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Mortgage Fraud:

Wells Fargo Wins, Homeowners, Attorney Generals and Courts Lose

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PICK-A-FRAUD CLASS ACTION:
THE MISREPRESENTATION OF AN UNDERREPRESENTED CLASS

From 2003 until the real estate market imploded in 2008, World Savings Bank (now Wells Fargo, through purchase of Wachovia by Wells Fargo), sold tens of thousands of fraudulent Pick-a-Payment loans which devastated entire communities and tens of thousands of borrowers and families. Many of these loans were marketed and sold to New Jersey residents (approximately 5% of the total according to the New Jersey Attorney General). These New Jersey homeowners are like half a million homeowners throughout the United States who purchased those Pick-A-Payment loans, so their ordeal represents the struggles that many Americans have faced because of banks like Wells Fargo.

Wells Fargo has engaged, and continues to engage, in a very aggressive position with regard to its liabilities and rights on these misleading and fraudulent lending products. The strategy has been to pursue foreclosure at the earliest opportunity as aggressively as possible in order to force homeowners out, which also uses up homeowners' financial resources defending the foreclosure rather than attacking the underlying fraud in the transaction.

Given its position and the underlying fraudulent misrepresentations of its lending product and practices, Wells Fargo was faced with actions by a variety of Attorneys General, including the Attorney General of New Jersey. The New Jersey Attorney General described the State's action against Wells Fargo as follows: "This case is part of our on-going effort to protect New Jersey consumers, and to assist homeowners who may have fallen victim to misleading or exploitative lending practices."

In addition, Wells Fargo faced a number of potential class actions filed against it throughout the country. Wells Fargo's strategic response to the threats facing it on these fraudulent loans was both ingenious and disingenuous. Wells Fargo negotiated with the Attorneys General (including New Jersey, whose residents enjoy far greater fraud and foreclosure protections than most other states) to provide resident "class members" in the Class Action suit a series of promised modifications *without* waiver of any of the homeowner's rights to sue for violations of their rights and also *without* waiver of any homeowner's defenses to a foreclosure action on these fraudulent loans; in response, the States' Attorneys Generals dropped their actions. Importantly, in the California Class Action suit parallel to this agreement with the Attorneys General, there was no New Jersey resident Class Representative to safeguard the far more stringent rights and protections of New Jersey homeowners. To that effect, the New Jersey Attorney General functioned within its Agreement as its citizens' protector. That Agreement, however, was effectively breached and revoked by Wells Fargo.

After settling with the Attorneys Generals, Wells Fargo then negotiated a settlement in the California Class Action suit against it to provide for essentially the same modifications it had agreed to with the Attorneys Generals. But, of the utmost importance, in the California Class Action Settlement Agreement, those same modifications came *with* a waiver of the homeowner's rights to sue for violations of their rights and *with* a waiver of any homeowner's defenses to a foreclosure action on these fraudulent loans.

Pointedly, the homeowners subject to the first Agreement made by the Attorneys General were not apprised or made aware by Wells Fargo that they already had the protections and the right to the promised modifications that were contained in the California Class Action Settlement. Instead, these homeowners were sent the "new" settlement agreement which contained promises and protections they already had (not explained) and a check in the amount of $178.04 in exchange for all their rights and defenses.

Adding insult to injury, Wells Fargo's failure to disclose in its second Settlement Agreement is painfully ironic because the underlying reason for the first Agreement— with the Attorneys Generals— was Wells Fargo's failure to disclose its predatory loan terms. In the first Agreement, the New Jersey Attorney General noted that it was to resolve allegations against Wells Fargo (through its acquired companies) that it had "**deceptively marketed** adjustable rate mortgage loans." The New Jersey Attorney General noted within its Press Release that: "In many cases, those who seek out these 'minimum payment' option mortgages are the very people who have the most limited financial resources. Signing them up for loan terms **that sound attractive without warning them of the potential financial pitfalls is wrong, and we intend to hold companies that engage in such conduct accountable**"; and, as noted prior, that "This case is part of our on-going effort to protect New Jersey consumers, and to assist homeowners who may have fallen victim to misleading or exploitative lending practices."

It is yet to be seen if the State of New Jersey and the other nine states which were parties to the first Agreement will hold Wells Fargo accountable for these most recent misleading, exploitative and deceptive practices which were supposed to atone for their prior misleading, exploitative and deceptive practices.

Adding further insult and injury, after engaging in the aforementioned misleading practices by entering into the two separate Settlements, Wells Fargo then, unfathomably, was found to have misled the Class and the Court regarding its compliance with the California Class Action Settlement.

Subsequent Class Action litigation has challenged Wells Fargo's good faith and compliance in the California Cass Action Settlement. This new Class Action filed in the Northern District of California maintains that Wells Fargo breached the California settlement through the use of inflated property value numbers, false income information, inaccurate interest-rate data and other such inappropriate tactics.

After a preliminary hearing, on July 2, 2013, Judge Grewal issued his Report and Recommendation on the course of the litigation, which concluded that "Wells Fargo's reports to Class Counsel pursuant to the settlement agreement, as well as its statistics submitted to the Court in opposition to Plaintiff's request for injunctive relief, are misleading and unreliable."

