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State Legislative Update

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STATE LEGISLATIVE UPDATE*

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I. STATE LEGISLATIVE FOCUS

A. Fighting Foreclosures with Mediation: A Look at Laws Calling for Mediation Between Borrowers and Lenders Before Lenders Can Foreclose: Illinois H.B. 5759,[1] Maryland H.B. 1374,[2] Missouri S.B. 670,[3] Mississippi H.B. 1275[4]

Bill Numbers:	Illinois House Bill 5759, Maryland House Bill 1374, Missouri Senate Bill 670, Mississippi House Bill 1275
Summary:	These bills require that before the lender can foreclose on the home of the borrower, mediation can either be chosen by the borrower or is made mandatory (depending on the bill), with the purpose of negotiating a deal that avoids a foreclosure.
Status:	As of 6/13/2012, the Illinois House Bill has been referred to the rules committee, the Maryland House Bill has been signed by the Governor, the Missouri Senate Bill was pending the Senate Judiciary And Civil And Criminal Jurisprudence Committee, and the Mississippi House bill has been pronounced dead.

1. Introduction

Ever since the economic recession hit in 2008 the housing industry in our country has been in great distress.[5] Many people now owe more on their houses

1. H.B. 5759, 97th Leg., Reg. Sess. (Ill .2012), *available at* http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=84&GA=97&DocTypeId=HB&DocNum=5759&GAID=11&LegID=66248&SpecSess=&Session=.

2. H.B. 1374, 430th Leg., Reg. Sess. (Md. 2012), *available at* http://mlis.state.md.us/2012rs/bills/hb/hb1374e.pdf.

3. S.B. 670, 96th Leg. Reg. Sess. (Mo. 2012), *available at* http://www.senate.mo.gov/12info/pdf-bill/intro/SB670.pdf.

4. H.B. 1275, 127th Leg., Reg. Sess. (Miss. 2012), *available at* http://billstatus.ls.state.ms.us/documents/2012/pdf/HB/1200-1299/HB1275IN.pdf.

5. *See* Thomas F. Cooley & Peter Rupert, *The Great Housing Recession Continues: Home Prices, Foreclosures and Unemployment*, FORBES (Apr., 21 2010, 06:00 AM), http://www.forbes.com/2010/04/20/housing-foreclosure-unemployment-opinions-columnists-thomas-cooley-peter-rupert.html. "In the current recession several factors have aligned to drive the large and

than they are worth, and with the job market struggling as well, many Americans have fallen behind on their mortgages.[6] As a result, banks have been foreclosing on houses in record numbers.[7] In 2009 alone, nearly 2.8 million foreclosures were initiated.[8] Such foreclosures have negative effects on entire communities, not just the people whose houses are foreclosed upon.[9] In recent years, state legislatures across the country have taken action to help alleviate the foreclosure crisis.[10] One common method is for states to require lenders to partake in mandatory mediation with the borrower before they are able to foreclose on the house.[11]

The primary goal of this kind of legislation is to encourage the parties to re-negotiate the loan and enable individuals to stay in their homes.[12] In *Emerging Strategies for Effective Foreclosure Mediation Programs*, the Justice Department states that mediation programs give at-risk homeowners an "opportunity to evaluate their options and appraise possible alternatives to losing their homes. Well-structured foreclosure mediation programs . . . can be valuable and even essential tools as jurisdictions around the country seek ways to combat the foreclosure crisis."[13]

Many may wonder why foreclosure mediation laws are even necessary. If neither side benefits from foreclosure, banks should want to work with borrowers to modify their loans in a mutually beneficial process. Despite this common belief that modification of loans can, and does, benefit both sides, many lenders believe that they are left better off by foreclosing due to additional risks they incur by modifying the loan.[14]

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rapid increase in foreclosures, and it appears likely that foreclosure rates might stay high for some time." *Id.*

6. *Id*. "In the perfect storm scenario what happens is that falling house prices (leading to a negative equity position in a house) *combined with* a job loss can lead to default and a foreclosure. So here it is because of both negative equity and unemployment that foreclosures rise." *Id.*

7. *Id*. "The housing meltdown started with a vengeance; in less than a year the percentage increase in foreclosures since the previous peak was already twice as high as during any other recession in recent history." *Id.*

8. *Id*.

9. *See Emerging Strategies for Effective Foreclosure Mediation Programs*, U.S. DEPARTMENT OF JUSTICE ACCESS TO JUSTICE INITIATIVE, 1, http://www.justice.gov/atj/effective-mediation-prog-strategies.pdf [hereinafter *Emerging Strategies*]. "The loss of a home to foreclosure can be devastating for a family. In addition to losing what is often their most significant asset, families are uprooted from community supports and may find themselves with no place to go. The losses extend beyond individual families: Foreclosures destabilize entire neighborhoods through declines in surrounding property values, loss of tax revenue, and blight." *Id.*

10. *Id*. "Federal, state, and local law and policy makers have initiated a broad array of interventions to the foreclosure pandemic." *Id*.

11. *Id*. "One vehicle that can usefully coordinate a number of these foreclosure mitigation tools is foreclosure mediation. Jurisdictions around the country are increasingly offering mediation programs as an opportunity for lenders and homeowners to reach mutually agreeable and beneficial alternatives to foreclosure." *Id*.

12. *Id*. "Mediation programs have the potential to decrease the number of defaults resulting in foreclosure, increase the likelihood that mortgage terms can be renegotiated, and facilitate 'graceful exits' by negotiating short sales, deeds-in-lieu of foreclosure (where the homeowner deeds the home to the lender in exchange for a release of liabilities under the mortgage), or other alternatives for homeowners who are unable to keep their homes." *Id.*

13. *Id*. at 11.

14. *See* Manuel Adelino et al., *Why Don't Lenders Renegotiate More Home Mortgages? Redefaults, Self-Cures, and Securitization*, FEDERAL RESERVE BANK OF BOSTON (July 6, 2009), http://www.bos.frb.org/economic/ppdp/2009/ppdp0904.pdf.

While on the surface it seems like any legislation helping Americans keep their homes is a good idea, some critics question the effectiveness of these laws. They cite evidence (to be discussed below) showing foreclosure rates do not improve in states with foreclosure mediation laws.[15] Others argue that while it may only be a short-term fix towards the larger problems that ail our economy, foreclosure mediation has shown to be a positive measure that helps many Americans, especially when the law is properly written.[16] This paper will analyze the recent foreclosure mediation laws, and will explore the effectiveness of this legislation as a method to confront the foreclosure crisis. It will begin by looking at the conflicting opinions over whether foreclosure mediation programs work. It will then examine what language or provisions can be included in foreclosure mediation bills to give foreclosure mediation the best chance to succeed, as not all of these bills are created equally. Next, it will analyze the four recent bills listed above to see whether they put their states' foreclosure mediation programs in a good position to succeed.

2. Are Bills Calling for Mediation Before Foreclosure Actually Making a Difference in Helping People Stay in Their Homes?

Because not every state keeps numbers on the success rates of mediations, and the legislation in states across the country is relatively recent, it is not completely clear how much of a difference laws calling for mediation before foreclosure actually makes.[17] The analysis below will examine views that claim the laws

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> If contract frictions are not a significant problem, then what is the explanation for why lenders do not renegotiate with delinquent borrowers more often? We argue for a very mundane explanation: lenders expect to recover more from foreclosure than from a modified loan. This may seem surprising, given the large losses lenders typically incur in foreclosure, which include both the difference between the value of the loan and the collateral, and the substantial legal expenses associated with the conveyance. The problem is that renegotiation exposes lenders to two types of risks that can dramatically increase its cost.

Id. at 6-7.

15. *See* Elliot Njus, *Lawmakers Approve $7.6 Million for Foreclosure Mediation Program and Enforcement*, THE OREGONIAN (May 23, 2012, 11:53 PM), http://www.oregonlive.com/front-porch/index.ssf/2012/05/lawmakers_approve_76_million_f.html. "The No. 1 reason for foreclosures is loss of job, period," said House Co-Speaker Bruce Hanna, R-Roseberg. "This is a Band-Aid. Getting Oregonians back at work and into work is a fix." *Id. See also* Ilyce Glink, *Foreclosure Mediation Programs Aren't Working Because of Net Present Value (NPV) Calculations*, CBSNEWS.COM (Sep. 23, 2009, 5:29 PM), http://www.cbsnews.com/8301-505145_162-37141067/foreclosure-mediation-programs-arent-working-because-of-net-present-value-npv-calculations/. "Is foreclosure mediation going to prevent millions of foreclosures over the next few years? Probably not, according to a new study released this afternoon by the National Consumer Law Center (NCLC) that looks at how effective 25 foreclosure mediation programs in 14 states have been at preventing foreclosures." *Id.*

16. *See* Barbara Buckley, *Nevada's Foreclosure Program Turns Two Years Old: Is It Working?*, NEV. LAW. 1, 8 (Mar. 2012), http://documents.scribd.com.s3.amazonaws.com/docs/3k6eai0af41g84f1.pdf?t=1331248540. "Two years later, more than 13,000 mediations have taken place. In 85 percent of the cases, foreclosure was not the outcome. In 51 percent of these cases, an agreement was reached . . . ." *Id.*

17. *See Emerging Strategies*, *supra* note 9, at 10. "The way to determine whether a mediation program is actually effective is through careful tracking and evaluation of program data. At a minimum, participation and settlement rates should be tracked. A more comprehensive approach would include tracking not just the occurrence of a settlement, but also the substance of the agreement (e.g.,

are not very effective in reducing foreclosures, followed by views that claim that laws are making a positive impact. It appears that foreclosure mediation is beginning to become more recognized as an effective tool to prevent foreclosures, as criticism that was prevalent early on seems to be lessening. However, states clearly have had varying degrees of success after implementing foreclosure mediation programs. Thus, a later section will examine what language can be included in the bills to provide the greatest chance for foreclosures to be avoided, as seemingly small changes in how the bill is written may have a large effect on the impact of the bill.

3. A Good Idea, But Ineffective in Practice?

Perhaps the most recognized scholarly piece criticizing foreclosure mediation bills is an article Geoffry Walsh wrote for the National Consumer Law Center.[18] Walsh has worked as a legal services attorney for over 25 years, and has extensive experience dealing with housing and foreclosure issues.[19] Walsh begins by acknowledging how popular foreclosure mediation bills have become across the country.[20] However, he states that their popularity is mostly undeserved, as false assumptions underlie much of their support, including too much weight being given to the borrower's inability to communicate effectively with his lender.[21] Walsh claims these bills have been largely ineffective in achieving their goal,

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loan modification, HAMP/non-HAMP, repayment/forbearance plan and principal forbearance amount, cash for keys, short sale, and other agreements), the time period for achieving resolution (tracked in Cuyahoga County, Ohio), and whether homeowners had the assistance of a counselor or attorney (tracked in New York City)." *Id.*

18. *See* Geoffry Walsh, *State and Local Foreclosure Mediation Programs: Can They Save Homes?* NATIONAL CONSUMER LAW CENTER (Sept. 2009), http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs.pdf [hereinafter Walsh, *Can They Save Homes*]. Walsh's follow up piece, in which he addresses updates and new developments in these bills, will be addressed later, as Walsh tends to back away from much of his criticism he leveled at these bills in his initial paper analyzed here. *See* Geoffry Walsh, *State and Local Foreclosure Mediation Programs: Updates and New Developments*, NATIONAL CONSUMER LAW CENTER, 2 (Jan. 2010), http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs-update.pdf ("Despite the lack of long-term historical data, there are indications that the Nevada law may be having an effect on slowing foreclosure activity in the state."); *see infra* Part I.A.4.

19. *Id*. at ii.

20. *Id*. at 3. "The growing popularity of foreclosure mediation programs cannot be disputed." *Id.* "Because they have such great potential to promote rational conduct as an alternative to massive destruction of value, foreclosure mediation programs have appeared as one of the few bright spots in the otherwise gloomy media coverage of the foreclosure crisis. The launching of some programs has been accompanied by optimistic forecasts of thousands of homes to be saved . . . As will be discussed later in this report, this estimate turned out to be wildly optimistic." *Id*.

21. *Id*. at 6. "The popularity of foreclosure mediation programs is built upon some major assumptions. The arguments in support of the programs tend to portray the lack of movement on loan modifications primarily as a 'communication' problem. The assumption seems to be that servicers want to modify loans, they want to make payment terms more affordable for homeowners, and they want to avoid foreclosures on a large scale. According to this view, the problem has been that homeowners simply have not been able to find the right people to talk with and the right setting for a talk. While homeowners have definitely encountered barriers in trying to communicate with their mortgage holders, these barriers have clearly not been the only impediment to more loan modifications." *Id.*

which is supposed to be finding a way to enable at risk homeowners to stay in their homes through mutually beneficial settlements.[22]

Although more statistics appear to have been kept in the years following Walsh's 2009 paper, he writes that a lack of data on the outcomes of mediations has made it difficult to determine if the mediations result in more loan modifications than would otherwise occur.[23] Walsh also questions the quality of the loan modifications when a settlement agreement is reached through mediation, as a modification that increases the borrower's monthly payment (which may likely end up leading to re-default) is not particularly beneficial to anyone.[24]

It should be noted that Walsh's premise is not to criticize the idea of mediating before foreclosure, as he clearly recognizes these bills can make a substantial difference in many American's lives.[25] He simply believes the analysis (initially at least) indicated these bills were not very effective in enabling Americans to stay in their homes. A big problem Walsh has with many of these bills is that they fail to impose the necessary obligations on mortgage servicers (such as making sure the lender's representative at the mediation has authority to change the loan), thus harming the mediation's effectiveness.[26] He adds that further problems with foreclosure mediation laws include "failing to impose sanctions for noncompliance with what minimal rules exist," a lack of accountability for servicer's decisions, too much discretion given to servicer's at mediation, and letting servicers get away with providing little to no significant information about their decision.[27] If sanctions for failing to comply with foreclosure mediation laws are not adequate,

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22. *Id*. at 3, 6. "Although the goal of these programs has been to produce long term settlements that will preserve homeownership for households facing foreclosures, there is no concrete evidence showing that any of these programs is truly achieving this goal." *Id.*

23. *Id*. "Although the goal of these programs has been to produce long term settlements that will preserve homeownership for households facing foreclosures, there is no concrete evidence showing that any of these programs is truly achieving this goal. Regardless of their location and structure, none of the 25 existing foreclosure mediation programs has offered any concrete data on the nature of the outcomes it has achieved. We do not know, for example, whether foreclosure mediation programs bring about more loan modifications than would occur in a given locality if the program did not exist." *Id.*

24. Walsh, *supra* note 18, at 6. "We also know nothing about the quality of loan modifications that come about through these programs. In most localities officials do not keep any data on outcomes. Programs that release data on outcomes do so only under the vaguest categories, typically designed to place the programs in a favorable light. Data on the manner in which a loan has been modified is particularly important in assessing the success of any foreclosure prevention effort. The tendency of many loan modifications to increase the homeowner's monthly payment has been well documented. In 2008, 58% of loan modifications nationally either increased monthly payments or left them unchanged. Modifications that capitalize arrearages and raise payments re-default quickly." *Id.*

25. *Id*. at v. "Foreclosure mediation programs have the potential to play an important role in preventing needless loss of homes." *Id.*

26. *Id*. "However, we found that the existing programs routinely fail to impose significant obligations on mortgage servicers. Without the imposition of these obligations, it is unlikely that mediations will lead to fewer foreclosures." *Id.*

27. *Id.* at v, 13. "The programs we considered often lack mandatory rules and fail to impose sanctions for non compliance with what minimal rules exist. The programs do not require servicers to provide information substantiating a right to foreclose. They do not mandate analyses of loan modification alternatives. Ultimately, under most of the existing foreclosure mediation programs servicer discretion prevails." *Id*. at v. "It is clear that most of these programs place few meaningful obligations on servicers. Many do little to hold servicers accountable for decisions to foreclose. They do not require that servicers demonstrate that they considered loan modifications under a reasonable and objective standard. Servicers effectively control the terms of discussion in most programs." *Id.* at 13.

lenders lose their incentive to abide by the program's rules. Limiting the information that lenders have to provide at the mediations enables lenders to claim foreclosure is necessary even though a modification could potentially suffice. It is much more difficult for the borrower to challenge the lender's reasoning without having access to factors that went into the lender's analysis.

An article written by Ilyce Glink, in which Glink interviews Walsh about his analysis, describes similar problems of mediation foreclosure bills.[28] Glink similarly notes that although foreclosure mediation may seem appealing, there is a difference between bills that seem like good ideas, and bills that actually make a significant difference.[29] Glink cites Walsh's *Can They Save Homes* article referenced above in support of the conclusion that a major problem with foreclosure mediation programs is that lenders do not have to disclose their calculations and other information to the borrower.[30]

Glink's article includes comments by Walsh about barriers that keep homeowners from partaking in these mediations, and the lack of power afforded to homeowners during the negotiations.[31] Walsh also shares his disappointment in the failure of these programs, as he describes the inefficiency of foreclosures compared with the loan modifications that could occur in mediation[32]. Walsh adds that "foreclosure mediation programs could really help homeowners who have been confused by loan modification options or rebuffed by their lenders."[33]

R.B. Davis is an attorney who has served as a mediator in many foreclosure mediation cases, and explains many of the problems that have arisen in practice in the article *Is Mortgage Foreclosure Mediation Working?*[34] Davis states that originally, most people in the legal community thought these bills would establish mediations that resembled mediations for disputes in other areas.[35] Unfortunately, as he explains, this is not what occurred in reality in his circuit. He explains that

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28. *See* Glink, *supra* note 15.

29. *Id*. "Like President Obama's HAMP program, foreclosure mediation is a great idea that just doesn't seem to be taking hold. In fact, most homeowners don't even know it exists." *Id.*

30. *Id*. "Foreclosure mediation programs were designed to help homeowners who were about to be foreclosed upon aren't working in part because the net present value (NPV) - calculations lenders do to decide whether loan modifications or foreclosures will be more profitable to the lender - aren't being disclosed to the borrower, along with a lot of other seemingly helpful information." *Id.*

31. *Id*. "There are barriers that preclude homeowners from participating in foreclosure mediations. Under most of the foreclosure mediation programs, servicers have all the discretion and homeowners have no power. If the programs demand little or no accountability from servicers, it's likely foreclosure mediation programs will go the way of the federal foreclosure prevention program and fail." *Id.*

32. Walsh is quoted as saying, "We looked at the promise of these programs. Investors and homeowners lose substantial amounts of money in foreclosure. Up to two-thirds of the value of the investment is lost when the foreclosure is completed. But loan modifications only cost investors 5 to 10 percent of their investment. That may not be a full NPV calculation, but it's clear to me that it's better for investors, lenders and homeowners to do a fast loan modification than allow a home to join a few million other foreclosed homes on the market." *Id*.

33. *Id*.

34. *See* R.B. Davis, *Is Mortgage Foreclosure Mediation Working?* CENTER FOR A JUST SOCIETY (Apr. 30, 2011), http://www.centerforajustsociety.org/2011/04/30/31670/cjs-forum/is-mortgage-foreclosure-mediation-working/.

35. *Id*. "At the outset, all of us involved in the legal system: lawyers (except bank attorneys), judges, and mediators alike thought mediation would work the usual way, i.e., the two parties would come to the table and state their objectives. The mediator would go back and forth to help the parties meet their objectives with some modification, alteration, extension, or refinancing of the property, or else the discussion would reach an impasse and the case would be moved forward to trial and sale." *Id.*

the mediations still do not ensure that borrowers get to deal with an actual person from the lender's company, thanks to the involvement of third parties brought in by the lenders.[36] Davis notes this is a particularly sizable problem because the servicing agents often do not have the authority to agree to any modifications of the loan, thus largely defeating the purpose of these bills in the first place.[37] The lack of authority of the servicing companies provides an easy excuse for the lenders to do nothing more than demand payment on the original loan at the mediation.[38] Thus, the mediations often end up being nothing more than a waste of time for both parties.[39]

Other criticism deals less with the effectiveness of the foreclosure mediations themselves, and more with the fact that re-structuring home loans is a short term fix which does not provide a true solution to the problems that ail our economy.[40] This criticism seems short-sighted, for while it is true foreclosure mediation laws may not fix our deeper economic problems, this is no reason not to try a measure that could help ease the crisis for people about to lose their homes.

