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*National Convening on Subprime Lending, Foreclosure and Race
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Panel 7 - Housing Preservation Project*

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MR. MENENDIAN: We have a fantastic closing panel for the day. I know it's been a long day. This is the final panel of the afternoon and this is on Litigation, Reform and Legislative Responses.

First up will be Mark Ireland. Mark Ireland is a supervising attorney of the Foreclosure Relief Law Project as well as an Adjunct Professor of Law at Hamline University. Mark graduated with honors from the University of Minnesota School of Law. And since graduating, Mark has represented injured people in a wide variety of consumer protection, healthcare and fraud cases. In private practice as an Attorney General for the State of Minnesota, his work there was primarily in the Consumer Enforcement Division. Mark has spoken locally and nationally on consumer protection matters and was named a rising star by Minnesota Law & Politics magazine. Between his first and second year of law school, Mark lived in Zimbabwe. He traveled and studied redistribution programs in southern Africa related to the high concentration of arid farmland owned by the minority White population. Prior to law school Mark was a public affairs fellow with the Coro Foundation, and he also interned for Senate Minority Leader Thomas Daschle and Vice President Al Gore.

Linda Fisher will be second speaker. She is a professor of law at Seton Hall Law School. Her current specialty is in the areas of foreclosure and subprime lending. Through her clinical work in the Center for Social Justice, she and her students defend borrowers in foreclosure and pursue consumer fraud claims against predatory lenders. She works with the Center's Urban Revitalization Project to develop and promote strategies addressing urban housing issues. She is a member of the New Jersey Supreme Court Committee on Minority Concerns, the State Bar Consumer Protection Committee and the Newark/Essex Foreclosure Task Force. Professor Fisher was an assistant professor of law at Penn State-Dickinson Law School before coming to Seton Hall. Prior to that, she was a constitutional civil rights lawyer in Chicago and taught legal writing at Northwestern Law School. She received an LL.M. from Northwestern, a J.D. from the University of Chicago, and her B.A. magna cum laude from Macalester College.

Nadine Cohen has been a civil rights lawyer for 20 years. She developed Boston's first private fair housing testing project and established a private bar panel to handle referrals of fair housing cases. She was instrumental in establishing the Fair Housing Center for Greater Boston, a private fair housing organization in Boston, and serves on its Board. Ms. Cohen is currently the director of a new Consumer Rights Project at Greater Boston Legal Services where she is engaged in predatory lending and foreclosure prevention issues. The project provides legal representation to low income homeowners facing foreclosure, particularly those who have been victimized by predatory and abusive lending practices. It also engages in community education, legislative advocacy and works

in coalition with community and government organizations to develop systemic approaches to address the current foreclosure crisis in Massachusetts.

I am Stephen menendian, and I'm a research associate with the Kirwan Institute. I'll be monitoring this panel. Let's begin.

MR. IRELAND: Good afternoon, everybody. My name is Mark Ireland, and I'm way older than 13 years old even though I look young. My dad shaves about every other day so maybe in about 10 or 20 years I'll be ready. All right.

Litigation responses to subprime lending foreclosures and race. Just as a little disclaimer, I really don't think that there is one remedy. And if there is one thing to take away from this conference and the other conferences that you go to, I don't think that there is anybody who has a magic solution, because every community is a little bit different, every state is a little bit different. And although there are common actors and common issues, it's going to take all of those things to really make a difference and really turn the tide that's just been devastating so many neighborhoods and so many cities across the country. And then also just that housing is just one piece of that larger problem.

As a lawyer, I want to sue people, right. So I think I'll make the pitch for why we should sue these people. All right. First, I think it provides order to a very complex system that we have, and I've got my little flow chart as well. It's proactive as opposed to reactive. So as opposed to waiting for somebody in Washinton D. C. to come up with a great idea, no offense to people in Washington, D. C., but I think if we are talking about building a grass roots response to subprime lending and predatory lending, it's got to come from the communities in which the impact is there, it's on the ground, you see it, and you're going to be able to devise those answers.

And the third is without a lawsuit, we don't have any leverage. Without a lawsuit, you are going hat in hand to the servicers and the lenders, the people who got you in this mess. And absent any leverage, you aren't going to get anything very substantive.

So just as it relates to the order, I think that I've seen this both at the Attorney General's office and then now at the Housing Preservation Project that public interests impact litigation, brings structure and order to complex situations.

So we have a traditional banking model. You know, the other people that have all the statistics and stuff, I've got a picture of a pig. So we got -- there are additional banking model where the pig loans the money to the consumer and it goes back and forth and this is a dumbed down version of Professor Peterson's chart. And you can see where now you have the accountability through the securitization process completely stripped or trunched out to different actors, different people. And it's very hard, because you have servicers who don't have any incentive to deal with you and because they don't have anything financially to gain, and it actually costs them money, cost them about seven to \$10,000 to do a loan modification.

And so absent any sort of uniform standards, what's in it for them? And just to give you an example, we approached a major servicer and said, hey, you just sell us it and we're a nonprofit. We'll write you a letter and we'll say here you go. You donated -- if you say this horrible property is worth \$100,000, fine. We'll accept that. You sell it to us for 10 grand, we'll write you a letter saying thank you for your donation of \$90,000. It will be a tax write-off for you. And the servicer said, we don't own a property. And even if it is a tax write-off, who of all those people are going to basically benefit from that tax write-off? None of them will. And the servicer certainly would not benefit from that tax write-off. So I think it provides order.

I think there are three litigation concepts or theories, and one is a straight race-based litigation under the Fair Housing Act: Our state, our federal discrimination laws.