Wells Fargo has perpetrated a seemingly endless cycle of misleading, deceptive and exploitative practices in response to its misleading, deceptive and exploitative practices. Not only did Wells Fargo and its predecessors:

- issue the predatory and misleading loans;

- settle with multiple States' Attorneys' General without requiring homeowners to waive any rights to entice the Attorneys' General to drop their actions;
- subsequently enter into the California Class Action Agreement which offered no further modification benefits to the class members but violated the original agreements by enforcing a waiver of all legal rights by class members;
- move aggressively forward with foreclosures and insist that class members could not defend against these suits because any right to defend their homes had been waived; but now Wells Fargo has been found to have:
- violated the California Class Action Agreement

For all of these acts Wells Fargomust be held accountable— fraud undoes everything.

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By 2009, Wells Fargo, its subsidiaries and predecessors had been sued many times by a class of nationwide homeowners who had been sold predatory loans designed by their lenders to fail. After more than two years of litigation regarding these so-called Pick-a-Payment loans, a settlement was eventually conceived by the Defendant Banks and Class Counsel for the Plaintiffs on the class action filed in the Northern District of California, M:09-CV-2015-JF. The terms of the settlement contained three essential elements: loan modification opportunities, a cash payment, and an extensive relinquishment of rights. These were essentially the same remedies that the New Jersey Attorney General had negotiated, but were considerably worse than the New Jersey agreement for New Jersey residents since the settlement included a waiver of ALL homeowner rights to sue or defend the foreclosure action.

There is no evidence that Wells Fargo ever notified the New Jersey Attorney General that it had purported to "revoke" its agreement with the State of New Jersey through its class action settlement agreement.

The terms negotiated by the New Jersey Attorney General, later effectively rescinded by Wells Fargo, were that New Jersey homeowners who became "class members" as part of the class action settlement would be considered for loan modifications. The primary modification opportunity – the Home Affordable Modification Program ("HAMP") – was already available to most of the New Jersey homeowners (and most of the class members as well) as a matter of federal law. As to the secondary modification opportunity – the MAP2R – Wells Fargo agreed to consider homeowners who did not qualify for HAMP modification for this new, principal-reducing loan modification. Attorneys General from ten states, including New Jersey, had obtained assurances from Wells Fargo that the bank would review the relevant borrowers from those states for the MAP2R modification. Therefore, in those ten states, the Pick-a-Payment class action did not offer a single new modification opportunity for aggrieved homeowners.

The settlement also provided a monetary payment to all class members. The Bank agreed to spend $75 million settling this case. First, 1/3 of the Bank's total expenditure ($25 Million Dollars) was paid to the class attorneys for brokering a deal worse than that which had already been secured by ten states' Attorneys General. Of the remaining $50 Million, approximately

$125,000[1] was distributed among the 26 class representatives and the remainder was divided up equally so that each of the half a million class members received a mere $178.04.

New Jersey homeowners received no benefit from the class settlement other than the $178.04 check.

That was it.

In exchange for this nominal sum New Jersey homeowners waived all rights to defend foreclosure and waived all rights to sue for fraud and for all other available relief.

For a $50 million dollar 'fine' payable to half a million homeowners, Wells Fargo managed to avoid billions of dollars in potential losses as none of these loans were enforceable according to the terms of the loan product.

Many questions are raised by this result:

- What was the point of the New Jersey Attorney General's action to protect New Jersey homeowners if the bank could go to federal court in California and take them away?
- Why would class members agree to so little from the bank to pay to immunize its frauds? Why would the bank pay so much to the class lawyers? And why so little to the class members?
- Who decided to settle on these terms? And why did the court approve the settlement?
- Were the class representatives involved in these decisions; if not, did the lawyers for the class act on behalf of the class and themselves without any approval from their clients?
- Aside from questions about compensation, what was the relationship with the class lawyers? Who picked the representatives?

On its face, the settlement purported to offer the aggrieved homeowners a cash payment and the opportunity to be considered for the "Lexus of loan modifications."[2] In reality, New Jersey class members (as well as those in other states with alert attorneys general) received a mere $178 and promises of rights they already has by virtue of the Attorney General's action in exchange for a drastic release of rights to a lender with a renewed vigor for, and unimpeded path towards, foreclosure.

I. The Pick-a-Pay Scheme: the Definition of a Predatory Loan

At the height of the housing bubble in the early 'aughts,' banks offered naïve borrowers improper predatory loans with complete impunity. Among these destined-to-fail loans was the notorious Pick-a-Payment loan. Pick-a-Payment loans offered borrowers four options for repayment – a 15 year repayment plan, a 30 year repayment plan, an interest-only schedule, and the poisonous negative-amortization option. Homeowners who were induced into the negative

[1] Court's Order, 3:4-5

[2] Grewal's July 2, 2013 Report and Recommendation, p. 17 ("The settlement agreement's real benefit to class members was supposed to be a sort of "Lexus" loan modification program that was more favorable to borrowers than programs available to the general public.")

amortization program would make payments less than the interest charged against them. As a result, the loan balance would *increase* monthly rather than decrease.[3] Once the loan hit a pre-determined level, the "neg. am." option would disappear and the homeowner would be required to pay a significantly higher monthly payment. That higher payment usually exceeded the payment level at which the homeowner was approved using traditional underwriting standards. The end result in most circumstances assured default and eventual foreclosure.