Florida is one state that has already completely terminated its foreclosure mediation program that it implemented just a few years before.[41] DiMaggio's article notes how while it was highly anticipated, the foreclosure mediation program did not meet its lofty expectations.[42] The article goes on to cite lack of incentives for

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36. *Id*. "One major problem is that the mortgage foreclosure actions are being brought in the name of the mortgage holder but the attorneys and litigation are actually managed by "servicing agents" – companies that are formed or hired to deal with the foreclosure." *Id.*

37. *Id*. "The problem is the servicing companies appear to have NO AUTHORITY from the principal mortgage holder except to accept the arrearage and reinstate the loan. The absurdity of being limited to that sole option in mediation is exacerbated when, in some cases, very young and inexperienced attorneys are hired merely to attend the mediation by the large law firms who filed the foreclosure." *Id.*

38. *Id*. "The servicing companies' reps, much less the attorneys, appear to have no authority from the named plaintiff to modify or otherwise reinstitute the mortgage or even to allow the arrearage to go on the end and just extend the mortgage. (The ability to do this alone would probable resolve about 25% of the actions). When the mediator pushes a little for more creative options, the attorneys or the servicing companies' representatives (who always appear by phone) make rumblings that it would violate federal banking law to modify or otherwise compromise the mortgage without having the proper forms filled out, etc." *Id.*

39. *Id*. "The mediator goes to the mediation; the bank wants the arrearage and, failing to get that, insists upon impasse. The mediator impasses the case, collects the $200, and goes home. Mediation in at least this circuit under the current process accomplishes little to nothing except to "check the block," and it deprives both parties the true benefit of mediation in the legal process." *Id.*

40. *See* Njus, *supra* note 15.

41. *See* Donna DiMaggio Berger, *Mortgage Foreclosure Mediation Program Terminated by Florida Supreme Court.* SUNSENTINEL (Jan. 2, 2012), http://blogs.sun-sentinel.com/condoblog/2012/01/mortgage-foreclosure-mediation-program-terminated-by-florida-supreme-court.html. "On Tuesday, December 19, 2011, the Florida Supreme Court effectively terminated the Residential Mortgage Foreclosure Mandatory Mediation Program. Any pending mediations would not be affected and the Order specifies that Circuit Courts can still refer cases to mediation on a "case by case" basis but for all intents and purposes the Supreme Court's Order is the death knell for residential mortgage foreclosure mediations." *Id.*

42. *Id*. "This program was touted as a means for the court system to deal with the overwhelming number of mortgage foreclosure cases in an orderly fashion. Many associations who continue to wait to see what the banks will do with delinquent properties in their communities were hoping it would speed up the backlog of those foreclosure actions. However, as is often the case, the reality fell far short of the vision." *Id.*

lenders to settle, and low participation by borrowers as possible reasons for the program's failure.[43]

The success rate of foreclosure mediation in Florida was alarmingly low.[44] Kimberly Miller's article cites the mediators' frequent inability to reach borrowers as one of the biggest reasons for the program's lack of success.[45] Rebecca Storrow, the Vice President of the American Arbitration Association, who runs Broward County, Florida's program is quoted as saying mediators in her county reached only 48 percent of borrowers facing foreclosure, as borrowers often move without updating their addresses, or simply are too overwhelmed by all the calls and mail they are getting to reply.[46]

However, a borrower choosing to ignore the mediator is not the only reason the program struggled.[47] One of the mediators quoted in Miller's article states that the Florida foreclosure mediation program simply has not provided significant financial relief to borrowers.[48] The mediator notes that it has been difficult to locate some borrowers, but lenders deserve a share of the blame for the failure of the program.[49]

Josh Salman's article, *Foreclosure Mediation Program Falters*, further explains the problems Florida experienced with their foreclosure mediation program.[50] He notes that the failure of the program eliminates another opportunity

43. *Id*. "Why did it fail? Some say it was due to lenders having no economic incentive to settle and a lack of participation in the program by borrowers. With many more foreclosure cases on the horizon, it will be interesting to see if any new ideas crop up this year and whether or not they will have more staying power and success than the mortgage mediation program did." *Id.*

44. *See* Kimberly Miller, *Florida's Foreclosure Mediation Program Produces Few Results*, THE PALM BEACH POST, (Jan. 3, 2011). "Florida's required foreclosure mediation program has produced scant results for struggling homeowners. The vast majority of Broward and Palm Beach County homeowners who underwent mediation have not ended up with a settlement and just 6 percent statewide left the negotiating table with a resolution . . . According to the statewide report, of 13,417 cases referred to mediation between March and June, 768 ended with the borrower and bank coming to an agreement. An agreement could include the homeowner agreeing to surrender the property instead of going through foreclosure, a short sale or a loan modification." *Id.*

45. *Id*. "A new statewide report, examining seven of the state's 20 circuit courts, found mediators were not able to even reach the majority of borrowers referred by the courts, with only 44 percent being contacted statewide. Of those contacted, 38 percent came in for a session." *Id.*

46. *Id*. "Storrow said mediators have been able to contact only 48 percent of borrowers in the 8,000 cases referred to them by the courts since June 1. 'Sometimes, they move and don't update their location,' she said. 'Or I think some borrowers may just be overwhelmed with all the letters and phone calls, so they just don't reply.'" *Id.*

47. *Id*. "'It's not always someone ignoring us, it's just getting them the information and helping them realize we're not just some company out there to scam them,' said Michael Napoleone, president of the Palm Beach County Bar Association, which oversees the county's mediation program." *Id.*

48. *Id*. "'If success is measured on the basis of providing significant financial relief to borrowers, then it has not accomplished that goal overall,' said Michael Gelfand, a licensed mediator and an attorney with Gelfand & Arpe in West Palm Beach. 'If success is measured in terms of moving cases forward, it's probably a C-minus.'" *Id.*

49. *Id*. "'Lenders also shoulder some of the blame for mediation failures. They come to meetings without the appropriate paperwork, no authority to modify a mortgage, or little willingness to write down the principal amount of a loan,' Gelfand said." *Id.*

50. *See* Josh Salman, *Foreclosure Mediation Program Falters*, BRADENTON HERALD (Dec. 21, 2011), http://www.bradenton.com/2011/12/21/3740856/foreclosure-mediation-program.html#storylink=cpy.

borrowers had to try to stay in their homes.[51] Salman explains that no matter how the blame gets distributed, it is no longer worth the cost to continue the program.[52] Judge Lee Haworth, who helped set up Florida's program, states that with such little success (less than four percent of eligible cases in the state resulted in successful settlements), continuation of Florida's program simply could not be justified.[53] Haworth cites many of the typical problems referenced above as reasons for the programs failure.[54] Salman's article also quotes an attorney involved in many mediations, who explains that a lack of good faith by lenders during mediations contributed to the problem.[55] Salman explains that banks often felt mediation would not make much of a difference, as there is not much that can be done after borrowers lose much of their income.[56]

Thus, many of the common criticisms relating to foreclosure mediation programs could be seen in the demise of Florida's program. It is clear that while there may be good intentions behind a foreclosure mediation bill, it does not always play out as well in practice as legislators originally anticipated.

4. Not Perfect, But Making a Positive Difference?

Many people who have analyzed foreclosure mediation laws believe they are a beneficial and efficient way to help alleviate the effects of the housing market crisis. In *Now We're Talking: A Look at Current State-Based Foreclosure Mediation Programs and How to Bring Them to Scale*, Alon Cohen and Andrew Jakabovics believe that laws providing for mediation before foreclosures are clearly helping at risk homeowners keep their homes through the loan modifications that result.[57] Jakabovics has extensive experience in the study of housing markets,

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51. *Id*. "Recession-battered homeowners currently in line for mediation remain eligible to complete the program, but no new cases will be heard, leaving area residents fighting to keep their home with one less avenue for recourse." *Id.*

52. *Id*. "Attorneys attribute the program's demise to a lack of cooperation by lenders. Banks point the blame back to underwater borrowers. Judges and program administrators say it's likely a mix of both, with the cost of mediation simply no longer justifiable." *Id.*

53. *Id*. "'It was a great opportunity and a noble experiment, but by-in-large, I don't think you could say it was a financially positive experience for anyone,' said Circuit Judge Lee Haworth, who helped craft the program as a member of the Supreme Court's task force. 'We just couldn't show justification to continue.'" *Id.*

54. *Id*. "'Mediators couldn't contact many default borrowers, and others simply refused to participate. Lenders were sending representatives to mediation who weren't authorized to handle issues that surfaced. Almost nobody came to the sessions as prepared as they should have been,' Haworth said." *Id.*

55. *Id*. "'There were definitely some people that just couldn't be helped, but what I saw in the program was lenders not acting in good faith negotiations,' said David Hicks, a foreclosure attorney with clients in Bradenton, Sarasota and Tampa. 'There was no reason to make this as convoluted as it was.'" *Id.*

56. Salman, *supra* note 50. "Banks defended their practice by arguing it was impractical to modify loans after borrowers lost most of their income and couldn't afford payments anyway." *Id.*

57. *See* Alon Cohen & Andrew Jakabovics, *Now We're Talking: A Look at Current State-Based Foreclosure Mediation Programs and How to Bring Them to Scale* 1, 34, CENTER FOR AMERICAN PROGRESS (June 2010), http://www.americanprogress.org/issues/2010/06/pdf/foreclosure_mediation.pdf. "Foreclosure mediation boasts a short but proven track record in preventing foreclosures, and it does so only because it permits both parties to see that there is a better deal to be had instead of foreclosure. We believe servicers foreclose because in the chaos of the housing crisis

and has testified before Congress on this issue, while Alon Cohen is an attorney with experience in several areas of law. They explain that in states where mediation is mandatory, 70-75% of the time a settlement is reached during mediation, and 60% of these settlements enable the borrower to keep their homes.[58] They cite foreclosure mediation as a simple solution to a major problem in our country.[59]

In Barbara Buckley's article, *Nevada's Foreclosure Program Turns Two Years Old: Is it Working?*, she cites statistics indicating that their foreclosure mediation program has greatly reduced the number of foreclosures that result.[60]

Even Geoffry Walsh appears to have changed his stance since his initial article, particularly where the laws contain express provisions (to be addressed later) that make the mediation more likely to be successful.[61] He cites a study indicating that the foreclosure mediation law in Nevada has been shown to make a positive difference in reducing the amount of foreclosures, perhaps by as much as 33 percent.[62] Walsh expresses further support for the positive effects foreclosure mediation can have in a 2012 follow up article that he contributed to, entitled *Foreclosure Mediation Can Save Millions of Homes and Taxpayer Money*.[63] The article is based on the National Consumer Law Center's 2012 report "Rebuilding America: How States Can Save Millions of Homes Through Foreclosure Mediation."[64]

In the article, the National Consumer Law Center explains that foreclosure mediation can help save millions of homes from being foreclosed upon over the

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connecting with a homeowner is complex and mediation is new on the scene. The path to foreclosure without mediation, however, is well trodden." *Id.*

58. *Id*. at 5.

59. *Id*. at 34. "States have it in their power to mitigate foreclosure and the accompanying blight through foreclosure mediation. The simple act of participating in mediation consistently yields solutions short of foreclosure that are acceptable to both sides." *Id.*

60. *See* Buckley, *supra* note 16, at 7. "Two years later, more than 13,000 mediations have taken place. In 85 percent of the cases, foreclosure was not the outcome. In 51 percent of these cases, an agreement was reached." *Id.*

61. *See generally* Geoff Walsh, *State and Local Foreclosure Mediation Programs: Updates and New Developments*, NATIONAL CONSUMER LAW CENTER (Jan. 2010), http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs-update.pdf.

62. *Id*. at 2. "Despite the lack of long-term historical data, there are indications that the Nevada law may be having an effect on slowing foreclosure activity in the state. *RealtyTrac*'s monthly survey of foreclosure activity tracks filings of notices of default, scheduled foreclosure sales, and completed foreclosures on a state by state basis. For Nevada, the total number of foreclosure-related filings in November 2009 was 33% lower than in November 2008. In the short term, from October 2009 to November 2009 Nevada foreclosure filings dropped by 33%. Nationally, according to the same *RealtyTrac* report, foreclosure filings in November 2009 were 18% *above* their level for November 2008. At the national level foreclosure filings dropped from October 2009 to November 2009, but by only 8%--compared to the 33% drop in Nevada. For Nevada this was the second consecutive month of decline in foreclosure activity." *Id.*

63. *See Foreclosure Mediation Can Save Millions of Homes and Taxpayer Money*, NATIONAL CONSUMER LAW CENTER (Feb. 6, 2012), http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/pr-rebuilding-america.pdf (hereinafter *Foreclosure Mediation*).

64. Geoffry Walsh, *Rebuilding America: How States Can Save Millions of Homes through Foreclosure Mediation*, NATIONAL CONSUMER LAW CENTER (Feb. 2012), http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-foreclosure-mediation.pdf.

next few years.[65] Walsh states that according to the recent report, "[e]vidence shows that effective foreclosure mediation can keep paying borrowers in their homes for the long term while also saving billions of dollars for taxpayers and investors."[66]

There are a few aspects of foreclosure mediation programs that Walsh finds particularly beneficial. He notes these programs can help many people stay in their homes, and the cost is extremely low.[67] Another important factor is that despite some beliefs to the alternative, foreclosure mediation programs actually do not prolong foreclosures.[68] Walsh also cites the ability of foreclosure mediation programs to connect borrowers with housing counselors, who help inform borrowers of their options and can offer important advice.[69]

In the report itself, Walsh acknowledges doubting the effectiveness of foreclosure mediation based on early results of these programs.[70] He explains that there were problems with the nature of the loan modifications initially, because the mortgages rarely became more affordable for the home owners as a result of the mediations.[71] However, as this began to change, foreclosure mediations became much more worthwhile for homeowners to partake in.[72] Thus, the trend in the effectiveness of foreclosure mediations appears to be heading in the right direction.[73]

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65. *See Foreclosure Mediation*, *supra* note 63, at 1. "Looking for a fix to help the broken housing market? There's already a proven inexpensive solution that can help head off the predicted 10 million homes in the United States that will be lost to foreclosure over the next several years. A new report from the National Consumer Law Center (NCLC), *Rebuilding America: How States Can Save Millions of Homes Through Foreclosure Mediation,* documents how states with strong programs are preventing foreclosures while saving money for investors and taxpayers." *Id.*

66. *Id*. Walsh adds that "If all states adopted strong foreclosure mediation programs, it would prevent further harm to millions of families while also saving local communities and investors billions of dollars." *Id.*

67. *Id*. "Mediation fees average from none to less than $1,000, typically paid by the homeowner and/or the mortgage lender. In comparison, investors lost an average $145,000 per home foreclosure in 2008, and foreclosures just in California have resulted in nearly $500 billion in aggregate direct and indirect costs." *Id.*

68. *Id*. "Effective mediation programs do not prolong foreclosures… Most mediation programs work within the time frames for existing state laws. In Philadelphia, for example, the typical foreclosure case spent 53 days in a foreclosure conference while the average time frame to complete an uncontested foreclosure was 10 months." *Id.*

69. *Id*. at 2. "Foreclosure mediation programs connect borrowers with housing counselors. Borrowers who receive housing counseling are much more likely to avoid foreclosure, and obtain affordable as well as sustainable loan modifications. According to a recent study, 63% of borrowers who obtained modifications with counseling sustained the modifications, while only 8%of borrowers who obtained modifications without counseling sustained them." *Id.*

70. *See* Walsh, *supra* note 64, at 4. "Loan modifications are viable alternatives to foreclosures. Looking solely at outcomes from modifications made early in the foreclosure crisis, there may have been some doubt about this point. Mortgages modified during 2008 redefaulted at an alarming rate. Over half the loans modified during 2008 were in serious default within a year of modification. By the beginning of 2010, barely one quarter of the loans modified in 2008 were current." *Id.*

71. *Id.* "Instead, the majority of modifications made then either raised payments or left them unchanged." *Id.*

72. *Id*. "To a much greater degree than before, recent loan modifications have taken into account how much the homeowner can afford to pay. Many modifications, particularly those under the federal government's Home Affordable Modification Program (HAMP), set the homeowner's monthly housing payment so that it does not exceed a certain percentage of household income." *Id.*

73. *Id*. at 5. "By the end of 2011, most new loan modifications were reducing homeowners' monthly payment for principal and interest by at least one-fifth. Less than ten percent of recent modifications

Part of the reason foreclosure mediation programs appear to be more successful in recent years simply comes from the way states have learned from previous mistakes.[74] Courts now seem to be much less likely to let lenders get away with breaking the rules of the mediation.[75] It is important that the sanctions are not mere slaps on the wrist, but are strong enough to ensure the lender will comply with the rules of the particular state.[76]

As Buckley noted earlier, Walsh similarly indicates that statistics show good foreclosure mediation programs can keep people in their homes.[77] There are also statistics from a study in Philadelphia indicating that not only do these programs keep people in their homes, but they keep people in their homes to stay, as 85 percent of the homeowners in the study were still in their homes 18 months after the mediation.[78] The study was conducted by The Reinvestment Fund of the Philadelphia Residential Mortgage Foreclosure Diversion Program to examine the success of Philadelphia's foreclosure mediation program. This study also found foreclosure mediation to be a relatively successful alternative to certain foreclosure.[79] Thus, while the foreclosure mediation programs certainly are not perfect, there is a substantial amount of authority indicating that they are making a positive difference at relatively little cost.

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have increased the payment or left it unchanged. Not surprisingly, the re-default rates on more recent modifications look much different than the rates from the 2008 modifications. For modifications made during 2010, re-defaults within one year of modification occurred at about one-half the rate they did under the 2008 modifications." *Id.*

74. *Id*. at 6. "Newer foreclosure mediation initiatives have learned from the experiences of older programs." *Id.*

75. *Id*. "The more recent laws, such as those in the District of Columbia and Washington State, provide clear authority for courts to enforce program rules. Over the past two years, courts in a number of states, including Connecticut, Indiana, Maine, Nevada, New York, Ohio, and Vermont, have sanctioned servicers for various deficiencies in their conduct in foreclosure conference and mediation programs. For example, courts imposed sanctions when servicers did not appear with an authorized representative who could make decisions on loss mitigation questions. Courts have sanctioned lenders who delayed unduly in deciding on applications for a loss mitigation option or failed to give reasonable explanations for their decisions." *Id.*

76. Walsh, *supra* note 64, at 7. "Sanctions have included monetary penalties, orders for servicers to bring in a qualified representative to negotiate, orders tolling accrual of interest and fees during periods of delay, and orders to modify a loan. When a servicer does not comply with program rules, a court can refuse to allow a foreclosure sale." In Missouri, Senate Bill 670 provides that a fine of up to $1,500 can be imposed on a party who does not comply with the provisions in the bill." *See* S.B. 670, 96th Leg. Reg. Sess. (Mo. 2012), available at http://legiscan.com/gaits/view/368210.

77. *See Foreclosure Mediation*, *supra* note 63, at 2. "Connecticut, has a similar program and more than 50% of homeowners who complete mediations end up with a permanent loan modification."

78. *See Philadelphia Residential Mortgage Foreclosure Diversion Program: Initial Report of Findings*, THE REINVESTMENT FUND, 26 (June 2011), http://www.trfund.com/resource/downloads/policypubs/Foreclosure_Diversion_Initial_Report.pdf. "Using data representing the first year's worth of Agreements – giving these Agreements time to "age" – we observe that 85% of those homeowners are still in their home more than 18 months later. Approximately 30% of all homeowners with Agreements have had subsequent foreclosure activity, but those have not yet forced people from their homes. Is the 85% remaining in the home unusual? Among those that did not avail themselves of the benefits of the Diversion Program (i.e., failed to appear), 50% of them are no longer in their homes." *Id.*

79. *Id* at 12. "[A]mong homeowners who are eligible and participate, approximately one in three ends up with an agreement with the plaintiff." *Id.*

5. What Language Can Be Included in the Foreclosure Mediation Bills to Give the Programs the Greatest Chance for Success?

It is clear that some states have found more success with foreclosure mediation programs than others, and it is unlikely mere chance is the only factor in why some work better than others. While the overall goals of the states are the same in calling for foreclosure mediation, the actual language of the various bills differs, and the research indicates the precise language included in the bills can make a big difference.

