

**LEGISLATIVE SOLUTIONS FOR PREVENTING LOAN MODIFICATION
AND FORECLOSURE RESCUE FRAUD**

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LEGISLATIVE SOLUTIONS FOR PREVENTING LOAN MODIFICATION AND FORECLOSURE RESCUE FRAUD

Chairwoman Waters, Congresswoman Capito, Members of the Committee: thank you for inviting me to testify today on behalf of the low income clients of the National Consumer Law Center,¹ the Consumer Federation of America,² the National Association of Consumer Advocates,³ the National Council of La Raza,⁴ and the Legal Aid Society of Milwaukee.⁵ I am here today expressing the frustrations of many homeowners who cannot get the help they desperately need to modify their loans to avoid foreclosure, and are instead finding themselves in the arms of operations set up to take their money, not provide help.

I. INTRODUCTION

Homeowners facing foreclosure have always been vulnerable to scammers, con-artists, and thieves. When property values were appreciating rapidly, foreclosure rescue scams primarily focused on obtaining title to the home and robbing homeowners of their equity.⁶ Today with property prices depreciating and many homes already “underwater,” equity is no longer the game.

Instead, rescuers have become high-volume, “loan modification specialists.” The pitch by this new breed of predators is that, for a fee, which can reach several thousand dollars, they will negotiate a loan modification for a financially distressed borrower. The hitch is that the “work”

¹ The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of sixteen practice treatises and annual supplements on consumer credit laws, including *Foreclosures* (2d ed. 2007 & Supp. 2008) and *Unfair and Deceptive Acts and Practices* (7th ed. 2008). NCLC also publishes practice guides, such as *Combating Foreclosure Rescue Scams: A Practice Guide* (2006) and bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. This testimony was written by Lauren Saunders and Tara Twomey.

² The Consumer Federation of America (CFA) is a nonprofit association of some 300 pro-consumer groups, which was founded in 1968 to advance consumers' interests through research, advocacy and education.

³ The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

⁴ The National Council of La Raza (NCLR) is the largest national Hispanic civil rights and advocacy organization in the United States. For the last ten years, NCLR has been helping Latino families become homeowners by supporting local housing counseling agencies. The NCLR Homeownership Network (NHN), a network of 51 community-based counseling providers, works with more than 40,000 families annually and produced more than 25,000 first-time homebuyers in its first decade. Last year, NHN members counseled more than 7,500 homeowners facing foreclosure.

⁵ The Legal Aid Society of Milwaukee was founded in 1916 “to do all things necessary for the prevention of injustice.” It is one of the nation’s oldest, continuously operating, public interest law firms. Each year the Society provides free legal services to 8,000 of Milwaukee’s most vulnerable residents: abused and neglected children, developmentally disabled adults, persons living with HIV/AIDS, battered women, immigrants, elderly, prisoners, mentally ill, physically impaired, unemployed, and homeless – all of whom are too poor to afford legal counsel.

⁶ National Consumer Law Center, *Dreams Foreclosed: The Rampant Theft of Americans' Homes Through Equity Stripping Foreclosure 'Rescue' Scams* (June 2005).

performed, if any, leads nowhere, with the homeowner out money and time and closer than ever to foreclosure.

These loan modification companies are flourishing because mortgage loan servicers cannot or will not provide borrowers with timely and consistent information regarding their requests for loan modifications. Frustrated by the lack of responsiveness on the part of the servicers, borrowers across the country are giving loan modification companies their precious dollars with disastrous consequences.

The most important work that Congress can do to prevent these scams is 1) address the servicing problems that drive homeowners to scammers, 2) support legitimate loan modification efforts, and 3) expand funding for existing federal enforcement efforts. In addition, though many states have laws to address foreclosure rescue scams, Congress could adopt a strong national floor to protect homeowners in all states.

To address the root cause of the problem, Congress should:

- *Mandate Borrower Access to a Decision Maker at the Servicer*—Servicers must provide borrowers with contact information for a real person with the information and authority to answer questions and fully resolve issues related to loss mitigation activities for the loan.
- *Require Servicers to Engage in Reasonable Loss Mitigation*—Servicers' failure to engage in reasonable loss mitigation before proceeding to foreclosure drives desperate homeowners into loan modification scams.
- *Increase Funding for HUD-Approved Housing Counseling Agencies*.---These agencies are the only loan modification specialists with a proven track record, but they are overwhelmed and need more resources.
- *Increase Enforcement Funding for the FTC and other appropriate federal agencies*.---Prominent federal enforcement actions can have a significant deterrent effect, but they are time consuming. The spread of these scams deserves further resources to attack them.

Regarding loan modification scams themselves, many states have been active in enacting laws, but other states lag behind. As long as stronger state laws are not preempted, federal legislation could help send a strong, uniform national message that firms may not charge borrowers fees until homeowners receive long-term, affordable loan modifications. Effective legislation should include the following elements, with any federal legislation as a floor, not a ceiling:

- *Prohibit Up Front Payments for Foreclosure Consultant Services*—A ban on up front payments will curb the most egregious scams in which companies take large payments from borrowers and make no effort to obtain a loan modification on their behalf.
- *Require Affordable, Sustainable Loan Modifications*—Permit fees for loan modification firms only if the services lead to a sustainable, affordable loan modification.

- *Tie compensation to results achieved*---Fees should be commensurate with the benefit to the homeowner.
- *Avoid exemptions that open wide loopholes, while avoiding excessive restrictions on legitimate services.* Exemptions to advance fee requirements for mortgage and real estate brokers should not be necessary, as these brokers are typically paid only when a mortgage is obtained or a home sold. Attorneys should be generally exempt but the exemption should be drawn to avoid evasions for work by nonlawyers.

II. THE ROLE OF MORTGAGE SERVICERS: CUTTING COST, CUTTING SERVICE AND DRIVING BORROWERS TO FORECLOSURE RESCUE OPERATIONS.

The most obvious cause of the recent flood of foreclosure rescue scam operations is the foreclosure crisis. An estimated 8.1 million mortgages are anticipated to be in foreclosure within the next four years.⁷ These millions of desperate homeowners are a target too tempting to resist for scammers.

Beyond the numbers, however, foreclosure rescue scams are flourishing because those who actually are in a position to help – the mortgage servicers and the lenders on whose behalf they are acting – have done an inadequate job of working with homeowners. Despite widespread efforts to encourage voluntary loan modifications since early 2007,⁸ the servicing industry⁹ has failed to implement a loan modification strategy on a scale commensurate with the problem. Instead, it has become clear that the mortgage servicing industry is fundamentally broken when it comes to meeting the needs of borrowers.

As with all businesses, servicers add more to their bottom line to the extent that they can reduce expenses. Servicers have cut costs by relying more on voicemail systems and less on people to assist borrowers, by refusing to respond to borrowers' inquires and by failing to resolve borrower disputes. Recent industry efforts to "staff-up" loss mitigation departments have been woefully inadequate.

From the homeowner's perspective one of the biggest obstacles to loan modification is finding a live person who can provide reliable information about the loan account and who has authority to make loan modification decisions. Stories abound of exasperated homeowners attempting to navigate vast voicemail systems, being bounced around from one department to

⁷ Credit Suisse, *Foreclosure Update: over 8 million foreclosures expected*, at 3 (Dec. 4, 2008).

⁸ For example, In May 2007, Senate Banking Committee Chairman Dodd announced a set of servicing principles aimed at long-term affordability. Those principles called, in part, for loan modifications that would "create a solution for the borrower to ensure that the loan is sustainable for the life of the loan." Senator Dodd Unifies Industry Members, Consumer Representatives to Help Preserve the American Dream of Homeownership (May 2, 2007), available at <http://dodd.senate.gov/index.php?q=node/3863/print>. In June 2007, Chairman Sheila Bair of the FDIC called for automatic loan modifications for borrowers with subprime ARMs.

⁹ Servicers are generally responsible for account maintenance activities such as sending monthly statements, accepting payments, keeping track of account balances, handling escrow accounts, calculating interest rate adjustments on adjustable rate mortgages, reporting to national credit bureaus, and remitting monies to the owners of the loans. Servicers also are responsible for engaging in loss mitigation activities and prosecuting foreclosures.

another, and receiving contradictory information from different servicer representatives.¹⁰ For example, an October 2007 survey from the Neighborhood Housing Services of Chicago found that “countless counselors shared stories of having a client in the office ready to begin dealing with long-deferred financial problems, but then having to wait 30 minutes or more in order to talk to an appropriate loss mitigation staff person.”¹¹ Unfortunately, things have not improved as servicers struggle to keep up with the increased workload caused by the foreclosure crisis.¹²

The Chairwoman of this Subcommittee, Congresswoman Maxine Waters, has demonstrated the difficulties faced by borrowers attempting to obtain a loan modification by making calls to servicers on behalf of three constituents.¹³ In one call to Bank of America it took ten minutes to get a live person on the line, then the Congresswoman was transferred to another department, put on hold and eventually disconnected. A common fate according to her constituent, who noted that he had been repeatedly disconnected in prior attempts to contact the servicer. After two hours and three additional calls to Bank of America’s call center, Congresswoman Waters still was unable to make much headway. The Congresswoman concluded that, “the average American trying to get through to negotiate a loan modification will not be able to get it done.”¹⁴

The servicing industry’s unresponsiveness to borrowers’ inquiries and their inability to provide timely and consistent information to borrowers is driving desperate homeowners into the outstretched arms of loan modification scammers. “Loan modification firms say they are taking up the slack left by unresponsive lenders and overwhelmed nonprofit groups.”¹⁵ If a homeowner is consistently disconnected or cannot wait on hold for 30 minutes because she has only a 15-minute work break maybe \$1000 is not too much to pay for a chance to save her home. If a homeowner can’t find his way out of the voice mail maze, maybe paying someone who can (or who claims to have special connections) seems like money well spent.

