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National Convening on Subprime Lending, Foreclosure and Race

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Panel 4 - Homeownership Rights & Advocacy

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MS. SCHWENKER: Welcome to the Class Action and Nuisance Litigation panel and discussion. In trying to keep with our time we are going to try to jump back on schedule and have this finish up at about 5 to 4:00 so the next session will start at 4:00.

I'm going to forgo reading the long bios for our esteemed panel, but to my right is Professor Creola Johnson who works here at the Ohio State University Moritz College of Law, professor of law there. Edward Kramer is director, chief counsel, housing advocates, and Charles Delbaum is the staff attorney at NCLC focusing on class action litigation. So we'll try to leave some time for questions. Please feel free to ask questions during the presentation. Everyone would enjoy that. And so we'll go ahead. Thank you.

MS. JOHNSON: So we wanted to get a sense of who is here to make sure that we're tailoring our discussion to help everybody. How many people are attorneys in here. So a couple other. You work?

FROM THE FLOOR: Kirwan Institute.

MS. JOHNSON: So not a law -- not a lawyer. Okay, then. So we'll make sure that I'll try not to talk over your head.

I decided to go first because of the context of what we just heard earlier from the previous two sessions including our keynote speaker in the sense that we're talking about the impact of the foreclosure crisis on cities, right. So how cities are responding to it.

Charles is going to talk about how do we respond to it from a class action litigation point of view. I didn't have a chance to rename my PowerPoint slide. I would rename it, large scale litigation, holding lenders responsible for the widespread foreclosure and abandonment problem. What we have from the foreclosure crisis that we didn't talk about today was the spike in abandoned properties. Those of you who live in urban areas, it's probably no mystery that we have a rash of abandoned properties, not just properties that are foreclosed. Lenders are operating from the mindset -- and it may have been true 30 years ago -- but they're operating from the mindset that when we complete foreclosure we want the person out. And the idea is if the person is out we can sell the house.

The declining market coupled with credit crunch, we don't have the ability to just sell the house. So, therefore, houses sit there. And we now know there is an industry that has arisen that comes around and strips houses.

I remember growing up poor in New Orleans, you left your cars on some streets, come by later and they're sitting on blocks because they get stripped. That's what's happening to houses now. They get stripped if they're sitting there. And I've been told by some of the inspectors that it doesn't take long at all from the time people move out and folks figure out the homeowner is gone, you've got these scavengers coming by stripping the houses of all metal.

We're not talking about the people leaving, taking their ceiling fans and so

forth. We're talking about scavengers coming in and stealing what they can later sell for scrap value.

I have been told I only have 15 minutes. Are you going to raise a note when I get to five minutes? I need to know that. I'm used to in law school seeing a clock, then I know how long I've been talking and I know when to shut up.

So there is a lot of rushing today. You've heard from lawyers today like Chris Peterson and he didn't tell you about MERS. MERS stands for Mortgage Electronic Registration System. MERS, they make it hard to figure out who is responsible, because MERS is set as an electronic assignment to hold all the assignments of these mortgages. Remember that big, convoluted picture where the mortgage is going somewhere. You have to figure out who is going to hold the note, who is going to hold the mortgage.

So MERS makes it difficult for the city who comes along, sees the abandoned property, goes and looks at real estate records. When you look at the real estate records, you can't figure out who actually owns the property. Remember, the tenant or the homeowner is gone. Let's assume they don't have any money. You can't get blood from a turnip. The only person left with a potential deep pocket is the bank. So how do you figure out who is the bank that holds the mortgage or note so you can hold them responsible.

So there a study from Cuyahoga County that found out that there were over 1300 post-foreclosure properties where the deeds had not been recorded. In other words the bank had completed the foreclosure process and didn't go to the sheriff to have the mortgage, the deed, recorded in the name of the bank, right. So then you can't figure out who is the actual one.

Remember if you are just looking at real estate records, it shows the originating mortgage company as the one holding it. That's why it doesn't matter what the real estate records say. You have to go through the trouble of figuring out how to find who is responsible.

I wanted to tell you the three main areas of how we try to go after the responsible party. The first way is through individual nuisance and abatement proceedings -- individual nuisance abatement and receivership proceedings.

By that I mean you've got through the city's housing court. In Columbus we don't use the housing court, we use the environmental court. So whatever jurisdiction you are from, some local municipal court has jurisdiction over these properties that are now blighted.

So you have got the city attorney who brings this nuisance abatement action and tries to hold the lender responsible. And what was happening with those proceedings is that you wind up with a default judgment. You then try to proceed either through receivership or through tax foreclosure proceedings and try to get somebody to show up and be responsible for the property. As you can imagine, the banks are ignoring it, and also the banks can say they didn't get proper notice because we didn't know who to send the proper notice to.

As a strategy proved to be unuseful.

Second strategy was to start initiating criminal proceedings. Buffalo and Cleveland literally are now coming into housing court, filing criminal indictments against banks to try to hold them responsible for the foreclosure crisis.

I'm going to skip to that because I want to show you a couple names.

And Buffalo is city attorney Cindy Cooper. She has written a paper, dissertation, about this. She has been in the media about this, how basically they have gotten criminal

default judgments, come up with a criminal sentence. And then, because the criminal sentences have not been paid, in other words, the fines have not been paid, they are using these to prevent the lender from coming in on some other property.

