Funding for Non-Profit Foreclosure Prevention Is Essential to Secure Mortgage Loan Modifications In New York Settlement Conference Parts Established by CPLR Rule 3408 For Distressed Homeowners

Testimony presented to the

NEW YORK STATE ASSEMBLY COMMITTEES
ON JUDICIARY, HOUSING AND BANKS

By

ADAM COHEN, Esq.
MFY LEGAL SERVICES, INC.
November 7, 2011

Thank you for the opportunity to testify today. During my tenure as a Staff Attorney at MFY Legal Services, I have represented more than 150 homeowners in foreclosure and have attended approximately 1,000 court-supervised settlement conferences. Based on this experience, I can speak to the need for lawyers in settlement conferences and the effectiveness of the CPLR Rule 3408 settlement conference process in helping New York homeowners avoid foreclosure by obtaining loan modifications and other loan workout agreements.

Legal Representation Is Necessary to Achieve Success at a Settlement Conference

When borrowers are represented by an experienced foreclosure prevention attorney, the settlement conference process is extremely effective in avoiding the unnecessary and costly result of foreclosure. Most homeowners that I have represented get loan modifications if they have regular income and mortgage balances that are not extremely large (which includes most homeowners). As a general rule, however, a homeowner obtains a mortgage loan modification only after he has made multiple, sometimes as many as 16, settlement conference appearances and only after his loan servicer has improperly denied his request for a loan modification – again, usually for varied reasons on different occasions. It is an arduous and complex process.

Homeowners who are not represented by counsel stand little chance when negotiating with mortgage lenders and servicers and their attorneys. Despite ongoing investigations by state attorneys general and the federal government, severe problems persist in the mortgage servicing industry, particularly the five entities that dominate the servicing and foreclosure industry – Bank of America, JPMorgan Chase, Wells Fargo, GMAC (owned by Ally Financial) and CitiMortgage. In almost every case I handle, **loan servicers processing loan modification applications violate federal HAMP guidelines and the NYS Banking Department Regulations in at least one of the following ways:**

1) **Making grossly inaccurate calculations** of the homeowner's income, causing either a denial of the homeowner's application for having too much income or leading to a grossly inflated payment under a HAMP modification that is not affordable to the homeowner, who will likely default under the modification agreement at a later date due to the bank's unlawful behavior in creating a clearly unaffordable payment;

2) **Denying requests for modifications for homeowners who recently lost a spouse** because the servicer refuses to allow the surviving spouse to modify the loan on his own, the subject of a recent story in the Staten Island Advance[1];
3) **Failing to convert HAMP Trial Period Plans to permanent HAMP Modifications** in violation of the trial period contracts between the servicer and homeowner, which is also the subject of a recent news story[2];
4) **Breaching permanent loan modification agreements**, misapplying borrowers' monthly payments, and charging borrowers illegal late fees and other default-related fees and costs simply because the servicer does not set up the permanent modification in its servicing computer system accurately and timely;
5) **Denying requests for loan modifications in clear violation of the rules governing the HAMP** program and the NYS Banking Department Regulations;
6) **Attempting to get homeowners to sign temporary forbearance agreements** that contain language waiving the homeowner's right to invoke any defenses to the foreclosure action in clear violation of the NYS Banking Department Regulations;
7) **Discontinuing foreclosure lawsuits in the midst of settlement conference negotiations**, effectively disrupting the borrower's chance for court oversight over the loan modification process, only to re-start to action again after getting its paperwork in order;
8) **Claiming it lost the homeowner's documentation** and then denying the homeowner's request for a loan modification based upon the homeowner's alleged failure to submit documentation in support of their loan modification application;
9) **Allowing the homeowner's documentation to "go stale,"** requiring new loan modification application packages and additional processing delays; and
10) **Failing to adhere to the decision-making time frames required under HAMP** and the NYS Banking Department Regulations.

