MEMORANDUM

TO: DRAFTING COMMITTEE MEMBERS, REPORTERS, ADVISORS, AND OBSERVERS FOR THE UNIFORM RESIDENTIAL REAL ESTATE MORTGAGE FORECLOSURE PROCESS AND PROTECTIONS ACT

FROM: BILL BREETZ, CHAIR

DATE: MAY 25, 2012

RE: EXISTING PROBLEMS IN THE CURRENT FORECLOSURE CRISIS.

Introduction This memorandum responds to the request from Commissioner Dale Higer of Idaho, a member of the drafting committee, who wrote:

> "It would be helpful to me, and I assume to other members of the committee, to get a little more background on the foreclosure abuses and other problems that have arisen over the last few years.…I have heard about robo signers, I have heard about plaintiffs not having proof they hold the note and mortgage being foreclosed on, but I suspect there are other problems as well. Would it be possible…to outline the perceived problems so that we that we can then prioritize the issues to be addressed."

This memorandum represents only the Chair's views regarding those problems; it does not necessarily represent the views of anyone else. It is written as a conversation piece and includes a highly idiosyncratic digest of various materials that I found helpful. As such, it does not purport to be a comprehensive review of the literature nor does it enjoy the careful *Blue Book* citations to which members of the drafting committee may be accustomed. I apologize for its length; if I had had more writing time, it surely would have been shorter. I welcome comments from readers proposing to amend or supplement it.

What This Memorandum Does Not Address There is a broad trade and academic literature describing how the United States got into the current mess. There clearly were multiple causes and endless attributions of fault; surely we all have our favorite culprits. However, regardless of what persons, institutions or policies might be responsible for current conditions, nothing in the charge to our committee causes us to consider what those causes were, or what might be done as a matter of state law to prevent their future recurrence.

Rather, this memorandum seeks to describe the scale of the foreclosure crisis confronting the nation and to identify what 'foreclosure abuses and other problems have arisen over the last few years.' I have tried to present those problems and abuses from the perspective of both the borrower and lender communities, as I have come to understand their respective grievances. Further, as you will see, much of the national debate concerning 'problems and abuses' – and the proposed solutions to them – involve exclusively federal resources and regulations over which we will have little impact.

I SUMMARY In January, 2012, The Federal Reserve issued a White Paper entitled *"The U.S. Housing Market: Current Conditions and Policy Considerations."* The White Paper can be found at this website: http://www.federalreserve.gov/publications/other-reports/files/housing-white-paper-20120104.pdf. That White Paper may offer the best single summary of the issues confronting the nation's housing market, and poses - as State policy options - some of the subjects on our issues list; I commend it to your reading. Many of its major observations appear in other sections of this memorandum.

The White Paper describes these major issues:

> The extraordinary problems plaguing the housing market reflect in part the effect of weak demand due to high unemployment and heightened uncertainty. But the problems also reflect three key forces originating from within the housing market itself: (1) a persistent excess supply of vacant homes on the market, many of which stem from foreclosures; (2) a marked and potentially long-term downshift in the supply of mortgage credit; and (3) the costs that an often unwieldy and inefficient foreclosure process imposes on homeowners, lenders, and communities. (Emphasis added).
>
> Looking forward, *** there is scope for policymakers to take action along three dimensions that could ease some of the pressures afflicting the housing market. In particular, policies could be considered that would help moderate the inflow of properties into the large inventory of unsold homes, remove some of the obstacles preventing creditworthy borrowers from accessing mortgage credit, and limit the number of homeowners who find themselves pushed into an inefficient and overburdened foreclosure pipeline.

White Paper, at 1. As detailed below, many of the problems identified in the White Paper – and many of the proposed solutions – require federal rather than state responses. Thus, except to the extent amendments to state law would facilitate a federal solution [and there are some limited opportunities here] many of the problems discussed below are outside any possible scope of our committee work.

I believe the space in which the drafting committee may be most successful lies in addressing these problems:

- Finding ways to reduce the excess supply of vacant homes on the market;
- Lowering the costs that the current foreclosure process imposes on homeowners, lenders and communities; and
- To a limited degree, we may be able to successfully urge discrete policy initiatives that provide substantive benefits to debtors and to communities suffering from a large number of abandoned properties.

Reducing The Supply Of Vacant Homes There are two dimensions to the challenge of limiting the supply of vacant homes on the market:

- limiting the initial supply of such housing by avoiding foreclosures, and
- increasing the demand for housing once it has been foreclosed.

The 'demand' side issues are addressed in the White Paper and by several of the resources identified below; they essentially involve the availability of credit, bulk sales of vacant homes and land banking - all of which are beyond the scope of our work.

A. The 'supply' side issues involve a broad range of devices which have the potential to keep borrowers in their homes and avoid foreclosures. In considering the problems that impede the ability of States to minimize the number of vacant homes on the market, these problems and abuses have been identified:

Most significantly, current state and local statutes do not mandate meaningful mortgage modification programs.

- Borrower advocates have identified these problems with servicer participation in mediation programs, leading to unsuccessful outcomes:
  - Failure to provide the borrower's financial information in advance of a mediation session
  - Failure to appear at a mediation session.
  - Failure to send representatives to the mediation who are familiar with the file and who then claim, for the first time, that they are unprepared, or that the file is incomplete or stale;
  - Failure to have authority to reach an agreement at a mediation session;.
  - Failure to send representatives to mediation sessions who understand the HAMP rules or the rules of the loan modification programs of the loan owners for whom they are servicing, or who fail to follow those rules.
  - Servicers who commit to complete review of homeowner loan modification application and provide a loan modification decision by an agreed upon date, but fail to do so.
  - Servicers who repeatedly lose homeowner financial packages.
  - Failure to abide by the "single point of contact" concept.
  - Failure of servicers in mediation to seek investor waivers on loan modification restrictions as required by HAMP.

- The Chicago ULC office has distributed a memorandum from Professor White on mediation programs and a memorandum from Attorney Heather Scheiwe Kulp on other issues that arise in mediation programs.

- Mortgage modification programs would be more likely to succeed if borrowers were able to negotiate reductions in the principal amount of their mortgages. Principal Reduction programs would enable some borrowers to avoid default by having more affordable monthly payments; theoretically, they would also encourage people to continue making mortgage payments, rather than deciding to 'strategically default' on their mortgages. The subject is controversial. While this is primarily a federal and private lender issue, there are limited steps that the drafting committee could undertake to make such programs more attractive to lenders.

- A significant problem exists in condominium, cooperative and homes associations around the country, where the association is responsible for insuring, maintaining the units and common elements and managing the complex and pays for those services through its common charges. When the unit owners fail to pay common charges, with or without abandoning the units, the lenders frequently decline to foreclose because the units are underwater and because they have no legal responsibility to pay the common charges. The associations have no incentive to foreclose because they would still be subject to the first mortgage. As a consequence, these units frequently become vacant.

Reducing The Costs of Foreclosure In considering the costs the current foreclosure process imposes on homeowners, lenders and communities, at least these problems and abuses exist, some of which are perceived as burdening borrowers and others as burdening lenders or the community:

1. Continuing legal uncertainty exists as to who may commence a foreclosure, what evidence the foreclosing party must present regarding authority to commence the foreclosure proceeding [in the form of an original note, evidence of default, mortgage assignments, or other requirements] and when in the process that evidence must be presented. These problems plainly make the process 'unwieldy and inefficient.

2. There is a great deal of commentary from the lending community regarding the cost and inefficiency of the long delays that exist, especially in judicial foreclosure states, from the time a foreclosure action is commenced to the time title passes and the lender gains possession of the home. From the lenders' perspective, the problem is exacerbated in those states which permit the borrower to redeem the property after title passes. In contrast, from the perspective of borrowers and local elected officials, there appears to be little interest in amending state foreclosure law to make the foreclosure process quicker or easier.

3. Again, from the lenders' perspective, they have identified several additional perceived problems in the current foreclosure process which they assert contribute to the system's costs and inefficiencies. At a minimum, they include: (1) the cost of newspaper publishing of legal notice to borrowers, when a far less costly system is available on the Internet which is no less likely to provide 'actual' [as opposed to constructive] notice to foreclosure defendants; (2) identification of persons other than sheriffs or court officials to conduct auctions of foreclosed property; (3) eliminating or reducing the redemption period for defendants in foreclosure cases, at least in non-farm properties; and (4) identification of a suitable means of confirming that valid title has passed after sale in non-judicial sale states.

4. The so-called 'robo-signing' and related servicer failures were and remain very real problems and abuses. There are a number of significant questions posed by that issue and by the various responses to it, including the servicer standards adopted in the Attorney Generals' National Consent Settlement, and the pending servicing standards being considered by the Federal Consumer Financial Protection Bureau.

5. The problem of 'strategic default' is a substantial and apparently growing problem. Fannie Mae has described such persons as "Defaulting borrowers who walk-away and had the capacity to pay or did not complete a workout alternative in good faith." Part of the problem is one of finding alternatives that will be appealing to persons whose mortgages are under water, and simultaneously attractive to lenders as devices that will not encourage a snowball effect among others who might consider a strategic default.

6. There are a range of potential alternatives – what have been called 'Graceful Exits' - to what the Federal Reserve describes first as the 'unwieldy and inefficient foreclosure process' and later as an 'inefficient and overburdened foreclosure pipeline'. While there currently are limitations on the efficacy of each of those alternatives, there are also likely statutory changes which could make these devices more attractive to both lenders and borrowers, particularly in non-judicial foreclosure states. These include

- Short sales – lenders and servicers frequently take too much time to review proposed short sales, so that either the potential buyers walk away, or real estate brokers choose not to pursue them, with the result that the seller either unilaterally abandons the home, or the lender is forced to foreclose. It may be that recent actions taken by FHFA to impose time limits on the review process have resolved some or all of this issue.

- Deeds in Lieu of Foreclosure - unless accompanied by some additional benefit to the borrower- such as the 'Rental Opportunities' and 'Cash for Keys' proposals below - a DIL simply accelerates the borrower's departure from the home. As this process is presently conducted, there is little incentive for the lender to offer more than a *de minimus* sum to the borrower, who therefore may find that a more appealing strategy is simply to remain in the home for as long as possible without paying a monthly mortgage payment, thus saving funds for the next stage of life. This of course works to the economic detriment of the lender and – as a result of deferred maintenance – the aesthetic and economic detriment to the neighborhood. In addition, if there are subordinate liens on the property, the lender is then obliged to pursue the usual foreclosure process.

- Rental Opportunities for Cooperating Borrowers – While Fannie Mae apparently has a rental program for cooperating borrowers, questions regarding regulatory restrictions on lenders conducting rental programs, and issues regarding the lenders' ability to dispossess a defaulting borrower/tenant, may discourage the wider use of this form of transaction.

- Cash for Keys – Professor Smith has distributed a memorandum on this subject. It is yet another means by which the borrower may be offered a 'fresh start' following default. Unfortunately, it suffers from the same limitations as the Deed In Lieu of Foreclosure, especially from the lender's perspective, since a foreclosure procedure must then be initiated.

- The Federal Reserve's White Paper suggests that we create an online registry of liens. They assert that 'the current system for lien registration in many jurisdictions is antiquated, largely manual, and not reliably available in cross-jurisdictional form.' Certainly the existence of such a system in 2006 would likely have avoided many of the problems encountered by mortgage servicers. However, this subject is not presently within the charge of the drafting committee.

Other Discrete Options - To a limited degree, the drafting committee may be able to successfully urge discrete policy initiatives that provide substantive benefits to debtors and to communities suffering from a large number of abandoned properties. Our ability to achieve these goals may depend on our success in identifying other devices – such as a robust mortgage mediation program – that provides sufficient benefits to lenders in avoiding foreclosures that they will support statutory responses to these kinds of problems reported by borrowers:

- Providing actual notice of the pendency of foreclosure actions, and of their rights to participate in mediation efforts.

- Permitting borrowers, after default, to cure the default and reinstate their mortgages, thereby avoiding acceleration.

- Prohibiting or limiting the use of deficiency judgments.

- Addressing the negative impacts on neighborhoods posed by the widespread abandonment of homes by defaulting buyers. The drafting committee may be able to respond to those problems with alternative proposals that are more likely to acceptable to both lenders and elected officials.

The problems leading to each of the foregoing policy options are discussed in detail in Section IV below.

II HOW BIG IS THE FORECLOSURE PROBLEM? Attached in **Appendix Exhibit 1** is testimony presented to the Senate Subcommittee on Housing, Transportation and Community Development of the United States Congress on March 15, 2012 by Ms. Laurie Goodman, a securities analyst who is regularly invited to testify before Congress.

Writing less than three months ago, Goodman estimated that, in the absence of significant policy steps that might be taken to alleviate the foreclosure crisis, there were between **7.4 and 9.3 million more borrowers** yet to face foreclosure or some other form of liquidation. Based on testimony that Goodman delivered to the same subcommittee on September 20, 2011, excerpts of which are contained in **Appendix Exhibit 2**, she estimates these matters will proceed to foreclosure in the next 5 to 6 years.[1] In March, Goodman estimated that 'there are about 52.5

million total U.S. homes with a mortgage', although in September, 2011 she had estimated that there were approximately 55 million homes in the United States subject to a mortgage.

> **Assuming Goodman's data are roughly accurate, and further assuming no changes in federal or state foreclosure policies, this would mean that between 7 and 9 million homeowners – between 14% and about 18% of all current US homeowners - will face foreclosure and eventual liquidation in the next 5 to 6 years. This does not include those who have already lost their homes.**

Appendix Exhibit 3 provides examples of other estimates of the size of the 'shadow inventory'– that is, the number of homes that are legally liable to be foreclosed but where a foreclosure action has not yet begun. Some of these estimates rely on Goodman's calculations, while others offer a different calculus. However, whether or not Goodman's data are entirely accurate, no one disagrees with the fundamental notion that the foreclosure overhang is a serious issue – not even the reluctant CATO Institute; see **Appendix Exhibit 4.** The challenge is what to do about the problem.

In seeking to understand the magnitude of the housing crisis, it is also worth noting that, according to the Federal Reserve's White Paper:

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[1] The foreclosure data contained in Goodman's testimony on September 20, 2011 was somewhat more pessimistic, although the passage of 6 months may account for some or all of the difference:

> [W]e have documented…a very significant supply/demand imbalance in the housing market. Distressed loans are moving very slowly through the delinquency/foreclosure pipeline. These loans weigh heavily on the residential real estate market, and are often referred to as shadow inventory. ****
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> Thus, there are <u>many distressed homes that will need to change hands over the next 5–6 years.</u> At the same time, mortgages are becoming increasingly difficult to obtain. Overall credit availability is tightening and the pool of qualified mortgage applicants is shrinking dramatically. A large number of borrowers who are delinquent on their current mortgage, and do not have the financial means to purchase another home, are likely to convert to renters. Despite this cloud surrounding the mortgage market, we see housing as very affordable by most traditional measures. ****
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> <u>Our results indicate if no changes in policy are made, 10.4 million additional borrowers are likely to default under our base "reasonable" case, and 8.3 million borrowers will default under our lower bound numbers. Since there are 55 million homes carrying mortgages, 10.4 million borrowers roughly equates to 1 borrower out of every 5.</u> (Emphasis added.)

> House prices for the nation as a whole (figure 1) declined sharply from 2007 to 2009 and remain about 33 percent below their early 2006 peak, according to data from CoreLogic. For the United States as a whole, declines on this scale are unprecedented since the Great Depression. **In the aggregate, more than $7 trillion in home equity (the difference between aggregate home values and mortgage debt owed by homeowners)--more than half of the aggregate home equity that existed in early 2006--has been lost**. Further, the ratio of home equity to disposable personal income has declined to 55 percent (figure 2), far below levels seen since this data series began in 1950.

White Paper, at 3.

A Note on the Relationship between the Number of Pending Foreclosures and Falling Home Prices. Before leaving the question of "how big is the problem", it is worth noting that the size of this so-called 'shadow inventory' has an enormous bearing on the prices of housing- and thus on the additional economic losses to be suffered both by lenders, by defaulting homeowners [at least to the extent of collectible deficiency judgments] and by home owners who either have no mortgage or are current on their mortgage, if and when they wish to sell their homes.

Appendix Exhibit 5 is a May 8, 2012 study from Standard & Poor that focuses on the differences in what it calls 'the liquidation rate' or 'clearing rate' for defaulted mortgages – that is, the rate at which title to homes in foreclosure passes from the borrower to the lender.

