South Carolina Law Review

Volume 60 | Issue 3 Article 10

Spring 2009

A View from the Trenches: The Legal Practitioner and Loss Mitigation

Samuel C. Waters
Rogers, Townsend & Thomas (SC)

Recommended Citation

Samuel C. Waters, A View from the Trenches: The Legal Practitioner and Loss Mitigation, 60 S. C. L. Rev. 807 (2009).

A VIEW FROM THE TRENCHES: THE LEGAL PRACTITIONER AND LOSS MITIGATION

SAMUEL C. WATERS*

I. INTRODUCTION

The task of resolving all the issues surrounding the subprime mortgage crisis and subsequent economic downturn is certainly an overwhelming one. Although most commentators agree that concentrated regulatory efforts of some sort are necessary to get our national economy healthy and back on track,[1] no general consensus has emerged as to which portions of the market the government should regulate or the form such regulation should take.[2] As a

---

* Mr. Waters is the Chairman of the Board of Directors at Rogers, Townsend & Thomas, PC; Freddie Mac Designated Counsel for South Carolina; Fannie Mae Designated Counsel for South Carolina; Director of the American Legal and Financial Network (AFN); and a board member of Committee for Actual Real Estate Solutions (CARES). He has practiced in the area of residential mortgage foreclosures and loss mitigation since 1976. The author would like to thank Blaire Lowery, a third-year law student at the University of South Carolina School of Law, for her assistance with the preparation of this Article.

1. *See, e.g.*, *Make Regulation Review a Priority*, INVESTMENT NEWS, Jan. 26, 2009, at 8, *available at* http://www.investmentnews.com/apps/pbcs.dll/article?AID=/20090125/REG/301259990 (noting that commentators agree that President Obama must restore public confidence and suggesting hearings designed to "identify weaknesses in the regulatory framework" and "provide guidance" on restructuring the regulatory system).

2. *Compare* Joe Adler, *Diverse Views on Revamping Regulation*, AMERICAN BANKER, Dec. 29, 2008, at 10, *available at* 2008 WLNR 24762106 (discussing survey results that highlight banking executives' differing views on regulation based on bank size), *with* Floyd Norris,

practitioner specializing in the niche of residential mortgage defaults and remedies for over three decades, I hope to share a practical viewpoint of the issues facing lenders, homeowners, and default servicing attorneys on a daily basis. The problems are broader than subprime loan defaults, and the most reasoned corrective approach will be one that marshals ideas from each party in the value chain and brings together all stakeholders, including, in particular, default servicing attorneys. This Article highlights current challenges practitioners and industry professionals face in dealing with residential mortgage defaults and foreclosures, current opportunities to improve loss mitigation efforts, and the transitional history of the legal practitioners' role in loss mitigation. The Article proposes several actions to encourage expansion of the role of attorneys in the foreclosure remediation process, advocating a holistic approach to the problem. The Article concludes that to accomplish the daunting task of restoring the nation's financial health, banking industry regulators should decrease restrictions on and increase incentives for attorneys so that they can bring their unique skills to bear on loss mitigation efforts.

II. OBSTACLES TO SUCCESSFUL FORECLOSURE AVOIDANCE

Defaulting mortgages cost banks a great deal of money—more than any alternative to foreclosure.[3] Not only are banks not receiving the payments the mortgagor promised to make, but they are also bearing the costs of foreclosure and the costs to carry the various properties until the banks can resell them.[4] The average loss an investor bears varies from 30%–60% of the outstanding loan balance at the time of default, depending on the length of the holding period.[5] It is certainly in the lender's best interest to attempt to avoid foreclosure and keep homeowners in their homes when possible.[6] So-called workout plans, such as forbearance agreements, repayment plans, and loan modifications, are beneficial for both lenders and homeowners. However, because foreclosures are so expensive for banks, banks are often reluctant to sink additional financial resources to expand servicing efforts for defaulting loans.[7] The decision to

Reckless? You're in Luck, N.Y. TIMES, Sept. 18, 2008, at C1, *available at* http://www.nytimes.com/2008/09/19/business/19norris.html ("If an activity is important enough to justify a government nationalization to prevent a default, it is important enough to be regulated.").

