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MARYLAND FORECLOSURE MEDIATION - WORKING OR WANING? A CRITICAL LOOK AT THE STATE'S FORECLOSURE MEDIATION PROGRAM

Chelsea Jones*

INTRODUCTION

In mid-January 2012, members of the Maryland Home Preservation Task Force testified before a state House committee with a number of recommendations aimed at solving Maryland's foreclosure crisis.¹ The foreclosure problem is particularly acute in Prince George's County, Maryland, a predominately African American county neighboring Washington, DC. Thirty-one percent of the state's foreclosure events are located within the county.² In the quarter from January to September 2011, there were 22,401 Notices of Intent to Foreclose ("NOIs") in Prince George's County.³ Elsewhere in the state, Baltimore City and Baltimore County were in second and third place, respectively, with nearly 12,000 NOIs each.⁴ Across the United States, foreclosure numbers continue to fluctuate. In September of the third quarter of 2012, national foreclosure filings, default notices, scheduled auctions, and bank repossessions of properties were at their lowest rate since 2007.⁵ In states such as New York and New Jersey, however, third quarter foreclosure activity increased substantially.⁶

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¹ Jamie Smith Hopkins, *Suggestions to Stave off Foreclosures*, BALT. SUN, Jan. 19, 2012, at A14.

² Anika Anand, *Affluent Black County Mired in Mortgage Mess*, NBCNEWS.COM (June 14, 2011, 10:50 AM), http://today.msnbc.msn.com/id/43343008/ns/mortgage_mess/#.Trm-KIYVLds; MD. DEP'T OF HOUS. & CMTY. DEV., PROPERTY FORECLOSURES IN MARYLAND THIRD QUARTER 2012 3 (2012), available at <http://mdhope.dhcd.maryland.gov/pages/MoreNews.aspx>.

³ MD. FORECLOSURE TASK FORCE, MARYLAND FORECLOSURE TASK FORCE REPORT 18 (2012).

⁴ *Id.*

⁵ Press Release, Foreclosure Activity Drops to 5-Year Low in September, RealtyTrac (Oct. 9, 2012), available at <http://www.realtytrac.com/content/foreclosure-market-report/september-and-q3-2012-us-foreclosure-market-report-7424>.

⁶ *Id.* Both New York and New Jersey are judicial foreclosure states. See *infra* Part III (discussing the different types of foreclosure processes).

These variations represent the lingering effects of the burst of the housing bubble.⁷

It is now widely understood that the collapse of the subprime market in 2007 was the catalyst in an economic avalanche that this country is still trying to claw its way through.⁸ The surge in subprime loans was evident in Maryland where, “[B]etween the first quarter of 2003 and the second quarter of 2007, the share of Maryland’s subprime loans as a percentage of all mortgage loans in service grew from a low of 2.6 percent to a historic high of 12.8 percent.”⁹ The United States Senate Committee on Homeland Security and Government Affairs issued a recent report titled, “Wall Street and the Financial Crisis: Anatomy of a Financial Collapse,” which pointed to high-risk loans as a major contributing factor of the “Great Recession.”¹⁰ The report identified a number of other key contributors to the economic crisis such as the failure of government oversight, inflated credit ratings for risky U.S. mortgage backed securities, and banks that created highly complex financial instruments that garnered billions of dollars.¹¹ This “perfect storm” sent ripples through the housing market, and in the first quarter of 2007, subprime loans in Maryland accounted for more than half of all serious deficiencies.¹²

States around the country tried to respond to the housing crisis by enacting legislation to slow its progress.¹³ Maryland’s effort came in the form of a foreclosure mediation bill, which took effect on July 1, 2010.¹⁴ The bill allows homeowners to meet with their lenders and a neutral third-party--an administrative law judge--to avoid foreclosure.¹⁵ Although many Marylanders facing foreclosure may be em-

⁷ Kathryn J. Byun, *The U.S. Housing Bubble and Bust*, MONTHLY LABOR REV., December 2012, available at <http://www.bls.gov/opub/mlr/2010/12/art1full.pdf>.

⁸ MD. FORECLOSURE TASK FORCE, *supra* note 3, at 12.

⁹ *Id.*

¹⁰ STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 112TH CONG., WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE (Comm. Print 2011).

¹¹ *Id.* at 2–12.

¹² MD. FORECLOSURE TASK FORCE, *supra* note 3, at 12.

¹³ *Foreclosure Mediation Programs by State*, NAT’L CONSUMER LAW CTR., <http://www.nclc.org/issues/foreclosure-mediation-programs-by-state.html> (last visited Jan. 9, 2013).

¹⁴ H.D. 472, 2010 Leg., 427th Sess. (Md. 2010).

¹⁵ Ovetta Wiggins, *Maryland Bill Provides Foreclosure Mediation for Homeowners*, WASH. POST (April 15, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/14/AR2010041404602.html>.

powered through legislation to take action, the available figures paint a less enthusiastic picture.¹⁶ In the program's first year, only 317 cases out of roughly 33,000 active foreclosures were resolved in mediation.¹⁷ Maryland is not the only state that has seen low foreclosure mediation success rates. Florida's rates were so low that the Florida Supreme Court decided to shutter its program altogether.¹⁸ Not all states, however, have encountered such a lackluster response. Philadelphia's foreclosure mediation program¹⁹ has seen remarkable success rates. In the first year of the program, "[eighty-five] percent of borrowers who had reached agreements with their lenders . . . were still in their homes eighteen months later."²⁰ With participation rates that vary state-to-state, firm conclusions about the country's collective response to foreclosure mediation as a tool to slow foreclosures are hard to pin down.

