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Law Offices

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Robert Mahini c/o  
FEDERAL TRADE COMMISSION  
Division of Financial Products  
600 Pennsylvania Ave, N.W.  
Washington, DC 20580

February 10, 2010

**CERTIFIED MAIL, RETURN RECEIPT**

Re: Public Comments about proposed rule regarding  
prohibiting attorney fees in loan modification

Dear FTC;

I understand that the FTC is about to issue a rule that would forbid lawyers from being paid 'up front' for aiding distressed homeowners in obtaining loan modifications. I would like to provide my input on this matter for your consideration.

I am from Nevada, where the percentage of foreclosures is the highest and it would be a great mistake to prevent homeowners from getting legal help. [making counsel wait to get paid would be the same thing from a practical standpoint]. Nevada is a 'foreclosure mediation' state under our newly enacted AB149, which is to say that those who occupy their own homes in foreclosure can elect to mediate and meet, face to face, with the bank before the home is lost. I have done a dozen or so of these since the law went into effect. What happens is that a lawyer from the loan servicer shows up and telephones in to someone at the HAMP desk. Initially the process comes down to qualifying for such a modification. There are, of course other kinds of modifications, but those are considered only if the person does not qualify for HAMP. Personally, I have about at 90% success rate with this procedure, though I have been doing mods long before the adoption of HAMP. There is a huge amount of pre-mediation preparation that is required to make these cases work, including writing a legal memorandum. I can provide you redacted copies of these materials if you like along with the modification paperwork. In my opinion, it would be a very great mistake to cut the lawyers out of this process, because the banks invariably try to 'get over' on the homeowners if they can find a way to do it.

For reasons of economics and the inherent structure securitized loans, a servicer can make more money foreclosing, than it can by modifying a loan.<sup>1</sup>

Let me give you a concrete example: The Nevada mediation process has a provision for homeowners to take an appeal to the state district court in the event that the lender acts in bad faith. This procedure is a 'petition for review', that can not be undertaken by a layman. A husband and wife came to me for representation when the mediation they attended without counsel failed and bad faith was found. I filed a petition for review asking the court to order the bank to do the mediation over, in good faith. The loan servicer was PNC and the lender/investor NATIONAL CITY.<sup>2</sup> The lawyer that went to the mediation on behalf of PNC said that while it was a participant in the HAMP program, that NATIONAL CITY was not, and hence no modification. A cursory review of the government website shows that PNC signed a participation agreement on July 14, 2009 and NATIONAL CITY signed one on June 18, 2009. Therefore, the lawyer for PNC was either ignorant of the facts or purposefully deceptive. There is nothing in the proposed rules that addresses that sort of behavior by counsel for the banks, and therefore no way to keep the lender's of the process honest.

Without counsel these people would simply have lost their home when there is a workable<sup>3</sup> federal program to prevent that. It is quite unfortunate that the lawyers for the banks are frequently telling the mediator that while servicer participates in HAMP, the investor does not, so consequently nothing can be done. Investors were not invited by the Treasury Department to participate in HAMP, unless they happen to be those who were warehousing loans that are awaiting the securitization process. This policy of deceit flies in the face of the 'safe harbor' provision that the Congress enacted last year; 15 U.S.C. 1639(a), which is to say that servicers are entitled to modify loans without consent of the loan holder. Homeowners need lawyers to guide them thru this morass.

I do not advertize that I help people with loan modifications, nor hold myself out for that sort of thing in any way. I get business by word of mouth, because I teach CLE on the subject and because my colleagues know that I am good at it. I started doing loan mods

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<sup>1</sup>See: "Why Servicers Foreclose When They Should Modify, and Other Puzzles of Servicer Behavior", by Dianne Thompson, NCLC 2009 [www.nclc.org/issues/mortgage..](http://www.nclc.org/issues/mortgage..)

<sup>2</sup> I actually doubt that National City was the owner of the note, but because the homeowners had a letter from it to that effect, I took it at face value. The terms; 'lender' 'servicer' 'bank' 'investor' are used somewhat interchangeably as a matter of stylistic parlance and not substance.