3. CHARLES A. CAPONE, JR., U.S. DEP'T OF HOUS. & URBAN DEV., PROVIDING ALTERNATIVES TO MORTGAGE FORECLOSURE: A REPORT TO CONGRESS 38 (1996), http://huduser.org/Publications/pdf/alt.pdf.

4. *See id.*

5. *Id.* at 39. Losses increase for riskier loans and also in markets where real estate prices are declining. *Id.*

6. *See id.* at 3.

7. *See id.* at 37.

invest additional funds into the area of foreclosure avoidance is counterintuitive from a business standpoint, although it is often the best possible solution.

At the outset, it is important to understand the nuanced difference between mortgage lender–brokers and mortgage servicers—two parties in the mortgage banking industry. Often mortgage lender–brokers and mortgage servicers are lumped together in one category,[8] but in fact the two perform very different functions. Mortgage lender–brokers originate consumer mortgage loans in discrete transactions from receiving loan applications to loan closings,[9] whereas mortgage servicers manage loans on an ongoing basis, processing monthly mortgage payments and developing relationships with mortgagors over the life of the loans.[10]

Although mortgage lender–brokers have several organizations that advocate on their behalf,[11] legislators often overlook mortgage servicers as entities that could provide valuable input in legislative responses. From a practical standpoint, it is mortgage servicers that have ongoing contact with borrowers,[12] and as such, servicers are most often the first ones with the opportunity to interact with distressed borrowers and identify appropriate solutions to avoid foreclosures. However, as discussed below, there are several reasons why loan servicers have difficulty successfully avoiding foreclosures or mitigating their losses.

---

8. *See, e.g.*, *id.* at 4 (referring to "[l]ender/servicers").

9. *See, e.g.*, Siddhartha Venkatesan, Note, *Abrogating the Holder in Due Course Doctrine in Subprime Mortgage Transactions to More Effectively Police Predatory Lending*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 185 (2003) (explaining how borrowers interact with mortgage brokers and the tasks mortgage brokers typically fulfill).

10. *See* DIV. OF CONSUMER & BUS. EDUC., FED. TRADE COMM'N, MORTGAGE SERVICING: MAKING SURE YOUR PAYMENTS COUNT 1–4 (2008), http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea10.pdf (listing the duties of a mortgage servicer). Occasionally lenders will keep and service their own loans; however, most lenders immediately sell their loans to a different entity that will repackage and service the loans. *See id.* In the alternative, lenders sell the loans but retain servicing rights. Jennifer Tescher, *Viewpoint: Blending Global Capital with Local Ideas*, AMERICAN BANKER, Sept. 26, 2008, at 11.

11. *See, e.g.*, National Association of Mortgage Brokers, http://www.namb.org (last visited Mar. 12, 2009) ("The National Association of Mortgage Brokers is the voice of the mortgage broker industry. . . ."); South Carolina Mortgage Brokers Association, http://www.scmba.org (last visited Feb. 20, 2009) (describing how the group advocates for the mortgage profession).

12. *See, e.g.*, Michael H. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law in the 1990s and the Implications of Changing Financial Markets*, 64 S. CAL. L. REV. 1261, 1268 (1991) (discussing the various types of contact that servicers have with borrowers).

A. *Dramatic Increases in the Number of Delinquencies and Foreclosures*

Since 2005, both the number of properties with foreclosure filings and the total number of foreclosure filings have steadily increased nationally.[13] In 2007, the total number of foreclosure filings increased by 75%, and the number of households in foreclosure increased by 79%.[14] Mid-2008 estimates projected the year ending with 1.9 million households in foreclosure, 3.2 million foreclosure filings nationwide,[15] and 1 million real estate owned (REO) properties.[16] At the end of the third quarter of 2008, almost 7% of all residential mortgage loans were in default.[17] This percentage includes all loans that are at least one payment behind, but it does not include any loans that are currently in the foreclosure process.[18] A total of 1.19% of all loans went into foreclosure in the second quarter of 2008, which is a 12% increase over the first quarter of 2008 and an 83% increase over the comparable period in 2007.[19] Delinquency rates and foreclosure start rates on subprime loans were much higher during the same time period—18.67% and 4.70% respectively.[20]

B. *Time Constraints*

As agents for investors, servicers are charged with maximizing their principals' financial return, and as such, they are faced with two competing objectives: resolving defaults as quickly as possible while foreclosing as quickly as possible. Loss mitigation teams must be assertive to achieve remediation in

---

13. *See* REALTYTRAC, FORECLOSURES AND THEIR EFFECT ON THE HOUSING MARKET 8 (2008), http://mortgagecoalition.org/images/CMIS_Foreclosure_Presentation.pps.

