

# Facing Foreclosure Alone: The Continuing Crisis in Legal Representation

*By Nabanita Pal*

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## **ABOUT THE AUTHOR**

**Nabanita (Neeta) Pal** joined the Brennan Center in July 2010 as a Research Associate in the Justice Program. She works with the Program's initiatives to increase low-income communities' access to the justice system, and improve the quality and availability of legal services. Neeta is a 2009 graduate of Brown University and a former Fulbright Scholar.

## **ACKNOWLEDGEMENTS**

The author is grateful to Rebekah Diller for her mentorship and extensive guidance through every stage of this paper. Mark Ladov and Laura Abel also provided valuable feedback. The author thanks Fabian McNally and Natalie Shapero for their helpful research contributions, and Jeanine Plant-Chirlin, Erik Opsal, and Kimberly Lubrano for their review and assistance. Finally, this paper would not have been possible without the contributions of court administrators, legal aid lawyers and homeowners across the country. The Justice Program is grateful to the Bernard F. and Alva B. Gimbel Foundation, the Open Society Foundations, and The New York Bar Foundation for their support of our access to justice work.



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## EXECUTIVE SUMMARY

Four years into the economic downturn, massive numbers of families continue to face the prospect of losing their homes through foreclosure. For some, foreclosure may be inevitable. But for others, it can be avoided if they find the right help. Many borrowers have legitimate legal defenses to foreclosure that can only be raised with skilled legal advice and assistance. Likewise, lawyers can help homeowners more effectively negotiate the byzantine loan modification process.

Yet, most homeowners facing what will likely be the most significant legal event of their lives continue to do so without legal assistance. Many court systems – overwhelmed by the number of cases and number of unrepresented litigants – have set up mediation processes to give the two sides a chance to negotiate and perhaps find a way to refinance the mortgage. But these processes, too, suffer when lenders resist efforts to modify loans and homeowners lack representation to press the issue. The organized bar and civil legal aid groups have launched impressive efforts to train pro bono attorneys in foreclosure, but they cannot begin to meet the need.

As a result, most families facing foreclosure have no legal counsel representing them throughout the process. In some cases, homeowners are able to get advice from loan counselors, legal aid groups, or pro bono programs before going to court appearances or mediation sessions. However, the data shows that most are not formally represented by counsel in their actual court cases or mediation sessions. For example:

- In New Jersey, defendants in 92.9 percent of foreclosure cases in 2010 had no attorneys on record.<sup>1</sup>
- In Connecticut, defendants in 74.1 percent of cases in the state's foreclosure mediation program did not have legal representation in 2010.<sup>2</sup>
- In Franklin County, Ohio, homeowners in 87 percent of cases scheduled for mediation did not have legal representation in 2009 and 2010.<sup>3</sup>

The result is a process gone awry. In the 20 states in which foreclosure is done predominantly through the court system,<sup>4</sup> what was supposed to be an adversarial legal proceeding has become a blowout, with effectively no one on the other side to act as a check on the way foreclosure cases are brought. In states in which foreclosure takes place without a court proceeding, unrepresented homeowners have even less of a chance to raise questions about the foreclosure. Finally, homeowners who are able to make future payments on their homes may miss their chance of getting the loan modification that they are entitled to if they do not have skilled counsel to help navigate the process.

In contrast, as our accompanying video series, [\*Fighting Foreclosure: Why Legal Assistance Matters\*](#), shows, when homeowners are able to obtain legal assistance, it can make the difference between saving and losing a home. This Issue Brief complements the video series and provides additional background on the crisis in foreclosure legal representation and its consequences.

## INTRODUCTION

In 2009, the Brennan Center for Justice published *Foreclosures: A Crisis in Legal Representation*, one of the first reports to look at the way the burgeoning foreclosure crisis was affecting our justice system and, in particular, those who could not afford counsel to represent their interests. As we wrote then, the foreclosure crisis is also a legal crisis. It has brought hundreds of thousands of Americans into contact with the court system with complicated legal situations that require assistance.

Yet that help has been in short supply for those who cannot afford a private attorney. At the same time as this vast new set of legal needs has arisen, the civil legal aid system has contracted. The federally funded Legal Services Corporation (“LSC”), which distributes funds to legal aid programs around the country to assist low-income Americans, has struggled with budget cuts. LSC’s funding is currently \$404.2 million. This amount reflects a cut from \$420 million in fiscal 2010, which already was far below LSC’s 1995 appropriation of \$574 million, when adjusted for inflation.<sup>5</sup> These funding cuts occur at a time when a record 60.4 million Americans are eligible for free legal assistance,<sup>6</sup> the largest number in LSC’s history. After federal LSC grants, Interest on Lawyer Trust Account (IOLTA) programs – which pool interest from lawyers’ trust accounts – are the largest source of revenue for civil legal aid programs across the country. In 2008, IOLTA funding totaled \$284 million. But IOLTA revenue has plummeted due to declining interest rates. In 2009, income dropped 57 percent to \$124.7 million.<sup>7</sup>

Against this backdrop, foreclosures continue to overwhelm communities across the country. In 2010, nearly 2.9 million homes received foreclosure filings,<sup>8</sup> a number that translates to 1 in 45 homes, or 2.23 percent of all homes in the United States.<sup>9</sup> The Federal Reserve estimates that there will be 2.25 million foreclosure filings in 2011 and 2 million more in 2012.<sup>10</sup>

