**Homeowners Get Screwed, Lawyers Get Played, Banks Make Profit: Where’s the Outrage?**

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*[](http://www.newdeal20.org/wp-content/uploads/2009/10/house-in-hands-150.jpg)The foreclosure industry is playing the system while homeowners suffer.*

Two recent reports, read together, should spark outrage in the country at large and among our political leadership. But no one seems to care anymore. JPMorgan Chase, the country’s third largest mortgage lender, [confessed](http://www.housingwire.com/2011/01/17/jpmorgan-overcharged-military-families-improperly-foreclosed) that it has overcharged over 4,000 active duty troops on their mortgages and improperly foreclosed upon 14 military families. Only three days before that, [reports](http://www.huffingtonpost.com/2011/01/14/jpmorgan-chase-profit-2010_n_808958.html) came out that JPMorgan had just experienced a 47% jump in profits for the previous quarter and 2010 profits reached a record level of $17.4 billion.

The story of the violations of the [Servicemembers Civil Relief Act](http://en.wikipedia.org/wiki/Servicemembers_Civil_Relief_Act) was forced into the open by a Marine fighter pilot. He kept all of his payments current, but due solely to the fault of JPMorgan Chase, his mortgage was placed into default status. His wife reports collection calls (sometimes three a day) coming on Saturdays, Sundays, holidays and even at 3:00 in the morning. It took over two years and the hiring of a lawyer to get JPMorgan to back off and finally admit that he had fully paid his mortgage obligations on time. Certainly no member of the military should have to endure this kind of treatment. But, beyond this, no American homeowner should have to endure those kinds of collection tactics from America’s second largest bank. Where is the outrage over these kinds of heavy-handed and abusive tactics?

**The Foreclosure Game**

The situation described above fits within a pattern of abuse of American homeowners by JPMorgan Chase and the other major loan servicers that I have experienced in my work as a lawyer representing homeowners in foreclosure. They treat the foreclosure process like a game, seeking to win at any cost without regard to the harm inflicted upon homeowners. Strategic decisions are made, odds of specific outcomes are calculated and bets based upon those odds are placed. Ways to skirt the rules are studied and ignored when referees (judges) are not watching, weak opponents are trampled, cheap shots are taken at opposing parties, and major efforts are made to wear out the opposition as the game winds on. Since the foreclosure industry’s pockets are deep, it is more than willing to outspend the opposition to gain an upper hand when it will help win the game.

Lawyers who have the experience and knowledge required to represent homeowners in foreclosure cases are in very short supply. The work does not pay well, if at all, it is very time consuming, and the level of knowledge necessary to do the work well is very high. I have been focusing on this work on a full-time basis for almost three years now. To be competent, I have to be familiar with the [Truth in Lending Act](http://en.wikipedia.org/wiki/Truth_in_Lending_Act) (”TILA”) and its related Regulation Z, the [Homeowner Equity Protection Act](http://en.wikipedia.org/wiki/Home_Ownership_and_Equity_Protection_Act_of_1994) (”HOEPA”), the [Real Estate Settlement Procedures Act](http://en.wikipedia.org/wiki/Real_Estate_Settlement_Procedures_Act) (”RESPA”), the Maine Consumer Credit Code, the Maine Unfair Trade Practices Act, the United States Bankruptcy Code, the Maine Civil Action Foreclosure Statute, the Maine and Federal Rules of Civil Procedure, the constantly changing HAMP loan modification guidelines, and the separate and distinct guidelines of Fannie, Freddie, FHA, VA, and Rural Development, each of which has its own variations on HAMP. In addition, I have to keep current on developing foreclosure case law all over the country on a daily basis. The number of us willing and able do this work is extremely limited when measured against the needs of homeowners for legal assistance — I hear that fewer than 5% of homeowners looking for legal help are able to obtain it.

Perhaps the largest frustration for me in this work is to experience on a daily basis the games that the servicers play in the foreclosure process. I am constantly frustrated by how much of my time is spent in dealing with the servicers’ antics, thus reducing the number of homeowners that I and my colleagues are able to help. What will follow is a two-part explanation of the game playing that we experience in our dealings with the mortgage loan servicers and their lawyers.

*Foreclosure industry lawyers use every trick in the bag to block the revelation of important documents.* [*here*](http://www.newdeal20.org/2011/01/20/homeowners-get-screwed-lawyers-get-played-banks-make-profit-wheres-the-outrage-33090/)*.*

Logic suggests that in foreclosure, the homeowner should be able to know who owns his loan. In the rare circumstance where the homeowner wants to pay off the loan rather than lose his or her house, he needs to know who is entitled to receive that payment so that the wrong party is not paid and so that he is protected against any other party ever claiming a right to payment. Where a homeowner cannot actually pay off his loan, he still has a real interest in knowing who claims ownership of it because only that party can respond to requests to work out a rational loan modification.

