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FTC COMMENT
March 25, 2010

Federal Trade Commission, Office of the Secretary
Attention: Evan Zullow
Room H-135, Annex W
600 Pennsylvania Avenue, NW
Washington DC 20580
Uploaded to: http://public.commentworks.com/ftc/MARS-NPRM

Dear Mr. Zullow,

I am a responsible and conscientious attorney. I have malpractice insurance to protect my clients in case I make mistakes that cause them harm. I am also subject to the Washington Bar Association and the Washington Supreme Court, and I practice law always with the thought in mind that if I fail to behave ethically and fairly towards my clients I can be disciplined and ordered to refund fees.

This is not enough for the Federal Trade Commission, which proposes to regulate the relationship between attorney and client, which up until now has been the jurisdiction of state bar associations and state supreme courts.

The FTC proposes to prohibit any attorney in the United States from receiving advance payment for certain kinds of legal work, specifically mortgage modifications, previously referred to as "workouts."

I am sending copies of this letter to various people, so for their orientation I will include some preliminary comments although you are already well aware of them. I am also including your phone number so they can call you: 202-326-2914. Interested parties may post comments at: http://public.commentworks.com/ftc/MARS-NPRM. Comments already submitted may be reviewed at: http://www.ftc.gov/os/comments/mars-nprm/index.shtm.

To make it convenient to follow links in this letter, it is posted on my web site at http://mortgage-modification-attorney.com/FTC.

The proposed regulations are at 16 CFR Part 322. To read them, click on: http://www.ftc.gov/os/2010/02/100204marsfrn.pdf and go directly to page 116 ff. where the actual proposed regulations begin.

See: http://www.ftc.gov/opa/2010/02/mars.shtm for a summary of the proposed regulations.

California passed a law forbidding all up-front fees on mortgage modifications, including fees paid to attorneys. For the full text of the California law, see http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0051-0100/sb_94_bill_20091011_chaptered.html.

There is no other area of law practice I know of where federal law prohibits an attorney from accepting a retainer fee from a client.

> The new regulations would regulate "any person who provides … mortgage assistance relief service [MARS]." Such person is a "mortgage assistance relief [MARS] provider." P. 121.

"Mortgage Assistance Relief Service [MARS]" includes:

(1) Negotiating, obtaining, or arranging a modification of any term of a dwelling loan, including a reduction in the amount of interest, principal balance, monthly payments, or fees;

(2) Stopping, preventing, or postponing any (i) mortgage or deed of trust foreclosure sale for a dwelling or (ii) repossession of the consumer's welling, or otherwise save the consumer's dwelling from foreclosure or repossession;

(3) Obtaining any forbearance or modification in the timing of payments from any dwelling loan holder or servicer on any dwelling loan;

(4) Negotiating, obtaining, or arranging any extension of the period of time within which the consumer may
   (i) cure his or her default on a dwelling loan,
   (ii) reinstate his or her dwelling loan,
   (iii) redeem a dwelling, or (iv) exercise any right to reinstate a dwelling loan or redeem a dwelling;

(5) Obtaining any waiver of an acceleration clause or balloon payment contained in any promissory note or contract secured by any dwelling; or

(6) Negotiating, obtaining, or arranging
   (i) a short sale of a dwelling,

(ii) a deed-in-lieu of foreclosure,
(iii) or any other disposition of a dwelling other than a sale to a third party that is not the dwelling loan holder. Page 120.

The attorney (or other MARS provider) must disclose in writing to the client:

> [This law office] "is a for-profit business not associated with the government. … This offer has not been approved by the government or your lender. … Even if you buy our service, your lender may not agree to change your loan." Page 124.

It is clear that these regulations apply to attorneys because there are limited exemptions spelled out for attorneys. For example, §322.7 says an attorney is exempt from §322.3(a), which prohibits MARS providers from advising a borrower that he should not "contact or communicate with his or her lender or servicer." Page 123.

Likewise, §322.7 specifically allows an attorney to collect advance payment if he is filing a bankruptcy petition or any other document as part of a court or administrative proceeding. Page 126.

However, if no lawsuit or no bankruptcy petition is being filed, then according to §322.5, an attorney (or any MARS provider) may not collect any payment unless he has:

(1) achieved all of the results

(i) the provider represented, expressly or by implication, to the consumer that the service would achieve, and
(ii) that are consistent with consumers' reasonable expectations about the service; and

(2) provided the consumer with documentation of such achieved results. Pages 124-125.

