PRIVATE PROPERTY RIGHTS DEFERRED: HAS PREDATORY MORTGAGE SERVICING DESTROYED THE AMERICAN DREAM

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"*Injustice anywhere is a threat to justice everywhere*."[1]

At a time when homeownership rates and real property values are soaring, the "American Dream" is being threatened by a quiet epidemic that seems to be sweeping across the Nation: mortgage servicing[2] fraud and abuse by unscrupulous mortgage companies and their agents. Our hypothesis: improper mortgage servicing trumps the very best home loan *every time*, and the stakes get even higher if a homeowner is saddled with a predatory, sub-prime loan.[3]

Although predatory mortgage lending (e.g., lopsided, high cost home loans) continues to garner the most public scrutiny, and for good reason,[4] this briefing paper examines its lesser known, evil twin in the wake of the landmark, $40.4 million settlement to resolve a federal probe and 29 consolidated class actions in *U.S. v. Fairbanks Capital Corp.*[5], *Curry v. Fairbanks Capital Corp.*[6], and the U.S. Supreme

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[1] Dr. Martin Luther King, Jr.'s Letter to Alabama Clergymen from the Birmingham Jail (April 16, 1963) (emphasis added).

[2] The terms "mortgage servicer" or "servicer" generally refer to a company involved in an outstanding loan transaction that has the responsibility for collecting and recording the monthly payments from the borrowers, pursuing all legal remedies against borrowers who fail to pay, and for remitting the collections to the appropriate parties. *See* http://www.ftc.gov/bcp/conline/edcams/fairbanks/index.htm

[3] *See* R. Quercia, M. Stegman & W. Davis, *The Impact of Predatory Loan Terms on Subprime Foreclosures: The Special Case of Prepayment Penalties and Balloon Payments,* at 1-5 (UNC Kenan-Flagler Bus. School Jan. 25, 2005).

[4] Presently, there are two competing Bills pending in the U.S. House of Representatives concerning predatory lending (a) H.R. 1182 (the "Prohibit Predatory Lending Act"); and (b) H.R. 1295 (the "Responsible Lending Act"). As of May 10, 2005, the House Financial Services Committee has not scheduled hearings to consider the merits *vel non* of either Bill.

[5] *U.S. v. Fairbanks Capital Corp.*[5], No. 03-CV-12219 (DPW) (D. Mass. May 12, 2004) (FTC-HUD settlement approved and consent decree approved).

[6] *Curry v. Fairbanks Capital Corp.*[6], No. 03-CV-10895 (DPW) (D. Mass. May 12, 2004) (Curry class settlement approved) (the FTC and Curry cases are referred to collectively herein as "*Fairbanks*").

Court's recent decision to deny *certiorari* in *Starks v. Sandberg, Phoenix and Von Gontard.*[7]

When announced publicly during November 2003 and later approved by a Massachusetts federal court in May 2004, the *Fairbanks* settlement was hailed by Federal Trade Commission ("FTC") and U.S. Housing & Urban Development ("HUD") officials, consumer rights groups, and borrowers as a victory in the struggle to preserve homeownership from fraudulent mortgage servicing and abusive debt collection practices.[8] In the aftermath of the *Fairbanks*, however, evidence is mounting that homeowners are still being stripped of equity or losing their homes outright because of the very corrupt mortgage servicing and debt collection practices that *Fairbanks* should have curbed or eliminated.

For example, on May 2, 2005, the U.S. Supreme Court declined to review the U.S. Court of Appeals for the Eight Circuit's[9] decision to uphold an arbitrator's award of $6.0 million punitive damages against EMC Mortgage Corporation[10] in *Starks*. However, there has been a muted response to this new legal development in the fight to preserve property rights from foreclosure fraud and abuse. Although there might be some plausible explanations for this deafening silence, this paper suggests that the situation persists because many well-intentioned initiatives designed to stop predatory lending seem unable or unwilling to draw the corresponding link to mortgage servicing.

To be sure, there are far too many examples of the horror stories at the closing table. The paradox is that few, if any, homeowners even know they have a problem with their mortgages until they hit a brick wall being maintained by an unknown mortgage servicer that likely did not originate the home loan in the first place, and foreclosure looms just around the corner. Unless and until this link between predatory lending and servicing fraud is highlighted, there is little hope the "American Nightmare" will ever be stopped.