In *Emerging Strategies for Effective Foreclosure Mediation Programs*, Cohen and Jakabovic's *Now We're Talking* article is cited for proof that participation in foreclosure mediation is significantly higher when the bill makes the mediation mandatory, as opposed to giving the borrower the chance to "opt in" to the mediation if he or she so wishes.[80] In his article *Lawmakers approve 7.6 million for foreclosure mediation program and enforcement*, Elliot Njus notes that when the mediation is not made mandatory in the bill, problems include borrowers forgetting and not being aware of information they have received in the mail from their lender.[81]

As referenced above, Cohen and Jakabovic's article does provide significant support for making the mediation mandatory prior to a foreclosure, as opposed to giving the borrower the option to elect mediation.[82] They note that naturally, participation is solely at the discretion of the homeowner for opt-in programs, and many states have chosen to go with the opt-in language despite statistics indicating it is less successful.[83] The authors explain that perhaps states have been pay-

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80. *See Emerging Strategies*, *supra* note 9. "Although many programs are still finding their footing, outcomes from several established programs are impressive, with some boasting 70-75 percent settlement rates with approximately 60 percent of homeowners reaching settlements that allow them to remain in their homes . . . Participation rates appear to be considerably higher in jurisdictions that have automatically scheduled programs, generally 70 percent and higher in jurisdictions such as Connecticut and New York, as compared to opt-in programs, which typically have participation rates for eligible home owners below 25 percent." *Id.*

81. *See* Njus, *supra* note 15. "'What we've seen in other states is the success of the program is substantially dependent on the number of people that participate,' said Keith Dubanevich, Oregon's associate attorney general. 'A lot of people may request mediation but stick their head in the sand and forget about it, or be reluctant to open mail from their mortgage servicers.'" *Id.*

82. *See* Cohen & Jakabovics, *supra* note 57. "Based on our in-depth analysis of existing foreclosure mediation programs and their successes (and failures) at bringing homeowners and their mortgage servicers together to settle claims without resorting to losing/taking the property in foreclosure, we find that the optimal programs are those in which the first mediation session is automatically scheduled by the state once the mortgage servicer initiates the foreclosure process. We recommend that automatic mediation programs should be available wherever a borrower lives in a state, and, to that end, local pilot programs in some states should be expanded statewide. Specifically, we recommend that: States with so-called opt-in mediation programs, which require the homeowner to ask for mediation services, should evolve to automatically scheduled mediation, which is often called mandatory mediation. This step would promote greater participation while resulting in the same high percentage of win-win settlements for homeowners and mortgage servicers." *Id.*

83. *Id.* "Participation in opt-in programs is effectively voluntary for the homeowner and mandatory for the servicer. Opt-in programs are currently the more popular structure among states and municipalities, but like opt-in programs in other areas of public policy (a popular example being organ donation10), participation rates are below 25 percent. In contrast, eligible homeowners participate around 75 percent of the time in programs with automatic scheduling." *Id.*

ing attention to these statistics, because at least some are now making the mediation mandatory.[84]

Another important provision the bills can include to provide a greater chance for success is language requiring lenders (or their representatives in the mediation) to have the authority to actually modify the loan.[85] This is particularly important because the whole mediation is essentially rendered useless if one of the parties is unable to agree to any change in the loan. Thus, without this language, what could be a mutually beneficial meeting between the two sides often turns into a pointless exercise. As the critics above note, failure of the lender's representative to have authority to modify the loan may be the single biggest complaint people have about the foreclosure mediation process. However, as Walsh suggests, this appears to be a relatively easy fix, as there is no reason states' bills cannot require all parties at the mediation to have the authority to change the loan.

One other aspect that may help foreclosure mediation be more successful is for bills to include a requirement calling for more disclosures by the lender at or before the mediation. Walsh specifically recommends that the lenders should have to produce certain calculations and documents they have created that relate to the borrower and his or her ability to pay.[86] This would help make the mediations a more open and less secretive process, and it would become significantly harder for lenders to falsely claim modification is not feasible. This is another simple addition to state bills that can address several critics' complaints with many current programs.

It may also be beneficial for bills to focus on making housing counselor's and lawyers with experience in foreclosure mediations more available to borrowers. This is important because homeowners typically get better results during foreclosure mediations when they are helped by someone who has been involved in this process many times before.[87]

The inclusion of a good faith requirement in the statute language may not be as significant as the suggestions referenced above, but has still been recommended

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84. *Id*. "Jurisdictions have seen the value of foreclosure mediation; nothing in mediation requires the parties to settle—they only do so if settlement nets the servicer greater value than foreclosure—and the high rate of settlements speak to its efficacy. The remaining obstacle is low participation—fewer people benefit if fewer participate. The answer is to increase participation. Some jurisdictions are now seeking these higher participation rates by replacing opt-in mediation with automatically scheduled mediation programs." *Id.* "We have found that automatic scheduling is the key to participation . . . . The best way to leverage their efforts is to put in place a system that effectively facilitates settlement, and system is automatic foreclosure mediation." *Id.*

85. *See* Glink, *supra* note 15. "Walsh's study suggests foreclosure mediation programs include the following: 3) Servicers should prove they have the standing to close on loan modifications and have the authority to negotiate loan modifications." *Id.*

86. *See* Walsh, *Can They Save Homes*, *supra* note 18. "This report . . . recommends that programs impose the following requirements on all services: 1) Require that the servicer give the homeowner a document showing its affordable loan modification calculation and net present value calculation. 2) Require that the servicer produce specified documents such as a pooling and servicing agreement, loan origination documents, an appraisal, and loan payment history." *Id.*

87. *See Emerging Strategies*, *supra* note 9. "There is broad consensus that homeowners fare better in mediation when assisted by a knowledgeable housing counselor and/or lawyer. These advocates can also help the process run more smoothly by helping gather loan documents, identifying loan modification options, and facilitating communication between the homeowner, mediator, and counsel for the lender." *Id.*

as a way to make the foreclosure mediation bills more effective.[88] While this suggestion may be tougher to define and implement than the other suggestions, it may make lenders less likely to engage in questionable practices throughout the mediation process (particularly if the sanctions are strong enough). Despite the fact that enforcement of a good faith requirement may be difficult, this does not mean that a provision this simple should not be included anyway.

As shown above, all foreclosure mediation bills are not created equal. Because there do not appear to be any suggestions claiming these extra requirements carry excessive costs that outweigh their benefit, it seems smarter to include these provisions in foreclosure mediation bills. Making foreclosure mediation mandatory can help solve problems of low participation, and requirements calling for lenders to show calculations help to restrict the lenders' ability to avoid complying when compliance is feasible. Ensuring that the lender's representative at the mediation has the authority to actually modify the loan seems so obvious that one has to wonder why all bills do not require this. Similarly, a good faith requirement seems so easy to attach to the bill that there is no reason not to include one.

6. Examination of the Bills

As explained above, certain provisions appear to make foreclosure mediation programs much more likely to succeed. It seems natural that if state legislatures bother to pass foreclosure mediation bills in the first place, they would include language that gives the bills the best chance to help their residents. However, as the following analysis of the four bills selected will show, states vary on how much language they include that would likely be very beneficial. This section will look at how much these particular states are following the advice of the experts referenced above, and based on this, the likelihood of success for the foreclosure mediation programs in Illinois, Maryland, Missouri, and Mississippi.

a. Illinois House Bill 5759

An examination of Illinois' foreclosure mediation bill indicates that the drafters knew what language to include in order to give the program a strong chance for success. Of the four bills that will be analyzed, Illinois' bill appears relatively strong. Most importantly, the bill's language speaks of *mandatory* good faith mediation between the mortgagee and mortgagor.[89] Based on the analysis from the preceding sections, making the mediation mandatory strengthens the effectiveness of Illinois' bill. Illinois' bill also addresses the concern that parties to the mediation do not have authority to actually modify the loan, as each party must have the ability to make "binding decisions" with respect to modification of the

88. *See* Walsh, *Can They Save Homes*, *supra* note 18. "This report . . . recommends that programs impose the following requirements on all servicers: 3) Require that servicers comply with all mediation obligations in good faith- negotiate in good faith and be subject to sanctions for the failure to do so." *Id.*

89. *See* Ill. H.B. 5759. "The mandatory foreclosure mediation notice shall be substantially in the form described in subsection (e) and shall communicate that the mortgagee intends to file a complaint to foreclose the mortgage, but that the mortgagee is required to participate in good faith in mandatory foreclosure mediation with the mortgagor." *Id.*

loan.[90] Since the mediation loses its effectiveness if a party cannot make a change in the loan, it is important that the Illinois bill recognizes this as a concern. A good faith requirement is also contained in the Illinois bill.[91] In addition, the Illinois bill contains provisions that increase the likelihood that important information about the borrower's ability to pay gets brought into the process.[92] The more information that is shared at the mediation, the better the chances are of obtaining a result that is beneficial to both sides. The bill also addresses the concern that borrowers may not be aware of what the mediation is when the letter comes in the mail and may simply ignore it by calling for bold type stating clearly what the letter means.[93] Based on the provisions referenced in this paragraph, the Illinois bill would put any foreclosure mediation program in a good starting position.

b. Maryland House Bill 1374

Maryland's bill contains some measures that would seem to improve the chances of foreclosure mediation in its state, but the bill is by no means perfect. Unlike the bill in Illinois, Maryland's bill does not make the foreclosure mediation mandatory, but rather leaves it up to the election of the borrower.[94] As explained

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90. *Id.* "No foreclosure action under Part 15 of Article XV of this Code shall be instituted on a mortgage secured by residential real estate before a mandatory foreclosure mediation has been held and the court-appointed mediator who presided over that mediation has issued a written report that:
(5) determines that, while at the mediation session, the mortgagor and the mortgagee each had the authority to make binding decisions in any discussions of any loan modification or, if a party did not have binding decision-making authority, why that party did not have that authority." *Id.*

91. *Id.* "No foreclosure action under Part 15 of Article XV of this Code shall be instituted on a mortgage secured by residential real estate before a mandatory foreclosure mediation has been held and the court-appointed mediator who presided over that mediation has issued a written report that:
(13) determines, in light of all of the relevant circumstances pertaining to the mortgagor, that in the mediator's opinion the mortgagee acted in good faith and that there is no just reason for the mortgagee not to file foreclosure as to the mortgaged real estate." *Id.*

92. *Id.* "No foreclosure action under Part 15 of Article XV of this Code shall be instituted on a mortgage secured by residential real estate before a mandatory foreclosure mediation has been held and the court-appointed mediator who presided over that mediation has issued a written report that:
(7) states the mortgagor's income and expense information, if available from the mortgagor;
(8) states the mortgagor's employment status, if available from the mortgagor." *Id.*

93. *Id.* "The notice required in subsection (d) shall include the information described in items (1) through (5) of subsection (c), shall state the date on which the notice was mailed, shall be headed in bold 14-point type 'MANDATORY FORECLOSURE MEDIATION NOTICE', and shall state the following in 14-point type:
'YOUR LOAN IS MORE THAN 60 DAYS PAST DUE. YOUR LOAN MAY BE PAST DUE BECAUSE OF FINANCIAL PROBLEMS. ILLINOIS LAW PROVIDES YOU WITH PROTECTION AND INFORMATION BEFORE YOU LOSE YOUR RESIDENCE IN COURT THROUGH A FORECLOSURE CASE. IF A RESOLUTION CANNOT BE AGREED UPON BY YOU AND US, WITH THE HELP OF THE MEDIATOR AND COUNSELOR, WE INTEND TO FILE A FORECLOSURE CASE IN COURT. THERE WILL BE A MEDIATION MEETING INVOLVING YOU, AN APPROVED HOUSING COUNSELOR, US (THE LENDER), AND A COURT-APPOINTED MEDIATOR. THE MEDIATOR WILL BE THERE TO HELP ALL OF US DETERMINE IF WE CAN FIND A SOLUTION TO THE PROBLEMS WITH THE LOAN AND KEEP YOUR LOAN AND PROPERTY FROM BECOMING A FORECLOSURE CASE IN COURT.'" *Id.*

94. Md. H.B. 13754. "IF A MORTGAGOR OR GRANTOR ELECTS TO PARTICIPATE IN PREFILE MEDIATION, THE MORTGAGOR OR GRANTOR SHALL NOTIFY THE SECURED PARTY BY SUBMITTING THE APPLICATION DESCRIBED IN SUBSECTION C)(5)(VI) OF

previously, this may be one of the biggest flaws a foreclosure mediation bill can have, as many people will likely overlook or otherwise fail to elect the mediation option. Thus, many people in Maryland who would otherwise benefit by this bill may inadvertently leave themselves out of the process.

However, the bill does include a provision to ensure that the lender's representative at the mediation actually has the authority to modify the loan, or if not, states that the representative must have immediate access to someone with such authority who is readily available to be contacted.[95] For this reason, assuming citizens of Maryland actually bother to elect the mediation, they should have a chance to make a beneficial deal based on the authority given to the lender's representative. Also in its favor is the provision in the bill that encourages borrowers to seek assistance from housing counseling services.[96] However, the bill does not contain a good faith provision. It appears that the language of the bill gives Maryland's foreclosure program a chance to succeed, but the failure to make the mediation mandatory and the lack of a good faith provision could certainly spell trouble for its future.

c. Missouri Senate Bill 670

With respect to its important provisions, Missouri's bill is relatively similar to Maryland's bill. The bills' drafters appear to be familiar with what language is commonly included in such a bill, but still fail to make the foreclosure mediation mandatory.[97] As stated many times above, this appears to be a mistake, as it reduces the effectiveness of any such foreclosure mediation program. However, also like Maryland, Missouri's bill wisely includes a provision to ensure the lender's party at the mediation actually is able to modify the loan, or at least has direct access to someone with such authority.[98] Missouri's bill also contains provisions calling for each party to bring important information to the negotiating table, including key financial documents the lender possesses about the borrower, which may make a modification more likely.[99] The bill also sets forth what constitutes

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THIS SECTION NOT MORE THAN 25 DAYS AFTER THE DATE ON WHICH THE NOTICE OF INTENT TO FORECLOSE IS MAILED BY THE SECURED PARTY." *Id.*

95. *Id.* "At a foreclosure mediation: . . . (iv) Any representative of the secured party must have the authority to settle the matter or be able to readily contact a person with authority to settle the matter." *Id.*

96. (4) The notice of intent to foreclose shall . . . contain . . . 4. A statement recommending that the mortgagor or grantor seek housing counseling services." *Id.*

97. Mo. H.B. 670. "Before a public sale may be conducted pursuant to sections 443.290 to 443.440 for owner-occupied residential property, the foreclosing mortgagee shall, at the election of the owner-occupant, participate in the foreclosure dispute resolution program pursuant to sections 443.470 to 443.535 to attempt to negotiate an agreement that avoids foreclosure or mitigates damages where foreclosure is unavoidable." *Id.*

98. *Id.* "The parties to a dispute resolution process under sections 443.470 to 443.535 shall consist of the owner-occupant or the owner-occupant's representative, and the mortgagee or the mortgagee's representative; provided that: (1) A representative of the mortgagee who participates in the dispute resolution shall be authorized to negotiate a loan modification on behalf of the mortgagee or shall have, at all stages of the dispute resolution process, direct access by telephone, videoconference, or other immediately available contemporaneous telecommunications medium, to a person who is so authorized." *Id.*

99. *Id.* "1) The mortgagee shall provide to the division and the mortgagor:

failure to comply with the bill's provisions.[100] Thus, other than the part of the bill that makes the mediation optional, other provisions in Missouri's bill do follow some key recommendations for strong foreclosure mediation programs.

d. Mississippi House Bill 1275

Similar to Missouri and Maryland's foreclosure mediation bills, Mississippi's bill contains some provisions that would improve the program's chances for success, but does not make the mediation mandatory.[101] It does contain provisions to help ensure important information is made available, which should only be beneficial towards reaching a modification.[102] Also, the fact that the use of foreclosure

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(a) A copy of the promissory note, signed by the mortgagor, including any endorsements, amendments, or riders to the note evidencing the debt;
(b) A copy of the security instrument and any amendments, riders, or other documentation evidencing the mortgagee's right of nonjudicial foreclosure and interest in the property including any interest as a successor or assignee; and
(c) Financial records and correspondence that confirms default.
(2) The owner-occupant shall provide to the division and the mortgagee:
(a) Documentation showing income qualification for a loan modification, including any copies of pay stubs, W-2 forms, social security or disability income, retirement income, child support income, or any other income that the owner-occupant deems relevant to the owner-occupant's financial ability to repay the debt;
(b) Any records or correspondence available which may dispute that the mortgagor is in default;
(c) Any records or correspondence available evidencing a loan modification or amendment." *Id.*

100. *Id.* "1) In the case of the mortgagee, failure to comply with the requirements of the program may consist of:
(a) Participation in dispute resolution without the authority to negotiate a loan modification or without access at all stages of the dispute resolution process to a person who is so authorized;
(b) Failure to provide the required information or documents;
(c) Refusal to cooperate or participate in dispute resolution; or
(d) Refusal or failure to pay program fees in a timely manner.
(2) In the case of the owner-occupant, failure to comply with the requirements of the program may consist of:
(a) Failure to provide the required information or documents; or
(b) Refusal to cooperate or participate in dispute resolution." *Id.*

101. M.S. H.B. 1275. "SECTION 8. (1) Upon the program manager receiving a copy of the RMFM Program Form, the program manager shall begin efforts to contact the borrower to explain the RMFM Program to the borrower and the requirements that the borrower must comply with to obtain a mediation. The program manager shall also ascertain whether the borrower wants to participate in the RMFM Program." *Id.*

102. *Id.* "2) The borrower must do the following before mediation being scheduled: meet with an approved mortgage foreclosure counselor, and provide to the program manager the information required by the borrower's financial disclosure for mediation.
3) It shall be the responsibility of the program manager to transmit the borrower's financial disclosure for mediation to plaintiff's counsel and the plaintiff's representative designated in the RMFM Program Form via a secure dedicated email address or to upload same to the web-enabled information platform described in Section 9 of this act. If the information is uploaded, the program manager shall notify plaintiff's counsel and the plaintiff's representative that the borrower's financial disclosure for mediation is available. The program manager is not responsible or liable for the accuracy of the borrower's financial information.
SECTION 9. (1) Within the time limit stated below, before attending mediation the borrower may request any of the following information and documents from the plaintiff:
(a) Documentary evidence the plaintiff is the owner and holder in due course of the note and mortgage sued upon.
(b) A history showing the application of all payments by the borrower during the life of the loan.
(c) A statement of the plaintiff's position on the present net value of the mortgage loan.

counselors is encouraged should be helpful to borrowers as they try to negotiate with their lenders.[103] In addition, the bill also wisely provides for borrowers getting the help of an attorney throughout the process.[104] Mississippi's bill also makes sure someone representing the lender at the mediation has the authority to sign any potential settlement agreement.[105] Thus, besides a failure to make mediation mandatory, Mississippi's bill contains some strong provisions that would help a foreclosure mediation program achieve success.

7. Conclusion

Bills calling for foreclosure mediation have been springing up with some frequency in recent years throughout the United States. It is a relatively cheap solution to a big problem in our country, and has the potential to make a big difference during tough economic times. Foreclosure mediation certainly has its critics, but effective foreclosure mediation programs have enabled many troubled homeowners to keep their homes.

One reason to trust in the future of these programs is quite simple- states can learn from the many early failures of failed mediation statutes. It is clear that some foreclosure mediation bills include more effective provisions than others, and thus give homeowners a better opportunity to succeed in the mediation. There is no reason states thinking about implementing such a bill cannot do a proper analysis of other states to see what type of foreclosure mediation bill works best. As more statistics become available regarding the success rates of foreclosure mediation in various states, it should only become easier for states considering foreclosure mediation bills to determine which states they will model their own bills on. Ideally, foreclosure mediation bills will not be as popular in the future, as a stronger economy would likely change the focus of many legislatures. Until that happens, foreclosure mediation provides an enticing option for states looking to ease the burden on its citizens who are trying to keep their homes.

(d) The most current appraisal of the property available to the plaintiff." *Id.*

103. *Id.* "SECTION 12. The program manager shall be responsible for referring the borrower to a foreclosure counselor prior to scheduling mediation." *Id.*

104. *Id.* "SECTION 13. In actions referred to the RMFM Program, the program manager shall advise any borrower who is not represented by an attorney that the borrower has a right to consult with an attorney at any time during the mediation process and the right to bring an attorney to the mediation session. The program manager shall also advise the borrower that the borrower may apply for a volunteer pro bono attorney in programs run by lawyer referral, legal services, and legal aid programs as may exist within the state." *Id.*

105. *Id.* "SECTION 15. (1) The following persons are required to be physically present at the mediation session: a plaintiff's representative designated in the most recently filed RMFM Program Form; plaintiff's counsel; the borrower; and the borrower's counsel of record, if any. However, the plaintiff's representative may appear at mediation through the use of communication equipment, if plaintiff files and serves at least five (5) days before the mediation a notice advising that the plaintiff's representative will be attending through the use of communication equipment and designating a person who is attending the mediation live and not electronically, who has full authority to sign any settlement agreement reached. Plaintiff's counsel may be designated as the person with full authority to sign the settlement agreement." *Id.*

B. Aiming for Efficiency: Arbitrators Are Unpaid Until Decision Is Issued

Bill Number: Connecticut House Bill 5205

Summary: This bill provides that arbitrators on the State Board of Mediation and Arbitration may be paid only after their decision has been issued as opposed to at the conclusion of arbitral proceedings.

Status: This bill passed received a favorable report from the Legislative Commissioner's Office and was calendared in the House of Representatives on March 19, 2012.

