com/ business/economy/regulators-mortgage-services-agree-on-reforms/2011/04/13/AFtQxsWD_story.html.

16. *Foreclosed Justice*, *supra* note 8, at 294.

17. *See* STATE OF ME. JUDICIAL BRANCH, REPORT OF THE JUDICIAL BRANCH COMM. ON FORECLOSURE DIVERSION 18 (2009) [hereinafter 2009 JUD. BRANCH REP.], *available at* http://www.courts.state.me.us/rules_forms_fees/fdc_report0609.pdf.

18. *See id.* at 4.

19. The Commission was formed by the Maine Supreme Judicial Court in March 2009. *See Commission on Foreclosure Diversion*, ME. JUDICIAL BRANCH, http://www.courts.state.me.us/ committees/foreclosure.html (last visited Sept 7, 2011). The Commission was tasked with proposing an “effective alternative dispute resolution process” to “promote prompt and fair resolutions” in foreclosure

that while foreclosures in Maine had not been as high as in some states hardest hit by the foreclosure crisis, Maine "is nonetheless experiencing unprecedented rates of foreclosures, particularly in those loans held by national lenders."[20] A Judicial Branch Report submitted to the Maine Legislature noted that "[f]oreclosure filing activity remained high" in 2010, reaching 5409 total filings.[21] Most recently, Maine banking regulators have indicated that completed foreclosures remain high, although foreclosure starts have declined.[22] Meanwhile, in addressing this increase in foreclosures, the Commission has identified one of the inherent difficulties created by the foreclosure crisis, observing that the "current rise in foreclosures represents a lose-lose situation because lenders incur increased transaction costs and reduced return from their collateral, and homeowners lose their homes. Additionally, communities lose as they suffer from the associated consequences of the proceedings."[23] To understand this situation better, it is helpful to understand the practices and principles that underlie the current foreclosure crisis.

B. Homeownership, Securitization, and Subprime Lending

Home ownership has been at the center of our policy priorities in the United States throughout the last century and is closely associated with representations of the American Dream.[24] Because home ownership would be an impossible dream for most families absent mortgage loans,[25] government policies encouraging a wide availability of credit, including the broad use of "creative financing," have significantly fueled home ownership rates.[26] At the same time, economic highs and

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proceedings. *Id.* The Commission is composed of representatives from all three branches of state government as well as practitioners representing the interests of various stakeholders, including those of lenders and legal services organizations. *See* 2009 JUD. BRANCH REP., *supra* note 17, at 38.

20. 2009 JUD. BRANCH REP., *supra* note 17, at 6-7. The report also notes that most data on the rate of foreclosure filings does not distinguish between commercial and residential mortgages, yet the report indicates that according to anecdotal evidence, the vast majority of foreclosures in Maine are residential (as much as ninety-seven percent). *See id.* at 7 n.1 (citation to footnote only).

21. STATE OF ME. JUDICIAL BRANCH FORECLOSURE DIVERSION PROGRAM, REPORT TO THE JOINT STANDING COMM. ON INS. AND FIN. SERVS., 125th Legis., at 2 (2011) [hereinafter 2011 JUD. BRANCH REP.], *available at* http://www.courts.state.me.us/publications_other/fdp_2010_ar.pdf. The first page of this document as available on the State website is unnumbered with the second page numbered as 1. The page references in this Comment follow this convention.

22 *Maine Foreclosure Picture Mixed*, BANGOR DAILY NEWS, Dec. 28, 2011, *available at* http://bangordailynews.com/2011/12/28/business/maine-foreclosure-picture-mixed/.

23. 2009 JUD. BRANCH REP., *supra* note 17, at 8.

24. *See* Kristen David Adams, *Home Ownership: American Dream or Illusion of Empowerment?*, 60 S.C. L. REV. 573, 574 (2009). Adams notes that United States Presidents from Franklin Delano Roosevelt and Herbert Hoover to George W. Bush and Bill Clinton have endorsed this priority. *See id.* 574-75. *See also* U.S. CENSUS BUREAU, CURRENT HOUSING REPORTS, H121-03-1, MOVING TO AMERICA--MOVING TO HOMEOWNERSHIP: 1994-2002, at 1 (2003), *available at* http://www.census.gov/prod/2003pubs/h121-03-1.pdf ("For many people, whether native or foreign born, homeownership is their American dream.").

25. Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 3 (2011).

26. Adams, *supra* note 24, at 587 (noting that home ownership rose in the United States from sixty-three percent in the early nineties to sixty-nine percent at its peak in 2005). *See also* Grant S. Nelson, *Confronting the Mortgage Meltdown: A Brief for the Federalization of State Mortgage Foreclosure Law*, 37 PEPP. L. REV. 583, 584, 594 (2010) (discussing Federal Reserve policies meant to hold down interest rates as well as "[a] variety of government-sponsored institutions . . . [that] purchase large

lows are recurrent, and the history of the United States has been "characterized by the ebb and flow of credit availability, coincident with economic boom and bust cycles."[27] The distinct elements that have defined our systems of governance and credit in the United States over the last century, including the enactment of the Uniform Commercial Code and abolishment of restrictive usury statutes, have provided for an "unprecedented convergence of the required elements that helped to create a fifty year credit and economic boom."[28] However, most recently, this credit boom has brought serious consequences, creating what one congressional panel concluded was a "foreclosure crisis unprecedented since the Great Depression."[29]

Many factors have contributed to the crisis, including the rise in available low-cost capital resulting in increased pressure on investors to obtain a return on that capital;[30] Federal Reserve Bank ("FRB") monetary policy;[31] and the rapid growth of subprime lending practices since the early nineties, which in turn was fueled by deregulation of the banking industry and securitization.[32] Insofar as these factors increased home ownership opportunities, they were aligned with Congress's longtime preference for "low interest rates, expanded home ownership, increasing asset prices, and widespread credit availability."[33] Congressional reports since the housing bubble burst have largely blamed federal policies.[34] As one report stated:

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blocks of mortgages from local lenders and thus greatly expand the amount of money available for housing purchases," as two contributing factors to increased home ownership).

27. Alvin C. Harrell, *The Great Credit Contraction: Who, What, When, Where and Why*, 26 GA. ST. U. L. REV. 1209, 1212 (2010).

28. *Id.* at 1212-13.

29. CONG. OVERSIGHT PANEL, 111TH CONG., OCTOBER OVERSIGHT REPORT: AN ASSESSMENT OF FORECLOSURE MITIGATION EFFORTS AFTER SIX MONTHS 5 (Oct. 9, 2009) [hereinafter COP FORECLOSURE REP.], *available at* http://www.gpo.gov/fdsys/pkg/CPRT-111JPRT52671/html/CPRT-111JPRT52671.pdf.

30. *See* Brent J. Horton, *In Defense of Private-Label Mortgage-Backed Securities*, 61 FLA. L. REV. 827, 830 (2009); *see also* Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 198-99 (2008) (discussing the relationship between capital costs and systemic risk); Heather M. Tashman, *The Subprime Lending Industry: An Industry in Crisis*, 124 BANKING L.J. 407, 410 (2007) (discussing the growth of securitization and subprime lending).

31. *See* Harrell, *supra* note 27, at 1214. *See also* Peter L. Cockrell, Comment, *Subprime Solutions to the Housing Crisis: Constitutional Problems with the Helping Families Save Their Homes Act of 2009*, 17 GEO. MASON L. REV. 1149, 1149 (2010) ("[T]he origins of the recent bubble can be traced back to the moral hazard created by the government's bailout of financial institutions during the S&L crisis and of Long Term Capital Management in 1998, as well as two decades of the Federal Reserve's loose monetary policy.").

32. Tashman, *supra* note 30, at 410 ("According to The Department of Housing and Urban Development . . . the subprime lending industry has grown from $35 billion in 1994 to $650 billion today.").

33. Harrell, *supra* note 27, at 1216.

34. *See* STAFF OF H.R. COMM. ON OVERSIGHT AND GOV'T REFORM, 111TH CONG., THE ROLE OF GOVERNMENT AFFORDABLE HOUSING POLICY IN CREATING THE GLOBAL FINANCIAL CRISIS OF 2008, at 2 (2010) [hereinafter H.R. COMM. REP. ON FIN. CRISIS], *available at* http://oversight.house.gov/images/stories/Reports/20100512affordablehousingpolicyandthefinancialcrisis.pdf. *See also generally* JOINT ECON. COMM., GOVERNMENT POLICY BLUNDERS LARGELY CAUSED THE GLOBAL FINANCIAL CRISIS, RES. REP. NO. 110-26 (2008), *available at* http://www.house.gov/jec/Research Reports/2008/rr110-26doc.pdf (blaming government policies, including the unintended consequences of certain financial regulations and housing policies).

> The housing bubble that burst in 2007 and led to a financial crisis can be traced back to federal government intervention in the U.S. housing market intended to help provide homeownership opportunities for more Americans. This intervention began with two government-backed corporations, Fannie Mae and Freddie Mac, which privatized their profits but socialized their risks [through securitization], creating powerful incentives for them to act recklessly and exposing taxpayers to tremendous losses. Government intervention also created "affordable" but dangerous lending policies which encouraged lower down payments, looser underwriting standards and higher leverage. Finally, government intervention created a nexus of vested interests – politicians, lenders and lobbyists – who profited from the "affordable" housing market and acted to kill reforms. In the short run, this government intervention was successful in its stated goal – raising the national homeownership rate. However, the ultimate effect was to create a mortgage tsunami that wrought devastation on the American people and economy. While government intervention was not the sole cause of the financial crisis, its role was significant . . . .[35]

It is widely accepted that the rapid growth of the subprime lending market has been at the very heart of this crisis,[36] and to understand the legal and policy issues involved, it is necessary to understand the nature of mortgage securitization and subprime lending.

The idea of offering a secondary market for loans is not new.[37] For example, Congress created Fannie Mae in 1938, during the Franklin Delano Roosevelt Administration, to jump-start the faltering lending market after the Great Depression by offering lenders an immediate way to recover their loan investment by selling their loans to Fannie Mae.[38] During Roosevelt's time, Fannie Mae would hold the loan purchased from the original lender until it was fully repaid, theoretically allowing the bank to turn around and re-loan that money, thus expanding loan availability.[39] It was not until the 1970's, after the creation of Freddie Mac, that Fannie and Freddie began securitizing conventional (non-subprime) loans purchased from the original lenders.[40] Securitization has now become standard practice upon origination of the majority of mortgage loans, where approximately sixty-five percent of all residential mortgages are currently securitized, and in 2009, nearly ninety percent of all first-lien residential mortgages were securitized after origination.[41] The size and growth of the securities market is evidenced by the existence of \$6.97 trillion in outstanding residential mortgage backed securities by the end of 2009.[42]

Securitization today typically refers to the process by which an investment

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35. H.R. COMM. REP. ON FIN. CRISIS, *supra* note 34, at 2.

36. *See* Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1359 (2010).

37. *See* Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2193 (2007) (noting that early "efforts to form a secondary market came out of private mortgage companies which, by the 1880s, were making mortgage loans around the country through local agents.").

38. *Id.* at 2196.

39. *Id.*

40. *Id.* at 2199.

41. Levitin & Twomey, *supra* note 25, at 12.

42. *Id.* at 16.

bank or its subsidiary purchases an individual mortgage loan from the mortgage originator[43] and combines or pools a number of these loans into securities.[44] The loans are then transferred into a trust created to hold hundreds of other similar loans, and the trust resells pieces of itself to investors.[45] To facilitate this sale, an underwriter will typically purchase all the securities (i.e. the income streams generated by the monthly loan payments) arising out of the trust pool.[46] The underwriter will then work closely with a credit rating agency to sell the securities to individual investors,[47] enhancing the pools' creditworthiness by "tranching" the securities into tiered senior-subordinate repayment structures.[48] The rating agency, in theory, investigates the underlying mortgages and rates the risk that the individual borrowers will fail to repay the loan.[49] In order to obtain a sufficiently favorable credit rating to interest investors, some less credit-worthy tranches may be insured against default.[50] In addition, the entity selling the securities will generally contract away the right to service the loan to a servicing company, including granting the servicer the power to foreclose on the mortgage if necessary.[51]

Finally, many lenders pay the Mortgage Electronic Registration System, Inc. (MERS),[52] a Delaware corporation headquartered in Virginia, to maintain a computer database that tracks ownership rights of mortgage loans issued around the country.[53] Lenders and loan servicers pay MERS dues to maintain this database, which members can access.[54] The individual members, who are not MERS employees, input assignments of the mortgage into the MERS database.[55] MERS does not verify the accuracy of this data.[56] Meanwhile, MERS records each mortgage as the lender's nominee of record in the local property recorder's registry.[57] Thus, MERS's name, rather than the lender's name, appears on the registry, despite the fact that MERS does not "solicit, fund, service, or actually own any mortgage loans."[58] Nevertheless, MERS purports to remain the mortgagee for the life of the mortgage loan, while generally the lender will pool the loans for

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43. In many cases, the originator, or original lender, is represented by a broker who is paid to market the loan products to the consumer.

