1ST AMERICAN LAW CENTER, INC.

A PROFESSIONAL LAW CORPORATION

Dean G. Chandler, Esq.
President/CEO

March 25, 2010

Federal Trade Commission
Office of The Secretary
Room H-135 (Annex T)
600 Pennsylvania Avenue, NW
Washington, DC 20580

REGARDING: Need To Prevent Flaws In FTC Proposed Rule For Mortgage Assistance Relief Services (MARS) From Worsening Foreclosure Crisis [RIN 3084-AB18] 16 CFR Part 322.

The FTC's current efforts to protect borrowers from fraud by MARS may very well increase the borrower's chances of losing their home to foreclosure by the banks. Media reports on banks providing only false hope to borrowers in distress make it clear that (if the flaws are corrected) this rule could make it easier for desperate homeowners to find help to keep from losing their home. If the flaws are not corrected, the rule will provide protection to abusive lenders and make it easier for those lenders to get paid federal rescue funds while they continue to foreclose.

Contrary to popular misconceptions (promoted by the lending industry) the sub-prime mortgages have been a source of incredible profit. That industry is now foreclosing on homes rather than complying with federal programs designed to protect their profits and the borrower's home. One of the few resources most borrowers have to avoid this outcome are (MARS) companies that can not only fill out the necessary forms and persevere through the modification process, but also explore the borrowers rights under a myriad of lending regulations, consumer laws, and statutory protections in forcing abusive lenders from taking the borrowers' homes.

The flaws in the rule would throw borrowers to the mercy of lenders who have shown none, allow those lenders to operate as MARS companies with absolute immunity, and help frustrate all of the efforts and expenditures by Congress to protect borrowers homes to date.

Sincerely,

1st AMERICAN LAW CENTER, INC.

Dean G. Chandler, Esq.
President/CEO

615 Mission Avenue, Oceanside, California 92054 Telephone: 800.761.6619 Fax: 760.722.0294
www.1stamericanlawcenter.com

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The FTC's current efforts to protect borrowers from fraud by sham rescue services may very well increase the borrower's chances of losing their home to foreclosure. If the flaws are corrected, the rule could promote the availability of help for desperate homeowners in risk of losing their home. If the flaws are not corrected, the rule will not only provide protection to abusive lenders, but also increase their chance of being paid federal rescue funds while taking the borrower's home.

Contrary to popular misconceptions (promoted by its members) the sub-prime mortgages have been a source of incredible profit for the lending industry. That industry is now in the process of foreclosing on homes that will result in a net loss to the lender (until they can sell us on the need for another bailout), rather than entering into federal programs that would pay them to adjust the loan allow the government to assure their profit on the loan over time. The media is providing more and more examples everyday where lenders are being shown to be avoiding and denying the very modifications they claim they are actively pursuing. The most recent was ABC's investigation, *"Whistle Blower: Banks Give Homeowners the Runaround"*, which included the admission by an anonymous vice president of a large bank that his bank had not allowed one modification to go to completion and described the methods that bank used to frustrate borrowers seeking modifications.

Lenders are even going so far as insisting on an impossibly high payment of the total amount in arrears as the only alternative to foreclosure. This true even when the amount owed exceeds the value of the property. In short, lenders are paying money to take borrower's homes at a loss (and then facing additional losses to maintain and sell the home) rather than allowing the borrowers to pay off the arrearage over time by including an additional amount towards the arrearages with each monthly payment.

It is not uncommon for lenders to turn down borrowers multiple times for modifications that they were perfectly qualified for at the time of their first application. If the modification is approved, it is usually conditioned on the borrower successfully completing a "trial mod" period.

It is not uncommon for the lender to set the trial modification to require two or more payments, followed by a miniature balloon payment of several times the monthly payment amounts, and then announce that they (or their investor) have decided not to continue with the modification.

One of the few resources most borrowers have to avoid this outcome are mortgage assistance relief service (MARS) companies. MARS can not only help fill out the necessary forms, but also persevere through the regular calls (with the inevitable "hold" times of often a ½- hour or more) inherent in the modification process, inform the borrower whether an approved modification offers any real relief, explore the borrowers rights under a myriad of lending regulations, consumer laws, bankruptcy, and statutory protections, and either provide litigation or bankruptcy services or direct the borrower to other attorneys who can. This ability can be invaluable in persuading abusive lenders to grant modifications rather than foreclosing.

Two of the largest flaws in this proposed rule are the prohibition of collecting up-front fees and the exemption of lending institutions from complying with this rule. The effect of the first rule would be to force the private MARS organizations out of business. Having delivered the borrower into the hand of their persecutor, the second rule would grant that predator license to operate with absolute immunity. In short, the government is creating a rule designed to protect the borrower which will result in protecting the predatory lenders while minimizing the motivation of those lenders to cooperate in the programs created by Congress to help the borrower.

It is not unreasonable to expect that if this scenario were allowed to develop, the government would actually end up paying lenders funds (designed to help the borrower stay in their home) while further reducing the government's ability to even slow-down the rate of foreclosures. In short, lenders could charge borrowers for MARS services that resulted in modifications that would only extend the borrowers payments for a while, entitle the lender to federal assistance funds, while merely delaying the inevitable foreclosure. The borrower would end-up paying even more money (most likely from protected sources such as IRA's and 401k's) before watching their monthly mortgage payments again outstrip their income and push them, once again, into foreclosure.

If, on the other hand, the rule were expanded to cover all parties in a position to prey upon borrowers and add the ability to license/certify legitimate MARS while prosecuting or eliminating the unqualified or the unscrupulous, the result would be to: 1) Eliminate predators, 2) License/certify the protectors, 3) Facilitate the identification of the reliable MARS, 4) Install a structure for the regulation of the industry, and 5) Generate revenue (from fines and licensing fees) to fund a victim's fund and/or education fund.

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Introduction

The purpose of these comments is to provide an overview of the loan Modification and Rescue Services (MARS) industry, identify and attempt to blunt the "scapegoat mentality" that usually fans these sorts of reforms, and address the needs and potential dangers of an FTC rule such as the one contemplated. It is essential to recognize that MARS providers are often the only practical source of help for many borrowers.

Such help extends beyond filling in forms to pushing applications through a system more often designed to frustrate, resist, and deny than to cooperate, process, and approve. It also requires the analysis of the borrower's problem in all its elements (nature of default, effects of credit cards and auto loans as well as mortgage terms) recognition of wrongful denials that can be overcome by re-submittals, legal defenses and claims that may remove the negotiations from the modification process, the potential benefits of bankruptcy, and the occasional instance when complaints to regulatory agencies may prove fruitful.

On March 23 and 24 of this year, ABC aired *their investigation, "Whistle Blower: Banks Give Homeowners the Runaround*"(http://abcnews.go.com/WN/saving-middle-class-whistle-blower-banks-helping-americans/story?id=10178938). Part of this investigation included the admission by an anonymous vice president of a large bank that his bank had not allowed one modification to go to completion. This bank officer described the methods his bank used to frustrate borrowers seeking modifications, including sending them to an "800" number where they were never able to get any meaningful response. These sorts of stories are beginning to snowball, with the media is demonstrating the availability of authoritative information. While these stories are breaking and an investigation by the House Committee On Oversight and Government Reform is just beginning, the lending industry is pushing for self-serving federal action designed to promote their to cooperate with the current borrower protections. The MARS rule runs the risk of allowing itself to be a part of this push if it is not corrected.

The effect of this proposed rule by preventing collection of up-front fees by all MARS is to prevent honest and qualified MARS from being able to survive financially. If lenders are exempted, it will provide immunities to the same lenders that created the problem, allow those

lenders to charge borrowers (without any legal standard as to what they charge and what they deliver), and in general contribute to the very problems the FTC and Congress have been trying to cure.

Effectively attacking an entire industry (rather than merely removing the abusers) and then providing immunity to the very industry that is created the problem and is now beginning to create their own MARS would be counter-productive in the extreme. Lenders are currently required by their respective regulations to comply with the FTC Act. Granting such exemptions as lenders have requested here would imply a change to one of the very few standards of fairness in the existing lending laws. Such a result would all but endorse lender abuses through the confusion that would result. It is hereby respectfully suggested that extension of this public comment period until the completion of the House Oversight Committee investigation into lender abuses would provide valuable guidance in defining the scope and terms of this rule prior to its final implementation.

1st American Law Center (1st ALC)

By way of introduction, 1stALC is a national law firm that is based in Oceanside, California whose services include but are not limited to assisting qualified borrowers in the pursuit of loan modifications or other legal redress in their attempts to keep their homes. 1stALC is also in the process of expanding into a nation-wide bankruptcy firm that is also addressing the need for litigation of consumer finance claims and defenses. 1stALC is forced to depend upon payments from borrowers to support its efforts and staff of approximately 25. This staff includes attorneys, paralegals, former underwriters and processors in the lending industry, and other employees with relevant skills and experience needed to process loan modifications. We have assisted approximately 2,000 borrowers in all levels of distress, often succeeding in holding off foreclosures through the successful processing of modifications for those borrowers who had previously been denied. Many of these modifications appear to have resulted from 1stALC's ability to supplement their submittals with forensic audits and analysis of Net Present Values of the affected homes. We operate individually in those states we are qualified in, and through a network of affiliate attorneys and firms in the states we are not formally authorized to operate in an individual capacity, while guaranteeing our services with a money-back guarantee.

A review of the public comments already published reveal some of the various elements of the world in which we routinely operate and the FTC now seeks to regulate. Those comments range from well intentioned individuals (some victims of the lending and/or MARS industries) to corporations perpetuating the abuses that have created the current crisis while alleging noble efforts on their own part to prevent the problems discussed herein.

The Problem

It is not possible to get a firm grasp on the current problem without delving briefly into the history of its creation and the misconceptions that facilitated its growth. Based upon our own experience and upon common knowledge in the industry, it is clear that a large percentage of the loans currently in distress were designed to fail when the lender originally wrote them.
The real estate industry has long been aware of the sizeable profits to be made by "churning" or "flipping" loans (the practice of continually re-marketing old loans with new fees to borrowers). The difference is that the state real estate regulators have told brokers (who do this by soliciting the borrower) that they are in danger of losing their license if caught, while the lending industry (who does this by putting borrowers in loans that will outstrip their ability to pay thereby forcing the person into refinancing after draining their assets) has simply lumped these loans into the "sub-prime loan" category and blamed the borrower.

Now that this prolonged deluge of "bad loans" has threatened not only the lending industry but also the financial, housing, and job markets, lenders are now seeking government assistance while they deny any relief to their borrowers and continue to amass one of the largest stores of real estate this country has ever known, doing so at the expense of everyone else. Real estate brokers who are starving for business find themselves excluded from the marketing of foreclosed (REO) properties, and in the midst of a feeding frenzy when they try to assist (often first-time) buyers as they compete for the few homes being sold. This market is almost exclusively controlled by the lenders. Borrowers are unable to sell their negative-equity homes without tight lender controls of their "short sales" and the buyers are forced to engage in cut-throat competition for the trickle of homes released back into the market.

Any contrary view faces insurmountable credibility problems. Creating a single bad loan may be a mistake, but when it becomes the creation of thousands of loans over a number of years (with all such loans favoring the lender) we must either believe in the total reversal of statistical probability or begin to recognize a business practice on the verge of becoming an industry. That this industry threatens our economy and the foundation America's unique innovation, the middle-class homeowner, is being demonstrated daily.

Protestations by banks that they cannot afford to lose money on bad loans are often made by banks in the process of foreclosing loans years after their sale of those loans (often within days of their making). These claims ignore the profit from the sale, from the subsequent income stream from servicing those loans, and from the issuance of various other financial devices such as the issuance of credit default swaps. These "bad loans are devices by which the lender seeks to either acquire first the borrower's assets and then either a tidy fee or the borrower's home.

This practice of "loan-to-own" usually consists of issuing a loan for less than the value of the borrower's home. The borrower then makes their payments for as long as they can, thereby further reducing the lender's "investment". The process forces the borrower to eventually expend all of the borrower's income and savings in their futile attempt to save their home before the lender takes the home as well. This can only be classified as a money losing practice when the greed of the lending industry causes the values of the homes to fall over a broad segment of the economy.

Failure to admit that these loans have continued to multiply due to their immense profit potential to the lender can most charitably be considered obfuscation and misdirection. Furthermore, avowals that lenders do not want to take people's homes when the servicer gets paid more for foreclosures than for rescues, and the lenders/investors continue to stockpile homes like so much cordwood while they gain an ever-increasing control of the market and the economy can only be accepted by the most naïve among us.

Most of the details of the numbers and specifics of these practices must be contained in the records of the agencies claiming to audit and regulate these lenders, but are rarely available to the public, to the attorneys and other organizations the public relies upon for representation or assistance, or to the news media and others that undertake to educate the public about these problems.

The myth of losing money on "bad" loans is compounded by its companion myth of extensive control of the banks through federal laws and regulations. For an attorney trying to represent a borrower who has been placed in one of these impossible loans, the few federal laws and regulations they can rely upon include:

- 12 USC § 85 authorizes banks to charge any rate of interest allowed state institutions.
    - The provision for a limitation of 7% where neither the banks nor the borrower's home state imposes limits (such as in California where California exempts loans made by banks or brokers and most banks reside in states with no interest ceiling) is almost universally ignored.
- 12 USC § 86 provides for double damages in the recovery of charges paid to banks in excess of the limits contained in 12 USC § 85 (above).
- 12 CFR § 7.4002 imposes a duty on banks to evaluate all charges on the basis of 4 considerations (cost to the bank, deterrence of misuse of bank services by customers, enhancement of the bank's competitive position, and maintenance of the safety and/or soundness of the bank).
    - This regulation:
        - Claims protection of banks from state (usury) legal standards under the doctrine of federal preemption.
        - Excludes interest from these standards.
- 12 CFR § 7.4008 prohibits the making of consumer loans based solely upon the banks recourse against the security and lists particular categories of state laws that banks are specifically subject to.
- 15 USC § 1601 et seq - Consumer Protection Act:
    - Truth In Lending Act (TILA) requires specific disclosures to assure the borrower's ability to accurately compare loans.
        - The original requirements that a disclosure contain an error of no less than 1/8% over-disclosure or under-disclosure to be within legal tolerance being attacked by the lending industry as too complex, the new standard retains the old standard (as applies to damages) but conditions the remedy of rescission upon an a myriad of tests that include whether the error resulted in an under-

statement of greater than either 1%, ½%, or ¼% (unless the error arose from a mistake in the computation of the Finance Charge etc.

- Home Ownership Equity Protection Act (HOEPA) is a sub-component of TILA that (abandoning the FTC Act standard imposed by the National Banking Act and the "net tangible benefit" standard applied to lines of credit and educational loans) limits the definition of predatory loans as those that charge more than 8% of the amount of the loan in fees or 10% above the going rate in interest. These "triggers" basically protect a lender who charges less than these amounts (i.e. on a $400,000 loan, the lender can charge $31,900 in fees and an interest rate 9.8% above the going interest rate and prove presumptively that they did not engage in predatory lending). This added fee and rate would add approximately $99,087.24 to the lender's profit over the life of a 30-year loan, and even substantially more if the loan is split into a first and a second at the time it is made.

  - o Fair Debt Collection Practices Act limits the use of threats or public disclosure of public data to collectors acting on behalf of banks but exempts the banks from using such tactics on their own behalf. A provision that permits state law to extend such liability to creditors is written in a manner that almost encourages judges to disregard it.
  - o Fair Credit Reporting Act requires reporters of credit to do so accurately.
- 12 USC §2605 et seq – Real Estate Settlement Procedures Act (RESPA) prohibits kickbacks and unearned fees while requiring accurate disclosure of fees charged as part of the loan.
  - o Lenders routinely (and often successfully) argue in court that RESPA does not prohibit the use of Yield-Spread-Premiums to compensate brokers for convincing borrowers to enter into loans that are more expensive than the ones they qualify for.
    - § TILA specifically excludes the need to include these fees from pre-paid finance charges on the theory that they are not paid out of the proceeds of the loan.

Anyone who has tried to use these rules to protect the victims of predatory loans quickly learns that, rather than being an "exhaustive body of regulations" the above regulations rarely provide any substantial protection for the borrower, and often provide protection to the predatory lenders they allege to regulate. Any person who views these regulations with an analytical eye realizes that justification for the hiring of armies of lawyers cannot be based on the need for compliance, but rather for the purpose of avoidance. This small a set of regulations would require (at most) one attorney to assure compliance, and could only justify the armies of attorneys employed by lenders if the goal was to minimize and circumvent even these few restrictions.

As long as this information is withheld or distorted from the American people while honest lenders must either lose their market share or raise their earnings by lowering their ethics, we must continue to be plagued by the bias that has helped to enable the development of this practice. This misinformation can be found at almost all levels of our system of government. Alan Greenspan has acknowledged that the "model" he relied upon, during his time as Chairman of the Federal Reserve Board, (the belief that banks are responsible and disciplined enough to protect the public and the economy) was "flawed". (See *Attachment 1.*)

Most judges and juries cannot be distracted from their concern (that no one should live anywhere for free or receive a "windfall" for having been given a loan) long enough to hold lenders to even the most basic pre-requisites to justice. It is so rare for a judge to require a lender to prove (by such methods as presenting the original note with all of its endorsements and assignments) that it owns the loan it is trying to foreclose upon, that when this does happen it is often reported by the media on a nationwide basis. (See *Attachment 2.*)

The power of this concern for the lender being made whole, even long after they have sold their loan (usually as a part of an asset-backed security), not only blinds the trier-of-fact to the need to insist on the need for the lender to prove its legal standing to bring the action, but also to the requirement that a true custodian-of -records be used to authenticate the lender's documentary evidence. Even when the trier-of-fact does apply such basic foundations of justice, they risk reversal or disapproval at the appellate level. This was demonstrated in California when the Court of Appeals in *Dimock v. Emerald Properties (4th Dist, 2000) 81 Cal App 4th 868, 876, 97 Cal Rptr 2d 255* (attached hereto as *Attachment 3*), held that a foreclosure sale conducted without proper authority was void. The response was a 2003 decision by the Second Appellate District, (*Jones v. First American Title Insurance Co (2nd Dist, 2003) 107 Cal App 4th 381, 390, 131 Cal Rptr 2d 859* attached hereto as *Attachment 4*) in which the new court held that, absent a strong public policy, the Dimock decision did not rule out the use of waiver to permit salvation of the otherwise void sale through the doctrine of reformation.

In comments such as those received in response to this ANPR, lenders such as Chase continue to represent themselves as concerned and dedicated to mustering their considerable powers to provide relief and ongoing communication to borrowers in distress. While lenders such as Chase are anxious to avow pure motives while facing potential regulation, they are just as fast to tell the public they are prevented by law from exercising such restraint, claiming their duty to generate profits for their shareholders as their paramount standard of conduct. Chase has demonstrated this practice (complete with the inherent inconsistencies that result) in their own comments submitted to this agency concerning MARS.

In their comment (comment number 4 on the list, assigned response number *542309-00041* and submitted herewith as *Attachment 5*), Chase made the usual claim to being responsive to their borrowers needs. If this claim is true, Chase should be able to explain why so many borrowers have resorted to hiring members of the modification industry to get the loan modifications they were entitled to. Few people would be expected to prefer to expend thousands of dollars to the simple making of a phone call and submittal of a few forms.

Chase Home Finance, LLC also claims they have approved 138,000 trial modifications to their loans.

a. According to the Treasury, this number equates to more than 88% of all trial modifications initiated by JP Morgan Chase and all of their almost 5,000 subsidiaries combined.

b. Given the reported 305 days JP Morgan Chase has been in the program, this number equates to approximately 512 (just over 10 per state) modifications per day accomplished by a multi-billion dollar nation-wide lender that claims to be making a dedicated effort to cooperate.
c. Treasury figures (reported on the Making Homes Affordable website on or about January 19, 2010 and attached hereto as *Attachment 6*) indicate that only 6% of these trial modifications became permanent (6% of 138,000 amounts to 8,280 or 27 per day). Neither the Treasury report nor Chase's comment provide any verification that the modified borrowers enjoyed any benefit from the modification.
d.

Chase's comments mask some of the key factors, such as when they describe their efforts on behalf of "customers who are having difficulty". A careful reading (which is supported by borrower experiences) reveals that until a borrower has missed at least one payment, they do not qualify for any assistance from Chase. This practice subjects the most conscientious borrowers to the elimination of their savings and retirement funds before any discussion is even commenced. In short, Chase is only willing to discuss modifications after they have assured that there is no more money to be had. In addition, Chase does not specify if they are among the growing number of lenders who treat and report (to the credit reporting agencies) each modified payment as another delinquent payment. The attached complaint against Chase provides additional and more specific examples of the sorts of practices more and more borrowers are facing. (See *Attachment* 7.)

Chase's comments raise still other inconsistencies when examined carefully. Chase cites the need to protect the public from MARS organizations, based at least partially on those organizations inability to guarantee the successful completion of a modification. This claim attempts to argue simultaneously that Chase is anxious to help borrowers in need of modifications, but that (even with help) there is not assurance the modification will be granted.

The implication should be clear, that Chase believes borrowers should be "protected" from having experienced help that is not controlled by the lender who (in many situations) deliberately placed the borrower at peril in the first place. IF BORROWERS NEED TO BE PROTECTED FROM MORTGAGE ASSISTANCE RELIEF SERVICERS WHO CANNOT GUARANTEE A SUCCESSFUL MODIFICATION, SHOULDN'T THEY ALSO BE PROTECTED FROM LENDERS WHO EXTRACT LARGE PAYMENTS FROM NEAR DESTITUTE BORROWERS (OFTEN FROM EXEMPT SOURCES SUCH AS RETIREMENT ACCOUNTS) AS A NECESSARY PART OF A TRIAL MODIFICATION THAT IS OFTEN REFUSED AFTER THE MONEY IS COLLECTED? We have experienced many occasions where (often desperate) borrowers were induced to further reduce their otherwise exempt assets and funds in order to pay for a modification that was then canceled by the lender.

This question becomes even more vital in light of the ever increasing anecdotal evidence that lenders (such as Indymac) are currently staffing up to create their own MARS entities. This makes the final question as clear as possible, IF LENDERS ARE NOT ANTICIPATING COMMITTING THE VIOLATIONS CONTAINED IN THIS REGULATION, WHY ARE

THEY SO INSISTANT THAT THEY SHOULD BE EXEMPTED FROM THE PENALTIES?

While it is true that mortgage assistance relief servicers cannot guarantee a successful modification, they can determine whether or not the individual fits the criteria prescribed by either federal programs or by the lender for a modification. (See the Modification Evaluator and Payment Reduction Estimator (from Making Home Affordable website) as an example of the basic analysis that can be applied to such evaluations attached hereto as *Attachment 8*). Such a determination (coupled with persistence) can exert the pressure that is often the only way some lenders will even consider a loan modification. MARS are also in a position to try to warn the borrower if the modification that is eventually offered fails to include any actual benefit to them.

Where experience indicates that the lender is not operating in good faith, the MARS can also advise the borrower of this fact while they may still be able to qualify for legal representation and/or bankruptcy that will allow them to preserve their pensions and other assets.

The attached Testimony of Massachusetts Attorney General Martha Coakley before the U.S. House Financial Services Committee on September 17, 2008 (See *Attachment 9*) makes it clear that no reasonable person should place any faith or reliance upon the concept of a voluntary correction of this problem by the lending industry. Despite this fact, the governmental and "qualified and approved" sources continue to advocate that borrowers only need to contact their lender to get the relief they need. This subtle (though probably well intentioned) undermining of the borrower assures the continuing stream of stories (such as Eric Wolff's article in the February 5 and 6, 2010 editions of the North County Times attached as Attachment 10 and other articles like those in the Wall Street Journal and other major newspapers and media) that demonstrate an ever-growing level of frustration and anguish of the American borrower and the seeming invincibility of lenders such as Chase.

Options

Borrowers that have been caught in predatory loans (or become a victim of an economy reeling from the effects of being flooded by such loans) have a very limited range of options to consider. Each of these options are endowed with certain benefits and problems.

Governmental Agencies

The first option is to rely upon public agencies for help. The advice from these agencies is free, but can be misleading and sometimes contradictory. An example of this is Office of the Comptroller of the Currency (O.C.C.) Consumer Advisory CA 2008-1, "Consumer Tips For Avoiding Mortgage Modification Scams and Foreclosure Rescue Scams". See Attachment 11. The second page of this advisory warns consumers never to follow advice that involves not making their payment, and stressing that the lender should be the starting point, in addition to "qualified and approved" counselors.

While this advice is basically correct for most circumstances, it ignores several facts. First, the borrower is often being advised by their own lender (as described in Chase' comments) or servicer, that they cannot be considered for a modification until they are a given number of payments behind. In addition, adhering to such advice may well prevent a borrower from being able to rescind under protections such as the Truth In Lending Act (legal tolerances are far lower where the property is in foreclosure) until it is either too late or the borrower has exhausted the funds they need to enforce any such rescission.

In addition, the examples of times that enforcement and regulatory agencies (especially those regulators such as the O.C.C.) responded to and obtained relief for an individual complainant are essentially non-existent. Traditionally, the regulators feel they are limited to responding to patterns of conduct by lenders, but are often hard-pressed to demonstrate any coordinated effort to track and establish such patterns. Even when such patterns might be detected, intervention on behalf of an individual by a regulatory agency (especially in time to prevent a foreclosure) is practically unheard of.

In short, these agencies receive their funding regardless of results or the ability of the borrower to pay. While they are therefore able to operate free of charge, they appear far more geared to the issues of "mankind" and are often perceived as indifferent to individuals appealing for help.

Non-Profit Organizations

While non-profit organizations, with their independent sources of funding, are able to attempt to perform (basically) the same job done by mortgage assistance relief services without cost to the borrower, they bear their own burdens. Their basic problem is that they are given too little financial and general support with which to provide assistance to a client base that is far too large. The answer is to rely upon volunteers and a small core of (often) highly experienced individuals to assist the public. The problem is that it is reportedly not uncommon for each of these individuals to be assigned hundreds of cases at a time in order to do what must be done for a desperate public. Just like most public-defender offices, this huge work load with the accompanying problems trying to communicate effectively with the affected borrowers leads many borrowers to seek alternatives such as MARS.