> "The supply of distressed loans continues to loom over the U.S. housing market and threaten to further depress home prices. Over the past two years, low liquidation rates have caused the shadow inventory to grow, adding to the number of distressed homes tied up in foreclosure proceedings. The shadow inventory will continue to jeopardize the housing market's recovery until servicers improve liquidation times. <u>However, if and when that happens, the influx of homes that will likely enter the market will increase supply and drive prices down further.</u>" (Emphasis added).

The Federal Reserve White Paper takes a similar view:

> Finally, foreclosures inflict economic damage beyond the personal suffering and dislocation that accompany them. In particular, foreclosures can be a costly and inefficient way to resolve the inability of households to meet their mortgage payment obligations because they can result in "deadweight losses," or costs that do not benefit anyone, including the neglect and deterioration of properties that often sit vacant for months (or even years) and the associated negative effects on neighborhoods.
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> **These deadweight losses compound the losses that households and creditors already bear and can result in further downward pressure on house prices.**

White Paper, at 2. Goodman concurs. On September 20, 2011 she testified:

> This housing supply overhang occurs against a backdrop in which homes are very affordable using traditional measures. Exhibit 7 shows that the S&P/Case Shiller 20-City Composite Index is off 32% since its peak in mid-2006. Primary mortgage rates are at a generational low, and look extremely attractive in any reasonable historical context. ***The ability of the average family to afford the average price home is at a generational high….
>
> **However, the overhang means that home prices, despite being very affordable, are likely to decline further. This may recreate the housing death spiral—as lower housing prices mean more borrowers become underwater. We have determined LTV is the single most important predictor of default. So more underwater borrowers means more defaults; more defaults means more inventory, more overhang, and even further declines in home prices. While home prices can go down another 5% without re-igniting this housing death spiral, a 10% decline would certainly re-ignite the spiral in our opinion.** (Emphasis added)

Notwithstanding this concern about more units entering the inventory, there are suggestions that foreclosure activity in 2012 will accelerate. In January 2012, RealtyTrac, Inc. released a Year-End 2011 U.S. Foreclosure Market Report; that report states that

> "a total of 2,698,967 foreclosure filings — default notices, scheduled auctions and bank repossessions — were reported on 1,887,777 U.S. properties in 2011. This was a decrease of 34 percent in total properties from 2010. <u>Foreclosure activity in 2011 was 33 percent below the 2009 total and 19 percent below the 2008 total.</u>
> ****
> 'Foreclosures were in full delay mode in 2011, resulting in a dramatic drop in foreclosure activity for the year,' said Brandon Moore, chief executive officer of RealtyTrac. "The lack of clarity regarding many of the documentation and legal issues plaguing the foreclosure industry means that we are continuing to see a highly dysfunctional foreclosure process that is inefficiently dealing with delinquent mortgages — particularly in states with a judicial foreclosure process.
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> "<u>There were strong signs in the second half of 2011 that lenders are finally beginning to push through some of the delayed foreclosures in select local markets. We expect that trend to continue this year, boosting foreclosure activity for 2012 higher than it was in 2011, though still below the peak of 2010.</u> [2]"
> (Emphasis added)

The importance of this threat of more homes passing through foreclosure into the supply of unsold homes, thus increasing the inventory of available homes and lowering home prices, was

[2] The full report from Realty Trac can be found at http://www.realtytrac.com/content/foreclosure-market-report/2011-year-end-foreclosure-market-report-6984.

highlighted in the otherwise optimistic report released on May 22, 2012 by the National Association of Realtors; see **Appendix Exhibit 9.** The NAR notes:

> [T]he housing recovery is underway. *** A return of normal home buying for occupancy is helping home sales across all price points, and now the recovery appears to be extending to home prices,"*** "The general downtrend in both listed and shadow inventory has shifted from a buyers' market to one that is much more balanced, but in some areas it has become a seller's market."
> ****
> <u>"A diminishing share of foreclosed property sales is helping home values.</u> (Emphasis added)

III WHAT ARE THE PROPOSED 'MACRO' SOLUTIONS TO THIS CRISIS?

Various parties make three principal proposals to address the foreclosure crisis and the collateral damage flowing from that crisis, which includes (i) enormous federal taxpayer losses flowing from the subsidies required to support Fannie Mae and Freddie Mac; (ii) unprecedented losses of equity suffered by home owners; (iii) dramatic adverse social consequences suffered by displaced families, and (iv) substantial losses to municipal tax bases and deterioration of neighborhoods in which foreclosed homes become vacant and abandoned.

FIRST, at the Federal level, in order to reduce the number of homes in foreclosure, many commentators urge the Federal Housing Finance Agency [FHFA] to employ one of several devices which would reduce the principal amount of the mortgages owed by underwater borrowers, with or without a retained 'equity kicker' or, more elegantly stated, conversion of an underwater first mortgage to a 'shared appreciation' mortgage. Laurie Goodman's testimony of September 20, 2011 is typical of this approach:

> *What is the best solution*? There is no simple solution, but we believe the situation requires both supply side and demand side measures. <u>On the supply side, we actually know exactly what it takes to create a successful modification—reduce principal, give the borrower substantial payment relief, and modify the borrower in the early stages of delinquency rate needs to rise in order to keep homes off the market</u>.. Since negative equity drives defaults, principal reduction is the key to a successful modification.

Goodman expanded on this position in her March 15 testimony:

> To absorb this large number of housing units that will face foreclosure and eventual liquidation, we need to both ***limit the supply of AND increase the demand for distressed properties***.
>
> To *limit supply*, we need more successful loan modifications. For this, we believe increased reliance on principal reduction is the key. ****Most of my testimony will be focused on *supply side* measures; namely, improving modification success through greater reliance on principal reductions.

The Federal Reserve's White Paper also addressed this issue and expressed reservations:

> Principal reduction has been proposed and debated as one possible policy response to negative equity, including for borrowers current on their mortgage payments. Principal reduction has the potential to decrease the probability of default (and thus the deadweight costs of foreclosure) and to improve migration between labor markets. Principal reduction may reduce the incidence of default both by improving a household's financial position, and thus increasing its resilience to economic shocks, and by reducing the incentive to engage in "strategic" default (that is, to default solely based on the household's underwater position rather than on the affordability of the payments).
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> These potential benefits, however, are hard to quantify. *** Further research or policy experiments in this area would be useful.
>
> At the same time, the costs of large-scale principal reduction would be quite substantial. Currently, 12 million mortgages are underwater, with aggregate negative equity of $700 billion. Of these mortgages, about 8.6 million, representing roughly $425 billion in negative equity, are current on their payments. These costs might be reduced if it was possible to target borrowers who are likely to default without a principal reduction. However, identifying such borrowers among the many who are current on their payments is difficult. Moreover, targeting principal reduction efforts on those most likely to default raises fairness issues to the extent that it discriminates against those who were more conservative in their borrowing for home purchases or those who rent instead of own. Depending on the requirements for relief, such a program may also give some borrowers who otherwise would not have defaulted an incentive to do so.

White Paper, at 20-21. The CATO Institute's strong reservations regarding principal reductions are found in the testimony referenced in **Appendix Exhibit 4**.

I understand but have not confirmed that the Emergency Economic Stabilization Act of 2008 – a 450 page bill –lists principal reduction as a potential loan modification tool. In addition, principal reduction funds were included as part of the Attorney Generals' National Consent Settlement with the five main servicers, although it is not clear that, as those funds are distributed to the states, the funds will actually be used for their intended purpose.

In any event, the subject of principal reduction and shared appreciation mortgages is complex and controversial, and the subject of active discussion in various federal venues. I understand current discussions are ongoing and focus on expanded use of principal forbearance, principal forgiveness and shared appreciation mortgages and the challenges related to their use such as moral hazard, operational implementation and homeowner adoption.

Because our drafting committee can only affect the issue of principal reduction at the margins – primarily regarding the priority of any modified first mortgage when there are second liens on the property – this memorandum does not analyze this topic or the obstacles. to its implementation.

National Electronic Lien Recording System The Federal Reserve believes that a national electronic lien recording system would improve mortgage servicing in the future:

> A final potential area for improvement in mortgage servicing would involve creating an online registry of liens. Among other problems, the current system for lien registration in many jurisdictions is antiquated, largely manual, and not reliably available in cross-jurisdictional form. Jurisdictions do not record liens in a consistent manner, and moreover, not all lien holders are required to register their liens. This lack of organization has made it difficult for regulators and policymakers to assess and address the issues raised by junior lien holders when a senior mortgage is being considered for modification. Requiring all holders of loans backed by residential real estate to register with a national lien registry would mitigate this information gap and would allow regulators, policymakers, and market participants to construct a more comprehensive picture of housing debt.
>
> The national lien registry could also record the name of the servicer. Currently, parties with a legitimate interest in contacting the servicer have little to go on from the land records because, among other reasons, many liens have been recorded only in the name of the trustee or of Mortgage Electronic Registration Systems (MERS).

White Paper, at 24-25. Professor Alan White has proposed creation of an electronic recording system for notes and mortgages; see "*Losing the Paper – Mortgage Assignments, Note Transfers and Consumer Protection,* scheduled to appear shortly in 24 Loyola Consumer Law Review 104, while Professor Dale Whitman, a long time advocate for such a system, will publish a paper in the winter edition of the University of Missouri Law Review entitled "*A Proposal for a National Mortgage Registry: MERS Done Right."* Again, however, this topic is not included in the charge to the Drafting Committee.

SECOND, at the State level, a great deal of commentary focuses on the increasing importance of so-called 'foreclosure mediation' programs as a means of either restructuring existing mortgages so that they will no longer be in default, or in those cases where the borrower is simply unable to pay any reasonable mortgage, finding various 'graceful exists' to enable the borrower to make a fresh start elsewhere.

Much of our June meeting will focus on the details of foreclosure mediation programs and various proposals for 'graceful exits;' the drafting committee will have several separate papers on these subject and the benefit of several persons who direct successful mediation programs throughout the United States.

THIRD, and also at the State and municipal levels, an extraordinary number of ideas have been proposed – and often passed into law – which are designed to either delay the foreclosure process or otherwise assist borrowers [for example, by prohibiting deficiency judgments], or, from the lenders' perspective, designed to expedite the foreclosure process and make it both more efficient and less costly. A limited number of those proposals are identified in the Issues paper sent to the drafting committee. Many of the subjects that are not contained in our Issues memorandum, and some that are, are controversial and may not be susceptible to enactment.

IV WHAT ABUSES AND PROBLEMS IMPEDE THE ABILITY OF STATES TO 'LIMIT THE SUPPLY' OF FORECLOSED HOMES?

A. Problems created by Lender and Servicer Failures The Appendix contains two cases - **Exhibits 6 and 7** - that illustrate some of the 'abuses and problems' that have occurred in this field that have undermined mediated efforts to avoid foreclosures – abuses that have, in general, prevented states from limiting the number of homes being foreclosed in their states.

The first example, in **Appendix Exhibit 6**, describes a failed mediation in Maine in April, 2012. In that case, the Bank of America's servicing subsidiary failed to comply with four successive mediation orders over 14 months. Following a warning from the Court, the servicer apparently still was not prepared to offer a loan modification, acknowledged that it was unable to find any of several duplicate sets of documents repeatedly submitted by the borrower, and claimed it now needed an entirely new and updated set of documents. On April 17, 2012 "<u>the court ran out of patience and ordered a dismissal of the foreclosure complaint with prejudice</u>" – meaning that, effectively, the borrower was no longer obligated to make any payments on its mortgage.

Appendix Exhibit 6 contains a summary description of the matter prepared by Attorney Thomas Cox, together with copies of the court record substantiating the description, and the mediator's recommended sanctions. The Exhibit also contains (i) a compilation by Attorney Cox in which he summarizes other sanction orders entered in Maine against servicers, and (ii) a summary of what he believes to be the principal failings of servicers as he has observed them.

Appendix Exhibit 7 contains extended excerpts from an April 2012 opinion in a federal district court case involving Wells Fargo's improper conduct in a bankruptcy case. The excerpts provide a flavor of Wells Fargo's actions to intentionally misapply post petition payments from debtors, according to the Court, in "every mortgage loan in Wells Fargo's portfolio." After five years of litigation, and after what the Court describes as Wells Fargo's 'willful and egregious conduct', its 'reckless disregard for the stay it violated', and its "actual knowledge that [Wells Fargo] was violating the federally protected right or with reckless disregard of whether [it] was doing so," the Court ordered Wells Fargo to pay the debtor's attorneys fees of $292,673.84; in addition to other sanctions ordered in prior cases, the Court also ordered a punitive damage award of nearly $3.2 million "<u>to deter Wells Fargo from similar conduct in the future</u>."

With respect to the broad range of servicer failures that are often grouped under the broad and misleading heading of 'robo-signing' (robo-signing being only one of many such abuses), the Federal Reserve summed up the problem in its White Paper:

> Thus far in the foreclosure crisis, the mortgage servicing industry has demonstrated that it had not prepared for large numbers of delinquent loans. They lacked the systems and staffing needed to modify loans, engaged in unsound practices, and significantly failed to comply with regulations. One reason is that servicers had developed systems designed to efficiently process large numbers of

routine payments from performing loans. Servicers did not build systems, however, that would prove sufficient to handle large numbers of delinquent borrowers, work that requires servicers to conduct labor-intensive, non-routine activities. As these systems became more strained, servicers exhibited severe backlogs and internal control failures, and, in some cases, violated consumers' rights. A 2010 interagency investigation of the foreclosure processes at servicers, collectively accounting for more than two-thirds of the nation's servicing activity, uncovered critical weaknesses at all institutions examined, resulting in unsafe and unsound practices and violations of federal and state laws. Treasury has conducted compliance reviews since the inception of HAMP, and, beginning in June 2011, it released servicer compliance reports on major HAMP servicers. These reports have shown significant failures to comply with the requirements of the MHA program. In several cases, Treasury has withheld MHA incentive payments until better compliance is demonstrated.

White Paper, at 21-22.

Appendix Exhibit 8 contains a reference to the May, 2011 report on robo-signing prepared by the Government Accounting Office. At page 7 of the Report, the GAO notes:

> In response to disclosed problems with foreclosure documentation, banking regulators conducted coordinated on-site reviews of foreclosure processes at 14 mortgage servicers. <u>Generally, these examinations revealed severe deficiencies in the preparation of foreclosure documentation and with the oversight of internal foreclosure processes and the activities of external third-party vendors.</u> Examiners generally found in the files they reviewed that borrowers were seriously delinquent on the payments on their loans and that the servicers had the documents necessary to demonstrate their authority to foreclose. However, examiners or internal servicer reviews of foreclosure loan files identified a limited number of cases in which foreclosures should not have proceeded even though the borrower was seriously delinquent. These cases include foreclosure proceedings against a borrower who had received a loan modification or against military service members on active duty, in violation of the Servicemembers Civil Relief Act.
>
> As a result of these reviews, the regulators issued enforcement actions requiring servicers to improve foreclosure practices. Regulators plan to assess compliance but have not fully developed plans for the extent of future oversight. According to the regulators' report on their coordinated review, they help ensure that servicers take corrective actions and fully implement enforcement orders. While regulatory staff recognized that additional oversight of foreclosure activities would likely be necessary in the future, as of April 2011 they had not determined what changes would be made to guidance or to the extent and frequency of examinations. Moreover, regulators with whom we spoke expressed uncertainty about how their organizations would interact and share responsibility with the newly created CFPB regarding oversight of mortgage servicing activities. According to

regulatory staff and the staff setting up CFPB, the agencies intend to coordinate oversight of mortgage servicing activities as CFPB assumes its authorities in the coming months. CFPB staff added that supervision of mortgage servicing will be a priority for the new agency. However, as of April 2011 CFPB's oversight plans had not been finalized. As we stated in our report, fragmentation among the various entities responsible for overseeing mortgage servicers heightens the importance of coordinating plans for future oversight. Until such plans are developed, the potential for continued fragmentation and gaps in oversight remains.