The federal government’s primary response to the crisis has been the Home Affordable Modification Program (“HAMP”), a foreclosure prevention program under the Department of Treasury’s Troubled Asset Relief Program (“TARP”). HAMP provides financial incentives for mortgage servicers to modify loans for struggling homeowners as an alternative to foreclosure. However, HAMP has failed to keep pace with rising foreclosures and reached only a small fraction of at-risk homeowners. At its inception in 2009, HAMP was expected to help 3 to 4 million homeowners permanently lower their monthly payments and avoid foreclosure.<sup>11</sup> As of June 2011, however, the program had only obtained permanent modifications for 657,044 loans.<sup>12</sup> Accounts of lost paperwork, unnecessary delays, and outright denial of modifications for no apparent reason are widespread.<sup>13</sup> This is largely due to the fact that the program has inadequate enforcement mechanisms and oversight, according to TARP’s Special Inspector General, Neil Barofsky.<sup>14</sup> Lender participation in the program is also voluntary.<sup>15</sup>

As the federal response has faltered, states have struggled with the fallout. Thousands of foreclosures continue to flood state courts across the country. For example, foreclosure filings in Florida jumped from 73,878 in 2006 to 368,710 in 2008.<sup>16</sup> In Ohio, 85,843 cases were filed in 2010, up from 63,996 in 2005.<sup>17</sup> Already operating under reduced budgets, courts’ ability to do justice to the backlog of cases in their civil docket has been further hampered by the fact that the majority of defendants in foreclosure do not have a lawyer.



Many states and jurisdictions have responded by creating foreclosure mediation programs. Since 2008, these programs – also called diversion or settlement conferences – have arisen in 30 states with both judicial and non-judicial foreclosure.<sup>18</sup> Mediation programs provide an alternative forum outside of a court proceeding for homeowners to meet with lender representatives and renegotiate their loan terms, with the goal of preventing foreclosure. Another goal of mediation is to divert the backlog of foreclosure cases from courts.<sup>19</sup>

While their popularity has grown, mediation programs still do not reach many homeowners. In hard-hit states and jurisdictions, only a small fraction of homeowners with foreclosure cases in court participate in mediation. For example, in Cook County, Illinois, there were approximately 43,000 residential foreclosures pending in 2010.<sup>20</sup> Between June 2010 and May 2011, only 627 cases completed mediation, despite the significantly larger volume of homeowners who originally contacted the program's central hotline.<sup>21</sup> Many of the homeowners who were unable to participate in the mediation program were ineligible because they had not yet received a foreclosure notice, were tenants in foreclosed properties or had insufficient income to qualify for a modification.<sup>22</sup> Not all mediation programs have the same requirements or enforcement mechanisms to ensure that servicers agree to and stand by their loan modification.<sup>23</sup> Furthermore, programs vary in their accessibility; some are mandatory for all homeowners in foreclosure, while others are voluntary.<sup>24</sup>

Loan modification and mediation programs offer hope for struggling homeowners. But the unfortunate reality for many is that they cannot fully avail themselves of these solutions without skilled legal assistance. As we describe below, that assistance is in short supply. And the widespread lack of representation for homeowners has created fertile ground for widespread abuse of the legal process.

## I. HOMEOWNERS ARE OVERWHELMINGLY UNREPRESENTED IN FORECLOSURE PROCEEDINGS AND IN MEDIATION

Many court systems do not track whether homeowners are represented.<sup>25</sup> The few courts that do collect legal representation information reveal that the majority of defendants in foreclosure do not have any counsel on record for their case.

- In New York, court officials reported that defendants in **70 percent of** foreclosure cases closed in 2009 had no attorney on record for the case.<sup>26</sup> The court cautions that this number includes people for whom no representation information is available.<sup>27</sup>
- In New Jersey, defendants in **92.9 percent** of cases in 2010 had no attorneys on record.<sup>28</sup>

Although a handful of mediation programs are tracking homeowner representation, the numbers are less likely to reflect the underlying situation in court since mediation is often optional and reaches only a proportion of cases. In some places, attorneys may formally “appear” as counselor of record for the mediation process but not in the underlying legal case. In addition, attorneys are sometimes permitted to appear on record as representing a homeowner for one particular session of mediation but not for the entire process. On the other hand, because the numbers reflect formal appearances they do not necessarily capture the fact that a homeowner may have received advice or counseling through a volunteer pro bono initiative or from a legal aid program. Nonetheless, the numbers of represented homeowners in mediation are strikingly low, as the examples from various states and jurisdictions below demonstrate.

### Philadelphia

- **In more than 95 percent** of cases that completed mediation in Philadelphia’s nationally recognized Residential Mortgage Foreclosure Diversion Program between September 2008 and May 2011, homeowners did not register a formal appearance by an attorney.<sup>29</sup> Program evaluators caution that this figure underestimates the total number of people receiving legal assistance because a significant number may have received some legal assistance that was more limited than formal representation in mediation.<sup>30</sup>

### Connecticut

- Defendants in **74.1 percent** of cases in the state’s foreclosure mediation program did not have legal representation in 2010.<sup>31</sup>

### Florida

- Homeowners in **56.6 percent** of cases that completed settlement conferences in six judicial districts between 2009 and 2011 did not have legal representation.<sup>32</sup>

### Franklin County, Ohio (Columbus)

- Homeowners in **87 percent** of cases scheduled for mediation did not have legal representation in 2009 and 2010.<sup>33</sup> In some cases, mediation lasts for more than one session. An attorney appears on record as representing a homeowner even if they attend only one session out of the entire course of mediation.