Imagine the scenario, over here we've got the property that's blighted, the lender is ignoring, it cares nothing about it. On this side of town is a piece of property that still has equity. The lender wants to foreclose, but the tenant or homeowner chooses not to leave, so we go to housing court to kick the person out. Because of the judgments outstanding on the property over here, the housing court judge says I'm not going to give you an order evicting the person on this property until you pay the abatement on this property. So that was good.

And then in Cleveland if you are taking notes the judge that's big on this is judge Pianka in the Cleveland housing court. If you Google that, you'll find a lot of information on that.

Then what was happening was as you can imagine these individual cases take too long and then if we're trying to find the responsible lender, we don't know who the lender is potentially to try to hold their feet to the fire until they come up in housing court on some other property. So obviously it takes too long.

Now we've got cities trying to be creative. And I'm using the term mass litigation or large scale litigation. Right now we've got three principal cities involved, Baltimore and if you came to the sessions earlier you heard John Railman talk about the Baltimore cases. I won't go into too much detail about that but simply to say that this reverse redlining case is a good case because you can show the first part of the test which is to show that the loans are predatory or unfair. That's easy because now we know how bad these loan products are. Then you've got to establish the second prong either by disparate treatment or disparate impact. Lots of data to show disparate impact in Baltimore. Any city you are involved anybody wants to get involved in this, get the folks to look at the city foreclosures, see where they are, map them out and see a disparate impact in terms of foreclosure in predominantly Latino, African-American communities.

Disparate treatment, as John Railman said earlier now we have all these employees that have been laid off from the subprime lenders. So some of these folks are willing to confess, get the sin out of their heart, and I think we're going to be able to find the disparate treatment and find out to what extent they actually targeted minority communities to give the bad loans.

That's all I'm going to say about that because I think Charles can talk about discrimination because his class action does deal with discrimination.

I'll skip ahead and move over to the Buffalo case. The Buffalo case instead of suing one lender Baltimore was suing one lender Wells Fargo based on the fact that there are 33 thousand properties.

In Buffalo we've got a different approach. We sued 36 lenders and we are not suing them based on the loans being subprimed and therefore in violation of discriminatory lending under the Fair Housing Act instead going after the lender based on common law statutory nuisance claim.

They sue 36 lenders, but we've only got 57 properties and literally in the lawsuit named the properties the address, 5622 Smith Avenue or whatever, okay.

So how are we going to establish this theory to be able to recover. First you have to figure out if the party you sued is the owner. As you can imagine, the owner covers the consumer. The owner covers anyone who is holding legal title. That's a

problem because remember I said if the lender has foreclosed but hasn't had the sheriff record the mortgage technically the lender isn't holding legal title. They can try to argue and they have -- all these lenders have been filing motions to dismiss on the basis that they're not the owner, not the responsible party, but the Buffalo code also says or otherwise having control over the property.

So the argument is you have control over the property because you've threatened foreclosure. You've initiated foreclosure or at the very least you've completed foreclosure to say you are exercising control over the property. Therefore the property in its current blighted condition is a nuisance. You've exerted control over it. Therefore you should be liable under the New York property maintenance code and the Buffalo city code.

Okay. So we're at the conference where race is at issue. I just went ahead and took some of the addresses in the complaint, mapped them using this zip code website. And one of the zip codes had a couple of properties in the complaint are in this 14206 zip code. Primarily white mostly single. I want you to pay attention to the income, income 27 thousand average value of the home 63 thousand. Now go to the next slide, another neighborhood. This neighborhood is mostly African-American. You see the jump, the decrease. We went from 27 thousand being the average income to 20 thousand being the average income for this zip code and went from 62 thousand being average property value to 43 thousand. That helps tie what Jim Carr was saying earlier which is we're talking about properties, we're talking about these foreclosures. We're not talking about people who got McMansions. Properties that are really not expensive properties. Ordinary properties that wound up in foreclosure.

So the short answer is here is the question is the Buffalo nuisance theory a good match litigation strategy. Yes. Yes because it's not grounded in whether or not the properties were originated through subprime loans.

So the Baltimore case is a Fair Housing Act discrimination claim. That means you have to first prove the loans were predatory or unfair subprime loans. In a nuisance case like this we don't care whether it's a prime loan or subprime loan. We simply say these properties are a nuisance. You have exerted control over the property. Therefore, you should be responsible. So Buffalo to me is the strongest strategy, and they should prevail.

Got to get to Cleveland because we're in Ohio. Cleveland sued 21 lawsuits 21 banks, Wall Street banks and their case is arising from the idea that you flooded the market with toxic mortgages. We're still saying the property is the nuisance. This piece of property is a piece of junk, but we're saying the reason why we have all these thousands and thousands of properties that are blighted is because you Wall Street bankers came in and flooded the market a depressed rust belt economy with subprime mortgages that any reasonable investor would have known at the outset would result in defaults and foreclosures. Therefore you should be responsible for the spike in foreclosures, for the myriad vacant properties and you should say to fix them up or pay to demolish them.

Let's move ahead to the short answer. and Cleveland can show a bunch of these zip codes are in minority predominant African-American neighborhoods. I had a bunch to tell you. I can't tell you so let's get to the short answer. Is this a good nuisance theory. I say maybe because remember their litigation is not necessarily suing the entity that holds the mortgage on the property or the completed foreclosure against the property. It says you flooded the market with toxic products and therefore you should be on the hook for it. I think that's a bigger stretch because you've got to have some judge that thinks

subprime mortgages are toxic and therefore that resulted in the causal connection between the toxic mortgage and the foreclosures.