Logic does not control the foreclosure industry’s practices.

**Variation Number 1: MERS hides the ball**

In the first variation of this tactic, homeowners must face a massive concealment scheme set up in 1995 by the foreclosure industry in the form of [Mortgage Electronic Registration Systems, Inc. (”MERS”)](http://www.newdeal20.org/2010/12/08/mers-28016/). Before MERS came along, every mortgage was recorded in a registry of deeds for the county where a mortgaged home is located. When that mortgage was assigned, it was recorded in the registry. Thus, if a homeowner ever had any doubt as to who owned his mortgage, he had only to check his nearby registry to find that information. MERS unilaterally changed the rules of the game (with no permission sought from state legislatures). Under the new regime, while an original mortgage is still filed in the local registry of deeds, subsequent assignments of that mortgage are not recorded there. Instead, information about them is simply entered into the MERS electronic recording system. Any homeowner can check the records of his local registry of deeds, but no homeowner is permitted to access MERS. Thus, it took away a sure way to identify the owners of mortgage loans.

After an outcry against MERS over its concealment of the identity of mortgage owners in its inaccessible system, it claims to have met those complaints by setting up a web site where homeowners can look up this information. The problem is, the website will not reveal the name of the owner of any mortgage unless the owner voluntarily allows MERS to disclose that information. My experience with look-ups on the website is that it repeatedly reports that the owner of the mortgage has not voluntarily agreed to disclose its identity.

Even when a mortgage owner does  allow its identity to be disclosed, there is a high likelihood that the information will be inaccurate. I am working on a case right now involving a Deutsche Bank trust created in 2006. Deutsche Bank claims that it has owned my client’s loan since 2006, but until July of 2009 the loan originator, not Deutsche Bank, was shown on the MERS system as the owner.

Use of the MERS website to look up mortgage ownership information is basically a waste of time for homeowners and their lawyers. I am working on another case right now where there were major errors at the inception of the loan that give our client the right to rescind it under the [Truth in Lending Act](http://en.wikipedia.org/wiki/Truth_in_Lending_Act). We know that the lender is out of business and that some other entity owns the loan, but we do not know who that is. The MERS website does not disclose the identity of the owner of this loan. Under TILA, the rescission letter must be sent to the owner, so we have to file a request with the servicer for that information. Experience tells us that the servicer may or may not respond and that if it does, the response may or may not be accurate. In any event, a lot of lawyer time will be wasted in seeking out information as to the identity of the owner of the loan, information that should be (and in pre-MERS days was) immediately available.

*Homeowners and their lawyers waste resources while the banks and their lawyers bide their time.*

As we pursue pre-trial discovery efforts, the servicers’ lawyers’ [hide the ball tactics](http://www.newdeal20.org/2011/01/21/how-banks-and-servicers-play-hide-the-ball-33250/) come into full play. In addition to throwing up unjustifiable objections, they stonewall for months on end in producing documents to which homeowners are undeniably entitled. We recently won a $2,500 sanction award against JPMorgan Chase after the bank stalled for almost a year in producing documents that it was obligated to produce within 30 days of our request.

While the lawyers for servicers are usually graded and paid for how fast they can rush a foreclosure case through the legal system, the rules change in that very small percentage of cases where lawyers show up to represent homeowners. At that point, the servicer is likely to remove the case from the grading system. The servicer’s lawyer is also likely to start billing the servicer at an hourly rate. When a case finally gets to a trial list, there are repeated requests from the servicer’s lawyer for continuances and delays so that the servicer can put off sending a witness to testify at trial.

**Cut and Run**

When we confront a servicer with clear proof that it cannot prove its right to a foreclosure, it will seldom pull back and take action to correct the problem. In one recent case where HSBC Bank was the foreclosing plaintiff, we developed clear proof that the note endorsement it was relying upon was signed by a person who had utterly no authority to endorse on behalf of the party from whom HSBC claimed to have acquired the note. Thus there was no proof that HSBC had any right to foreclose. Nevertheless, it convinced an unknowledgeable trial judge to give it [summary judgment](http://en.wikipedia.org/wiki/Summary_judgment). We appealed the case to the Maine Supreme Court and fully briefed it. While I was working as a volunteer lawyer on that case, the value of the work that I put into that appeal would have been well in excess of $20,000. On the day that its opposing brief was due, HSBC filed consent to the granting of the appeal, finally conceding at that late stage that it could not prove its entitlement to a foreclosure. It did not much care that it had forced that kind of legal effort on behalf of the homeowner because it does not have to pay the homeowner’s fees when it mismanages its cases.

Just a few weeks ago, we saw a similar development from the same servicer law firm, this time representing a Deutsche Bank securitized trust on a loan serviced by JPMorgan Chase. The trial court granted summary judgment to Deutsche Bank, even though it was clear that JPMorgan had failed to send the homeowner a proper notice of default and right to cure. Again, we appealed the case to the Maine Supreme Court, and again the foreclosure plaintiff capitulated only after its lawyers realized that we were not giving up and that it was about to lose.