As noted above, Co-Reporter Alan White will shortly publish an article on this subject, entitled "*Losing the Paper – Mortgage Assignments, Note Transfers and Consumer Protection";* in 24 Loyola Consumer Law Review 104. In this paper, Prof. White seeks to do the following

> First, I consider empirically how mortgage loan assignments and transfers were actually handled during the subprime boom, and to what extent courts have actually cast doubt on the validity of foreclosures and foreclosure sales affected by robo-signing, MERS, and related problems. This section includes a report on my own empirical survey of the accuracy of MERS records. Next, I identify the key consumer and investor protection values and interests that must be addressed in developing new laws and practices to govern transfers of home finance transactions. Finally, I offer a few suggestions for moving towards a true electronic mortgage loan transfer system with full consumer protection.

The National Consumer Law Center has also addressed this subject. In February 2012, NCLC published a thoroughly documented report supporting mortgage mediation programs as the most effective means of responding to the servicer problems and abuses that they identified in preparing their report, entitled *"Rebuilding America: How States Can Save Millions of Homes Through Foreclosure Mediation.*"[3] The Report asserts that

> "Servicers denied affordable loan modification to millions of borrowers through a process of calculated chaos. Common elements of this strategy included:
>
> • Losing documents
> • Failing to follow promised time frames
> • Failing to notify homeowners of reasons for servicers' actions
> • Giving invalid or blatantly false reasons for denials
> • Providing ineffective review of decisions
> • Foreclosing while reviewing for a modification or while the borrower was Complying with a trial modification
>
> The Treasury Department announced rules to prohibit many of these practices in the HAMP program. However, the rules were never routinely enforced. **Data now shows that mediation programs and similar interventions can increase the**

[3] The entire report can be found at http://www.nclc.org/foreclosures-and-mortgages/rebuilding-america.html.

> **number of sustainable loan modifications**. Federal oversight of servicers' practices in reviewing homeowners for eligibility for loan modification has failed. This failure leaves states in the position of having to take over the task."

Rebuilding America, at 5-6.

In February, 2012, 49 out of 50 State Attorney Generals signed a National Consent Settlement with the 5 largest servicing agents in the country; among other things, the settlement sets new national standards for mortgage servicers' behavior in foreclosure matters, and requires that an independent monitor oversee their compliance.

Courtesy of Commissioner Ray Pepe (PA), I have a 10 page summary of the highlights of the servicing standards contained in that National Consent Settlement, apparently prepared by the Department of Justice. I plan to distribute it for the Drafting Committee's consideration at our next meeting. Among the policy considerations these standards raise for the Drafting Committee will be these:

- Should the Drafting Committee propose a state statute that permanently adopts these standards and apply them to all servicers?
- If adopted, who should be entitled to enforce the standards?
- Whether or not adopted, to what extent should a violation of the servicer's standards affect either a foreclosure action of a mediation proceeding?

B. Lenders Should Provide Borrowers a Rights to Cure Default, and Meaningful Notice of that right Borrowers' advocates urge that state statutes be amended to allow borrowers, after default, to cure the default and reinstate their mortgages, thereby avoiding acceleration.

In their 2009 Report entitled *"Foreclosing a Dream: State Laws Deprive Homeowners of Basic Protections*[4], the National Consumer Law Center proposed that State law should "provide notice of default and right to cure, with a cure period of at least 60 days, before acceleration and before any legal fees of foreclosure costs are incurred." In support of their proposal, they describe the problem as follows:

> When a homeowner receives a letter from a mortgage holder declaring that a home mortgage has been accelerated, the impact can be devastating. A typical acceleration letter announces that the entire loan balance, along with an assortment of costs and fees, must be paid immediately. If the homeowner does not pay the full loan balance right away, the letter states that the mortgage holder will go ahead with the foreclosure and sale of the home. Essentially, an acceleration notice informs homeowners that they have lost the right to pay off the loan in monthly installments. Just making up the missed payments will not stop the foreclosure. Upon receipt of such a notice, which is often sent by a lawyer who represents the mortgage holder, it is not surprising that many homeowners view their situation as hopeless. They do not know where to turn, do not

[4] The entire report is found at http://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/foreclosing-dream-report.pdf.

> seek out alternatives to foreclosure, and simply await the inevitable sale and eviction. Neither mortgage holders nor borrowers have anything to gain from creating this premature sense of hopelessness, particularly when a foreclosure can be prevented by some relatively simple steps. State law requiring that the mortgage holder give the homeowner a notice of default *before* accelerating the loan and charging default fees provides an effective antidote to an uninformed borrower's impulse to lose hope and walk away from the mortgage obligation prematurely. Contrary to the unilateral fiat conveyed by many acceleration notices, there are often options short of full payment of the loan that can prevent foreclosure after a default in payments. A mandatory pre-acceleration notice informing the homeowner of these options ensures that homeowners receive accurate information about the means to avoid foreclosure.
>
> It is critically important that homeowners be given an opportunity to cure early in the process before default fees accrue and the costly formal foreclosure proceedings begin. ***
>
> Homeowners should be given a period of at least 60 days to cure an alleged default before the mortgage can be accelerated and before default fees may be charged. In some cases, the mortgage servicer may be wrongly claiming that the account is in default due to its misapplication of payments or some other account error. If this occurs it can often take weeks if not months for the homeowner just to get an answer from the servicer after attempting to resolve the dispute. In addition to not prohibiting assessment of foreclosure fees during the cure period, the 30-day cure period provided under the FannieMae and FreddieMac uniform mortgage documents is not long enough.
> ****
>
> An effective notice of default should inform the homeowner of the serious nature of the situation. It should go beyond a routine dunning letter and accurately describe the foreclosure proceedings that lie ahead if the homeowner does not pay the arrears within a time limit set by the statute. ****

Foreclosing a Dream, at 19-23.

C. Lenders Should Provide Personal Service of a Foreclosure Action Borrowers' advocates report that borrowers may not be receiving actual notice of the pendency of foreclosure actions, and of their rights to participate in mediation efforts. As a result, they assert that borrowers should be provided personal service of the notice of sale or foreclosure complaint. In that same 2009 Report, the National Consumer Law Center wrote:

> Laws must operate with the greatest possible care to ensure that homeowners have notice of ongoing proceedings and can make informed decisions in response to them.
>
> Non-judicial sales raise the most significant concerns about notice. Unfortunately, when homeowners fall into default and suspect that a foreclosure proceeding is imminent, they often believe there is nothing they can do to avoid loss of their home. Many homeowners who are in default, almost one-half of those surveyed in a 2007 Freddie Mac survey, describe their contacts with their mortgage holder or servicer as "embarrassing" or "frustrating." About one in four of these homeowners also considered their discussions with mortgage servicers as "scary," "intimidating," "confusing," and "pointless."

> It is therefore not surprising that many homeowners ignore initial letters they receive from mortgage servicers. ***For a variety of reasons then, homeowners may not receive or review notices of ongoing proceedings that are simply mailed to the foreclosed property.
>
> Many states' non-judicial foreclosure laws require mortgage holders to do nothing more than mail a notice of an upcoming sale to the borrowers at the property address, usually by regular and certified mail. Mortgage holders can comply with this service requirement even when they know that key documents such as the notice of sale have been returned as undeliverable or unclaimed. Curiously, many of these same states provide greater notice when a consumer is being sued on an unpaid personal debt. In those cases, the debt collector is typically required to have a court summons personally served on the consumer; a court official will go to the consumer's home and hand the summons to the consumer or leave it with an adult member of the household.

Foreclosing a Dream, at 29-30.

D. Limitations on Deficiency Judgments There is substantial evidence suggesting that the appraisals used to establish the value of property at the time of a foreclosure sale are consistently lower than market value. It is also the case that, in most states, there is no requirement that a foreclosure sale be conducted in a 'commercially reasonable' manner and there is often no independent review of the costs and penalties added to the amount of the debt owed by the borrower. As a consequence, in those increasingly rare cases where a lender chooses to pursue a deficiency judgment, the size of the deficiency judgment may be considerably overstated. This has led to various calls for reform of deficiency judgment practice, including a total ban on such judgments, permitting them only where judicial review is required under state law, or banning their use when the principal amount is below a statutory threshold amount.

The National Consumer Law Center also recommends a prohibition on deficiency judgments. They state the problem as follows:

> State legislatures have enacted anti-deficiency statutes in response to a number of unfair practices that have been endemic in the home lending industry. First, anti-deficiency statutes discourage lenders from overvaluing property when they originate a mortgage loan. This practice has contributed significantly to the current foreclosure crisis. ****
>
> Second, anti-deficiency statutes prevent the windfall scenario in which the holder purchases the home at a foreclosure sale for an artificially low price, sells it later for a much higher price, then seeks a double recovery by pursuing a deficiency claim based on the low forced sale price.
>
> Anti-deficiency statutes can also play a role in mitigating the region-wide effects of an economic downturn and a depressed real estate market. The likely result of

> mortgage holders' pursuit of deficiency judgments will be to drive many individuals into chapter 7 bankruptcies when they would not otherwise have sought bankruptcy relief. ****
>
> Similarly, if the borrowers refrain from seeking bankruptcy relief and struggle to pay the deficiency debts owed to mortgage holders, their payments toward the deficiency claims typically flow to distant holders of securitized loan obligations rather than providing needed stimulation for the distressed local economy.
>
> Anti-deficiency statutes encourage mortgage holders to make greater efforts to avoid foreclosure in the first place, but also to maximize the bids made at foreclosure auctions if the sale proceeds. Under prevailing practices, whether the sales are judicially supervised or take place under power of sale provisions, mortgage holders often do little to attract bidders to an auction. Relatively small expenditures by mortgage holders for advertising and marketing could yield significantly higher bids. Mortgage holders have access to title and appraisal information they could use for more effective marketing. They could encourage more lucrative bids by setting flexible bid or payment terms. Mortgage holders have the ability and, one would think, the financial incentive to encourage vigorous bidding. *** They rarely engage in any of the marketing practices associated with home sales outside of the foreclosure context. Because many of the deficiencies resulting from low foreclosure sale prices are really self-imposed by lenders, statutory restrictions on their ability to pursue borrowers for deficiencies is an appropriate response.

Foreclosing a Dream, at 36-38.

E. Inability to Collect Condominium Association Common Charges The inability of condominium and other associations to collect unpaid common charges threatens the economic viability of these communities. The fundamental importance of the association's ability to secure these payments is akin to the needs of municipalities to collect property taxes. The difference is that in the case of property taxes, the home owner's obligation to pay is secured by a real estate tax lien in favor of the municipality that primes all other liens, regardless of the traditional 'first in time, first in right' priority rules.

This has proved to be far less of a problem in those states which have adopted the Uniform Condominium Act or the Uniform Common Interest Ownership Act; both these Acts contain identical provisions that provide the Association a six month priority lien over all other liens, including first mortgages, and thus provide the association the means to effectively pay for the upkeep of the units. The current version of that section now appears as Section 3-116 of the Uniform Common Interest Ownership Act, and is included in this memorandum at **Appendix Exhibit 13.**

The central importance of providing a super-priority 'split' association lien was emphasized in 1978 by the then general counsel of the Federal Home Loan Mortgage Corporation, Henry Judy. That year, shortly after the Uniform Condominium Act was promulgated by the Uniform Law

Commission and then approved by the American Bar Association, Attorney Judy and his principal outside counsel, Robert Wittie, wrote an article entitled *"Uniform Condominium Act: Selected Key Issues*,"; it appears in 13 Real Property. & Trust Journal 437 (1978) and is now also found at HeinOnline. Fully half the article –pages 474 through 518 - is devoted to a defense of the association's super priority lien. In the introduction, the authors explain their basic premise:

> Part II of this article discusses the special lien priority which the UCA gives to the unit owners association to enable it to collect condominium fees. Condominium fees constitute the primary – and in the vast majority of cases, the only – source of revenue for the condominium. Accordingly, the ability of the association to collect these fees is critical to its continuing ability to provide essential and special services to unit owners. Part II considers the UCA provisions on lien priority by weighing the interests of the association against the competing interest of other lien claimants.

Selected Key Issues, at 438. Later, the authors focus on the policy issues embedded in this section:

> In many senses, a condominium functions as a "private government" which displaces or obviates many services which otherwise would be provided by a municipal or other government. Thus, *** funds to pay for these services are as much worthy of protection as are municipal revenues, which are protected by a high lien priority.

Selected Key Issues, at 485. The authors continue:

> The practical impact of the priority granted suggests that a superior assessment lien would be less detrimental to first mortgage lenders, other than construction loan mortgagees, than the impact of a superior mortgage lien would be to a condominium association. Mortgage lenders are better able to protect themselves from foreclosure by other lien claimants than are associations. They can and almost certainly will demand escrows or notices of non-payments so as to limit the amount of the assessment liens which come ahead of them before they can take action on their own behalf. In most cases, they can absorb the cost of paying assessments in order to avoid foreclosure far better than an association could absorb either paying off a superior mortgage or curing a default to accomplish reinstatement.
>
> Indeed, it seems unlikely that first mortgage lenders, who typically have substantial investments in their mortgage loans, would ever permit an association to foreclose a superior assessment lien, and thus, to wipe out the lender's security. Rather, lenders are likely to take control of the situation themselves by paying off the association's lien and seeking to recover from the unit owners under the terms of their mortgages. Thus, while mortgage lenders may oppose any change in the current law which would have the effect of giving the association a lien for unpaid assessments which could be superior to pre-existing mortgage liens, the practical impact of such a rule on lenders is likely to be mitigated by protective actions which the lenders may easily take for themselves.

Selected Key Issues, at 494. **Appendix Exhibit 13** contains a four page 'Summary' of the article's more detailed explanation.

F. Dealing with Vacant, Derelict and Abandoned Homes The widespread abandonment of homes by defaulting buyers has created a considerable problem in many communities, where the unkempt appearance of unmaintained properties, coupled with dropping real estate appraisals and increased vandalism, adversely affects the values of neighboring properties and the overall market appeal of those neighborhoods. At the same time, political responses such as those of the City of Chicago have caused litigation with lenders and, if successful, would almost certainly result in a reduced availability of credit in those communities. The drafting committee may be able to respond to those problems with alternative proposals that are more likely to acceptable to both lenders and elected officials.

V WHAT ABUSES AND PROBLEMS BY BORROWERS AND WHAT SORTS OF STATE AND MUNICIPAL LEGISLATIVE ACTIONS, GIVE RISE TO COMPLAINTS FROM LENDERS THAT UNDESERVING BORROWERS ARE 'GAMING THE SYSTEM' AND IMPOSING UNWARRANTED COSTS ON LENDERS AND, ULTIMATELY, ON TAXPAYERS?

Lenders assert that at least these categories of 'problems and abuses' plague them. Without evaluating any of them, I think they are:

- Abusive Defaulters - Owner/Borrowers who may or may not be able to afford to pay on their mortgage, but who, after default, simply seek delay after delay, so that they can 'live for free' as long as possible.

- Strategic Defaulters - Owner/Borrowers who can afford to pay, but who choose to voluntarily walk away from their homes rather than seek some form of cooperative agreement with their lender.

- Anti-Lender Legislation - State legislatures and municipal bodies that pass legislation or ordinances intended either to benefit borrowers – often by delaying the passing of title or to benefit municipalities – but which in both cases, is perceived to be a substantial detriment to the contractual rights and economics of lenders.

A. Abusive Defaulters **Appendix Exhibit 10** contains substantial excerpts from a March 4, 2012 article in the Washington Post entitled "*We Don't Believe In Living For Free.*" The couple depicted in this story has become the poster family in the lending community regarding 'abusive defaulters' or 'deadbeat borrowers' and the consequences to lenders and federal tax payers from lenient – some would say 'overly generous'- provisions of state foreclosure laws designed to help borrowers. Here are the first four paragraphs of that article:

> "The eviction from their million-dollar home could come at any moment. Keith and Janet Ritter have been bracing for it - and battling against it - almost from the

moment they moved into the five-bedroom, 4,900-square-foot manse along the Potomac River in Fort Washington.

In five years, they have never made a mortgage payment, a fact that amazes even the most seasoned veterans of the foreclosure crisis.

The Ritters have kept the sheriff at bay by repeatedly filing for bankruptcy and by exploiting changes in Maryland's laws designed to help delinquent homeowners avoid foreclosure.

Those efforts to protect homeowners have transformed Maryland's foreclosure process from one of the country's shortest to one of the longest. It now takes on average 634 days to complete a foreclosure in Maryland, compared with 132 days in Virginia."

There do not appear to be many reported examples of borrowers who are as abusive of the foreclosure process as the Ritters, and I believe that a study of relevant data bases would confirm that fact. Nevertheless, any policy proposals will need to address the image – and the reality – presented by the Ritter family.

