

Foreclosure Mediation Pilot Project Report for the Third Circuit
January 1, 2013 through December 31, 2013

BACKGROUND:

The Supreme Court of the State of Hawai`i established a Foreclosure Mediation Pilot Project (FMPP) in the Third Circuit, effective November 1, 2009 through October 31, 2010. On October 28, 2010, another order extended the FMPP through January 30, 2011. On December 22, 2010, a memorandum submitted by the Committee on Initiatives to Enhance Civil Justice to Chief Justice Mark Recktenwald strongly advocated for the improvement and continuation of the FMPP.

On February 10, 2011, the Supreme Court of Hawai`i extended the FMPP until March 31, 2012. The process was modified and required that the Plaintiff file and serve upon the borrower along with the Complaint and Summons, a Foreclosure Mediation Notice and a Foreclosure Mediation Request. Further, whenever a Plaintiff's attorney files a request for Entry of Default, he/she needs to certify that the Foreclosure Mediation Notice and Foreclosure Mediation Request were served upon the borrower.

On March 27, 2012, the Supreme Court of Hawai`i modified and extended the FMPP indefinitely until it is concluded that the pilot project is no longer necessary. The process was modified and required the plaintiff, not later than 15 days before the mediation conference, shall provide to the mediator the following information; 1) copy of promissory note, signed by the defendant-borrower, allonges, amendments, or riders to note the evidencing mortgage debt; 2) a copy of the mortgage document and any amendments, riders, or other documentation evidencing the plaintiff's right of nonjudicial foreclosure and interest in the property including any interest as a successor or assignee and, 3) financial records and correspondence that confirm the mortgage loan is in default. It also requires that the defendant-borrower, no later than 15 days before the mediation conference, shall provide to the mediator the following information; 1) Documentation showing income qualification for a loan modification, 2) Records or correspondence available that may dispute the mortgage loan is in default, 3) Records or correspondence evidencing a loan modification or amendment, 4) Records or correspondence that

indicate the parties are currently engaged in bona fide negotiations to modify the loan or negotiate a settlement of the delinquency; 5) Names and contact information for housing counselors, approved budget and credit counselors, or representatives of the mortgagee with whom the defendant-borrower may have or is currently working with to address the delinquency and 6) verification of counseling by an approved housing counselor or approved budget and credit counselor.

The eligible borrower can access the FMPP by completing the Foreclosure Mediation Request and file it in the appropriate district (Hilo or Kona). The borrower is then required to mail or hand-deliver the filed Foreclosure Mediation Request to the assigned Circuit Court Judge of the case and the plaintiff's attorney within 15 days of the filing date.

Upon the receipt of the Foreclosure Mediation Request, the attorney for the plaintiff shall schedule a pre-mediation conference with the appropriate Judge and shall provide notice of the conference to the defendant/borrower. At the status conference, the Judge will make a determination which may result in an order for Foreclosure Mediation. If so ordered, the Foreclosure Mediation Order shall be forwarded by the Court to the appropriate mediator. A second conference is to be set within 45 days.

In order to understand the following table of information, it is critical to understand how the Judiciary codes a civil case as a foreclosure. Upon filing of a new case, Plaintiff's attorney submits a Civil Information Sheet. The court staff will denote the case a foreclosure if the "Foreclosure" box is checked off.

Oftentimes, homeowner associations, condominium associations, private persons who are mortgagees under a purchase money mortgage, etc. will note that their case is a foreclosure. The focus and spirit of the Foreclosure Mediation is to address cases between a lender and a defendant-borrower. In other words, the primary focus is with Plaintiff-bank foreclosing on a defendant-borrower who lives on the property.

This process does not preclude any defendant in a foreclosure case who has received a Foreclosure Mediation Notice from filing a request for foreclosure mediation, although, our experience has shown that no one except the traditional bank vs. occupant-borrower has filed for mediation relief.

Finally, before examining the data, we note that the language in the February 10, 2011, Order, reads.. *”that in each foreclosure action filed in the Circuit Court of the Third Circuit seeking foreclosure on borrower-occupied property (hereafter “Residential Foreclosure Action)”*. It seems that plaintiffs in prior reports have taken the liberty of interpreting that since the Foreclosure Mediation Program only applies to “borrower-occupied property,” they need not file the Foreclosure Mediation Notice and the Request for Foreclosure Mediation in all foreclosure cases. We noticed that since our report in February of 2012, attorneys have become compliant in filing the Foreclosure Mediation Notice and Requests for Mediation.

On June 20, 2013, the Supreme Court modified and extended the Foreclosure Mediation Project indefinitely. All procedures have remained consistent without any changes. However, the Foreclosure Mediation Project will now include all four Third Circuit Court judges. The judges currently presiding are Judge Ronald Ibarra, Judge Greg Nakamura, Judge Glen Hara and Judge Elizabeth Strance.

Total number of foreclosures filed in the Third Circuit in 2013 967cases*

*These are the total number of foreclosure cases and may include homeowner and condominium association suits on liens or suits for delinquent homeowner association dues or assessments, etc.

The total number of foreclosure cases eligible for FMPP 923 cases*

These are cases in which the defendant may be an owner occupant.

* 472 cases in Hilo and 451 cases in Kona

Of the 923 cases deemed eligible for Foreclosure Mediation:

	Filed Req. By Def.	Filed Notif. by plaintiff	Mediation Ordered	Mediation Denied	Mediation Rescinded
Hilo	113	472	95	21	15
Kona	110	451	103	20	31
Total	223	923	198	41	46

Outcomes		KONA	HILO	TOTAL
Mediation Ordered	Mediation Still in Process	52	67	119
Kona (103)	Agreement Reached, Dismissal pending	20	13	33
Hilo (95)	Rescinded	31	15	46
Mediation Denied	Unresolved	20	21	41
Kona (20)	Foreclosed/Resolved	0	0	0
Hilo (21)				

The data shows that 198 cases were ordered into mediation since January of 2013. 33 cases were settled successfully and 119 are still active in the mediation process.

