

Foreclosure Dispute Resolution Programs

Do They Work?

By Heather Scheiwe Kulp and Jennifer Shack

Heather Scheiwe Kulp is a clinical fellow in the Negotiation and Mediation Clinical Program of Harvard Law School in Cambridge, Massachusetts. Jennifer Shack is the Director of Research, Resolution Systems Institute in Chicago, Illinois.

Do they work? This is the first question the authors, colleagues at Resolution Systems Institute (RSI), face when they describe their work helping courts and government agencies develop foreclosure dispute resolution programs (FDRP). The foreclosure crisis affected thousands of businesses, families, economies, and neighborhoods. Stakeholders—including consumer advocates, bank lobbyists, and congress people—want to know how to remedy the crisis. It is difficult, then, to answer this question with the law school exam answer: “It depends.”

Program goals, structure, funding, and resources provided to borrowers, requirements for both parties, and the rate of parties entering dispute resolution and reaching agreement vary considerably across the states. This renders impossible the creation of standardized “success” metrics.

So, to understand whether any program factors affect efficacy, the authors analyzed available data against the articulated goals of each program. The authors’ goal is to provide objective criteria by which borrower and servicer advocates can design the most appropriate foreclosure dispute system for their circumstances. For the reasons discussed below, however, that goal remains elusive.

Foreclosure Dispute Resolution Structure

In 2007, Iowa created an FDRP, modeled after the 1980s farm-lender mediation program. Now, half the states have at least one program in which borrowers and lenders meet with a third-party neutral (sometimes called a mediator, though disagreement exists about whether this is traditional mediation).

Imagine an FDRP as a funnel. A manager (usually, a court or government agency) notifies all borrowers in foreclosure of the availability of FDRP. The borrower may be automatically scheduled for a dispute resolution session (“opt-out”) or must request to participate (“opt-in”) and be deemed eligible. If the borrower wishes to apply for a loan modification, the servicer must receive a complete financial packet before deciding about a modification.

In a dispute resolution session, a neutral third-party facilitates a discussion between the borrower and servicer representative about the borrower’s options. The parties can agree to hold a second session, exchange more paperwork, proceed with foreclosure, or pursue an alternative to foreclosure.

At the conclusion of dispute resolution, there are three possible outcomes. First, the parties reach an agreement—either relinquishment (borrower will sell or otherwise leave the home) or retention (the borrower will remain in the home). Alternatively, parties may reach a partial agreement or come to no agreement at all.

The Statistics

Few FDRPs publish outcome data. Of those, most provide only minimal data, like participation or settlement rates. Only a handful—the city of Philadelphia, the state of Nevada, and Cook County, Illinois—publish more comprehensive information. Although fully evaluating a dispute resolution system is a best practice, only Philadelphia's FDRP has been fully evaluated.

States for which data are publicly available represent fewer than half of all states with operational FDRPs. Thus, some FDRPs that readers may expect to see mentioned here are not discussed.

Participation Rates

As seen in Figure 1, the percentage of eligible foreclosure cases that complete mediation varies from 4% (Cook County, Illinois) to 69% (Philadelphia). Philadelphia outpaces any other program, in part because every eligible foreclosure case in Philadelphia is referred to conciliation. Will County, Illinois (which schedules all borrowers for a pre-mediation session), and Connecticut (which schedules only borrowers who file a court appearance for mediation) follow at 25% and 22%, respectively.

For FDRPs that report referral rates, the rates of foreclosure cases being referred to dispute resolution range from 5% (Cook County, Illinois) to 97% (Philadelphia). The rates of referred, eligible cases that drop out before participating are 28% (Philadelphia), 27% (Florida), 21% (Connecticut), and 16% (Will County, Illinois). This difference between referral and participation rates results from one party—either servicer or borrower—failing to complete participation requirements or parties reaching agreement before the dispute resolution session.

Agreement Rates

Agreement rates (cases in which the borrower and servicer or lender reach agreement), represented in Figure 2, vary from a low of 14% (New Hampshire, not pictured in Figure 2 because the program was terminated after not producing beneficial results) to a high of approximately 80% (Connecticut). The average rate at which borrowers and lenders achieved agreement is 47%.