This Comment examines Maryland's foreclosure mediation law and takes a comparative look at city and state mediation programs across the country. This Comment then analyzes the inherent flaws of mediation that disproportionately affect minority communities and suggests litigation as a better avenue to vindicate the rights of homeowners who were the targets of predatory lending. Given that foreclosure mediation is currently law in Maryland, this Comment suggests that a switch to an "opt-out" or "automatic mediation" program will capture more homeowners eligible for foreclosure mediation. Finally, this Comment examines a recent Maryland Court of Appeals case involving whistleblower protection laws that might have broad application to financial institutions and the effort to strengthen loss mitigation strategies.

¹⁶ Due to the confidentiality surrounding foreclosure mediation many of the most recent participation figures are unreported.

¹⁷ Gary Haber, *Few Marylanders Facing Foreclosure Seeking Mediation*, BALT. BUS. J. (Jan. 18, 2011, 2:56 PM), <http://www.bizjournals.com/baltimore/news/2011/01/18/few-marylanders-facing-foreclosure.html>.

¹⁸ Kathleen Haughney, *Florida Justice Shuts Down Foreclosure Mediation*, ORLANDO SENTINEL, Dec. 20, 2011, at A10.

¹⁹ Philadelphia's program is formally called the "Residential Mortgage Foreclosure Diversion Program" and was instituted by the Court of Common Pleas. See *Residential Mortgage Foreclosure Diversion Program*, PHILA. CTS, <http://www.courts.phila.gov/mfdp/> (last visited Jan. 9, 2013).

²⁰ Al Heavens, *On the House: Phila.'s Anti-Foreclosure Program a Success Story*, PHILA. INQUIRER (July 3, 2011, 3:01 AM), http://www.philly.com/philly/columnists/al_heavens/20110703_On_the_House__Phila_s_anti-foreclosure_program_a_success_story.html.

I. WHAT IS MEDIATION?

Mediation is defined as “a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.”²¹ Mediation is often described under the umbrella of “alternative dispute resolution,” otherwise known as, “ADR.” A mediator’s role is important to the result that mediation produces. As a result, mediation can be directive, evaluative, facilitative, or relational/psychosocial.²² At a minimum, mediation is a vehicle for the parties subject to the mediation to engage in a constructive dialogue where one party states a position on an issue and the adverse party responds accordingly. The mediator “supervises the exchange of information and negotiations by helping the parties to re-define their respective issues and positions and bargain realistically.”²³ Mediation proceedings are kept highly confidential. In fact, Rule 17-109 of the Maryland Rules of Alternative Dispute Resolution states, “[A] mediator and any person present or otherwise participating in the mediation at the request of the mediator shall maintain the confidentiality of all mediation communications and may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding.”²⁴

Mediation has been touted as a superior alternative to litigation.²⁵ Backlogged courts and the high costs of going to trial are often large incentives for parties to settle their disputes out of court.²⁶ Mediators may also candidly describe to parties the hurdles they might face if a case is brought to trial. A trial-lawyer turned professor gave this description of a mediation experience: “[O]ur experienced mediator

²¹ BLACK’S LAW DICTIONARY 1003 (8th ed. 2004).

²² Josefina M. Rendón, *Under the Justice Radar?: Prejudice in Mediation and Settlement Negotiations*, 30 T. MARSHALL L. REV. 347, 350 (2005) (stating that directive occurs “where the neutral steers the parties towards his/her idea of what is appropriate for the parties;” 2) evaluative—“where the neutral assesses the parties’ legal arguments and chances in court;” 3) facilitative—“where the mediator merely aids the parties in their negotiations without imposing his/her own ideas or evaluating the parties’ case;” 4) relational or psychosocial—“focuses on the parties’ relationship rather than on achieving settlement”). *Id.*

²³ Cynthia R. Mabry, *African Americans “Are Not Carbon Copies” of White Americans – The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. L. ON DISP. RESOL. 405, 410 (1998).

²⁴ MD. R. 17-109(a).

²⁵ Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359–63 (1985).

²⁶ *Id.*

gave both sides a serious reality check. In meticulous fashion, he identified evidentiary and other obstacles we would have to overcome at trial.”²⁷ In the family law context, mediation disputes are resolved in far less time than litigation.²⁸ Often, the time it takes to settle a dispute via mediation is between three and twenty-five hours, whereas “litigants may wait six to twenty-four months just to get a trial date.”²⁹

The practice of mediation dates back to 1800 B.C. when the Mari Kingdom, in what is today known as Syria, resolved disputes with other kingdoms.³⁰ In America, ADR’s early roots can be found in both social and government contexts. Local churches played mediator-like roles, encouraging disputants to resolve conflict through a mutual agreement.³¹ The negotiating and coalition building at the Constitutional Convention has also been recognized as an ADR triumph.³² From early American History to present day, ADR, and mediation in particular, have grown in acceptance.³³ A layperson might be most familiar with mediation in the family law context where it is often employed to settle family disputes,³⁴ but recently, many states have adopted mediation as a tool in combating the foreclosure crisis.

II. MARYLAND’S FORECLOSURE MEDIATION PROGRAM

Before Maryland’s foreclosure mediation bill was passed, Governor Martin O’Malley testified before the state legislature’s House Environmental Matters Committee.³⁵ There, he touted the benefits of the proposed bill.³⁶ The Governor laid out four of its major components. First, it “requires servicers to provide critical information about timelines and tools available to borrowers that can save their

²⁷ Michael Goldsmith, *Confessions of A Litigator: The Surprising Benefits of Mediation*, UTAH B.J., May/June 2009, at 11.

²⁸ Mabry, *supra* note 23, at 413.

²⁹ *Id.*

³⁰ JEROME T. BARRETT WITH JOSEPH P. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION xxv (2004).

³¹ *Id.* at 42–43.

³² *Id.* at 47–48.

³³ *Id.* at 266–68.