Minneapolis and Minneapolis has filed a lawsuit not against the lender but against some defenders who had a fraudulent scheme with the real estate company housing rental agency, appraisers and so that case has turned out to be somewhat of a good case I think, but at the end I can't really assess how good it is because we have 141 properties that the city has taken charge of as a result of this lawsuit, but people are saying the properties aren't being sold because nobody wants to take them because if you buy the property you got to fix them up.

So at the end of the day I'm not so sure this is a good strategy to go after anyone other than the lender. The lender that holds title should be the one to fix the property not trying to pawn them off on somebody else to fix the property. I'm out of time I'm sure. Thanks.

MR. DELBAUM: Charles Delbaum with the National Consumer Law Center in Boston. And I just want to take 30 seconds to tell you what the National Consumer Law Center is if you are not familiar with it.

It is as its name implies a center providing back up assistance on all sorts of consumer issues. The thing I want you to know about is although we are heavily involved in this issue of predatory loans and particularly discrimination against minorities we also deal with fair credit reporting. We deal with warranty problems and all the rest of it. So if in some other part of your life you have issues in regard to that, then feel free to contact us as well, and we have a website. You can easily locate us. The good news and the bad news is I neither think nor speak as quickly as Cree. That could be good news if you are a little overwhelmed with information. I'm going to try to tell you a few things that I think are very, very important.

So there are obviously in the world of class actions, and I'm a class action litigator. There are really two kinds of cases that affect homeowners, one are mortgage discrimination cases. And I'm going to try to focus on those because that's primarily what this conference is about.

But obviously the subprime crisis has produced many other lawsuits that are trying to deal with saving people's homes and not showing that the bad loans were the result of discrimination. And if time permits I'm going to try to address those and Ed Kramer as well will speak on those subjects if we have a little bit of time to do it.

So there are four kinds of mortgage discrimination cases. There are individual borrower class actions; that is somebody who had a loan from Ameriquest and maybe a couple of other people get together. They hire a class action litigator and they file suit against Ameriquest. And they allege mortgage discrimination. There are about 20 of those, at least 20 of those going on around the country.

In addition, there is a class action suit that was filed by the NAACP in California which brings together 20 different, I'm sorry, about a dozen different lender in the NAACP as plaintiff on behalf of a class. Then there is a third group of suits that are not brought by private individuals or groups and that's the state Attorney General. And I'll try to tell you something about those because there are a couple of interesting ones and interesting suits in Massachusetts and New York and elsewhere and then there is the City of Baltimore suit which is targeting Wells Fargo engaging in mortgage discrimination. You've heard about that already.

So the private class actions we are part of a team of about five major law firms that are spearheading these separate class actions all around the country. You can see

we've got the rouge's list of lenders, some of whom are no longer in business but were when we sued them. That covers virtually all of the major predatory lenders are defendants in one or another of these suits. Again, they are not against several different lenders in the same suit.

One difference between our suit and the NAACP suit is our suit is on behalf of African-Americans and Hispanics. A difference between our suit and the Baltimore suit is that our suits and also a difference with the NAACP suit, our suits are alleging disparate impact not different treatment. And I'll explain why that is important and also what the big challenge is.

To understand the background of these suits for those of you who are lawyers in particular a big problem is that the bulk of these loans were made through mortgage brokers. So how do you show that the lender engaged in discrimination when they used a broker. Maybe a broker in the very community who, you know, knows people in the neighborhood and the ground breaker for this was the auto finance cases. These were brought within the last ten years and we were co-counsel in those also.

And in those the suits were against the lenders because they were the deep pockets, but they were based on what the dealers were doing, okay. And the lenders had a system which I don't think anybody has mentioned yet that's really important to understand. They had a discretionary pricing policy and the same is true for mortgage lenders. The discretionary pricing policy allows these third parties to mark up the loan rates. It was alluded to in the context of yield spread premium that's the yield spread premium in the mortgage. It's a markup. It's a discretionary pricing policy that allows the markup to occur. That was true in the auto cases too. The auto lenders GMAC or independent lender said to the dealers we don't care what you charge this guy, but if you charge him more money, you get to keep some of it. So the dealers had an interest in marking up the rates.

What we were able to show there by use of statistics is that had a disparate impact on minorities. And several of the lenders tried to get dismissed. Those motions to dismiss were denied. One of the cases went to trial and we wound up with a bunch of settlements that capped the markup that can be imposed by the dealers, provided funds for no markup loans for minorities and provided education funds.

The legal foundation of those cases as well as the mortgage cases based on disparate impact are the Equal Credit Opportunity Act which prohibits discrimination in loan terms and for mortgages only obviously the Fair Housing Act which you have heard about at length today.

The difference between disparate impact and treatment was commented on in the Watson versus Fort Worth Bank and Trust case where the court noted that while the defendants were arguing that it was only some intention that was prohibited by the statute, these facially neutral policies could be indistinguishable in their effects.

And there is an interesting quote in the case where one of our judges denied a motion to dismiss by Countrywide. This our mortgage discrimination case where the judge said Watson's focus on subjective decision making has particular resonance in the instant context where the fundamental question under COA and FHA is creditworthiness rather than say vague notions of suitability for this or that employment under Title 7.

Countrywide plainly identifies the objective standards that define creditworthiness and the par rate. Par rate is the base rate. It's enables its agents, brokers and corresponding lenders to add other charges at their other than discretion untethered from an objective assessment of creditworthiness.