Then we have our disparate litigation, and I'm misusing the word disparate

litigation because usually that's used to refer to Fair Housing Act claims related to race neutral policies that have disparate impact on communities of color.

Last night really late at night I came up with this now in the late of day it's probably not so clever, but the way that I viewed this litigation is race-neutral litigation that has a disparate beneficial impact on communities of color, so using race-neutral laws in legal theories that really weren't designed to help communities of color, but in the foreclosure context since the communities of color have been so disproportionately affected, that litigation is going to end up being and helping communities of color. And so that's the disparate litigation.

And then the third is micro litigation. So as it relates to micro litigation it's thinking small to think big. And one of the big problems right now is we need to go fast. And class actions -- I think there are lots of law firms where the people make a lot of money and they already know and have the briefs and they have the tools to slow you down when you file a class action. They know how to attack commonality and typicality and numerosity and particularly in the lending context there is so many other factors that it's pretty easy to say Borrower A is not like Borrower B, and they can make a good faith argument to put that hurdle up.

So one of the things that we're working on through the Housing Preservation Project is trying to do mass joinder cases where you have 50 to 100 or 150 individuals who have a Truth in Lending Act claim, strict liability claim, against the same servicer, against the same owner of the mortgage and then filing that claim all at once to get as much leverage as you can. And so you are avoiding the class action that the normal motions that you would normally have, but if the foreclosing entity is Chase or Wells Fargo having all of those claims as you now have a similar party, one Defendant that is the same for all those individuals, and you have similar legal claims, then you can add in the current owner of the trust of that mortgage and you'll get speed, efficiency, cost, and you'll get leverage in terms of a doing a mass modification as it relates to all those people.

SPEAKER: Can we ask questions now?

MR. MENENDIAN: You should probably hold off because we only have 20 minutes.

MR. IRELAND: So the litigation approaches are really front and back end and somewhere in between. And on the front end litigation I think it focuses on the practices that were immediately prior to and at the origination of the loans that ultimately resulted in the foreclosure. And usually those are your Discrimination Act claims, your Truth in Lending Act claims, and then you have the one that I'll talk a little bit more about which is the negligent or improvident lending cases.

And we've heard a little bit about the Baltimore and the Cleveland lawsuits. The Hawthorne Area Community Council versus City Mortgage is the case I filed last spring. And it's the first case that I'm aware of in which a neighborhood group sued a lender for the tort of negligent lending or improvident lending.

So the cause of action was that City Mortgage, through their negligence, in originating this loan to this other person, his name is David Keith, who's in prison, never had a job in his life, they loaned him \$250,000. He never made a payment. The home immediately went into foreclosure. And the crux is is that this house was in the middle of a development for the Hawthorne neighborhood, and the Hawthorne neighborhood needed that house to get site control of five properties to do their real estate development called the Eco Village.

And about three weeks before this quarter of a million dollar loan was originated to Mr. Keith, they had it appraised, and it came at \$130,000. And so when they offered that to the owner, he said, no, I've got another buyer, and then later on we saw this mortgage come out for a quarter of a million dollars. And that lending practice is their failure to properly underwrite that loan in that neighborhood, which is north Minneapolis, this was the spring of 2007. So we were already seeing lots of foreclosures, lots of

abandoned houses, was really City Mortgage not following the prudent underwriting standards of the industry.

And so you go back to law school. What are those elements of a tort, right? You've got the duty, right? You've got the duty under the federal law and under state law related to certain underwriting practices. You have a breach of that duty, which they did here. You have damages and you have causation.

Now, you can argue and you can see, well, did they owe that duty to the individual neighborhood? And I say, yes, they do. And when you look at both how they're regulated and you look at their individual mission statement and public statements, even if no duty existed at law, there is a long string of case law that say that people can voluntarily assume a duty. Even though ordinarily no duty exists at law, over time by making public statements and declarations, particularly when their PR people come into the community and say these are the standards that we have, these are the standards that we follow, these are our underwriting practices, that at that point they have assumed a duty to the neighborhood and the community.

Now, the result of that is we recently entered into a settlement agreement and the terms of the settlement agreement are confidential, but what I can reveal is that that house that we're going to buy for \$130,000 the neighborhood got for 18 grand, and now that development can go forward. The other benefit of that litigation is that it shielded it from all the slum lords that were going to come in and say, hey, this is great. This neighborhood really wants this piece of property. I'm going to bid up the price, because no matter what I buy it for, the neighborhood is probably going to buy me out for a little bit more and I'll make a quick profit. So that's the house there. Looks like a quarter of a million dollar house, doesn't it?

And there is a lot of interesting stories about just how this house deteriorated after this loan. So we had it appraised at 130,000. Then probably about three months after the mortgage was originated the basement was lit on fire, the windows were broken, here you see the glass, tires started accumulating. I don't know if they breed or what, but tires started to, you know, populate in the back of the house and so --

SPEAKER: Just like rabbits.

MR. IRELAND: So there is the back end litigation. And this is my pitch for the back end litigation, and it relates to conduct after the sheriff's sale and the foreclosure sale. So you saw Professor Peterson's big chart and it's really complex. And for people who aren't too smart, we know after the sheriff's sale who owns it, right? The people who bought it at the sheriff's sale. And they are the people in the property records, and they -- there is a dispute, you know, if it's MERS or if it's a trust, but my position is that if you are a trust and you bought it as a sheriff's sale, you own it and you're responsible for it. And I would challenge any attorney to come into a court of law and say, Your Honor, I bought this at a sheriff's sale, but I didn't really buy it as a sheriff's sale. I'd like to see that brief and I'd like to see them make that argument in court.

