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# HOME FORECLOSURES: WILL VOLUNTARY MORTGAGE MODIFICATION HELP FAMILIES SAVE THEIR HOMES? (PART II)

## HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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# CONTENTS

DECEMBER 11, 2009


Page

OPENING STATEMENTS

The Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Chairman, Subcommittee on Commercial and Administrative Law ..... 1
The Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Ranking Member, Subcommittee on Commercial and Administrative Law ..... 2
The Honorable William D. Delahunt, a Representative in Congress from the State of Massachusetts, and Member, Subcommittee on Commercial and Administrative Law ..... 3
The Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Ranking Member, Committee on the Judiciary ..... 4
The Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Georgia, and Member, Subcommittee on Commercial and Administrative Law ..... 5
The Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Member, Subcommittee on Commercial and Administrative Law ..... 7
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Chairman, Committee on the Judiciary, and Member, Subcommittee on Commercial and Administrative Law ..... 7

WITNESSES

Mr. Adam J. Levitin, Georgetown University Law Center
Oral Testimony ..... 8
Prepared Statement ..... 11
Ms. Faith Schwartz, Hope Now Alliance
Oral Testimony ..... 25
Prepared Statement ..... 27
Ms. Margery E. Golant, Golant & Golant, P.A.
Oral Testimony ..... 45
Prepared Statement ..... 47
Mr. Henry E. Hildebrand, III, National Association of Chapter 13 Trustees
Oral Testimony ..... 67
Prepared Statement ..... 69

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Response to Post-Hearing Questions from Adam J. Levitin, Georgetown University Law Center ..... 102
Response to Post-Hearing Questions from Faith Schwartz, HOPE NOW Alliance ..... 105
Response to Post-Hearing Questions from Margery E. Golant, Golant & Golant, P.A. ..... 108
Response to Post-Hearing Questions from Henry E. Hildebrand, III, National Association of Chapter 13 Trustees ..... 113

# HOME FORECLOSURES: WILL VOLUNTARY MORTGAGE MODIFICATION HELP FAMILIES SAVE THEIR HOMES? (PART II)

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**FRIDAY, DECEMBER 11, 2009**

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 11:41 a.m., in room 2141, Rayburn House Office Building, the Honorable Steve Cohen (Chairman of the Subcommittee) presiding.

Present: Representatives Cohen, Conyers, Delahunt, Johnson, Scott, Chu, Franks, Smith, Jordan, and Coble.

Staff Present: (Majority) James Park, Counsel; Adam Russell, Professional Staff Member; and (Minority) Zachary Somers, Counsel.

Mr. COHEN. This hearing of the Judiciary Committee, Subcommittee on Commercial and Administrative Law, will now come to order.

Without objection, the Chair will be authorized to declare a recess to the hearing. And I will now recognize myself for a short statement.

Today's hearing is part two of our examination of the voluntary mortgage modification efforts, with particular focus on the effectiveness of the Treasury Department's Home Affordable Modification Program, or HAMP. And I say effectiveness or ineffectiveness, which is something to be determined.

For me, the foreclosure crisis particularly hits home. In a survey of the top 100 metro areas, my home City of Memphis ranks 18th in the number of foreclosures. And in my town hall meetings, more people call me and talk to me about their personal foreclosures than anyplace else. Tonight, of course, is the first night of Hanukkah, and without a house, there is no place to put a menorah, so it is particularly relevant that we start today.

In a comparison of States, my home state of Tennessee routinely ranks among the top States in the number of foreclosures. Mr. Hildebrand surely knows, as the Chapter 13 trustee from Nashville, one of our witnesses, the extent of the foreclosure crisis is such that even some middle-class areas are affected by growing foreclosure numbers. The foreclosure crisis extends well beyond subprime mortgages.

With unemployment at 10 percent, many responsible homeowners find themselves on the brink of losing their homes through no cause of their own. It could be medical bills that forced them into bankruptcy. It could be just being laid off because of the economy and the previous Administration's failure to regulate that.

So, back in July, we heard testimony that raised concerns about the effectiveness of the HAMP program. That was in July. And so far, government's efforts at helping families avoid losing their homes appears not to be working effectively. Some of my colleagues and I suspect that this is because the government's efforts have focused almost exclusively on encouraging mortgage lenders and servicers to voluntarily modify mortgage terms for distressed borrowers. It might be the same as encouraging President Karzai to root out corruption. Evidence suggests that encouraging voluntary modifications alone is at best minimally effective at helping financially struggling borrowers stay in their homes.

I recognize that HAMP at 9 months of age is still relatively new, but I am deeply troubled by continuing reports in the media and from the Congressional Oversight Panel, suggesting the HAMP program is simply ineffective in stemming home foreclosures. Certainly my constituents think it is ineffective because they are not getting help, and they have tried.

This Congress has acted earlier. I cosponsored and helped champion Chairman Conyers's bill, H.R. 1106, the Helping Families Save Their Homes Act of 2009, which, among other things, would have given authority to bankruptcy judges to modify debtors' mortgage terms in bankruptcy, including a reduction of the mortgage principal amount. I also sponsored Chairman Conyers' amendment to the financial regulatory reform legislation now being considered on the House floor and debated this morning. This amendment contains language that is substantially identical to the judicial mortgage modification authority of H.R. 1106.

In my view, this provision would have substantially and effectively reduced the number of foreclosures. Unfortunately, this provision has not yet been signed into law, as it hasn't been passed by the Senate. Adopting this provision would help to strengthen any program to encourage voluntary mortgage modifications by loan servicers. You need a hammer to make the anvil work.

I thank the witnesses for appearing today, and I look forward to their testimony. I now recognize my colleague from the State that gave us our Christmas tree, Mr. Franks, the distinguished Ranking Member of the Subcommittee, for his opening remarks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And thank all of you for being here.

Mr. Chairman, undoubtedly the foreclosure crisis is one of the biggest issues facing America, but this Committee's jurisdiction to address the crisis is largely limited to modifying the Bankruptcy Code. As I have maintained ever since this issue was raised by the majority, I truly believe that allowing mortgage cramdown in bankruptcy poses a major threat to the housing sector and the overall economy.

It is completely unfair to future borrowers. It harms lenders and investors. And it undermines the stability necessary for recovery. As we have seen, such a proposal does not meet the threshold of

support needed to pass the U.S. Senate. This is important, because the uncertainty that cramdown will create for mortgage originators is exactly what the housing sector does not need in the currently volatile housing market. Now allowing cramdown would simply be a continuation of the heavy-handed government interference in the housing and lending markets that got us into this precarious predicament in the first place.

As we know, the political housing establishment, in the name of increasing home ownership, significantly contributed to the current crisis. This was accomplished through the intentional weakening of traditional mortgage lending standards. These weakened underwriting standards were encouraged by the Community Reinvestment Act mandated by Congress and spurred on by Fannie Mae and Freddie Mac.

Now, simply, Mr. Chairman, what I see happening here as my friends on the left worked so hard to coerce banks into changing their lending practices and even to making loans that were untenable, now we see them coming forward and suggesting that those banks should now make those loans that failed because of the interference as free as they possibly can. And it is a recipe that cannot stand.

I hope it is not lost on my friends in the majority that the lesson of the foreclosure crisis is not that we need more government intervention, but that we need less. Allowing mortgage cramdown in bankruptcy would simply be an extension of the failed government interference in the housing sector of the past.

Of course, according to the title of today's hearing, we are not here to discuss mortgage bankruptcy cramdown. We are here to discuss voluntary loan modifications. And although voluntary loan modification efforts have not been perfect, I would submit the evidence demonstrates that lenders and servicers are making an effort to keep borrowers in their homes. There have been over 650,000 trial mortgage modifications under the Administration's Home Affordable Modification Program and over 5 million as part of the HOPE Now Alliance.

Lenders and servicers continue to work every day to keep as many homeowners in their homes as possible. But, Mr. Chairman, their efforts are stifled and complicated by how poorly underwritten many of these loans really are and, more importantly, by an unemployment rate that continues to hover at or above 10 percent. As we all know, if a homeowner loses their job, it makes it difficult or almost impossible to repay any type of debt.

So, Mr. Chairman, I guess at this point, I just look forward to the witnesses' testimony and hope that they can provide some positive suggestions, apart from bankruptcy cramdown, for how we can improve voluntary modification efforts.

And I thank the Chairman and yield back.

Mr. COHEN. Thank you, Mr. Franks.

I now recognize the next gentleman in order, which would be the esteemed Vice Chair who just determined that he would like to make a statement on this issue.

Mr. DELAHUNT. I will be very brief.

My friend from Arizona, the distinguished Ranking Member, referenced his understanding of how we arrived here in these very,

very dire reality in terms of the housing market, and I could not disagree with him more.

And I think the facts are that, if one examines mortgages issued pursuant to the Community Reinvestment Act, that it is surprisingly a performance, in terms of foreclosures and troubled mortgages, that I only wish was true of the entire mortgage industry. The foreclosure rate is miniscule compared to the mortgages that were issued by, if you will, the unregulated market. So that is what the facts are.

. But I think that is going to be determined at some future time by the commission that is independent, that is bipartisan in nature, that will review how we actually got here. We didn't get here because of government. We got here because government didn't do its job. That is how we got here, at least it didn't do its job until the election in 2009 and the inauguration of President Obama. Now we are cleaning up the mess of government that did not pay attention to its responsibilities.

So it isn't about government overregulating. It is government abdicating its responsibility to supervise and ensure that the marketplace works, and works fairly, and is not susceptible and vulnerable to basically scam artists that actually have put us into this position.

Now, he is concerned about cramdowns. It is interesting that, if it is a business property, you can do a cramdown, but you can't do it if it is a private home. You know, I wonder how that happened. It would be interesting to go back and look at the legislative history, Mr. Chairman, to see how that was achieved. But it's okay to do it for investment properties, for second homes, for cars, for boats, for every asset but the home that somebody lives in with their family. I just would like to see the consumer treated fairly. That is all.

Every marketplace has its rules, and that is what I hope we can achieve and do what we did before, and have the Senate finally wake up. Because, unfortunately, despite good intentions, the voluntary programs don't seem to be working. And I know people are making an effort to do what is right. But, you know, I think if we continue to go the route of a voluntary program, we are just going to extend the pain. The pain will be extended. And you know what is going to happen, we are never going to get out of this housing slump. We are going to continue to see lower and lower prices and additional foreclosures. And if that is what the minority party wants, that is what is going to happen.

With that, I yield back.

Mr. COHEN. Thank you, sir.

I now recognize the distinguished Ranking Member of the full Committee who represents the district which my predecessor, Mr. Crockett, went to defend and gave his life for.

Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman. We won't go into the details as to why one of your distant predecessors moved to Texas, but we appreciate at least the correlation between the two States.

We all hope that voluntary loan modifications can help pull America's homeowners out of the foreclosure crisis. Unfortunately, modification efforts are being made more difficult by continuing

high unemployment, which is not being reduced by the Administration's economic policies.

In contrast to these voluntary modification efforts, today the House is considering an amendment to H.R. 4173 that gives bankruptcy judges broad discretion to rewrite and cram down mortgages in bankruptcy.

The bankruptcy amendment to H.R. 4173 not only fails to solve the foreclosure crisis, but also makes the crisis deeper, longer, and wider. Allowing bankruptcy courts to modify home mortgages will have adverse consequences for all, while providing little real relief to distressed borrowers.

Bankruptcy cramdown will invariably lead to higher interest rates and less generous borrowing terms for future borrowers.

Unemployment has been a driving factor behind most foreclosures. But because individuals without regular income may not file for bankruptcy under Chapter 13, cramdown will do nothing for those most in need of relief, the unemployed.

Additionally, many borrowers walk away from their homes, not because they can't afford their monthly payments but because their homes are mortgaged for more than they are worth. These borrowers should live with the responsibility for their decisions, not receive bailouts from bankruptcy courts.

Allowing relief through the bankruptcy system merely transfers the cost of bad financial decisions to prospective home buyers who will find it much harder to get a mortgage. Rather than revitalizing the housing sector, this will prolong the housing recession.

Furthermore, we must not forget that cramdown will not only impact lenders but investors as well. These investors often include pension funds representing the retirement savings of millions of people. We should not pass the cost of irresponsible borrowing and lending off on current and future retirees.

Considering that cramdown will produce only modest results at best, it is regrettable that the House is once again considering cramdown. We need to do everything we can to help solve the foreclosure crisis, but we must avoid measures like cramdown that punish the successful, tax the responsible, and hold no one accountable. Hopefully, the House will reject the cramdown amendment to H.R. 4173, just as the Senate wisely rejected cramdown earlier this year.

I hope the witnesses can provide us with some positive suggestions for improving voluntary mortgage modification programs, suggestions that are not dependent on enactment of cramdown. However, I don't believe that we will truly get out of this crisis until we focus our efforts on legislation that effectively improves the economy, creates jobs, and revitalizes the housing market.

Thank you, Mr. Chairman. I yield back.

Mr. COHEN. Thank you, Mr. Smith. I now recognize the gentleman from Georgia, the Committee Chair of the Antitrust Committee and Courts.

Mr. JOHNSON. Thank you, Mr. Chairman, for holding this important hearing on the Home Affordable Modification Program. It is ironic that the banking industry that made so much money based on these mortgage-backed securities that they both sold and purchased, that they would—I mean, they made a lot of money. When

things got bad for them, they got a government bailout. When they got the bailout, when they got the money, they failed and refused to use it to help folks on Main Street with issues such as foreclosure relief, and instead used it in part for obscene bonuses for work that was supposed to be meritorious but actually put us in the shape where the citizens had to bail them out.

And it is ironic that the Representatives in Congress who care more about the banking industry than they do about the people that they represent; it is ironic that—it is really an irony, you know, they will not support bankruptcy judges being able to restructure loans on the debtor's primary residence. The banking industry is fighting right now with our TARP money to oppose that. Why they are doing it, I don't know, but money, they say money is the root of all evil.

But, today, we will explore the viability of HAMP, Home Affordable Modification Program, and we will explore whether voluntary mortgage modification is a viable way to keep families in their homes. There are many who say that it is viable, but it is not being exercised in good faith by the banks. And it is, this modification, mortgage modification is of extreme importance in today's economy. Currently, our Nation is experiencing a major mortgage foreclosure crisis, and many families are struggling to make ends meet.

For homeowners who are struggling with their mortgage, a foreclosure can be devastating, impacting your credit, impacting your ability to obtain new employment if you have lost your job, and it has so many negative side effects. And foreclosure not only affects the family who owned the house, but also the neighborhood surrounding the house, bringing down the value of the surrounding houses, creating places where criminals and criminal conduct could take place, and just making the neighborhood look as if no one cares about it. And it is a psychological problem that ensues in people in the neighborhoods where there is large foreclosure activity, and it is just not good for people, and it is not good for America for us to—and for the banking industry and their supporters, to not want to take meaningful action to help the folks who are struggling on Main Street.

HAMP was intended to help homeowners modify their mortgage payments to make them more affordable and avoid foreclosure. It was designed to strengthen the housing market and stabilize the overall economy. It has been alleged that HAMP is a failure and has failed to help the majority of distressed homeowners modify their mortgages and stay in their homes. I am deeply concerned about these most serious allegations, and I am glad, Mr. Chairman, that you have called a hearing on this particular issue. If those allegations of ineffectiveness of HAMP are true, then Congress should act to ensure that HAMP is restructured to fulfill its intended and very needed purpose.

I thank the Chairman once again, and I look forward to hearing from our witnesses today, and I yield back.

Mr. COHEN. Thank you, Mr. Johnson.

Does Mr. Coble, the gentleman from North Carolina desire—thank you, sir.

I now recognize the gentleman from Virginia, the honorable Mr. Scott, Chairman of the Crime Subcommittee.

Mr. SCOTT. Thank you, Mr. Chairman. And, as they say, I will be brief.

There are two issues that I think are important. The first deals with the fact that many people are what is called upside down in their mortgages, where they owe more than the house is worth. In situations where there is secured collateral and the value is less than the debt, the property is liquidated; the secured creditor gets what is achieved from a distress sale, which is usually lower, minus expenses, and that is all they get.

There is an option to what is called cramdown; that is, you can reaffirm the debt at the value of the property. That is virtually always a better deal for the creditor because he is going to end up getting more than he would have in the distressed sale minus the expenses. And so that the so-called cramdown is available in bankruptcy except for home mortgages. We need to find out why that exception is there and whether that is an appropriate exception. The other—and whether or not that is a deterrent to modifications.

The other is whether or not there are some disadvantages in accounting for modifications, because I understand that there may be a situation where, if you agree—if a bank agrees to a modification, they have to realize the loss, which they didn't have to do before they agreed to a modification, which negatively affects their earnings. And there may be a situation where it affects their balance sheet, where the modification gives them less capital, less lending authority. So whether there are disadvantages in the accounting system, disincentives in the accounting system to agreeing to modifications, and also to why and certainly the reason why we shouldn't have cramdown, whether or not that would be an incentive to modification.

So I will looking at those two issues, Mr. Chairman. And I thank you for holding the hearing.

Mr. COHEN. Thank you, sir.

I would now like to recognize the distinguished Chairman of the Committee, the champion of cramdown, the champion of the people, the dispossessed, those in need of help, those who are calling and needing support to live the American way of life, the distinguished gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I think you should remain Chairman in the next Congress as well. So ordered.

This is important to us because, as you are going to testify, the subprime mortgage debacle was what triggered the financial place that we find ourselves in not nationally but globally as well, because they chopped up all those mortgages, rebundled them, and sent them out all over the country to all the markets and all over the world.

Now, our Judiciary Committee, and I think everybody here on the Subcommittee, supported a simple solution since we have jurisdiction of bankruptcy to allow the primary home, as Chairman Scott was referring to, to be able to be adjusted where there was fairness and a just cause for doing it. We passed it in the House. The Senate, as usual, they weren't able to shut off the filibusters, so the bill was withdrawn, and so we are working again.

I just left a press conference of the Congressional Black Caucus, and that is what we were talking about; how do we create jobs and ease this crisis that we are in?

I would like to hear from all of you about the sad fact that coming out of an economic downturn, getting the jobs rate up is the toughest single thing that we have to do. And so I am proud of the Chairman for holding the hearing, and I look forward to your testimony. Thank you.

Mr. COHEN. Thank you, Mr. Chairman.

I would now like to thank everybody for their statements.

Without objection, other Members' opening statements will be included in the record.

Mr. COHEN. I am pleased to introduce our witnesses, and we do them in the order of their testimony. First, thank you all for participating. Without objection, your written statements will be placed in the record. I ask you to limit your oral remarks to 5 minutes. Note that we have a lighting system that starts with a green light. After 4 minutes, it turns yellow, which means you have got a minute to go. At red, it is 5 minutes, and you should be finished or in the process of being finished.

After each witness has presented his or her testimony, Subcommittee Members will be permitted to ask questions, again, theoretically subject to the 5-minute limit.

Our first witness is Mr. Adam Levitin. Professor Levitin specializes in bankruptcy and commercial law. Before joining the Georgetown faculty, he practiced in the business finance and restructuring department of Weil, Gotshal & Manges limited liability partnership in New York. He also served as special counsel for mortgage affairs for the Congressional Oversight Panel.

His research focuses on financial institutions, the role of the consumer and business credit economy, credit card regulation, mortgage lending, identity theft, deficit DIP financing, and debtor in possession financing and bankruptcy claims trading. Thank you for coming, Professor Levitin, and will you proceed with your testimony.

## TESTIMONY OF ADAM J. LEVITIN, GEORGETOWN UNIVERSITY LAW CENTER

Mr. LEVITIN. Mr. Chairman, Ranking Member Franks, and Members of the Committee, good morning.

My name is Adam Levitin. I am the associate professor of law at Georgetown University Law Center. I also serve as special counsel to the Congressional Oversight Panel for the Troubled Asset Relief Program and am the Robert Zinman Resident Scholar at the American Bankruptcy Institute. The views I express today are my own.

We are now over 2 years into our foreclosure crisis, unequaled since the Great Depression. The picture is grim. Mortgage foreclosure rates are at four and a half times their historic level. Over 2 million American families have already lost their homes in foreclosure sales. Millions more will over the next few years. The cornerstone of Federal efforts to mitigate the foreclosure crisis is the Home Affordable Modification Program, or HAMP.

HAMP provides taxpayer-funded incentive payments to mortgage servicers, lenders, and homeowners to facilitate standardized loan modifications. A HAMP modification involves an initial trial modification period, after which the modification converts to what is termed a permanent status, even though permanent modification is actually only a 5-year, after which monthly payments increase.

In order for a HAMP modification to avert, rather than merely delay foreclosure, three things are necessary. First, a trial modification must be commenced. Second, the trial modification must convert to so-called permanent status. And, third, the permanently modified loan must not redefault.

HAMP has had some success at the first stage. There has been around 1 million trial modifications offered to borrowers, and around 70 percent have resulted in trial modifications commencing. Commencing the trial modification is easy, though. It can be done on a no-doc, a verbal basis. Even so, there was a sharp decline in the monthly number of new HAMP trials commenced in November, suggesting that monthly enrollment in the program might have already peaked.

Unfortunately, exceedingly few trial modifications have converted to permanent status. Data released yesterday by Treasury indicates that 9 months into HAMP, there are but 31,382 permanent modifications. Treasury has predicted a 50 to 75 percent conversion rate, but the Congressional Oversight Panel reported that as of the end of October, less than 5 percent were converting to permanent status by the end of the standard 3-month trial period.

HAMP's trial to permanent conversion rate has improved in recent months, but it is still at a pathetically low level, suggesting that the total number of permanent modifications produced by HAMP will be quite limited, and certainly not enough to have a noticeable impact on the foreclosure crisis. Conversion from trial to permanent status, however, is not the only obstacle for HAMP modification to be successful. The modified loan must also continue to perform.

It is too early to say much about redefaults on permanent HAMP modifications, but Treasury's own baseline prediction is that 40 percent will redefault within the first 5 years. I think that is optimistic, unfortunately. The closest structural analog to HAMP modified loans are the exotic subprime loans that we saw in recent years.

To be fair, the monthly payments on HAMP modified loans are far more affordable, but both HAMP mods and subprime loans feature below-market introductory rates that step up over time, balloon payments, and extremely high loan-to-value ratios. Indeed, HAMP loans actually look worse than some subprime loans because of their deep level of negative equity, typically around 124 percent loan-to-value ratio. The sustainability of HAMP modifications, therefore, is highly suspect.

Taken as a whole, low conversion rates and high expected redefault rates suggest that the success rate for HAMP modifications will be exceedingly low. Even based on Treasury's own assumptions, there will only be a 20 to 30 percent success rate, which will mean that current trial modifications would yield less than 250,000 permanent modifications. That is a drop in the bucket relative to

foreclosures. HAMP is, unfortunately, incapable of producing the volume of modifications necessary to have a macro-economic impact, even if it does help individual borrowers.

Treasury seems to believe that HAMP can be corrected through some technical fixes and moral suasion. I hope that is correct, but I would submit that the program is fundamentally incapable of helping a substantial number of homeowners faced with foreclosure. What is more, homeowners cannot wait 6 months to find out if Treasury has finally gotten it right this time.

The mortgage industry has had multiple bites at the apple to get voluntary modification and refinancing programs working: private modifications, the Hope Now Alliance, the FHA-secure refinancing program, HOPE for Homeowners Refinancing Program, and now HAMP. All of these programs rely on voluntary mortgage servicer cooperation for success, and none has done the job. For a variety of reasons, including limited capacity, skewed incentives, and contractual restrictions, mortgage servicers are either unable or unwilling to perform sustainable modifications in sufficient volume.

I would urge Congress to consider modification possibilities that do not rely on servicer participation. It is time to try something else. HAMP is not working.

[The prepared statement of Mr. Levitin follows:]

PREPARED STATEMENT OF ADAM J. LEVITIN

GEORGETOWN UNIVERSITY LAW CENTER

*Adam J. Levitin*
*Associate Professor of Law*

**Written Testimony of**

**Adam J. Levitin**
**Associate Professor of Law**
**Georgetown University Law Center**

Before the
House of Representatives
Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

"Home Foreclosures: Will Voluntary Mortgage Modification Help Families Save Their Homes? Part II?"

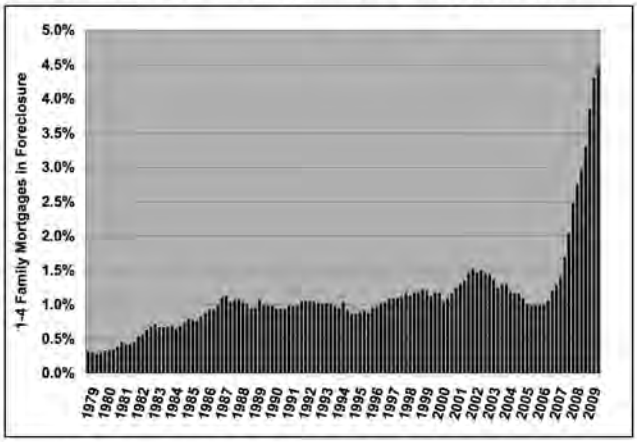
December 11, 2009

Mr. Chairman, Members of the Committee:

Good morning. My name is Adam Levitin. I am an Associate Professor of Law at the Georgetown University Law Center in Washington, D.C., where I teach courses in bankruptcy, commercial law, contracts, and structured finance. My research and writing focus on consumer finance and corporate bankruptcies. In particular, I have written about the obstacles to mortgage modification in the current crisis. I also serve as Special Counsel to the Congressional Oversight Panel for the Troubled Asset Relief Program, and am the Robert Zinman Resident Scholar at the American Bankruptcy Institute. The views I express today are my own.

We are now well into the third year of the foreclosure crisis, and there is no end in sight. Since mid-2007 nearly six million homes entered foreclosure,[1] and over two million borrowers lost their homes in foreclosure.[2] As of September 31, 2009, the Mortgage Bankers Association reported that 4.47% of 1-4 family residential mortgage loans were currently in the foreclosure, process a rate more than quadruple historical averages. (See Figure 1.) Additionally, 9.64% of mortgages were at least a month delinquent.[3]

**Chart 1: Percentage of 1-4 Family Residential Mortgages in Foreclosure[4]**




Unfortunately, no end is in sight. By the end of 2010, another 7 million homes are expected to enter foreclosure.[5] *Unless the crisis is abated, by the time it runs its course, as many as one in five residential borrowers will have gone into foreclosure.*

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[1] HOPE Now, Press Release, Dec. 2, 2009, *at* https://www.hopenow.com/press_release/files/October%202009%20Data%20Release.pdf (listing 5,710,039 foreclosure starts between July 2007 and September 2009).

[2] *Id.* (listing 2,018,873 completed foreclosure sales between July 2007 and September 2009).

[3] Mortgage Bankers Association, National Delinquency Survey.

[4] Mortgage Bankers Association, National Delinquency Surveys.

[5] *Not Much Relief*, NEW YORK TIMES, July 5, 2009, at WK7.

Private lenders, industry associations, and two successive administrations have made a variety of efforts to mitigate the crisis and encourage loan modifications and refinancings. A series of much hyped initiatives, such as the FHASecure refinancing program and the Hope4Homeowners have all met what can charitably be described as limited success. FHASecure, predicted to help 240,000 homeowners,[6] assisted only a few thousand borrowers before it wound down,[7] while Hope4 Homeowners, originally predicted to help 400,000 homeowners,[8] had closed only 94 refinancings as of September 23, 2009.[9]

The latest government attempt to address the foreclosure crisis is the Making Home Affordable Program (MHAP), and its two components, the Home Affordable Refinance Program (HARP) and the Home Affordable Modification (HAMP). Sadly, MHAP is also a failure, and Treasury's attempts to remedy the defects in the program are unlikely to fundamentally change its performance; there is no indication that MHAP will have a meaningful impact on the foreclosure crisis.

The following testimony provides a brief overview of MHAP, shows how MHAP is a failure by any metric, explains why Treasury's attempts to remedy the program are unlikely to have much impact, addresses potential causes of MHAP's failure, and considers potential alternative approaches.

## I. OVERVIEW OF HARP AND HAMP

MHAP attempts to deal with the foreclosure crisis by encouraging the preemptive refinancing of at-risk mortgages through HARP and by modifying defaulted mortgages through HAMP. HARP permits current, owner-occupied, government sponsored enterprise (GSE)-guaranteed mortgages to refinance into a more sustainable GSE-eligible mortgage. Critically, HARP permits refinancings for homeowners with up to 125% LTV without requiring additional private mortgage insurance. Treasury estimates that HARP could assist between four to five million homeowners refinance.[10]

HAMP is a mortgage modification program that uses TARP funds to facilitate the modification of qualified mortgages through incentive payments to mortgage servicers, homeowners, and lenders. HAMP modifications are on a standard template that aims to reduce the monthly mortgage payment to 31 percent of the borrower's monthly income after all arrearages have been capitalized. This is done by first reducing interest rates incrementally to as low as 2 percent, then stretching out the loan's term if possible, and then stretching out the loan's

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[6] *See, e.g.*, Press Release, US Dep't of Housing and Urban Development, Bush Administration to Help Nearly One-Quarter of a Million Homeowners Refinance, Keep Their Homes; FHA to implement new "FHASecure" refinancing product (Aug. 31, 2007), *available at* http://www.hud.gov/news/release.cfm?content=pr07-123.cfm; Press Release, US Dep't of Housing and Urban Development, FHA Helps 400,000 Families Find Mortgage Relief; Refinancing on pace to help half-million homeowners by year's end (Oct. 24, 2008), *available at* http://www.hud.gov/news/release.cfm?content=pr08-167.cfm.

[7] Michael Corkery, *Mortgage 'Cram-Downs' Loom as Foreclosures Mount*, WALL ST. J., Dec. 31, 2008.

[8] Dina ElBoghdady, *HUD Chief Calls Aid on Mortgages a Failure*, WASH. POST, Dec. 17, 2008, at A1.

[9] Congressional Oversight Panel, *October Oversight Report: An Assessment of Foreclosure Mitigation Efforts After Six Months*, Oct. 9, 2009, at 83.

[10] U.S. Department of the Treasury, Making Home Affordable Summary of Guidelines (Mar. 4, 2009) (online at www.treas.gov/press/releases/reports/guidelines_summary.pdf).

amortization period (forbearing on principal).[11] To qualify for HAMP, a loan must be delinquent, for no more than conforming loan limit, and secured by an owner-occupied primary residence, and the homeowner must be employed. If the homeowner qualifies for HAMP, then the servicer is required to run a comparison of the net present value (NPV) of the value of the unmodified loan and the value of the loan if it were modified per HAMP guidelines. If the loan's NPV would be greater under a modification that without, the servicer is required to offer the borrower a modification, if a modification is permitted under the servicer's contractual restraints. If the modified NPV would be lower, the servicer is still permitted to offer a modification. A large number of GSE HAMP modifications have been NPV negative.[12]

HAMP modifications begin with a three-month trial modification.[13] If the borrower is current on payments at the end of the three-month trial period and has provided full supporting documentation, such as proof of income, then the modification becomes "permanent,"[14] and incentive payments commence.[15] "Permanent" modifications, however, have fixed monthly payments for only five years. After five years, interest rates on the modified loans increase up to a cap.[16] In addition, Treasury contributes cash toward interest-rate reductions, and it also provides a variety of incentive payments to the defaulted homeowner, servicer, and lender. Treasury does not make any incentive payments unless a modification becomes permanent.