14. *Id.* at 4.

15. *Id.* at 8.

16. *Id.* at 15. REO is "the term given to properties that become owned by the investor at the foreclosure sale." Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 7 (Freddie Mac, Working Paper No. 08-01, 2008), *available at* http://www.freddiemac.com/news/pdf/interventions_in_mortgage_default.pdf. Institutional lenders and investors that purchase properties at a foreclosure sale subsequently remarket their REO inventory to recoup financial losses sustained by the foreclosure. *See id.* at 28.

17. Press Release, Mortgage Bankers Ass'n, National Delinquency Survey (Dec. 5, 2008), *available at* http://www.mortgagebankers.org/NewsandMedia/PressCenter/66626.htm.

18. *Id.* The Mortgage Bankers Association did note, however, that every state except for Alaska experienced an increase in the number of loans that were more than ninety days overdue but not yet transferred into foreclosure. *Id.* This indicates that mortgage companies are not referring loans for foreclosure due to loss mitigation efforts. *Id.*

19. OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T HOUS. & URBAN DEV., U.S. HOUSING MARKET CONDITIONS: 3RD QUARTER 2008, at 20 (2008), *available at* http://www.huduser.org/periodicals/ushmc/fall08/USHMC_Q308.pdf.

20. *Id.*

advance of a foreclosure sale.[21] Despite increased staffing and training, servicers struggle to accommodate the increasing backlog of loans as the volume of delinquencies and foreclosure referrals steadily increases.[22] Additionally, the longer it takes to develop a workout plan, the more difficult it becomes for delinquent borrowers to overcome additional interest, late charges, and foreclosure costs and reinstate their mortgage.[23]

In order to truly avoid foreclosure, a mortgage servicer must examine a troubled borrower's personal and financial situation and tailor an appropriate solution to solve that individual's problems; in other words, one must "[t]reat the disease, not the symptom."[24] There is no universal remedy because each borrower's financial and personal situation is different, and accordingly, the nature and extent of information required and assessment processes employed will be different for each borrower.[25] The borrower's particular loan product

---

21. *See id.* at 34 (""The key is getting the loss-mitigation process started much earlier than ever before."" (quoting Paul J. Wright, senior vice president of sales and marketing for DRI Management Systems, Inc.)). Additionally, federal regulations provide guidelines for engaging in loss mitigation, 24 C.F.R. § 203.501 (2008) (detailing the loss mitigation evaluation and action requirements), incentives for successful mitigations, 38 C.F.R. § 36.4819 (2008) (paying an incentive bonus for each successful loss mitigation alternative to foreclosure), and penalties for failure to engage in loss mitigation, 24 C.F.R. § 30.35(a)(15), (c)(2) (2008) (authorizing civil action against mortgagee or lender who fails to engage in loss mediation and allowing treble damages for a violation).

22. *See* Neil J. Morse, *Between a Rock and a Hard Place*, MORTGAGE BANKING, Aug. 2008, at 28, 31 (noting that one servicer has increased its loss mitigation staff by as much as 60%); Fannie Mae, Lender Announcement 08-14 (June 16, 2008), https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2008/0814.pdf (outlining the Fannie Mae workout hierarchy that recommends the preferred order of consideration for the use of loss mitigation options to resolve a delinquency); 2 FREDDIE MAC, SINGLE-FAMILY SELLER/SERVICER GUIDE, chs. 64–68 (2009), http://www.freddiemac.com/sell/guide (follow "AllRegs" hyperlink) (focusing on obtaining quality information prior to selecting and obtaining approval for workout plans); *see also* Letter from Brian D. Montgomery, Assistant Sec'y for Hous.–Fed. Hous. Comm'r, U.S. Dep't of Hous. & Urban Dev., to All Approved Mortgagees (Oct. 17, 2008), http:// www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/08-32ml.doc (requiring mortgagees to send loss mitigation information to counsel for borrowers that have filed for bankruptcy without first obtaining relief from the automatic stay).