B. Strategic Defaulters - **Appendix Exhibit 11** contains three pieces regarding the issue of 'strategic default' on mortgages- that is, a voluntary mortgage default by a borrower who chooses to default despite the fact that the borrower's income would be sufficient to pay the note over time. This subject is especially significant because it is based on a borrower's presumed economic decision that unilaterally walking away is better than negotiating with the lender.

The first piece is a 2010 policy statement from Fannie Mae, in which Fannie Mae seeks to discourage 'strategic defaults' by imposing a 7 year lockout on such borrowers, and a promise to seek deficiency judgments where possible, in contrast to a policy allowing new loans in as few as 2 years for those defaulters who cooperate with Fannie Mae. That policy appears to have been ineffective and I have not identified any articles suggesting other, more fruitful strategies.

The second piece is an advertisement on the Internet for a 'how to' book written by a Florida lawyer entitled '*The Strategic Default Plan'*. In it, the author purports to

"guide you through his step-by-step strategic default plan and teaches you the tips and insider information you need to know if you're thinking about walking away from your mortgage. The 'Strategic Default Plan' is a 'must-read' guide for anyone who is underwater on their mortgage.

Once considered taboo, choosing to walk away from a mortgage in a strategic default has become increasingly more common and acceptable, particularly as American consumers become aware that banks are not taking adequate steps to help property owners keep their homes. Anyone who has attempted to apply for a mortgage modification or conduct a short sale knows how difficult it is to deal with most banks. More Americans are becoming angry that these banks have taken billions of dollars in taxpayer bailouts, and then have used that money to forcibly remove hundreds of thousands of Americans from their homes.

<u>Many families have come to the realization that there will be no bailouts for the American homeowner struggling to make mortgage payments. No one is coming to save them. They feel abandoned by their banks and by their government.</u>

<u>If you feel this way, you are not alone. And you are right."</u>

I include this advertisement to provide the Drafting Committee some flavor of the intense interest and emotion that exists regarding this subject; a Google search of "Strategic Default' reveals many millions of hits, most commonly advertising the services of those who are advocates of such actions. Committee members seeking further appreciation of the subject may wish to explore the colorful website of the author of the foregoing book, which is http://www.sarasotaforeclosurelawfirm.com.

The third piece is entitled '*Bankers Warn About Strategic Default Risk In 2012'*, appeared in the May 23, 2012 issue of *National Mortgage News*- a mortgage originator and servicer trade paper. The full article appears in the Appendix and conveys what is an apparently widespread concern about strategic default among lenders.

BANKERS WARN ABOUT STRATEGIC DEFAULT RISK IN 2012 The foreclosure crisis is loosening the traditionally strong tie homeowners have with their homes. <u>New findings from FICO's latest quarterly survey of bank risk professionals indicate one way the slow recovery will affect distressed homeowners in 2012 is increased propensity for "strategic default</u>."

Up to 46% of the respondents expect the volume of strategic defaults in 2012 will surpass 2011 levels given that over 25% of U.S. homeowners are "under water" or owe more on their mortgages than their homes are worth.

***After five years of a brutal housing market, many people now view their homes more objectively and with less sentimentality.

Participants in the survey expressed concerns about changes in customers' attitudes towards payment hierarchy and debt obligations.
****
It means more homeowners who find themselves upside down on mortgages in the future "are likely to consider strategic default as an acceptable exit strategy," Jennings said.****

C. <u>Anti-Lender Legislation</u> **Appendix Exhibit 12** contains extended excerpts from two documents, both produced by the Federal Housing Finance Agency ('FHFA'). I include them to demonstrate the positions that FHFA has taken and is likely to take for itself - and I am guessing as a proxy for the general lending community - in response to legislative actions at both the state and municipal levels that they perceive to be unacceptably antagonistic to their interests.

The first exhibit is a December, 2011 Press Release by FHFA in which the agency announces it has sued the City of Chicago in Federal District Court to overturn a Chicago municipal ordinance. The ordinance would make a lender who holds a mortgage on a vacant or abandoned property responsible for repairing that property, despite the fact that the lender has not taken title to the property or, perhaps, even commenced a foreclosure action. In the press release and the litigation, FHFA makes clear that it seeks to defend what it sees as its privileged position under State and Federal law:

> "The lawsuit alleges that the city's ordinance impermissibly encroaches upon FHFA's role as the sole regulator and supervisor of the Enterprises. As Conservator of Fannie Mae and Freddie Mac, FHFA has been charged with the responsibility of preserving and conserving the assets of the Enterprises. This lawsuit seeks to ensure that the city's proposed registration and licensing system and "supervision" of the Enterprises by the Department of Buildings will not thwart Congress's intent. Further, the registration fee represents a tax on the Enterprises and the Conservator that is expressly precluded by long-standing congressional directive."

The second exhibit is a letter dated May 11, 2012 from Alfred Pollard, FHFA's General Counsel. It is addressed to several California legislators who are apparently tasked with final consideration of a variety of bills in the California Legislature that address 'robo-signing', tenant protection and other subjects connected to the foreclosure crisis. It is apparent from the description of the bills in Attorney Pollard's letter that the legislation would favor borrowers in default; his letter makes clear the extent to which FHFA vigorously disagrees with those policies: After describing the apparent failings of the legislation, Pollard writes:

> Such a strict liability approach is punitive, will have a chilling effect on the processing of lawful foreclosures and <u>will result in lenders and investors reevaluating the risks attendant to market operations in the state and may lead to reduced credit availability or higher interest rates</u>. (Emphasis added).

More broadly, commenting on the same bill, Pollard writes:

> The enactment of local laws and ordinances that result in unintended consequences and fail, in many instances, to achieve their goals does not assist homeowners, neighborhoods or the localities. State laws that stretch out the period for legitimate foreclosures- after every effort is made to avoid foreclosure and to keep homeowners in their homes - result in no added benefit for the homeowner and produce harm to the housing finance system and to neighborhoods. Simply attaching the terminology of consumer protection to legislation does not mean it will benefit a consumer and adverse consequences need to be examined. Increasing legal risks for lenders and investors- where existing remedies exist and where new language creates incentives for litigation ultimately creates harm for all homeowners.

Lest the addressees fail to understand the implications of his earlier observations, Pollard adds:

> Protecting homeowners, assisting them to stay in their homes and providing vehicles to avoid foreclosure must be balanced with permitting foreclosures, when other alternatives fail, to proceed in an orderly fashion to the benefit of other taxpaying homeowners through more stable housing prices, avoiding neighborhood deterioration and preserving the tax base. Foreclosure delays simply add to the costs for neighborhoods and communities and losses to lenders and investors. State directed delays in such circumstances harm the very groups that are intended as beneficiaries as **the cost of credit will increase** if creditors and investors cannot act on their collateral. (Emphasis added).

FHFA has previously acted vigorously to protect what it perceives to be its interests. For example, in lawsuits around the country FHFA has aggressively opposed a scheme proposed by municipalities to loan funds to homeowners for electric efficiency retrofits to their homes; those loans were to be secured by tax liens on the homes which would have priority over pre-existing and recorded first mortgages. In other action, FHFA recently adopted rules barring Fannie Mae and Freddie Mac from purchasing mortgages if there were so called 'transfer fee covenants' in the chain of title to the property – covenants which would have priority over GSE mortgages. And FHFA has resisted calls from the President of the United States and some members of the United States Congress to provide reductions in the principal amounts due from its borrowers on Fannie/Freddie mortgages, based on FHFA's belief that such reductions would violate its statutory mandate and that, in any event, such a policy decision is one best left to Congressional directives.

There is no reason to believe that FHFA and the private lending community would be any less aggressive in resisting our Drafting Committee's efforts if they found those efforts objectionable.

APPENDIX
LIST OF EXHIBITS

Exhibit 1 Data and Testimony of Laurie Goodman on March 15, 2012

Exhibit 2 Testimony of Laurie Goodman on September 20, 2011

Exhibit 3 Other Statements of the Size of Shadow Inventory

- National Consumer Law Center
- The Center For Responsible Lending"
- US Government Accounting Office

Exhibit 4 Testimony of Cato Institute re Responses to the Foreclosure Crisis

Exhibit 5 May 8, 2012 Report From Standard & Poor re the Shadow Inventory

Exhibit 6 Maine Servicer Sanction Materials

- A Case Summary re Bank Of America Maine Servicer Sanction Case
- B Court Order in BOA case
- C Memorandum from Attorney Cox Summarizing Servicer Issues
- D Summary Of Maine Mediation Sanction Cases

Exhibit 7 In Re Jones – (the Wells Fargo punitive damages case)

Exhibit 8 May, 2011 Government Accountability Report on Robo-Signing Problems –

Exhibit 9 Nat'l Assn of Realtors Press Release Re Rising Home Prices in April 2012.

Exhibit 10 March 12, 2012 Washington Post Article Re a 5 Year Delay in Foreclosure

Exhibit 11 Articles Regarding Strategic Default

- A Fannie Mae 2010 Policy Statement Regarding Strategic Defaults
- B Web Advertisement For A 'How-To' Book on Strategic Defaults
- C 2012 Lender Concern About Rising Strategic Defaults

Exhibit 12 Federal Housing Finance Agency Engagement with State and Municipal Enactments

- A Text Of FHFA Press Release Of December 2011 Regarding Lawsuit To Overturn Chicago's Vacant Property Ordinance
- B Excerpts From Text Of Alfred Pollard Letter Of May 11, 2012 To California Legislators Regarding Proposed State Legislation

Exhibit 13 Collection of Association Common Charges

- A Section 3-116 of the Uniform Common Interest Ownership Act [Lien for Sums Due Association; Enforcement].
- B Judy & Whittie, Summary of Why They Support a Super-Lien

EXHIBIT 1 –<u>DATA AND TESTIMONY OF LAURIE GOODMAN ON MARCH 15, 2012</u>

Laurie Goodman is the Senior Managing Director at Amherst Securities Group, LP, which she describes as a 'leading broker/dealer specializing in the trading of residential and commercial mortgage-backed securities.' On March 15, Ms. Goodman testified that

"our empirical studies have convinced us that there are a huge number of borrowers (7.4 – 9.3 million) yet to face foreclosure and eventual liquidation. The expected liquidations break down into the following categories:

3.5 – 4.0 million borrowers already 60+ days past due on loans (many seriously past due) PLUS

1.5 – 2.0 million borrowers with a compromised mortgage payment history (used to be 60+ past due, now not) PLUS

2.4 – 3.3 million borrowers with excellent payment history, but underwater (owe more than value of home)"

Her entire testimony of March 15, 2012 can be found at:

http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=0f96e0ff-8500-41a5-a0f2-0139d0df2e07.

EXHIBIT 2 –<u>TESTIMONY OF LAURIE GOODMAN ON SEPTEMBER 20, 2011</u>

In her September, 2011 testimony, Goodman described in some detail how her employer calculated the so-called 'shadow inventory' of loans that were susceptible to default:

Many analysts looking at the housing problem mistakenly assume it is limited to loans that are currently non-performing (we use 60+ days past due as our definition of non-performing). Such borrowers have a high probability of eventually losing their homes. However, the problem also includes loans with a compromised pay history; these are re-defaulting at a rapid rate. We define these re-performers as loans that were at one point 60+ days delinquent, but no longer are. Moreover, borrowers with good pay histories who are substantially underwater have shown that they, too, have a reasonable probability of transitioning to default (going 60+ days delinquent). Let's review the scope of the housing problem. An understanding of this will allow market participants and policy makers to put our supply/demand imbalance numbers in perspective. ****

[W]e classify the outstanding loans into five groups. <u>In total, we estimate that there are approximately 80 million homes in the US, 55 million of which have a mortgage.</u> Of these 55 million mortgages, there are 4.5 million non-performing loans (NPLs), 3.9 million re-performing loans, 2.6 million always performing loans with a mark-to-market LTV (loan-to-value) ratio >120, 5.4 million always performing loans with a mark-to-market LTV of 100-120, and 38.6million always performing loans with a mark-to-market LTV of 100. To size the problem, we focused on the eventual default rate of each group of loans. Our methodology is detailed in the Appendix.

Our results indicate if no changes in policy are made, 10.4 million additional borrowers are likely to default under our base "reasonable" case, and 8.3 million borrowers will default under our lower bound numbers. Since there are 55 million homes carrying mortgages, 10.4 million borrowers roughly equates to 1 borrower out of every 5. (Emphasis added.)

Ms. Goodman's entire testimony of September 20, 2012 can be found at the following website:

http://www.realtybizconsulting.com/downloadreports/LaurieGoodmanTestimony92011.pdf.

EXHIBIT 3- OTHER STATEMENTS OF THE SIZE OF SHADOW INVENTORY

The National Consumer Law Center, in its February 2012 report on foreclosure mediation programs, relied on Goodman's September 2011 data in describing the scale of the foreclosure crisis. That Report is entitled *"Rebuilding America: How States Can Save Millions of Homes through Foreclosure Mediation*"(February 2012) fn 11 at 11. The entire Report can be found at http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-foreclosure-mediation.pdf

In contrast, other parties have estimated a different size of the overhang of potential foreclosures. See, for example, the attached excerpt from recent Congressional testimony[5] from The Center For Responsible Lending"

"Last year, the Center for Responsible Lending published research showing that the nation is not yet halfway through the foreclosure crisis. CRL's research, which is detailed in our *Lost Ground* report, shows that for mortgages made during the height of the lending boom that occurred between 2004 and 2008, 8.3% of these loans were at least 60 days delinquent or in the foreclosure process as of February 2011. This represents another 3.6 million households that could possibly lose their homes. This is on top of the 6.4% of mortgages – totaling 2.7 million households – identified in CRL's study that has already gone through foreclosure. Because our research focused only on 2004-2008 originations, these estimates are likely to be on the conservative side. For example, Moody's has reported the completion of 5 million foreclosures or short sales. "

Testimony of Michael Calhoun, President, Center for Responsible Lending, before the Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on Housing, Transportation, and Community Development at its April 25, 2012 Hearing on Helping Responsible Homeowners Save Money Through Refinancing. Mr. Calhoun's entire testimony can be found at http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=605bf471-28b2-44e6-bd16-62bea74b0285.

Further, the US Government Accounting Office, writing in May, 2011, wrote the following:

> As of December 2010, an estimated 4.6 percent of the about 50 million first-lien mortgages outstanding were in foreclosure—an increase of more than 370 percent since the first quarter of 2006, when 1 percent were in foreclosure.
>
> Government Accountability Office *'Documentation Problems Reveal Need for Ongoing Regulatory Oversight'* (May, 2011) at 1. This Report can be found at **Appendix Exhibit 9.**

EXHIBIT 4- TESTIMONY OF CATO INSTITUTE

The testimony of Mark Calabria, entitled "Strengthening the Housing Market and Minimizing Losses to Taxpayers", before the *US Senate Committee on Banking, Housing and Urban Affairs, Subcommittee on Housing, Transportation and Community Development, Subcommittee on Securities, Insurance, and Investment* on March 15, 2012, can be found at http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=e1609bad-ea32-499f-97d6-23689d3ee417.

EXHIBIT 5- MAY 8, 2012 REPORT FROM STANDARD & POOR

Standard & Poor Structured Finance Research: '*First-Quarter 2012 Shadow Inventory Update: National Liquidation Rates Moderate, While Regional Differences Widen'* May 8, 2012.

The full report is found at http://www.housingviews.com/2012/05/09/first-quarter-2012-shadow-inventory-update-national-liquidation-rates-moderate-while-regional-differences-widen.

EXHIBIT 6 – MAINE SERVICER SANCTION MATERIALS

A. CASE SUMMARY REGARDING BANK OF AMERICA (PREPARED BY ATTORNEY THOMAS COX)

BAC Home Loans Servicing v. Stewart, RE-10-429 (Me. Super. Ct. Cumberland, 4/17/12) (Warren, J.)

1. At the first mediation session on January 7, 2011, involving a mortgage with a $233,000 principal balance, BOA acknowledged that it had received the homeowner’s financial package and told the homeowner that it would be offering him a loan modification.

2. By the second mediation session on April 28, 2011-- 110 days later--BOA told the mediator that they had not yet decided on the terms of a loan modification and that now the borrower's documents were stale and needed to be resubmitted.