And so I think that as it relates to the back end litigation and in terms of getting leverage and your foot in the door to negotiate all these other things that we want, right, we want them to be more responsive to our loan counselors, we want them to modify loans, we want them to take care of their properties. Looking at whether or not they are taking care of the properties that they bought at the sheriff's sale, whether or not they are taking care of the properties after the redemption period has expired and they are holding in their RAO portfolio can be a way to do that. And that's one of things -- I represent the City of St. Paul, and that's one of the things that we have done, is we went through our property records and we identified, okay, how many properties does Wells Fargo own? How many properties does Deutsche Bank own? How many properties does Chase own?

It's a different way and it's not how -- we sent them a letter with a spreadsheet

of all the properties that they own and the legal buffet of things that they are violating, and said, you know, tell us systemically how are you going to deal with all these properties that you own.

But I think that that initiative shows that you can get the attention of a lot of lenders, a lot of servicers, a lot of trusts and you can use them. If they say they are not responsible, then you can say, well, get me the people who are responsible around the table so that we can solve these problems.

And then finally, the somewhere in between. So we got the back end, the front end and now the somewhere in between. If you are a judicial foreclosure state, your court has the power and the authority to, like the City of Philadelphia, modify how cases that are filed, to foreclose on a home, how they are handled and most courts right now have procedures to encourage and facilitate alternative dispute resolution.

And about a little over a year ago we were at the National Consumer Law Center, and there was a meeting about what we could do. And one of the things that we talked about was, hey, you know, the credit card companies really like that binding mandatory arbitration. Why don't we try that, too. And so one of the things that is possible is that you can, through the court system, try and force some rationality on to this process which is totally missing. And through the court, before that foreclosure is processed, you can require that they engage in some sort of good faith, nonjudicial mediation of that foreclosure.

And the reports that I've heard from Philadelphia is that it's not a panacea, but that it's helping and that it's working. So I'll leave it to the other Panelists. There is my contact information if somebody ever wants to call me, feel free to give me a call. Thanks.

MS. FISHER: I do not have a Power Point, and in fact I'm calling this a green presentation. I have no handouts and I'm not using excess electricity if that's a rationalization for lacking slides. Maybe with the alternative energy source of my own personal wind power, I'm not sure.

I have seen so far today in this conference a real tension between, of course, not the big picture, the huge picture, the global historic credit crunch that we're in right now and everybody scrambling to make a little bit of sense out of the whole thing yet at the same time here we are addressing very discreet local efforts as well. If this isn't the best illustration of the maximum think globally act locally that I've seen in quite some time, I'm not sure what is.

And you'll notice my presentation is framed by my outlook as what I call a confirmed or dyed in the wool legal realist. I'm focusing not so much on law on the books, and in particular in New Jersey we've got some pretty good law on the books actually but rather the law in action. Is it being enforced? How is it being enforced? How could it be enforced better? How can we tweak what's there to make it work better?

A little bit of background on New Jersey first. I guess I'm feeling a little defensive since my new state -- I've been there now 13 years -- is truly a laughing stock of the nation. Doesn't deserve it. It really has been for a long time, I think, one of the most progressive states in the country both in terms of the court system legislatively and local leadership, and in some ways our current approach reflects that as well. It's a state of fewer than 9 million people, the most densely populated state in the union. Sometimes trades off between Connecticut, the most affluent state in the union, although that is not because of cities like Newark where I work, but rather the affluent suburbs and the fact that it's extremely suburbanized state kind of wedged in there between Philly and New York.

New Jersey's foreclosure rate in the last year has been roughly somewhere between 10 and 15 in the horse race among the states. Statewide foreclosure filings are double those of last year. I think that's pretty much the case around the country.

Interestingly, the Federal Reserve's August '08 snapshot of foreclosure statistics shows New Jersey with the second highest number of subprime loans in foreclosure in the country, 17 percent. That probably is largely due to the fact that we have really borrower friendly fair foreclosure act that builds in multiple notice periods and opportunities to redeem.

And I never heard of this before coming to New Jersey. There is a right to redeem a property that lasts for 10 days after the sheriff's sale. So if people could only get refinancing, the whole thing would probably work relatively well.

Now a little bit more about Newark. It's a city of a little less than 300,000. All those statistics and maps that we saw earlier in the day about Philadelphia and Baltimore, the overlay between the incidents of subprime lending and minority census tracts holds equally in Newark. Unlike cities like Baltimore, however, we don't have one subprime lender dominating the market the way Wells Fargo did there. Subprime lenders, about 12 or so have shared the bulk of subprime lending over the last several years.

Let me add parenthetically we started talking to John Relman about the possibilities of Baltimore-type reverse red lining suit, but it's complicated by the factors such as the spreading out of lending in the market.

The Newark home ownership rate is less than 25 percent. That astounded me when I first heard it, although I imagine that's shared by a number of other older, poorer minority cities. The vast majority of residents are then, of course, tenants, many of them living in two to three flat buildings, many of these owned by small investors who have fallen into foreclosure.

When I say investors, it's certainly -- I talked about this in the last panel for those of you who were here. A lot of these folks are just moderate income African-American residents of Newark and surrounding areas who for the first time in their lives had a little bit of money to invest, and for a bunch of reasons, including historical ones, they felt safer investing in the real estate market than, say, buying CDs or shares of mutual funds.

