



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

December 17, 2009

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By Electronic Mail

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex w)
600 Pennsylvania Ave., NW
Washington, DC 20580

Re: Mortgage Assistance Relief Services Rulemaking, Rule No. R911003

Dear Sir/Madame:

The Office of the Illinois Attorney General submits this comment in response to the Advanced Notice of Proposed Rulemaking for Mortgage Assistance Relief Services issued by the Federal Trade Commission ("FTC") on May 29, 2009. This comment supplements the July 15, 2009, submission by the National Association of Attorneys General. We write as the primary Illinois law enforcement agency that handles consumer complaints against companies offering mortgage assistance relief services and enforces laws designed to help protect consumers from unfair and deceptive practices perpetrated by these companies. Our initial comments alluded to issues with attorneys either providing or working with companies that provide mortgage consulting services for consumers. This supplemental comment focuses on the specific problems that we are seeing in this area.

The problems caused by purported mortgage relief companies are significant, and attorney involvement with those companies is a growing part of the problem. As of this date, the Illinois Attorney General's office has over 240 open investigations involving mortgage relief services, in addition to having filed 28 lawsuits against companies engaged in mortgage rescue work. Our analysis of available ownership information indicates that 33 percent of the mortgage consulting companies we have dealt with are owned by attorneys, while 38 percent have some link to the legal profession.

Mortgage consultant statutes typically have enumerated exemptions, including one for attorneys. This Office's review shows that attorneys are exempt from mortgage rescue consultant statutes in 23 states. We believe that any rule-making by the FTC should *not* include a categorical attorney exemption for three reasons. First, some attorneys are exploiting state exemptions to provide pure loan modification services without the

statutory protections; they are not providing the legal representation that the exemptions were meant to cover. Second, the types of problems we see with non-attorney mortgage relief consultants are the same problems we see with many attorneys who specialize in mortgage modification services. These attorneys provide no benefit to consumers and generally charge more than non-attorney consultants. Third, the traditional methods of attorney regulation and discipline are not well-equipped to address issues raised by attorneys performing non-attorney work, particularly considering the scope and urgency of this problem. In short, attorneys who are solely engaged in the mortgage modification business should not receive the benefit of any exemption from mortgage consultant rule-making.

Many attorneys are exploiting exemptions meant to protect legal representation to provide, at premium prices, the same services provided by non-attorneys.

The purpose of the attorney exemption was to insure that attorneys representing consumers in bankruptcy or foreclosure proceedings would not inadvertently be subject to the regulations of these acts. The exemptions were not included to induce attorneys to offer mortgage consulting services, nor to encourage individuals offering mortgage consulting services to retain attorneys on their staff. However, this is exactly the development taking place in the mortgage consulting field. Attorneys are using the exemption to market and sell the same mortgage consulting services provided by non-attorneys.

While attorney mortgage consultants charge a premium for their services and aggressively market their status as legal professionals, they generally exclude—either expressly or in practice—actual legal representation or legal work from their scope of provided services. As illustrated below, contracts between the attorneys and the consumers often specifically state that any fees paid by consumers are for mortgage consulting services only. Or, in some cases, “legal work” is defined so narrowly that it only covers mortgage consulting, with possible “advice” as to other issues. In Illinois, we have not spoken to any consumers who received promised “advice,” much less consumers who were able to use such “advice” to their benefit in a loan modification. The following language, taken from contracts between Illinois consumers and attorneys illustrates the typical language in these agreements:

“APPLICABLE LAW. Client understands that he/she is hiring attorney to undertake business transaction only...*Client is not hiring Attorney to perform any analysis of the laws of their state or to represent them in connection with any Court or legal proceeding.* The matters contemplated in this agreement are not intended to constitute the practice of law in any State where Attorney is not licensed to practice Law. If Attorney and Client determine that Client needs legal representation in any court proceeding, foreclosure proceeding, or bankruptcy, Client will retain an attorney at Client’s expense to represent Client in such proceeding. The services in this agreement are limited to requesting loss mitigation/loan modification form Client’s mortgage lenders.”