3. On May 27, 2011 the court fined BOA $750 for its bad faith in the mediation process and warned that a further violation could result in a dismissal of the case. The court noted that it had just sanctioned BOA in two other mediation cases.

4. At the third mediation on August 8, 2011--more than 90 days after the second session--BOA was still not prepared to offer a loan modification (or to tell the homeowner that he was not eligible).

5. On August 12, 2011 the Court sanctioned BOA a second time, ordered another fine of $750, ordered a suspension of the running of all interest, fees and costs and warned BOA that any further violation would result in a dismissal with prejudice.

6. At a fourth mediation on March 29, 2012--more than seven months after the 3rd session (and almost 14 months after the first mediation session)-- BOA still was not prepared to offer a loan modification, said it had failed to upload the new financial documents submitted by homeowner on January 5, 2012, was even unable to find more recently submitted documents, and said it now needed an entirely new and updated set of documents.

7. On April 17, 2012 the court ran out of patience and ordered a dismissal of the foreclosure complaint "with prejudice." Ironically, the pro se homeowner wrote a letter to the court on February 7, 2012 complaining about being jerked around by BOA and telling the court that all that the homeowner wanted was to have his loan extended out to 30 years-leaving the interest rate unchanged.

This judgment of dismissal with prejudice is final, as no appeal was taken. Under Maine law, in my opinion, this means that this pro se homeowner got the proverbial “free house”.

EXHIBIT 6 – B-COURT ORDER

BAC Home Loans Servicing LP v. Stewart, RE-10-429 (Superior Ct. Cumberland)

On March 29, 2012 the court issued an order directing plaintiff to show cause within 14 days why this action should not be dismissed with prejudice in light of plaintiff's repeated non-compliance with mediation requirements as set forth in the clurt's prior orders dated May 27, 2011 and August 12, 2011 (amended in part by order dated September 7, 2011) and the various reports by the mediator, most recently his report dated March 29, 2012.

Plaintiff has responded and has argued that it is not acting in bad faith and that it has recently asked for and received more financial information from defendant. However, one of the problems in this case is that plaintiff's response to the numerous delays that have occurred (and that plaintiff is largely responsible for) is to keep asking for updated information, therefore requiring defendant to go back to square one.

The record in this case demonstrates that plaintiff has certainly been placed on notice that its performance was deficient and that the mediator and the court have lost patience with its noncompliance. In the court's view, enough is enough.

If the court's repeated warnings are to have any meaning, the court has no choice but to follow through with the warning it issued in its May 27 order and the express provision in its August 12, 2011 order that "[a]ny further instances of noncompliance shall result in a dismissal with prejudice."

The entry shall be:

This case is dismissed with prejudice as a sanction for plaintiff's repeated noncompliance as detailed in the mediator's various reports. The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: April 17, 2012

Thomas D. Warren
Justice, Superior Court

STATE OF MAINE
Cumberland, ss. Clerk's Office

APR 17 2012

RECEIVED

EXHIBIT 6 **C. MEMORANDUM FROM ATTORNEY COX SUMMARIZING SERVICER ISSUES**

MEMORANDUM May 18, 2011

TO: William Breetz, Esq.

FROM: Thomas A. Cox, Esq.

RE: Issues With Servicers in Foreclosure mediation proceedings

---

The following is a list of problems that we encounter in our Maine foreclosure mediation program. This list is not one of isolated examples—these are issues that we are facing on a daily basis. We are often seeing it take three, four, five, and even six mediation sessions being required to get a loan modification. This dragging out of the mediation process by the servicers is in marked contrast the complaints by FHFA about foreclosures taking too long and about mediation causing delays. What is especially disturbing is to see cases where homeowners become emotionally exhausted by the process and just give up.

Here is the list of examples:

1. Failures to submit mandated financial information containing loan details in advance of mediation session.

2. Failures to appear at all at a mediation session.

3. The use of "potted plant" lawyers for mediation sessions—these are low paid contract lawyers, hired solely warm the chair at the mediation session and who do not see a file before the mediation or after, who do not contact the servicer before mediation session to ensure preparedness to mediate, who do nothing during mediation to facilitate the process (some of whom even see it as their job to be obstructive during the mediation session), and who do no follow-up after the mediation session regarding agreements made by the servicer during mediation.

4. Failures of servicers to have reviewed homeowner financial package in advance of mediation session and who then complain for the first time at mediation that it is incomplete.

5. Failures of servicers to have reviewed homeowner financial package in advance of mediation session and who then complain for the first time at mediation that the information has become stale.

6. Servicer representatives on the phone in mediation who assure the mediator that they have authority to make a deal but who have not looked at the file ever before and then assert that

someone else's authority is needed or that more time to review the homeowner's financial package is required.

7. Servicer representatives in mediation sessions who do not understand the HAMP rules or the rules of the loan modification programs of the loan owners for whom they are servicing. One example is a constant failure to "gross-up" Social Security benefits. Another example is a constant failure to properly apply the FHA partial claim rules.

8. Servicers who, during mediation, flat out refuse to follow the rules of the HAMP guidelines or the rules of the loan modification programs of the loan owners for whom they are servicing

9. Servicers who make commitments in mediation sessions to complete review of homeowner loan modification application and provide a loan modification decision by an agreed upon date, but then fail to do it.

9. Servicers who make commitments in mediation sessions to complete review of homeowner loan modification application and provide a loan modification decision by an agreed upon date, but then come back later and claim that still more homeowner documents are needed to complete the review, without having identified any documentation deficiencies during the mediation session.

10. Servicers who come into a mediation session denying receipt of homeowner financial packages even in the face of clear proof of sending and delivery.

11. Servicers who mock the "single point of contact" concept. I was recently in a mediation in a BOA case where the servicer representative on the phone, when confronted with the single point of contact issue said that the homeowner had a single point of contact for communications, a different single point of contact during mediation and still another single point of contact to deal with HAMP issues. This servicer representative in the mediation had no knowledge of extensive previous communications between the homeowner's housing counselor and two different single points of contact at the servicer in the weeks and even days before the mediation session.

12. The making of assertions in mediation that investor restrictions do not permit loan modifications, which are later proven to be completely false statements.

13. The failure of servicers in mediation to seek investor waivers on loan modification restrictions as required by HAMP.

EXHIBIT 6- D. Summary of Maine Mediation Sanction cases – prepared by Atty T. Cox

Maine Mediation Sanctions orders summary

Chase Home Finance,LLC v. Greer, RE-10-08 (Me. Super, Ct., Oxford, 10/26/10) (Laurence,J.) At 2nd mediation, π had failed to complete modification review promised at 1st session. Order for π to pay $3,000 to FDP for future mediation representation if case not resolved by 12/1/10, and π ordered to send a representative in person to next mediation if case is not sooner resolved.

Deutsche Bank v. Hughes, RE-10-96 (Me. Dist. Ct., Lewiston,1/21/11) (Laurence, J.) failure at 2nd mediation to provide HAMP review promised in 1st mediation session. Order for (1) no accrual of charges, expenses or fees during remainder of mediation, (2) no interest accrual during remainder of mediation

HSBC v. Bowie, RE-09-080 (Me. Dist. Ct. 2/10/11, Douglas, J.) servicer proposed a non-HAMP mod with a front end payment of $25,000, and said it could do nothing else due to investor restrictions. π claimed investor limitations are proprietary. Order for production of investor restrictions, and then further mediation.

Deutsche Bank v. Hughes, RE-10-96 (Me. Dist. Ct., Lewiston, 3/16/11) (Laurence, J.) Order for dismissal without prejudice due to failure of π to comply with agreement made at previous mediation session, even after sanctions order of 1/21/11 (see above)

Chase Home Finance v. Sargent, RE-09-79 (Me. Super. Ct., York, 5/5/11) (Cantara, J.) Order (1)for π to pay 50 hours of Δ fees at $250 per hour, (2) pay Δ's lost wages due to mediation of $314.50, (3) waive interest, fees, costs from 1st mediation to final report, (4) no denial of mod because loan is over 12 months in arrears, (5) no charge to loan account of mediation legal fees and costs, (6) . . .(line missing)

CitiMortgage v. Dente, BIDDC Re-10-215 (Me. Dist. Ct., Springvale, 5/19/11) (Cantera, J.) failure to determine Δ eligibility for HAMP, failure to review Δ docs for non-HAMP mod over 3 months after 1st mediation is bad faith. Order: no charge of fees to Δ loan account, $2,000 cou1nsel fees.

Springvale, 5/19/11) (Cantera, J.) failure to determine Δ eligibility for HAMP, failure to review Δ docs for non-HAMP mod over 3 months after 1st mediation is bad faith. Order: no charge of fees to Δ loan account, $2,000 counsel fees.

BONY v. Richardson, RE-09-248 (Me. Dist. Ct., Springvale, 5/20/11) (Jannelle, J.,) Mediation sanctions-failure to appear - case went to Law Ct. and was remanded as premature) repeat failure of π to appear at mediation result in award of $15,000 counsel fees, $2,500 fine and dismissal with prej. [Note: after remand from Law Court, this case settled with a confidentiality agreement-I suspect that Δ settled for a loan mod.]

BONY v. Richardson, 2011 ME 38, 15 A.3d 156 Rejecting BONY appeal of sanctions as having been filed prematurely.

BAC Home Loans v. Wildes, RE-10-529 (Me. Super. Ct., Cum., 7/21/110 (______,J.) Failure of π to comply with agreement at 1st mediation to respond to HAMP app within 45 days. Order for suspension of accrual of interest, late fees, and costs until HAMP review completed and shall not be added back to loan at any time.

Wells Fargo v. Clark, RE-10-134 (Me. Dist. Ct., Springvale, 8/31/11) (Cantara, J.) π failure to finalize stipulated judgment regarding loan mod and failure to initially produce authorized representative to negotiate. Order on motion for sanctions. P to pay Δ Atty fees of $1,443.5

BONY v. Barden, RE-10-384 (Me. Sup. Ct., Cum., 08/30/11) (Mills,J.) Order on Δ Mtn for Contempt. π violated noncompliance sanctions order coming out of mediation by failing to pay legal fees, and by failing to provide accounting showing waiver of accrued fees, cost, & interest. Ordered $2,500 fine and compliance with previous sanctions order.

BONY v. Barden RE-10-384(Me. Dist. Ct., Portl., 03-31-11) (____,J.) Order on Report of Noncompliance. Order to pay legal fees, Δ's lost wages, waive accrued costs, fees, interest, legal costs for participating in mediation.

Δ's Memo in Support of Noncompliance Report (3/29/11)

BONY v. Barden, RE-10-384 (Me. Sup. Ct., Cum., 2/8/12) (Mills,J.) Oder for Contempt (2nd one!) massive failures to provide appropriate loan mod. Oder to π to pay $5,000 fine to state, but contempt purged if π, (1)provides loan docs showing proper application of payments, (2) pays counsel fees to Δ, (2) and pays costs to Δ.

2 (Mills,J.) Order for Contempt (2nd one!) massive failures to provide appropriate loan mod. Order to π to pay $5,000 fine to state, but contempt purged if π, (1)provides loan docs showing proper application of payments, (2) pays counsel fees to Δ, (2) and pays costs to Δ.

BAC Home Loans Servicing v. Rowe, RE-09-0316 (Me. Dist.Ct., Lewiston) Noncompliance report only-8/10/11. Recommendation for heavy sanctions for failure to process Δ loan mod package within time frame agreed to at 2nd session.

Bank of America v. Hudson, YORDC-RE-10-109 (Me. Dist. Ct. Springvale, 6/7/11) (Cantera, J.) π failed to comply with agreement for review of loan mod package, then new HAMP rules came in requiring new docs and new review by π. Order for π to pay $1,000 FDP.

BAC Home Loans Servicing v. Kenney, RE-10-358 (Me. Super. Ct. Cumberland 5/27/11) (Warren, J.) BAC agreed to a loan mod in a previous mediation, but at following mediation asserted that the BAC rep. had no authority to make that deal. Court issues show cause order as to why BAC should not be ordered to complete the agreement. BAC did not show up at show cause hearing. Court enters order enforcing the agreement

BAC Home Loans v. Stafford, RE-10-483 (Me. Super. Ct. Cumberland 5/27/11) (Warren, J.) Second noncompliance, second sanctions order for (1) $1,000 to FDP, (2) π to pay Δ Atty fees

Wells Fargo Bank v. Kelly, RE-10-205 (Me. Dist. Ct. Springvale 8/2/11) (Cantera. J.) π failed to appear for mediation. Order for $1,000 sanction to FDP, π atty to pay $500 sanction, π to pay Δ $250 for time lost from work.

First Franklin v. Gardner, RE-10-122 (Me. Dist. Ct. 9/6/11) (Cantara, J.) no description of misconduct being sanctioned. Order for π to make (1) payment of $6,154 in legal fees, (2) payment to Δ for $500 for destruction of Δ creditworthiness, (3) payment to Δ of $500 for Δ lost wages for mediation, and (4) to enter into loan mod on terms agreed to at mediation.

BAC Home Loans Servicing v. Foley, RE-10-277 (Me. Dist. Ct., Springvale, 10/4/11) (Cantara, J.) Failure of π to extend loan mod offer after agreeing to do so in mediation. Orders additional mediation session and denies request for Δ legal fees

3 Springvale, 10/4/11) (Cantara, J.) Failure of π to extend loan mod offer after agreeing to do so in mediation. Orders additional mediation session and denies request for Δ legal fees

BONY v. Napolitano, RE-11-04 (Me. Sup. Ct., Cum., 10/14/11) (Mills, J.) π asserted a no-modification policy but refused to produce it. Order for production of the policy and abating interest and fees from initiation of mediation to end of mediation.

BAC Home Loans Servicing v. Rosenberg, RE-10-041 (Me. Dist. Ct. Lew., Lawrence, J., 10/18/11) π failed to rectify use of inaccurate Δ income information, failed to assist Δ in HAMP appeal process, failed to submit an in-house mod package to as promised. Δ attended 4 mediation sessions. Plaintiff ordered (1) to pay Δ reasonable atty fees, (2) pay Δ lost wages and costs, (3) pay $1,000 to FDP, (4) waive interest fees during mediation, and (5) present an in-house mod package as promised and state why Δ is ineligible for HAMP.

Wells Fargo Bank v. Whitten, RE-10-328 (Me. Dist. Ct. Springvale 10/21/11) (Cantara, J.) π failed to appear at mediation Order for π to pay for time lost from work, pay atty fees of $ 500 and $500 sanction to FDP

Wells Fargo v. Pecor, BRIDC-Re-2011-0052 (Me. Dist. Ct., Brid., 10/25/11) (Powers, J.) π failed to file FDP-02A or FDP-02B, failure to review documents and identify needed documents, failure to timely respond to short sale offer Order (1) for $5,000 Δ legal fees, (2) provide short-sale docs to Δ, (3) waive accrual of costs fees & interest during mediation

JPMorgan Chase v. Bouchles RE-11-031 (Me. Dist. Ct., And., 10-26-201) (Laurence, J.) Multiple mediation sessions, failure to review for modification, π counsel failure to respond to Δ inquires re loan mod app and rejection letter. Order for legal fees to Δ, tolling of interest from 1st med to 2nd session

BONY v. Barden, RE-10-384 (Me. Sup. Ct., Cum., 2/8/12) (Mills,J.) Oder for Contempt (2nd one!) massive failures to provide appropriate loan mod. Oder to π to pay $5,000 fine to state, but contempt purgee if π, (1)provides loan docs showing proper application of payments, (2) counsel fees to Δ, (2) and costs to Δ

Suntrust Mortgage v. Pickett, SPRDC-RE-10-282 (Me. Dist. Ct. Springvale, 3/16/12) (Cantara, J.) unknown noncompliance-but it appears that π failed to submit FDP-2A. Order for (1) π to pay Δ attorney fees and costs of $248.58 and (2) if π fails to submit FDP @A one week before next mediation, case to be dismissed with

4

Suntrust Mortgage v. Pickett, SPRDC-RE-10-282 (Me. Dist. Ct. Springvale, 3/16/12) (Cantara, J.) unknown noncompliance-but it appears that π failed to submit FDP-2A. Order for (1) π to pay Δ attorney fees and costs of $248.58 and (2) if π fails to submit FDP- @A one week before next mediation, case to be dismissed with prejudice, (3) π to pay FDP a fine of $250

Wells Fargo v. Pierce, SPRDC-RE-2011-00018 (Me. Dist. Ct.,Springvale, 3/20/12) (Douglas, J.) π failed to file FDP-02A and failed to appear for mediation. π ordered(1) to pay Δ $108.24 for value of vacation day used to attend, (2) pay $500 to FDP, and (3) case dismissed w/o prejudice

Ocwen v. McCoy, RE-10-392 (Me. Dist. Ct., Springvale, 3/30/12) (Douglas, J.) five mediation sessions, four focused on HAMP when Δ was never eligible for HAMP (loan after 1/1/09), failures to review Δ docs. Order: (1) int and fees tolled, (2) π to reimburse Δ for lost income & travel to 3 mediation sessions, (3) π pay Δ legal fees for sanctions hearing, (4) no pass through to Δ of π legal fees for mediation, (5) $1500 fine to FDP. four mediation sessions, π failure to provide promised HAMP mod, π failure to review documents, π demands for updated documents, two prior sanctions orders, π violation of order halting interest accrual, warning about dismissal with prejudice for future noncompliance, still no mod decision or offer from π. Order for dismissal **with prejudice**.