Treasury hopes to modify up to three million to four million mortgages under the HAMP program,[17] and has stated that around 375,000 trial modifications are scheduled to become permanent before the end of the year.[18]

As of October 31, 2009, 136,271 loans have been refinanced under HARP. Only a small fraction of these refinancings—17,091 or 12.5 percent—were of mortgages with negative equity, and only a handful of refinancings—272 or .2 percent—involved mortgages with loan-to-value (LTV) ratios of over 105 percent.[19] A substantial number of HARP refinancings involved mortgages with LTV ratios in the range of 80-90 percent; these refinancings might well have been feasible even without HARP. Thus, the true impact of HARP is likely significantly lower than even the 136,271 refinancings to its credit.

For HAMP, as of October 31, 2009, Treasury has catalogued 919,965 offers of trial modifications,[20] 595,536 trial modifications on unique borrowers,[21] but only 10,187 permanent

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[11] U.S. Department of the Treasury, *Home Affordable Modification Program Guidelines* at 6-7 (March 4, 2009) (online at www.treas.gov/press/releases/reports/modification_program_guidelines.pdf).

[12] *See* Congressional Oversight Panel, *supra* note 9.

[13] Treasury has extended the trial period to five months for HAMP modifications commenced before September 1, 2009, and is likely to extend the trial period for all modifications.

[14] U.S. Department of the Treasury, *Making Home Affordable Summary of Guidelines* (Mar. 4, 2009) (online at www.treas.gov/press/releases/reports/guidelines_summary.pdf); Congressional Oversight Panel, *October Oversight Report: An Assessment of Foreclosure Mitigation Efforts After Six Months* (Oct. 9, 2009) (online at cop.senate.gov/documents/cop-100909-report.pdf).

[15] U.S. Department of the Treasury, *Home Affordable Modification Program Guidelines* at 11 (Mar. 4, 2009) (online at www.treas.gov/press/releases/reports/modification_program_guidelines.pdf).

[16] *See* Congressional Oversight Panel, *supra* note 9, at 4, 27, 47-48.

[17] U.S. Department of the Treasury, *Making Home Affordable: Updated Detailed Program Description* (March 4, 2009) (online at www.treas.gov/press/releases/reports/housing_fact_sheet.pdf).

[18] http://www.financialstability.gov/latest/tg_11302009b.html

[19] Congressional Oversight Panel, *December Oversight Report: Taking Stock: What Has the Troubled Asset Relief Program Achieved?* Dec. 9, 2009, at 63-64.

[20] U.S. Department of the Treasury, *Making Home Affordable Program: Servicer Performance Report Through October 2009*, at 3 (online at www.makinghomeaffordable.gov/docs/MHA%20Public%20111009%20FINAL.PDF).

modifications.[22] Only 4.69% of trial modifications have become permanent within three months.[23]

## II. HAMP Is a Failure

HAMP is a failure. The ultimate success or failure of MHAP in general, and HAMP in particular, depends on the scale of relief that it can provide. It is patent that neither HARP nor HAMP will achieve anything near the scope of assistance that the administration projected or that will have a noticeable impact on the foreclosure crisis. The HOPE Now servicer alliance estimates that there are 3.47 million homeowners who are 60+ days delinquent on their mortgages as of the end of October 2009.[24] Yet, over its first eight months, MHAP has assisted less than 150,000 homeowners, and only around 10,000 who were delinquent. While improvements can be made to MHAP, there is no realistic possibility that HARP or HAMP will assist even a sizeable fraction of those who need help and qualify.

### *A. HAMP Has Produced Few Permanent Modifications*

The performance of HAMP, in particular, is concerning, as HAMP is the component of MHAP designed to assist homeowners in the most dire situations. Treasury has continues to use trial modifications as its public yardstick for the success of HAMP. This metric is largely meaningless. Trumpeting the achievement of 500,000 trial modifications[25] has eerie tones of the "Mission Accomplished" triumph for the hardly resolved Iraq War.

The only meaningful measure of HAMP's success or failure is the number of foreclosures avoided solely because of the program. There is not a clear numerical benchmark for such success; we cannot expect HAMP or any other program to prevent all foreclosures. A reasonable benchmark, however, might be historic foreclosure rates, which have been about 1% of mortgages entering foreclosure in any given year. This would entail approximately a 75% reduction in a current foreclosure rate.

There are three obstacles that must be cleared for a HAMP modification to have avoided a foreclosure. First, a trial modification must commence. Second, the trial modification must convert to a permanent modification. And third, the permanent modification must not result in a redefault. Success on the first or second stage is futile unless the modified mortgage is stable and continues to perform.

Treasury has met with some success on the first stage; a large number of homeowners have signed up for HAMP trial modifications. As of October 31, 2009, there were 595,536 unique borrowers who had received HAMP trial modification since March 1.[26]

The significance of this step should not be overstated, however. First, we do not know the reason that many of the homeowners who were offered trial modifications did not receive them. Second, very little is necessary to commence a trial modification; it can be done on an entirely verbal basis. While the number of trials commenced is substantial, it is far less than the 3,470,000 homeowners who are 60+ days delinquent as of the end of October 2009, and less than

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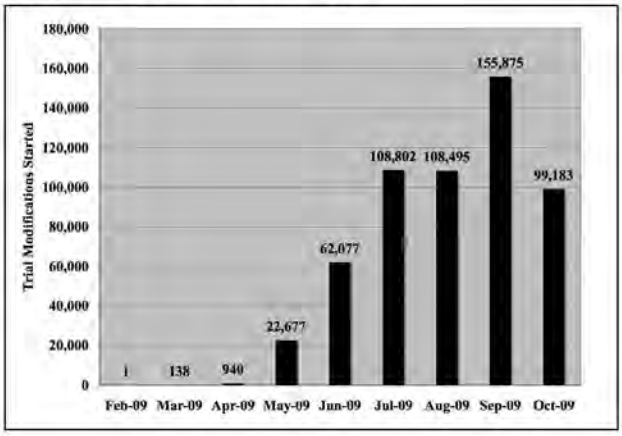
[21] Congressional Oversight Panel, *supra* note 19, at 64.
[22] *Id.*
[23] *Id.*
[24] HOPE Now, *supra* note 1.
[25] Peter S. Goodman, *Treasury Hails Milestone in Home Loan Modifications*, NY TIMES, Oct. 8, 2009, at B1.
[26] Congressional Oversight Panel, *supra* note 19, at 64.

the approximately 581,314 homeowners who have lost their homes in foreclosure between April 1 and October 31, 2009.[27]

A trial modification does temporarily lower a borrower's payments and stop foreclosure. Thus it provides borrowers with temporary relief. But unless the modification sticks, all a trial modification does is delay the foreclosure process by a few months. Moreover, there was a marked decline in the number of HAMP trial modifications commenced in October 2009, suggesting that the monthly trial enrollment in the program might have already peaked. (See Figure 2.)

**Figure 2. Trial HAMP Modifications by Month**




Treasury has had almost no success whatsoever at the second stage, converting trial modifications to permanent status. Treasury originally assumed that 50-75 percent of the trial modifications would convert into longer-term modifications.[28] Even now, Treasury notes that "Roughly 375,000 of the borrowers who have begun trial modifications since the start of the program are scheduled to convert to permanent modifications by the end of the year."[29] Scheduled is quite different from likely. It would be a remarkable accomplishment if even ten percent or 37,500 of those borrowers achieve permanent modifications by year's end. As of October 31, there were but 10,187 permanent modifications, meaning that only 4.69% of HAMP trial modifications converted to permanent after the originally allotted three-month trial period.[30]

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[27] HOPE Now, *supra* note 1.

[28] *See* Congressional Oversight Panel, Transcript Testimony of Treasury Assistant Secretary for Financial Stability Herbert M. Allison, Jr., *Congressional Oversight Panel Hearing with Assistant Treasury Secretary Herbert M. Allison, Jr.*, at 22-23 (Oct. 22, 2009) (forthcoming cop.senate.gov/hearings/library/hearing-102209-allison.cfm).

[29] http://www.financialstability.gov/latest/tg_11302009b.html

The net result of the modifications was that median (mean) monthly principal and interest payments dropped $500.25 ($598.49), from $1,419.43 ($1,554.14) to $849.31 ($955.65), a 35 (39) percent decline. [30] Congressional Oversight Panel, *supra* note 19, at 64

### *B. Most HAMP Modifications Will Redefault Within Five Years*

The extremely low number of permanent HAMP modification is itself discouraging, but even more discouraging are the predicted redefaults. Even thought HAMP modifications drastically lower borrower's monthly payments (the median monthly principal and interest amount declined 35% from $1,419.43 to $849.31),[31] redefaults are still likely to be high. Treasury's baseline prediction for redefaults is 40%.[32] Given the actual characteristics of HAMP modifications, however, significantly higher redefault rates are expected. In other words, HAMP is producing very few permanent modifications, and around half of them, if not more, will likely redefault within 5 years. Over the life of the loan, the redefault rate will be even higher. Assuming a (charitable) 50% redefault rate, HAMP has permanently avoided only around 5,000 foreclosures in 8 months, and some of which might have been avoided without taxpayer-funded incentive payments to servicers.[33]

High redefault rates should not be surprising for HAMP. Even though HAMP makes payments on modified loans initially affordable, HAMP modifications frequently result in loans that share many of the characteristics of the exotic, subprime mortgages that kindled the financial crisis: low, below-market introductory rates that step up over time, extremely high loan to value ratios, and balloon payments, either because of amortization periods that are longer than the loans' terms or forborne principal. Indeed, because of the deep level of negative equity, HAMP modified-loans actually look worse than some of the subprime loans made during the housing bubble. These loans were eminently affordable when at their teaser rates, but their sustainability was always suspect. So too are HAMP modifications. HAMP modifications are five-year modifications, no more.

### *C. Treasury's New Conversion Drive Is Unlikely to Have a Noticeable Impact*

Because of the poor conversion rate from trial to permanent, Treasury has recently announced that it will engage in an aggressive campaign of moral suasion to encourage servicers to convert more modifications to permanent status. As part of this campaign, Treasury states that it will require servicers to submit action plans, engage in greater monitoring of servicer's conversion rates, release data on individual servicer's progress in converting trial modifications to permanent, and even possibly withhold payments from servicers and impose monetary penalties and sanctions.[34]

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[31] Congressional Oversight Panel, *supra 9*, at 54.

[32] *See* Congressional Oversight Panel, Transcript Testimony of Treasury Assistant Secretary for Financial Stability Herbert M. Allison, Jr., *Congressional Oversight Panel Hearing with Assistant Treasury Secretary Herbert M. Allison, Jr.*, (Oct. 22, 2009) (Response to Questions for the Record).

[33] There are still a significant number of non-HAMP modifications occurring, although the number has declined substantially since the creation of HAMP. Thus in the first quarter of 2009, HOPE Now reported 370,436 private modifications, while only 236,734 in the third quarter of 2009. Whether these modifications are comparable with HAMP modifications in terms of affordability and sustainability is unclear.

To be sure, even if a HAMP modified loan redefaults, foreclosure is not the inevitable outcome; the servicer is free to attempt another modification (albeit without a federal incentive payment). Indeed, it is important to underscore that many mortgages have already been modified multiple times. Therefore, mortgage modification statistics that report the number of modifications or repayment plans enacted need to be discounted to reflect the number of unique borrowers helped.

[34] http://www.financialstability.gov/latest/tg_11302009b.html.

There are two problems with this approach. First, it is not apparent that Treasury itself understands why there are so few modifications converting from trial to permanent. Until and unless this is determined, attempts to rectify the situation will have haphazard results.

Second, Treasury has limited ability to pressure servicers, and, to date, it has shown little appetite to apply serious pressure. Treasury has known about low conversion rates for months, yet still appears reluctant to attempt to shame servicers into action. Treasury has indicated that it will release data on individual servicers' conversion rates, but not until January 2010.[35] Likewise, news reports indicate that Treasury will begin to pay servicers only upon modifications becoming permanent.[36] This is not a change to HAMP; Treasury has never made any payments under HAMP, except when modifications become permanent.

Similarly, as part of its "Conversion Drive," Treasury has stated, "[s]ervicers failing to meet performance obligations under the Servicer Participation Agreement will be subject to consequences which could include monetary penalties and sanctions." Treasury, however, has no authority to impose monetary penalties and sanctions. There is no such authority in law or under Servicer Participation Agreements.[37] The Servicer Participation Agreements allow Treasury to recoup funds paid for nonconforming modifications, but do not provide Treasury with any tools to penalize servicers for insufficient numbers of modifications. Treasury could withhold payments it is contractually obligated to make, but doing so risks servicers stopping all modification efforts. Similarly, public shaming measures bear the risk of backlash or even litigation. If Treasury is dissatisfied with servicer performance, its only real remedy is to bring suit for breach of contract, an exceedingly unlikely scenario. Treasury has the ability to bark, but not bite, and servicers know it, which makes moral suasion unlikely to affect change.

Even if Treasury is able to substantial increase conversion rates, they will never approach 100%, and many permanent modifications will still redefault. (See Figure 3.) In October 2009, there were 222,107 foreclosure starts,[38] significantly more than the 99,183 HAMP trial modifications initiated in the same month.[39] In October there were also 94,450 completed foreclosure sales.[40] To keep pace with completed foreclosure sales, 95 percent of trial modifications in October would have to convert to permanent modifications *with no redefaults on the modifications*.

Treasury's own initial assumptions of a 50-75% conversion rate and a 40% redefault rate indicate a predicted "success rate" of prevented foreclosures as a percentage of trial modifications between 20% and 30%. Thus, at best we can hope for HAMP to reduce foreclosure rates from four and a half times their historic levels to three times historic levels. This would be an improvement, no doubt, but a hardly a resolution of the foreclosure crisis, and more realistic assumptions produce substantially lower "success rates." To use a different conversion analogy, a two-point conversion is meaningless when a team is down by four touchdowns in the forth quarter.

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[35] http://www.financialstability.gov/latest/tg_11302009b.html (the December 2009 MHA Report comes out in January 2010).

[36] Peter Goodman, *U.S. Will Push Mortgage Firms to Reduce More Loan Payments*, N.Y. TIMES, Nov. 28, 2009, at A1.

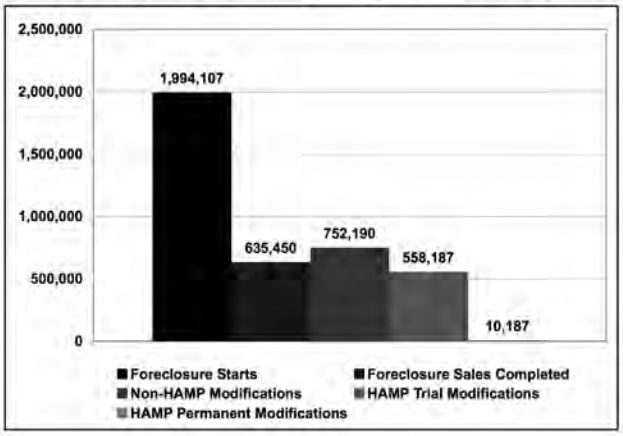
[37] Servicer Participation Agreement, *at* https://www.hmpadmin.com/portal/docs/hamp_servicer/servicerparticipationagreement.pdf.

[38] HOPE Now, *supra* note 1.

[39] Congressional Oversight Panel, *supra* note 19, at 63-64.

[40] HOPE Now, *supra* note 1.

**Figure 3. Foreclosures vs. Modifications (Cumulative March-October 2009)**[41]




## III. Why Has HAMP Failed?

The reasons for HAMP's failure are not yet clear. There are several possibilities.

### *A. Limited HAMP Eligibility*

There are factors limiting the HAMP eligibility. HAMP may simply be too restrictive in a number of ways. HAMP requires borrower employment. HAMP was designed when unemployment was significantly lower than today. Unemployment has become a major cause of mortgage delinquency, yet for borrowers who are delinquent because of unemployment, HAMP offers no assistance.

HAMP's DTI requirements also limit eligibility. HAMP requires modified loans to be at 31% and loans with premodification DTI of less than 31% are not eligible. The postmodification 31% DTI requirement means that some borrowers will not be able to qualify because the NPV on their loan, if modified, would be less than in foreclosure. Some of these borrowers would qualify, however, at slightly higher DTI ratios.

Conversely, the requirement that loans have a premodification DTI over 31% may also be too restrictive. The premodification 31% DTI requirement looks only at DTI per loan. There are some borrowers with multiple loans, each of which is at less than 31% DTI. These borrowers are ineligible for HAMP, although their total mortgage debt burden is well above 31% DTI.

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[41] U.S. Department of the Treasury, *Making Home Affordable Program: Servicer Performance Report Through October 2009*, at 3 (online at www.makinghomeaffordable.gov/docs/MHA%20Public%20110009%20FINAL.PDF) (accessed Dec. 7, 2009); HOPE NOW, *Latest HOPE NOW Data Shows Workout Solutions Outpace Foreclosures More than 3 to 1* (Dec. 2, 2009) (online at www.hopenow.com/press_release/files/October%202009%20Data%20Release.pdf); *Workout Plans (Repayment Plans + Modifications) and Foreclosure Sales, July 2007- September 2009* (online at www.hopenow.com/industry-data/HOPE%20NOW%20National%20Data%20July07%20to%20Sep09%20v2.pdf) (accessed Dec. 7, 2009).

HAMP is also restricted to owner-occupied properties. The negative externalities from a foreclosure do not depend on whether a property is owner-occupied or not, and renters also suffer in foreclosures. While the desire to avoid bailing out investors in understandable, investors in bank securities, GSE securities, private-label mortgage backed securities, and various asset-backed securities have all been bailed out directly or indirectly, so it is hard to make a case for treating owners of investment properties differently.

***B. Borrower-Side Problems***

The low conversion rates for HAMP modifications relate in part to borrower-side problems. HAMP trial modifications may be done on a verbal basis, but a permanent modification requires full documentation. Obtaining full documentation from borrowers is frequently difficult and delays conversion to permanent status. Borrowers are not good at managing paperwork, and some of HAMP's documentation requirements, such as requiring both tax returns and current pay stubs are redundant (tax returns speak to past income, which is of little relevance). Centralization of paperwork collection through a web-based portal would reduce paperwork problems; it would also help eliminate the frequently reported problem of servicers losing or claiming never to have received paperwork, as the paperwork could be easily be verified and retrieved from the web portal.

Another borrower-side problem is inability to make the trial modification payments. It is unknown how many borrowers have had payment defaults on trial modifications, a borrower can run 60 days delinquent and still qualify for a permanent modification, so long as all payments are made within the close of the trial period.

Longer-term, HAMP's inability to deal with unemployment and negative equity will contribute significantly to redefaults. HAMP has no solution for borrowers who receive permanent modifications and subsequently lose their jobs. Likewise, HAMP has no solution for negative equity. HAMP permits servicers to forgive principal, but there have been only a handful of permanent modifications involving principal forgiveness. Instead, servicers are forbearing on principal, meaning that it will have to eventually be repaid when the loan is paid off (including via a refinancing). The result is that HAMP modifications leave borrowers mired in deep negative equity; the median post-modification LTV is around 124%.[42]

Homeowners with negative equity have diminished incentives to care for their properties and might rationally abandon the property, if the loan is non-recourse or functionally non-recourse, and take up in cheaper rental property.

Homeowners with negative equity are also constrained in their ability to move, absent abandoning the house to foreclosure. There is a wide range of inevitable life events that necessitate moves: the birth of children, illness, death, divorce, retirement, job loss, and new jobs. Indeed, these are the primary reasons why homeowners move in the first place. When one of these life events occurs, if a homeowner has negative equity, the primary choices are between forgoing the move, finding the cash to make up the negative equity, or losing the house in foreclosure. Many will choose the foreclosure route.

One potential solution to the negative equity problem within the HAMP framework is to revise the HAMP NPV calculation to strongly differentiate redefault rates based on LTV in order to encourage principal forgiveness. Such a solution would only work, however, if NPV's of

[42] Congressional Oversight Panel, *supra* note 9, at 54.

lower LTV loans were increased, rather than the NPV's of high LTV loans decreasing, as the later would disqualify more loans mandatory modifications.

### *C. Servicer-Side Problems*

A variety of servicer-side problems may also be contributing to HAMP's failure. First, HAMP modifications are subject to any contractual restraints servicers have with investors. These restraints vary and rarely prohibit modifications, but the do often restrict term extensions and principal reductions.[43] Second liens also present servicers with an obstacle; first lien holders are reluctant to undertake modifications unless the second lienholder takes the first loss, and from the borrower's perspective, it is the total mortgage burden, not simply the payments to the first lienholder that matter. Therefore, unless modifications reduce payments to second lienholders, they are of limited benefit. HAMP has a new second-lien program, but to date it has not had any impact on the second lien problem.

Third, servicers may simply lack the capacity to handle the volume of modifications in a timely fashion. Servicers are not in the business of loan modification; the servicing business is primarily one of transaction processing, and it relies on automation and economies of scale. Loan modification is a manpower- and discretion-intensive undertaking involving underwriting, rather than transaction processing, and it is unreasonable to expect servicers to execute a quick or easy transition to this new line of business.

Fourth, HAMP may not have properly calibrated incentive payments to encourage servicers to perform permanent modifications. HAMP may be a money loser for servicers. Trial modifications are fairly cheap for servicers; there are significant additional expenses to covert a modification to permanent. HAMP incentive payments are made only for permanent modifications. Therefore, if a servicer anticipates one successful permanent modification for every ten trials, then the servicer will divide the incentive payment by ten. Unless that tenth of an incentive payment covers the marginal cost of attempting a permanent modification, servicers will be reluctant to expend additional effort attempting to convert trial modifications to permanent if they do not believe they will be successful.

## IV. POTENTIAL STEPS FORWARD

There are improvements that could be made to HAMP, but none will fundamentally transform it. In order for a program to be successful it must address (1) problems with servicers' contractual restrictions, capacity and incentives, (2) negative equity, and (3) unemployment. There are a number of ways to address servicer-side issues and negative equity; unemployment, however, presents a major challenge.

### *A. National Mediation Program*

One possibility for foreclosure mitigation is to implement a national mediation program as a prerequisite to foreclosure. A mediation program could also be combined with a standing government offer to refinance via FHA at 97% LTV with 31% DTI payments. A mediation program in Philadelphia has had some success; elsewhere, however, the results have been mixed.

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[43] *See, e.g.*, Anna Gelpern & Adam J. Levitin, *Rewriting Frankenstein Contracts: Workout Prohibitions in Residential Mortgage-Backed Securities*, 82 S. CAL. L. REV. (forthcoming 2009).

A recent study of a New York state mediation program found that in most cases the lender or servicer's representatives appeared without knowledge of the case or authority to settle.[44]

There are two things that can be accomplished by mediation. Mediation imposes delay, and delay is costly to lenders and servicers. The prospect of additional cost from delay might encourage more settlements. But it might also drag out the crisis. Delay via mediation does not sort between homeowners who can afford to pay a reasonably modified mortgage and those who have no ability to pay any reasonable modification.

***B. Permit Mortgage Modification in Chapter 13 Bankruptcy***

A second possibility to amend Chapter 13 of the Bankruptcy Code to permit modification of single-family principle residence mortgages and to allow greater flexibility in the modification of other mortgages.

Permitting the modification of single-family principle residence mortgages in bankruptcy would create a mechanism that would address the negative equity problem as well as the affordability problem, while denying relief to speculators who would abuse the system and to homeowners who cannot realistically afford even a modified mortgage.[45] Bankruptcy modification would bypass contractual, capacity, and incentive problems on the servicer side. It would also be immediately available and would have no additional cost to the taxpayers, and it would not result in higher mortgage costs or less mortgage credit availability as long as lenders' foreclosure losses remain greater than bankruptcy modification losses.

Bankruptcy modification would not yield a windfall to housing speculators or second home purchasers and would only help homeowners who could ultimately afford a reasonable mortgage. A mortgage loan modification in bankruptcy can occur only as part of a repayment plan. The automatic stay would likely be lifted on an investment property (or second home) before a plan could be confirmed. Accordingly, speculators and homeowners intent on keeping their second homes are unlikely to file for bankruptcy to seek mortgage modification in the first place.

To qualify for Chapter 13 bankruptcy, in which a loan can be modified, there must be at least one regular income in the homeowner's household,[46] and Chapter 13 plans must be feasible given the debtor's means.[47] This does not mean that any modification is permissible; federal common law of bankruptcy requires that modified loans reflect a reasonable risk premium for the debtor,[48] and the Bankruptcy Code requires that a mortgagee receive at least the present value of the property.[49] Only a debtor who can afford a loan modified within these limits will be able to

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[44] Center for New York City Neighborhoods, *Locked Out: Little Relief for NYC Homeowners in the Foreclosure Settlement Process*, 2009 Report.

[45] It is important to emphasize, however, that even with cramdown, Chapter 13 cannot help a homeowner, unless the homeowner has regular income. Regular income is a threshold eligibility requirement for Chapter 13. In a two-earner family, there need be only one regular income, but if a family's difficulty in paying its mortgage is caused by unemployment of the sole earner, Chapter 13 would not be an option. The reason I emphasize the importance of regular income for Chapter 13 eligibility is that unemployment will be a major factor in the coming wave of foreclosures.

[46] 11 U.S.C. § 109(e) (2005).

[47] 11 U.S.C. § 1325(a)(6) (2005).

[48] Till v. SCS Credit Corp., 541 U.S. 465 (2004).

[49] 11 U.S.C. § 1325(a)(5) (2005). *See* Stan Leibowitz, *New Evidence on the Foreclosure Crisis*, WALL ST. J., July 3, 2009; Congressional Oversight Panel, *The Foreclosure Crisis: Working Toward a Solution*, *at* http://cop.senate.gov/reports/library/report-030609-cop.cfm.

keep her home. Permitting bankruptcy modification of primary home mortgages thus steers a true course between extending the right sort of relief and not extending it too broadly.

***C. Create a Special, Streamlined Prepackaged Mortgage Bankruptcy Chapter (Chapter M)***

A third possibility is not to utilize Chapter 13, but instead to create a special, streamlined prepackaged mortgage bankruptcy chapter ("Chapter M"). In a Chapter M, all foreclosure actions would be automatically removed from state court to federal bankruptcy court. If the lender prevailed in the foreclosure action, then the homeowner would be offered a standardized pre-packaged bankruptcy plan. The plan could be based on HAMP modification guidelines (interest rate reduction to achieve 31% DTI goal, but without federal funding) plus cramdown to address negative equity.

If the homeowner were willing and able to pay under the plan, the homeowner would keep the house. Otherwise, the foreclosure sale would be completed on an expedited, standardized basis (say 45 days to sale) through a bankruptcy trustee's sale, which gives good title to the purchaser. The homeowner's non-mortgage debts would "ride-thru" unaffected. If the homeowner redefaulted, the same expedited foreclosure process would apply.

A Chapter M process would address negative equity (including second liens), as well as affordability. It would also remove mortgage servicers from the modification process, thereby eliminating servicer capacity and incentive issues.

A Chapter M might be more attractive to mortgage lenders than traditional Chapter 13 cramdown option because it offers a fast-tracked, standardized foreclosure process, quick foreclosure upon redefault, court-ordered protection of property against homeowner destruction during foreclosure, and the ability to provide clean title.

Chapter M would have no affect on non-mortgage lenders. Like Chapter 13 modification, Chapter M would have no cost to the federal government and would be immediately available, using existing courts and Chapter 7 panel trustees for sales. Unlike Chapter 13, Chapter M would avoid the adverse selection problem, as all homeowners in foreclosure choose between paying per standardized terms or losing the house quickly.

Chapter M could provide for a quick reset for housing market. But it also poses the risk of releasing a glut of properties on the market. Because lenders would trigger the process via filing a foreclosure action, it is ultimately in their control. Perhaps most significantly, Chapter M would not address problems of unaffordability due to unemployment or total consumer debt burdens.

***D. Encourage Forbearance to Deal with Unemployment***

Unemployment presents the greatest single challenge to foreclosure mitigation, as without income (or significant savings), no modified mortgage payment will be feasible. The difficulty faced by a lender is that it does not know whether the borrower's unemployment will be short-term or long-term or whether income from new employment will be comparable to that from the prior employment. If the unemployment is short-term and the new employment provides comparable income to the borrower, then forbearance is often a sensible solution, particularly when the borrower has equity in the property or the market is appreciating. Unfortunately, there is not a good mechanism for sorting among unemployed homeowners to determine who is a good risk for forbearance and who is not.

To the extent that Congress wishes to encourage forbearance, it is possible to do indirectly by imposing procedural hurdles to foreclosure, such as mandatory mediation or through tax or Community Reinvestment Act credits or by adjusting regulatory capital requirements. Risk-based capital requirements have already been lowered to encourage HAMP modifications. Instead of the normal 100% risk-weighting assigned to restructured loans, HAMP modified loans receive 50% risk-weighting.[50]

All of these methods for encouraging forbearance have drawbacks. Imposing delay has the effect of prolonging instability in the housing sector and delaying foreclosures on properties where there is no economic modification possible. Adjustments to risk-based capital have no impact on securitized mortgages, and there are definite risks to such an approach; risk-based capital requirements are safety-and-soundness devices and adjusting them in pursuit of other policy goals can undermine safety-and-soundness regulation.[51]

## V. CONCLUSION

The results to date from MHAP are deeply disappointing. Even the most optimistic view of HAMP and HARP's potential would now project the programs as having only a minor impact on the foreclosure crisis. Until and unless the problems of unemployment; negative equity, and servicer capacity, incentives, and contract restrictions are addressed, we are unlikely to see noticeably different results. These issues cannot be addressed within the current structure of HAMP.

Unfortunately, none of the solutions for foreclosures due to unemployment are particularly satisfying, and without addressing unemployment, foreclosures will remain at elevated levels. Bankruptcy presents possible solutions to negative equity as well as to servicer-side problems of capacity, incentives, and contractual restrictions, as it removes servicers from the modification business. A bankruptcy solution is not a silver bullet that will end the foreclosure crisis, but if negative equity and servicer-side problems can be successfully addressed, it will result in significant progress in foreclosure mitigation.

[50] *See, e.g.*, 12 C.F.R. Part 3, Appendix A, § 3(a)(3)(ii) ("For the purposes of the risk-based capital guidelines, a loan modified solely pursuant to the U.S. Department of Treasury's Making Home Affordable Program will not be considered to have been restructured.").

[51] Indeed, this speaks to the need to separate safety-and-soundness regulation from regulation in pursuit of other policies.