That's what the cases are all about. They're not looking at just creditworthiness. If they were, everybody would get the par rate. They're giving the third party freedom to do more than give the par rate.

As a result, the mortgage brokers get rewards through the yield spread premium and through upfront payments, loan origination fees, loan discount fees, they get paid. And the same applies to corresponding lenders and even retail operations personnel of the lenders.

One of the big reforms that we should be looking for in this conference is to make any reward that these individuals who are involved in soliciting and providing the wherewithal for the loans, any rewards to them should be tied into the performance of the loan.

As you've heard, there's securitization out here, and once it's securitized, the mortgage broker has already gotten what they're going to get out of the loan so they don't really care if the loan performs or not. And that has resulted in a lot of the fraud and a lot of the poor underwriting.

The lenders' liability under the statutes is not only because they provide this markup policy which is discretionary, but they also provided a training support and forms and they encourage high interest loans and yield spread premiums from which they benefited directly.

Before I say more about the discretionary pricing policy I need to apologize to Ed because I have been rushing head long because I know we're very limited and have more to cover than we should, and I'm trying to make up for my natural inclination to speak slowly so I haven't offered Ed the opportunity to chime in with something if I covered something you want to elaborate.

MR. KRAMER: We've kind of agreed that Charles and I are going to share our time so that he can continue on, and I'll kind of provide some commentary.

MR. DELBAUM: If you want to do it while I'm speaking.

MR. KRAMER: That's what I'm going to do. Let me just say the other aspect of the actions we've talked about, you know, with John Railman's the Baltimore and we're talking about the individual class actions that Charles are doing and the nuisance suit by Buffalo, another potential focus which the housing advocates is doing is fair housing organizations also have their own right for standing under federal and hopefully under the Ohio Fair Housing Act, but that's been brought into question the housing advocate as a fair housing agency in Cleveland, and by the way we have an office now here in Columbus, have been bringing actions in our own name because we have housing counselors and we've been expending tremendous amounts of resources. We have a decision by the house of rights commission against Argent which is one of the mortgage lenders that Charles has brought a suit. We're suing on Wells Fargo. We are filing counterclaims, fair housing counterclaims along with other consumer protection claims in foreclosure actions, and we have about 40 or 50 cases that we've brought so far in defense.

The problem with doing that on an individual case by case basis is that even though we have nine attorneys there is no way that we can match the kind of resources, and when you are talking about last year there was almost 16 thousand foreclosures filed in Cuyahoga County alone for every case every home we save we simply are going to be losing 99. So that's why it is so important for this session to be talking about mass actions to try to solve this problem.

MS. JOHNSON: When you are talking about the housing you are bringing it because you have standing as a housing agency.

MR. KRAMER: That's right. As a fair housing agency.

MS. JOHNSON: What relief are you trying to get?

MR. KRAMER: We're looking at asking for damages because of our own housing counsel resources that we've expended.

MS. JOHNSON: To help borrowers.

MR. KRAMER: Yes, but we're also asking because we do name individuals who are clients of ours for relief from those individuals.

MS. JOHNSON: In the form of what, loan modification.

MR. KRAMER: Loan modifications it has occurred. We've asked for transfer of property, real estate property owned by these individuals to like the Cleveland Housing Network or housing advocates.

MR. DELBAUM: I wanted to pick up on a point that John Railman made this morning and Cree certainly may have more to say on this subject also, but one of the big issues of course is all these brokers had discretion under this discretionary pricing policy. And they had financial incentives to take advantage of everybody. Okay.

So why did it turn out that minorities were more significantly impacted on a statistical basis. And John mentioned about minority borrowers being more vulnerable, and I want to add to that part of it, and I think perceived as more vulnerable also so that the brokers would take more of a chance in pushing a loan that they might not have the temerity to push on a white person just because they had the perception of it.

In addition, obviously, historically minorities have been denied home loans. There weren't institutions in the community at which they could comparison shop and they had less experience with credit for a variety of reasons including that some didn't want them to have credit. I don't know if either of you want to talk more about that.

So let me move on to the evidence of disparities. A little bit of this was talked about this morning also. The HUMDA data from 2004 showed that minorities were twice as likely to receive a higher rate loan as similarly situated whites and that data was analyzed by the Center for Responsible Lending to control for legitimate risk factors, that was a huge step forward because before that time, before they were able to get this data about the credit characteristics of the borrowers it wasn't -- you weren't able to cement the case really that similarly situated whites and minorities were being treated differently.

And one of the pieces of evidence that we've uncovered, in the New York metropolitan area African-Americans were seven times more likely and Hispanics three times more likely than whites to have received a high cost loan. The statistics are just astounding. And I think this point was mentioned this morning also, but it's really worth emphasizing again that the disparities were huge for middle and upper income minorities as well. For example, those with income over 165 percent, you still had more than half of the blacks getting high APR loans as compared to 7 percent of whites.

So where are we in the cases at the moment. We're at the stage where motions to dismiss have been denied. We're actually up to 11 cases motions to dismiss have been denied. Motions to dismiss have not been granted in any of them. The good news is we're still in the game, but we haven't won yet obviously. We're in the process of discovery and --

FROM THE FLOOR: Can we ask questions. What kind of evidence is put before the court on these summary judges? What do you have and what do they have?

