

October 18, 2010

To the Multistate Group Engaged in Inquiries of Mortgage Servicer Improprieties:

The undersigned organizations, some of whom are a part of the Americans for Financial Reform coalition and others who are legal aid or community housing programs, commend your efforts to investigate and address the improper activities by mortgage servicers in the foreclosure process. We urge you to ensure that any resolution results in real protections for homeowners seeking to avoid losing their homes to foreclosure.

Most of the recent public attention to the foreclosure crisis has focused on the issues affecting the chain of title for proving ownership of the loans and the extent to which servicers have misrepresented themselves in sworn affidavits to the courts. Your work will obviously be essential to ensure that in the future: (1) foreclosures are only brought by representatives of the true, legal owners of the loans with the right to foreclose under the security instruments; and (2) that servicers' statements to the foreclosure courts are true. However, we encourage you to view this paperwork crisis as indicative of a much more critical problem that impacts millions of homeowners facing foreclosure:

For years, housing counselors and advocates nationwide have documented a pattern of fraudulent and abusive practices by mortgage servicers whose staff are trained for collection activities rather than loss mitigation, whose infrastructure cannot handle the volume and intensity of demand, and whose business records are a mess. Servicers falsify court documents not just to save time and money, but because they simply have not kept the accurate records of ownership, payments and escrow accounts that would enable them to proceed legally. The robo-signing is not the entire problem – it's just the smoking gun.

Evaluations of servicers' records reveal that servicers *routinely* engage in practices that speed homeowners into foreclosure, including wrongfully:

- padding of fees, such as late fees, broker-price opinions, inspection fees, attorney's fees, and other fees;¹
- misapplying payments such that the homeowner's payments for principal and interest due on the loan are improperly applied to the servicer's fees, improperly causing the loan to be considered to be in default;²
- improper assessment of force-placed insurance, with premiums of two to four times the cost of standard homeowners' insurance, which in turn cause servicers to collect these premiums before applying the payments to principal and interest, precipitating foreclosure on otherwise up-to-date loans.³

These and other default-causing behaviors make it increasingly difficult for homeowners to avoid default, rectify real problems, and avoid foreclosure. There are hundreds of litigated and reported cases from every district in the country detailing sloppy, unethical and illegal loan servicing practices.⁴ And these are only the tip of the iceberg – for each reported case, there are hundreds of unreported cases, and for each litigated case, there are tens of thousands of unlitigated cases of homeowners who were unable to find an attorney.⁵

These behaviors by servicers have been so egregious and rampant that, on occasion, courts have painstakingly detailed the *standard* practices of servicers which routinely overcharge homeowners and push them into avoidable foreclosures.⁶

This complete disregard for the homeowner is characteristic of how servicers engage in loss mitigation. Servicers have strong financial incentives to push people into foreclosure, and avoid loan modifications.⁷ As a result, servicer non-compliance with HAMP is standard behavior and is well documented,⁸ and homeowners who qualify for loan modifications are routinely losing their homes to foreclosure.⁹

As you move through the process of addressing the ownership, title and other issues relating to robo-signing, you have the opportunity to require servicers to make meaningful changes so that foreclosures will truly be the last

and most appropriate resort. **We ask that your investigation include loss mitigation issues, and that any litigation or settlement includes resolution of these issues. Investigating agencies should demand discovery or loan sampling to review the extent to which existing loss mitigation obligations – under HAMP, FHA, GSE rules or private pooling and servicing agreements – have been met, as well as the extent to which amounts owed by homeowners were routinely miscalculated by servicers.**

Moreover, three meaningful policy changes to apply to the foreclosure process would go a considerable way toward ensuring that servicers curb abusive practices and comply with their obligations to engage in loan modifications analyses prior to foreclosure referral:

- The servicer's failure to comply with HAMP (or other loss modification procedures that are required of the servicer by GSE guidelines or state or federal law) should be a defense to a foreclosure.
- The loan modification protocol should emphasize principal reduction at least to the value of the home and sustainable terms for the life of the loan.
- In a nonjudicial foreclosure state – states in which the foreclosure takes place without the involvement or supervision of any court – homeowners are unable to raise defenses (even when they are not in default, or have been unjustly denied a HAMP loan modification) *unless* they have an attorney, who files an affirmative action in court, requests an injunction to stop the foreclosure, posts a bond (often thousands of dollars), and persuades a judge to enjoin the foreclosures. To address this, once a homeowner denies that a default has occurred, the servicer should be required to pursue the foreclosure through the courts. This will ensure at least some review of the homeowner's defenses and the servicer's claims.

Thank you for your concern for homeowners.