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Mr. COHEN. Thank you, Professor.

Our second witness is Ms. Faith Schwartz. Ms. Schwartz is the executive director of HOPE NOW Alliance, a coalition of Nationwide servicers, lenders, investors, counselors, and other mortgage market participants working together to help homeowners in distress. Previously she served as HOPE NOW's project manager. Prior to joining HOPE NOW, she was senior vice president of En-

terprise Risk and Public Affairs at Option One Mortgage Corporation, a subsidiary of H&R Block, Inc., and worked Not Walk to the Courthouse With You, or something to that effect. Ms. Schwartz has also served as the chair of the Mortgage Banking Association's Nonconforming Credit Committee in both 2005 and in 1996. And she was director of sales national lending for Freddie Mac.

Ms. Schwartz, welcome. And you may begin your testimony.

**TESTIMONY OF FAITH SCHWARTZ, HOPE NOW ALLIANCE**

Ms. SCHWARTZ. Thank you. Good morning, Chairman Cohen, Ranking Member Franks, and Members of the Subcommittee.

My name is Faith Schwartz, and I am the executive director of the HOPE NOW Alliance, and I appreciate the opportunity to appear before you today to discuss the loss mitigation efforts under way.

HOPE NOW is a broadbased industry, a nonprofit alliance working to reach and help as many homeowners as possible stay in their homes. Many HOPE NOW servicers are participating in HAMP. The Alliance is continuing to work with the GSEs and the Administration in implementing and improving the HAMP program. HAMP is an important tool to prevent foreclosures.

HOPE NOW servicers are providing other modifications and workout solutions for homeowners who do not qualify for HAMP. Also, HOPE NOW members are continuing outreach events for borrowers who have special—and we also have a new Web tool to better assist homeowners in applying for HAMP.

The current economic conditions are having a detrimental impact on homeowners and their ability to receive a loan modification. HOPE NOW and its members are working hard to help as many borrowers as possible. Unemployment continues to be our biggest challenge, and we are working with the industry and regulators on a solution to assist homeowners who want to stay in their homes while they look for reemployment.

First, I want to clarify that HAMP is not a voluntary program. Servicers are required to evaluate all Fannie and Freddie Mac loans for HAMP eligibility. Further, once a servicer signs up for HAMP, there is a legal contractual agreement between the servicer and the Administration requiring that all loans be reviewed for HAMP eligibility before going to foreclosure.

On average, over 20,000 trial modifications are being made every week, and a total of 728,000 have been reported thus far of trial modifications. And all of those people are making lower payments every month, substantially lower payments.

The key focus is now turning these trial modifications into permanent modifications. Servicers are doing everything possible to gather the required documentation from borrowers to make the modification permanent. We have suggested to Treasury some improvements to make this process easier, of which I might highlight later in the testimony.

HAMP is not the only useful tool that servicers are using to help borrowers. In 2009 alone, 2.6 million homeowners received a non-HAMP mortgage workout which prevented foreclosures. Since mid-2007, that number is 5.8 million homeowners. There are a variety of tools available to help distressed homeowners, including loan

modifications, repayment plans, extended forbearance and, if none of them work, deed in lieu and short sale. We encourage Treasury to report on non-HAMP workouts in addition to HAMP workouts to give a more complete picture of what is going on under way and show the true number of homeowners being assisted and avoiding foreclosure.

Since March 2008, HOPE NOW has held 55 local outreach events, helping 50,000 homeowners with the assistance of the Federal Reserve, banks, municipal government agencies, and other support, homeowners are given an opportunity to meet with a servicer or counselor to get help. We are planning at least 30 more in 2010. Additionally, we continue to support the Homeowners Preservation Foundation's Hotline, (888) 995-HOPE, 24 hours a day, 7 days a week, 365 days a year.

Finally, HOPE NOW has launched a Web portal, HOPE Loan Port, with six housing counseling agencies and six Nationwide servicers and a mortgage insurer. HOPE Loan Port counselors can submit borrowers' applications to HAMP, including full financial data and all necessary documentation directly to the servicer. This provides better communication among servicers, counselors, and homeowners, and eliminates the lost documentation issue. The objective is to scale this to market.

For loans in bankruptcy, HOPE NOW is working with servicers, bankruptcy attorneys, and Treasury in creating a loan workout solution for homeowners in bankruptcy, and I anticipate there will be progress made on this issue, which needs to address a best practice for modifications of loans already in bankruptcy.

There are ongoing issues and struggles with the HAMP program as has been noted. We are working on many of these, and I would like to highlight a few that we have recommended to Treasury. One is to streamline the HAMP documentation. The documentation requirements of HAMP should strike a balance of being less extensive but maintain the integrity of modifications. Document collection and perfection is often the cause of delays in turning trial mods to permanent mods. We believe Treasury should eliminate the requirement of tax returns for wage earners, and allow the use of most recent W-2 or two recent pay stubs. Some servicers do estimate an uptake of 20 to 30 percent of permanent mods.

Another example is to revise the redefault assumptions in HAMP NPV model. The net present value methods should be updated to reflect the positive impact of a trial performance and income verification. Servicer data indicates that borrowers who are successful in completing 3-month trial mods have significantly better performance than those who don't. With these changes, we anticipate the improvement on redefaults could include more borrowers, and you could get a better pick-up on productivity on loans.

In conclusion, HOPE NOW and its members are dedicated to implementing HAMP, providing solutions to those not eligible for HAMP, and reaching and assisting as many distressed homeowners as possible. Servicers continue to expand capacity, increase efficiency, and enhance execution on loan modifications, and I am certainly willing to keep you all informed of that progress. Thanks for the opportunity to testify.

[The prepared statement of Ms. Schwartz follows:]

PREPARED STATEMENT OF FAITH SCHWARTZ

**Statement of**

**Faith Schwartz**

**Executive Director, HOPE NOW Alliance**

**before the**

**Subcommittee on Commercial and Administrative Law**

**of the**

**Committee on the Judiciary**

**United States House of Representatives**

**December 11, 2009, 11:00 a.m.**

**Hearing on**

**"Voluntary Mortgage Modifications"**

**2141 Rayburn House Office Building**

Chairman Cohen, Ranking Member Franks, and members of the Subcommittee, I am Faith Schwartz, Executive Director of the HOPE NOW Alliance. I appreciate the opportunity to appear before you today to talk about mortgage modifications and what the members of the HOPE NOW Alliance are doing to help at-risk homeowners stay in their homes and avoid foreclosure during this challenging time. I will discuss our work with the Administration's Home Affordable Modification Program, servicers efforts on other loan workouts, our in-person outreach efforts across the country, and upgrades to the HOPE NOW website making it more useful for homeowners and housing counselors.

The HOPE NOW Alliance ("HOPE NOW") is a broad based industry and non-profit alliance with membership that includes housing counselors, mortgage servicers, investors, and other mortgage market participants. There are currently 46 members of HOPE NOW, including national HUD intermediaries, major mortgage lenders and virtually all major national mortgage servicers, Fannie Mae, Freddie Mac, and mortgage industry trade associations. Through unified, coordinated efforts, HOPE NOW members are reaching and helping as many homeowners as possible to maximize the preservation of homeownership and minimize foreclosures.

Many HOPE NOW servicers are participating in the Administration's Home Affordable Modification Program ("HAMP"), and the Alliance itself has worked consistently with our partners like the GSEs and the Administration in implementing and improving the HAMP program. HOPE NOW and its members are working to implement HAMP as effectively as possible as it is an important tool to prevent foreclosures.

HOPE NOW servicers continue to make dramatic on-going progress in reaching and helping borrowers. In addition to HAMP modifications, HOPE NOW servicers provide other modification and workout solutions for homeowners in difficulty who do not qualify for HAMP. HOPE NOW and its partners are continuing outreach events for borrowers to receive face-to-face assistance from servicers and counselors, and we have a special project to develop a web portal for counselors and servicers to streamline the submission of homeowner HAMP applications.

**Current Conditions**

Before I detail the efforts of HOPE NOW and its members, I want to provide a brief overview of the current conditions of the economy and its impact on homeowners. The unemployment level, mortgage delinquencies, and the increasing number of homeowners who have negative equity in their homes are

important factors to keep in mind when looking at the efforts and challenges faced in loan modifications.

According to Core Logic, 10.7 million (23%) of all U.S. mortgages have negative equity. This means there are millions of homeowners who owe more on their house than the house is worth. This is a serious issue, and due to certain program requirements, several modification programs are unavailable to these homeowners. Of even more concern is that, according to the Department of Labor, over 7.3 million people have lost their jobs since December 2007.

According to HOPE NOW's data, in October 2009, 3.5 million homeowners are 60 days or more past due on their mortgage. However, it is important to distinguish between foreclosure starts and foreclosure sales as less than 1 in 2 homeowners who start the foreclosure process end up in a foreclosure sale. **That indicates that significant efforts are being made to keep people in their homes.**

There is some good news. With all the outreach, loan modification programs, and efforts of servicers, counselors, and the Administration, workout solutions are outpacing foreclosures 4 to 1 thus far in 2009. That means, for every one borrower that goes to foreclosure, there are four at-risk homeowners receiving loan workouts. I will now explain these outreach efforts in more detail.

**HAMP**

It is not accurate to refer to the Administration's Home Affordable Modification Program ("HAMP") as simply a voluntary effort. All servicers are required to evaluate all loans owned by Fannie Mae and Freddie Mac for eligibility. Additionally, HAMP is a contractual, legal arrangement between Treasury and individual servicers. Servicers who are participating in HAMP must evaluate all loans they own or service for HAMP eligibility and must follow the guidance and procedure established by Treasury.

HOPE NOW and its members are supporters of and participants in the Administration's HAMP program. The HAMP program is an important part of an overall effort to help at-risk homeowners avoid foreclosure and stay in their homes. The fact that servicers have initiated more than 680,000 HAMP trial modifications by November 17 and have extended more than 920,000 trial mod offers shows that there has been a significant effort made to utilize HAMP to prevent foreclosures and assist homeowners.

This means that 680,000 troubled homeowners are making a smaller, more affordable mortgage payment, saving an average of $550 each month. According

to the Treasury Department servicers are initiating more than 20,000 HAMP trial modifications every week.

We fully recognize that the focus now is to turn these trial modifications into permanent modifications. Mortgage servicers participating in the Administration's HAMP program are doing everything possible to reach homeowners currently in a trial modification and complete the packages to enable them to get a permanent modification. Treasury indicates that about 375,000 trial modifications will have completed the three month trial period with timely payments by the end of the year. Servicers have received complete documentation in about 30% of active trial modifications. Getting complete documentation from homeowners who have a trial modification is one of the greatest challenges in making HAMP as effective as possible.

To help increase the number of people that are assisted under the HAMP program and increase the number of trial modifications that become permanent modifications, servicers have made a number of suggestions to Treasury to strengthen the program and enhance its implementation. These suggestions are included later in this statement.

**Loan Workouts in Addition to HAMP**

It is also important to recognize, that in addition to HAMP, the mortgage industry continues to make significant efforts to help all at-risk homeowners avoid foreclosure. One of the largest cooperative efforts is through the HOPE NOW Alliance. The latest data collected by HOPE NOW on workout solutions for homeowners shows that in 2009, 2.6 million homeowners received a mortgage workout that prevented a foreclosure. Overall, the industry has helped nearly 5.8 million homeowners avoid foreclosure since HOPE NOW started tracking workout data in mid-2007.

In addition to HAMP modifications, lenders and servicers are helping homeowners through a variety of plans including proprietary bank/investor specific loan modifications, repayment plans, extended forbearance, as well as deed in lieu, and short sales. The industry is continuing to produce individualized workout solutions tailored to each borrower's unique situation.

**Outreach to Troubled Homeowners**

Mortgage servicers continue to have difficulty in receiving responses from many distressed homeowners. Another critical task that HOPE NOW servicers, non-profits and other partners have focused on is contacting and helping borrowers in-person. Since 2008, HOPE NOW has held 55 outreach events in key

housing markets, providing opportunities for homeowners to meet in-person with a housing counselor and/or their mortgage servicer. Mortgage servicers, municipal government agencies, Federal Reserve Banks, numerous regulators, the Department of the Treasury, housing counseling agencies, local foreclosure prevention task forces and other partners have come together in key housing markets across the country to help nearly 50,000 borrowers. HOPE NOW is currently planning approximately 30 new outreach events across the country for 2010, and is working closely with Treasury to promote the HAMP program in all these events.

All HOPE NOW mortgage servicers participate in a monthly direct mail campaign to make sure delinquent borrowers are aware of their options for assistance. More than 250,000 HOPE NOW outreach letters are mailed to delinquent borrowers every single month. Since November 2007, HOPE NOW servicers have mailed over 5.7 million letters to at-risk homeowners, achieving an 18% response rate, which is approximately 6 times higher than typical servicer-to-borrower mailings.

In addition, HOPE NOW continues to support and promote the Homeownership Preservation Foundation's Homeowner's Hope™ Hotline, 888-995-HOPE. This national Hotline provides FREE counseling to homeowners, and is available 24 hours a day, 7 days a week, and 365 days a year to homeowners anywhere in the country. Since October of 2007, the Hotline has received over 3.2 million calls and counseled over 730,000 homeowners. The Hotline averages more than 5,500 calls per day, and in the past few weeks that number has risen to 8,000 calls per day.

**Web Tools to Assist Homeowners**

To better assist homeowners avoid foreclosure and receive a loan modification, the HOPE NOW Alliance is using a variety of web tools to assist homeowners and housing counselors. Since late 2007, HOPE NOW's website, www.hopenow.com, has been a useful resource for homeowners and housing counselors, providing information about how to reach mortgage servicers, what documentation is needed, and education about the different types of loan workouts. Additionally, a borrower can complete an online self assessment to determine if they meet the basic criteria to qualify for HAMP and provide detailed financial information that can immediately be sent to servicers to begin the process to obtain a workout solution.

To further assist at-risk homeowners, HOPE NOW has launched a web portal, "HOPE LoanPort", with six housing counselor agencies, six nationwide servicers, and a mortgage insurer who serves as a sponsor. This web portal allows

HUD-approved housing counseling agencies to assist troubled homeowners by submitting a homeowner's full application for assistance for a loan modification under the HAMP program. Through the HOPE LoanPort, counselors can submit all the homeowners' financial data and necessary documentations through secure lines directly to servicers. Housing counselors are able to track the progress of a homeowner's HAMP loan application. This program will help streamline the process of documenting and verifying where a delinquent borrower is in the process of qualifying for a HAMP modification by directly providing servicers with a completed application package. This web portal will also assist in converting HAMP trial modifications to permanent modifications. The expectation of the HOPE LoanPort is better communication between servicers, counselors, and homeowners, including elimination of lost documentation issues. The objective is to scale this to market, gain broad adoption, and work with strategic partners to leverage LoanPort.

In 2010, the HOPE LoanPort will be expanded to include additional servicer and counselor participants by leveraging a neutral open architecture that is compatible with the existing systems of servicers and counselors. This neutral portal will also provide transparency to help identify where any challenges may exist in the system. The development of this portal was based on significant feedback from investors, servicers, and non profit counseling organizations who all have a mutual interest in a successful system to help more homeowners. We will continue to report on the progress the LoanPort achieves in enabling servicers and counselors to assist more homeowners with their loan modification applications.

**Loans in Bankruptcy**

Currently, HOPE NOW is working with servicers, bankruptcy attorneys, and the Treasury Department on a solution for delinquent homeowners in bankruptcy. This joint working group is continuing to work on these solutions and we are optimistic that there will be a more streamlined approach to help borrowers who are in active Chapter 13 bankruptcy.

**Unemployment**

Unemployment continues to be the single greatest challenge facing an increasing number of homeowners and complicating loan modification efforts. An unemployed homeowner can often not pay ANY debts. Even a HAMP loan modification cannot work if the homeowner has lost his or her income. Serious study should be given to a product for unemployed borrowers. While under HAMP unemployed borrowers with extended benefits may be eligible for a modification, many unemployed homeowners will not pass the NPV test. Creating

an investor and industry acceptable solution that assists homeowners who have a willingness and desire to stay in their homes while looking for re-employment is a high priority.

**Improvements to HAMP**

The HAMP program is an important component of the effort to help at-risk homeowners who want to stay in their homes and have an ability to do so with some assistance. It is making a significant impact, but it does have some significant flaws that can be addressed to convert more homeowners from trial modifications to permanent ones. Here are several important changes that servicers have suggested to the Treasury Department. A number of these suggestions were developed by the HOPE NOW servicer working group. A complete list has been provided to the Treasury Department.

1) **Streamline HAMP documentation**. The HAMP program has detailed documentation requirements for both homeowners and servicers. Some of these are necessary to maintain the integrity of the program, but others can be adjusted to enable to servicers to identify and process qualified homeowners more quickly. One significant change that should be made is to immediately adjust documentation requirements to streamline income verification for wage earners. Many homeowners in a trial modification are not completing the tax return requirement. ***Treasury should consider eliminating the requirement for tax returns for wage earners and allow use of most recent W-2 or two most recent pay stubs.*** This change could significantly advance modifications and underwriting timelines. Some servicers estimate an increase of 20-30% in modification conversions. An alternative could be some form of ***"implied approval" process where the homeowner is notified that if they make the trial payment they are authorizing the lender to request their tax return information. Non-wage earner homeowners should continue to provide tax returns to verify income.***

2) **Revise the re-default assumptions in the HAMP NPV Model.** The Net Present Value Model (NPV) should be updated to reflect the positive impact of key HAMP features such as trial plan performance and income verification. The current re-default assumptions are based on historical modification programs that do not have the same rigor as HAMP and are resulting in homeowners not qualifying for the program. HAMP modifications are based on full underwriting, and servicer data demonstrates that borrowers who are successful in completing a three month trial plan prior to permanent modification have significantly better re-performance rates. With this change, some servicers estimate that re-

default rates will be about 30 to 50% lower than what is implied in the current NPV model.

3) **HAMP modification expirations**: A clear policy is needed for borrowers in HAMP trial modifications who (1) are current on their payments but fail to provide documents required by HAMP for a permanent modification; (2) are current but provided documents after the required time frame; or (3) made three payments but outside the required time period. If a homeowner is paying at the modified rate, policies should be established to deal with them rather than move to foreclosure. Servicers and the Administration should discuss options to set a uniform approach prior to December 31, 2009.

4) **Establish responsive and scalable exception process.** Treasury should establish a well-staffed help line and on site support for servicers to review and approve underwriting exceptions. Borrowers` personal and financial circumstances are highly individual and do not fit neatly into program rules that are quite prescriptive. Servicers are understandably reluctant to approve exceptions that are reasonable but outside the strict parameters of the program rules. Rapid response from Treasury would help these homeowners receive assistance.

5) **Clear communication and training for homeowners, counselors, servicers and advocates on HAMP process.** The Administration should increase clear and simple communications to consumers, counselors, servicers and investors on HAMP requirements, The Administration should strengthen efforts to clarify who is eligible for HAMP. There continues to be confusion among homeowners and stress on servicers in determining HAMP eligibility.

6) **HOPE NOW LoanPort:** The LoanPort initiated by HOPE NOW has the potential to assist counselors and servicers to help more borrowers complete their applications in a timely manner. Treasury should work with HOPE NOW members to scale use of LoanPort in order to enable housing counselors to assist borrowers in submitting complete applications for HAMP modifications. It will help address a critical concern- ***no more lost documents and incomplete applications between counselors and servicers.***

7) **HOPE NOW outreach events**: The Administration, HOPE NOW and other partners also can help more homeowners by holding events dedicated to collecting HAMP documentation from homeowner on existing trial modifications in high risk areas, and Treasury can assist servicers and

counselors in a program to locate in key high risk markets for one to two months to make substantial impact on assisting homeowners in those areas.

These are a number of steps that can be taken to strengthen the HAMP program; others should be reviewed after the current drive to convert trial modifications is completed. Servicers tell us that no new program requirements should be made until these changes are in place.

**Recognize Other Efforts to Assist Homeowners**

The HAMP program is an important effort that is assisting hundreds of thousands of homeowners. At the same time, servicers continue to assist hundreds of thousands more homeowners who do not qualify for HAMP through other solutions. These homeowners are avoiding foreclosure. HOPE NOW data shows that in 2009, 2.6 million troubled homeowners have received workouts that have prevented foreclosures. Going forward we would like to work with the Administration on how HOPE NOW can report on non-HAMP modifications and workouts that are effectively assisting homeowners and preventing foreclosures.

Mr. Chairman, Ranking Member Franks and members of the Subcommittee, the servicers, counselors and other partners in the HOPE NOW Alliance are dedicated to implementing HAMP and providing outreach and other assistance to troubled homeowners. HOPE NOW servicers are continuing to focus on expanding servicer capacity, increasing efficiency, and enhancing execution of loan modifications. These efforts will continue into 2010 until the housing market stabilizes and homeowners in need have received needed assistance. Thank you for inviting me to testify before you today on HOPE NOW's ongoing efforts to assist at-risk homeowners in avoiding foreclosure. I am happy to answer any questions you may have.

Support & Guidance For Homeowners

**December 11, 2009**

**About HOPE NOW**

HOPE NOW is a broad based industry and non-profit alliance with membership that includes counselors, servicers, investors and other mortgage market participants to maximize the preservation of home ownership while minimizing foreclosures. The alliance has created and is constantly working to improve a unified, coordinated plan to reach and help as many homeowners as possible. Roundtable and Housing Policy Council member companies are active members of HOPE NOW.

**Update**

**Membership:** Currently 46 mortgage market participants are members of HOPE NOW, including major mortgage lenders, servicers, insurers, Fannie Mae, and Freddie Mac. In addition, all HUD-approved counseling agencies, and the Mortgage Bankers Association and Housing Policy Council trade associations participate in HOPE NOW.

**2009 Accomplishments:**

- **Data Collection/total workouts:**
  - HOPE NOW members have completed a projected total of approximately **2.6 million foreclosure preventions in 2009**. In the month of October 2009 servicers completed more than 271,000 loan workouts. Of these workouts, over 73,000 were loan modifications. This is lower than our high of 140,000 modifications, due to the transition of trial HAMP modifications initiated but not yet finalized. Almost 5.8 million loan workouts were completed between July 2007 and October 31, 2009.

- **OUTREACH:**
  - HOPE NOW established and executed **26 outreach events** between January and November of 2009. Servicers, City Governments, Federal Reserve Banks, the Treasury Dept., and local housing non-profit agencies have come together at various locations across the country to **help over 28,000 borrowers**. HOPE NOW has 1 remaining outreach event scheduled for 2009. Since March 2008,

HOPE NOW has sponsored 55 outreach events and helped over 48,000 homeowners.
  - HOPE NOW servicers have mailed **5.7 million letters** to at-risk homeowners since November 2007, achieving an 18% response rate. The HOPE NOW response rate is approximately 6 times higher than servicer-to-borrower mailings.
  - In 2009, there have been almost **1.6 million total calls** from homeowners to the Hope Hotline, 888-995-HOPE. An average of more than 5,500 calls per day to the Hope Hotline which is available 24 hours a day, 7 days a week and 365 days a year.

- **Combating Mortgage Scam Fraud**
  - HOPE NOW worked with FTC and the Attorneys General, to combat mortgage scams with fraudsters.

- **Homeowners HOPE™ Hotline**
  - 1-888-995-HOPE, the Homeowners HOPE™ Hotline is a free counseling tool available to distressed homeowners 24 hours a day, 365 days a year. Since October of 2007, the hotline has received over 3.2 million calls and counseled over 730,000 homeowners. 1-888-995-HOPE is funded by mortgage industry members.

- **Updating loan servicing guidelines, unemployment programs, and short sale and deed in lieu guidelines feedback**
  - Guidelines were created and adopted by HOPE NOW servicers in June 2008. A key commitment in the guidelines was the adoption of uniform outreach efforts, standards, and timelines designed to streamline the process and make it more transparent for borrowers while loans were being "worked out." A redlined draft version of the updated guidelines was distributed on 10/27/09. Currently there are work streams in process to include additional HAMP processes.

**2010 Goals:** HOPE NOW will work to reach more homeowners and increase the number of loan workouts as the market dictates. 2010 plans include:

- **Outreach Events:**
  - HOPE NOW is planning over 30 outreach events across the country. HOPE NOW has aligned its Calendar with Treasury/Making Home Affordable and plans to partner with them throughout 2010. This calendar also includes servicers who do not participate in the HAMP program.

- At the request of our servicers, HOPE NOW is also looking to utilize new outreach models, increasing the ability for servicers and counselors to help distressed borrowers. This may include events to 1) collect incomplete HAMP mod documents, 2) utilize the Web Portal for intake using counselors, phoneathons requiring less servicer, and a possible shared regional presence in key markets that dictate need.

- **HOPE NOW LoanPort**
  - HOPE NOW will be launching a new web portal that will allow Department of Housing and Urban Development (HUD)-approved housing counseling agencies assist troubled homeowners by determining potential eligibility and submitting a homeowner's full application for assistance for a loan modification under the Making Home Affordable program. The new HOPE LoanPort will streamline the process of documenting and verifying a delinquent borrower's eligibility for a Home Affordable Modification (HAMP) by directly providing servicers with a completed application package.

- **Data**
  - HOPE NOW currently receives data from 26 mortgage servicers. The summary reports generated from this data help reveal mortgage market trends and the effects of loss mitigation and foreclosure prevention efforts.

**In addition HOPE NOW and HPC staff will:**

- Continue to inform and educate Congress and financial services regulators of HOPE NOW's activities and progress.
- Hold calls with Treasury/GSE's and servicers to work through difficult issues around implementation of Making Home Affordable.
- Work cross government agencies such as HUD, Treasury, FHFA and the Federal Reserve Banks.
- Streamline and Execute government modifications and workouts.
- Communicate broad facts about industry efforts beyond HAMP.

Support & Guidance For Homeowners

**December 2, 2009**

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## LATEST HOPE NOW DATA SHOWS WORKOUT SOLUTIONS OUTPACE FORECLOSURES MORE THAN 3 TO 1

### Unemployment Still Jeopardizes Ability to Stabilize At-Risk Borrowers

**Washington, DC (December 2, 2009) -** Since its formation in October 2007, HOPE NOW has led industry efforts to mitigate foreclosure. To date in 2009, HOPE NOW Alliance members and the mortgage industry have provided 2,640,000 modifications and repayment plans to homeowners at risk. In addition, the Department of Treasury reports 650,000 trial modifications implemented through the Making Home Affordable Program (HAMP). Therefore, total workout solutions in 2009 have exceeded 3.3 million homeowners helped versus an estimated 783,000 actual foreclosure sales. This does not account for other preventative solutions such as refinancing, short sales and deeds in lieu.

Despite an unprecedented use of government and private industry resources, unemployment and the weakened economy make it challenging for homeowners at-risk who want to remain in their homes. For many HAMP-participating loan servicers, HAMP modifications are the first stop for homeowners to obtain a modification. For homeowners who do not qualify, or are unable to provide updated required documentation, other tools are deployed by servicers to avoid foreclosure.

"Mortgage servicers, non-profit HUD-approved counseling agencies and the Homeowner's HOPE™ Hotline are committed to helping at-risk borrowers. When you couple overall 2009 year-to-date workout solutions with the 650,000 HAMP trial modifications currently in place, it shows the industry is working hard to stem the tide of foreclosures," said Faith Schwartz, Executive Director.

"Our number one priority is to convert HAMP modifications, but also do our best to help borrowers with all solutions available. This sometimes means a graceful exit via short sale or deed in lieu if a borrower has no other options."

Schwartz also commented that after two years of collecting loan workout information, HOPE NOW believes it is important to revise its data reporting to complement the government HAMP reporting. Currently, HOPE NOW only reports on HAMP modifications when they become permanent. Going forward, the goal is to focus on all activities that fall outside of HAMP and allow for full review of solutions available. It is expected that any new reporting from HOPE NOW will take place in the first quarter of 2010.

Please see the summary chart below which captures all loan workouts throughout the last two years.

- HOPE NOW will continue to hold outreach events across the country with its many partners to reach at risk homeowners (55 events to date).
- HOPE NOW will promote the 888-995-HOPE Homeowner's Hope™ Hotline and HOPENOW.com which allow for counseling for homeowners 24 hours a day, 7 days per week.
- HOPE NOW will fight mortgage scammers and work with the Government to identify copy cat organizations that confuse borrowers.
- HOPE NOW will continue to focus its efforts on the HOPE NOW LoanPort, a Web portal pilot that will help servicers, borrowers and housing counselors complete HAMP modifications.
- HOPE NOW will continue to work with all stakeholders to reach more borrowers at-risk to focus on keeping borrowers in their home and on stabilizing the housing market.
- HOPE NOW will remain committed to working with the Government, servicers, investors and non-profits to reach at risk borrowers and help with all alternatives to foreclosure.