³⁴ Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1363–64 (1985).

³⁵ Governor Martin O’Malley, Speech before the Md. House Env’tl. Matters Comm. (Feb. 16, 2010), available at <http://www.governor.maryland.gov/speeches/100216a.asp>.

³⁶ *Id.*

homes.”³⁷ Second, the bill prevents servicers from commencing a foreclosure action “until the servicer can file an affidavit that they have offered or tried to offer the borrower any . . . loan modification and loss mitigation options . . . available.”³⁸ Third, borrowers “must have the right to mediation before a foreclosure sale can take place.”³⁹ Finally, servicers are required to pay a foreclosure-filing fee to “help fund housing counselors and defray judicial costs.”⁴⁰

Under Maryland’s law, when a lender sends the homeowner a Notice of Intent to Foreclose, it is also required to include a number of additional documents including a loss mitigation application for programs applicable to the loan.⁴¹ If a loss mitigation analysis has not yet been completed, the lender should include contact information for nonprofit and government foreclosure resources that are available to the homeowner.⁴² The lender is also required to include a preprinted envelope with the address of the attorney in charge of handling the foreclosure for the lender.⁴³ From this point, homeowners have forty-five days to respond before a foreclosure sale of the property may occur.⁴⁴ If the lender ultimately files a complaint with the court to foreclose, the lender must include, among other things, a final loss mitigation affidavit and a \$300 dollar filing fee.⁴⁵ Homeowners have only fifteen days after receiving the lender’s final loss mitigation affidavit to request foreclosure mediation affirmatively. A fifty-dollar waiveable filing fee must accompany the request.⁴⁶ Once a request for foreclosure mediation has been filed, the property cannot go to sale until at least fifteen days after the mediation has been held.⁴⁷ It is important to note that the lender or servicer can move to strike the homeowner’s request for foreclosure mediation within fifteen days of receiving the request.⁴⁸

After receiving the homeowner’s request for foreclosure mediation, the court has five days to transmit the request to the Office of

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ H.D. 472, 2010 Leg., 427th Sess. (Md. 2010).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*; MD. R. CIV. P. CIR. CT. 2-322(e).

Administrative Hearings.⁴⁹ Within sixty days after transmittal, the parties must conduct a foreclosure mediation.⁵⁰ The homeowner is required to be present at the meeting and may be accompanied by a lawyer or housing counselor.⁵¹ The lender or a representative must also be present along with a neutral mediator.⁵² The parties have sixty days to reach an agreement, and if the time expires with no extension by the Office of Administrative Hearings, the foreclosure attorney may schedule the foreclosure sale.⁵³ In October 2011, the Office of the Commissioner of Financial Regulation set forth new regulations. These rules revised the notices provided to homeowners in risk of foreclosure, making them clearer.⁵⁴ In a sample Notice of Intent to Foreclose provided on the Maryland Department of Labor Licensing and Regulation website, the language at the top of the document reads in large, underlined letters, “There may be options to avoid foreclosure, but you must act immediately.”⁵⁵

Although the notice clearly conveys the urgency of taking action quickly, it does not and perhaps is not the best vehicle to convey to homeowners why mediation is worth their time and money. In predominately minority communities, many lenders engaged in predatory lending and led unsuspecting homeowners down the path to foreclosure.⁵⁶ It is not inconceivable to imagine the questions a homeowner might have upon receiving a Notice of Intent to Foreclose. On whose terms will the mediation agreement rest? Where predatory lending exists, will a lawsuit better vindicate a homeowner’s rights? Is the neutral mediator really neutral? What exactly is mediation? To the state’s credit, included in the Notice of Intent to Foreclose must be contact information for free housing counseling services as well as the web address for the state’s foreclosure resource.⁵⁷

⁴⁹ H.D. 472, 2010 Leg., 427th Sess. (Md. 2010).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ MD. CODE REGS. § 9.3.12 (2011).

⁵⁵ MD. DEP’T OF LAB., LICENSING & REGULATION, APPENDIX A: NOTICE OF INTENT TO FORECLOSE 1 (2011), available at <http://www.dllr.state.md.us/finance/finregforms.shtml>.

⁵⁶ See Editorial, *Fair Lending and Accountability*, N.Y. TIMES, Sept. 7, 2011, at A28.

⁵⁷ *Id.*

III. MEDIATION PROGRAMS ACROSS THE COUNTRY – A COMPARATIVE LOOK

As a result of the housing crisis, many cities and states have enacted foreclosure mediation laws or implemented foreclosure mediation proceedings.⁵⁸ Though the goal, stemming the tide of foreclosures and keeping financially troubled homeowners in their homes, is common among many states with foreclosure mediation laws, the methods of implementation vary from state to state. The Center for American Progress, a left-leaning Washington-based think tank conducted a review of state-based foreclosure mediation programs in June 2010 and noted the differences in mediation program structure. Some foreclosure mediation programs are judicial in nature; thus, the lender initiates a suit in court to foreclose on the property.⁵⁹ Some states have non-judicial programs where the court system is not involved.⁶⁰ Other states require homeowners to “opt-in” to the foreclosure mediation, meaning the homeowner must affirmatively request the mediation service, whereas in other states, the process is automatic, requiring mediation whenever a foreclosure is initiated through a foreclosure sale or through the filing of a judicial foreclosure.⁶¹ Many of these automatic foreclosure programs occur in judicial foreclosure states and see much higher rates of participation than opt-in states.

Philadelphia, Pennsylvania’s Residential Mortgage Foreclosure Diversion Pilot Program is often characterized as the gold standard of mediation programs.⁶² Philadelphia’s program was initiated in April 2008 and is mandatory.⁶³ Before a foreclosure sale can proceed, the parties must participate in a conciliation conference.⁶⁴ Philadelphia’s program provides homeowners with a hotline where they can speak directly with a housing counselor prior to meeting with the lender’s representative during mediation. Philadelphia also does not automatically

⁵⁸ The principal difference between the two is that some programs are legislatively created while others are judicially created.