While poor mortgage servicing has left borrowers flailing and looking for a lifeline, the loan modification industry has been perfectly happy to provide borrowers with cement life jackets.

III. FORECLOSURE RESCUE SCAMS: FLOURISHING IN GOOD TIMES AND IN BAD

A. An Overview of Foreclosure Rescue Scams

¹⁰ See, e.g., Gretchen Morgenson, *Can These Mortgages Be Saved?*, New York Times (Sept. 30, 2007) (describing one homeowner who identified 670 calls relating to her home foreclosure in the previous three months and who received nine different answers about how best to proceed from 14 different people at the company); *Miller v. McCalla*, Raymer, 214 F.3d 872, 875 (7th Cir. 2000) (describing the process of trying to get through to an 800 number as a “vexing and protracted undertaking”).

¹¹ Neighborhood Housing Services of Chicago, Inc., *Lessons from the Front Lines: Counselor Perspectives on Default Intervention*, p.6 (Oct. 29, 2007).

¹² See Kate Berry, *The Trouble with Loan Repayment Agreements*, American Banker (Jan. 9, 2008) (noting that servicers push repayment plans instead of modifications because they “need twice the staff, and in part they can’t manage the volume”).

¹³ ABC Nightline, *Congresswoman on Hold on Bank Helpline: Homeowners’ attempts to fight foreclosure are hampered by bank call centers* (Jan. 22, 2009), available at <http://abcnews.go.com/video/playerIndex?id=6704983>.

¹⁴ *Id.*

¹⁵ Renae Merle, *Firms Charge Thousands To Modify Mortgages: Nonprofits Offer Service For Free, Advocates Say*, Washington Post, p. A01 (Dec. 26, 2008).

Foreclosure rescue scams are not new. California passed a law to specifically address foreclosure rescue operations in 1979. By 2005, at the height of the housing boom, the scams were prevalent enough that we published a report, “Dreams Foreclosed: The Rampant Theft of Americans' Homes Through Equity-Stripping Foreclosure 'Rescue' Scams.”¹⁶

These scams revolve around heavily-promoted deals supposedly designed to save the homes of people who have fallen behind on their mortgage payments and face foreclosure. But with frightening regularity “help” from “rescuers” drains off homeowners’ scarce funds or built-up equity. In some cases, “rescuers” are left owning the houses – and families are eventually evicted from their homes. It is hard to escape the conclusion that such outcomes are exactly what the “rescues” are designed to achieve.

Our 2005 report described three varieties of foreclosure rescue scams. The first is “phantom help,” where the “rescuer” charges outrageous fees either for light-duty phone calls and paperwork the homeowner could have easily performed, or on a promise of more robust representation that never materializes. Victims of phantom help are inevitably left without enough assistance to save their homes, without the funds diverted to the rescuers, and without time to pursue other options by the time they realize the rescue has not materialized. The “rescuer” essentially abandons homeowners to a fate that might well have been prevented with better intervention.

A second variety of the scam is the sale/leaseback that never quite works. This scenario includes various schemes under which homeowners surrender title to their houses in the belief that they are entering deals where they’ll be able to remain as renters, and buy their homes back over the next few years. Homeowners are sometimes told that surrendering title is necessary so that someone with a better credit rating can secure new financing to prevent the loss of the home. But the terms of these deals are almost invariably so onerous that the buyback becomes impossible, the homeowner permanently loses possession, and the “rescuers” walk off with all or most of the home’s equity. In some cases, the homeowner’s mortgage is paid off, in others it is not – despite a due on sale clause – and the homeowner remains on the hook if the rescuer fails to make payments.

The third variety is a bait-and-switch where the homeowners ***do not realize*** they are surrendering ownership of their houses in exchange for a “rescue.” Either the sale documents are forged or the homeowners are led to believe that they are only signing documents for a new loan to make the mortgage current. Many also say they had made it quite clear they had no intention of selling or giving up their home to anyone. Further evidence that homeowners have been gulled by this variant of the scam is the many cases in which the home is transferred for a ridiculously small fraction of its actual value.

¹⁶ Available at: <http://www.nclc.org/issues/foreclosure/index.shtml>.

Today, with homes much more likely to be upside down than to have equity worth stealing, equity stripping scams are less prevalent. “Phantom help,” however, has taken off, under a new name: “loan modification specialists.”

B. Loan Modification: The Hottest Business Since Subprime Lending

Prior to 2008 there was no “loan modification industry.” Today, the loan modification industry is booming.

Advertising is all over TV, often late at night. It is on prime-time radio and the internet. It is in newspapers, on street flyers, signs and billboards, and on other direct mail solicitations.¹⁷ A recent press release for JCR Advertising announces the national launch of an infomercial produced exclusively for loan modification companies.¹⁸ The infomercial, entitled *Crisis on Main Street*, highlights news clips from Obama, Bush, Bernanke, McCain and others to provide “credibility to the campaign.” Saturation marketing, which is often laced with lies and exaggerations,¹⁹ and pressure tactics play on the desperation and trust of distressed homeowners. These are the same marketing practices that were used to sell the abusive loans that scammers now seek to modify.

Foreclosure rescue operators have seized on press reports about legitimate government and industry loan modification programs and publicity about millions of dollars of bailout money available. One website has bold red letters: “\$75 Billion Released in Government Funds.”²⁰ Homeowners who do not see any of that money trickling down to them, and who cannot get through to their servicers, are receptive to claims that an “expert” can help them cut through the red tape.

Many operations have adopted names that imply a government connection. One, “USHUD.com,” has a byline: “The name you know, the name you trust.”²¹ The Federal Trade Commission has issued cease and desist orders to several with deceptive names or websites, including Federal Loan Modification and Bailout.hud.gov.us, and others that trade on the legitimate Hope Now industry program, such as “Hope Assure,” “Hope Now Modifications,” “New Hope Property,” and “New Hope Modifications.”²²

Most loan modification scams involve taking up front payments and doing little or nothing for the homeowner. However, other variations on this theme have also been reported.

- Charging a fee to obtain an *unaffordable* loan modification;

¹⁷ See Alyssa Katz, *Predatory Lending With a Smiley Face*, salon.com (Mar. 3, 2004) available at [http://www.salon.com/news/feature/2009/03/04/loan_modifications/.\(describing](http://www.salon.com/news/feature/2009/03/04/loan_modifications/.(describing) loan mod company that “blitzes homeowners who have subprime loans and other high-risk mortgage with junk mail and telemarketing calls.

¹⁸ See JCR Advertising Press Release, *Crisis on Main Streets Delivers Big on over 200 Stations across the Country* (Jan. 15, 2009), available at <http://www.mortgagemag.com/news/2009/0101/1000010033070.htm>.

¹⁹ Often companies represent themselves as being affiliated with the federal or state governments. See John Leland, *Swindlers Find Growing Market in Foreclosures*, New York Times, p. A1 (Jan. 15, 2009).

²⁰ See <http://www.ushud.com/loanmodification.html>.

²¹ See <http://www.ushud.com/loanmodification.html>.

²² See Press Release, “Federal and State Agencies Crack Down on Mortgage Modification and Foreclosure Rescue Scams,” Federal Trade Commission (Apr. 6, 2009), <http://www.ftc.gov/opa/2009/04/hud.shtm>.

- Charging exorbitant fees to homeowners attending loan modification seminars;²³
- Charging thousands of dollars for “loan audits” which are not performed by an attorney or which are worthless because any potential claims the borrower may have are barred by a statute of limitations which has expired.

Regardless of the form they take, the bottom line is typically that the homeowner pays thousands of dollars and gets nothing in return. Here are a few examples.

- Queens, NY – The Middleton family with a young daughter battling cancer pays American Modification Agency \$1990 to renegotiate their mortgage loan. The company told the Middletons to stop making mortgage payments and promised a loan modification with lower payments. When the loan modification never materialized, the Middletons found themselves further behind, and their home was scheduled for foreclosure.²⁴

- Chicago, IL – Ms. McClelland paid \$1,300 to Foreclosure Solutions Experts to stop the foreclosure on her home and reduce her mortgage payments. Despite being told repeatedly by the company that she did not have to worry about anything the company failed to contact her lender.²⁵

- Alexandria, VA – A 75-year old retired nurse paid \$2,500 to U.S. Homeowners Assistance for help in modifying her loan. After taking her money, the company failed to return her calls and her home fell into foreclosure.²⁶

- Parker, CO – The Monsons paid Peoples First Financial \$3,000 to keep their home out of foreclosure. The company told them not to talk to their mortgage servicer and not to make mortgage payments “so it would be easier to renegotiate.” The company did nothing and the house is in foreclosure.²⁷

- Watsonville, CA – The Mendez family responded to a Spanish radio ad from Saving California, a company that promised to lower the Mendez’ mortgage payment. Two months after paying \$3500 to the company their bank had not been contacted regarding a loan modification for the Mendez family.²⁸

These stories represent just the tip of the iceberg. For too many families, loan modification scams make a precarious financial situation much worse. Homeowners are out thousands of dollars that could have been put towards their mortgages. Borrowers often fall further behind on their payments because loan modification companies frequently advise them to stop making mortgage payments. And, the foreclosure clock keeps ticking as borrowers wait for these companies to make good on their promises.