1. Introduction

The purpose of this Bill is to promote efficiency in the issuance of arbitration decisions by arbitrators on the State Board of Mediation and Arbitration by paying them only after their decision has been issued.[106]

The Connecticut State Board of Mediation and Arbitration ("Board") was created by Sec. 31-98 of the Connecticut General Statutes, and administers the Municipal Employee Relations Act under the State Employee Relations Act.[107] These statutes provide *inter alia* for mediation and arbitration services to private and public sector employers (towns, municipal unions and state employees) and employee organizations and appeals pursuant to Sec. 53-303e[108] of the Connecticut General Statutes.[109] Pursuant to the Municipal Employee Relations Act and the State Employee Relations Act, the Board conducts binding interest arbitration.[110]

The services provided by the Board poignantly impact the fiscal health of *inter alia* government employees, employers, and unions because these services are used as a part of the collective bargaining processes. The collective bargaining

106. H.B. 5202, 2012 Gen. Assem., Reg. Sess. (Conn. 2012), *available at* http://www.cga.ct.gov/2012/FC/2012HB-05202-R000038-FC.htm.

107. *Id.*

108. CONN. GEN. STAT. § 53-303e(c)-(d) (2009) provides in relevant part:

> c. Any employee, who believes that his discharge was in violation of an employee's observation of the Sabbath, as provided in subsection a. and b., of this section may appeal such discharge to the State Board of Mediation and Arbitration. If said board finds that the employee was discharged in violation of subsection (a) or (b), it may order whatever remedy will make the employee whole, including, but not limited to, reinstatement to his former or a comparable position. d. No employer may, as a prerequisite to employment, inquire whether the applicant observes any Sabbath. Any person who violates any provision of this section shall be fined not more than two hundred dollars.

The statute was found unconstitutional by the Connecticut Supreme Court in certain applications. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (holding that Section 53-303e violated the First Amendment by "provid[ing] Sabbath observers with an absolute and unqualified right not to work on their Sabbath . . . ."). Accordingly, this regulation continues to be applied in all other situations not precluded by the state Supreme Court's determination of unconstitutionality.

109. CONN. GEN. STAT. § 53-303e (2009).

110. Conn. H.B. 5202.

process establishes, in relevant part, employee pay, sick leave, vacation, benefits, disability benefits, and working conditions.[111] During this process the parties work to come to a joint solution, however this is not always possible and some disagreements may be submitted for resolution through arbitration.[112] Based on the terms of the agreement reached by the parties, workers can plan for the coming year and government entities can develop their budget.[113] In instances where disagreements must be submitted to arbitration for resolution, both parties are left in a holding pattern until a final decision is rendered.[114] Prolonged resolution of these arbitrated disputes can lead to fiscal difficulties for government entities by virtue of their inability to appropriately allocate necessary funds for town, city, and county governance.[115]

2. The Bill

Currently, under Section 31-98[116] of the general statutes arbitrators operating under the Board of Mediation and Arbitration, when administering binding arbi-

111. *Id.*

112. *See, e.g.*, *Collective Bargaining and Labor Arbitration: An Overview*, CORNELL UNIVERSITY LAW SCHOOL LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/collective_bargaining (last visited Oct. 18, 2012).

113. Alan I Model, *How to Play Collective Bargaining Hardball with the Union*, LAWMEMO, http://www.lawmemo.com/articles/hardball.htm (last visited Oct. 18, 2012).

114. *Id.* When a collective bargaining agreement has expired, an employer has a duty under the National Labor Relations Act ("NLRA") to meet and confer, in good faith, with the bargaining representative of its employees regarding the terms of employment. *Id.* This requirement does not impose a duty upon either party to agree to a certain proposal or make any specific concessions. *Id.* Accordingly, if one or both of parties remain immovable on a certain aspect of an agreement and refuse to accept anything other than their terms then an impasse is reached. *Id.* An impasse, a fact-laden situation, is "the point at which further discussions would be futile." *Id.* Once a legitimate impasse has been reached the duty to bargain becomes "dormant." *Id.* The employer is temporarily relieved of his duty to meet with the Union representative after an impasse has been reached. *Id.*

115. *Id. See, e.g.*, NATIONAL ADVISORY COUNCIL ON STATE AND LOCAL BUDGETING, RECOMMENDED BUDGET PRACTICES: A FRAMEWORK FOR IMPROVED STATE AND LOCAL GOVERNMENT BUDGETING, *available at* http://www.gfoa.org/services/dfl/budget/RecommendedBudgetPractices.pdf (last visited Oct. 18, 2012).

116. CONN. GEN. STAT. § 31-98 (2011). Section 31-98 states:

> Oral or written decision. Reduction of oral decision to writing. Compensation of members. (a) The panel, or its single member if sitting in accordance with section 31-93, may, in its discretion and with the consent of the parties, issue an oral decision immediately upon conclusion of the proceedings. If the decision is to be in writing, it shall be signed, within fifteen days, by a majority of the members of the panel or by the single member so sitting, and the decision shall state such details as will clearly show the nature of the decision and the points disposed of by the panel. Where the decision is in writing, one copy thereof shall be filed by the panel in the office of the town clerk in the town where the controversy arose and one copy shall be given to each of the parties to the controversy. The panel or single member which has rendered an oral decision immediately upon conclusion of the proceedings shall submit a written copy of the decision to each party within fifteen days from the issuance of such oral decision. In all cases where a decision is rendered orally from the bench, the secretary shall cause such oral decision to be transcribed, approved by the panel or single member as applicable and filed with the records of the board proceedings.
>
> (b) Upon the conclusion of the proceedings, each member of the panel shall receive one hundred fifty dollars and a panel member who prepares a written decision shall receive an additional one hundred dollars, or the single member, if sitting in accordance with section 31-93, shall receive two hundred fifty dollars, provided if the proceedings extend beyond one day, each member shall receive seventy-five dollars for each additional day beyond the first day, and provided further no

tration under the municipal and state employee collective bargaining laws, may issue either oral or written decisions.[117] Section 1, Section 31-98[118] provides that arbitral decisions be signed within 15 days of the conclusion of the arbitral proceedings.[119] Additionally, Section 1, Section 31-98 presently provides that each member of the arbitration panel will be paid for his or her arbitration services at the conclusion of the arbitration proceeding.[120]

House Bill 5205 amends both of these provisions by extending the allotted period of time in which an arbitration decision must be signed and changing the payment schedule to arbitrators administering the proceeding.[121] This bill provides that instead of requiring an arbitration decision be issued within 15 days, arbitrators now have 60 days before they must issue an arbitration award.[122]

The Bill also provides that instead of immediate statutory payment to arbitrators and arbitral panels upon the conclusion of an arbitration proceeding, payment will not be made until the arbitration decision is issued.[123] The Bill does not amend the per-day arbitrator payment schedule.[124]

The Bill does not amend the requirement that an oral decision issued immediately upon the conclusion of the proceedings must be submitted to the concerned parties in writing within 15 days.[125] There would be no fiscal impact to the state should HB5202 be enacted, but rather only the Board may have to recalculate payment schedules and associated budgets.[126]

3. Support and Opposition

House Bill 5205 received a Joint Favorable Report from the Labor and Public Employees Committee on March 1, 2012 with 8 out of the 10 Committee members voting in favor of the Bill.[127] Also in support of the measure were the Connecticut Conference of Municipalities and the Connecticut Council of Small Towns.[128]

The Connecticut Conference of Municipalities supported House Bill 5205, specifically the amended payment schedule to Arbitrators only after issuance of the arbitral award, on the grounds that the amendments would reasonably provide an incentive-based means of promoting an efficient collective bargaining pro-

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proceeding may be extended beyond two days without the prior approval of the Labor Commissioner for each such additional day.

(c) Upon the conclusion of an executive panel session, each member of such panel shall receive seventy-five dollars.

117. Conn. H.B. 5202.
118. CONN. GEN. STAT. § 31-98 (2011).
119. Conn. H.B. 5202.
120. *Id.*
121. *Id*.
122. *Id.*
123. *Id.*
124. *Id.*
125. Conn. H.B. 5202.
126. *Id.*
127. Conn. H.B. 5202 (Bill Status), *available at* http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=5202&which_year=2012&SUBMIT1.x=0&SUBMIT1.y=0 (last visited Oct. 18, 2012).
128. *Id.*

cess.[129] Similarly, the National Association of Towns and Townships,[130] Executive Director Bart Russell, testified that the Bill would help ensure final arbitration decisions were issued in a timely manner while also assisting towns in developing budgets with more accurate salary and benefit costs.[131]

4. Conclusion

Even though House Bill 5202 received a favorable report from the Labor and Public Employees Committee and generally positive feedback from stakeholders, the bill did not have much momentum toward enactment. The Bill received a favorable report from the Legislative Commissioners Office on March 19, 2012 and was thereafter calendared in the State of Connecticut House of Representatives.[132]

House Bill 5202 seems to address issues regarding delayed arbitration decisions; however, this legislation is really concerned with the larger issues faced not by the alternative dispute resolution industry, but by the government entities that use it. In a time when states, towns, and municipalities are scrutinizing the path of every dollar in an attempt to avoid cavernous budget shortfalls that seemingly arise in the later part of every fiscal year, delayed outcomes of collective bargaining disputes are fiscally debilitating. By creating an incentive, delayed payment, for arbitrators to work faster in rending final decisions the government entities are attempting to make better budget decisions and avoid later shortfalls.[133]

C. Mandatory Mediation: A Measure Intended To Ameliorate Familial Disputes

Bill Number: Pennsylvania House Bill 2282.

Summary: On March 27, 2012 Representative Matthew E. Baker (R) introduced House Bill 2282, which requires parties to mediate in "domestic relation" cases.[134] The bill seeks to make the court a more comfortable place to handle domestic relation cases by

129. Conn. H.B. 5202, *available at* http://www.cga.ct.gov/2012/FC/2012HB-05202-R000038-FC.htm.

130. NATaT's purpose is to advocate for fair-share federal funding decisions and to promote legislative and regulatory policies designed to strengthen grassroots local government. *See* Purpose, NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS, http://www.natat.org/index.aspx?nid=70 (last visited Oct. 18, 2012).

131. In opposition, two entities were formally registered, the Board of Mediation and Arbitration which provided reasoning inconsistent with the text of HB5202 and the Uniformed Professional Fire Fighters Association of Connecticut stating concerns that the bill would not be a constructive measure for the binding arbitration process. *See* Conn. H.B. 5202, *available at* http://www.cga.ct.gov/2012/FC/2012HB-05202-R000038-FC.htm.

132. *See supra* note 127 and accompanying text.

133. *See supra* note 115 and accompanying text.

134. H.B. 2282, 196th Gen. Assemb., Reg. Sess. (Pa. 2012), *available at* http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2011&sessInd=0&billBody=H&billTyp=B&billNbr=2282&pn=3284.

ensuring parties engage with the same judges and staff.[135] The bill also seeks to educate judges and staff on different matters—most notably mediation.[136] The intent of the Legislature is to reduce the adversarial nature in domestic relation cases by circumventing the traditional litigation process.[137] On March 27, 2012, the bill was referred to the Children and Youth Committee, where it remains.[138]

Status: HB 2282 was referred to the Children and Youth Committee on March 27, 2012.

1. Introduction

As the name suggests, Alternative Dispute Resolution ("ADR") mechanisms were originally created to provide parties with alternative mechanisms to solve legal disputes short of pursuing litigation. An underlying, although perhaps unspoken premise of ADR, was the presumption that the parties will voluntarily choose the "alternative." In fact, proponents of ADR considered the voluntary nature of the various processes to be its key feature.[139] Since its inception in 1970, legislators and courts have been increasingly relying on the use of ADR.[140] As ADR has been mainstreamed, however, its voluntary nature has been somewhat challenged. In fact, ADR has become more of a requirement rather than an alternative.[141] Pennsylvania House Bill 2282 ("Bill") was introduced by Republican Matthew E. Baker on March 27, 2012.[142] The Bill, in its relevant part, repeals language that makes mediation discretionary in domestic disputes and adds a chapter—The Family Law and Justice Act[143]—which mandates mediation before a court is allowed to preside over a domestic dispute.[144] To date, the only action to the Bill was its referral to the Children and Youth committee on March 27, 2012.[145]

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135. *Id.* § 7202.
136. *Id*. §§ 7203(8), 7230(b)(1)(vi).
137. *Id*. § 7203.
138. Pa. H.B. 2282.
139. Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIM. LAW. 69, 76 (2001).
140. JAY FOLBERG ET AL., DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 6, (2004).
141. *See* Pa. H.B. 2282 § 7222.
142. Pa. H.B. 2282.
143. *Id*. § 7201.
144. *Id*. § 7222.
145. There are currently no votes for House Bill 2282. *See Bill Information*, Pa. H.B. 2282, http://www.legis.state.pa.us/cfdocs/billinfo/bill_votes.cfm?syear=2011&sind=0&body=H&type=B&bn=2282.

2. House Bill 2282

House Bill 2282 requires mediation for most domestic disputes.[146] Specifically, the bill requires that any action for divorce, annulment, custody, child support, spousal support, alimony pendent elite, and equitable division of marital property be heard before a mediator before it can proceed to traditional litigation.[147] The bill justifies the mediation requirement as necessary to mitigate the "undue hardship" that normally follows from a domestic dispute.[148] Acknowledging that the disruption of a family is injurious to all members, the bill enumerates specific harms that children face.[149] The dissolution of a family augments a child's risk of engaging in "teen violence" and "suicide" and experiencing "depression."[150] The Bill also expresses that a breakup may "impede learning and emotional growth."[151]

To remedy the enumerated harms and other unforeseen issues, the Bill imposes special substantive and procedural requirements when a domestic dispute is before the court.[152] First, each judicial district must submit an annual report, which gives statistics about family litigation. [153] The report includes subjects such as: number of cases filed and pending, length of average case, and compliance with court orders.[154]

Second, the Bill requires each judicial district to screen all domestic disputes for signs of abuse or neglect. [155] If abuse or neglect is found, the case is referred to a resource center that provides information about government services designed to help prevent or treat the abuse or neglect.[156] The Bill also requires a "Family Information Statement" to accompany any complaint filed, which is another screening mechanism.[157]

Third, the Bill requires the establishment of "case management teams" so that parties may interact with the same staff each time they visit the court.[158] The management teams are there to supervise the process and to provide organization and consistency.[159] The management teams are also required to share information with other governmental agencies when necessary.[160]

Fourth, and most notably, the Bill mandates mediation as a tool to address the "undue hardship" that surrounds domestic disputes.[161] The parties are responsible for the cost of the mandatory mediation but it is based on their "ability to

146. Pa. H.B. 2282 § 7222(a)(1).
147. *Id.* §§ 7204, 7220(b)(5).
148. *Id.* § 7202(1).
149. *Id.* § 7202(3).
150. *Id.*
151. *Id.*
152. Pa. H.B. 2282.
153. *Id.* § 7207(a).
154. *Id.* § 7207(a)(1)-(9).
155. *Id.* § 7209.
156. *Id.*
157. *Id.* § 7212. The information sheet includes basic personal information as well as abuse or neglect information. *Id.*
158. Pa. H.B. § 7220(a).
159. *Id.* § 7220(b).
160. *Id.* § 7220(b)(6)-(7).
161. *Id.* §§ 7202(1), 7222(a)(1).

pay."[162] There is a general fund in Pennsylvania that helps offset some of the necessary costs for qualified families.[163] As for the mediator, she must meet the minimum qualifications set forth by the Pennsylvania Supreme Court, which covers the areas of education, experience, and interpersonal skills.[164]

There are exceptions in the Bill that make mediation unsuitable. For "good cause," a party may be excused from mediation.[165] The Bill expresses that "good cause" is "[a] history of child abuse or neglect, child sexual abuse or exploitation or domestic violence by a party."[166]

Although the intent of the legislature is benevolent and mediation has unmistakably great advantages, it still must be asked if those advantages and that intent warrant the imposition of mediation on almost every family before the court. Given the complexities of each family, should there be some level of discretion invested in a presiding judge or the parties themselves to ascertain whether mediation would be advantageous on a case-by-case basis?

3. Mediation

a. Generally

Mediation[167] is one option under the category of alternative dispute resolution.[168] As compared to traditional litigation, it is an informal process where two parties may resolve their dispute with the assistance of a mediator.[169] As expected, the mediator is a neutral party in the dispute process and seeks to flesh out the "sources of conflict"[170] so as to provide the parties with an effective resolution.[171]

Depending on the rules in the jurisdiction where the mediation occurs, the mediation may be confidential or nonconfidential.[172] In a confidential setting, the mediator is not allowed to disclose any information obtained during the mediation process, except when specific circumstances arise.[173] On the other hand, in a nonconfidential setting the mediator may be asked to disclose information to the court in the event that a settlement was not reached between the parties.[174] However,

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162. *Id*. § 7222(g).
163. *Id.* § 7226(b).
164. Pa. H.B. 2282 § 7222(d)(1)-(3)
165. Id. § 7222(c).
166. *Id*. § 7222(c)(1).
167. Mediation does not have an agreed upon definition. In its basic form, it is "simply the facilitation of settlement between individuals." FORREST S. MOSTEN, THE COMPLETE GUIDE TO MEDIATION 17 (1997).
168. *See* NANCY F. ATLAS ET AL., ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR'S HANDBOOK 2 (Stephen K. Huber & E. Wendy Trachte-Huber eds., 2000).
169. *Id*. at 6.
170. Conflicts have been broken down into the following categories: value; structural; interest, data, and relationship. MOSTEN, *supra* note 167, at 19.
171. *Id*. at 18-19.
172. *Id*. at 109-10.
173. A mediator is required to report to law enforcement or the court allegations or suspicions of child violence or sexual abuse, physical danger to a party or third person, or threats to commit crimes. *Id.* at 109.
174. *Id*. at 110.

unlike a traditional court proceeding, the record or information disclosed is not directly available to the public and therefore, any mediation is more confidential than litigation.[175]

b. Court-Annexed Mediation

Court-annexed mediation refers to a situation where parties litigating a dispute in a particular court system are required to agree to submit their dispute to mediation.[176] Court-annexed mediation has been challenged as interfering with the right to have disputes heard in court.[177] However, courts have found that the imposition of mediation does not obstruct a citizen's right to a trial.[178]

Mediation, pursuant to statutes or local rules, may be either voluntary or mandatory.[179] Voluntary mediation generally does not mean that a party is free to choose whether he will participate in mediation.[180] Instead, voluntary, in the context of statutes and local rules, means it is within the court's discretion whether to require parties to engage in mediation.[181] This decision is usually made based on the facts of a particular situation and therefore is made on a case-by-case basis.[182]

Conversely, if a statute or local rule requires mandatory mediation, then the judges is stripped of his discretion and all parties with a dispute must first try and resolve it through mediation before the matter is jurisdictionally ripe to be decided by a court.[183]

Mandatory mediation does not mean that parties must resolve their issues in the mediation process.[184] Nor does it mean that the mediator's decision, if he shall make one, is binding.[185] It simply means that it is "mandatory" to engage in mediation.[186]

c. Advantages of Mediation

As compared to the traditional litigation process, which tends to be characterized by a winner-takes-all mentality, mediation is generally thought of as a nonadversarial process as it aims to resolve conflicts amicably.[187] The nonadversarial environment is achieved because there is generally no binding decision. Because the parties are aware of the fact that a decision will not be forced upon them, they may enter the mediation process with a more open mind. Further, all disincen-

175. *Id.*.
176. *Id.* at 109.
177. *See* Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End For Mandatory Mediation?*, 47 FAM. CT. REV. 371, 379-80 (2009).
178. *Id*.
179. *See* MOSTEN, *supra* note 167, at 109.
180. *See* Pa. H.B. 2282; H.B. 600, 50th Leg., 1st Sess. (N.M. 2011), *available at* http://www.nmlegis.gov/Sessions/11%20Regular/bills/house/HB0600.html.
181. *See* Pa. H.B. 2282; N.M. H.B. 600.
182. *See* Pa. H.B. 2282; N.M. H.B. 600.
183. *See* MOSTEN, *supra* note 167, at 109.
184. *Id*.
185. *Id*.
186. *Id*.
187. *See* CONNIE J.A. BECK & BRUCE D. SALES, FAMILY MEDIATION: FACTS, MYTHS, AND FUTURE PROSPECTS 27 (2001).

tives to not be completely candid are removed because the parties have nothing to lose from telling the truth, especially if the mediation is confidential. Moreover, the informality of the mediation setting buttresses the nonadversarial environment. Ultimately, because parties are not pitted against each other in a winner–takes-all death match, the mediation process, as compared to traditional litigation, may have rewarding advantages for all involved.