### **Indiana**

- Only **56 borrowers** appeared with a pro bono attorney out of the 908 cases for which settlement conferences were held in a pilot program in 13 counties in 2010.<sup>34</sup> An attorney appears on record as representing a homeowner even if they attend only one conference out of the entire course of mediation.<sup>35</sup>

### **Maine**

- Homeowners in **61 percent** of cases that completed mediation in a statewide program in 2010 did not have legal representation.<sup>36</sup>

Cook County, Illinois's mediation program stands out as a model for guaranteeing free legal representation to every eligible homeowner for the entire course of their mediation.<sup>37</sup> Funded with a \$3.5 million appropriation from the County Board, the program has made community outreach and legal assistance central components of its design.<sup>38</sup> However, although volunteer canvassers contact a significant number of homeowners to educate them about the program, proportionally far fewer homeowners ultimately enter mediation.<sup>39</sup>

## II. THE PERVASIVE LACK OF LEGAL ASSISTANCE LEADS TO A LOPSIDED PROCESS WITHOUT ADEQUATE CONTROLS

Our justice system is adversarial. It assumes a process in which parties are represented by counsel on both sides who aggressively press their respective cases. But when homeowners facing foreclosure do not have legal representation that model fails and the process becomes fertile ground for abuse.

As New York's Executive Deputy Attorney General Martin Mack has testified, "[T]he lack of individual representation in foreclosure actions is one reason we have seen systemic abuses of the legal system by lenders and debt collectors."<sup>40</sup> Moreover, the abuses continue to go unchecked because homeowners do not have lawyers: "For every abusive case uncovered, there are dozens upon dozens of homeowners and, sad to say, former homeowners who have been steamrolled because they did not have adequate representation."<sup>41</sup>

Government oversight agencies, judges, and attorney generals have issued harsh criticism of the practices of lenders and foreclosure law firms. First, as the widely publicized "robo-signing" scandal revealed, many foreclosure actions are brought on the basis of affidavits and other legal papers that assert facts that the lender may not have properly established.<sup>42</sup> Amid the frenzy to repackage mortgages into securitized assets that could be sold to investors, many mortgages were bought and sold multiple times.<sup>43</sup> However, the paperwork surrounding those sales is often faulty.<sup>44</sup> As a result, it is not always clear that the party who claims to own a homeowner's loan really does; in legal parlance, this means that the lender may lack "standing" to bring the foreclosure. But without a lawyer, a homeowner may not be able to bring the inadequate record of ownership to light.

As one New York judge observed:

It was only because this was one of the rare foreclosure cases where the defendant was represented by counsel that the fact that the Plaintiff did not own the note came to light. The Court can only speculate in how many other cases plaintiffs with no interest in mortgages wrongfully foreclose on them and collect proceeds to which they are not entitled.<sup>45</sup>

Another judge in Florida noted that the sheer volume of foreclosures has been presented as an excuse for inadequate filings:

At oral argument, the bank's attorney tried to justify this improper filing due to the vast volume of foreclosure cases in the judicial system. While this court is well aware of the volume of these cases, that circumstance is not a matter that relieves the bank and its attorneys of their obligation to file pleadings that are adequately supported by a reasonable investigation prior to suit. If anything, the volume of these cases and the obvious detrimental effect that such volume has upon the legal system should be a factor requiring attorneys who file the actions to engage in a higher degree of professionalism.<sup>46</sup>

Second, even when homeowners are able to meet with lenders in face to face mediations or settlement conferences, these negotiations are stymied. As documented errors and abuses in the HAMP modification process show,<sup>47</sup> homeowners need effective advocates at their side pressing for results from lenders. Judges have commented on the gap that exists between the vast majority of homeowners who do not have lawyers and the banks and servicers who always do:

[T]he court notes the inherent inequity in the settlement process in the foreclosure part. Indeed, all plaintiffs are represented by counsel, and the homeowners are mostly self-represented and largely unaware of their legal rights including possible defenses to the action.<sup>48</sup>

Lenders have also acknowledged the ways in which representation improves the mediation process. One bank representative, Michael Helfer, the General Counsel of Citigroup, testified in a New York hearing:

We believe there is an important role for lawyers to assist borrowers in avoiding foreclosure in New York, especially in the context of the mandatory mediation programs that have been instituted in New York...lawyers can help facilitate communication and guide borrowers through the process to work out solutions more quickly and without the need for repeated sessions.<sup>49</sup>

Helfer noted that Citigroup's lawyers often have to reschedule mediation sessions because unrepresented homeowners are unaware of the documents they need or the procedure for modifying loans. Lawyers for homeowners not only benefit homeowners, they also ensure the entire mediation process works effectively, Helfer explained: "[I]f we could get lawyers, to a greater extent, to be involved in this mediation or settlement conference process...collectively, the system would work a lot better."<sup>50</sup>

### **III. WHEN HOMEOWNERS ARE REPRESENTED, THEIR ASSISTANCE CAN MAKE THE DIFFERENCE BETWEEN LOSING AND SAVING A HOME**

In contrast, when homeowners are represented, their attorneys can make a significant difference in their individual cases and in the process more broadly. In *Foreclosures: A Crisis in Legal Representation*, we identified several ways in which lawyers assist homeowners:

- Raising claims that protect homeowners from lenders and servicers who broke the law;
- Helping homeowners renegotiate their loans;
- Helping ensure that the legal process is followed properly;
- Helping homeowners obtain protection of the bankruptcy law;
- Helping tenants when a landlord's property is foreclosed; and
- Giving those affected by foreclosure a voice in policy reform.

In the two years since that report, the foreclosure landscape has evolved. Lawyers for homeowners continue to intervene in important ways, several of which we describe below.