MR. KRAMER: We haven't gotten a summary judgment yet, and we won't until we're allowed to do discovery. The motions to dismiss we're just saying the pleadings were

adequate to stay the claim, but to tell you a little bit about what's in the future, we do have a group of experts including Ian Ayers from Yale and Hal Jackson from Harvard and a number of other people who have analyzed a lot of this data, Pat McCoy and are going to support our case, but we believe it can be supported even more strongly once we're able to actually do discovery.

The other piece, and then I'll take your question, is this statute of limitation is a big issue in these cases. And we also have won on the continuing violation theory that one of the speakers mentioned this morning that allows you to go back beyond the usual two-year period and cover loans made in an earlier time because the violation is continuing into the present. Yes.

FROM THE FLOOR: I don't want to take up too much time. I have two questions. One you just alluded to the continuing violation. I am at CRL. And we're considering a class action up in Maine for the HOEPA violations for not evaluating people's ability to pay. HOEPA, much like TLA, it's a one-year statute of limitations. It's a pattern and practice case, and I was looking through the case law in continued violations. And they said, oh, no, it doesn't apply to TLA because it runs from the date that they execute the loan documents.

My thinking of it was more analogous to the FHA case patterns and practice, and you can't bring a case on the day that your loan is executed because you have to show a pattern and practice. It is not like it's a violation right then. It becomes a violation perhaps sometime in the future. I was wondering if you had any thoughts on that.

And the other thing is another case that we're considering against WAMU. That's obviously problematic now because they're no longer in business. And the little of what I could do Googling, J.P. Morgan Chase has acquired their bank branches and trusts and whatnot. The press release they took on most of their liabilities. I don't know in trying to -- we're trying to bring the case against them, but I don't know what liabilities they agreed to take on. And I can't find where to get that information. I was wondering if you had any ideas where to get that.

MR. KRAMER: I'll take your second question first because I have no idea. Sorry. On your first question, let me digress for a second, and Cree may want to speak to this too. You are thinking about a HOEPA, that's shorthand for the Home Ownership Equity Protection Act, you are not planning a minority focus on that, just generally.

FROM THE FLOOR: Yes. I mean it so happens that, you know, that's the way this works.

MR. KRAMER: A big problem is that, and obviously you know this too, there is a three-year statute of limitations for rescission claims, but the big problem, which some people in the audience may not be aware of, is the Court's are coming down against rescission class actions under TLA which people -- everyone had a lot of hope for. I'll digress to that.

It's going to be later in the program, but there are several pending class actions including one against Ameriquest on multi district litigation with 350 thousand borrowers or something where in that court of appeals in that circuit, 7th circuit, just last week issued a decision saying you can't do a class action for rescission of loans under the Truth and Lending Act. That's a devastating holding.

There was already a similar holding in the 2nd Circuit Court of Appeals and the 5th Circuit Court of Appeals. But people, on my side of the fence anyway, were holding out hope that the 7th Circuit would take a more technical stand actually than the 2nd Circuit and would uphold the right to bring these rescission class actions. And you can't

do that.

FROM THE FLOOR: We're working on au bon petition.

MR. KRAMER: Sure. I'm sure you'll get lots of support. We will probably be amicus in that case. If you get over that hurdle, which I certainly hope you will, but before I go on to that, did either of you want to say more?

MR. KRAMER: No.

MR. DELBAUM: Then I think your continuing violation theory is, I think, it is a solid theory. It was this pattern, same pattern, same argument. I can't give you -- I'm sorry I can't help. I can tell you I think you're right, but I can't give you chapter and verse to help support that.

FROM THE FLOOR: Just make you a judge in the right court. It will work out.

FROM THE FLOOR: Charles, just to be sure this fits into what you just said, you talked about your success in defeating motions to dismiss, did any of those cases involve defendants who were national banks and whether preemptions arose in those motions to dismiss?

MR. DELBAUM: No, we didn't have any that were national banks and preemption was not an issue.

FROM THE FLOOR: One other question going back to the auto finance cases. You talked about the markups and where the rewards are. In a mortgage analysis, do you think you could carry that reward analysis all the way up to the trustee of the security?

MR. DELBAUM: I would really want to think about that one before I answer.

FROM THE FLOOR: Then I'll call you.

MR. DELBAUM: Please do.

Stan.

FROM THE FLOOR: I think a similar question if the lender who did the discriminating goes bankrupt and you start struggling about who you can get relief against, Railman's case is against Wells Fargo. He thinks they are not going to go bankrupt, but say New Century or somebody like America, the two most discriminatory lenders against minorities, seem to go bankrupt, do you see any way to get at either the upstream securitizers or the trusts that have the loans to make them fix them and if so, what would you need to prove of their involvement?

MS. JOHNSON: I was just going to say the presentation that I did is actually going to turn into a law review article. And you'll have as the first two words Fight Flight. In the paper I layout Baltimore's case, and again for those of you who came in late, Baltimore, the City of Baltimore has sued Wells Fargo for FHA violation based on discrimination.

So I argue in the paper that if you use discovery to show that they knew what was going on, then you could get to Wells Fargo because Wells Fargo is not going to be the originator on some of those loans. It is going to be somewhat late in the food chain for some of these loans.

So how do we know. How do we know that Wells Fargo knew what was going on. So I went to a NAPA conference last month. And you were there. You seen the guys who were in the trenches coming back. One of the panels -- I went to one of the beginner panels, maybe you didn't go to a beginner panel because your an expert. In the beginner panel they showed documents they had obtained through discovery showing what the broker did and what the underwriter and Wells Fargo saw when they approved the loan.