As a practical matter, mediation is less expensive than litigation.[188] There are no costly documents that have to be filed, court costs, or extra personnel required as there are in a courtroom setting.[189] As compared to a trial, the mediation process is itself more informal than a trial.[190] There are no witnesses to examine, documents to be introduced in evidence, challenges and objections to be made.[191] Often, the parties themselves do most of the talking. As such attorneys are less involved, which potentially results in reduced expenses.[192] If the parties are able to save money on the front-end and successfully utilize the mediation process, then the parties will have conserved money for the back-end when it is necessary to divide the resources pursuant to the resolution.[193] The conservation of resources is arguably most important when children are involved.[194]

Mediation is usually faster and less time-consuming.[195] Parties may be able to resolve their dispute without extensive discovery or the back and forth of different motions to exclude and include evidence.[196] The less time spent resolving a dispute, the more time each party has to work at their normal business and continue to earn income. In addition, once the dispute is over, parties may return to their normal lives so a quicker process is preferable.

Mediation provides an opportunity for better communication between parties.[197] Parties are allowed to discuss the problems directly with each other in mediation; essentially, they are allowed to "air" their concerns.[198] Unlike a traditional litigation setting, where lawyers generally speak for their client, mediation fosters direct communication.[199] This face-to-face communication, which takes place in front of the mediator, is likely to produce favorable results because parties may reveal information that they never felt comfortable or compelled to say previously.[200] Generally, the root of most problems is poor communication[201] and therefore, this advantage of mediation over litigation should not be taken lightly.

Mediation tends to result in greater client satisfaction.[202] Most parties involved in a mediation that ended with a settlement are relatively more satisfied

188. *See* MOSTEN, *supra* note 167, at 60.
189. *Id*.
190. *See id*. at 56.
191. *See id*. at 55-64.
192. *Id*.
193. *See id*. at 62.
194. MOSTEN, *supra* note 167, at 63.
195. *Id.* at 61.
196. *Id*.
197. *Id.* at 63; BECK & SALES, *supra* note 187, at 27.
198. BECK & SALES, *supra* note 187, at 27.
199. *See* MOSTEN, *supra* note 167, at 63.
200. *Id*.
201. *Id*.
202. *Id*. at 55.

than parties who have litigated.[203] This may seem self-apparent because if one party was not satisfied, then that party would have never agreed to the settlement. In addition, because the parties have more control in a mediation, compared to litigation, the agreed upon settlement mediation is generally well received.

Lastly, the mediation process is a teaching mechanism.[204] During mediation, the parties have the opportunity not only to make their case, but also to begin to understand the other party's perspective. This therapeutic aspect is particularly important in family disputes. When families separate it is likely that they will create or become a part of new families. It is equally likely that new conflicts will surface. "What is great about the mediation approach, aside from its effectiveness in dealing with the immediate issues at hand, is that it teaches couples a cooperative process. They'll be able to use what they learn to cope with the new issue that will, in the future, inevitably arise."[205]

4. Family Law

a. Overview

In America, a family has traditionally been defined as a man, a woman, and their children. From time to time, disputes between the man and the woman may arise and if irreconcilable, may culminate with a divorce. These disputes often involve children and resources belonging to the parties.

b. Divorce

In most states, a divorce may be sought based on the fault of one spouse or both or no fault at all.[206] The former is properly categorized as a "fault" divorce and the latter is referred to as a "no fault" divorce.[207]

Traditionally, fault divorces were the only option available to married couples seeking to dissolve their relationship.[208] Unlike any other civil proceeding, a divorce could not be stipulated to, nor could there be a default judgment entered.[209] To obtain a fault divorce, there had to be blame placed on one spouse, or both, as to why the marriage could no longer continue.[210] This is typically referred to as "grounds" for a divorce.[211]

The fault divorce scheme was problematic for at least two reasons. First, the divorce proceeding would turn into a mud-slinging contest to produce as much

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203. *See id*.
204. *See id.* at 55.
205. *Id.* at 251-52 (quoting DR. CONSTANCE AHRONS, THE GOOD DIVORCE, (1994)).
206. WALTER WADLINGTON & RAYMOND C. O'BRIEN, FAMILY LAW IN PERSPECTIVE, 59-65 (2001).
207. *Id*.
208. LESLIE J. HARRIS ET AL., FAMILY LAW 320 (Richard A. Epstein et al. eds., 2d ed. 2000).
209. *See* JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 223 (2d ed. 2001). Marriage has important roots in America's history and as such, there are specific rules that govern the institution. Because marriage is considered to everlasting, or at least until death destroys it, the law did not favor divorce and only allowed it under certain circumstances. The traditional grounds for divorce were adultery, extreme cruelty, and desertion. *Id.*
210. WADLINGTON & O'BRIEN, *supra* note 206, at 60.
211. *Id*.

fault as possible so that the court would grant the divorce.[212] Often, spouses would stage acts inconsistent with marriage to obtain grounds for a divorce, and would necessarily commit perjury.[213] Second, it tended to exacerbate the differences rather than mitigate the problems.[214] Therefore, the law, which sought to discourage divorce, was simultaneously making divorce inevitable by requiring couples to prove fault once they questioned their relationship and entered into divorce proceedings.

Today, a divorce can be obtained in all fifty States without fault.[215] The no-fault divorce was implemented to remedy the nonsense—perjury and fabrication—created by the fault scheme.[216] Under a no-fault scheme, as its name intimates, couples may obtain a divorce without grounds other than the fact that they have "irreconcilable differences."[217] This scheme lessens the adversarial nature of the traditional fault-based divorce and allows couple to dissolve their marriage "amicably."[218]

Although no-fault divorce ameliorated the adversarial nature of fault-based divorce it did nothing to help stifle divorces or its byproducts.[219] In fact, critics of no-fault divorce believe that its scheme was instrumental in the rising rate of divorces because of its lax requirements.[220] Conversely, proponents of no-fault argue that the no-fault scheme is consistent for what is in the best interest of the children.[221] Specifically, proponents recognize that it is in everyone's best interest, including the children, to dissolve a malfunctioning, and possibly violent relationship, as quickly and peacefully as possible.[222]

c. Child Custody

Often domestic disputes involve children whom the parents are vying to obtain custodial rights over. This puts the judge who is presiding over the proceeding in a tough situation of determining which parent is better suited to raise the child. More importantly, this puts the child in an even tougher position of being virtually voiceless while some third-party decides his future. Judges take several

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212. *See* HARRIS ET AL., *supra* note 208, at 328-32.
213. GREGORY ET AL., *supra* note 209, at 223.
214. *Id*.
215. *Id.* at 224. California was the leading state for no-fault divorces by "recommending that divorce grounds be limited to irremediable breakdown and insanity." Following California's lead, the National Conference of Commissioners on Uniform State Laws proposed the Uniform Marriage and Divorce. *Id*.
216. *Id*. at 223.
217. *Id.* at 224. "Currently, some 15 states have adopted irreconcilable differences or irretrievable breakdown as the sole ground for divorce, while an additional 20 states list one of those grounds in addition to traditional fault-based grounds. The remaining states provide for a no-fault type divorce based on living separate and apart for a stated period of time, in addition to traditional fault-based grounds." *Id*.
218. *Id*.
219. WADLINGTON & O'BRIEN, *supra* note 206, at 62.
220. *Id.* Almost fifty percent of all marriages end with divorces. *Id*.
221. *Id*.
222. *Id.* Children exposed to violence and dysfunctional behavior at an early age may develop a propensity toward these characteristics and lead troubled lives. *Id*.

factors into account to try and mitigate the risks of making the wrong decision in regards to the child's custodial parent.[223]

One somewhat outdated[224] factor is the tender years presumption. Under this presumption, the mother would almost always receive sole custody of the child due to a child's natural inclination to cling to his mother.[225] Traditionally, this factor could warrant custody standing alone, but today it is considered among many other factors.[226]

Another factor is the primary caretaker presumption. Under this presumption, the custody is awarded to the parent who meets most of the enumerated qualifications[227] of being the child's primary caretaker.[228] It is argued by some that the primary caretaker presumption is the same as the tender years presumption but just in a different form.[229] However, the expressed factors under the primary caretaker presumption make it markedly different from the tender years presumption by placing the father and mother on equal footing.[230]

Probably the most beneficial to the child, from his perspective (who's perspective: child or judge, this sentence is unclear), is when the judge takes the child's preference into consideration. This approach only seems to be sensible if the child is of an appropriate age to gauge whether or not a particular parent is more equip to raise him. Obviously, the presiding judge will have to account for the lack of sagacity a child possesses. For example, a child may prefer a parent who lets the child do whatever he desires, i.e. spoils the child. Therefore, absent some form of abuse or neglect, it seems implausible to give much weight to the child's preference in determining his best interest, because the child may not truly understand what good parenting entails.[231]

Aside from the previous factors mentioned, it becomes more complicated when the two parental or quasi-parental units before the court are not in their traditional form, i.e., mother and father. In these situations, the judge may have to

223. *Id*. at 153-80.
224. *Id*. at 154.
225. *Id.* at 154.
226. *Id.*
227. *Id.* The factors to look at regarding a primary caretaker is as follows: "(1) preparing and planning of meals; (2) bathing grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school…; (6) arranging for alternative care, i.e. baby sitting, day care, etc.; (7) putting children to bed at night, attending [to] the child in the middle of the night, waking the child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; and (10) teaching elementary skills, i.e. reading, writing, and arithmetic. *Id.* at 155.
228. *Id*.
229. *Id*.
230. *Id.*
231. *Id.* at 157-58. In California, a child's best interest is determined by the following factors: "(1) the health and safety of the child; (2) any history of abuse by a parent against any child to whom he or she is related by blood or affinity or in a care taking relationship no matter for how long; (3) any history of abuse against the other parent, current spouse, or cohabitant; (4) and history of abuse against his or her own parent, or someone with whom he or she has a dating or engagement relationship; (5) the nature and amount of contact the child will have with both parents; and, (6) the habitual or continued use of illegal use of controlled substances or alcohol by either parent." *Id.*

decide who shall have custody of the child between a parent and a non-parent or even worse, a parent and the state.[232]

When a child is posited between a parent and the state, it is likely that the child's current environment was not in his best interest. The state only steps in between a child and his parent when there is improper behavior occurring or the child's environment is not suitable.[233] Once the state removes the child from his home, the parent must rectify the problem to reinstate parental rights.[234] If the parent fails to rectify, then the child may be eligible for adoption.[235] Under certain circumstances, pursuant to the Adoption and Safe Families Act of 1977, the State must seek to terminate the parental rights regardless of the remedial action taken by the questionable parent.[236]

d. Child Support

Traditionally, the man was the provider of the house and as such, when the issue of child support arose, he was responsible.[237] Those gender bias notions and rules have been discarded due to the acknowledgment of what "equal" means in the twenty-first century.[238] Today, the father and mother are both prime candidates for child support.[239] The law focuses on financial resources, instead of gender, to determine who shall pay the support or how the support should be allocated between the two.[240]

A financial resource inquiry brings its own problems, however.[241] Often, there may be little resources between the parents collectively and whatever resources are available may be directly from the State.[242] One of the primary concerns of child support, aside from the needs of the child, is to preclude the child from becoming a financial responsibility of the State.[243]

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232. *Id.* at 166-74.
233. *Id*. at 171-72.
234. *Id.* at 172. "The goal of the state is for the parents to work with social agencies once the child has been removed so as to alleviate the conditions which prompted removal. *Id.*
235. *Id*.
236. 42 U.S.C. § 675(5)(E) (2006). "[I]n the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption…" *Id.*
237. GREGORY ET AL., *supra* note 209, at 313.
238. *Id*.
239. *Id*.
240. *Id*. at 314.
241. WADLINGTON & O'BRIEN, *supra* note 206, at 138. The financial resource inquiry uses the following factors as guidance: "(1) the financial resources of the child; (2) the financial resources of the parent; (3) the standard of living the child would have enjoyed had the parents stayed together; (4) the physical, educational and emotional needs of the child; and (5) the financial resources and need of the noncustodial parent." *Id.*
242. *Id.*
243. *Id*.

On the other hand, some parents fall under the category of having too much income.[244] While this seems impossible in our "American Dream" (what do you mean by this?) society, it becomes a problem when the pie must be split and shared with others outside of the family. Generally, a child is only going to need support for his basic living expenses and a few social activities.[245] Courts, however, allow the child to receive the resources that will put the child's standard of living on equal footing with the bread-winning parent.[246] This rule is rational. But it must be noted that usually the child is not receiving the money directly, rather it is the custodial parent.[247] And if the payor has an "unusually large income" then the risks of child support being used as spousal support is augmented. As a result, states have set a maximum level of child support.[248]

Another issue under with financial resource determination was inconsistency.[249] Each judge had the discretion to award what she thought was proper.[250] This led to financial child support being determined on a case-by-case basis. [251] To create a more objective approach, Congress required all states receiving federal funding to adopt the child support guidelines.[252] These guidelines brought guidance and consistency into a massive area of family law.[253] However, it must be noted that the guidelines, while consistent throughout a state tend to vary among all the states.[254]

e. Child Abuse

Child abuse[255] is a troubling and pervasive problem in America. [256] In the 1960s, States began to recognize the pervasiveness and started enacting child abuse reporting statutes.[257] These statutes, which are in all fifty states, allow con-

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244. GREGORY ET AL., *supra* note 209, at 320.
245. *Id*.
246. *Id*. at 319.
247. *Id*. at 320.
248. *Id*.
249. WADLINGTON & O'BRIEN, *supra* note 206, at 138.
250. *Id*. at 139.
251. *Id*.
252. *Id.* "The United States Congress mandated as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1966, that all states adopt the Act in order to remain eligible for the federal funding of child support enforcement. Furthermore, all states receiving federal funding must adopt child support guidelines, and review them so as to evaluate effectiveness." *Id*.
253. *Id*.
254. GREGORY ET. AL., *supra* note 209, at 312.
255. *See, e.g.*, W.VA. CODE. ANN. § 49-1-3 (defining "child abuse and neglect as "physical injury, mental or emotional injury, sexual abuse, sexual exploitation, sale or attempted sale or negligent treatment or maltreatment of a child . . . under circumstances which harm or threaten the health and welfare of the child"). Other state statutes are more specific, where child abuse is defined as any physical injury inflicted on a child by other than accidental means including, but not limited to: severe bruising, lacerations, fractured bones, burns, internal injuries, sexual intercourse on contact, or any other injury constituting great bodily harm. *See, e.g.*, WIS. STAT. ANN. § 48.02 (2012); GREGORY ET AL., *supra* note 209, at 213 n.121.
256. GREGORY ET AL., *supra* note 209, at 213
257. *Id*. The statutes address "mandatory reporting, screening reports, proper maintenance and disclosure of records, domestic violence and other issues. *State Laws on Child Abuse and Neglect*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *available at* http://www.childwelfare.gov/systemwide/laws_policies/state/can/ (last visited Oct. 20, 2012).

cerned citizens to directly contact local law enforcement agencies, child abuse hotlines, and local child protective services.[258]

Even with laws put in place, child abuse is still prevalent because it is usually done within the privacy of one's home.[259] Therefore, until the abuse is suspected by a third-party, there is nothing or no one to protect the child. In most situations, the child is either to afraid or doesn't have the knowledge to reach out and seek help. For that reason, most statutes usually require certain persons who often come in contact with children to report suspected abuse.[260] However, some studies show that this statutory mechanism is not very effective.[261]

If the child is taken into the State's custody, then the dispute arises between the State and the deprived parent. While in custody, the State has an affirmative duty to protect the child from harm.[262] Until this point, States are usually not liable for harm done to the child. [263] Even if the child is not in the State's custody, maybe because one parent is harmful and the other is not, the court may grant restraining orders against the harmful parent or an order removing said parent from the home.[264]

f. Non-Traditional Families

Each preceding category—divorce, child support, child custody, and child abuse—has its place when considering families that include lesbians, gays, bisexuals and transgender couples.[265] This area of the law is still developing and the analysis below will not address it.

5. Mediation in Family Law

a. Overview

Mediation has been utilized to resolve domestic disputes for several decades.[266] Most states today have statutes that allow for mediation when addressing domestic disputes.[267] Several states make mediation mandatory, whereas the other

258. *State Laws on Child Abuse and Neglect*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *available at* http://www.childwelfare.gov/systemwide/laws_policies/state/can/ (last visited Oct. 20, 2012).
259. GREGORY ET AL., *supra* note 209, at 213.
260. *Id.* at 214. Persons who generally come into close contact with children and who must report suspected abuse are: (1) physicians; (2) nurses; (3) teachers; (4) social workers; (5) child care; (6) and law enforcement officials. *Id.*
261. *Id.* According to the United States Advisory Board on Child Abuse and Neglect, approximately 2,000 infants and young children die each year at the hands of their parents or caretakers, approximately 18,000 children a year are permanently disable, and approximately 142,000 children are seriously injured as a result of parental or caretaker maltreatment. *Id.*
262. *Id*.
263. *Id*.
264. *Id*. at 214-15.
265. For a thorough discussion on non-traditional family law *see* COURTNEY G. JOSLIN & SHANNON P. MINTER, LESBIAN, GAY BISEXUAL AND TRANSGENDER FAMILY LAW (2011).
266. JAY FOLBERG ET AL., *supra* note 140, at 6.
267. *Id*.at 5.

states allow for mediation if the judge decides to impose it on the parties.[268] The Pennsylvania Bill is attempting to switch their statutory scheme from discretionary to mandatory.

b. Pennsylvania House Bill 2822

The legislature's intent behind HB 2822 is to reduce the adversarial nature encompassing domestic disputes.[269] Recognizing that "family breakups" affect all members of the family, the legislature opines that the traditional litigation process exacerbates the pain.[270] Specifically, the legislature expresses that the traditional litigation process is "multilayered, segmented, over lengthy and costly."[271] More importantly, the legislature acknowledges that children are affected the most.[272]

The Legislature intends for the procedures under the Bill, notably mandatory mediation,[273] to be consistent with a quick and fair resolution.[274] The procedures also facilitate the parties' ability to cope with emotional pain that the parties are undoubtedly experiencing.[275] By assigning a case management team to each dispute, the Bill encourages stability by allowing parties to interact with the same court officers and staff each time they need assistance.[276]

The mediation requirement of the Bill applies to domestic disputes involving divorce, annulment, child support, spousal support, custody, alimony and equitable division of marital property.[277] Mediation is expressly precluded from being utilized when there is a report of domestic violence or child abuse.[278]

b. Analysis

By mandating mediation, the Legislature has overlooked the risk of augmenting the harm that results from the dissolution of a family and other familial disputes. While mediation possesses advantageous characteristics in its traditional form, the implication that those same advantages will absolutely transcend to mediation in this context is questionable. Put simply, parties forced to mediate may not reap the same benefits, if any, as those parties who choose to mediate because an effective mediation depends on cooperation of the parties and not the presence of a mediator. Ultimately, the effect of mandatory mediation depends on the attitudes and relationship of the family itself and not the subject matter of the meditation.

To be sure, there are several advantages to be obtained from mediating family disputes. Because mediation is less formal than traditional litigation, the parties have a greater opportunity to make statements without the type of evidentiary

268. *Id*. at 10,11.
269. Pa. H.B. 2282 § 7203.
270. *Id.* § 7202.
271. *Id.*
272. *Id.*
273. *Id*. § 7222.
274. *Id.* § 7203.
275. Pa. H.B. 2282 § 7203(6).
276. *Id*. § 7220(A).
277. *Id.* § 7222(A).
278. *Id*. § 7222(C)(1).

limitations common to a trial.[279] This ability to make statements in a less constrained manner has a number of salutary effects. By facilitating the flow of information, mediation tends to provide the mediator with a more accurate picture of the problem, and thus she is in a better position to suggest a more effective resolution as compared to a judge listening to the issues framed by the parties' attorneys.