But what's happened as a result of a lot of really atrocious property flipping -- and I'm representing a class of these small-time investors against property flipping operation -- is people were just defrauded up and down into lending their names and credit scores to the purchase up to 10 differential properties in order to benefit the flippers. The problem though with the slipover affect is all the renters are now being affected as well.

Okay. Enough background. Now a little road map of what I'm going to be addressing, the three areas that I think are most significant in terms of New Jersey's concerted actions against the crisis right now. And when I say New Jersey's efforts, I'm talking not just about state and local government, of course, but nonprofits, private advocates. We've been having some amount of success bringing entire community of state holders on these issues together to address them.

First, our Anti-Predatory Lending Act called the Home Ownership Security Act, I'm very involved in helping pass this in '03, and I want to talk a little bit about what's happened since then.

Second, some of the current issues in the foreclosure process in the court system in New Jersey relating to the Plaintiff foreclosing banks' ownership of the note and mortgage.

And then third a little bit more about our foreclosure task force in Newark and Essex County and some innovative issues of statistics and data that we're developing right now.

Okay. So, first our Anti-Predatory Lending Law. It's what's called a mini HOEPA. I know there has been a lot of talk about HOEPA here today. HOEPA was a disappointment, as enacted, to many advocates, not because of its structure but rather because it only applies to a tiny, tiny minority, maybe one or two percent of all mortgages that were out

there at the time in '94.

And as a result, for over a decade now advocates have been working on the state level to pass statutes that are structured the same way as HOEPA but are more consumer friendly in that they encompass a higher volume of loans than the Federal Act did.

I recently saw a figure 28 states have passed some version of mini HOEPA or other anti-predatory lending registration. And they range really from quite strong to consumer friendly. I would say North Carolina would probably be the first. Upstate New Jersey is in the top five down to rather some token efforts.

Not long after a lot of these statutes were passed, and we have also heard this mentioned in previous presentations, the Feds stepped in to preempt most of it. Office of Comptroller of the Currency, OCC, Office of Thrift Supervision, OTS, within months, just two or three months, the effective date of our bill in late '03 exempted all federally regulated banks from coverage under acts such as this.

But I'm happy to report that notwithstanding their wiping out seemingly much of the coverage of the statute we actually have seen it is effective in a number of ways.

Center for Responsible Lending came out with a study in '06, nationwide study, broken down state by state indicating that in New Jersey the volume of the worst predatory loans had dropped by over a third and that the cost of those subprime loans that remained to borrowers had lessened as well.

You know, what do I attribute this to? A little bit of speculation involved here. Yet at the same time if I look at the timeline of events after its passage, what I think happened is that the banks adjusted their rates. The banks and lenders adjusted their rates and the points and fees that they charged for entering into subprime loans to come in just under the threshold of the categories that were covered by our state act.

So, for instance, under the New Jersey act, any subprime loan with points and fees totaling more than 4.5 percent is deemed a high cost loan and subject to numerous prohibitions, which apparently the lenders found just too onerous to put up with. And they reacted by charging -- excuse me, giving loans with points and fees at, say, 4.45 percent. Does that solve the problem? Obviously not. Is it progress? Well, it seems to have been progress.

Why didn't the OCC preemption wipe out the whole thing? And reasons here I think have been alluded to by people from other states today as well. Much of the volume of the subprime lending was not done, at least at the get go, by federally regulated institutions, depository institutions. Instead it was done by a lot of the little correspondent lenders, brokers with a line of credit, that sort of thing, although the OCC preemption purports to cover third-party vendors dealing with the national banks, that whole question really -- and what it meant was up in the air until '07 when the Supreme Court ruled in *Waters versus Wachovia* that the preemption of operating subsidiaries of depository institutions actually is legal and appropriate.

Turning to my second point, the foreclosure legal landscape, as I mentioned New Jersey has really very favorable Fair Foreclosure Act. I feel fortunate to be in a state with judicial foreclosure as compared to half the states that I think don't have it that borrowers certainly have more opportunities to intervein and redeem their homes.

The effectiveness of our act, however, has been limited by a couple things. First, about 98, 99 percent of all homeowners in foreclosure are unrepresented by counsel. So what does that mean? That means that really judicial foreclosure doesn't matter a whole lot other than that you get a bunch of notices in the mail that you may or may not pay attention to. If you don't appear in the case, file contested answer, your foreclosure will just chug its way through an administrative project -- excuse me, process and judgment be granted on the back end. It's a shame because legal services and I share the view that the majority of borrowers in subprime loans, that is well over half have valid legal defenses that they could raise to a foreclosure.

And you connect this particular problem with the problem that we're having across

the country which is that the trustees for securitized pools are filing foreclosures and getting bulk foreclosure judgments in cases where they can't even prove that they have legally enforceable right in the note or the mortgage whatsoever. It's just quite amazing.

I think the whole judicial movement to counter this mass default judgment in cases where lenders are not entitled to it started here in Ohio a year or so ago, and it spread like a firestorm in a number of other states.

Our judges are paying attention. I've now had a bunch of foreclosures dismissed, because the lenders were unable to show that they had been assigned the mortgage in question before they filed the foreclosure action. Not only does that seem like fairly common sense requirements, you know, you're a Plaintiff trying to force an obligation you can't prove you own, but New Jersey statutory law clearly requires a written assignment and that it predate the foreclosure. And state law also requires the whole chain of assignments to be listed in the foreclosure complaints, yet they were doing it anyway. Until some of us started raising these defenses, judges, really quite educable, some of them, and they started granting our motions to dismiss, because of peculiarities in New Jersey law, we have focused up to till now primarily on the assignments, not on the mortgage notes. And that's a whole other conversation we can have during Q and A if people would like to.