Five programs report the percentage of all eligible homeowners facing foreclosure who retained their homes through FDRP. Those five, in Figure 3, varied from 2% (Cook County, Illinois) to 33% (D.C.).

Programs Achieving Some of Their Goals

Philadelphia

The Reinvestment Fund's 2011 examination of Philadelphia's Court of Common Pleas Foreclosure Diversion Program found the program achieved some of its articulated goals:

1. keeping homeowners facing foreclosure in their homes,
2. preserving and protecting neighborhoods from the disadvantages stemming from foreclosed properties,
3. intervening earlier in foreclosure-case processing to improve judicial efficiency, and
4. improving case management of the foreclosure docket by providing homeowners and servicers an opportunity for substantive discussions about resolution long before a case progresses to trial.

The program appears to have achieved its first goal. Between April 2008 and March 2011, about two-thirds of borrowers against whom a foreclosure case had been filed appeared at the initial conference. Of eligible cases, approximately 33% ended in agreement. Another 30% waited for resolution. Most impressively, of borrowers reaching agreement, 85% were still in their homes after one year. Of borrowers not participating in the program, only 50% were still in their homes after one year.

The program also appears to have achieved part of its second goal—between 2007 and 2009, the percentage of foreclosures filed that ended in a foreclosure sale dropped from 23.4% to 7.9%. It is unclear, however, how much the program contributed to this drop.

The program appears to have achieved its last goal. Although diversion did not reduce court orders per case, neither did adding volunteer borrower advocates to the court process prolong the foreclosure process. Instead, the court continued to move cases through the system at an average pace but with better-than-average outcomes. These data points are of particular interest to stakeholders concerned about FDRPs extending the timeline of foreclosure.

Connecticut

Connecticut's program helps "lenders and homeowners achieve a mutually agreeable resolution of a mortgage foreclosure action through the mediation process." Of eligible borrowers, 43% have completed mediation since the program began; this is the highest rate of any program that does not automatically schedule borrowers for dispute resolution. Parties who complete mediation are very likely to come to agreement; 82% of cases completing mediation fulfilled Connecticut's goal of achieving a mutually agreeable resolution. Borrowers who participate in mediation are also likely to remain in their homes; two-thirds of those who completed mediation reached a retention agreement. The home retention rate is 15% for all borrowers in foreclosure, the highest of any program except D.C., which has a smaller volume.

Washington, D.C.

The District of Columbia's FDRP contains its goal in its title: Saving D.C. Homes from Foreclosure. It appears to be meeting this goal. It boasts the second-highest rate of agreements; 81% of all completed mediations resulted in agreement. More significantly, 95% of those agreements allow borrowers to remain in the home, leading to a 33% retention rate for all foreclosure cases filed in D.C.

Unfortunately, sample size is limited: between the first case in May 2011 and August 2012, only 95 eligible foreclosures were filed. The mediation administrator rejected 32 because the servicer failed to comply with notice of default requirements, resulting in the borrowers' homes being "saved" until the servicer refiles. Of the remaining 63 cases, 36 borrowers (38% of all foreclosures) elected mediation, and 27 completed mediation (75% of those elected).

This small number is not representative of D.C.'s mortgage defaults; as of the third quarter 2012, nearly 3.5% of all D.C. mortgages were 90 days or more past due. Rather, after the FDRP began, title companies halted insuring residential mortgage titles, fearing that post-mediation foreclosure sales might not quiet title. The program worked with title companies to clarify the rule, but foreclosures remain sluggish.

Will County, Illinois

Will County's Mandatory Mediation Program's goal is to "reduce homeowner, lender and taxpayer's cost as well as reduce court case backlog." Of borrowers who received a mailed notice from the court scheduling them for a mandatory hearing, 41% appear. Parties cannot request mediation if they do not appear at a pre-mediation conference to discuss completing a loan modification package. This requirement reduces costs and shifts no-show cases immediately onto the regular foreclosure track. The percentage of borrowers participating is much higher than in opt-in programs. The program also has both a relatively high rate of mediation completion (25%) and a high rate of completed mediations resulting in agreement (57%). The program does not track retention versus relinquishment agreements.