The ability to "speak their minds" also serves as a tension-release mechanism. Parties feel included in the mediation process and resolution and therefore are more satisfied with the outcome. Studies show that when parties obtain a divorce through mediation there are no "serious disagreements" for at least six months.[280]

The mediation process has the distinctive advantage of giving equal voice to all parties. In the domestic dispute context this is particularly important. General stereotypes such as more education and assertiveness are said to be the cause of the disparity in bargaining power with the man holding the upper hand.[281] Mediation has the potential to balance this disparity, but only if the mediator is properly trained.[282] Specifically, the mediator should be trained to give equal attention to both parties' concerns and issues, which should theoretically stifle any advantage that the man has over the woman.[283]

As discussed earlier, mediation is also more economical than litigation.[284] Parties spend less on attorney fees and court costs and with these savings, more resources are available for distribution when a resolution is agreed upon.[285]

The advantages just listed tend to be particularly associated with voluntary mediation.[286] Where mediation is mandatory, as it will be the case under HB 2282, some of these advantages tend to disappear. In fact, a number of criticisms have been levied against mandatory mediation.[287] One school of thought suggests that leaving familial disputes to the determination of a mediator may result in inconsistent and irrational results.[288] Specifically, it is argued that although the parties are involved more with the process, the parties are generally under stress and may not be thinking rationally.[289] Further, because mediations are not afforded the same publicity or precedent as traditional litigation, the outcome of similar disputes may vary greatly.[290]

Criticism also comes from women activists.[291] It is argued that women are generally under more stress than men during a domestic dispute and the stress

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279. *See* Deborah A. Ledgerwood, *Family Mediation in St. Louis County: Steeled Against the Critics?*, 52 J. MO. B. 351, 351, 354 (1996).
280. *Id*. at 351 (noting the effects of divorce through mediation reduced hostility and tension for up to a year after the divorce was granted and that the Denver Custody Mediation Project reported 56% of successful mediation clients indicated no serious disagreements within six months).
281. *Id*. at 354.
282. *Id*.
283. *Id*.
284. *See* In re Marriage of Duffy, 718 N.E.2d 286, 291 (Ill. App. Ct. 1999).
285. *Id*.
286. *See* Zylstra, *supra* note 139, at 73-74.
287. *Id*.
288. *Id*.
289. *Id*. at 74.
290. *Id*. at 73-74.
291. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1548-50 (1991).

may affect women's ability to negotiate on an equal footing to men.[292] As discussed above, this concern may be satisfied with a properly trained mediator. In addition, this argument depends on the cause of the separation. For example, if the woman is leaving the relationship because she is unsatisfied, it is unlikely that the woman will be under disproportionate stress. On the other hand, if the woman is content with the status-quo of the relationship and the husband springs a divorce, then it is likely that she will be under disproportionate stress. Obviously, stress is not guaranteed to affect one party more than the other and stress apportionment must be determined based on the circumstances surrounding the dispute.

Some also assert that families with fewer resources are coerced into settlement by adding another procedure to the resolution of their familial dispute.[293] If there are mediation fees involved then resources are expended on mediation and there may not be enough left for litigation if a resolution is not agreed upon.[294] Therefore, families will do what they must to resolve in mediation.[295] Under the Pennsylvania Bill, the parties are responsible for the costs of mediation.[296] The Legislature states that it is based on the party's ability to pay, but there are no guidelines to ascertain the ability to pay a mediator.[297] Because a family's normal routine, which includes work, is disrupted when in a dispute it is likely that there are even less resources available to compensate a mediator. For families that don't have the finances, or the available time to engage in the multitude of procedures required by the statute, is mediation effectively their only option?

Despite the benevolent intent of the Pennsylvania Legislature, I believe mandatory mediation, as a blanket imposition, is not beneficial.

If one party does not wish to engage in mediation, which is effectively an additional procedural step to familial disputes in this context, then the mediation may be ineffective and the parties may become more hostile. An ineffective and hostile mediation simply lengthens the dispute process, which may ultimately exacerbate the same harm that the Legislature intends to stifle. Moreover, from the vantage point of the children, or even the parties, mediation may appear as duplicative and unnecessary if litigation follows. In this situation, instead of providing an effective mechanism to resolve a familial dispute, the mediation tends to further the destruction of the parties' relationship. In this situation, mandatory mediation may make a bad situation worse.

However, the inverse is equally likely. A party may not wish to engage in mediation, but nevertheless obtain an unexpected satisfactory result. In this situation, it seems that mandatory mediation may better serve a party because but for the requirement of mediation, the party would have never engaged in the process. This rationale falls under the "don't knock it until you try it" theory because parties may initially be against mediation but once in the process, may feel that mediation is actually helpful.

Mandatory mediation is undoubtedly well suited for parties who would have chosen to mediate notwithstanding a court order. Presumably these parties are

292. *Id*. at 1606-07.
293. Zylstra, *supra* note 139, at 77.
294. *Id*.
295. *Id*.
296. Pa. H.B. 2282 § 7222.
297. *Id.* § 7222(g).

familiar with the process and benefits of mediation and their use of mediation, in the ordinary course of things, would be in its traditional form, as an alternative to litigation. Therefore, the requirement of mediation has no effect.

Since the Legislature is concerned with mitigating the "undue hardships" surrounding and resulting from familial disputes and not judicial economy it would be helpful if there were provisions in the Bill that did not require mediation if it was only going to make a bad situation worse. As the Bill is currently written, if a party cannot show "good cause," which generally entails violence or sexual misconduct, then a party must mediate even if it results in more destruction.[298]

Legislatures and academics observe problems through a rational and objective lens. When the time comes for a family to breakup, emotions may be high. Adding another step to effectuate a hurting spouse's desire to end a current relationship is akin to having to complete paperwork in an emergency room before the doctor is allowed to remove a nail from your foot. At that point, the damage is done and the situation needs to be resolved as quickly as possible. Any prolongation worsens the pain and delays the recovery period. Obviously, this assumes that the mediation is unsuccessful, which in turn, may depend on the attitudes of the parties and the ability of the mediator.

To remedy the concerns expressed herein, the Legislature can make changes to the current Bill that are consistent with mediation's traditional role. First, the Legislature could make mediation voluntary. Mediation can be made voluntary based on the judge's or the parties' discretion. If the parties are left to decide, they should be given sufficient information about the pros and cons of mediation to make an informed decision. This discretion ensures that the parties' situation is not being worsened by the imposition of mediation. It also allows the parties to be directly involved with the procedure that will be used to resolve their dispute.

Another option would be to create a residual exception in addition to the "good cause" provision. This proposed exception may be used to capture the class of disputes that do not involve violence or abuse and mediation is likely to be ineffective. For example, mediation may not be required if the parties demonstrate extreme hostility towards each other and any attempt to mediate will be futile. This broadens the current exception and looks towards the emotions and attitudes of the parties. The residual exception would also insure that the Legislature's intent is effectuated. Specifically, under the Bill, traditional litigation is described as "multilayered, segmented, over lengthy and costly."[299] There is high probability that mediation will exacerbate these concerns if the parties simply mediate, without good faith, because the law requires mediation. Since parties must pay for mediation, if there is no resolution then the costs of the dispute rises. Further, without a resolution in the mediation stage, the duration of the dispute is lengthened and the parties must resort to litigation as different segment of the dispute process. Undoubtedly, imposing mediation on all parties without some meaningful level of assessment or discretion will make the Bill counterintuitive and worsen the situation for some families.

298. *Id.* § 7222(c).
299. *Id.* § 7202(2).

6. Conclusion

To be clear, H.B. 2282 has several provisions that will undoubtedly mitigate the "undue hardships" that surround familial disputes. However, a blanket statewide imposition of mediation is not and cannot be in the best interest of every family that desires to resolve a dispute. At best, parties should be informed of the advantages and disadvantages of mediation and should be left to decide whether or not to engage in the process. This is mediation's traditional role and probably most effective because parties who take part in mediation want to participate and their good faith is conducive to an effective resolution. In the alternative, the Legislature should give judges the discretion to determine if mediation would be in the best interest of the parties. This would help preclude the imposition of mediation when it would make the situation worse. Lastly, if the preceding two options aren't taken, the Bill should have a residual exception that broadens the class of parties that are not required to mediate so that the purpose of the Bill is not negated.

II. HIGHLIGHTS

A. Illinois House Bill 5759

Representative Luis Arroyo sponsored Illinois House Bill 5759.[300] The bill provides that before a mortgagee files an action to foreclose regarding a residential real estate property, the judge shall assign an attorney to serve as a mediator for mandatory good faith mediation between the mortgagee and mortgagor.[301] The purpose of the bill is to resolve the loan without a foreclosure resulting.[302] This may involve changing the terms of the loan so it becomes more affordable for the mortgagor.[303] Once the filing for mediation has been done by either party, the mortgagee has to freeze the mortgagor's account, and any obligation of the mortgagor to pay the mortgagee is stayed pending the mediation.[304] House Bill 5759 was referred to the House Rules Committee on February 16, 2012.[305] As of June 5, 2012, the bill is still pending the House Rules Committee.[306]

300. H.B. 5759, 97th Gen. Assemb., 2d Reg. Sess. (Ill. 2012), *available at* http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=84&GA=97&DocTypeId=HB&DocNum=5759&GAID=11&LegID=66248&SpecSess=&Session=.
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*

B. Minnesota House File 2531

Representatives Shimanski, Mahoney, Drazkowski, Scalze, Scott, Hausman, Gruenhagen, Vogel and Cornish sponsored Minnesota House File 2531.[307] The bill provides that during dissolutions of marriage that involve child custody issues, the court shall order the parties "to attend two hours of mediation to develop a parenting plan."[308] However, there are a few exceptions. First, subsection (a) does not apply if neither party can afford mediation.[309] Another exception says subsection (a) does not apply if one of the parents "has committed domestic abuse against a parent or child who is a party to, or subject of, the matter before the court."[310] The bill also states that the court must order the parties to mediate before the court is able to participate in early neutral evaluation.[311] As of June 6, 2012, the bill is pending the House Civil Law Committee.[312]

C. Nebraska Legislature Bill 827

Congressman Dubas introduced Legislature Bill 827 for the first time on January 5, 2012. [313] The bill's purpose is to provide a process for a county officer to challenge a county board's decision regarding its budget-making duties.[314] The officer and the board shall be required to participate in mediation for budget disputes.[315] The county officer shall not challenge the county board's decision in court unless the mediator has concluded that further efforts would not result in a resolution of the issue.[316] The costs of mediation shall be shared by the county board and the county officer.[317] The bill was referred to the Government, Military and Veterans Affairs Committee on January 9, 2012.[318] The notice of hearing was set for February 8, 2012; however, the hearing was indefinitely postponed on April 18, 2012.[319]

D. New York Assembly Bill 5275

Assembly Bill 5275 was introduced and sponsored by Congressman Titone and co-sponsored by Congressman Rivera.[320] This bill authorizes an attorney to

307. H.F. 2531, 87th Leg. Reg. Sess. (Minn. 2012), *available at* http://wdoc.house.leg.state.mn.us/leg/LS87/HF2531.1.pdf.
308. *Id.* § 2(a).
309. *Id.* § 2(a)(1).
310. *Id.* § 2(a)(2).
311. *Id.* § 3(b).
312. Minn. H.F. 2531.
313. H.B. 827, 101st Leg., 2d Sess. (Neb. 2012), *available at* http://nebraskalegislature.gov/FloorDocs/Current/PDF/Intro/LB827.pdf
314. I*d.*
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. H.R. 5275, 2011 Leg., Reg. Sess. (N.Y. 2011), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A05275&term=2011&Summary=Y&Memo=Y&Text.

attach a lien to awards and settlement proceeds received by his or her client through alternative dispute resolution or settlement negotiations.[321] The bill's purpose is "[t]o allow for an attorney's charging lien to become effective upon commencement of alternative dispute resolution proceedings."[322] Presently, liens may only attach after an action has been commenced.[323] The bill was signed into law on October 3, 2012.[324]

E. Rhode Island House Bill 7617

On February 16, 2012, Representative John McCauley, Jr. introduced House Bill 7617, which would compel teachers and other "municipal employees" to arbitrate monetary disputes.[325] The bill allows for the dispute to proceed to arbitration or mediation.[326] If the parties initially choose mediation, and disputes still remain, the bill requires that the parties proceed to a binding arbitration.[327] After the bill was introduced, it was referred to the Labor Committee in the House on February 16, 2012.[328] On March 8, 2012, the Labor Committee recommended that the bill be held for further study.[329]

F. Pennsylvania House Bill 2282

On March 27, 2012, Representative Matthew E. Baker introduced House Bill 2282, which would require mediation for "domestic relation" cases.[330] The bill seeks to make the court a more comfortable place to handle domestic relation cases by ensuring that parties engage with the same judges and staff and educating the judges and staff on different matters—most notably mediation.[331] The bill also requires that case management teams be established in every judicial district.[332] In an action involving child custody, a case manager will direct the parties to mediation.[333] On March 27, 2012, the bill was referred to the Children and Youth Committee, where it remains.[334]

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321. *Id*.
322. *Id*.
323. *Id*.
324. *Id*.
325. H.B. 7617, 2012 Leg., Reg. Sess. (R.I. 2012), *available at* http://webserver.rilin.state.ri.us/BillText12/HouseText12/H7617.pdf.
326. *Id*.
327. *Id*.
328. *Id.*
329. *Id.*
330. H.B. 2282, 2012 Leg., Reg. Sess. (Pa. 2012), *available at* http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2011&sessInd=0&billBody=H&billTyp=B&billNbr=2282&pn=3284.
331. *Id*.
332. *Id*.
333. *Id*.
334. *Id*.

G. Colorado Senate Bill 12-046: Discipline in Public Schools

Senate Bill 12-046: Discipline in Public Schools creates a legislative task force to study school discipline toward the implementation, by school administrators, of prevention, intervention, restorative justice, peer mediation, counseling, and other approaches to address student misconduct and conflict.[335] The bill encourages conflict resolution and misconduct prevention rather than punishment for bad conduct in schools.[336]

Senate Bill 12-046 has a fiscal note attached, meaning that there is a cost to the state associated with the implementation of the bill. [337] Fiscal notes can sometimes hinder the passage of a piece of legislation especially if the state is facing a fiscal deficit.[338] The bill was passed in the Colorado State Senate on April 27, 2012.[339] It underwent a second reading in the Colorado State House of Representatives, but was not referred to any committees in the House.[340] No further action on Senate Bill 12-046 has occurred since May 8, 2012.[341] This is indicative of little to no support for SB46 in the Colorado State House of Representatives.[342]

H. Colorado Senate Bill 12-071: Foreclosure Require Loan Modification Efforts

Senate Bill 12-071: Foreclosure Require Loan Modification Efforts establishes additional procedural measures for debtor holders.[343] The bill requires holders of an evidence of debt (typically a mortgage lender), before initiating or completing the process of foreclosing on residential real property containing four or fewer dwelling units, to make and fully document its efforts to contact the borrower directly and negotiate in good faith with the borrower.[344] These procedures work to "effectuate a cure for default rather than move directly into the foreclosure process."[345] Senate Bill 12-071 was introduced January 19, 2012 and assigned to the Senate Committee on Judiciary ("Judiciary Committee").[346] On May 4, 2012, the Judiciary Committee amended the bill and referred it to the Senate Appropriations Committee.[347] May 9, 2012 the Appropriations Committee postponed Senate

335. S.B. 12-046, 2012 Reg. Sess. (Colo. 2012), *available at* http://www.leg.state.co.us/clics/clics2012a/csl.nsf/fsbillcont3/BBB163E9D91CC52087257981007E02EE?open&file=046_01.pdf.
336. *Id.*
337. Fiscal Note, *available at* http://www.leg.state.co.us/clics/clics2012a/csl.nsf/fsbillcont3/BBB163E9D91CC52087257981007E02EE?Open&file=SB046_00.pdf
338.
339. Colo. S.B. 12-046.
340. *Id.*
341. *Id.*
342.
343. S.B. 12-071, 2012 Reg. Sess. (Colo. 2012), *available at* http://www.leg.state.co.us/clics/clics2012a/csl.nsf/fsbillcont3/C3AA473A7E5CF47787257981007F4510?open&file=071_01.pdf.
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*

Bill 12-071 indefinitely.[348] Given that SB12-071 was referred to the Appropriations Committee there must have been a fiscal impact or fiscal issue present. No further action has been taken on SB12-071 since May 9, 2012.

III. CATALOG OF STATE LEGISLATION

The following is a state-by-state list of measures introduced during the first eleven months of 2012 concerning alternative dispute resolution.

ALABAMA

Bills Enacted: None.

Other Legislation: S.B. 383 & H.B. 394 (Pharmacies, records, audit, minimum and uniform standards established, procedures, appeals, Pharmacy Audit Integrity Act); S.B. 450 (labor, merger of Department of Industrial Relations and Department of Labor); S.B. 375 & H.B. 403 (Insurance, Alabama Life and Disability Insurance Guaranty Association scope and purpose, specify limits for certain policies, to conform Alabama Law to model law); H.B. 394 (Pharmacies, records, audit, minimum and uniform standards established, procedures, appeals, Pharmacy Audit Integrity Act); H.B. 757 (Child custody, parenting plan required, shared time required if parents fit or unless agree otherwise, criteria to determine fitness report, content of parenting plan, court to designate when parties cannot agree); S.B. 492 & H.B. 482 (Marriage dissolution education programs, participation is required for certain parties in marital dissolution actions with minor children, program requirements established); S.B. 513 (Education Options Act; provides for establishment of innovative schools and school systems via flexibility contracts with State Department of Education, authorizes establishment of public charter schools as part of public education system); H.B. 527 (Alabama Revised Uniform Arbitration Act); S.B. 33 (Foreign law, application in violation of rights guaranteed United States and Alabama Citizens, prohibited, exceptions, American and Alabama Laws for Alabama Courts Amendment); S.B. 457 & H.B. 571 (Court reporters, contracts for providing court reporting services, further provided for).

ALASKA

Bills Enacted: None.

Other Legislation: S.B. 116 (An Act offering mediation of disputed workers' compensation claims by a hearing officer or other classified employee of the

348. *Id.*

division of workers' compensation and allowing collective bargaining agreements to supersede provisions).

ARIZONA

Bills Enacted: S.B. 1127 (Child Custody; Factors)

Other Legislation: S.B. 1403 (Digital Arizona infrastructure Office); S.B. 1064 (Municipalities; local liberty charter); S.B. 1226 (State employees; meet and confer); S.B. 1248 (Domestic relations; decision-making; parenting time); H.B. 2833 (foreclosure mediation program); H.B. 2304 (Employee organizational rights; DPS; corrections); H.B. 2290 (Homeowners' associations; dispute resolution; taping).

ARKANSAS

None.

CALIFORNIA

Bills Enacted: A.B. 1631 (An act to amend and repeal Section 1282.4 of the Code of Civil Procedure, relating to arbitration); A.B. 1927 (An act to amend Section 845 of the Civil Code, relating to real property).

Other Legislation: A.B. 2025 (An act relating to mediation); A.B. 2575 (An act to repeal Section 7303.2 of the Business and Professions Code, relating to barbering and cosmetology); A.B. 1692 (An act to amend Sections 53760.1 and 53760.3 of the Government Code, relating to bankruptcy); S.B. 1520 (An act to amend Sections 11346.2 and 11346.3 of the Government Code, relating to state government, and declaring the urgency thereof, to take effect immediately); A.B. 1864 (An act to add Section 43.100 to the Civil Code, relating to immunity).

COLORADO

Bills Enacted: S.J.R. 26 (Concerning recognition of conflict resolution month in October every year).

Other Legislation: S.B. 46 (Discipline in Public Schools); S.B. 174 (The bill creates a pilot program that authorizes the governing body of the city and county of Denver, at the request of the assessor, to elect to use an alternate protest and appeal procedure that combines the multiple steps in the annual valuation dispute process through the county board of equalization into the single hearing and appeal process conducted by the board of county commissioners. Decisions may be appealed to the judiciary or request for resolution via arbitration.); H.B. 1057

(Provides for additional arbitration requirements for disputes between insured homeowners and insurer relating to policy coverage); S.B.181 (Providing that provision in a building and construct contract that is performed in CO making the contract subject to the laws of another state or required ADR in another state is void); S.B.71 (The bill requires the holder of an evidence of debt before initiating or completing the process of foreclosing on residential real property containing 4 or fewer dwelling units, to make and fully document its efforts to: contact the borrower directly; negotiate in good faith with the borrower in an effort to effectuate a cure for default rather than move directly into the foreclosure process -- borrower can also request mediation in certain circumstances).

CONNECTICUT

Bills Enacted: H.B. 5201 (To create a deadline for the completion of municipal binding arbitration); H.B. 5202 (To promote efficiency in the issuance of arbitration decisions by arbitrators on the State Board of Mediation and Arbitration by paying them only after their decision has been issued.); H.B. 5203 (To encourage the efficiency of the municipal collective bargaining arbitration process through the appointment of neutral arbitrators at random to the arbitration panel.); H.B. 5238 (To prevent arbitration panels from considering the entirety of a municipality's reserve fund balance when determining a municipal employer's financial capability for the purpose of arbitration decisions.); H.B. 5239 (To allow the disclosure of performance evaluations of members of the State Board of Labor Relations and the State Board of Mediation and Arbitration to certain individuals.); H.B. 5555 (Expand mediation programs in criminal prosecutions to all geographical area court locations).

Other Legislation: None.

DELAWARE

Bills Enacted: H.B. 356 (Combines several agencies/entities and establishes that the Texas Hold'em Poker tournament director shall be the final arbitrator of all disputes that occur during that tournament.); H.B. 231 (This Bill makes it clear that the Superior Court can allow for non-profit legal service providers to perform the function of the HUD-certified housing counselors in the mediation process. Legal Services Corporation of Delaware has been authorized to serve in that role by Superior Court Administrative Directive No. 2011-2 and this bill will allow the Superior Court to preserve that role).

