

BRENNAN

CENTER

FOR JUSTICE

FORECLOSURES:
A CRISIS IN LEGAL
REPRESENTATION

Melanca Clark
with Maggie Barron

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The statements made and the views expressed in this paper are solely the responsibility of the Brennan Center.

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EXECUTIVE SUMMARY

The nation's massive foreclosure crisis is also, at its heart, a legal crisis. Many homeowners are losing their homes because they lack the ability to navigate the landscape of our lending laws. The Legal Services Corporation ("LSC"), the major federal source of funding for civil representation for the poor, reports that nonprofit legal services programs across the nation are "besieged with requests for foreclosure assistance." Too few people are ever able to obtain qualified legal guidance. According to our findings:

- In Connecticut, over 60 percent of defendants facing property foreclosure in 2007-08 did not have counsel.
- In New York, 84 percent of defendants in proceedings in Queens County involving foreclosures on "subprime," "high cost" or "non-traditional" mortgages (which are mortgages disproportionately targeted to low-income and minority homeowners) proceeded without full legal representation. In Richmond County (Staten Island), 91 percent of such defendants were unrepresented, and in Nassau County, 92 percent were unrepresented.
- In Stark County, Ohio, heavily impacted by foreclosures, data suggests that 86 percent of defendants facing property foreclosure did not have counsel in 2008.

Why Having a Lawyer Matters

Foreclosures may be inevitable for many individuals, but not for all. Legal representation can help many homeowners save their homes and, more broadly, help to stabilize neighborhoods at risk.

Many people have legitimate legal defenses that can halt foreclosure actions, or help open the door to alternative solutions, such as mortgage refinancing. But few homeowners and tenants are aware of their legal defenses. Among other important interventions, lawyers can identify violations of state and federal laws, enforce consumer protection laws, and advance defenses that can either inspire lenders to agree on sustainable loan terms, or slow foreclosure proceedings enough to create time in which to obtain alternative housing.

Barriers to Representation

Our nation's civil legal aid system is ill-equipped to deal with increased demand for legal services. Civil legal aid, always underfunded, has suffered from acute shortages since federal funds were cut by one-third in 1996. Moreover, just as the need for legal representation has reached its apex, the recession has forced state and local governments and private charities to cut their support for legal services.

Further compounding the problem, federal restrictions imposed by the Congress on the Legal Services Corporation as an outgrowth of Newt Gingrich’s “Contract with America,” have undercut homeowners’ efforts to obtain protection from predatory lenders. Abusive lenders enjoy a full arsenal of legal tools, while homeowners relying on restricted legal aid attorneys are barred from joining class actions, claiming attorneys’ fee awards, or relying on their attorneys to advocate before legislatures and administrative bodies. Congress, through the 2008 Housing and Economic Recovery Act, provided one-time funding for lawyers to help foreclosure victims, but then explicitly prohibited the lawyers it had funded from engaging in any litigation.

Our underfunded and restricted civil legal aid system is critically important for African-American and Latino communities, which are more likely than other communities to be injured by predatory lending practices and to require the assistance of publicly funded counsel. Insufficient legal resources exacerbates the wealth divide between these communities and the rest of the nation and undermines the legitimacy of our justice system by perpetuating two systems of justice, one for people with means and another, inferior system for the poor.

Recommendations

The Brennan Center offers the following recommendations:

1. **Increase funding for foreclosure legal representation** – Additional state and federal dollars should be dedicated to foreclosure legal assistance and directed to the hardest hit areas, often the areas with predominantly minority resident populations.
2. **Remove funding restrictions that undercut effective legal advocacy for homeowners and tenants** – Lifting the LSC funding restrictions, a cost-free fix, is among the easiest and most cost-effective ways to improve legal representation for foreclosure victims.
3. **Expand access to the courts and to other dispute resolution mechanisms for homeowners facing foreclosure proceedings** – States that allow foreclosures to proceed without according homeowners a day in court need reform. In every state, lenders should be required to participate in a mediation conference with homeowners before a foreclosure is permitted to proceed.
4. **Recognize a right to consult with a trained housing counselor and, as necessary, a lawyer** – Foreclosure proceedings should be deferred until the homeowner has consulted with either a trained housing counselor, or, where lending violations are suspected, a lawyer.

INTRODUCTION

The foreclosure crisis that has bedeviled American citizens and institutions since early 2008 is also a crisis in legal representation. As a direct result of the mortgage crisis, record numbers of Americans find themselves facing complicated legal proceedings. Many do so without the benefit of legal counsel. And, many lose their homes as a result. Though lawyers help homeowners save their homes – and more broadly, help stabilize affected communities – there has been little effort to increase the supply of legal representation afforded to the increasing numbers of indigent people fighting to keep their homes and their families intact.

Clearly, the ability to pay for legal counsel should not determine whether or not someone loses his or her home. Too often it does. Increasing numbers of homeowners lose their homes precisely because they do not have counsel and cannot navigate their way through the tangle of complex lending laws themselves.

The difference lawyers make in foreclosure proceedings springs from the simple fact that lawyers can make claims and raise defenses about which most homeowners are unaware. Counsel can advance viable legal claims on behalf of a homeowner as leverage to inspire the lender to agree on sustainable loan terms, and can also slow foreclosure proceedings to give the homeowner adequate time to find alternate solutions. Quite simply, for many Americans, the difference between facing foreclosure with counsel or unassisted can be the difference between having a roof over their heads – or not.

State and federal lawmakers have responded to the foreclosure crisis in a variety of ways; they have enacted laws that criminalize predatory lending practices, passed prevention and intervention initiatives, and created mortgage renegotiation incentives. But, to date, little has been done to ensure that homeowners who cannot afford counsel are represented adequately during foreclosure proceedings.

Foreclosure troubles did not cause the current shortage of lawyers for indigent Americans. But they have contributed to the growing demand for legal representation that results in an intolerable fact: America's justice system does not work for a huge portion of the poor. *By some estimates, 80 percent of the legal needs of America's poor go unmet.* The unprecedented foreclosure crisis has significantly intensified what has been a long growing and chronic shortage of legal assistance for low-income citizens.

Because lenders targeted low-income, Latino, African-American and other minority groups for subprime loans, there is also an explicit – and dramatic – race and class component to the current crisis. In these communities, a downward spiral can well be expected: the rolling contagion of layoffs and service cutbacks is hitting low-income and minority communities with disproportionate impact. Increased homelessness and poverty are likely to exacerbate an already intolerable crisis of civil representation, one that has a particular impact on low-income, minority communities and that has been stoked by chronic funding shortages and

also by the draconian restrictions Congress imposed on Legal Services Corporation-funded legal aid programs in 1996.

The consequence of neglecting the legal needs of America's poor cannot be overstated. A Vermont Supreme Court Justice put it well:

The difficulty poor clients experience in their efforts to access justice should be seen as the canary in the coal mine for the justice system as a whole – the poor are affected first because they are more vulnerable, but their difficulties are symptomatic of larger problems that ultimately will affect everyone.¹

America's poor *are* more vulnerable – especially in times of economic turmoil. Continued foreclosure proceedings are forecast; yet it is not too late for Congress and state legislators to make a difference. This paper explains why state and federal lawmakers must act, even now, to ensure that the victims of the crisis have quality legal representation and unrestricted access to justice. Renewed dedication to the tenets of fairness, equal justice, and shared responsibility will affect everyone, not just in this crisis, but beyond.

I. THE CRISIS

The United States is a nation of homeowners. More than two-thirds of Americans own their own homes,² meaning that the high-leverage, high-cost lending that swept the mortgage industry affects a staggering number of people, regardless of region or background. A perfect storm of lax underwriting standards, abusive lending practices, and a precipitous decline in home values led to rising numbers of foreclosures in almost every state in the country.³

Over 1 million homes entered foreclosure in 2007.⁴ In 2008, over three million foreclosures were filed — an increase of more than 225 percent from 2006 — and one in 54 homes received at least one foreclosure filing during that year.⁵ Foreclosures were up 18 percent this August from the same month in 2008.⁶ At the current rate, nearly 2,900 families lose their home each day.⁷ The crisis shows no signs of abating. In the next four years, continuing foreclosures could mean the loss of 8.1 million homes.⁸ Although there was initial optimism that foreclosures would taper off in 2009, according to Jay Brinkman, Chief Economist of the Mortgage Brokers' Association, “the effects of job losses and general economic deterioration make the 2009 outlook worse...”⁹ Initial foreclosure reports for the year are as dire as predicted, with foreclosure activity increasing to record levels in the first half of 2009.¹⁰ The fundamental goals of homeownership for families in America — building wealth, raising children, stabilizing communities, reducing crime, and more — are all endangered.¹¹ And, the ripple effects extend far beyond the individual homeowners.

Housing wealth and total family wealth are inextricably intertwined. Housing comprises about 30 percent of household wealth in the United States, but the loss of housing wealth has a greater impact on young, minority, and low-income homeowners, who tend to have a larger fraction of their total household wealth tied up in housing than do other groups (who may have stocks, bonds, and other financial assets).¹² For example, minority families had 54 percent of their wealth in their homes. Families with incomes under \$20,000 had 77 percent of their wealth in their homes.¹³ Drops in the housing market, therefore, do not affect all households equally.

Unfortunately, the risky mortgage lending at the core of the crisis was targeted at the communities most likely to be hurt by a housing bust.

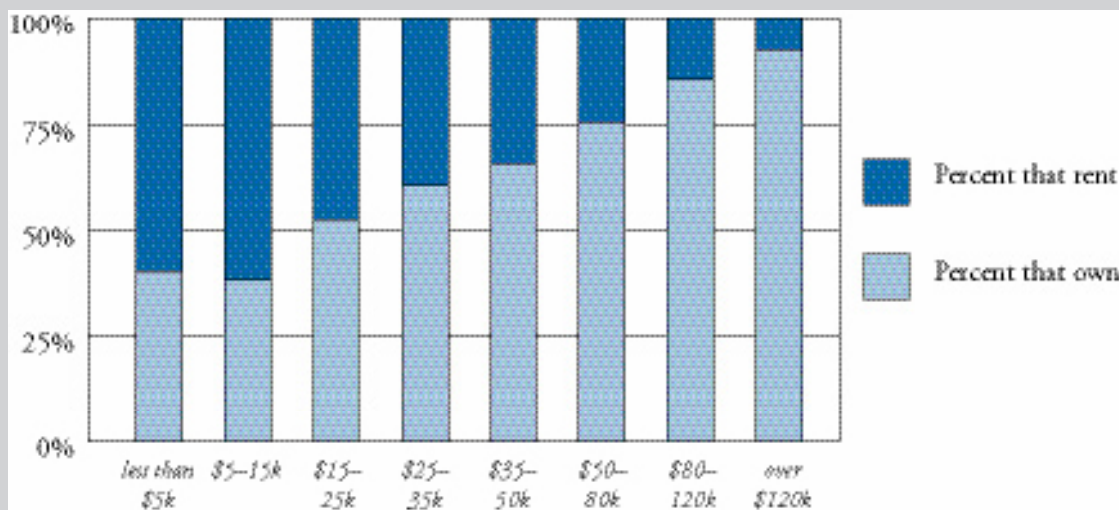
A. The Impact of Subprime Lending and Predatory Practices

The term “subprime” typically refers to loans that have adjustable and higher interest rates and fees, pre-payment penalties and broker kickbacks. Although subprime loans may have introductory low teaser rates, they eventually come with a high cost in the form of higher interest rates (which often go up over time), more fees and prepayment penalties. As a result, subprime borrowers face a great deal of trouble keeping up with their payment obligations. Even after controlling for employment rates, income and home values, one study found that subprime loans are still 20 times more likely to lead to foreclosure.¹⁴ Subprime loans comprise 14 percent of all mortgage loans being serviced, but more than half of all loans in foreclosure.¹⁵

Arguably, not all subprime loans are “predatory,” though predatory practices are, by and large, targeted at borrowers within the subprime market. In general, predatory lending is characterized by fraud or deceptive practices, including false information on loan applications and a lack of transparency of loan terms, as well as a disregard for a borrower’s ability to pay, in a scheme that strips the borrower of home equity.¹⁶ The most common victims of predatory practices tend to be minority and low-income households, and the elderly.¹⁷

Homeowners at Risk

A substantial number of home-owning families in the United States are poor or near poor. Nearly 7 percent of all families who own a home in America live below the federal poverty level, and nearly 22 percent live below 200 percent of the poverty level, the maximum income cut-off point for a variety of federal aid programs.¹⁸



source: U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2007, PUB. NO. H150/07, at 80 tbl.2-12 (2008).

B. The Costs of the Foreclosure Crisis

When a household goes through foreclosure, everyone loses. Foreclosure devastates families, uproots them from communities, schools, and places of worship, and rips older homeowners from support systems on which they depend. Families lose money invested in their homes and see their equity stripped. Years after a foreclosure, individuals who have lost their home will find that the black mark on their credit history not only negatively impacts their ability to secure new credit, but also presents obstacles to buying car insurance and even obtaining a job.¹⁹

Neighborhoods suffer too, as foreclosures cause property values for surrounding homes to decline. According to a recent study from the Furman Center, proximity to six or more

foreclosures within six years is associated with sale prices 3.9 percent lower than homes not in proximity to six or more foreclosures.²⁰ In the current crisis, it is estimated that the 40.6 million homes that are next door to foreclosed properties will suffer price declines of \$8,667 on average, which adds up to a \$352 billion decline in property values.²¹

Municipalities suffer.²² Lost tax revenue, unpaid utilities, extra costs for police, maintenance and other city services required to deal with increased crime and vagrancy associated with vacant housing stock can cost state and local governments up to \$20,000 per foreclosure.²³ In California alone, estimates have put lost tax revenue from foreclosures at \$4 billion for 2008.²⁴ In New York, experts estimate lost tax revenue of \$102 million between 2007 and the end of 2009.²⁵ In Atlanta, where foreclosures were up 42 percent between 2006 and 2008, the city's property tax revenue at the end of 2008 was 15.5 percent below projections.²⁶

Higher foreclosure levels contribute to higher levels of violent crime. More specifically, a 1 percentage point increase in foreclosure signals a 2.33 percent increase in the number of violent crimes, in part because of the increased presence of abandoned and vacant buildings.²⁷ Ominously, a March 2009 report estimated that 19 million housing units – nearly one in seven – were vacant across the country, the highest vacancy rate since the 1960s.²⁸

Foreclosures cost lenders too. Lenders lose 20 to 60 cents on the dollar per foreclosure, because foreclosed homes usually sell below market value, and when properties fail to sell at auction, lenders must also pay for maintaining the empty homes.²⁹ By one estimate, a typical foreclosure costs a lender \$58,000.³⁰

Why, then, have lenders not been more aggressive in taking steps to help homeowners avoid foreclosure? Several factors converged to create disincentives for such action. For example, allowing a borrower to avoid foreclosure by renegotiating the loan terms often requires the lender to write down the value of the loan principal and carry the loss on its books, something financial institutions are loath to do even if it would improve the likelihood of long-term repayment.³¹

In addition, the securitization of mortgages – the process in which mortgages are repacked into pools and sold to investors as “mortgage-backed securities” – has created a unique disincentive.³² Loan servicers, who collect and process loan payments during the life of a loan on behalf of mortgage-backed security investors, and who often serve as the gatekeepers for determining whether modifications will be made to loan terms, often make more money from foreclosures than from loan modifications, even if the lenders owning the underlying principal incur losses through foreclosure.³³

Such are some of the “incentive misalignment problems” that make foreclosure mitigation steps, such as loan modifications, difficult to achieve on a large scale even though they would constitute the most economically rational choice for both homeowners and lenders in many cases.

C. The Foreclosure Crisis has had a Disproportionate Impact on African Americans

The foreclosure crisis has been felt most acutely in African-American communities, which have disproportionately high foreclosure rates and have a disproportionate portion of family wealth invested in homes.³⁴ Latino communities have also been hard hit.³⁵ The high foreclosure rates in these minority neighborhoods are due largely to the prevalence of subprime loans.³⁶

According to a 2004 Federal Reserve study:

[B]lack homebuyers received higher priced loans more than three times as often as non-Hispanic white homebuyers, and Hispanic homebuyers received higher priced loans more than two times as often. In general, differences of this magnitude persist across borrowers with different income levels and across neighborhoods with different median incomes (for example, low-income versus middle-income).³⁷

The Federal Reserve's data from 2007 reveal similar patterns.³⁸ These disparities exist regardless of region. One study found that over 40 percent of the loans made by "high risk lenders" – distressed mortgage lenders that have gone out of business as part of the collapse of the subprime mortgage industry, in part due to their aggressive and predatory lending practices – were in neighborhoods where over 80 percent of residents were people of color, and less than 10 percent were in neighborhoods where less than 10 percent of the residents were people of color (in the seven metropolitan areas analyzed).³⁹

While the one virtue of the subprime lending market was, arguably, to afford greater access to credit to people with imperfect credit histories, many African Americans were given subprime mortgages even though they could have qualified for less expensive prime loans. A study by the National Community Reinvestment Coalition found that low- and moderate-income African Americans were 2.1 times more likely to receive subprime loans than similarly situated whites, and that middle- and upper-income African Americans were at least 2.7 times more likely to receive these loans.⁴⁰

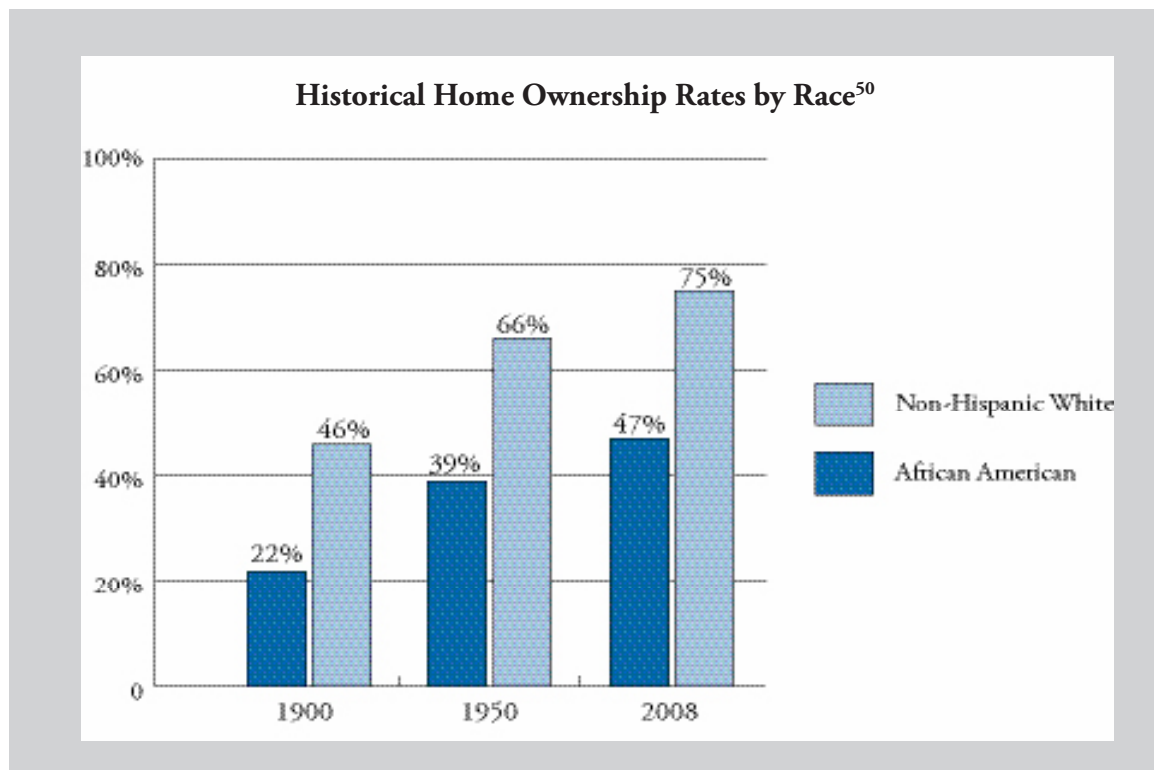
Targeting African-American communities for high-cost and predatory loans marks the latest chapter in an extensive history of discrimination in the housing and credit markets. African-American communities have long been excluded from access to credit and underserved by reputable credit institutions.⁴¹ In the 1990s, subprime and unscrupulous lenders rushed into the breach. African-American communities were less familiar with fair loan pricing and terms and more desperate for accessible credit when credit markets opened to borrowers with less-than-perfect credit scores, making them particularly vulnerable targets of unscrupulous brokers and lenders.⁴²

In the aggregate, equity has been drained from African-American neighborhoods across the country, as the residents have assumed debt that has put them at higher risk of default and foreclosure. Nationwide, subprime borrowers of color will lose between \$72 billion and \$93 billion as a result of home loans made during the past eight years.⁴³

Moreover, African-American neighborhoods – which have comparably higher poverty rates, joblessness, and decreased municipal services – are especially vulnerable to the many impacts of foreclosures.⁴⁴ For example, evidence suggests that property values in low-income neighborhoods are more easily destabilized by “visible, confidence-reducing events such as foreclosure sales.”⁴⁵ Foreclosed homes in neighborhoods with fewer economic resources are also more likely to be left vacant for extended periods of time, leading not only to a loss of confidence in a recovery, but also to tangible problems like rundown and blighted buildings (which can encourage more crime, as mentioned above).⁴⁶ In contrast, within higher-income neighborhoods, foreclosed properties are more easily sold and returned to productive use.