## SNAPSHOT EFFORTS JULY 2007 THROUGH OCTOBER 2009

- 3.6 mm repayment plans
- 2.2 mm modifications
- 5.8 mm workout solutions

- 5.7 mm foreclosure starts
- 2.0 mm foreclosure sales
- 3.47 mm homeowners 60 day plus delinquent

HOPE NOW
WORKOUT PLANS and FORECLOSURES
July 2007 - October 2009

BORROWER LOAN WORKOUT PLANS

| | 2007 Q3 | 2007 Q4 | 2008 Q1 | 2008 Q2 | 2008 Q3 | 2008 Q4 | 2009 Q1 | 2009 Q2 | 2009 Q3 | Oct-09 | Jul 2007-Oct 2009 ("Life to Date") Totals |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Repayment Plans | 357,900 | 348,531 | 314,453 | 302,565 | 335,152 | 345,078 | 340,384 | 496,097 | 613,907 | 198,373 | 3,652,440 |
| Prime | 154,383 | 150,127 | 146,814 | 141,940 | 179,864 | 203,752 | 215,778 | 341,929 | 444,754 | 139,676 | 2,130,916 |
| Subprime | 203,517 | 198,404 | 167,639 | 160,725 | 155,288 | 141,327 | 124,606 | 154,168 | 169,152 | 58,698 | 1,521,624 |
| Modifications | 72,773 | 139,467 | 170,218 | 220,349 | 256,188 | 314,602 | 370,436 | 310,556 | 286,734 | 73,190 | 2,158,512 |
| Prime | 29,714 | 56,634 | 46,142 | 56,202 | 70,503 | 92,126 | 121,011 | 127,871 | 115,691 | 36,468 | 734,367 |
| Subprime | 43,058 | 82,833 | 122,068 | 164,147 | 185,685 | 222,477 | 249,425 | 182,685 | 171,043 | 36,722 | 1,424,145 |
| Workout Plans | 430,673 | 487,998 | 484,669 | 522,914 | 591,340 | 659,680 | 710,820 | 806,653 | 900,641 | 271,563 | 5,810,952 |
| Prime | 184,097 | 196,761 | 196,961 | 198,042 | 250,367 | 295,877 | 336,788 | 469,800 | 560,445 | 176,144 | 2,865,283 |
| Subprime | 246,575 | 286,237 | 287,708 | 324,872 | 340,973 | 363,803 | 374,032 | 336,854 | 290,196 | 95,419 | 2,945,669 |

FORECLOSURE STARTS

| | 2007 Q3 | 2007 Q4 | 2008 Q1 | 2008 Q2 | 2008 Q3 | 2008 Q4 | 2009 Q1 | 2009 Q2 | 2009 Q3 | Oct-09 | Jul 2007-Oct 2009 ("Life to Date") Totals |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Foreclosure Starts | 488,097 | 571,955 | 527,680 | 574,526 | 569,806 | 549,598 | 726,780 | 744,956 | 798,750 | 222,107 | 5,716,039 |
| Prime | 196,579 | 233,236 | 251,658 | 288,670 | 301,425 | 314,729 | 471,148 | 519,113 | 539,963 | 159,241 | 3,274,752 |
| Subprime | 291,518 | 338,720 | 276,023 | 285,856 | 268,381 | 234,870 | 257,631 | 225,825 | 198,796 | 63,866 | 2,435,286 |

FORECLOSURE SALES

| | 2007 Q3 | 2007 Q4 | 2008 Q1 | 2008 Q2 | 2008 Q3 | 2008 Q4 | 2009 Q1 | 2009 Q2 | 2009 Q3 | Oct-09 | Jul 2007-Oct 2009 ("Life to Date") Totals |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Foreclosure Sales | 153,408 | 168,213 | 203,503 | 246,193 | 263,326 | 201,603 | 201,314 | 236,895 | 250,959 | 94,450 | 2,018,973 |
| Prime | 60,696 | 64,956 | 83,332 | 106,202 | 130,700 | 101,516 | 113,308 | 153,836 | 165,494 | 67,523 | 1,050,563 |
| Subprime | 92,706 | 103,256 | 120,161 | 137,990 | 132,626 | 100,084 | 88,006 | 82,059 | 84,475 | 26,927 | 968,286 |

(Workout Plans = Repayment Plans + Modifications)

**Repayment Plans:** A plan that allows the borrower to become current and catch up on missed payments that are appropriate to the borrower's circumstances, which involves deferring or rescheduling payments but the full amount of the loan is expected ultimately to be paid and within the original contractual maturity of the loan.

**Modifications:** A modification occurs any time any term of the original loan contract is permanently altered. This can involve a reduction in the interest rate, forgiveness of a portion of principal or extension of the maturity date of the loan.

www.hopenow.com

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Support & Guidance For Homeowners

## HOPE NOW Alliance Homeownership Preservation Workshops

The Homeownership Preservation Workshops are key outreach initiatives designed to allow homeowners at risk of foreclosure an opportunity to meet with their mortgage servicer and a local foreclosure counseling organization face-to-face for free.

In 2008, the Alliance held twenty-nine (29) events across the country. Typically, NeighborWorks America served as a key co-sponsor. In addition, HOPE NOW servicers, the GSEs, local non profit counselors, and Federal Reserve Banks were major contributors to each event's success. The Alliance met with over 20,000 distressed homeowners, providing workout solutions to many of them.

New challenges bring new approaches for 2009, establishing plans for a five pronged outreach program to reach as many troubled homeowners as possible. With help from celebrity faces, planned Phone-A-Thons, new alliance partners, and deeper outreach initiatives, the coming year aims to build a stronger network to reach homeowners.

**2008 Events**

| Date | Locations | Number of Non-Profit Counselors | Number of Servicers | Number of Borrowers Reached |
|---|---|---|---|---|
| March 3 | Riverside, CA | N/A | 10 | 227 |
| March 5 | Anaheim, CA | N/A | 10 | 267 |
| March 7 | Stockton, CA | N/A | 12 | 411 |
| March 30 | Columbus, OH | 5 | 12 | 170 |
| April 1 | Philadelphia, PA | 30 | 14 | 328 |
| April 19 | Atlanta, GA | N/A | 13 | 696 |
| April 21 | Milwaukee, WI | 16 | 10 | 501 |
| April 22 | Indianapolis, IN | N/A | 14 | 312 |
| April 24 | Chicago, IL | 17 | 17 | 642 |
| May 3 | Memphis, TN | 19 | 9 | 232 |
| May 5 | Jacksonville, FL | 23 | 12 | 237 |
| June 9 | Dallas, TX | 28 | 22 | 469 |
| June 10 | San Antonio, TX | 12 | 11 | 150 |
| June 13 & 14 | Las Vegas, NV | N/A | 15 | 1328 |
| July 25 | Newark, NJ | 23 | 12 | 193 |
| July 26 | Mount Laurel, NJ | 10 | 12 | 206 |
| August 12 | Boston, MA | 52 | 20 | 2176 |
| August 21 | Orlando, FL | 7 | 19 | 1008 |
| August 22 | Estero, FL | 9 | 17 | 614 |
| August 23 | Ft Lauderdale/ Miami, FL | 14 | 19 | 1695 |
| September 13 | Fairfax County, VA | 15 | 12 | 241 |
| September 20 | Prince Georges Co., MD | 15 | 12 | 100 |
| October 22 | Tucson, AZ | 21 | 17 | 490 |
| October 23 | Phoenix, AZ | 22 | 17 | 1815 |
| November 15 | Houston, TX | 9 | 18 | 953 |
| November 19 | Cleveland, OH | 14 | 20 | 671 |
| November 20 | Cincinnati, OH | 18 | 15 | 366 |
| December 4 | Sacramento, CA | 18 | 19 | 2050 |
| December 6 | Los Angeles, CA | 14 | 21 | 1635 |
| Year-End Total Number of Borrowers Reached | | | | 20,183 |

**2009 Events**

| Date | Locations | Number of Non-Profit Counselors | Number of Servicers | Number of Borrowers Reached |
|---|---|---|---|---|
| January 10 | Belleville, MI | Snowed out, only intake forms collected | | 323 |
| January 15 | Denver, CO | 18 | 18 | 488 |
| February 14 | Hartford, CT | 19 | 15 | 1013 |
| February 26 | Kansas City, MO | 11 | 12 | 736 |
| March 25 | Newark, NJ | 35 | 19 | 903 |
| April 15 & 16 | Atlanta, GA | 15 | 20 | 3216 |
| April 22 & 23 | Miami, FL | 11 | 23 | 2332 |
| April 25 | Charlotte, NC | 9 | 18 | 536 |
| May 7 | Cleveland, OH | 6 | 18 | 403 |
| May 28 | Orlando, FL | 13 | 19 | 1583 |
| June 4 | St. Paul, MN | 13 | 12 | 741 |
| June 11 | Fresno, CA | 6 | 12 | 658 |
| June 13 | Bakersfield, CA | 7 | 11 | 495 |
| July 24,25 | Las Vegas, NV | 11 | 18 | 1569 |
| July31, Aug 1 | Phoenix, AZ | 10 | 18 | 2782 |
| August 27 | Woodbridge ,VA | 8 | 15 | 720 |
| August 29 | Springdale, MD | 10 | 15 | 1100 |
| September 17 | Boston,MA | 29 | 17 | 781 |
| September 26 | Tampa Bay, FL | 14 | 14 | 986 |
| October 22 | San Diego, CA | 8 | 15 | 957 |
| October 24 | Riverside, CA | 10 | 15 | 2441 |
| October 29 | Atlanta, GA | 16 | 11 | 2168 |
| November 4 | St. Louis | 12 | 12 | 722 |
| November 7 | Dallas | 8 | 17 | 845 |
| November 19 | Jacksonville FL | 6 | 13 | 595 |
| Dec 5 | Detroit | 10 | 16 | 938 |
| Dec 12 | Los Angeles | | | |
| Current Total number of homeowners reached | | | | 29186 |

**Draft Calendar for 2010 Outreach Events**

| Date | Locations | Number of Non-Profit Counselors | Number of Servicers | Number of Borrowers Reached |
|---|---|---|---|---|
| TBD | Fort Meyers FL | | | |
| | Fort Lauderdale FL | | | |
| | Houston TX | | | |
| | Modesto CA | | | |
| | Sacramento CA | | | |
| | Phoenix CA | | | |
| | Baltimore MD | | | |
| | Washington DC | | | |
| | Indianapolis IN | | | |
| | Atlantic City NJ | | | |
| | Long Island NY | | | |
| | Riverside CA | | | |
| | Las Vegas NV | | | |
| | Memphis TN | | | |
| | Atlanta GA | | | |
| | Minneapolis MN | | | |

| | | | | |
|---|---|---|---|---|
| | Orange Co. CA | | | |
| | Los Angeles CA | | | |
| | Kansas City KS | | | |
| | Tampa Bay FL | | | |
| | St. Louis MO | | | |
| | Seattle WA | | | |
| | Daytona FL | | | |
| | Denver CO | | | |
| | Richmond VA | | | |
| | Tucson AZ | | | |
| | Milwaukee WI | | | |
| | Oakland CA | | | |
| | | | | |

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Mr. COHEN. Thank you, Ms. Schwartz. I appreciate your testimony.

And our next witness will be Ms. Golant. Ms. Golant is a former assistant general counsel for—our third witness is Ms. Marjorie Golant. Yeah. Okay. But she is still a former assistant. Whatever. Partner of the Boca Raton Florida law firm Golant & Golant. Ms.

Golant currently represents borrowers and financial service litigation, defensive foreclosure and firm litigation and bankruptcy mitigation. She handles issues of securitization and structured finance issues, predatory lending, predatory servicing in truth lending, Florida Consumer Collection Practice Act and fair debt collection practices. Former assistant general counsel for Ocwen Financial, the second largest U.S. Subprime mortgage servicer, and head of the residential litigation subgroup, which managed all litigative mortgages and an approximately 500,000 loan U.S. Portfolio. Former district court magistrate judge in Pennsylvania.

Judge, would you proceed with your testimony.

**TESTIMONY OF MARGERY E. GOLANT, GOLANT & GOLANT, P.A.**

Ms. GOLANT. Thank you, Mr. Chairman, Ranking Member Franks, and Members of the Subcommittee, I appreciate your inviting me. Thank you for inviting me to testify regarding my work helping families facing foreclosure.

My testimony is based upon my work for these families and also my earlier work on quote/unquote the other side. In addition to my work for the servicer, I also worked at two foreclosure law firms prior to that, so I really can see this from both sides. I want to tell you what the foreclosure crisis currently means for real people.

The current efforts are not enough. I work on Main Street; I defend homeowners whose goal is to try to save their homes. These people are not wise guys who gambled with unaffordable mortgages. Most are ordinary hardworking Americans. Due to circumstances beyond their control, they fell into a pit of quicksand and now cannot get out. They are frightened, desperate, and losing hope.

Most of us do not realize that if a borrower becomes more than 60 days delinquent, the servicer thereafter rejects any subsequent mortgage payments unless at the same time the borrower cures the default. So even if people manage to get a new job, get back on their feet, they are still not allowed to resume making payments, even if they want to and are able to. The result is that they then often become trapped in the foreclosure spiral, although many would gladly resume making full or partial payment.

When they come to me, they are terrified. They have tried to gain entry into HAMP, tried to work with their servicers, submitted financials, and even in desperation fell victim to loan modification scammers, often the same mortgage brokers that got them into this situation in the first place. All became my clients when, despite their efforts, foreclosure was filed anyway, forcing them to face the fact that the loss of their home was imminent and that they were helpless to stop it.

I set out to try to find them leverage. This is difficult, since our system currently affords them none. Generally, it is only when I back the plaintiff into an untenable foreclosure case that any sort of potential concession emerges. I also make a formal motion asking the court to require the servicer to accept a HAMP application. Opposing counsel usually fights fiercely against this, although my clients were clearly qualified for HAMP and had tried for months to get into it.

To date, I have filed approximately 60 of these motions. In only two of the cases, foreclosure counsel sent me HAMP application packets. All others were contested. Where hearings have occurred, all but one of the judges granted my motion. However, not one of my clients who got into a trial mod has to date received a permanent mod, even after exceeding the 3-month trial period, submitting all required documentation, and making all payments.

I take issue with any claims that the foreclosure crisis is improving. It is not so. Most troublesome is that the owners of many of these foreclosed homes could and would have made payments had there been simply a way to get there.

HAMP and purely voluntary programs of course do exist, but do not do enough or work fast enough to change the landscape significantly. The real problems are that the mortgage industry players lack the ability, the authority, and the wherewithal to really solve this mess, and there is no time to create something totally new, such as HAMP, and have it move quickly enough. Structural hurdles make it virtually impossible for the voluntary programs to work on any sort of meaningful scale quickly. Something must be done to resolve this problem. What has been done so far has not worked in quantity and cannot work fast enough to turn the tide.

Allowing bankruptcy judges to construct judicial modifications of these mortgages should be given a chance. I commend you, Mr. Chairman, the full Judiciary Committee, and indeed the full House of Representatives for adopting legislation that would allow for mortgage modification in bankruptcy, and I appreciate your fighting spirit for pushing the bill again as an amendment to the financial services reg reform bill now being debated by Congress.

Such an approach could and could immediately make a difference without a learning curve and without any cost to the taxpayers. Bankruptcy judges have extensive experience dealing with financial problems, and they are optimized for just such a function. Bankruptcy courts routinely resolve debt and delinquency issues. Judicial modification of many kinds of secured loans has been the norm in bankruptcy. The process is rigorous. Solutions are formulated wherein the best interest of the creditors are prioritized. The entire process is overseen by the Department of Justice.

Because of the tangled web of interests and lack of authority to restructure the loans, servicers are unable to do it and are not vested with any other real option but to foreclose. We need something more. If bankruptcy courts are given the ability to address the problem, the results would be a rigorous yet fair solution that would in a significant number of cases provide mechanisms to save homes, and it would be immediate. Thank you very much for your time and attention.

[The prepared statement of Ms. Golant follows:]

PREPARED STATEMENT OF MARGERY E. GOLANT

STATEMENT OF MARGERY GOLANT

Before the

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATION LAW
Judiciary Committee
U.S. House of Representatives

*"Home Foreclosures: Will Voluntary Mortgage Modification Help Families Save Their Homes, Part II"*

December 11, 2009

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**I. Introduction**

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today regarding my experiences relating to the topic "Home Foreclosures: Will Voluntary Mortgage Modification Help Families Save Their Homes, Part II".

I am an attorney in private practice in Florida, and for several years have represented consumers. Currently, I limit my practice to representation of borrowers in foreclosure, provided that they meet my qualifications for acceptance of their case. And, I can tell you that I have no shortage of potential clients.

I bring an unique perspective to this discussion: I worked for a number of years (from approximately 1998 to 2004) on behalf of the financial services industry, as an attorney with two different Florida foreclosure law firms, and then as in-house counsel, and eventually as Assistant General Counsel of Ocwen Financial Corporation, one of the largest US subprime mortgage servicers, where I headed the Residential Litigation Subgroup. I left that position several years ago, and have since been involved in representing certain borrowers who are defendants in foreclosure actions filed against them. The benefit of seeing the foreclosure issue from both sides informs the thoughts and conclusions I offer today.

**II. The Problem**

I doubt that anyone would dispute that we currently have a tremendous problem in this country, which expresses itself in the foreclosures of many thousands of homes, the dispossession of the families whose homes they were, the enormous oversupply of houses for sale post-foreclosure and as hoped for "short sales". The result is a snowball effect, where the growing numbers of foreclosed properties put an increasingly larger burden on neighborhoods, communities, tax bases, homeowners associations and the budges of municipalities. I am not an economist, so will

not presume to speak to how all of that then impacts business failure, unemployment and widening economic problems.

My clients come from all walks of middle-class American life, ranging from blue collar workers to professionals and small business owners. In my practice, I defend these homeowners, most of whom have the goal of trying to "save" their homes. In that context, I am constantly looking for ways to achieve that goal. It is an incredibly difficult process, because borrowers currently have no "tools" to get there, no leverage to bring to bear. Many of my clients have tried in vain to gain entry into the Home Affordable Modification Program ("HAMP"). Many had, prior to becoming clients, tried to reason with their servicers, willingly submitted endless sets of "financials," and even, in their desperation, paid "loan modification companies" to assist them. All of these people became my clients when, despite their efforts, an Action of Foreclosure was filed against them. At that point, they realized that if they did not seek counsel, they would lose their home.

A widely misunderstood aspect of the housing problem is that if borrowers fall behind by more than sixty days, servicers thereafter reject any attempts by them to make payments, unless at the same time they "cure" the default. I frequently see people who had a period of financial hardship (i.e. an illness, a job loss or cutback) and got behind, and later were not *allowed* to resume making payments, even if they could and wanted to. In these situations, the best servicers will generally do is what is commonly called a "forbearance plan", whereby they take the delinquent amount, divide it by three, six or 12 months, and then add that on top of the contractually due payment. This results in a higher payment, which is often beyond the reach of borrowers, and sets the stage for foreclosure. Borrowers sometimes attempt to commit to a forbearance plan, generally in the hope that somehow they will manage to make the payment. However, whether they fail to meet the terms of the forbearance plan or simply refuse to agree it, foreclosure is the next step. A particularly pernicious part of the "forbearance plan" mechanism is the normal requirement that borrowers who are parties to it waive all their legal rights and defenses as a condition for entry into the plan. Then, when the plan [inevitably] fails, they are left defenseless. I have attached examples of two different forbearance plans from two servicers as an exhibit to this statement.

Other than in the very limited, and generally unsatisfactory context of a forbearance plan, achieving any sort of "voluntary" modification remains an extremely difficult undertaking. This remains true even after foreclosure has started, and even after I take up defense; it is usually true that it is only when I back the Plaintiff into an untenable and unprovable foreclosure case does any sort of potential concession emerge. Once I take up representation of people in foreclosure, I set about trying to find points of leverage because this typically is the only way to make any progress at all toward a modification.

In defending my clients, I look for, and raise, any and all legal and technical infirmities I find, and at the same time, ask the court by means of a formal Motion to require the servicer to accept a HAMP application and to impose an abatement of ninety days to allow the process (which is supposed to take ninety days although it never does) to take its course. The results are astonishing. Foreclosure counsel, who are hired by the servicers, usually fight tooth and claw to defend against my motion. In one recent case, the servicer hired a second, very high priced law firm to defend against the motion. The position the mortgage company took in that instance was that the borrower had to prove to the satisfaction of the mortgage company that he qualified for HAMP *before* there was any obligation to consider him. Clearly this was completely wrong, yet the judge accepted their argument and denied my Motion. The borrower in that case was clearly qualified for HAMP and had tried for months prior to the foreclosure being filed to get into the program. As another example, I was told about a borrower who was seeking entrée into HAMP, and instead was foreclosed upon. The servicer took the position that since the husband and wife borrowers were now divorced, the house was no longer owner-occupied, although the ex-wife borrower and the parties' children still lived in the house.

To date, I have filed approximately 60 Motions of the sort I describe above. In all but two of the cases, my opponents have opposed the motions, and the matters are set for hearing. In two of the cases, foreclosure counsel instead sent me HAMP application packets for my clients to complete. To date, not one of my clients who managed to get into a trial modification has received a permanent modification, although some have exceeded the three month trial period, and despite the fact that all of them submitted all the required documentation at the outset of the process.

How we reached this point in America is beyond the scope of this hearing. However, how we are going to resolve it is the challenge we all face.

The foreclosure crisis is creating enormous difficulty across America. Many families are being forced out of their homes, and it is difficult to imagine what will become of those people and their children. The houses sit vacant, decaying, creating attractive nuisances. For example, a child drowned in a vacant foreclosure house in Broward County, Florida recently.[1] Some vacant houses have become quarters for vagrants and drug dealers. All homeowners are impacted, since the excessive numbers of houses vacant and for sale drags down property values for all. Homeowners with performing loans are unable to sell, due to the low prices presently realizable. Many condominium and homeowners' associations are in complete disarray, not able to collect sufficient revenue to fund their operations. Most troublesome is that the owners of many of these houses could and would have made payments, had there been a viable process for establishing a sustainable mortgage modification.

[1] http://www.sun-sentinel.com/news/broward/miramar/sfl-near-drown-101109,0,3079203.story

**III. Root Causes of the Current Situation**

Based on my experience on both sides of the issue, I have drawn a number of conclusions about why current efforts have failed, and why voluntary modification is not, and cannot be the solution to the problem.

I do not point any fingers. Blame is beside the point. While there may be some bad motives in all this, the real problem is that there is no one in the mortgage industry with the ability, the authority and the wherewithal to take this mess on and to solve it. This is demonstrated by the dismal statistics we have all seen. Key to understanding why this is the case is recognition that the mortgage industry has changed enormously over the past 10 years or so. Few mortgages belong to the firm that originated them, and daily work relating to virtually all mortgages now is performed by mortgage servicers, who are not the owners/real parties in interest. As I am sure you are aware, the role of the mortgage servicer is roughly analogous to that of a property manager; it takes borrowers' phone calls, sends billing statements, collects payments, checks to make sure that taxes and insurance are being maintained or if the loan is escrowed, it pays the taxes. Servicers are responsible for routine collection efforts when payments become delinquent. However, the mortgage servicers' activities are defined, delineated and circumscribed by complex contracts between them and the other parties to the structured finance transactions which created the securitization trusts that own them.

The picture is further complicated by the fact that the owners of the loans are most often securitized trusts. A securitized trust is a structured finance creation that is a pool of assets having an income flow. The trust is a special purpose entity created for the sole purpose of owning the assets; it has no other reason to exist, no other business and no other assets than the loans and the income flow resulting from them. Investors buy various kinds of interests in the pool. There are usually many different configurations and risk profiles of these ownership interests, such that the interests of the holders are often potentially conflicting. The differing categories of interests are called "tranches".

Mortgage backed securitized trusts are established and operated via a series of contracts between the Depositor/Issuer, the Trustee, the Servicer and the investors. There are usually other parties to the contracts, including insurers, sub-servicers, and risk managers. The primary document which creates the entity and defines the roles and responsibilities is usually called a Pooling and Servicing Agreement, although there are other layers of documents which cumulate in the Pooling and Servicing Agreement. Each such trust has a Trustee. However, the Trustee does not normally deal with the loans that comprise the assets of the trust; this is delegated to one or more Servicers. Until the mortgage crisis erupted, servicers' processes were geared to routine maintenance and management; troubled loans were limited in numbers and generally manageable with minimal disruption. That has changed, and it is clear from the results that servicers are not equal to the challenge. Furthermore, the processes already in existence, in

particular, referral to outside counsel to commence foreclosure, are easier, are compliant with their contractual obligations to their clients (the Trusts) and are more predictable. In fact, if the foreclosure is completed, the homeowner evicted, and the property sold for a fraction of the amount owed, the servicer has done what it was obligated to do in its contract, and it suffers no hit to its bottom line from the result. Moreover, during the time it serviced the defaulted loan, it is likely that the servicer was paid a higher fee, and may also have been able to charge various "junk fees". It would therefore be normal behavior of a for-profit servicing entity to seek to maintain the loan in that posture. Furthermore, any sort of "retooling" of a servicer's operation, even if it were desirous of doing so, would be extremely complicated, expensive, and difficult.

The result of this structure is that differing and often conflicting interests and aspects of the loans comprising each pool belong to a variety of interested parties. While the servicer has a certain amount of authority and routine decision-making ability in connection with the loans, that authority is not complete. The real parties in interest, the trust investors, have delegated management of the pool to a designated trustee. There also are often other stakeholders, such as bond insurers and private mortgage insurers, who must be consulted when potential modifications are under consideration, or the trust risks waiving coverage.

This web of interests creates a very convoluted decision-making process, when non-routine decisions are under consideration. Servicers may not have authority to make such decisions, the trustees may not have authority to make the decisions, the bond insurers and private mortgage insurers may be unwilling to acquiesce in a decision which could risk increasing their exposure. Accordingly, all involved are "safe" from claims by the other parties if and only if they adhere to the traditional contractual process, which does not contemplate significant modification to the obligation.

This web of conflicting interests is a problem seriously exacerbated by the fact that, during the "bubble", there was considerable failure to perfect transfers of interests in the subject loans from the originator, along the road of securitization to the final intended owner. As a result, in many cases the entity which believes itself to be the owner may not in fact be. This problem also is manifesting itself in some recent court cases that have made headlines, where courts concluded that the party making claim to a particular loan had not convinced the court it had the right to do so. Trusts holding defective loans or defectively perfected interests have the right to force these loans to be repurchased by the entities from which they were acquired. In fact, there has been a recent spike in repurchase demands.

The current "mortgage meltdown" and foreclosure crisis is unprecedented; accordingly it was not provided for in the agreements utilized in structured finance transactions. The agreement which created and regulated the trusts and the various parties to them were based on assumptions whereby the vast majority of the loans held by the trust continued to be "performing" and therefore default was normally limited in quantity and amount. In that environment, the

agreement charged servicers with pursuing collection, including foreclosure, unless a loan could be brought back into performing status in a relatively short time. There was a time when this was a readily achievable goal, however, that is not the case today. The trust documents do not speak to solutions or grants of authority for dealing with the current crisis, or dealing with the loans which are delinquent as a result of the crisis. Accordingly, the trustees and servicers may not feel they have sufficient authority to change the terms of subject loans, and in fact, they may lack such authority. The securitized trusts are created with reference to the Internal Revenue Code, which in 1986 was changed to provide for investment vehicles called REMICs (Real Estate Mortgage Investment Conduits). So long as the many applicable rules are followed, REMICS are tax-neutral entities, so pay no income tax on the revenue flow realized from their investments. The portion of the revenue paid out to investors is taxable to investors. Trustees and servicers are charged with taking no action which could cause the trust to be in violation of REMIC rules, and in fact can become personally responsible for resulting harm, which would be calamitious, if REMIC rules are violated. The allowable activities of REMICS are extremely limited; "to holding a fixed pool of mortgages and distributing payments currently to investors. A REMIC has some freedom to substitute qualified mortgages, declare bankruptcy, deal with foreclosures and defaults, dispose of and substitute defunct mortgages, prevent defaults on regular interests, prepay regular interests when the costs exceed the value of maintaining those interests, and undergo a qualified liquidation, in which the REMIC has 90 days to sell its assets and distribute cash to its holders. All other transactions are considered to be prohibited activities and are subject to a penalty tax of 100%, as are all nonqualifying contributions. [2]

As a result of the complex management structure and the REMIC rules, servicers and trustees proceed with great trepidation, and they are further constrained by the obligation not to jeopardize what mortgage insurance coverage exists, either on the pool or on individual loans. As a result of the often lacking transactional steps properly conveying the subject mortgage loans, it is in fact that case that trustees and servicers may well completely lack the right to enforce certain loans, since they may have no rights to them. Further, there is extensive confusion within the cases as to what party is the real party in interest, what party is only the servicer, what party is a former holder who has nothing further to do with the loan and no interest in the outcome.

As if this was not complicated enough, it is made far worse by the fact that the origination of a fair number of these loans was fraudulent, deceptive, violative of Truth in Lending and other law

[2] PEASLEE, JAMES M. & DAVID Z. NIRENBERG. FEDERAL INCOME TAXATION OF SECURITIZATION TRANSACTIONS. Frank J. Fabozzi Associates (2001, with annual supplements), www.securitizationtax.com; Lynn, Theodore S., Micah W. Bloomfield, & David W. Lowden. Real Estate Investment Trusts. Securities Law Series, Vol. 29. Thomson West (2007); SILVERSTEIN, GARY J. REMICS, TAX MANAGEMENT: FASITS AND OTHER MORTGAGE-BACKED SECURITIES. Tax Management Inc.: Securities Law Series (2007).

and in other ways legally problematic. The expanding chaos puts a huge strain on the servicing industry, undoubtedly increasing the rate of errors and increasing the difficulty of acknowledging and unwinding servicing errors.

While they may be reluctant to admit it, investors in securitizations are in many ways trapped by the present crisis; they have no choice but to continue to watch the train move along the track and to suffer from the ultimate low prices the collateral realizes. However, the "default servicing" industry, which exists to process foreclosures, serve process, handle property inspections, appraisals, evictions and management of defaulted loans and foreclosed properties, prospers at the expense of these same investors, and of the owners of the homes foreclosed upon. These companies have developed the default management niche to a profitable enterprise.[3]

**IV. A Potential Solution**

At present, my observation is that troubled loans in default fall roughly into three categories:

a. The loans that should never have been made at all – made without any documentation of sufficient income or sufficient real collateral value to make them viable (often referred to as "liar loans"), and loans with "exotic terms" such as teaser rates, interest only features, and negative amortization.

b. The loans that are legally infirm – loans closed fraudulently, unlawfully, in violation of Truth in Lending, subject to defective loan accounting, erroneous force-placement of insurance, etc.

c. Loans that appeared to be regular and appropriate, but which the borrowers now cannot pay due to deteriorating economic conditions and rising unemployment. In the early part of the decade, borrowers who could no longer afford a particular property or who needed to move away could sell the home and pay off the mortgage, but with the large loan to value imbalance which currently exists, this no longer is possible for large numbers of homeowners.

While these categories of loans are all problematic, albeit for different reasons, those borrowers who earnestly want to pay and have the ability to pay consistent with the market value of the collateral have the potential to be reformulated into functional transactions.

It is widely recognized that something must be done to resolve this problem. It is evident that the voluntary solutions that have been attempted so far have not worked, and that in fact there are more foreclosures than ever. A solution that would allow bankruptcy judges to construct judicial modifications of these mortgages has been proposed and I would urge that it be given a chance to

[3] http://www.ipsvcs.com/AboutUs/Brochures/Pages/default.aspx

prove its value. The beauty of such a suggestion is that bankruptcy judges have extensive experience dealing with financial problems, have done so for many years, and are optimized for just such a function. It is commonplace for bankruptcy courts to sort out and to resolve debts and delinquency issues. "Judicial modification" of many kinds of secured loans has been the norm through modern commercial history. The bankruptcy process is rigorous; people and entities seeking relief must disgorge all their financial information, which is then closely scrutinized and evaluated. Assets are valued and then solutions are formulated wherein the legitimate best interests of the creditors are prioritized. The entire process is overseen by the Office of the US Trustee, a division of the US Department of Justice.

In the current mortgage crisis, it is commonplace for mortgages to exceed by 30-40 percent the value of the underlying collateral. I have many clients whose mortgage balances are $100,000, $200,000, $300,000 and more in excess of the values of their homes. In most cases, these are people who bought at the wrong time, did not recognize that they were paying too much, and were given mortgage loans which did not take into account the bubble or their ability to repay the loan. These are people who would like to find some way to work the problem out, but unless a solution is found, they are powerless to do so. If they were to sell the home at "short sale" all that would be accomplished is that market value would be realized – and the family would have no house. If the mortgage is foreclosed, all the mortgage holder would be able to realize from the foreclosure process is the current value of the home, less a substantial "REO discount" because foreclosed homes sit vacant, get overgrown, mildewed, and are rightfully perceived as risky purchases. In fact, in Florida it is generally believed that many foreclosed homes will ultimately be torn down, which highlights the tragedy of it all.