And I think it's going to be clear if you can get discovery through these documents you are going to be able to show that Wells Fargo could look at the

documentation coming to them and know that these loans, for example, know that some of the notes, you'll see what's the term, GR, gross up.

So some of the discovery has shown let's call it New Century. New Century sends the package to Wells Fargo. The income is social security. The form says 667 dollars, but on the amount where it says income it's grossed up to 898 dollars because they just artificially decide we're going to inflate your income.

So Wells Fargo looking at the document cannot say they thought the borrower made 998 dollars because it's clear that grossing up was just an artificial thing used by New Century to make the borrower qualify using that dead income ratio for the mortgage.

Does that make any sense?

FROM THE FLOOR: Yeah, they justify that saying it has to do with gross income after taxes for people on social security.

MS. JOHNSON: They do.

FROM THE FLOOR: Whether that's true or not is another question, but as far as getting not even the lender and the broker. We're talking here about the secondary marketplace.

MS. JOHNSON: The trust.

FROM THE FLOOR: If you are going to have impact on this, you have to be able to get the loan, make somebody fix the loan. And it has to be somebody with money which may not even be the trust. It may end up being whoever the investment bank was that put all this stuff together.

FROM THE FLOOR: I want to say something though. If we're going to bail out these firms and buy out the loans, don't we as the taxpayers become the investors who can direct the servicing agreement to act in certain ways to modify loans as whatever we demand as investors.

MR. KRAMER: That doesn't help the victims. We have people who have lost their homes and that. Let me -- one of the things we're doing in Ohio, the Ohio Fair Housing Act has a provision that doesn't have a comparable provision in the federal law. It states, this is 4112.02 J, capital, J, for any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be unlawful, discriminatory practice, and we are approaching and arguing, and I wish I could say this was my idea, but Marilyn Tobocman was the one that point his out to me from the Attorney General's office, the aiding and abetting portion. There is some very good law that could allow us to go where you are suggesting which is we have to get to the secondary market where there is still some money.

The restatement of torts second says that no -- for harm resulting to a third person from a tortious conduct of another, a person is liable if he knows that the other conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct.

So I think that's really what we're talking about. We're saying that these secondary sources bought these loans and then reloaded the predators to give out more money.

MS. JOHNSON: That's right.

MR. KRAMER: They aided and abetted. And I think that's a great theory which I haven't seen really used, but it has actually case law both in New York and in California under their human relations act saying that you can bring a third party where you are not a part of the process and sue under their civil rights statute.

So we're going to be using that. And I think that's something I would suggest and

especially for Ohio advocates. We do have this specific statute that we can point to.

MS. JOHNSON: In terms of the breach of duty, the breach of duty should be that even if we don't have case law recognizing a fiduciary duty, there was a duty owing to the borrower to approve a loan that the borrower could afford to pay. Otherwise you are just doing asset based lending. And we say that's predatory to do strictly asset based lending.

We've got the documentation to show the brokers and originators were approving stated income loans. And to me that's just willful blindness. You have decided to be willfully blind about the borrowers actual income and decided to give a loan based on the value of the asset.

FROM THE FLOOR: Could the CSPA cover that kind of activity?

MR. KRAMER: The consumers sales practices act. It could except that at least in Ohio, you know --

MS. JOHNSON: The banks are not.

MR. KRAMER: -- it wasn't covered with that. Let me just read the next sentence of the restatement of torts. It says: The alleged aider or abetter itself need not owe a duty of care to the victim.

We may not have to have that as an issue, whether or not there is a fiduciary duty by the secondary market, as long as we can show a relationship that they knew or should have known.

MR. DELBAUM: I wanted to comment on the question you just asked, and then go back to Stan's question too real quickly if I can.

The consumer sales practices act or unfair trade practices act can be a very powerful remedy within a state for an individual as well as classes. And one of the speakers this morning mentioned that RESPA requires a good faith estimate, but there is no provision for relief under RESPA for fraud or failure to give it, but it could be a consumer sales practices act violation.

Going back to Stan's question, there is the S and E liability that we don't want to lose sight of also. And it recently is coming up in some litigation in a very important way.

Under truth in lending, S and Es are liable for violations not just the lender. And I'm sure most of you know you have to give notice of an intent to rescind within three years of a closing or receiving the notice of right to cancel. But sometimes you don't know who to give it to because you don't know whose got your loan any more. It's off in this trust somewhere or whatever.

There have been some recent favorable decisions that say giving the notice after three years is okay under those -- to an S and E is okay under those circumstances where you were not on notice who the S and E was. Don't give up on those people if you have that situation.

I want to jump in the interest of time, NAACP class action. I mentioned it's against about 12 of the banks, and it is primarily a steering claim, but it also has a disparate impact piece to it too.

The part I want to bring you up-to-date on is that about two weeks ago there was a notice of proposed settlement filed as to one of those 12 lenders, the option one. And if the court approves this settlement, it will resolve the NAACP's injunctive relief claims. Borrowers who want to can still sue for damages.

That sounds like not a bad thing except the problem is borrowers, as a practical matter, a borrower can't sue for mortgage discrimination and effectively pursue that case.

It has to be done as a class action because it's too mammoth to try to require proof.

To some extent this is leaving people with very little in the way of hope of getting damages. It does provide for better training of employees and mortgage brokers and education and outreach including by the NAACP which will get some funds for that purpose and undoubtedly will be criticized for apparent self-interest.