Other Legislation: H.B. 212/H.B. 361 (Covers the licensing of auctioneers and auction firms, and creates a commission to license auctioneers and auction firms and to oversee their activities. If a controversy between licensees arises, the licensees should seek the assistance of the Commission to arbitrate the controversy); H.J.R. 14 (Establishes a Study Group on Alternative Dispute Resolution ("ADR") for the purpose of studying and making recommendations for strength-

ening and expanding ADR in Delaware. The Study Group will be a multi-disciplinary body that cuts across political, geographic, economic and social boundaries to work toward developing a comprehensive state system offering appropriate dispute resolution options to all Delawareans through a network of government agencies, schools, community centers, non-profits and other institutions. The Study Group will develop an Action Plan that will pioneer problem-solving methods, programs and systems to provide alternatives to fighting, impasse and litigation. The Study Group is a starting point in this process. The Study Group will be organized and staffed by the Conflict Resolution Program of the University of Delaware's Institute for Public Administration. The Study Group is directed to report to the Governor and the General Assembly by June 30, 2013.); H.B. 352 (Establishes requirements and definitions for recreational vehicle manufacturer-dealer agreements. It also removes the exception to the $100 license fee for out-of-state recreational vehicle dealers at shows or exhibitions at enclosed malls); H.B. 379 (Creates a specific assessment and reporting requirement for the Delaware Interagency Council on Homelessness, in conjunction with the Department of Services for Children, Youth & their Families to identify and define youth who are runaway or homeless, and to provide a comprehensive analysis of the resources and that may already exist, or that may be needed to serve the runaway and homeless youth population. These agencies must prepare and submit to the Gov. and legislature a report on, inter alia, available resources including conflict resolution or mediation services).

FLORIDA

Bills Enacted: H.B. 917 (Includes an additional basis for subjecting person to jurisdiction of courts of this state provisions which state that person submits to jurisdiction of courts of this state by entering into contract that designates law of this state as law governing contract & that contains provision by which such person agrees to submit to jurisdiction of courts of this state; clarifies that arbitral tribunal receiving request for interim measure to preserve evidence in dispute governed by Florida International Commercial Arbitration Act need consider only to extent appropriate potential harm that may occur if measure is not awarded or possibility that requesting party will succeed on merits of claim; revises application dates of provisions relating to jurisdiction of courts).

Other Legislation: S. 1620 (Salvage vehicle dealer insurance requirements are not required for vehicles that cannot be legally operated on roads); S. 1852 (Providing that a sponsor's policies and procedures and previous school board decisions do not apply to a charter school under certain circumstances); H.B. 963 (Designates "Florida Arbitration Code" as "Revised Florida Arbitration Code"; creates & revises numerous provisions; provides for applicability of revised code; provides that code does not apply to any dispute involving child custody, visitation, or child support; deletes arbitration from voluntary trial resolution provisions; revises provisions relating to procedures in voluntary trial resolution; provides limits on jurisdiction of trial resolution judge); H.B. 929 (Requires claimant to provide written notice to motor vehicle dealer as condition precedent to initiating civil litigation or arbitration against such dealer under Florida Deceptive &

Unfair Trade Practices Act; provides for content of notice; provides method of delivery of notice; provides conditions for settling claims; provides for effective date of payment; limits attorney fees; provides for effect of payment; provides for tolling of applicable statutes of limitations; provides condition that constitutes waiver of notice; provides for applicability); H.B. 1113 (Prohibits entity that has sovereign immunity from avoiding payment pursuant to relief act by assigning claim it may have against third party; provides requirements with respect to notice of specified relief acts; provides restrictions with respect to sponsorship of relief act; requires referral of all relief acts to DOAH for review; provides procedures; prohibits lobbyists from receiving specified contingency fees; provides nonapplicability; provides for alternate submission of relief act to panel of arbitrators; provides procedures, requirements, & limitations with respect to such alternate submission); H.B. 4191 (Repeals provisions relating to mediation of motor vehicle insurance claims for personal injury less than specified amount or property damage of any amount; deletes requirements, procedures, & processes with respect to requests filed with DFS for mediation of such claims); H.B. 4193 (Repeals provisions requiring DFS to create & administer nonadversarial property insurance mediation program for resolving disputed property insurance claims & deletes requirements, procedures, & processes relating to program); S.B. 1890 (Reducing the limitations period for commencing an action to enforce a claim of a deficiency judgment subsequent to a foreclosure action; specifying required contents of a complaint seeking to foreclose on certain types of residential properties with respect to the authority of the plaintiff to foreclose on the note and the location of the note; expanding the class of persons authorized to move for expedited foreclosure; requiring the court to enter a final judgment of foreclosure and order a foreclosure sale under certain circumstances, etc.)

GEORGIA

Bills Enacted: S. 234 (Amends Title 48 of the Official Code of Georgia Annotated, the "Georgia Public Revenue Code," so as to extensively revise provisions relating to ad valorem tax assessments and appeals from such assessments); S. 383 (Amends Article 1 of Chapter 9 of Title 9 of the Official Code of Georgia Annotated, relating to general provisions for arbitration); S. 227 (Amends Subpart 2 of Part 1 of Article 16 of Chapter 2 of Title 20 of the Official Code of Georgia Annotated, relating to compulsory attendance for students in elementary and secondary education).

Other Legislation: S. 505 (Amends Code Section 5-6-34 and Article 2 of Chapter 9 of Title 9 of the Official Code of Georgia Annotated, relating to judgments and rulings deemed directly appealable and medical malpractice arbitration); H.B. 688 (Amends Title 46 of the Official Code of Georgia Annotated, relating to public utilities and public transportation); H.B. 242 (Amends Chapter 12 of Title 9 of the Official Code of Georgia Annotated, relating to verdict and judgment, so as to provide a short title; to provide for legislative findings); S. 305 (Amends Code Section 10-1-791 of the Official Code of Georgia Annotated, relating to consumer fees to implement provisions of Article 28, relating to the "Georgia Lemon Law," and enforcement); H.B. 950 (Amends Code Section 7-4-18 of

the O.C.G.A., relating to criminal penalties for excessive interest rates, so as to exclude motor vehicle title loan brokers from a 5 percent per month interest limit); S. 127 (Amends Title 15 of the Official Code of Georgia Annotated, relating to courts, so as to substantially revise, supersede, and modernize provisions relating to juvenile proceedings).

HAWAII

Bills Enacted: S.B. 2671 (Clarifies the Hawaii labor relations board's authority to appoint attorneys and paralegals); S.B. 3029 (Amends various provisions of the Hawaii Revised Statutes and the Session Laws of Hawaii for the purpose of correcting errors and references and clarifying language); H.B. 2573 (Amends the state apprenticeship law to conform to new federal regulations on apprenticeship in 29 Code of Federal Regulations part 29).

Other Legislation: H.B. 1830 (Establishes a process by which licensed or certified, unbiased real estate appraisers are used for arbitration proceedings to determine the fair market value, fair market rental, or fair and reasonable rent of real property. Requires the Department of Commerce and Consumer Affairs to provide a list of appraisers meeting certain criteria); S.B. 2938 (Requires real estate appraisers acting as arbitrators to provide information about the arbitration proceedings to any person upon request); S.B. 2458 (Removes department of education principals and vice principals from the bargaining unit. Provides that in an impasse between a public employer and the representative of the bargaining unit, the Board shall appoint a mediator, and after 20 days an arbitration panel); H.B. 1848 (Repeals the prohibition of using arbitration to resolve impasses or disputes relating to state and county EUTF contributions. Authorizes the arbitration panel to decide on EUTF contributions); S.B. 2967 (Creates a new bargaining unit for ocean safety officers employed by the state.), H.B. 2738 (A Bill for An Act Relating to Mortgage Dispute Resolution); S.B. 2429 (A Bill for an Act Relating to Foreclosures); S.B. 2428 (Repeals part I of chapter 667, HRS, relating to foreclosure by action or foreclosure by power of sale); S.B. 2469 (A Bill for an Act Relating to Medical Claim Conciliation); S.B. 2168 (Directs the insurance commissioner to join the surplus lines insurance multi-state compliance compact. Enacts the surplus lines insurance multi-state compliance compact into law. Provides that suits under this section cannot be brought to court without trying to first resolve the dispute. Says the Commission will provide ADR procedures to resolve disputes between insured and surplus lines licensees concerning tax calculations); H.B. 639 (Requires each state and county department to designate a freedom of information public liaison for freedom of information inquiries involving Hawaii's freedom of information laws (chapters 92 and 92F); requires office of information practices to provide training to the departmental freedom of information public liaisons). H.B. 565 (Relating to state leases. Allows the DLNR and other agencies with administrative control over state lands to enter into lease agreements with businesses that engage in projects under the New Markets Tax Credit Program); H.B. 587 (Relating to counties. Authorizes each county's liquor commission to appoint and remove their respective liquor administrator, unless otherwise prescribed by their respective county charter.)

IDAHO

None.

ILLINOIS

Bills Enacted: S.B. 3399 (Amends the Beer Industry Fair Dealing Act. Provides circum stances under which certain compensation requirements applicable to the termination of an agreement between a brewer and a wholesaler apply); S.B. 3726 (Amends the Code of Civil Procedure. Repeals a provision requiring the Supreme Court to evaluate the effectiveness of mandatory court-annexed arbitration and report the results of the evaluation to the General Assembly annually); H.B. 4573 (Amends the Public Utilities Act. Removes a provision concerning the inspection of all carbon dioxide pipelines in the State by the Illinois Commerce Commission. Amends the Illinois Gas Pipeline Safety Act. Makes changes to the definitions of "gas", "transportation of gas", and "pipeline facilities". Amends the Carbon Dioxide Transportation and Sequestration Act. Provides that the construction, maintenance, and operation of pipelines transporting carbon dioxide, whether interstate or intrastate, falls within the jurisdiction of the Pipeline and Hazardous Material Safety Administration of the federal Department of Transportation. Provides that each carbon dioxide pipeline owner shall comply fully with all federal laws and regulations governing the construction, maintenance, and operation of pipelines transporting carbon dioxide).

Other Legislation: H.B. 5931 (Amends the Illinois Public Labor Relations Act. Provides that arbitration panels hearing security employee, peace officer, firefighter, and paramedic disputes must not take into consideration the ability of a unit of government to raise taxes or impose new taxes when determining the financial ability of that unit of government to pay the costs associated with those employees' wages and other conditions of employment); H.B. 4547 (Amends the Illinois Public Labor Relations Act. Provides that if a public employer obtains a stay of an arbitration panel's order pending judicial review and the final decision of the court is adverse, then all reasonable costs of the proceedings in the reviewing courts including reasonable attorneys' fees, as determined by the court, shall be paid by the public employer. Amends the State Mandates Act to require implementation without reimbursement.); H.B. 5759 (Amends the Mortgage Foreclosure Article of the Code of Civil Procedure and the State Finance Act. Provides that an attorney appointed by the chief judge of the judicial circuit shall be assigned as a mediator for mandatory foreclosure mediation prior to the filing of a residential real estate foreclosure action, etc.); H.B. 5629 (Amends the Illinois Marriage and Dissolution of Marriage Act. Provides that the parent of a child who has been diagnosed with mental or physical developmental disabilities shall communicate to the other parent in writing any major decision regarding the minor child's education or medical, dental, or psychological treatment, etc.)

INDIANA

Bills Enacted: H.B. 1009 (Technical corrections bill. Resolves: (1) technical conflicts between differing 2011 amendments to Indiana Code sections; and (2) other technical problems in the Indiana Code, including incorrect statutory references, nonstandard tabulation, grammatical problems, and misspellings); S.B. 0287 (Makes conforming changes to the interstate compact for the placement of children. Changes references of the "county office of family and children" to the correct agency. Adds Title IV-D of the Social Security Act to the list of programs to which an agency may disclose a Social Security number. Removes a requirement that a local child protection team shall assist the department of child services ombudsman with redacting or reviewing certain reports. Removes a duty of the division of family services to administer preservation services to high risk youth); H.B. 1171 (Provides that certain restrictions pertaining to the relocation of new motor vehicle dealers do not apply to a new motor vehicle dealer located in a county of over 100,000 inhabitants under certain circumstances. Provides that an action challenging the establishment or relocation of a new motor vehicle dealer within a relevant market area is filed with the dealer services division of the secretary of state. Requires an auto dealer to serve a demand for mediation on a manufacturer or distributor before or at the same time as filing a complaint or petition for relief with the dealer services division of the secretary of state alleging an injury caused by an unfair practice); H.B. 1279 (Moves the state land office from the department of administration to the department of natural resources (DNR). Increases the amount that an office of DNR or the department of state revenue must deposit on the business day following receipt from $100 to $500. Increases the inspection period for each parcel of land classified as native forest land, a forest plantation, or wild lands from five to seven years. Amends law concerning the lake and river enhancement fund to prohibit funds from being used for projects related to a ditch or manmade channel. Defines "inland water"); S.B. 275 (Eliminates, after June 30, 2014, the license for real estate salespersons and the designation of principal real estate brokers. Prohibits, after June 30, 2014, an individual who holds a salesperson's license from performing certain acts as a salesperson without obtaining a broker's license. Establishes, for individuals who hold a salesperson's license on or after June 30, 2012, certain requirements to obtain a broker's license. Requires, after June 30, 2014, a person to meet certain requirements before the person may become a managing broker. Changes the appointment of members to the real estate education advisory council. Provides that broker's licenses are issued for three years. Revises education and continuing education requirements. Makes conforming changes); S.B. 156 (Establishes a new procedure for partitioning real and personal property that: (1) requires a court to refer the matter to mediation; and (2) requires the court to order that the property be sold using a method the parties agree upon, or if the parties are not able to reach an agreement, at auction. Repeals superseded provisions.)

Other Legislation: S.B. 36 (Foreign law); H.B. 1240 (Appeal process for public safety medical expenses.)

IOWA

Bills Enacted: S.F. 2203 (A bill for an act relating to nonsubstantive Code corrections and including effective date provisions; S.F. 430 (A bill for an act relating to violations of the open records and public meetings laws and the creation of the Iowa public information board, and including effective date provisions).

Other Legislation: H.F. 2122 (A bill for an act relating to motor home dealer and manufacturer licensing and the business hours of recreational vehicle dealers, making a penalty applicable, and including effective and applicability date provisions.); S.F. 2198 (A bill for an act establishing an Iowa freedom and sovereignty Act and including penalties.); S.F. 2108 (A bill for an act relating to the Iowa health care coverage partnership program and including effective date provisions.); H.F. 2327 (A bill for an act relating to notice of mortgage mediation assistance.); H.F. 2444 (A bill for an act concerning harassment and bullying by students and providing criminal and civil penalties and remedies for failure by parents, guardians, and custodians to prevent such harassment and bullying.)

KANSAS

Bills Enacted: None.

Other Legislation: H.B. 2761 (Updating references and corresponding changes relating to Executive Reorganization Order No. 40 and the Kansas department of agriculture.); S.B. 353 (Board of barbering; powers and duties; fees; licensure.); HB 2740 (Domestic relations; case management.); H.B. 2741 (Amending the Kansas family law code.); H.B. 2634 (defines mediation for school employee disputes).

KENTUCKY

Bills Enacted: H.B. 232 (Relating to sheriff's collection fees for volunteer fire department membership charges or subscriber fees); H.B. 311 (Relating to activities regulated by the Kentucky Board of Hairdressers and Cosmetologists); S.B. 97 (Relating to Property); H.B. 347 (provides that certain disputes concerning refund or replacement of defective new vehicles shall be resolved through the dispute resolution).

Other Legislation: H.B. 88 (Relating to arbitration); S.B. 12 (Relating to revenue); H.B. 386 (Relating to Foreign Law); H.B. 361 (Relating to medical review panels involving long-term-care facilities); H.B. 132 (Relating to Certified Mail); H.B. 233 (Relating to Domestic Violence); H.B. 498 (Relating to Domestic Violence); S.B. 20 (Relating to the Prescription Monitoring Program compact); H.B. 73 (Relating to promotional increments for state employees); H.B. 299 (Provides that "[t]he Kentucky Council for Interstate Adult Offender Supervision shall

meet at least annually, at the call of the chair, and shall provide recommendations regarding dispute resolution").

LOUISIANA

Bills Enacted: H.B. 1029 (Provides that if a builder violates this law "by failing to perform as required by the warranties" herein, "the parties may provide for the arbitration of any claim in dispute"); S.B. 360 (Provides that a provision contained in a selling agreement requiring that arbitration or litigation be conducted outside this state or a provision that seeks to apply any law other than Louisiana law to disputes between the parties to a selling agreement, is void and unenforceable); S.B. 756 (Enacts R.S. 22:1856.1, relative to the audit of pharmacy records by certain entities including pharmacy benefit managers; to provide for definitions; to provide with respect to an appeals process; and to provide for related matters).

Other Legislation: H.B. 879 (Provides that "appeals from discipline imposed upon a permanent teacher by a school board shall be subject to mandatory binding arbitration."); S.B. 194 (Amends and reenacts R.S. 9:4208, relative to arbitration awards; to provide for payment of attorney fees and costs in arbitration awards under certain circumstances; and to provide for related matters.); S.B. 310 (Enacts R.S. 22:1882 and repeals R.S.22:1826, relative to noncontracted providers of emergency medical services; to provide for definitions; to provide with respect to reimbursement of such providers by health insurance issuers; to provide for binding arbitration in certain circumstances; to provide for an effective date; and to provide for related matters); H.B. 1206 (provides that the commissioner shall not act to arbitrate, mediate, or settle disputes regarding a decision not to include a health care provider in a health benefit plan or in a provider network if the health insurance issuer has an adequate network as determined by the commissioner pursuant to the requirements contained in this Subpart. Adds that the commissioner shall not act to arbitrate, mediate, or settle disputes regarding any other dispute between a health insurance issuer, its intermediaries, or a provider network arising under or by reason of a health care provider contract or agreement or its termination); S.B. 246 (Provides that "any amount due from a judgment, settlement, or from a final award in an arbitration proceeding which is in excess of the total liability of all liable health care providers, as provided in Paragraph (2) of this Subsection, shall be paid from the patient's compensation fund pursuant to the provisions of R.S. 40:1299.44(C)."); S.B. 276 (Provides that "[a] provision contained in a franchise agreement requiring that arbitration or litigation be conducted outside this state or a provision that seeks to apply any law other than Louisiana law to disputes between the parties to a franchise agreement, is void and unenforceable."); S.B. 534 (Provides that "if a pharmacy or licensed pharmacist disputes a health insurance issuer's written notification of recoupment and a contract exists between the pharmacy or licensed pharmacist and the health insurance issuer, the dispute shall be resolved according to the general dispute resolution provisions in the contract.")

MAINE

Bills Enacted: L.D. 1903/H.P. 1405 (Provides that both "the bureau and the host community will be bound by the decision of the arbitrator."); L.D. 1845 (Implements the Recommendations of the Department of Health and Human Services and the Maine Developmental Disabilities Council Regarding Respectful Language); L.D. 1868 (Provides for the limitation on dissemination of intelligence and investigative information if there is a reasonable possibility that public release or inspection of the reports or records would disclose conduct or statements made or documents submitted by any person in the course of any mediation or arbitration conducted under the auspices of the Department of the Attorney General).

Other Legislation: L.D. 1810 (Implements recommendations of the committee to review issues dealing with regulatory takings).

MARYLAND

Bills Enacted: H.B. 1290 (Adding a new article to the Annotated Code of Maryland, to be designated and known as the "Land Use Article", to revise, restate, and re-codify the laws of the State relating to zoning, planning, subdivision, and other land use mechanisms, including comprehensive plans, historic preservation, and related matters; revising, restating, and re-codifying the laws of the State relating to the Maryland-National Capital Park and Planning Commission, including the Regional District and the Metropolitan District; etc.); H.B. 1182 (Authorizing a specified collective bargaining agreement in Charles County to contain a grievance procedure providing for binding arbitration of the interpretation of contract terms and clauses.); S.B. 856 (Establishing that specified communications made in the course of and relating to specified mediations may not be disclosed by the mediators, parties to the mediations, or specified persons who participate in or are present for the mediations, under specified circumstances; establishing exceptions for specified communications; defining terms; providing that the Act may be cited as the Maryland Mediation Confidentiality Act; etc.); H.B. 1374 (Establishing a pre-file mediation process between a secured party and a mortgagor or grantor before the commencement of foreclosure actions under specified circumstances; providing that a mortgagor or grantor is not entitled to participate in mediation after the filing of foreclosure actions except under specified circumstances; establishing procedures and notices for participation in a pre-file mediation; authorizing a county or municipal corporation to charge a specified fee to issue a specified certificate; etc.); H.B. 1189 (Authorizing the representatives of full-time deputy sheriffs at the rank of corporal and below in the Office of the Sheriff of Howard County to bargain collectively with the Sheriff on specified issues; authorizing deputy sheriffs to take specified actions with regard to collective bargaining; providing for the procedures for certifying a labor organization as a certified labor organization for collective bargaining; etc.); S.B. 711 (Clarifying the form of document that may be used to create a specified statutory form power of attorney; providing that a document substantially in the form of a specified statutory form in effect on the date the document is executed shall continue to have a specified meaning and effect notwithstanding enactment of specified legislation; requiring

specified co-agents to act together unanimously unless otherwise provided in a power of attorney; providing for the designation of specified co-agents; etc.); S.B. 1003 (Revising the Life and Health Insurance Guaranty Corporation Act; altering the maximum amounts of specified contractual obligations of specified impaired or insolvent insurers for which the Corporation may become liable under specified circumstances; authorizing the Corporation to elect to succeed to the rights and obligations of specified insolvent insurers relating to specified reinsurance contracts within 180 days after the date of an order of liquidation; etc.); S.B. 317 (Requiring a retail pet store that sells dogs to post conspicuously on each dog's cage specified information about the dog; requiring a retail pet store to maintain a written record that contains specified information about each dog in the possession of the retail pet store; requiring a retail pet store to maintain a record for at least 1 year after the date of sale of a dog and to make specified records available to the Division of Consumer Protection of the Office of the Attorney General under specified circumstances; etc.).

