FTC Considering Wrong Approach to Protecting Homeowners in Foreclosure from Loan Modification Scams

Posted: 07 Feb 2010 06:14 AM PST

The FTC is asking for comments on the proposed rule change described in this article. Instructions and links to submit such comments follow the text of the article.

Okay, so let's establish three or four teensey-weensey facts about foreclosures right up front.

First of all, as we all should know by now, on February 18, 2009, when President Obama said in his speech introducing his Making Home Affordable foreclosure rescue plan, that getting a modification of a home mortgage was free and easy... that all you had to do was call the handy dandy, toll-free government phone number... or just call your bank directly... he was... um... er... well... mistaken, optimistic, full of shit, or high. Sorry about that, but come on... seriously?

Second of all, it should by now no longer be contentious to say that people need help to negotiate a loan modification with a bank or mortgage servicer. I say this because even President Obama thinks that people need help and that's why he's spent tens of millions funding various nonprofit agencies across the country. I also say it because to-date there have been hundreds, if not thousands of stories of servicers abusing homeowners who have tried it on their own, and because I've personally been contacted by thousands of homeowners who said they tried it on their own before giving up and seeking someone to help them.

Thirdly, there should be no debate about the HAMP, or Home Affordable Modification Program. It's a prodigious failure on an Herculean scale... the contrast between its promise and what it has delivered is staggering. It's claim to fame is that it out-performed Dubya's Hope-4-Homeowners plan, which after six months had only modified one solitary mortgage.

As a corollary, trial modifications are the biggest loan modification scam the country has ever seen. Here's how they work in real life: The bank tells you to make three payments of some amount that won't reduce your indebtedness, but will be reported to the credit bureaus as delinquent payments, so that after you've made all three on time and as agreed, they can sell your home without notice. Most people learn of their house having sold when they come home one day to find investors standing on their front porch looking in the windows.

And fourth, the number of foreclosures has continued to rise steadily and there is no light at the end of the tunnel, because not even the government can afford to pay the electric bill. Housing prices remain in a free fall, and any blips in the market have only been caused by some distorted combination of government give-a-ways and government propaganda. Sort of like if Joseph Goebbels and Leni Riefenstahl had partnered up with David Lerah, the ex-Chief Economist for the National Association of Realtors… and maybe Carrot Top.

So, all in all, the whole save-my-house-through-a-loan-modification thing is going swimmingly, I think would be a fair way to phrase it.

With all of this in mind, the **Federal Trade Commission** ("FTC") has decided that the **best way to protect homeowners** from "scammers" who promise to help homeowners obtain a loan modification, but fail to deliver on that promise… is to eliminate the private sector from the field entirely… including attorneys.

That way, when you're at risk of losing your home, you'll either be able to call your bank directly, visit a HUD counselor, or… did I already mention calling your bank directly? Wait, you could also… darn it… what was the other one? Oh, that's right… visit a HUD counselor. See, if Geithner were adding things up he'd say: "So, there's four choices right there."

Goldman Sachs forecasts 14 million foreclosures in the next three years… others peg that number even higher… a lot higher actually, but no matter… everyone agrees there are going to be many millions of foreclosures to come. To put that kind of a number into perspective, if there were 14 million foreclosures, and each of those people needed say 10 hours of hope and change type counseling, that would be 140 million hours of said counseling, which, assuming a 24-hour work day, 365 days a year, translates into just a scosh over 383,561 years… for one person, of course, so that's a silly comparison.

To be more realistic, let's say you had say… 10,000 people providing said counseling, 24 hours a day, 365 days a year… why then it would only take a smidgeon over 38 years… which should provide everyone with a lot more confidence that the president's plan may still prove itself effective.

The FTC therefore, having been charged by Congress to come up with rules pertaining to loan modifications that would protect consumers from unscrupulous con artists who would promise to help them get their mortgages modified, has decided that the only possible thing that makes any sense whatsoever is to make it illegal to receive payment until the homeowner receives a permanent modification in line with what the firm promised he or she would receive.

If the banks and servicers had to work under such a rule, the day before its adoption would be the last loan modification ever seen under the president's program. No private sector firm could ever even consider operating under such a rule, and all legitimate practicing attorneys who have helped tens of thousands of homeowners apply for and obtain loan modifications to-date, will only take on such clients pro bono, something most do two or three times each year… so we dodged a bullet there, I'd have to say.