#### **A. PROTECTING AGAINST “RESCUE” SCAMS**

Amid widespread foreclosure, a second wave of scams has crept up on vulnerable households. Companies promising to reverse mortgages, repair credit, or provide legal assistance to defend foreclosure actions convince homeowners to invest their dwindling resources in fraudulent schemes. Attorneys General across the country have initiated investigations and sued mortgage rescue companies.<sup>51</sup> Skilled legal assistance is often the only hope for undoing the damage done by these mortgage rescue scams.

Take, for example, the case of Israel and Christine Muniz of Cook County, Illinois, who are featured in [\*Fighting Foreclosure: Why Legal Assistance Matters\*](#).<sup>52</sup> Mr. Muniz, a former Marine and active member of the Illinois National Guard, worked for a trucking company in between his deployments to Afghanistan. During the recession, Mr. Muniz's hours were reduced and the Munizes fell behind on their monthly mortgage payments. They feared foreclosure after speaking with a bank representative. A mortgage “rescue” company contacted the Munizes, promising to refinance their mortgage and repair their credit. Through a series of negotiations and meetings, Christine signed paperwork to approve what was presented to her as a refinance of her mortgage. What Christine signed, in fact, was paperwork authorizing the sale of their property, which transferred the title to the mortgage “rescue” company.

Christine took her case to the Legal Assistance Foundation of Metropolitan Chicago (LAF). LAF sued the “rescue” company, eventually settling the case once it became clear that the Munizes could not recover their home. With the settlement funds, a veterans' home loan, and money they had saved in an escrow account with LAF, the Munizes had the down payment for a new home. This “graceful” exit was possible only because LAF took on complex litigation that forced the “rescue” company to pay up – at least in part – for their scam. Yet other homeowners who have inadvertently lost their homes or drained their financial resources over similar scams often do not have the benefits of legal representation.

## B. NEGOTIATING LOAN MODIFICATIONS

For many homeowners, the best hope of saving a house is negotiating a loan modification to reduce monthly mortgage payments. But the federal HAMP program and other loan modification programs have been notoriously difficult to navigate. As the Troubled Asset Relief Program Special Inspector General has documented in quarterly reports to Congress, mortgage servicer violations are rampant in the administration of loan modifications through HAMP.<sup>53</sup> For example, one homeowner made payments on time for 13 months during her trial period and was promised a loan modification would be made permanent, only to discover the servicer had “decided not to go forward” with it.<sup>54</sup> Another borrower reported that he was denied a permanent modification for failing to sign papers he had never received in the first place.<sup>55</sup>

Although there have been no empirical studies measuring the difference legal representation makes in determining the outcome of a foreclosure case, a 2010 study by the Urban Institute evaluating a loan counseling program shows that skilled assistance makes a significant difference. The Urban Institute found that homeowners in the counseling program were 1.7 times more likely to avoid foreclosure than those who were not.<sup>56</sup> Homeowners with a counselor also secured better results in negotiating a loan modification with their lender. The study found that, on average, housing counseling clients lowered their monthly payments by \$267 more than those who did not have a counselor.<sup>57</sup>

The Urban Institute study also examined the effects of the level of counselor involvement in a client’s case. Homeowners who received more extensive assistance secured larger payment reductions in their loan modifications than a homeowner who met only once with their counselor and had no follow up meeting.<sup>58</sup> Homeowners who received the highest level of assistance lowered their monthly payments by an average of \$335 while those who received the lowest level of assistance lowered their monthly payment by an average of \$214.<sup>59</sup> While we cannot extrapolate this finding to the impact of legal assistance, it does suggest that the extent of assistance plays a role in influencing the outcome, especially given the complexity of some foreclosure cases.

In addition to assisting in negotiations, lawyers representing homeowners are able to spot legal defenses to the foreclosure and use those defenses as leverage to negotiate a refinancing of the mortgage. Several examples from [Fighting Foreclosure: Why Legal Assistance Matters](#) illustrate this point. Eighty-year-old Louise Golden<sup>60</sup> of Prince George’s County, Maryland has lived in her home for 28 years. In 2007, Mrs. Golden and her ailing husband, Stanley needed home repairs. A broker who visited their home convinced the Golden’s that the best way to finance their repairs was by signing a fixed-rate mortgage. The Golden’s went ahead with the refinance package. When Mr. Golden passed away shortly thereafter, Mrs. Golden saw her monthly payments jump from 2 percent to nearly 8 percent—contrary to what she had been told. Relying solely on her social Security Income, Mrs. Golden could not make the payments and received a foreclosure notice. She took her case to the Maryland Legal Aid Bureau where an attorney negotiated on her behalf in mediation. Mrs. Golden’s attorney convinced the lender to lower her monthly payments, arguing that if they did not arrive at a resolution in mediation, she could raise valid consumer protection claims in court.

[Charles Guider](#) provides another example of the way in which legal representation can save a home.<sup>61</sup> Mr. Guider's parents bought a house in the 1960s, joining other first-time African-American homeowners in Chicago. After refinancing their mortgage, Mr. Guider and his family fell behind on the payments and received a foreclosure notice in 2008. Mr. Guider requested a loan modification with his lender, but they refused to communicate with Mr. Guider because his late mother's name was on the loan. LAF took on Mr. Guider's case and found problems with the lender's disclosure of finance charges. Mr. Guider and his attorneys also pointed to the fact that the original plaintiff who had brought the foreclosure action against Mr. Guider had not proven to be the trustee of the mortgage. This defense is a difficult one to raise without legal representation, but it is extremely relevant in light of the thousands of mortgages that have been bundled and securitized with minimal tracking by banks and servicers. In negotiations, Mr. Guider and his attorneys ultimately secured a permanent loan modification under HAMP in exchange for dismissing other claims. Mr. Guider was able to save his family home, but LAF remained vigilant throughout his case, checking servicer errors during the loan modification process.