This briefing paper is divided into three sections. Part I of the work provides an overview of the types of servicing fraud and abuse that inspired the *Fairbanks*

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[7] *Starks v. Sandberg, Phoenix and Von Gontard,* 381 F.3d 793 (8th Cir. 2004), *cert. denied,* ___U.S. ___ (U.S. May 2, 2005) (No. 04-1056) (upholding a $6.0 million punitive damages award to claimants based on proof of $2,000 actual damages under the FDCPA and state deceptive practices act) ("*EMC Mortgage Corp. v. Starks" or "Starks"*).

[8] *See, e.g.*, 11/12/03 FTC-HUD Joint Press Release regarding the *Fairbanks* settlement. http://www.ftc.gov/opa/2003/11/fairbanks.htm (FTC Chmn. Timothy J. Muris: "Consumers should be treated fairly and honestly in the servicing of their loans. It is particularly important that the Commission stop unfair or deceptive practices in this industry, because consumers have no choice about who services their home loans…."; HUD Sec'y Mel Martinez: "Today's settlement makes clear that HUD and FTC are serious about protecting consumers from those who would try to steal their American Dream").

[9] The Eighth Circuit is a federal appeals court located in St. Louis, Missouri that encompasses the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota.

[10] EMC Mortgage Corp. is a subsidiary of The Bear Stearns Companies, Inc. (NYSE: BSC), an international investment banking, securities trading and brokerage firm.

settlement.[11] Part II identifies some of the most common forms of mortgage servicing fraud and abuse. Part III offers some general observations and practical solutions to defending *property* rights against these deceptive and abusive practices by mortgage companies and their agents.

I. PROPER SERVICING IS CRITICAL TO PROPERTY RIGHTS

A. The A-B-C's of Mortgage Servicing in the Technological Age

At its core, the mortgage servicer's role in the home loan process seems fairly simple. Collect and promptly credit funds received from the homeowner, and distribute these funds to the appropriate parties. "Perhaps because of the apparent simplicity of the function, the servicing role is often taken for granted…."[12] Nonetheless, servicing has been described by noted mortgage industry veterans as "the most *critical* element in a mortgage . . . transaction".[13] This is indeed an understatement in the Technological Age when house notes are bought and sold daily on Wall Street,[14] and serial refinancings virtually ensure that today's homeowners will "never burn the mortgage,"[15] i.e., lenders can expect a seemingly endless stream of monthly mortgage payments.[16] The problem, as described above, is that homeowners are stuck in the middle of the mortgage servicer-investor relationship, with a perpetual mortgage payment[17] and no choice in selecting or terminating the servicer regardless of whether the actual loan terms are fair or foul.

Practice Pointer: The often contentious relationship between homeowner and mortgage servicer could become even more hostile in light of recent congressional action that would dramatically reduce the noticing requirements for transferee servicers after

[11] After the settlement, Fairbanks Capital Corporation changed its name to "Select Portfolio Services, Inc.", presumably for marketing and public relations reasons. The successor entity, commonly known as SPS is bound by the terms and conditions of the settlement agreement with the FTC, HUD and the class.

[12] C. Henneman, *Mortgage Servicing*, AGS Financial, LLC (Mar. 2001 ed.) (emphasis added).

[13] L.A. Tibbits, *Efficient Servicing Key to Complex Structured Financings*, Standard & Poor's Structured Finance Report (Nov. 28, 2000 ed.) ("S&P Report").

[14] It is widely known that home mortgages are bought and sold through Fannie Mae, Freddie Mac, and various Real Estate Investment Trusts. These mortgage-backed securities (MSBs) are then bundled as derivatives to hedge or carry long term debt

[15] The phrase "burn the mortgage" refers to an age-old, agrarian custom when American homeowners literally would set fire to the original promissory note after making the final mortgage payment to the lender.

[16] *See* www.sec.gov answers/mortgagesecurities.htm. Mortgage-backed securities (MBS) are debt obligations that represent claims to the cash flows from pools of mortgage loans, most commonly on residential property. Mortgage loans are purchased from banks, mortgage companies, and other originators and then assembled into pools by a governmental, quasi-governmental, or private entity. The entity then issues securities that represent claims on the principal and interest payments made by borrowers on the loans in the pool, a process known as securitization.