This morning I talked to chief counsel in our statewide office of foreclosure. He's taking some innovative steps to address it even further to the consternation of the lenders bar. So, for instance, he promoted back the recent rule change in the foreclosure court rules that requires not only that lenders list the assignments and produce an assignment of the mortgage to them that predated the foreclosure complaint, but that they actually record these assignments before they can get a foreclosure judgment.

The advantage of that, of course, slows things down, but it hints at a real significant additional problem which is a lot of these assignment documents that lenders were using were bogus or unverifiable. And people who were signing these affidavits, nobody knew who they were, what connection they had to anybody else. Requiring the assignments to be recorded gives legitimacy to the assignments that can help ensure that without a case-by-case fight that these assignments are actually valid. And if the lender cannot prove this at the time of default judgment when they have to submit all their final paperwork, the office of foreclosure is turning them away. Since May 1st they have started turning away for default judgment all of these cases.

Counsel told me this morning about 35 percent of the thousands of foreclosures that are going through there have been turned away. I can't really think of a better way to slow down the foreclosure process than something like this. And we're all up in the air every day, you know, we're all fighting it out over whether the alternative evidence might suffice for a foreclosure or not. The verdict is out on that.

Then, finally, our last piece, foreclosure task force, we've got several local ones talking about putting together a statewide task force comprised of everybody who's working in the area. I'm seeing some effectiveness. Legal services has been drawing in about 100 pro bono attorneys to help with cases. The City of Newark is working with us closely on loan modification, workout fairs. A number of other ideas we've been tossing around, one group is putting together a mass purchase of dozens of properties for rehab, but most important point here I think is that we've been able to use data that's being gathered by Kathy Newman at Rutgers University about the incidents and nature of foreclosure in the Newark area to great advantage.

I'll get up and start talking anecdotally about clients that I represent, even classes of clients I represent, and nobody seems to want to listen, but Kathy gets up with the statistics, and suddenly everybody is all eyes and ears, including the Federal Reserve.

I would recommend all of you who can find yourselves resident number cruncher in

your foreclosure prevention efforts by all means find one. Kathy's gathered her data to get a fine grain picture of the Essex/Newark foreclosure situation right now from the Feds, loan performance data, state foreclosure complaints, state tax assessor data, recorded mortgages, sheriff's sale data. She's even sent her students out into neighborhoods in Newark that are particularly hard hit to get a block-by-block picture of what's the status of these homes, does it seem like there are tenants there, are they vacant, are they boarded up, have they been vandalized.

We ended up with a very rich picture of what's going on on the ground. She has helped us develop data on illegal property flipping practices. You can trace multiple flips within short periods of time, each sale price exorbitantly higher than the previous sale price and multiple flips to the same purchaser and by the same seller, et cetera. You can identify pretty clear patterns after a while.

She's helped identify which problems are the most serious to help us look at where we are to target our legal and legislative advocacy efforts. Producing data on the extent of small investor foreclosures, for instance, and the effect on tenants in identifying that particular neighborhoods or blocks most severely hit, we now have targeted efforts going.

The State is providing some money for temporary grants to homeowners who haven't yet fallen into default or foreclosure but are likely to do so unless they can get a grant or assistance for a small period of time until they get back on their feet.

And then finally, I've run out of time here, but the task force is also coordinating efforts for additional legislation on the statewide level. Now, at end of the day here after listening to all these presentations, in some ways it can be very -- you know, I feel discouraged in a lot of ways. I've just heard a parade of horrors. And I am in some ways a little discouraged. I've been doing work more or less similar to this for 40 years I realized not long ago, ever since I was in high school. I do have my days now when I ask why. Why do I keep doing this?

But in closing, I just got my colleague Chinlay and I just got a couple new clients, victims of a foreclosure rescue scam. They live in my town Mount Claire where shortly we'll be filing claims in their foreclosure action. I went to visit them at home on my way home last Friday to get them to sign a certification. I walked in the door and Mr. Webb said to me -- and these are folks I should say been in the house 25 years, have hundreds of thousands of dollars of equity in it. And they were scammed by these foreclosure rescue squad, I guess, into deeding over the house so somebody who let the whole thing go and ended up in a default foreclosure judgment.

But in any event, to wrap it up, I walked in the door, and Mr. Webb goes, God sent you to us. And we can debate the merits of that and whether it's actually the case or not. I'm not here to talk about that, but rather this is why we keep doing this, right. And I certainly hope I can live up to their expectations. I have -- you know, I really have a fair amount of hope that we will at least save these folks homes and many others like them.

MS. COHEN: Thank you and thank you all for sitting and listening all day. I know I have been here and I think it's exhausting to sit and listen to all this information. So I'm going to try to be a little briefer and maybe have some time for questions, plus I know we all need to go home and prepare for the Sarah Palin debate so we can be smarter than she is. I don't think it will take us all that long, but we have to be ready.

I'm going to focus on sort of hodgepodge of things, legislative efforts, some organizing efforts as well as some litigation. I'm from Massachusetts, so I'm going to tell you a little bit about what's going on there.

And one thing that I know I find really helpful at these conferences, and we were talking a little bit earlier, is it is depressing to hear sort of all the facts from all different angles, and there is no way to paint a rosy picture of the crisis, but it is very powerful to hear what people in different communities are doing, different litigation

strategies, different organizing strategies and share information. So I hope that's what people get out of it.