44. Levitin & Twomey, *supra* note 25, at 13.

45. Peterson, *supra* note 37, at 2209.

46. *Id.*

47. *Id.*

48. *See* Levitin & Twomey, *supra* note 25, at 15 (diagramming a typical securitization structure). The intricacies of tranching are beyond the scope of this Comment. For a more complete explanation of tranching, see *id.* at 21 as well as Peterson, *supra* note 37, at 2203.

49. Peterson, *supra* note 37, at 2209-10.

50. *Id.* at 2210.

51. *Id.*

52. Leading up to the 2008 crisis, MERS was legally involved in the origination of sixty percent of all mortgage loans in the United States. Peterson, *supra* note 36, at 1362.

53. *Id.* at 1361.

54. *Id.*

55. Deposition of William Hultman at 127, Bank of New York v. Ukpe, No. F-10209-08 (N.J. Super. Ct. Ch. Div., Apr. 7, 2010) (on file with author).

56. *Id.*

57. Peterson, *supra* note 36, at 1361.

58. *Id.*

securitization.[59] In so doing, MERS, in its own words, "simplifies the way mortgage ownership and servicing rights are originated, sold and tracked" by eliminating "the need to prepare and record assignments when trading residential and commercial mortgage loans."[60]

However, MERS has also been criticized for contributing to the mortgage lending meltdown insofar as it lowered exit costs for loan originators by providing a "super-generic placeholder" for originators of sometimes questionable integrity, thereby abetting "fly by night" mortgage financing[61] and undermining the transparency of local property recording systems by developing a private database of mortgage loan transactions which is unavailable to the public.[62] This in turn makes it more difficult to determine the underlying owner of the loan, creating "commercial uncertainty" and "inefficient litigation."[63] Finally, as one MERS senior vice-president has acknowledged, "MERS is owned and operated by and for the mortgage industry," which makes MERS's business model a unilateral industry attempt to effectively undermine longstanding local property recording laws without clear legislative authorization.[64] As discussed below, MERS's ambiguous relationship to the loan has come under sharp scrutiny in the Maine Courts, and has contributed to litigation uncertainty in the state.[65]

Although MERS tracks the ownership rights of the loan, the loan servicer generally manages the pooled loans for the benefit of the investors in the trust.[66] Most loans that are securitized have a servicer, which is often a separate corporate entity from the originator of the loan or the security trust.[67] The servicer sends out monthly bills and collects payments on the loans.[68] The servicer is also responsible for responding to loans in default, including prosecuting foreclosures, mitigating investor loss, and pursing repayment of mortgage loans to the trust.[69] In addition, several different servicers often serve one trust throughout the life of the loan, where each servicer may address different specialized servicing responsibilities.[70]

Over half of the mortgages serviced in the United States rely on Loan Processing Services' Mortgage Servicing Platform (MSP), which automates many of the servicing tasks, including default and foreclosure procedures.[71] When MSP software detects a sixty-day payment delinquency, the servicer enters a code into the system, which triggers an automatic referral and document transfer process, directing the receiving attorney to perform specific tasks on a predetermined timeline.[72] Thus, as one court noted, MSP "supports all mortgage servicing

59. *Id.* at 1361-62.
60. MERS, http://www.mersinc.org (last visited Sept. 8, 2011).
61. Peterson, *supra* note 36, at 1398 (emphasis omitted).
62. *See id.* at 1403.
63. *Id.*
64. *Id.* at 1405-06.
65. *See infra* Part III.C.
66. Levitin & Twomey, *supra* note 25, at 15.
67. *Id.*
68. *Id.*
69. *Id.* at 23.
70. *Id.* at 24.
71. *Id.* at 27.
72. *Id.*

functional areas within one comprehensive system, including comprehensive default functionality for collections work queue, foreclosure, bankruptcy and REO [real estate owned] management."[73] This system may maximize efficiency under certain conditions, but it also creates a business model that operates with "virtually no discretion or oversight."[74] In contrast, when a default occurs, negotiated solutions that avoid foreclosure require significant personal attention in order to "contact borrowers, collect and verify data, obtain home value estimates, determine whether the borrower has suffered a temporary or permanent setback, coordinate actions with second-lien holders, and calculate net present value estimates of loss mitigation alternatives."[75] Initiating a foreclosure action, however, is largely automated.[76] Thus, from a corporate efficiency standpoint, foreclosure is the automated default setting for many servicers, while a negotiated solution may require an entirely different business approach that falls outside the normal functions offered by the software.

In addition, the servicers' contractual compensation generally "incentivizes servicers to aggressively pursue ancillary fees and to pursue loss mitigation strategies that minimize costs, even if they fail to maximize returns to investors."[77] In fact, mortgage documents generally provide for the servicer to retain late fees and collection costs, including those fees associated with prosecuting the foreclosure and property maintenance after the foreclosure has occurred.[78] These fees represent a crucial portion of the servicers' income,[79] which may create incentives for less scrupulous servicers to charge illegal fees.[80] Such fee structures create perverse incentives for services to avoid rapid resolution to a default where prolonging the period between default and foreclosure may allow for increased fee collection, and simply doing nothing minimizes transaction costs to the servicer.[81] Furthermore, although servicers are generally reimbursed for their foreclosure costs, modification costs are generally not covered.[82] When reimbursements are available, they are paid off the top of foreclosure sales, thus minimizing the servicer's incentive to maximize the value of the foreclosure sale.[83] This creates a principal-agent conflict between trustees and servicers, as "servicers' incentives in managing a loan diverge from [those] of investors."[84] According to one scholar, this creates three problems:

> First, servicers are incentivized to pad the costs of handling defaulted loans at the expense of investors and borrowers. Second, servicers are not incentivized to

73. *In re* Taylor, 407 B.R. 618, 624 n.9 (Bankr. E.D. Pa. 2009).
74. Levitin & Twomey, *supra* note 25, at 28.
75. *Id.*
76. *Id.*
77. *Id.* at 37.
78. *Id.* at 41.
79. *See id.* at 42.
80. *See id.* at 43. *See also generally* Complaint, State v. Am. Home Mortg. Servicing, Inc., No. 2010-3307 (Tex. Dist. Ct. Aug. 30, 2010); Complaint, Walton v. Countrywide Home Loans, Inc. (*In re* Atchley), No. 08-6092 (Bankr. N.D. Ga. Feb. 28, 2008).
81. Levitin & Twomey, *supra* note 25, at 45.
82. *Id.* at 46.
83. *Id.* at 47.
84. *Id.* at 69.

> maximize the net present value of a loan, but are instead incentivized to drag out defaults . . . . In other words, servicers are incentivized to keep defaulted homeowners in a fee sweatbox, rather than moving to immediately foreclose on the loan. Third, servicers are incentivized to favor modifications that reduce interest rates rather than reduce principal, even if that raises the likelihood of redefault.[85]

The securitization process creates a complex string of relationships related to each loan, yet the benefits of securitization are widely recognized.[86] Securitization has significantly contributed to capital availability, which in turn has increased home purchases.[87] By linking investors to lenders, securitization provides lenders with large amounts of capital from investors around the world,[88] enabling lenders to quickly replenish their loan capital and offer new loans to new borrowers without having to wait for the original borrower to repay the entire loan in order to recover the capital extended through the original loan.[89] As one commentator observed, securitization has created a financial landscape in which "mortgages can be pooled and then sliced into new securities to be sold to investors anywhere in the world: a (piece of) a bank loan made in Boise can, in short, end up on the balance sheet of a bank in Berlin."[90]

The risk created by securitization is that originating lenders who immediately sell the loans are less scrupulous in stringently underwriting the loans to reduce the risk of default because the originating lender, who will have already sold the loan, will not immediately feel the effects of default.[91] This risk may have negative impacts where the underlying loans are subprime loans or otherwise carry a high risk of default.[92] Indeed, industry surveys reveal that underwriting standards were largely automated by 2001, thus reducing individualized attention to the unique circumstances of a given borrower.[93] As one scholar noted, "[i]n the world of securitization, with its ever churning markets, there are few long term relationships, but only the financial equivalents of one night stands."[94] Securitization has also given rise to an increasing standardization of loan instruments, which has severely limited any power the consumer formerly may have had to alter the loan contract.[95] Furthermore, scholars have noted that the growth of securitization has dramatically

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85. *Id.* at 69-70.

86. *See* Peterson, *supra* note 37, at 2188. *See also* Nelson, *supra* note 26, at 596; Tashman, *supra* note 30, at 410.

87. *See* Nelson, *supra* note 26, at 596.

88. Chris Brummer, *How International Financial Law Works (and How It Doesn't)*, 99 GEO. L.J. 257, 266 (2011).

89. *See* Tashman, *supra* note 30, at 410.

90. Brummer, *supra* note 88, 266.

91. *See* Kurt Eggert, *Held up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 550 (2002).

92. *See id.*

93. *Id.*

94. *Id.* at 551.

95. *Id.*

increased the use of mortgage brokers, which in turn has contributed to the rise in subprime lending.[96]

Not surprisingly, subprime loan borrowers have been the casualties of a significantly higher foreclosure rate than other borrowers.[97] Since the foreclosure crisis began with the decline in housing prices in 2007, approximately 2.5 million homeowners nationwide have lost their homes to foreclosure, and a further 5.7 million are in immediate jeopardy of foreclosure.[98] The Center for Responsible Lending estimates that for loans originated between 2005 and 2008, subprime loans account for sixty-four percent of the completed foreclosures, despite only representing twenty-two percent of the total loans originated during this period.[99] These numbers approximately correspond to a seventeen percent completed foreclosure rate for subprime loans, which is nearly seven times greater than the rate for other conventional home loans.[100] Contrary to the perceptions of some, it is estimated that eighty-two percent of completed foreclosures since 2007 were made on owner-occupied properties.[101] Meanwhile, as foreclosure numbers remain at record highs and continue to climb,[102] analysts estimate that between ten and thirteen million homes will enter foreclosure before this crisis is over.[103] To put the current foreclosure numbers in perspective, the foreclosure rates associated with this crisis have reached rates of three times the rate registered in 1933 at the height of the Great Depression.[104]

In addition to the obvious impacts on homeowners, high foreclosure rates result in significant losses for both lenders and investors, and also create third party externalities.[105] Typically, lenders lose an estimated forty to fifty percent of their

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96. *Id.* at 553. Subprime loans are loans extended to borrowers that generally would not qualify for credit due to lower than average income and credit scores. Tashman, *supra* note 30, at 408-09. Lenders typically charge higher interest rates for subprime loans than for other loans as protection against the corresponding higher risk of default. *Id.* at 409. The subprime lending market has also given rise to a number of oppressive lending practices, including: the extension of credit on terms that cannot realistically be repaid in consideration of the borrower's income; requiring repeated refinancing of the loan to extract additional fees from the borrower, even when not in the borrower's best interest; deceptive practices that conceal the true nature of the loan; and extending a loan that is more expensive than the borrower's income and credit score warrant. *See* Nathaniel R. Hull, Comment, *Crossing the Line: Prime, Subprime, and Predatory Lending*, 61 ME. L. REV. 287, 301 (2009).

97. *See* DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, FORECLOSURES BY RACE AND ETHNICITY: THE DEMOGRAPHICS OF A CRISIS 7 (2010), *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf.

98. *Id.*

99. *Id.* at 7.

100. *Id.*

101. *Id.*

102. *See supra* note 22 and accompanying text..

103. *Id.* at 3.

104. *Problems in Mortgage Servicing From Modification to Foreclosure: Hearing Before the S. Comm. on Banking, Housing & Urban Affairs,* 111th Cong. 4 (2010) (statement of Diane Thompson, National Consumer Law Center, noting that the foreclosure rate at the end of the second quarter of 2010 was 4.57%, as opposed to 1.4% for non-farm foreclosures in 1933).

105. Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565, 568-69 (2009). These externalities include costs to communities caused by foreclosure flight and depressed home values. *Id.* at 569.

investment in a foreclosure sale,[106] and even greater losses have been cited since the foreclosure crisis began.[107] Thus, Congress, local governments, and homeowners are not the only parties with incentives to avoid foreclosure as lenders and investors would appear to have strong financial incentives to avoid foreclosure whenever there are other reasonable alternatives.[108]

C. The Federal Response to the Foreclosure Crisis

Federal relief for homeowners facing foreclosure has included government promotion of mortgage modifications.[109] For example, the Home Affordable Modification Program (HAMP) offers government subsidies to lenders agreeing to modify mortgage terms for qualifying lower-income homeowners facing foreclosure.[110] Designed to encourage loan modifications on a large scale, the program originally allocated seventy-five billion dollars to be disbursed to servicers, investors, and borrowers as an incentive to sweeten modification solutions.[111] HAMP requires that participating lenders review loan modification options for qualifying homeowners in foreclosure or at risk of foreclosure.[112] HAMP also requires that the servicer conduct a "net present value" calculation for the loan in foreclosure to determine whether affordable modification as compared to foreclosure best maximizes the mortgage holder's financial interests in the mortgage.[113] Under the HAMP program, when the net present value calculation

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106. *Id.* at 568.

107. *See* GEOFFRY WALSH, NAT'L CONSUMER LAW CTR., STATE AND LOCAL FORECLOSURE MEDIATION PROGRAMS: CAN THEY SAVE HOMES? 3 (2009), *available at* http://www.realestateeconomywatch.com/wp-includes/upload-files/ReportS-Sept09.pdf.

108. *See id.*

109. Justin Wagner, *Assisting Distressed Homeowners to Avoid Foreclosure: An Advocate's Role in an Evolving Judicial and Policy Environment,* 17 GEO. J. ON POVERTY L. & POL'Y 423, 433 (2010).

110. *Id.* at 435. HAMP was by no means the only program adopted by the Federal Government and designed to assist homeowners in staying in their homes. Other initiatives included, but were not limited to, the Home Affordable Refinance Program and other guidelines similar to those prescribed by HAMP that attached to Government Sponsored Entities following the federal bailout of financial institutions. WALSH, *supra* note 107, at 7. However, addressing the varied federal responses to the foreclosure crisis is beyond the scope of this Comment, and for our purposes, a brief description of HAMP suffices. For a detailed description of HAMP and further sources regarding related legislation, see *id.*

111. WALSH, *supra* note 107, at 7.

112. *Id.*

113. *Id.* at 7-8. Walsh offers a helpful explanation of the net present value calculation:

> The HAMP loan modification analysis uses a calculation made up of two distinct parts. The first part of the analysis runs data through a sequence of loan modification options to arrive at a new affordable monthly payment for the borrower. As applied in sequence, these options include the capitalization of arrears, an interest rate reduction in steps to as low as 2%, extension of the loan repayment term, and then forbearance of a portion of the outstanding principal. Each option is applied in sequence until a monthly payment for principal, interest, taxes and insurance is reached that takes up no more than 31% of the household's current gross monthly income. After the program has modified the loan terms as needed to arrive at an affordable monthly payment, it produces a dollar figure that tells the servicer the "net present value" to investors of the loan as modified. The net present value of the modified loan is figured using a percentage discount. This discount factors in the delay in receipt of the reduced scheduled payments under the modified

favors modification and the parties otherwise meet the qualifying criteria, the mortgagee is obliged to implement a modified payment schedule based on monthly payments of no more than thirty-one percent of the mortgagor's income.[114]

Despite HAMP's promise, the possibility for success of "back end" solutions to the foreclosure crisis was limited from the start,[115] and consequently, HAMP has resulted in only 230,000 permanent modifications through 2010, or about eight percent of the total estimated number of homeowners eligible for the program.[116] While the reasons for HAMP's lack of success are complex, they include a series of lurking obstacles for investors and servicers participating in the program, including: a lack of servicer capacity to handle the scale of modifications requests; financial disincentives related to the intricacies of securitization; investor desire not to recognize losses; and concern about creating a moral hazard by granting widespread modifications given the volume of underwater homeowners.[117] To address HAMP's shortcomings in providing solutions for the overwhelming majority of homeowners with outstanding distressed mortgages, the House Financial Services Subcommittee has fielded proposals to make principal reductions mandatory, rather than optional, and to empower bankruptcy courts to modify mortgage balances for distressed homeowners.[118] However, no such action

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> loan. It also takes into account the possibility of a cure by the borrower and the likelihood and cost of a re-default. Once it has come up with a figure for the net present value of the modified loan, the HAMP calculation then compares this value with the estimated recovery the investors will obtain if a foreclosure is completed. In calculating the value to be received from a completed foreclosure, the model takes into account the current market value of the property and typical foreclosure losses, including the cost of delays in re-sale . . . and foreclosure costs. After completing all entries on the net present value calculation, the servicer has two figures to compare: the estimated loss investors will incur from the loan modification and the estimated loss investors will incur from a completed foreclosure. The servicer, acting on behalf of investors, must choose the option producing the smaller loss. The calculation format allows for quick, streamlined analysis of the data needed to make this decision. From the homeowner it requires the input of limited information, primarily recent income figures. From the servicer it requires some readily available servicer-specific and industry-wide data on costs and losses associated with loan modifications and foreclosures. The calculation also factors in data on the current market value for the property.

Id. at 8.

114. *See id.*

115. *See* Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program*, 52 ARIZ. L. REV. 727, 788 (2010) ("[B]ack-end solutions to a financial crisis . . . are likely to be too slow and too weak to reach most of those who suffer the consequences.").

116. *See id.* at 763. Braucher describes HAMP as "disappointing" and notes official estimates indicating that as many as forty percent of HAMP modifications could redefault. *Id.* at 727. *But cf.* Wagner, *supra* note 109, at 436 ("A much larger share of homeowners, 787,231 or about 23% of eligible homeowners, have received trial modification packages from their lenders," although these packages will not necessarily result in permanent modifications.).

117. Braucher, *supra* note 115, at 736.

118. *See The Recently Announced Revisions to the Home Affordable Modification Program (HAMP): Hearing Before the Subcomm. on Hous. and Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 111th Cong. 130 (2010) (statement of Alan M. White, Associate Professor, Valparasio University School of Law), *available at* http://financialservices.house.gov/Media/file/hearings/111/Printed Hearings/111-122.pdf.

has been taken,[119] and in the wake of HAMP's limited success, several state governments have taken action to address high foreclosure rates.[120]

III. MAINE'S RESPONSE TO INCREASED FORECLOSURE FILINGS

A. An Overview of the Relevant Maine Law

To understand Maine's response to the foreclosure spike, it is necessary to generally understand Maine foreclosure law as it existed prior to the foreclosure spike, as foreclosure is governed by state law and may vary widely from state to state.[121] The Law Court has described a mortgage of land to be

> in form a deed of warranty with a condition subsequent defining the means by which the grantor may defeat the conveyance. The legal title, therefore, passes immediately upon the delivery of the mortgage; and the mortgagee is regarded as having all the rights of a grantee in fee, subject to the defeasance.[122]

This title theory conception of a mortgage "has been the accepted doctrine in this State since it became a separate [state]."[123] Thus, "a mortgage is a conditional conveyance vesting the legal title in the mortgagee," while only the equity right of redemption remains with the mortgagor.[124] Although Maine property law protects the lender by requiring that title pass to the mortgagee upon execution of the loan, the mortgagor must rely on equity and the procedural safeguards of the adversarial system for protection of the right of redemption.

Maine has long required that all transactions conveying title must be recorded according to state property laws to ensure enforcement as against third parties.[125] Recording serves "to protect the title . . . against subsequent purchasers and attaching creditors of the party thus parting with his title," and thus acts to "protect the honest and to defeat the plans of the fraudulent, concealing debtor."[126] However, proper recording is not required to enforce a written conveyance between the parties to the transaction.[127] In assessing an attempt to assign a mortgage divorced from the debt it secures, the Law Court has held that "[t]he interest of a mortgagee before entry is not real estate, but a personal chattel. The interest in land is inseparable from the debt. It is an incident to the debt and cannot be detached from it."[128]

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119. *See id.*

120. *See* WALSH, *supra* note 107, at 1.

121. Nelson, *supra* note 26, at 587.

122. Johnson v. McNeil, 2002 ME 99, ¶ 11, 800 A.2d 702 (quoting Gilman v. Wills, 66 Me. 273, 275 (1877)).

123. *Id.* ¶ 10 (quoting First Auburn Trust Co. v. Buck, 137 Me. 172, 176, 16 A.2d 258, 260 (1940)).

124. *Id.* (quoting Martel v. Bearce, 311 A.2d 540, 543 (Me. 1973)).

125. See Bailey v. Myrick, 50 Me. 171, 180 (1860).

126. *Id.*

127. See ME. REV. STAT. tit. 33, § 201 (2011).

128. Wyman v. Porter, 108 Me. 110, 115, 79 A. 371, 373 (1911) (citing Ellison v. Daniels, 11 N.H. 274, 277 (1840)). The United States Supreme Court has held that "[t]he note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." Carpenter v. Longan, 83 U.S. (16 Wall.) 271, 274 (1872). The Law Court has not expressly adopted the *Carpenter* language, and, in

In Maine, after a party breaches a condition of the mortgage, the foreclosure process may proceed in one of two ways[129]: either by a power of sale foreclosure[130] or by judicial process.[131] Power of sale foreclosure is not available for non-commercial residential mortgages.[132] Therefore, for purposes of this Comment, foreclosure will refer exclusively to judicial foreclosure, which is the foreclosure process subject to the mediation program.[133] In a judicial foreclosure, "the mortgagee or any person claiming under [the mortgagee] may proceed for the purpose of foreclosure by a civil action against all parties in interest."[134] The Law Court has long recognized that a promissory note secured by a mortgage is enforceable by the note holder.[135]

B. An Act To Preserve Home Ownership and Stabilize the Economy by Preventing Foreclosure

Faced with unprecedented foreclosure rates and limited federal success in reversing these numbers, the Maine judicial and legislative branches endeavored to design "an effective alternative dispute resolution process . . . [to] promote fair and prompt resolutions . . . in foreclosure proceedings."[136] The result was "An Act to Preserve Home Ownership and Stabilize the Economy by Preventing Unnecessary

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Saunders, declined to address the situation in which the mortgage and note are held by different parties, citing *Wyman* as an example of that factual scenario. Mortg. Elec. Registration Sys., Inc. v. Saunders, 2010 ME 79, ¶ 11 n.3, 2 A.3d 289. Nevertheless, the Maine District Court has cited *Wyman* and *Carpenter* together in support of the *Carpenter* proposition that the assignment of a mortgage alone is a nullity. *See* BAC Home Loans Servicing LP v. Weymouth, No. RE-09-015, at 2 (Me. Dist. Ct., Kennebec, Dec. 2, 2009) (Mulhern, J.); U.S. Bank Nat'l Ass'n v. Hartman, No. RE-08-026, at 3 n.1 (Me. Dist. Ct., Augusta, May 11, 2009) (Mulhern, J.).

129. 2009 JUD. BRANCH REP., *supra* note 17, at 12.

130. *See* ME. REV. STAT. tit. 14, § 6203-A (2011).

131. *See id.* §§ 6321-25.

132. *See id.* § 6203-A.

133. *Compare id.* § 6203-A, *with id.* §§ 6321-25.

134. *Id.* § 6321.

135. *See* Webb v. Flanders, 32 Me. 175, 176 (1850); Mortg. Elec. Registration Sys, Inc. v. Saunders, 2010 ME 79, ¶ 12, 2 A.3d 289. The state of the law is somewhat uncertain regarding the extent to which the Uniform Commercial Code (UCC) controls issues of enforcement of a mortgage note and mortgage, and to what extent a mortgage note is a negotiable instrument within the meaning of the UCC, currently codified in Maine at title 11, section 3-1104 of the Maine Revised Statutes. *See* FDIC v. Houde, 90 F.3d 600, 604 n.3 (1st Cir. 1996) (proceeding on the assertion by both parties that the mortgage note in question was a negotiable note within the meaning of the UCC, while recognizing that an argument existed that the note was not a negotiable instrument within the meaning of the UCC). *See also generally* JOHN A. SEBERT, DRAFT REPORT OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, UCC RULES APPLICABLE TO THE ASSIGNMENT OF MORTGAGE NOTES AND TO THE OWNERSHIP AND ENFORCEMENT OF THOSE NOTES AND THE MORTGAGES SECURING THEM (2011) (suggesting that a mortgage note may be either negotiable or non-negotiable within the meaning of the UCC); Letter from Adam J. Levitin et al. to the Permanent Editorial Bd. of the UCC (May 27, 2011), *available at* https://www.law.georgetown.edu/faculty/levitin/documents/LawProfessors UCCPEBLetter.pdf (arguing that the UCC largely does not apply to the enforcement of mortgage notes, where enforcement is primarily realized through mortgage foreclosure which in significant part is beyond the purview of the UCC).

136. 2009 JUD. BRANCH REP., *supra* note 17, at 4 (internal quotation marks omitted).