⁵⁹ ALON COHEN & ANDREW JAKABOVICS, *NOW WE’RE TALKING: A LOOK AT CURRENT STATE-BASED FORECLOSURE MEDIATION PROGRAMS AND HOW TO BRING THEM TO SCALE 3* (2010).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 21; Peter S. Goodman, *Philadelphia Gives Homeowners a Way to Stay Put*, N.Y. TIMES, Nov. 17, 2009 at A1, http://www.nytimes.com/2009/11/18/business/18philly.html?pagewanted=all&_r=0.

⁶³ Heavens, *supra* note 20.

⁶⁴ HEATHER SCHEIWE KULP, *FORECLOSURE MEDIATION AND MITIGATION PROGRAM MODELS 33* (2011).

assign the parties a mediator. Instead, the parties informally meet with a retired judge, a *Judge Pro Temp*. If the dispute cannot be resolved with a conciliation conference, the court stands at the ready to appoint a mediator to commence a private meeting. In December 2008, more than six months after the city's mediation program was initiated, positive results were evident. Of the 2,331 homeowners who participated in a conciliation conference, 2,270 avoided foreclosure.⁶⁵ Of that total, 603 homeowners resolved with their lenders, 244 averted bankruptcy, and 1,423 postponed mediation to talk with a housing counselor.⁶⁶ As of December 16, 2010, unofficial court reports indicate that 13,000 conferences have taken place, resulting in borrowers maintaining 2,500 and 3,000 homes outright.⁶⁷

Not all foreclosure mediation programs have been as successful as Philadelphia's program. In December 2011, the Florida Supreme Court issued an order formally terminating its state-managed mediation foreclosure program.⁶⁸ Before its program was shuttered, Florida, like Philadelphia, used the automatic foreclosure mediation method. This method virtually requires no additional homeowner action because the state schedules the first mediation session once the mortgage lender initiates foreclosure proceedings.⁶⁹ Prior to a Florida Supreme Court order in 2009 aimed at developing a coordinated state response, Florida's twenty judicial circuits constructed their own distinct approaches to the foreclosure crisis.⁷⁰ Some counties, like that of Miami-Dade, implemented mediation programs where the success rate was as high as seventy-four percent.⁷¹

In an effort to streamline the success of Florida's foreclosure mediation program, former Chief Justice of Florida's highest court, Peggy Quince, adopted a model whereby, "[A]ll foreclosure cases in state courts that involve residential homestead property will be referred to mediation, unless the plaintiff and borrower agree otherwise or unless pre-suit mediation that substantially complies . . . with the managed mediation program requirements has been conducted."⁷² Less

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *In re Managed Mediation Program for Residential Mortgage Foreclosure Cases*, No. AOSC11-44 (Fla. Dec. 19, 2011).

⁶⁹ COHEN & JAKABOVICS, *supra* note 59, at 3, 5.

⁷⁰ Sharon Press, *Mortgages Foreclosure Mediation in Florida - Implementation Challenges for an Institutionalized Program*, 11 NEV. L.J. 306, 308-14 (2011).

⁷¹ COHEN & JAKABOVICS, *supra* note 59, at 17.

⁷² Press, *supra* note 70, at 334.

than two years later, in 2011, an order from the current Chief Justice of the Florida Supreme Court, Charles Canady, ended the program. His order stated, “The Court has reviewed the reports on the program and determined that it cannot justify continuation of the program. Accordingly, upon issuance of this administrative order, the statewide managed mediation program is terminated.”⁷³

Unlike Pennsylvania, and formerly Florida, Nevada is an “opt-in” state.⁷⁴ Its mediation program went into effect in July 2009, and by August of that year, only ten mediations had been scheduled despite having more than 7,500 foreclosure filings per month.⁷⁵ The state’s foreclosure rate is still among the highest in the nation, but there have been substantial improvements in the law and its participation rate. By the end of April 2010, after increasing the number of mediators, requests for mediation totaled nearly 8,000.⁷⁶ Figures obtained by the Reno-Gazette Journal, one of Nevada’s leading newspapers, show that from July 1, 2009 to March 31, 2011, more than 15,000 distressed borrowers requested mediation.⁷⁷ Of that number, more than 10,000 borrowers completed mediations.⁷⁸ Fifty-two percent of completed mediations resulted in no foreclosure and thirty-six percent resulted in homeowners staying in their homes.⁷⁹

A number of states lack foreclosure mediation programs altogether. Utah, Idaho,⁸⁰ and Minnesota all currently do not have a foreclosure program on the books, although there have been legislative efforts to enact mediation programs.⁸¹ Minnesota Governor Tim Pawlenty vetoed a 2009 bill, the Homestead Mediation Lender Act, which would have expanded the state’s Farmer Lender mediation pro-

⁷³ *In re Managed Mediation Program for Residential Mortgage Foreclosure Cases*, No. AOSC11-44 (Fla. Dec. 19, 2011).

⁷⁴ COHEN & JAKABOVICS, *supra* note 59, at 3.

⁷⁵ *Id.* at 10.

⁷⁶ *Id.*

⁷⁷ Jason Hidalgo, *Nevada’s Foreclosure Mediation Program Cites Confidentiality in Refusal to Release Records*, RENO GAZETTE J., July 19, 2011, at Business Section.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Idaho’s bill does not require mediation, but it does require the lender to provide the mortgagor with loan modification documents. *See* H.B. 331, 2011 Leg., 61st Sess. (Idaho 2011).