Unfortunately, this phenomenon makes recovery more difficult in lower-income neighborhoods with high rates of foreclosure. The Furman Center for Real Estate and Urban Policy reports that in New York City, for example, the same predominately minority neighborhoods that saw the highest rates of subprime lending, and the highest foreclosure rates are now experiencing the greatest declines in mortgage lending and new investment.⁴⁷

Homeownership has been the most accessible asset and path to stability for millions of African Americans. The foreclosure crisis is eroding these gains, deepening and worsening residential segregation by reducing African-American residential mobility,⁴⁸ divesting sorely needed capital from African-American communities, and exacerbating the enduring wealth divide between African Americans and whites.⁴⁹



Discrimination in the Mortgage Lending Market – A Brief History

1900s

Early twentieth century mortgage loans were characterized by substantial down payments of at least 40 percent or more, and short payment periods, typically of 6 to 11 years. Between a quarter and half of all homes were acquired debt free.⁵¹ As a result, “none but the most affluent men of European ancestry had reliable and widespread access to home finance.”⁵²

1933–34

The Federal Government enters the lending market with the creation of the Home Owner’s Loan Corporation in 1933, and the Federal Housing Administration (“FHA”) in 1934 and eventually the Federal National Mortgage Association (“Fannie Mae”) in 1938. These New Deal programs function to insure private lenders against loss, and popularize the use of long-term, amortized mortgages with decreased down-payments. The result is vast expansion of home ownership rates throughout the country, and creation of the white middle class. African Americans were explicitly excluded from these housing opportunities. For example, the FHA would not insure loans in neighborhoods with old housing stock, which excluded most neighborhoods where African Americans resided, and followed an explicit policy of refusing to insure loans made by private lenders in multiracial neighborhoods, and homes for nonwhites in white neighborhoods. Private lenders, taking their cue from the federal government, followed suit.

1944

G.I. Bill creates the Veterans Administration (“VA”) loan program allowing over five million veteran and active duty personnel to secure federally guaranteed individual mortgages with no down payment. The Veterans Administration follows the FHA’s policy of channeling investment away from neighborhoods where African Americans reside, exacerbating racial neighborhood segregation.⁵³

1945–1959

During this period less than 2 percent of federally insured loans are awarded to African Americans.⁵⁴ The FHA and VA, in charge of administering the federal government’s two major lending programs, endorse the use of race-restrictive covenants until 1950 and explicitly refuse to underwrite loans that would “introduc[e] ‘incompatible’ racial groups into white residential enclaves.”⁵⁵

1980s–1990s

The passage of the Fair Housing Act and court victories of the 1960s and 1970s diminish overt discrimination in the housing markets. In their place arise more subtle discriminatory practices by banks and private lenders, including the maintenance of offices only in white neighborhoods, and refusal to lend on properties in predominantly minority neighborhoods (“redlining”).

1990s–
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Innovations in automated, risk-based pricing lead to expansion of subprime lending to borrowers with less-than-perfect credit scores.⁵⁶ The opportunity for predatory lending practices grows with the increase in available capital in the mortgage market and an unregulated securitization system. In the absence of strong underwriting guidelines, unscrupulous lenders target minority communities for subprime predatory loans (“reverse redlining”). The expansion of access to credit thus comes at a high cost: while many African Americans were able to own homes for the first time, many are now losing not only their homes but their families’ accumulated wealth, as a result of the bad terms that they were offered.

II. LAWYERS MAKE A DIFFERENCE

The mortgage foreclosure crisis is also a legal crisis. Many homeowners possess legal defenses that could bar foreclosure, but cannot effectively raise them. For others, loan modification and refinancing programs could enable them to save their homes, but relying on lenders to agree to new terms in the absence of litigation incentives, has not, to date, been particularly effective.⁵⁷ With legal representation, many of these homeowners could prevent the loss of their families' equity and, in many instances, retain their homes.

Facing a foreclosure is daunting for even the most sophisticated home owner. Without a lawyer, it can be extremely difficult to figure out what is required to defend oneself.

Complicated legal notices may require specific responses – such as the filing of an “answer” with a court – by a particular date, in order to prevent judgment from being entered in favor of the lender. Legal papers may not spell out, in detail, how the lender has arrived at the sums allegedly owed and generally do not give the homeowner any clues as to possible defenses or solutions. According to Mary Asbury, Executive Director of the Legal Aid Society of Greater Cincinnati, foreclosure is among the most complicated practice areas addressed by the civil legal aid bar, “most lawyers without expertise in foreclosures would have trouble in these cases, let alone lay persons.”⁵⁸

A. The Need for Legal Assistance

No definitive nationwide study has been done on the number of persons without legal representation in the foreclosure process. The Brennan Center contacted 30 court clerk's offices in counties with the highest rates of foreclosure in the ten most foreclosure-impacted states.⁵⁹ Few tracked data on legal representation. In Stark County, Ohio, one of the only foreclosure-impacted counties for which information on legal representation is readily available, data suggests that 86 percent of defendants in foreclosure proceedings went without counsel in 2008.⁶⁰

Additionally, data from Connecticut, as well as several counties with high rates of foreclosure in New York, indicate that the number of unrepresented defendants in foreclosure actions is quite high.

In Connecticut, over 60 percent of defendants facing foreclosure of their property in 2007-08 did not have counsel. Of those without counsel, 43 percent attempted to represent themselves. The remaining 57 percent failed to respond to the notice of the foreclosure.⁶¹

These figures include owners of commercial and non-residential properties. The percentage of homeowners without representation – let alone from minority and low-income communities – is likely greater.

The Foreclosure Process

Once a borrower has missed several monthly mortgage payments, typically two to three, lenders in almost every state have the right to send a notice of default, and within 30 to 60 days, to initiate foreclosure proceedings.

Generally, the lender must notify the borrower of the lender's intention to foreclose. Upon receiving notice of the default, the homeowner is afforded a specified period of time or "reinstatement period" within which to pay off arrears, plus associated costs.

During this time, in almost every state, lenders are permitted to add certain late fees and costs to the outstanding amount. Lenders are also permitted, after a specified period of time, typically less than 60 days, to accelerate the entire past due amount of the loan.

Many homeowners who receive a notice of default are unaware of available options to avert foreclosure of their home. As one legal services attorney noted, "most folks feel hopeless and bury their heads in the sand."⁶²

Homeowners in the 25 states⁶³ that primarily use a "judicial foreclosure process," where lenders seeking to foreclose must file a complaint in a court and appear before a judge, are afforded the opportunity to have a court review the validity of the mortgage.

In an increasing number of jurisdictions, courts are requesting that the parties to the foreclosure participate in some form of mediation – they must meet to attempt a workable settlement that could keep the homeowner in his or her home. Without a lawyer, or someone to help the homeowner understand viable legal claims, homeowners have little opportunity to obtain a favorable outcome through mediation.

In "non-judicial foreclosure" states, homeowners are in an even tougher position.

In these states, lenders can bypass courts altogether and proceed directly to sell a home to the highest bidder after recording notice of the sale at the county clerk's office and publishing notice in the local newspapers. The homeowner has no legal right to be heard by a court of law. Theoretically, the homeowner could file an affirmative lawsuit to try to stop the sale by putting the case in front of a judge. Needless to say, this is a difficult step for any homeowner to take without the assistance of a lawyer.

Once the sale is complete, whether in a judicial foreclosure state, or in a non-judicial foreclosure state, the homeowner has no right to set aside the sale, even if the homeowner possessed valid claims and defenses to the foreclosure.

In sum, state foreclosure laws have not caught up with a lending landscape that has changed dramatically over the past three decades. Loans were made without regard to homeowners' ability to repay them, and without regard to inflated home values.

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(continued from page 13)

Debt servicing rights were routinely assigned to third parties who possess financial incentives to foreclose on homes. Yet, in many states, the law fails to provide homeowners a full and fair opportunity to save their homes.⁶⁴

As Judge Christopher A. Boyko, a federal judge in Cleveland, recently wrote, the foreclosure process has become a “quasi-monopolistic system where financial institutions have traditionally controlled, and still control...”⁶⁵

With the cards thus stacked against them, the many homeowners who possess legitimate legal claims to avoid foreclosure have no real chance to save their homes unless they are able to obtain the assistance of a lawyer.

In New York for example, in Queens County, data shows that 84 percent of defendants in proceedings involving foreclosures on “subprime,” “high cost” and or “non-traditional” mortgages (which are disproportionately targeted to low-income and minority homeowners) proceeded without full legal representation from November 2008 to May 2009. In Richmond County (Staten Island), 91 percent of such defendants were unrepresented, and in Nassau County, 92 percent were unrepresented.⁶⁶

Notably, judicial officers, lawmakers and other justice stakeholders have taken steps in each of these jurisdictions to ameliorate the problem of the lack of adequate legal representation for homeowners in foreclosure proceedings by encouraging or requiring lenders to participate in a mediation conference before a foreclosure is permitted to proceed to judgment. These programs differ in their implementation models, and are reported to be meeting with varied levels of success, though they are not a substitute for full legal representation when needed.⁶⁷

Around the country, there are further reports of courts inundated with cases in which people are facing foreclosure proceedings without the assistance of counsel. Chief Bankruptcy Judge Henry J. Boroff of Massachusetts reported that the number of Chapter 13 *pro se* bankruptcy filings jumped from 13 percent in 2004 to 20 percent in 2007, in large part a result of the higher rates of home-mortgage foreclosures.⁶⁸

And, in an unprecedented appeal to members of the organized bar, Chief Judge Robert M. Bell of the Maryland Court of Appeals wrote to every member of the Maryland State Bar asking attorneys to provide pro bono help to citizens facing foreclosure, explaining “[members of] the legal services community alone are inadequate to address the current need.”⁶⁹

In April 2009, the *New York Times* reported on the growing number of people defending themselves in civil cases because they cannot afford attorneys, casting doubt on the fairness of proceedings and clogging already cash-strapped courthouses with people in need of assistance.⁷⁰

MAGISTRATE COURT OF CLAYTON COUNTY
STATE OF GEORGIA

RECEIVED AND FILED

SEP 29 2008

CLAYTON COUNTY, GEORGIA
CLERK MAGISTRATE COURT

[Redacted Plaintiff Name and Address]

PLAINTIFF'S NAME AND ADDRESS

VS

[Redacted Defendant Name and Address]

DEFENDANT'S NAME AND ADDRESS

CASE NO. [Redacted]

STATEMENT OF CLAIM

Suit on a Note Suit on Account Other

The Court has jurisdiction over the defendant because: the Defendant is a resident of Clayton County; or
 Other:

Plaintiff states the defendant is indebted to the plaintiff as follows:

Refuse to pay on note as agreed.

That said claim is in the amount of \$ 10189.55 principal, \$ 0 interest, plus
\$ 10.00 costs to date, and all future costs of this suit.

1st Lt. Fred [Redacted] being duly sworn on oath, says the foregoing is a just and true statement
of the amount owing by defendant to plaintiff, exclusive of all set-offs and just grounds of defense.

Sworn to and subscribed before me
this 21 day of October, 2008.

[Signature]
Notary Public
Clayton County
State of Georgia
Notary Public Commission Expires Aug 23, 2011

[Redacted Signature]
Plaintiff/Agent/Attorney

[Redacted]
(If agent, title/capacity) (If attorney, include Bar #)

[Redacted]
area code phone number

NOTICE OF SUMMONS

TO

You are hereby notified that the above named Plaintiff has made a claim and is asking for judgment against you in the sum as shown by
the foregoing statement. YOU ARE REQUIRED TO FILE OR PRESENT AN ANSWER TO THIS CLAIM WITHIN 30 DAYS AFTER
SERVICE OF THIS CLAIM UPON YOU. IF YOU DO NOT ANSWER, JUDGMENT BY DEFAULT WILL BE ENTERED
AGAINST YOU. YOUR ANSWER MAY BE FILED IN WRITING OR MAY BE GIVEN ORALLY TO THE JUDGE.

The court will hold a hearing on this claim at the Clayton County Justice Center, 9151 Tara Blvd., Jonesboro, Georgia 30206-4912, to be
scheduled after your answer is filed. If you have witnesses, books, receipts, or other writings bearing on this claim, you should bring
them with you at the time of the hearing. If you wish to have witnesses summoned, see the court at once for assistance.

If you have any claim against the plaintiff, you should notify the court at once. If you admit the claim, but desire additional time to pay,
you must come to the hearing in person and state the circumstances to the court. You may come with or without an attorney.

LINDA T. MILLER
Clerk Magistrate Court

BY: [Signature]
Deputy Clerk

The above example of a typical summons fails to notify the homeowner of what
available defenses might be to the action, where to go for help, or that the failure to
respond could result in the sale of the home at auction.

The Legal Aid Society of Orange County reports a 337 percent increase in the number of clients seeking help with foreclosures and a 135 percent rise in foreclosure cases from 2006-2008.⁷¹ The wait time on the organization's legal assistance hotline has also risen from eight to 45 minutes.⁷² The Legal Services Corporation, the major source of federal funding for civil representation for the poor, reports that its providers – nonprofits distributed geographically across all fifty states – have been “besieged with requests for foreclosure assistance.”⁷³

This latest surge in demand for legal representation occurs against a backdrop of a severe shortage of legal help for the poor. Myriad studies find that 80 percent of the civil legal needs of low-income people go unmet.⁷⁴ African Americans and other minorities, who disproportionately fill the ranks of the poor and rely on publicly funded counsel, are disproportionately harmed by the lack of available legal representation for the poor.⁷⁵ The Legal Services Corporation estimates that even before the current increase in demand, already half of those seeking help were turned away because of lack of resources.⁷⁶ One vivid example: in New Jersey, 99 percent of individuals facing eviction in legal proceedings are not represented by a lawyer.⁷⁷

The situation puts added pressure on already overwhelmed courthouse personnel – on the clerks, who must take time to help unrepresented people with forms and filings in order to keep proceedings moving, and on the judges, who often feel constrained to remain neutral and not to act as advocates, even as they watch people without lawyers make costly mistakes.

Many judges believe that when individuals represent themselves in complex legal cases, the outcomes are unfair. Says John T. Broderick, New Hampshire's Chief Justice:

If you and I went to the hospital and they said, ‘Do you have insurance?’ and we don't, and they said, ‘There are some textbooks over there with some really good illustrations,’ we would think that was immoral.⁷⁸

While no definitive study has yet examined the difference that a lawyer makes in a foreclosure proceeding, studies conducted in other contexts have shown that having a lawyer can increase an individual's ability to prevail in a legal case by anywhere from 40 percent to 1,380 percent.⁷⁹ For example, a study of New York City's Housing Court found that, as compared to tenants who were not represented, tenants represented by lawyers were more likely to obtain a stipulation requiring a rent abatement or a repair, as contrasted with a final adverse judgment and order of eviction – without regard to the merits of their individual cases.⁸⁰

The intervention of a lawyer can make a particular difference in cases that are procedurally complicated, such as foreclosure cases.⁸¹ Prince George's County Circuit Judge Herman Dawson has observed that it is obvious that unrepresented homeowners appearing before him in foreclosure court do not understand the process. He repeatedly tells homeowners, “You don't come to court without a lawyer. This is the problem.”⁸²

The loan servicers and the lenders invariably have counsel whenever they take action against a homeowner for alleged default of the mortgage terms. Providing lawyers for low- and moderate-

income homeowners would level the playing field, and help to ensure that banks and other institutions that operate in economically distressed communities do so according to the rule of law. In the current crisis, characterized by predatory practices, the targeting of poor and of color communities, and disregard for the requirements of federal and state law, the call for basic fairness in foreclosure proceedings takes on increased importance.

B. Six Ways Lawyers Protect Families in Foreclosure

Civil legal aid lawyers, and other lawyers who advocate for the poor, can help to ensure that low-income homeowners facing foreclosure, a disproportionate number of whom are African American, will not unjustly lose their homes. How, in fact, can lawyers help these families? We identify six ways:

1. Lawyers Raise Claims that Protect Homeowners from Lenders and Servicers who Broke the Law

A troubling portion of the millions of foreclosures in this country are the product of unlawful and abusive lending practices to which our regulatory and law enforcement systems have been slow to react. As Senator Patrick Leahy recently stated, law enforcement cannot keep pace with the number of mortgage fraud complaints: “. . . suspicious activity reports alleging mortgage fraud that have been filed with the Treasury Department have increased more than 10-fold, from about 5,400 in 2002 to more than 60,000 in 2008.”⁸³ As one prosecutor put it, “Our natural inclination is that these are civil cases.”⁸⁴ Yet, with so few lawyers available to pursue civil remedies for homeowners who are injured by these violations, the homeowners get victimized repeatedly and the lenders are permitted to violate the law with impunity.⁸⁵

On the federal level, the laws providing protection include the Truth in Lending Act and the Home Equity Protection Act, which requires lenders to make “clear,” “conspicuous,” and “accurate” disclosures of credit terms prior to making a loan,⁸⁶ the Fair Debt Collection Practices Act, which prohibits “abusive, deceptive, and unfair debt collection practices,”⁸⁷ the Real Estate Settlement Procedures Act (“RESPA”), which prohibits “kickbacks” and “referral fees,”⁸⁸ and the Fair Housing Act, which prohibits discrimination in housing-related transactions.⁸⁹

Most states have consumer protection statutes and common law protections that prohibit lenders and their brokers from misleading or deceiving the homeowner prior to making the loan. With the assistance of a lawyer, homeowners can rely on these laws, commonly known as “unfair and deceptive practices acts,” to bring claims for unscrupulous practices such as repeated and unnecessary refinancing (“flipping”) of loans – which result in higher interest rates and costs assessed to the homeowner – and for making unaffordable “rescue” loans to consumers at risk of foreclosure in order to acquire the underlying equity in the home.