²³ Michale Doyle, *Claims to fix mortgages for fee set off red flags for the feds and Cardoza*, Modesto Bee (Oct. 25, 2008), available at <http://www.modbee.com/local/story/475093.html> (homeowners charged \$3500 to attend workshop to resolve delinquent mortgage problems).

²⁴ Daniel Massey, *No Helping Hand*, Crain’s New York Business (Jan. 10, 2009), available at <http://www.craigslist.com/article/20090111/FREE/301119975/rss22>.

²⁵ John Leland, *Swindlers Find Growing Market in Foreclosures*, New York Times, p. A1 (Jan. 15, 2009).

²⁶ Renae Merle, *Firms Charge Thousands To Modify Mortgages: Nonprofits Offer Service For Free, Advocates Say*, Washington Post, p. A01 (Dec. 26, 2008).

²⁷ John Rebchook, *Loan modification firms causing more problems for homeowners*, Rocky Mountain News (December 24, 2008), available at <http://www.rockymountainnews.com/news/2008/dec/24/loan-modification-firms-causing-more-problems/>.

²⁸ Anna Werner, *Loan Modification Firms May Not Always Be Helpful*, CBS5 (Jan. 30, 2009), available at <http://cbs5.com/local/foreclosures.loan.modification.2.922003.html>.

IV. DOES A “LEGITIMATE” FOR-PROFIT FORECLOSURE RESCUE INDUSTRY EXIST??

Many foreclosure rescue operations are run by scammers who have no intention of doing anything other than stealing the homeowner’s money. But in designing a legislative response, policymakers confront the question whether legitimate foreclosure rescue operations exist. Certainly the need is real because of servicers’ inadequate response to the foreclosure crisis. Though the free services offered by HUD-approved housing counseling agencies are unquestionably the first and best option for struggling homeowners, these counselors are overwhelmed and some homeowners report difficulties in getting through to them. For some homeowners, it would be well worth \$2,000 or \$3,000 to obtain an affordable modification of the loan that enables the family to save the home.

But whether the transaction began as a scam or merely is one that was unsuccessful, enormous damage is being inflicted on homeowners who pay thousands of dollars, lose valuable time and money, and get nothing. Thus, the real question is how far backwards lawmakers should bend to protect this industry. Our answer is: not very far.

A. Who Are These Loan Modification “Experts”? The Same Salesmen Who Got Us Into This Crisis.

Some have called the upstart industry the hottest business since subprime lending. Ironically, mortgage brokers and other real estate professionals, who saddled borrowers with unsustainable home loans, are now reaping more profit from the same borrowers by promising to fix their bad loans.²⁹

Indeed many loan modification companies have connections to the defunct subprime mortgage industry. For example, USMAC, which charges clients a non-refundable fee of \$3,495 to negotiate a loan modification, is owned, in part, by the president of Citywide Mortgage, a former subprime lender.³⁰ Mortgage brokers—oft cited as one of the driving forces in the growth of bad subprime loans—are in demand.³¹ For example, the Nationwide Foreclosure Prevention Center in Williamstown, NJ is looking for consultants with mortgage and real estate experience to join its cadre of loan modification specialists.³² Its classified ad urges consultants to “Tap Into The Lucrative Loan Modification Industry” and suggests that consultants could earn up to \$100k or more this year counseling troubled homeowners who are delinquent on their mortgage or facing foreclosure. The ad also notes that “Only strong CLOSERS NEED APPLY!”

Another internet ad says, “LAW FIRM SEEKS STRONG CLOSERS FOR LOAN MODIFICATIONS. Each seat is worth GOLD!!!! ... A realistic earning potential in the 200’s in today’s market.” Among the skills and qualifications sought: “Few months Modification experience

²⁹ See Alyssa Katz, *Predatory Lending With a Smiley Face*, salon.com (Mar. 3, 2004) available at http://www.salon.com/news/feature/2009/03/04/loan_modifications/.

³⁰ Robert Berner, ‘Help’ Can Be Costly, BusinessWeek (Nov. 11, 2008).

³¹ See Alyssa Katz, *Predatory Lending with a smiley face*, salon.com (Mar. 3, 2004) available at http://www.salon.com/news/feature/2009/03/04/loan_modifications/. (describing the Loan Processing Center which recruits mortgage brokers from across the country to join the operation).

³² See National Foreclosure Prevention Center, available at <http://www.ceasemyforeclosure.com/affiliates.php>.

is preferred or ‘Mortgage Refinance’ heavy hitter in the past... No Real Estate License Required **The ability to Sell (This is a sales role)**” (emphasis added).³³

Another company advertising for loan modification consultants has taken out ads with pictures of obscenely expensive cars. One ad implies that the consultants will earn enough to buy a \$200,000 Lamborghini.³⁴ Another ad features the \$1 million plus Bugatti Veyron.³⁵

These sales people work off of lists of homeowners who are 30, 60 or 90 days late on their mortgage, sold by lead generators who charge anywhere from a few cents to \$20 or more per name, depending on whether the name is being sold exclusively to one firm or to several. The lead generators also emphasize that their leads are offered to sales people. One boasts, “This is the best file for direct mail, telemarketing, or voice broadcasting.”³⁶

The conclusion appears inevitable that these operations are set up primarily to profit from the distress of others (and to attract those whose motivation is greed), not to perform a real service. Why else would these companies need “strong closers” who are skilled at pressuring reluctant homeowners into buying the snake oil they are selling?

B. The Dangers of For-Profit Loan Modification Consultants Who Are Not Outright Scammers

Assume for the sake of argument that some of the companies advertising loan modification assistance are not simply out to take homeowners’ money, but are engaged in actual attempts to modify the loans. Is this a business that policymakers should encourage?

The loan modification business has striking similarities to, and really is a variation of, the debt settlement industry. In fact, some loan modification firms *are* debt settlement companies. As Travis Plunkett of the Consumer Federation of America recently testified, the debt settlement industry’s business model is inherently harmful to vulnerable consumers. The highlights of his testimony are equally applicable to for-profit loan modification consultants, who also:

- Often mislead consumers about the likelihood of reducing their debt/loan;
- Cannot guarantee that creditors will agree to a reduced payment if certain conditions are met;
- Often mislead consumers about the effect of the process on their credit worthiness;
- Charge such high fees that consumers have little chance of benefiting;
- Often will only work with the consumers in the most serious distress, who are the least likelihood to have a favorable outcome, and encourage consumers to put themselves in distress as a condition of helping them; and

³³ See <http://www.postjobfree.com/Job.aspx?id=7d2c6c681abd416a9dad4e66400ddea9>

³⁴ See http://lasvegas.backpage.com/MiscJobs/work_from_home_loan_mod_sales_reps_needed_7_000_per_month_from_home_/classifieds/ViewAd?oid=1228365

³⁵ http://allcrs.newsreview.com/gyrobase/loan_modification_consultants_work_from_home_live_transfer_and_direct_response_leads_/classifieds/ViewAd?oid=1465704

³⁶ See <http://www.globalmatrixleads.com/loan-modification-leads/>.

- May do nothing until the firm's fees are paid in full.³⁷

The most obvious problem is that homeowners in distress are paying a substantial amount of money, and losing valuable time waiting for help to arrive, without any guarantee that it will. At the end of the day, from the homeowner's perspective, there is no difference between a company that takes her money and runs off with it, and one that takes it, makes some futile attempts, and says, "sorry, we tried, but you can't have your money back."

Even assuming the most diligent efforts by the consultant, success against unresponsive servicers is likely to be just as elusive as it is for homeowners who try on their own. Less diligent consultants, who are more interested in earning that promised \$200,000 salary than wasting a lot of time on a hard case, are likely to give up and move on to the next case. Claims of a high success rates seem inherently suspect, yet may be hard to prosecute without delving into the firm's actual files.

It is also useful to put this discussion in the context of the loan modifications that servicers are actually offering. Even the lucky few who can get through to their servicer and actually get a loan modification are not out of the water. The latest numbers³⁸ for modifications made in March 2009 show that only 15% reduced the interest rate or the principal. Only 55% even reduced payments (most likely by stretching out the amortization schedule with a balloon payment at maturity). That is, 45% either *increased* payments or left the amount untouched. For the few who got write-offs of principal, the write-offs averaged 13%. (This contrasts with a loss rate of 64% for loans that went to foreclosure). And of the loan modifications made to date, about 50% have redefaulted.³⁹

These abysmal numbers are worth keeping in mind when deciding whether it is worth encouraging an industry that charges \$2,000 to \$4,000 to the homeowner, and does not even guarantee any sort of loan modification. Moreover, the loan modifications obtained by for-profit firms are likely to be worse than the average. Unlike a nonprofit HUD-approved housing counseling agency, a for-profit loan modification consultant is likely to push the homeowner into taking the first modification offered, or to refuse to push for more, even if it offers little chance of actually saving the home.

