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MARYLAND BILL PROVIDES HOMEOWNERS WITH FORECLOSURE MEDIATION  
OPTION

By  
Jennifer Adams \*

In response to the growing foreclosure crisis among homeowners, the Maryland General Assembly passed a new bill mandating mediation in foreclosure proceedings.<sup>1</sup> Effective July 1, 2010, the bill seeks to encourage greater interaction between lenders and homeowners in an effort to find alternatives to foreclosure.<sup>2</sup> Struggling homeowners in Maryland now have the opportunity to participate in mediation prior to the loss of their homes.<sup>3</sup>

In the words of Maryland Governor Martin O'Malley, the bill attempts to “put [homeowners] on a more equal footing with mortgage companies that too often can't be bothered to pick up the phone before beginning a foreclosure proceeding.”<sup>4</sup> While participation in foreclosure mediation does not ultimately guarantee that the pending foreclosure will stop, the bill does guarantee that those who are eligible for alternative solutions will have the opportunity to seek them.<sup>5</sup>

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<sup>1</sup> H.B. 472, 2010 Leg., 427<sup>th</sup> Sess. (Md. 2010).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Arnold S. Platou, *New Law Offers Mediation in Md. Foreclosure Cases*, THE HERALD-MAIL (August 7, 2010), available at [http://articles.herald-mail.com/2010-08-07/news/25197902\\_1\\_foreclosure-mediation-foreclosure-cases-information-about-modification-programs](http://articles.herald-mail.com/2010-08-07/news/25197902_1_foreclosure-mediation-foreclosure-cases-information-about-modification-programs) (last visited April 1, 2011).

<sup>5</sup> *Id.*

## I. FORECLOSURE REQUIREMENTS

### A. *Lender's Duties Under the New Bill*

At least forty-five days prior to filing a foreclosure action in court, a lender must provide a defaulting homeowner with a Notice of Intent to Foreclose.<sup>6</sup> Under the new bill, anytime a lender sends a Notice of Intent to Foreclose, it must also send:

- (1) information and resources on how to access housing counseling services,
- (2) an explanation of the Maryland foreclosure process and timeline,
- (3) a Loss Mitigation Application, including a description of the eligibility requirements for programs offered by the lender/server,
- (4) instructions for completing and returning the application to the attorney handling the foreclosure for the lender, [and]
- (5) an envelope preprinted with the address of the person responsible for conducting the loss mitigation analysis.<sup>7</sup>

If the homeowner takes advantage of the opportunity to complete the Loss Mitigation Application, the lender must properly “evaluate the request and document their decision.”<sup>8</sup> If the lender finds that the home owner is ineligible for the loss mitigation programs, it must file a court affidavit stating this finding and

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<sup>6</sup> Maryland HOPE Initiative: Home Owners Preserving Equity, Maryland's Foreclosure Mediation Program, <http://www.mdhope.org/foreclosuremediation.aspx> (last visited April 1, 2011) [hereinafter HOPE Initiative].

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

the reasons for it.<sup>9</sup> At that point, the lender is required to send the homeowner the Loss Mitigation Affidavit along with a “Request for Mediation” form in order to file foreclosure proceedings with a Circuit Court.<sup>10</sup> The lender must also pay a \$300 foreclosure filing fee, which helps fund the new scheme.<sup>11</sup>

*B. “Responsibilities of Homeowners”<sup>12</sup>*

After receiving the required documents, the homeowner is responsible for completing and returning the Loss Mitigation Application to the lender.<sup>13</sup> If, then, the homeowner’s application is denied and he or she receives a Request for Mediation Form, the homeowner has fifteen days to complete the form and file the request for court supervised mediation.<sup>14</sup> To file a request for mediation, a homeowner must pay a \$50 fee.<sup>15</sup>

Mediation is available only for a homeowner’s primary residence.<sup>16</sup> “Commercial and other non-owner occupied properties are not eligible for foreclosure mediation.”<sup>17</sup> Moreover, as mediation occurs late in the foreclosure process, and participation does not guarantee that a homeowner will avoid foreclosure, Maryland encourages homeowners to seek alternative solutions to a financial crisis before receiving the foreclosure notice.<sup>18</sup> Maryland’s HOPE

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> HOPE Initiative, *supra* note 6.

<sup>12</sup> Maryland Department of Housing and Community Development, Maryland’s Foreclosure Mediation Law (June 30, 2010), [http://www.dhcd.maryland.gov/Website/documents/guidelines\\_Rosa\\_only.pdf](http://www.dhcd.maryland.gov/Website/documents/guidelines_Rosa_only.pdf) (last visited April 1, 2011) [hereinafter Housing and Community Development].