Scope of Services:

Client is hiring Attorney to represent Client in connection with the following specified matters only:

- a. Contacting Mortgage Lenders identified by Client for loan modification purposes on behalf of Client.
- b. Request that the mortgage lenders consider a loan modification or appropriate loan adjustment.
- c. Attempt to obtain the loan modification that is appropriate to Client's situation.

1. CLIENT UNDERSTANDS THAT THE SERVICES ABOVE ARE THE ONLY LEGAL SERVICES THAT CLIENT IS REQUESTING ATTORNEY TO PERFORM ON CLIENT'S BEHALF. CLIENT UNDERSTANDS THAT ATTORNEY IS NOT BEING HIRED TO REPRESENT CLIENT IN ANY COURT PROCEEDING, FILING OF A LAWSUIT, BANKRUPTCY OR TO PROVIDE ANY TAX ADVICE, AND CLIENT DOES NOT EXPECT ATTORNEY TO REPRESENT CLIENT IN ANY LITIGATION, BANKRUPTCY PROCEEDING, OR TO INTERVENE IN ANY FORECLOSURE PROCEEDINGS AND STOP ANY FORECLOSURE PROCEEDINGS IF ONE IS PENDING. IF CLIENT REQUESTS SUCH SERVICES OR SUCH SERVICES ARE RENDERED, THEY ARE TO BE RENDERED ONLY UNDER A SEPARATE ENGAGEMENT AND RETAINER AGREEMENT. IT IS UNDERSTOOD THAT IF LEGAL SERVICES ARE REQUIRED BEYOND THE SCOPE OF THIS AGREEMENT CLIENT UNDERSTANDS THAT HE/SHE WILL SEEK COUNSEL FROM AN ATTORNEY WITHIN THE STATE WHERE THE PROPERTY IS LOCATED FOR STATE SPECIFIC ISSUES.

....

16. APPLICABLE LAW. Client understands that he/she is hiring Attorney to undertake a business transaction only, specifically those transactions listed in paragraph 2 above. Client is not hiring Attorney to perform an analysis of the laws of their state or to represent them in connection with any Court or Legal proceeding. The matters contemplated in this agreement are not intended to constitute the practice of Loan Origination in any STATE where our professionals are not licensed to practice Loan Origination. If our Professionals and Clients determine that Client needs legal representation in any court proceeding, foreclosure proceeding, or bankruptcy, Client will retain assistance of an attorney at Client's expense to represent Client in such proceeding. The services in this agreement are limited to requesting mitigation/loan modification from Client's mortgage lenders.

“SCOPE OF SERVICES: Client hires Attorney to provide legal services relating to assisting Client with analyzing mortgage terms and conditions, adjustable rate mortgage, mortgage delinquency or loan documentation auditing.

Services may include:

- 1) *Representing Client in negotiations with lenders regarding Client's mortgage payment*
- 2) Advising Client of potential benefits of loan document audit
- 3) Organizing and presenting information to lenders on behalf of Client
- 4) Advising Client of potential claims against lender(s)
- 5) Advising Client of potential benefits of bankruptcy

Even when the lawyers advertise and emphasize their legal experience, as in the following example, their contracts explicitly disclaim any legal work on behalf of the consumers. One company advertised as follows:

“At [REDACTED] we are aggressively taking on the challenge that this current economy poses and finding the logical and appropriate solution! Having vast knowledge and experience with Loan Modification, Real Estate Law, Bankruptcy Laws, Fair Debt Collection Practice Act, Short Sales, Principle Reductions, Loss mitigation negotiations, debt settlement and much more we offer you [sic] all that you will need to get on your feet and reestablish your budget. [REDACTED] – A Service you can Trust!”

This company's contractual language, however, made clear that the touted legal services would not actually be provided.