⁸¹ *See supra* note 13 for a list of foreclosure mediation programs by state that fails to list Utah, Idaho, or Minnesota; *but see* S.B. 80, 2011 Gen. Sess. (Utah 2011) *available at* <http://www.ncsl.org/issues-research/banking/foreclosures-2011-legislation.aspx>, for Utah’s attempt to pass foreclosure mediation legislation; *see also infra* note 84 and accompanying text, for Minnesota’s attempt.

gram.⁸² Governor Pawlenty took issue with a number of the bill's provisions, including the \$125 foreclosure fee, stating the program should be able to support itself.⁸³ The Housing crisis has hit minority communities in St. Paul particularly hard. A recent report by a Minneapolis faith-based group, Isaiah, found that "[a]lmost half of the city's vacant housing is located in a minority neighborhood, although minority neighborhoods contain just 20% of the housing units in the city."⁸⁴

IV. ANALYSIS

A. Mediation has Inherent Structural Flaws that Negatively Affect Minority Communities.

Mediation, despite all of its benefits, is not without its shortcomings. One legal commentator noted that the African American community's "historic experiences" of racial discrimination, slavery, and Jim Crow laws, which were "sanctioned and protected by law," have led to a distrust of legal and judicial systems.⁸⁵ Moreover, the commentator said, African-Americans are "more likely to consult 'close family, friends and spiritual leaders' to discuss 'core problems' first."⁸⁶ It is not inconceivable that the lingering distrust may only be amplified when the adverse party in mediation is one that seeks to take something away from the other party. This is especially true in the context of foreclosures that are the result of predatory lending.

With distrust as the backdrop, mediation's inherent flaws are exacerbated. Some scholars have noted that mediation allows weaker parties to be manipulated by "not-so-neutral" mediators.⁸⁷ These mediators may have objectives that are at odds with those of the parties subject to mediation. For instance, some mediators have "the settle all

⁸² Betsy Sundquist, *Legislative Efforts to Hold Back Foreclosure Tide in Minnesota Died in Committee*, SAINT PAUL LEGAL LEDGER CAPITOL REPORT, May 28, 2009; See also H.J. Cummins, *Foreclosure Mediation, Relief for the Little Guy*, the STAR TRIBUNE, March 23, 2011 available at <http://www.startribune.com/local/34818349.html?page=all&prepage=2&c=y#continue>.

⁸³ Sundquist, *supra* note 82.

⁸⁴ Gita Sitaramiah, *Housing Crisis Effect on Minorities Decried*, ST. PAUL PIONEER PRESS, Oct. 10, 2011, at Business Section (citing U.S. data).

⁸⁵ Janice Tudy-Jackson, *Non-Traditional Approaches to ADR Processes that Engage African-American Communities and African-American ADR Professionals*, 39 CAP. U. L. REV. 921, 932-33 (2011).

⁸⁶ *Id.* at 933 (quoting FREDDY A. PANIAGUA, *ASSESSING AND TREATING CULTURALLY DIVERSE CLIENTS: A PRACTICAL GUIDE* (1994)).

⁸⁷ Rendón, *supra* note 22, at 353.

costs mentality while others may have their own, well-intentioned, but misguided idea of what is appropriate, fair or likely to happen at trial.”⁸⁸ Additionally, the confidential nature of mediation has been criticized as “hiding malfeasance.”⁸⁹ In fact, the *Reno Gazette-Journal* recently expressed frustration at the state’s strict mediation confidentiality laws: “The program cited confidentiality in denying requests for six other records. Another six were not provided because the information was not available.”⁹⁰ The article further commented, “[T]he records that were not provided strike at the heart of measuring the programs’ success.”⁹¹

In a widely cited 1985 article published in the *Wisconsin Law Review*, Richard Delgado raised early concerns about ADR and its potential for fostering class-based prejudice and abuse.⁹² There, he said that the informal nature of ADR renders it susceptible to an exploitation of groups that are already “particularly vulnerable to prejudice.”⁹³ Delgado notes that several theories explain racial or ethnic prejudice.⁹⁴ Among them are social-psychological theories of prejudice.⁹⁵ These theories explain racial prejudice as behavior that is learned through groups and generally emerges in early childhood.⁹⁶ Delgado argues that prejudiced people are least likely to act-out or express their feelings if the feelings in question, “deviate from what is expected.”⁹⁷ When that deviation from the norm occurs, prejudiced people will change or suppress their behavior.⁹⁸ It is the formal structure of adjudication that serves as a check on the behavior of prejudiced individuals.⁹⁹ Conversely, “ADR increases the risk of prejudice toward vulnerable disputants . . . [T]he rules and structure of formal justice tend to suppress bias, whereas informality tends to increase it.”¹⁰⁰ Delgado notes that prejudice is most likely to take root “when a person of low status and power confronts a person or institution of high status and

⁸⁸ *Id.* at 354.

⁸⁹ *Id.*

⁹⁰ Hidalgo, *supra* note 77.

⁹¹ *Id.*

⁹² Delgado et al., *supra* note 34, at 1361.

⁹³ *Id.*

⁹⁴ *Id.* at 1375.

⁹⁵ *Id.* at 1380.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1387.

⁹⁸ Delgado et al., *supra* note 34, at 1387.

⁹⁹ *Id.* at 1388.

¹⁰⁰ *Id.* at 1400.

power.”¹⁰¹ The “minority” party is also “less likely to press his or her claim energetically” and this effect is compounded when the mediator is a member of the superior group.¹⁰² Proponents of ADR argue that its informality is its virtue because parties that might be threatened by formal court procedures might be more willing to participate in an informal forum.¹⁰³

B. Formal Court Litigation is a Better Vehicle to Vindicate the Rights of Minority Communities that Have Fallen Victim to Predatory Lending.