23. Cutts & Merrill, *supra* note 16, at 35–36. Despite pleas from consumer advocacy groups, an average of 84% of foreclosure costs are interest arrearages, taxes and insurance—costs that are present in both performing loans and delinquent loans. *Id.* at 37. A mere 11% of foreclosure costs are attorneys' fees, although these tend to be higher in states with judicial foreclosures. *Id.* Cutts and Merrill suggest that less successful loss mitigation in states with longer foreclosure timelines is the result of borrowers' decreased sense of urgency and a decrease in the borrowers' incentives to reinstate their mortgages. *Id.*

24. Dona DeZube, *A Survival Guide*, MORTGAGE BANKING, Aug. 2007, at 32, 36.

25. *See* CAPONE, *supra* note 3, at 25.

also governs the resolution.[26] Offering an inappropriate remedy will not prevent foreclosure, it will only prolong or postpone the foreclosure process and increase costs to servicers and borrowers. Careful and deliberate loss mitigation is a "time-consuming, manual, hands-on process,"[27] during which a servicer must spend time analyzing each delinquent borrower's particular financial and personal information to assess problems and develop potential solutions.[28]

Recognizing that foreclosures are at historic highs, servicers already understand the benefit of avoiding foreclosure and are exploring new ways to engage borrowers in loss mitigation activities.[29] Despite many servicers' proactive efforts, delinquent or distressed borrowers are often reluctant to cooperate with attempts to initiate the loss mitigation process.[30] National news media coverage of rising foreclosure rates has increased borrower awareness, yet more than half of delinquent borrowers are not aware of or ignore the reality that servicers could assist them with a workout plan, and the borrowers ultimately lose their homes without speaking to their servicers.[31] Even borrowers who initially speak with servicers do not always follow through with workout negotiations.[32]

III. LOSS MITIGATION EFFORTS AND THE LEGAL PRACTITIONER

Despite the difficulties mortgage servicers face in loss mitigation efforts, demand for loss mitigation has increased rapidly in recent years. Bank of America experienced a 407% increase in foreclosure remediation in the first

---

26. *See, e.g.*, Gregory D. Squires, *Urban Development and Unequal Access to Housing Financial Services*, 53 N.Y.L. SCH. L. REV. 255, 266 (2008) (suggesting that lenders should recommend loan products appropriate to a borrower's financial situation).

27. *See* Morse, *supra* note 22, at 31.

28. *See* CAPONE, *supra* note 3, at 25.

29. *See* Cutts & Merrill, *supra* note 16, at 5 & n.4. Cutts and Merrill note that "[s]ome of the more creative servicers mail prepaid disposable cell phones with the servicer's number programmed in to delinquent borrowers. Others send calling cards worth $5 or $10, and still others offer cash payments or entry into a prize drawing if the borrower returns the servicer's call." *Id.* at 5 n.4.

30. Dean C. Williams, *There's Got to Be a Better Way*, MORTGAGE BANKING, Feb. 2006, at 52, 57 (explaining that 92% of delinquent homeowners who recalled a servicer contacting them did not follow up with the servicer because the homeowners thought the lender could not help).

31. *See* Cutts & Merrill, *supra* note 16, at 10–11.

32. *See* DeZube, *supra* note 24, at 37. DeZube highlights one servicer's comments that equated requesting borrowers to complete loss mitigation package paperwork with requesting borrowers to file income tax returns. *Id.* Other servicers have experienced better results by pre-filling worksheet blanks with a distressed borrower's financial and personal information that the servicer already has on file. *Id.*

eight months of 2008 from the comparable period in 2007,[33] and the Hope Now Alliance is expecting to assist 40% more homeowners to avoid foreclosure in 2008 over the same time period as the previous year.[34] This dramatic increase in volume is resulting in increases in the length of time required to process a workout plan,[35] and the continually rising volume of delinquent loans shows no signs of slowing.[36] Mortgage servicers are severely pressed to provide adequate coverage of the expanded loss mitigation demands.