Foreclosures" ("the Act").[137] The Act was passed in June 2009 as emergency legislation to be effective immediately, justified as such by the "unprecedented levels" of foreclosures expected to continue at high levels, the "decline in the State's housing market," loss in property values, the resulting decline in tax revenues, and the burden this foreclosure load was placing on the courts.[138] The Act provided for the creation of a foreclosure mediation program to be administered by the Maine Supreme Judicial Court and initiated statewide on January 1, 2010.[139] Subsequently, the Supreme Judicial Court adopted Maine Rule of Civil Procedure 93 to govern the Court's Foreclosure Diversion Program ("FDP"), as authorized by the Act.[140] The Court also amended Rule 56 to require completion of mediation (absent waiver, good cause, or default of mediation) before a foreclosing party can move for summary judgment.[141] The FDP applies to all foreclosures filed on or after January 1, 2010 against owner-occupied primary residents of residential property consisting of four units or less.

The Act creates heightened notice and production requirements at the initiation of the foreclosure action.[142] These include the requirement that upon filing the complaint, the mortgagee must "certify proof of ownership" of the mortgage note and "produce evidence" of the mortgage and mortgage note, including all assignments and endorsements of both documents.[143] Upon initiation of the foreclosure action, the mortgagee must also provide the homeowner with information as to the homeowner's right to cure the default by full payment of all amounts due without acceleration; an itemized list of all amounts due and additional charges; and the contact information for the persons having authority to modify the loan.[144] The foreclosure complaint sent to the homeowner must also include both a brief description of the mediation program and a one-page form answer informing the homeowner that failure to answer the complaint will result in foreclosure.[145] The defendant to the foreclosure action may complete the answer form as the only necessary answer to preserve all defenses to the complaint.[146]

The Act also creates the mediation program, which is triggered by the homeowner's response to the foreclosure complaint, thus making mediation

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137. P.L. 2009, ch. 402 (emergency, effective June 15, 2009). This Comment focuses on those portions of the Act which are codified within title 14, chapter 713 of the Maine Revised Statutes.

138. *Id.* pmbl.

139. *See id.* § 24.

140. *See* ME. R. CIV. P. 93 (effective Jan. 1, 2010).

141. *See* ME. R. CIV. P. 56(j).

142. *See* ME. REV. STAT. tit. 14, §§ 6111(1-A), 6321 (2011).

143. *Id.* § 6321.

144. *Id.* § 6111(1-A). The Act also required that the mortgagee notify the Maine Bureau of Consumer Credit Protection ("BCCP") of the defendant to the foreclosure action within three days of providing notice to the homeowner. *Id.* § 6111(3-A). The BCCP is then required to contact the homeowner and provide additional information regarding the homeowner's rights and available resources, including information pertaining to the mediation program, and availability of a foreclosure prevention hotline. *Id.* § 6111(4-A). *See also New Foreclosure Law - Frequently-Asked Questions*, ME. BUREAU OF CONSUMER CREDIT PROT., http://www.maine.gov/pfr/consumercredit/pre-foreclosure_faq.html (last visited Sept. 16, 2011).

145. ME. REV. STAT. tit. 14, § 6321-A(2).

146. *See id.*

mandatory for both parties.[147] Mediation requires that the defendant provide financial information to the mortgagee prior to the mediation session to facilitate modification or some other foreclosure-avoidance solution to the default, and the parties may be required by the mediator to exchange further information in anticipation of the mediation.[148] Generally, mediation must be completed no more than ninety days after the scheduling order is sent to the parties.[149] Mediation "shall address all issues of foreclosure," including, ownership of the mortgage and note, calculation of sums due, modification of the loan, and restructuring of the mortgage debt.[150] This process includes completion of a net present value worksheet, which is developed by the Federal Deposit Insurance Corporation ("FDIC") and included in the FDIC's Loan Modification Program Guide.[151] Finally, mediation may not operate as a waiver of either party's rights in the foreclosure action.[152]

Additionally, Rule 93 specifically requires that the mortgagee's representative at mediation "ha[ve] the authority to agree to a proposed settlement, loan modification, or dismissal of the action," and only allows the mortgagee to appear by telephone if the mortgagee's counsel is authorized to agree to any proposed agreement.[153] If either party "fails to attend or to make a good faith effort to mediate," the court is authorized to impose "appropriate sanctions."[154] Such sanctions may include, but are not limited to

> the assessment of costs and fees, assessment of reasonable attorney fees, entry of judgment, permitting dispositive motions and/or requests for admissions to be filed, entry of an order that mediation shall not occur, dismissal without prejudice, dismissal without prejudice with a prohibition on refiling the foreclosure action for a stated period of time, and/or dismissal with prejudice.[155]

Upon completion of each mediation session, the mediator must submit a report to the court indicating any agreement or points of agreement reached and the results of the FDIC worksheet analysis.[156] Finally, the mediation program requires some confidentiality of certain information revealed during mediation.[157]

The Act raises the burden of proof on the foreclosing party before foreclosure judgment may be granted by requiring that the mortgagee prove that all elements of

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147. *Id.* § 6321-A(6).

148. ME. R. CIV. P. 93(c)(4), (p)(1).

149. ME. R. CIV. P. 93(e).

150. ME. R. CIV. P. 93(g).

151. ME. R. CIV. P. 93(n). The FDIC net present value worksheet served as a prototype, with some modifications, for the HAMP net present value worksheet. Walsh, *supra* note 107, at 8.

152. *See* ME. REV. STAT. tit. 14, § 6321-A(5); ME. R. CIV. P. 93(o).

153. ME. R. CIV. P. 93(h).

154. ME. R. CIV. P. 93(j).

155. *Id.*

156. ME. R. CIV. P. 93(n).

157. ME. R. CIV. P. 93(p). There is some ambiguity as to the application of the confidentiality provisions in the Rule, particularly as to the extent to which a mediator's report is confidential, which is not entirely clear based on the language of Rule 93. However, clarity as to this issue will be crucial going forward to ensure consistent enforcement of negotiated agreements memorialized in a mediator's report.

the heightened notice rules were "strictly performed."[158] Furthermore, the Act requires that the mortgagee provide the street address, if any, of the property subject to the foreclosure action and the book and page number in the registry of deeds identifying the property in question.[159]

C. Relevant Decisions by the Maine Supreme Judicial Court

Since the passage of Maine's new foreclosure law in 2009 the Law Court has decided several residential foreclosure cases that are worthy of mention for purposes of this Comment.[160]

The first of these cases, decided in December 2009, is *Deutsche Bank National Trust Co. v. Raggiani*.[161] In that case, Joanna and Vincenzo Raggiani executed a promissory note secured by a mortgage in favor of Argent Mortgage in July 2006.[162] Just over a year later, the Raggianis defaulted on the note when they failed to make a monthly payment.[163] Deutsche Bank then filed a complaint for foreclosure and moved for summary judgment, asserting in its statement of material facts that it was the holder of the mortgage and promissory note.[164] However, this assertion was not supported by a record citation, rather only with a citation to Deutsche Bank's "unverified complaint," while the Raggianis' contested Deutsche Bank's ownership of both the mortgage and note.[165] At a hearing before the District Court (Portland, *Eggert, J.*), Deutsche Bank was allowed to admit into evidence, over the Raggianis' objection, a copy of Argent Mortgage's assignment of the note and mortgage to Deutsche Bank.[166] Although the note was not properly filed in the summary judgment record, the court considered it and granted summary judgment for Deutsche Bank.[167]

The Raggianis appealed, and the Law Court vacated the judgment.[168] The Law Court held that because Deutsche Bank failed to support its factual assertion at summary judgment with a proper record citation as required by M.R. Civ. P. 56(h), the Bank did not prove it was the owner of the note and mortgage; therefore, it was not entitled to summary judgment.[169] The Law Court noted that a "court is neither required nor permitted to independently search a record to find support for facts offered by a party."[170] The Law Court reasoned that "[i]n the unique setting of

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158. ME. REV. STAT. tit. 14, §6321 (2011).
159. *Id.*
160. The issues presented in these cases do not directly address the mediation program. However, in the context of the FDP, these cases are instructive in understanding the current state of the law regarding foreclosure proceedings in Maine.
161. 2009 ME 120, 985 A.2d 1.
162. *Id.* ¶ 2.
163. *Id.*
164. *Id.* ¶ 3.
165. *Id.*
166. *Id.* ¶ 4.
167. *Id.*
168. *Id.* ¶ 1.
169. *Id.* ¶ 6.
170. *Id.* ¶ 7 (quoting Levine v. R.B.K. Caly Corp., 2001 ME 77, ¶ 9, 770 A.2d 653).

summary judgment, strict adherence to the Rule's requirements is necessary to ensure that the process is both predictable and just."[171]

The same month the Law Court ruled on *Raggiani*, it also decided *Chase Home Finance v. Higgins*.[172] John and Valarie Higgins executed a promissory note for $ 250,000 secured by a home mortgage to Wachovia Mortgage Corporation.[173] The terms of the loan required repayment over thirty years with a fixed annual interest rate of six percent.[174] Chase filed a foreclosure action in 2007, alleging that the Higginses defaulted on the modified mortgage agreement, were properly notified of their right to cure, and owed Chase $ 286,965.33.[175] Chase moved for summary judgment, which the Higginses opposed, providing evidence that Chase had accelerated the loan before the statutorily required notice of default was provided, in violation of title 14, section 6111 of the Maine Revised Statutes.[176] The Higginses also contested the amount owed, providing evidence that suggested they had not been fully credited for at least nine payments on the note.[177] Chase filed a reply memorandum and supporting documents that controverted the Higginses' assertions but did not properly file a reply statement of material fact, and thus the memorandum was not considered part of the summary judgment record.[178] Nevertheless, the Superior Court (York County, *Fritzsche, J.*) granted summary judgment in favor of Chase.[179]

The Higginses appealed, and the Law Court vacated and remanded, finding that genuine issues of material fact persisted as to whether Chase provided the Higginses with proper notice and as to the amount due on the note.[180] The Law Court noted that summary judgment must not be granted in a residential foreclosure action before the mortgage holder provides certain information, including

> the existence of the mortgage . . . ; properly presented proof of ownership of the mortgage note and the mortgage, including all assignments . . . ; a breach of condition in the mortgage; the amount due on the mortgage, including reasonable attorney's fees . . . ; the order of priority and any amounts that may be due to other parties . . . ; evidence of properly served notice of default and mortgagor's right to cure . . . ; . . . proof of completed mediation (or waiver or default of mediation), when required . . . ; and, if the homeowner has not appeared in the proceeding, a statement . . . of whether or not the [homeowner] is in military service in accordance with the Servicemembers Civil Relief Act.[181]

Third, in September 2010, the Law Court decided *Mortgage Electronic Registration Systems, Inc. v. Saunders*.[182] Jon Saunders signed a promissory note

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171. *Id.*
172. 2009 ME 136, 985 A.2d 508.
173. *Id.* ¶ 2.
174. *Id.*
175. *Id.* ¶ 4.
176. *Id.* ¶ 7.
177. *Id.*
178. *Id.* ¶ 8.
179. *Id.* ¶ 1.
180. *Id.*
181. *Id.* ¶ 11 (citations omitted). To establish the list of required information, the Law Court relied on many of the sources that have been discussed in this Part. *See id.*
182. 2010 ME 79, 2 A.3d 289.

in benefit of Accredited Home Lenders, Inc. in June 2006.[183] The accompanying mortgage instrument signed by Jon and Belinda Saunders secured the promissory note and named MERS as "nominee" for Accredited and all "successors and assigns."[184] Less than three years after taking the mortgage registered to MERS, the Saunderses failed to make payments on the note, and MERS filed a foreclosure complaint on February 4, 2009.[185] MERS moved for summary judgment on May 27, 2009, claiming it was the "holder" of both the mortgage and the note without identifying whether any real property actually secured the note.[186] The Saunderses maintained that MERS held neither the mortgage nor the note and produced MERS's admissions, pursuant to Maine Rule of Civil Procedure 36, that Deutsche Bank was the actual note holder.[187] The parties further disputed whether Deutsche Bank gave the Saunderses effective notice of the foreclosure proceedings and whether the Saunderses were actually in default on the note.[188]

On September 9, 2009, the District Court denied MERS's motion for summary judgment without detailing what genuine issues of material fact persisted.[189] The next day, Deutsche Bank moved, pursuant to Maine Rule of Civil Procedure 25(c), to substitute itself for MERS where the Bank was not yet a party to the action.[190] Approximately one week later and before the District Court had ruled on the substitution motion, Deutsche Bank moved to reconsider or amend the order denying summary judgment for MERS pursuant to Maine Rule of Civil Procedure 59(e) and made a motion for further findings pursuant Rule 52(b).[191] In support of these motions, Deutsche Bank filed a document showing that on July 8, 2009, Accredited transferred the promissory note to Deutsche Bank and that MERS had transferred to Deutsche Bank any interest it had in the note and mortgage.[192] The Saunderses contested both motions and filed their own cross-motion for summary judgment, claiming that neither party could show that MERS held the note when the complaint was originally filed.[193] The District Court entered judgment for Deutsche Bank on December 16, 2009, allowing Deutsche Bank's substitution for MERS, and simultaneously granting summary judgment to Deutsche Bank.[194]

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183. *Id.* ¶ 3. Accredited Home Lenders is listed in Maine as a California corporation. *Corporate Name Search*, ME. DEP'T OF THE SEC'Y OF STATE, https://icrs.informe.org/nei-sos-icrs/ICRS?CorpSumm=19980038+F (last visited Sept. 23, 2011). Accredited's corporate authority in Maine was revoked on September 28, 2009 after it failed to file its annual report. *Id.* (click on "View list of filings"). Accredited filed for Chapter 11 bankruptcy on May 1, 2009 and former clients may call a phone number to get more information regarding their Accredited issued loans. *See Accredited Home Lenders Holding Co.*, KURTZMAN CARSON CONSULTANTS, http://www.kccllc.net/accredited (last visited Sept. 24, 2011).