Other Legislation: S.B. 924 (Prohibiting a party, in the trial of specified actions against a health care provider for an alleged medical injury, from presenting testimony from more than two experts, unless the court, for good cause shown, permits additional experts; and applying the Act to actions filed on or after the effective date.); H.B. 740 (Making unenforceable a provision of a declaration, a bylaw, a contract for sale of a unit, or any other instrument made by a developer relating to residential condominiums that purports to shorten the statute of limitations for specified claims, purports to waive the application of a specified accrual date for specified claims, operates to prevent the filing of a lawsuit or other proceeding within an applicable statute of limitations, or requires the assertion of a claim within a shorter time period than applicable; etc.); H.B. 543 (Requiring the establishment of a pretrial victim-offender mediation program by the Chief Judge of the District Court; requiring the Chief Judge of the District Court to establish procedures to implement a specified victim-offender mediation program; providing that a specified defendant under specified circumstances is eligible to be diverted to a specified victim-offender mediation program; providing for specified procedures; authorizing the Chief Judge of the District Court to establish a specified fee; etc.); S.B. 706 (Deals with the expansion of certain agricultural operations to include fishing and seafood operations); S.B. 278 (Makes certain provisions against discrimination applicable to internet sites); H.B. 682 (Repealing and revising provisions of law related to trusts); H.B. 287 (Authorizes specific persons to have discrimination claims asserted in a public accommodation forum).

MASSACHUSETTS

Bills Enacted: None.

Other Legislation: S. 2197 (Promotes excellence in public schools); S. 2204 (Relative to the right to repair); S.B. 2267 (Relative to the right to repair); S. 2241(Relative to veterans' access, livelihood, opportunity and resources).

MICHIGAN

Bills Enacted: H.B. 4751 (Deals with agriculture, marketing, and unfair practices in both); S.B. 529 (Protects the environment and natural resources of the state).

Other Legislation: S.B. 903 (Deals with arbitration provisions, and other dispute resolution elements); S.B. 901 (Condominium act); S.B. 902 (Arbitration); H.B. 5465 (Businesses; franchises; contract provision authorizing independent sourcing of certain goods and services; prohibit); H.B. 5277 (Labor; collective bargaining; transit employees; exempt from prohibition against wage increases during collective bargaining); S.B. 862 (Property tax; assessments; certain property deemed qualified agricultural property for purposes of assessment; allow for all contiguous property owned by the landowner to also be deemed agricultural); S.B. 1008 (Water; other; groundwater dispute resolution program; restore.); H.B. 5325 (Occupations; construction; licensure of persons engaged in certain occupations related to residential building and contracting; eliminate and clarify licensing requirements for residential builders.); H.B. 4596 (Insurance; essential; use of credit information and credit scoring; regulate.); H.B. 5062 (Elections; other; postelection audits and continuing election education programs; add to the Michigan election law and make other miscellaneous changes to the Michigan election law).

MINNESOTA

Bills Enacted: None.

Other Legislation: H.F. 2647 (Public data definition relating to agreements involving payment of public money clarified.); H.F. 2958 (Vikings stadium bill; National Football League stadium in Minnesota provided for; Minnesota Sports Facilities Authority established; Metropolitan Sports Facilities Commission abolished; local tax revenue provided for.); H.F. 2949 (General education, education excellence, special education, and other programs provided for, and money appropriated.); H.F. 1738 (Public employee insurance program (PEIP) provisions modification and temporary moratorium authorization); S.F. 2164 (Nursing homes and boarding care homes sales tax exemption; Omnibus environment and natural resources bill.); H.F. 2694 (Arbitration factors specified.); H.F. 2045 (Teacher employment contracts due process procedures clarifications.); H.F. 1908 (Provides that if a retailer subject to this paragraph and the commissioner are unable to agree on the method for calculating compensation and the retailer demands arbitration, the matter must be submitted to binding arbitration according to sections 572B.01 to 572B.31 and the rules of the American Arbitration Association); S.F. 993 (Provides that as an alternative to initiating or continuing with a contested case proceeding, the parties, subsequent to agency approval, may enter into a written agreement to submit the issues raised to arbitration by an administrative law judge); S.F. 2205 (Provides that a judge shall not act as an arbitrator, a mediator, or otherwise perform judicial functions in a private capacity unless expressly authorized by law. A retired judge may act as mediator or arbitrator if the judge does not act as an arbitrator or mediator during the period of any judicial assign-

ment); H.F. 1974 (Provides that an employer may not enter into a contract, and an arbitrator may not issue an interest arbitration award, that would retroactively provide a wage or salary increase or retroactively provide an increase in the dollar amount of an employer contribution for benefits); H.F. 2531 (When jurisdiction is established over the parties in a dissolution of marriage proceeding in which child custody matters will be determined, the court shall immediately issue an order for the parties to attend two hours of mediation to develop a parenting plan, unless neither party can afford mediation); S.F. 2347 (Provides that the governor and the legislature must seek to resolve the disagreements concerning the bill through mediation after the legislature has adjourned the regular legislative session for that year, as provided in this section); H.F. 322 (Provides that in preparing a report concerning a child, the investigator may consult any person who may have information about the child and the potential custodial arrangements except for persons involved in mediation efforts between the parties. Mediation personnel may disclose to investigators and evaluators information collected during mediation only if agreed to in writing by all parties); H.F. 1909 (Provides that to maintain one's listing on the state court administrator's roster of parenting consultants, an individual must annually attend three hours of continuing education about alternative dispute resolution subjects); H.F. 2420 (Provides that a contract for a charter school must contain a dispute resolution process agreed upon by the authorizer and the charter school that includes the following: a written notice process to invoke the dispute resolution process and a description of the matter in dispute; a time limit for response; a procedure for selecting a neutral party to assist in resolution of the dispute); S.F. 1830 (Provides that local government units may request the board's dispute resolution committee or executive director to hear and make recommendations to resolve boundary and plan implementation disputes).

MISSISSIPPI

Enacted Bills: S.B. 2576 (Provides that any dispute over the amount charged for service rendered under the provisions of this chapter, or over the amount of reimbursement for services rendered under the provisions of this chapter, shall be limited to and resolved between the provider and the employer or carrier in accordance with the fee dispute resolution procedures adopted by the commission).

Other Legislation: H.B. 1272 (Provides that an arbitration clause in any contract between a seller or provider and a citizen of this state shall be considered nonbinding. Such citizen shall have all legal remedies available in the courts of this state in any matter that may be subject to such arbitration clause); H.B. 530 (Provides that any dispute with respect to Personal Injury Protection coverage between a Personal Injury Protection Insurer and an injured person, or the dependents of such person, shall be submitted to arbitration); S.B. 2415 (Provides that The Office of Employee Relations and Job Discrimination in the Mississippi Department of Labor shall do all in its power to promote the voluntary arbitration, mediation, and conciliation of disputes between employers and employees and to avoid strikes, picketing, lockouts, boycotts, black list, discriminations, and legal proceedings in matters of employment. In pursuance of this duty, the office may appoint temporary boards of arbitration); S.B. 2900 (Provides that an arbitration

clause in a payday loan contract shall not be enforceable if the contract is unconscionable); H.B. 1411 (Provides that no managed care plan may compel a health care provider to accept arbitration as the sole or primary means of dispute resolution between the parties); H.B. 570 (Provides that the board may order payment of a claim against the fund only if the claimant provides the board with a certified copy of a final judgment of a court of competent jurisdiction or a final award in arbitration, with all rights of appeal exhausted, in which the court or arbitrator expressly has found on the merits that the claimant is entitled to recover and has found the value of the actual loss); H.B. 644 (Provides that in the event either party to such contract initiates litigation against the other with respect to the contract, the arbitration provision shall be deemed waived); H.B. 290 (Provides that an employer shall not be allowed to avoid any portion of this act through an arbitration agreement); H.B. 267 (Provides that no such endorsement or provisions shall contain a provision requiring arbitration of any claim arising under any such endorsement or provisions); H.B. 1275 (Provides that in actions to foreclose a mortgage on a homestead residence, the plaintiff and borrower shall attend at least one (1) mediation session); H.B. 1183 (Provides that nothing in this act shall be construed to provide employees with any grievance, dispute resolution, or appeals process with regard to any idea application submitted by the employees); H.B. 976 (Provides that the municipal judge shall have the power to establish and operate a probation program, dispute resolution program, and other practices or procedures appropriate to the judiciary and designed to aid in the administration of justice).

MISSOURI

Bills Enacted: S.B. 595 (Repeals section 162.961, RSMo, and enacts two new sections relating to due process hearing panel members).

Other Legislation: H.B. 1789 (Provides that in determining whether it is necessary to change the boundary line between seven-director districts, the board of arbitration shall base its decision upon a variety of listed factors); S.B. 444 (Repeals a provision of law that requires MoDOT to submit to binding arbitration in negligence actions); S.B. 439 (Provides that the state and the employer shall submit to an arbitration process to be established by the department by rule); H.B. 1936 (Provides that this paragraph is not intended to conflict with or override the obligation of the parties to a reinsurance agreement to arbitrate their disputes); H.B. 1900 (Provides that any differences between the vocational enterprises program and the state, its departments, divisions, agencies, institutions, or the political subdivisions of the state as to style, design, price or quality of goods shall be submitted to arbitrators whose decision shall be final); H.B. 1113 (Repeals section 434.100, RSMo, and enacts one new section relating to contracts for construction work); H.R. 1300 (Repeals section 137.115 RSMo, and enacts one new section relating to motor vehicle valuations); H.B. 1342 (Amends chapter 511, RSMo, by adding six new sections relating to settlement offers); S.B. 863 (Repeals section 210.853, RSMo, and enacts one new section relating to parenting plans upon a finding of paternity); S.B. 891 (Amends chapter 392, RSMo, by adding one new section relating to utilities); S.B. 670 (Amends chapter 443, RSMo, adding twenty-four new sections relating to real estate foreclosure, with penalty provisions);

H.B. 1676 (Repeals section 355.025, RSMo, and enacts three new sections relating to homeowner and community improvement associations).

MONTANA

Bills Enacted: H.B. 374 (Implement the Uniform Power of Attorney model law); SB 218 (Establish procedures related to protected plants); S.B. 187 (Generally revise Public Defender Laws); H.B. 97 (Amend supervision of chief appellate defender); H.B. 359 (Revise workers compensation law on settlements and lump sum payments); HB 95 (General revision MT human rights Act- Indian preference subpoenas attorney fees); L.B. 673 (Change Support liens and provide for military parents and kids in divorce).

Other Legislation: S.B. 406 (Central Assessment mediation instead of dispute review or tax appeal board); H.B. 596 (Abolish income tax with replacement sales tax); H.B. 371 (Revise statutes on practice of law); H.B. 527 (Revise laws relating to arbitration for public labor contracts); S.B. 185 (Abolish death penalty and replace with life in prison without parole); S.B. 196 (Address bullying in the workplace); S.B. 405 (Revise stream access law); S.B. 243 (General revision of workers compensation law); S.B. 240 (revise eminent domain laws); S.B. 137 (Ban credit scoring on auto insurance); H.B. 445 (Allow health care choice thru out of state policies).

NEBRASKA

Bills Enacted: L.B. 972 (Change provisions relating to youth rehabilitation and treatment centers); L.B. 390 (Change provisions relating to jails, community corrections, and the Community Trust) (Provisions/portions of L.B. 300 amended into L.B. 390 by A.M. 1537); L.B. 782 (Require that reports submitted to the Legislature be submitted electronically); L.B. 157 (Change guardianship and conservatorship provisions and adopt the Nebraska Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act) (Provisions/portions of L.B. 85 amended into L.B. 157 by A.M. 106); L.B. 463 (Change juvenile penalty, records, service plan, probation sanctions, and truancy provisions) (Provisions/portions of L.B. 669 amended into L.B. 463 by A.M. 1306); L.B. 575 (Adopt the Interstate Compact on Educational Opportunity for Military Children) (Provisions/portions of LB63 amended into LB575 by AM955); L.B. 374 (Appropriate funds for state government expenses) (Provisions/portions of L.B. 282 amended into L.B. 374 by A.M. 1313); L.B. 378 (Provide for fund transfers and change provisions relating to various funds) (created the dispute resolution cash fund).

Other Legislation: L.B. 1012 (Change medical treatment and temporary disability provisions under the Nebraska Workers' Compensation Act); L.B. 571 (Change provisions relating to homeowners' association and condominium association liens); L.B. 636 (Change provisions relating to access to student records and learning community reporting and diversity plans); L.B. 827 (Require mediation

for budget disputes between a county board and a county officer); L.B. 435 (Create the Business Ombudsman Division of the Department of Economic Development); L.B. 450 (Extend Supreme Court cash fund authority).

NEVADA

Bills Enacted: S.B. 98 (Relating to local governments revises provisions relating to mediation and arbitration during the process of collective bargaining).

Other Legislation: None.

NEW HAMPSHIRE

Bills Enacted: H.B. 349 (Mandates ADR in certain civil cases); H.B. 151 (Bill repealing the laws relative to marital masters. Goals of family division are to use ADR to reduce adversarial nature of proceedings involving families); H.B. 609 (Establishing New Hampshire circuit court to replace current probate court and district court); H.B. 2 (Eliminates the state fund for payment of mediators in cases where parents are indigent).

Other Legislation: S.B. 254 (Relating to common interest communities revises the procedures for ADR of certain claims relating to common interest communities).

NEW JERSEY

Bills Enacted: H.B. 362 (Relative to binding arbitration in public labor relations disputes.) (Requires binding arbitration in labor relations disputes).

Other Legislation: None.

NEW MEXICO

Bills Enacted: H.B. 64 (Requiring dispute resolution proceedings arising from construction contracts in New Mexico).

Other Legislation: S.B. 165 (Creates non state funded dispute resolution program for common interest community association); S.B. 1132 (The owners rights and obligations in shared ownership communities acts); S.B. 374 (Relating to executive reorganization; creating the office of peace; providing powers and duties; creating the citizens peace advisory council).

NEW YORK

Bills Enacted: A.B. 5275 (Authorizes an attorney to attach a lien to awards and settlement proceeds received by his or her client through ADR or settlement).

Other Legislation: S.B. 395 (Condominium ombudsman will encourage ADR when disputes arise and provide ADR services on consent of the parties); S.B. 1878 (Requires school districts to establish and maintain peace conflict resolution center); S.B. 2110 (Creates the conflict resolution and school violence reduction program).

NORTH CAROLINA

Bills Enacted: None.

Other legislation: H.B. 823 (The state board of education superintendent of public instruction shall develop a list of recommended conflict resolution and mediation materials, models and curricula that address responsible decision making); S.B. 500 (Funds shall be allocated by the OAH for mediation services provided for Medicaid applicant and recipient appeals).

NORTH DAKOTA

Bills Enacted: H.B. 1001 (Allocates $65,039,419 to mediation, and ADR generally); S.B. 2156 (Controversy arising out of a contract for construction or repair of a highway entered by the director must be submitted to arbitration); H.B. 1462 (Relating to the agricultural mediation service).

Other legislation: None.

OHIO

Bills Enacted: H.B. 20 (Specifying that attempting to intimidate attorney witness or victim applies during any ADR); S.B. 122 (Provides an order requiring the child who is guilty of truancy to participate in a truancy prevention mediation program).

Other legislation: None.

OKLAHOMA

Bills Enacted: H.B. 3079 (Consolidating state agencies); H.B. 3053 (State government; creating the State Government Administrative Process Consolidation and Reorganization Reform Act of 2012; consolidating certain agencies into the

Office of Enterprise and Management Services; effecting date); S.B. 1321 (Workers' compensation fraud; authorizing contracts with retired police officers for certain investigative services; effective date).

Other legislation: H.B. 2542 (Expands Oklahoma's regulatory power to dealers of power sport vehicles; prohibits mandatory arbitration); H.B. 2657 (Oklahoma Employee Injury Benefit Act; allows any dispute process for resolution); H.B. 2316 (Oklahoma Employee Injury Benefit Act); S.B.1378 (Benefits for employee injury; creating the Oklahoma Employee Injury Benefit Act; Effective date); H.B. 2155 (Benefits for employee injury; creating the Oklahoma Employee Injury Benefit Act; effective date); S.B. 1300 (Guardian ad litems; creating the Guardian Ad Litem Training Task Force; effective date); H.B. 2401 (Grandparental visitation rights; effective date); H.B. 2466 (Providing for offer of settlement in civil actions; requiring mediation prior to certain deadline; effective date); H.B. 2500 (Civil procedure; relating to hearsay; modifying certain age limitation; effective date); H.B. 3132 (Civil procedure; increasing court costs collected for alternative dispute resolution system; effective date); S.B. 1587 (Allows Appraiser Certification and Licensure Board to choose any "dispute process"); S.B. 1509 (Creating the Public Retirement Systems Act of 2012; Effective date); H.B. 2155 (Benefits for employee injury; creating the Oklahoma Employee Injury Benefit Act; effective date).

PENNSYLVANIA

Bills Enacted: None.

Other Legislation: H.B. 1988 (Act amending P.L.246, No.47, defining "arbitration settlement"); S.B. 1520 (Act amending Title 10 (Charities), sets guidelines and rules for arbitration for disputes arising from Public Charities); H.B. 2282 (Act amending Titles 23 (Domestic Relations) and 42 (Judiciary and Judicial Procedure, repealing programs for mediation in domestic relation cases).

RHODE ISLAND

Bills Enacted: None.

Other Legislation: H.B. 7617 (School employee arbitration, expands the scope of binding arbitration for monetary damages for teachers and non-teachers); H.B. 7598 (An Act Relating To Domestic Relations -- Domestic Abuse Prevention); H.B. 7346 (Arbitration Board can render a decision regarding collective bargaining agreement for firefighters and police officers); S.B. 2649 (This Act would increase the filing fees in the Superior court for arbitration programs).

SOUTH CAROLINA

Bills Enacted: H.B. 4614 (Authorizes a parent to seek arbitration in a joint custody dispute).

Other Legislation: None.

SOUTH DAKOTA

Bills Enacted: H.B. 1037 (Revises the purpose of the agriculture mediation program).

Other Legislation: None.

TENNESSEE

Bills Enacted: None.

Other Legislation: S.B. 3299 (Amends TCA Section 5-23-107 and Title 49, collective bargaining agreement and arbitration process); H.B. 3767 (Sets forth the rules and guidelines for arbitration process).

TEXAS

Bills Enacted: None.

Other Legislation: None.

UTAH

Bills Enacted: S.B. 35 (Manufacturer and new owner shall engage in arbitration regarding recreational vehicle if manufacturer was not in compliance).

Other Legislation: H.B. 457 (Sets out procedure for Eminent Domain and allows for an arbitrator or mediator to select an independent appraiser); H.B. 74 (Other persons than the government seeking to utilize eminent domain must advise the home owner of the right to arbitration or mediation).

VERMONT

Bills Enacted: None.

Other Legislation: S.B. 175 (Party can have court impose sanctions when the other party fails to mediate in good faith); S.B. 219 (Public school teachers will negotiate their employment contract with the State); H.B. 600 (Foreclosure proceedings must go through the mediation process); S.B. 224 (Binding arbitration to settle disputes regarding assessments or liens prior to foreclosure); H.B. 631 (Arbitration Agreement cannot have choice of law as a foreign jurisdiction).

WASHINGTON

Bills Enacted: None.

Other Legislation: None.

WEST VIRGINIA

Bills Enacted: None.

Other Legislation: H.B. 3210 (Specifying when arbitration agreements are void and unenforceable).

WISCONSIN

Bills Enacted: None.

Other Legislation: None.

WYOMING

Bills Enacted: None.

Other Legislation: None.