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EXHIBIT 7 <u>IN RE JONES </u>– the Wells Fargo punitive damages case

The entire Westlaw opinion is found at 2012 WL 1155715 [Only the Westlaw citation is currently available.] The opinion is captioned

United States Court, E.D. Louisiana.
In re Michael L. **JONES**, Debtor.
Michael L. **Jones**, Plaintiff
v.
Wells Fargo Home Mortgage, Inc., Defendant.
Bankruptcy No. 03–16518. | Adversary
No. 06–1093. | April 5, 2012.

The following excerpts provide a flavor of the Court's description of Wells Fargo's conduct in this case.

"This adversary proceeding was filed by Michael L. **Jones**, debtor, ("**Jones**" or "Debtor") in an effort to recoup overpayments made to Wells Fargo on his home mortgage loan."

[T]he [original] Opinion found Wells Fargo to be in violation of the automatic stay because it applied postpetition payments made by **Jones** and his trustee to undisclosed postpetition fees and costs not authorized by the Court, noticed to Debtor or his trustee, and in contravention of Debtor's confirmed plan of reorganization and the Confirmation Order. <u>Wells Fargo's conduct was found to be willful and egregious.</u> **** [The opinion goes on at length to describe Wells Fargo’s behavior]

In this case, Wells Fargo testified that every home mortgage loan was administered by its proprietary computer software. The evidence established that ***Wells Fargo applied payments first to fees and costs assessed on mortgage loans, then to outstanding principal, accrued interest, and escrowed costs. This application method was directly contrary to the terms of **Jones**' note and mortgage, as well as, Wells Fargo's standard form mortgages and notes. ***The improper application method resulted in an incorrect amortization of loans when fees or costs were assessed. The improper amortization resulted in the assessment of additional interest, default fees and costs against the loan. <u>The evidence established the utilization of this application method for every mortgage loan in Wells Fargo's portfolio</u>.
****
Punitive damages are warranted when the conduct in question is willful and egregious, or when the defendant acted “with actual knowledge that he was violating the federally protected right or with reckless disregard of whether he was doing so.” There is no question that Wells Fargo's conduct was willful. As previously decided, Wells Fargo clearly knew of Debtor's pending bankruptcy and was represented by bankruptcy counsel in this case. Wells Fargo is a sophisticated lender with thousands of claims in bankruptcy cases pending throughout the country and is familiar with the provisions of the Bankruptcy Code, particularly those regarding However, it was not the assessment of the charges, but the conduct which followed that this Court found sanctionable.

Despite assessing postpetition charges, Wells Fargo withheld this fact from its borrower and diverted payments made by the trustee and Debtor to satisfy claims not authorized by the plan or Court. Wells Fargo admitted that these actions were part of its normal course of conduct, practiced in perhaps thousands of cases. As a result of the evidence presented, the Court also found Wells Fargo's actions to be egregious.

There is also no question that Wells Fargo exhibited reckless disregard for the stay it violated. ****The net effect of Wells Fargo's actions was an overcharge in excess of $24,000.00. When **Jones** questioned the amounts owed, Wells Fargo refused to explain its calculations or provide an amortization schedule. When **Jones** sued Wells Fargo, it again failed to properly account for its calculations.

After judgment was awarded, Wells Fargo fought the compensatory portion of the award despite never challenging the calculations of the overpayment. In fact, Wells Fargo's initial legal position both before this Court and in its first appeal denied any responsibility to refund payments. The cost to **Jones** was hundreds of thousands of dollars in legal fees and five (5) years of litigation.

While every litigant has a right to pursue appeal, Wells Fargo's style of litigation was particularly vexing.
****
Although its own representatives have admitted that it routinely misapplied payments on loans and improperly charged fees, they have refused to correct past errors. They stubbornly insist on limiting any change in their conduct prospectively, even as they seek to collect on loans in other cases for amounts owed in error.

Wells Fargo's conduct is clandestine. Rather than provide **Jones** with a complete history of his debt on an ongoing basis, Wells Fargo simply stopped communicating with **Jones** once it deemed him in default. At that point in time, fees and costs were assessed against his account and satisfied with postpetition payments intended for other debt without notice. Only through litigation was this practice discovered. Wells Fargo admitted to the same practices for all other loans in bankruptcy or default. As a result, it is unlikely that most debtors will be able to discern problems with their accounts without extensive discovery.

****

Wells Fargo has taken advantage of borrowers who rely on it to accurately apply payments and calculate the amounts owed. But perhaps more disturbing is Wells Fargo's refusal to voluntarily correct its errors. It prefers to rely on the ignorance of borrowers or their inability to fund a challenge to its demands, rather than voluntarily relinquish gains obtained through improper accounting methods. Wells Fargo's conduct was a breach of its contractual obligations to its borrowers. More importantly, when exposed, it revealed its true corporate character by denying any obligation to correct its past transgressions and mounting a legal assault [designed to] ensure it never had to. Society requires that those in business conduct themselves with honestly and fair dealing. Thus, there is a strong societal interest in deterring such future conduct through the imposition of punitive relief.
****
As previously set forth, Wells Fargo is a sophisticated lender and a regular participant in bankruptcy proceedings throughout the country. It is represented by able counsel and it well versed in the Bankruptcy Code and the provisions of the automatic stay.

VI. Conclusion

Wells Fargo's actions were not only highly reprehensible, but its subsequent reaction on their exposure has been less than satisfactory. There is a strong societal interest in preventing such future conduct through a punitive award.
****
After considering the compensatory damages of $24,441.65 awarded in this case, along with the litigation costs of $292,673.84; awards against Wells Fargo in other cases for the same behavior which did not deter its conduct; and the previous judgments in this case none of which deterred its actions; the Court finds that a punitive damage award of $3,171,154.00 is warranted to deter Wells Fargo from similar conduct in the future. This Court hopes that the relief granted will finally motivate Wells Fargo to rectify its practices and comply with the terms of court orders, plans and the automatic stay.

EXHIBIT 8 MAY, 2011 Government Accountability Report On Robo-Signing Problems - Documentation Problems Reveal Need for Ongoing Regulatory Oversight

This entire report can be found at http://www.gao.gov/assets/130/126215.pdf.

GAO's self-described 'highlights' of its report are found at http://www.gao.gov/products/GAO-11-649T.

EXHIBIT 9 Nat'l Ass'n of Realtors PRESS RELEASE OF MAY 22, 2012 REGARDING RISING HOME PRICES IN APRIL 2012.

The following are substantial excerpts from this press release:

WASHINGTON (May 22, 2012) – Existing-home sales rose in April and remain above a year ago, while home prices continued to rise, according to the National Association of Realtors®. The improvements in sales and prices were broad based across all regions.

Total existing-home sales, which are completed transactions that include single-family homes, townhomes, condominiums and co-ops, increased 3.4 percent to a seasonally adjusted annual rate of 4.62 million in April from a downwardly revised 4.47 million in March, and are 10.0 percent higher than the 4.20 million-unit level in April 2011.

Lawrence Yun, NAR chief economist, said the housing recovery is underway. "It is no longer just the investors who are taking advantage of high affordability conditions. A return of normal home buying for occupancy is helping home sales across all price points, and now the recovery appears to be extending to home prices," he said. "The general downtrend in both listed and shadow inventory has shifted from a buyers' market to one that is much more balanced, but in some areas it has become a seller's market."

Total housing inventory at the end of April rose 9.5 percent to 2.54 million existing homes available for sale, a seasonal increase which represents a 6.6-month supply[2] at the current sales pace, up from a 6.2-month supply in March. Listed inventory is 20.6 percent below a year ago when there was a 9.1-month supply; the record for unsold inventory was 4.04 million in July 2007.

"A diminishing share of foreclosed property sales is helping home values. Moreover, an acute shortage of inventory in certain markets is leading to multiple biddings and escalating price conditions," Yun said. He notes some areas with tight supply include the Washington, D.C., area; Miami; Naples, Fla.; North Dakota; Phoenix; Orange County, Calif.; and Seattle. "We expect stronger price increases in most of these areas."

The national median existing-home price[3] for all housing types jumped 10.1 percent to $177,400 in April from a year ago; the March price showed an upwardly revised 3.1 percent annual improvement. "This is the first time we've had back-to-back price increases from a year earlier since June and July of 2010 when the gains were less than one percent," Yun said. "For the year we're looking for a modest overall price gain of 1.0 to 2.0 percent, with stronger improvement in 2013."

Distressed homes[4] – foreclosures and short sales sold at deep discounts – accounted for 28 percent of April sales (17 percent were foreclosures and 11 percent were short sales), down from 29 percent in March and 37 percent in April 2011. Foreclosures sold for an average discount of 21 percent below market value in April, while short sales were discounted 14 percent.

****

According to Freddie Mac, the national average commitment rate for a 30-year, conventional, fixed-rate mortgage declined to 3.91 percent in April from 3.95 percent in March; the rate was 4.84 percent in April 2011. Last week the 30-year fixed rate dropped to a record weekly low of 3.79 percent; recordkeeping began in 1971.

First-time buyers rose to 35 percent of purchasers in April from 33 percent in March; they were 36 percent in April 2011.

All-cash sales fell to 29 percent of transactions in April from 32 percent in March; they were 31 percent in April 2011. Investors, who account for the bulk of cash sales, purchased 20 percent of homes in April, compared with 21 percent in March and 20 percent in April 2011.

Single-family home sales rose 3.0 percent to a seasonally adjusted annual rate of 4.09 million in April from 3.97 million in March, and are 9.9 percent higher than the 3.72 million-unit pace a year ago. The median existing single-family home price was $178,000 in April, up 10.4 percent from April 2011.

Existing condominium and co-op sales increased 6.0 percent to a seasonally adjusted annual rate of 530,000 in April from 500,000 in March, and are 10.4 percent above the 480,000-unit level in April 2011. The median existing condo price was $172,900 in April, which is 8.1 percent above a year ago.

Regionally, existing-home sales in the Northeast rose 5.1 percent to an annual level of 620,000 in April and are 19.2 percent higher than a year ago. The median price in the Northeast was $256,600, up 8.8 percent from April 2011.

Existing-home sales in the Midwest increased 1.0 percent in April to a pace of 1.03 million and are 14.4 percent above April 2011. The median price in the Midwest was $141,400, up 7.4 percent from a year ago.

In the South, existing-home sales rose 3.5 percent to an annual level of 1.79 million in April and are 6.5 percent higher than a year ago. The median price in the South was $153,400, up 8.0 percent from April 2011.

Existing-home sales in the West increased 4.4 percent to an annual pace of 1.18 million in April and are 7.3 percent above April 2011. The median price in the West was $221,700, a surge of 15.9 percent from a year ago.

The entire May 22, 2012 Press release from the National Association of Realtors is found at http://www.realtor.org/news-releases/2012/05/april-existing-home-sales-up-prices-rise-again.

EXHIBIT 10 MARCH 12, 2012 ARTICLE FROM THE WASHINGTON POST REGARDING A 5 YEAR DELAY IN FORECLOSURE

The complete text of this article can be found at 2012 WLNR 4705766.

The eviction from their million-dollar home could come at any moment. Keith and Janet Ritter have been bracing for it - and battling against it - almost from the moment they moved into the five-bedroom, 4,900-square-foot manse along the Potomac River in Fort Washington.

In five years, they have never made a mortgage payment, a fact that amazes even the most seasoned veterans of the foreclosure crisis.

The Ritters have kept the sheriff at bay by repeatedly filing for bankruptcy and by exploiting changes in Maryland's laws designed to help delinquent homeowners avoid foreclosure.

Those efforts to protect homeowners have transformed Maryland's foreclosure process from one of the country's shortest to one of the longest. It now takes on average 634 days to complete a foreclosure in Maryland, compared with 132 days in Virginia.

Champions of Maryland's system, including Gov. Martin O'Malley (D), credit it with driving down the state's foreclosure rate and helping thousands of victims of predatory lending, fraud and other abuses hang on to their homes.

"The market won't fix itself," said Anne Norton, Maryland's deputy commissioner for financial regulations. "By the time it does, how many homeowners will be churned up and spit out by the machine?"

Critics, including economists and lenders, blame the state's go-slow approach for a growing backlog of foreclosures and a weak-to-nonexistent recovery in home prices. To them, the system puts too much emphasis on helping individual homeowners and not enough on quickly clearing the market of foreclosures so prices can rebound and hard-hit communities can recover. And they say it also creates opportunities for abuse by those determined to drag the process out for as long as possible.

"How is it people can stay in a house for five years without ever making a mortgage payment?" said Thomas A. Lawler, a former senior vice president at Fannie Mae who now runs his own consulting firm in Loudoun County. "That's a screwed-up process. It's an example of how the process is broken."

The Ritters, who bought their house for $1.29 million with almost no money down, are hardly representative of the vast majority of Maryland's distressed homeowners.

During the boom, they set out to become mini real estate moguls, buying properties and flipping them for a profit. In the process, Keith Ritter, 54, went from being on probation for bankruptcy fraud and making minimum wage to being a successful real estate investor and landlord with a six-figure income. Then, when the housing market tanked five years ago, the couple found themselves facing multiple foreclosures.

The Ritters have tried to negotiate different payment arrangements with their lender to save their posh home near National Harbor, they said, but to no avail.

"It was never our intention to get here and never make a mortgage payment," Keith Ritter said. "We don't believe in living for free."

But he and Janet, a 51-year-old real estate agent, make no apology for using every tactic available to them to stay in their house, including challenging the foreclosure sale in court, requesting mediation and claiming they had a tenant living with them. Their adversaries, they argued, are giant financial institutions with armies of lawyers that are out to make as much money as possible at the expense of homeowners.

"When a bank does all it can to save itself, that's good business," Keith said. "When a homeowner does the same thing, he's called a deadbeat."

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The custom-built property, on three-quarters of an acre on Riverview Road, was a showstopper, with Palladian windows, high ceilings and a gabled roof. Inside, French patio doors led to a magnificent sunroom. The dining room had red walls, a tray ceiling and a chandelier the original owner had brought back from Prague. Upstairs, the master bedroom had a sitting area and a three-way fireplace. The windows surrounding the tub in the master bath offered incredible views of the Potomac. And the house next door had sold for $1.7 million.

The Ritters were not sure they could afford the million-dollar-plus price tag until they were approved by Realty Mortgage Corp., a now-defunct Mississippi lender, for $1 million. Another lender covered the down payment.

The couple called their new residence "God's house" because, as Keith Ritter put it, "that's the only way we could have been approved for a loan."

They did not get to revel in their good fortune for long. By the time they moved in at the end of 2006, home prices had begun their disastrous free fall.

The housing crash

The market soured with ferocious speed. Between 2006 and 2008, housing prices in Prince George's County fell 17 percent while the number of properties in foreclosure surged from 3,094 to 32,338, according to a state report. Housing counselors went from seeing one homeowner behind on a mortgage a week to seeing 10 a day.

For the Ritters, the housing crash was a catastrophe. The couple still owned five properties, four of which they had rented out.

But falling home values meant they could not refinance the mortgages, some of which carried adjustable rates. Pretty soon the rents they were charging were not covering the mortgages. Janet Ritter's sales commissions started to dry up, along with other sources of income. By the time the first mortgage payment of almost $7,600 on the Riverview Road house was due in January 2007, they faced a decision: which properties to save.

