Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-11490

U.S. BANK NATIONAL ASSOCIATION,
PLAINTIFF-APPELLEE,

v.

EDNA SCHUMACHER AND JOHN SCHUMACHER,
DEFENDANTS-APPELLANTS.

SUA SPONTE TRANSFER FROM APPEALS COURT

ON APPEAL FROM THE WORCESTER HOUSING COURT

NATIONAL CONSUMER LAW CENTER BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT JOHN SCHUMACHER AND ARGUING FOR REVERSAL

GEOFFRY WALSH
BBO #601059
NATIONAL CONSUMER LAW CENTER
7 Winthrop Square, 4th Floor
Boston, Massachusetts 02110
(617) 542-8010
(617) 545-8028 FAX
gwalsh@nclc.org

Dated: October 23, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES....................................ii

INTEREST OF AMICUS CURIAE...............................1

ISSUE TO BE ADDRESSED...................................2

SUMMARY OF ARGUMENT.....................................2

ARGUMENT..5

I. STRICT COMPLIANCE WITH G.L. C. 244, § 35A IS ESSENTIAL TO PREVENT UNNECESSARY FORECLOSURES....................5

a. The Importance of Loss Mitigation Review for Homeowners and for Investors in Mortgage Debt..............5

b. Section 35A's Critical Role in Promoting Loss Mitigation Reviews.....14

II. THE NOTICE OF A RIGHT TO CURE BEFORE ACCELERATION IS CRITICAL TO IMPLEMENTATION OF ALL FEDERAL AND STATE LOSS MITIGATION PROGRAMS...................20

a. The Importance of Starting Loss Mitigation Reviews Before Acceleration of a Mortgage Loan.......20

b. If Properly Enforced, § 35A Works in Tandem with Major Federal Efforts to Ensure that Servicers Conduct Loss Mitigation Reviews Before Foreclosure Begins.............24

III. THE NEED FOR ACCURATE IDENTIFICATION OF PARTIES WHO OWN SECURITIZED MORTGAGE DEBT MAKES STRICT COMPLIANCE WITH § 35A ESSENTIAL.................................29

a. Section 35A's Key Function is to Require Early Identification of the Loan's Owner......................29

b. Securitization has Made Identification of a Loan's Owner More Difficult, While Current Loss Mitigation Rules Make Accurate Identification of the Loan's Owner Critically Important..................32

CONCLUSION..40

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

CASES:

Bank of America v. Lucido, 35 Misc. 3d 1211(A), 950 N.Y.S. 2d 721 (N.Y. Sup. 2012)................................38

Beck v. Wells Fargo Bank, 2011 WL 6217345 (N.D. Cal. Dec. 14, 2011).......27

Bottomly v. Kabachnick, 13 Mass. App. Ct. 480 (1980)....................29

Corvello v. Wells Fargo Bank, N.A., 728 F.3d 878 (9th Cir. 2013)....................10

Eaton v. Federal National Mortgage Assoc., 462 Mass. 569 (2012)............................33

Moore v. Dick, 187 Mass. 207 (1905)............................30

Rivera v. BAC Home Loan Servicing, L.P., 2010 WL 2757041 (N.D. Cal. July 9, 2010)........27

Roche v. Farnsworth, 106 Mass. 509 (1871)............................29

U.S. Bank Nat'l Assoc. v. Ibanez, 458 Mass. 637 (2011)........................29, 30

Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547 (7th Cir. 2012)................10, 38

Young v. Wells Fargo Bank, N.A, 717 F.3d 224 (1st Cir. 2013)....................10

STATUTES, REGULATIONS AND RULES:

12 U.S.C. §§ 2603-2617...........................17, 26

12 C.F.R. § 1024.41..................17, 25, 26, 31, 39

12 C.F.R. §§ 1024.30-1024.41.........................17

24 C.F.R. § 1024.41..................................25

24 C.F.R. § 203.604..................................29

24 C.F.R. § 203.605..................................29

78 Fed. Reg. 10,818 (Feb. 14, 2013)..................17

Ariz. Rev. Stat. Ann. § 33-807(D)....................21

Cal. Civ. Code § 2924(a)(2),(3)......................21

M.G.L. c. 244, § 14..........................4, 25, 30

M.G.L. c. 244, § 35A.........................*passim*

Nev. Rev. Stat. 107.080(c),(d)....................21-22

Mass. R. App. P. 17...................................1

OTHER AUTHORITIES:

2 *Inside Mortgage Finance, the 2010 Mortgage Market Statistical Annual*........................34

Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications*, 41 Conn. L. Rev. 1107 (2009)..................................11

American Association of Mortgage Investors, *White Paper, The Future of the Housing Market for Consumers After the Housing Crisis: Remedies to Restore and Stabilize America's Mortgage and Housing Markets* (Jan. 2011) *available at* http://the-ami.com/wp-content/uploads/2011/01/AMI_State_AG_Investigation_Remedy_Recommendations_Jan_2011.pdf................12, 14

American Securitization Forum, *Statement of Principles, Recommendations and Guidelines for the Modification of Securitized Subprime Residential Mortgage Loans* (June 2007) p. 2. http://www.americansecuritization.com/uploadedfiles/asf%20subprime%20loan%20modification%20principles_060107.pdf..............37

Center for Responsible Lending, *The Cost of Bad Lending in Massachusetts at* http://www.responsible lending.org/mortgage-lending/tools-resources/factsheets/massachusetts.html..............................6

CFPB, Amendment to the 2013 Mortgage Rules under RESPA (Sept. 13, 2013) p. 84 at http://www.consumerfinance. gov/regulations.....25

Christopher L. Peterson, *Predatory Structured Finance*, 28 Cardozo L. Rev. 2185 (2007).........35

Cong. Oversight Panel, 64-832, *March Oversight Report: The Final Report of the Congressional Oversight Panel*, p. 78 (2011)......9

Congressional Oversight Panel, 111th Cong., *Foreclosure Crisis: Working Toward a Solution,* Report March 6, 2009) p. 44 http://cyber cemetery.unt.edu/archive /cop/20110402010739/http:// cop.senate.gov/documents/cop-030609-report.pdf....................................37

Congressional Oversight Panel, *Foreclosure Crisis: Working Toward a Solution,* March 2009 Oversight Report, pp. 44-46 (March 6, 2009)..13

CoreLogic, *CoreLogic Reports 63,000 Completed Foreclosures in May* (June 29, 2012)..............6

Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications,* 86 Wash. L. Rev. 755 (December 2011)................................13

Diane E. Thompson, *Problems in Mortgage Servicing From Modification to Foreclosure,* Written Testimony before U.S. Senate Committee on Banking, Housing, & Urban Affairs (Nov. 16, 2010)..37

Fannie Mae Announcement SVC-2011-08R (Sept. 2, 2011) https://www.fanniemae.com/ content/announcement /svc1108.pdf; Freddie Mac Bulletin 2011-11 (June 30, 2011) http://www.freddiemac.com/sell/guide/bulletins /pdf/bll1111.pdf.........................18-19

Fannie Mae Announcement SVC-2011-08R (Sept. 2, 2011) p.17 https://www.fanniemae.com/content /announcement/svc1108.pdf...................28, 32

Fannie Mae Single Family Servicing Guide ch. VIII 103.04 p. 801-8 (March 14, 2012)................28