Traditional Law Offices

While often considered the obvious source of help for people being subjected to unfair (and often illegal) treatment, law offices have their own limitations. In some cases it is the lack of knowledge and experience in the areas of law needed to properly advise borrowers in distress. It is not uncommon for those few borrowers who decide to seek legal advice to endure the expense and inconvenience of the appointment procedure required to obtain legal advice, only to be told that if they don't pay their loan the bank is entitled to take their home. Such advice fails to advise the borrower of the possible ability to rescind the loan under Truth In Lending Act or state law (and that such a rescission effectively destroys the right of foreclosure), the protections afforded victims of illegal or unconscionable acts and practices, the possible protections afforded by state foreclosure statutes or violation of assorted lending laws. The attorney is doing their best to provide the appropriate advice, but does not know what they do not know.

Those law offices with the requisite knowledge must still do what they can to assure they are paid for their services. If they can find a violation of a consumer protection statute, they may be able to rely upon the consumer's right to recover attorney's fees to justify taking on the borrower's case with little or no cost up front, provided they can afford the delay (and risk of non-payment). However if the office is small, it may not be able to absorb the costs of experts, depositions, and court fees (that can easily exceed $10,000 over the life of a case), mandating that the client bear these fees. However, it is difficult to figure how they will be paid if they agree to represent the borrower on a contingency basis based upon legal violations that do not provide such remedies. (How do you cash a percentage of an amount you have saved an individual whose credit has been wrecked and whose home has no equity?).

Aside from the need to be paid, the law office that cannot find a legal violation on which to base an action in law or equity must resort to the same conduct as regular MARS, risking the taint of a suspected scammer and possible risk to their license and/or standing in the community if they chose to operate outside their chosen profession. They are further frustrated where such a representation would involve claims outside their home state (i.e. handling their client's financing of a vacation home in another state) where the laws of the other state defines their attempts to simply negotiate a modification of their client's loan as the unauthorized practice of law in that other state.

Even the filing of bankruptcy may not offer a viable source of relief. While bankruptcy judges are not precluded from excising illegal terms in a mortgage, the rules do not authorize reforming first position home loans. This fine distinction appears to create an reluctance on the part of bankruptcy judges to appear to be disregarding the basic tenants of their domain when they are considering extending relief to borrowers who are victims of predatory loans.

Mortgage Assistance Relief Services (MARS)

Where most law offices are operated on the basis of the billable hour, MARS tend to operate on the basis of a standardized fee. While this fee does not usually cover non-related services (such as litigation or bankruptcy where such services become necessary), this arrangement lends itself to the sort of war of attrition that is usually needed to get the modifications that are needed. Furthermore, by not being restricted to the need for a license to practice law, the MARS are able to focus their hiring efforts on those skill sets they deem most valuable for accomplishing their task. Traditionally they will focus on the hiring of underwriters, processors, and forensic loan auditors. In the meantime, they are free to either include licensed attorneys in their operation, or to establish professional relationships to reflect the needs of the borrowers they are attempting to assist.

At the very least, a MARS provides a third party witness as to the facts of any communications and abuses by the lender. Where the modification is not successful, this additional evidence, coupled with any forensic audits, net-present-value computations, etc performed by the MARS are often the difference between a borrower being able to find and retain legal representation.

RECOMMENDATIONS

Based upon the above scenario, 1stALC respectfully offers the following recommendations:

1. That the FTC establishes that its rules apply to all involved in the handling of loan modifications, even where there is no direct power of the FTC to personally enforce those rules as to some categories of lenders.
    a. Such rules should be coordinated with the related proposal for Unfair and Deceptive Mortgage Practices, to create clarity and uniformity in the requirements for compliance with 15 USC § 45(a)(1) contained in each of the lending regulations under which the regulators such as the OCC, OTS, and SEC are supposed to be working, and monitored to assure compliance and implementation by regulator and lender/ MARS alike.
    b. Laws should be clarified to provide that when a lender exceeds the scope of its protected activities by the commission of a criminal act (individually or in concert with others), it is subject to the same enforcement efforts as everyone else.
    c. Any resulting rule should be reviewed for its potential for such lender abuses as those demonstrated in letters (such as the one attached hereto as Attachment 12 to borrowers (who are already being inundated with warnings of fraud and frustrated by lender delays and repeated denials) justifying the lenders refusal to deal with a MARS by repeating alleged governmental warnings.
2. That the FTC and/or resulting rules provide a program to certify those agencies and/or individuals that possess the needed knowledge and integrity to provide those services covered by said rules on behalf of consumers and others in need of assistance.
3. That the FTC and/or resulting rules provide the authority of such certified personnel/companies to assist borrowers nation-wide without exposure to claims of unauthorized practice of law or unlicensed business activity.
4. That the FTC recognize the mutual benefits to consumers and to MARS providers in permitting the billing and payment for services as each agreed stage of the performance is completed. This would be consistent with the benefits of unbundled services as addressed in a resolution of the State Bar of California (Attachment 13) and in an article co-authored by the Chief Justice of the California Supreme Court, as quoted by attorney David Cameron Carr (Attachment 14).
5. The FTC and/or resulting rules require the posting of a bond (or equivalent undertaking) to cover possible claims by dissatisfied clients who prevail in their claim of right to a refund.
6. Having thus assured the ability of the consumer to recover any fees that were unsupportable, the FTC through this regulation should permit the charging of such fees as are reasonable based on the circumstances of the case upon the undertaking of the case or in a reasonable manner throughout.
7. The FTC and/or resulting rules provide a method or venue in which disputes regarding loan modifications or the parties providing services related thereto can be heard and resolved.
8. The FTC and/or resulting rules provide for the recovery of attorney fees and costs (or similar losses) by prevailing claimants (i.e. a private attorney general basis for recovery or at least public right of action), for borrowers and / or their representatives as well as for lenders who can show a bad-faith basis for said claim.
9. The FTC and/or resulting rules establish a public clearinghouse of data

from governmental and /or private sources that could be useful to individuals, governmental agencies, and/or the public and new media in establishing the sincerity, integrity, and successes of lenders in providing both abusive loans and modifications to those loans, complete with the degree and permanence of the relief granted in each modification and overall.

a. This clearinghouse should include a matrix of the laws, regulations, and agency commentaries that are applicable in evaluating the compliance of certain transactions/practices with 15 USC § (45)(1) and other relevant standards of conduct.
b. This matrix should include reference to such banking regulations as 12 CFR § 7.4008 (attached hereto as Attachment 15).
    i. While barred by 15 USC § 45(a)(2) from taking direct action against banks and other defined lenders, FTC cannot ignore the fact that these lenders are charged with compliance with the statute that bears their name and responsibility. Failure to comment on the fact that violation of a regulation that bars making loans without adequately verifying the ability of the borrower to pay in inconsistent with operating in compliance of said act weakens the application of the act to all.
    ii. Similarly, the promising of a modification conditioned upon payment of charges and fees which is then refused after receipt of such payments not only violates the FTC Act, but also the state laws the lenders are also bound to follow. If the FTC is barred from direct authority, they cannot be barred from assisting those states and organizations that are attempting to uphold these standards.
    iii. Finally, the taking of a home in foreclosure by a lender that no longer owns the obligation and accomplishes such a taking by violating state law is another example of conduct that is impliedly condoned if it is not opposed.

10. The FTC and/or resulting rules provide educational resources to promote knowledgeable use and evaluation of credit, assessment of claims related to credit, and promotion of a better understanding of the operation of all parts of the credit industry and the related governmental agencies that oversee them.

11. The FTC should endeavor to act as a conduit, forwarding complaints it finds to have merit to those agencies charged with the direct regulation of the lender involved, and tracking that regulator's response to evaluate the degree of responsiveness of each agency and the sufficiency of affected laws and regulations.

Justice Jackson described the Federal Trade Commission as an essential tool for Congress to address complex issues, enabling Congress to legislate in generalities and delegate the final detailed choices to authorities such as the FTC that could act with considerable latitude in conforming its orders to administrative as well as legislative policies. FTC v. Ruberoid Co., 343 US 470, 484 (1952). In considering the adoption of MARS regulation, the FTC faces two courses of action. The first, as called for by lenders such as Chase, is to wipe out all private MARS providers, thereby providing an effective monopoly to the lending industry to operate free of any control as sought herein. The second is to provide borrowers reasonable protections from all predators (private or corporate) while preserving a valuable source of assistance in facing the growing assault on home ownership that spans more classes than has been fully demonstrated to date. In short, if the FTC does not avoid providing absolute immunity to an industry that firmly believes in the receipt of checks without balance, they will fall far short of the system of checks and balances they profess to be promoting.

Summary

1stALC has witnessed and can provide documentation of a growing pattern of disregard and illegal conduct by lenders. This pattern includes such conduct as:

1. Refusing to respond to Qualified Written Requests (or attempting to condition any response upon the payment of fees per document) or directions of the borrower for the lender to deal directly with 1stALC.
2. Communicating directly with the borrower once the lender knows the borrower is represented by 1stALC in order to threaten or attempt to scare the borrower into abandoning their efforts.
3. Lenders submitting a modification directly to the client (sometimes with the advice that they should demand their money back from us).
4. Providing modifications that are as bad as or worse than the loans they claim to correct.
5. Obstructing the modification process by providing limited access (i.e. a single fax number that is constantly busy), denying receipt of documents that were faxed, insisting upon new authorizations every few months, etc).
6. Providing trial modifications with little or no documentation, no commitment to the final terms if successfully completed, often involving terms of a few slightly reduced payments, followed by a miniature balloon payment of several times the monthly payment, followed by either a denial of the modification or a failure to advance the borrower to the final commitment.
    a. We currently have approximately 39 trial modifications pending from Bank of America/Countrywide that were issued in or about August 2009 with the commitment that they would only last a couple months but have still not advanced further.
7. Sending (trial) modifications in such a manner and with such terms as to require the borrower to complete the forms, provide the documents and payments required, and have the forms back to the lender within only a few days. Failure to get it back in time voids the process and requires a renewal of the process from the beginning.

If the FTC acts to construct a body of regulations that will remove the risk of abuses by bad MARS, initiate a certification program that will assist borrowers in finding qualified MARS, allow those MARS to operate where needed, and minimize the chances for lenders to abuse these protective measures or to imply exemptions they are not entitled to, and undertake to clarify the standards contained in the FTC Act as it applies to loans (and modifications of those loans), the FTC will have done as much as anyone can ask in taking a meaningful step toward minimizing threats to innocent borrowers and promoting viable options for those borrowers who are trying to preserve their homes and escape abusive loans or insurmountable burdens.

Respectfully submitted this date, March 25, 2010, by:

1ST AMERICAN LAW CENTER

Dean G. Chandler Esq., President / CEO

Bloomberg.com

Greenspan Concedes to `Flaw' in His Market Ideology (Update2)

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By Scott Lanman and Steve Matthews

Oct. 23 (Bloomberg) -- Former Federal Reserve Chairman **Alan Greenspan** said a ``once-in-a-century credit tsunami'' has engulfed financial markets and conceded that his free-market ideology shunning regulation was flawed.

``Yes, I found a flaw,'' Greenspan said in response to grilling from the House Committee on Oversight and Government Reform. ``That is precisely the reason I was shocked because I'd been going for 40 years or more with very considerable evidence that it was working exceptionally well.''

Greenspan said he was ``partially'' wrong in opposing regulation of derivatives and acknowledged that financial institutions didn't protect shareholders and investments as well as he expected.

``We cannot expect perfection in any area where forecasting is required,'' he said. ``We have to do our best but not expect infallibility or omniscience.''

Part of the problem was that the Fed's ability to forecast the economy's trajectory is an inexact science, he said.

``If we are right 60 percent of the time in forecasting, we are doing exceptionally well; that means we are wrong 40 percent of the time,'' Greenspan said. ``Forecasting never gets to the point where it is 100 percent accurate.''

Self-Policing

The admission that free markets have their faults was a shift for the former Fed chairman who declared in a May 2005 speech that ``private regulation generally has proved far better at constraining excessive risk-taking than has government regulation.''

Today Committee Chairman **Henry Waxman**, a California Democrat, said Greenspan had ``the authority to prevent irresponsible lending practices that led to the subprime mortgage crisis.''

``You were advised to do so by many others,'' he told Greenspan. ``And now our whole economy is paying the price.''

Waxman and other lawmakers repeatedly interrupted Greenspan as he answered their questions, in contrast to deference to his testimony while he was Fed chairman.

Firms that bundle loans into securities for sale should be required to keep part of those securities, Greenspan said in prepared testimony. Other rules should address fraud and settlement of trades, he said.

Resistant to Regulation

Greenspan opposed increasing financial supervision as Fed chairman from August 1987 to January 2006. Policy makers are now struggling to contain a financial crisis marked by record foreclosures, falling asset prices and almost $660 billion in writedowns and losses tied to U.S. subprime mortgages.

Today, the former Fed chairman asked: ``What went wrong with global economic policies that had worked so effectively for nearly four decades?"

Greenspan reiterated his ``shocked disbelief" that financial companies failed to execute sufficient ``surveillance" on their trading counterparties to prevent surging losses. The ``breakdown" was clearest in the market where securities firms packaged home mortgages into debt sold on to other investors, he said.

``As much as I would prefer it otherwise, in this financial environment I see no choice but to require that all securitizers retain a meaningful part of the securities they issue," Greenspan said. That would give the companies an incentive to ensure the assets are properly priced for their risk, advocates say.

Subprime Lending

Greenspan said the Fed didn't know the size of the subprime mortgage market until late 2005.

Securities and Exchange Commission Chairman **Christopher Cox** and former Treasury Secretary **John Snow** also appeared at the House committee hearing.

Snow said the economy is headed down a ``bad, bad path" and he endorsed consideration of more fiscal stimulus. For the longer term, Snow said the global financial system should be reorganized by focusing on increasing transparency of ``excessive" leverage to prevent institutions from creating too much risk.

The U.S. needs ``one strong national regulator" to oversee firms and fix what Snow called ``a fragmented approach" to regulation. ``Steps to restore transparency and responsibility in the marketplace will go a long way towards restoring stability and confidence," he said.

Addressing the trio that oversaw the U.S. financial markets as the housing bubble developed, Representative **John Yarmuth**, a Democrat from Kentucky, characterized them as ``three **Bill Buckners**," referring to the Boston Red Sox first baseman whose fielding error some fans blame for the team's loss in the 1986 World Series.

To contact the reporter on this story: **Scott Lanman** in Washington at **slanman@bloomberg.net**; **Steve Matthews** in Atlanta at **smatthews@bloomberg.net**.

Last Updated: October 23, 2008 14:14 EDT

Foreclosure Defense, Lost Note

This is a discussion on *Foreclosure Defense, Lost Note* within the **Real Estate Law Forums** forums, part of the Main Forums category; Hello Forum, For those of you handling foreclosure defense (in FL or elsewhere), I thought I'd post a motion to dismiss in a Florida case to see if anyone had any opinions as to its merits. MOTION TO DISMISS COUNT I. Defendant moves to dismiss count I of Plaintiff's complaint ...

Real Estate Law Forums Real Estate Law Discussion Forums including Buyer and Selling, Landlord and Tenant Issues, Mortgages, Refinancing, Foreclosure, and Contractor Disputes.

01-12-2009, 02:55 PM #1 (permalink)

BrokenCredit.com
Member

Join Date: Jan 2009
Posts: 58

Foreclosure Defense, Lost Note

Hello Forum,

For those of you handling foreclosure defense (in FL or elsewhere), I thought I'd post a motion to dismiss in a Florida case to see if anyone had any opinions as to its merits.

MOTION TO DISMISS COUNT I.

Defendant moves to dismiss count I of Plaintiff's complaint to re-establish a lost promissory note for failure to state a cause of action.

29. Florida Statutes Chapter 673 "applies to negotiable instruments."

30. F.S. 673.1041(1)(c) defines the term "negotiable instrument" as an unconditional promise or order to pay a fixed amount of money, if the instrument does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money. (emphasis added)

31. F.S. 673.1041(2) provides that "instrument" means a "negotiable instrument".

32. The official comment to F.S. 673.1041 states that the definition of "negotiable instrument" delineates the scope of Article 3 of the Uniform Commercial Code.

33. The promissory note that the plaintiff seeks to foreclose is not a negotiable instrument under Florida law because the note is not just a promise to pay as it requires additional undertakings by the owner and holder of the note imposed pursuant to the special default loan servicing obligations that apply to this loan. These special and highly detailed loan servicing requirements are incorporated into the subject note and serve to create uncertainty in the amount due. As a result, the promissory note is not a negotiable instrument and not subject to reestablishment under the Uniform Commercial Code.

34. A promissory note to be negotiable, must contain an unconditional promise and there must be a specific ascertainable sum. The uncertainty presented by the terms of the note at issue in this foreclosure defeat negotiability of the note and eliminates the possibility of the application of F.S. Chapter 673 in an action to enforce the note. Nagel v. Cronebaugh, 782 So. 2d 436 (Fla. 5th DCA 2001), citing United Nat'l Bank of Miami v. Airport Plaza Ltd. P'ship, 537 So. 2d 608,609 (Fla. 3d DCA 1988); Thompson v. First Union, 643 So. 2d 1179 (Fla. 5th DCA 1994); See also, Bankers Trust v. 236 Beltway Investment, 865 F. Supp. 1186 (E.D. Va. 1994).

Quote

01-14-2009, 12:11 AM #2 (permalink)

tampabayatty
Junior Member

Join Date: Jan 2009
Posts: 1

motion to dismiss

How did the lender respond to the MTD?

Quote

01-15-2009, 06:03 PM #3 (permalink)

BrokenCredit.com
Member

Join Date: Jan 2009
Posts: 58

Sorry, tried to post a link to the case without tenure to no avail.

HSBC Bank USA, N.A. v. Pinkston (8:2008cv01662, M.D. Fla.)

Quote

02-01-2009, 05:52 PM #4 (permalink)

BrokenCredit.com
Member

Join Date: Jan 2009
Posts: 58

Any thoughts?

Bueller?

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Loan Modification Free Avoid Foreclosure Seminar Free Credit Repair Seminar Get Our Of Mortgage Free

None of my comments should be taken as legal advice. I am not an attorney.

Quote

11-26-2009, 10:02 PM #5 (permalink)

timr
Junior Member

Join Date: Nov 2009
Posts: 1

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DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO STRIKE COUNTERCLAIM
AND
DEFENDANT'S MOTION TO DENY RE-ESTABLISHMENT OF NOTE
AND
DEFENDANT'S MOTION TO DISMISS FOR WANT OF SUBJECT MATTER JURISDICTION AND DUE TO RES JUDICATA

1. Whereas this court shall notice that defendant disputes the putative obligation DLJ MORTGAGE CAPITAL, INC. as assignee of NEW CENTURY MORTGAGE CORPORATION, facts are in dispute. Where triable issues of fact are disputed on the record, summary judgment is inappropriate. The rule of law requires denial of plaintiff's motion for summary judgment.
2. The pleadings of WILLIAM T. RIEDER, JR. and BRIAN HUMMEL are opinion and hearsay, and without foundation: there is no note, no witness. This court knows that this court CANNOT rely on the conclusions of Mr. RIEDER, JR. and Mr. HUMMEL. Mr. RIEDER, JR.'s and Mr. HUMMEL's conclusions and opinions ARE NOT FACTS BEFORE THIS COURT. United States v. Lovasco (06/09/77) 431
3. The so-called "affidavit" of WILLIAM T. RIEDER, JR. and BRIAN HUMMEL is deficient on its face: (1). WILLIAM T. RIEDER, JR. and BRIAN HUMMEL claim this instant action is "an uncontested residential mortgage foreclosure," but WILLIAM T. RIEDER, JR. and BRIAN HUMMEL have no personal knowledge of defendant's contest of DLJ MORTGAGE CAPITAL, INC.'s, NEW CENTURY MORTGAGE CORPORATION's, SELECT PORTFOLIO SERVICING, INC.'s claim of a mortgage note due their failure to provide any basis for their claim.
Mandatory Judicial Notice
In the absence of legitimate federal common law, which extends to the several States, in order to retain all common law rights in the instant matter and to secure proper jurisdiction and venue in a Article III Common Law Court of the State of Florida, John Henry Doe invokes the Savings to Suitors clause pursuant to 28 U.S.C.A. 1331(1). Shannon v. City of Anchorage, Alaska, 478 P.2d 815, 818. John Henry Doe demands the full slate of due process rights including trial by jury pursuant to FRCP 38(b). 1] Clark v. Graham, 19 U.S. (6 Wheat.) 577 (1821), is an early case in which the Supreme Court enforced this rule. 2] Congressional legislation under the full faith and credit clause, so far as it is pertinent to adjudication hereunder, is today embraced in 28 U.S.C. Sec. Sec. 1738-1739. See also 28 U.S.C. Sec. Sec. 1740-1742.

MOTION TO DENY RE-ESTABLISHMENT OF NOTE
4. Plaintiff's attorneys claim that the original note is "lost," and request court to re-establish note. Request fails to meet the requirements of "71.011 Reestablishment of papers, records, and files," to wit: attorneys for plaintiff have not shown that a certified copy of note or deed has been "filed in the court or public office where the original belonged," as required by 71.011 (4) (a). Attorneys for plaintiff have not shown that the purported deed has "been placed on the proper record" as required by 71.011 (4) (b). Even if they had, 71.011 (4) (b) stipulates that "certified copies of the record of the deed as so recorded may be received as evidence to reestablish the deed if the deed has been so recorded for 20 years." Aforesaid purported deed has not been so recorded for 20 years. In addition, under 71.011 (5) the plaintiff or its attorneys are to detail "the time and manner of loss or destruction," which they have failed to do. The public record for virtually all other mortgage foreclosure actions in the 13th Judicial Circuit Court shows a pattern of frequently "lost notes" that indicates either outrageous incompetence, or simply conspiracy to defraud and racketeering on the part of actors such as DLJ MORTGAGE CAPITAL, INC., NEW CENTURY MORTGAGE CORPORATION, AND SELECT PORTFOLIO SERVICING, INC. and others. Respect for the ideals of substantial justice and fair play requires striking the so-called affidavit of WILLIAM T. RIEDER, JR. and BRIAN HUMMEL d/b/a FLORIDA DEFAULT LAW GROUP, P.L., and denying plaintiff's motion or request to "re-establish a lost Mortgage Note," for failure to comply with the terms of 71.011 (4) and (5).
5. Affidavit of John Henry Doe disputes the alleged obligation.
6. Whereas this court shall notice that John Henry Doe required verification of the debt to be verified by Counterclaim (Docket 10/09/2008) demand that: the DLJ MORTGAGE CAPITAL, INC., NEW CENTURY MORTGAGE CORPORATION, SELECT PORTFOLIO SERVICING, INC. and FLORIDA DEFAULT LAW GROUP, P.L. produce their Proof of Claim;
7. Whereas this court shall notice that John Henry Doe required verification of the debt to be verified by Counterclaim (Docket 10/09/2008) demand: to inspect the "Original Mortgage Note", with wet ink signatures, along with the Title Page that shows whether or not the mortgage has been satisfied. I believe that DLJ MORTGAGE CAPITAL, INC., NEW CENTURY MORTGAGE CORPORATION, and SELECT PORTFOLIO

SERVICING, INC. have sold the original note and failed to give credit to my account;
8. Whereas this court shall notice that John Henry Doe required verification of the debt to be verified by Counterclaim (Docket 10/09/2008) demand that: DLJ MORTGAGE CAPITAL, INC., NEW CENTURY MORTGAGE CORPORATION, SELECT PORTFOLIO SERVICING, INC. and FLORIDA DEFAULT LAW GROUP, P.L. prove your claims against me by providing me with lawfully documented evidence that is certified true and correct, by Officers of the Court and their respective corporations, in their unlimited commercial liability, while Under Oath, On and For the Official Record, under penalties of the law including Perjury;
9. Whereas this court shall notice that John Henry Doe required verification of the debt to be verified by Counterclaim (Docket 10/09/2008) demand that: DLJ MORTGAGE CAPITAL, INC., NEW CENTURY MORTGAGE CORPORATION, SELECT PORTFOLIO SERVICING, INC. and FLORIDA DEFAULT LAW GROUP, P.L. meet ALL remaining demands of Counterclaim;
10. Therefore, this court has notice of want of subject matter jurisdiction to consider the claim of DLJ MORTGAGE CAPITAL, INC. as assignee of NEW CENTURY MORTGAGE CORPORATION for reason of a fraud upon the court. In addition, DLJ MORTGAGE CAPITAL, INC. alleged assignee of NEW CENTURY MORTGAGE CORPORATION, is still bound by its agreement (see paragraph 12, 13 below), with Thornberry, Docket 08/06/2008, titled NOTICE OF SETTLEMENT, DEMAND FOR ACKNOWLEDGEMENT OF PAYMENT and CERTIFICATE OF SERVICE, now filed and recorded in the Lamar County, GA Clerk's Office, BPA Book #7, Pages 495-609, and now filed in the 13th JUDICIAL CIRCUIT CASE No. 07-CA 015829-I as of August 6, 2008 and is res judicata.
11. Plaintiff's attorneys admit that they have no note, and no witness with first hand knowledge to testify in this instant action. In addition, this matter has been settled via "private" contractual processes between myself and certain appointed fiduciaries d/b/a DLJ MORTGAGE CAPITAL, INC., NEW CENTURY MORTGAGE CORPORATION, SELECT PORTFOLIO SERVICING, INC. and FLORIDA DEFAULT LAW GROUP, P.L.
13. In preparing its pleadings, Attorneys for plaintiff were required, under Florida R.C.P. Rule 11, to certify to the "best of their knowledge, information and belief, formed after inquiry" that the complaint was correct and accurate. Mr. RIEDER, JR. and Mr. HUMMEL d/b/a FLORIDA DEFAULT LAW GROUP, P.L. knew, or should have known, that the mortgage foreclosure which they claimed to be "uncontested" has been repeatedly contested and has been settled twice by agreement of the parties. Mr. RIEDER, JR. and Mr. HUMMEL have failed to comply with Rule 11 in writing their pleadings due to no knowledge of the facts nor any inquiry whatsoever, and have failed to meet the terms of 71.011 for the re-establishment of the note; have falsely claimed this is "an uncontested residential mortgage foreclosure," and brought a fraud upon the court by claiming the note is "lost," which from a cursory examination of the public record is clearly false: 1. there are entirely too many "lost notes" in similar actions, and, there has been no attempt to report "the time and manner of loss or destruction" of said alleged note or to comply with any of the other requirements of FL Stat 71.011.