[17] The age old 30-year mortgage might be giving way to a 40-year mortgage depending on the results of a pilot program that Fannie Mae is promoting via certain credit unions. Although stretching mortgage payments another ten years would lower monthly payments, it also adds another ten years of servicing and stunts the traditional rate of home equity growth. *See generally* http://moneycentral.msn.com/content/Banking/Homefinancing/P99137.asp (discussing the benefits and burdens of the 40-year mortgage).

troubled loans are acquired from originators and transferor servicers. On April 6, 2005, the U.S. House of Representatives passed **H.R. 1025, the Mortgage Servicing Clarification Act**.

If approved by the U.S. Senate and signed into law by the President, H.R. 1025 would amend the FDCPA by creating an exemption from mandatory debt collection disclosures for servicers of first mortgages.[18] Presently, if a servicing company acquires the rights to service a portfolio of home loans, and some of the loans are in default at the time of transfer, the servicer is required to provide certain mandatory warnings and disclosures to the defaulting homeowner. Specifically, the FDCPA mandates that mortgage servicers provide a so-called "Mini-Miranda"[19] warning to these defaulting homeowners that: (a) they are being contacted for purposes of collecting a debt; (b) the homeowners have 30-days to dispute the validity of the debt; and (c) any information collected from the homeowners can be used for that purpose. Under current law, this disclosure is mandatory when the new servicer makes initial contact with the customer and is often included in a welcome letter.

Under H.R. 1025, new servicers of non-performing loans would be excused from providing the Mini-Miranda warning to inform (or remind) already struggling homeowners of their rights. The stated rationale for H.R. 1025 is that the Mini-Miranda warning has a tendency to chill the initial communications between the homeowner and the new service company at the inception of the relationship. Nevertheless, this proposed change in federal law would seem to be at odds with the well-established standard for evaluating homeowners' perceptions and dealings with debt collectors under the FDCPA. Courts routinely evaluate a debt collector's compliance with Act under a least sophisticated consumer standard in favor of the debtor.[20]

If the end goal is financial literacy for American homeowners, the elimination of mandatory warnings and disclosures that are designed to bring some semblance of parity to the homeowner-lender relationship does not appear to be a viable solution to the problem. Hence the question: if the FDCPA and existing decisional law presumes debt collectors are dealing with "the least sophisticated consumers", how will the elimination of these mandatory warnings benefit homeowners or, at the very least, level the playing field between consumers and debt collectors when trying to work out allegedly aged debts or stop needless foreclosures.[21]

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[18] Mortgage companies and servicers that assume ownership or control over home loans after they are in default are deemed "debt collectors" under the FDCPA. *See, e.g., Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987).

[19] The Mini-Miranda notice required under the FDCPA refers to the language provided in the statute under which the debt collector advises the borrower that the notice is being sent for purposes of collecting a debt and any information gather thereunder will be used for that purpose.

[20] *See, e.g., Maguire v. Citicorp Retail Services, Inc.*, 147 F. 3d 232 (2nd Cir. 1998); *United States v. Nat'l Fin. Serv.*, 98 F. 3d 131 (4th Cir. 1996); *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993) ("The basic purpose of the least sophisticated consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd").

[21] *Compare* The Federalist No. 54 ("Government is instituted no less for the protection of the property than of the persons of individuals") (J. Madison).

Another seemingly benign development, which could have an explosive impact on the relationships between homeowners and mortgage servicers if H.R. 1025 becomes law, arises from HUD's recent announcement to raise penalties for a FHA lender's failure to engage in loss mitigation activities with troubled borrowers.[22] The FHA Loss Mitigation Program requires lenders to employ actions and strategies to assist borrowers in default and reduce losses to FHA's insurance funds. Two of the most widely used home retention options under the program are "mortgage modification" and "partial claim".