In addition, state warranty law, usury laws, and common law doctrines such as unconscionability, breach of fiduciary duty, fraud, and contract law can also be relied on by victims of abusive lending practices who have the assistance of a lawyer.

To be sure, protections afforded homeowners by federal and state law are not as strong as many advocates would wish.⁹⁰ Not every legal protection described above will entitle a homeowner to halt a foreclosure outright, for example, by requiring rescission of the underlying loan. Nonetheless, raising legitimate legal claims may, at the least, enable the homeowner to temporarily suspend the proceedings. This may provide a borrower with sufficient time to repay the deficiency and to reinstate the loan. Moreover, and as described below, raising these claims may better position the homeowner to negotiate more equitable loan terms, a result that is often more meaningful to a homeowner than a victorious outcome in court.

Finally, by aggregating individual claims into class actions, and/or seeking attorneys' fees, attorneys can, for example, turn a claim under RESPA, which ordinarily has a \$1000 cap on statutory damages per violation, into a more powerful deterrence mechanism by effectively increasing the costs to lenders of engaging in such illegal practices. Unfortunately, as described in Section III, many attorneys for the poor are unable to rely on the class action device or the tool of attorneys' fees.

Why do homeowners need a lawyer to raise these defenses? Foreclosure representation requires knowledge of complex areas of state and federal law. It also requires the wherewithal to scrutinize voluminous and difficult-to-decipher loan documents. Even attorneys can find foreclosure cases daunting, particularly if they are unfamiliar with this specialized area of the law. Untutored homeowners would find these cases impossible to navigate. As one Arizona foreclosure attorney observed, "it's better to have a lawyer than be *pro se*. A lot of this stuff requires knowledge of motion practice, civil procedure, evidence, proof that the average person never had a reason to learn."⁹¹

Federal and state agencies, including U.S. Attorneys and state Attorney General offices may also bring enforcement actions, but they cannot possibly reach and protect all those affected. One illustrative example: the Brooklyn district attorney's office has obtained only 45 mortgage fraud pleas and convictions since 2000 or, "only five per year in a county of 2.4 million people."⁹² As Senator Charles Schumer has observed, "The district attorneys are really strapped ... mortgage fraud cases are very labor intensive because they involve paper trails that require a lot of prosecutors and analysts and they have to pull people off other cases."⁹³ The National Fair Housing Alliance notes that from 2006-07, the Department of Housing and Urban Development and the Department of Justice investigated only 10 percent of the fair lending complaints that private groups filed in that period.⁹⁴

2. Lawyers Help Homeowners Renegotiate their Loans

Another important way that lawyers are helping homeowners in crisis is to assist them with negotiating better loan terms.⁹⁵

Not all loan modifications are created equal. Modifications that add overdue amounts of interest and late fees to the principal generally make monthly mortgage payments higher, and virtually ensure that the homeowner will re-default.⁹⁶ Lenders may agree to defer payments,

Fighting for Homeowners

As reported to the Brennan Center by attorneys from the Consumer Rights Unit of Greater Boston Legal Services (“GBLS”)⁹⁷, in 2007, Ms. A⁹⁸, a Latina factory worker in Boston, Massachusetts, was approached by a mortgage broker who told her she could help her buy a home. Ms. A said she did not have money for a house, as her income was only \$25,000, but the broker told her that her income did not matter and that Ms. A should put her brother and son on the mortgage application so their incomes could be included. They were sold a \$500,000 two-family house and got two mortgages for close to the full purchase price. Ms. A did not have a lawyer, and the terms of the loans were never clearly explained. Because Ms. A could not speak or read English, there was no way for her to understand the complex mortgage terms she was given. The first tier mortgage had an adjustable rate set to adjust to 14.6 percent; the second mortgage was an option adjustable rate (meaning they could pay only interest) set to adjust to 11.75 percent. Total monthly payments for Ms. A were over \$3,400 without taxes. The mortgage broker received over \$7,800 in fees, an additional \$4,000 premium from the lender and a portion of the real estate commission for closing the deal. Ms. A later refinanced into another high-cost, abusive loan – again without the assistance of an attorney – and as the high rates kicked in, was unable to make the payments.

On the verge of foreclosure, Ms. A reached out to Greater Boston Legal Services for assistance. The civil legal aid attorneys took Ms. A’s case and raised claims that the loans were unconscionable, unfair and deceptive, and in violation of the Massachusetts Consumer Protection Act. GBLS also raised the claim that the lender failed to provide accurate and complete copies of closing documents in violation of the Truth In Lending Act and other state laws. In the face of these claims, the lender agreed to rescind the loans. With the assistance of GBLS attorneys, Ms. A negotiated new loan terms that reduced the principal balance by \$100,000 and reduced the interest rate to a fixed rate of 3 percent for 30 years – thus making Ms. A’s monthly mortgage payments affordable and allowing her and her family to remain in their home.

but these simply put off the problem until a balloon payment comes due. Indeed, one recent government study found that, in 2008, most loan modifications were in name only. Lenders offered only temporary relief on payments for a few months, followed by resumption of original terms, or, in nearly a third of cases, even higher monthly payments than before.⁹⁹ Effective modifications are those that get late fees and other penalties waived, reduce or fix the interest rate to an affordable level, and in the best cases, reduce the principal loan amount.

Homeowners represented by legal counsel are often better able to negotiate meaningful loan modifications. Lawyers can review loan documents and assess viable claims and defenses and use these claims to persuade lenders to agree to more favorable terms. “The goal of the process,” as Mary Asbury, Executive Director of the Legal Aid Society of Greater Cincinnati has observed, “is to pull these cases off the mortgage foreclosure conveyer belt. Only then,” says Asbury, “can better terms with the lender in possession of the loan be negotiated.”¹⁰⁰

Combating Foreclosure Rescue Scams

Foreclosure rescue scams – in which unsavory “consultants” make money by falsely promising to help distressed homeowners refinance or otherwise reduce their mortgage debt – are popping up with alarming frequency around the country. Homeowners are enticed to sell their homes, often rich in equity, to investors who offer to pay the mortgage and rent the homes to the owners so they can continue to live in the houses and, eventually, repay the investors to reclaim their homes. When the homeowner signs over the deed to his or her house, the investor drains off the property’s equity, or evicts the family outright. The alarming increase in the number of foreclosure rescue scams has prompted the Federal Reserve to advise homeowners, “Be sure to talk with an attorney before signing anything that transfers the title of your home to another party.”¹⁰¹

William and Daphne Webb are an elderly couple that fell behind on mortgage payments on their home when, in 2003, Mrs. Webb, a 73-year old grandmother, suffered a heart attack that forced her to cease working.¹⁰² In an attempt to save their Montclair, New Jersey home of 14 years, the Webbs initially sought bankruptcy protection. Even after the bankruptcy proceedings were dismissed in 2006, the Webbs’ financial woes continued and the home went back into foreclosure.

Soon after, two real estate investors contacted the Webbs offering “help.” As alleged in related court papers, by taking advantage of the Webbs’ financial distress and lack of economic sophistication, the investors persuaded the Webbs to enter into a “credit rehabilitation program” that would save their home from foreclosure. The Webbs entered into a complex real estate transaction wherein the couple surrendered title of their home to a third-party “straw-buyer,” with the promise that they could continue to live in their home and, after making monthly payments of \$2,600 for eighteen months, re-establish their credit and then repurchase their home. The Webbs were not represented by counsel in the transaction and did not fully appreciate that by entering the arrangement, they were signing away the legal rights to their home.

According to a court filed complaint, after a year the investors themselves defaulted on the mortgage, putting the Webbs on the verge of eviction despite their monthly rental payments totaling approximately \$36,000. In other words, although the Webbs made the payments as agreed, the straw buyers ceased making payments to the mortgage-holding bank. Foreclosure proceedings ultimately resulted, with judgment entered in favor of the bank.

The Webbs sought help from the Center for Social Justice at Seton Hall Law School and were able to vacate a default judgment and intervene in the foreclosure, enabling them to remain in their home while the claims are litigated on the merits. The Webbs have also asserted third-party claims for damages against the foreclosure rescue scammers who defrauded them. The paper trail of the investors’ purchase reveals that the bank gave the mortgage despite the investors’ weak credit and highly leveraged real estate holdings. Says Chinh Le, one of the Seton Hall attorneys representing the Webbs in the suit, “There are countless, unfortunate homeowners out there like the Webbs, victims of unscrupulous ‘investors’ and a reckless lending environment that disbursed large volumes of cash to those investors with little oversight or accountability.”¹⁰³

With the assistance of a lawyer, a homeowner can often bypass the lender's loss mitigation department and obtain the attention of someone in a position to significantly change loan terms. Homeowners seeking loan modifications, or simply information about their loans, must otherwise wait hours on the phone to speak with a bank representative, if they can get through at all, as U.S. Representative Maxine Waters demonstrated when she spent two hours on the phone with Bank of America trying unsuccessfully to reach someone who could help one of her constituents modify his mortgage payment.¹⁰⁴

Notably, even homeowners taking advantage of President Obama's "Making Home Affordable Plan," a \$75 billion program that went into effect in March, and which creates incentives for lenders to enter into sustainable loan modification and refinancing agreements with borrowers, may find it difficult to take advantage of the program because of the difficulty of obtaining reliable information.¹⁰⁵ One housing counselor has stated, "[o]ur experience at the ground level has been, so far, frustrating... Entry-level employees at mortgage companies are either steering borrowers away from the plan or are entirely unaware of it."¹⁰⁶

When homeowners do get through, the representative at the other end of the line often does not have the authority to make any but the most modest changes to the loan terms. In explaining state officials' decision to try and enlist the legal bar for help in foreclosure prevention, one Maryland labor department consumer protection advisor stated, "When you have a lawyer on the phone, most lenders bump it up one level to decision makers... That's been very effective..."¹⁰⁷ According to the Congressional Oversight Panel, "[m]any borrowers are ignored until they retain assistance of a legal advocate or local public official."¹⁰⁸

Bryan Hetherington, Chief Counsel at the Empire Justice Center, which provides free legal assistance to low- and moderate-income clients throughout New York, reports, "We are not just kicking the can down the road. We work out modifications that are sustainable for homeowners and allow them to stay in their homes long term, not simply for another 60 days."

For this reason, lawyers are often able to obtain better outcomes for their clients than homeowners could achieve on their own, or even with the assistance of a non-attorney housing counselor, notwithstanding the valued role that counselors can perform in many cases. By way of illustration, HOPE NOW, the group of housing market participants convened by the Bush Administration to address the housing crisis by providing debt management, credit counseling and overall foreclosure counseling services (free of charge), obtained loan modifications for just one out of four borrowers (in a pool of one million loans) in 2007.¹⁰⁹ It is worth considering whether these outcomes would have been improved with the involvement of attorneys.

Finally, by negotiating short sales (when a lender agrees to a discounted pay-off to release a mortgage) and deeds-in-lieu of foreclosure (when a homeowner conveys his or her interest in the home to the lender to satisfy a default and avoid foreclosure proceedings), lawyers can also help homeowners cut their losses when the loss of the home cannot be avoided.

3. Lawyers Help Ensure that the Foreclosure Legal Process is Followed Properly

Another way in which lawyers are able to assist homeowners is by ensuring that lenders meet the necessary legal requirements for repossessing a home. When a homeowner is unrepresented by counsel, the homeowner is unlikely to know whether a lender's court filings have demonstrated that the lender is indeed entitled to foreclose on the property.

One of the most basic requirements is that the foreclosing party must own the underlying mortgage or, in legal parlance, have "standing." Since 2003, an increasing number of mortgages have been

Negotiating Better Solutions

Ms. Jenie McCaslin, a seventy-year old African-American widow, has owned her home in Southwest Atlanta for over 38 years. Ms. McCaslin bought the home with her husband in a neighborhood that was home to the first wave of African-American homebuyers in Atlanta in the 1960s, and is now one of the neighborhoods hardest hit by subprime lending and foreclosures.

In March 2007, Ms. McCaslin received a knock on the door from a contractor who told her that he noticed her home could use some repairs and he could help her find a way to pay for them. The contractor was employed by a renovation company whose CEO also owned a mortgage company that acted as a broker to refinance Ms. McCaslin into two consecutive high-cost refinance loans. As Ms. McCaslin struggled to make payments on her mortgage, the mortgage company extended Ms. McCaslin a refinance loan for \$102,050 with an adjustable interest rate starting at 11.75 percent that had the potential to adjust as high as 17.75 percent. The loan proceeds paid off Ms. McCaslin's previous mortgage in the amount of \$87,000. She was charged over \$6,500 in closing costs, close to 7 percent of the total loan amount, and the remaining \$8,300 was used to pay for minor home repairs.

Ms. McCaslin's income at the time of the closing of the loan was a total of \$796 in Social Security widow's benefits, not nearly enough to qualify for the loan that had a monthly mortgage payment of \$1,138. As Ms. McCaslin did not qualify by herself, the mortgage company required her son, who had not lived in the home for 15 years, to be a co-borrower. Option One also required Ms. McCaslin to convey half her interest in the home to her son. Ms. McCaslin son's income was never verified, but even if it had been, the debt burden for the pair was in excess of recommended debt ratios of HUD and Ginnie Mae. Ms. McCaslin, who is illiterate, did not have the assistance of counsel at the closing of any of the refinance loans. For several months Ms. McCaslin struggled to make payments with the help of family members, but almost immediately went into default. The mortgage company scheduled her home for foreclosure in November 2007.

Completely without resources, Ms. MsCaslin sought out assistance from the Home Defense Program of the Atlanta Legal Aid Society.

(continued on page 23)

bought, bundled with other mortgages into securitized assets, chopped up, and sold many times over to creditors across the world.¹¹³ One estimate puts the value of mortgages bundled into securities by private banks at \$2.1 trillion or 19 percent of the total value of outstanding mortgages.¹¹⁴ More than two thirds of all residential loans originating since 2001 have been thus “securitized.”¹¹⁵

When a mortgage is sold, the seller is required to sign over the mortgage note to the purchaser. That note documents the debt, its terms, and the new creditor’s standing to collect the debt. However, in the frenzied buying and selling of mortgages that preceded the current crisis, lenders were sloppy in documenting the transfer of ownership of mortgages.¹¹⁶ Indeed, a study by University of Iowa Professor Katherine Porter of Chapter 13 bankruptcy cases filed by homeowners found that approximately 40 percent of home loans were missing original mortgage notes.¹¹⁷

(continued from page 22)

Ms. McCaslin’s attorney wrote a letter on Ms. McCaslin’s behalf to the mortgage company detailing the alleged predatory lending abuses that occurred including, among other claims, issuing a loan that it knew or should have known Ms. McCaslin did not have the ability to pay, and that had no net tangible benefit to the borrower, in violation of its own and industry standards, and Georgia’s Fair Business Practices Act, Unfair and Deceptive Trade Practices Toward the Elderly Act, and laws prohibiting lending with the intent to foreclose. Said Sarah Bolling, Ms. McCaslin’s attorney, “this was a loan that Ms. McCaslin was unable to afford on day one.”¹¹⁰

In its letter, Atlanta Legal Aid proposed a settlement of Ms. McCaslin legal claims by offering the proceeds that Ms. McCaslin could receive from a reverse mortgage offered by a third-party lender as a short payoff in full satisfaction of the mortgage. In a reverse mortgage, the lender pays the senior citizen homeowner a lump sum or monthly payments, without the senior having to make payments as long as he or she lives in the home. The loan, usually totaling 50-60 percent of the appraised value of the house, must be repaid in full with interest when the homeowner dies or moves out of the house.

The mortgage company agreed to accept the proceeds of the reverse mortgage, \$17,000, approximately \$100,000 less than the balance owed on the loan.

“I’ve been in my home for a real long time. I had no idea what to do when I was about to lose my house.” said Ms. McCaslin. “I know I wouldn’t be in my home today if not for my lawyer.”¹¹¹

In describing the Atlanta Legal Aid Home Defense Programs unique use of reverse mortgages, William Brennan, director of the program, has said, “Taking a short payoff from a reverse mortgage now is the penalty that the lender should have to pay for this abusive lending practice. How can it ever be right, moral, or even legal to make a mortgage loan to an elderly African-American longtime homeowner with terms that virtually assure that he will default, be foreclosed on, and be evicted.”¹¹²

Over the past four years, the Atlanta Legal Aid Home Defense Program has saved its low-income homeowner clients over one million dollars using litigation and/or demand letters plus reverse mortgages to settle claims against predatory or subprime mortgage lenders.

A lawyer in the Ohio Attorney General's office, who sees the issue of missing mortgage notes as a way to stem foreclosures, has stated "The best thing to do is to keep people in their homes and for everybody to take steps necessary to make that happen...[However,] these trusts are purchasing these notes, and before they even get the paperwork, they foreclose on people."¹¹⁸

Attorneys for homeowners have required that lenders prove that they have standing to foreclose on the loan by producing the original mortgage paperwork. Even if the foreclosure action is not dismissed for lack of standing, the request for proof of ownership of the loan can provide a reason for a creditor to agree to renegotiate a loan's terms and can help to produce a more favorable outcome for the homeowner.¹¹⁹ In states with non-judicial foreclosure systems (in which the foreclosure proceeding does not involve a court), the lawyer's role can become even more critical because there is no judge to serve as an independent check on the process.

With the assistance of a lawyer, a homeowner can also ensure that the debts claimed by the creditor are, in fact, accurate, and do not include illegitimate and excessive fees and penalties. A University of Iowa study shows that a startling number of mortgage servicers and lenders make calculation mistakes and also demand unnecessary and excessive fees.¹²⁰ With the assistance of a lawyer, a homeowner is better able to identify mistakes and better able to compel corrections.

For example, at St. Ambrose Housing Aid Center in Baltimore, lawyers assisting a client in bankruptcy proceedings discovered that over \$20,000 paid by the homeowner toward arrears had never been credited by the mortgage servicer to the loan. The director of St. Ambrose's Foreclosure Prevention project, Ann Balcer Norton, notes, "We see debt calculation mistakes in a high number of cases. The figures are simply never double checked."¹²¹

In an even more egregious case in Texas, a mortgage company filed a proof of claim for more than \$1 million, when the principal balance on the note was only \$60,000.¹²²

4. Lawyers Help Homeowners Obtain Protection of the Bankruptcy Law

A homeowner can also benefit from the assistance of a lawyer in a bankruptcy proceeding. Although typically an option of last resort – as the bankruptcy laws do not permit judicial modification of mortgages on primary residences¹²³ – bankruptcy is one way that homeowners can temporarily suspend a foreclosure, which sometimes will create space in which to reach more favorable resolutions. The act of filing for bankruptcy creates an "automatic stay" that precludes all lenders and creditors from proceeding with legal action against the debtor.