When the goal is to modify a mortgage, the attorney (or any MARS provider) may not be paid until he has "obtained a mortgage loan modification for the consumer." Modification is defined as:

(1) the contractual change to one or more terms of an existing dwelling loan between the consumer and the owner of such debt that substantially reduces the consumer's scheduled periodic payments, where the change is

(i) permanent for a period of five years or more; or

(ii) will become permanent for a period of five years or more once the consumer successfully completes a trial period of three months or less. Page 125.

Thus, except when an attorney files suit or bankruptcy, he is prohibited from collecting a retainer if he is performing any of a wide range of workout services which have been practiced by attorneys for thousands of years.

If the attorney obtains a workout that greatly reduces a borrower's interest rate or monthly payment but is effective for a period shorter than five years, the attorney (or any MARS provider) may collect no fee whatsoever.

Lenders have been violating the letter and the spirit of the Making Home Affordable guidelines, but it is the attorneys who will suffer the financial penalty for the lenders' violations by not being paid. See the Making Home Affordable guidelines at http://www.ustreas.gov/press/releases/reports/modification_program_guidelines.pdf.

This new FTC regulation would only apply to one to four unit residences. If a client owns a single-family rental home or duplex or triplex or four-plex, his attorney cannot accept the client's advance retainer fee. The attorney must bill the client after the work is done and hope the client pays. However, if the client owns a 5-plex or an apartment building or a skyscraper, the client can pay the attorney an advance retainer.

The practical effect of this is that attorneys will not be willing to work for clients needing these services, and people who need legal services will not be able to obtain them. And that is because they will not be able to convince the lawyer to do the work without payment in advance.

Why am I unwilling to work for clients who do not pay me at least a substantial part of my fee in advance? Abraham Lincoln was asked the same question, and his response was: So the attorney will know he has a client and so the client will know he has an attorney. I do not really know that my client wants me to work on his file until he pays me. I am required by my ethical standards and my bar association to be committed to the client, but the client is not governed by any regulatory body that obligates him to pay me.

Many clients who need mortgage modification are on the verge of bankruptcy. Sometimes I advise them to file bankruptcy. When they file bankruptcy, they are discharged from their debts, including their debts to me. Even if they do not file bankruptcy, they might still refuse to pay for work done well. I am not interested in chasing clients who fail to pay. It is usually a waste of time and money.

Further, lenders generally do their best to circumvent me. They call and write directly to clients. They act as if I do not exist. Many lenders actively discourage clients from working with "third-party providers." Chase has such discouragement on its recorded hold message.

I have had situations where I was not paid in advance, where I did excellent work for the client, where the lender granted modification to the client without informing me, where the client accepted the modification without telling me, and where the client conveniently forgot to pay me.

I work my heart out for my clients. I am not interested in working my heart out for clients who do not pay me.

Most of the clients who hire me to work on modifying their loans have tried doing it themselves and have given up. Some have been declined modifications, some several times. In most cases I have been able to reformulate their proposal and push their modifications through. Lenders are notorious for “losing papers.” They often send out decline notices without explaining exactly what is wrong with a borrower’s package. Sometimes some minor adjustment is all that is needed to push a package through. Some lenders delay approval for months. I have Bank of America workout proposals which are now nearly a year old. My clients just keep paying monthly trial payments. It is part of my job to identify and keep track of lender violations of the law for use as leverage in negotiation or if litigation is necessary.

I should explain my theory of how this twisted situation arose. Starting in 2007 the real estate market declined sharply. Loan officers and real estate agents were closing few deals. They needed a new source of income. So mortgage brokers everywhere and real estate agents in California (where real estate agents and mortgage brokers receive the same license) got involved in mortgage modification. They collected large advance fees. They took their cut and referred the business to others who would do the actual work.

Some non-attorney modification companies claimed to have attorneys on staff or available to review the work or to negotiate with lenders. A few lawyers

“rented” their names to non-attorney MARS providers while providing little service.

Whether these outfits intended not to complete the mortgage modifications, I do not know. I assume that they learned quickly that mortgage modification is neither simple nor quick. I assume that many ran out of capital and closed up shop.