Many loan modification firms give advice that can be damaging to homeowners, encouraging those who are not yet in default on their loans to become so. The advice may be direct, or the firm may tell homeowners that they cannot help them unless and until they are in default. Direct advice may be hard to prove without a "he said she said" and war of evidence. Indirect advice may not be actionable. As in the case of debt settlement companies, one has to wonder whether this posture is intended solely for negotiating purposes or whether the firm is also trying to free up resources to pay the firm's fees.

Finally, the substantial advertising spent to promote these firms obscures the message that homeowners are much better off taking advantage of the free, qualified help that is available from

³⁷ See Testimony of Travis B. Plunkett Before the Committee on Commerce, Science, and Transportation of the United States Senate Regarding Consumer Protection and the Credit Crisis at 8-10 (Feb. 26, 2009).

³⁸ Prof. Alan White, "February and March Foreclosure Trends," Consumer Law and Policy Blog (Apr. 8, 2009), <http://pubcit.typepad.com/clpblog/2009/04/february-and-march-foreclosure-trends.html>.

³⁹ See Emily Flitter, "Rising Redefaults Raise Loan Mod Mandate Odds," American Banker at 1 (May 5, 2009).

HUD-approved housing counseling agencies. One website, USHUD.com, even claims to be: “America’s Only **Free** Foreclosure Resource.” Some loan modification firms actively discourage homeowners from going to HUD-approved agencies, claiming superior expertise. Yet neither federal nor state laws impose *any* requirements on the substantive expertise that a for-profit loan modification firm must have to hold itself out as an “expert.” As discussed above, the primary experience appears to be expertise at selling mortgage products.

By contrast, HUD-approved housing counseling agencies must be nonprofit, 501 c-3 corporations, must complete the HUD approval process, and need to comply with HUD regulations, including requirements for trained, experienced staff. These regulations include conflict of interest provisions that require acting in the best interest of the client, quarterly reporting to HUD of performance numbers, biennial site visits and review of client files, restrictions on charging fees, and record keeping requirements. The nonprofit housing counseling industry has extensive foreclosure training programs, provided by NeighborWorks, National Council of La Raza, and HUD, along with internal training programs provided by ACORN Housing, National Foundation of Credit Counseling, Money Management International and others. And all that for free.

HUD and the agencies it funds have made serious investments in the training of counselors. Allowing scammers to undermine their efforts is also working against federal investments.

C. What Else Are They Selling? Loan Mods That Turn Into Questionable Short Sales?

Information is beginning to surface about a new variety of foreclosure rescue involving the sale of a house that is upside down (that is, more is owed on the house than is worth). Indeed, some loan modification websites tout their expertise in short sales.

A true short sale is one where the lender agrees to take less than the full amount of the loan in order to clear title and permit the sale to proceed. As long as the lender is part of the process and everyone knows and agrees to the true sale price and the ramifications of a short sale, there is nothing unlawful about a short sale. Like a foreclosure, however, it has an impact on the homeowner’s credit report. The lender may also insist that the homeowner remain liable for the deficiency, or even if it is forgiven, the homeowner may also owe taxes on the forgiven amount. The same is true if the lender were to permit the new buyer to assume the mortgage.

In one version of a short sale scam, the realtor and the buyer collude to conceal the full price of the sale from the lender so that they can pocket the difference, often by using option contracts and back to back closings. This version is aimed primarily at defrauding the lender, though the homeowner is also hurt by an artificially low sales price, either by being liable on a deficiency or by paying taxes on a higher forgiven balance.⁴⁰

⁴⁰ See Nick & Cindy Davis, “Sellers Beware of Short Sale Scams” (Apr. 21, 2009), <http://www.city-data.com/blogs/blog5708-sellers-beware-short-sale-scams.html>; Bill Gassett, “Short Sale Scammers We Buy Houses” (Aug. 14 2008); <http://metrowestmarealestate.blogspot.com/2008/08/short-sale-scammers-we-buy-houses.html>; “New “short sale” scam taking root?,” St. Petersburg Times (April 22, 2008), <http://blogs.tampabay.com/realstate/2008/04/new-short-sale.html>.

In another version of a short sale scam, the buyer takes over the mortgage without satisfying the due on sale clause and the sale is concealed from the lender.⁴¹ The owner of a We Buy Houses franchise explained at trial that these deals work when the homeowner is only 10% to 15% upside down, because the home is sold to a buyer who is willing to pay a premium above fair market value to avoid a credit check because they cannot qualify for a regular loan.⁴² Depending on how the transaction works, the homeowner may be out cash, lose the home, and still end up with a foreclosure on the credit report.

Even assuming that this scheme works for the buyer, whose name is not on the mortgage and whose credit is not at risk, the perils for the homeowner are great. The homeowner remains on the hook for the mortgage if the buyer defaults, risking both a foreclosure on the record and potential liability for any deficiency. Default by the new buyer may be likely, because the buyers that these deals attract are ones who want to avoid a credit check and a substantial down payment. That is, they are seeking the type of no doc/no money down loan of the type that led to the foreclosure crisis and is no longer available from regular lenders. The homeowner is also exposed to any other liability, civil or criminal, that comes with violating the due-on-sale clause and actively concealing that sale.

These transactions may begin as traditional loan modification contracts, in which the homeowner pays a fee in the hopes of saving the home. The rescuer may then pressure the homeowner into agreeing to the sale – and into paying a sales commission to the rescuer. Thus, the homeowner has to pay two fees, loses the home, may still have her credit blemished by a foreclosure if the new buyer defaults, and may be exposed to liability for violating the contract.

⁴¹ An article appearing on several real estate investing websites explains how the due on sale clause is avoided. “The game for us is how to transfer ownership to the property without getting caught by the lender Attorney William Bronchick, “There's No "Due on Sale" Jail, <http://www.legalwiz.com/due-on-sale-clause>. That article – which pre-dates the foreclosure crisis and the loan modification explosion – explains a scheme in which the property is first transferred to an *inter vivos* trust in the name of the original homeowner, with that homeowner as a beneficiary. That transfer is exempt from the due-on-sale clause under federal law *as long as there is no change in occupancy*. But then, “Sammy Seller quietly assigns his interest under the trust to you [the buyer] (similar to a transfer of stock in a corporation). This assignment is not recorded in any public record. *Sammy moves out and you move in*” (emphasis added). The article – which is aimed at investors, not homeowners – addresses the risks that the parties could be held liable for fraud or other criminal liability, or for civil liability, argues that the risks are not great, and concludes that the transaction “is a risk versus reward gamble.”

⁴² Reporters Transcript, Adversary Proceeding at 35-46, *In re Michelle Perry*, No. 08-26905-C-7, (*Nunes v. Perry*, Adversary No. 08-2463), U.S. Bankruptcy Court (E.D. Cal. Feb. 11, 2009) (on file at National Consumer Law Center).

V. STATE FORECLOSURE RESCUE LAWS

A. State Foreclosure Consultant Laws

In the past five years, several states have enacted laws to deal with foreclosure rescue scams. About 24 states and the District of Columbia now have laws that impose constraints on foreclosure rescue operations, both those that merely involve a fee for service, and the sale/leaseback scams that involve transfer of title.⁴³

Though not every state law contains every provision, the typical foreclosure consultant laws:

- Ban up front payments;
- Ban any compensation until the consultant has fully performed every promised service;
- Require the contract to detail exactly what the consultant is promising to do;
- Require the consultant to give the homeowner notice of the right to cancel the contract within 3 to 5 days – which is extended if the notice is not given or the contract otherwise violates the statute;
- Require other disclosures;
- Prohibit the consultant from obtaining a power of attorney;
- Some prohibit the consultant from taking an interest in the property;
- Prohibit the consultant from receiving compensation from a third party;
- Some require the contract to be in the language used to negotiate with the homeowner.

Most of these laws exempt nonprofits and a variety of licensed entities. The issues posed by these exemptions are discussed below.

Most state laws only address services to homeowners who are in foreclosure or are 30 to 90 days in default.

These laws have given enforcement agencies and homeowners useful tools. A number of states have used their foreclosure rescue laws against loan modification firms. More than 20 state law enforcers have taken actions against companies engaged in these types of deception, including 22 brought by Illinois Attorney General Madigan.⁴⁴ Though the scams have spread rapidly even in states that have strong laws, it is too early to say whether the scams will abate as publicity over enforcement efforts expands.

Reports of homeowners using these laws against loan modification scams are more scarce. Most likely, homeowners are unable to find attorneys to help in light of the relatively small dollar amounts involved, and the firms disappear once homeowners and state officials begin investigating them.

⁴³ Arizona, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maryland, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New York, Oregon, Rhode Island, Washington and Wisconsin have specific foreclosure rescue laws. Massachusetts has enacted similar, but less detailed, provision in regulations under the states unfair and deceptive acts and practices statute. Other states, like Michigan, have credit repair statutes imposing similar provisions that may be broad enough to apply to foreclosure rescue operations.