The scammers, however, would simply continue their scamming ways, selling whatever is "next" on the con artist hit parade list of scams for 2010. Scammers don't stop what they're doing because of new rules, as evidenced by the fact that… they're scammers, silly. And scammers that follow rules are called: NOT SCAMMERS!

Are you reading this carefully, people? Are you? Because if you are, and this doesn't strike you as being monumentally stupid, I think you may need to seek medical attention, as synapses are clearly not firing properly in your cerebral cortex, and you may be about to be hit by a bus and not even realize it.

Imagine being an attorney… or any other professional for that matter. And you had to help someone apply for and actually get a permanent loan modification before being paid for any of the work along the way. Maybe the bank will move quickly and the loan modification will be done in six months… maybe it will take 9, or 12… could take even longer, based on the government's stellar performance statistics. And, of course, it might never happen. The banks may simply refuse to do anything but foreclose, which some seem to think is the lawyer's fault, I understand, but that does not make it so.

An Uncertain Outcome…

All situations in which you hire an attorney have one thing in common: an uncertain outcome. If the outcome wasn't uncertain, you wouldn't need to hire an attorney.

In other words, if I consult with an attorney about a certain matter, and he or she informs me that the outcome is certain to be the same whether he or she is involved or not, then I will probably elect to save the five grand, or whatever it is, and handle it myself.

And in the case of a loan modification, it's become distorted as to why people are hiring an attorney. No one should hire a lawyer to get a loan modification, they should hire a qualified attorney, or other professional, in attempt to make the best of a horrible situation. They hire an attorney because they've tried it on their own and failed and it stands to reason that an experienced law firm is likely to do better than a layperson on his or her own.

But the practice of law as related to loan modifications should not be focused on a single outcome: loan modification. When you're at risk of losing your home there are many decisions you will need to make, and not knowing the pros and cons of each makes the process much harder and much more dangerous.

On one end there's the federal bankruptcy code, as many homeowners do need to consider it, and on the other end there's civil litigation against the bank. In the middle, there are various flavors of government loan modification programs, and there are additional programs internal at most every bank. There are also short sales, Deed in Lieu arrangements, Cash for Keys deals, there are property tax issues, and occurrences that can make one subject to a deficiency judgement where one may not have existed in the past.

The lawyer should not be paid for obtaining a loan modification, but for all of the work along the way. If someone doesn't want to pay a lawyer to do that work, they don't have to, right? Why should a person be able to come to an attorney, dump 9 months worth of work on that attorney, knowing that the attorney is not permitted to send a bill for what could easily be a year? Under that circumstance, why would a homeowner EVER attempt to get a modification on their own?

Gee... would you like handle this yourself, or would you rather take all the paper work to an attorney and pay him or her next year... and only if the bank grants the modification? Hell, I'd ask what else I could drop of at my lawyer's office under the same terms. I'm working on a proposal for a client of mine. I wonder if I can drop it at my lawyer's office, have my lawyer write it, and only pay him next year if my client wins the account.

So, let's just get this straight... under the FTC's proposal...

A. If a homeowner tries to handle the work involved in getting a loan modification themselves, they do all the work, resend the paperwork every time the bank loses it, and continues to be available for calls and the bank's ongoing requests for information. And at the end, if the bank chooses not to modify, the homeowner has no recourse and loses the home to foreclosure... and loses all the time he or she put into trying to get the modification.

B. But under the way the FTC sees it, a homeowner would be an idiot to do it on their own. They could just drop it all off at the lawyer's office and ask what day the package will be ready to send in to the lender.

Then the homeowner goes to Hawaii and relaxes,takes a few calls if the lawyer has questions. Then the package is ready and the homeowner comes in to check the lawyer's work, and if he or she approves, the package is submitted and the lawyer has to stay on top of the bank for up to a year, or more. At the end of the process, if the bank says no, the homeowner walks away, and the lawyer isn't even permitted to be paid for that whole year's work that the homeowner would have had to do themselves?

And let's not forget that even if the bank does grant a modification, the homeowner may decline it. Or screw up and be late on trial payments, or any number of things that happen all the time. Because at the end of the day, the lawyer has no recourse... if the homeowner doesn't pay the bill, what's the lawyer going to do?