184. *Saunders,* 2010 ME 79, ¶ 3, 2 A.3d 289.

185. *Id.* ¶ 4.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* ¶ 5.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* ¶ 6.

The Saunderses appealed, arguing that (1) as a non-stakeholder, MERS did not have standing to sue, (2) substitution of parties could not be used to cure the jurisdictional defect, and (3) Deutsche Bank was not entitled to summary judgment.[195]

Examining the question of MERS's standing, the Law Court found that the relationship of MERS to the Saunderses' transaction was somewhat unclear.[196] The Court noted that the mortgage document simultaneously defined MERS as both a "nominee" and a "mortgagee."[197] The Law Court found that

> [Deutsche] Bank admitted in its statement of material facts that Accredited had never assigned, transferred, or endorsed the note executed by Jon Saunders to MERS, and represented that Accredited had transferred the note directly to [Deutsche] Bank. Without possession of or any interest in the note, MERS lacked standing to institute foreclosure proceedings and could not invoke the jurisdiction of our trial courts.[198]

Furthermore, the Law Court held that Accredited was the real party in interest at the time MERS initiated the action[199] because Accredited was both the mortgagee and the holder of the note, whereas MERS merely held the right to record the mortgage.[200]

However, the Law Court found that substitution was not an abuse of the District Court's discretion where the Law Court had not previously spoken on the issue of MERS standing in foreclosure, and the complaint filed in MERS's name rather than the lender's name was an "understandable mistake" within the meaning of the Maine Rule of Civil Procedure 17(a) substitution provision and the Court's holding in *Tisdale v. Rawson*.[201] Finally, the Court held that the District Court erred in granting summary judgment because "the Rules of Civil Procedure do not allow for reconsideration or amendment in the absence of a final judgment," and because the foreclosing parties' amended motion did not support a judgment as a matter of law for Deutsche Bank.[202] Thus, the Law Court remanded the case for further proceedings.[203]

Fourth, in January 2011, the Law Court decided *JPMorgan Chase Bank v. Harp*.[204] JPMorgan Chase filed a foreclosure complaint against Brian Harp in March 2009 alleging that Harp was in default.[205] However, the record established that JPMorgan Chase was not assigned the mortgage until April 16, 2009 and that the assignment was not recorded until May 28, 2009.[206] Nevertheless, the District

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195. *Id.* ¶ 1.
196. *Id.* ¶ 8.
197. *See id.* ¶ 9.
198. *Id.* ¶ 15.
199. *Id.* ¶ 19.
200. *Id.* ¶ 11 n.3.
201. *Id.* ¶ 19 (citing Tisdale v. Rawson, 2003 ME 68, ¶ 19, 822 A.2d 1136).
202. *Id.* ¶ 26.
203. *Id.*
204. 2011 ME 5, 10 A.3d 718.
205. *Id.* ¶¶ 2-3.
206. *Id.* ¶ 3. Indeed, JPMorgan never affirmatively brought the fact of its subsequent acquisition of the mortgage to the court's attention. *Id.* ¶ 10 n.4.

Court (Ellsworth, *Staples, J.*) granted JPMorgan Chase's motion for summary judgment.[207]

Harp appealed, arguing that because the bank did not hold the mortgage at the time the action was commenced, it lacked standing to bring the action.[208] The Law Court affirmed summary judgment for JPMorgan Chase,[209] reasoning that although JPMorgan Chase "improperly filed the foreclosure complaint" before owning the mortgage, "this defect was cured" when the mortgage was assigned to JPMorgan Chase.[210] Thus, because Harp did not raise this issue until after the assignment and JPMorgan Chase properly held the mortgage before moving for summary judgment, the court below did not err in granting JPMorgan Chase's motion.[211] The Court concluded that JPMorgan Chase's premature filing was an "understandable mistake" within the meaning of Maine Rule of Civil Procedure 17(a), and that although substitution might be available in this case, it was not "appropriate or necessary."[212] The Law Court was careful to note that this case appeared before it in a "new and uncharted posture" and, therefore, cautioned against relying on substitution to avoid strict standing requirements.[213] The Court also observed that although the District Court granted summary judgment before the enactment of the FDP, going forward the mediation program would protect homeowners and require "careful scrutiny for compliance with all procedural prerequisites at the outset of litigation."[214]

Harp further argued that JPMorgan did not provide him with proper notice of default and that the servicer had instructed him not to make payments while a loan modification was being negotiated.[215] The Law Court, however, dismissed the notice argument, finding that Harp had failed to sufficiently meet his burden to prove the applicability of this affirmative defense.[216] As to the arguments regarding the modification, the Court found no record evidence to support Harp's contentions.[217] Significantly, Harp appeared before the Court as a *pro se* litigant,[218] and in its conclusion the Law Court noted the fact that JPMorgan's motion for summary judgment was "effectively unopposed" as support for its flexible application of the standing requirements.[219]

These cases demonstrate the Law Court's careful scrutiny of summary judgment motions by foreclosing parties, particularly when effectively opposed by counsel, as evidenced by the fact that in three out of the four cases the Law Court vacated lower court judgments in favor of the foreclosing party based on persisting issues of fact. Furthermore, the Court's decision in *Saunders* effectively precludes

207. *Id.* ¶ 1.
208. *See id.* ¶ 7.
209. *Id.* ¶ 1.
210. *Id.* ¶ 19.
211. *Id.* ¶ 14.
212. *Id.* ¶¶ 11-12.
213. *Id.* ¶ 19.
214. *Id.* ¶ 12 n.5.
215. *Id.* ¶¶ 16-17.
216. *Id.* ¶ 17.
217. *Id.* ¶ 16.
218. *Id.* ¶ 14 n.6.
219. *Id.* ¶ 19.

MERS from acting as the plaintiff to initiate foreclosure actions insofar as MERS acts as merely a nominee to the mortgagee. Finally, in both *Saunders* and *Harp*, the Law Court demonstrates a somewhat flexible approach to substitution, although the Court in *Harp* appears to condition this flexibility on the facts of the case and discourages future parties from relying on substitution to avoid the strict standing requirements in foreclosure cases.

IV. MAXIMIZING FAIRNESS AND EFFICIENCY? MEDIATION, SUMMARY JUDGMENT, AND THE "GOOD FAITH" REQUIREMENT

A. The Results of the Mediation Program

Prior to implementing the FDP, the Maine Judicial Commission on Foreclosure Diversion identified the goal of promoting "prompt and fair resolutions" to foreclosure proceedings.[220] In a report to the Maine Legislature submitted after one year of operation of the FDP, the Judicial Branch noted that 2010 saw 5,409 new foreclosure filings,[221] of which the courts conducted mediation in 983 cases and a total of 1,243 mediations when including cases involving multiple mediation sessions.[222] The courts conducted these mediation sessions between April and December 2010,[223] resulting in 505 final reports filed upon completion of the mediation.[224] From those 505 final reports, one can begin to ascertain the initial results of the mediation program. Mediation was concluded most often—over fifty percent of the time—because the parties could not reach an agreement.[225] About twenty-one percent of the final reports indicated that the parties reached some sort of agreement.[226] Slightly more than twenty percent, or the remaining cases, concluded because the homeowner failed to attend the mediation sessions.[227] Thus, the report reveals that the mediation program has obtained a twenty-one percent success rate in its first year of operation.[228] Of the 1243 mediations, the remaining 738 that did not produce final reports resulted in interim reports.[229] The two most common reasons for issuing an interim rather than a final report were either "because the parties wanted to exchange additional information or because the parties entered into a loan modification with a [successfully run] trial period . . . before the [mortgagee] would agree to dismiss the [foreclosure] action."[230]

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220. 2009 JUD. BRANCH REP., *supra* note 17, at 9. These goals conform to Maine Rule of Civil Procedure 1 ("[The Rules] shall be construed to secure the just, speedy and inexpensive determination of every action.").

221. 2011 JUD. BRANCH REP., *supra* note 21, at 2.

222. *Id.* at 4.

223. Telephone Interview with Lauren Blake Weliver, Manager, Foreclosure Diversion Program (Aug. 16, 2011) (notes on file with author).

224. 2011 JUD. BRANCH REP., *supra* note 21, at 4.

225. *Id.* (207 out of 505 mediations where a final report was submitted).

226. *Id.* (107 out of 505 mediations where a final report was submitted).

227. *Id.* (121 out of 505 mediations where a final report was submitted).

228. *Id.*

229. *Id.*

230. *Id.*

However, the report reveals that even where agreements are reached, these agreements often take "months of negotiation by the parties" and thus the true impact of the mediation program will not be evident until more cases move through the mediation process and finally off the court's docket.[231] Of the ninety-eight cases that resulted in dismissal because of mediation in 2010, sixty-two involved modification agreements.[232] The remaining dismissals were a result of one of the following: repayment and forbearance plans; deeds in lieu of foreclosure; short sales; mortgage reinstatements; homeowner sales; or, cash for keys agreements.[233] It is worth noting that four dismissals were the result of the court's sanction against the lender.[234] Unfortunately, the FDP does not have the ability to track successful mediations upon dismissal of the case, and thus it will be difficult to gauge the extent to which mediated modifications provide lasting solutions for the parties involved.[235]

In sum, in its first year of operation, the mediation program achieved significant success in assisting homeowners and lenders to avoid foreclosure through negotiated resolutions to default. However, it is also apparent that the majority of mediation sessions do not result in a negotiated resolution while delays during mediation and a lack of permanency of negotiated agreements have proven to be significant challenges to the program's stated goals of maximizing fairness and efficiency. Any adjustments to the program going forward must take these factors into account while improving upon the overall successes of the program in its first year.

B. The Ongoing Challenges to Effective Foreclosure Diversion: Summary Judgment Shortcomings and Pro Se *Defendants*

In addition to certain difficulties in achieving efficient and permanent resolutions at the mediation phase of the foreclosure dispute, it is worth considering two additional factors that have contributed to hindering the mediation program's success. The first is revealed at the summary judgment stage of litigation. Indeed, as in *Raggiani*, *Higgins*, and *Saunders*, a series of recent Maine lower court cases reveal regular delays and challenges to fairness when the foreclosing party moves for summary judgment yet fails to meet its burden of proof to warrant foregoing

231. *Id.* at 5.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.* Although tracking the success of a negotiated agreement following dismissal from mediation is clearly beyond the immediate jurisdiction of the District Courts, the ultimate success of the mediation program depends upon whether the agreements negotiated in mediation prove to be long-term solutions rather than merely temporary foreclosure avoidance mechanisms. Thus, while it is understandable that long-term tracking of negotiated solutions has proven beyond the scope of the FDP's data collection capabilities, any evaluation of the ultimate success of the program depends on some analysis of the lasting effects of mediation. Therefore, the FDP and the Legislature should consider creating some means for obtaining this data, even if only from a representative sample of mediation participants.

further proceedings.[236] An examination of these cases reveals that the defendants' attorneys repeatedly raised genuine issues of material fact, leading the lower courts to subsequently deny the foreclosing party's motion for summary judgment.[237] Presiding judges in these cases found genuine issues of material fact as to whether (1) the moving party was actually the owner of the note,[238] (2) the defendant was actually in default,[239] (3) the foreclosing party provided the homeowner with proper notice of default,[240] (4) the defendant in default had a meaningful opportunity to

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236. *See infra* notes 243-46 and accompanying text. Although most of these cases were filed prior to the initiation of the mediation program, the results at summary judgment nonetheless prove instructive going forward.