By design, the Pick-a-Payment loans were inappropriate and in violation of federal lending regulations[4] in almost every circumstance.[5] Nevertheless, the banks, most notoriously, World Savings Bank, sold these loans to individuals despite knowing from their own sales practices and underwriting that the borrowers would not be able to pay the loan back in full without resorting to the collateral (i.e. the borrowers' home) by sale, refinance, or foreclosure.

A Pick-a-Pay loan in which the broker enticed the borrower and/or approved the borrower into the loan on the basis that he can make the minimum negative amortizing payment violates federal law. Under 12 C.F.R. § 30, *Et Seq.* the regulations governing the Federal Deposit Insurance Act, it is a violation of lending laws to issue a mortgage loan based on the liquidation value of the home rather than the borrower's ability to pay. Pick-a-Pay loans almost always result in equity stripping, which is yet another violation of 12 C.F.R. § 30. Lastly, 12 C.F.R. § 30 directly warns banks against issuing negative amortizing loans, explaining that in many circumstances such loans are by default inappropriate and punishable under the regulations.

Under the Federal Trade Commission Act, 15 U.S.C. § 45, Pick-a-Pay loans are most often illegal as unfair and deceptive. According to the Federal Reserve Bank's Consumer Compliance Handbook issued to national banks, Pick-a-Pay loans are inappropriate because the benefit of the product does not outweigh the injury when negative amortization occurs. More often than not, the disclosures provided with the loan documents were confusing and misleading.

In many circumstances, this reality caused untold financial and personal harm to the borrowers who, when pressed for payment, defaulted on credit cards, student loans, car loans and every other payment all in an effort to save their most important asset, their home. Even homeowners who were otherwise perfectly solvent were destined for the inevitable destruction of their financial lives as a result of Wells Fargo's predatory Pick-a-Payment product.

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[3] Imagine paying only the minimum payment on a credit card month after month rather than paying the balance. Quickly, the interest accrues and the balance balloons, yet the consumer is lulled into thinking they are being responsible and satisfying their obligation.

[4] According to Federal Register Vol. 70, No. 24, February 7, 2005 page 6329 footnote 2, "Federal consumer protection laws and regulations that apply with respect to the residential real estate lending activities of national banks and their operating subsidiaries include: the Federal Trade Commission Act, 15 U.S.C. §§ 41, *et seq*.; the Truth in Lending Act, 15 U.S.C. §§ 1601, *et seq.*; the Home Ownership and Equity Protection Act, 15 U.S.C. §§ 1639, *et seq*.; the Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.*; the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691, *et seq*.; the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 1261, *et seq.*; the Flood Disaster Protection Act, 42 U.S.C. §§ 4001, *et seq.*; the Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801, *et seq.*; the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, *et seq.*, as recently amended by the Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 111 Stat. 1952; the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq*.; and the privacy provisions of Title V of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801, *et seq.*

[5] The Pick-a-Pay option is always inappropriate for a person making a steady paycheck.

II. Class Action Chaos

Once the housing bubble met its inevitable end and burst, numerous homeowners filed legal actions against World Savings Bank, Wachovia Mortgage, and Wells Fargo (hereafter, collectively, the "Banks") for damages arising from the predatory Pick-a-Payment loans. In February 2009, more than half a million homeowners were joined in a class action suit against the Banks.

a. Class Members were Underrepresented by the Class Representatives

Class action suits are a controversial way of resolving disputes involving large numbers of individuals. While they can offer the hope of relief for those whose claims are too small to be prosecuted individually, they pose substantial risks when pursued by careless or unscrupulous attorneys and not actively supervised by judges. Ordinarily, every party to a trial gets his or her day in court to seek justice for the harms that he or she has suffered. However, in a class action, in order to accommodate the large number of parties to the suit, the plaintiffs are represented by a subset of the class who, at least in theory, will pursue the interests of the entire group and are for that reason named the "Class Representatives." The theory underlying the election of class representatives is that the harms suffered by all of the sidelined plaintiffs are nonetheless addressed by their proxies.

In this class action suit, *In re Wachovia Corp. "Pick-A-Payment" Mortgage Marketing And Sales Practice Litigation* ("*In re Wachovia*"), the common element among the class members was that they were all homeowners who executed a "Pick-a-Payment" loan marketed to them by the banks. Under that common umbrella, however, were homeowners from each of the fifty states, all of whom were divided into one of three separate classes of debtors: Class A - individuals who had originated a Pick-a-Payment loan, but no longer carried the debt; Class B - those who were in danger of imminent default; and Class C - homeowners who had already defaulted. Accordingly, although each of the class members' harms may have originated from a common point, there were actually 150 different circumstantial variations among the members.[6] Under the classic class action structure, one would expect there to be one representative for each circumstantial variation. Yet for some unknown reason, only twenty-six individuals were identified for the purposes of representing the class members.[7]

The twenty-six class representatives were residents of just seven states: Arizona, California, Florida, Illinois, Maryland, Missouri, and South Carolina.[8] All twenty-six class representatives were named class representatives after their individually-filed complaints were consolidated.