But what it doesn't do it doesn't require option one to cap the mark ups the way the auto discrimination cases did. And it doesn't really require them to change their practices. So there may be some objections to that settlement when it is presented to the court.

FROM THE FLOOR: Question. If this is not allowing the borrowers to file for damages, why are they settling?

MR. DELBAUM: It is allowing them to file for damages. In other words, they're settling for injunctive relief. They're saying we're going to get some things better, which they are, and we're not going to deprive any class member of their right to sue for damages which is a good thing because it would be far worse if they were settling and also depriving individual borrowers of their rights.

It's one of the criticisms, as most of you know or at least litigators know, it's one of the criticisms of class actions. Sometimes they're settled, and the consumers who were the victims get virtually nothing but the lawyers get a big fee.

That happens on occasion. And we try to fight it when we see it as objectors, but it does happen. That is not happening in this case. They're not getting anything for those individual borrowers either. They are not getting any sort of fund to help them.

FROM THE FLOOR: What would be a better option as opposed to this type of settlement? What would be a better?

MR. DELBAUM: Two things, one would be a cap on mark ups so that in the future while I think Option One is basically out of business. Maybe they didn't need to worry about it. They didn't need to worry. That's fine. They don't need to worry.

FROM THE FLOOR: Wasn't it bought by Wilbur Ross?

MR. DELBAUM: It was H & R Block.

FROM THE FLOOR: Wilbur Ross. He's trying to make a big play in the market.

MR. DELBAUM: You are more current than I am. I knew about the H & R Block. And some sort of funds to help the people in these loans. Obviously we have a foreclosure crisis. This settlement isn't going to help anybody who is in a foreclosure posture.

I'll keep this short. New York Attorney General recently announced settlement with Greenpoint Mortgage. This one in brief is a good settlement partly because it provides for a million dollars in restitution to African-American and Latino customers. I can't comment on whether that's ten dollars per customers or a thousand dollars per customer. I don't know if it's good or bad. On its face at least it's trying to do something to help the current customers as well as requiring remedial steps.

MR. KRAMER: Does that have an impact on them being able to bring their own suits; do you know? That's been my problem with some of these as you mentioned class actions. We have clients come into our office who got a check for 167 dollars and their rights have been extinguished. They didn't even know it. We filed our actions and got a motion to dismiss with an attachment showing some judge in California said, well, these rights are extinguished unless they opt out. I wonder if that's the case with the Attorney General's office.

MR. DELBAUM: The Attorney General's press release didn't reveal that, but I didn't check the decree itself. I don't know.

But that's a good segue into the Ameriquest litigation which I think is important to talk about briefly, and the reason it's a segue is the Attorney Generals from around the country, 49 Attorney Generals, and banking regulators sued Ameriquest. They didn't sue Ameriquest. They negotiated with Ameriquest en masse. And the reason it was only 49 is Ameriquest didn't do business in Virginia.

So every place a Ameriquest did business you had a regulator in there negotiating to try to get some help for all the borrowers. And they did. They got the second largest settlement ever. They got 325 million dollars. And 295 million dollars of that went to help borrowers who were in these loans, but there were so many borrowers that the reality was that the maximum any borrower would get was less than a thousand dollars which isn't chump change, but it doesn't really change when you are in a hugely predatory loan that's kind of like these payments that we got from the government, the 600 dollars, they were nice for a month or two, but it's not going to help you.

If they took that one thousand dollars -- you weren't required to take it. It was an opt in settlement. Borrowers didn't lose their rights without being given the option of saying, no, I don't want any part of your class action settlement, but if you took the class action settlement you were barred from affirmatively suing Ameriquest.

Again, in a good feature that was going to be more interesting to lawyers than non-lawyers, the borrowers kept their rights to use their claims as defenses if they went into foreclosure even if they took the thousand dollars as part of settlement.

In a lot of these situations you are dealing with the real world which is imperfect. And this was a realistic effort to try to balance it. It didn't end the private litigation and currently in Chicago there is a multi-district litigation involving several consolidated class actions and about 800 individual suits. And I'm cochair of the steering committee for the individual litigants in that case.

And I think the last thing I want to say is about the loan modifications and the settlements that are in progress in that litigation. Bear in mind the context.

You have Ameriquest, the poster child of nasty, aggressive, misleading, fraudulent practices that would, you know, they would give somebody a loan and six months later they would solicit them to flip the loan. And they would phoney up income, phoney up appraisals, as bad as you can get. Despite that and despite the efforts of a mediator, there is very little loan modification going on in the way of bringing about settlements of these cases. So far we've been able to get modifications of about 15 to 20 individual loans.

And the reason is because we're not dealing with just Ameriquest any more. We're dealing with these trusts that are controlling the loans and, A, sometimes they don't even know really who has authority, B, sometimes they don't have authority, I don't know if that was emphasized enough this morning, sometimes the servicers or the trusts because of the documents they can't modify the loan. And, C, the problem is that a lot of these current owners want indemnification from Ameriquest, and Ameriquest is out of business.

The good thing about the suits is they put some of these out really bad actors of business, Ameriquest, Option One, New Century, but the bad news is it's hard to help the people who were stuck in the loans originated.

MS. JOHNSON: I wanted to say a couple things on the bail out. I was talking about using large scale litigation primarily using nuisance law to go after the lender to hold them responsible.