SUMMARY
Wherefore, defendant in error, John Henry Doe requests that plaintiff's MOTION TO STRIKE COUNTERCLAIM be denied, and John Henry Doe's motion to dismiss be granted due to an insufficiency of pleading by Plaintiff and due to the Res Judicata already obtained by John Henry Doe.

I, John Henry Doe, of lawful age and competent to testify, states as follows:

1. I am not in receipt of any document which verifies that I have a contract with DLJ MORTGAGE CAPITAL, INC., NEW CENTURY MORTGAGE CORPORATION, SELECT PORTFOLIO SERVICING, INC.
2. I am not in receipt of any answer from DLJ MORTGAGE CAPITAL, INC. or its co-parties and agents, NEW CENTURY MORTGAGE CORPORATION, SELECT PORTFOLIO SERVICING, INC. in response to the NOTICE OF SETTLEMENT, DEMAND FOR ACKNOWLEDGEMENT OF PAYMENT and CERTIFICATE OF SERVICE, now filed and recorded in the Lamar County, GA Clerk's Office, BPA Book #7, Pages 495-609, and now filed in the 13th JUDICIAL CIRCUIT CASE No. 07-CA 015829-I as of August 6, 2008.
3. I am not in receipt of any document which verifies that I owe DLJ MORTGAGE CAPITAL, INC., NEW CENTURY MORTGAGE CORPORATION, SELECT PORTFOLIO SERVICING, INC. money.
4. I am not in receipt of any document from DLJ MORTGAGE CAPITAL, INC. or its co-parties and agents, NEW CENTURY MORTGAGE CORPORATION, SELECT PORTFOLIO SERVICING, INC., which disputes the NOTICE OF SETTLEMENT, DEMAND FOR ACKNOWLEDGEMENT OF PAYMENT and CERTIFICATE OF SERVICE filed in the 13th JUDICIAL CIRCUIT CASE No. 07-CA 015829-I as of August 6, 2008.
5. As result of WILLIAM T. RIEDER, JR. and BRIAN HUMMEL d/b/a FLORIDA DEFAULT LAW GROUP, P.L.'s conduct, and that of the partners of FLORIDA DEFAULT LAW GROUP, P.L., and DLJ MORTGAGE CAPITAL, INC., NEW CENTURY MORTGAGE CORPORATION, SELECT PORTFOLIO SERVICING, INC., I have been damaged financially, socially, and emotionally.

Quote

01-04-2010, 05:49 PM #6 (permalink)

foreclosure2010
Junior Member

Join Date: Jan 2010
Posts: 1

BrokenCredit: What was the ruling on this?

Quote

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LEXSEE 2000 CAL. APP. LEXIS 491

Caution
As of: Jan 29, 2010

ANTHONY E. DIMOCK, Plaintiff and Appellant, v. EMERALD PROPERTIES LLC et al., Defendants and Respondents.

No. D032454.

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

81 Cal. App. 4th 868; 97 Cal. Rptr. 2d 255; 2000 Cal. App. LEXIS 491; 2000 Cal. Daily Op. Service 5010; 2000 Daily Journal DAR 6653

June 21, 2000, Decided

PRIOR HISTORY: [***1] APPEAL from a judgment of the Superior Court of San Diego County. Super. Ct. No. 705077. David J. Danielsen, Judge.

DISPOSITION: The summary judgments entered in favor of the defendants are reversed and the trial court is instructed to enter judgment quieting title in favor of Dimock subject to such encumbrances as existed at the time of the foreclosure sale. The trial court is further instructed to conduct such additional proceedings as are consistent with the views expressed herein and which, in its discretion, the trial court believes are necessary.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff appealed from the Superior Court of San Diego County (California), which granted summary judgment in favor of defendants, various trustees. Plaintiff claimed that a foreclosure sale conducted by defendant prior trustee was void due to an earlier substitution of trustee.

OVERVIEW: Plaintiff brought causes of action for declaratory and injunctive relief, quiet title, and damages in relation to the foreclosure sale of his home by defendant prior trustee following the recorded substitution of a second defendant trustee. He argued that in light of the substitution, the sale was void. There was nothing on the face of the substitution which indicated that it was other than a valid and bona fide substitution. The substitution was never subject to any further recorded substitution. Because defendant prior trustee had no power to convey his property, its deed was void as opposed to merely voidable. Plaintiff was not required to rely upon equity in setting aside a merely voidable deed, but could rely on the face of the record to show that the deed was void. The trial court's grant of summary judgment in favor of defendants was reversed.

OUTCOME: Judgment reversed. Trial court was instructed to enter judgment quieting title in favor of plaintiff subject to encumbrances as existed at time of foreclosure sale. Because defendant prior trustee had no power to convey plaintiff's property, its deed was void.

CORE TERMS: substitution, deed, deed of trust, recorded, notice, new trustee, void, recital, beneficiary, notice of default, recording, voidable, substituted, foreclosure, trustee's sale, conclusive, mortgage, foreclosure sale, successor, summary judgment, trustor, convey, buyer, trust deed, power to convey, real property, real estate broker, regularity, mortgagor, licensed

LexisNexis(R) Headnotes

Estate, Gift & Trust Law > Trusts > Beneficiaries > General Overview
[HN1] The legislature has permitted the beneficiary of a deed of trust to substitute, at anytime, a new trustee for the existing trustee. The substitution is made by simply recording a document evidencing the substitution. *Cal. Civ. Code § 2934(a)*. After such a substitution has been recorded, the new trustee shall succeed to all the powers, duties, authority, and title granted and delegated to the trustee named in the deed of trust. *Cal. Civ. Code § 2934(a)(4)*.

Estate, Gift & Trust Law > Trusts > Beneficiaries > General Overview
[HN2] Other than by recording a further substitution there are no other statutory means by which the effect of a substitution of a new trustee, once recorded, may be avoided.

Civil Procedure > Summary Judgment > Standards > Materiality
[HN3] A summary judgment motion shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Cal. Civ. Proc. Code § 437(c)*.

Civil Procedure > Summary Judgment > Standards > General Overview
[HN4] To succeed on a summary judgment motion, a defendant must show that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial. If the defendant makes such showing, the court must look at the plaintiff's papers to determine whether they demonstrate the existence of a triable, material factual issue.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Standards > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN5] When reviewing a grant of summary judgment, courts review the record de novo.

Contracts Law > Types of Contracts > Bona Fide Purchasers
Real Property Law > Deeds > Enforceability
[HN6] Only where recitals of regularity appear in the deed and no contrary recitals are made have notice defects been found to make a deed voidable, rather than void. In such instances a trustor then bears the burden of showing that there are grounds for equitable relief from the deed, such as fraud or that the buyer was not a bona fide purchaser for value, and that there were also defects in notice.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

In response to underlying unlawful detainer proceedings against him, a homeowner filed an action against the beneficiary of his deed of trust, the former and new trustees, and others, alleging causes of action for declaratory and injunctive relief, quiet title, and damages. During the course of discovery, plaintiff became aware that the new trustee had been substituted for the former trustee, and he asserted that in light of the substitution the foreclosure sale of the property by the former trustee to a new buyer was void. The parties filed cross-motions for summary judgment, and the trial court granted defendants' motions and denied plaintiff's. Thereafter the trial court entered judgment in favor of defendants. (Superior Court of San Diego County, No. 705077, David J. Danielsen, Judge.)

The Court of Appeal reversed the summary judgments entered in favor of defendants and instructed the trial court to enter judgment quieting title in favor of plaintiff, subject to such encumbrances as existed at the time of the foreclosure, and to conduct additional proceedings as necessary. The court held that since the beneficiary of the deed of trust recorded the document that substituted the new trustee for the former trustee, and the substitution of the new trustee was never subject to any further recorded substitution by the beneficiary, the new trustee had sole power to convey the property. Under the unambiguous terms of *Civ. Code, § 2934a, subd. (a)(4)*, the recording of the substitution of trustee transferred to the new trustee the exclusive power to conduct a trustee's sale. Upon the appointment being made under the power, the new trustee became vested, ipso facto, with the title to the trust premises and was clothed with the same power as if the new trustee had been originally named. The court further held that since the new trustee had sole power to convey the property, the former trustee's conveyance of the property to the new buyer after the foreclosure sale was void, and not merely voidable. (Opinion by Benke, Acting P. J., with McDonald and O'Rourke, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) Summary Judgment § 26--Appellate Review--Scope. --A summary judgment motion shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law (*Code Civ. Proc., § 437c, subd. (c)*). The defendant must show that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact that requires examination by trial. If the defendant makes such a showing, the court must look at the plaintiff's papers to determine whether they demonstrate the existence of a triable, material factual issue. The appellate court reviews the record de novo.

(2) Deeds of Trust § 35--Sale Under Power--Who May Convey--Following Substitution of New Trustee. --Where the beneficiary of a deed of trust recorded a document that substituted a new trustee for the former trustee, and the substitution of the new trustee was never subject to any further recorded substitution by the beneficiary, the new trustee had sole power to convey the property. Under the unambiguous terms of *Civ. Code, § 2934a, subd. (a)(4)*, the recording of the substitution of trustee transferred to the new trustee the exclusive power to conduct a trustee's sale. Upon the appointment being made under the power, the new trustee became vested, ipso facto, with the title to the trust premises and was clothed with the same power as if the new trustee had been originally named. Such a reading of the statute is consistent with practical necessity: To avoid confusion and litigation, there cannot be at any given time more than one person with the power to conduct a sale under a deed of trust. The beneficiary's agent was not able to effectively reinstate the former trustee by simply abandoning the internal foreclosure file it had created upon the substitution. *Civ. Code, § 2934a*, permits a substitution only by way of a recorded document, and the terms of the deed of trust itself did not provide any alternative means of making a substitution. As a practical matter, if the validity of a recorded substitution was subject to the undisclosed, undocumented, and subjective decisions of agents of the beneficiary, the successor trustee's ability to provide marketable title would be severely hampered.

[See 3 Witkin, Summary of Cal. Law (9th ed. 1987) Security Transactions in Real Property, § 8.]

(3a) (3b) Deeds of Trust § 35--Sale Under Power--Who May Convey--Following Substitution of New Trustee--Void Conveyance by Former Trustee. --Where the beneficiary of a deed of trust recorded a document that substituted a new trustee for the former trustee, the new trustee had sole power to convey the property, and therefore the former trustee's conveyance of the property to a new buyer after a foreclosure sale was void. The transaction was not merely voidable. The former trustee, who no longer had title to the property, could not convey effective title. Moreover, although the deed of trust that the homeowner executed stated that a recital in a trustee's deed of any matters of fact shall be conclusive proof of the truthfulness thereof, the deed that the former trustee gave to the new buyer after the foreclosure sale contained no statement that the former trustee's power to act as trustee had survived any recorded substitution. Rather, the deed merely conveyed to the new buyer "such interest as Trustee has in" the homeowner's property. The only factual recitals in the deed related to the notice given to the homeowner and the conduct of the sale; there was no representation as to whether a conflicting substitution of trustee had been recorded. Because there was no recital in the former trustee's deed to the new buyer that undermined the new trustee's substitution, the deed to the new buyer did not create any conclusive presumption that the former trustee continued to act as trustee. Thus, in attacking the former trustee's deed, the homeowner was not required to rely upon equity in setting aside a merely voidable deed. Rather, he could rely on the face of the record to show that the former trustee's deed was void.

(4) Deeds of Trust § 2--Definitions and Distinctions--Deed of Trust Versus Mortgage. --A deed of trust differs from a mortgage in that (1) title passes to the trustee in case of a deed of trust, while, in the case of a mortgage, the mortgagor retains title; (2) the statute of limitations never runs against the power of sale in a deed of trust, while it does run against a mortgage; and (3) a mortgagor has a statutory right of redemption after foreclosure, while no such right exists under a deed of trust.

COUNSEL: Philip H. Dyson for Plaintiff and Appellant.

Cameron & Dreyfuss and Lawrence J. Dreyfuss for Defendants and Respondents T.D. Service Company and Commonwealth Trust Deed Services, Inc.

Roup & Loomis, Ronald D. Roup and Joan C. Spaeder-Younkin for Defendants and Respondents Lawrence Baber, Cecilia Baber, Robert Shawcroft and April Shawcroft.

Kimball, Tirey & St. John and Mark A. Brody for Defendant and Respondent Emerald Properties LLC.

Suppa, Trucchi & Lee, Jerry Michael Suppa and Marjan Mortazavi for Defendants and Respondents Temple Inland Mortgage Corporation, Calmco Trustee Services, Inc., and Bankers Trust [***2] Company.

JUDGES: Opinion by Benke, Acting P. J., with McDonald and O'Rourke, JJ., concurring.

OPINION BY: BENKE

OPINION

[*871] [**257] **BENKE, Acting P. J.**

[HN1] By statute the Legislature has permitted the beneficiary of a deed of trust to substitute, at any time, a new trustee for the existing trustee. Under the governing statute the substitution is made by simply recording a document evidencing the substitution. (*Civ. Code,* [1] *§ 2934a, subd. (a).*) By its terms the statute provides that after such a substitution has been recorded, "the new trustee shall succeed to all the powers, duties, authority, and title granted and delegated to the trustee named in the deed of trust." (*§ 2934a, subd. (a)(4).*)

1 All statutory references are to this code unless otherwise stated.

[HN2] Other than by recording a further substitution there [***3] are no other statutory means by which the effect of a substitution, once recorded, may be avoided. Moreover, notwithstanding the arguments of respondents, we are not disposed to create any nonstatutory means of doing so on the record presented here.

Because the respondent beneficiary in this case recorded a substitution of trustee, thereafter only the substituted trustee had the power to sell the trustor's property at a foreclosure sale. Thus a later sale by the prior trustee was void. Accordingly we must reverse a judgment entered in favor of the respondents and direct that a judgment be entered quieting title in favor of plaintiff and appellant, the trustor under the deed of trust.

FACTUAL BACKGROUND

At all pertinent times, plaintiff and appellant Anthony E. Dimock owned a home in San Diego. In 1993 he borrowed $ 80,000 and gave a deed of trust on the home as security for the loan. Eventually, the note and deed of trust were purchased by defendant and respondent Bankers Trust Company (Bankers).

In June 1995 Dimock failed to make payments on the loan. In January 1996, the trustee under the deed of trust, defendant and respondent Commonwealth Trust [**258] Deed Services, [***4] Inc. (Commonwealth), recorded a notice of [*872] default. The notice of default was prepared and recorded for Commonwealth by its agent, defendant and respondent T.D. Service Company (TD).

In May 1996 Dimock entered into a forbearance agreement with defendant and respondent Temple Inland Mortgage Corporation (Temple), which was acting on behalf of Bankers. Under the forbearance agreement Bankers agreed it would not go forward with the foreclosure in return for a promise from Dimock to make regular payments on the loan which, over a period of time, would bring the loan current. However, after making the initial payment required under the forbearance agreement, Dimock made no further payments on the loan.

On August 15, 1996, Bankers recorded a substitution of trustee which substituted defendant and respondent Calmco Trustee Services, Inc. (Calmco), as the trustee of record in the place and stead of Commonwealth. The substitution was prepared by TD acting on Bankers's behalf.

Also on August 15, 1996, TD, acting on behalf of Calmco, recorded a notice of default and election to sell. Consistent with statutory requirements, the notice of default stated: "No sale date may be [***5] set until three months from the date this notice of default may be recorded."

According to an employee of TD, the recording of the Calmco substitution and the recording of the Calmco notice of default were mistakes. According to the TD employee, at the time these documents were recorded TD did not know that it had previously recorded a notice of default on Commonwealth's behalf and that a foreclosure file already existed with respect to Dimock's home. When a title company advised TD about the earlier Commonwealth notice of default, TD "abandoned" the Calmco file it had created to process the Dimock foreclosure and instead proceeded with the foreclosure using its earlier Commonwealth file.

Because it discovered the error shortly after recording the documents, TD did not send Dimock copies of either the Calmco substitution or the Calmco notice of default. However, other than abandoning its own file on the matter, TD did not record any document which expressly abandoned or otherwise vacated the Calmco substitution or Calmco notice of default.

Dimock did not discover the substitution of Calmco as trustee or the Calmco notice of default until after he initiated these proceedings.

[***6] On August 27, 1996, TD, acting on behalf of Commonwealth, recorded a notice of trustee's sale which set September 18, 1996, as the date for a [*873] trustee's sale. By its terms the notice of sale was given by Commmonwealth and stated that Commonwealth would be the seller at the trustee's sale. The notice of sale was both mailed to Dimock and posted on the front door of his home.

On September 18, 1996, TD, again acting on behalf of Commonwealth, conducted the trustee's sale and sold the property to defendant and respondent Emerald Properties LLC (Emerald) for the sum of $ 98,000. The sale price yielded $ 9,829.02 in funds in excess of what was needed to discharge Bankers' note and the costs of foreclosure.

On September 23, 1996, Commonwealth gave Emerald a trustee's deed and on October 1, 1996, the deed was recorded.

On September 24, 1996, Emerald initiated an unlawful detainer action against Dimock and obtained a judgment giving it possession of his home.

In response to the unlawful detainer proceedings, Dimock filed the instant action against Bankers, Commonwealth, Calmco and TD, among others. He alleged causes of action for declaratory and injunctive relief, quiet [***7] title and damages. He initially argued that he had not been given proper notice of the trustee's sale. During the course of discovery he became [**259] aware of the Calmco substitution and argued that in light of it the sale by Commonwealth to Emerald was void.

TD filed an interpleader cross-complaint with respect to the excess funds it was holding by virtue of the trustee sale. TD argued that it did not know what to do with the funds because if Dimock was successful in having the sale to Emerald vacated, the excess funds would belong to Emerald.

The parties filed cross-motions for summary judgment. The trial court granted the defendants' motions and denied Dimock's. Thereafter it entered judgment in favor of the defendants and ordered that TD turn over the excess funds it was holding to Dimock. Dimock filed a timely notice of appeal.

I

(1) [HN3] A summary judgment motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Code Civ. Proc., § 437c* [***8] , *subd. (c)*.) [HN4] "The defendant 'must show that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial.' " [*874] (*Sanchez v. Swinerton & Walberg Co. (1996) 47 Cal. App. 4th 1461,* *1465 [55 Cal. Rptr. 2d 415].)* If the defendant makes such showing, the court must look at the plaintiff's papers to determine whether they "[demonstrate] the existence of a triable, material factual issue." (AARTS *Productions, Inc. v. Crocker National Bank (1986) 179 Cal. App. 3d 1061, 1065 [225 Cal. Rptr. 203].)* [HN5] *We review the record de novo.* (*Allan v. Snow Summit, Inc. (1996) 51 Cal. App. 4th 1358, 1365 [59 Cal. Rptr. 2d 813].)*

II

(2) There is no dispute Bankers, by its agent TD, recorded a document which substituted Calmco as trustee under the subject deed of trust. There is nothing on the face of the substitution which indicates it is other than a valid [***9] and bona fide substitution. There is also no dispute that the substitution of Calmco was never subject to any further recorded substitution by Bankers. Finally, there is no dispute that the deed conveying the property to Emerald was executed by Commonwealth, not Calmco. Given this record we have no choice but to reverse the trial court's order granting summary judgment in favor of the defendants and direct that the trial court enter a judgment quieting title in favor of Dimock, subject to such encumbrances as existed at the time of the purported sale by Commonwealth.

A. *Calmco Had the Sole Power to Convey the Property*

Under the unambiguous terms of *section 2934a,* [2] *subdivision (a)(4),* the recording of the substitution of trustee transferred to [**260] Calmco the exclusive [*875] power to conduct a trustee's sale. This plain reading of the statute is consistent with the law as it existed before the predecessor statute was enacted in 1935 and the power to substitute a trustee depended solely on the express provisions of a deed of trust. (See *Witter v. Bank of Milpitas (1928) 204 Cal. 570, 577-578 [269 P. 614]; Pacific S. & L. Co. v. N. American etc. Co. (1940) 37 Cal. App. 2d 307, 309-310 [99 P.2d 355].)* [***10] *" ' "Upon the appointment being made under the power, the new trustee becomes vested, ipso facto, with the title to the trust premises and is clothed with the same power as if he had been originally named. . . ." ' "* *(Witter v. Bank of Milpitas, supra, 204 Cal. at p. 578.)* [*876]

2 At all pertinent times *section 2934a* stated: "(a)(1) The trustee under a trust deed upon real property or an estate for years therein given to secure an obligation to pay money and conferring no other duties upon the trustee than those which are incidental to the exercise of the power of sale therein conferred, may be substituted by the recording in the county in which the property is located of a substitution executed and acknowledged by: (A) all of the beneficiaries under the trust deed, or their successors in interest, and the substitution shall be effective notwithstanding any contrary provision in any trust deed executed on or after January 1, 1968; or (B) the holders of more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by real property equivalent to a series transaction, exclusive of any notes or interests of a licensed real estate broker that is the issuer or servicer of the notes or interests or of any affiliate of that licensed real estate broker.

"(2) A substitution executed pursuant to subparagraph (B) of paragraph (1) is not effective unless all the parties signing the substitution sign, under penalty of perjury, a separate written document stating the following:

"(A) The substitution has been signed pursuant to subparagraph (B) of paragraph (1).

"(B) None of the undersigned is a licensed real estate broker or an affiliate of the broker that is the issuer or servicer of the obligation secured by the deed of trust.

"(C) The undersigned together hold more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by real property equivalent to a series transaction.

"(D) Notice of the substitution was sent by certified mail, postage prepaid, with return receipt requested to each holder of an interest in the obligation secured by the deed of trust who has not joined in the execution of the substitution or the separate document.

"The separate document shall be attached to the substitution and be recorded in the office of the county recorder of each county in which the real property described in the deed of trust is located. Once the document required by this paragraph is recorded, it shall constitute conclusive evidence of compliance with the requirements of this paragraph in favor of substituted trustees acting pursuant to this section, subsequent assignees of the obligation secured by the deed of trust, and subsequent bona fide purchasers or encumbrancers for value of the real property described therein.

"(3) For purposes of this section, 'affiliate of the licensed real estate broker' includes any person as defined in *Section 25013 of the Corporations Code* that is controlled by, or is under common control with, or who controls, a licensed real estate broker. 'Control' means the possession, direct or indirect, of the power to direct or cause the direction of management and policies.

"(4) The substitution shall contain the date of recordation of the trust deed, the name of the trustor, the book and page or instrument number where the trust deed is recorded, and the name of the new trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority, and title granted and delegated to the trustee named in the deed of trust. A substitution may be accomplished, with respect to multiple deeds of trust which are recorded in the same county in which the substitution is being recorded and which all have the same trustee and beneficiary or beneficiaries, by recording a single document, complying with the requirements of this section, substituting trustees for all those deeds of trust.

"(b) If the substitution is effected after a notice of default has been recorded but prior to the recording of the notice of sale, the beneficiary or beneficiaries shall cause a copy of the substitution to be mailed, prior to the recording thereof, in the manner provided in Section 2924b, to the trustee then of record and to all persons to whom a copy of the notice of default would be required to be mailed by the provisions of Section 2924b. An affidavit shall be attached to the substitution that notice has been given to those persons and in the manner required by this subdivision.

"(c) Notwithstanding any provision of this section or any provision in any deed of trust, unless a new notice of sale containing the name, street address, and telephone number of the substituted trustee is given pursuant to Section 2924f, any sale conducted by the substituted trustee shall be void.

"(d) This section shall remain in effect only until January 1, 1998, and shall have no force or effect after that date, unless a later enacted statute, which is enacted before January 1, 1998, deletes or extends that date."

[***11] Our reading of the statute is also consistent with practical necessity: there simply cannot be at any given time more than one person with the power to conduct a sale under a deed of trust. We would create inestimable levels of confusion, chaos and litigation were we to permit a beneficiary to appoint multiple trustees, each one retaining the power to sell a borrower's property.

The defendants' suggestion that TD, by simply "abandoning" its internal Calmco foreclosure file, could thereby effectively reinstate Commonwealth as trustee is similarly unsupported by any authority and is almost as impractical as the notion there could be multiple trustees with the power [**261] to convey. As Dimock points out, *section 2934a* only permits a substitution by way of a recorded document. The terms of the deed of trust itself do not provide any alternative means of making a substitution. [3] As a practical matter, were the validity of recorded substitutions subject to the undisclosed, undocumented and subjective decisions of agents of the beneficiary, the ability of successor trustees to provide marketable title would be severely hampered. [4]

3 The deed of trust states: "Lender may, from time to time, by instrument in writing, substitute a successor or successors to any Trustee named in the Security Instrument or acting thereunder. Such instrument shall be executed and acknowledged by Lender and recorded in the office of the recorder of the county or counties where the Property is situated and shall be conclusive proof of the proper substitution of such successor Trustee or Trustees. Such successor Trustee or Trustees shall, without conveyance from the

> predecessor Trustee, succeed to all its title, estate, rights, powers and duties. The procedure herein provided for substitution of Trustee shall not be exclusive of other provisions for substitution permitted by law."

[***12]

> 4 Other than recording a further substitution, the only means by which Commonwealth might arguably have been empowered to convey Dimock's property would have been with Dimock's consent. (See *Pacific S. & L. Co. v. N. American etc. Co., supra, 37 Cal. App. 2d at pp. 310-311.) However, because Dimock was not even aware of the substitution, there is no evidence in the record which would establish his consent to its abandonment.*

In sum then, on this record Commonwealth had no power to convey Dimock's property.