However, not every litigant in one of the consolidated matters was given the opportunity to act as a class representative. For instance, Laura Johnson had filed a claim in New Jersey state court

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[6] Each of the 50 states could potentially host a class member from each of the three subclasses, A, B, and C. Given the distinctions between state laws available to resident homeowners and the differences between the factual situations among the subclasses, each state's subclass is a distinct subclass, totaling 150 subclasses.
Agreement and Stipulation of Settlement of Class Action § I.1.12. "Class Representatives" identifies 26 individual class representatives.

[8] Agreement and Stipulation of Settlement of Class Action, Factual Background and Recitals §§ 2-3.j. states the venue in which each of the individual claimants filed their suits.

but when her claim was consolidated along with the other cases as *In re Wachovia*, she was not named as a class representative.[9] Similarly, Joseph Henning had filed in federal court in Massachusetts, but when his claim was consolidated with the other cases as *In re Wachovia*, he was not named as a class representative.[10] The result is that the majority of the class members, including Laura Johnson and all other New Jersey class members, had no representative advocating for their interests. In contrast, Californians were over-represented. Nearly a quarter of the class representatives were California residents.[11]

The substantive issue caused by this lack of representation is that many class members were required to give up significantly more rights than other members without anyone advocating for those rights. For instance in Maryland, foreclosures are conducted in secret; the lender is not required to notify the borrower of a pending foreclosure proceeding, which typically concludes within six weeks.[12] In California, most foreclosures are administrative, not judicial actions, which last an average of four months.[13] In contrast, in New Jersey, the lender must notify the borrower of a pending foreclosure proceeding and the borrower has a lengthy amount of time during which to obtain a lawyer and defend against the action, with the litigation lasting an average of nine months.[14] Furthermore, in New Jersey, state claims such as the Consumer Fraud Act, N.J.S.A. §§ 56:8-1, et seq., and the Fair Foreclosure Act, N.J.S.A. §§ 2A:50-53, et seq., provide unique private rights of action for homeowners to assert against lenders.

Because New Jerseyans, among others, were effectively unrepresented by the class representatives, they had no one to truly advocate for their unique rights. As a result, not only were those rights ignored and left in the wake of this massive lawsuit, but those individuals did not even have someone "in the room" to advocate for their right to be told of this excessive relinquishment of rights.

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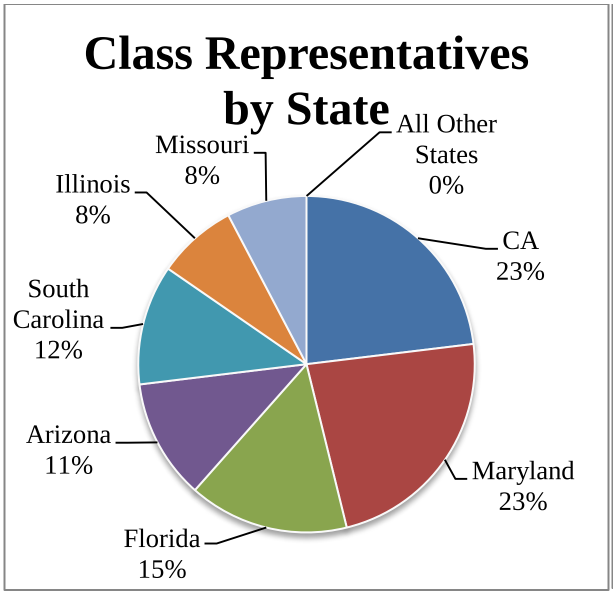
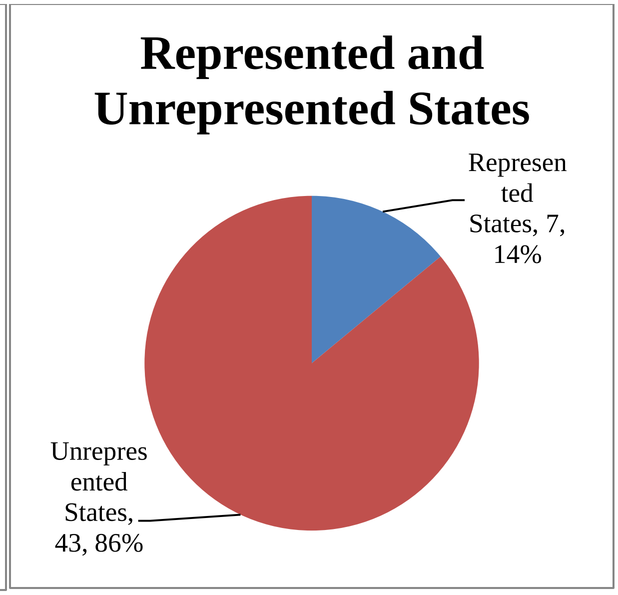
[9] *See* Agreement and Stipulation of Settlement of Class Action § I.1.12 and Factual Background and Recitals § 3.b.
[10] *See* Agreement and Stipulation of Settlement of Class Action § I.1.12 and Factual Background and Recitals § 3.h.
[11] *See* Agreement and Stipulation of Settlement of Class Action § I.1.12 and Factual Background and Recitals §§ 2-3.j.
[12] Realty Trac, *Foreclosure Laws and Procedures by State*, http://www.realtytrac.com/real-estate-guides/foreclosure-laws/ (last visited Dec. 2, 2013).
[13] *Id*.
[14] *Id.*





The lack of actual representation is especially egregious not only because most of the class members were not represented, but also because it appears that some of the class representatives did not even know that they were acting on behalf of 500,000 fellow homeowners from across the country.