Lawyers can't sue their clients if they don't pay a bill for three or four grand. Mortgage or Real Estate Brokers could, but attorneys not so much. When lawyers sue a client, they almost always end up with a bar complaint, which can cost more to defend that the stupid $3,000 bill. And when an attorney fills out the application for his or her E&O insurance coverage, there's a question: How many times have you had to sue a client in the last five years... ideally you want that answer to be 0, or your rates are going to climb significantly.

This rule was not well thought out in the least, and there's no chance that a single attorney was involved in drafting it... WHICH THE FTC SHOULD NOT ALLOW.

Under this rule, there would never be another homeowner that would even consider trying to get a modification on their own, and every lawyer who took a case like this would go broke midstream and leave the client with no lawyer as he or she shuts down the office. GUYS... AND YOU KNOW WHO YOU ARE BECAUSE I'M CALLING YOU FIRST THING TOMORROW... THIS IS EMBARRASSING.

Not that any of this will be possible, because there WON'T BE A SINGLE LAWYER in the country that will offer to handle the work related to a loan modification under those terms. So, the other benefit of this rule is that it effectively takes away a person's right to an attorney, which you might argue is not a right guaranteed by the U.S. Constitution, but I'm going to argue it most certainly is.

Perfect… the housing markets are in free fall… foreclosures are ravaging our citizenry… the government's failed miserably to-date at trying to contain the damage… and the FTC is going to adopt a rule that we're going to fight about all the way to the Supreme Court? Just friggin' perfect guys… because we've got nothing else to do. Oh well… I guess it's see you in court. I needed a God damn hobby.

And let's not forget, when someone receives either a trial or permanent modification under HAMP, or a private program, that person is asked to sign a legally binding contract. I've seen them; in fact one I looked at closely was 26 pages long, if memory services… and without a doubt… written by lawyers. Should a homeowner not consult an attorney prior to signing either of those documents too. Absurd.

I'll tell you what… If I personally am ever within earshot when a banker tells a homeowner that they should sign a 20+ page legally binding contract, I'm going to start screaming: DON'T DO IT! NO! STOP! And if I happen to have a whistle, I'm going to start blowing it until the homeowner comes to his or her senses and shows the document to a lawyer before signing it. Make no mistake about it, the days of me trusting bankers are OVER. If I've learned anything… it's that.

I just met with several folks from the FTC while at an ABA conference on consumer financial services, and, I have to say, I liked them. It's not their fault that all they can come up with is a somewhat vague and ambiguous, half-baked, blanket of a plan… it's become obvious that they don't know what the hell else to do. In fact, it's become painfully obvious that no one in Washington D.C. today knows what to do about anything, and the housing crisis simply provides the most visual evidence of government's abject and ongoing failure.

Never mind that homeowners unquestionably need help. Never mind that there will be even more foreclosures in the next few years… at the very least… and that there aren't enough bank employees or nonprofit housing counselors on the planet to handle the volume. Let's just kill the idea that the private sector may be able to help, because the private sector is the only place you'll find enough lawyers to help tackle the problem, were enough of them of a mind to do so. Either the FTC's not thinking about this correctly, or they are the most optimistic people ever to walk the earth.

What does the FTC expect to accomplish through the adoption of a rule preventing lawyers from being paid for their work?

The proposed new rule does provide an exemption for lawyers if they are attempting to obtain a loan modification within the context of filing a bankruptcy or as part of litigation. Gee whizakers… I wonder what the scammers are going to do? And I know what they should call this new rule… "The Bankruptcy Attorney Full Employment Act?"

"Hi, Mr. Bankruptcy Attorney… I want to file bankruptcy… I think… but not just yet. While I'm thinking about it, would you mind seeing if you could get my mortgage modified? My checkbook? Why, yes I have it right here."

Come on guys… this must have been brought up in one of your committee meetings, right? If not by any of the actual committee members, then perhaps by one of their children of grade school age.

If this kind of thinking was the product of a committee formed two years ago I would have been willing to write if off as being from the same people that brought us Hope-4-Homeowners, or Tim Geithner as Treasury Secretary. But it's not two years ago… it's now. And the government's already blown through its allotment of Mulligans for this decade, and frankly its already borrowed into the next. You can't do something else that doesn't work worth a darn, or when the next election rolls around people are going to be letting family pets decide for whom they'll pull the lever.