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Housing and Community Development, *supra* note 12.

<sup>18</sup> HOPE Initiative, *supra* note 6.

initiative provides housing counseling. HOPE encourages homeowner's to seek counseling at the first sign of financial difficulty.<sup>19</sup>

## II. FORECLOSURE MEDIATION

### A. *Before the Office of Administrative Hearings*

Regardless of which Circuit Court a homeowner files a Request for Mediation in, Maryland's Office of Administrative Hearings will handle the mediation.<sup>20</sup> Created by Maryland's Legislature in 1990, the Office of Administrative Hearings ("OAH"), consists of Administrative Law Judges ("ALJ's") who travel throughout the state to hear complaints filed against state agencies.<sup>21</sup> Each ALJ is a certified and experienced mediator.<sup>22</sup> Concerning Foreclosure Mediation, the OAH's website provides:

Once the homeowner files a mediation request with the Circuit Court and pays the \$50.00 fee, the Circuit Court will refer the request to OAH. OAH will conduct the mediation within 60 days after it receives the request from the Circuit Court. OAH will send the parties a Notice of Mediation that will inform them of the time, date and location of the mediation and all of the documents they will be required to produce no later than 20 days before the mediation.

If a borrower fails to appear for a scheduled mediation, the ALJ will send the case back to the Circuit Court and the

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<sup>19</sup> *Id.*

<sup>20</sup> Maryland Office of Administrative Hearings, Foreclosure Mediation, <http://www.oah.state.md.us/foreclosuremediation.asp> (last visited April 1, 2011).

<sup>21</sup> Arnold S. Platou, *supra* note 4.

<sup>22</sup> Maryland Office of Administrative Hearings, *supra* note 20.

foreclosure sale shall proceed. Should this occur, the borrower has 15 days from the scheduled mediation to file a motion to stay the foreclosure sale with the Circuit Court.

If the lender does not come to the mediation, the ALJ will send the case back to Circuit Court on the day of the scheduled mediation and the Circuit Court may dismiss the foreclosure action . . .

A party may request a postponement for good cause. Requests must be in writing and received at OAH no later than 5 business days before the mediation.<sup>23</sup>

The OAH has hired six new ALJ's to help deal with the expected influx of foreclosure mediation cases.<sup>24</sup> As of August 2010, all of the OAH's ALJ's began training to help them better understand their new responsibilities and the options available to lenders and home owners in foreclosure situations.<sup>25</sup>

*B. The Mediator's Role*

In an August 7, 2010, article, Thomas Dewberry, chief administrative law judge of Maryland's Office of Administrative Hearings, was quoted explaining the mediation itself:

As the mediator, '[the Administrative Law Judge] do[es]n't have any authority whatsoever,' except to delay a mediation session as long as 30 days if that seems likely to lead to an agreement, [].

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<sup>23</sup> *Id.*

<sup>24</sup> Platou, *supra* note 4.

<sup>25</sup> *Id.*

Otherwise, [] ‘all [the Administrative Law Judges are] there (for) is to try to facilitate an agreement between the two parties.’

‘We’re going to set [the mediations] up to take about two hours,’ Dewberry said. ‘Some will take longer. Some will take a lot shorter ... I have no power to order [the parties] to resolve [the matter] or settle it. We are there as a facilitator,’ [].

‘There’s a skill in that. We do mediations already, in a variety of cases. It’s a challenge, but it’s very rewarding when you can bring [the parties] together and get them to agree,’ []. ‘It’s like trying to lead a horse to water — and get them to drink the water.’<sup>26</sup>

Dewberry expounded further for the THE WASHINGTON POST for an article published April 15, 2010:

Mediation is not a conflict,’ []. ‘It’s a meeting of the minds, trying to come up with a resolution. I don’t think [how the program will run] will fall on complex legalities. My understanding is that the mortgage companies want to work these things out. They don’t want empty houses or to be in the real estate business.’<sup>27</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> Ovetta Wiggins, *Maryland Bill Provides Foreclosure Mediation for Homeowners*, THE WASHINGTON POST (April 15, 2010) available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/14/AR2010041404602.html> (last visited April 1, 2011).

A mediator is a neutral third party who attempts to assist the parties in reaching a solution.