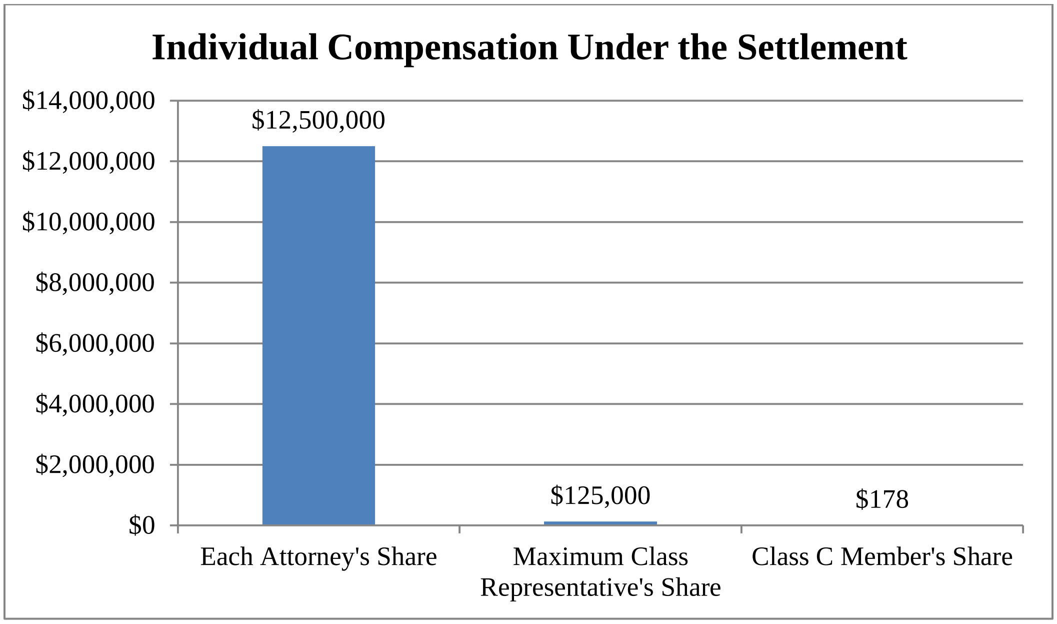
As of this writing 20 of the 26 Class Representatives have been personally contacted by this firm. However, to date, only one individual has agreed to tell her story – Jayme Brunkhorst.

Mrs. Brunkhorst had originally filed a claim against World Savings Bank for its use of the predatory Pick-a-Payment loans in the Southern District of Illinois. Eventually, her attorney recommended that she join the *In Re Wachovia* class action and she was put in contact with the attorneys for the class. Two attorneys met with her and collected documents relevant to the action. However, she did not hear anything about the class action for months and did not hear from those attorneys again. In fact, the next and last communication she received about the class action was when she and her husband (also one of the 26 class representatives) each received a check for $2,500. She had never been informed as to the status of the case, nor had she ever been asked to consider the settlement terms including the $25 million payment the attorneys had negotiated for themselves, the fact that the settlement required homeowners to give up their rights to further relief, or the fact that different homeowners were required to give up more rights than others.

b. *The Best Deal Wells Fargo Ever Made*

Despite the unequivocally improper and insufficient representation of the class members by 26 individuals who may or may not have been aware of their role in one of the largest class action litigations in the history of the mortgage industry, a settlement was eventually struck between the Banks and Class Counsel.

The two sides agreed to the terms of the settlement in December 2010, and Judge Jeremy Fogel of the Northern District of California ordered the settlement on May 17, 2011. The settlement expired on June 30, 2013.[15] The basic terms of the settlement included a $50 million payout to be shared among the class members, and a series of loan modification options based on eligibility criteria. However, that amount was reduced by the 26 individual representatives receiving priority compensation. Meanwhile the class attorneys received $25 million. Class members who accepted the terms of settlement by not opting out further waived claims against the Banks. After a small number of class members opted out of the settlement so that they could retain the right to pursue their individual claims against the banks, the remaining class members who waived their rights to defend their homes each were paid $178.04.



This settlement was possibly the most lucrative deal Wells Fargo ever made.

On the other hand, it is hard to imagine a worse deal for New Jersey homeowners. In exchange for a waiver of their right to raise the predatory nature of the loan as a defense to a Wells Fargo foreclosure action, New Jersey homeowners received a check for $178.04.

c. *The New Jersey Attorney General already secured essentially the same settlement and without waiving any homeowner's right to defend a foreclosure or sue for damages against Wells Fargo.*

Prior to the execution of the *In re Wachovia* settlement, several states had already entered into Assurances with Wells Fargo for certain relief based on the Bank's predatory lending practices, including the use of Pick-a-Payment loans.