A. Why Attorneys?

Default attorneys have the greatest opportunity to employ their skills in negotiating remedial solutions that preserve performing mortgages in the area of loss mitigation, albeit at some possible diminution of return to investors. In fact, since the onset of the subprime mortgage crisis, third parties seem to be experiencing higher success rates in assisting defaulting borrowers than servicers. For example, the Hope Now Alliance boasts a letter campaign response rate six times higher than that of servicers,[37] and attorneys similarly see better response rates from distressed borrowers.[38] Some investors and servicers are also experimenting with third-party credit counselors to increase rates of contact with delinquent borrowers,[39] even though industry professionals remain concerned about data integrity in such situations.[40]

The presence of independent agencies and other third parties creates an additional, significant staffing issue for servicers in that the agencies' successes in reaching mortgagors have increased the demand on servicers to meet normal response times.[41] Moreover, timely hiring and expedited training of an adequate number of professionals to handle loss mitigation programs has presented its

---

33. Lisa Zagaroli, *BofA Claims Success in Halting Foreclosures*, CHARLOTTE OBSERVER, Sept. 18, 2008, at 1D.

34. *Hope Now Sees Record Monthly Workouts*, NAT'L MORTGAGE NEWS, Nov. 3, 2008, at 11 [hereinafter *Hope Now*].

35. *See* Emily Flitter, *In Focus: In Loan Mods, Process Isn't Quite Progress*, AMERICAN BANKER, Sept. 8, 2008, at 1.

36. *See* Cutts & Merrill, *supra* note 16, at 39.

37. *Hope Now*, *supra* note 34, at 12.

38. Williams, *supra* note 30, at 57. The Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) both instituted pilot programs in which foreclosure law firms, rather than servicers, provided loss mitigation packages to delinquent borrowers. *Id.* Reports indicated that 60% of borrowers called the law firm, and 40% of those borrowers completed and returned the package. *Id.*

39. *See* Cutts & Merrill, *supra* note 16, at 5.

40. *See* Flitter, *supra* note 35, at 2.

41. *Cf.* Morse, *supra* note 22, at 30 (acknowledging the success of the Hope Now Alliance and criticism of the length of time servicers take to modify loans, but stating that the "criticism rings a bit hollow" because "servicers are facing an almost unprecedented challenge").

own challenges to servicers.[42] Offshore call centers, designed to take basic inquiries from mortgagors, offer little assistance in loan resolution.[43]

Many lenders and investors now recognize that employing their default attorneys could substantially reduce their burden. Default attorneys have skills that are valuable in the loss mitigation sphere: "Lawyers are clearly positioned to be part of the solution by training, inclination and level of discourse."[44] By nature, attorneys are problem solvers and advocates, and the law holds them to certain ethical standards. Furthermore, their area of practice requires default attorneys to understand the complexities of the mortgage finance industry and the quagmire of state and federal regulations which entwine securitized mortgage pools.[45]

The brief period following a mortgagor's default between the cessation of the servicer's in-house collection efforts and referral of the matter for foreclosure offers another prime opportunity for attorneys to expand loss mitigation efforts.[46] Contact from an attorney often jolts a mortgagor out of inaction, resulting in greater cooperation before a foreclosure ever commences.[47]

After the bank initiates foreclosure, default attorneys' superior knowledge of a case's status and deadlines uniquely equips them to expand loss mitigation efforts in ways that simultaneously prevent unnecessary delays and increased costs to servicers and borrowers alike. Additionally, in states having a judicial foreclosure process, default attorneys' management of loss mitigation can assist the courts by avoiding contentious or unnecessary litigation which would require substantial court time.

---

42. *See* DeZube *supra* note 24, at 38–39; Morse, *supra* note 22.

43. *But cf.* DeZube, *supra* note 24, at 38 (suggesting that servicers that offer loss mitigation borrowers "a self-service option for routine questions about balances" might deflect calls that would otherwise occupy the time of loss mitigation agents, thus maximizing human interaction for difficult cases).

44. Joe Surkiewicz, *Commentary: Of Service: How Can a Lawyer Help Those Facing Foreclosure?*, DAILY RECORD (Baltimore, Md.), Aug. 4, 2008.