Mortgage modification is a permanent change to one or more of the home loan terms to eliminate the default. These loan restructuring options typically involve an increase in the total amount due to include the amount of the delinquency, an extension of the length of time the borrower has to repay, or a change in the interest rate to achieve a monthly payments the borrower can afford.[23]

Partial claim, on the other hand, is a loss mitigation option available only to borrowers with FHA-insured loans.[24] Through a partial claim, HUD lends the borrower money to cure the default. The HUD bridge loan carries no interest and does not become due until the mortgage loan is paid off or the property is sold. Despite some success stories, loss mitigation tensions traditionally arise when mortgage servicers or their agents demand sensitive financial information from troubled homeowners while at the same time pressing for full payment or threatening foreclosure.

One practical solution might be for lenders to simply explain that they are seeking personal financial and related information as part of the formal loss mitigation program, and to grant limited forbearance from foreclosure pending a resolution of the process (e.g., 45-days). There is little, if any, empirical evidence that mortgage companies are engaging in this type of open dialogue with troubled homeowners before their agents make such intrusive demands of borrowers. Rather, the current practice seems imperiled from the start because some national lenders and their affiliates appear more interested in demanding information without explanation, followed by a curt notation on the homeowner's file that "borrower refused to provide the information requested." This only frustrates the design, purpose and intent of the FHA Loss Mitigation Program,[25]

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[22] *See* 24 CFR Parts 30 and 203 (HUD Final Rule) Loss mitigation options enable many homeowners who are in default on their FHA mortgage loans to avoid foreclosure and remain in their homes. Under the prior Rule, the maximum penalty was $6,500/violation, up to a maximum of $1.25 million for all violations committed by a lender during any one-year period. This new penalty provides for additional damages of three times the amount (i.e., treble damages) of any FHA mortgage insurance benefit claimed by a lender and is not subject to the current limitations; *see also* 04/29/05 HUD Press Release No. 05-062 (www.hud.gov).

[23] *See* 04/29/05 HUD Press Release No. 05-062 (www.hud.gov).

[24] *Id.*

[25] The U.S. House of Representatives has approved legislation similar to H.R 1025 in the past two Congresses.

particularly in jurisdictions like the District of Columbia where non-judicial foreclosures are permitted.[26]

B. The Impact of *Fairbanks* and *Starks* on Mortgage Servicing

1. Fairbanks *preyed* on Homeowners to generate servicing fees

Fairbanks Capital's principal business was acquiring and servicing sub-prime and non-performing residential mortgage loans. Fairbanks Capital bought its home loans in bulk, often without checking to ascertain whether each loan had been documented properly.[27] Following numerous homeowner complaints about abusive collection practices, the U.S. government and the national class brought lawsuits in the U.S. District Court for the District of Massachusetts alleging that Fairbanks Capital intentionally or recklessly mishandled loans in default or performing loans that Fairbanks Capital treated as if they were in default.[28] When homeowners are in default or considered to be in default, the mortgage company or its servicer is authorized to take certain actions in response, including but not limited to imposing late fees and other charges, obtaining property insurance to secure the mortgage, and/or foreclosing on the property itself to satisfy the secured debt.[29]

In *Fairbanks*, the plaintiffs alleged that Fairbanks Capital: (a) assessed late fees and other charges even when mortgage payments were made in a timely manner; (b) charged fees that were not authorized under the loan documents; (c) obtained property insurance at the borrowers' expense even when the borrowers had property insurance in place; (d) engaged in improper collection practices; and (d) took steps to foreclose on borrowers' homes even though not authorized under applicable law or the loan documents.[30] The plaintiffs in *Fairbanks* also alleged that improper imposition of "prepayment penalties" in violation of applicable state law.[31] The claims in *Fairbanks* deal with alleged violations of the Fair Debt Collection Practices Act, the Real Estate

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[26] Under D.C. law lenders file a lawsuit to obtain a deficiency judgment against the borrower for the difference between the foreclosure sale amount and the amount remaining on the original loan and the borrower has no rights of redemption after foreclosure. *See*

[27] *See generally Maxwell v. Fairbanks Capital Corp.* (*In re Maxwell*), 281 BR 101 (Bankr.D.Mass. July 16, 2002) (granting summary judgment for plaintiff on federal and state consumer rights claims). For purposes of the discussion on *Fairbanks*, the author relies principally on the Massachusetts Bankruptcy Court's recitation of facts in the *Maxwell* Chapter 13 adversary proceeding, the civil complaints filed by the FTC and the Curry class of plaintiffs, and the "*Notice of Proposed Class Action Settlement and Settlement Hearing*" ("*Fairbanks* Settlement Notice") submitted in the U.S. District Court for the District of Massachusetts.