My own experience here is relevant. I had numerous non-attorney modification companies ask me to serve as their lawyer and accept a flat fee on each file. I would get this money and do little or no work for it. In some cases I would take in the advance fee and then disbursing a share to the loan officer producing the deal and a share to the company actually doing the work. Or I would be collecting the advance fee and then holding all or part of it in my trust account until the modification was completed. I declined to get involved in such arrangements.

This is an important point: The big programs that took a lot of money from a lot of people and then did not deliver modification services for the most part were started and run by real estate agents and loan officers, not by attorneys. For the most part, the attorneys just got sucked in.

A real estate agent can write a purchase and sale agreement, provided the agreement can be written on routine fill-in-the-blank forms. A loan officer can negotiate the origination of a mortgage on standard documents which are closely monitored under RESPA.

However, the renegotiating a mortgage, after it is in place, is a far different matter. Mortgage modification is not real estate sales. Nor is it mortgage loan origination. Doing mortgage workouts is the practice of law. It involves studying the laws pertaining to modification and interpreting them. It involves advising clients regarding whether they should file bankruptcy and under what chapter they should file. It involves counseling clients about foreclosure timelines and deficiency judgments, and how to handle second mortgages, credit card debts, and car loans. When the final workout agreement is presented by the lender, the agreement needs to be reviewed for any adverse provisions.

Non-attorney modifiers spend a lot of their time saying, "Well I can't answer that question. You need to talk with an attorney." The entire field bristles with legal issues, so why are real estate agents and loan officers trying to do the work? Lawyers should be the ones doing the workouts.

Attorneys have been negotiating mortgage workouts for centuries. To prohibit attorneys from charging advance fees is the same as prohibiting attorneys from doing workouts.

The situation here in Washington is instructive. On April 10, 2009, Deborah Bortner, Director, Division of Consumer Services of the Washington DFI, assisted by attorney Cindy Fosia, posed the following question: "Must loan modification service providers be licensed in Washington to offer services to Washington residents involving their Washington real property?"

Her answer was this:

> Yes, companies and individuals offering loan modification services to Washington residents involving their Washington real property must be licensed under the Mortgage Broker Practices Act (MBPA), chapter 19.146 RCW, or Consumer Loan Act (CLA), chapter 31.04 RCW, unless otherwise exempt under the language of those Acts. …
>
> It is the Director's position that individuals and companies taking the borrower's name, monthly income, Social Security number, property address, estimate of the value of the property, and any other information deemed necessary to provide a loan modification or negotiating residential mortgage loan terms are acting as mortgage brokers or loan originators and must be licensed under the MBPA or CLA unless specifically exempt from those Acts.
>
> Attorneys who represent Washington residents in matters involving real property in Washington must be licensed to practice law in Washington. Additionally, the attorney exemption from the MBPA is limited. The exemption applies only to attorneys licensed in Washington "not principally engaged in the business of negotiating residential mortgage loans." Finally, a company that hires or is hired by an attorney does not itself avoid the requirement for licensing if providing loan modification services.
>
> http://www.dfi.wa.gov/cs/interpretive_statements/mortgage/IS-2009-01.pdf

The Washington DFI purports to regulate the practice of law in the field of mortgage workouts. The DFI seems to believe it is running its own little bar association. Further, the Washington DFI appears to be authorizing and regulating the practice of law by non-attorney loan officers.

I have discussed the Washington rule to illustrate just how this issue has become so confused. Mortgage brokers and loan officers started offering mortgage modification services. The DFI decided that such work was sufficiently similar to originating mortgages that mortgage brokers and loan officers could do the work. The next step was to rule that an attorney could not do mortgage workouts unless he obtained a loan officer license or did only incidential mortgage modification work.

My point is that some how the regulators have gotten way out on a limb, here in Washington, in California, and now on the federal level.

I offer the following recommendations:

Regarding the proposed FTC rule, attorneys should be exempt. Attorneys are well regulated by their bar associations.

Regarding non-attorneys who are doing loan modifications, to the extent their work involves the practice of law, they should be required to stop.

Trial modifications should be eliminated. If a borrower qualifies, the borrower should be given a final modification immediately.