FDIC Center for Financial Research Working Paper No. 2010-06 *Estimating the Effects of Foreclosure Counseling for Troubled Borrowers* (June 2010).........................23

Foreclosure Prevention Counseling (2d ed. 2009).......1

Foreclosures (4th ed. 2012)..........................1

Freddie Mac Bulletin 2011-11 (June 30, 2011) p. 4
http:// www.freddiemac.
com/sell/guide/bulletins/pdf/b111111.pdf........28

Hunt, John P., *What Do Subprime Securitization Contracts Actually Say About Loan Modifications? Preliminary Results and Implications* (March 25, 2009) Available at SSRN: http://ssrn.com/abstract=1369286 or http://dx.doi.org/ 10.2139/ssrn.1369286.........37

Karen Weise, "When Denying Loan Mods, Loan Servicers Often Wrongly Blame Investors," *ProPublica* July 23, 2010........................38

Mortgage Lending (1st ed. 2012) 1

National Consumer Law Center, *At a Crossroads, Lessons from the Home Affordable Modification Program (HAMP)*, NCLC Jan. 2013 available at http://www.nclc.org/issues/at-a-crossroads.html...............................7

Neil Mayer & Peter A. Tatian, *et al. National Foreclosure Mitigation Counseling Program Evaluation: Preliminary Analysis of Program Effects*, Urban Institute (Sept. 2010 Update)....24

New Ideas to Address the Glut of Foreclosure Properties: Hearing Before the Subcomm. on Housing, Trans., and Com. Dev. of the S. Comm. on Banking, Housing, and Urban Affairs, 112th Cong. 2 (2011) 6

Office of the Comptroller of the Currency, *Mortgage Metrics Report Disclosure of National Bank and Federal Savings Association Mortgage Loan Data,* Second Quarter 2013 (Sept. 2013)....................7, 8

Paul Kiel, *Bank of America Lied to Homeowners and Rewarded Foreclosures, Former Employees Say,* ProPublica June 14, 2013. http://www.propublica.org/article/bank-of-america-lied-to-homeowners-and-rewarded-foreclosures.........39

RealtyTrac, *Massachusetts Reports Over 18,000 Properties With Foreclosure Filings in First Half of 2009* (July 31, 2009).....................6

Special Inspector Gen. for the Troubled Asset Relief Program, *Quarterly Report to Congress: April 25, 2012* at 189 (2012)...........9

Truth-in-Lending (8th ed. 2012); and *Consumer Bankruptcy Law and Practice* (8th ed. 2012) 1

U.S. Dept. of Treasury Making Home Affordable Program Handbook for Non-GSE Mortgages Version 4.2 (May 1, 2013), ch. I §§ 1.3, 2.2; ch. II § 6.5 at https://www.hmpadmin.com/portal/programs/guidance.jsp............20, 38

U.S. Dept. of Treasury, *Making Home Affordable Program Performance Report Through July 2013*.....9

U.S. Govt. Accountability Office, *Troubled Asset Relief Program: Results of Housing Counselor Survey of Borrower Experiences in the HAMP Program,* GAO Report 11-367R (May 26, 2011).......9

This Brief is submitted in support of the Appellant John Schumacher pursuant to Mass. R. App. P. 17 and the Supreme Judicial Court's August 2, 2013 Announcement soliciting amicus briefs in this appeal. The National Consumer Law Center submits this Brief on behalf of its low-income clients.

INTEREST OF AMICUS CURIAE

The National Consumer Law Center ("NCLC") is a nonprofit organization with its main office in Boston. Since 1969, NCLC has provided resources for legal services offices, private law firms, and governmental entities in the area of consumer law. NCLC publishes nationally recognized practice manuals including: *Foreclosures* (4th ed. 2012); *Mortgage Lending* (1st ed. 2012); *Foreclosure Prevention Counseling* (2d ed. 2009); *Truth-in-Lending* (8th ed. 2012); and *Consumer Bankruptcy Law and Practice* (8th ed. 2012). During the current foreclosure crisis, NCLC staff have conducted numerous trainings for attorneys, housing counselors, and mediators on foreclosure-related topics in more than twenty states. NCLC attorneys testify regularly before Congressional committees, federal agencies, and state legislative bodies on foreclosure and mortgage-

related topics. NCLC staff have been working regularly with Massachusetts legal services attorneys statewide to provide training and direct support on foreclosure issues.

ISSUE TO BE ADDRESSED

This Brief will address the question posed by the Court:

> Whether a failure strictly to comply with the notice provisions of G.L. c. 244, § 35A, renders an extrajudicial foreclosure sale void, voidable, or otherwise affects its validity; whether the notice in this case, which listed the name and address of the mortgage servicer, and which identified as the current mortgagee an entity to whom the mortgage eventually was but had not yet been assigned, satisfied the statutory requirement that the notice provide the name and address of the mortgagee, or anyone holding thereunder.

SUMMARY OF ARGUMENT

Strict enforcement of G.L. c. 244, § 35A is essential because the statute plays a key role in the Massachusetts foreclosure process. During the current foreclosure crisis, millions of foreclosures nationwide have been prevented through timely reviews for loss mitigation. At the same time, millions of foreclosures have gone ahead unnecessarily because mortgage servicers failed to complete loss mitigation

reviews or provided homeowners with inaccurate information. (NCLC Amicus pp. 5-11).

Section 35A promotes loss mitigation reviews in several important ways. First, it delays acceleration of a mortgage loan for a period that is sufficient to conduct a loss mitigation review. Second, it stops accrual of foreclosure costs and fees during the loss mitigation review, making a successful outcome more likely. Third, § 35A requires that the foreclosing party give the homeowner vital information that facilitates the loss mitigation review. In particular, § 35A requires that the foreclosing party accurately identify the current owner of the mortgage loan. (NCLC Amicus pp. 20-32).

Correct information about who owns a mortgage loan is essential for every homeowner attempting to navigate current loss mitigation protocols. The loan's owner - the mortgagee - ultimately determines whether a particular loss mitigation option will be implemented. Most national loss mitigation protocols strongly encourage mortgage servicers to consider and implement loss mitigation options, including loan modifications. Nearly all mortgage servicers are required to follow one of the major national

protocols. These protocols include rules for the HAMP program, the new Consumer Financial Protection Bureau's mortgage servicing regulations, the National Mortgage Settlement servicing standards, or the rules for servicers of government-insured loans. However, a servicer can refuse to implement an option under these protocols if the guidelines set by the loan's owner prohibit approval. Misinformation about who owns a loan and which entity's guidelines apply has been a recurring problem during the foreclosure crisis. Section 35A serves a critically important function by mandating early and accurate disclosure of loan ownership information. (NCLC Amicus pp. 32-38).

U.S. Bank's position is that the notice of sale required by G.L. c. 244, § 14 is the only notice the homeowner must receive which correctly identifies the loan owner. The homeowner receives the notice of sale on the eve of a pending sale date, as late as 30 days before a scheduled foreclosure sale. Delaying notice of essential information until this late stage in the foreclosure proceeding undercuts the purpose and goals of § 35A. Section 35A was designed to ensure early review for loss mitigation, before loan acceleration and before substantial arrears and fees accumulate.