Of the forty-one (41) cases denied for mediation:

- 17 denied as owner did not reside on the property;
- 7 denied as defendant did not appear as ordered in court.
- 3 denied as defendant unable to participate in mediation
- 2 denied as defendant withdrew request as pending a short sale
- 4 denied as defendant did not qualify
- 1 denied as defendant's name is on the mortgage but not on the note
- 2 denied as parties are preparing for dismissal of case.
- 1 denied as defendant is now deceased
- 1 denied as is not a mortgage foreclosure
- 1 denied as defendant chose to give up property.
- 1 denied as defendant not actual owner of property.
- 1 denied as defendant wishes to pursue title

Of the forty-six (46) case(s) which were ordered into mediation and subsequently the orders were rescinded or cancelled:

- 13 rescinded as the defendant failed to provide the necessary documentation for mediation as ordered
- 17 rescinded as "mediation was not working".
- 4 rescinded as defendant failed to appear for status conferences
- 1 rescinded as defendant has health issues and is willing to give up property
- 1 rescinded as defendant refused offer
- 2 rescinded as defendant failed to provide necessary tax papers
- 3 rescinded as lender failed to comply with court orders
- 3 rescinded as parties pending short sale outside of FMPP
- 1 rescinded as defendant chose to leave mediation program.
- 1 rescinded as defendant unable to make payments toward mortgage.

STATISTICAL DATA AFTER MARCH, 2012 MODIFICATIONS:

As of December of 2013, 100% of the tracked cases in Hilo and 100% of the tracked cases in Kona included filed Foreclosure Mediation Notices/Requests by the plaintiff. This indicates a strict compliance to the orders and modifications of the Supreme Court in this area.

The final report for year 2012 reflected 140 cases that were ordered into mediation and 44 were successfully mediated. It should be noted that many cases ordered in 2011 and 2012 were not resolved at the time of the final report and mediation was ongoing into year 2013.

So as not to skew the data collected for year 2013 as indicated above, the results of the cases ordered into mediation in 2011 and 2012 that were ongoing and have reached conclusion in 2013 are as follows:

Settlement Reached:

Kona: 32
Hilo: 14
Total: 46

Rescinded:

Kona: 25
Hilo: 12
Total: 37

This is not to say however, that cases which were not ordered into the mediation process haven't been helpful. It appears that the presiding courts' stringent schedule of pre-mediation conferences prior to ordering mediation, have prompted the parties to initiate talks, and in 215 cases (114 in Kona, 101 in Hilo), did in fact work out their own settlements.

It seems the court's involvement, even at the inception, is important and often results in positive results prior to ordering a case into mediation. We feel the data elicited shows a significant improvement.

The prior concerns from the assigned court clerks has dissipated with the addition of two temporary foreclosure clerks whom have taken most of the burden in regard to pre-mediation and status conferences. As of this report, the number of pre-mediation and status conferences continue to be extensive. See table below:

<u>Pre-Mediation Conferences Ordered</u>	<u>Mediation Status Conferences Ordered</u>
Kona: 112	Kona: 333
Hilo: 102	Hilo: 342
Total: 214	Total: 675

The presiding Judges are sometimes ordering sixth and seventh status conference on a considerable amount of cases. **This has delayed the progress of mediation and significantly burdened the courts' calendar.**

In an effort to address this matter, Judge Ronald Ibarra has recently begun setting "Mediation Deadlines" for both the plaintiff and defendant in each case. There will be one pre-mediation conference, one status conference ordered upon entry into the mediation program, and a "Post Foreclosure Hearing". If the specific instructions of the court are not met by the parties by the required deadlines, the case is rescinded from the Foreclosure Mediation Program and appropriate sanctions imposed.

Per Request of Chief Justice Recktenwald, the total amount of “Entry of Default” has been requested and made part of this report. The results are as follows:

Entry of Default

Kona: 46
Hilo: 52
Total: 98

MEDIATION SERVICES:

We note that although at the start of the FMPP in 2009, mediators were trained in a one day crash course and available for mediation services at no expense to the parties. Today, all of the mediations are being done by the Kuikahi Mediation Center in Hilo and the West Hawaii Mediation Center in Kona. Both Mediation Centers charge a total of \$400 per case, \$200 borne by the plaintiff and \$200 borne by the defendant-occupier.

Reaction from both the Kuikahi Mediation Center and West Hawaii Mediation Center has been very positive. They support the process but note if the parties were prepared at the inception in bringing in the required documentation, this would greatly speed up the mediation process.

There has been a continuing increase in Orders for Mediation in 2013; 198 cases in 12 months. Although the amount of eligible cases filed in the Third Circuit in 2013 is not significantly more than those filed in 2012, there has been a drastic increase in those cases that have been referred to and are participating in mediation. It appears the most significant factor would be the participation of two additional Circuit Court judges within the Third Circuit.

RECOMMENDATIONS:

At this time, the only recommendation is for continued support and funding for the mediation specialists as without their support this Foreclosure Mediation Project would not be possible.

Respectfully Submitted,

Ronald Ibarra
Chief Judge
Third Circuit Court

Date

Respectfully Submitted,

Lester D. Oshiro
Chief Court Administrator
Third Circuit Court

Date