### **C. ENSURING THE LEGAL PROCESS IS FOLLOWED**

In states where foreclosure is under the purview of the courts, lawyers for homeowners play a critical role in making sure that the legal process is followed properly. One lawyer's volunteer work on a Maine case that made national headlines provides a compelling illustration of how homeowner representation is critical for uncovering problems in the foreclosure process. Like so many homeowners across the country, Nicole Bradbury received a foreclosure notice after losing her job and falling behind on her mortgage.<sup>62</sup> Ms. Bradbury had been paying the mortgage on her house for seven years. It was a modest home unlike the trailer she had lived in before. Unable to afford a private attorney, Ms. Bradbury contacted Pine Tree Legal Assistance (PTLA), an organization that provides free legal representation to low-income people in Maine. PTLA was able to connect Ms. Bradbury with a volunteer lawyer, Thomas Cox. Mr. Cox's intervention in Ms. Bradbury's foreclosure case brought into sharp focus a convoluted legal process in which lawyers for homeowners play a very important role.

Buried in Ms. Bradbury's paperwork, Mr. Cox discovered a discrepancy. The mortgage servicer's documents had been signed by an employee whose title indicated that his knowledge of Ms. Bradbury's case was probably limited. Mr. Cox deposed the employee, where he admitted to signing off on thousands of affidavits purporting that the servicer had a right to foreclose on homeowners — without ever reviewing the cases. Following the deposition, it soon became clear that this practice of “robo-signing” documents was not unique to that particular servicer. Four years into the foreclosure crisis, the country was hit with a historic scandal that brought into question the validity of thousands of foreclosures.

In the following months, major banks temporarily froze foreclosure actions in 23 states as their operations came under scrutiny from attorney general offices and the national media.<sup>63</sup> The rate of filings slowed temporarily in late 2010 after Ms. Bradbury's case in Maine helped expose the widespread practice of rubber-stamping legal documents. By November 2010, there were 21 percent fewer foreclosures filings than in October, and 14 percent less than in November 2009.<sup>64</sup> But this was only a temporary lull in activity.



Not surprisingly, legal aid programs representing homeowners in foreclosure are often the first to identify errors made by servicers' attorneys. Because these civil legal services providers handle a high volume of cases, they are able to identify trends that cut across individual cases and reflect systemic problems in the way that foreclosures are handled by lenders and the courts. For example, a recent study by MFY Legal Services Inc., a legal aid organization in New York City, also identified troubling trends for a set of foreclosure cases filed by four foreclosure law firms in the state. The study found that these firms delay filing paperwork that is required to move a case from the initial complaint to the settlement conference phase, which is mandatory in New York.<sup>65</sup> As a result, the cases remained in limbo, and fees and interest against the homeowner continued to accrue. Moreover, because this paperwork triggers the phase in the case at which referrals to housing counselors occur, homeowners were not gaining access to that assistance nor were they being connected to legal assistance.<sup>66</sup> Examining case files in November 2010, MFY found that approximately 82 percent of the same cases had not moved onto settlement conferences in June 2011 because the law firms had failed to file the necessary paperwork.<sup>67</sup> These are just some of the systemic problems that have been brought to light by the presence of skilled counsel on the side of homeowners.

## **CONCLUSION**

With no clear end in sight for the foreclosure crisis, policymakers and advocates continue to debate many worthy interventions to address the problem. Expanded legal assistance needs to be part of the solution, too. Preventing further cuts to LSC, the backbone of our nation's civil legal aid system, is a critical first priority. LSC-funded programs provide a significant amount of the homeowner representation that is occurring but they cannot hope to meet the need for assistance under current funding conditions. These programs also serve as hubs for the many foreclosure volunteer and pro bono initiatives that courts and bar associations have launched. Efforts at the state and local level also play an important role in foreclosure prevention. Legal services providers and housing counseling agencies depend on dedicated state and local funding to bolster their programs and reach more homeowners. Foreclosure is not only an incredibly complex process, it is also lopsided. For homeowners facing foreclosure, having a skilled advocate at their side can make all the difference.

## ENDNOTES

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<sup>1</sup> E-mail from Kristi Robinson, Chief Liaison, Civil Practice Div., N.J. Admin. of the Courts to Neeta Pal, Research Assoc., Brennan Ctr. for Justice (Oct. 28, 2011) (on file with author).

<sup>2</sup> A total of 5,470 cases entered mediation that year out of 23,838 foreclosure cases on the court's docket. E-mail from Roberta Palmer, Program Manager, Conn. Judicial Branch to Neeta Pal, Research Assoc., Brennan Ctr. for Justice (Jan. 28, 2011) (on file with author).

<sup>3</sup> An attorney appears on record as representing a homeowner even if they attend only one session out of the entire course of mediation. There were a total of 18,609 foreclosures filed in the Franklin County Court of Common Pleas and 3,591 cases scheduled for mediation in 2009 and 2010. 6 percent of defendants did not appear for their scheduled mediation. Limited representation is allowed in mediation. E-mail from Eileen Pruett, Manager, Small Claims Div. and Dispute Resolution Programs, Franklin Cnty. Mun. Court to Neeta Pal, Research Assoc., Brennan Ctr. for Justice (Apr. 22, 2011) (on file with author).

<sup>4</sup> Geoffrey Walsh, *State and Local Foreclosure Mediation Programs: Can They Save Homes?* NAT'L CONSUMER LAW CTR. 2 (Sept. 2009), available at [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/mediation/report-state-meditation-programs.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-meditation-programs.pdf).