All the important federal loss mitigation protocols similarly stress early intervention. The federal guidelines cut off or severely limit access to loss mitigation options during the thirty-day period preceding a foreclosure sale. Essentially, US Bank's position would require that the homeowner receive accurate notice of who owns a loan only when it is too late to be of any help. This view undercuts both state and federal efforts to alleviate the impact of the ongoing foreclosure crisis. (NCLC Amicus pp. 35-40).

ARGUMENT

I. STRICT COMPLIANCE WITH G.L. C. 244, § 35A IS ESSENTIAL TO PREVENT UNNECESSARY FORECLOSURES.

a. The Importance of Loss Mitigation Review for Homeowners and for Investors in Mortgage Debt.

The Massachusetts Legislature enacted G.L. c. 244, § 35A at the inception of the greatest mortgage foreclosure crisis in the nation's history. The business practices of poorly regulated financial institutions played a major role in the buildup to this crisis. It is estimated that before tide of foreclosures subsides, fourteen million homes

nationwide will have been lost to foreclosures.[1] During this crisis lenders in Massachusetts have been filing as many as 3,000 petitions each month to begin foreclosure proceedings against residential properties.[2]

The loss of wealth from foreclosures has been catastrophic. It is estimated that the destruction of home equity in Massachusetts due to the foreclosure crisis will cost a total of 37.8 billion dollars.[3] The losses have not been limited to individual borrowers whose homes have been foreclosed. Foreclosures decrease neighboring property values. As local governments face the increased cost of dealing with

---

[1] CoreLogic, *CoreLogic Reports 63,000 Completed Foreclosures in May* (June 29, 2012) (3.6 million completed foreclosures since September 2008); *New Ideas to Address the Glut of Foreclosure Properties*: Hearing Before the Subcomm. on Housing, Trans., and Com. Dev. of the S. Comm. on Banking, Housing, and Urban Affairs, 112th Cong. 2 (2011) Testimony of Laurie S. Goodman, Senior Managing Dir., Amherst Securities Group.

[2] RealtyTrac, *Massachusetts Reports Over 18,000 Properties With Foreclosure Filings in First Half of 2009* (July 31, 2009) at http://www.realtytrac.com/content/news-and-opinion/massachusetts-reports-over-18000-properties-with-foreclosure-filings-in-first-half-of-2009-5095.

[3] Center for Responsible Lending, *The Cost of Bad Lending in Massachusetts at* http://www.responsiblelending.org/mortgage-lending/tools-resources/factsheets/massachusetts.html (estimating 121,153 home foreclosures in Massachusetts 2009-2012).

abandoned homes and displaced citizens, they must do so with diminished property tax revenues. Perhaps the most tragic aspect of this crisis has been that so many foreclosures were unnecessary.

One lesson learned from the foreclosure crisis is that loss mitigation programs work.[4] When mortgage servicers conduct reviews for loss mitigation before they start a foreclosure and when they implement appropriate alternatives to foreclosure, all parties stand to benefit. Early in the crisis, mortgage servicers often channeled defaulted borrowers into repayment plans and loan modifications that increased monthly payments.[5] Most homeowners who entered into loan modifications in 2008 redefaulted within one year.[6]

Since 2009, however, with the implementation of the federal Home Affordable Modification Program ("HAMP") and other more carefully crafted national

---

[4] National Consumer Law Center, *At a Crossroads, Lessons from the Home Affordable Modification Program (HAMP)*, NCLC Jan. 2013 available at http://www.nclc.org/issues/at-a-crossroads.html.

[5] *Id.* p. 14.

[6] Office of the Comptroller of the Currency, *Mortgage Metrics Report Disclosure of National Bank and Federal Savings Association Mortgage Loan Data*, Second Quarter 2013 (Sept. 2013) ("OCC Metrics Report") p. 37.

loan modification protocols, the focus has shifted to modifications calculated to be affordable for borrowers. Increasingly, modifications set a borrower's future payment as a percentage of household income. While earlier modifications increased borrowers' monthly payments, by 2012 mortgage modifications were decreasing the payments by an average of about 20%. In mid-2013, modifications under the HAMP program decreased the borrower's payment on average by 34% (a decrease in the average monthly principal and interest payment of $517).[7] In 2013 the redefault rate on mortgages modified under the HAMP program fell to a level of just over ten percent one year after modification.[8] In 2008, when most modifications raised the monthly payment or kept it the same, over 50% of modified loans redefaulted within one year.[9] Today, the overwhelming majority of

---

[7] OCC Metrics Report 2d Quarter 2013 p. 30. According to the Report the average non-HAMP or proprietary mortgage modification made in the second quarter of 2013 decreased the borrowers' payment by $358, or by 25%.

[8] *Id.* p. 36, reporting that one year after they were modified, 11% of HAMP-modified loans were in default, while 19% of non-HAMP modifications were in default.

[9] *Id.* p. 37 (twelve months after modification, 57% of loans modified during 2008 had redefaulted).

homeowners whose loans are being modified remain in their homes. These loans continue to produce an income stream for the investors who own them.

The problem has not been that loan modifications do not work. Rather, the problem has been that too few homeowners receive them. Since 2009, 1.2 million homeowners have received permanent modifications under the HAMP program.[10] This is a small fraction of the 14.5 million homeowners in default estimated to have been eligible for HAMP.[11] Of homeowners who completed applications for HAMP, barely one in four received a permanent modification.[12] These figures might not be so alarming were it not for the widespread evidence that the HAMP program rules were haphazardly enforced and routinely flaunted by mortgage servicers.[13]

---

[10] U.S. Dept. of Treasury, *Making Home Affordable Program Performance Report Through July 2013.*

[11] NCLC *Crossroads* Report, *supra*. pp. 26-27 (calculation based on quarterly data from National Delinquency Survey).

[12] *Id.*

[13] Cong. Oversight Panel, 64-832, *March Oversight Report: The Final Report of the Congressional Oversight Panel*, p. 78 (2011); Special Inspector Gen. for the Troubled Asset Relief Program, *Quarterly Report to Congress: April 25, 2012* at 189-90 (2012); U.S. Govt. Accountability Office, *Troubled Asset Relief Program: Results of Housing Counselor Survey of Borrower Experiences in the HAMP Program,* GAO Report 11-367R (May 26, 2011).

The courts have sustained claims of individual homeowners who fell victim to servicers' arbitrary practices under HAMP. *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013); *Young v. Wells Fargo Bank, N.A*, 717 F.3d 224 (1st Cir. 2013); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012). However, litigation is an unaffordable option for most homeowners facing foreclosure and is a burden on the courts. *See, e.g., Young v. Wells Fargo, supra*, 717 F.3d at 228 ("[c]ourts in many jurisdictions, including our own, are grappling with the influx of these cases and the complex legal issues that they raise.") Strict enforcement of § 35A forces the parties to address loss mitigation at the earliest possible stage of foreclosure, significantly reducing the risk for homeowners and the need for litigation. Section 35A encourages the resolution of mortgage disputes well before, rather than on the eve of a foreclosure sale or after a sale has been conducted.