“WHEREAS, [REDACTED] is a legal document investigation and mortgage loan restructuring preparation firm with expertise in the review and repackaging of loan documentation for the purpose of negotiating note reconstruction for consumers; and

WE PROVIDE NEGOTIATION SERVICES ONLY TO OBTAIN A VOLUNTARY RESTRUCTURING OF YOUR LOAN(S). NEITHER LAW OFFICES OF [REDACTED] NOR THEIR AFFILIATE ATTORNEYS WILL BE TAKING LEGAL STEPS (WITH THE COURT) TO STOP FORECLOSURE OF YOUR PROPERTY OR TO PROSECUTE ANY CLAIM OF PREDATORY LENDING YOU MAY HAVE AGAINST YOUR LENDER. YOU ARE ADVISED TO SEEK INDEPENDENT LEGAL COUNSEL IF YOU ARE FACING

IMMINENT FORECLOSURE AND OR FORCLOSURE [sic] SALE
AND/OR EVICTION.”

As these examples illustrate, consumers receive no additional legal benefit from retaining an attorney as a mortgage consultant. To compound the problem, attorney mortgage consultants charge higher fees than other individuals in the field. Mortgage rescue consultants typically charge between \$1,200 and \$1,500. But, based on information received by this office, attorneys generally charge between \$2,000 and \$3,000 – or more. The following examples from Illinois consumers’ mortgage consulting contracts illustrate the massive fees being charged by these attorneys.

“LEGAL FEES AND OTHER CHARGES. Client shall pay an engagement retainer of \$4,190.00...to the [REDACTED] upon execution of this agreement. In the event Client requires expedited negotiations an additional fee of \$500.00 will apply. Said retainer shall be a True Retainer for Attorneys time, that is fully earned upon receipt, since services are deemed rendered upon receipt of payment, and Attorney shall credit Client’s charges against said True Retainer.”

“RETAINER AND BILLING PRACTICES: Client agrees to pay a retainer of \$3,295 for Attorney’s services described in...this Agreement. Attorney shall have no obligation to provide services to Client until the retainer is paid in full. Unless Attorney withdraws before the completion of the services or otherwise fails to perform services contemplated under this Agreement, the fixed fee will be earned in full and no portion of it will be refunded once any material services have been performed, except as set forth above. If this Agreement calls for payment of the retainer in multiple payments, Client acknowledges that the Attorney may suspend all activity should the second or third payment not be received timely.”

In addition to these statements proclaiming their benefits, some attorneys working as mortgage consultants also employ misleading advertisements and engage in marketing that is indistinguishable from other mortgage consultants. Marketing materials received by the Illinois Attorney General’s Office include flyers designed to look like correspondence from banks and postcards with messages warning consumers that they may miss out on “government programs” for distressed homeowners. Furthermore, these materials claim that access to government programs or bank refinancing opportunities are available only by contacting these companies directly. Overall, these marketing materials conceal the identity of their sender, make misleading claims about government programs, and pressure consumers to sign up with these companies or risk losing any opportunity to modify their loans. Additionally, some attorneys are associated with firms that use telemarketers to sign up clients without regard to the facts of the individual cases or whether or not the client can be helped in their particular situation. These practices are identical to those employed by non-attorney mortgage consultants.

Contracts with attorneys may further frustrate consumers' attempts to resolve their mortgage issues by explicitly prohibiting consumers from contacting their lenders. Such provisions are directly contradictory to the federal government's intent that consumers work directly with their servicers to obtain loan modifications, as evidenced by programs such as the Making Home Affordable initiative. The following examples from consumers' contracts with attorney mortgage consultants are illustrative.

"NO CLIENT CONTACT WITH LENDER. Client understands that once Client has retained Law Firm, the Lenders are not permitted to contact Client...In order to avoid any complications in the process, Client agrees to call Law Firm, rather than Lenders, to obtain the status of the case or other information needed. Experience has shown that the process is most efficient when the Client does not contact the Lender."

