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### **WRITTEN TESTIMONY BEFORE THE CONGRESSIONAL OVERSIGHT PANEL**

### **“Coping with the Foreclosure Crisis: State and Local Efforts to Combat Foreclosures in Prince George’s County, Maryland”**

**Prince George’s County Community College  
Friday, February 27, 2009  
Largo, MD**

**by Phillip Robinson, Executive Director  
Civil Justice, Inc.**

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#### **INTRODUCTION**

Madam Chair and members of the Congressional Oversight Panel, thank you for the opportunity to speak before you today at this important hearing. My name is Phillip Robinson and I presently serve as Executive Director of Civil Justice Inc., a Maryland non-profit legal services agency that is co-leading Maryland’s Foreclosure Prevention Pro Bono Project. There is no other issue more important to solving the current economic crisis than finding sustainable solutions for homeowners at risk or facing foreclosure. Not every homeowner can be helped; however, as Maryland has effectively demonstrated, when all the key stakeholders participate in a multi-pronged approach to the problem, we can significantly reduce the negative consequences of foreclosure for families, neighborhoods, local and state governments, and note holders.

## **BACKGROUND ON CIVIL JUSTICE INC.**

Founded over ten years ago, Civil Justice Inc. (CJ) works to increase the delivery of legal services to clients of low and moderate income through a network of solo, small firm and community based lawyers who share a common commitment to increasing access to justice through traditional and non-traditional means. A core part of this access to justice program is carried out through direct representation to homeowners by direct and class representation in the broad area of homeownership. In this regard CJ has successfully worked to train, co-counsel, and coach its network attorneys and others to help homeowners in the area of predatory real estate practices so that the mission of the organization may be carried out exponentially.

As a result of its multi-pronged efforts to (i) support private, public interest attorneys do well and good at the same time and (ii) increase access to justice, CJ has established a track record of impact and recognition in the community. For example:

- CJ has co-counseled on several consumer class action lawsuits that have resulted in more than 100% of millions of dollars in illegal finance, broker fees, and/or illegal kickbacks being returned to the consumers as well as prospective injunctive relief against the defendants to prevent them from continuing the same practices.<sup>1</sup>

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<sup>1</sup> See, e.g., *Greer v. Crown Title Corp.*, Cir. Ct. Balt. City, Case No. 24-C-02001227; *Naughten v. Millennium Escrow & Title*, Civil Action No. 02-cv-2078 (U.S. Dist. Ct. Md.); *Gray v. Fountainhead Title*, Civil Action No. 03-cv-01675 (U.S. Dist. Ct. Md.); *Keneipp v. Fountainhead Title Group Corp.*, Civil Action No. 03-cv-02813 (U.S. Dist. Ct. Md.); *Johnson v. Fountainhead Title Group Corp.*, Civil Action No. 03-cv-03106 (U.S. Dist. Ct. Md.);

- CJ's statewide membership exceeds more than 100 private, public interest attorneys committed to the overall mission of the organization in some key way.
- CJ is recognized by the Maryland community as the public interest "expert" in predatory relate practices and foreclosure defense issues in Maryland.<sup>2</sup>

CJ and its leadership are also award winners. For example, as the 2002 recipient of the Louis M. Brown Award for Legal Access, the American Bar Association's Standing Committee on the Delivery of Legal Services recognized CJ for filling in the gap of unmet legal needs of the middle class and those of moderate incomes with lawyers who provide affordable legal information, services and representation. Last year the Maryland Consumer Rights Coalition also recognized me as the Denis J. Murphy Consumer Advocate of the Year for CJ's work and efforts to reform Maryland's foreclosure process.