In Massachusetts, unlike New Jersey and unlike Minnesota, right, we do not have judicial foreclosure. I think there are about 26 or 27 states that do have judicial foreclosure, and Massachusetts, which has this reputation of being one of the most liberal states and certainly has very, very strong tenant protection laws, does not have a judicial foreclosure process.

So all that has to happen is they file these complaints in land court just to make sure someone's not in active military service, they're under the Service Member Civil Relief Act. And you don't even -- if you're not in the military, you don't even have a right to go into land court and file anything or do anything. They just get an automatic judgment from land court. Then they send you -- they publish in the newspaper for three weeks, and they send you a notice, 14-day notice, that they're going to auction your house.

It could be a very quick process given the numbers of foreclosures and some other things I'll mention. It's a little slower, but one of our first efforts when I started really getting into this is this is crazy. Why don't we have a -- you could live in your house for 30 years, you could have, you know, \$300,000 of equity in it, and you have no right to go to court and tell a judge that, you know -- and I think Linda mentioned there was a lot, probably half the cases, there is some legal defense to the foreclosure.

So one of the first things we started doing is we actually formed the Massachusetts Alliance Against Predatory Lending. Even though we have very many advocacy groups in the Boston area and throughout the state, we really wanted to have a group focused on the predatory lending crisis.

So we actually started working on three pieces of legislation last year. One is to have judicial foreclosure. The other was a bill to have a four-month moratorium, and I know I was part of a discussion before with Jim Carr where, you know, some people were saying, well, a moratorium just delays things. It doesn't really solve the problem.

It does, but at that point we thought maybe there was going to be some federal legislation that would really deal with the issue on a systemic basis. And I also, in doing my research, I have been involved -- in the early '90s in Boston we had what we called the second mortgage scam, home improvement scam crisis, and people were losing their homes and there were lots of foreclosures, and I was very actively involved in it.

And unbeknownst to me the legislature had passed a four-month moratorium then, and I thought, well, if we could do it in the early '90s, this is even a greater crisis, more foreclosures. So we tried and we had a lot of legislative support, but it was not successful, and I don't know that we're going to push it this time. I think we'd much rather push for judicial foreclosure.

The other piece of legislation I wanted to mention -- and someone in the morning sessions talked about this. Cities like Boston, some of the older cities, we have lots of two and three family houses, and the foreclosure crisis impacts not only the homeowners but also the tenants. So you can have one house where, you know, two, three or even four families are being displaced, and the tenants are totally innocent of it.

We had one case, it was very sad, a Chinese woman who do not speak English was in her kitchen cooking, you know, food for her family around, I don't know, two or three in the afternoon, and these big guys come into her house and start moving her furniture out, and she can't, you know, understand them. They can't understand her. She thought she was being robbed. It turned out she had been foreclosed on. She was a tenant and the landlord kept coming back and getting the rent check every month.

So she says I pay my rent, you know. And they literally put her stuff on the street. She luckily got hooked up -- she went to a help center and they hooked her up with a lawyer. And I work in legal services and we were able to represent her and keep her from being evicted, but that was a very scary situation.

So one of the pieces of legislation we worked on was a Just Cause Eviction Statute that says that tenants in foreclosed properties cannot be evicted except for just cause until a new actual person buys the property and wants to live there, because what's happening it's all bank-owned property. No one's living there, and it's the same issue as everywhere else. The banks don't take responsibility, and I use banks loosely. We know there are all sorts of financial institutions, and they don't, you know, keep the properties up.

So this is a way to keep people in housing and I know -- I'm always shocked. I was in Cleveland a few weeks ago, and they were talking about destroying, what, 15,000 houses because they've been foreclosed on and they're abandoned, and they're going to -- they are trying to develop a land trust to destroy the houses. Is this right? And coming from Boston, I'm, like, shocked. 15,000 houses for people to live in. We could use those houses, but I guess in Cleveland you don't have the people to live in them.

And so our goal is to preserve housing and keep tenants in properties. So this was some of our legislative work, and obviously it didn't get through this past year. We're going to reintroduce these two bills this year.

One other thing that did happen on our city level is the city passed an ordinance requiring lenders of foreclosed properties to register the properties with the city and to post on the property you know the name of the owner and an actual property manager with a phone number that could be contacted, and they can get fined. I have no idea how well it's working, but it's one of the things that I think is important.

The other thing I wanted to talk about is some organizing efforts. We have a very active community organization that has been working with tenants and homeowners in foreclosed properties, and they have been doing a very unique thing.

One, they go to the courts and they actually get the names and addresses of people being evicted after foreclosure or homeowners who have lost their homes, and they invite people to these weekly meetings, and they really have empowered people to take actions. And what they do is every time a family is being evicted or foreclosed on, they have what they call eviction blockades and basically demonstrations of people and other homeowners and tenants and up until the last few weeks they were, like, totally successful, nine for nine, they stopped people from being evicted. The last two times people actually got arrested for blocking the doorways, but I think this is an opportunity to organize and get people empowered.

The other thing I want to talk about is a very interesting case that the Massachusetts Attorney General's office brought against Fremont Investment and Loan. And how many people have had dealings with Fremont? They're kind of a bad -- a bad apple in this and basically the Attorney General's office brought a consumer protection action in court saying that lending without regard for a borrower's ability to repay is unfair, deceptive and predatory.

And the Superior Court judge actually granted a preliminary injunction and found that any -- found that Fremont loans that had four characteristics were presumptively unfair, and for this class of loans, there were only about 200, Fremont could not foreclose without going to the Attorney General's office. So the four presumptively unfair terms of the loan are that it's an adjustable rate mortgage with an introductory rate of three years or less; the teaser rate is 3 percent lower than the fully indexed rate; the debt to income ratio is over 50 percent under the fully indexed rate.