Bankruptcy is a complicated and specialized area of the law. The legal work required to prepare a Chapter 13 bankruptcy petition – the type of petition appropriate to avoid foreclosure – is particularly complex. Through bankruptcy proceedings, homeowners assisted by lawyers can sometimes preserve the hard-earned wealth to which they are legally entitled, while also protecting the integrity of the judicial process.

5. Lawyers Help Tenants When a Landlord's Property is Foreclosed

Approximately 40 percent of families facing eviction due to foreclosures are rental tenants.¹²⁴ Tenants are often the last to know that the building they live in is in foreclosure, and yet are no less profoundly affected by the loss of their home.¹²⁵

Although legal protections for tenants are minimal in many states, a lawyer can at least ensure that the jurisdiction's notice requirements are followed, and may also be able to provide the tenant with additional time in the home by raising affirmative defenses, such as the house or apartment being in disrepair.¹²⁶

Tenants may need a lawyer's help to obtain protection from other types of abuses too, such as when a landlord continues to collect the rent, long after he or she has relinquished title to the home in a foreclosure proceeding.

Lawyers can also prevent the unjust eviction of some tenants by relying on the federal protections available to certain classes of tenants in properties owned by Fannie Mae or banks receiving federal bailout funds, or who receive federal Section 8 housing subsidies.¹²⁷

Keeping a tenant in his or her home, even if not permanently, can make a substantial difference in the quality of life for the individual or family, and can help preserve the value of the property, while preventing blight in the neighborhood - a good result for everyone.

6. Lawyers Give Those Affected by Foreclosure a Voice in Policy Reform

When individuals have the assistance of a lawyer, they also obtain the opportunity to have more of a say in public policy choices affecting their communities. Lawyers for the poor who are on the front lines in protecting homes from foreclosure can perform a critical function in sharing their clients' perspectives on the crisis with state legislatures and local governing bodies. They can help stakeholders construct better policies to help homeowners avoid foreclosure. They can work with elected officials to craft legislation to address lending abuses, and to provide input on the role government can perform to better address the foreclosure crisis. Many times, these lawyers are the only experts who possess direct knowledge of how laws and policies affect low-income communities (as contrasted with the lending industry). For example:

- In Maryland, attorneys from the St. Ambrose Housing Center participated actively in Governor Martin O'Malley's task force on the mortgage crisis, and recommended legislative action, including a new requirement that brokers consider homeowners' ability to repay the loan. That recommendation ultimately was enacted as part of a law that has been described as "some of the nation's most ambitious legislation" in the wake of the foreclosure crisis.¹²⁸
- In Ohio, the Legal Aid Society of Southwest Ohio was a leader in creating the Hamilton County Homeowner Preservation Group, a group of nonprofit counseling agencies and

lending institutions that teamed up with Hamilton County and the city of Cincinnati to assist residents who are in danger of losing their homes to foreclosure. The program connects homeowners with a local nonprofit housing counselor through United Way's Help Line, and provides access to emergency assistance funds to help them refinance existing mortgages and get into more affordable, stable loans. The effort also provides consumers protection by making it easier for homeowners to report fraudulent and deceptive practices that result in unwarranted financial strain and foreclosures through Legal Aid and the Attorney General's office. From January through June, the Hamilton County Homeowner Preservation Initiative has saved approximately 700 homes from foreclosure, avoiding a property value loss of tens of millions of dollars.

- In Connecticut, lawyers at New Haven Legal Assistance Association Inc., an agency that helps low-income clients, have met with eleven financial firms servicing loans for Deutsche Bank to review provisions of a new ordinance requiring that banks register foreclosures with the city, and have urged the servicers to allow good tenants to remain in their homes following foreclosure.¹²⁹ In addition, the organization has proposed a bill in the Connecticut General Assembly to provide protections for tenants whose landlord is being foreclosed upon.¹³⁰
- In Massachusetts, the Massachusetts Alliance Against Predatory Lending, a coalition of advocates for the poor that includes Greater Boston Legal Services, is educating constituents and legislators about the need for three proposed bills in the state legislature that would: 1) require protections for tenants in foreclosed properties, 2) require court approval of foreclosures, 3) provide a six-month moratorium on foreclosures involving subprime and other presumptively unfair mortgages, and 4) create a court-supervised foreclosure mediation program. These bills (Massachusetts General Court, S.2664, S.2663, S.2662) were presented at a Public Hearing on May 13, 2009.
- In New York, the Empire Justice Center of New York, a legal services provider, played an instrumental role in the state legislature's passage of a budget that included over \$30 million for counseling assistance, one of the largest amounts any state has provided for such services to date.¹³¹

Almost all of these examples are exceptions to the rule, since pursuing policy reforms of this nature is nearly impossible for the majority of legal services providers that are funded by the Legal Services Corporation ("LSC"), the primary federal source of funding for civil representation for the poor.¹³² As described in Section III of this report, with few exceptions, programs accepting LSC funds are prohibited from engaging in policy advocacy in front of legislative and administrative bodies.

III. IMPEDIMENTS TO FORECLOSURE REPRESENTATION

A. Who Represents Homeowners and Tenants?

Only a small number of the families unable to afford a private attorney are able to obtain legal assistance. On the front lines are the nonprofit legal services programs, distributed across the country, whose primary mission is to provide legal services to the poor. Over 130 of these programs receive at least part of their funding through the Legal Services Corporation (an independent, nonprofit corporation, established in 1974 by legislation signed by President Richard Nixon, for the purpose of ensuring that legal disputes involving the poor would be resolved pursuant to the rule of law). Other legal services programs receive funding entirely from non-LSC sources.¹³³

In addition, certain law schools operate clinical legal education programs that are able to handle a handful of cases for clients impacted by foreclosure proceedings. These include the Center for Social Justice at Seton Hall and the Post-Foreclosure Eviction Defense Housing Clinic at Harvard Law School. A few private, nonprofit organizations assist foreclosure victims. For example, the NAACP has brought a number of class action suits against mortgage lenders that it alleges engaged in racially discriminatory lending practices.

In some parts of the country, the private bar has stepped in to help coordinate the delivery of pro bono assistance to foreclosure victims. The “Florida Attorneys Saving Homes” initiative has put homeowners facing foreclosure in touch with over 1000 volunteer attorneys in that hard-hit state.¹³⁴ In Maryland, the statewide “Foreclosure Prevention Pro Bono Project” has enlisted the help of over 770 attorneys to help homeowners prevent or mitigate losses associated with foreclosure.¹³⁵ A similar program has been organized in New York.

These efforts are important, but are not sufficient to meet existing need. Pro bono representation is inevitably limited by a variety of factors, including client conflicts,¹³⁶ time constraints, and lack of expertise in the area of law. The most effective programs rely on pro bono assistance to complement the work of legal services programs. For example, pro bono attorneys offering services through the Florida Attorneys Saving Homes initiative provide advice, counseling and assistance in negotiations, but do not represent homeowners in foreclosure cases in court. Court cases are referred to lawyers with Florida legal aid offices, who, as described by the executive director of Florida Legal Services “are better trained to identify predatory lending and do the litigation.”¹³⁷

Federal, state and local law enforcement agencies gradually are stepping up efforts to combat mortgage fraud.¹³⁸ For example, in 2008, the city of Baltimore filed a high-profile federal lawsuit against Wells Fargo Bank, alleging that the bank had engaged in reverse redlining, thus doubling foreclosure rates in low-income neighborhoods as compared to the citywide average.¹³⁹ Illinois Attorney General Lisa Madigan and California Attorney General Jerry Brown led a lawsuit with nine other states (Arizona, Connecticut, Florida, Iowa, Michigan,

North Carolina, Ohio, Texas and Washington) against Countrywide, accusing it (the nation's largest mortgage lender and servicer) of predatory lending and fraud.¹⁴⁰ In Ohio, New Jersey, Florida, and Michigan, similar suits by state and local agencies target predatory lending and fraudulent foreclosure rescue schemes.

But, regulators alone cannot possibly address the large number of cases.¹⁴¹ Moreover, in most cases, the prosecution of bad actors will not help the majority of individual homeowners to save their homes.

Finally, the federal government has earmarked a considerable amount of funding for non-attorney housing counseling services. Sixty-five million dollars was appropriated in the FY09 Omnibus Appropriations Act for HUD-certified housing counseling services.¹⁴² The National Foreclosure Mitigation Counseling Program received \$180 million through federal appropriations in 2008.¹⁴³ The program provides foreclosure mitigation counseling and scholarships to housing counselors. Funds for counseling are also available through HUD's Community Development Block Grant Program.¹⁴⁴ Additionally, the HOME Investment Partnerships Program is increasingly partnering with the lending industry to provide homeowners with non-attorney counselors through the creation of new counseling programs.¹⁴⁵

Housing counselors provide important services to homeowners. They can help homeowners come up with a realistic budget to manage monthly mortgage payments, facilitate dialogue between the homeowner and servicer to obtain modification of loan terms, and link borrowers to resources in the community such as publicly funded short-term loans and mortgage refinance funds. In some instances, counselors may be able to review documents to spot legal issues that require handling by an attorney.

However, many of the counseling services provided by the government are intended to be preventative, and are not a substitute for assistance from a lawyer when the homeowner possesses valid legal defenses to an impending foreclosure.

All of the above-described efforts are crucial supplements to vigorous civil legal aid programs, but not a substitute. Unfortunately, as the economy falters, already-strapped legal aid budgets are in crisis.

B. Legal Services Organizations Lack Funding for Foreclosure Representation

The country's major source of funding for legal aid in civil matters, including foreclosure, is the Legal Services Corporation. The Legal Services Corporation helps the poorest and most vulnerable in our society obtain access to the justice system. Its programs' clients live at or below 125 percent of the federal poverty level (an income of \$27,563 a year for a family of four).¹⁴⁶ In 1996, Congress, bent on implementing the "Contract with America" cuts in resources for the poor, slashed the Corporation's budget by nearly a third, with the intent to eventually eliminate the LSC.¹⁴⁷ Within a year of the cuts, Legal Services Corporation programs served one million fewer clients.¹⁴⁸ At the same time, Congress imposed funding restrictions on who

attorneys in LSC-funded programs could represent, and how (see below).

In May 2009, the Obama Administration recommended a \$45 million funding increase for the LSC in FY 2010, which, if enacted, would raise the LSC's full grant to \$435 million.¹⁴⁹ Even this welcome increase would not nearly meet the level of genuine need. The LSC's budget would need to be increased to approximately \$753 million dollars to match, in real dollars, what the Corporation received in 1981, the last time a "minimum level of access" was achieved.¹⁵⁰

In addition to LSC funding, Congress has dedicated certain other funds to providing *non-litigation-related* foreclosure legal assistance. Thus, the Housing and Economic Recovery Act of 2008 appropriated \$30 million for legal assistance as part of the National Foreclosure Mitigation Counseling ("NFMC") Program.¹⁵¹ The funds were distributed by NeighborWorks America, a Congressionally created national nonprofit designed to provide financial support, technical assistance, and training for community-based revitalization efforts, which has received additional appropriations for counseling services.¹⁵²

Unfortunately, funding for legal assistance through the NFMC program only scratches the surface of the growing need. Funds have been limited, and, as noted above, Congress encumbered the funds with a flat prohibition on litigation, sharply decreasing the funds' utility. That is, "no funds provided under [the] Act shall be used to provide, obtain, or arrange on behalf of a homeowner, legal representation involving or for the purposes of civil litigation."¹⁵³

The largest grant of federal dollars to fund crisis-related relief for the states, the American Recovery and Reinvestment Act¹⁵⁴ (often referred to as the economic stimulus plan), a \$787 billion federal appropriation, included nothing — zero — for foreclosure-related legal assistance.¹⁵⁵

In response to the crisis, several states are taking incremental steps to provide increased legal representation to foreclosure victims, but these are few and far between, and the outlook for the coming fiscal year is bleak as states slash programs in order to balance budgets.¹⁵⁶

In this landscape, the federal Mortgage Reform and Anti-Predatory Lending Act, pending in Congress as this report goes to press, would approve \$35 million in funding for "grants for providing a full range of foreclosure legal assistance to low- and moderate-income homeowners and tenants related to home ownership preservation, home foreclosure prevention, and tenancy associated with home foreclosure."¹⁵⁷ Notably, these funds include a restriction on class action litigation.¹⁵⁸ Although this legislation has been passed by the House, as this report goes to press, no companion bill has yet been introduced in the Senate.

Worse, a key funding source for legal assistance to homeowners has declined sharply. Legal aid programs rely on state Interest on Lawyers' Trust Accounts ("IOLTA") programs, in which attorneys bundle client funds in order to generate net interest revenue where no interest would otherwise be generated. In 2008, IOLTA was the second single largest source of revenue for civil legal aid programs across the country.¹⁵⁹ The reduced number of real estate transactions,

the primary source of IOLTA funds, and the decline in interest rates have caused IOLTA revenue to plummet. IOLTA revenue is expected to fall by as much as 50 percent on average in 2009, and in some states the drop will be worse.¹⁶⁰ In Connecticut, for example, IOLTA revenue dropped from \$21 million in 2007 to an estimated \$4 million in 2009.¹⁶¹ And in Texas, IOLTA funds are down to \$1.5 million from \$20 million.¹⁶²

Across the nation, the drop in IOLTA revenue has had crushing effects. Funding shortfalls have caused legal services layoffs, salary reductions, and office closures. To consider just one example, the Legal Aid Society of Columbus, Ohio (in a county with one of every 127 homes in some stage of foreclosure¹⁶³), expects to lay off a quarter to a third of its staff in the next year due to IOLTA revenue shortfalls.¹⁶⁴

Certain private funding sources have tried to ease some of the burden of budget cuts. For example, in 2008 the Institute for Foreclosure Legal Assistance (“IFLA”), a project of the Center for Responsible Lending, awarded \$6.5 million in privately contributed funds to 27 groups in 19 states and the District of Columbia. In 2009, in the second and final round of funding, IFLA awarded \$2.4 million in grants to legal aid offices in nine states.¹⁶⁵

In the midst of the nation’s foreclosure crisis, when the need for legal representation for homeowners is at its apex, the available funding for legal representation has been devastated. Increased state and federal appropriations for foreclosure representation are critically important.

C. Federal Funding Restrictions Undercut Foreclosure Representation by LSC-Funded Programs

As if funding challenges were not enough, the LSC funding restrictions are sharply undercutting the efforts of foreclosure victims to obtain justice. Since 1996, legal aid programs that receive any LSC funding have been hamstrung by these harsh and wasteful federal restrictions that directly interfere with homeowners’ efforts to protect their legal rights.

These restrictions prevent individuals who are represented by LSC-funded programs from filing class action lawsuits, seeking statutory attorneys’ fee awards, and advocating for lending reform – all critical tools that would help individuals to keep their homes by defending themselves from unscrupulous lenders.

Broad Relief from Reverse Redlining Out of Reach.

Represented by LSC-funded South Brooklyn Legal Services (“SBLs”), eight first-time homebuyers brought suit against United Homes, LLC, a self-titled “one-stop shop” of real estate companies, lenders, appraisers, and lawyers. The homeowners claim that the defendant conspired to sell them over-valued, defective homes financed with predatory loans.

According to related court papers, United Homes failed to disclose the properties’ histories, inflated the homes’ values with inaccurate appraisals, overstated the homeowners’ assets and incomes on loan applications, concealed information about loan terms, sold the homes in uninhabitable conditions, and refused to make agreed upon repairs.¹⁶⁶ The homebuyers also allege that United Homes targeted them because they are minorities and exploited the racially segregated housing market to engage in “reverse redlining,” the practice of intentionally extending credit to members of minority communities on unfair terms.¹⁶⁷

A District Court judge found the homeowners’ allegations against United Homes’ “conspiratorial endeavor” enough to warrant moving the case forward, and refused to dismiss the majority of the claims. This case is ongoing.

As a result of United Homes’ alleged fraud, eight named homeowners entered into mortgages they could not afford and now risk losing their homes under terms not met by the lender. It is unlikely that they are the only homeowners affected by these practices. However, unable to file a class action against United Homes due to federal restrictions, SBLs cannot seek more widespread relief for other homeowners potentially taken advantage of by the company.

1. The Restriction on Class Actions Adversely Impacts Low-Income Americans’ Access to Justice

People represented by LSC-funded lawyers are barred from participating in class actions, and cannot pursue the class-wide relief that is often the most efficient way, for example, to stop a predatory lender from targeting a whole neighborhood with an illegal scheme. Instead, individuals are limited to proceeding on a substantially less efficient, case-by-case basis.

Class action lawsuits are a legal tool available to all individuals under the law, except those represented by attorneys working in federally funded legal services programs. Class action lawsuits can reduce illegal conduct against homeowners in low-income and minority communities. As we have seen in the mortgage crisis, many of these communities were specifically targeted by predatory lenders, and yet throughout this time, legal aid attorneys could not bring class action lawsuits on behalf of targeted communities to fight these practices. As the North Carolina Legal Services Planning Council – a voluntary association of North Carolina organizations serving low-income persons – puts it, challenging “illegal but widespread practices” without a class action is “impossible.”¹⁶⁸

In every appropriations cycle since 1996, the Commerce, Justice, and Science Subcommittee’s appropriations law has included a rider that restricts the activities of legal services organizations that receive funds from the Legal Services Corporation (“LSC”).¹⁶⁹

Several of these onerous provisions are described below.

Class Actions	Clients of attorneys in LSC-funded programs cannot participate in class action suits.
Attorneys’ Fees	Clients of attorneys in LSC-funded programs cannot advance claims for attorneys’ fee awards, even when authorized by the underlying law.
Advocacy	Clients of attorneys in LSC-funded programs cannot rely on their lawyers to advocate before legislative and administrative bodies unless in response to an invitation extended by those entities.
Client Ineligibility	Undocumented immigrants, certain lawfully documented immigrants, and people in prison cannot qualify for legal representation by staff of LSC-funded programs.
Use of Non-LSC Funds	The “poison pill” restriction – client representation in the above-prohibited categories cannot be conducted by any LSC-funded programs, even if financed by state, local, private, or other federal funds intended for those purposes.

Class actions provide access to the courts for homeowners who might not have the resources to bring an individual claim. In some cases, the availability of a class action ensures that broad discovery can take place as to the defendant’s unlawful actions. More specifically, when a court considers ordering relief in a class action, it has jurisdiction to order class-wide, prospective relief, such as directing a loan servicer, lender, or rescue scam artist, to cease specified misleading practices. The class action device also makes it possible for a court to order class-wide, retroactive relief, for example, by requiring a loan servicer to reimburse a class of homeowners who were all overcharged as a result of an unlawful practice.

2. The Restriction on Attorneys’ Fee Awards Hinders the Ability of Low-Income Americans to Level the Playing Field

People represented by legal services offices are banned from claiming court-ordered statutory attorneys’ fee awards, even though Congress and state legislatures have enacted laws that authorize prevailing parties to collect these fee awards as part of the comprehensive regulatory system intended to deter consumer fraud.¹⁷⁰

Restriction Prevents Client of Legal Aid Program from Claiming \$50,000 in Attorneys' Fees.

Angela Carter and her family lived in their Illinois home for over 45 years. Over the years, Ms. Carter took out two mortgage loans to make repairs to the home. When Ms. Carter lost her job, she was unable to keep up with her payments and she filed for bankruptcy but was allowed to remain in her home. Three years later, Ms. Carter was served with a foreclosure complaint.