B. *The Commonwealth Conveyance to Emerald Was Void*

(3a) As Dimock points out, because Commonwealth had no power to convey his property its deed to Emerald was void as opposed to merely voidable. That is, the Commonwealth deed was a complete nullity with no force or effect as opposed to one which may be set aside but only through the intervention of equity. (See *Little v. CFS Service Corp. (1987) 188 Cal. App. 3d 1354, 1358-1359 [233 Cal. Rptr. 923].)*

The void nature of the Commonwealth deed derives in some measure from the fact that our courts [***13] have adopted a title theory of deeds of trust. [*877] (*Bank of Italy etc. Assn. v. Bentley (1933) 217 Cal. 644, 655 [20 P.2d 940].)* **(4)** "[A] deed of trust differs from a mortgage in that title passes to the trustee in case of a deed of trust, while, in the case of a mortgage, the mortgagor retains title; that the statute of limitations never runs against the power of sale in a deed of trust, while it does run against a mortgage; and that a mortgagor has a statutory right of redemption after foreclosure [citation], while no such right exists under a deed of trust." (*Ibid.*) **(3b)** Given that title to property is held by the trustee under a deed of trust, it is difficult to accept the notion that one who no longer has title could nonetheless convey effective title. Admittedly, however, the title theory of deeds of trusts does not control their treatment in all circumstances. (*Id. at pp. 655-656.*) In any number of cases the title theory has been ignored in order to afford borrowers with the protection provided to mortgagors. (*Ibid.*)

The more fundamental difficulty we have with the defendants' contention that the Commonwealth deed was only voidable [***14] and not void, is that the particular circumstances which have permitted other courts to save defective foreclosure sales as voidable rather than void, do not exist here. In *Little v. CFS Service Corp., supra, 188 Cal. App. 3d at pages 1358-1359*, the court reviewed the California cases which considered whether defects in notice made a foreclosure sale void or voidable. The court found: "Although the extent of the defect is not determinative, what seems to be determinative is the existence and effect of a conclusive presumption of regularity of the sale. A deed of trust, which binds the trustor, may direct [**262] the trustee to include in the deed to the property recitals that notice was given as required under the deed of trust and state that such recitals shall be conclusive proof of the truthfulness and regularity thereof." (*Id. at p. 1359.*) Where no such recitals as to the regularity of a sale appear in a deed and there was a defect in the notice to the trustor, the deed has been found void. (*Ibid.*) Where such recitals appear on the face of a deed but the deed also sets forth facts which are inconsistent with the recital of regularity, the [***15] deed has been found void on the basis that the deed showed that the recitals were not valid. (*Ibid.*, citing *Holland v. Pendleton Mtge. Co. (1943) 61 Cal. App. 2d 570, 576-577 [143 P.2d 493].)*

[HN6] Only where recitals of regularity appear in the deed and no contrary recitals are made have notice defects been found to make a deed voidable, rather than void. (*Little v. CFS Service Corp., supra, 188 Cal. App. 3d at p. 1359.*) In such instances a trustor then bears the burden of showing that there are grounds for equitable relief from the deed, such as fraud or that the buyer was not a bona fide purchaser for value, and that there were also defects in notice. (*Ibid.*)

In addition, in the context of overcoming a voidable sale, the debtor must tender any amounts due under the deed of trust. (See *Karlsen v. American* [*878] *Sav. & Loan Assn. (1971) 15 Cal. App. 3d 112, 117 [92 Cal. Rptr. 851]; Py v. Pleitner (1945) 70 Cal. App. 2d 576, 582 [161 P.2d 393].) This requirement is based on the theory that one who is relying* [***16] *upon equity in overcoming a voidable sale must show that he is able to perform his obligations under the contract so that equity* *will not have been employed for an idle purpose.* (*Karlsen v. American Sav. & Loan Assn., supra, 15 Cal.app.3d at p. 118.)*

Here, although the deed of trust Dimock executed states that a recital in a trustee's deed "of any matters of fact shall be conclusive proof of the truthfulness thereof," the deed Commonwealth gave Emerald following the foreclosure sale contains no statement that Commonwealth's power to act as trustee had survived any recorded substitution. Rather, by its terms the Commonwealth deed merely conveyed to Emerald "such interest as Trustee has in" Dimock's property.

The only factual recitals in the deed are to Commonwealth's compliance with the requirements of section 2924 et seq. and the deed of trust. Section 2924 et seq. sets forth the notice which must be provided to the debtor and junior lienholders and the means by which the sale must be conducted; the deed of trust sets forth similar requirements with respect to notice and conduct of the sale. These factual recitals, relating to the notice given Dimock and the conduct [***17] of the sale, cannot be interpreted as making any representation as to whether a conflicting substitution of trustee had been recorded.

Because there was no recital in the Commonwealth deed to Emerald which undermined the Calmco substitution, the deed to Emerald did not create any conclusive presumption that Commonwealth continued to act as trustee. Accordingly, in attacking the Commonwealth deed Dimock was not required to rely upon equity in setting aside a merely voidable deed. (*Little v. CFS Service Corp., supra, 188 Cal. App. 3d at p. 1359.*) Rather, he could rely on the face of the record to show that the Commonwealth deed was void. (*Ibid.*)

Because Dimock was not required to rely upon equity in attacking the deed, he was not required to meet any of the burdens imposed when, as a matter of equity, a party wishes to set aside a voidable deed. (See *Little v. CFS Service Corp., supra, 188 Cal. App. 3d at p. 1359.*) In particular, contrary to the defendants' argument, he was not required to tender any of the amounts due under the note. [**263]

DISPOSITION

The summary judgments entered in favor of the defendants are reversed and the trial [***18] court is instructed to enter judgment quieting title in favor of [*879] Dimock subject to such encumbrances as existed at the time of the foreclosure sale. The trial court is further instructed to conduct such additional proceedings as are consistent with the views expressed herein and which, in its discretion, the trial court believes are necessary.

Appellant to recover his costs of appeal.

McDonald, J., and O'Rourke, J., concurred.

LEXSEE 2003 CAL. APP. LEXIS 447

Caution
As of: Jan 29, 2010

JERVE M. JONES et al., Plaintiffs, Cross-defendants and Appellants, v. FIRST AMERICAN TITLE INSURANCE COMPANY et al., Defendants, Cross-complainants and Appellants.

No. B137593.

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

107 Cal. App. 4th 381; 131 Cal. Rptr. 2d 859; 2003 Cal. App. LEXIS 447; 2003 Cal. Daily Op. Service 2651; 2003 Daily Journal DAR 3355

March 25, 2003, Decided
March 25, 2003, Filed

SUBSEQUENT HISTORY: [***1]
Modified and rehearing denied by *Jones v. First American Title Ins. Co., 2003 Cal. App. LEXIS 640 (Cal. App. 2d Dist., Apr. 23, 2003)*
Later proceeding at *Jones v. First American Title Ins. Co., 2003 Cal. LEXIS 4408 (Cal., June 20, 2003)*
Review denied by *Jones v. First American Title Ins. Co., 2003 Cal. LEXIS 5237 (Cal., July 23, 2003)*
Costs and fees proceeding at *Jones v. Union Bank of California, 127 Cal. App. 4th 542, 25 Cal. Rptr. 3d 783, 2005 Cal. App. LEXIS 356 (Cal. App. 2d Dist., 2005)*
Related proceeding at *Heritage Oaks v. First Am. Title Ins. Co., 2007 Cal. App. LEXIS 1571 (Cal. App. 2d Dist., Sept. 19, 2007)*

PRIOR HISTORY: Superior Court of Ventura County, No. SC019528, Joe D. Hadden, Judge.
Dreyfuss v. Union Bank of California, 24 Cal. 4th 400, 101 Cal. Rptr. 2d 29, 11 P.3d 383, 2000 Cal. LEXIS 8279 (2000)

DISPOSITION: The judgment is reversed and the matter is remanded for further proceedings consistent with this opinion. Appellants Union Bank and First American shall recover their costs on appeal.

CASE SUMMARY:

PROCEDURAL POSTURE: In an action to quiet title and set aside a foreclosure sale, the Superior Court County of Ventura, California, awarded plaintiff borrowers $ 450,000 in attorney fees and ordered defendant bank to return the foreclosed property. All parties appealed.

OVERVIEW: The borrowers obtained a loan in the amount of $ 8.7 million from a bank to purchase and develop property. The loan was secured by a deed of trust on the property. The deed of trust contained a provision for nonjudicial foreclosure in the event of default. A subsidiary of the bank was designated as trustee. When the borrowers defaulted, the bank instituted foreclosure proceedings against the property and recorded a document substituting a title company as trustee. A notice of sale was recorded by the trustee. The borrowers filed a complaint against the bank, alleging that the foreclosure sale was void under *Cal. Civ. Code § 2934a. Section 2934a (a)(4)* provided that the beneficiary of a deed of trust could replace the appointed trustee simply by recording a substitution. The bank made a mistake by failing to substitute the trustee prior to foreclosure. Reformation of the deed of trust to reflect the substitution was the appropriate remedy.

OUTCOME: The judgment was reversed, and the matter was remanded for further proceedings consistent with this opinion.

CORE TERMS: borrowers', reformation, substitution, foreclosure sale, deed, parcel, foreclosure, forbearance, recorded, deed of trust, mutual, trust deed, real property, equitable, recording, notice, void, partial, foreclosure proceedings, new trustee, substituted, decedent, reconveyance, initial payment, decedent's death, cancellation, postponement, machinery, suspected, default

LexisNexis(R) Headnotes

Estate, Gift & Trust Law > Trusts > Trustees > Removal & Resignation
[HN1] *Cal. Civ. Code § 2934a (a)(4)* provides that the beneficiary of a deed of trust may replace the appointed trustee simply by recording a substitution, and the new trustee shall succeed to all the powers, duties, authority, and title granted and delegated to the trustee named in the deed of trust.

Contracts Law > Remedies > Reformation
Estate, Gift & Trust Law > Trusts > Trustees > Removal & Resignation
[HN2] Reformation may validate a sale under *Cal. Civ. Code § 2934a* when a former trustee mistakenly conducts the sale after a new trustee has been substituted.

Estate, Gift & Trust Law > Trusts > Trustees > Removal & Resignation
Real Property Law > Landlord & Tenant > Tenancies > Term Tenancies
[HN3] See *Cal. Civ. Code § 2934a (a)(1)*.

Contracts Law > Defenses > Ambiguity & Mistake > Mutual Mistake
Contracts Law > Formation > Ambiguity & Mistake > Mutual Mistake
Contracts Law > Remedies > Reformation
[HN4] See *Cal. Civ. Code § 3399*.

Contracts Law > Remedies > Reformation
[HN5] The remedy of reformation is equitable in nature and not restricted to the exact situations stated in *Cal. Civ. Code § 3399*.

Contracts Law > Remedies > Reformation
[HN6] The essential purpose of reformation is to reflect the intent of the parties.

Contracts Law > Defenses > Ambiguity & Mistake > Mutual Mistake
Contracts Law > Formation > Ambiguity & Mistake > Mutual Mistake
Contracts Law > Remedies > Reformation
[HN7] Reformation is necessary to carry out the manifest intent of the parties.

Governments > Courts > Judicial Precedents
[HN8] A case is not authority for propositions not considered.

Estate, Gift & Trust Law > Trusts > Trustees > Removal & Resignation
[HN9] Parties to a deed of trust may agree to a form of substitution of trustee other than that provided in *Cal. Civ. Code § 2934a*.

Governments > Legislation > Interpretation
[HN10] Under the maxim of statutory construction, expressio unius est exclusio alterius, or the expression of one thing is the exclusion of another.

Governments > Legislation > Interpretation
[HN11] An express exclusion from the operation of a

statute indicates the legislature intended no other exceptions are to be implied.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court entered a judgment that a real estate foreclosure sale was void because the sale was conducted by a trustee substituted for the original trustee, but the substitution was not properly recorded as required by *Civ. Code, § 2934, subd. (a)*. The judgment gave the borrowers the foreclosed properties free and clear of the lending bank's interest in the properties. (Superior Court of Ventura County, No. SC019528, Joe D. Hadden, Judge.)

The Court of Appeal reversed. The court held that the trial court abused its discretion in denying reformation (*Civ. Code, § 3399*) of the defective substitution of trustee. The parties had entered into a complex set of agreements, which included the bank's right to foreclose if the borrowers did not perform. One of the documents necessary to effectuate the agreements was deficient. Under the circumstances, reformation was necessary to cary out the manifest intent of the parties. Mutual mistake was satisfied by the undisputed evidence that at the time of foreclosure all parties believed that the documents were sufficient to carry out the intent of the parties. The mistake concerned only who was to perform a ministerial act. There was no showing the borrowers were prejudiced by the successor trustee's conduct of the foreclosure sale. The borrowers did not raise the issue until almost two years after foreclosure when the properties had greatly increased in value. (Opinion by Gilbert, P.J., with Yegan and Coffee, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1a) (1b) (1c) Cancellation and Reformation of Instruments § 11--Reformation--Grounds--Mistake--Failure to Record Substitution of Trustee of Deeds of Trust. --The trial court erred in entering a judgment that a real estate foreclosure sale was void because the sale was conducted by a trustee substituted for the original trustee, but the substitution was not properly recorded as required by Civ. Code, § 2934, subd. (a), and also erred in denying reformation (Civ. Code, § 3399) of the defective substitution of trustee. The parties had entered into a complex set of agreements, which included the bank's right to foreclose if the borrowers did not perform. One of the documents necessary to effectuate the agreements was deficient. Under the circumstances, reformation was necessary to carry out the manifest intent of the parties. Mutual mistake was satisfied by the undisputed evidence that at the time of foreclosure all parties believed that the documents were sufficient to carry out the intent of the parties. The mistake concerned only who was to perform a ministerial act. There was no showing the borrowers were prejudiced by the successor trustee's conduct of the foreclosure sale. The borrowers did not raise the issue until almost two years after foreclosure when fortuitously the properties had greatly increased in value.

(2) Cancellation and Reformation of Instruments § 9--Reformation--Equitable Remedy. --The remedy of reformation is equitable in nature and not restricted to the exact situations stated in Civ. Code, § 3399. Although mistake is an ingredient of reformation, it is not its essence. The essential purpose of reformation is to reflect the intent of the parties.

(3) Deeds of Trust § 10--Trustee--Substitution--Recording Requirement--Waiver. --No statute expressly prohibits the waiver of Civ. Code, § 2934, subd. (a) (recording substitution of trustee of trust deed). Civ. Code, § 2934, subd. (a), is not included in the statute enumerating the statutory provisions incident to foreclosure that are not subject to waiver (Civ. Code, § 2953). Following the maxim of statutory construction, *expressio unius est exclusio alterius*, or the expression of one thing is the exclusion of another, if the Legislature had intended Civ. Code, § 2953. An express exclusion from the operation of a statute indicates the Legislature intended no other exceptions are to be implied.

COUNSEL: Norman, Dowler, Sawyer, Israel, Walker & Barton, Richard M. Norman, Michael G. Walker and Matthew P. Guasco for Plaintiffs, Cross-defendants and Appellants.

Ferguson, Case, Orr, Paterson & Cunningham, Michael W. Case, Joseph L. Strohman, Jr., and Douglas E. Kulper for Defendant, Cross-complainant and Appellant First American Title Insurance Company.

Arter & Hadden, John L. Hosack, Aaron M. Peck and

Andrea L. Slade for Defendant, Cross-complainant and Appellant Union Bank of California, N.A.

Epstein Becker & Green, Alan E. Walcher and Diane B. Sherman for Defendant, Cross-complainant and Appellant Heritage Oak Partners.

JUDGES: (Opinion by Gilbert, P. J., with Yegan and Coffee, JJ., concurring.)

OPINION BY: GILBERT

OPINION

[**860] [*383] **GILBERT, P. J.**--

Civil Code section 2934a, subdivision (a)(4) [1] [HN1] provides that the beneficiary of a deed [***2] of trust may replace the appointed trustee simply by recording a substitution, and that "the new trustee shall succeed to all the powers, duties, authority, and title granted and delegated to the trustee named in the deed of trust." We conclude that under the circumstances here [HN2] reformation may validate a foreclosure sale under *section 2934a* [2] when a former trustee mistakenly conducts the sale after a new trustee has been substituted.

1 All further statutory references are to the Civil Code unless otherwise noted.

2 *Section 2934a, subdivision (a)* provides in part: [HN3] "(a)(1) The trustee under a trust deed upon real property or an estate for years therein given to secure an obligation to pay money and conferring no other duties upon the trustee than those which are incidental to the exercise of the power of sale therein conferred, may be substituted by the recording in the county in which the property is located of a substitution . . . . [P] . . . [P] (4) The substitution shall contain the date of recordation of the trust deed, the name of the trustor, the book and page or instrument number where the trust deed is recorded, and the name of the new trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority, and title granted and delegated to the trustee named in the deed of trust."

[***3] FACTS AND PROCEDURAL HISTORY

The Loan and Deed of Trust

In June 1988, LCF Income Group (hereafter LCFIG), La Canada Flintridge Development Corporation (hereafter LCFDC), San Martin Investment Development Corporation (hereafter San Martin), and Peppertree Corporate Business Park, Ltd. (hereafter Peppertree), obtained a loan in the [*384] amount of $ 8.7 million from the predecessor in interest to Union Bank of California (hereafter the bank). The borrowers used the loan proceeds to purchase and develop property in Simi Valley (hereafter the Peppertree property). The loan was secured by a deed of trust on the Peppertree property. The deed of trust [**861] contained the standard provision for nonjudicial foreclosure in the event of default. Jerve M. Jones, Gilbert Dreyfuss and Evelyn Dreyfuss personally guaranteed the loan. [3] California-Sansome Corporation, a subsidiary of the bank, was designated as trustee.

3 The Dreyfusses own LCFDC, and LCFIG is a general partnership of two Dreyfuss family trusts. Peppertree is a limited partnership controlled by Jerve Jones and his sons, and San Martin is Peppertree's general partner. The borrowers and guarantors are sometimes collectively referred to as "the borrowers" as the context requires.

[***4] The loan was due on July 1, 1991. After the borrowers defaulted, the bank agreed to modify the loan to extend the due date to October 1993. In exchange, LCFIG gave deeds of trust on parcels of real property in Maryland (hereafter the Maryland property) and California (hereafter Lot 66) as additional security. The bank also allowed the borrowers to sell parcel 2 of the Peppertree property to pay down the loan, and reconveyed the parcel for that purpose.

The Substitution of First American as Trustee and Institution of Foreclosure Proceedings

When the borrowers defaulted again, the bank instituted foreclosure proceedings against the Peppertree property, the Maryland property, and Lot 66. On February 9, 1994, the bank recorded a document substituting First American Title Insurance Company (hereafter First American) as trustee in place of the California-Sansome Corporation. That same date, First American recorded a notice of default on the Peppertree property deed of trust. In order to stay foreclosure, LCFDC and LCFIG filed chapter 11 bankruptcy proceedings. The automatic stay was lifted on April 14, 1995. First American subsequently recorded a notice of sale on May 18, 1995.

[***5] *The Limited Forbearance Agreement and Release*

On June 29, 1995, the parties executed a limited forbearance agreement. The agreement provided that the borrowers would make an initial payment of $ 1.2 million, obtain release of a setaside letter pledged by the bank on the borrowers' behalf, and pay an additional $ 4 million by December 1, 1995. The borrowers also agreed to "deliver to Lender such certificates . . . (a) to confirm that the postponement of Lender's foreclosure sales on the Peppertree Property and Lot 66 in accordance with this Forbearance Agreement has [*385] occurred by the mutual consent of the parties pursuant to *California Civil Code § 2924 (g) (c) (2)* [*2924g (c)(2)*], and *(b)* to confirm that the acceptance by Lender of the Initial Payment shall have no adverse effect on Lender's presently pending foreclosure proceedings against said properties." In exchange, the bank agreed to extend the due date on the loan and forgive the remaining indebtedness of approximately $ 1.3 million. The borrowers subsequently made the initial payment and obtained release of the setaside letter. The forbearance agreement also contained a general release by which [***6] the borrowers and guarantors released the bank from any and all claims, known and unknown.

The Bank's Substitution as Trustee and the Partial Reconveyance

As an accommodation to the borrowers, the bank also agreed to release parcel 3 of the Peppertree property from the trust deed for sale to a third party. On October 20, 1995, Chicago Title Company, the escrow agency chosen by the borrowers to conduct the purchase and sale, requested [**862] that the bank forward a partial reconveyance for parcel 3 along with its demand for payment.

The bank subsequently approved the sale and sent Chicago Title its demand on October 26, 1995, along with a document entitled "Substitution of Trustee and Partial Deed of Reconveyance." In that document, the bank substituted itself as trustee in place of First American. Bank employees testified the bank intended to substitute itself as trustee only as to parcel 3, and to otherwise retain First American as trustee for purposes of the already pending foreclosure proceedings. The substitution however was not so limited. [4] The bank appeared as trustee for all parcels. The demand letter directed Chicago Title to record the document upon satisfaction of all conditions.

4 The document provided in pertinent part: "WHEREAS, the undersigned desires to substitute a new Trustee under said Deed of Trust in the place and instead of First American Title Insurance Company. [P] NOW THEREFORE, the undersigned hereby substitutes [the bank] as Trustee under said Deed of Trust . . . . [P] The undersigned hereby accepts such assignment and as such Trustee DOES HEREBY RECONVEY to the person or persons legally entitled thereto, without warranty, all the estate, title, and interest acquired by Trustee under said Deed of Trust in and to . . . Parcel 3 . . . ."

[***7] On three different occasions, the bank sent copies of the substitution along with updated demand letters to Gilbert Dreyfuss and Michael Milam, the chief financial officer of LCFIG and LCFDC. Dreyfuss and Milam each claimed that they did not review the substitutions of trustee that were sent to them by the bank. Chicago Title recorded the substitution of trustee and partial reconveyance on the borrowers' behalf on November 20, 1995. The borrowers subsequently contributed the sale proceeds from parcel 3 ($ 1.49 million) [*386] to reduce the discounted amount owed under the forbearance agreement to $ 2,510,000.

The Extension of the Limited Forbearance Agreement and Postponements of the Foreclosure Sale

On December 6, 1995, the parties executed an extension to the limited forbearance agreement whereby the bank agreed to extend the loan until December 21, 1995, in exchange for, among other things, borrowers' promise to provide documentation confirming "that the postponement of Lender's foreclosure sales on the Peppertree Property and Lot 66 in accordance with the Forbearance Agreement and/or this Extension Agreement has occurred by the mutual consent of the parties pursuant to California *Civil Code § 2924 (g) (c) (2)*." [***8] The borrowers also "reaffirm[ed] and confirm[ed] their respective releases of claims in favor of Lender as set forth in Section VIII of the Forbearance Agreement as of the date hereof." First American postponed the sale five times pursuant to the borrowers' consent.

The borrowers once again defaulted. On January 4, 1996, the bank informed the borrowers that it had terminated their right to pay a discounted amount under the limited forbearance agreement and demanded payment in excess of $ 3.8 million. After the foreclosure sale was scheduled for January 9, 1996, LCFIG filed another bankruptcy petition. The bank obtained relief from the automatic stay, and rescheduled the foreclosure sale for January 30, 1996.

The Foreclosure Sale

As directed by the bank, First American conducted the foreclosure sale on the Peppertree property on January 30, 1996. A representative appeared at the sale on behalf of borrowers. The bank obtained the property with a credit bid of $ 2,150,000, and First American executed a trustee's deed in favor of the bank that was recorded [**863] on February 6, 1996. The bank then foreclosed on the Maryland property and Lot 66. It obtained both properties by credit bids [***9] of $ 1.4 million and $ 200,000, respectively.

[*387] On October 18, 1996, the bank sold the Peppertree property to Heritage Oak Partners (hereafter Heritage) for $ 3,050,000. [5] In September 1996, the bank sold Lot 66 for $ 110,000.

5 Heritage dismissed its appeal against the borrowers pursuant to settlement after filing its opening brief.

The Complaint, Lis Pendens, and Quitclaim of Parcels 1 and 5

On October 18, 1997, Dreyfuss discovered a copy of the substitution of trustee while reviewing documents produced by the bank in another action challenging the bank's foreclosure on the Maryland property and Lot 66. 6 In December 1997, the borrowers filed this complaint against the bank and First American (hereafter collectively the bank), alleging that the foreclosure sale was void under *section 2934a* and seeking to quiet title. In the meantime, the borrowers quitclaimed parcels 1 and 5 to Heritage for $ 300,000. The bank answered the complaint and filed cross-complaints seeking reformation or cancellation [***10] of the substitution of trustee, and asserting defenses of release, consent, laches, res judicata, and collateral estoppel.

6 In December 1996, the Dreyfusses and LCFIG filed a complaint against the bank in Los Angeles County Superior Court seeking to set aside the bank's foreclosures on the Maryland property and Lot 66 on the ground, among others, that the bank's failure to give the borrowers credit for the fair market value of those properties violated the antideficiency provisions of *Code of Civil Procedure sections 580a* and *580d*. The California Supreme Court subsequently affirmed the Court of Appeal's decision affirming summary judgment in favor of the bank. (*Dreyfuss v. Union Bank of California (2000) 24 Cal.4th 400 [101 Cal.Rptr. 2d 29, 11 P.3d 383].*)

The Judgment

In its statement of decision, the trial court noted that "plaintiff was clearly in default on a legitimate obligation . . . [a]nd the Bank and First American Title could just as easily, on the very date of [***11] the sale, . . . have carried out a valid foreclosure . . . ." The court concluded, however, that reforming or canceling the substitution of trustee as urged by the bank "would be a wrench in the gears of the machinery facilitating the purchase and improvement of real property in this state . . . ." The court also concluded, among other things, that *section 2934a* is not subject to waiver because it was enacted for a "public reason" as defined by *section 3513*. The court did not discuss the bank's contention that the borrowers consented to the sale. In rejecting the defense of laches, the court concluded that the borrowers had merely received "constructive notice" of the substitution of trustee, and thus could not be held accountable for failing to contest First American's authority to conduct the foreclosure sale.

Accordingly, the court rendered the foreclosure sale void pursuant to *section 2934a* and ordered title to the remaining Peppertree property parcels quieted in the borrowers. The loan balance of $ 3,860,228 was reinstated. Since foreclosure, the properties had increased in value. Against the balance owing, the trial court credited the borrowers with the fair market value of [***12] Lot 66 ($ 250,000) and the two parcels that the borrowers had quitclaimed to [*388] Heritage ($ 3,470,228), minus the $ 300,000 that the borrowers had received for those parcels. The court also awarded the borrowers $ 450,000 in attorney fees and ordered the bank to return the Maryland property. [**864] The resulting judgment gave the borrowers the Peppertree property and the Maryland property free and clear of the bank's interest in those properties, with the bank owing the borrowers $ 10,739.