### III. A BIGGER PICTURE

#### A. *Foreclosure Mediation's Goals*

Though the program is new, and there is little certainty regarding its outcome, its proponents have high hopes for its success. Foreclosure mediation is intended to insure that those homeowners who are qualified for loan-modification or other loss mitigation programs are given the opportunity to apply such solutions.<sup>28</sup> The mediation also seeks to respond to the sentiment that many homeowners, though eligible for alternatives to foreclosure, never have the opportunity to realize those alternatives, and that many more never have the opportunity to reach their lenders to determine their eligibility.<sup>29</sup> Supporters hope that the program will encourage greater communication between lenders and borrowers.<sup>30</sup> Ideally, even if a foreclosure is completed, the homeowner will understand why it must happen and will feel as though he or she did all that was possible to save his or her home.

#### B. *Criticisms*

While the program's goals are laudable, it has faced criticism from a number of sources. Analysts suggest that the short window of time in which

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<sup>28</sup> *Id.*

<sup>29</sup> Martin O'Malley, et al., *Property Foreclosures in Maryland: First Quarter 2010*, MARYLAND DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT (April 2010), available at [http://www.mdhope.org/Documents/Property\\_Foreclosure\\_Events\\_in\\_Maryland\\_10Q1.pdf](http://www.mdhope.org/Documents/Property_Foreclosure_Events_in_Maryland_10Q1.pdf) (last visited April 1, 2011).

<sup>30</sup> *Id.*



homeowners may request mediation—fifteen days—is too short, especially in light of the pressures that a family faced with the possibility of losing its home is already under.<sup>31</sup> Others criticize that the foreclosure mediation program starts too late in the process to actually accomplish its goal of decreasing foreclosure rates.<sup>32</sup> Finally, economists fear that the added mediation step will slow down the foreclosure process and hinder economic recovery in the state.<sup>33</sup>

Additionally, the program may already have caused an actual rise in foreclosures. In May 2010, the month this bill was passed, “Maryland ranked 10<sup>th</sup> nationally for the most foreclosure filings.”<sup>34</sup> There were sixty-five percent more foreclosures than the same month of the previous year; “one in every 398 properties in Maryland received a foreclosure filing notice in May” 2010.<sup>35</sup> A similar phenomenon occurred in June, as lenders rushed to foreclose on homes before the bill came into effect on July first.<sup>36</sup> In June 2010, 155 homes were foreclosed on in Washington County, in July, two.<sup>37</sup>

### C. *Other States with Similar Laws*

In August 2010, Chief Judge Dewberry predicted that, as a best estimate, the OAH would “have about 5,500 [foreclosure mediation] cases per year.”<sup>38</sup> He based this estimate on statistics from other states that offer foreclosure mediation

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<sup>31</sup> Kerry Curry, *Maryland’s Foreclosure Mediation Law Takes Effect*, HOUSING WIRE (July 1, 2010), available at <http://www.housingwire.com/2010/07/01/maryland%E2%80%99s-foreclosure-mediation-law-takes-effect> (last visited April 1, 2011).

<sup>32</sup> *Id.*

<sup>33</sup> *Maryland’s Impending Foreclosure Mediation Law Comes under Criticism*, Foreclosure DataBank, June 1, 2010, available at <http://www.foreclosurebank.com/foreclosures-blog/article/2002/marylands-impending-foreclosure-mediation-law-comes-under-criticism> (last visited April 1, 2011).

<sup>34</sup> Curry, *supra* note 31.

<sup>35</sup> *Id.*

<sup>36</sup> Arnold S. Platou, *supra* note 4.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

or a similar program.<sup>39</sup> Dewberry stated that in those states “help is being sought by a sizeable number — twelve percent to twenty-three percent — of all those people threatened with losing their homes to foreclosure. In Maryland last year, about 43,000 foreclosures were filed statewide.”<sup>40</sup> Dewberry hoped to see a similar percentage of those 43,000 seek mediation under Maryland’s program.<sup>41</sup>

Despite the numbers seeking mediation, the twenty-five foreclosure programs in fourteen other states have been criticized as being largely ineffective.<sup>42</sup> The National Consumer Law Center (NCLC) published a report in September 2009 titled: “State and Local Foreclosure Mediation Programs: Can they save homes?” In it the NCLC, suggested that mediation programs could be improved by enforcing standards of lender accountability, increasing homeowner participation by making it automatic, postponing foreclosures until lenders met their obligations and better providing for the costs of the programs.<sup>43</sup> Maryland’s Foreclosure Mediation Program seems to have incorporated some of these recommendations into its structure. It remains to be seen whether Maryland has improved upon the flaws in other programs enough to be successful in decreasing foreclosure rates within its borders.

#### D. *The Current Situation*

The Foreclosure Mediation Bill was passed in response to rising foreclosure rates throughout Maryland as part of an effort to deal with the nationwide foreclosure crisis. Maryland’s efforts began in earnest in 2008, with legislation that made “the most egregious mortgage schemes subject to criminal

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Arnold S. Platou, *supra* note 4.