Americans for Financial Reform
Center for Digital Democracy
Center for Responsible Lending
Consumer Action
Consumers Union
National Association of Consumer Advocates
The National Association of Consumer Bankruptcy Attorneys (NACBA)
National Consumer Law Center
National Fair Housing Alliance
National Peoples Action
National Legal Aid & Defender Association
PICO National Network
Public Citizen
Center for Fair Housing of Mobile, **Alabama**
California Reinvestment Coalition of San Francisco, **California**
Fair Housing of Marin, **California**
Connecticut Fair Housing Center of Hartford, **Connecticut**
Jacksonville Area Legal Aid, Inc. of Jacksonville, **Florida**
Legal Aid of Manasota, Inc. of Sarasota, **Florida**
Illinois People's Action
Legal Assistance Foundation of Metropolitan Chicago, **Illinois**
Legal Aid of the Bluegrass of Covington, **Kentucky**
Appalachian Research and Defense Fund of **Kentucky**
Massachusetts Communities Action Network
UAW Legal Services Plan of Detroit, **Michigan**
The Foreclosure Relief Law Project of St. Paul, **Minnesota**
Mississippi Center for Justice of Jackson, **Mississippi**

Grass Roots Organizing of **Missouri**
Legal Services of **New Jersey**
Empire Justice Center of Albany, **New York**
Neighborhood Economic Development Advocacy Project (NEDAP) of New York, **New York**
People United for Sustainable Housing of Buffalo, **New York**
Fair Housing Justice Center, Inc. of New York, **New York**
Staten Island Legal Services of **New York**
Financial Protection Law Center of Wilmington, **North Carolina**
North Carolina Justice Center of Raleigh, **North Carolina**
Miami Valley Fair Housing Center, Inc. of Dayton, **Ohio**
Ohio Association for Justice
Housing Research & Advocacy Center of Cleveland, **Ohio**
Southeastern Ohio Legal Services of Athens, **Ohio**
Advocates for Basic Legal Equality of Dayton, **Ohio**
Western States Center of Portland, **Oregon**
Community Legal Services of Philadelphia, **Pennsylvania**
Southwestern **Pennsylvania** Legal Services, Inc.
Commonwealth Housing Leg Svcs of Glenside, **Pennsylvania**
Philadelphia Legal Assistance of Philadelphia, **Pennsylvania**
South Carolina Appleseed
Virginia Poverty Law Center
Virginia Organizing of Charlottesville, **Virginia**
Housing Opportunities Made Equal of **Virginia**, Inc.
Blue Ridge Legal Services, Inc., **Virginia**
Mountain State Justice of Charleston, **West Virginia**
Legal Aid Society of Milwaukee, **Wisconsin**

Endnotes

¹ See *McAdams v. Citifinancial Mortgage Co.*, 2007 WL 141128 (M.D. La. Jan. 16, 2007) (finding nothing in mortgage loan agreement permitted late fees to be captured before interest and principal); *In re Parsley*, 384 B.R. 138 (Bankr. S.D. Tex. 2008) (servicer unable to explain why proof of claim in bankruptcy case claimed \$243.36 in late fees, but master servicing loan history only indicated \$101.40 in late fees); *Bank of Crockett v. Cullipher*, 752 S.W.2d 473 (Tenn. Ct. App. 1988) (imposing substantial late charges in absence of contractual authorization to pressure repayment was unconscionable conduct under state statute); *Bowman Plumbing, Heating and Elec. v. Logan*, 2002 WL 31119669 (Va. Cir. Ct. Sept. 12, 2002) (Virginia late payment statute requires late payment fee to be specified in the contract); *Metro Hauling, Inc. v. Daffern*, 723 P.2d 32 (Wash. Ct. App. 1986).

² The misapplication of payments is one of the most common problems that borrowers are reported to have with servicers. The reasons for misapplication of payments range from sloppy procedures to more insidious efforts to generate more revenue. Servicers may purposefully ignore grace periods, may fail to apply funds in the order specified by the contract, or may improperly charge late fees. See *In re Ocwen Fed. Bank F.S.B. Mortgage Servicing*, 2006 WL 794739 (N.D. Ill. Mar. 22, 2006), *aff'd*, 491 F.3d 638 (7th Cir. 2007) (denying motion to dismiss state law claims including fraudulent concealment, unjust enrichment, breach of contract, breach of good faith and fair dealing, conversion, negligence, misrepresentation, defamation, and fraud and deceit based on federal preemption grounds).

³ See e.g. *Abels v. JPMorgan Chase Bank, N.A.*, 2009 WL 5342768 (S.D. Fla. Nov. 23, 2009) (breach of implied covenant of fair dealing sufficiently pleaded where lender purchased force placed insurance from affiliate at excessive rate).