Seeing few options, Ms. Carter responded to a mail solicitation that promised her a way to stay in her home. After several visits to her home by representatives of the soliciting company, Ms. Carter was coaxed into signing various documents, and without completely understanding the possible implications of her actions, Ms. Carter sold her home. "I signed the agreement with the company that bought my home without having anyone representing me," notes Ms. Carter.

Under the terms of the mortgage she signed, Ms. Carter was allowed to stay in the home, paying rent, with the option to repurchase in the future. Ms. Carter managed to pay her monthly rent to the lender for over two and a half years, but when she began to fall behind on payments, her tenancy was terminated.

"I knew I needed a lawyer," observed Ms. Carter. "Most people don't know how to find one. I called the Legal Assistance Foundation and one other place, but I had no plan if they couldn't take my case."

With help from the LSC-funded Legal Assistance Foundation of Metropolitan Chicago ("LAFMC"), Ms. Carter filed suit against the rescue lender who had bought her home. A Chicago circuit court determined that the purchasing company violated the Truth in Lending Act and the Home Ownership Equity and Protection Act by failing to make statutorily-mandated disclosures and by failing to allow Ms. Carter to rescind the sale of her home. The Court awarded Ms. Carter damages and she was returned the title of her home subject to a mortgage lien. Said Ms. Carter, "I wouldn't have been able to get our home back without an attorney."

(continued on page 34)

These fee awards play a critical role in consumer protection and mortgage fraud cases, in particular. In all but five states, consumer protection statutes that prohibit deceptive practices permit prevailing homeowners to recover attorneys' fee awards from defendants who have been found to have violated the law.¹⁷¹

The possibility of having to pay attorneys' fees provides a critical incentive to help ensure that a better funded legal adversary does not drag out proceedings in an attempt to exhaust the indigent client's resources and those of the legal aid attorney. In the absence of a homeowner's ability to rely on the prospect of fees, a lender facing suit can drag a case out using stall tactics, such as failing to respond in a timely manner for requests for discovery, forcing plaintiffs to

(continued from page 33)

Ms. Carter's lawyers at LAFMC were able to recover around \$4,000 in costs; however, due to the restrictions on LSC-funded organizations, they could not seek attorneys' fees. Any private attorney could have sought attorneys' fees in this foreclosure rescue scam case under the Truth In Lending Act, possibly expediting the proceedings and surely raising the price of these illegal practices for lenders. The attorney handling Ms. Carter's case believed the fees awarded would likely have been well over \$50,000.

Ironically, Ms. Carter, when deciding whether or not to take up the deceptive lender's offer, did seek help from LAFMC. Unfortunately, LAFMC, due to its high volume of requests for representation and limited resources, was not able to advise Ms. Carter in a timely way. If LSC-funded legal services organizations like LAFMC were able to seek attorneys' fees, not only would their clients be allowed the legal tools available to all other litigants, but fraudulent lenders would be more deterred from continuing illegal practices. In addition, allowing LSC-funded providers to seek attorneys' fees would allow these providers, with their increased revenue, to help more of the growing number of people who need help to stay in their homes.

file motions to compel action, knowing that, even if it loses the case, it will have no obligation to pay attorneys' fees to the other side. As the New York Court of Appeals has stated, the availability of attorneys' fee awards is "an incentive to resolve disputes quickly and without undue expense" on the part of the court and litigants.¹⁷² Homeowners who rely on the lawyers in LSC-funded programs lack essential bargaining power when litigating against lenders.

Additionally, statutory attorneys' fee award provisions have benefits that extend beyond the courtroom. Attorneys' fees raise the cost of engaging in deceitful business practices and are thus a deterrent to such behavior, especially for an industry that carefully calculates the financial margins associated with all of its practices. When lenders know that litigation will expose them to fee liability, they are more likely to curb the excessive practices that can lead to litigation.

Finally, attorneys' fees have the added benefit of enabling legal services programs to bring in additional funds to enable more homeowners to protect their rights. The California Legal Services Commission has observed that in addition to impeding successful case resolutions, the attorneys' fee award restriction contributes to serious funding problems for LSC grantees.¹⁷³ Prior to the restriction's enactment, LSC-funded organizations in California recovered approximately \$1.75 million annually in attorneys' fee awards (from diverse cases), a revenue source that is no longer available to these programs as a result of the LSC attorneys' fee award restriction.¹⁷⁴

3. The Restriction on Legislative Advocacy has a Deleterious Impact on Low-Income Clients' Ability to be Heard

As a result of the federal legal services restrictions, homeowners are denied a voice in the process of reforming lending policies in this country. Staff of LSC-funded programs were not allowed

to initiate advocacy before legislatures for mortgage reform and predatory practice regulation that could have helped to stop this crisis before it began, and they remain prohibited from pursuing such advocacy even today. Paradoxically, mortgage lenders and banks have been given free rein to lobby for *their* industry's interests even though they are receiving federal bailout funds in amounts that dwarf federal appropriations to legal services for the poor.

At the front lines of many of the battles waged in communities across the country, legal aid attorneys are keenly aware of the true impact of laws and policies on the communities they are charged to protect. The current foreclosure crisis is no exception; many of the bad practices that contributed to the foreclosure crisis could have been prevented with stronger consumer protections.

Far from being “just another lobbyist,” legal services staff are among the few potential voices for the most vulnerable individuals, families and communities in this country. As a legal aid attorney for the Maryland Legal Aid Bureau put it, “When Legal Aid shows up, it’s not about personal enrichment.” Legal aid attorneys who see the legal problems faced by low-income communities on a daily basis can potentially play a critical role in alerting legislatures and other government bodies to gaps in regulation and problems in the implementation of the laws.

But, under the LSC restrictions, lawyers in LSC-funded programs cannot initiate advocacy on behalf of communities that need changes in lending policy. They are prohibited from approaching legislators. The sole exception to this flat ban is for attorneys whose testimony is sought out by the legislators themselves.

4. The “Poison Pill” Restriction Extends Federal Prohibitions to Encumber State, Local and Private Dollars

Most egregiously, through a “poison pill” restriction, Congress has extended the funding restrictions to *all* activities of LSC recipient programs, even the activities not funded by the federal government. In other words, LSC-recipient programs cannot use their non-LSC dollars (raised from other sources such as private charitable donations, foundation grants, state and local governments, or other federal revenue streams) for any service or activity that they would be barred from doing with federal LSC dollars. If a program wishes to spend its private funds on any of the otherwise prohibited activities, it must do so through a physically separate office with separate staff and equipment. In Oregon alone, legal services leaders estimate that they spend \$300,000 per year on duplicate costs prompted by this requirement.¹⁷⁵ By contrast, banks that receive TARP funds are not barred from using their own “*other* funds” to lobby Congress.

The absurdity of this rule is clear, especially in the midst of an economic and funding crisis. Legal aid programs are unfairly burdened and are held to stricter levels of control than other government-funded entities, including faith-based organizations and TARP recipients. Many nonprofits must strictly account for government funds, but virtually none are forced to operate dual systems, isolating their publicly funded activities from their privately funded activities, out of separate offices.

IV. RECOMMENDATIONS

The mortgage crisis is a result of many known factors: a weakening housing market, a breakdown in underwriting standards and the advent of mortgage securitization in pursuit of short-term profit. The broad scope of the problem requires a broad array of interventions, but observers generally agree that societal losses, both economic and social, can be stemmed if people are kept in their homes.¹⁷⁶

The decision to cut funding and impose draconian restrictions on legal aid has left us with a system ill-equipped to represent the interests of low-income people and help them avoid foreclosure. We are reaping the consequences of that decision today. With the ability to lobby for law reform and the ability to file class action lawsuits, legal aid attorneys might have been able to prevent some of the worst abuses of the mortgage lending crisis before they happened and could make a difference for many homeowners, even now.

Without restrictions undercutting their ability to litigate, lawyers receiving federal funds would have a better chance of saving deserving homeowners' homes. With better funding, legal aid programs would not be cutting back at the moment when millions of Americans need them most.

The unfairness of such a system is clear: while lawyers for mortgage lenders and banks rely on a full arsenal of legal tools to pursue homeowners, the homeowners on the receiving end of foreclosure proceedings often have no choice but to go it alone. As has been made harrowingly clear, the implications reach far beyond the individual impact on homeowners, affecting society as a whole.

An under-funded and hobbled civil legal aid system disproportionately burdens African-American and Latino communities, which are more likely to rely on publicly funded counsel and that have been most impacted by discriminatory lending practices in the home mortgage market.¹⁷⁷ The foreclosure crisis is divesting sorely needed capital from minority communities. Insufficient access to legal representation exacerbates the wealth divide between those communities and the rest of the nation,¹⁷⁸ and undermines the legitimacy of our justice system by creating two systems of justice, one for people with means, and an inferior system for the poor.

To restore basic fairness in foreclosure proceedings, we offer the following recommendations:

1. Increase Funding for Foreclosure Legal Representation

Most low-income people cannot obtain legal counsel to represent them in civil matters. The crisis of representation in civil cases exists, and grows worse year by year, because of chronic funding shortages. Today, 50 million Americans would qualify for federally funded legal assistance, many of whom are poor for the first time.¹⁷⁹ As the number of people falling into poverty increases, so too does the number of people newly eligible to receive civil legal aid assistance. Cuts in funding — from federal, state, local, IOLTA and private sources — have

impeded the delivery of civil legal services at a time when it has never been more urgently needed.

Additional state, local and federal dollars should be dedicated to foreclosure legal assistance, and directed towards those neighborhoods that have been hardest hit by the foreclosure crisis. Further, the federal annual appropriation for the Legal Services Corporation (“LSC”) should be increased for FY 2010. At a minimum, Congress should allocate \$485 million – the amount called for by the LSC – which will still leave many dire legal needs unmet.

2. Remove Funding Restrictions that Undercut Effective Advocacy for Homeowners and Tenants

To put it plainly, the majority of lawyers for the poor are prevented from relying on the basic legal tools that lawyers for wealthier clients have at their disposal. Plus, the restrictions practically ensure budget shortfalls. When LSC programs have to pay twice for staff and overhead, and are barred from collecting fees for their work, already tight budgets are strained even further.

Supporters of restrictions claim that without them, LSC-funded programs will become “ideologically motivated.” These scare tactics, used for years, are particularly tone deaf now. Ensuring fair access and equal representation to the poor is not a matter of ideology. It is a central tenet of our justice system.

Removing restrictions on LSC funding would improve foreclosure legal representation for the country’s poor. The Civil Access to Justice Act, introduced in the U.S. Senate in March 2009, would significantly improve access to civil legal aid by removing the most severe restrictions on federal funds and would lift most of the restrictions on the use of non-LSC funds, which means that communities will no longer have to establish duplicative, parallel LSC-funded and non-LSC-funded offices.

President Obama’s 2010 budget called on Congress to lift three of the most burdensome LSC restrictions: the restriction on non-LSC funds, the restriction prohibiting LSC grantees from participating in class actions, and the restriction on collecting statutory attorneys’ fee awards.¹⁸⁰ On June 18th, 2009, the House passed an appropriations bill that eliminates the attorneys’ fee restriction, but that has no effect on the other LSC restrictions.¹⁸¹ On June 25th, 2009, the Senate Appropriations Committee passed an appropriations bill that would leave all of the restrictions on federal funds intact, but that would lift most of the restrictions imposed on LSC grantees’ use of non-federal funds. If the bill is passed by the full Senate, it will have to be reconciled with the House bill before becoming law. This would be a major step forward, but action will still be needed to remove remaining restrictions and expand access to justice at this time of growing need.

3. Expand Access to the Courts and to Other Dispute Resolution Mechanisms for Homeowners Facing Foreclosure Proceedings

At the end of the day, even assuming that an increased number of homeowners may benefit from representation provided by lawyers, the underlying laws that regulate lending are in need of substantial reform to provide better protections to homeowners and to our society.

At a minimum, states that currently permit lenders to foreclose on a home by means of a power of sale (non-judicial foreclosure states) should provide a judicial forum for homeowners to raise available legal defenses.

Further, lenders should be required to participate in a mediation conference with homeowners before a foreclosure is permitted to proceed. One successful example of such a program is the Mortgage Foreclosure Diversion Pilot Program (“MFDPP”) in Philadelphia, a program designed to provide early court intervention in residential, owner-occupied, foreclosure cases.¹⁸² Through the program, before an eligible home can be sold at a sheriff’s sale, a court order requires homeowners to be referred to a housing counseling agency. Also required before home sale is a “Conciliation Conference” conducted by court-appointed personnel, which requires that lenders negotiate with homeowners and attempt to reach a resolution before foreclosure can proceed.¹⁸³ In 2008, over 2,000 homeowners relied on the MFDPP to secure a meeting with their lender for the purpose of renegotiating mortgage terms. To date, the process has enabled over 600 Philadelphia families to keep their homes.¹⁸⁴

With the support of courts, bar associations and legal services organizations, mandatory mediation programs can ameliorate some of the harsh consequences of foreclosures, and enable an increasing number of homeowners and lenders to reach negotiated solutions.¹⁸⁵ Lenders should have the obligation to at least consider every reasonable alternative that would avoid foreclosure on the home.

4. Recognize a Right to Consult with a Trained Housing Counselor, and, When There is Reason to Believe the Foreclosure Results from Lending Violations, a Lawyer

Homeowners facing foreclosure should have a right to consult with a housing counselor who can, in the first instance, educate homeowners about the options available to them. For many homeowners facing foreclosure, a consultation with a housing counselor may be sufficient. But for those whose foreclosures raise significant legal issues, a right to consult with a lawyer is also essential.

Unless and until the foreclosure process and laws are simplified to the point where legal counsel is not necessary, each homeowner facing foreclosure should be provided with an opportunity to consult with a trained counselor and then to receive fuller representation by a lawyer where necessary to ensure just and fair proceedings.¹⁸⁶ Under the current system, homeowners lose their homes unnecessarily at great cost both to the homeowners and to the public. Set

against the significant costs of foreclosure, the relatively low cost of providing trained housing counselors and lawyers is a cost effective measure.

The government should rely on approved housing counselors who are trained to identify cases involving illegal practices to guide the decision as to which homeowners require referral to an attorney. In either case, foreclosure proceedings should be deferred until the homeowner has consulted either with a trained housing counselor, or where necessary, a lawyer.

ENDNOTES

¹ Hon. Denise R. Johnson, *The Legal Needs of the Poor as a Starting Point for Systemic Reform*, 17 YALE L. & POL'Y REV. 479, 484 (1998).

² See Eric S. Belsky, *Housing Wealth Effects and the Course of the U.S. Economy: Theory, Evidence, and Policy Implications 3* (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. W08-7, 2008), available at http://www.jchs.harvard.edu/publications/finance/w08-7_belsky.pdf. Over 70% of American homeowners have a mortgage on their home. George S. Masnick, Zhu Xiao Di, and Eric S. Belsky, *Emerging Cohort Trends in Housing Debt and Home Equity 2* (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. W05-1, 2005), available at <http://www.jchs.harvard.edu/publications/finance/w05-1.pdf>.

³ THE PEW CHARITABLE TRUSTS, *DEFAULTING ON THE DREAM: STATES RESPOND TO AMERICA'S FORECLOSURE CRISIS 2*, 11 (2008), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Subprime_mortgages/defaulting_on_the_dream.pdf.

⁴ HOPENOW.com, *WORKOUT PLANS (REPAYMENT PLANS + MODIFICATIONS) AND FORECLOSURE SALES, JULY 2007-NOVEMBER 2008*, available at <http://www.hopenow.com/upload/data/files/HOPE%20NOW%20Loss%20Mitigation%20National%20Data%20July%2007%20to%20November%2008.pdf>.

⁵ Stephanie Amour, *2008 Foreclosure Filings Set Record*, U.S.A. Today, Jan. 15, 2009, at 1B. The Court Clerk in Collier County, Florida, a particularly hard hit county, reported that the number of foreclosure filings in March 2009 alone – 797 – surpassed the number of filings in all of 2006 which was 733. Telephone Interview with Collier County Court Clerk (Apr. 14, 2009).

⁶ Press Release, RealtyTrac, *Foreclosure Activity Remains Near Record Level In August* (Sept. 10, 2009), <http://www.realtytrac.com/contentmanagement/pressrelease.aspx?channelid=9&acct=0&itemid=7381>.

⁷ CONGRESSIONAL OVERSIGHT PANEL, *FORECLOSURE CRISIS: WORKING TOWARD A SOLUTION 7* (Mar. 6, 2009), available at <http://cop.senate.gov/documents/cop-030609-report.pdf>.

⁸ CREDIT SUISSE FIXED INCOME RESEARCH, *FORECLOSURE UPDATE: OVER 8 MILLION FORECLOSURES EXPECTED 3* (Dec. 4, 2008), available at <http://www.chapa.org/pdf/ForeclosureUpdateCreditSuisse.pdf>.

⁹ Press Release, Mortgage Bankers Association, *Delinquencies Increase, Foreclosure Starts Flat in Latest MBA National Delinquency Survey* (Dec. 5, 2008), www.mbaa.org/NewsandMedia/PressCenter/66626.htm.

¹⁰ Press Release, RealtyTrac, *1.9 Million Foreclosure Filings Reported On More Than 1.5 Million U.S. Properties In First Half Of 2009* (Jul. 16, 2009), <http://www.realtytrac.com/contentmanagement/pressrelease.aspx?channelid=9&acct=0&itemid=6802> (“In spite of the industry-wide moratorium earlier this year, along with local, state and national legislative action and increased levels of loan modification activity, foreclosure activity continues to increase to record levels.”).

¹¹ For studies of the beneficial impact of home ownership see generally Robert D. Dietz & Donald R. Haurin, *The Social and Private Micro-Level Consequences of Homeownership*, 54 J. URB. ECON. 401 (2003) (providing that past research has shown that homeowners have “greater ties to their neighborhood and community,” are “more likely to vote” and have “better health than renters,” and that research demonstrates the “positive direct and indirect effects of homeownership on child outcomes.”); Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership*, 77 FORD. L. REV. 949, 952 (2008) (stating that “[t]he harm of losing one’s status as homeowner has a far-reaching impact at both the individual and collective levels. Property ownership ties one to the larger community in myriad ways. Homeowners—even those with the same income, education, and other socioeconomic characteristics—tend to be both more civically active and more apt to engage in market transactions linked to their homes.”).

¹² Belsky, *supra* note 2, at 4.

¹³ Todd J. Zywicki & Joseph D. Adamson, *The Law And Economics Of Subprime Lending*, 80 U. COLO. L. REV. 1, 21 (2001) (citing Zhu Xiao Di, *Housing Wealth and Household Net Wealth in the United States: A New Profile Based on the Recently Released*

2001 SCF Data 10 (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. W03-8, 2003)).

¹⁴ DAN IMMERGLUCK & GEOFF SMITH, *RISKY BUSINESS—AN ECONOMETRIC ANALYSIS OF THE RELATIONSHIP BETWEEN SUBPRIME LENDING AND NEIGHBORHOOD FORECLOSURES*, at i (2004), *available at* <http://www.woodstockinst.org/publications/research-reports/5/35/date/DESC/>.

¹⁵ *DEFAULTING ON THE DREAM*, *supra* note 3, at 4.