In the now notorious [*FNMA v. Bradbury* case](http://www.scribd.com/doc/38656771/Federal-National-Mortgage-Assoc-v-Nicollee-Bradbury), in which I exposed the [dishonest affidavit practices](http://www.newdeal20.org/2010/10/20/robo-signer-23851/) of GMAC Mortgage’s Jeffrey Stephan when I deposed him this past June, GMAC recently moved to dismiss the case after two failed motions for summary judgment, a failed motion to prevent any sharing of Stephan’s deposition with other lawyers, and an imposition of sanctions upon it for its bad faith conduct. In moving to dismiss, GMAC admitted that it could not prevail in the action. This admission came after we invested legal work that, if a private lawyer had been billing, would have cost well in excess of $40,000.

In the “hide the ball variation 2″ case [described in my previous post](http://www.newdeal20.org/2011/01/21/how-banks-and-servicers-play-hide-the-ball-33250/), where GMAC filed a dishonest mortgagee certification signed by Jeffrey Stephan, it moved to dismiss that case only after we named that client as a plaintiff in the class action that we have brought against it.

The pattern that emerges from these and similar cases shows the practice of foreclosure industry lawyers to litigate right to the point where they are about to lose and to then cut and run. In this process, they are usually getting themselves off the flat fee charged in unopposed cases and onto an hourly fee arrangement that they like, and they are content to see homeowner’s lawyers’ time diverted from representing other homeowners.

**Wear Down the Opposition**

Working with homeowners to obtain modifications can be some of the most rewarding, and yet most frustrating, work that we do as foreclosure defense lawyers. Until Maine’s new foreclosure mediation program began on January 1, 2010, we were almost never able to obtain loan modifications for our clients. We couldn’t even get employees of servicers to talk to us. With the program now fully operational, we are able to negotiate loan modifications in many cases. It is very satisfying to see a homeowner walk away with a loan payment that he or she can afford, experiencing the relief from a terminated foreclosure action.

The flip side of this picture is the outrageous abuses of the loan modification process that we constantly see. The servicer leagues ahead of all others in this misconduct is Bank of America. We often have Bank of America customers come to us before foreclosures begin. These homeowners are desperate. They have suffered diminished or lost incomes for one reason or another and have been attempting to work out loan modifications before their reserves are totally gone and they are forced to default. Bank of America often ignores these homeowners or puts them through endless cycles of financial disclosures (repeated time after time because it routinely loses these papers), or it simply tells homeowners that they must default before it will even talk to them.

It gets worse. Even in the rare cases where a homeowner has obtained  entry into the HAMP modification process from Bank of America, which is supposed to involve a three-month trial payment period, it strings them along in the temporary payment for nine or 12 months or longer, only to finally, and without any justification, deny a permanent modification. By the time these homeowners get to us, they are angry, discouraged, depressed and exhausted. They are often ready to just give up and to walk away from their homes to bring an end to the tortuous process. I suspect that this is exactly the result that Bank of America wants.

Even when we come into these cases as lawyers, the same exhausting process continues. Agreements that we reach in mediation are not kept. Our efforts to obtain conversions of temporary payment plans to permanent modifications become an effort of guerilla legal warfare. Over the past few months, there have been abundant reports of the perverse incentives that motivate loan servicers to pursue foreclosures and avoid loan modifications. In the line of foreclosure defense on a daily basis, we see directly the suffering inflicted on homeowners who hope for nothing more than a fair chance to stay in their homes.

**Where is the outrage?**

Certainly the military families who [have been abused](http://www.housingwire.com/2011/01/17/jpmorgan-overcharged-military-families-improperly-foreclosed) by JPMorgan Chase must be outraged. Homeowners all over the country experiencing these abusive tactics are outraged. Overworked and tireless foreclosure defense lawyers are outraged by the abuses that we see on a daily basis. Very few judges, like [Judge Arthur Shack](http://www.mfi-miami.com/2010/05/judge-schack-nukes-us-banks-foreclosure-action-steven-baums-office/) in New York, have become outraged. But I do not see the outrage at out largest (and taxpayer bailed-out) financial institutions coming to a boiling point. When I [testified in front of the House Judiciary Committee](http://www.newdeal20.org/2010/12/08/a-foreclosure-laywer-goes-to-washington-29199/) in December, I did not come away with any sense of outrage there. When I saw the report about the abuse of American military families, I thought that would become a tipping point, but I has not even made headlines in the nation’s print and television media. What is it going to take?

*Thomas Cox is a retired bank lawyer in Portland, Maine who serves as the Volunteer Program Coordinator for the Maine Attorney’s Saving Homes (MASH) program. He represents homeowners in foreclosure and assists and consults with other volunteer lawyers in providing pro bono legal services to these Maine homeowners.*