If you have Paulson buy up these loans, and these loans have properties that are blighted, then we the taxpayers are the ones now responsible for the properties. Does

everybody see that? That's why this whole idea to me of us buying these mortgages, and we don't know -- it's -- when I look at the people questioning it, some of the people they question it, they're questioning it in the sense of do we know what the loans are worth.

My short answer to the question is, well, the loans aren't worth anything. If the loans were worth something, wouldn't we have people in the open market willing to buy them. And we're going to sit and here and buy the loans. In case you split up in one of the sessions tomorrow is supposed to be talking about legislation and what we can do. And in the paper I talk about how we need comprehensive nuisance ordinances. We need to have whatever you want to call them comprehensive nuisance ordinances to require lenders to register their property once they've declared default.

Because if you have an obligation to register the property, then we can find you. We don't leave cities in a lurch trying to figure out who in the world is responsible for the property. Broadly define owner so you are able to get a lender even if the lender fails to record the mortgage. Require the lender to pay a registration fee. Somebody has to pay for the inspectors to go out and check on the properties potentially in foreclosure to make sure they haven't become a haven for criminals or looters.

The other thing is to require the lenders to monthly inspect the property. If you a heard a lender say: this is horrible and too much of a burden. We have Safeguard and a whole bunch of companies that exist to go around and preserve the property. Then I think we need to charge hefty fines for noncompliance.

The problem with what we have right now is in most jurisdictions if you have property where a nuisance needs to be abated, the fine for failure to abate is only 100 bucks. If you start making failure to abate nuisance a thousand bucks a day, it would take 30 days for the bank to be in the hole 30 thousand dollars, and the banks when they do cost benefit analysis, they would say it is better to go and take care of the property than be on the hook for 30 thousand. I promise you Safeguard is not going to charge 30 thousand dollars a month to maintain the property.

A comprehensive nuisance should give the city first priority lien status for any expenses incurred to take care of the property. When I say first priority liens status some statutes already have that, but I'm talking about first priority lien status not going through the long drawn out nuisance abatement proceeding, but simply saying if property is vacant and has anything wrong with it, grass growing all over the place, scavengers, any one of these conditions we can define and say if this is happening at the property, it is automatically a nuisance and then we have first lien priority status. So many days to fix it and you don't fix it, we have first priority lien status for any expenses that we do incur or are about to incur to take care of the property.

You should set up a situation where neighbors are able to trigger the lender's obligation. If you got a lazy lender that won't do something, the neighbors should be able to do something. Most of the time it's the neighbor that notices something wrong with the property once the homeowner has abandoned.

Then you heard me mention briefly this new bill that was signed in July by President Bush, the Housing and Economic Recovery Act, appropriates 3.92 billion to eight states and local communities to buy up foreclosed and abandoned property.

I say if you are going to do that, it should be heavily discounted evaluation of the properties. Evaluation of the properties based on their blighted condition not any two or three years ago appraisal that we know had some fraud in it as well, but we should require new, recent appraisals that takes into account how much it's going to cost the city or the community to rehab the property, to put it in a condition to make it

resalable.

In other words, the lender might say I want 100 thousand dollars because that's the debt they have on the books. Say, no, this property is in bad shape. The most we can offer is 20 thousand bucks. If you don't take it, then the city comes after you to make you fix up the property and maintain the property. I just wanted to say that in case I don't make it tomorrow because I have another conference to go to next week, and I haven't prepared for it.

MR. KRAMER: Maybe I can do a couple closing to give you some indication of the impact that this has had. We just settled a case. The mortgage appraisal in 2005 was for 89 thousand for this East 147th property owned by a woman for the last 38 years, an African-American.

The appraisal may have been a little high, but it was pretty on point. She's got a very nice house, well maintained. She still maintains it. Her street is all three sides of her is vacant properties. The appraisal that came back in March of this year, 31 thousand dollars. So her equity has been stripped.

Now, we were able and demanded to settle her case that we only get -- the new mortgage is only for 80 percent of that 31 thousand so she has some equity, but that's what we're talking about.

We have a client whose appraisal in 2004 was 67 thousand dollars. It's now negative 11 thousand because they say the property, there is so much repairs that still need to be done, and the properties are so vacant.

The people are demanding -- the bank is demanding 8500 dollars for us to buy this property. It has already been foreclosed in sheriff's sale. But the bank is demanding -- we offered 2500 dollars. And they're asking even though it's appraised, their own appraiser at minus 11 thousand. This is a what we're facing here.

One other thing. I just found this out on Tuesday which you probably can't see it, but maybe after. This is First American Title has data for throughout the United States of all adjustable rate mortgages that will set for the next 18 months that you can buy. And Case Western Reserve University has used that data along with looking at the HUD subprime list.

And from June 2008 to January 2010, 18,079 additional mortgages are going to reset in Cuyahoga County. If you look at this area that's so blue, each dot is a mortgage that is the east side of Cleveland. It's African-American. It's already been devastated. In 18 months, if we don't do something to solve this problem, we're going to be -- we're going to slip below the waves. The tsunami is coming, and the second one is on its way.

That's why this conference is so important and what we're all doing is so important. We've got basically 18 months, and what we're hoping to do with this data, we now have the names of all 18 thousand people, the addresses, how do we contact them, how do we try to get the loans remodified. And this is something you can do too in your community. It's available. And you should contact, if you are interested, myself or -- and we can give you the information of how you might go to try to get this down from First American. Thanks.

MS. SCHWENKER: Thank you very much. Very interesting.

This is a rough draft - it has not been proofread for errors