<sup>42</sup> *State and Local Foreclosure Mediation Programs*, NATIONAL CONSUMER LAW CENTER, September 2009, available at [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/mediation/report-state-mediation-programs.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs.pdf) (last visited April 1, 2011).

<sup>43</sup> *Id.*

prosecution, extended the foreclosure timetable from fifteen to one hundred and fifty days and prohibited prepayment penalties and transactions in which homeowners are tricked into signing over their houses to third parties.”<sup>44</sup> However, despite these changes, foreclosure filings in Maryland continued to climb year after year.<sup>45</sup> Some proponents expect that the mediation program will be a step towards solving the foreclosure crisis that has affected tens of thousands Maryland homeowners.<sup>46</sup> In August 2010, the Baltimore Sun suggested that “things [may be] looking up for struggling [Maryland] homeowners.”<sup>47</sup> However, by October, the Washington Examiner had a more pessimistic point of view.<sup>48</sup>

As of October 2010, fewer homeowners were taking advantage of the mediation option than was previously expected.<sup>49</sup> At that time, Bernie Kohn, “spokesman for the Department of Labor, Licensing and Regulation,” explained that officials “knew that there would be a lag starting up,” but that “requests [had] started to pick up [in September], just as major national banks began halting foreclosures after lending officials admitted they approved thousands of foreclosures without reading the documentation.”<sup>50</sup> Lawyer Jeff Nadel, however, explained a more negative perspective, he said “has attended a number of mediation sessions and in almost every case, the homeowner was unable to afford the newly worked compromise.”<sup>51</sup>

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<sup>44</sup> Wiggins, *supra* note 27.

<sup>45</sup> O’Malley et. al., *supra* note 29.

<sup>46</sup> *Id.*

<sup>47</sup> Jamie Smith Hopkins, *Things Looking Up for Struggling Md. Homeowners?*, THE BALTIMORE SUN (August 27, 2010), available at [http://weblogs.baltimoresun.com/business/realestate/blog/2010/08/things\\_looking\\_up\\_for\\_struggling\\_md\\_homeowners.html#more](http://weblogs.baltimoresun.com/business/realestate/blog/2010/08/things_looking_up_for_struggling_md_homeowners.html#more) (last visited April 1, 2011).

<sup>48</sup> Haley Peterson, *Md. Foreclosure Mediation in Low Demand*, WASHINGTONEXAMINER.COM (October 12, 2010) available at <http://washingtonexaminer.com/local/maryland/md-foreclosure-mediation-low-demand> (last visited April 1, 2011).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

By January of 2011, the Department of Labor, Licensing and Regulation had reported that “[o]f the 317 cases that were closed in mediation, 111, or about a third, were resolved by loan modifications and other means. . . . [And that a]nother 140 mediation sessions [we]re pending.”<sup>52</sup> These numbers are low, and the program has spent more than it has raised, causing some lawmakers to question the costs involved.<sup>53</sup> However, the OAH has reported that “mediations have gone smoothly” and that “more homeowners . . . are [being] accompanied by either a lawyer or a housing counselor.”<sup>54</sup>

“Maryland saw a significant drop in the number of foreclosure filings in the last six months of 2010[.]”<sup>55</sup> Whether this drop will continue is an open question, but the need for mediation will definitely continue in 2011, and it may even become more effective.<sup>56</sup> Maryland is in line for a “grant from the federal Department of Housing and Urban Development,” which would allow “homeowners behind on their mortgages [to] be eligible for up to \$50,000 in assistance.”<sup>57</sup> If the grant could help homeowners afford the options presented them in mediation, some of the biggest criticisms regarding mediation’s effectiveness could be resolved.

#### IV. CONCLUSION

Though it is, perhaps, too early to predict the future of Maryland’s foreclosure mediation program, national trends suggest that states will continue to look to alternative dispute resolution for solutions to the foreclosure crisis.

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<sup>52</sup> Gary Haber, *Few Marylanders Facing Foreclosure Seeking Mediation*, BALTIMORE BUSINESS JOURNAL (January 18, 2011), available at <http://www.bizjournals.com/baltimore/news/2011/01/18/few-marylanders-facing-foreclosure.html> (last visited April 1, 2011).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Gary Haber, *supra* note 52.

Foreclosure mediation may simply slow the inevitable as some detractors have suggested, but it also could be the one tool by which your clients may communicate with the bank and save their homes. The role of legal practitioners is to remain aware of the options available to their clients and to take full advantage of those options for them.