"Do we put the money we had left in this one? Or is it better to spread it to the others?" Keith Ritter recalled wondering.

They chose the latter course, expecting to be able to catch up on the Riverview Road payments later. But that didn't happen.

The first foreclosure against the Riverview Road house was filed in 2007. By that time, Realty Mortgage no longer owned their loan, which would change hands at least two more times. The foreclosure case was brought by lawyers representing Mortgage Electronic Registration Systems, or MERS, the controversial electronic mortgage registry that some lenders used as a proxy to initiate foreclosures. But the proceedings ground to a halt the next year after Janet Ritter filed for bankruptcy protection. The bankruptcy case was later dismissed at her request.

Meanwhile, the couple's rental properties and previous residence, which they had held on to, were also facing foreclosure.

In 2009, the year foreclosure proceedings began on their old house on Clay Drive, Keith Ritter filed for bankruptcy twice. Both bankruptcy cases were later dismissed, but they managed to disrupt the foreclosure of the Clay Drive home three separate times. The property was even sold on the courthouse steps in Upper Marlboro in spring 2010. However, a county circuit court judge later declared the sale invalid because the bankruptcy case was still active when the sale took place.

Ritter defended his tactics.

"Anytime anyone tries to take your home," he said, "you are going to use the legal system to save it."

Only they didn't save it. In 2010, the Riverview Road house went into foreclosure for the second time shortly after Kondaur Capital, a California company that buys and services troubled home loans, purchased the note from Morgan Stanley.

Talks with Kondaur began. The Ritters initially agreed to a short sale, with a starting sales price of $1 million that was later dropped to $799,000. The house did not get any takers.

At different times, the couple said, they offered to make payments, but they said Kondaur turned them down, preferring to foreclose. Kondaur did not return calls and e-mails asking for comment. The company's attorney, Robert Hillman, also declined to discuss the case.

The Ritters then asked for a remedy that had just been approved by Maryland lawmakers to help distressed homeowners: mediation.

"Defendant(s), humbly prays that the Honorable Judge, will recognize that this process, written into law by Governor O'Malley was to prevent just this situation, whereby the note holder can . . . trample on the rights of the homeowner," Keith Ritter wrote in a December 2010 mediation request.

When the mediation day arrived in April, however, the Ritters were not there. They later said that, because of a mailing address mix-up, they never got the necessary paperwork. They complained that they were denied mediation, but Prince George's Circuit Court Judge Thomas P. Smith ordered the house sold.

Janet Ritter filed for bankruptcy, this time in Georgia, where the couple owned another house that was later lost to foreclosure. The foreclosure on the Riverview Road house was stopped again until that bankruptcy was dismissed, too. The house finally went on the auction block in July, and Kondaur bought it back for $552,500, a common industry practice.

The Ritters immediately challenged the sale in court. Judge Smith ratified the sale. The couple then said they had a tenant living with them, potentially triggering recently passed state and federal laws that prohibit tenants from being tossed out when their landlords are foreclosed on. Kondaur's attorneys again demanded possession of the house, usually the last step before eviction. A hearing was set for mid-December.

The day of the hearing, the hallway outside the courtroom buzzed with speculation that the couple in the million-dollar home had finally reached the end of the road.

Hillman, the Kondaur attorney, arrived first. As he placed his briefcase on the plaintiff's table, he said to the few people seated inside the courtroom, "It's old me - the underdog."

The Ritters arrived soon after to represent themselves. The tenant, whom the judge had ordered to appear, was a no-show.

Janet Ritter argued that Kondaur had no right to foreclose, because it could not prove it owned the note on the house. She said some of the paperwork documenting the mortgage's many transfers from one pool of mortgages to another was fraudulent because it had been "robosigned," a legacy of hasty processing during the boom in which foreclosure-mill employees signed thousands of documents without reading them. Such errors have been sufficient to halt foreclosures in other states. And widespread evidence of robosigning led to a recent $25 billion settlement with several major banks on behalf of hundreds of thousands of homeowners. But in Maryland, the courts have ruled that if the lender can provide records of a note's history, and how it came to possess it, it has the right to foreclose, even if the records weren't properly endorsed.

In response to Janet Ritter's argument, Hillman held up an original copy of the note, with Keith Ritter's signature in blue ink.

Judge Smith awarded Kondaur possession of the property. Two days later, Kondaur filed for eviction. The Ritters knew it was only a matter of time before the sheriff showed up at their door to deliver it.

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"People think, because you haven't paid, you must be a bad person. But not everything is black and white," Ritter said. "A lot of things happen between the lines."

Ritter still thinks he can work something out to save his house. He is trying to persuade an investor to buy the house from Kondaur and then sell it back to them. It's a long shot, and Ritter said he has been praying a lot. In January, he fasted for 30 days "for spiritual cleansing and guidance," he said.

He has found solace in his Bible, especially a passage from Matthew that he has bracketed in black ink from the parable of the unforgiving servant.

"At this the servant fell on his knees before him," the passage reads. " 'Be patient with me,' he begged, 'and I will pay back everything.' "

EXHIBIT 11 ARTICLES REGARDING STRATEGIC DEFAULT

A. Fannie Mae 2010 Policy Statement Regarding Strategic Defaults

Fannie Mae Increases Penalties for Borrowers Who Walk Away
Seven-Year Lockout Policy for Strategic Defaulters [June 23, 2010]

WASHINGTON, DC — Fannie Mae (FNM/NYSE) announced today policy changes designed to encourage borrowers to work with their servicers and pursue alternatives to foreclosure. Defaulting borrowers who walk-away and had the capacity to pay or did not complete a workout alternative in good faith will be ineligible for a new Fannie Mae-backed mortgage loan for a period of seven years from the date of foreclosure. Borrowers who have extenuating circumstances may be eligible for new loan in a shorter timeframe.

"We're taking these steps to highlight the importance of working with your servicer," said Terence Edwards, executive vice president for credit portfolio management. "Walking away from a mortgage is bad for borrowers and bad for communities and our approach is meant to deter the disturbing trend toward strategic defaulting. On the flip side, borrowers facing hardship who make a good faith effort to resolve their situation with their servicer will preserve the option to be considered for a future Fannie Mae loan in a shorter period of time."

Fannie Mae will also take legal action to recoup the outstanding mortgage debt from borrowers who strategically default on their loans in jurisdictions that allow for deficiency judgments. In an announcement next month, the company will be instructing its servicers to monitor delinquent loans facing foreclosure and put forth recommendations for cases that warrant the pursuit of deficiency judgments.

Troubled borrowers who work with their servicers, and provide information to help the servicer assess their situation, can be considered for foreclosure alternatives, such as a loan modification, a short sale, or a deed-in-lieu of foreclosure. A borrower with extenuating circumstances who works out one of these options with their servicer could be eligible for a new mortgage loan in three years and in as little as two years depending on the circumstances. These policy changes were announced in April, 2010.

B. Web Advertisement for a 'How-To' Book on Strategic Defaults

"In THE STRATEGIC DEFAULT PLAN, nationally renowned foreclosure defense attorney Christopher Forrest guides you through his step-by-step strategic default plan and teaches you the tips and insider information you need to know if you're thinking about walking away from your mortgage. THE STRATEGIC DEFAULT PLAN is a 'must-read' guide for anyone who is underwater on their mortgage.

Attorney Christopher Forrest has advised and represented thousands of property owners in strategic defaults and foreclosure defense. His law practice and legal techniques have garnered national media attention and The Forrest Law Firm has been featured in over 84 newspaper articles, television reports, the Associated Press, Bloomberg News, AOL News, and The Huffington Post.

Once considered taboo, choosing to walk away from a mortgage in a strategic default has become increasingly more common and acceptable, particularly as American consumers become aware that banks are not taking adequate steps to help property owners keep their homes. Anyone who has attempted to apply for a mortgage modification or conduct a short sale knows how difficult it is to deal with most banks. More Americans are becoming angry that these banks have taken billions of dollars in taxpayer bailouts, and then have used that money to forcibly remove hundreds of thousands of Americans from their homes.

Many families have come to the realization that there will be no bailouts for the American homeowner struggling to make mortgage payments. No one is coming to save them. They feel abandoned by their banks and by their government.

If you feel this way, you are not alone. And you are right. I have spent years defending American homeowners in a war being waged against them by banks and financial institutions. The courtrooms of America have become the battleground in this war. The American homeowner is losing.

But you have the means to fight back. You have the ability to unshackle yourself and walk away. To survive in these new times, in this "new normal," you must come to the realization that since no one is coming to help you, you must help yourself. You must take stock of your financial situation and your future. You must put yourself and your family first. You must decide what is in your best interest, and then let nothing stand in your way.

THE STRATEGIC DEFAULT PLAN can help you take control of your financial future. Don't wait. Buy your copy of THE STRATEGIC DEFAULT PLAN today!"

C. 2012 LENDER CONCERN ABOUT RISING STRATEGIC DEFAULTS

The following article appeared in the *National Mortgage News* on Wednesday, May 23, 2012. It can be found on the Internet at http://www.mortgageservicingnews.com/msn_features/foreclosures-strategic-defaults-1029932-1.html.

"BANKERS WARN ABOUT STRATEGIC DEFAULT RISK IN 2012

The foreclosure crisis is loosening the traditionally strong tie homeowners have with their homes. New findings from FICO's latest quarterly survey of bank risk professionals indicate one way the slow recovery will affect distressed homeowners in 2012 is increased propensity for "strategic default."

Up to 46% of the respondents expect the volume of strategic defaults in 2012 will surpass 2011 levels given that over 25% of U.S. homeowners are "under water" or owe more on their mortgages than their homes are worth.

Lenders need look beyond the legal and ethical aspect of "strategic default" risk when they evaluate mortgage applications in declining markets, said Andrew Jennings, chief analytics officer at FICO and head of FICO Labs. "After five years of a brutal housing market, many people now view their homes more objectively and with less sentimentality."

Participants in the survey expressed concerns about changes in customers' attitudes towards payment hierarchy and debt obligations.

When asked whether the current generation of homeowners sees mortgage as their "most important credit obligation," 49% of these bankers said no, compared to 29% who said yes.

It means more homeowners who find themselves upside down on mortgages in the future "are likely to consider strategic default as an acceptable exit strategy," Jennings said.

FICO reports however that lenders "seem to believe" the housing market is stabilizing as 26% expected delinquencies on mortgages to decline in the coming months, which is higher than at any previous time in the two years FICO has been conducting this survey.

Over half, 53% of respondents, expect the housing market will improve by the end of 2012, compared to 24% who expect it to deteriorate.

Despite increased optimism about the recovery, FICO analysts find, "whether strategic or not," defaults continue to be problematic until improvements in the job market help change the dynamics in housing through better credit quality and reduced default risk.

Conducted by FICO in collaboration with the Professional Risk Managers' International Association and the Columbia Business School's Center for Decision Sciences, the survey includes responses from 263 risk managers at banks throughout the U.S. in February 2012."

EXHIBIT 12 FEDERAL HOUSING FINANCE AGENCY ENGAGEMENT WITH STATE AND MUNICIPAL ENACTMENTS

A. TEXT OF FHFA PRESS RELEASE OF DECEMBER 2011 REGARDING LAWSUIT TO OVERTURN CHICAGO'S VACANT PROPERTY ORDINANCE

This Press Release is at http://www.fhfa.gov/webfiles/22832/Chicago_Lawsuit_121211.pdf.

Washington, DC – The Federal Housing Finance Agency (FHFA), on its own behalf and as Conservator for Fannie Mae and Freddie Mac (the Enterprises), has filed a lawsuit in the U.S. District Court for the Northern District of Illinois against the city of Chicago to prevent enforcement of the city's recently amended "Vacant Buildings Ordinance" against the Enterprises. FHFA reluctantly took this action after undertaking efforts to discuss these matters and to seek alternative solutions to the problem of vacant properties that the ordinance seeks to address. FHFA indicated that the ordinance could affect costs for homeowners in the city.

The ordinance would impose on the Enterprises the responsibilities, but not the benefits, of ownership of vacant property on which they hold mortgages. The ordinance would create risks and liabilities for the Enterprises at a time when they are already supported by taxpayers, including those in the city of Chicago. Additionally, the ordinance would subject the Enterprises to the regulation and supervision of the Chicago Department of Buildings instead of FHFA, as Congress intended.

The ordinance requires mortgagees to pay a $500 registration fee for vacant properties and requires monthly inspections of mortgaged properties to determine if they are vacant. The ordinance also requires the Enterprises to pay the registration fees and to comply with these maintenance requirements *even when the Enterprises have not foreclosed upon a property and therefore do not have ownership* of the property. If the Enterprises fail to comply with the ordinance, the city may levy fines and penalties of up to $1,000 per day for noncompliance with any provision of the ordinance. Additionally, the ordinance sets forth detailed maintenance requirements which may be revised and amended by the Department of Buildings.

The lawsuit alleges that the city's ordinance impermissibly encroaches upon FHFA's role as the sole regulator and supervisor of the Enterprises. As Conservator of Fannie Mae and Freddie Mac, FHFA has been charged with the responsibility of preserving and conserving the assets of the Enterprises. This lawsuit seeks to ensure that the city's proposed registration and licensing system and "supervision" of the Enterprises by the Department of Buildings will not thwart Congress's intent. Further, the registration fee represents a tax on the Enterprises and the Conservator that is expressly precluded by long-standing congressional directive.

B. EXCERPTS FROM TEXT OF ALFRED POLLARD LETTER OF MAY 11, 2012 TO CALIFORNIA LEGISLATORS REGARDING PROPOSED STATE LEGISLATION

“On behalf of the Federal Housing Finance Agency (FHFA), I wish to provide FHFA's views regarding legislation pending before your Conference Committee. ***Since the legislation under consideration affects mortgage markets and, in particular, addresses the default and foreclosure processes as well as provisions relating to homeowners and tenants, I hope that FHFA's views would benefit your deliberations.

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While there are several bills before you, I will address two. The absence of comments on other measures does not constitute any endorsement of the other legislation, but rather a focus on the items of greatest consequence.

Assembly Bill 2425/Senate Bill 1471

AB 2425/SB 1471 contains provisions that would require servicers to establish a single point of contact and impose significant civil penalties for "robosigned" documents. FHFA is concerned that the "robosigning" provisions of SB 1471 are disconnected from the issues first giving rise to this practice in judicial states, go well beyond anything in the National Mortgage Settlement and pose significant risks for the housing market. The "robosigning" provisions of SB 1471 are overly broad and disproportionate to the perceived problem. As reported in the press, "robosigning" resulted from the high-volume generation of affidavits by persons who lacked the requisite "personal" knowledge to sign the affidavits; this contrasts dramatically with the legislative provisions in the bill that purport to address robosigning,.

While the National Mortgage Settlement refers to "robosigning" as the "repeated false attestation of information in affidavits," it nowhere contains an actual definition of "robosigning." By contrast, Section 2924.17 (a) of SB 1471 would define a "robosigned" document broadly to include "any document" that contains factual assertions that are "not accurate" or are "incomplete." The proposed bill would allow the Attorney General or a district attorney to punish any entity that records or files a "robosigned" document by imposing a $10,000 "civil penalty" per such document.

<u>*** Such a strict liability approach is punitive, will have a chilling effect on the processing of lawful foreclosures and will result in lenders and investors reevaluating the risks attendant to market operations in the state and may lead to reduced credit availability or higher interest rates</u>. (Emphasis added)

The private remedies section that SB 1471 separately creates for borrowers compounds the challenges for lenders. *** <u>The potential recovery for a defaulted borrower and plaintiff’s counsel will merely encourage litigation as part of a strategy to forestall a lawful foreclosure or extract a settlement. In the end, California's non-judicial foreclosure process, that has served the State well and allowed a faster recovery of its housing market, will suffer.</u> (Emphasis added)

Page 3
Assembly Bill 2610/Senate Bill 1473

AB 2610/SB 1473 is intended to provide greater protections to tenants by incorporating portions of the federal "Protecting Tenants at Foreclosure Act" ("ProTAFA") into California law. FHFA is concerned that this bill could encourage fraud and abuse of the foreclosure process. *** This lack of a "bona fide" lease requirement under AB 2610/SB 1473 fails to account for the possibility that property owners could "game the system" by leasing property at below market rates or preventing the new owner from taking possession for 90-days or the duration of the lease with the "renter." This type of event has been seen in practice under the current federal law and the availability of the "bona fide" lease requirement has helped avoid fundamentally fraudulent practices.