In reality, the principal writedown occurred when the housing bubble burst; all that remains is the recognition of the writedown. However, because of the tangled web of interests and lack of authority to restructure the loan to a realistic number, the servicer and holders are unable to do that, and are not vested with any other real option but to foreclose. So, none of the mechanisms in use today do anything more for the mortgage holder than to, at best, bring them the current market value of the house, less all the costs of sale, and in many cases far less. However, if the bankruptcy courts are given the ability to address this problem, they would be able to realistically value the collateral, and then to formulate a rigorous yet fair solution that would, in many cases, provide a mechanism to afford borrowers an opportunity to save their homes, without the mortgage holders taking any greater loss than they would anyway, and in many instances the holders would in fact do better; relief would be immediate, the bleeding would stop, cash flow would resume immediately, mortgage holders and their servicers would not be required to support and maintain the properties, pay taxes, insure them, monitor them, or otherwise be responsible for them. This would create the potential for a "win-win" situation, since the people committed to saving their homes would have a mechanism to do so, yet this would be founded upon a carefully constructed and strictly enforced bankruptcy court program.

Mr. Chairman and Members of the Subcommittee, I commend you for taking action to provide for judicial modification of home mortgages. Indeed, I cheered when the full House of Representatives passed H.R. 1106 earlier this year. I am joined my colleagues across the country who sit by, frustrated by our inability to help the families that seek our help every day. I know the financial services industry opposes judicial mortgage modifications and have implored Congress not to adopt this solution because of the "fragile housing recovery." Where I sit, there is no housing recovery, and will not be until we figure out how to stem the rising tide of foreclosures. We should be using every tool available to us to accomplish this goal. Otherwise, I fear we may never experience a true and robust economic recovery.

Thank you for your time and attention. I will be pleased to do my best to provide answers to any questions that you may have.

**ATTACHMENT**



Aurora • Loan Services

2617 COLLEGE PARK • P.O. BOX 1706 • SCOTTSBLUFF, NE 69363-1706
PHONE: 800-560-0508 • FAX: 303-728-7648

WORKOUT AGREEMENT

BY AND BETWEEN AURORA LOAN SERVICES

AND

[redacted]

Property Address: [redacted] Loan No. [redacted]

This Workout Agreement is made May 20, 2009, by and between AURORA LOAN SERVICES ("Lender") located at 2617 College Park, Scottsbluff, NE 69361, and [redacted] (individually and collectively, "Customer").

WHEREAS, Lender is the servicing agent and/or the owner and holder of a certain Note dated 06-14-06, executed and delivered by Customer, in the original principal amount of $ 256,000 (the "Note"). The Note is secured by a mortgage, deed of trust or comparable security instrument dated 06-14-06, (the "Security Instrument"), on the property located at the address specified above (the "Property"). The Note and Security Instrument are collectively referred to as the "Loan Documents".

WHEREAS, Customer is in default under the Loan Documents, has failed to make payment of monthly installments of principal, interest, and escrow, if any, and has incurred additional expenses authorized under the Loan Documents, resulting in a total arrearage now due of $ 30,515.07, as more particularly set forth below:

| | |
|---|---|
| Unpaid monthly payment(s) of PITI* from 07-01-08 through and including 05-20-09 | $ 25,906.65 |
| Accrued Late Charges | 689.92 |
| NSF Charges | .00 |
| Legal Fees | 1,808.00 |
| Corporate Advances** | 2,110.50 |
| Other Fees*** | .00 |
| Minus Credit (suspense balance/partial payment) | .00 |
| Total Amount Due (the "Arrearage") | $ 30,515.07 |

* "PITI" means the monthly payment of principal, interest, and escrows, required, for taxes and insurance premium installments.
** "Corporate Advances" include, but are not limited to, property inspection fees, property preservation fees, legal fees, foreclosure fees and costs, appraisal fees, BPO (i.e. broker price opinion) fees, title report fees, recording fees, and subordination fees.
*** "Other Fees" include, but are not limited to, short payment advances and Speed ACH fees.

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PHONE: 800-550-0508 • FAX: 303-728-7648

Loan No. [redacted]



WHEREAS, as a result of Customer's default, Lender (i) has the right to accelerate, and to require Customer to make immediate payment in full, all of the sums owed under the Note and secured by the Security Instrument, (ii) has so accelerated and declared due in full all such sums, and (iii) may have already commenced foreclosure proceedings to sell the Property.

WHEREAS, as of the date of execution of the Agreement, Lender commenced Foreclosure proceedings to sell the property on 10/29/08 by legal filing in the county and state where the Property is located A Foreclosure sale has not yet been scheduled.

WHEREAS, customer has requested Lender's forbearance in exercising its rights and remedies under the default provisions of the Loan Documents and with regard to any foreclosure action that may now be pending.

WHEREAS, Customer has requested and Lender has agreed to allow Customer to repay the Arrearage pursuant to a loan work-out arrangement on the terms set forth herein.

NOW, THEREFORE, in consideration of the promises and mutual covenants herein contained, the parties hereto agree as follows:

1. Term. This Agreement shall expire on the "Expiration Date," as defined in Attachment A.

2. Lenders Forbearance. Lender shall forbear from exercising any or all of its rights and remedies now existing or arising during the term of this Agreement under the Loan Documents, provided there is no "Default", as such term is defined in paragraph 5.

3. Customer's Admissions. Customer admits that the Arrearage is correct and is currently owing under the Loan Documents, and represents, agrees and acknowledges that there are no defenses, offsets, or counterclaims of any nature whatsoever to any of the Loan Documents or any of the debt evidenced or secured thereby.

Customer admits and agrees that any and all postponements of a foreclosure sale, made during the term of this Agreement or in anticipation of this Agreement, are done by mutual consent of the Customer and Lender and that, to the extent allowed by applicable law, any such foreclosure sale may be postponed from time to time until the loan evidenced by the Note is fully reinstated or the foreclosure sale is consummated. Lender shall be under no obligation to dismiss a pending foreclosure proceeding until such time as all terms and conditions of this Agreement and Attachment A have been fully performed.

4. Terms of Workout. See Attachment A, which is made a part hereof.

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PHONE: 800-550-0608 • FAX: 303-728-7648

Loan No. [redacted]



5. Default. If Customer fails to make any of the payments specified in Attachment A on the due dates and in the amount stated, or otherwise fails to comply with any of the terms and conditions herein or therein (any such even hereby defined as a "Default"), Lender, at its sole option, may terminate this Agreement without further notice to Customer. In such case, all amounts that are then owing under the Note, the Security Instrument, and this Agreement shall become immediately due and payable, and Lender shall be permitted to exercise any and all rights and remedies provided for in the Loan Documents, including, but not limited to, immediate commencement of a foreclosure action or resumption of a pending foreclosure action without further notice to Customer.

6. No Waiver. Nothing contained herein shall constitute a waiver of any of all of the Lender's rights or remedies, including the right to commence or resume foreclosure proceedings. Failure by Lender to exercise any right or remedy under this Agreement or as otherwise provided by applicable law shall not be deemed to be a waiver thereof.1

7. Status of Default and Foreclosure. Customer acknowledges that if the Lender previously notified the Customer that the account was in default, that the Note and Security Instrument are accelerated and the debt evidenced by the Note is due in full, the account remains in default, such Loan Documents remain accelerated, and such debt due in full, although Customer may be entitled by law to cure such default by bringing the loan evidenced by Note current rather than paying it in full. Lender's acceptance of any payments from Customer which, individually, are less than the total amount due to cure the default described herein shall in no way prevent Lender from continuing with collection action, or require Lender to re-notify Customer of such default, re-accelerate the loan, re-issue any notice, or resume any process prior to Lender proceeding with collection action if Customer Defaults. Customer agrees that a foreclosure action if commenced by the Lender against Customer will not be withdrawn unless Lender determines to do so by applicable law. In the event Customer Defaults, the foreclosure will commence, or resume from the point at which it was placed on hold, without further notice.

8. Limited Modification. Except as otherwise provided in this Agreement, the Note and Security Instrument, and any amendments thereto, are ratified and confirmed and shall remain in full force and effect.

1 A typical example of this would be if Lender decides to accept a partial or untimely payment from Customer instead of returning such payment or terminating this Agreement as provided herein, Lender shall not be precluded from rejecting a subsequent partial or untimely payment, terminating this Agreement, or taking any other action permitted by applicable law.

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PHONE: 800-550-0508 • FAX: 303-728-7648

Loan No. [redacted]



9. Application of Payments. The payments received by Lender from Customer pursuant to this Agreement shall be applied, at Lender's sole option, first to the earliest monthly payment under the Note that is due. Any amounts received by Lender that are less than the full payment under then due and owing under this Agreement shall be, at Lender's sole option, (1) returned to Customer, or (2) held by Lender in partial or suspense payment balance until sufficient sum is received by Lender to apply a full payment. If this Agreement is canceled and/or terminated for any reason, any remaining funds in this partial or suspense payment balance shall be credited towards Customer's remaining obligation owing in connection with the loan and shall not be refunded.

10. Methods of Making Payments. All payments made to Lender under this Agreement shall (i) contain the Lender's loan number shown above, (ii) unless otherwise agreed to by the Lender, be payable in certified funds by means of cashier's check, Western Union (code city: Bluff,NE) money order, or certified check, and (iii) be sent to AURORA LOAN SERVICES as specified in Attachment A. Any payment made other than strictly pursuant to the requirements of this paragraph 10 and Attachment A shall not be considered to have been received by Lender, although Lender may, in its sole discretion, decide to accept any non-conforming payment.

11. Credit Reporting. The payment status of Customer's loan in existence immediately prior to execution of this Agreement will be reported monthly to all credit reporting agencies for the duration of this Agreement and thereafter. Accordingly, Lender will report the loan subject to this Agreement as delinquent if the loan is not paid current under the Loan Documents, even if Customer makes timely payments to Lender under this Agreement. However, Lender may disclose that Customer is in a repayment or work-out plan. This Agreement does not constitute an agreement by Lender to waive any reporting of the delinquency status of loan payments.

12. Property Taxes, Insurance, and Other Amounts. If Customer's loan is not escrowed for taxes and insurance premium payments, it is Customer's responsibility to pay all property taxes, premiums for insurance, and all other amounts Customer agreed to pay as required under the terms of the Loan Documents. Customer's failure to pay property taxes, amounts owed on any senior lien security instrument, other amounts that may attain priority over the Security Instrument, or insurance premiums, in each case before their due date, shall constitute a Default hereunder.

13. The Entire Agreement. This Agreement sets forth all of the promises, covenants, agreements, conditions and understandings between the parties hereto with respect to the subject matter hereof. This Agreement supersedes all prior understandings, inducements or conditions, express or implied, oral or written, with respect thereto except as contained or referred to herein. This Agreement may not be amended, waived, discharged or terminated orally but only by an instrument in writing.

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PHONE: 800-550-0508 • FAX: 303-728-7648

Loan No. [redacted]



14. Time is of the Essence. The Customer agrees and understands that TIME IS OF THE ESSENCE as to all of the Customer's obligations under this Agreement. The grace period for monthly payments under the Loan Documents will not apply to payment under this Agreement. Therefore, the Lender must receive the payments under this Agreement on or before the Due Dates specified in Attachment A.

15. Assignment by Customer Prohibited. This Agreement shall be non-transferable by Customer. However, if the legal or beneficial interest or the servicing of this loan is transferred by Lender, this Agreement inures to the benefit of any subsequent servicer or beneficial interest holder of the Note.

16. Severability. To the extent that any word, phrase, clause, or sentence of this Agreement shall be found to be illegal or unenforceable for any reason, such word, phrase, clause, or sentence shall be modified or deleted in such a manner so as to make the Agreement, as modified, legal and enforceable under applicable law, and the balance of the Agreement or parts thereof shall not be affected thereby, the balance being construed as severable and independent; provided that no such severability shall be effective if it materially changes the economic benefit of this Agreement to either party.

17. Execution in Counterparts. This Agreement may be executed and delivered in two or more counterparts, each of which, when so executed and delivered, shall be an original, but such counterparts shall together constitute but one and the same instrument and Agreement. Facsimile signatures shall be deemed as valid as originals.

18. Customer Contact. If Customer has any questions regarding this matter, Customer should contact one of Lender's Loan Counselors at the address above or by calling 800-550-0509.

IN WITNESS HEREOF, the parties hereto have caused this Agreement to be duly executed as of the date signed.

Dated: _____ [redacted]

Dated: _____ _____

Aurora Loan Services [redacted] Borrower
Dated: _____ _____

Aurora Loan Services is a debt collector. Aurora is attempting to collect a debt and any information obtained will be used for that purpose. However, if you are in bankruptcy or received a bankruptcy discharge of this debt, this communication is not an attempt to collect the debt against you personally, but is notice of a possible enforcement of the lien against the collateral property.

Aurora • Loan Services

2617 COLLEGE PARK • P.O. BOX 1706 • SCOTTSBLUFF, NE 69363-1706
PHONE: 800-550-6808 • FAX: 308-716-7648

ATTACHMENT A-STIPULATED PAYMENTS

a.1 For purposes of repayment of the Arrearage, Customer shall pay $870.41, on or before 06/01/2009. Thereafter, Customer shall pay three (3) stipulated monthly payments each in the amount of $870.41 (each, a "Plan payment"). On or before 06/01/2009 (the "Agreement Return Date"), Customer shall execute and return the Agreement, including this Attachment A, in accordance with the following instructions:

| If by overnight mail service to | or | if by US Postal Services to |
|---|---|---|
| Aurora Loan Services | | Aurora Loan Services |
| Attention: Home Retention | | Attention: Home Retention |
| 2617 College Park | | P.O. Box 1706 |
| Scottsbluff, NE 69361 | | Scottsbluff, NE 69363-1706 |

The Agreement will be of no force and effect unless Lender receives the executed Agreement, including Attachment A, as well as the first Plan payment by the Agreement Return Date. Customer shall remit to Lender the first Plan payment, in the amount specified above, made payable to Aurora Loan Services in certified funds by means of cashier's check, money order, Western Union (code city: Bluff, NE), or certified check. All Plan payments, including the first Plan payment, shall contain the Lender's loan number shown in the Agreement and, unless otherwise agreed to by the Lender, shall be payable in certified funds as described above are to be sent to Lender's Payment Processing Center in accordance with the following instructions:

| If by overnight mail service to | or | if by US Postal Services to |
|---|---|---|
| Aurora Loan Services | | Aurora Loan Services |
| Attention: Cashiering Department | | Attention: Cashiering Department |
| 10350 Park Meadows Drive | | P.O. Box 5180 |
| Littleton, CO 80124 | | Denver, CO 80217-5180 |

a.2 Plan payments are to be paid on or before the 1st day of every month (each, a "Due Date"). Lender must receive each Plan payment by the Due Date of each month. The Agreement shall expire on the Due Date of the last Plan payment contemplated by section a.1 above (the "Expiration Date"). At the time Customer makes the third (3rd) Plan payment under this Agreement, it shall be the Customer's responsibility to provide Aurora with accurate and complete financial information in support of the Customer's request for a loan modification or other workout option. Customer must also provide Lender with a completed Borrower's Financial Statement and proof of income (copies of Customer's two (2) most recent pay stubs) to enable Lender to properly evaluate Customer's current financial situation and the Customer's request for a loan modification or other loan workout option. Tender of the last Plan payment shall not be deemed acceptance by Aurora of a workout plan or loan modification.

Aurora • Loan Services

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PHONE: 800-550-0508 • FAX: 303-728-7648

Loan No. [redacted]

b. The aggregate Plan payment will be insufficient to pay the Arrearage. At the Expiration Date, a portion of the Arrearage will still be outstanding. Because payment of the Plan payments will not cure the Arrearage, Customer's account will remain delinquent. Upon the Expiration Date, Customer must cure the Arrearage through a full reinstatement, payment in full, loan modification agreement or other loan workout option that Lender may offer (individually and collectively, a "Cure Method.") Customer's failure to enter into a Cure Method will result in the loan being disqualified from any future Lender Home Retention Group program with respect to the loan evidenced by the Note, and regular collection activity will continue, including, but not limited to, commencement or resumption of the foreclosure process, as specified in paragraphs 5 and 7 of the Agreement.

IN WITNESS HEREOF, the parties hereto have caused this Attachment A to be duly executed as of the date signed below.

Dated: _____ _____ [redacted] Borrower

Dated: _____ _____ [redacted] Borrower

Aurora Loan Services

Dated: _____ By: _____

Title: _____

**OCWEN LOAN SERVICING LLC**
**FORBEARANCE AGREEMENT**

[redacted]/2008

[redacted]

Re: Loan#: [redacted]
Property Address: [redacted]
Customer(s): [redacted]

In return for Ocwen Loan Servicing LLC (Ocwen Loan Servicing) not exercising its rights to remedy the delinquency presently existing on the above referenced loan property, it is hereby stipulated and agreed by and between the undersigned as follows:

**WHEREAS,** The Borrower(s) [redacted] (hereinafter the "Borrower(s)") executed that certain promissory note agreement (the "Note") and Mortgage on or abou[redacted] in the original amount of $200,000.00 (the "Loan").

**WHEREAS,** The Borrower(s) also secured the Loan by virtue of that certain Mortgage/Deed of Trust covering the premises commonly known as [redacted] (the "Mortgage").

**WHEREAS,** The Borrower(s) agreed under the Note and Mortgage to pay legal fees and costs to the holder of the Note and Mortgage in the event of default.

**WHEREAS,** The Borrower(s) acknowledge their default of certain terms of the Note and Mortgage and reaffirm their obligations thereunder. The Borrower(s) acknowledge by their execution and delivery hereof, that they have no defense, setoff or counterclaim with respect to their default, and their obligations under the Note and Mortgage.

**WHEREAS,** The Borrower(s) acknowledge that they voluntarily release, discharge, and covenant not to sue Ocwen Loan Servicing for any and all claims, to the extent that any claims may exist now, that are related or connected in any manner, directly or indirectly, to the Note, Mortgage or the aforementioned premises.

**WHEREAS,** The reinstatement amount under the Note is $21,178.36 as of 1/31/2008.

**NOW THEREFORE,** in consideration of the mutual benefits derived from the Forbearance Agreement, and for other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereby mutually agree as follows:

1.
**RECITALS** The above recitals are true and correct and are incorporated herein by reference.

**CONTRACTUAL DUE DATE** The current contractual due date of the Note and Mortgage is 6/1/2007 and completion of this Forbearance Agreement will cure the default under the Loan.

**INCREASED MONTHLY PAYMENTS** The payments due under this Forbearance Agreement shall be as follows: A down payment in the amount of $3,000.00 **made payable to Ocwen Loan Servicing LLC** must be received the earlier of either, 5:00 PM eastern time on or before 1/31/2008 or prior to the foreclosure sale or law day, whichever occurs first, via "overnight" mail sent to Loan Resolution Dept., 12650 Ingenuity Dr., Orlando, Florida, 32826. The down payment must be in the form of certified funds. Commencing 3/1/2008 and continuing on the 1st day of each and every month through (and including) 4/1/2008 payments shall be made in the monthly amount of $1,723.00. All Monthly payments shall be in the form of a cashier's check or money order payable to Ocwen Loan Servicing LLC and sent to Ocwen Loan Servicing LLC at P.O. Box 6440, Carol Stream, IL 60197-6440 instead of 514577 Los Angeles, CA 90051-4577. All payments shall clearly include the above referenced loan number. As to each and every payment required hereto, time shall be *strictly of the essence.* In other words, there is no grace period under this Forbearance Agreement and even the slightest default shall be considered a material breach. Notwithstanding the foregoing, additional increased

Borrower Initials : [redacted]



"Exhibit C"

payments may be necessary to fully reinstate the Mortgage. The sum of any such additional increased payments shall equal any additional attorney fees and expenses incurred by Ocwen Loan Servicing in excess of $. _____.

**EFFECT ON PENDING FORECLOSURE ACTION**
*In the event that a foreclosure is pending, the foreclosure action will not be dismissed, however it will be placed on hold pending the completion of this Forbearance Agreement, unless Ocwen Loan Servicing is unable to place the foreclosure on hold as set forth in the paragraph below entitled "Foreclosure Sale/Law Day". In the event of default under this agreement Ocwen Loan Servicing LLC may immediately proceed with the pending foreclosure without further notification.*

**MONTHLY LATE CHARGES AND ADDITIONAL FEES AND COSTS**

Late Charges:
Monthly late charges shall continue to accrue, including during the term of this Forbearance Agreement, until the contractual due date of the Note and Mortgage have been brought current.

Additional Fees and Costs:
Your account may still have additional fees, expenses and charges which have not yet been billed or posted to your loan account. Any such additional charges will be added to your loan balance when received, and it will be necessary that you pay them in order to fully reinstate your mortgage, in addition to the payments provided for in this forbearance plan. Borrower(s) understands that they will be responsible for repayment of these charges.

**CREDIT REPORTING**
While you are on this forbearance plan, your loan is still considered delinquent, and will be reported as contractually delinquent to the credit reporting agencies to which Ocwen reports, until such time as the loan is brought current.

[redacted]

**MONTHLY STATEMENTS** Borrower(s) understand they will be receiving monthly statements from Ocwen and that failure to receive a statement is not a valid reason for failing to submit payments timely. Likewise, borrower(s) understand that during the term of the Forbearance Agreement, the monthly statement(s) may indicate the loan is otherwise current or paid in advance. Borrower(s) understand the payment status represented on the monthly statements shall not impair, waive or otherwise alter the obligation to make each and every payment required under this Forbearance Agreement.

**FORECLOSURE NOT DISMISSED** So long as the Borrower(s) comply with all of the conditions set forth in this Forbearance Agreement, Ocwen will undertake no affirmative steps to advance this pending foreclosure action. Notwithstanding the foregoing, Borrower(s) specifically agree Ocwen shall be entitled to continually postpone this foreclosure action or sale, file notices with the Court, publish this foreclosure, complete service or otherwise take any action reasonable necessary to maintain the pending status of this foreclosure action. Likewise, if Ocwen, or its designated agent, has submitted any motion or order with the Court, Ocwen shall not be required to withdraw such motion or order by virtue of this Forbearance Agreement. Rather, the Borrower(s) agree to permit the Court to consider such motion and to enter any order reasonably required thereby. Borrower(s) understand that any breach of this Forbearance Agreement, including a late payment, shall entitle Ocwen to proceed with the foreclosure action without any further notice to the borrower(s).

**FORECLOSURE SALE/LAW DAY** Borrower(s) understand if a foreclosure sale or law day is scheduled to occur within 72 hours after Ocwen has received both the signed Forbearance Agreement and down payment, then Ocwen may not be able to stop the sale or vesting. In this event, the down payment will be returned to the borrower and the Forbearance Agreement shall have no further force and effect. Ocwen assumes no liability for failing to 'stop' the sale or to otherwise unwind, rescind or reverse the sale or vesting should such sale or vesting occur within the time period prescribed herein. If in the event the Parties agree to undertake any effort to unwind, rescind or reverse the sale or vesting, then any attorney fees and costs result ing from such activity shall be added to the Loan balance provided any such fees and costs are not prohibited by state law.

**Borrowers acknowledgement of the above paragraph:** _____ _____

**CHANGE IN FINANCIAL CONDITION** Borrower(s) agree that upon 30-days written notice, Ocwen Loan Servicing shall have the right to increase the monthly payment required under the Forbearance Agreement if Ocwen Loan Servicing has verified that (I) either there has been a material change in the Borrower(s)' financial condition or that there were significant inaccuracies in the financial information last submitted by the Borrower(s) and (II) that the Borrower(s) are financially able to make increased payments.

**TAXES AND HAZARD INSURANCE** As additional consideration for this Forbearance Agreement, upon the request of Ocwen Loan Servicing, Borrower(s) with non-impounded accounts shall deposit with Ocwen Loan Servicing in monthly installments, an amount equal to one-twelfth(1/12) of the estimated aggregate annual real estate taxes and/or insurance premiums on all policies of insurance required under the Mortgage. If at any time and for any reason the funds so deposited with Ocwen Loan Servicing are or will be insufficient to pay such amounts as may be then or subsequently due, Ocwen Loan Servicing may notify Borrower(s) and Borrower(s) shall immediately deposit an amount equal to such deficiency with Ocwen Loan Servicing. If taxes or insurance requirements decrease, the Forbearance Agreement payments will not decrease. Such surplus shall be applied against the Loan delinquency regardless if the loan had been impounded prior to executing the agreement.

**Borrowers acknowledgement of the above paragraph for tax and insurance.** _____ _____

**PREPAYMENTS** If all payments past due under the terms of the Note and Mortgage are paid prior to completion of the Forbearance Agreement, the Forbearance Agreement shall terminate and the monthly payments required by the original Note and Mortgage will begin again. The amount of the original payments, however, may be different due to changes to escrow requirements.

**CUSTOMER AGREES TO PAY FEES/COSTS ASSOCIATED WITH RELEASE:**
**RELEASE** Upon payment of all sums secured by the Mortgage, the Mortgage shall be released. The Borrower(s) acknowledge that they shall pay any recordation costs. In addition, Ocwen Loan Servicing may charge Borrower(s) a fee for releasing the Mortgage. This language modifies and supercedes the language in the Mortgage Instrument. The provisions of this Section shall survive the term or termination of this Agreement for any reason.

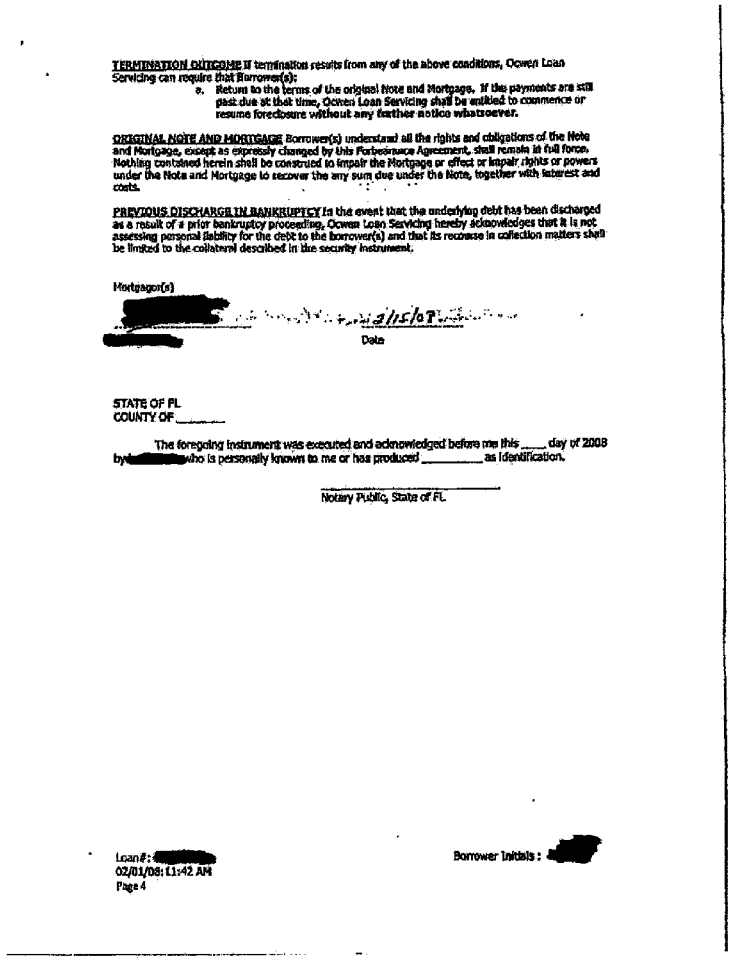
**TERMINATION CONDITIONS** This Forbearance agreement is automatically terminated under any of the following circumstances:

a. The mortgaged property is abandoned or left vacant for more than sixty (60) days.
b. Borrower(s) no longer use the mortgaged property as a principal residence unless Borrower(s) can provide evidence of a temporary relocation by the primary employer or, if in the military, assignment to a new post.
c. Borrower(s) transfer ownership or interest in the property, Note or Mortgage without consent of Ocwen Loan Servicing.
d. The facts or circumstances relating to Borrower(s) financial condition, which caused Ocwen Loan Servicing to enter into this Agreement, are substantially changed.
e. Incorrect information in connection with securing this Forbearance Agreement was submitted to Ocwen Loan Servicing.
f. Borrower(s) fail to meet any of the terms of this Forbearance Agreement or the original Note and Mortgage.

Any Obligation to provide Notice of Termination is waived by parties. No written notice of termination will be given. Upon any one of the circumstances set forth above, OCWEN shall be entitled to commence or resume foreclosure without any further notice whatsoever.



Borrower Initials : [redacted]



**TERMINATION OUTCOME** If termination results from any of the above conditions, Ocwen Loan Servicing can require that Borrower(s):

a. Return to the terms of the original Note and Mortgage. If the payments are still past due at that time, Ocwen Loan Servicing shall be entitled to commence or resume foreclosure without any further notice whatsoever.

**ORIGINAL NOTE AND MORTGAGE** Borrower(s) understand all the rights and obligations of the Note and Mortgage, except as expressly changed by this Forbearance Agreement, shall remain in full force. Nothing contained herein shall be construed to impair the Mortgage or effect or impair rights or powers under the Note and Mortgage to recover the any sum due under the Note, together with interest and costs.

**PREVIOUS DISCHARGE IN BANKRUPTCY** In the event that the underlying debt has been discharged as a result of a prior bankruptcy proceeding, Ocwen Loan Servicing hereby acknowledges that it is not assessing personal liability for the debt to the borrower(s) and that its recourse in collection matters shall be limited to the collateral described in the security instrument.

Mortgagor(s)

[redacted] 2/15/08

Date

STATE OF FL
COUNTY OF_____

The foregoing instrument was executed and acknowledged before me this ____ day of 2008 by [redacted] who is personally known to me or has produced _____ as identification.

_____
Notary Public, State of FL

Loan#: [redacted]
02/01/08: 11:42 AM
Page 4

Borrower Initials : [redacted]

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Mr. COHEN. Thank you, Judge. I appreciate your testimony.

Our final witness is Mr. Henry E., Hank, Hildebrand, III. Mr. Hildebrand has served as standing trustee for Chapter 13 matters in the Middle District of Tennessee since 1982, and as standing Chapter 12 trustee for that district since 1986. He has been a friend of mine since 1982, working closely with the Tennessee General Assembly on matters above and beyond these issues. Counsel of the national law firm of Lassiter, Tidwell, Davis, Keller & Hogan, and an honorary Kentucky colonel and Tennessee colonel. He is a fellow of the American College of Bankruptcy and serves

on its education committee. He is chairman of the Legislative and Legal Affairs Committee of the National Association of Chapter 13 Trustees and the board of directors of that same group's consumer bankruptcy education group. Adjunct faculty member at the National School of Law and St. Johns University School of Law and highly respected member of the National and Tennessee State community.

Thank you, Mr. Hildebrand. Will you proceed with your testimony?