Modifications benefit the owners of mortgage loans. A loan modification that reduces the borrower's monthly payment typically results in some loss of income for the owners of the loan. After a modification, investors who own the loan will not

receive the same level of income they would have received if the loan had not been modified. However, the monetary loss from a loan modification can be paltry compared to the monetary loss investors incur through a foreclosure sale. Investors in mortgage debt can lose from fifty to sixty percent of the value of their investment when a foreclosure takes place.[14]

In recognition of the staggering losses inflicted by foreclosures, the lending industry has developed tests to determine whether the loss to investors from a foreclosure sale is likely to be greater than the loss the same investors will incur if the loan is modified instead. This test is called a "Net Present Value" ("NPV") test. The NPV test compares one loss (the long-term reduction in income from lowering the interest rate, forbearing or forgiving part of the loan principal, and exposure to potential redefault) with the loss likely to be incurred from a foreclosure sale. The NPV test is an essential element of HAMP and of most standard lending industry loss mitigation protocols.

[14] Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications*, 41 Conn. L. Rev. 1107, 1108 (2009).

A NPV test focuses on minimizing the losses to investors who own securitized mortgage debt. These investors are often pension funds, governmental units, and educational institutions.[15] Unlike mortgage servicers, they face direct losses from foreclosures. In addition, most home mortgage loans in the United States are insured by the government. The government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac, as well as the Federal Housing Administration (FHA), the Veterans Administration, and the Department of Agriculture insure millions of home loans. U.S. taxpayers ultimately foot the bill for unnecessary foreclosures of government-insured loans.

Loan modifications may not benefit mortgage servicers. Unfortunately, investors and the owners of loans do not conduct most mortgage foreclosures. Instead, a trust that owns mortgage-backed securities enters into a contract with a mortgage servicer. The servicer is often an affiliate of a large national financial institution. The servicer may have no

---

[15] American Association of Mortgage Investors, *White Paper, The Future of the Housing Market for Consumers After the Housing Crisis: Remedies to Restore and Stabilize America's Mortgage and Housing Markets* (Jan. 2011) *available at* http://the-ami.com/wp-content/uploads/2011/01/AMI_State_AG_Investigation_Remedy_Recommendations_Jan_2011.pdf.

relation to the entity that originated a particular loan in a pool that it services. It is the servicer that typically hires foreclosure counsel, and the servicer makes the critical decisions related to foreclosures.

Unlike the investors, servicers do not bear the direct loss from a foreclosure. Servicers earn money from fees connected with default servicing. In addition, they must advance unpaid interest to the owners of the loan during a foreclosure. Servicers' interests are often to maximize fees and get the foreclosure completed so that their obligation to advance interest and fees stops and their incurred costs are paid off the top from the foreclosure sale proceeds.[16] In the foreclosure context, the interests of servicers and investors do not always coincide. Investors have been some of the most vocal proponents of vigorous loss mitigation reviews and have favored

---

[16] Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications,* 86 Wash. L. Rev. 755 (December 2011). *See, also,* Congressional Oversight Panel, *Foreclosure Crisis: Working Toward a Solution,* March 2009 Oversight Report, pp. 44-46 (March 6, 2009).

stricter regulation of the foreclosure practices of mortgage servicers.[17]

b. Section 35A's Critical Role in Promoting Loss Mitigation Reviews.

G.L. c. 244, § 35A is a statute designed to promote servicers' consideration of loss mitigation options as alternatives to foreclosures. Section 35A furthers this objective in several ways. First, it creates a 90-day (now up to 150-day) breathing spell during which the servicer can review the borrower for non-foreclosure options before any foreclosure costs are incurred. Second, the law mandates that the servicer provide the homeowner with certain information, including the identity of relevant parties, in order to facilitate the loss mitigation review.

Section 35A facilitates loss mitigation consistently with other Massachusetts law and with federal guidelines. Most recently, the Massachusetts Legislature built upon § 35A to create additional requirements for mortgage servicers to consider borrowers for loss mitigation before they begin to

---

[17] American Association of Mortgage Investors, *White Paper*, note 15 *supra*.

foreclose. G.L c. 244, § 35B (St. 2012 c. 194, § 2, effective Nov. 1, 2012). In new § 35B the Legislature mandated that servicers of certain loans implement affordable loan modifications whenever an NPV test is positive for modification. *Id.* at § 35B(b)(2)(iv). Section 35B interacts with pre-existing § 35A by requiring that the servicer conduct a specified loss mitigation review during the breathing space provided for in § 35A. G.L. c. 244, § 35B(b)(2)(iii).

Section 35A strengthens efforts at the national level to promote loss mitigation. At the national level, several protocols now mandate that servicers engage in loss mitigation reviews during a fixed period after default and before a foreclosure begins. These include new regulations promulgated by the Consumer Financial Protection Bureau ("CFPB"), the National Mortgage Settlement by 49 states' attorneys general, new servicing guidelines developed by the Government Sponsored Enterprises ("GSEs") Fannie Mae and Freddie Mac, and the HAMP program. The HAMP program will continue to be in effect for several more years.

With a few exceptions, all of these federal guidelines defer to state laws on the subject of

foreclosures and loss mitigation. The federal standards set certain minimum thresholds, while state laws may create greater procedural and substantive protections for homeowners. Section 35A is a state law that is consistent with these federal guidelines, while it provides certain protections for borrowers that are stronger than those required at the federal level. For example, § 35A requires the timely identification of the mortgage holder, a term that has specific meaning under Massachusetts law. The federal guidelines clearly mandate that servicers perform thorough loss mitigation reviews before foreclosure. However, all federal standards allow a servicer to deny a loan modification option that the owner of the loan does not permit. Because § 35A requires timely identification of the loan owner, the Massachusetts borrower will be better able to monitor a servicer's compliance with the federal guidelines. As discussed below, requiring strict compliance with § 35A enhances the likelihood that servicers will adhere to the various federal guidelines.

The Dodd Frank Act of 2010 delegated to the Consumer Financial Protection Bureau ("CFPB") the authority to promulgate regulations of mortgage

servicers.[18] In 2013, the CFPB published an extensive set of mortgage servicing regulations. 12 C.F.R. §§ 1024.30-1024.41.[19] These regulations go into effect in January 2014. The CFPB regulations mandate that servicers review borrowers in default for all available loss mitigation options before initiating any foreclosure proceedings. 12 C.F.R. § 1024.41(c)(1)(i). The CFPB has established a strict framework for loss mitigation review while recognizing that servicers must implement the loss mitigation programs established by "owners or assignees of mortgage loans."[20]

In April 2012, each of the five largest mortgage servicers[21] entered into a consent decree with federal

---

[18] Specifically, the Dodd-Frank Act delegated to the CFPB the authority to issue regulations of mortgage servicers pursuant the Real Estate Settlement Procedures Act, ("RESPA"), 12 U.S.C. § 2603-2617.

[19] The CFPB released the final regulations and Official Commentary to the rules in July 2013. http://www.consumerfinance.gov/regulations. The Bureau amended the Official Commentary for several of the rules in a subsequent publication dated September 13, 2013 (available at same site).

[20] CFPB Section-by-Section Analysis § 1024.41, 78 Fed. Reg. 10,818 (Feb. 14, 2013).