DISCUSSION

I

(1a) The bank contends the trial court abused its discretion by denying reformation.

Section 3399 provides, [HN4] "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

In denying reformation the trial court found that the bank's substitution of trustee was not a mistake; the mistake was in the failure to resubstitute First American as trustee prior to foreclosure. The court [***13] also found the mistake was not mutual nor one that the other party knew or suspected.

But the trial court viewed its powers of reformation too narrowly.

(2) It is well settled that [HN5] the remedy of reformation is equitable in nature and not restricted to the exact situations stated in *section 3399*. (*Demetris v. Demetris (1954) 125 Cal.App.2d 440, 443 [270 P.2d 891].*)

The broad reach of reformation is illustrated in *Merkle v. Merkle (1927) 85 Cal.App. 87 [258 P. 969]*. There the decedent during her life entered into an agreement with the plaintiff that required the plaintiff to care for the decedent. In return, upon the decedent's death, the plaintiff would receive certain real property. The plaintiff performed her part of the agreement. The decedent attempted to perform her part by executing a deed and giving it to a third party with instructions to deliver it to the plaintiff upon the decedent's death. The plaintiff never saw the deed prior to the decedent's death. After the decedent died, the plaintiff discovered that the description of the property in the deed was defective. The trial court granted reformation of the deed. The Court of Appeal affirmed.

In affirming reformation the court recognized that, because the [***14] plaintiff never saw the deed, the mistake was "literally" neither mutual nor one that [*389] the plaintiff knew or suspected. (*Merkle v. Merkle, supra, 85 Cal.App. at p. 105.*) The court, however, emphasized the equitable nature of the remedy. Because each party believed the deed would be sufficient to carry out their agreement, the court affirmed that reformation was appropriate to carry out the intent of the parties. (*Id. at pp. 107-108.*)

Merkle illustrates that mistake is an ingredient of reformation, but not its essence. [HN6] The essential purpose of reformation is to reflect the intent of the parties.

(1b) Here the parties entered into a complex set of agreements. The agreements included the bank's right to foreclose if the borrowers did not perform. As in *Merkle*, one of the documents necessary to effectuate the agreements was deficient. Under the circumstances, [HN7] reformation is necessary to carry out the manifest intent of the parties. Mutual mistake is satisfied by the undisputed evidence that at the time of foreclosure all parties believed that the documents were sufficient to carry out the intent of the parties. (See *Merkle v. Merkle, supra, 85 Cal.App. at pp. 107-108.*)

[***15] Of course failure to have a recorded trustee conduct a foreclosure sale will not justify reformation in every case. Each case must be judged on its own facts. [**865] This case involves a complex set of transactions that included multiple forbearances and a partial release of the trust deed. *Merkle* involved a mistake in the description of property in a deed. Here the mistake concerned only who was to perform a ministerial act. There was no showing the borrowers were prejudiced by the former trustee's conduct of the foreclosure sale. The borrowers claim they did not read the notice of substitution of trustee prior to the sale. The borrowers did not raise the issue until almost two years after foreclosure, when fortuitously the properties had greatly increased in value. More importantly, reformation is an equitable remedy. The trial court's judgment amply shows the failure to apply reformation gives a windfall to the borrowers and works a great injustice on the bank.

The trial court's concern that granting reformation "would be a wrench in the gears of the machinery facilitating the purchase and improvement of real property in this state" is misplaced. To the contrary, here reformation [***16] reflects the intent of the parties. This removes a wrench from the machinery so that its gears mesh smoothly to facilitate the purchase and improvement of real property.

The borrowers' reliance on *Dimock v. Emerald Properties (2000) 81 Cal.App.4th 868 [97 Cal.Rptr.2d 255]* is misplaced. There the court held that a foreclosure sale conducted by a former trustee is void. The court reasoned [*390] that the only statutory means of changing a recorded substitution is the recording of another substitution under *section 2934a*. (*Dimock, at p. 876*.) But *Dimock* did not consider reformation. [HN8] A case is not authority for propositions not considered. (*Contra Costa Water Dist. v. Bar-C Properties (1992) 5 Cal.App.4th 652, 660 [7 Cal.Rptr.2d 91]*.)

Here the trial court expressed concern that noncompliance with *section 2934a* amounts to a waiver which would violate public policy. We would be reluctant to apply reformation where the result would be tantamount to a waiver of a statutory right in violation of public policy. There is, however, no such concern here.

Any public purpose attendant to *section 2934a* would not be compromised by allowing waiver in this context. It is well settled that [HN9] parties to a deed [***17] of trust may agree to a form of substitution of trustee other than that provided in *section 2934a*. (See *Pacific S. & L. Co. v. N. American etc. Co. (1940) 37 Cal.App.2d 307, 309-311 [99 P.2d 355]*.)

(3) Moreover, no statute expressly prohibits the waiver of *section 2934a*. Tellingly, the Legislature has enacted a statute enumerating the statutory provisions incident to foreclosure that are not subject to waiver. (*§ 2953*.) *Section 2934a* is not included. [HN10] Following the maxim of statutory construction, *expressio unius est exclusio alterius*, or " 'the expression of one thing is the exclusion of another' " (*People v. Anzalone (1999) 19 Cal.4th 1074, 1078 [81 Cal.Rptr.2d 315, 969 P.2d 160]*, quoting Black's Law Dict. (6th ed. 1990) p. 581, col. 1), we conclude that if the Legislature had intended *section 2934a* to be nonwaivable, it would have included it in *section 2953*, which prohibits the waiver of rights under *sections 2924, 2924b*, and *2924c* and *Code of Civil Procedure sections 580a* and *726*. (See *Strang v. Cabrol (1984) 37 Cal.3d 720, 725 [209 Cal.Rptr. 347, 691 P.2d 1013]* ["[A]n [HN11] express exclusion from the operation [***18] of a statute indicates the Legislature intended no other exceptions are to be implied"].)

(1c) The trial court misapprehended the scope of reformation. Remand for the trial court to consider reformation is unnecessary. Under the circumstances here, reformation is the only reasonable disposition. To rule otherwise would be an abuse of discretion. In light of our conclusion, we need not discuss the bank's remaining contentions. [7] The [**866] borrowers' cross-appeal, which is predicated on the court's finding that the foreclosure sale is void, is dismissed as moot. The borrowers' claim that they are entitled to their attorney fees on appeal is also moot.

7 The borrowers' December 28, 2001, motion to strike portions of the bank's reply brief relating to its defense of res judicata/collateral estoppel, and the bank's December 14, 2001, motion for judicial notice, are denied as moot.

[*391] The judgment is reversed and the matter is remanded for further proceedings consistent with this opinion. Appellants [***19] Union Bank and First American shall recover their costs on appeal.

Yegan, J., and Coffee, J., concurred.

A petition for a rehearing was denied April 23, 2003, and the opinion was modified to read as printed above. The petition of appellants Jerve M. Jones et al., for review by the Supreme Court was denied July 23, 2003. George, C. J., and Brown, J., did not participate therein.

CHASE

July 14, 2009

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

RE: **Mortgage Assistance Relief Services Rulemaking**
Docket No. R911003

Dear Sir or Madam:

JPMorgan Chase Bank, N.A. ("Chase") appreciates the opportunity to submit its comments in response to the Federal Trade Commission ("FTC") Advance Notice of Proposed Rulemaking ("ANPR") regarding mortgage assistance relief services ("MARS"). As one of the largest residential mortgage loan servicers in the country, Chase regularly deals with MARS entities that get involved in loan default workouts. Though some MARS entities may provide legitimate services, they do so at a cost to the borrowers that could be avoided by having the borrowers work directly with their servicers or through reputable, nonprofit consumer advocates. Chase strongly supports the proposed regulations because it has witnessed MARS entities engage in patterns of abusive and deceptive practices to the detriment of borrowers, as described below in this letter.

Chase would support a regulation that targets specific abuses by MARS entities provided that loan servicers are clearly exempted. Chase's experience has been that MARS entities disrupt the loan modification process and provide little value in exchange for the high fees they charge.

Accordingly, Chase offers the following answers to selected questions raised by the ANPR:

1. The Loan Modification and Foreclosure Rescue Industry

E. What roles do mortgage servicers play in the loan modification and foreclosure rescue industry? What are the costs and benefits of their conduct in the context of loan modification and foreclosure rescue services? Do the practices of mortgage servicers present consumer protection concerns? If so, how are these concerns the same as or different from those raised by third party loan modification and foreclosure rescue entities?

Mortgage servicers such as Chase provide a vital role in modifying the loans that they service for investors or on their own behalf. Some of the servicing activities engaged in by servicers are similar to the activities undertaken by the MARS entities. For example, servicers solicit borrowers who are experiencing difficulty making their payments to offer modification and other options to avoid foreclosure. However, servicers typically only offer these services to their own borrowers. They don't market their services to the general public as the MARS providers do.

Chase has found that most of the services offered by the MARS industry are unnecessary and serve only to interfere in Chase's efforts to assist its customers directly for free. Chase has a very active program for working directly with borrowers who are having trouble making payments. Chase has opened 27 Chase Homeownership Centers where struggling borrowers around the country can meet face to face with trained counselors. More than 20,000 borrowers have met with counselors at the centers in an attempt to keep the borrowers in their homes.

Chase recently announced that it has approved 138,000 trial mortgage modifications for struggling homeowners since April 6, when it began processing trial modifications through President Obama's Making Home Affordable program. Since 2007, Chase has continued to expand its comprehensive plan to keep families in their homes, helping prevent 565,000 foreclosures—including the 138,000 trial modifications—for Chase, Washington Mutual and EMC customers. Another 155,000 applications are in the review process.

Chase has gone to great lengths to proactively reach out to its customers who are having difficulty making their payments to encourage them to contact Chase directly to review the options available to assist them in avoiding foreclosure. This has included a direct mail campaign to customers who are delinquent in making their payments or are already in the process of foreclosure. Chase conducts community outreach events and counseling sessions in cities across the U.S. to explore workout options for distressed homeowners. Chase also provides comprehensive information and links on its web site for customers to learn about their options and get in touch with a Chase representative who can assist them with a loan modification or other foreclosure avoidance plan.

Chase generally stops foreclosure while reviewing a mortgage for modification. If a loan does not qualify for a Making Home Affordable or a Chase modification, it is referred to the loss mitigation department, which will consider more traditional plans as well as short sales and deeds in lieu of foreclosure.

Chase also works closely with HUD and state-approved nonprofit housing counseling services. These nonprofits provide the same services as the MARS entities in assisting distressed borrowers obtain loan modifications or other foreclosure prevention measures, but they do it at no charge to the borrower. Chase has established a toll free number and central point of contact for nonprofits and HUD-approved counseling agencies. It also offers a comprehensive Foreclosure Prevention/Loss Mitigation training program for nonprofit agencies, counselors and housing advocates to provide them with tools to help their clients avoid mortgage foreclosure.

Chase is also participating in the NeighborWorks America and Homeownership Preservation Foundation's national foreclosure intervention campaign along with other industry leaders including members of the Financial Services Roundtable's Housing Policy Council.

When one of the MARS entities intervenes in Chase's established modification programs, it disrupts the direct communication with the borrower and only serves to add an extra layer of bureaucracy that can lead to confusion and miscommunication.

Some of the MARS entities engage in abusive practices. They collect their fees upfront and promise the borrower they can get a loan modification or other foreclosure relief, when, in fact, this is only a determination that the servicer can make after reviewing the borrower's financial information and investor agreements. These MARS entities also may lead the borrower to believe that they are associated with the servicer or that they have special agreements with the servicer for processing loan modifications, when, in fact, they do not. Once the MARS entity collects its fee, it may actually do little, if anything for the borrower that the borrower could not do directly with the servicer. There is no reason for a servicer to mislead borrowers into believing that they will qualify for a loan modification or to mislead borrowers about the level of services they can provide. Servicers are compensated by investors through the cash flows from the loan payments, so they don't charge upfront fees to the borrowers and they have every incentive to work with the borrowers to modify the loan payments into terms that the borrowers are better able to afford.

3. Scope of Covered Practices

B. 3. (ii) Should the Commission ban the payment of advance fees for loan modification and foreclosure rescue services in a proposed FTC rule? If so, why or why not? What effect, if any, would an advance fee ban have on the willingness or ability of loan modification and foreclosure rescue services providers to do business?
(iii) Should the Commission impose fee restrictions in a proposed FTC rule other than a ban on the advance fees that providers of loan modification and foreclosure rescue services receive? If so, what restrictions should be imposed and why?

Yes, the payment of advance fees should be banned because there is no guarantee the MARS provider will be successful in obtaining a loan modification or foreclosure rescue. In addition, care should be taken in defining the point in the process at which a fee can legitimately be charged. Some MARS providers charge a fee at the point where the servicer has established a trial modification payment to determine whether the borrower can afford the modified payments. If the borrower fails to make the payments during this trial modification period, the borrower does not qualify for the permanent loan modification. If the borrower has to pay the MARS provider's fee, which can range as high as several thousand dollars, the borrower is less likely to be able to afford the trial modification payments and thus is less likely to qualify for a permanent loan modification. The funds paid to the MARS providers would be better served going to make the trial loan modification payments.

C. Are there any unfair or deceptive acts and practices by providers or advertisers of loan modification and foreclosure rescue services that neither the FTC nor the states have addressed that a proposed FTC rule should address? If so, how should these acts and practices be addressed and why?

Correspondence to servicers from MARS entities frequently list a series of unfounded claims in an attempt to slow down the default and foreclosure process. Usually, these are form letters with generic claims that the lender or servicer has engaged in fraud or violated various consumer protection laws, such as the Truth in Lending Act, Real Estate Settlement Procedures Act, or Fair Debt Collection Practices Act. No specific details are provided by the MARS entity to support their allegations. They are only making these claims in an attempt to gain leverage by forcing the servicer into time-consuming investigations and research to respond to the allegations. The use of these delay tactics based on unfounded claims should be prohibited under the regulation.

Other widespread abusive and deceptive tactics that should be prohibited under the regulation include: (1) the requirement by the MARS entity that all borrower loan payments be funneled through them to be held "in escrow" or acting as a pass-through for payments, which has often led to borrowers losing payments made in addition to their upfront fees if the MARS entity ceases to operate; (2) the use by the MARS provider of the servicer's name, logos, and even forms to give the appearance to borrowers that they have a special connection with the servicer; (3) the use of names similar to government entities or housing programs that give the impression that the MARS provider is a government-sponsored agency; and (4) intimidation and bullying of the servicer's employees who are processing the modification request, by using unfounded litigation threats and frequent repetitive contacts by phone and email, which distracts the employees from their primary jobs of assisting borrowers and slows down the process.

4. Scope of Covered Entities

A. As described in the text, an FTC proposed rule would not cover banks, thrifts, federal credit unions, and nonprofits. To what extent do these types of entities provide or advertise loan modification and foreclosure rescue services? To what extent do these entities compete with entities that an FTC proposed rule would cover and what effect would an FTC proposed rule have on such competition?

Banking institutions typically do not advertise these services for loans that they do not service themselves. Therefore, they are not in competition with the MARS entities. There are many nonprofit housing counseling agencies approved by HUD or state agencies that provide similar services MARS entities, but they typically do it free of charge.

B. As described in the text, many states have exempted attorneys from laws (e.g., foreclosure consultant laws) which regulate the conduct of providers and advertisers of loan modification and foreclosure rescue services. What are the costs and benefits of exempting attorneys from these laws? What has been the effect of such exemptions on competition between attorneys and nonattorneys in providing or advertising loan modification and foreclosure rescue services? Should an FTC proposed rule include an exemption for attorneys or any other class of persons or entities? Why or why not?

Attorneys should not be entirely exempt from the regulation. Many MARS providers claim to be affiliated with attorneys, but typically the people performing the services are not attorneys, and the connection with the attorney is very tenuous. Calls to the MARS provider do not go to the attorney's office and addresses used by the providers are not the same as the attorney's. If attorneys are to be exempted, it should only be to the extent that the attorney is representing the borrower in a *bona fide* attorney-client relationship, and the loan modification or foreclosure rescue services are legal services provided directly by the attorney in the context of that relationship. The Uniform Debt-Management Services Act could be followed as an example in drafting a rule in this regard. This Act has served as the basis for regulating debt-management services in many states. It provides an exemption for "legal services provided in an attorney-client relationship by an attorney licensed or otherwise authorized to practice law in this state." Uniform Debt-Management Services Act, Section 2(9)(A).

Chase appreciates the opportunity to comment on the proposed rulemaking concerning the abuses by MARS providers. As stated above, Chase would support a regulation that targets specific abuses by MARS entities as long as loan servicers are clearly exempted. If you have any questions or need any additional information, please contact the undersigned.

Sincerely,

David C. Schneider
Executive Vice President
Home Lending

Chart: Performance by Mortgage Servicers

On **Jan. 15, 2010**, the Treasury Department released data showing how the largest mortgage servicers participating in the administration's $75 billion foreclosure prevention program have been performing. You can see that breakdown below. The data show activity through **Dec. 31, 2009**.

To give an indication of each servicer's performance as a percentage of its loans eligible for modification, the Treasury listed the number of eligible loans that are more than 60 days delinquent (that's the "Est. Eligible Loans" listed below). Treasury only released data for servicers with over 5,000 eligible loans.

Under the program's guidelines, servicers initially approve borrowers for a three-month trial period. If the homeowner makes the payments on time, sends in the required documentation and meets the program's criteria for eligibility, the servicer is supposed to convert the modification to a permanent one at the end of that period. The data below show the number of loans that have moved to the permanent stage.

We've shown the number of permanent and failed mods as a percentage of the trial mods each servicer had begun as of Sept. 30. That's because the trial stage is supposed to last three months, so trials begun after that date are not expected to have a final outcome.

Note: The "Only GSE servicers" row below refers to companies that have not enrolled in the Treasury Department programs, but do service loans owned or guaranteed by Fannie Mae or Freddie Mac. "Smaller servicers" refers to servicers enrolled in the program with fewer than 5,000 eligible loans.

Trial Mods Started:
902,620

Total Permanent Mods:
66,465

Name	**Entered Program**	**Trial Mods Started as Share of Est. Eligible Loans**	**Permanent Mods**	**Failed Trial Mods**
			As % of Trial Mods Started, as of **September 30, 2009.**	
Saxon Mortgage Services	Apr 13, 2009	36,406 : 72,709 **(50%)**	2,497 **7.6%**	2,995 **9.1%**
CitiMortgage	Apr 13, 2009	119,097 : 241,981 **(49%)**	4,999 **7.3%**	6,099 **8.9%**

Name	Entered Program	Trial Mods Started as Share of Est. Eligible Loans	Permanent Mods	Failed Trial Mods
			As % of Trial Mods Started, as of **September 30, 2009**.	
Aurora Loan Services	May 1, 2009	36,618 : 78,225 **(47%)**	4,682 **19.6%**	10,024 **42.0%**
GMAC Mortgage	Apr 13, 2009	32,159 : 69,281 **(46%)**	9,872 **51.1%**	1,615 **8.4%**
Select Portfolio Servicing	Apr 13, 2009	29,280 : 63,690 **(46%)**	4,675 **29.8%**	7,206 **45.9%**
JPMorgan Chase subsidiaries	Apr 13, 2009	156,359 : 424,965 **(37%)**	7,139 **6.1%**	2,392 **2.0%**
Wells Fargo Bank, NA	Apr 13, 2009	126,413 : 350,169 **(36%)**	8,424 **13.4%**	7,705 **12.2%**
Bayview Loan Servicing, LLC	Jul 1, 2009	3,653 : 10,183 **(36%)**	106 **54.1%**	149 **76.0%**
PNC Mortgage	Jun 26, 2009	13,237 : 41,136 **(32%)**	61 **1.6%**	1,023 **26.6%**
Green Tree Servicing	Apr 24, 2009	3,455 : 10,927 **(32%)**	87 **18.4%**	100 **21.1%**
Nationstar Mortgage	May 28, 2009	14,588 : 49,026 **(30%)**	1,277 **15.2%**	1,135 **13.5%**
U.S. Bank National Association	Sep 9, 2009	7,404 : 28,524 **(26%)**	418 **48.4%**	2 **0.2%**
OneWest Bank	Aug 28, 2009	24,284 : 112,846 **(22%)**	1,226 **23.5%**	46 **0.9%**
CCO Mortgage	Jun 17, 2009	1,132 : 5,304 **(21%)**	5 **3.2%**	0 **0.0%**
Ocwen Financial Corporation	Apr 16, 2009	12,884 : 64,797 **(20%)**	5,332 **102.7%**	125 **2.4%**
Bank of America subsidiaries	Apr 17, 2009	206,775 : 1,046,008 **(20%)**	3,183 **3.3%**	3,305 **3.4%**

Name	Entered Program	Trial Mods Started as Share of Est. Eligible Loans	Permanent Mods	Failed Trial Mods
			As % of Trial Mods Started, as of **September 30, 2009**.	
(incl. Countrywide)				
Litton Loan Servicing	Aug 12, 2009	21,113 : 111,260 **(19%)**	959 **43.0%**	2,777 **124.6%**
Only GSE servicers		39,049 : 272,365 **(14%)**	9,880 **52.5%**	2,031 **10.8%**
Bank United	Oct 23, 2009	685 : 5,422 **(13%)**	2 **N/A**	0 **N/A**
American Home Mortgage Servicing, Inc	Jul 24, 2009	10,918 : 124,262 **(9%)**	232 **52.7%**	28 **6.4%**
Carrington Mortgage Services	Apr 27, 2009	1,507 : 18,937 **(8%)**	608 **104.1%**	0 **0.0%**
Smaller servicers		1,414 : 20,463 **(7%)**	457 **95.4%**	29 **6.1%**
HomEq Servicing	Aug 5, 2009	1,753 : 41,817 **(4%)**	0 **N/A**	91 **N/A**
Wachovia subsidiaries	Jul 1, 2009	2,437 : 82,990 **(3%)**	344 **17.0%**	47 **2.3%**
Franklin Credit Management Corporation	Sep 11, 2009	0 : 9,557 **(0%)**	0 **N/A**	0 **N/A**

RICHARD D. McCUNE, Esq., State Bar No. 132124
rdm@mccunewright.com
JAE (EDDIE) K. KIM, Esq., State Bar No.: 236805
jkk@mccunewright.com
McCUNEWRIGHT LLP
2068 Orange Tree Lane, Suite 216
Redlands, California 92374
Telephone: (909) 557-1250
Facsimile: (909) 557-1275

Attorneys for Plaintiff

FILED
JUL - 9 2009
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORIGINAL

BY FACSIMILE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RANDALL STEVENS, on behalf of himself and all others similar situated, Plaintiff, v. JPMORGAN CHASE & CO.; JPMORGAN CHASE BANK, N.A. and DOES 1 through 125, Defendants.	Case No.: CV 09 3116 LMC **CLASS ACTION COMPLAINT** 1. VIOLATION OF UNFAIR BUSINESS PRACTICES ACT [BUSINESS & PROFESSIONS CODE SECTION 17200, ET SEQ.] 2. VIOLATION OF UNFAIR BUSINESS PRACTICES ACT [BUSINESS & PROFESSIONS CODE SECTION 17500, ET SEQ.] 3. FRAUD 4. NEGLIGENT MISREPRESENTATION 5. BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING **DEMAND FOR JURY TRIAL**

Plaintiff Randall Stevens ("Plaintiff"), on behalf of himself and all others similarly situated (i.e., the members of the Plaintiff Class described and defined, infra), herein alleges as follows:

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I

JURISDICTION AND VENUE

1. This Court has original jurisdiction of this action under the Class Action Fairness Act of 2005. The amount-in-controversy exceeds the sum or value of $5,000,000 exclusive of interest and costs, and there is minimal diversity because certain members of the class are citizens of a different state than any defendant as required by 28 U.S.C., section 1332(d)(2).

2. Venue as to Defendant is proper in this judicial district because Defendants JPMorgan Chase & Co. and JPMorgan Chase Bank have their west coast headquarters in the City and County of San Francisco. Furthermore, Defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. do substantial business in this judicial district and some of the acts complained of occurred in this judicial district.

II

GENERAL ALLEGATIONS

3. This is a civil action primarily seeking from Defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. (together referred hereinafter as "JPMorgan Chase," "Defendants" or "Defendant JPMorgan Chase") injunctive relief, as well as restitution and disgorgement of all profits gained from the up-front fees from existing customers unsuccessfully applying under one of Defendants home loan modification programs. These programs were set up to assist homeowners that were in danger of foreclosure of their home, and customers are encouraged by both the Federal government and the Defendants to apply for one of the home loan modification programs.

4. However, for Defendants' customers who are vulnerable and potentially at risk of losing their homes, but ultimately do not qualify for Defendants' home loan modifications programs, Defendants have put into place a plan to extract expensive up-front loan modification fees from these customers. Then, when Defendants deny the loan modification application, Defendants keep the up-front fees even though the services that the fee was supposed to pay for either did not occur or were unnecessarily spent. As such, Defendants have turned the up-front loan modification fees taken from the unqualified customers into a profit center, thereby putting these customers into an even worse financial position than they were before applying for the loan modification program.

5. As a result of this practice, Plaintiff also seek remedies for Defendants' failure to adequately notify customers of this practice and misrepresenting that the up-front fees were for services that were either unnecessary or not provided to him and the class members. Finally, Plaintiff seeks to enjoin Defendants from continuing to conduct such improper activities. Plaintiff, for himself and all others similarly situated, brings this action pursuant to the Unfair Business Practices Act, Business & Professions Code section 17200, *et seq.* and False Advertising, Business & Professions Code section 17500, *et seq*; as well as California common law fraud, negligent misrepresentation, and breach of the implied covenant of good faith and fair dealing.

6. Plaintiff Randall Stevens is a resident of the County of San Bernardino, California. Defendants own Plaintiffs home loan for his home located in the City of Loma Linda, County of San Bernardino, California.