¹⁶ NATIONAL COMMUNITY REINVESTMENT COALITION, *INCOME IS NO SHIELD AGAINST RACIAL DIFFERENCES IN LENDING II: A COMPARISON OF HIGH-COST LENDING IN AMERICA'S METROPOLITAN AND RURAL AREAS 7* (2008), *available at* <http://www.ncrc.org/images/stories/pdf/research/income%20is%20no%20shield%20ii.pdf>.

¹⁷ *See* ALLEN J. FISHBEIN & PATRICK WOODALL, CONSUMER FEDERATION OF AMERICA, *SUBPRIME LOCATIONS: PATTERNS OF GEOGRAPHIC DISPARITY IN SUBPRIME LENDING 4* (2006), *available at* <http://www.consumerfed.org/pdfs/SubprimeLocationsStudy090506.pdf> (describing racial disparities in frequency of subprime loans).

¹⁸ U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE & OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP'T OF HOUS. AND URBAN DEV., *AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2007*, PUB. NO. H150/07, at 80 tbl.2-12 (2008), *available at* <http://www.census.gov/prod/2008pubs/h150-07.pdf> (listing 75.647 million total homeowners, 5.566 million homeowners below federal poverty level, and 16.515 million homeowners below 200% of federal poverty level).

¹⁹ *See* Jonathan D. Glater, *Another Hurdle for Jobless: Credit Inquiries*, N.Y. TIMES, Aug. 6, 2009, at A1 (reporting that 40 percent of employers use credit checks at least sometimes to assess a candidate's suitability for a job).

²⁰ Jenny Schuetz, Vicki Been & Ingrid Gould Ellen, *Neighborhood Effects of Concentrated Mortgage Foreclosures 17* (NYU Center for Law and Econ., Law & Econ. Research Paper Series, Working Paper No. 08-41, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270121 (defining proximity as within 500 feet and noting that "the results do not suggest that having had any [foreclosures] occur prior to the sale significantly decreases prices, but they do suggest large baseline differences in price between properties that will be near to substantial foreclosure activity and those that will not").

²¹ CENTER FOR RESPONSIBLE LENDING, *supra* note 10, at tbl.1. This number "represent[s] only . . . declines caused by nearby foreclosures, not [from other factors] associated with the [drop] in local housing markets." *Id.* at 1.

²² *See generally* WILLIAM C. APGAR & MARK DUDA, *COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM* (2005), *available at* http://www.995hope.org/content/pdf/Apgar_Duda_Study_Short_Version.pdf (discussing direct and indirect costs of foreclosure borne by municipalities).

²³ JOINT ECON. COMM., 110TH CONG., *SHELTERING NEIGHBORHOODS FROM THE SUBPRIME FORECLOSURE STORM*, 15 (2007), *available at* http://jec.senate.gov/index.cfm?FuseAction=Files.View&FileStore_id=8c3884e5-2641-4228-af85-b61f8a677c28.

²⁴ *See* U.S. CONFERENCE OF MAYORS & COUNCIL FOR A NEW AM. CITY, *U.S. METRO ECONOMIES: THE MORTGAGE CRISIS 5-6* (2007), *available at* <http://usmayors.org/metroeconomies/1107/report.pdf> (discussing November 2007 prediction of potential tax revenue lost in terms of property tax, transfer tax, and sales tax due to decreased consumer spending as result of declining home values).

²⁵ MAJORITY STAFF OF JOINT ECON. COMM., 110TH CONG., *THE SUBPRIME LENDING CRISIS: THE ECONOMIC IMPACT ON WEALTH, PROPERTY VALUES AND TAX REVENUES, AND HOW WE GOT HERE 13* (2007), *available at* http://jec.senate.gov/index.cfm?FuseAction=Files.View&FileStore_id=148eaf7c-ee62-42f0-b215-006db6a11d65.

²⁶ Eric Stirgus, *Atlanta Might Sue Mortgage Lenders*, ATLANTA J.-CONST., Apr. 7, 2009, at B1, *available at* http://www.ajc.com/business/content/metro/atlanta/stories/2009/04/07/atlanta_may_sue_lenders.html.

²⁷ Dan Immergluck & Geoff Smith, *The Impact of Single-family Mortgage Foreclosures on Neighborhood Crime*, 21 HOUSING STUD. 851, 862 (2006), *available at* <http://www.prism.gatech.edu/~di17/HousingStudies.pdf>.

²⁸ Vikas Bajaj, *A Grim Season is Forecast for Home Sales in the U.S.*, INT. HERALD TRIB. (March 8, 2009), <https://www.istockanalyst.com/article/viewiStockNews/articleid/3099564>.

²⁹ DEFAULTING ON THE DREAM, *supra* note 3, at 4.

³⁰ See Homeownership Preservation Foundation, *About Foreclosure, Common Myths*, <http://www.995hope.org/about-foreclosure/common-myths/> (last visited Mar. 15, 2009).

³¹ CONGRESSIONAL OVERSIGHT PANEL, *supra* note 7, at 30.

³² More than two thirds of all residential loans originating since 2001 are “securitized.” *Id.* at 41-42.

³³ *Id.* at 45; Peter S. Goodman, *Lucrative Fees may Deter Efforts to Alter Loans*, N.Y. TIMES, Jul. 29, 2009 at A1.

³⁴ See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 66 (2006).

³⁵ See generally RAKESH KOCHHAR, ANA GONZALEZ-BERRERA, & DANIEL DOCKTERMAN, PEW HISPANIC CENTER, *THROUGH BOOM AND BUST: MINORITIES, IMMIGRANTS AND HOMEOWNERSHIP* v,vi (May 2009), *available at* <http://pewhispanic.org/files/reports/109.pdf> (reporting that counties with higher shares of immigrant residents had elevated rates of foreclosure); JANIS BOWDLER, NATIONAL COUNCIL OF LA RAZA, *JEOPARDIZING HISPANIC HOMEOWNERSHIP: PREDATORY PRACTICES IN THE HOMEBUYING MARKET* 4-5 (May 2005), *available at* <http://www.nclr.org/content/publications/detail/31596/> (reporting on prevalence of predatory lending in Hispanic communities and increased exposure to default and foreclosure).

³⁶ See FISHBEIN & WOODALL, *supra* note 17, at 4 (reporting that more than one half of all African American conventional borrowers for loans of all types (purchase, home improvement and refinance) received subprime mortgages in 2005. More than one third of Latinos received subprime mortgages. In comparison, about one fifth of white borrowers and one eighth of Asian borrowers received subprime loans.); CALVIN BRADFORD, CTR. FOR CMTY. CHANGE, *RISK OR RACE? RACIAL DISPARITIES AND THE SUBPRIME REFINANCE MARKET* 6 (May 2002), *available at* www.butera-andrews.com/legislative-updates/directory/Background-Reports/Center%20for%20Community%20Change%20Report.pdf (“Lower-income African-Americans receive 2.4 times as many subprime loans as lower-income whites, while upper-income African-Americans receive 3.0 times as many subprime loans as do whites with comparable incomes. Lower-income Hispanics receive 1.4 times as many subprime loans as do lower-income whites, while upper-income Hispanics receive 2.2 times as many of these loans.”).

³⁷ BOARD OF GOVERNORS OF THE FED. RESERVE SYS., 92ND ANNUAL REPORT 99 (2005), *available at* <http://www.federalreserve.gov/boarddocs/rptcongress/annual05/pdf/ar05.pdf>; see also Robert B. Avery, Kenneth P. Brevoort, & Glenn B. Canner, *Higher-Priced Home Lending and the 2005 HMDA Data*, FED. RESERVE BULL. A124, A159 (2006) (noting that differences in loan pricing outcomes have “increased concern about the fairness of the lending process.”); Robert B. Avery, Glenn B. Canner & Robert E. Cook, *New Information Reported Under HMDA and Its Application in Fair Lending Enforcement*, 91 FED. RESERVE BULL. 344 (2005); FISHBEIN & WOODALL, *supra* note 17.

³⁸ Avery, Brevoort, & Canner, *supra* note 37, at A107, A139 (“2007 HMDA data, like those from earlier years, indicate that black and Hispanic white borrowers are more likely, and Asian borrowers less likely, to obtain loans with prices above the HMDA price-reporting thresholds than are non-Hispanic white borrowers.”).

³⁹ CAL. REINV. COAL., ET AL., *PAYING MORE FOR THE AMERICAN DREAM, THE SUBPRIME SHAKEOUT AND ITS IMPACT ON LOWER-INCOME AND MINORITY COMMUNITIES* 5 (March 2008), *available at* <http://www.woodstockinst.org/publications/download/paying-more-for-the-american-dream-%11-the-subprime-shakeout-and-its-impact-on-lower%11-income-and-minority-communities/>.

⁴⁰ NATIONAL COMMUNITY REINVESTMENT COALITION, *supra* note 16, at 9. Other reports confirm that racial disparities in high-cost lending holds even in the most affluent parts of the country, and is fact most pronounced at upper-income levels. See Kirstin Downey, *High Cost Loans More Common in Prince George’s County*, WASH. POST, Mar. 17, 2007, at A01; CONGRESSIONAL OVERSIGHT PANEL, *supra* note 7, at 21.

⁴¹ See, e.g., JOINT U.S. DEP’T OF HOUS. & URBAN AFFAIRS & DEP’T OF TREASURY TASK FORCE ON PREDATORY LENDING,

CURBING PREDATORY HOME MORTGAGE LENDING 2 (June 2000), *available at* <http://www.huduser.org/intercept.asp?loc=/Publications/pdf/treasrpt.pdf> (“Unscrupulous actors in these markets often prey on certain groups - the elderly, minorities, and individuals with lower incomes and less education – with deceptive or high-pressure sales tactics.”); Michael Powell, *Bank Accused of Pushing Mortgage Deals on Blacks*, N.Y. TIMES, June 6, 2009, at A16 (reporting statements from affidavit of former Wells Fargo loan officer that loan officers “received cash incentives to aggressively market subprime loans in minority communities,” including bonuses for referring borrowers who would have qualified for prime loans to the subprime loan division); Mike Wagner & Doug Haddix, *Color of Money; Lenders More Likely to Give Minorities Costly Loans*, COLUMBUS DISPATCH, June 3, 2008, *available at* http://www.dispatch.com/live/content/local_news/stories/2008/06/03/Minloan2.ART_ART_06-03-08_A1_HVACNFV.html?sid=101 (describing study revealing that black borrowers in Ohio at all income levels were far more likely to receive loans with high interest rates than white borrowers); Sue Kirchhoff, *More U.S. Home Buyers Fall Prey to Predatory Lenders*, USA TODAY (Dec. 6, 2004) (“Recent immigrants and minorities, who will make up the bulk of new households and about half of first-time home buyers in coming decades, are far more likely than whites to take out subprime loans — and appear more likely to be victimized by predatory lending.”). A number of lawsuits have been filed around the country challenging these practices. *See, e.g.,* Barkley v. Olympia Mortgage Co., No. 04 CV 875(RJD)(KAM) 2007 WL 2437810 (E.D.N.Y. Aug. 22, 2007) (alleging that United Homes concentrated its business in minority census tracts and targeted minorities for the alleged scam by creating advertisements that featured minority homebuyers and selectively running these ads in minority communities.”); Ramirez v. Greenpoint Mortgage Funding, Inc., No. C08-0369, 2008 WL 2051018 (N.D.Cal. May 13, 2008) (alleging that the lender authorized its brokers to use subjective criteria to markup standard interest rates and financing charges on Greenpoint loans irrespective of the credit-worthiness of the borrower and that the “policy results in minority borrowers receiving mortgage loans with significantly higher interest rates and financing charges than similarly creditworthy white borrowers.”); Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251 (D. Mass. 2008) (alleging that the lender’s credit pricing policy has widespread discriminatory impact on black applicants for home mortgage loans, in violation of Equal Credit Opportunity Act and the Fair Housing Act.); NAACP v. Wells Fargo, CV 09-01758 (C.D. Cal.) (alleging that Wells Fargo unlawfully steered applicants to less favorable credit products than they qualified for on the basis of race.).

⁴² *See* JOINT U.S. DEP’T OF HOUS. & URBAN AFFAIRS & DEP’T OF TREASURY TASK FORCE ON PREDATORY LENDING, CURBING PREDATORY HOME MORTGAGE LENDING 2 (June 2000), *available at* <http://www.huduser.org/intercept.asp?loc=/Publications/pdf/treasrpt.pdf> (noting that “[a]mong the most common reasons for borrowers to turn to the subprime market to access necessary credit are: a poor credit history, high monthly debt payments relative to income, variable income sources, or a lack of familiarity with traditional prime lenders. However, the existence of any one of these factors could also cause a borrower to believe that no other credit sources are available, making it easier for an unscrupulous lender to manipulate or mislead the borrower.”).

⁴³ AMAAD RIVERA, ET AL., UNITED FOR A FAIR ECONOMY, FORECLOSED: STATE OF THE DREAM 2008 17 (Jan. 15, 2008), *available at* http://www.faireconomy.org/files/StateOfDream_01_16_08_Web.pdf.

⁴⁴ *Id.*

⁴⁵ Dan Immergluck and Geoff Smith, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, 21 HOUS. POL’Y DEBATE 851, 854 (2006).

⁴⁶ Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, 17 HOUS. POL’Y DEBATE 57, 70 (2006).

⁴⁷ FURMAN CTR. FOR REAL ESTATE AND URB. POL’Y, State of New York City’s Housing and Neighborhoods (2008), at 8, *available at* http://furmancenter.org/files/soc2008/State_of_the_City_2008.pdf.

⁴⁸ *See* John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 650 (2008) (noting that the “massive drain of equity” from minority neighborhoods as a result of the foreclosure crisis will deepen and worsen spatial segregation because it decreases minority homeowners’ economic ability to pursue integrated housing choices and at the same time shuts down mobility of residential buyers and private investment dollars into economically distressed neighborhoods).

⁴⁹ *See* Thomas M. Shapiro, *Race Homeownership and Wealth*, 20 J.L. & POL’Y 53 (2006) *available at* <http://law.wustl.edu/Journal/20/p53Shapirobookpages.pdf> (describing persistent wealth divide between African Americans and whites and arguing

that increasing home ownership among African Americans is an appropriate strategy to address the problem).

⁵⁰ William J. Collins and Robert A. Margo, Nat'l Bureau of Econ. Research, *Race and Home Ownership: A Century-Long View*, 38 EXPLORATIONS IN ECON. HISTORY 68, 73 (2001) (for 1900 and 1950 rates, which include homeownership rates only for males); U.S. CENSUS BUREAU & U.S. DEP'T OF HOUS. & URB. DEV., AMERICAN HOUSING SURVEY, ANNUAL STATISTICS (2008), available at <http://www.census.gov/hhes/www/housing/hvs/annual08/ann08ind.html> (follow "Homeownership Rates by Race and Ethnicity of Householder" hyperlink) (for 2008 data).

⁵¹ GEORGE MASNICK, JOINT CTR. FOR HOUS. STUDIES, HOME OWNERSHIP TRENDS AND RACIAL INEQUALITY IN THE UNITED STATES IN THE 20TH CENTURY 3 (Feb. 2001), available at http://www.jchs.harvard.edu/publications/homeownership/masnick_w01-4.pdf.

⁵² CHRISTOPHER L. PETERSON, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, SUBPRIME LENDING, FORECLOSURE AND RACE: AN INTRODUCTION TO THE ROLE OF SECURITIZATION IN RESIDENTIAL MORTGAGE FINANCE 3 (Dec. 2008), available at http://4909e99d35cada63e7f757471b7243be73e53e14.gripelements.com/pdfs/Peterson_Securitization_Primer.pdf (citing CHRISTOPHER L. PETERSON, TAMING THE SHARKS: TOWARDS A CURE FOR THE HIGH-COST CREDIT MARKET 81 (2004) (discussing origins of American credit discrimination)).

⁵³ Michael S. Carliner, *Development of Federal Homeownership "Policy,"* 9 HOUS. POL'Y DEBATE 299, 307-8 (1998).

⁵⁴ Thomas W. Hanchett, *The Other "Subsidized Housing": Federal Aid to Suburbanization, 1940s-1960s*, in FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA 166-68 (John F. Bauman, Roger Biles, & Kristin M. Szylyvian eds., 2000).

⁵⁵ Michael B. de Leeuw et al., *The Current State of Residential Segregation and Housing Discrimination: The United States' Obligations Under the International Convention on the Elimination of all Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337, 356-57 (2008) (citing David M.P. Freund, *Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America*, in THE NEW SUBURBAN HISTORY 11, 16 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006)).

⁵⁶ See William B. Senhauser & John P. Relman, Reflections on the Airlie Conference, in the Role of Automated Underwriting in Expanding Minority Homeownership: Conference Proceedings 9, 11-12, 16 (Fannie Mae ed., 2001); see also Sandra Braunstein & Carolyn Welch, *Financial Literacy: An Overview of Practice, Research, and Policy*, 88 FED. RES. BULL. 445, 446 (2002) ("Technological advances have... increased the capacity for targeted marketing to consumers, with robust databases of consumer information making it possible to match household characteristics and preferences with product offerings. This application of technology can promote competition and improve customer service. However, its misuse can increase consumer vulnerability to unscrupulous lenders. Questionable marketing and sales tactics may induce consumers to acquire products that they do not need or that are inappropriate for their circumstances.").

⁵⁷ See CONGRESSIONAL OVERSIGHT PANEL, *supra* note 7, at 30-48.

⁵⁸ Telephone Interview with Mary Asbury, Executive Director, Legal Aid Society of Greater Cincinnati (Feb. 12, 2009).

⁵⁹ Based on calls by the Brennan Center to county court clerks in Florida, Ohio, Illinois, Nevada, California, Arizona, Idaho, Michigan, Georgia and Oregon. Data on foreclosure rates were obtained from RealtyTrac, <http://www.realtytrac.com/MapSearch/> (last visited June 1, 2009). See also Mike Stuckey, *The Home You Save Could be Your Own: In Foreclosure Crisis More Homeowners Representing Themselves in Court*, MSNBC, Jan. 28, 2009, <http://www.msnbc.msn.com/id/28877173/> ("There's no way to know how many *pro se* foreclosure cases are currently moving through U.S. courts, but anecdotal accounts from lawyers and others indicate the number is growing along with the nation's mortgage crisis, which has reached unprecedented proportions.").

⁶⁰ Based on the Brennan Center's own review of 269 docket sheets representing a sample of the 2685 foreclosure cases filed in Stark County, Ohio in 2008, available on-line at <http://www.starkcjis.org/docket/main.html>. Docket numbers for the 2008 foreclosure filings were provided to the Brennan Center by the Stark County Clerk of Court's Office. Note that the data describe the representation status of the first defendant named in the case caption, since the first party named is typically the property owner (although entities possessing a legal interest in the property are routinely named as additional defendants on the foreclosure complaint). A defendant was counted as having legal representation when the docket indicated that an attorney

for the defendant entered an appearance in the case, or where a defendant filed an answer in the case, with the following single exception. Defendants described in the docket as proceeding *pro se* were counted as unrepresented even if they had filed an answer, however this occurred in only nine of the 269 cases that the Brennan Center reviewed. Commercial and other non-owner occupied property foreclosures were not excluded from the data.

