

Legal Waivers Harm Homeowners:
Federal Foreclosure Reviews Should Protect Consumer Rights

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To date, the question of whether a servicer can require that a homeowner waive legal rights in order to receive compensation from the foreclosure reviews has been left for the servicers themselves to decide. Homeowners would be affirmatively harmed if servicers were permitted to require homeowners to waive their rights in exchange for compensation. The Federal Reserve Board and the OCC must require servicers to forego waivers as part of the compensation process.

1. Servicer waivers are broad and eliminate a homeowner's ability to save the home later when unrelated claims or future conduct cause a foreclosure.

Servicers have routinely sought to extract overbearing waivers from homeowners in exchange for routine loan modifications or even for the promise of a review for a loan modification. *See, e.g., Preserving Homeownership: Progress Needed to Prevent Foreclosures : Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs, 111th Cong. 22 (2009)* (written testimony of Diane E. Thompson, Of Counsel, Nat'l Consumer Law Center). A typical waiver from a loan modification offer, such as the one below, requires a homeowner to waive all legal rights, past and future.

You agree to release and discharge Bank of America, and all of its investors, employees and related companies, from any and all claims you have or may have against them concerning the Loan. Although California law . . . provides that "[a] general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with debtor," you agree to waive that provision, or any similar provision under other state or federal laws, so that this release shall include all and any claim whatsoever of every nature concerning the Loan, regardless of whether you know about or suspect such claims including but not limited to, claims arising under the following federal acts, and their rules and implementing regulations: [ECOA HMDA, EFTA, TILA, RESPA, FCRA, FHA and FDCA].

Servicers, left to their own devices, will likely choose to impose the most expansive waiver possible, viewing this as a profit-maximizing move that makes good business sense.

2. Most homeowners will not have a trusted advisor at the end of the process to help determine whether a waiver is a worthwhile tradeoff for compensation.

At the end of the day, most homeowners will not have an attorney or housing counselor to help assess the adequacy of the remedy. It is well documented that housing counseling agencies and legal services offices face severe cuts and already are beyond capacity. Most homeowners who receive offers of compensation from the foreclosure reviews will face any final decisions on their own, without the ability to weigh the remedy against any waiver of legal rights.

3. Preservation of claims will not result in significant litigation risk.

The notion that the servicers face significant litigation risk without legal waiver is unfounded. As noted above, legal assistance is unavailable to most homeowners. In 2010, while there were approximately 1.4 million foreclosures initiated, there were only 660 rescission cases under the Truth in Lending Act. In addition, class action litigation in this area is extremely limited. The individualized nature of servicing abuses combined with recent jurisprudence on class action litigation create significant hurdles for class litigation. Finally, where compensation is provided, a homeowner will be prevented by ordinary judicial conventions from recovering again for the same harm—even without a waiver. The important difference is that a waiver would likely prevent the homeowner from recovering for *any* harm and *any* wrong, even harms for which no compensation is provided.

4. Even a waiver limited to past servicing behavior will harm homeowners.

The review process does not ensure that each homeowner offered compensation has received a thorough analysis of financial harm. Whether or not the definitions of harm are expanded from the 22 scenarios listed, the claim form provides many fewer examples of harm. Although some homeowners will be reviewed for all eligible types of financial harm, homeowners who choose to identify specific types of harm rather than provide a general narrative, are likely to omit key aspects of their situation due to the technical nature of the servicing problems, and thus will not be reviewed for all eligible types of harm. For example, most homeowners will not know if their payments were applied correctly or if their fees were charged properly. Thus, even a waiver that only applies to conduct covered by the reviews would result in some homeowners losing claims that were not reviewed and that could contribute later to a foreclosure.

5. Allowing servicers to obtain waivers rewards misconduct.

Servicers providing HAMP modifications are prohibited by the Treasury Department from extracting legal waivers from homeowners. Yet, unless the FRB and the OCC adopt a similar rule, servicers who committed misconduct in implementing HAMP or in other foreclosure processes will be able to obtain just such a waiver. This outcome defies logic and undermines the sensible safeguards enacted under HAMP. A servicer who follows the rules should not be able to obtain less legal insulation than one who failed to properly administer foreclosures.

6. The waiver language in the U.S. Department of Justice's Saxon case is not a model for the foreclosure reviews.

The language regarding waiver in DOJ's Saxon case on SCRA issues provides that a homeowner will be required to sign the following:

In consideration for the parties' agreement to the terms of the Consent Order entered in United States v. Saxon Mortgage Services, Inc., et al., (N.D. Tex.), and Saxon's payment to me of \$ -----, pursuant to the Consent Order, I hereby release and forever discharge all claims arising prior to the entrance of this Order related to the facts at issue in the litigation referenced above and related to the alleged violations of Section

533(c) of the Servicemembers Civil Relief Act, that I may have against Saxon, subsidiaries, and affiliates, and all of its past and present directors, officers, agents, managers, supervisors, shareholders and employees and their heirs, executors, administrators, successors or assigns.

There are two significant differences between this settlement and the foreclosure reviews. First, this release is very narrowly tailored to the specific claim addressed by DOJ's Complaint. In the foreclosure review process, however, there is no specific set of legal claims being addressed. There are a number of potential federal and state statutory claims and state common law claims (as well as foreclosure defenses) available to borrowers who have been wronged by servicers, many of which may address conduct not addressed by the reviews.

Second, in its settlement, the DOJ viewed the remedy amount as addressing the full value of all possible damages the borrower suffered. The foreclosure reviews suffer from several weaknesses precluding a full review, including a complex application form which misdirects homeowners to a narrow set of harms and a broader list of harms that nevertheless omits key types of harm suffered by homeowners.

It is important to note that the recent DOJ Countrywide fair lending settlement also contemplates a very narrow release focused only on enumerated claims asserted by the DOJ in its complaint and only those that accrued prior to the settlement.

Finally, the foreclosure reviews just as closely resemble several actions by the state Attorneys General in which no consumer waivers were permitted. These matters include settlements against Countrywide, Ameriquest and Household.

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