### **CIVIL JUSTICE INC.'S SUSTAINABLE PROJECT**

The overall goal of the CJ's Sustainable Homeownership Project (SHP) is to promote the legal services and remedies available to prevent foreclosures

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*Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478 (D. Md. 2006); *Benway v. Res. Real Estate Servs.*, Civil Action No. 05-CV-3250 (U.S. Dist. Ct. Md.); *Capitol Mortgage Bankers, Inc. v. Cuomo*, 222 F.3d 151 (C.A.4 2000) (on behalf of *Amici Curiae*); and *Wells Fargo Home Mortgage Inc. v. Neal*, 398 Md. 705 Md., (2007) (on behalf of *Amici Curiae*); and *Atta Poku v. Friedman*, 403 Md. 47 (2008) (on behalf of *Amici Curiae*).

<sup>2</sup> See Surkiewicz, Joe, "Of Service: How can a lawyer help those facing foreclosure?" *Daily Record*, August 4, 2008; Kearney, Brendan, "Waldorf Retiree Gets Verdict on Subprime Loan," *The Daily Record*, July 21, 2008; Smith Hopkins, Jamie, "A Cry to help Save Homes in Maryland: Top Judge Seeks to Stop Foreclosures," *Baltimore Sun*, July 8, 2008 (Page D.1); Madigan, Nick, "8 Accused of Loan Scheme," *Baltimore Sun*, June 13, 2008 (Page A.1); Trejos, Nancy, "Mortgage Survivors; On the Brink of Foreclosure, They Got Their Loans Changed – but it Wasn't Easy," *Washington Post*, May 4, 2008 (Page F.1); Smith Hopkins, Jamie, "Waging the Fight for Homeowners," *Baltimore Sun*, Feb. 29, 2008 (Page D.1); Hancock, Jay, "Seizing of Homes Too easy in MD," *Baltimore Sun*, Jan. 11, 2008 (Page D.1); Wiggins, Ovetta, "Foreclosure Task Force Proposes Remedies: Strict Lending Laws Sought," *Washington Post*, Nov. 17, 2007 (Page B. 2).

of suspect transactions through a series of statewide partnerships designed to make a positive, short- and long-term impact for homeowners at risk of losing their homes.<sup>3</sup> While reaching to obtain this goal, the Project has several primary objectives including:

1. The Project provides **indirect legal counseling to Maryland homeowners, through a network of statewide housing counseling agencies**, facing foreclosure in order to help these families to retain and stabilize their mortgages and decrease the negative impacts of foreclosures on consumers and general communities. CJ continues to expand its outreach and partnership efforts to work together with non-profit housing counseling agencies statewide to help provide default and delinquency counseling to homeowners in trouble. Since only one housing counseling agency in Maryland actually has in-house attorneys with experience, the remaining thirty or more counseling agencies would greatly benefit from the opportunity to work with qualified attorneys at CJ as well as the pro- and low-bono attorneys trained and supported by CJ throughout the project.
2. In partnership with the Pro-Bono Resource Center of Maryland (PBRC), the Project has **established a targeted pro- and low-bono legal service program** designed to preserve housing and prevent foreclosure. This legal service program included training for attorneys wishing to do this

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<sup>3</sup> CJ does not limit its services to certain demographic groups or income levels as is the case with every other Maryland legal service provider providing the services contemplated herein. In the area of foreclosure prevention this is important since so many of the new borrowers facing foreclosure are middle-income and employed but cannot afford private market rate attorneys who require substantial upfront fee retainers.

kind of work for homeowners facing foreclosure throughout the State.<sup>4</sup>

Few attorneys in Maryland even contemplate foreclosure defense work, unless in a bankruptcy case, yet thanks in part to CJ, the Court of Appeals has recently created new defenses that can be raised for homeowners.<sup>5</sup>

PBRC will work together with CJ on non-litigation related activities and volunteer coordination while CJ will provide the substantive, legal support to participating attorneys on the matters in which they are raising legal defenses on behalf of homeowners at risk of foreclosure.

