



L E G A L

S E R V I C E S

I N C O R P O R A T E D

**TESTIMONY
ON**

HOUSING BUDGET HEARING:

**IMPACT OF THE MORTGAGE FORECLOSURE
PROCESS AND CRISIS
AND
FUNDING FOR NON-PROFIT FORECLOSURE LEGAL
DEFENSE**

SUBMITTED TO:

**THE NEW YORK STATE ASSEMBLY WAYS AND MEANS AND
NEW YORK STATE SENATE FINANCE COMMITTEES**

PRESENTED BY:

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Thank you for the opportunity to submit this testimony. I am a Staff Attorney at MFY Legal Services' Foreclosure Prevention Project, which has provided free legal foreclosure defense to hundreds of homeowners over the past two years.

New York State should be commended for its quick response to the foreclosure crisis. In 2008, recognizing the impending crisis, the New York State Legislature amended New York law to mandate a court-supervised settlement conference for every subprime loan being foreclosed upon. In 2009, as the crisis spread, the Legislature again took action, extending the mandatory settlement conference requirement to *every* home loan in foreclosure. The Legislature also enacted legislation requiring mortgaging servicing companies to mail to every at-risk homeowner a notice of his or her rights and alerting the homeowner of the various HUD-approved housing counselors located in the homeowner's neighborhood.¹ But most important of all, the Legislature wisely sought to fund foreclosure prevention efforts, including legal defense for homeowners facing foreclosure.

As the Office of Court Administration declared in last November's report which analyzed the effectiveness of New York's efforts to combat foreclosures, legal representation remains the most important factor in obtaining a loan modification.² Represented homeowners stand a significantly better chance of saving their homes. All too often, unrepresented homeowners are taken advantage of by the mortgage servicing companies and the lawyers that represent them. Both federal and New York State

¹ RPAPL § 1304.

² Ann Pfau, New York State Unified Court System, 2010 Report of the Chief Administration of the Courts Pursuant to Chapter 507 of the Laws of 2009 (November 2010), *available at* . <http://www.nycourts.gov/publications/pdfs/foreclosurereportnov2010.pdf> [hereinafter Court Foreclosure Report] ("The lack of representation in foreclosure cases continues to be one of the greatest challenges we face in fulfilling our statutory mandate.")

guidelines are routinely ignored or violated; statements of the servicers' lawyers in court are often directly at odds with statements the servicers make to homeowners on the telephone, leaving homeowners confused as to whose directives to follow; and as has become dangerously common in New York State courts, the plaintiff seeking to foreclose often lacks standing to have brought the foreclosure action in the first place. Three of MFY's cases make the need for legal representation abundantly clear.

- **Helping a Daughter Keep Her Disabled, Elderly Father in His Home**: When her father, Mr. B, suffered a stroke and became partially paralyzed, Ms. C and her children moved into her father's Staten Island home so that he she could help take care of him and that he could live the remainder of his life in his own home, not a nursing home. However, with Mr. B's job loss after his stroke, Mr. B quickly fell behind on his mortgage payments and the bank filed a foreclosure action. Ms. C, a special education teacher, took on a second job at night in order to help with the mortgage payments. At the same time, she requested a modification. What she thought would be an easy process – submitting the various financial documents requested for both her and her father – turned into a nightmare. Documents were repeatedly lost and settlement conferences were continuously adjourned. When MFY became involved, Ms. C had been rejected for a modification on the obscure and usually misused reason of “excessive principal forbearance.” Because this is an issue that MFY attorneys see repeatedly, MFY was able to threaten the mortgage servicing company with sanctions for not negotiating in good faith unless a modification was offered. With MFY's help, Mr. B now has an affordable mortgage and will be able to make his monthly mortgage payments for the remainder of the life of the loan. Mr. B no longer has to fear losing his home and his family and winding up in a nursing home.
- **Saving a Garden in Jamaica, Queens**: For Ms. R, a 73 year-old retiree raising two grandchildren in her Jamaica, Queens home, her beautiful garden, exploding with color every spring and summer, is her pride and joy. But that joy was taken from her last fall; Ms. R first learned of the foreclosure on her home of 22 years when Fannie Mae nailed a notice to quit the premises since it had just purchased her home at a foreclosure sale. Unaware of what to do next and in fear of having to live the remainder of her life in a shelter, Ms. R sought the services of MFY. Through an Order to Show Cause, MFY was able to expose the bank's duplicitous behavior of cashing her mortgage payments at the same time it was foreclosing on her in an action in which Ms. R was never served, and MFY was able to identify

the signature of multiple robo-signers in the foreclosure papers, raising doubts if the bank even had the standing to bring the foreclosure action in the first place. Only by publicly exposing the bank in both court papers and in the press was MFY able to get Fannie Mae and the bank return to the table and to negotiate a modification with Ms. R, this time in good faith. Ms. R now not only has a fixed-rate, affordable mortgage and has just made her first payment. She is eagerly waiting for spring to begin working in her garden again.