As in: "I'm voting for Tom Smith because my Schnauzer, Roxie, likes him better. Rorrrougghh! You see… that's my little voting girl. Such a good voter you are."

The FTC says that it is accepting comments for the next 40-odd days, after which time it expects to adopt the new rule. Forty days, huh? How long did it take you guys to come up with this dazzling piece of regulatory virtuosity anyway? Don't tell me this wasn't the first idea that came up at meeting one, because there's no way I'm buying. This new rule couldn't possibly have taken more than a minute and a half to conceive of, describe to the group, vote on, and you'd still have time to pour a cup of coffee.

Wouldn't it make more sense, considering the times and all, that you slow down this runaway train and come up with something that's at least got a shot at not making things worse? Because we really don't need worse right now, we've got enough worse. Our proverbial cup runneth over with worse at the moment, wouldn't you say? In fact, the only thing that we've got too much of is worse.

And please don't fall back on the huge number of scammers and the vast populations living in the valley of the scammed. I'm not saying it's been Mayberry RFD out there, but you made many of us afraid to leave the house, there were so many scammers out there, and that's clearly not the case. Besides, how many of those that you said were "scammers" just turned out to be people trying to get the banks to modify loans only to find out that the President of the United States can't even do that with any regularity or predictability? I'm not the only one watching this three-ring circus remember, this stuff has finally made the news on both sides of the ideological divide.

It's time for a thoughtful solution, instead of one that I'd hazard a guess was funded by the banking lobby. Whoever it is on your committee that led you to the path you're currently on, if they have anything to do with banking, tell them the next meeting is on Tuesday, and then hold it on Monday. They've had more than their share of influence this past year.

Tell Mr. Yingdingaling of the ABA to go foreclose on some senior citizen couple that one of his banksters refinanced into a spring-loaded, neg-am, adjustable rate, piece of garbage mortgage just because they mentioned to a teller that they were thinking of taking a cruise for their 50th Anniversary. Tell him it's way past time, and you're going to let someone else have a turn. He'll pout and maybe even threaten Senator Sycophant, but who really cares? Let him eat cake for a change, and let's accomplish something for the good of the people. It's been so long since that happened that the shock will be palpable from Secaucus New Jersey to Stockton California.

What Causes Scams, the Scammer or the Scammed?

People being scammed out of money is hardly a new phenomena. It's likely to have been around as long as the human race has had shiny stones to trade for pelts, and it's just as likely that it will never go away. This past year in particular, scams related to loan modifications have been in the news almost every day. Apparently, loan modification companies have defrauded homeowners at risk of losing their homes to foreclosure out of many thousands, or perhaps even millions of dollars… I'm don't think anyone really knows.

Our politicians and regulatory agencies have responded to this deplorable situation by at least appearing to crack down on the scammers, but in the history of this country that's never eliminated scammers before, so I'm not sure why anyone thinks it's going to be effective this time around.

The government also embarked on a nationwide campaign telling homeowners to avoid any company offering loan modification services if they ask for money up front, but apparently that hasn't been very effective at stopping scammers either. Everyone from President Barack Obama to my mother in Pittsburgh has heard that "loan modifications are free," and all you have to do is "call your bank directly, or call a HUD counselor". Evidently, none of this has worked to prevent scammers from stealing from distressed homeowners, and there is only one inescapable conclusion to be drawn: People at risk of losing their homes are intent on being scammed before they do.

Regardless of what the government has said or how many times they've said it, we've continued to contact such private sector firms in an effort to get help obtaining a loan modification, and we've continued to do so in large number. The reason is actually simple, although it's obviously anything but to our politicians and regulators.

Why aren't we heeding the advice of our government? I can't speak for everyone, but one reason might be that they haven't been right about anything having to do with the housing crisis yet, in fact they've been wholly inept at every single turn since the day the crisis began. People call private sector, for profit firms to assist them in the negotiations with their banks because the alternatives presented by our government consistently fail to meet anyone's expectations.

The vast majority of homeowners that find themselves at risk of foreclosure, and I've personally interviewed many hundreds of them this past year, start out by calling the government help-line, a nonprofit organization or their banks directly. When none of those answers produces the desired outcome they look to the private sector firms for help. So… that would be one way to eliminate the scammers. The government could come up with a housing rescue program that works…. Nah, never mind… now I'm just getting fanciful.