⁶¹ Data obtained from Connecticut Judicial Branch Court Operations office (on file with Brennan Center) for Fiscal Year 2007 through 2008. Note that the data describe only the representation status of the property owner (although entities possessing a legal interest in the property are routinely named as additional defendants on the foreclosure complaint). Commercial and other non-owner occupied property foreclosures are included in the data, although a court official for the Connecticut Judicial Branch conveyed to the authors his observation that these constituted only about 10 to 15 percent of the total foreclosure proceedings. Telephone Interview, Gregory Pac, judicial statistician, Connecticut Judicial Branch, September 15, 2009.

⁶² Telephone Interview with Bryan Hetherington, Chief Counsel, Empire Justice Center (Feb. 12, 2009).

⁶³ RealtyTrac, *Foreclosure Laws and Procedures by State*, <http://www.realtytrac.com/foreclosure-laws/foreclosure-laws-comparison.asp> (last visited June 10, 2009).

⁶⁴ For a description of the shortcomings of state regulatory frameworks for mortgage foreclosures, see JOHN RAO & GEOFF WALSH, NATIONAL CONSUMER LAW CENTER, *FORECLOSING A DREAM, STATE LAWS DEPRIVE HOMEOWNERS BASIC PROTECTIONS* (February 2009).

⁶⁵ *In re* Foreclosure Cases, Nos. 1:07CV2282, et seq., 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007).

⁶⁶ Data obtained from the New York State Unified Court System, Office of Court Administration, Division of Technology for “subprime,” “high-cost,” and “non-traditional” mortgage foreclosure cases in which a Request for Judicial Intervention was filed between November 1, 2008 through May 1, 2009 (on file with Brennan Center). In New York, “subprime,” “high-cost,” and “non-traditional” loans are defined by statute, and include home loans originated between January 1, 2003 and September 1, 2008, with high interest rates and/or points and fees. See Foreclosure Prevention and Responsible Lending Act, 2008 N.Y. Laws ch. 472; N.Y. Banking L. § 6-1 (2009). Representation rates were calculated as a percent of all defendants for whom legal representation information was recorded. Clerks in Richmond (Staten Island), Queens, and Nassau Counties stated that it is not common practice within their respective offices to record attorney of record information for “incidental” or additional defendants, e.g., entities possessing a legal interest in the property. Legal representation information also may not have been recorded for homeowner defendants that failed to respond to a foreclosure notice, and did not request or attend a settlement conference. If such homeowners were included in the data, defendant legal representation rates would be even lower than that reported here. Telephone Interviews, Joseph Como, Chief Clerk, Richmond County Supreme Court; Maureen Daquila, First Deputy Chief Clerk, Queens County Clerk’s Office; Kathryn Driscoll Hopkins, Chief Clerk, Nassau County Supreme Court; Stanley Drosky, Principal Management Analyst, New York State Unified Court System, Office of Court Administration, Division of Technology (Sept. 14 - 28, 2009). Data on New York county foreclosure rates were obtained from RealtyTrac, New York Foreclosure Rates, <http://www.realtytrac.com/MapSearch/New%20York.html> (last visited Sept. 28, 2009).

⁶⁷ In Stark County, Ohio, the court provided mediation in a total of 387 out of several thousand foreclosure cases, with nearly half being settled through this process in 2008. See Laurie Huffman, *Help Available to Avoid Foreclosure*, Apr. 25, 2009, THE REVIEW, available at <http://www.the-review.com/news/article/4574235>. Connecticut has a court-run mediation program in place that became mandatory for lenders in June of 2009. To date, 34 percent of eligible homeowners (defined as an owner-occupant of a one, two, three or four family residential property) have taken advantage of the program. See Douglas S. Malan, *Foreclosure Mediation Becomes Mandatory*, CONN. LAW TRIB., Jun. 8, 2009, available at <http://www.ctlawtribune.com/getarticle.aspx?ID=33993>. New York has a court-run mandatory mediation program available to homeowners with “sub prime,” “high cost,” or “non-traditional” mortgages, as defined by statute. A bill is currently being considered in the New York State Senate that would extend the program to non-subprime mortgage holders. See James Pethokoukis, *US Mayors Urge States to Require Mortgage Mediation*, REUTERS, Jun. 11, 2009, available at <http://www.reuters.com/article/companyNewsAndPR/idUSN115228752009061>. Other jurisdictions throughout the country have in place or are contemplating similar programs. See *Id.* Mediation programs are a welcome intervention where the alternative is to allow homeowners to “go it alone” through the entire process. This is most true when a homeowner does not possess complicated legal claims against the lender. However, such forums can be an inadequate substitute for full legal representation where legal claims do exist, even in the few jurisdictions that routinely provide access to at least some form of free assistance from lawyers in settlement or mediation conferences, as in New York City. This is because mediation conferences primarily focus on determining whether the lender will agree to modify

some term of the loan, but is not the forum in which a homeowner can raise, much less prevail on, legal claims. Telephone Interviews, Meghan Faux, South Brooklyn Legal Services; Mark Lawson, Legal Aid Society of Greater Cincinnati; Jonathan Levy, Legal Services NYC-Bronx; Andrew Pizor, National Consumer Law Center; Marshall Green, Bronx Neighborhood Office of the Legal Aid Society (Sept. 14 - 28, 2009). For an overview and analysis of the promise and limitations of foreclosure mediation programs around the country, see Geoffrey Walsh, NATIONAL CONSUMER LAW CENTER, *State and Local Foreclosure Mediation Programs: Can They Save Homes?* (September 2009).

⁶⁸ Barbara Rabinowitz, *Mortgage Woes in Massachusetts Lead to Spike in Pro Se Debtors Under Chapter 13*, MASS. L. WKLY., Oct. 8, 2007.

⁶⁹ Letter from Chief Judge Robert M. Bell, Md. Ct. App., to Maryland Lawyers (July 7, 2007) (on file with the Brennan Center).

⁷⁰ See Jonathan D. Glater, *In A Downturn, More Act as Their Own Lawyers*, N.Y. TIMES, Apr. 10, 2009, at B1.

⁷¹ Rachanee Srisavasdi, *Bankruptcies, Foreclosures Send Folks in Search of Free Legal Help*, ORANGE COUNTY REGISTER, Apr. 20, 2009, available at <http://www.ocregister.com/articles/legal-help-aid-2366127-center-home>.

⁷² *Id.*

⁷³ LEGAL SERVS. CORP., LEGAL SERVS. CORP. BUDGET REQUEST, FISCAL YEAR 2010 7 (2009), available at <http://www.lsc.gov/pdfs/br2010.pdf>.

⁷⁴ See Helaine M. Barnett, Preface to LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (1st. ed. 2005).

⁷⁵ See generally, Wade Henderson & Jonathan M. Smith, *The Right to Counsel and Civil Rights: An Opportunity to Broaden the Debate*, 40 CLEARINGHOUSE REV. 210, 211 (July-Aug. 2006) (describing that women and racial minorities are more likely to be poor and thus to suffer the effects of not having a lawyer).

⁷⁶ Barnett, *supra* note 74.

⁷⁷ *Id.*

⁷⁸ Glater, *supra* note 70, at B1.

⁷⁹ See Rebecca L. Sandefur, *Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes* 24 (Mar. 26, 2008) (on file with the Brennan Center).

⁸⁰ Specifically, only 22% of represented tenants had final judgments against them as compared with 51% of tenants without legal representation. Carroll Seron, Gregg Van Ryzin, Martin Frankel & Jean Korvath, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results from a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 423-26 (2001). Similarly, in Baltimore, Maryland, comparisons of represented and unrepresented women in domestic violence protective order proceedings demonstrated that 83% of complainants with attorneys experienced success in obtaining a protective order as compared to only 32% of complainants without an attorney. See Jane Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U.J. GENDER SOC. POL'Y & L. 499, 511-12 (2003). Another Baltimore study of bail review hearings revealed that defendants with lawyers were four times as likely to have their bail reduced as defendants without lawyers, and were over twice as likely to be released on their own recognizance. See Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1752-61 (2002).

⁸¹ Rebecca L. Sandefur, *Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes* 28-29 (Mar. 26, 2008) (on file with the Brennan Center).

⁸² Ovetta Wiggons, *Foreclosure's Final Act; Area's Homeowners' Fears Unfold in High-Stakes Courtroom Dramas*, WASH. POST, Jan. 31, 2009, at A01 ("Most [homeowners in the courtroom] share a look of puzzlement, fearful about their futures and uncertain of how the legal system works. They sound confused when the judge begins to pepper them with questions about dates of missed

payments and when the bank began warning them about default. Few offer any evidence to support their claims.”).

⁸³ Senator Patrick Leahy, Chairman, Senate Judiciary Comm., Statement Introducing Fraud Enforcement and Recovery Act of 2009 (February 5, 2009), *available at* <http://leahy.senate.gov/press/200902/020509b.html>); *see also* FINANCIAL CRIMES ENFORCEMENT NETWORK, FILING TRENDS IN MORTGAGE LOAN FRAUD: A REVIEW OF SUSPICIOUS ACTIVITY REPORTS FILED JULY 1, 2007 THROUGH JUNE 30, 2008 10 (Feb. 2009); MERLE SHARICK, ERIN E. OMBAS, NICK LARSON, & D. JAMES CROFT, MORTGAGE ASSET RESEARCH INSTITUTE, EIGHT PERIODIC MORTGAGE FRAUD CASE REPORT TO MORTGAGE BANKERS’ ASSOCIATION 2 (Apr. 2006).

⁸⁴ Michael Powell, *Prosecutions Lag as N.Y. Foreclosure Frauds Surge*, N.Y. TIMES, Apr. 14, 2009, at A1.

⁸⁵ *Id.*

⁸⁶ 15 U.S.C. § 1601 (2009). Additionally, for refinance loans, if a lender fails to disclose finance charges, annual percentage rates, and other important loan features, the loan may be rescinded. The Federal Home Ownership and Equity Protection Act (HOEPA) 15 U.S.C. §§ 1602(aa), 1639, 1641(d)(1) (2009) is an amendment to the Truth and Lending Act, and covers home equity loans that have high annual percentage rates or which have fees that exceed a certain percentage of the loan amount. Many states have analogous bills providing these types of protections.

⁸⁷ 15 U.S.C. § 1692 (2009). The Act limits the manner and method in which debt collectors can contact borrowers, and requires debt collectors to accurately report the debt amount, and to notify borrowers of their right to dispute or obtain verification of the debt amount. Violations of the Act entitle borrowers to awards of damages and attorneys’ fees.

⁸⁸ 12 U.S.C. § 2601 (2009). Under the Federal Real Estate Settlement Procedures Act, any payment by the lender to the broker is illegal if it is not for the reasonable value of the services actually performed. The Act prohibits “kickbacks” and “referral fees” that increase the costs of certain settlement services. The Act also provides for awards of damages and attorneys’ fees when violations are proven.

⁸⁹ 42 U.S.C. § 3601 (2009). Several courts have held that “reverse redlining,” or targeting individuals in minority communities for high-cost loans, whether conducted intentionally or unintentionally, constitutes a violation of the Act. *See e.g.*, *Munoz v. Int’l Home Capital Corp.*, No. C 03-01099 RS, 2004 (“Here, plaintiffs have averred sufficient facts to plead ‘reverse redlining’ under section 3605.”); *Johnson v. Equicredit Corp. of Am.*, No. 01 C 5197, 2002 U.S. Dist. LEXIS 4817, at 18 (N.D. Ill. Mar. 22, 2002) (“Because it is clear that plaintiff’s allegations are sufficient to state claim under 42 U.S.C. §3605, defendants’ motions to dismiss are denied.”); *Matthews v. New Century Mortgage Corp.*, 185 F. Supp. 2d 874, 886-87 (S.D. Ohio 2002); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 301 (7th Cir. 1992); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000).

⁹⁰ Discussion of the foreclosure crisis, and the need for legal representation, would be incomplete without consideration of the weak regulatory environment in which so many loans were made. In recent years, our federal regulatory agencies (for example, the Comptroller of the Currency, and the Office of Thrift Supervision) issued new regulations that broadly preempted the efforts by the states to regulate lending through consumer protection laws. For example, the Office of the Comptroller of the Currency filed a lawsuit against then New York Attorney General Elliot Spitzer to stop his office’s investigation of nationally chartered banks to assess possible violations of state and federal fair lending laws. The Supreme Court recently issued an opinion holding that state attorneys general can proceed against national banks on such matters. *See Clearing House Assoc v. Cuomo*, --S. Ct.--, (2009) WL 1835148 (June 29, 2009). *See also Federal Deposit Insurance Corporation on Modernizing Bank Supervision and Regulation Before the Comm. on Banking, Hous., & Urban Affairs.*, 111th Cong. (March 19, 2009) (statement of Sheila Bair, Chairman, FDIC) (“Federal preemption had previously been seen as a way to improve efficiencies for federally chartered banks and lower costs for consumers ... While that may have been true in the short run, it has now become clear that abrogating sound state laws, particularly consumer protection laws, created an opportunity for regulatory arbitrage that frankly resulted in a ‘race-to-the-bottom’ mentality...”).

⁹¹ Stuckey, *supra* note 59.

⁹² Michael Powell, *Prosecutions Lag as N.Y. Foreclosure Frauds Surge*, N.Y. TIMES, Apr. 15, 2009, at A1.

⁹³ Michael Powell, *Schumer Seeks Grants to Battle Mortgage Fraud*, N.Y. TIMES, Apr. 21, 2009, at A21.

⁹⁴ THE NATIONAL FAIR HOUSING ALLIANCE, DR. KING'S DREAM DENIED: FORTY YEARS OF FAILED FEDERAL ENFORCEMENT: 2008 FAIR HOUSING TRENDS REPORT (Apr. 8, 2008).

⁹⁵ Loan modifications, done well, can make a big difference. Credit Suisse estimates that if 50% of at-risk loans are modified, total foreclosures in the next four years would drop from 8 or 9 million to 6.3 million. See CREDIT SUISSE FIXED INCOME RESEARCH, *supra* note 8, at 1. According to the Treasury Department, loan modifications are more likely to succeed if they happen before people miss payments. See U.S. DEPT. OF TREASURY, HOMEOWNER AFFORDABILITY AND STABILITY PLAN: EXECUTIVE SUMMARY (Feb. 19, 2009), available at <http://www.treas.gov/press/releases/tg33.htm>.

⁹⁶ See Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications*, CONN L. REV. (forthcoming 2009) (finding that in a study of data on more than 3.5 million subprime and alt-A mortgages, 68% of loan modifications did not include significant cancellation of either past due interest or principal, and that many modifications involved capitalizing unpaid interest and fees and reamortizing the loan. Fewer than half of modifications made in January 2008 were current in payments on November 25, 2008).

⁹⁷ Telephone Interview with Nadine Cohen, Managing Attorney, Consumer Rights Unit, Greater Boston Legal Services (Mar. 18, 2009).

⁹⁸ The terms of Ms. A's settlement are confidential and thus her identity and that of the lender has not been disclosed.

⁹⁹ OFFICE OF THE COMPTROLLER OF THE CURRENCY AND OFFICE OF THRIFT SUPERVISION, MORTGAGE METRICS REPORT: DISCLOSURE OF NATIONAL BANK AND FEDERAL THRIFT MORTGAGE LOAN DATA, FOURTH QUARTER 2008 (April 2009), available at <http://files.ots.treas.gov/4820362.pdf>.

¹⁰⁰ Telephone Interview with Mary Asbury, Executive Director, Legal Aid Society of Greater Cincinnati (Feb. 12, 2009).

¹⁰¹ Federal Reserve Board, *Five Tips for Avoiding Foreclosure Scams*, <http://www.federalreserve.gov/pubs/foreclosurescamtips/default.htm> (last visited June 10, 2009); see also NATIONAL CONSUMER LAW CENTER, DREAMS FORECLOSED: THE RAMPANT THEFT OF AMERICANS' HOMES THROUGH EQUITY-STRIPPING FORECLOSURE 'RESCUE' SCAMS (June 2005), available at <http://www.consumerlaw.org/news/ForeclosureReportFinal.pdf> (for a description of foreclosure scams).

¹⁰² For a profile of the Webbs' story, see Philip Shishkin, *When 'Rescue' Means Eviction*, WALL ST. J., Feb. 25, 2009, available at <http://online.wsj.com/article/SB123561189654377741.html>.

¹⁰³ Telephone Interview with Chinh Q. Le, Practitioner in Residence, Urban Revitalization Project, Center for Social Justice, Seton Hall Law School (Apr. 6, 2009).

¹⁰⁴ Brian Ross & Avni Patel, *On Hold: Even Congresswoman Gets the Runaround on Bank Help Lines*, ABC NEWS, Jan. 22, 2009, available at <http://abcnews.go.com/Blotter/Story?id=6702731&page=1>; see also NEIGHBORHOOD HOUSING SERVICES OF CHICAGO, INC., LESSONS FROM THE FRONT LINES: COUNSELOR PERSPECTIVES ON DEFAULT INTERVENTIONS (Oct. 29, 2007), available at <http://www.nhschicago.org/downloads/8366LessonsFrontLinesOct2007.pdf> (describing some of the challenges counselors have in dealing with servicing and loss mitigation staff).

¹⁰⁵ Editorial, *Mr. Obama's Foreclosure Plan*, N.Y. TIMES, Feb. 18, 2009, at A26.

¹⁰⁶ Alan Zibel, *US Unveils More Help for Homeowners*, AOL MON. & FIN., Mar. 14, 2009, available at <http://money.aol.com/article/obama-administration-to-expand-housing/449296>; see also Ellen Yan, *Mixed reviews on LI for Obama's Affordable Housing Plan*, NEWSDAY, May 14, 2009, available at <http://www.newsday.com/business/ny-bzhome1512768642may14,0,3438771.story> (reporting that in addition to notable successes, some homeowners are finding that lenders are giving them the runaround or are inexperienced with the program, and in the worse case have been "charged high refinancing fees, told to go to retail locations for other programs, or wrongly rejected for the Obama plan, then offered less beneficial terms as alternatives.").

¹⁰⁷ Henri E. Cauvin, *Lawyers Sought for Foreclosure Prevention*, WASH. POST, Dec. 4, 2008, at PG01.

¹⁰⁸ CONGRESSIONAL OVERSIGHT PANEL, *supra* note 7, at 39.

¹⁰⁹ See ANDREW JAKABOVICS, CENTER FOR AMERICAN PROGRESS, HOPE NOW NEEDS HELP: HOUSING CRISIS REQUIRES FEDERAL ACTION, March 4, 2008, *available at* http://www.americanprogress.org/issues/2008/03/hope_now.html (“To their credit, alliance members have increased the number of workouts offered, but those workouts are still predominantly repayment plans rather than substantive modifications of loan terms. More often than not, repayment plans do not offer long-term relief to borrowers.”).

¹¹⁰ Telephone Interview with Sarah Bolling, Attorney, Atlanta Legal Aid Society (Apr. 20, 2009).

¹¹¹ Telephone Interview with Jenie McCaslin (Apr. 29, 2009).

¹¹² *A Good Day in the Home Defense Program*, Fulton County Daily Report, Atlanta Legal Aid Docket, December 5, 2008.

¹¹³ See generally KIRWAN INST. *supra* note 52, 7-12 (describing evolution of private securitization).

¹¹⁴ Bob Ivory, *Banks Lose to Deadbeat Homeowners as Loans Sold in Bonds Vanish*, Bloomberg.com, Feb. 22, 2008, *available at* <http://www.bloomberg.com/apps/news?pid=20601109&sid=aejJZdqodTCM&refer=hoe>.