- ***Keeping Kids not Just in their Home, but also on their Little League Team:*** Mr. C was left to raise his two young sons after his wife abandoned the family due to a nervous breakdown. With a decrease in family income and an increase in household expenses due to the now necessary child care, Mr. C fell behind on his monthly mortgage payments. Once Mr. C was able to obtain more hours at work, he sought to get back on track with his mortgage payment and keep his young children in the only home they have ever known and on their local little league team. Mr. C attempted to obtain a mortgage modification on his own, but he was continually given the run-around from the bank and asked to resubmit documents multiple times. When MFY became involved, Mr. C had just been rejected for a modification because, the bank claimed, his current mortgage payment was already 31% of his monthly income.³ However, the bank's reason was completely fabricated since Mr. C's own paystubs reflected that the current mortgage payment was closer to 40% of his monthly income. Although the bank is required under federal and state regulations to produce the number it uses for a household's gross income, it rarely if ever does. MFY demanded, under threat of seeking sanctions at the next settlement conference, that the bank state what number it used for Mr. C's income. Although the bank never produced that number, at the next settlement conference, the bank offered Mr. C an affordable modification that is currently around 29% of Mr. C's gross monthly income. Mr. C is looking forward to cheering on his sons on their little league team once baseball resumes on Staten Island in a few weeks.

Without funding from the New York State Legislature, MFY's Foreclosure Prevention Project would not have been able to help these three individuals and the many other

³ Under the federal Home Affordable Modification Program ("HAMP"), eligible borrowers are those borrowers whose current mortgage payment is currently above 31% of their gross monthly income. If the current mortgage payment is already below 31% of the borrower's income, the borrower is not HAMP-eligible and the mortgage servicing company does not have to provide the borrower with a modification. See Making Home Affordable Program, *Handbook for Servicers of Non-GSE Mortgages*, p. 41 (Version 3.0, Dec. 2, 2010), available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_30.pdf.

homeowners that MFY serves. Mr. B would be living a lonely existence in a nursing home, without his daughter and grandchildren surrounding him; for the first time in 22 years, no one would be preparing the garden at Ms. R's home since she would be packing her bags for a shelter; and Mr. C's two kids would be ripped from the only life and friends they have ever known.

The overly-sophisticated and often fabricated reasons mortgage servicing companies provide homeowners for denying them modifications are difficult for individuals to identify, understand, or much less combat without attorneys advocating on their behalf. The reality of the situation is that, even with the court-mandated settlement conferences, our system is, by nature, adversarial and operates on the premise that each party is represented by counsel. The mortgage servicing industry adheres to this maxim – at all court hearings, even settlement conferences, the mortgage servicing company is represented by counsel. Without an advocate on behalf of the homeowner, more homes than are necessary would be lost to the overzealous and unscrupulous foreclosure practices of the mortgage servicing industry.

The courts have also recognized the imbalance inherent when homeowners lack an attorney and susceptibility of unrepresented homeowners to the dishonest practices of the mortgage servicing companies and their attorneys. Chief Judge Jonathan Lippman noted that “[w]e cannot allow the courts in New York State to stand by idly and be party to what we now know is a deeply flawed process . . .” when he enacted the requirement that foreclosure plaintiffs’ attorneys sign affirmations attesting to the accuracy of foreclosure documents.

But, while the “Lippman Affirmation” will help to create some balance between the homeowner and the mortgage servicer, an entity that is typically the subsidiary of a multi-billion dollar bank,⁴ the best way to truly level the playing field is to continue funding foreclosure defense work. Unfortunately, as foreclosure filings rise,⁵ state funding for foreclosure defense is set to expire at the end of 2011. If funding does not continue to be available for non-profit foreclosure legal defense, there will be no one to defend the massive spike in foreclosures that will likely occur by the middle to end of 2011.⁶ It is true that settlement conferences for all homeowners in foreclosure have now become a part of New York law and provide court oversight to the process. But underfunded and understaffed courts cannot be expected to advocate for homeowners or to identify and address violations of federal and state regulations, standing issues, and the mortgage servicing industry’s double-talk. This is asking too much of the courts, for this is not their role in our justice system. Rather, this is the task of an attorney.

If non-profit legal services foreclosure prevention programs are shuttered because funding is not renewed, thousands of New Yorkers will lose their homes due to lack of representation, tenants of those former homeowners will face displacement, poverty values and the tax base will continue to decrease, and New Yorkers will lose faith in a fair judicial process that does not unwarrantedly foreclose on citizens’ homes.

⁴ In the fourth quarter 2010, J.P. Morgan Chase posted a record-setting profit of \$4.8 billion. In 2010, J.P. Morgan Chase posted income of \$17.4 billion, 48% higher than the previous year. Press Release, J.P. Morgan Chase, JP Morgan Chase Reports Fourth-Quarter 2010 Income of \$4.8 Billion, available at http://files.shareholder.com/downloads/ONE/1129525879x0x435239/0a530301-596c-4723-9af3-3751c348f183/4Q10_JPMorgan_EPR_FINAL2.pdf.

⁵ From 2009 to 2010, there was a 42% rise in the number of pending foreclosure cases in New York State. In 2009, 54,591 cases were pending; in 2010, 77,815 cases. Court Foreclosure Report, *supra* note 2, at 4.

⁶ There was a significant drop in foreclosures in October 2010 due to the Lippman Affirmation requirement. See Andrew Keshner, *Foreclosures Plunge as Lawyers Adjust to New Affirmation Rule*, N.Y.L.J., Dec. 16, 2010, available at <http://finance.yahoo.com/news/Foreclosures-Plunge-as-law-2037534287.html?x=0>. Presumably, New York’s foreclosure firms will eventually find a strategy to deal with the Lippman Affirmation and will begin to file the foreclosure actions it has held off on filing, creating a flood of new cases by the middle to end of 2011.

MFY Legal Services urges the Assembly Ways and Means and the Senate Finance Committees to work with the Assembly leadership, the Senate leadership and the Executive to continue funding foreclosure prevention programs across the State of New York. The future of our neighborhoods and of this State depends upon it. Again, thank you for the opportunity to offer this testimony.