**TESTIMONY OF HENRY E. HILDEBRAND, III, NATIONAL ASSOCIATION OF CHAPTER 13 TRUSTEES**

Mr. HILDEBRAND. Thank you, Mr. Chairman.

And thank you, Mr. Frank, Members of the Committee.

I am delighted to appear here today on behalf of the National Association of Chapter 13 Trustees. There are about 212 Chapter 13 trustees across the country who are charged with the responsibility of administrating the Chapter 13 program across the country.

Chapter 13, of course, is the mechanism in bankruptcy whereby there is an administration of repayment in bankruptcy. Debts are actually paid back. We are now paying back approximately $6 billion a year of debt repayment through the Chapter 13 program.

Traditionally, Chapter 13 has constituted the last resort of a borrower in which to save a home in which the mortgage is in default. It has provided the tools whereby that mortgage can be cured and payments can be maintained. And over the time that Chapter 13 has been effective since 1979, millions of families have saved their homes through Chapter 13, curing defaults, maintaining mortgages, and getting themselves back on their feet.

It is remarkably successful where I come from. It is remarkably successful across the country. But the Chapter 13 model in curing mortgage defaults and maintaining payments is based upon a mortgage model that is no longer a valid model. We have been inundated with and we are now facing what I call the exotic mortgage, the mortgage that doesn't fit the natural, historical model of mortgages, and debtors, borrowers getting these mortgages not only didn't understand what they were getting into, they fell into default not even knowing what the requirements were under their own mortgage.

So the question is, does Chapter 13 from a model from 1979 provide the tools to be able to cure the problems that exist under these exotic mortgages? The Chapter 13 trustees are disappointed that the Senate didn't agree with the House in providing a tool for dealing with the exotic mortgages in Chapter 13. Bankruptcy has been described as the last platform whereby you create a new dialogue between parties who can act in their own economic self-interest.

As Professor Allen White's study—and I know he testified before this Committee in the spring. He reviews these, and he points out that the economic interests would seem to point toward increased HAMP modifications. As he reported in a report I just got yesterday, mortgages in the pool he looked at, mortgage modifications result in a loss of approximately $12,000 per mortgage. In foreclosures, the loss is approximately $147,000 per foreclosure. That is not acting in your own economic self-interest.

Why? Well, risk is not connected with reward under these mortgages. The model simply does not work. Legal barriers exist between the servicing entity, the mortgage entity, and the entity that actually has the possibility of reward.

So the HAMP programs you are seeing have been largely unsuccessful in dealing with the vast number of borrowers that are in default. It is not what we wanted. It is not what you wanted. It is not what Treasury wanted. But it is the truth; the HAMP system right now does not work.

Can we make it work better? I hope so. And the trustees are certainly willing and participating now in processes where we can make this work better. Can it work better where borrowers are in bankruptcy? Remember, bankruptcy, they are there, many of them, in Chapter 13 in order to save their home. They already have the incentive to try and save their home. They want the house. They want the mortgage paid. They just need help doing it. Bankruptcy creates a system whereby documentation can be provided. Let's change the HAMP program to allow the bankruptcy documentation to suffice instead of adding an additional layer.

Does this mean that, because it didn't work, that we stop on the process of trying to make HAMP better? No. We still need to do that. We need to make it work. So the trustees would encourage you to continue to look at the tools that can make Chapter 13 a better mechanism to cure defaults and get these mortgages back on track. If, as Representative Franks has pointed out, that 1106 is not the way you want to go, and I would agree, the trustees would agree that 1106 can be tweaked or can be improved. But it does recognize, as Mr. Scott had pointed out, that Chapter 13 recognizes that values for mortgages that are being cured are different than the distressed values that are facing in foreclosure.

The second recommendation we would make, bring trustees and attorneys into the HAMP process. Do not exclude them. Do not ignore them. Encourage trustees and debtors attorneys to participate in the process.

And, finally, we would recommend that if the HAMP process is stalled, doesn't work, results in silence, create judicial review of the HAMP process. If the mortgage modification is not acceptable, at least take a look at allowing the judges to review the determinations made in the HAMP process.

Thank you for the opportunity to be here, Mr. Chairman. And I am willing to answer any questions you may have.

[The prepared statement of Mr. Hildebrand follows:]

PREPARED STATEMENT OF HENRY E. HILDEBRAND, III

House Committee on the Judiciary

Subcommittee on Commercial and Administrative Law

Washington, D.C.

"Home Foreclosures: Will Voluntary Mortgage Modification Help Families

Save Their Homes?

Part II"

Friday, December 11, 2009

11:00 a.m.

Testimony of

Henry E. Hildebrand, III

Standing Chapter 13 Trustee for

The Middle District of Tennessee

and

Chair, Legislative and Legal Affairs Committee of the

National Association of Chapter 13 Trustees

Testimony of Henry E. Hildebrand, III
House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
"Home Foreclosures: Will Voluntary Mortgage Modification Help Families
Save Their Homes? Part II"
December 11, 2009

Mr. Chairman, members of the Sub-Committee, and distinguished witnesses, I am pleased to have the opportunity to meet with you today to deal with the question raised by the Committee, "Will Voluntary Mortgage Modification Help Families Save Their Homes?" As a Chapter 13 trustee for the past 27 years, as chairman of the Legislative & Legal Affairs Committee of the National Association of Chapter Thirteen Trustees, and having direct involvement in administering 14,000 active Chapter 13 cases, I regret to tell you that the answer to your question is "no."

I appear today as a representative of the National Association of Chapter Thirteen Trustees (NACTT), a national organization of consumer bankruptcy professionals, created to further the education of bankruptcy practitioners, trustees, and others involved in consumer bankruptcy, and to provide assistance and support to policy makers and the courts. The NACTT is an organization committed to imparting the highest professional standards to all of our members. The NACTT and its members have been fully committed to assisting debtors as they work to save their homes, while protecting the appropriate contractual interests of creditors, using whatever tools they are provided.

Chapter 13 has long provided the avenue where a homeowner, in arrears on a home mortgage, can save the home by curing the existing default and maintaining the ongoing contractual mortgage payments. For years, this has been an adequate bankruptcy remedy to save

hundreds of thousands of homes, preserving home ownership for thousands of families in communities across the country.

However, the structure of home mortgages has changed since the early days of the Bankruptcy Code, and the tools that Chapter 13 once provided are no longer adequate to help the families in distress keep their homes. The exotic mortgages created by the mortgage industry enticed expanded home ownership but did not conform with the traditional and prudent model of mortgages. Consequently, Chapter 13 no longer works as well to save homes from foreclosure. This committee has previously considered this same question.

The NACTT made suggestions to this Committee and members of Congress in reference to your consideration of H.R. 200 (S 61). As this Committee noted in its report on H.R. 200, submitted in February 2009, "Our Nation is currently experiencing a mortgage foreclosure crisis unprecedented since the Great Depression. It is severely harming neighborhoods, communities and the United States economy as a whole. Our economic recovery depends upon stabilizing the housing sector; and this requires more effective measures to stem the flood of foreclosures."[1] The financial hits on homeowners that led to House passage of H.R. 200 have not improved. If anything, the conditions have deteriorated where mortgage defaults continue to climb, foreclosures increase, and family displacements escalate. Some 7.5 million foreclosure sales will have taken place between 2006 and 2011. Mark Sandy, economist for Moody's, has predicted that 4.8 million foreclosures are expected between 2009 and 2011.[2] The third quarter delinquency rate in home mortgages is the highest since the Mortgage Bankers Association began keeping records in 1972. The combined percentage of those in foreclosure as well as

[1] H.R. REP. NO. 111-19, at 4 (2009).
[2] *See* Ray Clancy, *U.S. Property Market Facing Further Pressure in 2010, According to Leading Economists*, U.S. PROP. NEWS, Dec. 7, 2009.

delinquent homeowners is 14.41 percent, or about 1 in 7 mortgage holders.[3] "The outlook is that delinquency rates and foreclosure rates will continue to worsen before they improve."[4] The percentage of loans on which foreclosure actions were commenced reached a record at 1.42 percent.[5]

When the Senate rejected S. 61, the companion bill to H.R. 200, supporters of the remedies it had promised still held hope that the Making Homes Affordable program would encourage voluntary modification of mortgages by lenders that would give individual borrowers in distress the ability to keep their homes through modified mortgage payments.

The benefits of ongoing home ownership are clear. Continued home occupancy and payments, even when modified, provide a home for multiple family members, a performing loan for the mortgage creditor, the prevention of neighborhood decay and blight that can poison a community as foreclosed homes sit abandoned and the continuation of property tax revenues to cover the essential services such as schools, police and fire protection. The obviously economic benefits of making it possible for individuals to keep their homes and make their mortgage payments lead to the unavoidable conclusion that voluntary mortgage modifications are a good idea for all.

Chapter 13 trustees were encouraged by these efforts of Treasury to promote voluntary mortgage modifications through the Homes Affordable Modification Program (HAMP). The sad truth, however, is that HAMP is complex, difficult for servicers to administer, confusing to unsophisticated borrowers facing financial problems, and provides neither adequate nor timely relief they so desperately need to restructure their mortgages.

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[3] David Streitfeld, *U.S. Mortgage Delinquencies Reach a Record High*, N.Y. TIMES, Nov. 19, 2009, *at* nytimes.com.
[4] Renae Merle, *Foreclosure Delinquency Rates Spike Amid Growing Unemployment*, WASH. POST, Nov. 19, 2009, *at* washingtonpost.com.
[5] Kathleen Howley, *FHA, Prime Mortgage Defaults at Records on Job Losses*, Nov. 19, 2009, *at* Bloomberg.com.

To be sure, many borrowers cannot afford their homes and the modifications contemplated under the HAMP program do little to cure the underlying problem: the debtor's income is inadequate to cover the mortgage payments even as modified.

Many homeowners, however, might well profit from a restructuring of the mortgage under HAMP, provided such modifications were offered as a part of the existing Chapter 13 bankruptcy infrastructure.

In today's mortgage environment, where exotic mortgages adjust interest rates, modify payments and escalate mortgage obligations, Chapter 13 no longer helps desperate debtors trying to keep their homes. Under current laws, ongoing mortgage obligations on a debtor's principal residence must be paid as provided in the original contract.[6] Chapter 13 debtors, seeking to preserve their homes, are powerless to restructure mortgages with a fixed and fair interest rate or a re-amortization of their mortgage debt. Servicers, however, advised by the HAMP directives that mortgage modifications are only optional for debtors in bankruptcy, have shied away from borrowers in bankruptcy, particularly Chapter 13. As trustees, we understand that debtors with the commitment to dedicate future income to the payment of creditors are willing to subject themselves to the scrutiny of a trustee and a bankruptcy court, and have experienced attorneys to assist them, are prime candidates for a mortgage modification. We are disappointed that voluntary mortgage modifications are not routine for Chapter 13 debtors.

This is not to imply that the individuals at the Department of the Treasury and individual servicers have not worked diligently in an effort to make HAMP modifications available to more debtors in Chapter 13 cases. The unfortunate truth, however, is that very few, if any, of the mortgage modifications proposed by Chapter 13 debtors have been accepted.

[6] 11 U.S.C. §§1322(b)(5).and 1322(b)(2). It is somewhat ironic to note that the Bankruptcy Code permits a modification of a mortgage on investment property or a vacation home. Only a debtor's home mortgage is isolated from modification.

Trustee after trustee has indicated that the only consistent scenario they've seen from HAMP in Chapter 13 cases is failure, frustration and silence. Servicers fail to respond to inquiries by debtors and their attorneys. Debtors fail to understand the requirements imposed on them by HAMP. Debtors' counsel are not included in communications by servicers to borrowers, and thus are excluded from facilitating the very remedies they seek which can make a difference for their clients.[7]

We now know from the media that many of the modifications under the HAMP are not "working." This is no surprise, largely because of a systemic myopia in the program. HAMP looks primarily at the mortgage payments and does not examine the entire financial structure of a borrower, as occurs in a Chapter 13 case. It is time to awaken to the benefits of using Chapter 13 to facilitate the mortgage modification process.

Trustees know that HAMP modifications are not being made available to most debtors in Chapter 13. This view is supported by information we've received from debtors' attorneys.

An attorney in northern California indicates that for 20 requested HAMP modifications for Chapter 13 cases filed from July 1, 2009 through September 30, 2009, none of the debtors have received a permanent HAMP modification, none of the debtors received a temporary plan that had not been subsequently revoked, 85 percent (17 out of 20) of the servicers did not respond at all to the request for a HAMP modification, and 65 percent of the mortgage lenders actually objected to the confirmation of a Chapter 13 plan that simply requested a HAMP modification.

[7] This is not to say that some servicers are not actively responding to modification requests. SPS, Countrywide and Wells Fargo appear to be more active than others in attempting to reach out to Chapter 13 debtors.

In my home city of Nashville, a leading debtors' law firm requested HAMP modifications in 19 separate cases. None of these requests resulted in either a temporary or permanent modification. In nine of the cases, debtor's counsel received no response at all.

A Kansas attorney reports that after six months of attempting to work out a loan modification from Bank of America (f/k/a Countrywide Home Loans), a couple received a foreclosure lawsuit at the same time they were being told that they were being reviewed for a modification. A judgment in civil court was taken against them and their home was repeatedly placed on the auction docket every month and removed at the last minute while Bank of America considered the modification request. These debtors finally received an offer from Bank of America approving a modification. This offer was later withdrawn when they filed bankruptcy to deal with the rest of their debt problems.[8]

Even where submissions of HAMP requests have been simplified by use of a web site (www.defaultmitigation.com), only 33 percent of the submissions appear to have led to a HAMP offer. While this is better than it has been, it is far from what we had hoped.

Chapter 13 trustees, wishing to encourage the use of HAMP modifications, repeatedly inquire of debtors at Meetings of Creditors whether they had had any success in soliciting a HAMP modification. The response is always the same: as long as borrowers are in bankruptcy they are ineligible for a HAMP modification.

A trustee in Maryland reports that Chapter 13 debtors often complain about receiving inconsistent information related to mortgage modifications. Some debtors, being advised to make a modified payment amount, do so, only to discover that the bankruptcy department of their loan servicer has referred the matter for foreclosure precisely because the debtors paid the lower, trial period payment amount.

[8]See *In re Devorsky*, Bk. No. 09-22087 (Bankr D. Kan.).

We are aware that HAMP has been disappointing in many ways.[9] In October, the Congressional Oversight Panel revealed that only about 1,700 permanent modifications under the HAMP program had been completed. This number is far less than anticipated and far too few to have any meaningful impact on our housing crisis.

What trustees and participants in the bankruptcy process have learned is that HAMP is a massive disappointment, across the board, failing to adjust mortgages, whether in or out of bankruptcy. The HAMP program, while a novel and commendable idea, has been marked only with a lack of success and overwhelming frustration by borrowers, their attorneys, and trustees. As more homes fall to foreclosure, as more homeowners fall delinquent on their mortgages, our opportunity to fix the problem diminishes. Chapter 13, formerly the best means by which a debtor could maintain possession of a home while repaying a mortgage as currently established, cannot solve the problems of today's mortgages in today's world. In April, the Senate rejected the House's proposal of judicial modification of home mortgages by federal courts. The NACTT supported H.R. 200 and encouraged its enactment. We saw the strengths of an impartial and fair judicial system, with substantial experience in valuing real property and restructuring secured debt, effecting modifications of exotic home mortgages in the context of a broad, comprehensive reorganization of an individual borrower's debt. When H.R. 200 failed to become law, the NACTT was hopeful that voluntary modifications would help. We now know: they did not.

**Proposals to Effect a Meaningful Response**

The NACTT continues to believe that judicial modifications of home mortgages through our existing federal court structure is the best way to quickly, fairly and effectively restructure home mortgages facing foreclosure. We believe that the problems facing us do not arise from

[9] See *Edward et al. v Aurora Loan Services, et al.*, civil action pending in the U.S. District Court for the District of Columbia, filed November 9, 2009.

local community banks and credit unions.[10] Similarly, revisiting judicial modification of mortgages, even if limited to interest rates, amortization and capitalization of advances, enforced by authority of a court order, can make modifications meaningful and can actually have a broad impact on helping to solve our growing foreclosure crisis. While we understand that there were some valid questions raised by H.R. 200 and S. 61[11], the trustees supported the efforts of this Committee.

If judicial modification is not possible, then, at a minimum, HAMP should be modified to make clear that Chapter 13 debtors are not precluded from pursuing a HAMP modification while they are in bankruptcy. The documentation required under HAMP should be modified to recognize that debtors in bankruptcy are subjected to severe scrutiny by creditors, trustees, and the court. Thus, the documents provided to the trustee should be adequate to provide the documentation necessary for an evaluation as to whether the Chapter 13 debtor is eligible for a HAMP modification early in the bankruptcy process. The Bankruptcy Code itself, 11 U.S.C. § 521(a)(1), requires the submission of detailed documentation of a debtor's income, expenses, assets and liabilities. A debtor must submit tax returns to the trustee in their case. *See* 11 U.S.C. §521(f). Debtors must submit pay advices for review to verify the veracity of the debtor's stated income. The submission of these documents should be sufficient to satisfy the documentation requirements imposed under HAMP. We encourage Treasury to require servicers to accept bankruptcy documentation in lieu of the documentation currently requested as part of a HAMP modification.

[10] Often such financial institutions retain an adequate interest in a mortgage to facilitate voluntary mortgage modifications without the institutional impediments that asset-backed security pools and their servicers face.

[11] The trustees are concerned over the limitations that the legislation would place upon the percentage fee that trustees would be permitted to assess in a case when they are administering a modified mortgage under the proposal.

**Prompt Response Required or Defer to the Court**

For Chapter 13 debtors seeking to propose a restructure of their debts, it is essential that HAMP requests be dealt with promptly and efficiently. If a mortgage servicer fails to respond to a HAMP request, it only makes sense to permit the HAMP analysis to be done by the court to determine whether a Chapter 13 debtor is eligible for the HAMP modification. If a debtor appears to be eligible for a HAMP modification at the onset of a Chapter 13 bankruptcy case, the mortgage servicer should be required to demonstrate that it is not in the best interest of the mortgage holder to permit the HAMP-style modification requested by a debtor.[12]

**Permit Courts to Apply the HAMP Tests**

Although this Committee endorsed the concept of broad judicial modification of home mortgages in a Chapter 13 bankruptcy plan in H.R. 200, the Senate rejected such a modification. Despite this rejection by the Senate, this Committee should revisit this issue and confer authority to a judicial officer -- the bankruptcy judge -- to impose HAMP-style modifications by (1) capitalizing late fees, advances, escrow shortages, etc.; (2) adjusting the interest rate in .125 increments; (3) re-amortizing the obligation up to 40 years; and/or (4) capitalizing the unpaid principal over the remaining life of the loan. While this does limit the effect of judicial modifications of home mortgages, it can encourage prompt and effective mortgage modifications for debtors in bankruptcy.

**Encourage the Debtors' Attorneys to Become More Active in the Process**

The efforts of the Department of the Treasury and the HAMP program have been focused on compensating servicers for their consideration and work involved in working through a HAMP modification. Similarly, the Department of Treasury ought to encourage debtors'

[12] This is the essence of the Net Present Value (NPV) test of HAMP. Where a court determines that a HAMP modification should be imposed, a mortgage lender should be required to demonstrate that the NPV test precludes a modification.

attorneys and borrowers' representatives to become more active in submitting the documentation necessary to obtain a HAMP modification, particularly where a borrower is in a Chapter 13 bankruptcy and the information is already in the possession of a debtor's attorney. This Committee should make clear that compensating a debtor's attorney, not with taxpayer funds, but with funds from the estate created in a Chapter 13 case, is appropriate for an attorney pursuing a modification pursuant to the relatively complex requirements of a HAMP modification.

**Bring Chapter Thirteen Trustees into the System**

The Department of the Treasury has made a commendable effort to bring Chapter 13 trustees into this process to work with servicers and government officials in encouraging HAMP program implementation in the bankruptcy system. This should continue to be encouraged and Treasury should provide full information to Chapter 13 trustees through the Executive Office of the United States Trustee, educating trustees and their staffs in order to assist debtors and their attorneys in making HAMP modification requests.

The NACTT members are willing to assist the Department of the Treasury in reaching out to individual trustees, debtor's attorneys, borrower's advocates, and servicers, as they work through an ongoing effort to make HAMP modifications, whether voluntarily accepted as under the current program, or, through legislative change, imposed on lenders through a judicial process, such that participation can be meaningful and effective.

NACTT members strongly support this Committee's original proposal that home mortgages be modified through a fair, open and tested judicial process. We believe that the system within which we work is well equipped to promptly effectuate mortgage modifications

The Trustee members of the NACTT stand willing to provide the structure and the support to the bankruptcy community to insure that modifications are meaningful and effective.

The NACTT stands ready to answer any questions you may have.



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Mr. COHEN. Thank you, Mr. Hildebrand. You have shown that you are as knowledgeable about preserving the use of and preservation of real assets as you are liquid assets.

Mr. HILDEBRAND. Thank you, Mr. Chairman.

Mr. COHEN. We now begin questioning. And I recognize myself for 5 minutes for questioning.

Ms. Schwartz, you are put in the somewhat difficult position of being the only person here that attempts to defend the HAMP program. Professor Levitin says it is a failure. Judge Golant apparently says something similar, and so does Mr. Hildebrand. They all have suggestions, like the cramdown provision. Tell me the things that they have said that you agree with.

Ms. SCHWARTZ. Thank you for the question.

Listen, I think we all get frustrated that we can't see all of this wrapped up with a bow and finish every month at a greater number. But the truth is there are a lot of people paying $500 or $600 less on a mortgage. In fact, 728,000 people.

I think what the government has done through HAMP has put some uniformity into the program that there has not been across the market. I have been involved for 2 years, as you know, on this. So that is a good thing. Pull-through will be a good thing. Working with third parties will be a good thing. Time is of the essence. We all know that. There are 3.5 million people 60 days late on their mortgage.

That said, what I agree with is that we should work on loans that are already in bankruptcy and figure out a way to help those people get modifications. That is something we are already working on with some of my colleagues at the table here with Treasury.

Another issue is not one loan should go to foreclosure that hasn't been reviewed for a HAMP mod or another mod. Because, let me assure you all, the loans that fail HAMP will get other mods, and they do, as do many other——

Mr. COHEN. Let me interrupt you slightly, because I know you have many other areas to go to that you want to agree with these folks.

Judge, you are shaking your head. Tell me why.

Ms. GOLANT. They are not getting reviewed. I only see people when they have tried their hearts out and have not gotten reviewed. They haven't gotten any answer. And while they are still waiting for an answer, the process server shows up with a foreclosure complaint. Then they come to me. So I know they are not getting reviewed.

Mr. COHEN. Ms. Schwartz.

Ms. SCHWARTZ. Yes. So a requirement and a legal contract with the United States Government for everyone who has signed up for it is this loan will be reviewed for eligibility on a HAMP modification, and many others.

The foreclosure—rate of foreclosures has gone down, the foreclosure sales, and there is this cue of people in waiting for sales while they are being reviewed for eligibility. And they haven't all been timely reviewed, we all know that because we are seeing the numbers, but that is the process that has been prescribed, and it is the process within these organizations to do so. And maybe it is the lack of communication that is half of this.

Mr. COHEN. Professor Golant, let me ask you this. The question on the cramdown, as the other side says, this will dry up the market and raise credit rates and all these things and make it more difficult for people to get mortgages if we do this. We allow family farms to have their conditions modified, homes modified, vacation

homes, yachts. Have you seen this in financing for yachts and vacation homes?

Ms. GOLANT. No, Mr. Chairman. And in fact, the bill as I understand it is only for existing mortgages anyway. So it couldn't possibly affect new finance.

Mr. COHEN. Anybody else seeing a big problem in this country with financing yachts?

Mr. HILDEBRAND. I serve as the Chapter 12 trustee in the middle district and have done that for 20 years. And in the context of farmers, they are allowed to do this. They are allowed to restructure their home mortgages or farm mortgages over the period of time longer than the 5-year term of the plan, and they have worked, and it has not caused farm credit to disappear.

Mr. COHEN. Professor Levitin, you say it is a failure. Is there any way to cure HAMP.

Mr. LEVITIN. Well, it depends on what you want HAMP to do. If you want HAMP to have a macroeconomic impact, I don't think there is any way to fix it.

That said, it doesn't mean we should toss HAMP out. HAMP does help people. I mean, to the extent we can help any person who is in foreclosure, we should try to do it. And HAMP is helping some people, but it is just not ever going to produce the volume we need to keep up with foreclosures.

Mr. COHEN. Does anybody know what percentage of people it is helping? Is it like 4 percent?

Ms. Schwartz, do you have any idea?

Ms. SCHWARTZ. Well, I think we don't know that answer yet, because they are all in process, 60, 90, 120 days under the grace period of getting their final docs in. So that measurement is difficult to assess.

Mr. JORDAN. Mr. Chairman?

Mr. COHEN. Yes?

Mr. JORDAN. Just in response to the question, we had a hearing in Cleveland this Monday with Mr. Kucinich on the Domestic Policy Subcommittee of OGR. Testimony from Ms. Caldwell from Treasury was 650,000 are in some type of preliminary modification trial phase.

But, to date, my numbers that we got, confirmed by Ms. Caldwell, were 1,711 families in the HAMP program. That is all that have had their loans modified.

Mr. COHEN. 1,711 out of 65,000?

Mr. JORDAN. 650,000 are in the trial phase. 1,711 families have had their loans actually modified; that is it—permanent modification. It is that bad.

Mr. COHEN. Thank you, Mr. Jordan.

Ms. Schwartz?

Ms. SCHWARTZ. I just actually had the number from the Treasury report that there are 31,000 permanent modifications. And, remember, you have to be 90-days current with full documentation to get permanent. There are a substantial number of people current on their payments but have not documented, just to keep the distinction.

Mr. COHEN. Before I yield to the Ranking Member of the minority, Judge, do you have a response?

Ms. GOLANT. I do, your honor—I am sorry, Mr. Chairman—because——

Mr. COHEN. No, "your honor" works. I like that.

Ms. GOLANT. Yes, your honor. I try to get people even to be allowed to apply for HAMP, because, despite the participation agreements, many servicers will not even allow it. So I have people that have also made their 3-month payments and they are still not getting permanent mods.

But I am talking about people that can't even get in the door. I don't know why, but it is not that I am not trying. And when I try, I get resistance. I don't get a package, "Here, send it in, and we will consider it." I get a hearing in front of a judge, because they won't agree.

Mr. COHEN. Thank you.

I now yield to the Ranking Member from Arizona, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Chairman, let me just, if I could, begin by trying to clarify a couple of things.

Related to the comparison on the Chapter 12, the family farm comparison, there were only 314 of those last year. So it is, kind of, not a really very good comparison.

And I also wanted to just—because I understand that there is a partisan disagreement over how this challenge came into existence. But there are a lot of statements on the other side of the aisle that says that rebundling and all of these things that were done with the derivatives were the problem.

But I just want to remind everyone, if the loans that were the fundamental matrix of those instruments, if the loans that made up those financial instruments had performed as one would have expected them normally to do so, none of this would have happened. All of the derivatives would have been fine. I am not suggesting it was a perfect system, but I am saying that the problem, the thing that caused this problem was that bad loans were made.

And, certainly, the CRA put a great deal of pressure on banks to make bad loans. And banks, due to their own fault or due to the pressure that was in the system, kind of did away with the three main legs that hold up loans. One of those is income, one of those is credit history, and, of course, one of those is the collateral, how much money they put into the loan in the first place. And when you take those three things out, as a lot of that happened, that is what catalyzed this problem.

And we should be, as a Congress, looking very hard on ways to prevent that again and at least to face that squarely. And I don't really think it is a partisan issue, and, unfortunately, it has become that. But I don't know what else we can do with that.

Ms. Schwartz, I have been very obviously impressed with your testimony today. You note that there have been 680,000 trial modifications under HAMP. What does it take to convert a trial modification to a permanent modification? And what are the main impediments to making those conversions?

Ms. SCHWARTZ. Well, I could just name a few. I think because there are taxpayer dollars involved with these modifications, what you have seen in the past is maybe less rigorous dotting of the "i" and crossing of the "t" before you would grant a permanent modi-

fication. It would be performance on pay history that gets them there, you know, some documentation like a hardship, maybe a pay stub, et cetera.

This is more prescriptive. In fact, if you need a W-2 and tax returns and a 4506(t) and the hardship letter and the other documentation, if it is going back and forth with servicers, counselors, and the borrower 10 times on the same mortgage, it is very difficult to be efficient and effective.

And with any government program, you are at risk of making a mistake, and no one wants total make a mistake if they put them into a mod. A lot of process and friction is in the system, understandably. These are taxpayer dollars.

So that is the biggest difference, is documentation, streamlining, and trying to contact with the borrower that don't return calls, and maybe 120 days later you start getting into the process. There are just all kinds of issues.

Mr. FRANKS. Is there any way to eliminate some of these impediments without putting the program in the same kind of challenges that got us here?

Ms. SCHWARTZ. Yes, sir. I mean, we do have some recommendations, and to the government, that we think there are ways to improve it. I don't know that you are going to get the pull-through that everyone wants and expects for a program like this. And, again, unemployment is one the biggest drivers. Lack of income means you cannot modify a loan.

Mr. FRANKS. I guess that is my question. How is unemployment affecting mortgage-modification efforts? And isn't it, or is it, the single greatest impediment to these modifications?

Ms. SCHWARTZ. I think it is one of the biggest ones, in that we are all in such a changing landscape that what was true 120 days before when you start the trial modification, a loss of income of one spouse, maybe overtime being cut changes the dynamics. And when the income documentation gets documented, it is different than what it was 90 days ago.

And so this changing landscape, it is difficult to keep the process in place. And it is a threat, I think, to all of the good work going on with all parties, whether it is counselors, lawyers, and servicers. This changing landscape is clearly the issue.

Mr. FRANKS. Mr. Chairman, I guess, with that, I will just suggest that one thing that we should be able to get together on on both sides of this aisle here is to recognize the importance of jobs and productivity to solving these problems. It is the only way home.

And it is astonishing how a lot of the economists can talk in big words, but, fundamentally, the economy is about productivity, and that is measured in large part by jobs. And I hope that we can get together and face that. I don't know if either side has the answer on how to fix it, but we should agree that that is a huge, huge issue.

And I yield back.

Mr. COHEN. Thank you, sir.

I would now like to recognize Mr. Delahunt. Would you like to ask questions? Mr. Conyers passes, I believe.

Mr. Conyers?

Mr. CONYERS. No, I don't pass.

Mr. COHEN. You don't pass. You pass everything; you pass with honors.

You are recognized, Mr. Conyers.

Mr. CONYERS. You can't Chair two Subcommittees at the same time.

Let's see what we are talking about here. This is, I won't say a funny kind of hearing, but we have two witnesses that say everything is going along about as well as it can and two that are clearly dissatisfied.