7. Defendant JPMorgan Chase & Co. is incorporated in Delaware and located in New York and provides diversified financial services, including banking, insurance, investments, loan banking and consumer finance to individuals, businesses and institutions in all counties in the State of California as well as in all 50 states and internationally. Upon information and belief, the west coast headquarters of JPMorgan Chase & Co., which is located in San Francisco, California, is responsible for many of the policies and practices complained of herein.

8. Defendant JPMorgan Chase Bank is a subsidiary of JPMorgan Chase & Co. and is incorporated in New York and located in Ohio, with a west coast headquarters in San Francisco, California. JPMorgan Chase Bank provides banking and account services in all counties in the State of California as well as in al 50 states and internationally. Upon information and belief, JPMorgan Chase Bank's west coast headquarters is responsible for many of the policies and practice complained of herein.

9. Based on information and belief, some of the decisions relating to developing, marketing and implementing the actions complained herein originated from JPMorgan Chase's headquarters in San Francisco, California.

10. The true names and capacities of Defendants sued herein as DOES 1 through 125, inclusive, are currently unknown to Plaintiff, who therefore sues such Defendants by such fictitious

names. Each of the Defendants designated herein as a DOE is legally responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek leave of Court to amend this Complaint to reflect the true names and capacities of the Defendants designated herein as DOES when such identities become known.

11. Based upon information and belief, Plaintiff alleges that at all times mentioned herein, each and every Defendant was acting as an agent and/or employee of each of the other Defendants, and at all times mentioned was acting within the course and scope of said agency and/or employment with the full knowledge, permission and consent of each of the other Defendants. In addition, each of the acts and/or omissions of each Defendant alleged herein were made known to, and ratified by, each of the other Defendants.

III

FACTUAL ALLEGATIONS

12. Based on information and belief, JPMorgan Chase is one of the largest providers of home loans in the United States, servicing millions of customers nationwide. JPMorgan Chase is a participant in the Troubled Asset Relief Program ("TARP"), created by the United States government to purchase assets and equity from financial institutions in large part to address the nation's housing crisis. As a participant of TARP, Defendants agreed to offer the Obama administration's "Making Homes Affordable" program to vulnerable homeowners who are at risk to lose their homes because of their inability to attain refinancing or modify their loan payments. Defendants' program purportedly offers home loan modifications for such vulnerable homeowners. Defendants also offer their own separate loan modification programs.

13. However, as part of the offering of these loan modification programs, Defendants charge a large up-front fee for services in processing the loan modification program without disclosing that such fees are for services that are either unnecessary, or not provided at all, to the homeowner who does not qualify for the programs.

14. Defendants further take actions that will increase the likelihood those customers who do not meet the qualifications of the loan modification programs will pay Defendants a large up-front fee

for which they will receive nothing in return. This is done through using appraisals that are artificially low; so as to decrease the likelihood the loan will meet the loan modification threshold requirements.

15. Plaintiff Randall Stevens secured a loan from Washington Mutual on a residential property located in Loma Linda, California. That loan was subsequently purchased by Defendants. On April 8, 2009, Plaintiff Randall Stevens spoke by telephone with a JP Morgan Chase representative inquiring about whether he would be able to modify his loan under the available programs. Plaintiff was advised by Defendants that it was likely he could, but it would be necessary to pay $750 to reimburse Defendants for the cost of an appraisal, title search and processing of the paperwork. Plaintiff then paid Defendants $750 by credit card.

16. On April 10, 2009, Defendants sent an appraiser from Bakersfield, CA, with no apparent knowledge of the real estate market in Loma Linda, California to appraise Plaintiff's property. Using what appeared to be foreclosures and short sales, the appraisal was for substantially less than the amount of the loan. Based on information and belief, that appraisal was provided to Defendants on April 11, 2009, only three days from when Plaintiff entered into the contractual relationship for the loan modification.

17. However, even though Defendants were aware that Plaintiff did not qualify for the loan modification program based on an appraisal that was less than the threshold requirement, it did not notify Plaintiff of that fact for over a month later, and then only in response to Plaintiff's inquiry as to the status of the loan modification. Plaintiff then requested a refund on the $750, and Defendants denied the request and refused to refund any portion of the $750.

18. For Plaintiff, Defendants misrepresented to him over the telephone that the up-front fees were for services that were either unnecessary or not provided to him if he did not qualify for the loan modification. For many putative class members who obtained information about the program from Defendants' website, brochures, or telephone contact, Defendants failed to disclose that there is a large up-front fee for applying for the loan modification, that in the event of the customer non qualifying for the loan, results in the customer paying Defendants for services that are either unnecessary or not provided. The website further advises customers to avoid loan modification "scams" that charge large up-front fees, then do not deliver a loan modification, which is precisely Defendants' program.

IV

CLASS ACTION ALLEGATIONS

19. Plaintiff initially proposes a nationwide class – the "Class" – in litigating this case, as defined as follows:

> All JPMorgan Chase customers who paid up-front fees for enrollment in Defendants' home loan modification program on or after July 10, 2005, and upon not qualifying for the program, were not refunded total or partial fees for unnecessary services or services not rendered.

Excluded from the above class is any entity in which Defendants have a controlling interest, and officers or director of Defendants.

20. If the Court determines that a nationwide class is not warranted, Plaintiff request, in the alternative, the certification of a California class consisting of JPMorgan Chase customers whose home loans relate to homes in California.

21. This action is brought as a class action and may properly be so maintained pursuant to the provisions of the Federal Rules of Civil Procedure 23(a) and 23(b). Plaintiff reserve the right to modify the class definitions and the class period based on the results of discovery.

22. **Numerosity of the Class** – The members of the Class are so numerous that their individual joinder is impracticable. Plaintiff is informed and believes that there are at least hundreds of thousands of customers in the class. Since the class members may be identified through business records regularly maintained by Defendants and their employees and agents, and through the media, the number and identities of class members can be ascertained. Members of the Class can be notified of the pending action by e-mail, mail and supplemented by published notice, if necessary;

23. **Existence and Predominance of Common Question of Fact and Law** – There are questions of law and fact common to the Class. These questions predominate over any questions affecting only individual class members. These common legal and factual issues include, but are not limited to:

a. Whether Defendants charged disqualified loan modification customers up-front fees for services that were either unnecessary or not undertaken;

b. Whether Defendants encouraged customers it knew, or should have known, would not qualify for the loan modification program to pay up-front loan modification fees that constituted profit for Defendants;

c. Whether Defendants took actions, including encouraging artificially low appraisals, which prevented customers who should have qualified for the loan modification to be disqualified from the programs;

d. Whether Defendant JPMorgan Chase breached the implied covenant of good faith and fair dealing with regards to these practices;

e. Whether Defendant JPMorgan Chase's contract with its customers are unconscionable in that it allows the Defendants to keep fees for services not rendered, thereby taking advantage of millions of vulnerable customers;

f. Whether Defendant JPMorgan Chase's conduct as described above constitutes violations of the causes of action set forth below.

g. Whether Defendant JPMorgan Chase misled customers about the value of their homes and/or the necessity of the fees in determining qualification for enrollment in the program;

h. Whether Defendant JPMorgan Chase failed to disclose to customers each of the above practices;

i. Whether Defendant JPMorgan Chase engaged in deceptive advertising campaigns which created consumer expectations that are inconsistent with each of the above practices;

24. **<u>Typicality</u>** – The claims of the representative Plaintiff is typical of the claims of the members of the Class. Plaintiff, like all other members of the Class, has sustained damages arising from Defendants' violations of the laws, as alleged herein. The representative Plaintiff and the members of the Class were and are similarly or identically harmed by the same unlawful, deceptive, unfair, systematic and pervasive pattern of misconduct engaged in by Defendants.

25. **<u>Adequacy</u>** – The representative Plaintiff will fairly and adequately represent and protect the interests of the Class members and has retained counsel who are experienced and competent trial

lawyers in complex litigation and class action litigation. There are no material conflicts between the claims of the representative Plaintiff and the members of the Class that would make class certification inappropriate. Counsel for the Class will vigorously assert the claims of all Class members.

26. **Predominance and Superiority** – This suit may be maintained as a class action under Federal Rules of Civil Procedure 23(b)(3) because questions of law and fact common to the Class predominate over the questions affecting only individual members of the Class and a class action is superior to other available means for the fair and efficient adjudication of this dispute. The damages suffered by individual class members are small compared to the burden and expense of individual prosecution of the complex and extensive litigation needed to address Defendants' conduct. Further, it would be virtually impossible for the members of the Class to individually redress effectively the wrongs done to them. Even if class members themselves could afford such individual litigation, the court system could not. In addition, individualized litigation increases the delay and expense to all parties and to the court system resulting from complex legal and factual issues of the case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. By contrast, the class action device presents far fewer management difficulties; allows the hearing of claims which might otherwise go unaddressed because of the relative expense of bringing individual lawsuits; and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court.

27. The Class Plaintiff contemplates the eventual issuance of notice to the proposed Class members setting forth the subject and nature of the instant action. Upon information and belief, Defendants' own business records and electronic media can be utilized for the contemplated notices. To the extent that any further notices may be required, the Class Plaintiff would contemplate the use of additional media and/or mailings.

28. In addition to meeting the statutory prerequisites to a Class Action, this action is properly maintained as a Class Action pursuant to Rule 23(b) of the Federal Rules of Civil Procedure, in that:

a. Without class certification and determination of declaratory, injunctive, statutory and other legal questions within the class format, prosecution of separate actions by individual members of the Class will create the risk of:

i. Inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the parties opposing the Class; or

ii. Adjudication with respect to individual members of the Class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests;

b. The parties opposing the Class have acted or refused to act on grounds generally applicable to each member of the Class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the Class as a whole; or

c. Common questions of law and fact exist as to the members of the Class and predominate over any questions affecting only individual members, and a Class Action is superior to other available methods of the fair and efficient adjudication of the controversy, including consideration of:

i. The interests of the members of the Class in individually controlling the prosecution or defense of separate actions;

ii. The extent and nature of any litigation concerning controversy already commenced by or against members of the Class;

iii. The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

iv. The difficulties likely to be encountered in the management of a Class Action.

FIRST CAUSE OF ACTION

Violation of Business And Professions Code Section 17200 *et seq.* – Unlawful, Fraudulent, and Unfair Business Act and Practices

(Against all Defendants)

29. Plaintiff incorporates by reference and re-alleges all paragraphs previously alleged herein.

30. Defendants' acts and practices as described herein constitute unlawful, fraudulent, and unfair business acts and practices, in that (1) Defendants' practices, as described herein, violate each of the statutes set forth within this Complaint, and/or (2) the justification for Defendants' conduct is outweighed by the gravity of the consequences to Plaintiff and members of the Class, and/or (3) Defendants' conduct is immoral, unethical, oppressive, unscrupulous, unconscionable or substantially injurious to Plaintiff and members of the Class, and/or (4) the uniform conduct of Defendants has a tendency to deceive Plaintiff and the members of the Class.

31. Defendants' unlawful, unfair and fraudulent business acts and practices are described throughout this Complaint and include, but are not limited to, taking advantage of vulnerable and desperate homeowners by charging unnecessary up-front loan modification fees that provide customers nothing in value thereby worsening their financial position; and then not disclosing, misrepresenting and concealing this fact.

32. In addition to the above, the conduct as alleged throughout the complaint constitutes negligent misrepresentation, fraud, unconscionability, and breach of the implied covenant of good faith and fair dealing, and violation of the California Legal Remedies Act, that not only result in liability as individual causes of action, they also provide the basis for a finding of liability under Business and Professions Code Section 17200 et seq.

33. Plaintiff and the Class members, and each of them, have been damaged by said practices.

34. The conduct of Defendants as described herein violates Business and Professions Code section 17200 *et seq.*, and other similar state unfair competition and unlawful business practices statutes.

35. Pursuant to Business and Professions Code sections 17200 and 17203, Plaintiff, on behalf of himself and all others similarly situated, seeks relief as prayed for below.

SECOND CAUSE OF ACTION

Violation of Business and Professions Code Section 17500 *et seq.* – False Advertising

(Against all Defendants)

36. Plaintiff incorporates by reference and re-alleges all paragraphs previously alleged herein.

37. The misleading standardized practice and advertisements regarding the practice were uniformly applied to Plaintiff and the Class members. Plaintiff and many putative Class members were given a standardized sales pitch on the telephone. Many putative Class members also were exposed to uniform advertisements on websites and brochures.

38. As a result, Plaintiff and the class relied on the advertisements and were damaged as a result by incurring overdraft charges they otherwise would not have incurred.

39. Plaintiff, on behalf of himself and the Class, seek relief as prayed for below.

THIRD CAUSE OF ACTION

Fraud

(Against all Defendants)

40. Plaintiff incorporates by reference and re-alleges all paragraphs previously alleged herein.

41. The misrepresentations, nondisclosure and/or concealment of material facts made by Defendants to Plaintiff and the members of the Class, as set forth above, were known by Defendants to be false and material and were intended by the Defendants to mislead Plaintiff and the members of the Class.

42. That Plaintiff and the Class were actually misled and deceived and were induced by Defendants to pay a large up-front fee for services that were either unnecessary or not provided to them.

43. As a result of the conduct of Defendants, Plaintiff and the Class members have been damaged by having paid large fees for services that were neither necessary and/or not provided. In addition to such damages, Plaintiff seek punitive or exemplary damages pursuant to Civil Code section 3294 in that Defendants engaged in "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant[s] with the intention on the part of the defendant[s] of thereby depriving a person of property or legal rights or otherwise causing injury."

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FOURTH CAUSE OF ACTION

Negligent Misrepresentation

(Against all Defendants)

44. Plaintiff incorporates by reference and re-alleges all paragraphs previously alleged herein.

45. That Defendants had a duty to provide honest and accurate information regarding the likelihood of customers qualifying for the home loan modification program before charging unnecessary up-front fees; the true value of the property; and that the large up-front fees were for services that were either unnecessary or not provided to Plaintiff and the Class members if they were disqualified from the home loan modification programs.

46. Defendants specifically and expressly indicated to class members that the up-front fees were necessary for the processing of the home loan modification program.

47. Such misrepresentations were and are made by JPMorgan Chase through standardized telephone communications (in the case of Plaintiff and many Class members) and its website and various marketing materials (in the case of many Class members).

48. Defendants knew, or in the exercise of reasonable diligence should have known, that the ordinary consumer and customer of Defendants' services would understand Defendants' representations as meaning that the up-front fees would be for services that would actually be performed. Defendants also knew or in the exercise of reasonable diligence should have known, that because the ordinary consumer and customer of Defendants' service would be in the desperate need of a loan modification to avoid disastrous financial consequences, that they would be vulnerable to paying large fees that were unnecessary as they would not result in loan modification. Any other understanding on the part of consumers would not be reasonable given Defendants' representations.

49. Plaintiff and the Class members justifiably relied on Defendants' misrepresentations when paying the large up-front fees.

50. As a result of the conduct of Defendants, Plaintiff and the Class Members have been damaged by having relied on Defendants' misrepresentations as to the necessity of the large up-front fees.

51. Defendants knew or in the exercise of reasonable diligence should have known, that Plaintiff and ordinary customers would rely on those representations.

52. That Plaintiff and the Class members did reasonably rely on those representations.

53. As a result, Plaintiff and the Class members have been damaged by being assessed expensive and unnecessary overdraft fees.

FIFTH CAUSE OF ACTION

Breach of Implied Covenant of Good Faith and Fair Dealing

(Against all Defendants)

54. Plaintiff incorporates by reference and re-alleges all paragraphs previously alleged herein.

55. California law implies a covenant of good faith and fair dealing in all contracts between parties.

56. As a result of the actions of Defendants, set forth hereinabove, Defendants have violated the implied covenant of good faith and fair dealing contained in the agreements which purport to govern Plaintiff' and the Class members' home loan accounts, and as a result thereof, Plaintiff and the Class members are entitled to damages as prayed.

57. Specifically, Defendants charged large up-front fees to vulnerable customers who have no choice but to apply for loan modifications, without providing the services for which the fees were paid.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on his own behalf and on behalf of the Class, prays for relief as follows:

A. For an order certifying the nationwide Class, and appointing Plaintiff and his counsel to represent the Class;

B. Alternatively, if the Court does not grant certification of the nationwide Class, Plaintiff prays for an order certifying a California Class, and appointing Plaintiff and his counsel to represent the class;

C. For an order awarding Plaintiff and the Class restitution and/or disgorgement and other equitable relief as the Court deems proper;

D. For an order awarding Plaintiff and the Class punitive damages as to the appropriate cause of action;

E. For an order enjoining Defendants:

1. under Business and Professions Code section 17203 from continuing to engage in business acts and practices, or any of them, which are unlawful, unfair, or fraudulent, as alleged herein; and
2. under Business and Professions Code section 17535 from continuing to engage in the dissemination of advertisements which are untrue or misleading, alleged herein;

F. For an order mandating that Defendants engage in a corrective advertising campaign to correct the misperceptions Defendants' conduct created;

G. For an order awarding Plaintiff and the Class pre-judgment and post-judgment interest, as well as reasonable attorneys' and expert-witness fees and other costs pursuant to Code of Civil Procedure section 1021.5, and other statutes as may be applicable; and

H. For an order awarding such other and further relief as this Court may deem just and proper.

DATED: July 9, 2009. MCCUNEWRIGHT, LLP

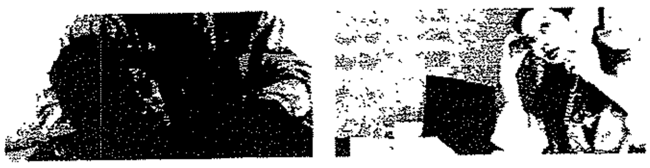
BY: ______________________
Richard D. McCune
Attorney for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff, and all others similarly situated, hereby demands a trial by jury herein.

DATED: July 9, 2009. MCCUNEWRIGHT, LLP

BY: ______________________
Richard D. McCune
Attorney for Plaintiff



Evaluator

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MODIFICATION EVALUATOR

Use this tool to determine if you may be eligible for the Home Affordable Modification. Simply enter your current monthly gross income. The tool will calculate a mortgage payment guideline amount. If your current mortgage payment is above this amount and you meet the other Home Affordable Modification guidelines, then you may be eligible. Please be sure to read the notes below for further information.

Modification Evaluator for
Home Affordable Mortgage Modification

Enter Your Gross Monthly Income
This is the income of all borrowers who signed your mortgage BEFORE taxes and any adjustments.
If you need help, click here.

Mortgage Payment-to-Income Guideline 31%

Mortgage Payment Guideline

Calculate

If your current mortgage payment is above the amount shown in the **Mortgage Payment Guideline**, then you may be eligible for the Home Affordable Modification. Please go to the Modification Eligibility page to get started.

Notes

Gross Monthly Income: is the total income of all borrowers who signed your mortgage before any taxes or other deductions are made. If more than one person signed your mortgage, such as your spouse or a co-signer, add the gross monthly income of all borrowers and enter this amount.

Mortgage Payment: is defined as what you pay on a monthly-basis for principal, interest, property taxes, hazard insurance and homeowner's association fees, if applicable. Please include information about your first (or "primary") mortgage only. Do not include any payments on your second mortgage. You may have taxes and interest in escrow added to your monthly payment already, so be careful to count taxes and escrow only once.

Mortgage Payment Guideline: this is calculated as 31% of your current monthly gross income. If your current monthly mortgage payment is above this amount, you may be eligible for the Home Affordable Modification.

Note: to protect your privacy, this site will not record your information.

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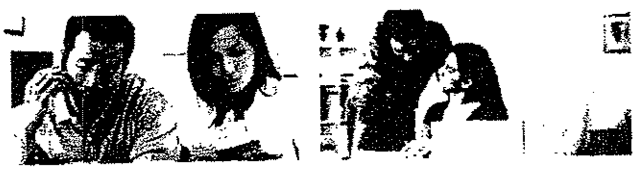

Estimator

Home › Payment Reduction Estimator

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PAYMENT REDUCTION ESTIMATOR

Under the Home Affordable Modification program, the target maximum amount for your mortgage payment (or mortgage debt-to-income) should be 31% of your gross (pre-tax) monthly income. This Payment Reduction Estimator will determine what your current mortgage debt-to-income is and how much your monthly payment may be reduced if you qualify for a modification.

Do not include any payments on your second mortgage. You may have taxes and interest in escrow added to your monthly payment already, so be careful to count taxes and escrow only once.

Payment Reduction Estimator for Home Affordable Mortgage Modification

Total Monthly Payment on Your First (or "primary") Mortgage
Be sure to INCLUDE principal, interest, taxes, insurance and homeowners association dues if applicable.
If you need help, click here.

Enter Your Gross Monthly Income
This is the income of all borrowers who signed your mortgage BEFORE taxes and any adjustments.
If you need help, click here.

Calculate

This is Your Current Debt-to-Income (DTI) Level	%
Target DTI under the Home Affordable Modification	31%
Potential New Monthly Payment If You Qualify	$
Potential Monthly Payment Reduction If You Qualify	$

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In this section

- News and Information
- Frequently Asked Questions
- Understanding Your Mortgage Statement
- Homeowner Events
- Homeowner Examples
  - Meet Brian and Lisa
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THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MARTHA COAKLEY
ATTORNEY GENERAL

(617) 727-2200
www.mass.gov/ago

TESTIMONY OF MASSACHUSETTS ATTORNEY GENERAL MARTHA COAKLEY U.S. HOUSE FINANCIAL SERVICES COMMITTEE

Wednesday, September 17, 2008

Lenders and Servicers' Promises of Loan Modifications in Massachusetts are Not Matched by Meaningful Actions That Promote Sustainable Loans

I thank Chairman Frank and the Committee for allowing me the opportunity to submit testimony on this important issue of foreclosure mitigation efforts as it relates to the predatory lending crisis that has permeated our nation.

By way of background, I would like to provide a brief overview of our office's commitment to combating predatory lending and guarding against the impact of the foreclosure crisis. In Massachusetts, as in many parts of the country, we are experiencing a dramatic surge in home mortgage foreclosures, due in large measure to unsound and predatory lending practices. In fact many foreclosures have resulted from loan practices and products that were destined to fail because too many lenders departed from the bedrock lending principle that one should reasonably assess the borrower's ability to repay before lending money.

In response, our office has sought accountability through litigation, regulation and other advocacy. On the enforcement side, we have brought predatory lending cases against two major subprime lenders, Fremont Investment & Loan/Fremont General and H&R Block/Option One Mortgage Corporation. In the Fremont action, we obtained an unprecedented injunction that restricts foreclosure on certain loans that were doomed to foreclosure because of the specific combination of ultra risky loan features used by Fremont. The injunction is one of the first pronouncements by a court that it is an unfair trade practice to sell mortgage loans that require borrowers to refinance while making such refinancing virtually impossible to obtain, at least absent a perpetual increase in home values. We have also brought enforcement actions against mortgage professionals who engaged in loan application fraud and other loan origination misconduct.

On the regulatory side, our office enacted regulations to prevent predatory lending and worked together with the Massachusetts Division of Banks for the enactment of legislation that provides additional protections for borrowers facing foreclosure. Our office issued new regulations, effective in January 2008, governing the mortgage brokers and mortgage lenders in Massachusetts. These regulations, 940 CMR 8.00, amended and expanded regulations first issued in 1992, and significantly extended the applicability of the regulations to purchase-money and refinance mortgage loans. These consumer protection regulations now address an array of unfair and deceptive practices in home lending that have contributed to the ongoing foreclosure crisis and harmed thousands of Massachusetts residents and their communities.

Our office also has joined other states to seek real progress from lenders and servicers on the issue of loan modifications. We have coordinated training efforts for attorneys willing to take pro bono case assignments to help homeowners avoid foreclosure. In addition, we have advocated for stringent federal regulation of mortgage lenders and brokers. We recognize that combating the current foreclosure crisis will require the resources and cooperation of federal, state and local authorities.

A critical aspect of our enforcement efforts, specifically in the Fremont case, has been the successful demand that lenders' loan origination misconduct—selling loans that were doomed to foreclosure and selling loans without assessing a borrower's ability to repay—must be taken into account before a foreclosure proceeds. In February 2008, we obtained a preliminary injunction that prevents Fremont or its assignees from foreclosing on certain risk-layered loans until our office has reviewed the loan, and if we object, Fremont must obtain the court's approval. I am pleased that other enforcement agencies—State Attorneys General and last week the Federal Trade Commission—have seen fit to follow this law enforcement approach to combating unfair and deceptive lending and servicing practices. In lieu of always resorting to litigation, we have tried to combat unnecessary foreclosures in Massachusetts by engaging lenders and urging them to "do the right thing"—to modify loans in order to staunch the public harms of foreclosures while still protecting their economic interests. Federal authorities have urged the same thing, in a very public way. Regrettably, this approach has not been successful. Indeed, the "voluntary" approach to loan modifications has failed. In Massachusetts, our office, Governor Deval Patrick, and the Legislature have focused on avoiding unnecessary foreclosures for more than a year. Based on our experience in Massachusetts—and we have no reason to believe we are unique—we have reached the following conclusions:

- Loan modifications are not being achieved in significant numbers. When compared to the number of foreclosures in process, far too few borrowers are able to restructure their loans to generate a sustainable loan; and

- When so-called loan modifications do occur, they often do not result in a sustainable loan. Lenders and servicers routinely offer and complete so-called loan modifications that increase monthly payments and increase overall debt. They do not meaningfully avoid foreclosure. At best, they

> temporarily delay the inevitable delinquency and eventual foreclosure—they "kick the can down the road."

Put simply, lenders, holders and servicers have not lived up to their very public promises of avoiding foreclosures by achieving loan modifications. As this Committee, and federal agencies, and state law enforcement continue to combat foreclosures and the unfair lending practices that caused this crisis, that reality should impact your decisions.

I would like to explain our office's experience with respect to loan modifications as well as the specific bases for my conclusions.