New Jersey was one of those ten states.

[15] *See* Agreement and Stipulation of Settlement of Class Action §§ VI.E., VI.E.11., VI.F.: ("These benefits […] shall remain open until June 30, 2013.")

On October 5, 2010, the New Jersey Attorney General entered into an Assurance with Wells Fargo.[16] That agreement provided that, between December 18, 2010, and June 30, 2013, Wells Fargo was required to consider all eligible Pick-a-Payment victims for a modification pursuant to HAMP, or if unqualified for HAMP, for a MAP2R modification.[17] Additionally, beneficiary homeowners who do not qualify for HAMP or MAP2R were nonetheless to be presented with other loss mitigation options including entry into the Home Affordable Foreclosure Alternative program,[18] consideration for a short-sale, or an offer of a deed-in-lieu of foreclosure. Notably, each of these alternatives was required to provide a minimum value for the homeowner of at least $1,500.[19] Moreover, the New Jersey Assurance secured this relief without the beneficiaries giving up any legal rights, including the right to a private right of action.

This Assurance, in Judge Fogel's words, provided *"the identical relief"* that would eventually be obtained by class counsel in the *In re Wachovia* settlement two months later.[20] However, characterizing the two settlements as conferring "the identical relief" is not quite true. In reality, the *In re Wachovia* settlement actually put homeowners in a *worse* position than they had been in previously.

In re Wachovia awarded homeowners, who in large part were in financial ruin, $178.04 in exchange for a waiver of legal rights to any and all claims or defenses associated with the predatory nature of the Pick-a-Payment loan. Moreover, while the Assurance required the Banks to conduct "Outreach to Borrowers," consisting of two letters between October 5, and December 18, 2010, "describing MAP2R's eligibility requirements, terms, and application process and its relationship with HAMP,"[21] the class action settlement had a significantly diminished notice requirement.[22]

The most egregious failure of the *In re Wachovia* settlement notice was that it did not actually advise the homeowners that they were already entitled to "the identical relief," pursuant to the Attorneys General Assurances. Moreover, the notice failed to identify that the only substantive benefit in the settlement was a check $178.04 in exchange for a sweeping l relinquishment of the right to claims and defenses in connection with the origination of the predatory loan. Thus, when the *In re Wachovia* settlement was reached, not only did the settlement not offer any additional rights for thousands of homeowners, it actually left those individuals worse off than they had been previously.

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[16] *See* New Jersey Attorney General Assurance.

[17] New Jersey Attorney General Assurance § V.A.

[18] The Home Affordable Foreclosure Alternative ("HAFA") Program is a federal program that "provides opportunities for homeowners who can no longer afford to stay in their home but want to avoid foreclosure to transition to more affordable housing through a short sale or deed-in-lieu of foreclosure." Departments of the Treasury and Housing and Urban Development, *Glossary*, Making Home Affordable, http://www.makinghomeaffordable.gov/learning-center/glossary/Pages/default.aspx (last visited October 23, 2013).

[19] New Jersey Attorney General Assurance § VIII.

[20] Order § II.B.

[21] New Jersey Attorney General Assurance § VI.

[22] Notably, the notice required by the *In re Wachovia* settlement involved only one letter which was not required to, and did not, include a description of MAP2R's eligibility requirements, terms, application process, and its relationship with HAMP.

III. Wells Fargo has failed to comply with its basic obligations under the settlement

The settlement "agreed upon" is essentially meaningless to most homeowners. Nevertheless, Wells Fargo was obligated, assuming the settlement was otherwise valid, to take certain actions. However, Wells Fargo has failed to comply with some of the most basic elements of the Settlement, including considering all class members for an appropriate modification.

Wells Fargo has avoided this obligation by taking the stance that the settlement terms shift the burden for obtaining relief to the aggrieved homeowners. The Bank's position is that homeowners must actively apply for a HAMP modification in order to trigger the bank's obligation to evaluate the class member for relief under the terms of the settlement.[23] In other words, in the Bank's eyes, the fact that a homeowner opted into a settlement which entitled them to the "Lexus of loan modifications" was not alone a concrete enough statement that they were interested in said luxury modification. This is a selective reading of the settlement that can only be interpreted as the Bank's most recent effort to skirt their duties and deny homeowners the "benefits" of the settlement.

This position is highlighted by the deposition testimony of Michael Dolan. Mr. Dolan is the corporate representative selected by Wells Fargo to speak on behalf of the Bank whenever it appears before Judge Fogel.[24] He, and by extension Wells Fargo, have stated that homeowners who assert that, under the terms of the *In re Wachovia* settlement, "they're entitled to a loan modification served up on a platter" are misconstruing the bank's obligations.[25]

However, despite the Bank's reliance on their misguided interpretation of the settlement, Mr. Dolan cannot actually support this analysis as evidenced by his uninformed and contradictory deposition testimony:

Q. So [does a homeowner] have to ask for a modification?
A. She had to ask to be reviewed for a modification.
Q. Where does it say that in this document?[26]
...
A. Page 6, No. 10[27]
...
Q. Would you please tell me what in paragraph 10, if anything, describes what she has to do?
A. Paragraph 10 does not describe what she has to do, paragraph 14 does.[28]
...