Cook County, Illinois

Cook County, Illinois, has one of the highest annual foreclosure volumes of any area in the United States, with an estimated residential foreclosure docket of nearly 78,000 cases. Therefore, its FDRP took capacity into consideration when designing its model. It likely could not have achieved the goal of saving all homes. It chose a more achievable, though more difficult to measure, goal—to assist borrowers.

Though borrowers who mediate are a very small portion (4%) of the overall number of borrowers in foreclosure and only half of borrowers who mediate actually reach agreement, the program provides significant assistance to borrowers. Borrowers who elect mediation must work with both a housing counselor and at least one pro bono attorney. By design, the program educates the borrower about the foreclosure process, screens for legal defenses, and aids the borrower in both completing a financial

disclosure packet and communicating with the servicer about the packet before mediation occurs. Indeed, between the program's inception in 2010 and spring 2012, 53,264 housing counseling sessions were completed, and 57,261 borrowers received pro bono legal assistance.

Cuyahoga County, Ohio

The Supreme Court of Ohio's goal for its FDRP is "to determine if a mutually acceptable agreement that is commercially reasonable and sustainable is possible." The court understood this statement to mean that a successful outcome is not always one in which the borrower retains the home. The court also understood that a successful outcome could be litigation. With this goal in mind, Ohio's court developed a model that is flexible enough for each county to adapt for local needs. Thus, all 88 counties are able to offer foreclosure mediation based on their particular goals and resources.

Cuyahoga County, Ohio, has an opt-in program in which a judge can refer cases to mediation or the borrower can request mediation. Between the program's inception in June 2008 and the end of 2011, 82% of all borrowers who requested mediation were found eligible. Of eligible cases, 33% did not reach the first pre-mediation session. During a pre-mediation session, borrowers have the opportunity to work with housing counselors to better understand their options; about one-fifth of borrowers use this resource. Of cases that reach this point, 71% are passed on to mediation. These three points of borrower screening and filtering serve the program's interest by channeling cases into mediation in which borrowers likely can create a sustainable outcome.

Once in mediation, a servicer, and sometimes an investor, must be present in person or telephonically at all sessions. About 66% of those cases that reach mediation come to an agreement. This high rate of agreement suggests that extensive screening and the presence of parties with authority render cases with the best chance of finding a reasonable and sustainable outcome in mediation.

Lessons from Effective Programs: System Design Modifications to Improve Foreclosure Dispute Resolution

FDRP success cannot be based on a particular universal program structure; otherwise, statistics for similarly modeled programs—like Nevada, D.C., Washington, Hawaii, and Oregon—would be consistent.

Rather, success results from factors viewed in light of program goals and with consideration for characteristics inside and outside the actual dispute system structure. What are common characteristics among goal-achieving programs?

- These programs have clear goals and objectives. They can more easily set up monitoring and evaluation systems that allow for public reporting of data.
- These programs are efficient at moving appropriate cases through the process with clear document exchange expectations for both parties based on the stated needs of relevant loan modification programs.

- These programs appear to be effective in helping borrowers retain their homes by employing or contracting with neutrals who actively manage each case between dispute resolution sessions.
- These programs want to assist the most borrowers, whether through dispute resolution or supplemental services like housing counseling and pro bono assistance, so they conduct extensive outreach.

Goal and Objective Articulation

By examining articulated goals of FDRPs against their outcomes, as above, one can see the importance of realistic goal articulation to overall program success. From there, a program can design a system with processes and monitoring protocols that facilitate and evaluate that goal.

A stakeholder group composed of a variety of affected individuals and entities—including borrower, servicer, manager, and dispute resolution representatives—can determine the goal. Though it may be easier to replicate what has already been designed by other states, goal-setting groups must take into account local needs and resources. These can include the number of foreclosures in a region, the number of neutrals or borrower-support personnel available, the capacity of a managing or contracted entity to conduct outreach and schedule sessions, the local effect of foreclosures, and the involvement of a referring agency.

Document Exchange Management

Although customization can lead to greater efficacy, some processes demand standardization. Federal and lender-based loan modification programs require borrowers to submit certain paperwork before the loan can be reviewed for a modification. Required paperwork varies considerably, and even the same loan modification program might change its requirements regularly. Meeting the documentation requirements, however, is a necessary step for borrowers to obtain a mortgage-modification alternative to foreclosure.