NO CLIENT CONTACT WITH LENDER. Client has been informed that mortgage lenders are often dishonest and unethical, and may try to trick Client into breaking Client's agreement with [REDACTED]. Particularly, lenders who have previously refused to negotiate with a borrower will, as soon as the lender knows the borrower has hired an attorney, will [sic] suddenly agree to negotiate with the borrower and will tell the borrower that he/she no longer needs attorney. Client has been informed that [REDACTED] has a ZERO TOLERANCE POLICY for such circumvention by a Client and a lender. If Client negotiates directly with lender during the term of this agreement, all fees due to [REDACTED] will be deemed earned and will be forfeited by Client, and [REDACTED]'s obligation to do any further work will cease.

The Illinois Attorney General's Office has received complaints from consumers who received notice from attorneys that they forfeited any refund under contractual guarantees due to speaking with their lenders. An example of the relevant portions of such a notice is below.

TERMINATION OF SERVICES LETTER

As you know, you hired this law firm to represent you in your efforts to obtain a loan modification and/or other loan solution for the mortgage loans presently outstanding against the above-referenced real property. You will recall that you signed a written fee agreement with this law firm before or shortly after we initiated work on your case. In that agreement, we promised to represent you fervently within the bounds of the law, and we also offered you a money-back guarantee if certain conditions were met. In that agreement, you also made promises. One of the promises you made was the agreement not to compromise any matter in the retainer agreement (see section 4).

You have negotiated terms with [REDACTED] outside of our retainer agreement and without the involvement or consent of counsel.

Accordingly, it has become unreasonably difficult for us to continue to represent you. All work on your case is stopped. Your failure to fulfill the terms of our agreement has thus voided our money-back guarantee.

The mortgage rescue consulting industry is increasingly dominated by attorneys who engage in the same fraudulent practices as non-attorney mortgage rescue consultants.

As with other mortgage consultants, consumers have filed complaints against attorney mortgage consultants based on failure to complete work, return consumer calls, contact lenders and loan servicers, and/or refund money as promised in the mortgage consulting agreements. Many attorney consultants give consumers the impression that they will provide legal assistance, but then disclaim that they will do so. Overall, consumers are not placed in a better position by hiring an attorney for mortgage consulting services. In fact, due to the fees charged, bad advice received, and the delay in seeking legitimate help, most consumers are worse off than they were before purchasing the services. The following examples from Illinois consumer complaints illustrate the poor performance of attorneys in this field.

“I was seeking to lower my interest rate on my home. I contacted [REDACTED]...I was informed that I would receive superb service and an answer in a timely manner. Instead, I was given the run around and eventually was sued.”

“I was completely disgusted with [REDACTED] because they tried to take credit for our own negotiations with our lenders. If I would’ve continued waiting on them to reach an agreement my family would be homeless...All correspondence with my loan consultant ...ceased after they cashed the final payment. When I tried to contact her direct number...it had been reassigned to someone else and they didn’t know anyone by that name... What I still can’t believe is how much [they] tried to get a letter of recommendation from me stating how they secured a lower mortgage for us.”

“We wanted to just have our mortgage payment lowered because of the economy and my husband’s job changed. [The representative] told us NOT to even attempt to make payments. On July 29, 2009 we received FORECLOSURE papers on our home. As of this letter we have a tentative buyer for our home (short sale) to be finalized in the coming weeks... When we leave our home we will be leasing a house. And, as you can see we are very hurt and upset by [the representative] and [REDACTED]; we are both seniors.”

Unfortunately, the above examples are not isolated incidents. A significant and growing portion of the companies in the mortgage consulting field are owned by attorneys, employ attorneys, offer legal services, or act as marketing shells that transfer consumers to attorneys. In fact, our review of consumer complaints shows that attorney-owned companies are becoming the dominant business model in the rescue consultant field.