[21] Ally Bank (GMAC), Bank of America, CitiMortgage, JP Morgan Chase Bank, and Wells Fargo Mortgage. Together, these five servicers are responsible for servicing and loss mitigation for most residential mortgages in the United States.

agencies (the departments of Justice, Treasury, and HUD) and 49 state attorneys general (including the Massachusetts Attorney General) in settlement of an extensive investigation of servicers' foreclosure practices.[22] These consent decrees obligated the affected servicers to conduct an NPV test before proceeding with a foreclosure. The five servicers must implement a modification whenever the outcome of the NPV test is positive.[23] However, the servicer is not required to implement the modification if to do so is contrary to a guideline set by the investor or owner of the loan.[24]

In 2011 the two GSEs, Fannie Mae and Freddie Mac announced a new set of mortgage servicing guidelines, known as their serving "alignment."[25] These guidelines

---

[22] Copies of the consent decrees and servicing standards for each of the five servicers are available at the National Mortgage Settlement website: http://www.nationalmortgagesettlement.com/ The servicing standards are contained in a "Settlement Term Sheet" Attachment A to each consent decree. The mandatory servicing standards are in effect from October 2012 until 2016.

[23] National Mortgage Settlement Term Sheet, Exhibit A, Part IV.A.2.

[24] *Id.*

[25] Fannie Mae Announcement SVC-2011-08R (Sept. 2, 2011) https://www.fanniemae.com/content/announcement/svc1108.pdf; Freddie Mac Bulletin 2011-11 (June 30,

require that servicers of GSE-owned or insured loans conduct early and thorough loss mitigation reviews, including evaluation of each borrower for specified loan modifications, before initiating foreclosure. Here, again, information about loan ownership is essential to determining whether the loan is GSE-owned or insured and therefore subject to the new GSE servicing guidelines.

Finally, the Treasury Department's HAMP program has been extended at least through 2015. Over one hundred servicers, responsible for nearly 90% of home mortgage loans in the United States, are obligated by contract with the Treasury Department or the GSEs to review all borrowers in default for eligibility for a HAMP modification before beginning a foreclosure.[26] The HAMP rules mandate that participating servicers implement affordable modifications for all eligible homeowners. However, a servicer may refuse to approve

---

2011) http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1111.pdf

[26] The list of participating servicers and program outcome data are set out in the HAMP Program's monthly reports at http://www.treasury.gov/initiatives/financial-stability/reports/Documents/August%202013%20MHA%20Report%20Final.pdf

a HAMP modification if the loan owner's rules prohibit the modification.[27]

II. THE NOTICE OF A RIGHT TO CURE BEFORE ACCELERATION IS CRITICAL TO IMPLEMENTATION OF ALL FEDERAL AND STATE LOSS MITIGATION PROGRAMS.

a. The Importance of Starting Loss Mitigation Reviews Before Acceleration of a Mortgage Loan.

Mass. G.L. c. 244, § 35A established much more than a "technical" procedural requirement. The statute created important substantive protections for homeowners. These protections override the terms of loan documents in two significant ways. First, § 35A limits the time during which the creditor may exercise a contractual acceleration remedy. Second, the statute bars the assessment of collection costs and fees against the homeowner in circumstances when the loan documents would otherwise allow the creditor to shift these costs to the homeowner.

The pre-acceleration "breathing spell." The acceleration of a debt obligation is a significant event. Massachusetts home mortgages typically secure a note with a principal balance of several hundred

[27] U.S. Dept. of Treasury Making Home Affordable Program Handbook for Non-GSE Mortgages Version 4.2 (May 1, 2013), ch. I §§ 1.3, 2.2; ch. II § 6.5 at https://www.hmpadmin.com/portal/programs/guidance.jsp.

thousand dollars. The note and mortgage permit repayment of the debt in relatively small scheduled monthly installments over an extended time, often over several decades. So long as the mortgagor makes scheduled payments when due under the terms of the note, enforcement of the note through foreclosure is stayed. However, upon the mortgagor's failure to pay a scheduled monthly installment when due, the note allows the lender to "accelerate" the loan. Upon acceleration, the mortgagor must pay the entire loan balance immediately. Failure to do so allows the lender to proceed to exercise the power of sale. The foreclosure sale terminates the mortgagor's right to "redeem" the property - the right to acquire full title to the property by payment of the loan balance in full.

G.L. c. 244, § 35A limits the mortgagee's exercise of contractual acceleration remedies.[28] In

---

[28] In recognition of the harshness of strict enforcement of acceleration clauses, several other states have enacted legislation mandating delays in non-judicial foreclosure proceedings to allow for cures and reinstatement. *See, e.g.*, Ariz. Rev. Stat. Ann. § 33-807(D) (power of sale may not be executed until 91st day after recording notice of sale); Cal. Civ. Code § 2924(a)(2),(3) (foreclosing entity must record notice of default and right to cure three months before notice of sale); Nev. Rev. Stat.

its form in effect in 2008, § 35A declared that in the case of residential mortgages the mortgagee "shall not accelerate maturity of the unpaid balance of such mortgage obligation or otherwise enforce the mortgage" because of a monetary default "until at least 90 days after the date a written notice is given by the mortgagee to the mortgagor." G.L. c. 244, § 35A(b).[29] The written notice must contain specific information to facilitate the mortgagor's efforts to bring the loan out of default. *Id.*

In addition to displacing contractual provisions governing the timing of acceleration, § 35A modifies contract terms that would otherwise define the amount that the borrower must pay to reinstate the regular pre-default payment schedule. For example, attorney's fees related to a foreclosure can total several thousand dollars. Foreclosure advertising costs can run from three to four thousand dollars. Under the written terms of most mortgage documents, the mortgagee may proceed quickly after default to incur

---

107.080(c),(d) (power of sale may not be exercised until three months after recording notice of breach and election to sell).

[29] The references in this Brief are to the version of G.L. c. 244, § 35A in effect during 2008, the time of Schumacher proceedings below.

these charges. The mortgagor would then have to pay all collection costs in addition to the installment arrearage in order to cure the default. Section 35A delays the enforcement of all contractual fees-shifting provisions in order to promote reinstatement of loans.

During the current foreclosure crisis policymakers have focused upon the need for intervention as early as possible in the foreclosure process.[30] The likelihood that an alternative to foreclosure, such as a loan modification, will succeed increases greatly the sooner the alternative is implemented. In addition to allowing foreclosure costs to mount, putting off the review for loss mitigation permits the debt for unpaid interest to spiral upward. The greater the arrearage that must be capitalized in a modified loan, the higher the payments under the modified loan will be. Higher payments under the modified loan heighten the risk of

---

[30] FDIC Center for Financial Research Working Paper No. 2010-06 *Estimating the Effects of Foreclosure Counseling for Troubled Borrowers* (June 2010) p. 3 (the effectiveness of counseling varies based on when the borrower sought counseling, with borrowers seeking counseling at 30 to 60 days past due performing better than those seeking counseling at 90 days delinquent).

redefault. In addition, early intervention that leads homeowners to seek out housing counseling and other legal assistance dramatically increases the likelihood that foreclosure will be avoided.[31] One requirement of the current version of § 35A is the foreclosing party's notice to the homeowner of contact information for referrals to governmental assistance programs. G.L. c. 244, § 35A(h)(6).

b. If Properly Enforced, § 35A Works in Tandem with Major Federal Efforts to Ensure that Servicers Conduct Loss Mitigation Reviews Before Foreclosure Begins.