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[23] *See* Dolan Dep. Sept. 10, 2013, 47:16-48:1 ("Q: [If a class member] never applied for a HAMP [modification] after this settlement agreement, what would the bank's obligations be to her? […] A: We have no obligation to her except to pay her the money, which we did."). *See also* Id. at 55:19-56:5 ("[Wells Fargo] can't give [a class member] a HAMP at any time, even in June of 2010, if she doesn't apply […]").
[24] *See* Dolan Dep. June 26, 2013, 48:7-10.
[25] Dolan Dep. June 26, 2013, 34:22-35:1.
[26] Dolan Dep. Sept. 10, 2013, 19:13-21.
[27] *Id*.
[28] Dolan Dep. Sept. 10, 2013, 23:23-24:4.

A. Section 27 allows them to also call in to find out more information about the proposed settlement.[29]

...

Q. if somebody doesn't contact them, do they lose their rights under the agreement?

A. No, they do not.

Q. So they don't have to make that call?

A. Well, they have to make this call to this number . . . but we also mailed her [] letters saying if you would like to apply for a loan modification, you need to call these other phone numbers.[30]

...

Q. What does [paragraph 14] tell her she has to do, if anything, to obtain the benefits of this settlement.

A. It doesn't say that, it says, "If you would like to apply," it doesn't say she has to do anything, sir.[31]

...

Q. [W]hat is it exactly she has to do to get a benefit? . . .

A. Call the bank and respond to the solicitation. . . all she has to do is respond to the mailings.[32]

...

Q. What does [the settlement agreement] say that [a homeowner] would have to do to obtain the benefits of the loan modification?

A. "consistent with federal requirements"

Q. How would she know what they are?

A. She would hire someone like you who was already her counsel. . . [or] [s]he could go to the HAMP website and find out what that said.[33]

...

Q. If [a homeowner] never applied for a HAMP loan after this settlement agreement, what would the bank's obligations be to her? . . .

A. We have no obligation to her except to pay her the money.[34]

The banks' bad faith in compliance with the settlement is compounded by its conduct with regard to inquiries into its compliance. When challenged on the issue of whether the banks complied with their obligations under the settlement, Mr. Dolan insisted that the answer was protected by "privilege" by virtue of concurrent litigation.[35] However, even if the information regarding compliance was protected by attorney-client privilege, Wells Fargo is still governed by "a continuing obligation during the course of [a] litigation" to identify all concurrent actions and the parties to those actions.[36] Thus, even if Mr. Dolan's knowledge is privileged, the existence of the information is not privileged and must be revealed.

[29] Dolan Dep. Sept. 10, 2013, 18:20.
[30] Dolan Dep. Sept. 10, 2013, 25:5-13.
[31] Dolan Dep. Sept. 10, 2013, 25:16-21.
[32] Dolan Dep. Sept. 10, 2013.
[33] Dolan Dep. Sept. 10, 2013, 42:2-16.
[34] Dolan Dep. Sept. 10, 2013.
[35] Dolan Dep. June 26, 2013, 63:6-15.
[36] N.J. Ct. R. 4:5-1(b)(2) See also CA R. 3.300.

At any rate, to the extent that Mr. Dolan's reading of the settlement can be accepted, the persistent language in the settlement and the notice sent to homeowners that conflicts with the bank's position indicates that the settlement and notice were so equivocal that they were inadequate. Assuming that the bank has a valid position that it was not obligated to offer anything to homeowners – other than $178.04 – until the homeowners initiated the extensive review process, the homeowners were explicitly notified otherwise.

The settlement notice reads in various places, "If the Court grants final approval to the Settlement, you will automatically receive benefits if you qualify;"[37] "The Defendants will offer permanent loan modifications to eligible Settlement Class C Members who live in their homes and who are at least 60 days delinquent on their mortgage payments;"[38] "You do not need to do anything to get a payment from the Settlement…. The Defendants are attempting to contact Settlement Class C Members who are eligible for loan modifications or the incentive program."[39] Thus, assuming that Mr. Dolan's position is reasonable, it is to be taken in contrast with language that literally informs class members that they "will automatically receive benefits if [they] qualify." The language of the notice and settlement are in direct conflict, and the apparent possibility of construing the language in diametrically opposite manners, renders them inadequate as to all class members.