<sup>5</sup> LEGAL SERVICES CORPORATION, BUDGET REQUEST FISCAL YEAR 2012 5 (2011), available at [http://www.lsc.gov/pdfs/budget\\_request\\_fy\\_2012.pdf](http://www.lsc.gov/pdfs/budget_request_fy_2012.pdf).

<sup>6</sup> Press Release, Statement by John G. Levi, Chairman, Board of Directors, on New Federal Poverty Data (Sept. 13, 2011), [http://www.lsc.gov/press/pressrelease\\_detail\\_2011\\_T274\\_R50.php](http://www.lsc.gov/press/pressrelease_detail_2011_T274_R50.php).

<sup>7</sup> Data supplied by the ABA Commission on IOLTA (on file with the Brennan Center).

<sup>8</sup> Press Release, RealtyTrac, Record 2.9 Million U.S. Properties Receive Foreclosure Filings in 2010 Despite 30-Month Low in December (Jan. 12, 2011), <http://www.realtytrac.com/content/foreclosure-market-report/record-29-million-us-properties-receive-foreclosure-filings-in-2010-despite-30-month-low-in-december-6309>.

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

<sup>10</sup> Governor Elizabeth A. Duke, Foreclosure Documentation Issues, Before the Financial Services Subcommittee on Housing and Community Opportunity, U.S. House of Representatives (Nov. 18, 2010) (transcript available at <http://federalreserve.gov/newsevents/testimony/duke20101118a.htm>).

<sup>11</sup> OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLE ASSET RELIEF PROGRAM, QUARTERLY REPORT TO CONGRESS 11 (Jan. 26, 2011), available at [http://www.sig tarp.gov/reports/congress/2011/January2011\\_Quarterly\\_Report\\_to\\_Congress.pdf](http://www.sig tarp.gov/reports/congress/2011/January2011_Quarterly_Report_to_Congress.pdf) [hereinafter *SIGTARP Report 2011*].

<sup>12</sup> MAKING HOME AFFORDABLE, PROGRAM PERFORMANCE REPORT THROUGH JUNE 2011 2 (2011), available at <http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/June%202011%20MHA%20Report%20FINAL.pdf>.

<sup>13</sup> SIGTARP Report 2011, *supra* note 11, at 12.

<sup>14</sup> *Id.* at 12, 13.

<sup>15</sup> *Id.* at 13.

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<sup>16</sup> FLORIDA SUPREME COURT, *Interim Report*, TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES (2009), [http://www.floridasupremecourt.org/pub\\_info/documents/05-08-2009\\_Foreclosure\\_TaskForce\\_Interim\\_Report.pdf](http://www.floridasupremecourt.org/pub_info/documents/05-08-2009_Foreclosure_TaskForce_Interim_Report.pdf).

<sup>17</sup> *Foreclosures Down 4 Percent in 2010*, THE SUP. CT. OF OHIO & THE OHIO JUDICIAL SYS. (Feb. 10, 2011) [http://www.supremecourt.ohio.gov/PIO/news/2011/foreclosureStats\\_021011.asp](http://www.supremecourt.ohio.gov/PIO/news/2011/foreclosureStats_021011.asp) (follow “complete county-by-county foreclosure data” hyperlink).

<sup>18</sup> Heather S. Kulp, *Foreclosure Mediation and Mitigation Program Models*, RESOLUTION SYS. INST. (May 17, 2011), available at [http://www.aboutrsi.org/pfimages/ForeclosureMediationProgramModels\\_May2011.pdf](http://www.aboutrsi.org/pfimages/ForeclosureMediationProgramModels_May2011.pdf).

<sup>19</sup> See generally Heather S. Kulp, *Foreclosure Mediation and Mitigation Program Models*, RESOLUTION SYS. INST. (May 17, 2011), available at [http://www.aboutrsi.org/pfimages/ForeclosureMediationProgramModels\\_May2011.pdf](http://www.aboutrsi.org/pfimages/ForeclosureMediationProgramModels_May2011.pdf); Geoffrey Walsh, *State and Local Foreclosure Mediation Programs: Can They Save Homes?*, NAT’L CONSUMER LAW CTR. (Sept. 2009), available at [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/mediation/report-state-meditation-programs.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-meditation-programs.pdf).

<sup>20</sup> See generally MORTGAGE FORECLOSURE MEDIATION PROGRAM, STATE OF ILL. CIR. CT. OF COOK CNTY., REPORT AND UPDATE 22 (2011) (85% of the 50,621 new foreclosure filings).

<sup>21</sup> MORTGAGE FORECLOSURE MEDIATION PROGRAM, STATE OF ILL. CIR. CT. OF COOK CNTY., REPORT AND UPDATE 23 (2011).

<sup>22</sup> *Id.*

<sup>23</sup> See Geoffrey Walsh, *State and Local Foreclosure Mediation Programs: Can They Save Homes?*, NAT’L CONSUMER LAW CTR. (Sept. 2009), available at [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/mediation/report-state-meditation-programs.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-meditation-programs.pdf).

<sup>24</sup> *Id.*

<sup>25</sup> In July 2010, the Brennan Center contacted 22 states and jurisdictions to determine which mediation programs and state courts were tracking or intended to track the legal representation status of homeowners in foreclosure. Internal Brennan Center Memorandum on Extent of Representation and Data Collection Practices in Foreclosure Mediation Programs and State Courts (Aug. 4, 2010) (on file with the Brennan Center). The Brennan Center conducted follow-up interviews in 2011 and obtained data from select courts that are tracking legal representation.