In promoting early intervention for loss mitigation review § 35A works consistently with protocols mandated at the federal level. For example, the CFPB's new mortgage servicing rules require a 120-day delay from the date of default before the servicer may file the "first notice" of foreclosure.[32] The Rule provides:

---

[31] Neil Mayer & Peter A. Tatian, *et al. National Foreclosure Mitigation Counseling Program Evaluation: Preliminary Analysis of Program Effects*, Urban Institute (Sept. 2010 Update) (borrowers who received housing counseling were 1.7 times more likely to cure default than those who did not).

[32] In an amended Official Comment released in September 2013 the CFPB clarified that Massachusetts' § 35A is not a "first notice" of foreclosure that must be given only *after* the initial 120-waiting period

> (f) *Prohibition on foreclosure referral.*
> (1) *Pre-foreclosure review period.* A servicer shall not make the first notice of filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan obligation is more than 120 days delinquent. 12 C.F.R. § 1024.41(f)(2).

With this rule the CFPB intended to preempt all state foreclosure laws to the extent that they do not provide for a pre-foreclosure breathing spell or permit only a shorter loss mitigation review period.[33] In recently amending its Official Comments to the mortgage servicing rules, the CFPB specifically referred to Massachusetts' § 35A as a state cure law that provides for a period of suspension of foreclosure to run concurrently with the 120-day

---

mandated by the CFPB rule §1024.41(f). CFPB, Amendment to the 2013 Mortgage Rules under RESPA (Sept. 13, 2013) p. 84 at http://www.consumerfinance.gov/regulations. The time frames under § 35A and 12 C.F.R. § 1024.41(f) run concurrently and not consecutively. The CFPB rule would clearly bar the recording and service of the notice of sale under G.L. c. 244, § 14 or the initiation of any judicial proceeding until the expiration of the 120 period post-default period.

[33] *CFPB Mortgage Rules Official Interpretation* § 1024.41(f), at p. 502. ("The Bureau understands and intends that any such requirement will preempt State laws to the extent such laws permit filing of foreclosure actions earlier than after the 120th day of delinquency.")

period required under 24 C.F.R. § 1024.41(f).[34] The CFPB Official Comment states:

> The Bureau agrees with commenters that permitting communication about cure rights or pre foreclosure loss mitigation assistance or procedures available under state law, even within the first 120 days of a borrower's delinquency, furthers the objective of § 1024.41's loss mitigation procedures. The Bureau believes early communication to borrowers about resources such as housing counseling, emergency loan programs, and pre-foreclosure mediation will increase the likelihood that borrowers will submit complete applications in time to benefit from the full loss mitigation procedures under § 1024.41.[35]

The purpose 12 C.F.R. § 1024.41(f) is to mandate a fixed period during which the servicer must conduct specified reviews for loss mitigation. During this period the borrower must be insulated from the threat of mounting fees and costs and other pressures related to litigation over a pending foreclosure sale. Section 35A is perfectly consistent with the CFPB's new national servicing regulation.

The CFPB's rules were promulgated under the authority of the federal RESPA statute. 12 U.S.C. §§ 2603-2617. RESPA authorizes a private cause of

---

[34] CFPB, Amendment to the 2013 Mortgage Rules under RESPA, *supra*, p. 84, Official Comment to § 1024.41(f) p. 84 (Sept. 13, 2013).

[35] *Id.* pp. 87-88.

action for a homeowner to sue for damages. However, most courts have interpreted RESPA as not providing a cause of action for injunctive relief.[36] In Massachusetts, a homeowner may assert a servicer's non-compliance with § 35A as the basis for an injunction to stop a pending foreclosure sale. Since the new federal rule may not be directly enforceable by an action for injunctive relief, strict enforcement of § 35A will be an important tool to ensure compliance with the new federal guidelines.

Strict enforcement of § 35A furthers enforcement of other major federal loss mitigation efforts. The National Mortgage Settlement involving the five large servicers mandates a similar 120-day period after default before a loan may be referred to foreclosure.[37] During this period the servicer must review the borrower for certain loss mitigation options mandated

---

[36] *See, e.g., Beck v. Wells Fargo Bank*, 2011 WL 6217345 (N.D. Cal. Dec. 14, 2011); *Rivera v. BAC Home Loan Servicing, L.P.*, 2010 WL 2757041 (N.D. Cal. July 9, 2010).

[37] National Mortgage Settlement, *supra*, Settlement Term Sheet IV Part B 1. Servicer shall not refer account to foreclosure if it receives complete or substantially complete loss mitigation application from borrower no later than day 120 of delinquency.

by the consent decrees.[38] The new "alignment" rules for mortgages owned or insured by the GSEs Fannie Mae and Freddie Mac also emphasize early intervention to review borrowers for loan modifications and other alternatives to foreclosure. The GSE rules bar servicers from referring a loan to a foreclosure attorney for a period of 120 days after default unless the servicer has completed a review for all GSE loss mitigation options and found the borrower ineligible for all of them.[39] Finally, HUD has promulgated extensive regulations that apply to servicers of FHA-insured mortgages. HUD's rules mandate that the

---

[38] *Id.* at IV A.2: "Servicer shall offer and facilitate loan modification for borrowers rather than initiate foreclosure when such loan modifications for which they are eligible are net present value (NPV) positive and meet other investor, guarantor, insurer and program requirements." Text at http://www.nationalmortgagesettlement.com/

[39] Fannie Mae Single Family Servicing Guide ch. VIII 103.04 pp. 801-8 to 801-10 (March 14, 2012); Fannie Mae Announcement SVC-2011-08R (Sept. 2, 2011) p. 17 https://www.fanniemae.com/content/announcement/svc1108.pdf (servicer must conduct pre-referral foreclosure review before the date 120 days after default, and after this date servicer must refer to attorney for foreclosure); Freddie Mac Bulletin 2011-11 (June 30, 2011) p. 4 http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1111.pdf (required notices and evaluation during the 120 days); FHFA FAQ on Servicing Alignment Guidelines p. 2 http://www.fhfa.gov/webfiles/21191/FAQs42811Final.pdf ("Under the new requirements, servicers must engage in a single track for considering foreclosure alternatives up to the 120th day of delinquency").

servicer complete a loss mitigation review by the fourth month of delinquency and before acceleration.[40]

III. THE NEED FOR ACCURATE IDENTIFICATION OF PARTIES WHO OWN SECURITIZED MORTGAGE DEBT MAKES STRICT COMPLIANCE WITH § 35A ESSENTIAL.

a. Section 35A's Key Function is to Require Early Identification of the Loan's Owner.

Massachusetts courts have long recognized that notices of foreclosure must accurately inform the borrower who is conducting the foreclosure. *U.S. Bank Nat'l Assoc. v. Ibanez*, 458 Mass. 637, 648 n.17 (2011); *Roche v. Farnsworth*, 106 Mass. 509, 513 (1871) (foreclosure sale void where notice did not clearly identify mortgagee); *Bottomly v. Kabachnick*, 13 Mass. App. Ct. 480, 484 (1980). The requirements for valid exercise of a power of sale are contained in two sources: in the loan documents themselves and in the state statutes that regulate the exercise of a contractual power of sale. The statutes are found in G.L. c. 244, and include § 35A. Massachusetts courts require strict compliance with the contractual and

[40] 24 C.F.R. § 203.604 (before a loan is three months in default and before commencing foreclosure, servicer of an FHA-insured loan must attempt face-to-face meeting with borrower and review for all FHA loss mitigation options); 24 C.F.R. § 203.605 (loss mitigation review must be completed by four months of delinquency).

statutory provisions governing exercise of the power of sale, including the notice requirements. Noncomplying sales are void. *Ibanez, supra,* 458 Mass. at 647-48; *Moore v. Dick*, 187 Mass. 207, 211 (1905).