Many low-income neighborhoods are breeding grounds for risky, high interest lending.¹⁰⁴ Low-income communities are often the targets of “gotcha” gimmicks, and often, these tactics go undetected until they grow so egregious and out-of-control that nothing short of judicial intervention will resolve the problem. The practice of predatory lending shares a similar narrative. The United States Department of Housing and Urban Development describes predatory lending as practices engaged by appraisers, mortgage brokers, and home improvement contractors who among other things, “encourage borrowers to lie about their incomes . . . in order to get a loan,” “knowingly lend more money than a borrower can afford to pay,” and “charge more high interest rates to borrowers based on their race or national origin and not on their credit history.”¹⁰⁵

Studies have shown that risky, subprime loans are indeed more prevalent in minority communities.¹⁰⁶ In the midst of the foreclosure crisis, the *New York Times* ran an article regarding a recently published study that indicated home buyers in predominately minority neighborhoods in New York were more likely to receive a subprime loan.¹⁰⁷ New York University’s Furman Center for Real Estate and Urban Policy conducted the analysis and found that in Jamaica Queens, forty-six

¹⁰¹ *Id.* at 1402.

¹⁰² *Id.* at 1402–03.

¹⁰³ *Id.* at 1366.

¹⁰⁴ See *Menendez Hails DOJ \$335M Countrywide Settlement - Makes Them Pay For Preying On Minority Homebuyers*, TARGETED NEWS SERV. LLC, Dec. 22, 2011.

¹⁰⁵ *Don’t be a Victim of Loan Fraud*, U.S. DEP’T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/buying/loanfraud (last visited Jan. 25, 2013).

¹⁰⁶ Manny Fernandez, *Study Finds Disparities in Mortgages by Race*, N.Y. TIMES, Oct. 15, 2007, at A20.

¹⁰⁷ *Id.*

percent of mortgages were issued by subprime lenders, whereas none of the predominately white neighborhoods had a rate more than the city's average of 19.8%.¹⁰⁸ A similar study in 2006 by the Center for Responsible Lending showed that African-American borrowers with prepayment penalties were six to thirty-four percent more likely to receive a higher-rate loan than white borrowers.¹⁰⁹ Latino borrowers were twenty-nine percent to 142% more likely to receive a higher-rate loan than their white counterparts.¹¹⁰

Litigation has been one vehicle for parties to hold predatory lenders accountable. Beginning in 2007, the NAACP alone sued several different financial institutions alleging that the institutions violated the Fair Housing and Equal Credit Opportunity Acts for their lending practices.¹¹¹ In general, lawsuits do not require the high degree of confidentiality that mediation does, so plaintiffs are in a better position to hold the feet of the financial institutions to the fire. Legal commentators have also recognized that the legal system has a framework of checks and rules to insure that biases and prejudice don't affect the rights of parties.¹¹² Delgado's "Fairness and Formality: Minimizing the Risk in Alternative Dispute Resolution," went into great depth regarding court mechanisms in place that "check and contain prejudice."¹¹³ First, he noted, judges serve long terms and often have repetitive caseloads, diminishing the likelihood that the judge will rule based solely on the parties to the litigation.¹¹⁴ Second, lawyers can also check the biases of jurors through voir dire and peremptory challenges,

¹⁰⁸ *Id.*

¹⁰⁹ DEBBIE GRUENSTEIN BOCIAN, KEITH S. ERNST & WEI LI, UNFAIR LENDING: THE EFFECT OF RACE, AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES, CTR. FOR RESPONSIBLE LENDING 3 (2006). It is important to note that the specific population group the study references is African-American borrowers with "pre-payment penalties" (penalties the homeowner will incur if the mortgage is paid off in its entirety before a set period). A "higher-rate loan" refers to a loan with a significantly high APR rate. *Id.*

¹¹⁰ *Id.* at 4. These percentages varied depending on the type of interest rate and whether the loan contained a pre-payment penalty.

¹¹¹ E. Scott Reckard, *NAACP Drops Lender Lawsuit; It had Accused Wells Fargo of Steering Black Borrowers Into More Costly Mortgages*, L.A. TIMES, April 10, 2010 at B2. In 2010, the NAACP dropped its lawsuit against Wells Fargo where it alleged the bank of directing African Americans to subprime mortgages and providing loans with more attractive rates to white borrowers. Wells Fargo and the NAACP agreed move forward as collaborative partners. NAACP will now review Wells Fargo's lending practices. *Id.*

¹¹² Delgado et al., *supra* note 34, at 1370–71.

¹¹³ *Id.* at 1361.

¹¹⁴ *Id.* at 1368.

although the latter has been subject to abuse.¹¹⁵ Third, rules of civil procedure and evidence govern formal adjudications and can also check prejudice by sanctioning parties for misconduct and facilitating the introduction of relevant evidence.¹¹⁶

The available remedies in litigation as compared to mediation also give force to litigation's superiority as a vehicle to vindicate rights. During mediation, the best-case scenario for many homeowners is to stay in their homes with payments that they can afford through a loan modification. In litigation, the injured party might receive a monetary award, and the party at fault might be deterred from future conduct from the sheer negative publicity of trial. Indeed, many of the banks that contributed to the housing crisis have been the targets of negative press.¹¹⁷

In President Obama's January 2012 State of the Union Address, he announced the formation of a new Department of Justice unit that would investigate and potentially prosecute the banks that caused the collapse of the housing market.¹¹⁸ In 2009, Baltimore City sued Wells Fargo bank for the bank's unfair lending practices.¹¹⁹ The city's suit marked the first time a municipality sued a financial institution for its discriminatory lending practices since the foreclosure crisis began in 2007.¹²⁰ The city suffered a number of legal setbacks when its complaint was dismissed several times by a federal district court judge.¹²¹ Finally, in July 2012, Wells Fargo settled the case with the City by agreeing to pay \$175 million, the second-largest fair-lending settlement in the history of the Justice Department.¹²²

¹¹⁵ *Id.* at 1369; *see also* *Batson v. Kentucky*, 476 U.S. 79 (1986) for a history of racial discrimination in peremptory challenges.