Now, my investigator tells me that the HOPE coalition is made up of community counselors, bankers, and mortgage company officials. True?

Ms. SCHWARTZ. Yes, and investors and Freddie Mac and all the nonprofit, HUD-approved counseling agencies, that is correct.

Mr. CONYERS. How many bankers?

Ms. SCHWARTZ. Well, we have about 34 different servicing institutions. Many of the top banks are members of HOPE NOW.

Mr. CONYERS. They are the ones that created the problem.

Ms. SCHWARTZ. You know what, sir? They are the ones who need to get you out of this. You need to work with us——

Mr. CONYERS. Oh. Because they got us into this.

Ms. SCHWARTZ. They are the ones in charge of executing modifications and helping borrowers through loss mitigation. And to not have them work through this to help get out of it would be a mistake.

Mr. CONYERS. How many are there?

Ms. SCHWARTZ. Pardon me?

Mr. CONYERS. How many bankers are there, just roughly?

Ms. SCHWARTZ. I just don't know the breakout of who is—let me think. Maybe it is 18 out of 33 or something. I have to relook at that.

Mr. CONYERS. Well, look at it, and we want to put it in the record.

Ms. SCHWARTZ. Sure. Sure.

Mr. CONYERS. What about mortgage company people?

Ms. SCHWARTZ. So all of these institutions——

Mr. CONYERS. All of them are? Most of them are?

Ms. SCHWARTZ. Well, I mean, we have the resources of people to work with us on all the Committees and help go to the outreach events and send teams of people to meet with borrowers. So there are all, kind of, walks of life within these companies.

Mr. CONYERS. Yeah, how many?

Ms. SCHWARTZ. Thousands, probably, working to help. I don't understand the question perhaps. I apologize.

Mr. CONYERS. That is all right. Well, that is a great acronym, HOPE. Reverend Jesse Jackson, "Keep hope alive."

How many people have you helped?

Ms. SCHWARTZ. This year alone, the records on 40 million loans, which is the majority of the market share, indicates that 2.6 million people have had either modifications or repayment plans, in addition to the 700,000 government trial plans. 3.4 million people, while 700,000 went to actual foreclosure sale. Four times higher.

Mr. CONYERS. What am I missing in this question, counsel?

What is the basis for saying—you are saying millions were saved. How can you identify who was prevented from foreclosure? The numbers you reveal are staggering and raise some questions.

Ms. SCHWARTZ. Well, those are actually records we get on the data of people that are in repayment plans or actual modification, which is a structural change in a contract, and we have the government actual modification trials. And then foreclosure sales are records, and so we know how many go to actual sale.

And there are a lot of people in between. There are millions of people whole need help, and we know that. So I am acknowledging that. What I am trying to share with you is data that is very strong data around this issue.

Mr. CONYERS. Professor, help me out here.

Mr. LEVITIN. Sure, Mr. Chairman.

First, it is important to distinguish between the private modifications counted by HOPE NOW and private modifications and repayment plans that are included in Ms. Schwartz's statistics and HAMP modifications. There have been, as Ms. Schwartz notes, several million repayment plans and private modifications. There are a couple of important things to note about those.

First, we don't know what the terms of any of those are. And the terms actually matter. A repayment plan can be a very helpful thing or it can be a useless thing, depending on its terms. So just looking at an absolute number doesn't really tell us that much.

Secondly, there is some element of double-counting in the repayment plans and modifications. Because often a borrower gets in a repayment plan and fails in the repayment plan and then gets a modification and maybe fails in that modification and gets another modification. And we don't know how long, you know—how this string of events goes.

But just looking at, sort of, the cumulative numbers from HOPE NOW compared with foreclosures is not the most meaningful comparison. Certainly, HOPE NOW and its members are trying to do various mitigation actions. How effective those are is another question entirely.

Mr. CONYERS. Well, you know, this isn't working out so well, Mrs. Schwartz. What is the problem here? What is the difference between what I asked you and what Professor Levitin responds? Does he understand this program fully?

Ms. SCHWARTZ. He does. We have talked several times.

And I think what is important here, sir, is—I know you are right, in that if 30 percent or 40 percent go back in default and you try another modification—for instance, maybe the HAMP modification—you know, that is another bite at the apple before you go to foreclosure.

And what I would say with my numbers that are accurate is we count every foreclosure, so they would flow through our pipelines and show you what has happened. And, clearly, millions of people are not in the final stage of foreclosure over the efforts. That is clear. Two out of three don't go to foreclosure, And that is historic in the last year, through these efforts. It used to be one out of two go to foreclosure.

That said, more work needs to be done, I totally agree. But I would say that every loan should be reviewed for a workout alter-

native. And that is the prescriptive legal agreement of what HAMP is. And after they have been exhausted, they go to foreclosure sale. And, you know, I would like to think that that is exactly what is happening, but I don't know every answer on this one.

Mr. CONYERS. Well, you say the mortgage bankers and the mortgage people are the ones that can help us get out of it. Who is it that helped us get into it?

Ms. SCHWARTZ. Well, I think there are a lot of parties to all these transactions. We all know that.

Mr. CONYERS. Yeah. But I am talking about these two groups.

Ms. SCHWARTZ. We have counselors——

Mr. CONYERS. Don't you want to blame the subprime mortgage thing as triggering this off?

Ms. SCHWARTZ. You know what? Those have stabilized. We are into the prime—two to three times higher foreclosures on prime mortgages.

Mr. CONYERS. Yeah, but I am talking about what started it. You shake your head. That means yes?

Ms. SCHWARTZ. Yes, I think it started in the product of high-risk layering and subprime, and it has migrated to a different issue. Negative equity is now a big issue that hasn't been discussed. That is another haunting issue, as is unemployment. So the nature of making a modification has changed.

Mr. CONYERS. But the bankers and the mortgage people are the ones that gave out the subprime mortgages.

Ms. SCHWARTZ. I am working with the loan servicers, sir, whose job is to——

Mr. CONYERS. I am not talking about that one guy. I am talking about the industry people. These are the guys that got us into this. Now, most people recognize and acknowledge that. This is a couple of years old now. So why are we going back and forth and modifying all of this?

I am going to have, Ms. Schwartz, some additional questions for you to submit for the record because of the 5 minutes. And the Chairman has been generous. We need to go into this a little deeper.

And I thank the gentleman.

Mr. DELAHUNT. [Presiding.] Yeah, and I thank the Chairman of the full Committee.

We have a series of votes. Let me inquire of the panel. I think this is an important hearing. It is my understanding that we are looking at probably a 45-minute recess. If you are willing to come back, I don't want to encroach on your time, but I think this is an important hearing. It might only be one or two of us that come back, but I think hearing from you at this point with the kind of questions that are being posed by the Chairman of the full Committee, Mr. Conyers, is important.

If it is a significant inconvenience, individuals, obviously the Chair, would not be in any way offended if you didn't return. But it would be great to hear from you, because I think you all have so much to contribute.

Can I have a show of hands if there is a genuine willingness to return around quarter of 2:00?

Then that is what we will do.

Mr. SCOTT. Mr. Chairman?

Mr. DELAHUNT. Yes, Mr. Scott?

Mr. SCOTT. Could I be recognized? I just have a couple of questions that I would like to ask before we go.

Mr. DELAHUNT. Of course. And what we will do, we will end up and give the remaining time, as much as he needs, to Mr. Scott. He won't return, but I promise I will. And I know the Chairman of the Committee, Mr. Cohen, he will be here, because he, too, is a Kentucky colonel.

And, with that, I will yield to the gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

I wanted to ask Mr. Hildebrand, in a normal bankruptcy, if you have a yacht and it is upside-down and you owe more than the value of the yacht, what happens?

Mr. HILDEBRAND. The implication in the question is, can bankruptcy judges, can a bankruptcy plan structure and recognize the economic reality that you mentioned in your opening remarks, that the collateral is the extent of the secured claim, whether it is a yacht or a piece of business equipment or whether it is an airplane for United Airlines or whether it is the plants for General Motors?

Bankruptcy judges are entrusted with the ability to make these valuations, determine them for everything except the home mortgage.

Mr. SCOTT. Okay. Now, on the yacht, you could reaffirm the debt, but you would only have to reaffirm the debt up to the value of the yacht, is that right?

Mr. HILDEBRAND. If I could distinguish, reaffirmation would require a voluntary consent on both sides, pretty much like an agreement. On a plan, like a Chapter 11 plan, Chapter 12 plan, or Chapter 13 plan, it is the value you provide. And as long as the court determines that the value is fair and that it is a fair market value for whatever the collateral is, that is the extent of your secured claim that you must pay.

Mr. SCOTT. Okay. Now, if the debtor wants to reaffirm, does he need permission from the creditor?

Mr. HILDEBRAND. For a reaffirmation in a Chapter 7, yes, sir.

Mr. SCOTT. What about a 13?

Mr. HILDEBRAND. In a 13, no. That would be part of the plan process in the restructuring.

Mr. SCOTT. Okay. So, in a 13, the debtor can say, "I want to reaffirm," and the debt he has to reaffirm is the value of the yacht at that time?

Mr. HILDEBRAND. The plan he proposes is whatever the value of the yacht is——

Mr. SCOTT. Right. And that is probably a better deal for the creditor, because it is not a distress sale minus expenses.

Mr. HILDEBRAND. And as we have the amendments from 2005, it recognizes that the value we are giving this is not distressed value, wholesale value, auction value; it is retail value.

Mr. SCOTT. Okay. Now, the reason that a person would reaffirm at a higher rate on a home is essentially not because a creditor would get any more in a liquidation, they would actually get less, but because he is over a barrel if he doesn't reaffirm, he is homeless. Is that right?

Mr. HILDEBRAND. To the extent a borrower agrees to pay more than the economic dictates, the answer would be yes.

Mr. SCOTT. Okay. Now, to take advantage of a debtor in that case, is that fair?

Mr. HILDEBRAND. I am not sure I am the one to answer what is fair and not fair.

Mr. SCOTT. Making them reaffirm to higher economic value than the creditor would be entitled to on liquidation because, if he doesn't reaffirm, he is over a barrel. Either he reaffirms at the higher rate or he is homeless.

Mr. HILDEBRAND. Traditionally, bankruptcy law has been created to be fair to the most people involved. And, in the context of putting one creditor entity, or any entity, having more clout, if you will, more ability to hold somebody over a barrel, that works to the detriment not simply of the borrower or the debtor, but all the other creditors in the case.

Mr. SCOTT. I think I hear you saying that is not fair, which we would agree with.

Mr. HILDEBRAND. I wouldn't disagree with that.

Mr. SCOTT. Mr. Chairman, I would ask all of the witnesses, because we don't have time for a coherent answer, on accounting incentives and disincentives, whether or not the generally accepted—what is it, GATT?—generally accepted accounting practices give a disincentive to modifications or incentives to modifications.

I understand there may be some realization problems that may affect the balance sheet and earnings that would give people a disincentive to modify. And if any of the witnesses can comment on that briefly or in writing, I would appreciate it.

Mr. LEVITIN. Mr. Scott, I do not speak as an expert on accounting principals, but I can say this: Accounting principals are a disincentive for doing modifications that involve principal writedowns. Because when you write down principal, that immediately appears—that has a loss realization event on a balance sheet. Whereas if you lower interest rates, that does not affect how the loan appears on a balance sheet, even if they would have the same effect——

Mr. SCOTT. And all of that is artificial, because the fact that you modified doesn't put you in any better position, because you are about to lose even more if you let the thing go into foreclosure.

Mr. LEVITIN. That is correct.

Mr. DELAHUNT. I have been notified by staff that, rather than 40 minutes, it is closer to an hour and 15. Now, you know, I am sure that some of us are more than willing to come back around 2:15. If that presents a problem and you can't make it, that is fine. I just think your testimony is that important, I will show up and we will have a conversation.

And if anyone here is significantly inconvenienced or has anything else to do, like Christmas shopping or whatever, we understand. We don't want to impose. But I think maybe Mr. Coble and maybe myself and I know the Chair of the Subcommittee will also return.

So, why don't we plan on seeing each other around 2:15, 2:20? There is a great cafeteria here.

And we are in recess.

[Recess.]

Mr. DELAHUNT. We are back in session.

Let me extend my gratitude to this panel. Not only have you all made a contribution to the discourse, but you have established the fact that you have patience and can endure, which means that you would make fine Members of Congress, particularly in the Senate—or in the House, waiting for the Senate to do something.

And I think we are going to be joined shortly by the Chair of the Subcommittee, Mr. Cohen, but let me proceed. And let me pose a hypothesis. I see clear problems in terms of utilizing voluntary modifications. I think it has been articulated by at least three of our panelists. Clearly, any particular program, no matter how well-intentioned, would have to be revamped, take into account all of what I believe to be obvious impediments to success. That requires a sustained effort and much consultation among the parties.

I read something recently in the media about how the Treasury Department was going to shame those banks who were not or did not appear to be cooperating, in terms of helping to resolve this problem. I just don't think that works.

And it is not just bankers. I don't want to particularly castigate anyone. I think it is just that there are different viewpoints, different obligations. Banks, other corporations, have a primary obligation to shareholders. There are obviously self-interests. Self-interest is not limited to lenders. It is not limited to politicians. It is not limited to professors or CEOs of nonprofits. It is what human nature is all about. But there needs to be a balance.

Now, in terms of the voluntary programs, does this make sense: If there were—and this is the hypothesis—if there were authority conferred on the bankruptcy courts to reduce principal, in your individual judgments, would we find lenders moving more quickly to voluntary programs?

Since you are shaking your head, Ms. Golant, let me begin asking you, am I anywhere in the ballpark? Would it provide leverage?

Ms. GOLANT. Absolutely. Absolutely. And that is one of the huge issues now. And that is why when I get the plaintiff, the bank, in a jam in the foreclosure case, that for the first time gives the borrower leverage, then we get somewhere.

Right now, other than in that very limited context, borrowers have no leverage. So, yes, the possibility of a judicial modification or of a Chapter 13 would certainly provide leverage.

Mr. DELAHUNT. See, that is what my instinct tells me, and that, you know, programs like HAMP—and, you know, I appreciate the fact that there is substantial counseling going on through these programs. I think that is a positive. But I don't think it gets us to the point where we are dealing with the issue.

I think what we are doing by going the voluntary route is delaying—delaying the ultimate resolution. And we are just extending the pain and suffering and possibly and potentially exacerbating into a full-scale crisis that, at some point in time, could really do permanent and serious damage to not just real estate but to our overall economy.

Mr. Hildebrand?

Mr. HILDEBRAND. Mr. Chairman, I administer about 600 new Chapter 13 cases every month. And in each one of those cases, there is issues that deal with the valuation of collateral or the in-

terest rate that is an appropriate interest rate, how much debtors have to pay back. And what we have seen is that only one or two or three maybe a month have actually litigated, because in the backstop or the backdrop of the fact that there is a judicial remedy, a judicial response, negotiations take place.

So, as I said in my original testimony, bankruptcy creates a platform upon which there is negotiation, where parties can act in their own economic self-interest.

So I totally agree with your hypothetical. And it is accurate that, whether it is a modification of the principal amount or whether it is a judicial backstop to the HAMP program, where if HAMP is silent or there is no response or the HAMP is somehow mysteriously denied, there is some judicial response to review it, to see exactly what is going on.

And, in that context, which is not the same as the 1106 response, it is something different, which is should there be a judicial backstop, which is the purview of this Committee, and it would be appropriate.

Mr. DELAHUNT. Would the two of you agree that it would make Ms. Schwartz's program significantly more effective?

Mr. HILDEBRAND. No question.

Ms. GOLANT. Yes.

Mr. DELAHUNT. And we would see data that, in a relatively short period of time, would reflect?

Mr. HILDEBRAND. There is no question that, if a modification was requested and there is silence, then—and there is a backstop to that, whether it is a judicial review, then there would be a heavy incentive to participate in the HOPE program or the HAMP program by the servicers and by the investors. They will exercise that right, and it will facilitate a resolution to the process.

Ms. GOLANT. And, in addition, Mr. Chairman, at this point, with the voluntary programs, there is no two-way dialogue, there is no balance of power.

And that is why, when these voluntary modifications are proposed, many times borrowers will accept them even though they know they can't pay them, because it is better than nothing, in their view. And there is no opportunity to negotiate at all, so it is take it or leave it. And they figure, well, we better take it or else we will lose our house.

If there was a way to discuss and to have recourse to a judicial process, if need be, it would make a huge difference.

Mr. DELAHUNT. Well, Ms. Schwartz, you are next.

Ms. SCHWARTZ. My pleasure.

Mr. DELAHUNT. And we have plenty of time.

Ms. SCHWARTZ. Well, let me first——

Mr. DELAHUNT. So this is going to be much more of a conversation than is usually the case in a formal congressional hearing because of the fact that I now have the gavel. And I Chair the Europe Subcommittee on Foreign Affairs, and I describe it as "the Committee with no rules," because I think it is much more important to be able to engage in a dialogue and fully flesh out these issues and see where there is agreement and see where there is consensus.

I think it is clear you know where I am coming from. But that does not, in any way, mean that I don't appreciate the value of voluntary programs, particularly counseling aspects.

And, if you will, think of it in this way: Oftentimes, courts will refer matters for mediation, and those mediators oftentimes have demonstrable effect on serious problems, because it keeps the court calendars somewhat unclogged and it doesn't, in any way, like I say, diminish the significance. It just creates a different role for voluntary modification programs.

Ms. Schwartz?

Ms. SCHWARTZ. Well, thank you very much.

You know, the way I think about it—and I really have spent time, frankly, with foreclosure attorneys, bankruptcy attorneys, all the nonprofit counselors, the bankers, the servicers. I feel like I have spent a lot of time on this.

But I do need to reiterate: First, there is a requirement for banks who have signed up with the United States Treasury and have loans that are owned by Fannie Mae and Freddie Mac, it is a requirement, as their job, as servicers, to go to HAMP.

If it does not comply, and they can still be NPV positive to their investor——

Mr. DELAHUNT. NPV means what now?

Ms. SCHWARTZ. Net present value test, which is the unfortunate cold calculation of either a foreclosure is preferred or a modification and workout. And we heard today that modifications are far better for investors than are foreclosures, certainly in this market.

And so, whether they are redefaulting or not because of unemployment and other burdensome issues in the economy, those are requirements of the contracts they have in place with many parties and the United States Government.

And the reason I say that is, when I hear "voluntary," it makes me kind of crazy, because the agreements for people to look through loans are to work on an NPV test before and after to assess if they go to foreclosure. Those are the facts.

Mr. DELAHUNT. We are going save you for cleanup, Professor Levitin.

Ms. SCHWARTZ. No, no. He will clean up. We are cleaning up offline, too. But I don't——

Mr. DELAHUNT. But let me interrupt, because, you know, I hear what you are saying, and I am sure that is true. But how many individuals who find themselves in foreclosure proceedings are aware of that contract?

It is like, when you talk about the credit card contract, there is nobody in this room that has ever read their credit card contract. I mean, I think we are asking too much of people.

And, you know, what agency is policing, monitoring the contracts?

Ms. SCHWARTZ. It is also the communication with the homeowner. So an honest conflict is there are State laws that govern the foreclosure process. Remember, I earlier said two-thirds of the people that start that process have not gone to foreclosure and they get worked out. But it is cumbersome that people are working on modifications and going down the route of foreclosure. That happens a lot, because the State laws govern timelines, et cetera, on

foreclosure versus the workouts. Some of the workouts do not pass the testing—and the rigorous testing—that goes on.

But I might also add, many people make 30 to 40 attempts to reach the homeowner—FedExes, calls, door-knockers—and don't have any communication sometimes until after the foreclosure process. Again, those are pretty good facts on the grounds of what attempts have been made. But we should do better at measuring that to understand where the breakdown is for the borrowers who call in and——

Mr. DELAHUNT. I am not going to dispute that. I guess my position is, we don't have time.

Ms. SCHWARTZ. I know. It is tough.

Mr. DELAHUNT. Really, I don't think the American public is aware nor Members of Congress are aware that, given the data that I see in terms of the increasing numbers of foreclosures, that time is of the essence here.

If we continue to drag this out and attempt to perfect all of the pieces of the programs that, again, I am sure are worthy, we are going to find ourselves in a real serious, severe crisis. Because we don't have anybody—we get together like this, and we have a conversation, and, you know, Chairman Cohen and I are going to be on a plane going back to our respective districts, you will be going back to your offices, and everybody here will feel that it has been a good discussion. But we need action now.

And I get very frustrated because I understand the banks have their role, but, in the end, it is self-defeating, I think, for the lenders, as well. Because God forbid they have a total collapse on the real estate market, we are going to be back to where we were in September of 2008. I can see that as a real possibility. And there are no more bailouts coming from this Congress. That ain't gonna happen. It is just not going to happen.

Again, I am thinking of, you know, the authority to reduce principal as a mechanism to—when you have everybody's feet to the fire, you have the servicer out there, and it is somebody else's problem, and it is the lender and the investor. And, you know, how do you find where the mortgage is, because it has been securitized and it is off in some, you know, Never Never Land anywhere. And you are making calls, and the robocall comes and you are afraid it is the creditor so you don't pick up the phone.

I mean, these are very real, human responses. And unless you get—and these trustees are good. We have a good bankruptcy system in this country. And I dare say, Mr. Hildebrand and his colleagues are not out to punish people, including all the stakeholders. As he said in part of his statement, you know, we want to be fair. We understand that bankruptcy is incorporated into the Constitution by the Founders to give people a chance, but at the same time there is a balance to ensure that the investor and the lender, you know, be treated fairly and equitably, as well.

I just think that we have gone down a road that could very well bring us back even to a more dangerous and risky situation than what we were looking at better than a year ago. And here we are today with, you know—and I really wanted to come back, and I appreciate the four of you indulging me, because I want to get it on the record. Because, God forbid, but if I am correct and my in-

stincts are accurate, I want to be able to refer to this record and say, "I told you so. I told you so."

And all I hear is it is the CRA and Fannie Mae and Freddie Mac and all of this and that government is the problem. Well, you know, it might be a—I am not suggesting that government is the answer, but a bankruptcy court system that has evolved from our Constitution has proven to be a very effective instrument of helping people and, at the same time, being fair and equitable.

That is my concern. I want your program to work. I really do. But I think you need a little bit of a hammer hanging out there.

Ms. SCHWARTZ. Two things. I just want to be very clear. HOPE NOW doesn't, you know, really go on or off for what legislation should pass. We work with all the rules and the tools that are in the arsenal. So, today, HAMP is a dominant part of what we do. If it fails HAMP, we do other mods, et cetera.

My personal background is a capital market background for the first 15 to 18 years of my career. And what I would just share is today we have a broken market still. And the mortgage-backed security market and the trading market and the government is, fortunately for all of us, investing in those.

What I do know is, I don't know what a bankruptcy on a first lien mortgage would mean to the markets, but our markets aren't even acting yet in a functional way. There are no global investors. And, even in the United States, it is the government buying our assets.

So I don't know what bankruptcy would do. I just don't have enough data to know that. I worry about that.

Mr. DELAHUNT. Okay, but here is my guess. And I have listened to a lot of experts, and you know what I have discovered? Everybody is guessing. Okay? There really aren't any experts.

Ms. SCHWARTZ. I worry that that could be an issue.

Mr. DELAHUNT. But I think that the major concern I have is timeliness. Okay? And I don't see leverage to create the dynamic necessary to resolve the problem.

I am not an advocate, you know, to go into a situation with guns blazing and, you know, tear down the markets. I think you are correct. I don't see, right now, a rational market. And until it hits bottom—and that is, I think, why people are hesitant, because they don't think it has hit bottom.

And I think I agree with my Republican colleagues; it isn't about subprime now, it is about unemployment. But, you know, there is this chicken and egg argument, too. If you go underwater, then you lose your house and people are holding back in terms of expenditures, you create more joblessness. You create this vicious cycle.

And I don't know. Again, I am not saying it is a panacea, you know, to cram down authority. But I am saying it is a significant—and it is not even a tool. I would like to think that the voluntary modification programs would work if you just had that sitting over on the side.

Ms. GOLANT. It would help.

Mr. DELAHUNT. Professor Levitin, am I making any sense to you?

Mr. LEVITIN. Perfect sense. This is——

Mr. DELAHUNT. You must agree with me then.

Mr. LEVITIN. Of course. This is, should we approach this with a stick or a carrot or both? Treasury's approach has been to offer a carrot; taxpayer-funded incentives paid to servicers, to lenders, and in some cases to homeowners, to encourage HAMP modifications.

A carrot is a good way of encouraging behavior. But when it is combined with a stick, it is likely to be much more effective. Take the carrot, and, if you don't, out comes the stick. And bankruptcy would be the stick.

There are a few things that Ms. Schwartz said that I want to comment on, not so much to disagree with her but just to expand on her comments.

Ms. Schwartz rightly noted that servicers who sign up for HAMP—and it is largely voluntary, whether they sign up for HAMP—that servicers who sign up for HAMP are then under a contractual obligation. They have a contract with Fannie Mae, as Treasury's agent, that they will operate under the terms of the program.

It is worth noting, though, you know, what is the penalty for a servicer that fails to do this? Well, the only thing that is in that servicer participation agreement is regular contractual rights; that if Treasury thinks a servicer isn't complying with the servicing contract, isn't giving a proper review to a borrowers' cases, then Treasury's only real remedy is to take the servicer to court and sue them. And I think that is credibly unlikely. And, frankly, what would the damages be to Treasury? The servicer might even be saving Treasury money if the lender——

Mr. DELAHUNT. Is that accurate, Ms. Schwartz?

Ms. GOLANT. Yes.

Mr. DELAHUNT. Is that really the remedy?

Ms. SCHWARTZ. I haven't read all the legal terms of the contract, but I know banks take seriously a contract with the United States.

Mr. DELAHUNT. I am sure they do. And I am sure they don't want that on their record. But I would know, if I am a banker and I want to keep my balance sheet looking well and be able to hold those assets so that, you know, when I have to report to stockholders—and I know how the bureaucracy moves and how often I am going to get sued. I might take the risk of not disregarding my contractual obligations, but really not giving it my all either, if it didn't suit my self-interest.

I mean, again, I like to put these things in terms that I can understand. And the government doesn't have enough lawyers, you know, to bring those kind of suits.

Go ahead, Professor.

Mr. LEVITIN. I want to be clear that I am not alleging any actual bad faith.

Mr. DELAHUNT. No, I understand. Nor am I.

Mr. LEVITIN. But this is a program with very limited oversight, and that is just the nature. If you are trying to modify tens of thousands of loans, that there is limited—without tremendous staffing, you can't do serious oversight. And, in that space where you don't have a lot of oversight and where servicers may have incentives not to do the modifications, it wouldn't be surprising if we saw servicers dragging their feet.

Treasury is making incentive payments to servicers. It is far from clear, though, whether the incentive payments are enough to make this work.

Mr. DELAHUNT. Well, see, that is my point, too. You know, I look at the numbers, it is $1,000. And I am the servicer; let's say I am the guy on the phone. I don't mean the servicer, the corporate entity. But if I am the guy on the phone—and how is he getting paid? Is it a commission?

Ms. GOLANT. Probably.

Mr. DELAHUNT. What is my piece of the $1,000, or am I just a straight salary? Again, I know how it—and maybe I am wrong, but I just think of human nature.

And when we talk about how we got here, I can remember talking to mortgage brokers, and I say, why the subprime? And the answer was very simple. Well, the subprime because, you know, the salesman that was out there pitching the mortgage—because I saw these numbers, and I presume that you wouldn't have any great disagreement, but 70 percent of those that took a subprime loan could have qualified for the traditional 30-year fixed rate, which they might have been able to sustain.

I said, how did that happen? Because I am naive; I don't really know. Well, because they got $13,000 commission for pushing the subprime rather than the $3,000 that they would have got for the traditional. And then you get loosey-goosey with the underwriting standards, and you get into—you know, it was the wild West.

And that is why I take offense when I hear it is the Community Reinvestment Act that did this. That is baloney. That has no data at all to support it. It just doesn't. But we hear it because we want it to be that way because government is bad. Government had nothing to do with that. It is human nature. And you have to, kind of, keep our demons from surfacing and hurt the community at large. That is my sense of government.

I mean, I am a free-market guy. I am a capitalist.

Yes, you are not recognized yet, because Mr. Levitin had his hand raised.

Mr. LEVITIN. I will gladly cede to Mr. Cohen.

Mr. COHEN. Thank you. And I appreciate that, Professor Levitin. Machiavelli a long time ago said, power is taken, not given. Chairman Delahunt, example one.

You know, this has been a good discussion. It is an excellent discussion. The problem is, the House just voted down the cramdown provision as an amendment to the Wall Street bill we had. The Senate has never passed it.

And the problem is, you know, you are right about government and the problems and there wasn't regulation and all these things. But if we can't get 218 votes—well, we get 218 in the House and we passed it once. But if the Senate can't pass it, we have to have something else to help people. And that is the reality.

And that is just the same thing as the public option. If there aren't the votes for public option in the Senate, the House, as good as we can be and Florence Nightingale wanting to be, you got to do something else.

And that is—you have got to deal with the Senate. We need a unicameral legislature, we really do, and it would be on this cam-

eral. But, you know, it's a mess. How would you recommend we go about that.

Mr. DELAHUNT. [Presiding.] Well, I would like to propose to the four of you, because the Chairman is correct. I was disappointed in the vote, but I——

Mr. COHEN. You rallied.

Mr. DELAHUNT. I am sorry?

Mr. COHEN. You rallied and came back to Chair the Committee.

Mr. DELAHUNT. But I came back. And I am very disappointed. And I think it says something about our system, our political system and how, you know, how there are powerful interests that oftentimes, I believe, don't really understand their own interests in the long term. You know, they see it in a very short window. Got to keep those balance sheets there. We don't want to do this. And I understand that, and I am not being critical of their self-interest, because that is their obligation.

At the same time, in terms of their long-term benefit, it would be ideal to clean up this mess before the mess continues to exacerbate and brings down those big banks one more time, because I don't know how the Chairman feels, but I know that the bailout time is over. If they want the market to function in a way where there is no government support, intervention, regulation, they will discover it if there is another September of 2008; it will be a debacle, because there is no political will in the United States Congress that I can discern on either side of the aisle for any continued support.

If it gets bad again, let's be clear, those that killed that legislation today, killed that amendment, are the ones that are going to be responsible. And let them face the American people and say, well, we thought it, you know, we thought it was in the long-term best interest of the market. There is really no data anywhere that indicates that interest rates will rise. That is baloney. That is just the short-term view. I like to think that it is our responsibility here in the Congress to take a long-term view and try to understand what the best interest of our free-market economy is so that we have, at the end of the day, a functioning, functional capitalistic system.

But my question is, how do we give Ms. Schwartz the leverage, if we can't get the bill through so that the voluntary modification programs work, without going through all of the bureaucratic, you know, gyrations that we no longer have time for? You know, maybe we should lock the four of you in a room someplace and tell you to come up with some answers and come back so that we can satisfy those powerful interests on Wall Street so that we can save Wall Street from itself and save the American economy.