U.S. Bank argues that the only duty to give a notice with which a mortgagee must strictly comply is to identify the mortgagee accurately in the notice of sale described in G.L. c. 244, § 14. U.S. Bank Brief p. 23. The notice of sale described in G.L. c. 244, § 14 must be published and given to the mortgagor when a specific date for the foreclosure sale is set. The notice of sale can be given as late as 30 days before a scheduled foreclosure sale date. Under U.S. Bank's view, the homeowner who first learns the proper identity of the mortgagee 30 days before a foreclosure sale date should be able to access appropriate loss mitigation reviews and be considered for all options before the sale takes place.

There a number of problems with the Bank's argument. First, nearly all the major loss mitigation and loan modification options are closed or severely restricted for homeowners who first apply within 30 days of a scheduled foreclosure sale. "Dual tracking" is the controversial practice in which mortgage

servicers continue with foreclosure proceedings while reviewing a homeowner for loss mitigation options. The practice leads to completed foreclosure sales before the evaluations have been performed. Once the sale occurs, the evaluation process stops.

Section 35A and related federal regulatory efforts restrict dual tracking in the early stages of foreclosure. However, they generally do not restrict dual tracking in the later stages, particularly in the period thirty days before a scheduled foreclosure sale. For example, under the new CFPB servicing regulations, a homeowner who submits a loss mitigation application more than 37 days before a sale date does not have the right to receive a decision on the application or a review of the decision before the sale date. 12 C.F.R. 1024.41(g). The 49-State Attorneys General Settlement consent decrees contain a similar limitation.[41] Under the Fannie Mae and Freddie Mac guidelines, the servicer is under no obligation to cease foreclosure proceedings to review a loss mitigation application once the account has been

---

[41] National Mortgage Settlement, *supra,* Settlement Terms, Appendix A, Para. IV.B.6-8.

referred to an attorney for foreclosure.[42] The referral to foreclosure must take place by 120 days after the date of default.

Aside from the lack of dual tracking protections, waiting until the eve of a foreclosure sale to initiate a loss mitigation review allows unpaid principal, interest, costs, and fees to accumulate. These additions to the loan balance make a successful loss mitigation outcome much less likely.

b. Securitization has Made Identification of a Loan's Owner More Difficult, While Current Loss Mitigation Rules Make Accurate Identification of the Loan's Owner Critically Important.

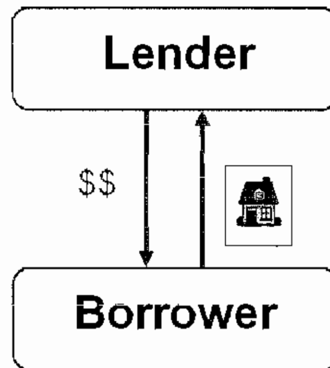
As discussed above, one goal of § 35A is to create a breathing space between the occurrence of a default and the commencement of foreclosure. Another purpose is to facilitate communication between the homeowner and the owner of the loan during this important pre-foreclosure breathing space. Section 35A promotes communication by requiring specific content in the pre-foreclosure notice that the foreclosing party must give the homeowner. The mandatory content includes the amounts due, the timing

[42] *See, e.g.*, Fannie Mae Announcement SVS-2011-08R (Sept. 2, 2011).

of foreclosure, contact information, and the identity of the mortgagee. G.L. c. 244, § 35A(h). At the time of foreclosure, the entity seeking to foreclose should be both the assignee of the mortgage and the holder of the related promissory note. *Eaton v. Federal National Mortgage Assoc.*, 462 Mass. 569, 584 (2012). To comply with § 35A the pre-foreclosure notice must accurately identify the entity that currently holds this dual status.

The importance of identifying the mortgagee. The securitization of home mortgage debt became widespread in the 1990s. Before then, the question of who owned a particular mortgage loan could usually be answered quite simply. Most borrowers entered into a loan transaction with a financial institution. The originating institution was the beneficiary to whom the loan note was payable, and the same institution appeared as named mortgagee on the mortgage. The financial institution that originated the loan typically held on to it. The loan originator remained the party that decided whether to foreclose or to approve a loss mitigation option. The originator had a direct financial interest in minimizing losses because it incurred the loss upon foreclosure. Under

the traditional mortgage lending arrangement, the loan origination transaction looked something like this:



Today, the overwhelming majority of home mortgage loan are securitized.[43] Brokers and non-bank financial institutions play a major role in mortgage loan originations. In a typical residential mortgage securitization transaction, the loan originator transfers the loan soon after origination to an entity known as a "seller." The seller pools loans for sale into a securitization stream, conveying groups of loans to another entity known as a "depositor." The depositor then funnels the loans into a trust. The trust becomes the legal owner of the pool of loans. The trust issues certificates to investors who

---

[43] *See,* 2 *Inside Mortgage Finance, the 2010 Mortgage Market Statistical Annual* (estimating that 85% of mortgage loans originated in 2009 entered into securitization).

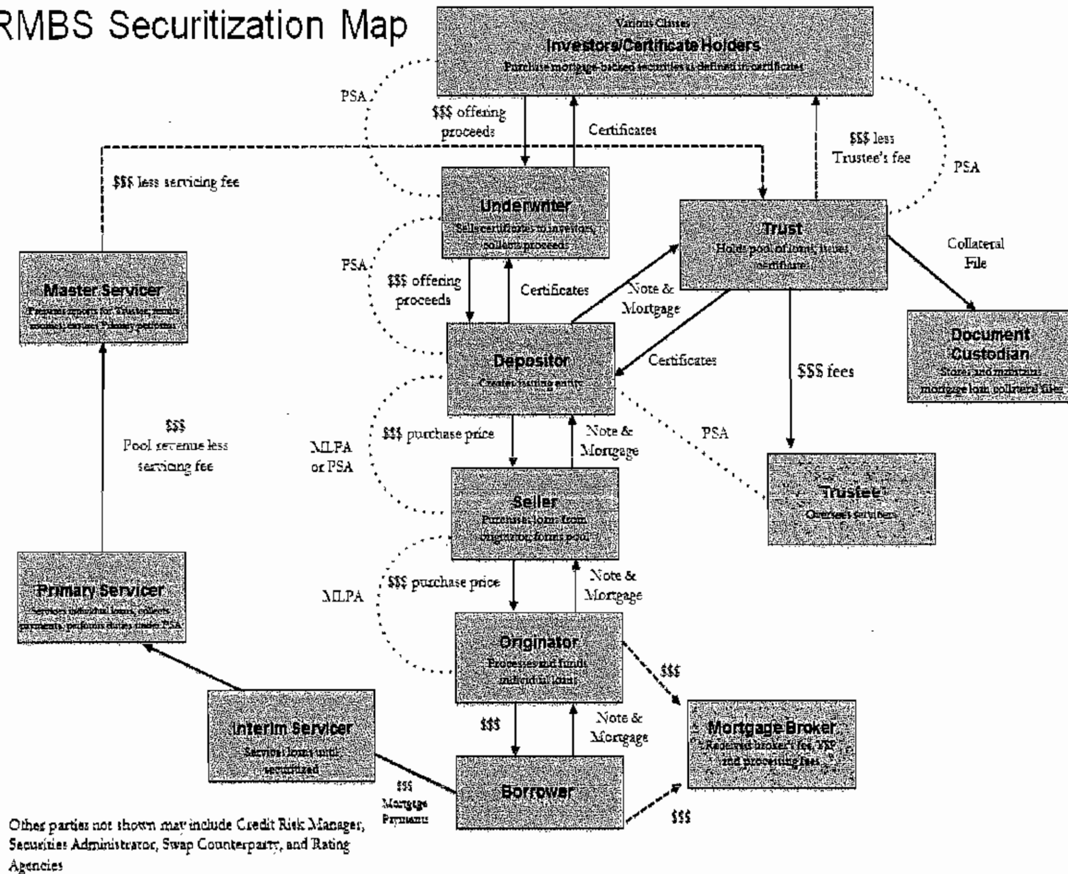
purchase interests in the right to receive certain income streams from the pooled loans.[44]