Very early in my involvement in the subprime lending crisis, as our office was developing enforcement actions, we realized, like many others, that a vital part of combating foreclosures was to work with lenders to modify loans. Our office has explored wide scale loan modifications in the litigation we are conducting against predatory subprime lenders, with some success (discussed below). We also have been part of the States Foreclosure Prevention Working Group that has collected data from most of the nation's top twenty subprime servicers and engaged them in discussions on implementing wide scale loan modifications. Iowa Attorney General Tom Miller, among others, has testified before this Committee on that group's goals and findings. More recently, the Massachusetts legislature enacted a 90 day right to cure period, requiring that lenders provide 90 days of breathing room before foreclosure during which, hopefully, borrowers and servicers would explore ways to restructure a sustainable loan and avoid foreclosure. Together with Governor Deval Patrick and Banking Commissioner Steve Antonakes, on May 1, 2008 we urged lenders and servicers to use that 90 day period as a real opportunity for loan modifications, not simply a new procedural hurdle for foreclosing attorneys. We state officials used that initial 90 day period to engage some of the nation's largest creditors, asking them to agree to a loan modification protocol to ensure that avoidable foreclosures did not take place. We asked only that they commit to loan modifications consistent with their own economic interests. Nonetheless, we got the brush-off. And Massachusetts, like the rest of the country, still is not witnessing real loan modifications in meaningful numbers.

We continue to believe that, especially in the current real estate market, a significant portion of foreclosures should be avoided through loan modifications. The loan modifications that I speak of would serve both borrowers and holders: borrowers, of course, would achieve a monthly payment that they can afford, usually achieved by reducing interest rates and, as necessary, addressing arrearages, not necessarily by erasing them, but in a manner that still promotes an affordable monthly payment. The holder benefits because they can significantly adjust the monthly payment to achieve a sustainable income stream that still exceeds the value recovered following a foreclosure. To be clear: we do not contend that every loan must be restructured. We have seen enough fraudulent subprime loans in our office to know that many are beyond saving. Our approach—at least with non-defendants—has always been focused on (i) evaluating the borrower's current ability to pay, (ii) comparing the value of that income stream to the expected losses at foreclosure, and (iii) demanding that lenders/servicers achieve a loan modification when it serves borrower interests as well as the holder's economic interest.

If implemented, this simple approach can result in massive numbers of loan modifications. It is not controversial. Indeed, when shared with servicers, we hear a chorus of agreement, much like the chorus of "helping borrowers" that emanates from Hope Now. But results have not followed.

One year after our office first zeroed in on seeking voluntary loan modifications, and four months after the start of the initial 90 day right to cure period under Massachusetts law (which commenced May 1, 2008 and ended August 1, 2008), we in Massachusetts can fairly assess the results of asking lenders and servicers to modify loans to avoid foreclosures: The results are dismal. Successful modifications continue to be a tiny fraction of loans that are in foreclosure. Likewise, the number of modifications pales when compared to the number of loans that are delinquent. Just as important, when so-called loan modifications are completed, they routinely fail to provide an affordable monthly payment, and therefore fail to result in a sustainable loan. Instead, they almost always increase, not decrease, principal and often increase, not decrease, the borrower's monthly payments. By any measure, those types of loan modifications are not helping borrowers and are not helping solve this foreclosure crisis.

I will briefly touch on the bases for these conclusions. First, back in April 2008, the State Foreclosure Prevention Working Group released its second data report based on loss mitigation statistics collected from thirteen major servicers. That data indicated that an unacceptably small number of loans in serious delinquency were the subject of loss mitigation efforts—7 out of 10 borrowers in serious delinquency were not on track for any type of loan work-out or loss mitigation to help them avoid foreclosure. An even lower percentage of troubled loans actually accomplished a loan modification or other loss mitigation approach. The intervening months have not changed this prognosis. For example, in Massachusetts the number of loan modifications filed with the Registry of

Deeds in recent months (144 loan modifications in last three months) is miniscule compared to the number of loans in active foreclosure; in the same period there were 4,721 foreclosure starts (Orders of Notice filed with Land Court) and 4,324 foreclosure deeds (signaling a completed foreclosure process). Even presuming the loan modification figure understates actual loan modifications (because some creditors may not file loan modifications) the number of solutions pales compared to the scope of the problem.

Equally troubling is the type of modifications that are actually being completed by servicers. They may be captioned "loan modification," and lenders and Hope Now may call them loan modifications and claim they are helping borrowers, but they fail to promote a sustainable loan and thus fail to provide a meaningful solution to foreclosure.

On this point, I commend a recent study by Professor Alan White of Valparaiso Law School. Professor White analyzed a sample of 106,000 securitized subprime loans, 4,344 had been the subject of a loan modification, defining that term broadly. Analyzing those modifications, Professor White concluded:

- Although technically the number of "modifications" has increased in recent months, the modifications rarely decrease debt and often do not promote affordability.
- The modifications reviewed virtually never reduced the principal debt owed, and often increased the principal.
- Only 50% of modifications reduced, in any amount, monthly payments; increased monthly payments are just as likely to result from these loan modifications.
- There is no consistency among lenders or servicers as to their approach to loan modifications—how much benefit may be extended and how modifications are actually achieved.

These conclusions from August 2008 are consistent with the State Foreclosure Prevention Working Group's conclusions in April 2008. They are likewise entirely consistent with the Center for Responsible Lending's testimony before this Committee on July 25, 2008 which, among other things, warned that servicers were completing loan modifications that failed to promote loans that were sustainable over the long term.

We have analyzed loan modification information from the Massachusetts registries of deeds to attempt to answer the same questions addressed by Professor White's study. Namely, to the extent loan modifications are occurring in Massachusetts, do they result in sustainable loans? Based on our Massachusetts investigation, the answer is a resounding "No." My office reviewed 144 loan modification documents, reflecting all loan modifications filed in 14 counties. Although not all loan modifications are necessarily filed with the registries, this is at least a representative sample. We found:

- *Not one of the 144 loan modifications reduced the principal mortgage balance of Massachusetts homeowners* (identical to Professor White's conclusion drawn from a national sample). I do not suggest that loan modifications need to reduce principal to afford meaningful relief. It is worth noting, however, that many holders have already written down these assets significantly, but that does not appear to translate into a willingness to reduce principal in the loan modification process.

- *Virtually none of the 144 loan modifications reduced the monthly payments for Massachusetts homeowners, so the distressed loans are no more affordable after "modification" than before.* This finding is startling. It undermines the notion that servicers are helping to preserve home ownership. Our analysis shows that servicers almost always capitalize arrearages, penalties, attorneys fees and the like, increasing the principal balance. Therefore, even though they may also reduce the interest rate, the impact of the reduction is offset by capitalizing arrearages. While the loan terms technically have been modified, the resulting loan is neither affordable nor sustainable.

We are not suggesting that arrearages must be forgiven or that principal must be invaded for loan modifications to be meaningful. But if the point is sustainable loans instead of foreclosure—a premise with which lenders publicly agree—that clearly is not achieved when both principal and monthly payments increase.

This sobering analysis of Massachusetts loan modifications is matched by the feedback we receive from those on the front lines of the foreclosure crisis. Our office is in constant contact with housing counselors, legal services lawyers and bankruptcy court personnel, and recently surveyed them to learn about their experiences in obtaining loan modifications from servicers. The reports we have received say loan modifications are few and far between. Some servicers never offer them, some servicers still cannot manage to answer the phones, and some get started on loss mitigation but cannot deliver the necessary papers, or worse, retract initial promises of restructuring.

Whether national reports like Professor White's, Massachusetts-specific analysis by our office, or anecdotal reports from the field, the evidence we have received is uniform: the voluntary call for loan modifications, by this Committee, by state government, and by federal officials, has failed to succeed. Our direct experience points in the same direction. We engaged three major creditors—Bank of America, Citigroup, and Wells Fargo—in an effort to explore a reasonable loan modification protocol, one that would memorialize the mutual interests of holders and borrowers, and which would allow their commitment to be measured. Once we proposed to move beyond general principles to measurable details, silence fell. These lenders have simply refused to move beyond platitudes and press releases.

The evidence and experience I have described here will undoubtedly contradict what this Committee will hear from the lending and servicing community. It certainly contradicts the glowing press releases issued by Hope Now every time state officials or housing advocates suggest the pace of modifications is slow. Hope Now and the major lenders may reiterate their supposed commitment to avoiding foreclosures; may cite increased servicing staff; and may point to improved raw numbers of loss mitigation contacts. But I urge this Committee, and the public, to compare the number of modifications to the astounding number of loans in delinquency and foreclosure. I urge you to look behind the numbers to determine what type of loan modifications are actually being completed—whether they provide affordability, whether it is temporary or sustainable, whether it just delays inevitable failure of the loan. The answers to those questions are a critical part of the story. The superficial tale told by lenders and Hope Now must be tested and, when tested, there is no denying that it fails. The disconnect between words and action has lasted more than a year. It is time to end this disconnect and for lenders to make good on their promises.

Our recent experience indicates that loan modifications <u>can</u> occur on a broad scale when the holders are motivated. It is possible to memorialize a loan modification protocol that provides significant relief to borrowers and accounts for the economic interests of holders. For example, in the Fremont matter, we negotiated with WMD Capital, the purchaser of a bundle of Fremont-originated subprime loans, to account for the Fremont's loan origination misdeeds. Specifically, WMD Capital agreed to provide payment relief for borrowers who could not afford their current scheduled payment. If their current ability to pay warranted it, borrowers could reduce their monthly payment dramatically (as much as 50%) and still remain in their home. WMD, in my view, was willing to do so because it was willing to acknowledge the other side of the ledger—its expected losses if it was forced to foreclose in a difficult real estate market. While it is true that WMD presumably purchased that bundle of loans at a serious discount, this agreement is a perfect example of how economic realities can justify meaningful loan modifications.

In closing, I turn to some policy implications of this failure of the voluntary model for loan modifications. First, I sincerely hope that October 1 brings a significant change to the loan modification landscape. The incentive toward meaningful, sustainable loan modifications provided by the Hope for Homeowners Act appears to be very real. I hope it works, and breaks the logjam. We cannot predict whether that will happen because, in the end, it remains the choice of lenders and servicers to participate in the program.

Second, unless the Hope for Homeowners Act proves successful in achieving broad scale sustainable loan modifications, more must be done. The economic incentives of mortgage holders continue to point in the same direction as borrower interests and the public interest—loan modifications should occur. I urge Congress to continue to consider its points of leverage to motivate real loan modifications. At the state level, we are frustrated by the chorus of agreement but absence of meaningful action. Because our cooperative efforts have not borne fruit, we will bolster our litigation efforts when appropriate, and we also will be exploring legislative and regulatory approaches to stimulating industry solutions to this very real, very public problem.

Finally, I would like to touch on our office's Abandoned Housing Initiative, as it is a creative state-based approach to combating the impact of foreclosures. One way Massachusetts is addressing the rising number of abandoned properties created as a result of the foreclosure crisis, is through the Massachusetts Attorney General Office's Abandoned Housing Initiative.

In the mid-1990s, our office created its Abandoned Housing Initiative, which in large part provides legal assistance with respect to the receivership process. In its current form, the Initiative addresses abandoned housing problems throughout the state by coordinating the resources of our office, municipal officials, local community groups and local residents. When local outreach and coordination does not work, Assistant Attorneys General utilize civil code enforcement protocols and the Massachusetts Sanitary Code's receivership provision, G.L. c.111, §127*I*, to rehabilitate dangerous and abandoned homes in these neighborhoods. This rehabilitation is significant because evidence has shown that abandoned properties within a community bring with them increased crime including violence, drugs, and arson.

This program has been extremely successful in providing cities and towns with the necessary tools to take properties into receivership in order to revitalize neighborhoods. Because of its success, our office is currently working towards expanding this Initiative. By expanding the Massachusetts Attorney General's Abandoned Housing Initiative, Massachusetts can increase its enforcement of the state receivership provision; expand its coordinated outreach with local officials and community groups; and ultimately reduce the amount of abandoned properties in the state. That is why I respectfully ask for any federal assistance that might aid us in our expansion, so that we can begin to hire more attorneys to conduct outreach within the community and assist in the receivership process.

Thank you again for the opportunity to provide testimony to the Committee today. I applaud the Chairman and the Committee members for their work on this issue, particularly, the recently enacted Housing and Economic Recovery Act of 2008, and I look forward to working with you on this issue in the future.

The North County Times - Californian

HOUSING: Federal rescue misses most homeowners

President's loan modification plan founders amid delays

By ERIC WOLFF - ewolff@nctimes.com | Posted: Friday, February 5, 2010 10:45 pm

In March, President Barack Obama launched a sweeping plan to save potentially millions of homeowners from the same kind of financial collapse that, just months earlier, had brought the world's economies to their knees.

The idea was to stabilize neighborhoods ---- and the U.S. economy ---- by lowering mortgage payments for families and containing an epidemic of defaults.

A key part of the government's plan was to lower monthly mortgage payments through the Home Affordable Modification Program, a $75 billion commitment intended to get people paying their loans again.

But the program has been stymied by a tangle of paperwork, new bank hires, ineligible customers and ever-changing rules.

In its 10 months of existence, HAMP has permanently modified 66,000 of 1.1 million mortgages ---- just 5.6 percent, according to the U.S. Department of Treasury.

The low rate is hardly news to the thousands of Californians who have applied.

Linda Halstead has cut back on groceries and been late on utility payments to keep up the $1,619 monthly payment on her Murrieta home.

Halstead and other Riverside County homeowners have seen their property lose half its value since the market's peak in 2006 (on average, San Diego County homeowners lost 40 percent of their value).

And she is one of 730,885 homeowners in San Diego, Riverside and San Bernardino counties who owe more on their homes than their properties are worth, according to First American CoreLogic Inc., a real estate data company.

Halstead first sought lower payments in fall 2008 from her lender, Countrywide Financial, after her income declined from her home-based manicure and pedicure business.

At first, Countrywide was merely slow to respond to requests.

Then company representatives told her to wait until March, when Obama would announce the details of government incentives for modifications. Then they said her paperwork was out of date.

In the months since, there's been a recurring cycle of documents sent, documents lost and documents expiring ---- and still no loan modification.

"I've just had to get rid of things I can do without," she said.

In over her head

The HAMP program was designed for people such as Halstead: homeowners who still have some income, but got in over their heads during the boom.

Under the program, homeowners get a series of options to lower payments, including a temporarily reduced interest rate, extending the loan out 40 years, and even temporary reduction in the loan's principal.

HAMP is part of a tapestry of federal programs intended to bolster the housing market, and stabilize the economy as a whole.

But Halstead's story of problems with loan servicers and paperwork is common.

The volume of applications is enormous: Those 1.1 million applications have come in just since March, and most of them since July.

A spokesman for JPMorgan Chase & Co., Gary Kishner, said the big bank had 13 million calls in 2009 just on homeownership issues.

To cope with the volume, loan servicers added staff in a hurry.

Kishner said Chase will expand from 34 retail mortgage centers to 50 by the end of March, and company officials will hire employees to staff them.

Kishner said that lost paperwork is a fact of life with so much volume and so many green employees.

GMAC Financial Services spokeswoman Jeannine Bruin said her company has increased its staff at call centers by 35 percent, each of whom had a five-week training course.

"You're talking about retraining large numbers of employees to handle a different function as well as a more complex function," Bruin said.

But Bruin also said customers bear some of the responsibility for the paperwork issues.

"You're also dealing with the public, and asking them to come up with financial documents that they may not be intricately educated on," she said.

Donna Steward is a San Diego County mortgage broker who helps clients try to get their loans modified.

While she holds the banks responsible for the mess, she agreed that there's a lot of documents to manage: two months of pay stubs, a hardship letter, tax returns and self-employed income statements, among others.

She said it can add up to 70 pages of documents.

Not so temporary

The paperwork problem has been exacerbated by the way HAMP modifications are put together.

HAMP requires loan servicers to put borrowers into a three-month test period, called a trial modification, before they get a permanent modification.

If the borrowers make all their payments and meet financial requirements, they're supposed to get a permanent modification.

Real estate agent Pam Tushak owes $560,000 on her Vista home because she refinanced in the Aughts to buy a rental property in New Mexico and to clear credit card debt.

Like Halstead, she's been trying to get her loan modified since late 2008.

But unlike Halstead, her servicer, Chase, put her in a trial modification in August.

She made payments, sent in paperwork and waited for the permanent modification papers to come in.

But four months after the trial period was supposed to end, Tushak still can't get the paperwork for a permanent modification.

"Each time I'd call them, they'd tell me they needed updated documents," she said.

She got in the habit of calling them every other day, but got different people and different answers to her questions.

Tushak's story highlights a systemic problem with HAMP: Borrowers don't have to submit complete paperwork to get a trial modification.

As of December, the majority of customers in trial modifications have incomplete paperwork, wrote Phyllis Caldwell, chief of Homeownership Preservation for the Department of Treasury.

But to make the modification permanent, customers have to get all their paperwork.

The result can be interminable delays as documents are faxed or mailed and lost, or go out of date, requiring new copies of statements.

All of this lengthens the time the borrower stays in a trial modification, and it raises the specter that a borrower could be rejected because of insufficient income later.

Until recently, GMAC was one of only two servicers who required full documentation before putting customers into a trial loan modification, and it had a better rate of getting people into modifications than other servicers.

Paperwork required up front

In January, the Treasury Department changed the documentation rules specifically to mimic the more successful GMAC policies.

Treasury now requires borrowers applying for government programs to provide two pay stubs and give the IRS permission to send the servicers their latest tax returns before going into a trial modification.

And then there's the possibility that the trials themselves could be a problem.

In 2009, Chase approved or completed 30,913 HAMP modifications, a number representing 12 percent of applicants; but they converted 129,676, or 42.7 percent, of their own in-house modifications.

Kishner said the company doesn't have any trial period, but it also doesn't lower payments until it has all the paperwork and has fully vetted the customer.

Either a loan is modified or it isn't.

"HAMP lowers people's payments right away," Kishner said.

As a result, it's the first option for most homeowners.

Changes are on the way for homeowners looking for modifications.

The HOPENOW Alliance, a nonprofit consortium of housing counselors and advocates, is testing an online program that will allow homeowners to submit their documentation from their home computer to reduce the chance of it getting lost.

Treasury has extended the paperwork deadline.

And, as Bruin pointed out, those inexperienced staffers will become experienced.

In the meantime, homeowners will have to choose between continuing to pay or walking away.

Halstead knows what she will do.

"I happen to be a Christian," she said. "I think God put me here in this situation. I can't default on the loan. I put my signature on that paper."

Call staff writer Eric Wolff at 760-740-5412.

Home / Business

HOUSING: Federal effort to help homeowners revives risky mortgages

Critics call program to prevent foreclosures 'most exotic loans ever'

- Story
- Discussion

By ERIC WOLFF - ewolff@nctimes.com | Posted: February 6, 2010 6:50 pm | (4) Comments | Print

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The pitch is strikingly familiar: A home loan deal that offers a five-year "teaser" rate with low monthly payments, but then escalates to sharply higher costs.

No, this isn't a recap of the variable-rate, interest-only loans of the Amazing Aughts that led to record numbers of defaults. It's a description of the Home Affordable Modification Program from the U.S. Treasury Department, a plan that some analysts and real estate agents think is a dangerous repetition of mistakes of the past.

Launched in March by President Barack Obama as part of a broad program to head off foreclosures and shore up the nation's financial system, HAMP pays lenders cash incentives to reduce mortgage payments for struggling homeowners. But the program doesn't reduce the loan amount ---- often leaving borrowers owing far more than their homes are worth ---- and the low rates generally are set to jump again in the future.

"These are the most exotic loans ever!" said Sean O'Toole, a foreclosure data specialist who founded ForeclosureRadar.com.

So far, the president's program has failed to modify a large number of loans. O'Toole and other critics say that's because many homeowners have learned the hard lessons of the nation's housing crash.

Beginning in the late 1990s, mortgage brokers induced homebuyers to take outsized loans by offering multiyear teaser rates with very low monthly costs. The payments jumped at the end of the teaser period, but if the house had accrued enough value, the homeowner could sell at a profit and pay back the loan.

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But in 2006 the market began to crash, eventually erasing 40-50 percent of the average home's value in San Diego and Riverside counties, and other markets around the nation.

Easy credit vanished, selling homes became harder, and thousands of owners found themselves unable to keep up with their ballooning loan payments. Defaults and foreclosures leapt, and the ripple effect took down the U.S. economy.

HAMP was implemented by the Treasury Department in an effort to break this cycle and prevent further damage to the financial system.

Meg Reilly, a spokeswoman for the department, said in an e-mail that the program was intended to "provide immediate relief to homeowners who have suffered a recent financial hardship."

Federal cash offered

The program offers $1,000 per year to each borrower, mortgage servicing firm and loan holder for five years as an incentive to lower monthly payments. Qualified borrowers are those who have suffered financial hardship, but still have the income to make payments, if lowered.

Lenders then go through a series of steps to reduce a borrower's monthly payments to 31 percent of their monthly income. First lenders convert variable interest loans into fixed rates. If that doesn't get the payments low enough, they reduce interest rates for five years; if that doesn't work, they extend loans to 40 years. And last, but not least, they will delay payment of principal of the loan, though that balance still has to be paid off later on.

O'Toole thinks staying in a debt that's far higher than a home's value is a bad idea. To him, the HAMP modifications are a worse idea than any of the exotic loans offered by the lending industry during the housing boom.

"For all the crazy things we did back in 2006 ---- we allowed stated income, we allowed these teaser interest rates, we qualified people based on the teaser rate rather than the long-term rate ---- the one thing we never did was make 125-200 percent loan-to-value loans," O'Toole said.

Homeowners are still making payments for assets that have lost a huge amount of value.

Despite recent gains, homes are down from the market's 2006 peak by 40 percent in San Diego County and 50 percent in Riverside County, according to real estate data firm MDA DataQuick. Few analysts think values will recover in just five years.

"It's a five-year teaser rate," said Donna Steward, a mortgage broker who also does loan modifications. "I tell them (clients), in four years and nine months, file bankruptcy, because your house isn't going to get value back."

Thus far, HAMP has only gotten 5.6 percent of 1.1 million applicants into permanent loan modifications.

Borrowers say mortgage servicers are unable to handle the volume, lenders say borrowers can't get the paperwork right, and servicers say investors who hold the loans are slow to make crucial decisions.

Financial wisdom seen

But some analysts think the real reason home loans aren't being modified is that borrowers don't think these modifications are a wise financial decision.

"This is worse than subprime," said Chris Thornberg, an economist with Beacon Economics. "These loan mods aren't going to work, because it relies on the fact that people are dumb and don't understand they're upside down."

But the equity problem is not one the Treasury Department plans to solve.

"The large number of underwater borrowers is a serious policy concern," said Treasury's Reilly. "However, there are no simple solutions, and we have to consider moral hazard and fairness issues. The administration has no major changes planned for addressing negative equity in the HAMP program."

The Mortgage Bankers Association, an industry group, said the loan modifications were essentially a way to buy time.

"By offering a modification, even for just five years, lenders are giving borrowers affordable payments and allowing them time to get back on their feet or sell the property," said spokesman John Mechem in an e-mail.

But maybe because time is what homeowners need, there have been 1.1 million applications to HAMP.

Jeannette Rodriguez is a 74-year-old retiree who bought her house with her husband in 2005. Not long after, her husband was injured on the job and could no longer work, and then a doctor told her to stop being an accountant because of the stress.

They survived for years on disability payments and savings, but when HAMP was created, they tried to get their loan modified. She said it was because they just don't have the energy to move.

"I used to be a workhorse, but not anymore," she said.

In December, Rodriguez was rejected by the program. Now she's two months behind on mortgage payments and taking her case to the Department of Veterans Affairs, which backed her loan.

"During January, I had gradually gotten a cool mad going on," she said. "My anger has given me new energy to go back at it and start it again."

Call staff writer Eric Wolff at 760-740-5412.

Posted in Business on *Saturday, February 6, 2010 6:50 pm* Updated: 7:06 pm. | Tags: Top, Nct, Business, Local, Housing

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CA 2008-1
Consumer Advisory

Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

May 16, 2008 (Superseded by CA 2009-1 on April 21, 2009)

OCC Consumer Tips for Avoiding Mortgage Modification Scams and Foreclosure Rescue Scams

Scams that promise to "rescue" you from foreclosure are popping up at an alarming rate nationwide, and you need to protect yourself and your home.

If you're falling behind on your mortgage, others may know it, too — including con artists and scam artists. They know that people in these situations are vulnerable and often desperate. Potential victims are easy to find: mortgage lenders publish notices before foreclosing on homes. Private firms frequently compile and sell lists of these foreclosed properties and distressed borrowers. After reading these notices, con artists approach their targets in person, by mail, over the telephone, or by e-mail. They often advertise their services on television, radio, or the Web, and in newspapers, describing themselves as "foreclosure consultants" or "mortgage consultants," offering "foreclosure prevention" or "foreclosure rescue" services. And they are only too happy to take advantage of homeowners who want to save their homes.

If someone offers to negotiate a loan modification for you or to stop or delay foreclosure for a fee, carefully check his or her credentials, reputation, and experience, watch out for warning signs of a scam, and always maintain personal contact with your lender and mortgage servicer. Your mortgage lender can help you find real options to avoid foreclosure. It is important to contact your mortgage lender early to preserve all your options. There are legitimate consumer financial counseling agencies that can help you work with your lender.

This Consumer Advisory, issued by the Office of the Comptroller of the Currency (OCC), describes common scams, suggests ways to protect yourself, provides information on U.S. government loan programs and counseling resources, and lists 10 warning signs of a mortgage modification scam.

Common Types of Scams

Here are some examples of scams related to mortgage modification and foreclosure avoidance.

- **Foreclosure "rescue" and refinance fraud.** The scam artist offers to act as an intermediary between you and your lender to negotiate a repayment plan or loan modification and may even "guarantee" to save your home from foreclosure.

You may be told to make mortgage payments to the scammer directly — along with significant, up-front fees — and be told that the scammer will forward the payments to your lender. In reality, the scammer may pocket your money and leave you in worse shape on your loan. The scam artist also may tell you to stop making payments or stop communicating with your lender. Don't follow that advice.

Remember that your mortgage lender should be the starting point for finding options to avoid foreclosure. You also should consider contacting qualified and approved credit counselors.