45. *See* Morse, *supra* note 22. One industry professional noted that "[m]odifying and restructuring of loans is problematic," and "no one knows how to do it yet, because there are so many legal consequences of loans being in different pools, and what does it mean [in terms of those legal consequences] to modify them." *Id.* (second alteration in original) (internal quotation marks omitted).

46. *See, e.g.*, Reni Gertner, *Lawyers Lend Hands to Homeowners*, ST. PAUL LEGAL LEDGER, Aug. 23, 2007 (noting that "in most instances" an attorney can take steps "to stop a foreclosure").

47. *See id.*

B. Why Are Attorneys Largely Uninvolved?

During the 1980s and 1990s, attorneys were substantially involved in the loss mitigation process.[48] However, more recently, attorneys have been excluded from the process for two main reasons. First, the investors' loss mitigation programs create financial incentives for lenders who engage in successful remediation, so lenders have developed in-house loss mitigation departments.[49] Second, Congress removed the "attorney exception" from the Fair Debt Collection Practices Act (FDCPA),[50] and attorneys now face major obstacles to engage meaningfully in loss mitigation efforts.[51]

Fannie Mae, Freddie Mac, and the Department of Veterans Affairs (VA) all offer incentives to lenders who successfully engage in loss mitigation.[52] Although Fannie Mae has recently developed a pilot program whereby it offers financial incentives for successful foreclosure avoidance to attorneys and lenders,[53] neither Freddie Mac, the VA, nor the Department of Housing and Urban Development (HUD) have followed suit. Freddie Mac remains focused on obtaining better information regarding a borrower's personal and financial status to ensure that whatever loss mitigation alternative is ultimately selected, it will best meet the investor's and the borrower's needs.[54] Although Freddie Mac does not offer financial incentives to attorneys, foreclosure attorneys are now permitted to postpone foreclosure sales without prior approval by Freddie Mac

---

48. *See* Melissa B. Jacoby, *Home Ownership Risk Beyond a Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261, 2289 (2008).

49. *See* CAPONE, *supra* note 3, at ix.

50. Act of July 9, 1986, Pub. L. No. 99-361, 100 Stat. 768 (codified as amended at 15 U.S.C. § 1692a(6) (2006)).

51. *See generally* Jonathan K. Van Patten, *Lending Liability: Changing or Enforcing the Ground Rules?*, 33 S.D. L. REV. 387, 420 & n.171 (citing Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (2006)) (describing debt collection torts that "provided the impetus for federal regulation of collection practices" and noting that attorneys are now subject to the FDCPA).

52. *See, e.g.*, Servicer Loss-mitigation Options and Incentives, 38 C.F.R. § 36.4819 (2008) (paying an incentive bonus for each successful loss mitigation alternative to foreclosure); News Release, Fannie Mae, Fannie Mae to Increase Cash Incentives Paid to Servicers to Avoid Foreclosure (July 30, 2008), http://www.fanniemae.com/newsreleases/2008/4439.jhtml?p=Media&s=News+Releases (discussing Fannie Mae's incentive program); FREDDIE MAC, WORKOUT INCENTIVE PROGRAM (2008), http://www.freddiemac.com/service/factsheets/pdf/workout_incentive_program_374.pdf (detailing Freddie Mac's incentives for servicers that help borrowers avoid foreclosure).

53. Daniel H. Mudd, President & Chief Executive Officer, Fannie Mae, Address at National Association of Home Builders 2008 International Builders' Show 2 (Feb. 13, 2008), http://www.fanniemae.com/media/pdf/Dan_Hm_Builders_Int_021308.pdf.

54. *See, e.g.*, FREDDIE MAC, AFFORDABLE SERVICING BEST PRACTICES FOR HOUSING COUNSELORS 2 (2006), http://www.freddiemac.com/learn/pdfs/community/bp_hc.pdf (discussing how collecting accurate financial information gives an underlying foundation for intervention).

if a workout plan is imminent.[55] This is a major departure from its past policy.[56] The VA has not expanded its loss mitigation process or incentives to attorneys either, but it has begun taking mortgage assignments back from servicers and recasting mortgage terms through loan modifications.[57] HUD awards treble damages against servicers who fail to engage in loss mitigation,[58] but continues to exclude attorneys from any financial incentives in the foreclosure avoidance process. Either because these financial incentives are available only for lenders and not for attorneys performing loss mitigation functions or because lenders want to keep these incentives for themselves, attorneys do not play a large role in loss mitigation.