The trust owning securitized mortgage debt is a passive entity. The financial institutions involved in a securitization transaction designate an entity to act as trustee for the trust. The trustee's duties are described in an agreement entered into by the securitization parties. This agreement is called a "Pooling and Servicing Agreement" ("PSA"). The PSA identifies a financial institution to act as servicer of the individual loans and defines the servicer's duties. The servicer's duties include collecting payments and managing escrow accounts as well as conducting foreclosures and reviewing borrowers for loss mitigation.

---

[44] *See, generally,* Christopher L. Peterson, *Predatory Structured Finance,* 28 Cardozo L. Rev. 2185 (2007).

The structure of a typical residential mortgage-backed securities (RMBS) loan transaction looks like this:[45]



From this array of financial entities, the homeowner facing foreclosure needs to know who has the final say as to whether a particular alternative to foreclosure is truly an option.

The need for accurate information about "owner restrictions" on loan modifications. A PSA agreement

---

[45] Chart prepared by Tara Twomey, Esq., of counsel National Consumer Law Center.

describes the circumstances under which a mortgage servicer may approve a loss mitigation option for one of the loans owned by the Trust. Many PSA agreements authorize the servicer to modify a loan in accordance with industry-recognized standards. For the homeowner seeking a modification as an alternative to foreclosure it is critically important to know exactly what options the PSA authorizes the servicer to approve. Few PSAs prohibit the servicer from all modifications under all circumstances.[46] To find out what the PSA says, the homeowner needs accurate information about who owns the loan.

For example, the rules for the HAMP program mandate that participating servicers implement

---

[46] Diane E. Thompson, *Problems in Mortgage Servicing From Modification to Foreclosure,* Written Testimony before U.S. Senate Committee on Banking, Housing, & Urban Affairs (Nov. 16, 2010), p. 44; American Securitization Forum, *Statement of Principles, Recommendations and Guidelines for the Modification of Securitized Subprime Residential Mortgage Loans* (June 2007) p. 2. http://www.americansecuritization.com/uploadedfiles/asf%20subprime%20loan%20modification%20principles_060107.pdf; Hunt, John P., *What Do Subprime Securitization Contracts Actually Say About Loan Modifications? Preliminary Results and Implications* (March 25, 2009) Available at SSRN: http://ssrn.com/abstract=1369286 or http://dx.doi.org/10.2139/ssrn.1369286; Congressional Oversight Panel, 111th Cong., *Foreclosure Crisis: Working Toward a Solution,* Report March 6, 2009) p. 44 http://cybercemetery.unt.edu/archive/cop/20110402010739/http://cop.senate.gov/documents/cop-030609-report.pdf

affordable modifications for all eligible homeowners. However, the HAMP rules allow a servicer to refuse to approve a modification if the loan's owner prohibits modifications.[47] A major impediment to implementation of the HAMP program has been the frequency of servicer claims that a loan owner will not allow a modification, when in fact no such restriction exists.[48] *See, e.g.*, *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 558 (7th Cir. 2012) (homeowner stated valid claim to challenge servicer's refusal to modify loan despite servicer's assertion that modification would not be consistent with "investor guidelines"); *Bank of America v. Lucido*, 35 Misc. 3d 1211(A), 950 N.Y.S. 2d 721 (N.Y. Sup. 2012) (sanctioning servicer that falsely claimed PSA barred principal reduction modification). Even more disturbing have been recent revelations that servicer employers were trained

---

[47] U.S. Dept. of Treasury Making Home Affordable Program Handbook for Non-GSE Mortgages Version 4.2 (May 1, 2013), ch. I §§ 1.3, 2.2; ch. II § 6.5 at https://www.hmpadmin.com/portal/programs/guidance.jsp.

[48] *See, e.g.*, Karen Weise, "When Denying Loan Mods, Loan Servicers Often Wrongly Blame Investors," *ProPublica* July 23, 2010.

deliberately to misrepresent eligibility status to HAMP applicants.[49]

Similarly, the CFPB mortgage serving rules contain extensive requirements for servicers to review homeowners facing foreclosure for all loss mitigation options that are "available" under guidelines set by the owner of the loan.[50] The CFPB regulations cannot define the options that may apply for every mortgage loan in the country. Instead, the PSA and other documents maintained by the owner of the loan define the parameters of available options that a servicer may approve.

Providing the homeowner with accurate information about who owns a mortgage loan as soon as possible after default is an essential step that ensures that effective loss mitigation reviews takes place. In

---

[49] Paul Kiel, *Bank of America Lied to Homeowners and Rewarded Foreclosures, Former Employees Say,* ProPublica June 14, 2013. http://www.propublica.org/article/bank-of-america-lied-to-homeowners-and-rewarded-foreclosures

[50] 12 C.F.R. § 1024.41(c)(1). *See, also,* CFPB Official Interpretation 12 C.F.R. § 1024.41 p. 446 ("The Bureau believes that this framework provides an appropriate mortgage servicing standard; servicers must implement the loss mitigation programs established by owners or assignees of mortgage loans and borrowers are entitled to receive certain protections regarding the process (but not the substance) of those evaluations.")

most instances, giving the homeowner this information for the first time thirty days before a scheduled foreclosure sale will be useless. Fewer foreclosure sales will take place and more loans will be modified when informed homeowners seek loss mitigation help early on. Strict compliance with § 35A will produce more sustainable modifications that will inure to the long-term benefit of homeowners and investors.

CONCLUSION

The decision of the Housing Court should be reversed and judgment for possession entered for the Appellant.

Respectfully submitted,

/s/ Geoffry Walsh

GEOFFRY WALSH
BBO #601059
NATIONAL CONSUMER LAW CENTER
7 Winthrop Square, 4th Floor
Boston, Massachusetts 02110
(617) 542-8010
(617) 545-8028 FAX
gwalsh@nclc.org

For Amicus Curiae

NATIONAL CONSUMER LAW CENTER

Dated: October 23, 2013

CERTIFICATE OF COMPLIANCE

This brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

/s/ Geoffry Walsh

GEOFFRY WALSH