[28] *See Fairbanks* Settlement Notice, at § 2.

[29] *Id.*

[30] *Id.*

[31] Prepayment penalties are a common form of predatory lending under which borrowers sign mortgages or notes that authorize the mortgage company to generate ancillary fee income via the imposition of monetary penalties if the loan if paid off early, typically as a result of refinancing. *See generally* www.responsiblelending.org.

Settlement Procedures Act pertaining to servicing, the Fair Housing Act, and related state laws.

Following discovery and motions practice, Fairbanks Capital settled the governmental and putative class action cases for $40.4 million and consent decree to modify its servicing practices and procedures.

2. EMC Mortgage Corporation victimized the Starks

On Monday, May 2, 2005, the U.S. Supreme Court rejected EMC Mortgage Corporation's ("EMC") petition for appellate review of a $6 million punitive damages award an arbitrator ordered the company to pay because of its questionable mortgage servicing and debt collection practices. The U.S. Supreme Court rejected EMC's cert. petition, despite third party requests from the U.S. Chamber of Commerce, the American Financial Services Association and several other banking groups and business interests that filed friend of the court briefs requesting that the Supreme Court hear the appeal.

The Starks sued EMC and its agents when the company repeatedly contacted them directly even though they had an attorney. EMC representatives also entered the Starks household forcibly to post foreclosure related signs in the windows after the couple moved out of the house. Under the terms of the mortgage, court proceedings and punitive damages were waived in favor of binding arbitration of all disputes. In 2002, an arbitrator awarded the Starks $2,000 in actual damages and $6 million in punitive damages for conduct that violated the FDCPA and was "reprehensible and outrageous, even though the arbitration provision of the mortgage had language expressly precluding punitive damages. The arbitrator determined that punitive damages were permissible under state law.

EMC challenged the punitive damages award in federal court, which was vacated after review by the U.S. District Court for the Western District of Missouri. The 8th U.S. Circuit Court of Appeals in St. Louis reinstated punitive damages award, however, ruling the arbitration agreement and Missouri law allowed such damages. The 8th Circuit also rejected EMC's arguments that the punitive damages awarded were excessive in light of recent Supreme Court rulings indicating that punitive damages bear some proportional relationship with actual damages. Thereafter, EMC filed a petition for certiorari with the U.S. Supreme Court, in the matter styled, *EMC Mortgage Corp. v. Stark*, 04-1056. On May 2, 2005, the Supreme Court issued a summary disposition order declining to hear the appeal.

Practice Pointer: Some states have adopted laws that set limits on the amount and timing of prepayment fees for all lenders. However, the Office of the Comptroller of the Currency ("OCC") has ruled that the 1981 federal regulations it issued under the National Bank Act[32] preempt and override state laws, rules and regulations when directed at

[32] 12 U.S.C. §§ 21, 371(a) (1864); 12 C.F.R. §§ 34.21 and 34.23 (1981) (authorizing national banks to create adjustable rate mortgages ("ARMs") and impose prepayment fees).

national banks and their subsidiaries. In fact, the national banks apparently are no longer willing to sit on the sidelines awaiting state enforcement actions aimed at their lending policies and practices, by filing declaratory judgment actions as a preemptive strike against the enforcement of state banking laws.[33] There is little doubt the current debate over federalism and national banking policy, which has origins dating back to *McCulloch v. Maryland*,[34] is headed back to the U.S. Supreme Court.