Additionally, the FDCPA no longer exempts attorneys from its requirements and now subjects attorneys to statutory damages even for technical violations.[59] When Congress first enacted the FDCPA, it did not classify attorneys as "debt collectors"; thus, the FDCPA did not bind attorneys.[60] This changed in 1986, when "Congress repealed this exemption thereby requiring attorneys to comply with the standards of conduct imposed by the FDCPA on lay 'debt collectors.'"[61] Now, attorneys must ensure that their staff complies with all aspects of the FDCPA, particularly including notice, debt validation, and disclosure requirements.[62] In the event an attorney (or a member of the attorney's staff) violates one of these provisions, the attorney is strictly liable, and the debtor is entitled to statutory damages regardless of whether the debtor sustained any actual damages.[63] The debtor may also be entitled to attorneys' fees.[64] These strict liability provisions make it increasingly difficult for attorneys to engage meaningfully in loss mitigation for an increasing number of

55. *See* Bulletin from Freddie Mac to All Freddie Mac Servicers 12 (Dec. 12, 2008), *available at* http://www.freddiemac.com/sell/guide/bulletins/pdf/bll121208.pdf.

56. *See* 2 FREDDIE MAC, SINGLE-FAMILY SELLER/SERVICER GUIDE, ch. 66.11 (2009), http://www.freddiemac.com/sell/guide (follow "AllRegs" hyperlink).

57. *See, e.g.*, Saint Paul Regional Office RLC Foreclosure Alternatives, U.S. Department of Veterans Affairs, http://www.vba.va.gov/ro/central/stpau/Servicers/foreclosurealternatives.html#Anchor-60088 (last visited Feb. 21, 2009) (listing "loan modification" as one option available to the VA if a servicer is not working).

58. *See* 24 C.F.R. § 30.35(a)(14), (c)(2) (2008).

59. *See supra* notes 50–51 and accompanying text.

60. Christopher A. Golden, *Fair Debt Collection Practices Act . . . An Emerging Source of Liability for Attorneys*, N.Y. ST. B.J., Feb. 1997, at 14, 14 (citing H.R. REP. NO. 99-405, at 8 (1985), *as reprinted in* 1986 U.S.C.C.A.N. 1752, 1759).

61. *Id.*

62. *See id.* at 15–16.

63. *See* 15 U.S.C. § 1692k(a) (2006).

64. *See* Golden, *supra* note 60, at 16 (citing Graziano v. Harrison, 950 F.2d 107, 113 (3d Cir. 1991); Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22, 27–28 (2d Cir. 1989); Emanuel v. Am. Credit Exch., 870 F.2d 805, 809 (2d Cir. 1989)).

foreclosure referrals, and the provisions significantly curb attorneys' potential effectiveness in resolving delinquencies and avoiding foreclosures.

IV. PROPOSED SOLUTIONS

In this unprecedented legal and financial environment, industry professionals can no longer rely on their experience. This *terra nova* is forcing stakeholders to develop innovative ways to cope with their hemorrhaging losses and insurmountable workloads. Lenders, brokers, servicers, attorneys, policymakers, and consumers must combine their perspectives to develop a holistic approach to avoiding foreclosures and emerging from the crisis as soundly as possible. Attorneys are vital parties to these discussions. Not only do attorneys' advocacy skills and legal knowledge make them invaluable resources, but attorneys also have a higher success rate at engaging borrowers in effective loss mitigation.[65] They are in courtrooms on a daily basis, wading through these very issues with hundreds of homeowners, lenders, judges, and other attorneys. They see the action first hand and have a unique perspective on how tinkering with legislation and policy could affect the outcome of loss mitigation efforts and foreclosures—for better or for worse.[66]

Although Congress has already enacted some legislation, this legislation will not be fully implemented until attorneys can be involved in a meaningful way. The Housing Economic Recovery Act of 2008[67] establishes the Hope for Homeowners Program and provides for loan modifications for eligible

---

65. *See supra* note 38 and accompanying text.