3. The Project will co-counsel on targeted foreclosure related **“Impact” Litigation** designed to change fundamental flaws in Maryland’s limited judicial foreclosure process.<sup>6</sup> CJ will build upon its track record of successful public interest litigation to pursue cutting edge impact cases that other legal service providers are prohibited from pursuing.<sup>7</sup> CJ will also pursue targeted appellate cases, as counsel and/or *amici*, to work to change Maryland’s foreclosure process through the Courts. Given that many of the lenders and secondary market investors are going out of

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<sup>4</sup> The project has already completed more than eight trainings around the state attended by 800 attorneys (700 of whom have volunteered to provide pro bono hours). Additional more substantial trainings are being planned for the next six months. Topics of these additional trainings will involve detailed federal and state law defenses and advanced loss mitigation strategies and techniques.

<sup>5</sup> The Court of Appeals of Maryland, in a case in which CJ served as co-counsel and Amici, that, “under principles of equity, a mortgagee’s commencement of a foreclosure proceeding on a FHA-insured mortgage, without first adhering to the mandatory HUD loss mitigation regulations, may invalidate the mortgagee’s declaration of default.” *Wells Fargo v. Neal*, 2007 WL 738444 (Md. 2007).

<sup>6</sup> Maryland homeowners facing foreclosure basically have two opportunities to challenge the foreclosure. A mortgagor may challenge a foreclosure by obtaining a pre-sale stay pursuant to Maryland Rule 14-209 and filing post-sale exceptions to ratification of the sale under Maryland Rule 14-305(d). ALEXANDER GORDON, IV, GORDON ON MARYLAND FORECLOSURES § 21.1 (4<sup>th</sup> ed. 2004).

<sup>7</sup> CJ is the only Maryland legal service provider with experience in foreclosures eligible and approved to initiate class action litigation. LSC and MLSC funds to other legal service providers expressly prohibit or severely restrict from doing so.

business at a rate of several per week, there can be no question that the new mortgage origination system that emerges from the current crisis will not be like that we have experienced in the last two decades. However, those who appear unaffected thus far are third parties who have facilitated the meltdown and made excessive profits at the expense of homeowners stuck in unaffordable loans.

4. The Project **partners with federal, state, and local efforts** to help homeowners at risk of facing foreclosure from exploding mortgages. CJ actively assists federal, state and community and organizational efforts to help homeowners facing foreclosure. Such efforts will keep the Project in the forefront of emerging issues and trends and ensure that the key policy makers continue to recognize CJ as the lead organization in Maryland protecting the rights of homeowners facing the risk of foreclosure.<sup>8</sup>

#### **FORECLOSURE PREVENTION PRO BONO PROJECT**

In partnership with the Pro-Bono Resource Center of Maryland (PBRC), the CJ is co-leading Maryland's Foreclosure Prevention Pro Bono Project. Launched last July, the project has recruited over 700 Maryland attorneys who have volunteered to help the tsunami of homeowners at-risk or in foreclosure foreclosures. The need for these volunteers is great because the counseling agencies have been flooded with calls for help and cannot reasonable meet the demand for help. With this reality in mind, the project has identified three distinct

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<sup>8</sup> CJ was the only non-public legal service provider asked to speak from the Maryland Senate's Judiciary Committee on foreclosure issues in a special briefing in September 2007 and again on a joint committee panel of the House of Delegates in October 2007.

roles for the participating attorneys and is implementing these efforts on a daily basis including:

1. **Brief Advice and Counsel** – Attorneys participate at community events and meet with homeowners to assess the homeowner’s situation and attempt to provide the homeowner with a road map for their situation. Getting correct information and answers to their basic questions is the first step for any homeowner with a sustainable solution. These community events are necessary, well received, and effective and involve all contingencies and ethnic and social groups.
  - Majority Leader Hoyer, Congressman Van Hollen, Congresswoman Edwards, Congressman Cummings, and state and local officials have held public events which have attracted thousands of homeowners at risk. The project brings as many attorneys as needed to each event and over the course of a full-day will provide whatever length of time is needed to the homeowner to help them understand their road map and plan.
  