237. *See infra* notes 243-46 and accompanying text.

238. *See* CIT Grp./Consumer Fin. v. Bernier, 2008 Me. Super. LEXIS 166 (July 29, 2008); SunTrust Mortg., Inc. v. Humes, No. RE-08-196 (Me. Dist. Ct., West Bath, Jan. 6, 2010) (Field, J.); HSBC Bank USA, Nat'l Ass'n v. Davis, No. RE-09-098 (Me. Dist. Ct., West Bath, Mar. 19, 2010) (Field, J.); BAC Home Loans Servicing LP v. Weymouth, No. RE-09-015 (Me. Dist. Ct., Augusta, Dec. 12, 2009) (Mulhern, J.); U.S. Bank Nat'l Ass'n v. Jaenisch, No. RE-09-23 (Me. Dist. Ct., Dover-Foxcroft, July 31, 2009) (Stitham, J.) (denying summary judgment for the foreclosing party where it failed to establish valid assignment of the note to the Bank, valid possession of the note, and the appropriate amount of interest due on the note); Wells Fargo Bank v. Clark, No. RE-08-295 (Me. Dist. Ct., Biddeford, June 9, 2009) (Douglas, J.) (holding that the foreclosing party was not a party in interest and lacked standing where it was assigned the mortgage and note four days after it filed the foreclosure action); U.S. Bank Nat'l Ass'n v. Hartman, No. RE-08-026 (Me. Dist. Ct., Augusta, May 11, 2009) (Mulhern, J.) (denying summary judgment to the foreclosing party where it failed to provide the defendant with an indorsed copy of the promissory note as requested by defendant in discovery, thus raising a genuine issue of material fact as to the validity of the endorsement); Aurora Loan Servs. LLC v. Simpson, No. RE-08-127 (Me. Dist. Ct., Wiscasset, Apr. 16, 2009) (Hjelm, J.); LaSalle Bank v. Frye, No. RE-08-41 (Me. Dist. Ct., South Paris, Jan. 14, 2009) (Cote, J.) (finding that the Bank had not satisfactorily established it was the holder of the promissory note as of the date of filing, thus precluding summary judgment); CountryWide Home Loans, Inc. v. D'Amico, No. RE-07-204 (Me. Dist. Ct., Biddeford, Dec. 3, 2008) (O'Neil, J.); PHH Mortg. Corp. v. Mosher, No. RE-08-10 (Me. Dist. Ct., Farmington, May 6, 2008) (Stanfill, J.) (finding there was an issue of material fact as to whether PHH had any interest in the note it sought to enforce where it was assigned the mortgage but the record did not support a finding that it held the note); Deutsche Bank Trust Co. Americas v. Philbrick, No. RE-07-70 (Me. Dist. Ct., Farmington, Jan. 28, 2008) (Stanfill, J.) (finding that while the record supported a finding that the mortgage was assigned to Deutsche Bank, there was no evidence on the record that the promissory note was ever assigned to the Bank).

239. *See* Quicken Loans, Inc. v. Brown, No. RE-2008-258 (Me. Super. Ct., Cum. Cty., Feb. 12, 2009) (Warren, J.); *Simpson*, No. RE-08-127; *D'Amico*, No. RE-07-204. In *Brown*, the court found that Quicken's attached affidavit in support of its motion for summary judgment, which alleged defendant Brown was in default, was not based on personal knowledge and not supported by any attached business record; thus, the affidavit was inadmissible hearsay under Maine Rule of Evidence 803(6), and summary judgment was precluded under Maine Rule of Civil Procedure 56(e). *Brown*, RE-08-258, at 3.

240. *See* Camden Nat'l Bank v. Soule, 2010 Me. Super. LEXIS 39 (Apr. 8, 2010); *Davis*, No. RE-09-098; *Humes*, No. RE-08-196 (holding that the foreclosing party provided defective notice of default where it did not adhere to the mortgage agreement's requirements for foreclosure). In *Soule*, the Superior Court (Cumberland County, *Wheeler, J.*) rejected a mortgagee's motion for summary judgment on its foreclosure action finding that the moving party had failed to include information in its statement of material facts that the "notice requirement [was] strictly complied with or a statement as to whether or not the Defendants are in military service as required by the Servicemember's Civil Relief Act." *Soule*, 2010 Me. Super. LEXIS 39, at *4. The Servicemember's Civil Relief Act provides heightened protection from default judgment for military service members, including requiring the moving party to file an affidavit as to whether the defendant who has failed to appear is a military service member before granting summary judgment for the plaintiff. *See* 50 U.S.C.A. Appx. § 521 (West 2010). The Court found a deficiency in the notice requirement existed at summary judgment despite the fact that the

cure default;[241] and (5) the foreclosing party properly established the amount due on the promissory note.[242]

Of the fifteen lower court orders denying summary judgment examined in this Comment, twelve denied summary judgment based on the moving party's failure to satisfactorily prove it was the owner of the note at the time it filed the foreclosure complaint.[243] Generally, the lower court's reasoning in denying summary judgment in these cases rested on four different factual scenarios: (1) a failure to properly record an assignment;[244] (2) the foreclosing party had proven it received

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foreclosing party attached an affidavit to the statement of material facts evidencing notice. *Soule*, 2010 Me. Super. LEXIS 39, at *4-5 n.4. However, where the foreclosing party had failed to cite the information from this affidavit in its statement of material fact, the Court found that this affidavit was "not properly before the court," and cited *Chase Home Finance v. Higgins* as supporting precedent. *Id.* In *Higgins*, the Law Court found that summary judgment was precluded even though "[a]n affidavit referred to in [the Plaintiff's] statement of material facts did state the amount owed on the mortgage note [but] the amount was not stated in the statement of material facts itself." Chase Home Fin. LLC v. Higgins, 2009 ME 136, ¶ 12 n.4, 985 A.2d 508.

241. *See* Bank of N.Y. Trust Co. v. Taggert, 2009 Me. Super. LEXIS 105 (July 20, 2009). The Superior Court (Cumberland County, *Cole, J.*) denied summary judgment where an issue of material fact remained as to whether the lender had provided the homeowner with a "meaningful opportunity" to cure the default as required by the mortgage agreement. *Id.* at *9. The homeowner, Connie Taggert, had executed a promissory note and mortgage in 2005 to MERS as nominee for the lender. *Id.* at *1. MERS subsequently assigned the note to the Bank of New York, whose servicer sent Taggert a default notice in October 2008, advising Taggert that $ 11,888.92 was due on the mortgage and that further fees could accrue immediately. *Id.* at *2-3. That same month, Taggert and another defendant party in interest (collectively "Taggert") interacted with the Bank in attempting to cure the default. *Id.* at *3. Taggert had a check sent to the Bank in the full amount due according to the notice, but the Bank returned the check a few days later claiming it failed to cure the default because the payment was not equal to the full amount due at the time of receipt of the check. *Id.* While the letter did not reveal the full amount due to cure the default, it advised Taggert to contact the attorney assigned to her loan. *Id.* at *4. However, the Superior Court record reveals that prior to sending the check to the Bank, Taggert had attempted to contact the Bank's servicer or the servicer's attorney five different times in less than a month to ascertain the full amount needed to cure the default. *Id.* at *4 n.2. Taggert claimed that, despite these attempts, she was never provided information as to what she actually owed and alleged the servicer or servicer's attorney told her on different occasions that this information was "not available"; that her file did not appear on the attorney's computer; and even that the firm was "way behind" in calculating the full amount due and therefore was unable to help her. *Id.* at *7 n.4. The court reasoned that while Taggert was incorrect in arguing that she was not in default based on the attempted payment that the servicer returned where that payment didn't represent the full amount due, Taggert had generated a genuine issue of material fact as to whether she had been afforded an adequate opportunity to cure the default as provided by the mortgage agreement, and therefore, the Bank was precluded from summary judgment. *Id.* at *9.

242. *Jaenisch*, No. RE-09-23, at 3.

243. *See supra* note 237 and accompanying text.

244. *See, e.g.,* CIT Grp./Consumer Fin. v. Bernier, 2008 Me. Super. LEXIS 166, at *3 (July 29, 2008). The Superior Court (Cumberland County, *Cole, J.*) denied summary judgment for CIT Group, the alleged mortgagee and foreclosing party, where CIT failed to provide any documentation proving it was in fact the owner of the loan despite the fact that the homeowner "failed to properly oppose" the summary judgment motion. *Id.* at *3-4. The defendants, Joseph and Ivy Bernier, had executed a promissory note secured by a mortgage to MERS in 2007. *Id.* at *1. The Berniers simultaneously executed a quit claim deed to Amanda Bernier, yet less than three months later, the Berniers were in default on the loan. *Id.* Six months after default, CIT allegedly sent a notice to cure default to the Berniers and subsequently moved for foreclosure. *Id.* at *1-2. In denying summary judgment, the Superior Court noted that CIT had conceded that at the time it filed for summary judgment, it had not

an assignment of the mortgage, but not the note;[245] (3) the foreclosure action was initiated by a party who was only assigned the note after the action commenced;[246]

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yet recorded an assignment of the note, and the court rejected CIT's attempt to cure this defect by filing an assignment of the mortgage after moving for summary judgment. *Id.* at *3. The court cited the Law Court's holding in *Camden National Bank v. Peterson* for the proposition that the court, in making a summary judgment determination, is "neither required nor permitted" to search the record outside the summary judgment filings for facts supporting the parties' motions. *Id.* at *4 (citing Camden Nat'l Bank v. Peterson, 2008 ME 85, ¶ 26, 948 A.2d 1251). *See also* ME. R. CIV. P. 56(h)(4) ("The court shall have no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of facts."). Interestingly, Justice Cole, presiding in *Bernier*, had faced a somewhat similar issue in *Taggert,* where the moving party, Bank of New York, filed a foreclosure complaint one week before receiving an assignment of the mortgage from MERS, yet the court declined to consider the defendant's argument that the Bank lacked standing at the time the complaint was filed. *Taggert*, 2009 Me. Super. LEXIS 105, at *2 n.1. Rather, the court stated that it was "satisfied that [Bank of New York] will receive a corrective assignment" and thus rejected the standing argument. *Id.*

245. *See, e.g.,* BAC Home Loans Servicing LP v. Weymouth, No. RE-09-015, at 2 (Me. Dist. Ct., Augusta, Dec. 12, 2009) (Mulhern, J.). *See also* Deutsche Bank Trust Co. Americas v. Philbrick, No. RE-07-70 (Me. Dist. Ct., Farmington, Jan. 28, 2008) (Stanfill, J.). In *Weymouth*, the District Court (Augusta, *Mulhern, J.*) denied summary judgment to BAC where BAC failed to prove it was the valid assignee of the underlying promissory note. *Weymouth*, No. RE-09-015, at 1. Defendant Celisa Weymouth executed a promissory note to American Residential Mortgage ("ARM") and signed the underlying mortgage over to MERS as ARM's nominee. *Id.* MERS subsequently assigned the mortgage to CountryWide Home Loans Servicing, which then assigned the note to BAC. *Id.* at 1-2. When Weymouth defaulted on her mortgage and BAC brought the foreclosure action seeking summary judgment, the court noted "an assignment of the mortgage by MERS is not an assignment of the note." *Id.* at 2. Thus, the court found BAC had not made any showing that MERS ever had any interest in the note to suggest the assignment of the mortgage to BAC included assignment of the note, and therefore, BAC was precluded from summary judgment. *Id.* (citing *Wyman v. Porter*, 108 Me. 110, 115, 79 A. 371, 373 (1911), and *Carpenter v. Longan*, 83 U.S. (16 Wall.) 271, 274 (1872), in support of the view that an assignment of a mortgage alone without the promissory note is a "nullity."). *See supra* note 128. Interestingly, the court also cited a New York decision in support of the proposition that "MERS does not have the authority, in its capacity as 'nominee' for the lender on a Mortgage, to assign the note to a third party." *Weymouth,* No. RE-09-015, at 2 (citing LaSalle Bank Nat'l Ass'n v. Lamy, 824 N.Y.S.2d 769 (N.Y. Sup. Ct., Aug. 7, 2006)).