¹¹⁵ CONGRESSIONAL OVERSIGHT PANEL, *supra* note 7, at 41-42.

¹¹⁶ See Bob Ivory, *Mortgage Note Issues Help Debtors Avoid Foreclosure*, Bloomberg News (Feb. 23, 2008), *available at* http://www2.tbo.com/content/2008/feb/23/222033/bz-mortgage-note-issues-help-debtors-avoid-foreclo/c_3/#comments.

¹¹⁷ Katherine M. Porter, *Misbehavior and Mistake in Bankruptcy*, 87 TEX. L. REV. 17 (2008).

¹¹⁸ *Mortgage Note Issues Help Debtors Avoid Foreclosure*, *supra* note 116. One judge, in a decision dismissing a foreclosure action on the basis of a missing note, observed, “Unlike the focus of financial institutions, the federal courts must act as gatekeepers, assuring that only those who meet diversity and standing requirements are allowed to pass through. Counsel for the institutions are not without legal argument to support their position, but their arguments fall woefully short of justifying their premature filings, and utterly fail to satisfy their standing and jurisdictional burdens. The institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally put to the test, their weak legal arguments compel the Court to stop them at the gate.” *In re Foreclosure Cases*, Nos. 1:07CV2282, et seq., 2007 WL 3232430, at *3 (N.D. Ohio Oct. 31, 2007).

¹¹⁹ See generally Mitch Stacy, *Sliced, Diced Mortgages Buy Owners Time*, ORLANDO SENT., Feb. 18, 2009, *available at* <http://www.orlandosentinel.com/services/newspaper/printedition/wednesday/orl-foreclose1809feb18,0,923358.story>; *Mortgage Note Issues Help Debtors Avoid Foreclosure*, *supra* note 116; John Cutts, *Homeowners Facing Foreclosure Demand Proof of Mortgage Ownership*, REAL EST. PRO ART., Feb. 21, 2009, *available at* <http://www.realestateproarticles.com/Art/5682/265/Homeowners-Facing-Foreclosure-Demand-Proof-of-Mortgage-Ownership.html>; Moe Bedard & Aaron Krowne, *Deutsche Bank Foreclosures Tossed Out of Ohio Federal Court – ‘They Own Nothing!’*, IAMFACINGFORECLOSURE.COM, Nov. 12, 2007, *available at* <http://iamfacingforeclosure.com/blog/2007/11/12/deutsche-bank-foreclosures-tossed-out-of-ohio-federal-court-they-own-nothing/>.

¹²⁰ Porter, *supra* note 117, at 121.

¹²¹ Interview with Ann Balcer Norton, Director, St. Ambrose’s Foreclosure Prevention Project, (Feb. 17, 2009).

¹²² Porter, *supra* note 117, at 136.

¹²³ A bill that would have amended the bankruptcy code to allow judges to modify mortgages on primary residences was recently defeated in the Senate. See Stephen Labaton, *Senate Refuses to Let Judges Fix Mortgages in Bankruptcy*, N.Y. TIMES, Apr. 30, 2009, at B3.

¹²⁴ DANILO PELLETIERE, NATIONAL LOW INCOME HOUSING COALITION, RECOGNIZING RENTERS IN THE FORECLOSURE CRISIS 9 (2009), *available at* <http://www.nlihc.org/doc/NLIHC-Renters-in-Foreclosure-UCLA-5-2009.pdf>; see also RHODE ISLAND

LEGAL SERVICES, MOVING OUT RHODE ISLAND: AN ANALYSIS OF 2008 FORECLOSURE RELATED EVICTIONS (June 2009), *available at* <http://www.rhomeless.org/Portals/0/Uploads/Documents/Public/Eviction%20Report.pdf> (highlighting extent of evictions in Rhode Island caused by foreclosures and noting that over two thirds of evictions occurred in minority communities).

¹²⁵ See Cathy Duchamp, *States Move to Help Tenants Stung by Foreclosure*, NPR.COM, May 19, 2009, <http://www.npr.org/templates/story/story.php?storyId=104100129> (reporting that most states had no formal way to notify tenants about a pending foreclosure — and no legal requirement to do so); Andria Simmons, *Foreclosures Reach Renters: Tenants Frequently Evicted if Landlord Loses Property*, THE ATLANTA JOURNAL-CONST., Dec. 7, 2008, <http://www.ajc.com/services/content/printedition/2008/12/07/evictions.html> (reporting that under Georgia law tenants are not informed that a property is in foreclosure until after the process is over).

¹²⁶ See Raun J. Rasmussen, *Foreclosure Crisis: Both Owners, Many Tenants to Be Homeless*, N.Y.L.J., January 16, 2009, *available at* <http://www.legalservicesnyc.org/storage/lsny/PDFs/rroutsidecounsel.pdf> (describing some of the protections available to renters in foreclosed properties).

¹²⁷ See, e.g., Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 109, 122 Stat. 3765, 3775 (2008) (providing that “The Secretary shall coordinate with the Corporation, the Board [and other Federal Government entities]... to attempt to identify opportunities for the acquisition of classes of troubled assets that will improve the ability of the Secretary,... where permissible, to permit bona fide tenants who are current on their rent to remain in their homes under the terms of the lease.”).

¹²⁸ Philip Rucker, *Sweeping Bills Passed to Help Homeowners*, WASH. POST, April 3, 2008, at A01.

¹²⁹ See Elizabeth Benton, *Loan Servicers Meet Over Ordinance on Foreclosed Homes*, NEW HAVEN REG., April 29, 2009.

¹³⁰ See H.B. 6143, 2009 Gen. Assem., Reg. Sess. (Conn. 2009).

¹³¹ See 2009-10 Appropriations Bill (S51A A151A): Legislature and Judiciary, N.Y. Assem. (N.Y. 2009), *available at* <http://www.nysenate.gov/report/budget-bill-texts-2009-10-legislature-and-judiciary>.

¹³² With the exception of the Legal Aid Society of Southwest Ohio, none of the described organizations are funded by the Legal Services Corporation and are therefore not encumbered by restrictions on these federal funds.

¹³³ These sources include state and local governments, Interest on Lawyers’ Trust Accounts (“IOLTA”) programs, foundations and private donors, such as the Institute for Foreclosure Legal Assistance, a project of the Center for Responsible Lending, and other non-LSC federal grant programs. See LEGAL SERVS. CORP., LEGAL SERVICES CORPORATION FACT BOOK 2007, at 7-8 (2008), *available at* <http://www.lsc.gov/pdfs/factbook2007.pdf>.

¹³⁴ Telephone Interview with Kent Spuhler, Executive Director, Florida Legal Services (Apr. 21, 2009).

¹³⁵ Telephone Interview with Jennifer Larrabee, Program Manager, Foreclosure Prevention Pro Bono Project, Pro Bono Resource Center of Maryland (Feb. 19, 2009).

¹³⁶ When a law firm also represents a lender that holds mortgages, it may be prohibited by ethical standards of professional conduct from concurrently representing homeowners in suits against that lender, or even other similarly situated lenders. See MODEL CODE OF PROF’L CONDUCT R. 1.7 (2002).

¹³⁷ Telephone Interview with Kent Spuhler, Executive Director, Florida Legal Services (Apr. 21, 2009).

¹³⁸ This past April, the Fighting Real Estate Fraud Act of 2009 was introduced in Congress. The Act would establish a competitive grant program in the Department of Justice for local District Attorney’s offices to fight real estate fraud. The bill authorizes \$100 million in grants for FY 2010 and each year through FY 2013. See also Michael Powell, *Schumer Seeks Grants to Battle Mortgage Fraud*, N.Y. TIMES, Apr. 20, 2009, at A21.

¹³⁹ See Gretchen Morgenson, *Baltimore is Suing Bank Over Foreclosure Crisis*, N.Y. TIMES, Jan. 8, 2008, at A12; *Bank Accused of Pushing Mortgage Deals on Blacks*, *supra* note 41, at A16.

¹⁴⁰ In October 2008, Countrywide settled the suit for \$8.8 billion and formed the first mandatory loan modification program in the country. See David Greising, *Deal to Help 21,000 in State Keep Homes*, CHI. TRIB. (Oct. 6, 2008), http://archives.chicagotribune.com/2008/oct/06/business/chi-mon_countrywide-settlementoct06.

¹⁴¹ See Sturgis, *supra* note 26 (noting State Senator Vincent Fort's observation of the city's relationship to several major banks as possible cause for delay in initiating a lawsuit against the lenders. Fort said, "[The City Council] fiddled while Rome burned.")

¹⁴² The Appropriations Act also permits a portion of the \$50 million designated for the Neighborhood Reinvestment Corporation to be granted to counseling intermediaries. FY09 Omnibus Appropriation, Pub. L. No. 111-8, Title II, Housing Counseling Assistance.

¹⁴³ Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007).

¹⁴⁴ For a description of the program, see HUD, *Community Development Block Grant Program – CDBG*, <http://www.hud.gov/offices/cpd/communitydevelopment/programs/index.cfm> (last visited June 10, 2009).

¹⁴⁵ For a description of the program, see HUD, *HOME Investment Partnerships Program*, <http://www.hud.gov/offices/cpd/affordablehousing/programs/home/> (last visited June 10, 2009).

¹⁴⁶ See *Legal Services Corporation: Hearing Before the Subcomm. on Justice, Science, and Related Agencies of the H. Comm. on Appropriations*, 111th Cong. 2 (2009) (statement of Helaine Barnett, President, Legal Services Corporation).

¹⁴⁷ See ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW AND SOC. POLICY, *SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* 36-37 (2007), available at http://www.clasp.org/publications/legal_aid_history_2007.pdf.

¹⁴⁸ See BRENNAN CENTER FOR JUSTICE, *STRUGGLING TO MEET THE NEED: COMMUNITIES CONFRONT GAPS IN FEDERAL LEGAL AID* 6 (2003), available at http://brennan.3cdn.net/7689d2f385e9f3d753_bvm6y9ucy.pdf.

¹⁴⁹ See Budget of the U.S. Government, Fiscal Year 2010 Appendix, at 1243 (May 8, 2009), available at <http://www.whitehouse.gov/omb/budget/fy2010/assets/oia.pdf>.

¹⁵⁰ LEGAL SERV. CORP., *Documenting the Justice Gap* 2 (Sept. 2005), available at <http://www.lsc.gov/justicegap.pdf> (dollar amounts adjusted for inflation using CPI Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl>).

¹⁵¹ Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008).

¹⁵² For a description of the program, see NeighborWorks America, *About Us*, <http://www.nw.org/network/aboutUs/aboutUs.asp> (last visited June 10, 2009); Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 526 (2009).

¹⁵³ Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2305, 122 Stat. 2654 (2008).

¹⁵⁴ American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115 (2009).

¹⁵⁵ Senators Casey, Dodd, Harkin, Leahy, Kerry, Schumer and Specter attempted to amend the Senate version of the stimulus bill to set aside \$30 million of the money originally allocated to the Neighborhood Stabilization Program (NSP) for legal aid. The funding, allocated through HUD, would have been available to both LSC and non-LSC funded legal aid providers. In the final version of the Senate bill, all \$2.25 billion in NSP funding was cut. In conference, NSP funding was restored, but no legal aid set-aside was included.

¹⁵⁶ For example, the New York State Budget for 2008-09 included \$25 million for counseling and legal services through the Subprime Foreclosure Prevention Services Program. See New York State Division of Housing & Community Renewal, *Subprime Foreclosure Prevention Services Program*, <http://www.dhcr.state.ny.us/programs/ForeclosurePrevention/> (last visited May 5, 2009).

¹⁵⁷ Mortgage Reform and Anti-Predatory Lending Act, H.R. 1728, 111th Cong. § 216 (2009).

¹⁵⁸ *Id.*

¹⁵⁹ THE BRENNAN CENTER FOR JUSTICE, THE ECONOMY AND CIVIL LEGAL SERVICES, (Feb. 1, 2009), http://www.brennancenter.org/content/resource/the_economy_and_civil_legal_services/.

¹⁶⁰ Manuel Valdes, *Legal-Aid Groups for the Poor Endure Severe Budget Reductions*, AP/ SEATTLE POST-INTELLIGENCER (Nov. 27, 2008), http://seattlepi.nwsource.com/local/389819_legalaid28.html.

¹⁶¹ *Aid for Legal Aid*, THE HARTFORD COURANT, Dec. 29, 2008, at A9.

¹⁶² Justice Harriet O'Neill, *Legal Aid Funding Vital to At-Risk Texans*, SAN ANTONIO EXPRESS-NEWS, March 27, 2009, http://www.mysanantonio.com/opinion/Legal_aid_funding_vital_to_at-risk_Texans.html. The effect of this shortfall is hard to imagine, considering that Texas is already among states with the lowest per capita spending on civil legal aid, assisting only 20 to 25 percent of low-income residents who need legal help.

¹⁶³ *Dayton Foreclosures Rank 5th in Ohio*, DAYTON BUSINESS JOURNAL, Apr. 22, 2009, <http://www.bizjournals.com/dayton/stories/2009/04/20/daily47.html>.

¹⁶⁴ LEGAL SERV. CORP., *Background to LEGAL SERVICES CORPORATION BUDGET REQUEST, FISCAL YEAR 2010 3* (2009), *available at* <http://www.lsc.gov/pdfs/br2010.pdf>.

¹⁶⁵ Press Release, Institute for Foreclosure Legal Assistance, Helping Americans Keep Their Homes: Institute Announces \$2.4 Million More in Grants to Help Families Fight Foreclosure (Feb. 5, 2009) *available at* <http://www.foreclosurelegalassistance.org/>.

¹⁶⁶ *Barkley v. Olympia Mortgage Co.*, 2007 WL 2437810 (E.D.N.Y. Aug. 22, 2007).

¹⁶⁷ *Id.* at *2.

¹⁶⁸ NORTH CAROLINA LEGAL SERVICES PLANNING COUNCIL, NORTH CAROLINA STATEWIDE LEGAL NEEDS ASSESSMENT 49 (2003), *available at* https://www.legalaidnc.org/Public/Participate/Legal_Services_Community/EqualJusticeAlliance/NC%20Statewide%20Needs%20Assessment%2003%2024%2003.pdf.

¹⁶⁹ Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53-1321-56 (1996). Congress has carried forward these restrictions each year by incorporating them in the annual appropriations rider for LSC.

¹⁷⁰ *See Closing the Justice Gap: Providing Civil Legal Assistance to Low-Income Americans: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 4 (2008) (statement of Rebekah Diller, Deputy Director, Justice Program, Brennan Center for Justice at New York University School of Law).

¹⁷¹ *See* CAROLYN L. CARTER, NAT'L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 21 (February 2009), *available at* http://www.nclc.org/issues/udap/content/UDAP_Report_Feb09.pdf.on Unfair and Deceptive Acts and Practices Statutes 21 (February 2009) http://www.nclc.org/issues/udap/content/UDAP_Report_Feb09.pdf

¹⁷² *Duell v. Condon*, 84 N.Y.2d 773, 780 (1995) (describing New York's Real Property Law § 234 which permits tenants to obtain attorneys' fees when a residential lease term permits landlords to collect fees).

¹⁷³ *See* CAL. LEGAL SERVS. COORDINATING COMM., CALIFORNIA STATE JUSTICE PLAN 2001: RESPONSE TO LSC PROGRAM LETTER 2000-1 32 (2001), *available at* http://www.lri.lsc.gov/state_planning/slfevals/ca_slfeval_01.pdf.

¹⁷⁴ *Id.*

¹⁷⁵ *See* Diller, *supra* note 170.

¹⁷⁶ See e.g., *Monetary Policy and the State of the Economy: Hearings on the Conduct of Monetary Policy Before the H. Comm. on Financial Services*, 111th Cong. 9 (2009) (statement of James Galbraith, Lloyd M. Bentsen, Jr. Chair in Government/Business Relations, Lyndon B. Johnson School of Public Affairs, The University of Texas at Austin and Senior Scholar, Levy Economics Institute) (“[t]he economic crisis cannot be solved without first stabilizing the housing market....the only way to [stabilize housing prices], short of buying up surplus homes and knocking them down, is to find means to stop the wave of evictions, vacancies, trash-outs and forced sales that is overwhelming the system.”).

¹⁷⁷ See generally, NORTHEASTERN UNIV. SCH. OF LAW, PROGRAM ON HUMAN RIGHTS & THE GLOBAL ECON., ACCESS TO CIVIL JUSTICE: RACIAL DISPARITIES AND DISCRIMINATORY IMPACTS ARISING FROM LACK OF ACCESS TO COUNSEL IN CIVIL CASES 8 (Dec. 10, 2007) (“[T]he lack of civil counsel is a key factor in perpetuating racial bias in the administration of civil justice in the U.S.”), available at http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/14_Access_to_Civil_Justice.pdf; Michael Powell & Janet Roberts, *Minorities Affected Most as New York Foreclosures Rise*, N.Y. TIMES, May 16, 2009, at A1.

¹⁷⁸ See Shapiro, *supra* note 49.

¹⁷⁹ See *Closing the Justice Gap: Providing Civil Legal Assistance to Low-Income Americans?: Hearing Before the S. Comm. on the Judiciary, 110th Cong.* (May 22, 2008) (statement of Lora J. Livingston, J., 261st District Court of Texas, and Member, Standing Committee on Legal Aid and Indigent Defendants, American Bar Association).

¹⁸⁰ See Budget of the U.S. Government, Fiscal Year 2010 Appendix, at 1243 (May 8, 2009), available at <http://www.whitehouse.gov/omb/budget/fy2010/assets/oia.pdf>.

¹⁸¹ Appropriations for the Departments of Commerce and Justice, and Science, and Related Agencies for Fiscal Year 2010, H.R. 2847, 111th Cong. (as reported by H.R., June 18, 2009).

¹⁸² The program arose, in part, from the advocacy efforts of Community Legal Services of Philadelphia.

¹⁸³ “Residential Mortgage Foreclosure Diversion Pilot Program,” Joint General Court Regulation No. 2008-01, First Judicial District of Philadelphia Court of Common Pleas of Philadelphia County (April 16, 2008), available at <http://fjd.phila.gov/pdf/regs/2008/cpjgcr-2008-01.pdf>

¹⁸⁴ Mike Sharkey, *Hyde Crafting Foreclosure Mediation Legislation*, FIN. NEWS & DAILY REC., March 9, 2009, http://www.jaxdailyrecord.com/showstory.php?Story_id=51952.

¹⁸⁵ See RAO & WALSH, *supra* note 64, at 49.

¹⁸⁶ The ABA has unanimously adopted a formal resolution urging government at all levels to provide counsel to low-income individuals in high-stakes civil cases, including those in which shelter is at issue. AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES NO. 112A (2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>. In New York, a bill is pending before the New York City Council that would create a right to counsel for low-income seniors facing eviction from or foreclosure on their homes. In Oklahoma, individuals who were *pro se* in the trial court and asserting a right to counsel on appeal in tax deed foreclosure cases, must now be represented by legal services lawyers. In California, a bill that would recognize a civil right to counsel in “human-needs cases” recently cleared the State Assembly. See also Paul Marvey & Laura Klein Abel, *Current Developments In Advocacy To Expand The Civil Right To Counsel*, 25 TOURO L. REV. 132 (2009) (for a description of state based advocacy efforts to secure a civil right to counsel).

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