<sup>26</sup> Hon. Fern Fisher, Deputy Chief Admin. Judge for N.Y.C. Courts and Dir. of the New York State Courts Access Justice Program at The Chief Judge’s Hearing on Civil Legal Services, Second Dep’t at Executive Summary 1 (Oct. 7, 2010) (transcript available at <http://www.courts.state.ny.us/ip/nya2j/pdfs/Judge%20Fisher%27s%20Testimony.pdf>).

<sup>27</sup> *Id.*

<sup>28</sup> Robinson, *supra* note 1.

<sup>29</sup> Of the 15,915 cases that completed mediation 2.2 percent entered a formal appearance by a civil legal services attorney; 2.3 percent had a private attorney on record. THE REINVESTMENT FUND, PHILA. RESIDENTIAL MORTG. FORECLOSURE DIVERSION PROGRAM: INITIAL FINDINGS 10 (Jun. 2011), available at [http://www.trfund.com/resource/downloads/policypubs/Foreclosure\\_Diversion\\_Initial\\_Report.pdf](http://www.trfund.com/resource/downloads/policypubs/Foreclosure_Diversion_Initial_Report.pdf). Approximately 7 out of 10 eligible homeowners participate in mediation.

<sup>30</sup> *Id.* at 10.

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<sup>31</sup> A total of 5,470 cases entered mediation that year, out of 23,838 foreclosure cases on the court's docket. E-mail from Roberta Palmer, Program Manager, Conn. Judicial Branch to Neeta Pal, Research Assoc., Brennan Ctr. for Justice (Jan. 28, 2011) (on file with author).

<sup>32</sup> Limited representation is not allowed. 15,919 cases completed settlement conferences between May 2009 and March 2011. Cases took place in the 1<sup>st</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup> and 19<sup>th</sup> judicial districts, which comprise the following counties: Escambia, Santa Rosa, Okaloosa, Walton, Hardee, Highlands, Polk, Miami Dade, De Soto, Manatee, Sarasota, Bay, Calhoun, Gulf, Holmes, Jackson, Washington, Martin, St. Lucie, Okeechobee and Indian River. E-mail from Jay Foster, Consultant, Collins Ctr for Pub. Policy to Neeta Pal, Research Assoc., Brennan Ctr. for Justice (Apr. 4, 2011) (on file with author); A judicial committee of the Florida Supreme Court recommended in October 2011 that the state eliminate its requirement that all foreclosure cases enter mediation, because a small percentage of resolutions have been reached through the mediation process. Advocates argue that problems with Florida's mediation stem largely from servicer noncompliance. Kimberly Miller, *Panel: Kill foreclosure mediation*, PALM BEACH POST, (Oct. 21, 2011), <http://www.palmbeachpost.com/money/foreclosures/panel-kill-foreclosure-mediation-1927455.html>.

<sup>33</sup> There were a total of 18,609 foreclosures filed in the Franklin County Court of Common Pleas and 3,591 cases scheduled for mediation in 2009 and 2010. 6 percent of defendants did not appear for their scheduled mediation. E-mail from Eileen Pruet, Manager, Small Claims Div. and Dispute Resolution Programs, Franklin Cnty. Municipal Court to Neeta Pal, Research Assoc., Brennan Ctr. for Justice (Apr. 22, 2011) (on file with author).

<sup>34</sup> Between March 1 and December 31, 2010, 2,431 telephone conferences were scheduled in 13 pilot counties under Indiana's Mortgage Foreclosure Trial Court Assistance Project. Of those initially scheduled conferences, 908 conferences were ultimately held face to face between lenders and homeowners. E-mail from Elizabeth Daulton, Project Manager, Mortg. Foreclosure Trial Court Assistance Project, Ind. Sup. Ct., Div. of State Court Admin. to Neeta Pal, Research Assoc., Brennan Ctr. for Justice (Oct. 26, 2011) (on file with author).

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

<sup>36</sup> Mediations took place for 983 foreclosure cases from January 1 to December 31, 2010, which was the Maine Foreclosure Diversion Program's first year. In that time period, there were 5,409 foreclosure filings in civil court. ME JUD. BRANCH FORECLOSURE DIVERSION PROGRAM, REPORT TO THE JOINT STANDING COMMITTEE ON INSURANCE AND FINANCIAL SERVICES 3, 4 (Feb. 7, 2011) *available at* [http://www.courts.state.me.us/publications\\_other/fdp\\_2010\\_ar.pdf](http://www.courts.state.me.us/publications_other/fdp_2010_ar.pdf).

<sup>37</sup> The volunteer attorney is not required to, and in most cases does not, represent the homeowner in litigation if no resolution is reached in mediation. Telephone Interview with Patricia Nelson, Dir., Chancery Court Access to Justice Program, Chi. Volunteer Legal Servs. (Mar. 23, 2011).

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

<sup>39</sup> *Id.* at 22.

<sup>40</sup> Martin Mack, Exec. Deputy Att'y Gen. for Reg'l Affairs, First Dep't Civil Legal Servs. Hearing 16 (Sept. 28, 2010) (transcript available at <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/3dDept2011-Hearing-Transcript.pdf>).

<sup>41</sup> *Id.*

<sup>42</sup> FEDERAL HOUSING FINANCE AGENCY OFFICE OF INSPECTOR GENERAL, FHFA OVERSIGHT OF FANNIE MAE'S DEFAULT-RELATED LEGAL SERVICES 23 (Sept. 30, 2011), *available at* <http://mattweidnerlaw.com/blog/wp-content/uploads/2011/10/FHFAAUDIT.pdf>.