Professor.

Mr. LEVITIN. There are some steps that can be taken definitely to improve the HAMP program, and I think a few of those would be, firstly, greater transparency, both on the overall, sort of the macro level of the program; the data the Treasury has been releasing has not been particularly granular. It makes it hard for any kind of real outside analysis. But also, on the borrowers side, that the Treasury has not released publicly the details of its net present value calculation, that if I am a borrower and looking to get a

HAMP modification, I should be able to have, go to a Web site, plug in my data and see the net present value calculation and how it weighs out. There is a fear that if that is made public that would allow for the system to be gamed.

Mr. DELAHUNT. Do you all, everybody feel that is a thoughtful suggestion?

Ms. Schwartz, you are the minority witness here, so you have got to——

Ms. SCHWARTZ. Okay. Well, I think more improvements can be done to the NPV test, and I believe there is going to be a transparent test put out in the new year. So I think more can be done there. I can't speak to whether it is consumer facing, or there is a double check that no one was out of, no one did anything wrong.

Mr. DELAHUNT. How do we give you, let me start with you, Ms. Schwartz. How do we give you real clout?

Ms. SCHWARTZ. Well, I don't know, but I——

Mr. LEVITIN. I will make a suggestion.

Mr. DELAHUNT. Okay.

Mr. LEVITIN. Treasury needs a club to go with the carrot. And if bankruptcy isn't to be that club, then some sort of very concrete, monetary penalty to be imposed on servicers for violations of the terms of the HAMP servicer participation agreement.

Mr. DELAHUNT. But can they really enforce it? Do they have the compliance team that can enforce it?

Ms. GOLANT. Even as it currently stands, Mr. Chairman, there are—borrowers, do not have the ability as the intended third party beneficiaries of these contracts, to come into court, they would be willing to, and enforce for Treasury.

But, several times, it has been attempted. In fact, there is a new class action that has just been filed in the last few weeks where that is exactly what borrowers are trying to do. But the courts don't understand why borrowers can stand in the shoes of Treasury. So so far that has not been available. But because, without some sort of balance of power, there is just no way to get the wheels turning. That is what is missing is enforceability, accountability and leverage.

Mr. DELAHUNT. Ms. Schwartz, let me ask you outright, what do you think about the cramdown issue?

Ms. SCHWARTZ. You know, I am not going to say.

Mr. DELAHUNT. You are not going to venture an opinion.

Ms. SCHWARTZ. I mean, I will tell you, I have empathy for all sides of this. You know I do. I would work around the clock to stop foreclosure.

Mr. DELAHUNT. And let me say that I really respect and appreciate what you are doing.

Ms. SCHWARTZ. You know, the uncertainty is concerning that someone from my background, and I see a broken market, and I just worry that that just keeps it broken for longer.

I think our job is a couple of things. Why aren't we figuring it out a product to help the unemployed? You know, that could be 30 percent or 40 percent of this problem so that it is in front of the HAMP mod. We have some kind of program to slow down the required payments and then slowly get into partial payments to get to a HAMP mod once they are back on their feet and re-employed.

That is what we should be talking about. Let's talk about making sure no borrower goes to foreclosures without a review for HAMP mods. I agree. We are all in violent agreement.

Ms. GOLANT. But they do.

Ms. SCHWARTZ. I hear you, but since I don't know those metrics, it is hard for me to respond to that because I see the metrics of all the people getting workouts, some in process, and all the ones who didn't go to foreclosure because they are in the process of review. So I am sure you are right. But let's get to the more detail and facts and then proper controls into place so that doesn't happen.

Mr. DELAHUNT. But see, I agree with you. But I don't think we have the time.

Ms. SCHWARTZ. Well, we should go in a room and figure that out.

Mr. DELAHUNT. I mean that respectfully. And I just think that we need that, and I don't even want to use the word stick, but I want to have that option available to leverage so that the kind of suggestions and recommendations that you make, because I know how slow the decision-making process is, whether it is here in the U.S. Congress or in any agency or bureaucracy, and there is interagency review and all of that other stuff, that we are going to find ourselves next September looking like it is 2008 rather than 2010. That is my fear.

Mr. HILDEBRAND. Mr. Chairman, there is a vast gulf between where the law is now, where mortgages cannot be modified at all except for curing a default and maintaining payments, and the proposal that just got defeated, which is to allow cramdowns and restructuring, to allow some kind of modification that may not involve evaluation of the mortgage, fees and costs and interest adjustments, and things that are within the HAMP model that could be done, that are not cramming down the mortgage if that is not a political option. So those options need to be, I would suggest, should be addressed, should be discussed, which is why the suggestion of having a backstop, a judicial backstop to a HAMP program that may not be working fast enough will certainly speed it up.

Mr. DELAHUNT. Who would administer the judicial backstop? Could the bankruptcy courts do that?

What do you think of that, Ms. Schwartz.

Ms. SCHWARTZ. I don't feel like I am expert enough to have an opinion.

Mr. DELAHUNT. Everybody has got an opinion now. Come on.

Ms. SCHWARTZ. I mean, I think that we have enough rules in place to make sure we are doing the right thing, and we need to measure the outcomes where it is being violated.

Ms. GOLANT. There are no enforcement mechanisms, though.

Ms. SCHWARTZ. Well, I don't know. I think the FBI, the Freddie Mac compliance unit, the Inspector General and SIGTARP are all pretty powerful.

Mr. HILDEBRAND. Mr. Chairman, I would ask, where do I go when I see a debtor across the table from me that has not heard from the HAMP request, over 30 days or 60 days or 90 days, hasn't even heard, where do I go to say they are not doing what they say they are going to do, or not contractually obligated to do, so that this family has a shot, anyway, to stay in their house? Where do

I go? And there is no place that we can go. I will agree with Ms. Schwartz though——

Mr. DELAHUNT. That is a concern.

Ms. SCHWARTZ. We need to have a place for them to go. I totally agree. The hotline takes complaints for Treasury, for Fannie Mae and Freddie Mac for anyone who is falling out.

Mr. DELAHUNT. You know what? The four of you are as good as it gets, okay? How about helping us and come up with a concept or a mechanism to do that back up. And let's not create a new bureaucracy. Let's give some sort of additional authority to the trustees or whatever. I mean, I am just really, really concerned about this. And I am going to turn the gavel back to the real Chair of the Commercial and Administrative Law Subcommittee, Mr. Steve Cohen of Tennessee.

Mr. COHEN. [Presiding.] I thank the distinguished gentleman from Massachusetts and the vice Chair for that discussion that he led and for the time he spent and for his many good works and years of service to the Bay State, as well as the United States. And he got back here quicker than I did. I am sure he was disappointed, as I was. I was very disappointed at the vote today. And there were a series of votes I was disappointed in. Sarbanes/Oxley wasn't extended to be fully implemented. And the cramdown provision, so to speak, mortgage modifications, wasn't passed. But we passed the bill. But that is—you don't get everything. You don't get some things. But I appreciate you all being here, and if you all could work together to bring something to us to consider, because it looks like we are not going to have—although sometimes you can put these provisions on other bills that look like they are alien, but that is the only way you can sometimes get good alien projects to become law. So this system sometimes has a method to its madness.

I thank each of you for your time you have taken to be witnesses for this testimony today. Without objection, Members will have 5 legislative days to submit any additional written questions which we will forward to the witnesses and ask you to answer as promptly as you can. They will be made a part of the record.

Without objection, the record will remain open for 5 legislative days for the submission of any other additional material. And, again, I thank everyone for their time and patience.

I wish everybody a Happy Hanukkah, a Merry Christmas, a Happy Kwanzaa and any other holidays that you may hold dear and near. This hearing of the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 3:11 p.m., the Subcommittee was adjourned.]

# APPENDIX

## Material Submitted for the Hearing Record

RESPONSE TO POST-HEARING QUESTIONS FROM ADAM J. LEVITIN,
GEORGETOWN UNIVERSITY LAW CENTER

**Questions for the Record**
**Subcommittee on Commercial and Administrative Law**
**Hearing on Home Foreclosures: Will Voluntary Mortgage Modification Help Families Save Their Homes? Part II**
**December 11, 2009**

**Adam J. Levitin, Georgetown University Law Center**

**Questions from the Honorable Steve Cohen, Chairman**

1. **Should HAMP include lender or servicer incentives to lower mortgage principal for distressed borrowers?**

I am reluctant to see taxpayers shoulder the cost of restructuring poorly underwritten mortgages; those losses should be borne by the parties to those mortgages—lenders and borrowers. That said, there are significant spill-over effects from foreclosures on the rest of the economy. After monthly payment affordability, negative equity has the highest correlation of any factor with loan default. Given that HAMP is already making incentive payments for loan modifications to improve affordability, principal reduction incentives should also be considered.

2. **Does HAMP's provision of financial reward to servicers whose borrowers remain current on their mortgages under modified terms provide an incentive for servicers to modify loans only for relatively financially secure borrowers rather than those who are the most financially distressed?**

Yes. Servicer compensation structures make servicers reluctant to attempt loan modifications. Servicers incur significant costs when undertaking a loan modification—estimated at between $1,000 and $1,500 per modification. These are sunk costs for the servicer. If the modified loan continues to perform, the servicer will recoup the costs of the modification and earn more than if it had proceeded directly to foreclosure. But if the modified loan redefaults before the servicer recoups the costs of the modification, then the servicer will incur a larger loss than if it had proceeded directly to foreclosure.

While a reperforming loan is the optimal outcome for a servicer, a servicer must weigh the chance that a loan will reperform against the chance that it will redefault. As part of this equation, the critical question for the servicer, is not *whether* the loan will redefault, but *when*. If the servicer anticipates early redefaults, the servicer will be disinclined to attempt modifications, lest it incur greater losses.

For most mortgages, it takes a servicer between 12 and 24 months to recoup the cost of a modification. Given that redefault rates on modified loans have been in the 60% range for a single year, and at around 30% just in the first three months post-modification, servicers have a strong incentive not to attempt modifications, especially of loans they think are likely to redefault quickly. Most servicers, however, lack predictive capabilities regarding redefault, and

therefore, if they are risk averse, are likely to assume that all loans are likely to be early redefaulters.

HAMP provides servicers with two sets of incentive payments for modifications. First, HAMP pays $1,000 for each permanent modification. Second, HAMP pays up to $1,000/year for three years for permanent modifications that continue to perform. In light of the redefault timing problem, initial HAMP incentive payments may be too low to have a significant effect. HAMP servicer incentive payments of $1,000 roughly cover the cost of a modification. HAMP incentive payments are only made when a loan modification becomes permanent. If a trial modification's costs are similar to a permanent modification's costs, then a payment of $1,000 per permanent modification will fail to come anywhere close to offsetting servicers' costs when only one in ten trial modifications becomes permanent. With trial to permanent roll rates at around 15%, servicers are, on average receiving guaranteed incentive payments of $1,500 for every $10,000-$15,000 of modification costs they incur. If so, then HAMP incentive payments may simply be too small to correct misaligned servicer incentives.

The additional payments for performing modifications help offset some of the incentive misalignment problem, but only to the degree that servicers are not able to predict which modifications are likely to be viable. To the extent they are, then the additional payments would only encourage servicers to make sure-bet modifications.

3. **If there are any additional points that you would like to make to expand on your hearing testimony or in response to other witnesses' testimony, please do so.**

**Questions from the Honorable Judy Chu**

1. **You point out that since the middle of 2007, over two million families have lost their homes due to foreclosure. The HAMP program appears to have affected only a small fraction of homeowners delinquent on their mortgages. As you know, the Oversight Panel has made a series of recommendations to help fix some deficiencies in the HAMP program. Even if all of these changes are made, is the program sufficient to help stem the foreclosure crisis? If not, what can Congress do to fix the HAMP program and begin to curtail this mounting problem?**

No. Even with all possible improvements made, HAMP, as presently conceived, is incapable of stemming the foreclosure crisis. Treasury estimates that there are currently around 6 million first lien mortgage loans that are at least 60 days delinquent. Only 1.8 million of those loans are eligible for HAMP modifications. *See* U.S. Dept. of Treasury, Making Home Affordable Program Servicer Performance Report Through February 2010, at 5. To date, around 1.1 million HAMP trial modifications have started, resulting in around 170,000 permanent modifications, a conversion rate of around 15%. In addition, Treasury anticipates at least 40% redefault rates within five years on permanent modifications. This suggests that the total number of homeowners who avoid foreclosure over the long-run as a result of HAMP will be extremely limited—in the hundreds of thousands at best, not millions.

There is, unfortunately, little that Congress can do to improve HAMP as currently conceived. There are a range of more invasive actions that Congress could take to encourage modifications, including amending the Bankruptcy Code to allow mortgage modification or prohibiting the GSEs and FHA from doing business with servicers that are not engaged in an active principal reduction program. The improvements that can be done within the HAMP framework will yield at best marginally better results.

RESPONSE TO POST-HEARING QUESTIONS FROM FAITH SCHWARTZ, HOPE NOW ALLIANCE

**Questions for the Record**
**Subcommittee on Commercial and Administrative Law**
**Hearing on Home Foreclosures: Will Voluntary Mortgage Modification Help Families Save Their Homes? Part II**
**December 11, 2009**

**Faith Schwartz, HOPE NOW Alliance**

**Questions from the Honorable Steve Cohen, Chairman**

1. **How many banks, mortgage companies, and other financial institutions are members of the HOPE NOW Alliance? What percentage of HOPE NOW's membership is composed of such institutions?**

We have 38 companies in addition to the HUD Certified non-profit counseling agencies that are part of HOPE NOW. They are listed below

American Home Mortgage Services Co.
ASSURANT GROUP
Aurora Loan Services, Lehman Brothers
Bank of America
Bayview Financial
Carrington Mortgage Services
CITIGROUP
Fannie Mae
Freddie Mac
First Horizon
Genworth
GMAC
HomEq Servicing
HSBC USA
JP MORGAN/CHASE MANHATTAN
Litton Loan Servicing
Loan Care
Marathon Asset Management
METLIFE
MGIC
Mortgage Electronic Registration System
NATIONAL CITY
Nationstar Mortgage LLC
Ocwen Loan Servicing
OneWest Bank
PMI Group, Inc.
Quicken Loans
Radian

Residential Credit Solutions
RoundPoint Financial Group
Saxon Mortgage Services/ Morgan Stanly
Select Portfolio Servicing
State Farm
Strategic Recovery Group
SunTrust
Vericrest Financials
Wells Fargo
Wilshire Credit Corporation, ML Home Loan

These companies comprise the companies who work with us from the industry, banks, servicers and GSE's and MI's.

2. **On what basis do you say that 2.6 million borrowers received modifications that "prevented foreclosures?" What were the terms of these modifications? Did any of these modifications include reductions in mortgage principal? What was the rate of redefault on these modified mortgages?**

As for the 2.6 million borrowers and modifications, this represents actual mortgage terms changing to adjust the terms (rate, term, capitalization or deferral/principal) of the mortgage. This is different than repayment plans or catch up plans which speak to shorter term solutions and not final changes to the terms of a contract. We do not have the re-default rate on these loans but we are collecting this in 2010 to track more closely the re-default rate. Others collect it such as the OCC in their quarterly metric report.

In 2010 HOPE NOW is collecting modification data (non-hamp only) which will point to what modifications include lower principal and interest payments on restructuring modifications. In our past data, we did not have that granular data to report. So, we only knew that the borrower was given a chance to avoid foreclosure by accepting new terms of a modification to avoid foreclosure. As long as someone was in a new modification, we know they did not take a legal step toward foreclosure but had an alternative so my comments stand as noted.

3. **Please respond to the criticisms of HAMP leveled by the other witnesses, particularly its inability to address the problem of negative equity.**

As for the comments made about HAMP and negative equity, my only observation is that the program was designed to deal with affordability and 31% DTI is more aggressive than any formally introduced modification program without Government subsidies. It was not the intention of the Government to offer a negative equity product for borrowers who may have an affordable payment but decline to do so due to negative equity. This is a separate policy question that may need to be answered but was not part of the initial design.

I think the HAMP program has done a good job of introducing the protocols, waterfalls, and tools that should be used to have more affordable restructuring and modifications (rate, term and principal deferral and reduction) that have followed through on proprietary modifications. We should see increasing numbers of "non-hamp mods" that follow similar protocols that do not require a government subsidy (if they fail HAMP).

RESPONSE TO POST-HEARING QUESTIONS FROM MARGERY E. GOLANT, GOLANT & GOLANT, P.A.

**Questions for the Record**
**Subcommittee on Commercial and Administrative Law**
**Hearing on Home Foreclosures: Will Voluntary Mortgage Modification Help Families Save Their Homes? Part II**
**December 11, 2009**

**Margery E. Golant, Golant & Golant, P.A.**

**Questions from the Honorable Steve Cohen, Chairman**

1. **If there are any additional points that you would like to make to expand on your hearing testimony or in response to other witnesses' testimony, please do so.**

Mr. Chairman, thank you very much for your question and for the opportunity to respond and to expand on my testimony.

By way of response to the other witnesses' testimony, I was struck by Ms. Schwartz' obviously sincere belief that the voluntary programs are working. While I am sure she truly believes this is the case, my own experience now and previously when I was on that side make me certain that she is not being told the truth. It is easy to lie with statistics, and I use the term 'lie' not necessarily to mean to tell an intentional falsehood but to perpetrate an untruth. The claims by the servicing industry of all the millions of homes they are saving are not borne out by the facts. There are so many different players, and so many different manifestations and layers to the problem that it is truly impossible to have dependable data. There is no standard definition of "loan modification". I see numerous "modification" documents which do nothing but briefly reduce payments (for six months or so), adding the entire shortage to the balance of the loan, and requiring borrowers to waive all their legal rights and defenses in order to get this minimal concession which does not "save" them in any way. I have even seen some purported "modifications" where the monthly payments actually *increased.* I doubt that Ms. Schwartz is aware of the many thousands of borrowers who are still making trial payments long after three months have passed, who submitted all required documentation with the first payment, and yet still cannot get answers, while the servicer presses forward with foreclosure. I doubt that Ms. Schwartz is aware of the many thousands of borrowers call their servicers, are transferred numerous times and eventually disconnected, or how many fax and mail in their supporting documentation over and over and over, only to be told it was never received at all. I know firsthand of numerous borrowers who are denied a modification although their numbers clearly support one, and who are refused the information as to why they were denied. Given the fact that we run parallel calculations, I am sure that in a significant number of these cases, the denials are based on erroneous data entry or incorrect property values utilized by the servicer.

By way of additional points and expansion on my hearing testimony making, I do have several further comments. First, while it is not directly related to the modification, issue, much has been made both by the servicers and the Administration of the concept of short sales as a solution for borrowers whose loans are too great to allow them to keep the property and the property too upside down to sell it. The Administration and Treasury have even recently announced " the Home Affordable Foreclosure Alternatives program (HAFA)" Program. Yet, the way the servicers currently administer short sales is extremely telling as to their desire to "help" homeowners - or really, their lack of a desire to do so; borrowers whose families are willing to purchase the house at current market value via a short sale and then allow the original borrowers to continue to live there. Notwithstanding the fact that these short sales represent a complete escape for the mortgage holders from bad loans, on terms no different than what they would require if purchase was by a total stranger, the servicers refuse to approve the short sale unless the buyer and seller swear that they are not related parties. I cannot conceive of any rationale for this, or any good reason why a short sale would be approvable if the new purchaser was a total stranger and the economics of the transaction otherwise reasonable, leading to a turnover and dispossession of the former borrower, but if the purchaser is a helpful family member or friend who is willing to intervene and to purchase the property, such a sale is not approvable; the servicers will sooner force the property to foreclosure than allow such a short sale.

Borrowers are repeatedly wrongfully rejected from HAMP and almost none have received any permanent modifications. In order to assure ourselves that these are not examples of a failure by our client to provide the documentation, as the servicers like to claim, we provide copies of the financials directly to opposing counsel. It makes no difference; the inaction and rejections continue. The numbers of permanent HAMP modifications speak for themselves; they are dismal.

Here the volume and intensity of foreclosures increases steadily. There is even currently an effort by the Florida Mortgage Bankers Association to get legislation passed which would "convert" mortgages and the judicial mortgage foreclosure process to non-judicial process, so that they could be done even faster, so that they would not be forced to prove that they have title to these loans (which they often do not), and to shift to borrowers the burden of raising as defenses the many servicing defects, origination defects, misrepresentations made to borrowers and numerous other problems and issues. It is not enough that they have control of so many consumers and their futures, they want *complete* control.

So, more and more, borrowers worn out from fighting, from begging, from submitting innumerable copies of their financial packages to indifferent servicers, from being mocked by call center employees, from being stalked by process servers and even locked out of their homes pre-foreclosure, are giving up, surrendering their homes and in recourse states such as Florida, are filing bankruptcy since otherwise they are subject to deficiency liability. This is sad. Many of these people were willing to make monthly payments if only they would be allowed to. However, they are forced to turn their backs

on their homes, many of which will molder into ruin due to the huge number of unsold "bank-owned" properties on the market, and to walk away.

In such a scenario, the mortgage investors necessarily take a sharp loss on their investments. Once foreclosure begins, borrower payments are normally rejected, unless the borrower is in some sort of formal loss mitigation with the servicer. Accordingly, all cash flow from affected loans to the investors ceases. Additionally, the loans are charged for all the foreclosure-related costs, and "junk fees" (i.e. attorneys' fees, title searches, filing and process server fees, drive-by property inspections sometimes as often as weekly, broker price opinions, property management fees, realtors' commissions, etc. etc. The ongoing expenses of maintaining and marketing these properties after the foreclosure is concluded are charged to them, while the prices continue to drop due to oversupply and due to the steadily eroding condition of the properties, and the "default servicing industry" makes record profits. ( http://finance.yahoo.com/echarts?s=LPS )

Once the borrowers have lost their homes, and have discharged their remaining obligation in bankruptcy, there is no potential recovery for the investors other than whatever low price the property ultimately brings; further losses continue to accrue as the now empty properties deteriorate and involve ongoing expense, code-enforcement citations and potential liability. Interestingly, even the investor community is starting to recognize that judicial modification in bankruptcy might actually operate to their benefit. ( http://www.businessweek.com/news/2010-01-21/blackrock-proposes-new-consumer-bankruptcy-option-novick-says.html ).

An interesting and often overlooked and poorly understood dynamic of this problem is that many mortgage servicers benefit financially in their servicing and default servicing functions from the skyrocketing default rates. The same horrific default rates which represent such a terrible danger to borrowers, bond investors and the broader economy actually provide a substantial benefit to the default servicing industry. Accordingly, there is substantial tension between the best interests of the servicers and the best interests of their clients. ( http://www.nytimes.com/2009/07/30/business/30services.html ).

The Administration continues to try to tweak the HAMP program, http://www.nytimes.com/2010/01/22/business/economy/22modify.html and now to propose the HAFA program to encourage homeowners to give up their homes via short sales. It undertook a "conversion program" intended to produce more permanent modifications from the trial modifications. The results were meagre, and, notwithstanding the tweaks, the rate of foreclosure continues to spiral. It was necessary at the beginning of the year for Treasury to announce a new rule which prohibited servicers from offering trial HAMP modifications without any prior verification of eligibility, because it had become apparent that some servicers were simply handing out trial modifications to all, which had the obvious effect of boosting their apparent performance statistics, thereby gaming the data.

The real problem, acknowledged by many, is that the principal of these loans is too high relative to the actual value of the properties.
http://www.nasdaq.net/publicpages/NewsDetailPublic.aspx?symbol=&storyId=20100120%5cACQDJON201001201125DOWJONESDJONLINE000531.htm

This is the legacy of the out of control mortgage lending which was the norm during 2003-2006. HAMP does nothing to address the excessive loan to value ratios, and without a mechanism to reduce mortgage principal a solution is not at hand. In Florida, it is not even slightly unusual for the value of homes to be less than half the mortgage balance; homeowners are $200,000 and more upside down. This is indicative of something far more than a normal economic fluctuation that will right itself; people who purchased or refinanced homes in 2004-2006 will quite simply never be able to get on the right side of these loans. The problem of the too-high balance is made far worse by the fact that many of these loans are based upon adjustable rate and negative amortization adjustable rate mortgages. The irony is that borrowers and bondholders have come to understand what the mortgage servicing industry refuses to admit: that without principal reduction, there is no solution, the crisis continues to snowball, property values decline further, and measures to resolve the problem become yet more difficult.

So, in historically record numbers, borrowers continue to lose their homes and walk away and *then* to file bankruptcy, extinguishing all further obligation and leaving behind homes that they would much rather have saved, and could have saved had there been a judicial mechanism to do so, leaving investors holding growing deficits which could have been stabilized, while the mortgage servicers, claiming they are trying their best to work these loans out, are instead expanding tremendously the numbers of foreclosed properties, thereby tremendously expanding the problem, and benefitting substantially thereby. Ironically, it is often only *after* they file bankruptcy, after it is too late, that the servicer offers to "work with them.

The crisis continues to spread like a cancer; as property values continue to fall, more and more homeowners are being drawn into the quicksand, unable to sell or refinance their homes. I can see this in the differing demographics of clients consulting me recently; more and more they are longstanding homeowners who never have refinanced but now, due to job changes, transfers, layoffs, the need to downsize and various other reasons need to sell, and find that they cannot, due to dismal property values

While we all wish it was otherwise, the grim statistics from Treasury demonstrate that, more than a full year after it was launched, the HAMP program has not made any meaningful dent in the foreclosure crisis facing America. While the servicers claim that they have done much to assist borrowers, given the lack of documentable, consistent data, these claims are anecdotal and unverifiable, and are not supported by the evidence in front of our eyes. If there is to be a solution, it must be deployed and quickly, and it must contain a structured, enforceable methodology which reduces payments and mortgage principal in appropriate cases. Trying to create something new (a la HAMP and HAFA) supervised by Fannie Mae and Freddie Mac, who themselves were unable to

manage their own portfolios and who had no prior experience with such a project, was always doomed. It is too huge an undertaking, which would necessarily take far too long to reach critical mass, assuming it ever did. It is instructive that the HAMP program has issued *eleven* Supplemental Directives since April 6, 2009, most lengthy, confusing tomes, difficult to implement and impossible to enforce, for the purpose of getting this program operational. I have attached one of these as an example and challenge anyone reading it to explain what the rules are that it contains.

RESPONSE TO POST-HEARING QUESTIONS FROM HENRY E. HILDEBRAND, III, NATIONAL ASSOCIATION OF CHAPTER 13 TRUSTEES

**Questions for the Record**
**Subcommittee on Commercial and Administrative Law**
**Hearing on Home Foreclosures: Will Voluntary Mortgage Modification Help Families Save Their Homes? Part II**
**December 11, 2009**

**Henry E. Hildebrand, III, National Association of Chapter 13 Trustees**

**Question from the Honorable Steve Cohen, Chairman**

**1. If there are any additional points that you would like to make to expand on your hearing testimony or in response to other witnesses' testimony, please do so.**

A. If we are going to rely on the Home Affordable Modification Program (HAMP) as the only mechanism where we can restructure mortgages to avoid foreclosure and provide a means where Americans in financial distress can afford to pay the obligations they owe, there should be some accountability, before an independent third party, to verify compliance. The unfortunate aspect of HAMP is, as testified by Ms. Schwartz, that it relies upon a contractual relationship between servicers and the government. There is no judicial or third party review of the decisions that are made under HAMP, nor is there accountability for such decisions.

If bankruptcy courts are not to be given the ability to restructure home mortgages in the same fashion they restructure loans on vacation homes, boats, furniture, automobiles, etc., then we should provide the opportunity for judicial review of the servicer's determination that an individual is not eligible for a HAMP modification. There should be a mechanism to speed up the process when a family seeks a modification and is left in limbo without an adequate and full response.

If we have established HAMP as the means by which mortgages can be modified and we want to make certain that such modification should be effected when a debtor is eligible, we should empower the bankruptcy court to review HAMP modification denials based upon objective and verifiable information such as HAMP requirements.

B. I encourage you to pay close attention to the proposal of the National Bankruptcy Conference to amend Chapter 12 to expand the coverage of that chapter to small business. This would permit *business* loans (not necessarily a standard home mortgage) which are secured by a borrower's principal residence, to be restructured and modified. In so doing, Chapter 12 could be used to preserve the principal engine of our economy and the many jobs created by small businesses and entrepreneurs just as we strive to retain jobs for larger business in Chapter 11s like General Motors, Chrysler, Delta Airlines, and United Airlines.

**Question from the Honorable Judy Chu**

1. **The current mortgage foreclosure crisis is harming our neighborhoods, our communities, and the economy as a whole. I appreciate your support of the proposed legislation to allow bankruptcy courts to modify mortgages, but I want to ensure that this avenue is available to the wide diversity of Americans who are at risk of losing their homes. In particular, I would like to know whether these complicated legal proceedings will be available to homeowners who cannot afford an attorney and are unfamiliar with the legal system. What can we do to ensure this change in the law helps as many Americans as possible?**

The National Association of Chapter 13 Trustees has supported modification of the bankruptcy code to grant to bankruptcy courts the ability to modify home mortgages to restructure payments, modify interest rates, and even reduce principal to the value of the property. We have further suggested that, in order to avoid shifting the entire risk of loss onto the creditors, that mortgage creditors subject to a "cram down," reducing their secured claim to the value of the property, be given the option of electing to retain a junior lien on the property to the extent their debt exceeds the value of the property. Such junior lien would not receive payments and would not accrue interest unless and until the property were sold or refinanced. Such a proposal is similar to a Chapter 11 secured creditor's options under 11 U.S.C. § 1111(b). We believe that such an option is balanced.

Recognizing, however, that the likelihood that 11 U.S.C. § 1322(b)(2) will be modified is remote, the trustees have searched for ways in which the debtors with whom we work – debtors struggling to retain their homes, living on a budget, and dedicating all of their available disposable income to repay their debts – could have a meaningful shot at retaining their home and avoiding foreclosure. In a bankruptcy, such families tend to be represented by counsel to assist them in the bankruptcy code made so much more complicated by BAPCPA, and it is only appropriate that we look to assistance from these debtors' counsel to help debtors find their way through the thicket of a complicated legal process that is bankruptcy. With this assistance, we believe that such families can use the bankruptcy system, if it were amended, to overcome their personal financial crisis, retain their homes, preserve their communities, and pay their mortgages. Where it works, such is the motivation of Chapter 13.

The mechanism established by HAMP is itself extremely complicated. The testimony presented clearly indicated that most HAMP temporary payment plans fail because of an inability of borrowers to provide full documentation and the necessary information to the mortgage servicer. Failing to provide such information generally stems from a lack of sophistication in a complicated legal proceeding. It is doubtful that a simple, easily understood, streamlined procedure could be developed outside of bankruptcy that can still provide the safeguards and protections against abuse that the Treasury Department has sought to place in HAMP and the bankruptcy code has developed over time.