So you understand that, the teaser rate is just that low rate in the beginning. The fully indexed rate is what it goes to when it jumps up, and most people's income was more than 50 percent on the higher rate. And the loan to value ratio had to be 100 percent or there were substantial prepayment penalties.

And the Court said that loans with these four characteristics were presumptively unfair. It was a Superior Court decision upheld by the Appeals Court. It's on appeal to our highest court. I think the appeal's being heard next week.

What Fremont is trying to say is these loans were not specifically prohibited by any statute and therefore can't be unfair and should be exempt under the consumer protection laws, and we're very, very optimistic -- or at least I'm trying to be optimistic that this is upheld, because if it is, what my hope has been over the past few months is to bring a lawsuit saying that any loan from any lender that has these four characteristics is presumptively unfair and the lender cannot foreclose on these loans.

So I've been waiting, you know, to have a final judgment here, and it obviously has taken longer. So hopefully we'll be able to do that.

I just want to report on one or two other things quickly. People have talked a lot about loan modifications. The Massachusetts Attorney General just came out with a report and testified at Congress saying that voluntary loan modification efforts have failed. And I heard today she just had an abet piece in the Boston Globe. They are either not being done. When they are being done, they are not sustainable modifications, and they looked at -- there were, like, 4700 foreclosure petitions in the last three months in Massachusetts and only 144 modifications recorded, and none of them were really sustainable. They didn't have lower rates. So I think this just confirms everything almost all of us have felt which is that voluntary loan modifications do not work.

Couple of other things I wanted to mention is that in Boston 75 percent of all the foreclosures are in four neighborhoods of color, with the highest number of people of color, which is not surprising. So I think we are trying to put together a Baltimore type lawsuit under the Fair Housing Act, and we may use some consumer protection laws as well on behalf of some community organizations whose neighborhoods have been the most heavily impacted by the foreclosures.

So I just throw that out as another idea that people can use. The other thing I want -- and the other thing I should say I have also brought some discrimination claims at our state, antidiscrimination agency, because one, I think it's a good way to get some free discovery and find out what they're going to say and at the same time you could build your broader case. So use your administrative agencies as well.

The other thing I want to say is one thing I want to do is some CRA challenges under the Community Reinvestment Act. I think our mainstream banks have an obligation to meet the credit needs of their low and moderate income communities. What do these communities need? They need refinancing of their mortgages at affordable rates and all their -- and some of their principal written down. So I think that there is some opportunity.

I noticed under the HUD foreclosure, this hope for homeowner program that also is voluntary. There was not one bank listed in Boston. There were banks sort of in some of the suburbs in Rhode Island, but not one there. So I think the mainstream banks need to step up to the plate and do that.

Last thing, somebody asked at one of the sessions I was at, they asked the Panelist what did you learn at this conference or what do you come away with. And it made me think of five things I think I come away with are the need for systemic loan modifications. We can't do this on a case-by-case basis. We don't have the resources, the servicers or lenders don't have the resources, so we need something. We need to stop blaming the victims as we talked about. I think we need to organize. I think this is an important opportunity. I think people are mad, and I think if we could work with our community groups.

The other thing I think all the advocacy organizations need to come together and speak with one voice. I'm on some many list serves, and I feel like we all say sort of the same thing but slightly different, and I think we need to get to Congress and people with really one voice. And the last thing is we have to vote. Thank you.

MR. MENENDIAN: Before we begin questions, I was told to remind you to head upstairs to, I think, Ballroom A and B after the Q and A for refreshments and some musical entertainment. We're going to do questions one at a time. And if you'd please say your

name for the panel reporter, it would be very helpfully. Thank you.

MS. MARILYN TOBOCKMAN: Marilyn Tobockman, Cleveland, partner with Ed Kramer.

You

talked about the 75 percent of the foreclosures in four neighborhoods as a basis for a lawsuit. Will that be multiple foreclosures, or is that statistic arising from a single --

MS. COHEN: No. The 75 percent are all the foreclosures that happened in the City of Boston. Out of all the foreclosures 75 percent are in the neighborhoods of color, but it's multiple lender. And what we're trying to do is figure out if we could target one or two lenders who do the most foreclosures.

MR. MENENDIAN: Sir.

MR. KRAMER: Mark, when you talk about joinder of the 100, 150 properties, I did 14, and when we got our first series of 14 sets of interrogatories, it ground us to a halt. So how can you do 50, 100, 150? Don't you face a potential where, you know, one bank can put you basically unable to represent other clients?

MR. IRELAND: Well, I think when you are undergoing that micro litigation as this is strategy that we're developing now, so we'll see, but our plan it's not going to just be me. I didn't mean to be flippant and say we're going to sue this willy-nilly. The plan is -- the goal is to get your foot in the door to get leverage to not only deal with those individuals but perhaps other individuals that come down the pipeline in the future. And it's an opportunity, I think, to negotiate the uniform loan modification standards, some sort of system where just right off the bat because you're dealing with, you know, 50 or 100, 150 or whatever the ultimate number is, that that amount is large enough that it gets the servicer, lender, trust, whoever, all of the above, in terms of who you're going to be suing, that it's large enough that it gets their attention; that you can negotiate these larger loan modification standards.