Because of the necessity and regularity of document exchange between borrowers and lenders, managing this exchange is an FDRP's primary challenge. Two major problems arise.

First, few cases are so uniform that a servicer- or program-created standardized list constitutes a complete loan modification package. Circumstances like divorce, rental income, and business ownership require documentation beyond a standard package. Yet servicers rarely examine borrower circumstances and, if a circumstance is identified, the servicer often provides conflicting information to borrowers about how to document the circumstance appropriately. This results in incomplete loan modification packages and delayed review.

Second, packages become outdated quickly, usually within 30 to 60 days. Thus, if a borrower fails to include one necessary document in a package (whether through borrower or servicer error), the borrower likely must submit an entirely new package along with the missing document. As a result, this process creates further delays.

Inconsistent communication between servicer and borrower often leads to failed reviews or denials of many loan modification applications, even when the borrower's income appears to qualify the borrower for a loan modification. Herein lies a paradox of foreclosure dispute system design: servicers need a complete packet to review borrowers for a foreclosure alternative, yet the servicer is often the reason for an incomplete packet.

Because of extended timelines and reduced likelihoods of timely resolution, most programs have abandoned the practice of gathering borrower's documents before an initial meeting with the servicer. Instead, programs are designing innovative ways to manage the document exchange process.

For example, in May 2012, D.C.'s program changed its original requirement that borrowers mail all documents to the program before mediation; information exchange now happens during mediation. Nevada followed D.C.'s example in December.

Some programs, like Connecticut's and Will County's, adopted a pre-mediation conference. No negotiation takes place at the conference. Instead, the parties use the pre-mediation conference to review the borrower's particular circumstances to determine what paperwork is needed for a loan modification review. Will County's program does not allow mediation to proceed until the servicer has reviewed the packet. Because parties are prepared to discuss options, not documents, in mediation, those who mediate settle more than half of the time.

Active Third-Party Neutrals

Understanding the need for more in-depth assisted communication, Connecticut's program hired 20 full-time mediators to manage the document exchange and borrower-servicer communication process. The mediators contact parties between sessions to ensure servicers have everything needed to conduct a complete review. The case remains open until a full review is completed.

Similar to Connecticut's mediators, D.C.'s mediators manage document exchange and timeline adherence between sessions. Once again, the program's goals affect the design. D.C.'s goal is to save homes, while Connecticut's goal is to secure a desirable outcome for both parties. Thus, D.C.'s mediators manage the document exchange process differently; D.C.'s mediators report to a District agency about whether the borrower completed document exchange and whether the servicer reviewed and approved or denied the package. The agency can then move the foreclosure forward or sanction the servicer. This sanctioning power is controversial; the Uniform Mediation Act (which D.C. has adopted) suggests that mediators should not report party behavior. Focused, third-party attention to the document exchange process, however, seems to contribute significantly to Connecticut and D.C. FDRP's high rate of home retention.

If programs cannot afford full-time mediators, other third-party entities can serve a similar case management role. Some programs allow or require borrowers to meet with a housing counselor before dispute resolution. In these meetings, counselors experienced in communicating with servicers help borrowers prepare loan modification packages. Cook County, Illinois, expects housing counselors to

guide borrowers from the time of referral to mediation until the case is resolved. Though it has the lowest rate of foreclosure cases attending a dispute resolution session, every borrower receiving additional information and support during the foreclosure process aligns with Cook County's goal of assisting borrowers.

Outreach to Inform and Encourage Borrowers to Elect Mediation

Both opt-in and opt-out programs face the challenge of informing borrowers of the program's availability and encouraging borrowers to appear for the first session. Few borrowers in foreclosure open their mail or answer their phones, so more proactive outreach may be necessary to inform them of the FDRP.

Philadelphia's program, which has the goal of getting as many borrowers under its "umbrella" as possible, hired a community organization to visit people whose homes were in foreclosure. The organization's representatives help borrowers understand the program and walk them through participation requirements. Appearance at the first conciliation session in Philadelphia increased, and outreach was implemented.

Cook County's program aims to offer as many people as possible some support through the foreclosure process. The program contracts with community outreach workers, but instead of informing people about a conciliation date, the door-knockers hand cell phones to borrowers and ask them to call a hotline, at which time borrowers are scheduled for a housing counseling appointment. From April 2010 to April 2012, 87,807 borrowers called the hotline.