246. *See, e.g.,* HSBC Bank USA, Nat'l Ass'n v. Davis, No. RE-09-098, at 7 (Me. Dist. Ct., West Bath, Mar. 19, 2010) (Field, J.); Wells Fargo Bank v. Clark, No. RE-08-295, at 2-3 (Me. Dist. Ct., Biddeford, June 9, 2009) (Douglas, J.). *See also* SunTrust Mortg., Inc. v. Humes, No. RE-08-196 (Me. Dist. Ct., West Bath, Jan. 6, 2010) (Field, J.); LaSalle Bank v. Frye, No. RE-08-41 (Me. Dist. Ct., South Paris, Jan. 14, 2009) (Cote, J.). In *Davis*, the District Court (West Bath, *Field, J.*) denied summary judgment for the foreclosing party HSBC Bank and further held HSBC did not have standing to sue where it was not assigned the promissory note or mortgage until after filing the complaint for foreclosure. *Davis,* No. RE-09-098, at 7. Defendants Richard and June Davis executed a promissory note to Accredited Home Lenders in November 2004, secured by a mortgage granted to MERS as nominee to Accredited. *Id.* at 1. The Davises subsequently defaulted in January 2009. *Id.* Chase Home Finance notified the Davises of default the following month. *Id.* HSBC filed a foreclosure action on June 4, 2009. *Id.* Five days later MERS assigned its "interest" in the Davis mortgage and note to HSBC. *Id.* HSBC then moved for summary judgment. *Id.* at 2. In denying summary judgment and dismissing the case, the court refused to "assume physical possession of the original [n]ote and [m]ortgage merely because copies of those instruments were attached to the [c]omplaint." *Id.* at 4. The court further ruled that the servicer Chase Home Finance provided defective notice of default to the Davises, where the mortgage instrument required the "lender," not the servicer, to deliver the notice of default. *Id.* at 7. Finally, the court held that even if the lender had properly delivered the notice, it would still have been defective because it failed to properly inform the Davises of their rights, including their right to cure. *Id.*

and (4) a failure to properly support an assertion of ownership of the note.[247] All contested at summary judgment, these cases illustrate the lower courts' strict scrutiny of the moving parties' claims at summary judgment in foreclosure proceedings, mirroring the Law Court's decisions supporting this approach. These cases also illustrate repeated failures by the foreclosing parties to efficiently adapt their business practices to the relevant state law requirements for foreclosure actions. These inefficiencies are further exemplified by several cases imposing sanctions on the foreclosing party at mediation.[248]

The second challenge to achieving the FDP's goals of fairness and efficiency, specifically that of fairness, is revealed by the 2011 Judicial Branch Report to the Maine Legislature, which indicates that although the foreclosing party is typically represented at all stages of the foreclosure proceeding, only thirty-nine percent of homeowners had legal representation at mediation.[249] However, prior to the mediation program, estimates indicate that less than ten percent of all homeowners facing foreclosure enjoyed representation by counsel.[250] Furthermore, prior to implementation of the mediation program, the mortgagor did not contest seventy

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247. *See, e.g.*, Fed. Nat'l Mortg. Ass'n v. Cormiea, No. RE-10-259 (Me. Dist. Ct., Biddeford, Mar. 8, 2011) (dismissing a foreclosure action without prejudice where the foreclosing party failed to comply with the title 14, section § 6321 of the Maine Revised Statutes requirements that the foreclosing party attach certain documents to the complaint, including proof of possession of the note and mortgage and evidence of compliance with the statutory notice requirements). *See also Jaenisch*, No. RE-09-23; U.S. Bank Nat'l Ass'n v. Hartman, No. RE-08-026 (Me. Dist. Ct., Augusta, May 11, 2009) (Mulhern, J.); Aurora Loan Servs. LLC v. Simpson, No. RE-08-127 (Me. Dist. Ct., Wiscasset, Apr. 16, 2009) (Hjelm, J.); CountryWide Home Loans, Inc. v. D'Amico, No. RE-07-204 (Me. Dist. Ct., Biddeford, Dec. 3, 2008) (O'Neil, J.); PHH Mortg. Corp. v. Mosher, No. RE-08-10 (Me. Dist. Ct., Farmington, May 6, 2008). In *D'Amico*, the District Court (Biddeford, *O'Neil, J.*) denied foreclosing party CountryWide Home Loans' motion for summary judgment where it failed to adequately prove it was the holder of the promissory note or that the defendant was in default on the note. *D'Amico,* No. RE-07-204, at 2. The court noted that CountryWide had only submitted a sworn affidavit with attached proof of assignment of the note to prove it was in fact the holder of the note, but the mortgage indicated its holder was another company. *Id.* The court, therefore, held that CountryWide "cannot demand payment on a note it does not hold." *Id.* Although CountryWide attempted to correct this problem by mailing a different version of the promissory note to the court and asking the court to attach this document to the affidavit, the court refused to attach the second version of the note, finding this would "destroy the integrity of a sworn affidavit by illegally attaching a different document to it than was sworn to by the affiant." *Id.* The court further found that CountryWide failed to properly prove the defendant was in default where its sworn affidavit alleged default but was not supported by any business record proving default. *Id.* Thus, the court found that the affidavit was inadmissible hearsay under Maine Rule of Evidence 803(6) and therefore could not be considered for purposes of summary judgment under Maine Rule of Civil Procedure 56(e). *Id.* Rule 56(e) states that "affidavits . . . shall set forth such facts as would be admissible in evidence."

248. *See, e.g.*, Bank of N.Y. v. Richardson, 2011 ME 38, ¶¶ 1, 5, 15 A.3d 756 (imposing sanctions where the foreclosing party's representative repeatedly failed to attend scheduled mediation sessions and failed to offer a credible justification). *See also* CitiMortgage v. Dente, No. RE-10-215 (Me. Dist. Ct., Biddeford, May 20, 2011) (Cantara, J.) (imposing sanctions where the foreclosing party failed to present requested forms at mediation and where the foreclosing party was not forthcoming regarding whether the homeowner qualified for HAMP or other modifications).

249. 2011 JUD. BRANCH REP., *supra* note 21, at 3. Forty-nine percent of homeowners participating in mediation received some help in filling out the financial forms and worksheets required at mediation. *Id.*

250. *Foreclosed Justice*, *supra* note 8, at 294.

percent of foreclosure actions, generally resulting in summary judgment.[251] This trend appears to have largely continued despite mediation.[252] In sum, although mediation has provided solutions for a minority of parties, it appears that foreclosure actions in Maine continue to be dominated by unrepresented litigants, unanswered complaints, and uncontested summary judgment orders for the mortgagee.

The low incidence of legal representation for defaulting parties in foreclosure actions may carry some relation to the foreclosing parties' consistent failure to prove a beneficiary interest in the note in cases where summary judgment is contested. Maine Rule of Civil Procedure 56(h)(4) requires that the court in uncontested cases admit the foreclosing party's statement of material fact if supported by proper record citations,[253] a lesson *pro se* litigant Brian Harp learned the hard way in *JPMorgan Chase Bank v. Harp*, where Harp failed to timely contest the late assignment of the mortgage to JPMorgan.[254] Thus, as *Harp* demonstrates, uncontested foreclosure actions result in less scrutiny of the foreclosing party's assertions and record citations, allowing the foreclosing party to win on summary judgment without its assertions and the underlying record proof of these assertions being fully tested by the adversary system.

Because uncontested foreclosure actions are not fully tested by the adversary process, there is no way to know with empirical certainty whether, if contested, uncontested foreclosure actions would suffer from the same sorts of failures of proof as evident in contested cases.[255] However, anecdotal evidence and inference strongly suggest that similar documentation problems may often exist in uncontested cases. For example, in testimony before the House Judiciary Committee, Volunteer Lawyers Project attorney Thomas Cox stated that in his extensive experience with foreclosure summary judgment motions handled by PTLA and MASH,[256] foreclosure defense attorneys prevailed approximately seventy-five percent of the time in blocking summary judgment for the foreclosing party.[257] Likewise, the nationwide incidence of reliance on faulty lender affidavits

251. 2009 JUD. BRANCH REP., *supra* note 17, at 18.

252. In 2010, there were 5,409 new foreclosure filings. 2011 JUD. BRANCH REP., *supra* note 21, at 2. Given that mediation was only conducted in 983 cases and that mediation is triggered merely by filling out and returning the one-page answer form provided to the mortgagor by the foreclosing party when notice of the foreclosure complaint is filed, it would appear that most mortgagors fail to respond to the complaint, suggesting that most foreclosure actions continue to go uncontested..

253. ME. R. CIV. P. 56(h)(4) (stating "[f]acts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted. An assertion of fact set forth in a statement of material facts shall be followed by a citation to the specific page or paragraph of identified record material supporting the assertion. The court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment.").

254. *See* 2011 ME 5, ¶ 19, 10 A.3d 718; *see also supra*, Part III.C.

255. Additionally, if no discovery is ever performed in uncontested summary judgment motions, defendants never develop records that to rebut moving parties' statements of material fact.

256. MASH is a group of approximately sixty attorneys in Maine dedicated to providing Maine homeowners with pro bono legal assistance. *Foreclosed Justice, supra* note 8, at 293.

257. *Id.* at 294. While screening may in part explain this high success rate, it is not unreasonable to surmise that these successful oppositions to summary judgment indicate the likely unsoundness of a significant percentage of uncontested summary judgment motions.

revealed in *Bradbury* provides further evidence of the widespread unsoundness of at least one necessary element (the lender affidavit) for summary judgment in many states, including Maine.[258]

Thus, the combination of a high incidence of *pro se* foreclosure defendants and the foreclosing parties' repeated failures to prove their cases at summary judgment in contested cases raises significant concerns about the integrity of the foreclosing parties' conduct in foreclosure proceedings and the prevalence of basic documentation deficiencies. At the same time, the mediation program has demonstrated some success in diverting cases away from foreclosure, thus saving judicial resources and providing the parties with an agreeable alternative to foreclosure. This avoids the lose-lose situation the Judicial Report warned of in 2009[259] by keeping homeowners in their homes while also allowing lenders to recover their investment without excessive litigation fees. It therefore follows that mediation should continue to be required whenever feasible to avoid the expenses and perils litigation has proven to carry for both homeowners and lenders alike.

V. SUGGESTIONS FOR IMPROVING THE FORECLOSURE DIVERSION PROGRAM

A. The Argument for a Broad Interpretation of the Good Faith Requirement

Historically, the Law Court has affirmed the trial court's authority to exercise its equitable powers "[w]hen necessary for the adjustment of equities between mortgagor and mortgagee."[260] While the adoption of the Maine Rules of Civil Procedure affected a merger of law and equity, the "right to a specific kind of legal or equitable relief upon proof of certain facts" remained unchanged.[261] Several courts around the country have relied on the court's equity power, the doctrine of unclean hands, and statutory good faith requirements in sanctioning the foreclosing parties' bad faith conduct during mediation.[262] While these cases raise some analogies to Maine's good faith requirement in foreclosure mediation, Maine courts

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258. *See* Fed. Nat'l Mortg. Assoc. v. Bradbury, No. RE-09-65, at 4 (Me. Dist. Ct., Bridgton, Sept. 24, 2010) (Powers, J.); Streitfeld, *supra* note 1.

259. *See supra* note 23 and accompanying text.

260. Woodman v. Freeman, 25 Me. 531, 547 (1846) (citing Pratt v. Law, 13 U.S. (9 Cranch) 456 (1815)).

261. Greenlaw v. Rodick, 158 Me. 440, 444, 185 A.2d 895, 897 (1962).

262. *See* U.S. Bank Nat'l Ass'n v. Mathon, No. 2007-30481, 2010 WL 4910164 (N.Y. Sup. Ct. Dec. 1, 2010) (denying judgment in foreclosure for the mortgagee and scheduling a hearing to determine the mortgagee's good faith based on the grounds of the mortgagee's unclean hands in seeking foreclosure after accepting thirteen modification payments in accordance with a modification agreement signed by both parties); BAC Home Loans Servicing v. Westervelt, No. 2455/10, 2010 WL 4702276 (N.Y. Sup. Ct. Nov. 18, 2010) (denying foreclosure for the mortgagee, barring the foreclosing party from collecting further fees from the defendant, and sua sponte finding that the mortgagee acted in bad faith in refusing to follow HAMP guidelines binding on the mortgagee and in failing to appear at mediation or offer an adequate excuse for absence); Wells Fargo Bank v. Hughes, 897 N.Y.S.2d 605, 633-34 (N.Y. Sup. Ct. 2010) (dismissing the foreclosure action without prejudice on the basis of the mortgagee's unclean hands where the mortgagee proposed a modification agreement rife with subprime lending characteristics contrary to New York legislation, and refused to revise the terms of the modification agreement at the court's request).

act with clear statutory authority to require that the parties mediate in good faith.[263] However, the Law Court has not yet had occasion to pass on the proper interpretation of the good faith requirement.[264] Meanwhile, the lower courts appear to have rarely found that the foreclosing party failed to participate in mediation in good faith.[265]

This Comment proposes that the goals of the Foreclosure Diversion Program will be further served, and the incidence of successful mediation may be increased, by strict enforcement of the foreclosing parties' compliance with a broad and clearly articulated interpretation of the good faith requirement of title 14, section 6321 of the Maine Revised Statutes and Maine Rule of Civil Procedure 93(j).[266] To achieve effective foreclosure diversion, both parties must be held to a high standard of conduct and urged to approach mediation willing and able to fully participate and negotiate a meaningful resolution whenever possible. Given the costs of foreclosure to all parties, the courts should be wary of foreclosing parties that fail to make meaningful efforts to mediate, particularly in cases in which the defendant is unrepresented and thus does not have full command of the normal adversarial safeguards. Careful scrutiny of the mortgagee's efforts to mediate is further necessitated by the documented incentive arrangements of many servicers, which often discourage mediation while encouraging delays and ultimately foreclosure, even when not in the investor's financial best interest.[267]

By sending a clear message to the foreclosing party that a meaningful effort to reach a negotiated solution will be required at mediation, mediators and the courts can further encourage mutually agreeable negotiated resolutions. Meaningful mediation will also serve the protective function envisioned by the Law Court in *Harp* by subjecting the foreclosing party to "careful scrutiny for compliance with all procedural prerequisites at the outset of litigation" while saving precious judicial resources by avoiding time-consuming summary judgment determinations.[268] By requiring strict compliance with the good faith requirement and heeding the Law Court's advice in *Harp*, trial courts can nudge the foreclosing

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263. ME. REV. STAT. tit. 14, § 6321-A(12) (2011); *see also* ME. R. CIV. P. 93(j). At the same time, any expansion of the good faith requirement must necessarily be constrained by the mediation program requirement that mediation may not act as a waiver of either party's rights. ME. REV. STAT. tit. 14, § 6321-A(5) (2011).