2. **Direct Representation** – Attorneys helping in this capacity provide direct representation to homeowners in: (i) negotiating with their note owner a sustainable modification or solution to the homeowner’s individual situation; and/or (ii) representing homeowners in court when the foreclosure action has been initiated.
  - The vast majority of the work being performed under this category is loss mitigation efforts appropriate and suitable to the homeowner’s situation and does not involve litigation.
  - However, for the attorney to be able to effectively represent the homeowner’s interests, she must examine the loan and determine what if any legal claims the homeowner has. This determination can often help the homeowner and note holder come to a sustainable solution rather than proceed to litigation.
  - Once the homeowner has a lawyer involved, most servicers react differently and more quickly to the homeowner’s loan modification proposal.

3. **Of Counsel** – As the final part of the project, we are asking attorneys to “affiliate” with the qualified housing counseling agencies in the state for the long-term. By doing this we hope to increase the capacity of the agencies to help more homeowners for the long-term since it is not anticipated that the crisis will subside for some time. Attorneys participating in this role will be volunteering for the long-term and will perform many of the same functions above except in our project (and the State’s overall plan) this function is intended as the long-term solution for capacity and services to homeowners at risk (see Exhibit 1 for more details). Rather than create a whole new system, we are seeking merely to expand the capacity of the qualified housing counseling agencies to do more with volunteer attorneys.

Since the project launched in July, the landscape has changed dramatically in the marketplace. With the bank failures and FDIC takeovers, we constantly have to inform and train the participating attorneys as to new strategies, tips, and procedures. The project uses email to carry-out daily updates and is also conducting trainings around timely topics. Just this week 50 attorneys received advance loss mitigation tips session. This training and collaboration is in fact the “hook” by which we have recruited so many attorneys to participate and offer meaningful advice and counsel to homeowners at risk—and especially to homeowners who have sustainable solutions.



**MARYLAND’S NEW FIDUCIARY DUTY UPON LOAN SERVICERS AND OTHER STATE ACTION DIRECTED AT SERVICERS AND LENDERS**

Maryland’s efforts in this area are due to Governor O’Malley and Secretary Perez. Each of them have invested their personal time and resources to the effort when they very easily could have said ‘it’s a federal problem’ and looked elsewhere. However, because of their commitment, the lending community came to the table and agreed (but did not prefer) to reasonable common sense solutions that the State could take to help homeowners.

For example, Maryland is one of very few States which licenses and regulates mortgage loan servicers. As of last summer, state regulated servicers were required pursuant to COMAR regulation 09.03.06 to report data to the State concerning their foreclosure and loss mitigation efforts. From this monthly report, it will be possible to track the efforts of the regulated servicers for the first time ever in Maryland or perhaps even nationally. Recently, the Commissioner of Financial Regulation has also adopted regulations to require servicers to have a minimum duty of care to:

- (a) promptly provide borrowers with an accurate accounting of the debt owed when asked to do so;
- (b) make borrowers in default aware of the loss mitigation options offered by the licensee;
- (c) promptly respond and answer borrower inquires regarding mortgage loans; and
- (d) pursue loss mitigation when possible.

COMAR 09.03.06.20(A)(3).

It is too early to tell if these regulations have made a difference for Maryland homeowners. However, we will soon have concrete data to substantiate our view and experience (discussed below). In addition, homeowners will have a

new defense to foreclosure when they do everything they are asked to do, and the servicer or lender does nothing and the foreclosure train is moving faster and faster.

### **MORTGAGE FRAUD**

For three years, CJ has been observing and actively representing homeowners involved in various mortgage and foreclosure rescue frauds. While much of these cases and matters are beyond the direct scope of the panel's interests today, the discovery and evidence we have learned in these cases is important to understanding some of the problems you intend to address in your reports to Congress.