- **Fake "government" modification programs.** Unscrupulous people may claim to be affiliated with, or approved by, the government or may ask you to pay high up-front fees to qualify for government mortgage modification programs. While government-supported mortgage modification and refinancing initiatives are legitimate, the scam artists' claims are not. Keep in mind that you do not have to pay to benefit from these government programs. All you need to do is contact your lender or loan servicer.

  The scam artist's name or Web site may be very similar to those of government agencies. The scam artist may use such terms as "federal," "TARP," or other words or acronyms related to official U.S. government programs. These tactics are designed to fool you into thinking the scam artist is somehow approved by, or affiliated with, the government. The government is taking actions to stop this fraud, but you also need to protect yourself. So be wary of claims offering "government-approved" or "official government" loan modifications. Your lender will be able to tell you whether you qualify for any government initiatives to prevent foreclosure. You do not have to pay anyone to benefit from them.

- **Leaseback/rent-to-buy schemes.** In this type of scam, you are asked to transfer the title to your home to the scammer, who will, supposedly, obtain new and better financing and/or allow you to remain in the home as a renter and eventually buy it back. If you do not comply with the terms of the rent-to-buy agreement, you will lose your money and face eviction. The agreement may be very hard to comply with, because it may require, for instance, high up-front and monthly payments that you may not be able to afford. In fact, the scammers may have no intention of ever selling the home back to you. They simply want your home and your money.

  Remember that transferring your title does not change your payment obligations — you will still owe your mortgage debt. The difference will be that you will no longer own your home. If payments are not made on the mortgage, your lender has the right to foreclose, and the foreclosure and any other problems will appear on your credit report.

- **Bankruptcy scams.** You may have heard that filing bankruptcy will stop a foreclosure. This is true — but only temporarily. Filing bankruptcy brings an "automatic stay" into effect that stops any collection and foreclosure while the bankruptcy court administers the case. Eventually, you must start paying your mortgage lender, or the lender will be able to foreclose. Bankruptcy is rarely, if ever, a permanent solution to prevent foreclosure. In addition, bankruptcy will negatively impact your credit score and will remain on your credit report for 10 years.

- **Debt-elimination schemes.** Scammers may claim to be able to "eliminate" your debt by making illegitimate legal arguments that you are not obligated to pay back your mortgage. These scammers will provide you with inaccurate claims about applicable laws and finance, such as that "secret laws" can be used to eliminate debt or that banks do not have the authority to lend money. Do not stop making payments on your mortgage based on their claims.

How to Protect Yourself from Mortgage Modification and Foreclosure Avoidance Scams

Always proceed with caution when dealing with anyone offering to help you modify your mortgage or avoid foreclosure. Remember that you do not *need* a third party to work with your lender — any such party should make the process easier, not harder and more expensive.

- **Contact your lender or mortgage servicer first.** Speak with someone in the loss mitigation department for mortgage modification options and other alternatives to foreclosure.

- **Make all mortgage payments directly to your lender or to the mortgage servicer.** Do not trust anyone to make mortgage payments for you, and do not stop making your payments.

- **Avoid paying up-front fees.** While some legitimate housing counselors will charge small fees for their services, do not pay fees to anyone before receiving any services. Make sure you are dealing with a legitimate organization.

- **Know what you are signing.** Read and understand every document you sign. Do not rely on an oral explanation of a document you are signing — make sure that you read and understand what the document actually says. Otherwise, a document may obligate you to terms you don't want or may even convey ownership of your home to someone else. Never sign documents with blank spaces that can be filled in later. Never sign a document that contains errors or false statements, even if someone promises to correct them. If a document is too complex to understand, seek advice from a lawyer you trust or a legitimate, trusted financial counselor.

- **Do not sign over your deed without consulting a lawyer you select.** Foreclosure scams often involve transfer of ownership of your home to a con artist or another third party. Never agree to this without getting the advice of your own lawyer, financial advisor, credit counselor, or other independent person you know you can trust. By signing over your deed, you lose the rights to your home and any equity built up in the home — and you are still obligated to pay the mortgage.

- **Get promises in writing.** Oral promises and agreements relating to your home are usually not legally binding. Protect your rights with a written document or contract signed by the person making the promise. Keep copies of all contracts that you sign. Again, never sign anything you don't understand.

- **Report suspicious activity to relevant federal agencies, such as the Federal Trade Commission, and to your state and local consumer protection agencies.** Reporting con artists and suspicious schemes helps prevent others from becoming victims. If your complaint or question involves a national bank and you cannot resolve it directly with the bank, contact the OCC's Customer Assistance Group by calling (800) 613-6743, by sending an e-mail to customer.assistance@occ.treas.gov, or by visiting www.HelpWithMyBank.gov.

- **Contact a legitimate housing or financial counselor to help you work through your problems.**

    - To find a counselor, contact the U.S. Department of Housing and Urban Development (HUD) at (800) 569-4287 or (877) 483-1515, or go to www.hud.gov/offices/hsg/sfh/hcc/hccprof14.cfm.

    - Call (888) 995-HOPE, the Homeowner's HOPE Hotline to reach a nonprofit, HUD-approved counselor through HOPE NOW, a cooperative effort of mortgage counselors and lenders to assist homeowners.

    - Visit NeighborWorks America's Web site at www.nw.org/network/home.asp.

- **Visit the following Web sites for further information:**

    - The OCC's consumer information site for banking-related questions: www.helpwithmybank.gov.
    - OCC Customer Assistance Group and consumer assistance site: www.occ.gov/customer.htm.
    - Federal Trade Commission: www.ftc.gov/bcp/edu/pubs/consumer/homes/rea04.shtm.
    - Federal Reserve Board: http://www.federalreserve.gov/pubs/foreclosurescamtips/default.htm.
    - NeighborWorks America: www.nw.org.
    - HOPE NOW: www.hopenow.com.

- **Apply for a government-sponsored loan modification or refinancing.** The U.S. government has developed a major loan modification and refinancing program to help homeowners find affordable loans and to save their homes.

    - Go to this Web site for information on these federal mortgage modification and refinancing programs: www.makinghomeaffordable.gov.

Ten Warning Signs of a Mortgage Modification Scam

1. **"Pay us $1,000, and we'll save your home."** Some legitimate housing counselors may charge small fees, but fees that amount to thousands of dollars are likely a sign of potential fraud — especially if they are charged up-front, before the "counselor" has done any work for you. Be wary of companies that require you to provide a cashier's check or wire transfer before they take any action on your behalf.

2. **"I guarantee I will save your home – trust me."** Beware of guarantees that a person or company can stop foreclosure and allow you to remain in your house. Unrealistic promises are a sign that the person making them will not consider your particular circumstances and is unlikely to provide services that will actually help you.

3. **"Sign over your home, and we'll let you stay in it."** Be very suspicious if someone offers to pay your mortgage and rent your home back to you in exchange for transferring title to your home. Signing over the deed to another person gives that person the power to evict you, raise your rent, or sell the house. Although you will no longer own your home, you still will be legally responsible for paying the mortgage on it.

4. **"Stop paying your mortgage."** Do not trust anyone who tells you to stop making payments to your lender and servicer, even if that person says it will be done for you.

5. **"If your lender calls, don't talk to them."** Your lender should be your first point of contact for negotiating a repayment plan, modification, or short sale. It is vital to your interests to stay in close communication with your lender and servicer, so they understand your circumstances.

6. **"Your lender never had the legal authority to make a loan."** Do not listen to anyone who claims that "secret laws" or "secret information" will be used to eliminate your debt and have your mortgage contract declared invalid. These scammers use sham legal arguments to claim that you are not obligated to pay your mortgage. These arguments don't work.

7. **"Just sign this now; we'll fill in the blanks later."** Take the time to read and understand anything you sign. Never let anyone else fill out paperwork for you. Don't let anyone pressure you into signing anything that you don't agree with or understand.

8. **"Call 1-800-Fed-Loan."** This may be a scam. Some companies trick borrowers into believing that they are affiliated with or are approved by the government or tell you that you must pay them high fees to qualify for government loan modification programs. Keep in mind that you do not have to pay to participate in legitimate government programs. All you need to do is contact your lender to find out if you qualify.

9. **"File for bankruptcy and keep your home."** Filing bankruptcy only temporarily stops foreclosure. If your mortgage payments are not made, the bankruptcy court will eventually allow your lender to foreclose on your

home. Be aware that some scammers will file bankruptcy in your name, without your knowledge, to temporarily stop foreclosure and make it seem as though they have negotiated a new payment agreement with your lender.

10. **"Why haven't you replied to our offer? Do you want to live on the streets?"** High-pressure tactics signal trouble. If someone continually contacts you and pressures you to work with them to stop foreclosure, do not work with that person. Legitimate housing counselors do not conduct business that way.

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apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.

[66 FR 34791, July 2, 2001]

§ 7.4007 Deposit-taking.

(a) *Authority of national banks.* A national bank may receive deposits and engage in any activity incidental to receiving deposits, including issuing evidence of accounts, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.

(b) *Applicability of state law.* (1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized deposit-taking powers are not applicable to national banks.

(2) A national bank may exercise its deposit-taking powers without regard to state law limitations concerning:

(i) Abandoned and dormant accounts;[3]

(ii) Checking accounts;

(iii) Disclosure requirements;

(iv) Funds availability;

(v) Savings account orders of withdrawal;

(vi) State licensing or registration requirements (except for purposes of service of process); and

(vii) Special purpose savings services;

[illegible]

(c) *State laws that are not preempted.* State laws on the following subjects are not inconsistent with the deposit-taking powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' deposit-taking powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;[5]

(4) Rights to collect debts;

(5) Acquisition and transfer of property;

(6) Taxation;

(7) Zoning; and

(8) Any other law the effect of which the OCC determines to be incidental to the deposit-taking operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

[69 FR 1916, Jan. 13, 2004]

§ 7.4008 Lending.

(a) *Authority of national banks.* A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.

(b) *Standards for loans.* A national bank shall not make a consumer loan subject to this § 7.4008 based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors.

[3] This does not apply to state laws of the type upheld by the United States Supreme Court in *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233 (1944), which obligate a national bank to "pay [deposits] to the persons entitled to demand payment according to the law of the state where it does business." *Id.* at 248–249.

[4] State laws purporting to regulate national bank fees and charges are addressed in 12 CFR 7.4002.

[5] *But see* the distinction drawn by the Supreme Court in *Easton* v. *Iowa*, 188 U.S. 220, 238 (1903) between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States." The Court stated that "[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction * * *. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States." *Id.* at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

(c) *Unfair and deceptive practices.* A national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and regulations promulgated thereunder in connection with loans made under this § 7.4008.

(d) *Applicability of state law.* (1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks.

(2) A national bank may make non-real estate loans without regard to state law limitations concerning:

(i) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(ii) The ability of a creditor to require or obtain insurance for collateral or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(iii) Loan-to-value ratios;

(iv) The terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(v) Escrow accounts, impound accounts, and similar accounts;

(vi) Security property, including leaseholds;

(vii) Access to, and use of, credit reports;

(viii) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(ix) Disbursements and repayments; and

(x) Rates of interest on loans.[6]

(e) *State laws that are not preempted.* State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;[7]

(4) Rights to collect debts;

(5) Acquisition and transfer of property;

(6) Taxation;

(7) Zoning; and

(8) Any other law the effect of which the OCC determines to be incidental to the non-real estate lending operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

[69 FR 1916, Jan. 13, 2004]

§ 7.4009 Applicability of state law to national bank operations.

(a) *Authority of national banks.* A national bank may exercise all powers authorized to it under Federal law, including conducting any activity that is part of, or incidental to, the business of banking, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any applicable Federal law.

(b) *Applicability of state law.* Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks.

(c) *Applicability of state law to particular national bank activities.* (1) The provisions of this section govern with respect to any national bank power or aspect of a national bank's operations that is not covered by another OCC regulation specifically addressing the applicability of state law.

[6] The limitations on charges that comprise rates of interest on loans by national banks are determined under Federal law. *See* 12 U.S.C. 85; 12 CFR 7.4001. State laws purporting to regulate national bank fees and charges that do not constitute interest are addressed in 12 CFR 7.4002.

[7] *See supra* note 5 regarding the distinction drawn by the Supreme Court in *Easton v. Iowa*, 188 U.S. 220, 238 (1903) between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States."

STATE BAR OF CALIFORNIA
LIMITED SCOPE LEGAL ASSISTANCE (UNBUNDLING) RESOLUTION

(Adopted by the Board of Governors of the State Bar of California at its May 15, 2009 Meeting)

Whereas, limited scope legal assistance is defined as a relationship between an attorney and a person seeking legal services in which it is agreed that the scope of the legal services will be limited to the defined tasks that the person asks the attorney to perform;

Whereas the need for legal services for all Californians continues to increase and limited scope representation can help fill that need by providing legal assistance and specific representation at critical points in the legal process;

Whereas limited scope practice has been recognized by the State Bar Board of Governors as well as by the Judicial Council through the adoption of Rules of Court and Court Forms to facilitate providing legal services;

Whereas the Standing Committee on the Delivery of Legal Services has promoted the use of limited scope legal assistance as a way to address the unmet legal need of low and moderate income Californians; they have sponsored or co-sponsored multiple trainings on Limited Scope Representation at numerous conferences and local bar associations statewide to educate State Bar members on the ethical and competent practice of Limited Scope Legal Assistance;

Whereas various segments of the legal profession can play an important role in promoting and expanding limited scope practice and State Bar members can enhance their practices by providing services on a limited scope basis;

RESOLVED that the State Bar supports the expansion of limited scope legal assistance as part of the ongoing effort to increase access to legal services; that it is important to continue to identify ways in which attorneys can appropriately provide "unbundled" legal services to provide limited and specific services to litigants without undertaking full case representation;

RESOLVED FURTHER that limited scope legal assistance must be performed with a sound understanding of the ethical obligations, and that all education programs must clearly explain that limits on the scope of legal assistance do not limit the ethical obligations of the attorney to the client nor the obligations of counsel to other parties or to the court, the attorney's exposure to liability for the work he or she agreed to perform is not limited, and that the attorney continues to have an obligation to warn a client about issues outside the scope of representation which the client should address, and for which the client should consider seeking counsel. Attorneys and clients must be thoughtful in their approach to establishing the scope of services, and an attorney should not undertake such an engagement without a careful analysis of the client's capabilities, the complexity of the case, as well as the alternatives available.

THEREFORE the following steps should be pursued:

- **State Bar Section members**, particularly the Family Law, Solo and Small Firm Practice, Business Law, Real Property and Trusts & Estates Sections, should be encouraged to develop education for their membership and to expand the use of limited scope representation in their respective practice areas, and should emphasize the benefits to their members if they offer limited scope legal assistance;

- **Law schools** should be encouraged to expand their efforts to raise awareness of limited scope legal assistance, particularly through their legal clinics, so that their students can competently incorporate it into their private practices after graduation. Law schools can also help by developing a quality teaching curriculum including the concept of limited scope representation to supplement their clinical offerings;

- **State Bar Certified Lawyer Referral Services** should be encouraged to create and expand subject matter panels to include limited scope representation in a greater number of practice areas and to provide additional training for increased participation of panel attorneys;

- **Errors and Omissions insurance carriers** should be encouraged to offer training on limited scope representation;

- **The Judicial Council** should continue to be involved with the coordination of strategies for educating the legal profession and the judiciary as to the need for and implementation of increased limited scope representation; and

- **The State Bar** should continue to coordinate with experts in the field and with legal training providers to present training programs on limited scope representation on a statewide and local basis, with programs offered live and online to maximize training opportunities and the expanded limited scope practice.

The State Bar Board of Governors will continue to review the efforts to expand the use of limited scope representation on an annual basis to further support and promote these efforts.

Law Office of
David Cameron Carr
Professional Law Corporation
3333 Camino del Rio South, Suite 215
San Diego, California 92108
(619) 696-0526 voice
(619) 696-0523 fax

January 6, 2010

Via First Class Mail and Email

Gary Almond
Director of Operations
BBB of the Southland, Inc.
315 North La Cadena
Colton California 92324

Re:

Dear Mr. Almond:

I am writing to you as Mr. s counsel on ethics matters[1]. He has forwarded a string of email messages regarding the question of whether his fee agreement is valid under California's Senate Bill 94.

BBB of the Southland, Inc., (BBB) appears to be asserting that an attorney licensed to practice law in California is not permitted to collect any fees prior to a client's loan modification being approved by the lender or mortgage servicer and may not unbundle the services in distinct stages, each requiring a separate agreement.

Mr. understands and lauds BBB's intent in helping to protect California homeowners. However, in this instance, we respectfully argue that the correct interpretation of the new statutes is that an attorney may collect fees for services performed and billed for before the loan is modified. There is understandable confusion over what the new law requires. We feel confident that upon closer examination of the facts, the Bureau will revise its position on how licensed attorneys may practice under the new law.

Senate Bill 94 ("SB 94") was passed by the state legislature and signed into law by Governor Schwarzenegger on October 12, 2009. Sen. Ron S. Calderon, Chairman of the Senate Committee on Banking Finance & Insurance, sponsored the bill.

[1] For information on me, my background and practice, please visit www.ethics-lawyer.com.

Eileen Newhall, Staff Director to the Senate Banking Finance & Insurance Committee, drafted SB 94. Ms. Newhall's role is to analyze and draft mortgage and other financial services legislation, staff legislation for the Chair of the Committee, plan and direct informational hearings, and respond to questions from legislators, members of the public, and the press about matters before the Committee.

Eileen Newhall had a conversation with Martin Andelman, a noted blogger and consultant on loan modification issues[2], on October 1, 2009. Mr. Andelman specifically raised the issue and Ms. Newhall stated specifically that she sees no issue with an attorney breaking up the services related to obtaining a loan modification under the new law. She stated that it was the Committee's intent to allow attorneys to break up their services and be paid on a piecemeal basis as they are completed. In fact, she thought this a good idea, as it would allow a homeowner to take over at any point in the process should they become disenchanted with their attorney.

The new law applies to both real estate licensees, who are licensed and regulated by the California Department of Real Estate, and attorneys practicing law in California, who are licensed and fall under the jurisdiction of the California State Bar Association.

For attorneys, SB 94 establishes one new section of the California Business & Professions Code, and two new sections of the California Civil Code.

New California Bus. & Prof. Code section 6106.3 merely contains the enabling language that allows the California State Bar to discipline lawyers for violations of the two new civil code sections discussed below.

New Civil Code section 2944.6 contains language stating that an attorney must provide a written notice in 14-point bold type, prior to entering into any fee agreement with the borrower that begins:

> IT IS NOT NECESSARY TO PAY A THIRD PARTY TO ARRANGE FOR A LOAN MODIFICATION OR OTHER FORM OF FORBEARANCE FROM YOUR MORTGAGE LENDER OR SERVICER.

Mr. r has added this language to his fee agreement.

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[2] Mandelman Matters (http://mandelman.ml-implode.com/)

New Civil Code 2944.7 contains the operative language related to the timing of payment for services rendered in conjunction with the attempt by a licensed attorney to obtain a loan modification. This section states that you cannot: claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.

For real estate licensees, the new law establishes one new section of the California Business & Professions Code, and amends one section of the Code. It is important to note that these sections are in division 4 of the Business and Professions Code which applies only to real estate licensees and not to attorneys. Bus. & Prof. Code section 100116 defines "licensee" as "a person, whether broker or salesman, licensed under any of the provisions of this part."

New Bus. & Prof. Code section 10085.6 duplicates for real estate licensees the language found in the new Civil Code section 2944.7, which also applies to licensed attorneys through new Bus. & Prof. Code section 6106.3. They may not 'claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform."

But SB 94 also enacted amended Bus. & Prof. Code section 10026 - a section that is applicable only to real estate licensees. This language modifies the definition of advance fee for real estate licensees and specifically prohibits "licensees" from breaking up the services related to a loan modification.

Most significantly, the Legislature could have chosen to impose the same restrictions on attorneys in SB 94 as real estate licensees but chose not to. Instead the Legislature passed a different bill on the same subject, AB 764. AB 764 would have imposed the same restrictions on lawyers against collecting any fees unless the modification effort was successful.

In Sen. Calderon's own words, as quoted from his editorial published by the Sacramento Bee just prior to the bill being passed by the legislature:

"The primary way in which the two bills differ involves the circumstances under which fee-for-service providers of foreclosure-avoidance assistance may be paid. Under SB 94, a fee-for-service provider may not collect a fee or other compensation until after he or she fully performs each and every service the provider contracts to perform. Under AB 764, that same fee-for-service provider may not obtain payment until and unless a loan modification is obtained."

Governor Schwarzenegger vetoed the Assembly Bill and signed the Senate Bill. His written explanation for choosing the approach found in SB 94 over the other follows:

> To the Members of the California State Assembly:
>
> I am returning Assembly Bill 764 without my signature.
>
> Although I support the prohibition of individuals charging advance fees for mortgage loan modifications, I do not agree with the provision of this bill that will only allow fees to be collected if a modification is successful.
>
> This could adversely affect legitimate businesses that provide loan modification services. As such, I am signing SB 94 that accomplishes this prohibition against advance fees without unnecessarily harming legitimate companies.
>
> For these reasons, I am unable to sign this bill.

The intent of the Legislature and the Governor was not to put legitimate firms out of business, rather it was to ensure that homeowners are only changed for work that has legitimately been done in service of the clients' goal to modify their mortgage. Attorneys cannot guarantee the outcome of legal representation and the banks have not made it easy for individuals seeking to modify their loan obligations, whether they are represented by attorneys or not. Staking all of the attorney's fees on the successful loan modifications will lead to no attorneys willing to even make the effort. This is an access to justice issue clearly recognized by the Governor when he vetoed AB 764.

Allowing consumers to pay for legal services in discrete "unbundled" increments serves the interests of clients and attorneys. Chief Justice Ronald George recently co-authorized an op-ed article in the New York Times praising unbundled practice as allowing "lawyers — especially sole practitioners — to service people who might otherwise have never sought legal assistance.[3]"

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[3] Broderick and George "A Nation of Do-It-Yourself Lawyers" *New York Times* 1/1/10.)

It is unfortunate that people who are stuck with a mortgage that they cannot pay sometimes have to hire a lawyer to even get their lender to talk to them. It is sad that government programs intended to help people in that position don't seem to be making a dent in the problem. Our system relies on private lawyers to fight for our rights and private lawyers must be able to generate a profit to keep providing services, even as automation and proper utilization of staff can keep costs to a minimum. Part of that process involves reducing needless duplication. For that reason, Mr. . has one written agreement setting forth the services that each can contract for. Each service is a separate and independent legal contract, even though they are contained on the same document.

Mr. is committed to give his clients a fighting chance in dealing with their mortgage lenders. He is doing this while keeping the costs to the clients as low as possible and operating in a scrupulously ethical matter. That is the reason he hired me as his ethics counsel. There is nothing unethical about a lawyer collecting fees for work performed before the loan is successfully modified and nothing unethical about a lawyer breaking all the work that might be done to obtain a loan modification into separate stages and collecting fees for work done after each stage.

The BBB should continue to give Mr. its seal of approval.

Please telephone me if you wish discuss.

Verv Trulv Yours.

David Cameron Carr

cc:

Martin Andelman

First National
Acceptance Company

January 19, 2010

Dear Mr. & Mrs. ʻ

Property Address: ene Dr.
MS.

Account No.:

We recently received notice from 1st. American Law Center, a third party that you have given limited power of attorney and/or authorization concerning your loan, account number including the ability to negotiate loan terms and review information regarding the account.

This letter is being sent to alert you of several scams and frauds being perpetrated by third parties that prey on those that are struggling to stay current on their mortgage loan. We have incidents in which our customers have lost thousands of dollars because they believed, based upon assurances given by the third party, that the third party was able to negotiate a better rate of interest, reduce their monthly payment, and perhaps even reduce their mortgage balance.

These schemes to defraud have common approaches and include, but are not limited to the following:

- **Forwarding copies of documents signed by our customer, giving authorization for us to discuss your account with them;**
- **Requests for loan documents which they are not entitled to;**
- **False implication that their request for the information meets the definition of a "qualified written request," or "forensic Document Request," a request mandating a response or action by the creditor;**
- Other evidence that they have been in contact with you, such as the provision of your name, account number and invoice.

This is not to say that 1st. American Law Center is out to defraud you, however, please be aware that the possibility exists. To help you decide if that is the case, please review the warning signs below. They have been identified by the Federal Trade Commission and communicated to us by our regulatory supervisor, the Office of the Comptroller of the Currency.

When a homeowner has hired a third party, perhaps advertised as or alleged to be a "foreclosure specialist" or "mortgage specialist," to help him/her avoid foreclosure or help renegotiate the terms of his/her mortgage with the lender, it may be suspicious if the third party did one or more of the following:

- Charged up-front fees for foreclosure rescue or loan modification services;
- Accepted up-front payment only by official check, cashier's check or wire transfer;
- Used aggressive tactics to seek out the homeowner by telephone, e-mail, mail or in person;
- Pressured the homeowner to sign paperwork he/she didn't have an opportunity to read thoroughly or that he/she didn't understand;
- Guaranteed to save the home from foreclosure or stop the foreclosure process "no matter what;"
- Claimed the process will be quick with relatively little information and paperwork required from the homeowner;
- Offered to buy the house and then rent it back to the homeowner;
- Falsely claimed to be affiliated with the government. (Perpetrators of scams often use names or symbols that mimic federal and state programs or falsely suggest that they offer legal services or are affiliated with an attorney or law firm); or
- **Instructed the homeowner not to contact or speak with the lender, a lawyer or financial counselor.**
- **Informed the homeowner to not make payment on the loan or to forward payment to them as a means to leverage negotiations with the lender.**

We hope you have not paid or been charged any up-front fees, have been told to withhold payment on your loan or to re-direct payments to this third party, have been misled that we are obligated to modify your loan, or promised other financial benefits that cannot be delivered.

Please be advised that at this point we do not intend to release any information to 1st. American Law Center, or to enter into any negotiations with them.

If you need any further assistance, please contact me Monday through Friday, 8:00 a.m. to 5:00 p.m. Eastern Standard Time at (517) 333-7 or the Credit Services Department, through Friday, 8:00 a.m. to 9:00 p.m. at 1-800-642-

Sincerely,
First National Acceptance Company