It makes sense though, right? I mean… ask yourself what you would do in that situation. I may or may not succeed in saving my home from foreclosure, but I will be damned if I'm going to lose it without writing someone a check to help me save it… and the closer I get to a sale date, the more checks I'm going to be willing to write to whomever says they can possibly help. A day or two before the sale, I might make Don Corleone an offer he can't refuse.

What actually causes homeowners to be scammed? Has there been a proliferation of con artists in our society? Perhaps, as a result of the Great Recession going into its third year, more people have joined the ranks of the scammers. No, that's not it… shut up.

The truth of the matter is that scammers of one type or another are around us every day. We don't get scammed every day, however, because we're not in a panic. The first time we find ourselves in a panic, why that's the day we may find that we've been taken advantage of, because in the vast majority of cases, fear or greed are the prerequisites to being scammed.

At the end of 2008, I remember reading about two women who were sent to prison for loan modification fraud in California. I remember the story because it was so striking. The two women were convicted of scamming roughly 70 homeowners out of something like $3,000 each; the bill totaled something very close to $210,000.

What was so remarkable was that neither of the two women had any sort of license, nor did the pair have an office, or any files for that matter. They just went door-to-door in the Central Valley of California, near Bakersfield, and people wrote them checks… checks for $3,000.

As I read the story I remember thinking of the time someone's 12 year-old boy scout type wanted me to write a check for a magazine subscription he was selling so that his group could go to camp, or something like that. I finally did it, I think. But that was only a $36 dollar check, if I'm remembering correctly. I don't care whom comes knocking at my front door, for a $3,000 check, unless it's my mother and she's got the pink slip to her car, I'm going to have to think about it.

No one writes checks for three grand at their front door without knowing anything about the people and the company's track record, at the very least. Theirs was not a sophisticated crime, perpetrated by brilliant, if sociopathic minds, theirs was a crime enabled by people consumed by panic who willingly became victims of their scheme because it seemed safer than the alternatives for whatever reason.

It's not the proliferation of scammers that have caused so many to be scammed, it's the hundreds of thousands or even millions of people that continue to be in a panic because they are losing their homes and don't know what to do. Without the ability to hire an attorney to help them with a loan modification, will they therefore be better off or even worse?

If you want to get rid of bootleggers, you put a liquor store on every corner in town… presto… no more bootleggers. If you want to get rid of the loan modification scammers, you certainly don't reduce the number of legitimate attorneys and mortgage professionals that are available to help, you let people know where they can get legitimate help beyond calling their bank or standing in line at HUD. Because those options have long since proven themselves to be less than adequate for hundreds of thousands of people, and that's the fact... no matter how badly you may want them to be, they're not.

Now is the time when calmer heads are needed to prevail. Having a rule in 45 days that fails to achieve what it sets out to accomplish, will just be further proof of the government's incompetence in dealing with this tragic situation. We need a rule, I would agree, but we need one that helps and protects America's homeowners in meaningful ways and certainly not one that does anything less... but is ready in 45 days.

The FTC notice seeks public input, particularly from attorneys and other professionals, on a proposed rule that would require mortgage relief companies to make good on their promised results before charging or accepting payment from consumers. Under the proposed rule, companies could not be paid until they had a documented offer from a mortgage lender or servicer that lives up to the promises they have made.

Interested parties are invited to submit written comments electronically or in paper form by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Comments in electronic form should be submitted at http://public.commentworks.com/ftc/MARS-NPRM (and following the instructions on the web-based form).

Comments in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex W), 600 Pennsylvania Avenue, NW, Washington, DC 20580, in the manner detailed in the SUPPLEMENTARY INFORMATION section below.

FOR FURTHER INFORMATION CONTACT:

Laura Sullivan, Evan Zullow, or Robert Mahini, Attorneys, Division of Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, (202) 326-3224.

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ONE FINAL QUESTION:

Here's a driect quote from the FTC press release.

“Far too many homeowners have paid up-front fees to bad actors who promised loan modifications but never delivered,” Treasury Secretary Timothy Geithner said. “I commend the FTC for proposing a strong set of safeguards to protect consumers from these predatory practices.”

Here, here! Geithner's talking about the banks, right?