⁴⁴ See Press Release, “Federal and State Agencies Crack Down on Mortgage Modification and Foreclosure Rescue Scams,” Federal Trade Commission (Apr. 6, 2009), <http://www.ftc.gov/opa/2009/04/hud.shtm>.

Of the substantive provisions, a clear ban on any fees *until the homeowner actually receives an acceptable loan modification* is the most important. In addition to using individuals or entities that fall within an exemption, there are some indications that companies are avoiding the advance fee bans by taking the money “in trust” until the “services” are performed. Of course, if the only service performed is to make calls without achieving a loan modification, the homeowner has no protection.

Most of these laws were passed, or are copied from laws that were passed, before the current wave of loan modification scams began. States have also been considering new approaches to deal with loan modification scams.

Illinois recently lowered its cap on the total fees for foreclosure consultant or loan modification services to 50% of the homeowner’s monthly mortgage payment, unless the homeowner’s mortgage payments are reduced for at least five years, in which case the cap goes up to the lesser of the value of any loan reduction for 12 months or one full monthly mortgage payment.⁴⁵ A fee cap tied to results is a useful way of enforcing a rule that the fee is earned only if an affordable loan modification actually results.

California permits real estate department licensees who wish to charge advance fees for loan modification services to submit their contracts for approval, and approved companies are listed on the department’s website.⁴⁶ Unfortunately, licensing or approval requirements that do not have real teeth in them – requiring clear results for any fee – only end up giving the state’s imprimatur to firms without effective oversight.

B. To What Extent Should Attorneys, Real Estate Brokers and Other Licensed Entities Be Exempt?

All state foreclosure consultant laws contain exemptions, typically for nonprofits⁴⁷ and certain licensed entities, including mortgage brokers, mortgage lenders, attorneys, real estate brokers, and depository institutions. The exemptions should extend only to conduct within the scope of the license, whether that is stated directly or implicitly in the statute.

These exemptions can be problematic, as many if not most of the difficulties involve individuals or firms that fall into these categories. Even if the exemption is limited to conduct within the scope of the license, the critical protection of banning advance fees will not apply unless the consultant violates some other law.

Moreover, some of the mortgage and real estate broker licensing laws are written broadly and may cover those who offer “services” beyond their traditional roles of finding mortgages or selling homes. States need to be careful in interpreting their licensing laws broadly to crack down on unlicensed operations, because in doing so they may open up a larger loophole in their foreclosure rescue statute for licensed entities.⁴⁸

⁴⁵ 765 Ill. Comp. Stat. § 940/70 (effective Apr. 6, 2009).

⁴⁶ We have concerns about licensing or approval regimes that imply state blessing of these arrangements, though we do not have information about whether the companies listed on the California website have engaged in abusive conduct.

⁴⁷ The exemption for nonprofits has to date not proved problematic, but vigilance is needed to watch out for the creation of sham nonprofits as has occurred in the credit repair context to avoid the Credit Repair Organizations Act, 15 U.S.C. §§ 1679-1679j.

⁴⁸For example, Pennsylvania was able to use its mortgage broker licensing requirements to crack down on out-of-state loan modification companies. See Press Release, “Banking Department Takes Action Against

On the other hand, the definition of foreclosure consulting services covered by foreclosure rescue statutes is broad, and without an exemption it can reach to the work of honest and helpful real estate brokers, mortgage brokers and attorneys who can certainly play a role in helping a homeowner avoid foreclosure. Lawmakers need to be careful not to throw the baby out with the bathwater.

Massachusetts' foreclosure consultant regulation is the strictest in terms of coverage.⁴⁹ The only exemptions to the advance fee ban are for attorneys who prepare or file a bankruptcy petition or court proceedings to avoid a foreclosure, or loan application fees paid to a licensed mortgage broker or licensed mortgage lender. The regulation also requires that the attorney, broker or lender comply with all applicable laws and regulations.

This narrow exemption for mortgage application fees may be the best way to avoid an overbroad exemption for real estate or mortgage brokers. Both are normally paid only when a sale or mortgage is completed, and permitting an application fee allows their traditional activities to go forward. Maryland's law achieves a similar result by exempting mortgage and real estate brokers only when refinancing a mortgage or engaged in selling the property, respectively.⁵⁰ But if real estate or mortgage brokers go beyond their regular business of finding mortgages or selling homes and try to capitalize on the foreclosure crisis and loan modification efforts, they should be covered by the same rules as other foreclosure consultants.

The role of attorneys is more complicated. Attorneys can play a wide number of roles in helping a client avoid foreclosure – from filing a bankruptcy petition, a suit challenging a predatory loan, or a defense to foreclosure, to activities that do not involve litigation, including advising a client on potential claims or defenses or on the intricacies of loan modification programs, or negotiating a settlement with a lender for a client outside of litigation. Though some attorneys have unquestionably been involved in harmful conduct, an attorney's traditional role of analyzing a client's paperwork and advising the client of potential claims and options fits within the definition of foreclosure consulting services. These services take time, cannot always be offered for free, and cannot guarantee a successful claim. Even my office, which is a nonprofit, charges other attorneys for consulting services that can include loan documentation analysis. Thus, drawing a clear line that excludes harmful conduct but does not prevent beneficial advice and activities is not so easy.

Attorneys are also regulated at the state level, and misconduct can lead to revocation of their license, a severe sanction that does have a deterrent effect. Attorneys also are required to carry malpractice insurance, and so may be more reachable when things go wrong than other scammers.

On the other hand, it may be possible to attack those who use the guise of an attorney license to cloak activities by nonlawyers and to fit within the attorney exemption in statutes that ban advance fee bans. For example, some loan modification firms that are owned by real estate or mortgage professionals tout the attorney services that they offer. Conversely, some attorneys are running large loan modification operations or other large operations staffed largely by nonlawyers

Mortgage Modification Companies,” Pennsylvania Department of Banking (Apr. 23, 2009). Though Pennsylvania does not presently have a specific foreclosure rescue statute, if it decides to adopt one it needs to be careful about the interplay with this broad interpretation of the mortgage broker statute.

⁴⁹ See 940 Code Mass. Reg. 25.02(b).

⁵⁰ See Md. Real Prop. § 7-302.

doing nonlegal work. Lawmakers should consider ways to narrow any exemption for attorneys to exclude these types of activities.

State bars should also do a better job of cracking down on abusive advertising practices by attorneys. That is, it might be appropriate for a state bar to adopt a rule that, if an attorney does not want to abide by a foreclosure consultant law that prohibits advance fees until and unless a loan modification is obtained or a foreclosure avoided, then the attorney must refrain from advertising services that hold out the promise of those results.

C. State Laws Governing Sale/Leaseback Transactions

Most of the state foreclosure rescue laws also govern transactions in which title to the home is actually transferred but the homeowner retains possession. Though these transactions are less prevalent today as fewer and fewer homeowners have equity to steal, they have not disappeared.

Sale/leaseback scams are typically addressed through laws governing “foreclosure purchasers” who take title to a home with the homeowner remaining in possession. As with foreclosure consultant provisions, most foreclosure purchaser laws do not ban the transactions but impose extensive requirements and notice of a three- or five-day right to cancel, with the time extended if the contract does not comply.

The typical foreclosure purchaser statute prohibits an array of deceptive, unfair, and abusive practices. Many prohibit unconscionable contract terms. Some prohibit deception in broad terms. Another common provision is a cap on fees or interest rates for any loans, or a requirement that a rescuer who purchases the property must pay at least a certain percentage of its fair market value, typically 82%. Some statutes prohibit the rescuer from entering into an agreement to reconvey the home to the homeowner unless the homeowner has a reasonable ability to meet the requirements for reconveyance.

Massachusetts, Maryland and the District of Columbia take a stronger approach to sale/leaseback transactions: they ban them. Massachusetts and DC directly prohibit transactions, entered into for profit or gain, intended to delay or forestall foreclosure in which the property is conveyed but the homeowner retains possession.⁵¹ Maryland achieves the same result indirectly in its foreclosure consultant law by prohibiting the consultant from taking an interest in the property.⁵²

These state laws have been effective in cutting back on the number of sale/leaseback scams, though the full effect of the newer laws is not yet clear as these scams can take a year or two to ripen and come to the attention of homeowner attorneys and enforcement officials. The statutes that have been invoked in litigation have done well in giving consumers who are victimized effective remedies against the scammer. The homeowner may still have difficulty gaining complete relief, however, if the straw buyer has taken out a new mortgage or has sold the property to an innocent third party.

The National Consumer Law Center has developed a model state foreclosure rescue scam law that treats sale/leaseback transactions as what they really are: a loan, rather than a sale.⁵³ Using

⁵¹ 940 Code of Mass. Reg. 25.00 *et seq.*; DC Stat. § 42-2432.

⁵² *See* Md. Code Real Prop. § 7-307.

⁵³ The model law is available on our website at <http://www.nclc.org/issues/foreclosure/index.shtml> and is attached as Exhibit 1.

the century-old common law equitable mortgage doctrine,⁵⁴ the law converts the sale into a loan and requires the rescuer to comply with lending laws. The model law also sets out a detailed remedy scheme that none of the state laws includes, and sets out factors to consider when a mortgage lender or purchaser claims to be an innocent third party but in fact had enough notice to know better.