<sup>3</sup> The HAMP process has gotten a great deal of bad press, largely because people are impatient and desire a rapid resolution of their loan issues, and because the popular press has not devoted the time and energy to understand the issues. This is generally not possible to resolve these cases quickly as financial statements have to be gathered and reviewed by the servicer that is on the verge of being overwhelmed with an avalanche of paperwork. BAC has had 10,000 'new hires' in 2009, and it is just recently getting to the point were it can deal with the defaults.

after I quit practicing Bankruptcy in light of the BAPCPA in 2005. At this point they were extremely difficult to obtain and many homeowners ended up in bankruptcy. On average, a successful loan modification takes a year, and is never accomplished in less than six (6) months, though those figures are improving. Most people come to me because they have tried to get loan mods on their own and are being stone-walled by the banks. I can not tell you how many times that I have made contact with a mortgage company; gotten a request for 50-100 pages of documentation, sent those things in by fax, eMail and certified mail, only to hear later that the bank doesn't have them. Worse, they frequently 'sit on' the documents without action, only to call or write back that the information is 'stale'. This is frequently accompanied by a letter that concludes the client must no longer be interested, with is the furthest thing from the truth. [At this juncture I will not discuss the issues of calling in to a servicer about a problem on a toll free phone number; suffice it to say that it is not generally possible to do so, protestations of the industry notwithstanding.]

The average family that has kids in school, simply can not tolerate such a lengthy period of uncertainty. As counsel, I do the 'hand holding' throughout the process and I am the one that assures them they are not going to lose their homes. I make referrals to chapter 13 counsel in extreme circumstances. Having done dozens of these in the last few years I have not, as yet, failed in that mission, with only one exception. If the FTC says I can't collect a fee in advance, I will have to exit this field of practice. What am I supposed to tell my secretary? My landlord? My vendors? That they get paid in a year! That is unreasonable may be an unconstitutional denial of access to the court system. In a few cases I have agreed to work for nothing up front, and when I finally get the deal, the client mulcets me<sup>4</sup>

The simple fact is that the banks/lenders/services/investors have gotten billions in taxpayer dollars that are never going to be recovered, no matter how much they 'spin' the facts. These funds are trickling down to the homeowners, but the mechanism for doing this is in its infancy. All the numbers I have seen point to the fact that the 'second wave' of foreclosures will crest in 2011, when the bulk of the prime ARMs explode. The term 'reset' is a euphemism that I am not prepared to use for this phenomenon.

The average homeowner didn't read his or her loan documents at closing because they were not allowed to take them home, and they could not spend 3-4 hours reading them at the title company, so they accepted as true, that which was told to them about the loan. I believe the great majority of people with badly structured loans would never have signed

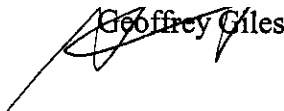
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<sup>4</sup> It took me 8 months to get a loan mod from a non-HAMP participating bank last year. The client said she would pay when the job was done. I got \$25k in arrears wrapped into the balance, got the interest rate down from 7.5% to 5% and got her a ten (10) year balloon, when the construction loan was all due and payable before she came in to see me. The reason she is not paying me is because I did not get her a 2% deal like she read about on the internet.

for them if they understood how they work, but I have no direct evidence of that contention. By the same token these homeowners simply can not understand the loan modification applications nor what is necessary to get them submitted, reviewed and approved. I wrote to the Inspector General about this problem at the inception of HAMP, but have not yet received a reply.

If you take the lawyer out the picture, the only ones that will remain in the industry are the fraudsters and scam-artists, that you are trying to stamp out. These people are in the grey market, under the radar, and rules simply will not deter them. I personally have a policy to refund the fees to the client where I am unsuccessful. I don't tell them about it, but that's how I have practiced law for my entire career. In thirty (30) years of lawyering I have no bar complaints, fee disputes nor lawsuits of any kind. If you pass this rule, it will drive lawyers like myself out of the market, and the number of permanent HAMPs that are executed will probably drop precipitously. In Nevada, if lawyers are forbidden to practice under AB149, that legislation will fail to meet its objectives. Thank you for listening. This is the first 'public comment' I have ever made on anything during my career, and I hope that I have not been so long winded that it fails to be considered. I remain...

Yours truly,

 Geoffrey Giles

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cc: NACA

Foreclosure Mediation Director