It also is worth noting that in a benign nod to the significance of the U.S. Supreme Court's refusal to overturn the $6 million punitive damages award for the homeowners victimized in *EMC Mortgage Corp. v. Starks*, CitiFinancial, a subsidiary of Citigroup, Inc. (NYSE: C) announced on May 19, 2005 that it will eliminate mandatory arbitration provisions from all home loans it originates *after* August 2005, and reduce the maximum pre-payment penalty during the first three years of home mortgages it originates.[35] It remains to be seen whether or to what extent other mortgage companies will follow CitiFinancial's lead in this regard.[36]

II. COMMON FORMS OF PREDATORY MORTGAGE SERVICING

Although predatory mortgage servicing is an illusory concept to some constituencies, no less an authority than FTC Chairman Timothy Munis has publicly acknowledged that: "Consumers should be treated fairly and honestly in the servicing of their loans. It is particularly important that the [Federal Trade] Commission stop unfair or deceptive practices in this industry, because consumers have no choice about who services their home loans…."[37]

Unfortunately, like many things legal these day, identifying or defining precisely what "is" is in terms of mortgage servicing violations can be a difficult task for the consumer and counsel when the rights, incidents and vestiges of homeownership are on the line. Based on a review of recent case law and pleadings, the following is an inexhaustive listing of type of misconduct that likely constitutes predatory mortgage servicing under applicable federal and state law:[38]

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[33] *See, e.g., National City Mortgage v. Turnbaugh, Fin. Reg. Comm'r of Md.,* No.CCB-04-2719, slip op., at 6-9, 25 (D. Md. Apr. 15, 2005) (Blake, J.) (granting permanent injunction for bank; citing numerous decisions in accord); Smitherman, *Maryland loses suit over mortgage penalties: State predatory lending law doesn't apply to national banks, judge says,* Balt. Sun, Apr. 19, 2005, at § D1.

[34] 17 U.S. 316 (1819).

[35] *See* Nat'l Mortgage News Online (http://www.nationalmortgagenews.com/nmn/dcnews.htm) (Citi to Bar Mandatory Arbitration Clauses).

[36] *Compare* note 33, *supra*.

[37] *See* 11/12/03 FTC-HUD Joint Press Release regarding the *Fairbanks* settlement. http://www.ftc.gov/opa/2003/11/fairbanks.htm

[38] *See In re Maxwell*, 281 B.R. 101, 117 (Bankr. D. Mass. 2002). Any of the foregoing could trigger an improper foreclosure episode. Under these circumstances, a homeowner may very well have a valid defense to at least part of the servicer's claim for payment because: (a) the borrower is not truly in default; (b) the extent of the arrearage is significantly less than claimed; or (c) the mortgage loan is predatory,, and thus, subject to attack. *Accord* 15 U.S.C. §1601 et seq. ("Truth in Lending Act" or "TILA"), as amended by the Home Ownership & Equity Protection Act of 1994, 15 U.S.C. §§1602(aa) and 1639 ("HOEPA"), and implementing Regulation Z, 12 C.F.R. Part 226.

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The Seven (7) Deadly Signs of Predatory Mortgage Servicing

1. Recording timely payments as late, thereby imposing unauthorized fees;

2. Improperly refusing to accept monthly mortgage payments, resulting in default and adverse credit reporting;

3. Paying property taxes late, and then charging the late fees to the borrower;

4. Charging force-placed insurance when the homeowner already has full coverage;

5. Disregarding qualified written requests under RESPA and related homeowner complaints;

6. Abusive treatment by customer service representatives and collection attorneys; and

7. Forcibly entering borrowers' homes to winterize or place foreclosure signs on the premises.

III. GENERAL OBSERVATIONS & PRACTICAL SOLUTIONS

"Those who win every battle are not really skillful—
those who render others' armies helpless without fighting are the best of all."[39]

A. Private Property Rights are Sacred in America

From the earliest days of our Republic, Americans have always believed in the inalienable rights to "life, liberty, and property." In fact, property rights were considered so sacred to the framers of our Constitution that they are protected in the original document,[40] as well as the Third,[41] Fourth,[42] and Fifth Amendments.[43] The U.S. Constitution is thought to provide such express limitations on the ability to impair

[39] T. Cleary, *Mastering the Art of War: Zhuge Liang's and Liu Ji's commentaries on the classic by Sun Tzu,* at 19 (1989).
[40] U.S. Const. Preamble ("secure the Blessings of Liberty to ourselves and *our* Posterity"); Art. 1, §§ 8, 10; Art. 4, § 2 (taxes, duties, imposts, excises, lands, commerce, bankruptcies, bills of credit, the exclusive rights of authors and inventors, contracts, debts, and engagements are expressly identified in the Constitution.
[41] U.S. Const. Amend. III ("No Soldier shall, in time of peace be quartered *in any house, without the consent of the Owner*, nor in time of war, but in a manner to be prescribed by law") (emphasis added).
[42] U.S. Const. Amend. IV ("*The right of the people to be secure in their* persons, *houses*, papers, and effects, *against unreasonable searches and seizures*, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized").
[43] U.S. Const. Amend. V ("*No person shall be … deprived* of life, liberty, or *property*, without due process of law; nor shall *private property* be taken for public use, without just compensation").