⁵⁴ See, e.g., *Russell v. Southard*, 53 U.S. 139 (1851); *Lynch v. Murphy*, 161 U.S. 247 (1896); *In re Cox*, 493 F.3d 1336 (11th Cir. 2007) (Georgia law); National Consumer Law Center, *Foreclosures* §15.4 (2d Ed. 2007 & Supp. 2008).

VI. THE ROLE OF FEDERAL LEGISLATION

A. General Principles

As the presence of state legislation and the current activity of state legislators on this subject demonstrates, state law is not preempted in the area of foreclosure rescue scams, and states who choose to do so face no significant obstacles in passing laws to govern these operations. States are also in position to address the interplay with state licensing regimes for attorneys, mortgage brokers, and others who have legitimate reason to be exempted but can also be part of the problem.

Nonetheless, federal legislation can be helpful as long as it:

- creates strong, significant protections and not just disclosure hoops for scammers to jump through;
- is enforceable by the homeowners who are victimized and creates significant penalties for the scammers;
- is a floor and not a ceiling and does not preempt stronger state laws;
- helps in developing a clear national message about the dangers of these schemes;
- does not excessively restrict legitimate services outside the scope of the statute; and
- does not end up inadvertently legitimizing a very problematic industry.

We do not recommend new federal legislation to address sale/leaseback scams in which the homeowner's title is actually transferred. These scams, which target equity, are less prevalent in today's declining market. The federal Truth In Lending Act has been effectively used in combination with state equitable mortgage doctrines to invoke TILA's rescission remedies. Specific state legislation has also been effective in giving homeowners remedies. Anything short of a complete, strong, flat out federal ban on sale/leaseback transactions could risk undermining these successful strategies and legitimizing a model that provides no benefits to homeowners.

B. H.R. 1231, the Foreclosure Rescue Fraud Act of 2009

Representatives Gwen Moore and Barney Frank have introduced H.R. 1231, the Foreclosure Rescue Fraud Act of 2009, the companion bill to Senator Herb Kohl's S. 117. H.R. 1231 is a similar, somewhat simplified version of the state legislation discussed above in effect in about 23 states and the District of Columbia. A modified version of the bill was recently offered, and then withdrawn, as an amendment to H.R. 1728.

By banning advance fees for foreclosure consultants, the bill addresses the most problematic aspect of this industry: taking money for doing or achieving nothing.⁵⁵ It makes possible a clear, nationwide message against advance fees. The bill also has a clear provision protecting stronger state laws and is enforceable by the victimized homeowner.

The bill could be strengthened, however, as could state legislation on this subject:

- Homeowners should have more time, 30 days, to cancel the contract;
- The advance fee prohibition should not be circumvented by taking money in trust or escrow (unless of course in connection with an exempt transaction such as an attorney's retainer agreement);

⁵⁵ The bill appropriately does not address sale/leaseback scams, which are better left to states, other than by prohibiting a consultant from taking an interest in the property or a power of attorney from the homeowner.

- The bill should be clear that the fee is not earned unless and until the consultant delivers actual results. Merely performing services that lead nowhere is not enough;
- The results must include a long-term, affordable loan modification or another outcome that has a substantial probability of saving the home. A loan modification that increases payments, keeps unaffordable payments the same, or otherwise is likely to lead to redefault should not qualify;
- Any fee cap should be commensurate with the results obtained;
- The penalties for violations should be the greater of *triple* the consultant's fee or the amount of actual damages. Merely requiring a refund of the fee is not a significant deterrent.

The latest version of the bill omits any exemption for real estate brokers, which will help to avoid evasion of the bill's protections.

The latest version also includes attorneys, though it permits advance fees for preparing or filing bankruptcy petitions or court proceedings to avoid a foreclosure. As discussed above, this exemption is too narrow and could prohibit legitimate activities by attorneys, but there may be ways to carve out legitimate attorney services while including nonlawyer services that seek to exploit an attorney exemption.

With these improvements, H.R. 1231 can be useful in protecting homeowners nationwide from loan modification firms that take their money without providing an affordable loan modification.

VII. CONCLUSION

Poor servicing has pushed many borrowers to seek assistance from loan modification companies, but the loan modification industry is complicit in fleecing financially distressed homeowners. Many times these companies take up front fees based on promises of loan modifications that never materialize. While many states have taken steps to curb these practices, existing laws could be tightened up.

Congress can help first and foremost by addressing the servicing problems and providing more resources for HUD-approved housing counseling agencies and enforcement. Congress could also adopt strong, minimum, national standards to assist the majority of states that does not have foreclosure rescue laws.

Thank you for this opportunity to testify before you on this important subject. I welcome your questions.

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To: State Legislators Interested in Combating Foreclosure Rescue Scams
From: National Consumer Law Center⁵⁶
Date: March 11, 2008
Re: NCLC Model Foreclosure Rescue Statute

The foreclosure crisis has presented the perfect opportunity for foreclosure rescue scams. These scams come in two main varieties.⁵⁷ In the first, a foreclosure “consultant” takes an up front payment and promises to arrange refinancing or postpone the foreclosure, but does nothing and costs the homeowner not only money but critical time. In the second, the rescuer takes title to the property “temporarily” with the promise that the homeowner will get it back, a promise that always fails. These sale/leaseback scams are designed to steal the home’s equity.

NCLC has drafted a model state law designed to combat the more complicated sale/leaseback scams. Our model law builds upon but differs from the two approaches that some states have enacted. Several states have regulated foreclosure rescue scams by specifying requirements for the contracts and giving the homeowner a right to cancel. More recently, the Massachusetts Attorney General issued an order under her unfair and deceptive acts and practices authority completely banning foreclosure rescue transactions, and the District of Columbia enacted a similar prohibition by statute. These different approaches have had some success, though they have not completely stopped foreclosure rescue scams.

Our model law builds upon the centuries-old common law equitable mortgage doctrine to call a sale/leaseback transaction what it is: a loan. The model law requires the rescuer to comply with lending laws, deems the rescuer’s deed to be merely a mortgage, and deems the rescuer to be merely a lender, with no right to evict or encumber the property.

The model law has the following advantages over the other approaches:

⁵⁶ This memorandum was written by Lauren Saunders, Managing Attorney of NCLC’s Washington, DC office.

⁵⁷ For more background, see NCLC, “Dreams Foreclosed: The Rampant Theft of America’s Homes Through Equity-Stripping “Foreclosure Rescue” Scams (2005), available at www.nclc.org/news/content/ForeclosureReportFinal.pdf

- It is simple to apply.
- It does not send out a mixed message that it is acceptable to take a homeowner's title as long as contract requirements are satisfied.
- It may be more appealing to legislatures that are concerned about banning all foreclosure rescue transactions outright.
- It includes a clear, detailed remedy scheme that none of the existing statutes has, showing precisely how to restructure a transaction that looks like a sale into a loan.
- It provides a workable approach to helping homeowners who received some cash from the rescuer that they cannot afford to pay back immediately.
- It clarifies the warning signs that third party lenders, buyers, title insurers and escrow companies should look for to ensure that they do not unwittingly enable these scams.

Our model law makes clear and explicit what the other statutes leave implicit. Under all the existing statutes, once the transaction is found to be unlawful, it is generally necessary to resort to the common law equitable mortgage doctrine or the federal Truth in Lending Act to unwind the transaction. Yet courts are sometimes uncomfortable doing so without clear direction or more recent caselaw than equitable mortgage cases that could be a century old.

In addition, the model law attempts to achieve a more complete remedy and, better yet, to stop the scams from happening by depriving scammers of the unwitting assistance of third parties that are critical to the deals. No matter what approach is taken, scammers will violate the law because they are lawbreakers. But even once the scammer is caught, complete relief is often impossible because the home has been encumbered by a new loan from a bona fide lender, or title has been passed to a bona fide purchaser. The model law specifies the warning signs that should put a third party on notice to inquire into the homeowner's status before getting caught in the middle. Scammers will be unable to complete their transactions if legitimate title or escrow companies will not close their deals, if legitimate lenders will not finance them or enable them to get their money out, and if the scammers cannot flip the properties to legitimate buyers.

Note that the model law's remedy and bona fide purchaser provisions are also adaptable to supplement the existing "regulate it" and "ban it" approaches.

For more information, contact Lauren Saunders in NCLC's Washington office.

About NCLC

National Consumer Law Center is a non-profit organization with nearly 40 years of working experience in consumer issues, especially those affecting low-income consumers. NCLC works with and offers training to thousands of legal-service, government and private attorneys, as well as community groups and organizations

representing low-income and elderly people. Note that NCLC does not directly assist individuals.