Because if it is large enough, if you reach over that tipping point -- and I'm not saying I've decided what that tipping point is. But once you get a broad enough tipping point, it becomes more efficient and economical for that lender to do a uniform loan modification across the whole 150, 200 individuals and then potentially expand that out to in the future when those housing counselors or the other claims come against XYZ Servicer, that they say just call us before you sue us, please, and this is the deal that you're going to get.

And so that's the idea behind having one of those larger scale. As in terms of just the resource issue, we started the Minnesota Foreclosure Defense Task Force, and it's a group of private attorneys, nonprofit attorneys and legal services attorneys. And so when this action is filed, there won't be just me and two other people that are nonprofit legal services handling the interrogatories and dealing with the individual cases; that you will have other attorneys that are donating their time pro bono to that case.

But, again, the goal of all of those impact litigation is kind of using it to get the door a little wider, because I don't think anybody has the resources to do an individual lawsuit related to every single vacant property or every single Truth in Lending Act claim. So there has to be an approach that's taken where the goal is to do enough to get a systemic resolution or a systemic settlement.

And so I think going beyond and filing that case where you've got this long list of Plaintiffs against a servicer and then John Doe Trust Company will be enough, I think, to force them into some sort of conversation to boast some rationality.

MR. KRAMER: I thought that was my case.

MS. COHEN: So I know 14 is not enough.

MR. KRAMER: I guess so. I don't know, I have one other thing which I think is important for this group that I just found out Tuesday. First America Data has all of the variable rate mortgages that are going to reset for the next 18 months, and Case Western Reserve University has been able to get for Cuyahoga County, for example, the location,

the address of each variable rate, and they were able to match it with the HUD subprime list. So they have a map for our county with 18,079 variable rates and the locations. And so we know where the variable rates are going to be and we're meeting now to try to get both the city and the county to help us knock on doors, send letters to try to stop the defaults from occurring, and it's available throughout the United States.

Now, it's a commercially available -- some money, but we were able to get it in a much reduced rate. And if anyone's interested, they can contact me and I can get you Mike Schram who's doing this at Case Western Reserve, but you can see this map shows -- I mean, if you're at all familiar with Cleveland, if you look at the blues, I mean that's basically the African-American neighborhoods on the east side and we are -- the second wave is coming, I mean, if we don't do something in the next 18 months.

MR. IRELAND: The New York Federal Reserve Bank has the interactive map that allows you to zero in on particular areas that have high rates of the option arms and things like that.

MR. KRAMER: Does that have the location actually where the address?

MR. IRELAND: It doesn't have the address, but it has -- you know, you have a neighborhood that's all blue or all red.

MR. MENENDIAN: Other questions?

MS. PEGGY LEE: I want to address Ms. Fisher's comment. One thing that we're finding in Ohio is that the bogus assignment is also a problem. They don't have proper endorsement under article three of the UCC but also the pooling and servicing agreement assigned all title, interest and rights to the mortgages to the trust as of the date of closing, and what we're finding is that they are generating bogus assignments after the date that all the assignments was made to the trust and I'm just --

MR. MENENDIAN: Could you state your name, please.

MS. PEGGY LEE: Peggy Lee with Southeastern Ohio Legal Services.

And so what we're finding is that, you know, there is no interest to assign through members or whatever they use as of the date of the notary. Could they do that to establish standing in courts here? And they really can't establish real party in interest standing and where to file the foreclosures. And I'm wondering if that's something that you had success with?

MS. FISHER: We haven't gotten there yet. I'd say we're a step or so behind you folks here in terms of courts deciding what evidence is sufficient, legally sufficient, to constitute a protectable ownership interest, and heard noises from lenders about using pooling and servicing agreements to do that. Haven't seen anybody do it yet.

MR. IRELAND: I have a complaint that I think is available on the Housing Preservation Project website that alleges that where we went and pulled the pooling and servicing agreement for one of my clients and extracted the language from the pooling and servicing agreement and tracked it through the Lehman Brothers Family of Companies, B & C, up to sale, structured asset investment loan trust 2005-5.

So there is an example of a lawsuit on our website if you are interested in one.

MR. KRAMER: What's the nature of the complaint? Are you asking -- perjury? What is the --

MR. IRELAND: Under Minnesota law, we have both judicial and nonjudicial foreclosure, and most of the residential are nonjudicial foreclosure. And under our law they require in the notice of foreclosure all assignments to be -- they require all assignments to be recorded as a prerequisite to do nonjudicial foreclosure. And then in the notice that they receive they have to identify all of the assignments of the mortgage loan. So we say that the foreclosure itself is defective. And so it has to be -- so the sheriff's sale is undone and everything unwinds.

MR. MENENDIAN: Other questions? Anybody?

MR. MENENDIAN: Please state your name.

MR. STANLEY HURDLE: Stanley Hurdle from Dayton.

Do you see any way to deal -- use that to accomplish anything other than on a case-by-case basis slowing down foreclosures and hoping that they decide to modify the loan? I mean, does anybody see anything useful?

We heard in Cleveland that the whole system is somehow totally gummed up and invalid, but it doesn't seem like there is much to do with that.

MR. IRELAND: I can say why I did it. There is a number of case law that says that when the sheriff's sale occurs, your Truth in Lending Act claim is extinguished. And so by alleging that assignment and using it to avoid the sheriff's sale, I get my Truth in Lending Act claim back. And then once I have my Truth in Lending Act claim back, then I've got all sorts of leverage to rewind the mortgage and restructure the terms.

MR. STANLEY HURDLE: So in a nonjudicial foreclosure state.

MR. IRELAND: Yeah.

MR. MENENDIAN: Any other questions?

All right. Thank the Panelists.

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