⁴ See, e.g. *Young v. Wells Fargo & Co.*, 671 F. Supp. 2d 1006 (S.D. Iowa 2009) (denying motion to dismiss RICO claim where borrowers alleged servicer and default services provider systematically charged unwarranted, improper and unreasonable property inspection and late fees); *Porter v. Fairbanks Capital Corp.*, 2003 WL 21210115 (N.D. Ill. May 21, 2003) (plaintiff's sufficiently alleged FDCPA violation claiming that BPO was not "necessary to protect the value of the Property"); *In re Zunner*, 396 B.R. 265 (Bankr. W.D.N.Y. 2008) (broker's price opinion in preparation of foreclosure was not allowable charge to protect mortgage holders' interest in property); *Walker v. Countrywide Home Loans, Inc.*, 98 Cal. App. 4th 1158, 121 Cal. Rptr. 2d 79 (2002); *In re Jones*, 366 B.R. 584 (Bankr. E.D. La. 2007), *aff'd in relevant part, and rev'd in part on other grounds*, 391 B.R. 577 (E.D. La. 2008) (where servicer presented no evidence concerning its policy guidelines on inspections and could not state any reasons why continuous monthly property inspections were necessary, particularly when inspection reports showed little or no change in the property's condition from month to month and gave lender no cause for concern, property inspections were unreasonable); *Korea First Bank v. Lee*, 14 F. Supp. 2d 530 (S.D.N.Y. 1998) (lender was not entitled to recover more than it paid its attorney or what was reasonable); *In re Watson*, 384 B.R. 697 (Bankr. D. Del. 2008) (rejecting lender's argument that fees did not have to be reasonable); *In re Riser*, 289 B.R. 201 (Bankr.M.D. Fla. 2003) (attorney fee assessment to debtors' mortgage account when no lender attorney ever appeared in case was "both illegal and fraudulent"); *In re Coates*, 292 B.R. 894 (Bankr. C.D. Ill. 2003) (creditor required to disclose agreement between itself and law firm so that court can determine exactly how much creditor is actually being charged for services); *In re 1095 Commonwealth Ave. Corp.*, 204 B.R. 284 (Bankr. D. Mass. 1997) (secured creditor fraudulently overstated its claim for legal fees by failing to disclose two-tiered fee arrangement with its attorneys in which attorneys granted bank a discount but bank billed debtors at full standard rate), *aff'd in relevant part, modified in part on other grounds*, 236 B.R. 530 (D. Mass. 1999). *In re McMullen*, 273 B.R. 558 (Bankr. C.D. Ill. 2001) (flat fee covering attorney fees for entire foreclosure proceeding found excessive where not pro-rated to cover only services actually performed prior to bankruptcy filing); *In re Hight*, 393 B.R. 484 (Bankr. S.D. Tex. 2008) (disallowing creditor's prepetition attorney fees for preparation of foreclosure sale when creditor failed to provide evidence pertaining to what work was done, who did the work, hourly rate, and time spent); see generally, National Consumer Law Center, *Foreclosures*, (3rd Ed. 2010), chapters 4, 6,7,9,10.

⁵ Diane E. Thompson, *Why Servicers Foreclose, When They Should Modify and Other Puzzles of Servicer Behavior: Servicer Compensation and its Consequences*, October 2009. Available at: <http://www.nclc.org/images/pdf/pr-reports/report-servicers-modify.pdf>.

⁶ See, e.g. *In re Stewart*, 391 B.R. 327 (Bankr. E.D. La. 4/10/08). (“The testimony in *Jones* indicated that this conduct was not unique to Jones' account but systematic.”). In *In re Gorshtein*, (285 B.R. 118 (Bankr. S.D.N.Y. 2002)) the court determined that sanctions were warranted against several servicers for filing motions to lift the automatic stay based upon attorney affidavits certifying material post-petition defaults, when in fact, there were no material defaults by the debtors. The court rejected what it termed as the mortgage servicers’ “dog ate my homework” excuses, such as those relating to “the Servicing Agent’s defective computer system, which could not cope with payments by the debtor except in the exact amount programmed into the computer, or the Bank’s mistake in taxing the debtor with the premium on a \$1 million property insurance policy for a \$100,000 house.” The court emphasized the damage to the judicial process that occurs when a court is asked to rule on incorrect or baseless facts. It also noted that in each instance, the mortgage servicers’ actions had created a danger that a debtor would lose his or her home without just cause and in violation of the debtor’s rights under the Bankruptcy Code. In *In re Nosek*, (363 B.R. 643 (Bankr. D. Mass. 2007), vacated on other grounds, 544 F.3d 34 (1st Cir. 2008)), the bankruptcy court was outraged at the servicer’s poor accounting practices for homeowners in bankruptcy. The servicer used a variety of excuses for failing to properly account for the homeowner’s payments during bankruptcy, all of which the court found to be unacceptable. As the court said: “Even if Ameriquest must manually account for these payments . . . Ameriquest is not excused from doing it right, even if it is an administrative burden. . . . Ameriquest is simply unable or unwilling to conform its accounting practices to what is required under the Bankruptcy Code.”).

⁷ Diane E. Thompson, *Why Servicers Foreclose, When They Should Modify and Other Puzzles of Servicer Behavior: Servicer Compensation and its Consequences*, October 2009. Available at: <http://www.nclc.org/images/pdf/pr-reports/report-servicers-modify.pdf>.

⁸ See, e.g. NCLC, *HAMP Changes Urgently Needed*, September 2010. Available at http://www.nclc.org/images/pdf/foreclosure_mortgage/loan_mod/hamp_policy_brief.pdf.

⁹ Kate Berry, *B of A, JPM and Wells Told to Comply After HAMP Audit*, American Banker, September 27, 2010 at 8.