NCLC has extensive experience in mortgage lending and the problem of foreclosure rescue scams and has published several reports and legal treatises on the issue. More detailed advice on the legal theories used to assist homeowners in foreclosure or to attack foreclosure rescue transactions can be found in the Foreclosure Rescue Scams chapter of *Foreclosures: Defenses, Workouts, and Mortgage Servicing* (2d ed. 2007 & Supp.). Other legal treatises include *Truth in Lending* (6th Ed. 2007 & Supp.) and *Unfair and Deceptive Acts and Practices* (7th ed. Forthcoming 2008). Other publications that can be useful to lay advocates include *Foreclosure Prevention Counseling* (1st ed. 2007); *Stop Predatory Lending* (2d ed. 2007); and *Surviving Debt* (7th ed. 2008). Ordering information can be found on our website.



MODEL STATE FORECLOSURE RESCUE FRAUD PREVENTION ACT

January 18, 2008

1. Title; Declaration of Purpose

- 1.1. This Chapter shall be known as the "Foreclosure Rescue Fraud Prevention Act."
- 1.2. This Act shall be liberally construed to effectuate its purpose, which is to prevent homeowners who are facing foreclosure from becoming the victim of persons who purport to help save the home while actually taking title to the home and the homeowner's equity.
- 1.3. The legislature finds that when a homeowner transfers title to the home as part of a foreclosure rescue transaction, the homeowner's intent is merely to provide security for the loan of money to avoid foreclosure, not to transfer the home to the rescuer. The purpose of this law is to require that all foreclosure rescue transactions comply with lending laws; to provide a mechanism to restructure foreclosure rescue transactions and other equitable mortgages from a transfer of title into a loan to conform with the homeowner's intentions; to define and forbid certain unfair foreclosure rescue transactions; to set out factors that put a potential purchaser or lender on notice to inquire as to the rights of a person in possession of the property; and to set out remedies for a violation of the Act.

2. Definitions

- 2.1. "Bona fide purchaser or lender."
 - 2.1.1. "Bona fide purchaser or lender" means anyone acting in good faith who purchases property, as defined in this Act, from the grantee for valuable consideration or makes a mortgage loan to the grantee or a subsequent bona fide purchaser, provided that he or she had no prior notice of the homeowner's continuing interest, equity or right to possess the property, of the facts deeming the deed or conveyance to be an equitable mortgage, or of any violation of this Chapter.
 - 2.1.2. In addition to any other grounds for notice under state or federal law, a purported bona fide purchaser or lender is on inquiry notice as to the

- 2.1.3. rights of any person in possession of the property if the purchaser or lender, or his or her agent, has notice (i) that the property is or was in foreclosure or default, or was within the previous 12 months, and (ii) one or more of the following factors applies:
 - 2.1.3.1. the total consideration paid to the homeowner, as described in section 5.6.1, was less than 82% of the fair market value of the property;
 - 2.1.3.2. the homeowner intends to remain or has remained in the property after transferring title;
 - 2.1.3.3. the grantee who seeks to sell or mortgage the property does not intend to live or is not living in the property after acquiring title;
 - 2.1.3.4. the property was transferred from the homeowner through a quit claim deed or power of attorney, or without a formal closing;
 - 2.1.3.5. the grantee seeks a purchase money loan and the purported bona fide lender failed to review the purchase and sale documents governing the grantee's acquisition of the property;
 - 2.1.3.6. encumbrances remain or will remain on the property for which the homeowner could be liable after transfer of title;
 - 2.1.3.7. any payments made upon the transfer of title from the homeowner (i) are characterized as payoffs of liens or other encumbrances not on the title, (ii) are due to the homeowner but are assigned to another person; or (iii) violate the Real Estate Settlements Procedures Act, 12 U.S.C. § 2601 *et seq.* ;
 - 2.1.3.8. the grantee is an inter vivos trust created after the default or foreclosure; or
 - 2.1.3.9. the purchaser or lender has any other reason to know that the deed or conveyance is an equitable mortgage or that the homeowner intends to retain title to or possession of the property.
- 2.2. "Foreclosure" means the state law process by which a person with a security interest in residential property may foreclose on that security interest.
- 2.3. "Foreclosure rescue transaction."
 - 2.3.1. "Foreclosure rescue transaction" means a transaction that meets all of the following elements:

- 2.3.1.1. property subject to this Act is conveyed by a homeowner to a grantee;
 - 2.3.1.2. the property is, or was at the time of the foreclosure rescue transaction, in default or foreclosure;
 - 2.3.1.3. the transaction is designed, intended or promoted by the parties as a means to avoid or delay actual or anticipated foreclosure proceedings against the property while permitting the homeowner to maintain a legal or equitable interest in the property conveyed, including, without limitation, a lease interest, a right to possession, an option to acquire the property, or other interest in the property conveyed; and
 - 2.3.1.4. the grantee enters into the transaction for compensation or gain or for potential or contingent compensation or gain.
- 2.3.2. A transaction shall not be deemed to be a foreclosure rescue transaction merely because it provides the homeowner up to three months beyond the transfer date to vacate the property, provided that it is clear from all of the circumstances that the homeowner has no expectation of remaining in the property beyond the date to vacate.
- 2.3.3. The term "foreclosure rescue transaction" includes any contract, agreement, or arrangement, or any term thereof, between a grantee and a homeowner that is incident to a foreclosure rescue transaction.
- 2.3.4. Parol evidence is admissible to show that a transaction is a foreclosure rescue transaction.
- 2.4. "Formal closing" means an in-person, face-to-face meeting with the homeowner conducted by and in the office of a closing agent who is not employed by or affiliated with the grantee to complete final documents incident to the sale or transfer of an interest in property, or the creation of a mortgage or equitable interest in property, during which the homeowner must be presented with a completed copy of any settlement statement required under state or federal law.
- 2.5. "Grantee" means any person who acquires title to property, as defined in this Act. The term "grantee" includes the grantee's representative as defined in this subdivision, successor in interest, or any person acting in joint venture or joint enterprise with the grantee. The term "grantee" does not include a person who acquires title as follows:
- 2.5.1. by a deed as a result of a foreclosure sale;

- 2.5.2. by a deed in lieu of foreclosure of any voluntary lien or encumbrance of record, other than a lien or encumbrance created in connection with a foreclosure rescue transaction;
 - 2.5.3. at a short sale at which the outstanding obligations against the property, other than obligations created in connection with a foreclosure rescue transaction or equitable mortgage, are greater than the fair market value of the property;
 - 2.5.4. at any sale of property authorized by statute;
 - 2.5.5. by order or judgment of any court; or
 - 2.5.6. as a bona fide purchaser or lender as defined in this Act.
- 2.6. "Homeowner" means a natural person who, at the time of the foreclosure rescue transaction or the creation of an equitable mortgage, held title to the property as defined in this Act.
- 2.7. "In default" means a property whose owner is more than 90 days delinquent on any loan or debt, including real estate taxes, that is secured by the property.
- 2.8. "In foreclosure" means a property for which a secured party or taxing authority has initiated a foreclosure.
- 2.9. "Property" means residential property, whether real or personal, including condominiums, modular homes or manufactured or mobile homes, consisting of from one to six dwelling units at least one of which is occupied or was occupied prior to the transfer of title to the property by the homeowner as a primary residence.
- 2.10. "Representative" means a person who in any manner solicits, induces, arranges, or causes a homeowner to transfer title or solicits any member of the homeowner's family or household to induce or cause a homeowner to transfer title to the property pursuant to a foreclosure rescue transaction.
- 2.11. "Title" includes title to or ownership of the property, as well as ownership of an interest in the property through a trust document.
- 3. Equitable Mortgages.**
- 3.1. Every deed or other conveyance of an interest in property that purports to be an absolute conveyance of title to property but was made as security for the performance of an obligation, is deemed to be an equitable mortgage.

The obligation may have been created prior to or contemporaneous with the conveyance and need not be the personal liability of any person.

- 3.2. Intent that the deed or other conveyance serve as security may be inferred by a preponderance of the evidence from the totality of the circumstances, including but not limited to the following factors:
 - 3.2.1. statements of the parties;
 - 3.2.2. the presence of a substantial disparity between the value received by the homeowner and the fair market value of the property at the time of the transaction;
 - 3.2.3. the fact that the homeowner retained possession of the property;
 - 3.2.4. the fact that the homeowner reserved or was assured an option to repurchase, retain or regain title to the property;
 - 3.2.5. the fact that the homeowner continued to pay real estate taxes on the property;
 - 3.2.6. the fact that the homeowner continued to pay or to be liable for other encumbrances on the property;
 - 3.2.7. the fact that the homeowner made post-conveyance improvements to the property; or
 - 3.2.8. the nature of the parties and their relationship prior to and after the conveyance.
- 3.3. Parol evidence shall be admissible to prove that a transaction is an equitable mortgage.
- 3.4. The grantee of a deed or conveyance that is deemed to be an equitable mortgage is deemed to be a mortgagee and may not evict the homeowner nor cause the homeowner to quit involuntarily, other than by foreclosure pursuant to the procedures of state law, nor may the grantee transfer or encumber any interest in the property. Any such transfer or encumbrance is void as to anyone but a bona fide purchaser or lender.
- 3.5. A transaction deemed to be an equitable mortgage must comply with all applicable state and federal laws governing mortgages in property covered by this Act.
- 3.6. The provisions of this Chapter are in addition to and do not preclude any rights or remedies relating to equitable mortgages under common law.