property rights because owning your home is an intensely personal experience in America that in many ways gives birth to your dreams and visions for the future.[44]

On the other hand, foreclosure can be likened to five stages of a death.[45] These stages of despair and hopelessness include:

(1) Denial that the lender is trying to take your home even as certified letters and newspaper listings arrive at your door step;

(2) Anger about the fact that your home will be taken away;

(3) Bargaining as you mull over a series of dead-end options to save the home (including HOEPA loans, i.e., short term, high cost 11th hour financings to cure alleged defaults);

(4) Depression that all your hopes and dreams are being wiped out; and

(5) Acceptance that you are going to lose your home or have to seek bankruptcy protection to keep it.[46]

B. Document Retention is Critical

Although the age old saying, "Get it in writing," certainly a bear repeating anytime an individual is involved in a real estate transaction. The safe keeping of what the homeowner *actually* receives in writing from the lender or servicers is equally important to protecting and preserving the American Dream.

Predatory lending and mortgage servicing cases are document intensive by nature because of the federal and state disclosure requirements. The following is a brief summary document categories that homeowners should have received in connection with a home purchase or likely will need in the event of a mortgage servicing dispute:

1. Pre-Closing Documents

- Good Faith Estimates
- HOEPA Disclosures
- Business Cards
- Offering Circulars/Brochures
- Purchase Agreement
- Amendments to Purchasing Agreement, if any
- Other signed documents

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[44] *Accord* Special Field Orders No. 15 (Jan. 16, 1865) (Field Order issued by Union Gen. William T. Sherman granting 40 acres of tillable land and a mule to the freed slaves in accordance with President Abraham Lincoln's Emancipation Proclamation).

[45] See Elisabeth Kübler-Ross, M.D., *On Death and Dying* (1969) (this book introduced the five stages of dying).

[46] *See* R. Quercia, M. Stegman & W. Davis, *supra* note 3 at 22, 31 (noting that "most homeowners who experienced at least one foreclosure episode eventually lost their homes").

2. Settlement/Closing Documents

- HUD-1
- Truth in Lending Disclosure Statement (TILA)
- Deed in Trust
- Promissory Note
- Mortgage
- Closing statement agreement regarding errors
- A-R-M Disclosures
- Prorations statement
- IRS Form 1099
- Condo or Home Owner's Association approval, if required

3. Post-Closing Documents

- Copies of Check(s), if funds received @ closing
- Coupon Books
- Escrow Statements
- Property Tax Statements
- Property Valuations
- Property Insurance Notices

4. Debt Collection Records

- Notice(s) that loan has been transferred to another lender/servicer
- Late Payment Notices
- Default Notices
- Foreclosure Notices
- Keep telephone log of date(s) and time(s) of calls from mortgage servicer
- Bankruptcy Papers, if applicable

5. Proof of Payments

- Bank statements
- Canceled Checks
- Western Union receipts, including Quick Collect confirmations
- Copies of Money Orders/Cashier's checks
- Overnight Mail receipts (Fed Ex, USPS, DHL, etc.)

CONCLUSION

Predatory mortgage servicing is a scourge on the America Dream. Next to life and death, there are few, if any, human events that equal the condition of being a property owner with a tangible stake in today's reality and tomorrow's promise. This briefing paper draws a bright line between predatory lending and mortgage servicing abuse, by analyzing the significance of the recent *Fairbanks* settlement and the U.S. Supreme Court's refusal to even review *EMC Mortgage Corp. v. Starks*. It is only through a direct linkage between predatory lending and mortgage servicing abuse that either of these evils can be stopped. If and when this happens, we posit that the Secondary Marketplace will abandon "bad paper" because open debate throughout academia, boardrooms, courtrooms and the Halls of Congress will underscore that improper mortgage servicing trumps the very best home loan *every time*.

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