Our analysis of Illinois consumer complaints indicates that 33 percent of mortgage consulting companies are owned by attorneys. This includes those that operate explicitly as law offices, and those that have attorneys as principles or owners but do not operate under an attorney's name. Another five percent of the companies with known ownership claim to offer legal services. Thus, 38 percent of the mortgage rescue consultant field is supposedly tied to legal work. These companies often aggressively market mortgage consulting services as a legal specialty, one of the array of benefits to hiring an attorney. In reality, however, as evidenced by numerous contracts, consumers are entitled only to loan modification consulting in exchange for their fees.

Mortgage loan modifications do not require the intervention of any for-profit third parties – much less attorneys. Thus, while companies may use attorneys as a marketing tool or to evade regulatory requirements, it would be impossible for consumers to ensure that they are receiving attorney services from these companies in return for their fees. Any regulation that exempts attorneys would leave a significant portion of the market to continue to operate in a manner adverse to consumers, undermining the effectiveness of the regulation.

Traditional attorney regulatory bodies are not designed or equipped to deal with the magnitude and scope of fraud involved in the mortgage rescue consulting industry.

Traditionally, attorney malfeasance, including claims of fraud from consumers, has been dealt with by state bar commissions. The problem of attorney mortgage consultants, however, has grown so large that it is already straining the resources of state bar commissions. Recently the California Bar commission issued an ethics alert in which it outlined the scope of disciplinary investigations being conducted against attorneys for misconduct related to loan modification. The California Bar called the magnitude of the disciplinary crisis “truly unprecedented.” About one-quarter of the California Bar’s active investigations, almost 800 cases, are related to foreclosure complaints, and the office has experienced a 58% increase in active investigations due in large part to attorneys offering loan modifications. In recent months, the California Bar, in lieu of formal disciplinary actions, has obtained the resignations of three attorneys who were offering loan modification services. Additionally, the California Bar published the names of 16 attorneys for whom they have received a “significant” number of complaints related to the mortgage consulting services they were hired to perform. On the basis of all of their investigations the Bar made the following statement:

“The number of attorneys using their law licenses to essentially take money from unwary but trusting consumers is astounding... There are

literally thousands of victims who have lost money they could not afford to lose. Under the circumstances, the need for public information and protection is paramount.”

The pattern of conduct identified by the California Bar is exactly that perpetrated by other fraudulent mortgage consulting companies. As the ethics alert states: “Those attorneys being named by the State Bar have allegedly taken fees and promised services and then failed to perform those services.... Some attorneys misrepresented the services they could provide.” *Id.* Thus, coordinated national regulation of attorney mortgage consultants, beyond relieving bar commissions’ resources, would integrate seamlessly with other FTC action in this area, as attorneys’ actions and malfeasance are indistinguishable from the other individuals in the field.

Conclusion

The experience of the Illinois Attorney General’s Office is that attorneys engaged primarily in the mortgage modification industry provide no true legal services to consumers and charge more for the same services provided by non-attorney mortgage rescue consultants. From the evidence in the Illinois consumer complaints, attorney-controlled entities are becoming a larger portion of the companies in the mortgage consulting business. As other companies are being shut down by state and FTC actions, attorneys continue to thrive in the industry. The exemptions from regulation have given attorneys a perverse competitive advantage over their regulated counterparts. Already, attorney entities represent close to 40% of the field. We continue to support a limited exemption for attorneys who render legal services on behalf of consumers in the course of serving as the *attorney of record in bankruptcy or foreclosure proceedings*. But, if a national regulation categorically exempts attorneys or contains an exemption for “the practice of law” without defining what that is, they may become the dominant or only actors in the field of mortgage consulting. Without action by the FTC, consumers will continue to fall prey to unscrupulous mortgage rescue consultants – without any real protection whatsoever.

Very truly yours,

Lisa Madigan /
ATTORNEY GENERAL