66. Several organizations, such as CARES and the Coalition for Mortgage Industry Solutions (CMIS), have already demonstrated this understanding of and appreciation for the unique role of attorneys. Both of these organizations seek to foster communication among professionals throughout the mortgage banking industry and promote solutions that can be implemented without unintended or unforeseen consequences. The CARES mission is "[t]o address our clients' needs and the nation's interests related to the mortgage industry's issues and challenges through forwarding the best legal opinions and processes resulting in superior long term solutions." *Mission and Vision Statements*, CARES UPDATE (Comm. for Actual Real Estate Solutions, Inc., Newport, Ky.), Oct. 2008, at 4. The CMIS states that its aim is to provide a "neutral forum and framework to foster dialogue necessary to convert diverse self-interests into comprehensive solutions or priorities for all as well as participants, including borrowers and consumers." COALITION FOR MORTGAGE INDUSTRY SOLUTIONS, EXECUTIVE LEADERSHIP SUMMIT: ASSESSING THE MORTGAGE, CREDIT, AND CAPITAL MARKETS CRISIS AND EXPLORING INDUSTRY-BASED SOLUTIONS (June 17, 2008), http://www.mortgagecoalition.org/pdf/062008/CMIS_Assessing_Mortgage_Credit_Capital_Markets_Crisis.pdf. While it is too early to tell what impact these organizations will have because they are both relatively new creations, the dialogue among diverse industry professionals will certainly be beneficial.

67. Pub. L. No. 110-289, 122 Stat. 2654 (to be codified as amended in scattered sections of 12 U.S.C.).

homeowners;[68] however, engaging borrowers and soliciting participation in this program is similar to typical loss mitigation efforts—a prime opportunity for attorney participation. If investors altered their incentive programs to make attorneys eligible recipients, servicers would be more likely to shift the burdensome task of engaging distressed borrowers, and attorneys would have an incentive to engage borrowers in foreclosure mitigation.

Additionally, revisions to the FDCPA[69] could make a major difference in the practical ability of attorneys to engage distressed borrowers in loss mitigation. Minor changes to two definitions—"communication"[70] and "debt collector"[71]—would preserve the current consumer protections but permit attorneys to participate in loss mitigation activities. Currently, the definition of communication is "the conveying of information regarding a debt directly or indirectly to any person through any medium."[72] This certainly includes sending information to or soliciting information from borrowers regarding workout plans and other options to prevent foreclosure because it is related to the borrowers' defaulted mortgage debt. If Congress added a short clause to this definition to carve out an exception for loss mitigation efforts or options in lieu of a residential mortgage foreclosure, this would protect borrowers from undesirable harassment but still allow attorneys to actively communicate with distressed borrowers to save the borrowers' homes from foreclosure. Additionally, Congress should change the definition of debt collector[73] to add an exclusion for attorneys to the preexisting list of parties that the statute does not consider debt collectors. This provision should include licensed attorneys or their supervised staff members so long as the primary purpose of the communication is to explore home retention or loss mitigation activity. These two small definitional changes could make a significant difference in the potential liability to which attorneys are exposed when they seek to engage borrowers in loss mitigation.

V. CONCLUSION

While the task of developing regulatory solutions to restore the financial health of the mortgage banking industry, the nation, and the world is a daunting one, an effective, deliberate response is possible. However, in order to accomplish this task, parties from throughout the industry must innovate a

---

68. *Id.* at § 1402, 122 Stat. at 2800 (to be codified at 12 U.S.C. § 1715z-23); *see* 12 U.S.C.A. § 1715z-23 (West 2008).

69. *See* 15 U.S.C. §§ 1692a–1692p (2006).

70. *See id.* § 1692a(2).

71. *See id.* § 1692a(6).

72. § 1692a(2).

73. § 1692a(6).

holistic approach. Attorneys have invaluable skills and a unique vantage point that make them indispensable players not only in policy discussions but also in directly engaging distressed borrowers in loss mitigation. Regulators should release the fetters, increase the incentives, and allow attorneys to do what they are trained to do—solve problems.

*