Foreclosure Delays

Unfortunately, as noted here, some of the proposals under consideration in the Conference Committee present unnecessary and counterproductive approaches to addressing housing market issues and the needs of homeowners and tenants. FHF A is well aware of the challenges facing states and localities from the housing crisis- homeowners losing their homes, erosion of the tax base and resulting curtailment of local services and, in many areas, blighted neighborhoods. <u>The enactment of local laws and ordinances that result in unintended consequences and fail, in many instances, to achieve their goals does not assist homeowners, neighborhoods or the localities. State laws that stretch out the period for legitimate foreclosures- after every effort is made to avoid foreclosure and to keep homeowners in their homes- result in no added benefit for the homeowner and produce harm to the housing finance system and to neighborhoods. Simply attaching the terminology of consumer protection to legislation does not mean it will benefit a consumer and adverse consequences need to be examined. Increasing legal risks for lenders and investors- where existing remedies exist and where new language creates incentives for litigation ultimately creates harm for all homeowners.</u> (Emphasis added)

Adding impediments to actions undertaken after default and layering restrictions on legitimate foreclosures, thereby permitting homeowners to stay in their homes for hundreds of days while not paying their mortgages, property taxes or homeowner's association dues, costs neighborhoods, costs lenders and, ultimately, costs local taxpayers and future borrowers. Clearly, laws governing the default and foreclosure process must be followed. Where there are violations, they should be sanctioned. However, adding new laws, procedures and requirements where sanctions have been applied and remedial steps taken, may only add to delays and produce no different outcome for homeowners who have received appropriate efforts at loan modifications or foreclosure avoidance approaches. The preferred option of servicers and lenders is to keep the homeowner in the home. In the end, there must be some likelihood that the homeowner who has defaulted can renew meeting their obligations, if necessary with a loan modification, or can avoid foreclosure through a short sale or other device; if not, then foreclosure is appropriate. Despite discussion regarding mediation, procedural law discrepancies, "robosigning" and false affidavits

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all of which merit review and possible sanction and remediation where violations have occurred few of these matters have affected a homeowner's ultimate situation regarding ownership where they have not met their financial obligations.[FN1]

At the present time, with the coming together of actions by federal regulators, federal law enforcement and state attorneys general, it is unclear why legislation would be undertaken that could produce contrary results to these remedial steps. Even if gaps are believed to exist in recent actions, such gaps may be filled or may prove non-existent in the implementation of new laws, consent orders and consent agreements. *** <u>Protecting homeowners, assisting them to stay in their homes and providing vehicles to avoid foreclosure must be balanced with permitting foreclosures, when other alternatives fail, to proceed in an orderly fashion to the benefit of other taxpaying homeowners through more stable housing prices, avoiding neighborhood deterioration and preserving the tax base.</u> Foreclosure delays simply add to the costs for neighborhoods and communities and losses to lenders and investors. <u>State directed delays in such circumstances harm the very groups that are intended as beneficiaries as the cost of credit will increase if creditors and investors cannot act on their collateral.</u> (Emphasis added) Once a bona fide and robust effort is made to avoid foreclosure and keep people in their homes, then creditors must be permitted to move forward with their contractual right to foreclose as provided by law and undertaken in an expeditious manner to the benefit of other homeowners. Laws and ordinances that add to the overhang of properties simply depress values for other homeowners and increases losses for creditors and investors. ***

[FNI] In a recent study by the National Bureau of Economic Research, authors from the Federal Reserve Bank of Atlanta, the Federal Reserve Bank of Boston and the Massachusetts Institute of Technology Department of Urban Studies reviewed various foreclosure regimes and the outcomes for homeowners. For the most part, the study found that the result of many of the laws aimed to protect borrowers from foreclosure was delay in, but not prevention of, foreclosures. The delays contribute to an overhang in the market without borrowers finding relief during these excessive delay periods. Many borrowers neither cure their deficiency nor gain relief, but simply remain in delinquency for greater lengths of time. A key finding of the study was that most parties able to cure or benefit from loss mitigation do so in the first 60 to 90 days of delinquency; this approach has been the focus of FHFA and the Enterprises. Under the FHFA's Servicing Alignment Initiative, a GSE servicer does not refer a delinquent mortgage to foreclosure until the 120th day of delinquency in order to provide borrowers up to five (5) months from the due date of their last mortgage payment to engage in fruitful loss mitigation efforts with their servicers. This represents the early intervention approach being undertaken that is most likely to help homeowners.

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With all best wishes, I am
Sincerely,
(signed) Alfred Pollard, General Counsel

EXHIBIT 13 Section 3-116 of the Uniform Common Interest Ownership Act

A. SECTION 3-116. LIEN FOR SUMS DUE ASSOCIATION; ENFORCEMENT.

(a) The association has a statutory lien on a unit for any assessment attributable to that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, reasonable attorney's fees and costs, other fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12), and any other sums due to the association under the declaration, this [act], or as a result of an administrative, arbitration, mediation, or judicial decision are enforceable in the same manner as unpaid assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except:

(1) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances that the association creates, assumes, or takes subject to;

(2) except as otherwise provided in subsection (c), a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent~~,~~ or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and

(3) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

(c) A lien under this section is also prior to all security interests described in subsection (b)(2) to the extent of both the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien. Subsection (b) and this subsection do not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [A lien under this section is not subject to [insert appropriate reference to state homestead, dower and curtesy, or other exemptions].]

(d) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(e) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(f) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within [three] years after the full amount of the assessments becomes due.

(g) This section does not prohibit actions against unit owners to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(h) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(i) The association upon request made in a record shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within [10] business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

(j) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section.

(k) The association's lien may be foreclosed as provided in this subsection and subsection (p):

(1) in a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]];

(2) in a cooperative whose unit owners' interests in the units are real estate, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]] [or by power of sale under subsection (l)]; [and]

(3) in a cooperative whose unit owners' interests in the units are personal property, the association's lien must be foreclosed in like manner as a security interest under [insert reference to Article 9, Uniform Commercial Code][;and]

[(4) in a foreclosure under [insert reference to state power of sale statute], the association shall give the notice required by statute or, if there is no such requirement, reasonable notice of its action to all lien holders of the unit whose interest would be affected].

[(l) If the unit owner's interest in a unit in a cooperative is real estate, the following requirements apply:

(1) The association, upon nonpayment of assessments and compliance with this subsection, may sell that unit at a public sale or by private negotiation and at any time, date, and place. The association shall give to the unit owner and any lessee of the unit owner reasonable notice in a record of the time, date, and place of any public sale or, if a private sale is intended, of the intention of entering into a contract to sell and of the time and date after which a private disposition may be made. The same notice must also be sent to any other person that has a

recorded interest in the unit which would be cut off by the sale, but only if the recorded interest was on record seven weeks before the date specified in the notice as the date of any public sale or seven weeks before the date specified in the notice as the date after which a private sale may be made. The notices required by this subsection may be sent to any address reasonable in the circumstances. A sale may not be held until five weeks after the sending of the notice. The association may buy at any public sale and, if the sale is conducted by a fiduciary or other person not related to the association, at a private sale.

(2) Unless otherwise agreed, the unit owner is liable for any deficiency in a foreclosure sale.

(3) The proceeds of a foreclosure sale must be applied in the following order:

(A) the reasonable expenses of sale;

(B) the reasonable expenses of securing possession before sale; the reasonable expenses of holding, maintaining, and preparing the unit for sale~~,~~, including payment of taxes and other governmental charges~~,~~ and premiums on insurance; and, to the extent provided for by agreement between the association and the unit owner, reasonable attorney's fees, costs, and other legal expenses incurred by the association;

(C) satisfaction of the association's lien;

(D) satisfaction in the order of priority of any subordinate claim of record; and

(E) remittance of any excess to the unit owner.

(4) A good faith purchaser for value acquires the unit free of the association's debt that gave rise to the lien under which the foreclosure sale occurred and any subordinate interest, even though the association or other person conducting the sale failed to comply with this section. The person conducting the sale shall execute a conveyance to the purchaser sufficient to convey the unit and stating that it is executed by the person after a foreclosure of the association's lien by power of sale and that the person was empowered to make the sale. Signature and title or authority of the person signing the conveyance as grantor and a recital of the facts of nonpayment of the assessment and of the giving of the notices required by this subsection are sufficient proof of the facts recited and of the authority to sign. Further proof of authority is not required even though the association is named as grantee in the conveyance.

(5) At any time before the association has disposed of a unit in a cooperative or entered into a contract for its disposition under the power of sale, the unit owners or the holder of any subordinate security interest may cure the unit owner's default and prevent sale or other disposition by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees and costs of the creditor.]

(m) In an action by an association to collect assessments or to foreclose a lien on a unit under this section, the court may appoint a receiver to collect all sums alleged to be due and owing to a unit owner before commencement or during pendency of the action. The receivership is governed by [insert state law generally applicable to receiverships]. The court may order the receiver to pay any sums held by the receiver to the association during pendency of the action to the extent of the association's common expense assessments based on a periodic budget adopted by the association pursuant to Section 3-115.

(n) An association may not commence an action to foreclose a lien on a unit under this section unless:

(1) the unit owner, at the time the action is commenced, owes a sum equal to at least [three] months of common expense assessments based on the periodic budget last adopted by the association pursuant to Section 3-115(a) and the unit owner has failed to accept or comply with a payment plan offered by the association; and

(2) the executive board votes to commence a foreclosure action specifically against that unit.

(o) Unless the parties otherwise agree, the association shall apply any sums paid by unit owners that are delinquent in paying assessments in the following order:

(1) unpaid assessments;

(2) late charges;

(3) reasonable attorney's fees and costs and other reasonable collection charges; and

(4) all other unpaid fees, charges, fines, penalties, interest, and late charges.

(p) If the only sums due with respect to a unit are fines and related sums imposed against the unit, a foreclosure action may not be commenced against the unit unless the association has a judgment against the unit owner for the fines and related sums and has perfected a judgment lien against the unit under [insert reference to state statute on perfection of judgments].

(q) Every aspect of a foreclosure, sale, or other disposition under this section, including the method, advertising, time, date, place, and terms, must be commercially reasonable.

B. SUMMARY OF ARGUMENTS FAVORING THE ASSOCIATION'S SUPER-PRIORITY 'SPLIT LIEN'.

This summary appears in **Henry Judy and Robert Wittie**, *"Uniform Condominium Act: Selected Key Issues*,"; 13 Real Property. & Trust Journal 437 (1978) [also found at HeinOnline] at 475-478.

II. SUMMARY

The UCA accords a relatively high lien priority to a condominium association's assessments for common expenses. It does this by creating two special rules for the association's priority which significantly modify the basic American principle of "first in time, first in right."

The first special rule created by the UCA is that the lien for assessments will be prior to all encumbrances which do not predate the recordation of the condominium declaration. This means that the lien for assessments will have priority over nearly all other liens against units except for those categories of liens which are expressly subject to another rule under the UCA.

The justification for creating such a substantial lien protection for the association's assessments derives from the peculiar nature of the condominium as "creditor." In effect, the condominium is an *involuntary* creditor which becomes obligated to advance services to unit owners in return for a promise of future payment. Such advances are much like the loans made by a mortgagee under an obligatory mortgage future advances clause, but with only the most rudimentary controls upon the amount and timing of the loan advances, the terms of the loan, and the continuing creditworthiness of the borrower. At the same time, the association is very much at the mercy of its borrowers whose defaults could impair the association's financial stability.

The threat that the condominium faces is one shared by all secured creditors—insufficient equity in a unit foreclosed upon to provide a full dollar recovery of unpaid assessments. If the equity is not there, the only remaining means to make good the unpaid assessments is to reassess the other unit owners. Clearly, the priority of the creditor's lien is a crucial determinant of the creditor's exposure to the risk of inadequate equity. The specter of reassessment and the potential impact of reassessment on a condominium, coupled with the condominium's status as an involuntary creditor, argues for the high lien priority which the UCA confers upon the association.

However, the mere fact that it is important for the association to be able to collect assessments is not of itself a sufficient reason for according the association a high lien priority. While this may be desirable, granting such a lien priority may interfere with the rights accorded to other entities. Since the interests of the general public are deemed to be more important than those of the condominium alone, real estate tax liens and other governmental charges against a unit are excepted from the priority accorded to the association.

Similarly, the association's lien priority might so contradict the expectations of other entities involved in the creation, purchase and operation of condominiums that a severe limitation on condominium development and transfers would result. In particular, construction lenders and first mortgage lenders might be reluctant to lend on the security of condominium property.

Further, federally or state-regulated lending institutions might encounter regulatory inhibitions in relying on liens subject to the assessments of the association. In fact, most regulated institutional lenders are restricted in the amount of mortgage lending they may do which involves security other than "first liens." Other lenders, which are not subject to such regulatory limitations, also might be dissuaded from lending on the security of condominium property if they perceive the exposure which could result from the priority of the association's assessment lien as an unacceptable additional risk. Such a result seems particularly likely for construction lenders, who already face a wide range of lending risks. Were first mortgage lenders to be significantly discouraged from financing the purchase of condominium units, or were condominium unit owners to find it marginally more difficult to borrow against the equity they have in their units because of the impaired security a condominium was perceived to be by the lender, the effort to enhance the condominium form of ownership would have turned against itself.

It is for the foregoing reasons that the second special rule on lien priority under the UCA was created. The first special rule, giving the association's lien priority as of recordation of the declaration, does not apply to first mortgages. Rather, the priority of the association's lien with respect to first mortgages is to be determined by reference to the time when the assessment becomes due. However, the association is given a limited or "split" priority with respect to first mortgage liens. The association's lien is superior to a mortgage lien which is prior to it in time to the extent of the assessments for six months immediately preceding an action to enforce the association's lien. This split priority in favor of the association is based upon a proper recognition of the greater resources typically available to first mortgage lenders in protecting themselves from the consequences of default and in ensuring that there will be equity in the property to protect them.

The UCA's split priority rule will almost certainly tend to result in requirements by first mortgagees (other than construction lenders, who can rely on other protections) that condominium owners establish an escrow in an amount approximating the assessments which may become superior to the mortgagee's lien. Since this escrow could be a large dollar amount, the draftsmen of the UCA decided to reduce the length of the period in which assessments may have priority from one year (as had been provided in the early drafts of the UCA) to six months. The draftsmen's purpose was to limit the possibility that the amount of the reserve which first mortgagees are likely to require might become a significant impediment to the purchase of condominium units, particularly by younger couples for whom the down payment and closing costs are of concern. The draftsmen also recognized that, the more limited the prior association's lien is, the less likelihood there is of a technical objection that the mortgage loan is not a first lien. At the same time, the draftsmen felt that a reduction of the lien priority period from one year to six months would not seem likely to substantially weaken the advantages which the association would gain from having a lien with special priority.

The UCA also provides that the priority of mechanics' and material-men's liens shall not be affected by the rules established for the association's assessment lien priority. Political and related considerations dictated this result. Analytically, however, such a blanket exclusion does not seem appropriate. As discussed here in Part II, the relative priority between assessment liens and mechanics' liens ought to be considered with a distinction in mind between mechanics' liens resulting from action by the declarant and those resulting from action by the association after the period of declarant control and by individual unit owners.

Other competing claims should be analyzed on the basis of the relative ability of the competing entities to protect themselves from the defaulting owner. This part considers them as well. Included in this analysis are: the provision in the UCA that the traditional priority accorded real estate taxes should not be disturbed; and the optional provision that homestead, dower and curtesy rights will not affect the association's lien rights. This optional provision is to be used in states in which such rights exist.

Finally, it must be remembered that lien priority, while important, must be supported by an effective and low-cost remedy. Several remedies which are not related to the lien itself are available to the association. These include the ability to proceed against a defaulting unit owner personally [Section 3-115(e)] and the ability to impose such limited sanctions as a restriction on use of common elements and the loss of voting rights. However, potentially the most important remedy for the association is the right to enforce its lien through private power of sale. The UCA contains an optional provision that would grant such a right. The draftsmen considered arguments that granting the association such a right was improper or even unconstitutional. In the end, however, the draftsmen concluded that individual states should be able to grant the power of sale if they so desire. Part II suggests that a power of sale, when coupled with the limited priority over the lien of first mortgages also contained in the UCA, constitutes a strong—yet reasonable—protection for the condominium association against the dangers inherent in being an involuntary creditor.