Managing short sales is another matter, and my comments on this point are more tentative. Real estate agents would seem to be capable of providing such services. Real estate agents customarily get paid only after their work is done. A short sale is fundamentally different from a mortgage modification: In a short sale the loan is satisfied and not renegotiated. However, in some cases lenders demand that borrowers sign a promissory note and agree to pay a part of the short sale balance at a later date. Regarding such provisions, real estate agents should be required to advise their clients to seek legal counsel.

There appear to be legitimate paralegal groups that provide modification support services for attorneys. They do not solicit “retail” modification work directly from consumers. They solicit “back end” work from attorneys and offer to provide only “wholesale” services such as computerization of the system and interfacing with lenders. These wholesale modification companies are typically composed of experienced mortgage professionals and underwriters and would seem to have worthwhile services to offer a law office.

Lenders should be required to communicate with a borrower’s attorney and send documents to him if a borrower requests that. Lender loss mitigation departments presumably have attorneys who are ultimately responsible for operation of the department, and so they should be subject to the attorney rule

that requires that they communicate with a client's attorney if the borrower has one. As mentioned above, loss mitigation departments often do their best to cut a borrower's attorney out of the loop.

Lenders are very hard to communicate with. Except for Bank of America, none communicates by e-mail. Rarely will lenders appoint a specific contact person to work with. Faxes go to a general fax pool, and lender representatives cannot respond to them until they are uploaded to the system.

Lenders cannot be trusted to deal fairly with borrowers when a foreclosure date is approaching. The Making Home Affordable guidelines say:

> Any foreclosure action will be temporarily suspended during the trial period, or while borrowers are considered for alternative foreclosure prevention options. In the event that the Home Affordable Modification or alternative foreclosure prevention options fail, the foreclosure action may be resumed. Page 3.
> http://www.ustreas.gov/press/releases/reports/modification_program_guidelines.pdf
>
> If the NPV Test result is negative and a Home Affordable Modification is not pursued, the lender/investor must seek other foreclosure prevention alternatives, including alternative modification programs, deed-in-lieu and short sale programs. Page 6.

Despite these provisions, lenders sometimes foreclose while a modification is under consideration. They also sometimes foreclose even if a modification has been approved. Further, if a modification is denied, they will proceed with foreclosure without giving the borrower notice that the modification has been denied. This can be a problem when a foreclosure is only a few days away. I believe the source of this problem is that the investor/owner of the loan retains the foreclosure decision, and the servicer has no power to delay or cancel a foreclosure. There is a lack of communication between investor and servicer.

Also, the Making Home Affordable guidelines should be made mandatory for lenders and servicers and not optional as they are now.

Thus, any regulations enacted should include regulations pertaining to lender and servicer behavior.

Finally, it is my observation that few attorneys are aware that this proposed regulation is pending. Therefore, the comment period for this important new regulation should be expended to allow the Washington State Bar Association

and other bar associations and individual attorneys to consider it and submit comments.

To make it easy for the reader to follow links in this comment, I have posted this letter at http://mortgage-modification-attorney.com/FTC.

Sincerely,

James Robert Deal, Attorney

Copies to:

Senator John D. Rockefeller, Chair of Commiteee on Commerce, Science, and Transportation, sent by fax to: 202-224-7665

Senator Mark Prior, Chair of Consumer Protection, Product Safety, and Insurance Subcommittee of Committee on Commerce, Science, and Transportation, sent by fax to: 202-228-0908

Representative Henry Waxman, Chair of the House Energy and Commerce Committee, sent by fax to: 202-225-4099

Representative Bobby Rush, Chair of Subcommittee on Commerce, Trade, and Consumer Protection, sent by fax to: 202-226-0333

Senator Patty Murray, sent by fax to: 212-224-0238

Senator Maria Cantwell, sent by fax to: 202-228-0514

Representative Brian Baird, sent by fax to: 202-225-3478

Representative Norm Dicks, sent by fax to: 202-226-1176

Representative Doc Hastings, sent by fax to: 202-225-3251

Representative Norm Dicks, sent by fax to: 202-226-1606

Representative Rick Larsen, sent by fax to: 202-225-4420

Representative Jim McDermott, sent by fax to: 202-225-6197

Representative Cathy McMorris Rodgers, sent by fax to: 202-225-3392

Representative Dave Reichert, sent by fax to: 202-225-4282

Representative Adam Smith, sent by fax to: 202-225-5893