¹¹⁶ Delgado et al., *supra* note 34, at 1370–75.

¹¹⁷ *See The Giant Pool of Money*, NAT'L PUB. RADIO (May 9, 2008), <http://www.thisamericanlife.org/radio-archives/episode/355/transcript> (describing NINA loans, also known as “No Income, No Asset” loans).

¹¹⁸ President Barack Obama, 2012 State of the Union Address (Jan. 25, 2012), *available at* <http://www.whitehouse.gov/photos-and-video/video/2012/01/25/2012-state-union-address-enhanced-version#transcript>.

¹¹⁹ Tricia Bishop, *City Says Bank Was Predatory*, BALT. SUN, Jan. 29, 2009 at 3A.

¹²⁰ Robbie Whelan, *Baltimore City Revises Suit Against Wells Fargo*, BALT. SUN, Apr. 7, 2010, http://articles.baltimoresun.com/2010-04-07/news/bal-wells07_1_wells-fargo-andrew-l-sandler-city-solicitor-george-nilson.

¹²¹ *Id.*

¹²² Editorial, *Wells Fargo Settlement: A predatory lender pays up*, BALT. SUN, July 15, 2012, http://articles.baltimoresun.com/2012-07-15/news/bs-ed-wells-fargo-20120715_1_subprime-mortgages-minority-borrowers-mortgage-brokers.

*C. Maryland Should Re-Evaluate its Foreclosure Mediation
Law to Better Serve the Needs of the State's
Most Vulnerable Homeowners.*

On September 22, 2011, Governor O'Malley established the Maryland Foreclosure Task Force.¹²³ The task force was charged with accomplishing three goals.¹²⁴ The first was to identify key foreclosure trends and the impact of foreclosures in the state.¹²⁵ The second was to identify strategies to "enhance loss mitigation outcomes for homeowners."¹²⁶ The task force's final charge was to identify effective strategies to strengthen neighborhoods in the state that have been affected by foreclosure.¹²⁷ The task force released a report detailing its recommendations on January 11, 2012.¹²⁸ Because the task force's mandate was broad, its recommendations were similarly scaled. However, the report's proposals to enhance loss mitigation are particularly instructive here.

Among the chief obstacles to loss mitigation cited in the report were timing and income.¹²⁹ It is important for homeowners to seek housing counseling early, as there are often tight deadlines and narrow windows to receive assistance.¹³⁰ Many homeowners facing foreclosure have fallen on hard times and may be unemployed, making it more difficult for the homeowner facing foreclosure to satisfy his or her arrears.¹³¹ In the midst of the task force's research, Maryland's Office of the Commissioner of Financial Regulation instituted emergency foreclosure regulations aimed at fixing some of the aforementioned problems. The emergency changes revised the structure and language of foreclosure documents, making them much easier for the average homeowner to comprehend.¹³² The task force's recommendations to enhance loss mitigation included a pre-file mediation proposal that would introduce mediation as an option to both the homeowner and the mortgage service prior to the filing of a foreclosure action in Cir-

¹²³ See MD. FORECLOSURE TASK FORCE, *supra* note 3, at 3.

¹²⁴ *Id.* at 3-4.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ MD. FORECLOSURE TASK FORCE, *supra* note 3, at 19-20. Also cited as obstacles to loss mitigation were: vacancy, assistance, value, and post-foreclosure deficiencies. *Id.*

¹³⁰ H.D. 472, 2010 Leg., 427th Sess. (Md. 2010).

¹³¹ MD. FORECLOSURE TASK FORCE, *supra* note 3, at 19.

¹³² See MD. CODE REGS. § 9.3.12 (2011).

cuit Court.¹³³ The report also recommended extended forbearance for homeowners who have lost their jobs.¹³⁴ Additionally, the task force suggested that homeowners facing foreclosure have a “single point of contact” with the lender to prevent the frustration that homeowners often face when they are passed around from one representative to the next and information is misplaced.¹³⁵ The recommendations listed in the report represent leaps toward the finish line of slowing foreclosures in the state; however, Maryland should strongly consider moving from an opt-in mediation system to an automatic mediation program.

1. The opt-in requirement fails to capture the most needy at-risk homeowners.

Although Maryland’s foreclosure mediation program is a step in the right direction, the “opt-in” requirement fails to capture a significant number of low-income homeowners who are least likely to take advantage of the mediation process. Even when this cohort requests mediation, confusing paperwork, legalese, and tight deadlines often besiege them, limiting the likelihood of a successful settlement. Maryland should amend the law to replace the “opt-in” provision with an “opt-out” provision or the state should institute automatic mediation where the first mediation session is scheduled automatically once the lender institutes a foreclosure action. This change will automatically swallow-up all homeowners faced with foreclosure and reach a far greater population than the current provision.

Nearly one year ago, the *Boston Globe* ran an editorial touting the benefits of automatic mediation as support for the mayor’s effort to make the city’s process automatic.¹³⁶ The *Globe* rightfully pointed out that automatic mediation helps build “transparency and communication into the foreclosure process.”¹³⁷ The Center for American Progress (“CAP”) is also a proponent of automatic mediation.¹³⁸ CAP

¹³³ The General Assembly adopted this proposal and it went into effect in October 2012. See MD. FORECLOSURE TASK FORCE, *supra* note 3, at 5. See also DEP’T OF LEGIS. SERV., FISCAL AND POLICY NOTE, H.B. 1374, 2012 Session (Md. 2012).

