

**SETON HALL UNIVERSITY SCHOOL OF LAW  
CENTER FOR SOCIAL JUSTICE**

833 McCarter Highway  
Newark, New Jersey 07102



**Testimony of**

**Linda E. Fisher**

**Professor of Law, Seton Hall University School of Law**

**Before the Subcommittee on Housing and Community Opportunity,  
House Financial Services Committee**

***Hearing on Robo-Signing, Chain of Title, Loss Mitigation  
& Other Issues***

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Thank you for providing me the opportunity to participate in this hearing. I am a law professor and attorney with expertise in the areas of predatory lending, foreclosure defense and other public interest litigation. I also teach civil procedure and professional responsibility. With the assistance of law students in my Civil Litigation Clinic, I have been involved in predatory lending, mortgage fraud, and foreclosure litigation for over ten years. The Clinic's clients are low and moderate income residents of urban North Jersey. In addition, I work closely with the Newark/Essex Foreclosure Task Force, a coalition of government and nonprofit agencies addressing the foreclosure crisis in the greater Newark, New Jersey area.

My testimony focuses primarily on the relationship between faulty foreclosure practices and fraud, as well as on the consequences for homeowners and neighborhoods. I describe the steps in a judicial foreclosure in which robo-signing problems can occur. I also draw links between widespread origination fraud in subprime lending, opportunistic fraud such as foreclosure rescue scams, and the assembly-line foreclosures – often involving illegalities – that are further destabilizing urban communities. I will provide

examples from my own cases as well as from lawyers and housing counselors with whom I work. In many of these instances, homeowners were induced and duped into taking out loans they could not afford, or they were defrauded of title to their homes by foreclosure rescue scammers.

The current crisis is exacerbating the disparities between poor and wealthy families and neighborhoods, in part because vacant foreclosed properties depress property values and facilitate crime.<sup>1</sup> Widespread foreclosures invite further opportunistic fraud and increase inequality between urban minorities and the rest of the country.<sup>2</sup> Additional regulation and enforcement of existing law are necessary, but perhaps the most critical need is for serious mortgage modifications allowing homeowners who can make reasonable mortgage payments to remain in their homes. Absent realistic modifications, many hard-working, law-abiding homeowners --who may have been victims of fraud, illegal fee padding, or inaccurate accounting -- will lose their homes, uprooting their families in the process.

First, what is “robo-signing”? While this newly coined phrase is hardly a term of art, it generally refers to the practice of servicer employees signing high volumes of affidavits in foreclosure cases<sup>3</sup> with false attestations that they have personal knowledge of the facts recounted and that they have reviewed supporting documentation.<sup>4</sup> These affidavits can violate state false swearing and unfair and deceptive acts and practices

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<sup>1</sup> Studies have documented the relationship between vacant and abandoned foreclosed properties, depressed property values, and increased crime in neighborhoods with high rates of foreclosures. See Dan Immergluck, *Intrametropolitan Patterns of Foreclosed Homes*, Community Affairs Discussion Paper, Federal Reserve Bank of Atlanta (2009).

<sup>2</sup> See Linda E. Fisher, *Reverse Redlining, Racialized Consumer Fraud and Target Marketing of Subprime Loans*, 18 Brooklyn J. of L. & Pol’y. 101 (2009).

<sup>3</sup> Twenty-three states, including New Jersey, have a judicial foreclosure process in which evidence must be submitted to a court, and judgment entered, before a foreclosure sale can take place.

<sup>4</sup> For a further description of the problem and its potential consequences, see the report of the Congressional Oversight Panel released this past Tuesday. *November Oversight Report: Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation*, Nov. 16, 2010.

statutes, as well as the due process rights of homeowners. When an attorney is involved, court rules requiring an evidentiary basis for all filed submissions may be violated. For instance, an affidavit may falsely state that a homeowner has been served with process, that the foreclosure plaintiff is the holder of the mortgage obligation, that an assignment of a mortgage and note timely took place, or that inflated amounts are owed to the lender. When the plaintiff is not the party entitled to foreclose because the wrong party was named or because the plaintiff trust did not hold the obligation at the time of filing, it does not have standing and is not entitled to judgment.<sup>5</sup>

Yet every day foreclosures proceed to judgment because a court relied on a plaintiff's inaccurate attestations.<sup>6</sup> For the past several years, I have been involved in cases in which the wrong entity filed a foreclosure because of a documentation error, while alleging that it held the note and owned the mortgage. I have been involved in many additional cases in which plaintiffs erroneously attested that a mortgage and note were timely assigned into a trust, when the assignments and transfers actually occurred after default and after the foreclosure case was filed, depriving the plaintiff of standing. Without representation, it is unlikely that these errors would ever have been discovered, as courts frequently lack the resources to closely scrutinize all submissions. However, homeowners generally are unable to contest and raise defenses in foreclosure because they cannot afford counsel. For instance, until recently, well over 90% of New Jersey foreclosure defendants were unrepresented; that figure has declined only a little in the past year. Providers of legal services to the indigent are overwhelmed with requests for assistance and can represent only a fraction of the people seeking their assistance with foreclosures. It is likely that many of these unrepresented borrowers are losing their homes because of servicer errors.