264. *See* Bank of N.Y. v. Richardson, 2011 ME 38, ¶¶ 1. 5, 15 A.3d 756 (declining to address the trial court's imposition of sanctions and dismissal with prejudice of the foreclosing party's action where the dismissal of the bank's claim was not a final judgment as to all asserted claims in that case).

265. *See* 2011 JUD. BRANCH REP., *supra* note 21, at 5 (noting that four mediation cases have resulted in sanctions against the foreclosing party). The imposition of sanctions may or may not indicate a finding of bad faith, but a finding of bad faith would likely include the imposition of sanctions.

266. While clearly the court must require good faith by both parties, given the conduct of the foreclosing parties over the last several years, it appears that strict application of the good faith requirement will most frequently subject the foreclosing party to scrutiny and, in appropriate cases, sanctions. This Comment in no way proposes that the mortgagor should be immune from the good faith requirement nor should the mortgagor be subject to a less stringent good faith standard. However, this Comment proceeds on the premise that given the current challenges facing the Foreclosure Diversion Program, strict enforcement of the good faith requirement against the foreclosing party provides a promising vehicle to further the goals of the Program.

267. *See supra* Part II.B.

268. JPMorgan Chase Bank v. Harp, 2011 ME 5, ¶ 12 n.5, 10 A.3 718.

parties toward a mutually agreeable resolution to avoid foreclosure. This includes providing clear incentives for accepting a negotiated solution at mediation for those foreclosing parties that may be unable to prove their cases at summary judgment, which in turn will promote fairness and efficiency for all parties involved.

B. What Good Faith Should Mean in the Foreclosure Mediation Context

First, Maine law already requires that "[e]ach party and each party's attorney, if any, must be present at mediation . . . and shall make a good faith effort to mediate all issues."[269] Likewise, the law provides that the mortgagee's representative who participates in the mediation session must have the authority to accept a mutually agreeable negotiated solution.[270] In addition, the mortgagee is required by statute to provide the homeowner with contact information for a representative authorized to modify or otherwise approve a negotiated solution to the action.[271] The mediator and the court can give force to these provisions by carefully monitoring the mortgagee's participation in mediation sessions and evaluating the actual authority the mortgagee's representative has to negotiate with the homeowner and accept proposals that arise from the mediation. Where the mortgagee's representative fails to attend mediation and also fails to present a reasonable explanation for that absence, or else fails to make a properly authorized representative available to negotiate with the homeowner and fully consider any reasonable negotiated agreement modifying the loan, the mediator should include this information in the mediator's report to the court as indicia of bad faith, and the appropriateness of sanctions should be considered.[272] Lack of authority to accept a proposal in mediation should generally not be reason for the foreclosing party to reject the proposal or otherwise delay mediation.[273]

Second, in order for mediation to occur, the parties' relationships to the note and mortgage must be clear, as this bears directly on the parties' authority to accept any modification. Where the foreclosing party appearing at the mediation session has not provided proof of ownership of the note and mortgage upon filing the

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269. ME. REV. STAT. tit. 14, § 6321-A(12) (2011). *See also* ME. R. CIV. P. 93(j).

270. ME. REV. STAT. tit. 14, § 6321-A(11)(A) (2011).

271. *Id.* § 6111(1-A)(E).

272. *See* Bank of N.Y. v. Richardson, 2011 ME 38, ¶ 1, 15 A.3d 756. In addition, the Nevada Supreme Court has ruled that where the foreclosing party does not make a representative with the power to modify the loan available at mediation, that party must be subject to sanctions. Pasillas v. HSBC Bank USA, 255 P.3d 1281, 1283 (Nev. 2011).

273. Fairness would be encouraged by particular scrutiny of any unreasonable delay by the foreclosing party where delay in the foreclosure process often means increased fee collection opportunities for the servicer. *See supra* Part II.B. Furthermore, while Maine Rule of Civil Procedure 93(j) provides a host of options that the court may consider in imposing sanctions, the court should consider the ultimate goal of ensuring a resolution to the foreclosure action while deterring any bad faith. Insofar as Rule 93 authorizes the court to consider dismissal without prejudice or dismissal without prejudice with a prohibition on refilling the foreclosure action for a stated period of time, the court should carefully consider the effect this will have on both parties, particularly on the homeowner where dismissal will likely not resolve the underlying reasons for the homeowner's original default and may cause the homeowner to continue to incur fee obligations to the mortgagor after dismissal. As such, the net result of dismissal without prejudice will likely be that the foreclosing party is forced to refile the foreclosure action, thus increasing transaction costs for all parties, including the court, while not furthering any resolution to the foreclosure action.

complaint as required by title 14, section 6321 of the Maine Revised Statutes, and the foreclosing party is unwilling or unable to produce the relevant documents to comply with section 6321, this failure should be noted in the mediator's report as indicia of bad faith, and sanctions should be considered.[274]

Third, the homeowner is required to present a host of financial information to the mortgagee prior to the mediation session.[275] It follows that the mortgagee's representative should be required to have reasonable personal knowledge of this information, including the homeowner's payment history, current income, the current appraisal value of the property in question, and the applicability of any available loss mitigation programs. The mortgagee's representative should also be prepared to timely act on that information to avoid delays due to staleness of financial data. Likewise, the mortgagee's representative should have personal knowledge of any known restrictions on accepting a negotiated solution provided by investor agreements or other agreements binding on the foreclosing party, including sufficient knowledge of the relevant provisions of those agreements to describe and explain those restrictions. Where the mortgagee's representative participates in mediation without a reasonable basis of personal knowledge of this information, the goals of requiring this pre-mediation exchange of information are defeated. Where the mortgagee's representative clearly lacks this basic level of personal knowledge and does not possess the provided documentation of this information that would serve as personal knowledge, the mediator's report should take this into account, and the court should consider appropriate sanctions absent a reasonable justification by the mortgagee.[276]

Fourth, where the net present value calculation and the homeowner's income data indicate that it is in the mortgagee's financial interest to modify, modification is presumed to be in both parties' financial best interest unless the foreclosing party raises reasonable grounds for rejecting modification and provides specific documentation of those grounds.[277] A reasonable justification shall include proof of the specific provisions of a valid pooling or securitization agreement or other valid agreement binding on the foreclosing party that restricts or prohibits the

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274. Nevada law requires production of documents proving ownership of the note and mortgage at mediation. *See* NEV. REV. STAT. § 107.086(4) (2011). The Nevada Supreme Court has held that where the foreclosing party fails to provide these documents at mediation, the foreclosure action cannot proceed, and sanctions are appropriate. Leyva v. Nat'l Default Servicing Co., 255 P.3d 1275, 1276-77 (Nev. 2011); *Pasillas*, 255 P.3d, at 1283. The Nevada Supreme Court's ruling requiring sanctions where the foreclosing party fails to provide this proof is analogous to those situations in Maine in which the foreclosing party does not provide the documents required by title 14, section 6321 of the Maine Revised Statutes upon filing the complaint and subsequently fails to produce these documents at mediation.

275. *See* ME. R. CIV. P. 93(c)(4), (5).

276. At least one Maine District Court judge has already found that the foreclosing party is obliged to produce investor guidelines when the foreclosing party argues that those guidelines restrict the sorts of modifications the foreclosing party can accept yet alleges that the guidelines are confidential and therefore cannot be produced. HSBC Bank USA v. Bowie, No. RE-09-080, at 4 (Me. Dist. Ct., York, Mar. 3, 2011) (Douglas, J.).

277. HAMP already requires that the mortgagee accept the result of the net present value calculation, where other HAMP requirements are met. *See supra* Part II.C.

proposed modification or any other contemplated negotiated solution.[278] Where the mortgagee fails to accept the result of the net present value calculation and fails to provide any reasonable justification for refusing to do so, including failing to provide any relevant documents that verify this justification, this should be noted in the mediator's report as indicia of bad faith and the court should consider sanctions where appropriate.

Fifth and finally, while it may appear obvious, the mediator's report should take into account any unreasonable delay the foreclosing party creates in the mediation process. This includes delays in any required exchange of documents or in making available a representative who is authorized to accept a negotiated solution to the foreclosure action. Likewise, where the foreclosing party initially accepts a trial modification agreement through mediation but unreasonably delays making that modification permanent and dismissing the foreclosure action after the agreed-upon trial period has been completed, and the foreclosing party is unable to justify that delay, the mediator's report should make note of this delay and the court should consider whether the foreclosing party has acted in bad faith. Where delay is apparent, and no reasonable justification for that delay is forthcoming, the court should consider appropriate sanctions.[279]

VI. CONCLUSION

As this Comment has illustrated, Maine's mediation program has demonstrated significant success in providing a fair and efficient alternative to foreclosure that potentially allows the homeowner to remain in the home, maximizes the investor's return on the original investment, and relieves some of the burden placed on the court system posed by time-consuming summary judgment motions. However, the success of foreclosure diversion has been challenged by a variety of factors, including the mortgagee's own documentation problems and the *pro se* status of many homeowner-litigants. Against this backdrop, strict scrutiny of summary judgment motions in foreclosure has proven crucial in ensuring fairness in the foreclosure process. By empowering mediators and judges to carefully monitor the mortgagee's good faith at mediation based on clear, predictable, and realistic criteria, the FDP can build on the success of the mediation program to date and continue to function as a model for other mediation programs around the country.

As a last note, *Bradbury*, *Saunders*, and many other foreclosure cases demonstrate that the procedural fairness of the foreclosure process has relied heavily on the work of highly qualified volunteer and nonprofit attorneys who understand the foreclosure process in Maine. Absent the dedication of these attorneys, the robo-signing uncovered in *Bradbury* may never have been discovered in Maine, and MERS lack of standing in Maine Courts might never have been successfully challenged. These are just two of many important contributions by volunteer and nonprofit attorneys, yet the *Bradbury* and *Saunders*

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278. This requirement would comply with one Maine District Court judge's interpretation of the good faith provision to require that the foreclosing party produce investor guidelines alleged by the party to restrict its ability to accept a modification based on the net present value calculation. *Bowie*, No. RE-09-080, at 4.

279. ME. R. CIV. P. 93(j) provides a nonexclusive list of possible sanctions.

cases are exemplary because they both contributed to national measures to correct improper practices found to be rampant in foreclosure cases.[280] Competent representation has likewise proven important in the mediation context.[281] Thus, continued support for the representation of indigent litigants is vital to the success of the mediation program going forward,[282] and to ensure that the adversary process adequately tests the strength of foreclosure actions against Maine homeowners. Indeed, the integrity of our system of justice depends upon it.

280. *See, e.g.*, ElBoghdady, *supra* note 15 (reporting that federal regulators reached consent agreements with the nation's largest mortgage lenders to correct improper practices such as the use of robo-signers); Streitfeld, *supra* note 1.

281. *See Foreclosed Justice*, *supra* note 8, at 309.

282. For an excellent articulation of the need for increased access to counsel for low-income individuals facing civil litigation, see the Honorable Jonathan Lippman's *A Proactive Judicial Branch: Confronting the Crisis of the Unrepresented*, 2011 CARDOZO L. REV. DE NOVO 1.