¹³⁴ MD. FORECLOSURE TASK FORCE, *supra* note 3, at 5.

¹³⁵ *Id.* at 6.

¹³⁶ Editorial, BOS. GLOBE, Jan. 11, 2011, http://www.boston.com/boston_globe/editorial_opinion/editorials/articles/2011/01/11/in_foreclosure_cases_mediation_should_be_automatic_option/.

¹³⁷ *Id.*

¹³⁸ See Alon Cohen, *Talking It Up*, CTR. FOR AM. PROGRESS (Jan. 31, 2011), http://www.americanprogress.org/issues/2011/01/talking_it_up.html.

goes further and recommends that the federal government also institute automatic mediation through its mortgage entities.¹³⁹

2. Strengthen external laws – whistleblower protection as a tool in the foreclosure mitigation tool belt

At first blush, it is hard to imagine how whistleblower protection laws might relate to a strengthening of loss mitigation strategies, but the seemingly irreparable state of this country's housing market has left little room for conventional parallels. One group, Progressive States Action ("PSA"), describes its mission as one that "aims to transform the political landscape by sparking progressive actions at the state level."¹⁴⁰ PSA included as part of its foreclosure and predatory lending reform platform, a recommendation to legislatures to enact laws that would "protect employees of financial institutions from retaliation when they reveal criminal or unethical conduct by their employers"¹⁴¹ This relatively straightforward idea has serious potential in Maryland, where a recent Court of Appeals case has ripened the field for this idea to take root.

In *Lawson v. Bowie State University*,¹⁴² the Maryland Court of Appeals reinstated an employee after concluding that he was wrongfully terminated.¹⁴³ Lawson, a nearly twenty-year veteran of the Bowie State University Police Department superseded his department's chain of command when he reported his fellow officers' misconduct to the University's Vice President of Student Affairs.¹⁴⁴ The Vice-President notified Lawson's Department Chief who then fired Lawson for insubordination.¹⁴⁵ Lawson challenged his firing before an administrative law judge and argued that he was entitled to whistleblower protection because the letter he wrote, which revealed his colleagues' behavior, constituted a "protected disclosure."¹⁴⁶ The judge ruled that the letter could not be considered a "protected disclosure" because it was part and parcel of Lawson's personal mission to improve his de-

¹³⁹ *Id.*

¹⁴⁰ *About Progressive States Action*, PROGRESSIVE STATES ACTION <http://www.progressivestatesaction.org/psa> (last visited Jan. 25, 2013).

¹⁴¹ *Foreclosure and Predatory Lending Reform*, PROGRESSIVE STATES NETWORK, <http://progressivestates.org/node/24191#2> (last visited Jan. 25, 2013).

¹⁴² 26 A.3d 866 (Md. 2011).

¹⁴³ *Id.* at 877.

¹⁴⁴ *Id.* at 868.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

partment rather than the purpose of notifying a higher-up of a violation.¹⁴⁷ The Court of Appeals concluded that the administrative judge applied the wrong standard by zeroing in on Lawson's motivations for disclosure.¹⁴⁸ The Court stated, ". . . [B]oth the WPA and Maryland's Whistleblower Protection statute require only that an employee have a reasonable belief that he is reporting a violation, not that the employee possess a purely altruistic motive for the disclosure."¹⁴⁹ The Court's ruling and the reasoning supporting it have broad application to loss mitigation strategies.¹⁵⁰

If a bank were state owned or otherwise state operated,¹⁵¹ the Court's interpretation of Maryland's whistleblower protection law would serve to counteract predatory or risky lending practices that were prevalent during the subprime boom.¹⁵² In theory, using the Court's interpretation of the federal Whistleblower Protect Act and Maryland's Whistleblower Protection statute, an employee of a state financial institution would have recourse to challenge his or her firing if the firing was believed to have been triggered by the reporting or objecting to unfair, abusive or deceptive practices. This internal check coupled with oversight of financial institutions might serve as a powerful tool to prevent unsuspecting homeowners from being entangled in risky loans.

CONCLUSION

Home foreclosures existed before the housing crisis, and, by all accounts, they will persist. How often they will occur and where they will be concentrated, one can only predict. However, many states and municipalities seem more prepared today to deal with the uncertainty of the economic future than before the housing bubble burst. Mediation has become a critical tool for states as they try to soften the blow

¹⁴⁷ *Id.* at 869.

¹⁴⁸ 26 A.3d at 877.

¹⁴⁹ *Id.* at 876.

¹⁵⁰ The Author understands that Bowie State University is indeed a state university and that the officers employed by the university are therefore state employees and subject to Maryland law. The proposition set forth in this Comment reflects a general parallel and suggests a broad application only.

¹⁵¹ Some states are considering forming their own banks. At least seventeen states have proposed legislation to create a state bank in some form. *See* Alexander Eichler, *More States Pushing for State-Owned Banks in the Wake of Financial Crisis*, HUFFINGTON POST (Mar. 7, 2012), http://www.huffingtonpost.com/2012/03/07/state-owned-banks_n_1327259.html.

¹⁵² *See The Giant Pool of Money*, *supra* note 117.

of the housing crisis. While mediation has proven successful in cities like Philadelphia and has strong prospects for further success in Maryland, it is important to be cautious of the ways in which mediation might prove to be less than ideal. Inequities in bargaining power and the informality of ADR are both downsides of mediation that might hurt more than they help minority communities. Litigation can be costly and lengthy, but it has the potential to better vindicate the rights of homeowners who have been targeted through unfair lending practices. If foreclosure mediation is here to stay, the state can strengthen loss mitigation by switching the current mediation program from opt-in to automatic mediation. Additionally, Maryland legislators and housing advocates should consider the broad application of whistleblower protection laws to protect employees of financial institutions who wish to expose unfair lending practices.