On December 7, 2012, Berns Weiss filed a new Class Action Complaint, 5:09-MD-02015-JF, in the Northern District of California.[40] This new Class Action alleged that Wells Fargo breached the *In re Wachovia* settlement and the implied covenant of good faith and fair dealing.[41] Plaintiffs in the new Class Action alleged that Wells Fargo used inflated property value numbers,[42] false income information,[43] and inaccurate interest-rate data[44] and other tactics to avoid compliance with the terms of the *In re Wachovia* settlement. A new set of class representatives were named for the new Class Action and none of the former class representatives were included in the new class.[45] The new class sought injunctive relief and compensatory damages.[46]

In addition to filing a new complaint, the new class also requested a temporary restraining order on December 7, 2012, to enjoin Wells Fargo from foreclosing, selling, or attempting to sell homes of class members whose mortgage loans are classified as either in default or in imminent threat of default.[47] Judge Fogel denied the class members request for a temporary restraining order on December 12, 2012, and instead set a date for a hearing on the motion for the preliminary injunction sought in the new class-action complaint.[48] Following that hearing and a

[37] Notice p. 1
[38] Notice § 10
[39] Notice § 14
[40] Case Number 5:09-MD-02015-JF Class Action Complaint.
[41] *Id.* at § I, ¶ 1.
[42] *Id.* at § IV, ¶ 47.
[43] *Id.* at § IV, ¶ 49.
[44] *Id.* at § IV, ¶ 50.
[45] *Id.* at § V.
[46] *Id.* at § XI.
[47] Case Number 5:09-MD-02015-JF Notice of Application and Application for Temporary Restraining Order.
[48] Case Number 5:09-MD-02015-JF Order Denying Application for Temporary Restraining Order. The hearing was scheduled for January 31, 2013.

subsequent case-management conference held on April 3, 2013, Judge Grewal conducted a hearing between the parties to the litigation on May 28, 2013.[49]

On July 2, 2013, Judge Grewal issued his Report and Recommendation on the course of the litigation, which concluded that "*Wells Fargo's reports* to Class Counsel pursuant to the settlement agreement, as well as its statistics submitted to the Court in opposition to Plaintiff's request for injunctive relief, *are misleading and unreliable*."[50] In particular, Judge Grewal observed that Wells Fargo's Corporate Representative and Compliance Officer, Michael Dolan, "appears to have been, to put it mildly, *ill-suited to the task at hand*" and that his "misrepresentations […] have muddled and multiplied this litigation."[51] Michael Dolan submitted five declarations between December 12, 2012, and March 29, 2013, "several of which are contradictory."[52] As an example of Michael Dolan's repeated contradictions, Judge Grewal concluded that "it is apparent that under Wells Fargo's unilaterally created and undisclosed lexicon, numerous applications that would be considered 'denied' under any ordinary use of the term […] were not counted as 'denied' [but instead] were deemed 'withdrawn.'"[53] Judge Grewal worried that Michael Dolan's "inability to provide accurate information is troubling, to say the least."[54] Wells Fargo even conceded "that Dolan's representations […] simply were not true."[55] Michael Dolan had been found to be so unreliable that Wells Fargo began submitting the declarations of a different employee "to correct Dolan's misstatements."[56] Based on Judge Grewal's observations, Judge Fogel denied Wells Fargo's motion to enforce the settlement on September 25, 2013.[57]

Confoundingly, Wells Fargo has not replaced Michael Dolan despite his repeated falsifications. Even more egregiously, Wells Fargo has failed to inform New Jersey class members whom it purports are bound by the *In re Wachovia* settlement of any of the Ninth Circuit actions following the implementation of the settlement, in direct violation of New Jersey Court Rule 4:9-4.

Conclusion

It is difficult to understand how our legal system allowed this unfair treatment to occur. It must be that the New Jersey Attorney General is simply unaware that Wells Fargo refused to abide by the Assurance with the State of New Jersey. There is scant other explanation for why New Jersey would allow a private bank to trample the state's prerogative to protect its own citizens and to enforce its own jurisdiction over these fraudulent practices.

[49] *Id.* at § I.
[50] *Id.* at § III (emphasis added).
[51] *Id.* (emphasis added).
[52] *Id.*at § I.
[53] *Id.*
[54] *Id*. at § III.
[55] *Id.* at § I.
[56] *Id.*
[57] Case Number 5:09-MD-02015 Order re Preliminary Injunction and Enforcement of Settlement.

It must also be that the Judge in the Northern District of California was unaware at any relevant time that the benefit to New Jersey homeowners was a negative benefit. It is impossible, even for Wells Fargo or any other entity who would seek to defend this absurd result, for anyone to argue in good faith that a homeowner's right to defend a fraudulent loan in a foreclosure lawsuit is worth *less* than $178.04.

The Court's pronouncement in the Northern District of California litigation that these were the "Lexus" of loan modifications should make everyone familiar with this situation want to buy American.

But perhaps the Court can be somewhat forgiven for its pronouncement of success of its endeavors to protect the American public because none of the parties (other than perhaps Wells Fargo) could have foreseen the lengths to which Wells Fargo would go to undermine its obligation to comply with the requirements of proper disclosure of the consumer's rights with regard to the Assurance and the Class Action Settlement. The Court probably could not have foreseen Wells Fargo's utter refusal to comply with the terms of either obligation to consumers.

The class counsel had 25 million reasons to keep their silence, even in the face of the clearly erroneous assertions from the Court that the class action had been a tremendous success for all homeowners.

In sum, Wells Fargo's conduct has been odious and fraudulent. New Jersey consumers have been sacrificed to conceal Wells Fargo's fraudulent activity.