These violations are serious in themselves and far from technical, yet robo-signing and other false attestations are only the tip of the foreclosure iceberg. The iceberg

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<sup>5</sup> I will not go into detail concerning the various chain of title issues that can arise when a securitized trust attempts to foreclose because others have already described these issues at some length. The November Congressional Oversight Panel report provides a comprehensive and accurate description of the problems.

<sup>6</sup> A colleague calls these widespread practices "servicer civil disobedience."

includes the entire servicing and default servicing system, with its rampant inaccuracies, lack of verification procedures and lack of accountability. Automation, cost-cutting, and financial incentives to foreclose have combined to create a treadmill that cannot stop to rectify errors or modify mortgages so that qualified homeowners can remain in their homes and investors can continue to receive a stream of income. I have repeatedly been told by counsel for foreclosure plaintiffs that even they are unable to contact their servicer clients to request reasonable settlements in cases. I also have tried in vain to reach servicers on behalf of my clients, only to end up in a loop of endless telephone transfers to equally ineffectual employees after our paperwork was lost repeatedly. Much less are housing counselors able to stop the “left-hand, right-hand problem” in which foreclosures proceed even after mortgage modification agreements have been reached. This problem is quite common both in New Jersey and across the country.

Origination and opportunistic foreclosure fraud – frequently occurring during the peak subprime lending years of 2004 to 2007 -- are another piece of the subprime foreclosure iceberg, since fraudulent loans tend to end up in assembly-line foreclosures with little hope of redress. The securitization machine that originated so many fraudulent loans is the same machine that now forecloses even when reasonable alternatives may be available. In the rush to originate new subprime and Alt-A mortgages to distribute to securitizations – whose demand for these products was seemingly insatiable -- lenders abandoned strict underwriting standards in favor of “low-doc” and “no-doc” underwriting. The lack of verification procedures and failure to investigate telltale signs of fraud allowed many fraudulent originations to occur, particularly in wholesale lending channels involving mortgage broker originations, where fraud was known to be rampant. Myriad types of fraud occurred during this period. In my own practice, I have frequently seen false mortgage applications prepared and submitted by brokers and loan officers – with little input from the clients and sometimes with forged signatures – that vastly overstate the clients’ income and assets, and sometimes list false employment.<sup>7</sup> Inflated appraisals have been near universal in the cases I have litigated. Where borrowers in these cases can

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<sup>7</sup> Such practices were widespread during the peak subprime lending years. Abuses by Ameriquest, Household Finance, and Countrywide have been particularly well-documented, though many other entities were involved as well.

make reasonable monthly payments, servicers should pursue reasonable alternatives to foreclosure, even if principal writedowns are required to bring the loan into line with actual market value.

Various types of foreclosure rescue scams were also commonplace during the peak lending years. Lenders frequently provided funding for rescue scams in which desperate homeowners facing foreclosure were duped into “temporarily” signing over title to their homes to a straw buyer with decent credit.<sup>8</sup> In return, they received assurances that the buyer would obtain and pay a new mortgage, while the former owners could remain in the property and pay rent, with an option to repurchase the home once they improved their credit. Despite the existence of common red flags indicating a scam, the straw buyers were able to take out new loans, which they almost universally stopped paying before disappearing, rapidly causing a new foreclosure. Yet because the loans were securitized, existing financial incentives encouraged such behavior. The same cost-cutting, profit making system that produced robo-signing facilitated and enabled these frauds.

We currently have a case in which the former homeowners paid a straw buyer in full for a year and a half, only to have her default and disappear. They have intervened in the foreclosure action against the straw buyer to assert their own claims and defenses.<sup>9</sup> These clients continue to make full payments into an escrow account while the litigation proceeds. In another current case, an elderly, disabled woman who had owned her home for forty years was duped into signing it over to a rescue scammer. After two strokes, her cognitive capacities were impaired, making her easy prey. She and her family can now make reasonable mortgage payments and pay off the arrears under a reasonable installment plan if one were offered. Similar stories abound. A common feature of all is

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<sup>8</sup> For an explanation of these scams and how a foreclosure court can address them, see Linda E. Fisher and Leena Khandwala, *Foreclosure Rescue Scams*, Real Estate Financing Treatise, Matthew Bender Pub. 592, release 91 (2010), available on Lexis.

<sup>9</sup> Securitized trusts may be liable for the originator’s actions if they are not holders in due course.

that the straw buyers were easily able to obtain new mortgages despite indications of underlying fraud. Another common feature is that these homes end up in foreclosure.<sup>10</sup>

Any policy solution to the foreclosure crisis must take borrowers' rights and situations into account, as well as the rights of lenders and concerns for the broader housing market and national economy. Banks should be required to engage in serious mortgage modification efforts before foreclosing, even if principal writedowns are required. Servicers must be subject to meaningful federal regulation. In the short term, independent monitors and auditors should be appointed to investigate the servicer practices that have contributed so heavily to the current crisis.

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<sup>10</sup> Another common scam involves credit repair and mortgage modification operations that promise to assist homeowners with saving their homes, generally for an upfront fee of about \$3000. Lawyers frequently are involved. After obtaining the fee, the scammers disappear, leaving the borrowers in even worse shape than they were before being scammed. As an example of how common these scams are, without my mentioning the type of work I do, a D.C. cabdriver told me last week that he was the victim of such a scam. Clients of mine have also been scammed in this fashion, as have many others in the greater Newark area and across the country. A lack of serious opportunity to modify mortgages contributes to the proliferation of these scams.