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<sup>43</sup> Thomas J. Miller, Att’y Gen, Iowa, Hearing Before the S. Comm. On Banking, Housing and Urban Affairs, 111<sup>th</sup> Cong. 3 (Nov. 16, 2010) (transcript available at [http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=1feca776-9009-4d40-87d4-bd8f679061b1](http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=1feca776-9009-4d40-87d4-bd8f679061b1)).

<sup>44</sup> Diane E. Thompson, Nat’l. Consumer Law Cntr., Before the S. Comm. On Banking, Housing and Urban Affairs, 111<sup>th</sup> Cong. 16 (Nov. 16, 2010) (transcript available at [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/mortgage\\_servicing/testimony-senate-banking.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/testimony-senate-banking.pdf)).

<sup>45</sup> U.S. Bank v. Gonzalez., No. 4137/2009, slip op. at 7 (Sup. Ct. Kings Cnty. June 8, 2010).

<sup>46</sup> South Bay Lakes Homeowners Ass’n, Inc. v. Wells Fargo Bank, N.A., 53 So.3d 1239 (Fla.App. 2 Dist., 2011).

<sup>47</sup> OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLE ASSET RELIEF PROGRAM, QUARTERLY REPORT TO CONGRESS 172-75 (Oct. 26, 2010), *available at* [http://www.sig tarp.gov/reports/congress/2010/October2010\\_Quarterly\\_Report\\_to\\_Congress.pdf](http://www.sig tarp.gov/reports/congress/2010/October2010_Quarterly_Report_to_Congress.pdf).

<sup>48</sup> BAC Home Loans Servicing v. Westervelt, 2010 WL 4702276, n1. (N.Y. Sup. Nov. 18, 2010).

<sup>49</sup> Michael Helfer, Gen. Counsel of Citigroup, First Dep’t Civil Legal Servs. Hearing 27, 28 (Sept. 28, 2010) (transcript available at <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/1st-Dept-Hearing-Transcript.pdf>).

<sup>50</sup> *Id.* at 29.

<sup>51</sup> *Attorney General Cuomo Expands Investigation into Mortgage Rescue Companies that Abuse Homeowners*, OFFICE OF THE ATTORNEY GENERAL (Jun. 28, 2010), [http://www.ag.ny.gov/media\\_center/2010/june/june28a\\_10.html](http://www.ag.ny.gov/media_center/2010/june/june28a_10.html).

<sup>52</sup> The Brennan Center, *Fighting Foreclosure: Christine Muniz*, YOUTUBE <http://www.youtube.com/watch?v=zuXJc9j5Yfw>.

<sup>53</sup> OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLE ASSET RELIEF PROGRAM, QUARTERLY REPORT TO CONGRESS 172-75 (Oct. 26, 2010), *available at* [http://www.sig tarp.gov/reports/congress/2010/October2010\\_Quarterly\\_Report\\_to\\_Congress.pdf](http://www.sig tarp.gov/reports/congress/2010/October2010_Quarterly_Report_to_Congress.pdf).

<sup>54</sup> *Id.* at 172.

<sup>55</sup> *Id.* at 172, 173.

<sup>56</sup> Neil Mayer et al., *National Foreclosure Mitigation Counseling Program Evaluation: Preliminary Analysis of Program Effects September 2010 Update*, THE URBAN INSTITUTE 2 (2010), *available at* <http://www.nw.org/network/nfmcp/documents/2010.12.14FINALModelingReport.pdf>

<sup>57</sup> *Id.* at 3.

<sup>58</sup> *Id.* at 39.

<sup>59</sup> *Id.*

<sup>60</sup> The Brennan Center, *Fighting Foreclosure: Louise Golden*, YOUTUBE <http://www.youtube.com/watch?v=XYcws1V5A5Y>.

<sup>61</sup> The Brennan Center, *Fighting Foreclosure: Charles Guider*, YOUTUBE <http://www.youtube.com/watch?v=CS16DBnLmEw>.

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<sup>62</sup> David Streitfeld, *From a Maine House, a National Foreclosure Freeze*, N.Y. TIMES (Oct. 14, 2010), <http://www.nytimes.com/2010/10/15/business/15maine.html?pagewanted=all>; Tux Turkel, *Maine lawyers help uncover mishandled foreclosures*, THE PORTLAND PRESS HERALD (Sept. 23, 2010), [http://www.pressherald.com/news/maine-lawyers-help-uncover-mishandled-foreclosures\\_2010-09-23.html](http://www.pressherald.com/news/maine-lawyers-help-uncover-mishandled-foreclosures_2010-09-23.html).

<sup>63</sup> David Streitfeld, *Bank of America to Freeze Foreclosure Cases*, N.Y. TIMES (Oct. 1, 2010), <http://www.nytimes.com/2010/10/02/business/02mortgage.html>.

<sup>64</sup> Press Release, RealtyTrac, *Foreclosure Activity Decreases 21 Percent in November* (Dec. 16, 2010), <http://www.realtytrac.com/content/press-releases/foreclosure-activity-decreases-21-percent-in-november-6251>.

<sup>65</sup> MFY LEGAL SERVICES, INC., *JUSTICE DECEIVED: HOW LARGE FORECLOSURE FIRMS SUBVERT STATE REGULATIONS PROTECTING HOMEOWNERS 1* (JUL. 2011), *available at* <http://www.mfy.org/wp-content/uploads/MFY-White-Paper-JUSTICE-DECEIVED.pdf>.

<sup>66</sup> *Id.* at 18.

<sup>67</sup> *Id.* at 1.