In the course of the cases we have performed, I have taken or participated in the depositions of no less than five mortgage-backed securities (MBS) in the last year. This discovery has demonstrated the following universal faults in the current mortgage system most affected by the crisis:

- No MBS ever looks at any of loan it purchases.
- The MBS solely relies upon the warranties and representations of the depositor (and/or originator) as to the bona fides of the loan and loan product.
- The MBS refuses, in all but one instance, to tender back the bad loan to the depositor/originator.

While these conclusions come from fraudulent cases, they are examples of the frustrations faced by non-fraudulent homeowners when having to negotiate with a MBS through its servicer. They have to endure another layer of complexity to the process which often has competing interests that often prevents common sense loan modifications from being realized.

## RECOMMENDATIONS

From my grassroots, frontline perspective, I can offer the panel the following recommendations:

1. More support for housing counselors and legal service programs in this area can make a positive difference for homeowners. Programs, like Maryland's Foreclosure Prevention Pro Bono Project, which are easily replicated, are a relatively low-cost way for the government to ramp up a quick support network to support homeowners with sustainable solutions. This support however should not have restrictions which are inherently conflicting with the purpose of helping homeowners.
2. Note holders receiving TARP assistance directly or indirectly, should be required to offer meaningful loan modification analysis before initiating foreclosure process. In addition, once a homeowner submits a bona fide modification proposal, directly or indirectly, note holders should be required to stop, stay, or enjoin any foreclosure action that has already initiated.
3. Federal legislation should follow Maryland's lead and make it illegal for a foreclosure consultant providing "loss mitigation" services from receiving any funds for services until she has performed bona fide services.
4. Note holders receiving TARP funds should be required not only to offer sustainable loan modifications to homeowners in default but also to homeowner for whom default is reasonably foreseeable.
5. All servicers, whether federal or state, should have a fiduciary duty to homeowners like those regulations adopted here in Maryland. The

splintered regulation only creates problems rather than solves them and the federal government must increase its standards and enforcement. Certainly any lender receiving TARP funds should agree to a fiduciary duty like Maryland's otherwise the taxpayer's investment will not receive the attention that was intended.

**CONCLUSION**

Thank you for the opportunity to testify today and please do not hesitate to let me know if I can be of any further help to your efforts.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'P. Robinson', with a long horizontal line extending to the right.

Phillip Robinson

## Exhibit 1

### Civil Justice Inc. Foreclosure Prevention Pro Bono Project Of Counsel to Nonprofit Housing Counseling Agency Draft Scope of Services

With ongoing consultation and mentoring from Civil Justice Inc., pro bono attorneys can provide some or all of the services listed below to serve as Of Counsel to one of the nonprofit housing counseling agencies that are currently supported by the State Department of Housing & Community Development under the Governor's HOPE Initiative:

1. Answer questions from the foreclosure prevention counselors.
2. Review loan transactions and assist counselors in reviewing such documents.
3. Review proposed loan modifications and forbearance agreements offered by the mortgage loan servicers.

Recommend revisions to these proposed workouts as needed, particularly if the documents include waivers of claims and defenses.

4. Negotiate directly with the mortgage servicer or the servicer's in-house counsel if counseling efforts fail to avoid a referral to foreclosure.
5. Negotiate with the foreclosure attorneys (who rarely return calls to a homeowner or counselor) if an Order to Docket has been filed.
6. Take a specific case for direct representation.

#### Possible Parameters to be Established

Respond to counselor's emails and questions within two business days.

Be available for consultation on specific days/specific hours on a weekly/bi-weekly basis.

Meet in person with counselors at the agency on a bi-weekly/monthly basis.

Meet with homeowners if requested by counselors, for example, explain loan transaction to homeowner, explain recommendation to homeowner regarding proposed loan modification or other workout offered by mortgage servicer.

Be available during certain business hours and/or evenings if necessary to meet with homeowners.