Loan servicers—the companies that collect borrowers' payments, handle all aspects of the foreclosure, and process loan modification and other loss mitigation requests—do not own the vast majority of the loans they service. Because they do not own the loans they service, they do not suffer

[1] *See* http://www.silive.com/news/index.ssf/2011/03/meiers_corners_widower_with_th.html (last visited on November 1, 2011).
[2] *See* http://www.silive.com/news/index.ssf/2010/11/west_brighton_woman_says_bank.html (last visited on November 1, 2011).

losses when a home is foreclosed upon. In fact, the **loan servicing business profits from foreclosures**.[3] Experienced foreclosure prevention advocates expect servicers to deny homeowners' modification requests unfairly and unlawfully, but we know how to fight against this unfair and illegal behavior. In fact, one recent study shows that a homeowner's chances of obtaining loan modification greatly increase when the homeowner is assisted by a foreclosure prevention counselor.[4] A homeowner fighting on his own against a large loan servicing company that makes more money foreclosing on rather than modifying a loan faces extremely long odds of success.

New York Foreclosure Law Firms Are Thwarting the Effectiveness of CPLR Rule 3408 by Depriving Homeowners Access to the Settlement Conference Process

Compounding the abusive conduct in the loan servicing industry, foreclosure law firms are violating New York law by failing to file the paperwork necessary to initiate the settlement conference process. This issue has also been the subject of several recent news stories.[5] In particular, foreclosure law firms are not filing Specialized Requests for Judicial Intervention when required to do so under Section 202.12-a(b) of the Uniform Rules for NY State Trial Courts.

The foreclosure law firms' unlawful behavior causes serious financial harm to homeowners in the form of tens of thousands of dollars in delinquent interest accruals, as well as unnecessary delinquency-related fees and other charges that the homeowner would not have incurred absent the foreclosure law firms' violations of these state court procedures and CPLR Rule 3408. MFY has studied this problem in depth and published a white paper detailing the problem entitled *Justice Deceived,* a copy of which is included with my written testimony for your convenience.

Across New York State, thousands of foreclosure cases currently sit in limbo waiting to be transferred to the settlement conference process mandated by CPLR Rule 3408 – hundreds of these cases have been absolutely dormant since November 2010. Because of the focus brought to bear on the issue by MFY and other foreclosure defense advocates, the issue is now being addressed.

---

[3] *See* Thompson, Diane E., *Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior*, National Consumer Law Center (October 2009).
[4] *See* Chan, Gedal, Been and Haughwout, *The Role of Neighborhood Characteristics in Mortgage Default Risk: Evidence from New York City,* Furman Center for Real Estate & Urban Policy Working Paper (August 2011).
[5] *See Suit Targets Lenders' Firm Over Foreclosure Filing Requirements,* New York Law Journal (Aug. 10, 2011).

But State funding for foreclosure housing counseling and legal defense ends December 31, 2011, right at the time when settlement conferences in these cases will likely begin. With understaffed settlement conference parts and few legal services attorneys available to represent homeowners who cannot afford a private attorney, thousands of preventable foreclosures will move through the court system. Homeowners who can afford a modestly reduced monthly payment (usually through a basic interest rate reduction) will lose their family homes to foreclosure and be displaced.

Continued Funding of the NY State Foreclosure Prevention Services Program is Necessary

An experienced foreclosure prevention advocate is essential for most homeowners to obtain affordable loan modifications. If left to defend themselves, homeowners will experience the litany of abusive loan servicing and loss mitigation practices of the major loan servicing companies that I described in the first portion of my testimony. Because the New York State Legislature was proactive with funding in 2009 and 2010, the foreclosure defense community has developed a tremendous amount of experience advocating on behalf of middle- and low-income New Yorkers and have been incredibly successful thus far. In the process of representing thousands of New York homeowners suffering through foreclosure, we have gained significant experience navigating the complexities of the loan servicing industry.

Within the next few months, thousands of cases that have been sitting in limbo will pour into the Supreme Court Foreclosure Settlement conference parts. Without advocates for homeowners when the floodgates open, too many homeowners to count will lose their homes to foreclosure unnecessarily. We urge the Committee to support efforts to continue funding the Foreclosure Prevention Services Program.