In summary, earlier, face-to-face, informational outreach seems to lead to greater borrower investment and participation.

The Need for Better Statistics

These programs represent only a portion of FDRPs in the United States, and their statistics represent an even smaller portion of the data needed to determine whether foreclosure dispute resolution is achieving its goals. Few programs have committed resources to monitoring the outcomes of their programs beyond one or two statistics.

One desirable barrier to uniform data collection is that each program has a different stated or unstated purpose. Because the needs of communities and stakeholders differ, programs should set goals and metrics that fit those needs. Still, while some data points should be specific to each program, most should be uniform across programs.

Incomplete and inconsistent monitoring has consequences for a program's quality and its policies. If a program does not monitor all stages of the dispute resolution process, it cannot make fully informed decisions about program modifications. Either the program will not know about inefficiencies, or the program will know about inefficiencies but have difficulty identifying the source or solution.

Lack of uniform monitoring also has policy consequences. As states adopt foreclosure programs or assess and improve an existing program, they look to what other states have done. Without uniform data across programs, policymakers have limited ability to compare programs and understand which program characteristics make an individual program successful. Policymakers may make jumps in logic and recommend structures or goals—like an opt-out program for every state—that are not practicable.

Foreclosure dispute resolution programs must improve statistical reporting in four ways.

First, programs should track borrowers through the program at every level. Understanding how a borrower moves from outreach to completing the process is key to finding inefficiencies in the process. Articulating the process should include how borrowers elect or are assigned to participate, how a case is referred to dispute resolution, the time frame in which the case progresses through the program, and whether the program provides services such as housing counseling and pro bono legal representation.

Second, programs should use standard language to track agreements and other outcomes. Currently, programs vary considerably in what they deem a successful agreement, ranging from retention only to a borrower's staying in the home while awaiting dispute resolution. This inconsistency makes evaluating success extremely difficult.

Third, programs should standardize statistical calculations. Although this article standardizes when possible, available information did not allow for all statistics to be calculated the same way. For instance, in Cook County, the borrower is not counted as referred to mediation until the borrower has met with housing and legal counselors. Will County counts borrowers as referred to mediation at the first pre-mediation conference. So, though Cook County assists far more borrowers than Will County, the difference in reporting makes Cook County's program appear unsuccessful.

Fourth, programs should provide information on how many borrowers are in foreclosure and how many borrowers their programs serve. Currently, programs that potentially involve a few thousand cases inappropriately look to models that involve tens of thousands of cases. Reporting scope information, as well as outcome and program characteristics data, will not only help programs adapt to their own changing needs but also will help start-up programs evaluate what is most effective in a context similar to theirs.

Conclusion

FDRPs are intended to address the breakdown in communication between borrower and servicer. Certainly, programs increase the percentage of borrowers who receive assistance during the foreclosure process. But are the benefits felt to the fullest extent possible?

The failure of foreclosure dispute resolution is not that it does not assist borrowers in retaining their homes (almost all programs result in greater retention of homes than if there were not a program) or that it leads borrowers to extend intentionally the time in their homes (in fact, few cases of intentional delay have surfaced; the delays usually result from document exchange and review).

Rather, the failure of foreclosure dispute resolution is that such processes have not sufficiently tracked, evaluated, and reported their goal achievement. The limited statistics found by the authors show a significant gap between the message of foreclosure dispute resolution (“this process will help resolve a major national crisis”) and its reality (“we actually don’t know much about whether it is achieving the goals for which we created it”).

To effectively employ the dispute resolution process, foreclosure dispute resolution programs need to focus on goal creation, system design, and regular data collection and evaluation. With a shift in attention from vague platitudes like “helping borrowers” to specific goal adoption and assessment, programs will be able to detect the weak links in the dispute resolution system, develop creative solutions to address those links, and continuously improve the system. Moreover, a program that publicly states its specific goal and releases data that speak to that goal cannot justly be accused of failing to achieve an unintended goal. With goal articulation and evaluation systems in place, a program can focus on increasing its efficacy instead of defending its existence. Then, its creators, managers, and defenders can confidently state, “Yes, it does work, and here’s why.”