4. Foreclosure Rescue Transactions.

- 4.1. All foreclosure rescue transactions are conclusively deemed to be equitable mortgages subject to Section 3 without further proof of the elements of that Section.
- 4.2. All deeds or other conveyances transferring title to property from a homeowner pursuant to a foreclosure rescue transaction shall carry the statement on the face of the deed or conveyance: "This property is subject to the Foreclosure Rescue Fraud Prevention Act."
- 4.3. If the grantee records any deed or other conveyance transferring title from the homeowner pursuant to a foreclosure rescue transaction, the grantee shall also document and record with the County Recorder's office any legal or equitable interest that the homeowner retains in the title of the property as described in Section 2.3.3. Failure to comply with sections 4.2 or 4.3 shall not affect the homeowner's rights and remedies under this Chapter.
- 4.4. Unfair foreclosure rescue transactions are unlawful, void and a violation of _____. A foreclosure rescue transaction is unfair if it meets any of the following criteria:
 - 4.4.1. The grantee has violated Section 3.4 or 3.5;
 - 4.4.2. The grantee fails to pay the homeowner consideration amounting to at least 82 percent of the fair market value of the property. Consideration includes only those payments set forth in Section 5.6.1.
 - 4.4.3. The grantee fails to verify that the homeowner has or is likely to have a reasonable ability to make any payments required under the foreclosure rescue transaction and to pay for the subsequent reconveyance back to the homeowner of the full title previously held by homeowner, based upon consideration of the homeowner's current and expected income, current obligations, employment status, and other financial resources (other than the homeowner's equity in the property that is the subject of the transaction), as verified by documentation of all sources of income and corroborated by independent verification.
 - 4.4.3.1. There is a rebuttable presumption that the grantee has not verified reasonable payment ability if the grantee has not obtained documents other than a statement by the homeowner of assets, liabilities and income.

4.4.3.2. There is a rebuttable presumption that a homeowner has a reasonable ability to pay if the grantee demonstrates that at the time the foreclosure rescue transaction is consummated, the homeowner's total monthly debts, including amounts owed under the transaction, do not exceed fifty percent of the homeowner's monthly gross income; and the grantee follows the residual income guidelines established in 38 C.F.R. § 36.4337(e) and VA Form 26-6393 or their successors.

4.4.4. The homeowner's cost to repurchase or to reacquire title to the property exceeds the consideration paid to the homeowner as set forth in section 5.6.1 by more than 10% if the repurchase is exercised within 24 months of the sale, by more than 15% if the purchase is exercised more than 24 but within 36 months after the sale, or by more than 18% if the repurchase is exercised more than 36 months after the sale.

4.4.5. The homeowner remains liable for an existing mortgage loan on the property.

4.4.6. The transaction, restructured as an equitable mortgage pursuant to Section 5, is a mortgage referred to in 15 U.S.C. § 1602(aa) [the Home Owner's Equity Protection Act] and its implementing regulations; or

4.4.7. The foreclosure rescue transaction is otherwise unfair, deceptive, or commercially unreasonable.

4.4.8. The criteria set forth in this subsection are for purposes of identifying unfair foreclosure rescue transactions and shall not limit a homeowner's damages against the grantee of an unfair foreclosure rescue transaction.

5. **Reformation of Equitable Mortgage.**

5.1. **Voidable Deed.** A deed or other conveyance that is deemed an equitable mortgage is voidable, except as to a bona fide purchaser or bona fide lender, and may be reformed into an equitable mortgage at any time while the homeowner remains in possession of the property or within three months after the homeowner's loss of possession of the property other than by way of foreclosure by a party other than the grantee.

5.2. **Demand to Return Title.** The homeowner may void a deed or conveyance that is deemed an equitable mortgage pursuant to Section 3 or 4.1 and demand that the grantee reform the transaction into an equitable mortgage within the time set forth in Section 5.1 by giving written notice to the grantee or his or her successor in interest. The notice need not take any particular form and, however expressed, is effective if it indicates the intention of the homeowner to retain or regain title to the property.

5.3. Recording of Demand to Return Title. If the transaction is a foreclosure rescue transaction the homeowner may record the demand to return title with the County Recorder's office of the county in which the property is located, within the time set forth in Section 5.1. In order to be recorded, the notice shall contain the name of the homeowner and the grantee, shall particularly describe the property, and shall cite this Act. The demand to return title shall expire and shall have no effect on the rights of a subsequent purchaser or lender if the homeowner has not recorded a lis pendens within 30 days after recording the demand to return title.

5.4. Obligation to Return Title. Within 20 calendar days after receipt of a demand to return title, the grantee shall reconvey title to the homeowner, subject to any equitable mortgage pursuant to 5.5 and 5.6 but free and clear of any encumbrances other than tax or utility obligations for which the homeowner would have been responsible had title not been transferred.

5.5. No Prior Tender Required; Recording of Equitable Mortgage. The homeowner's right to void the deed or other conveyance and demand return of the title, and the grantee's obligation to return title, may not be conditioned on the homeowner's repayment of any funds. The recording of the reconveyance may be accompanied by a Notice of Equitable Mortgage asserting a mortgage in the amount due pursuant to Section 5.6 as follows:

"Notice of Equitable Mortgage. Notice is hereby given that ____ hereby asserts an equitable mortgage of \$_____ against this property pursuant to the Foreclosure Rescue Fraud Prevention Act."

If the amount of the equitable mortgage asserted by the grantee does not conform to the requirements of Section 5.6, the homeowner may bring an appropriate action to dispute it in court.

5.6. Obligations Under the Equitable Mortgage. If the grantee has paid any money to or on behalf of the homeowner, that money shall be deemed and held an equitable mortgage as follows:

5.6.1. The following shall be deemed the principal of the equitable mortgage:

5.6.1.1. Any money paid to the homeowner;

5.6.1.2. Any money paid on behalf of the homeowner that reduced the homeowner's legal obligations secured by the property to persons unaffiliated with the grantee; and

5.6.1.3. Any money paid on behalf of the homeowner to a person unaffiliated with the grantee that was necessary to prevent a foreclosure of the property.

5.6.2. All other fees, charges, interest or other costs paid by the homeowner as part of the transaction or for which the homeowner is obligated shall be treated as interest and charges on a loan of money secured by a lien on a home under state and federal law. If the equitable mortgage is an unfair foreclosure rescue transaction as defined in this Act, all such fees, charges, interest or other costs are void and must be refunded by the grantee to the homeowner.

5.6.3. Any payments that the homeowner has made in connection with the transaction deemed to be an equitable mortgage, including but not limited to any fees, charges, interest, rent, or other payments, shall be deemed payments on the equitable mortgage for purposes of state and federal law.

5.6.4. The balance of the equitable mortgage shall be further reduced by any damages or statutory penalties owed by the grantee to the homeowner under this section or any other state or federal law governing the transaction.

5.7. Payment of the Equitable Mortgage.

5.7.1. After the grantee has complied with Section 5.4, the homeowner shall either tender the full balance of the equitable mortgage to the grantee within 120 days, or make monthly payments to the grantee for one year in an amount based on a 30-year amortization of the amount due pursuant to Section 5.6.1, followed by payment of the remaining balance in full. Until paid, the balance on the equitable mortgage accrues interest at the legal rate from the date of the grantee's compliance with Section 5.4. The court shall not shorten the time for tender or condition the grantee's obligations under Section 5.4 on tender by the homeowner.

5.7.2. The homeowner's failure to repay the balance of the equitable mortgage shall not invalidate the voiding of the deed or conveyance nor the reconveyance of the property. If the homeowner fails to repay the equitable mortgage as set forth in Section 5.7.1, the grantee may recover the balance of the equitable mortgage by way of foreclosure pursuant to the procedures of state law.

6. Actions for damages or equitable relief. A homeowner may bring an action for the recovery of damages, declaratory or equitable relief for a violation of this Act. The court may award to a prevailing homeowner actual damages plus

reasonable attorneys' fees, costs and expenses. The court may increase the award to an amount not to exceed three times the homeowner's actual damages if the court deems such award proper. Any action brought pursuant to this Act shall be commenced within six years after the date of the alleged violation; provided, however, that a court may grant relief to void or otherwise reverse transfer of title from the homeowner only if the action is filed within the time set forth in Section 5.1.

7. Stay of Eviction Action.

7.1. A court hearing an eviction action against the homeowner must stay the eviction action, without imposition of a bond, if the homeowner has commenced an action asserting a violation of this Act, or has made a prima facie case that the eviction plaintiff is merely a mortgagee of an equitable mortgage and has no right to evict. Any court with jurisdiction over claims related to the equitable mortgage or foreclosure rescue transaction may issue a stay of any eviction action on the same grounds.

7.2. A prima facie case consists of a showing that the homeowner conveyed title to the property while the homeowner was in foreclosure or default; that the homeowner retained possession of the property subsequent to conveying title; and that the homeowner was given or assured an opportunity to retain or regain title to or possession of the property. Parol evidence is admissible to make this showing.

7.3. The stay expires upon the latter of:

7.3.1. the failure of the homeowner to commence an action in a court of competent jurisdiction pursuant to this Act within 90 days of the issuance of the stay, or

7.3.2. the issuance of an order lifting the stay by a court hearing claims related to the equitable mortgage or foreclosure rescue transaction.