

**KEYNOTE ADDRESS JULY 17 2008**  
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**Emergent Realities & Impediments to Solutions**  
**[New Best Practices & Incentivized Change™]**

Thank You. Welcome everyone. It's my honor to be asked to speak to you today. Today I will be speaking about: Emergent Realities & Impediments to Solutions [and New Best Practices & Incentivized Change™.]

We are in the grips of a housing and mortgage finance crisis, wherein the posture of our publicly stated goals has now caught up with, and are now reminiscent of the extreme measures taken by the 1933 Homeowners Loan Corp (HOLC) government interventions. Public policy is now compelled to accept the challenge to reduce the burden on borrowers and increase liquidity and credit in the mortgage and finance markets. Free market capitalism may be forced to make another historic move away from the conceptual purism of free open markets to something more refined like, free but responsible open markets. Should we? Can we? And how do we embrace this? Is it a threat to any self interest or profession? No, it is not if we embrace it in search of comprehensive solutions for all diverse self interests.

Yesterday it was announced that consumer prices jumped higher than they have in 17 years. Consumer debt loads and tensions between paying the mortgage or credit cards will worsen.

There are serious considerations being given to employing temporary moratoriums on foreclosures, not only in spotted localities but nationally. The backlog and continuing wave of delinquencies, defaults and foreclosures are overwhelming the industry, the government, the consumer and the economy. This dynamic will shape public policy.

Just this week alone, The Office of Thrift Supervision shut down INDYMAC BANK, its largest THRIFT, and the FDIC took it over; Treasury backed the FEDERAL RESERVE in opening up emergency but temporary life lines to FANNIE MAE and FREDDIE MAC in a 3 point plan to increase a line of credit, grant authority to buy equity in GSEs and undertake a consultative role. Ben Bernanke announced that new rules are coming aimed at protecting consumers from unfair or deceptive practices of lenders; of course now they have to urgently amend the Home Mortgage Disclosure Act rules to conform to TILA; and decide on one effective date for "higher priced mortgage loan" (Jan or Oct 2009). These are not business-as-usual events. Business and markets need to run with a minimum level of certainty and security. Recently, we have been waking up each month, week, and now day, to one emergency after another threatening our industry and economy. It's time for comprehensive solutions, not emergency band-aids, before things get much worse.

Comprehensive Solutions require LEADERSHIP. We have not seen the level of leadership required to pull us out of this mess. The measures suggested or taken have been hasty, and not comprehensive. Comprehensive means all-inclusive. We have seen incomplete, partial, unfinished,

imperfect, curtailed, deficient, shortened or temporary solutions. In fact, “temporary” has become the required safe harbor word. If you call it temporary, well then it must be a solution; at least for now. We need leadership that can change the framework and mindset of our government and industry policy makers “from temporary for some” - to “comprehensive for all”.

There is a terrible void in policy Leadership that must be filled. Regulations, laws, rules and best practices conflict with each other in ways we are not yet aware. Effective and sensible solutions cannot reveal itself until Leadership appears and embraces comprehensive reconciliation that prompts CHANGE for all diverse conflicting self interests. That includes each and every participant in the mortgage banking industry; from investors, lenders, servicers, investment banks, REMICs, ancillary vendors, to the foreclosure and bankruptcy bars, the insurer and the consumer, the borrower.

Let’s talk about CHANGE. FIRST, I will talk about two components of change

1st PAIN: Change is only possible when the pain of not changing is so intolerable to all industry participants that no participant can endure it any longer.

2nd LEADERSHIP: Change requires leadership. Leadership requires dedication and commitment with vision and courage.

Well a keynote has to contain a **quote** and at least one **joke or story!**

So my quote is:

***“Change your thoughts and you change your world,” Norman Vincent Peale***

My story is:

***The Struggle of 2 Mice:***

*“2 mice jumped into a bucket of cream*

*The 1st mouse gave up and drowns.*

*The 2nd mouse struggled so hard by running and running to get out of the bucket that he turned the cream into butter and climbed out!*

The bad news is DEDICATION and COMMITMENT alone will not produce CHANGE. It will take VISION and COURAGE as well! Speaking of VISION and COURAGE, there is no one who has Vision and Courage more than the AFN Leadership: William Leroy, Wes, Garry, Matt and Christina.

General Patton said: “Courage is Fear holding on a moment longer!”

I want to thank the AFN for their Leadership in a time of industry crisis. The AFN through the LEADERSHIP of William Leroy has become the VOICE of LEADERSHIP and the VOICE of CHANGE for the industry. Please let’s have a round of applause for William Leroy.

## Problems / Solutions / Change

The problems we face in the economy will become the solutions. The solution is in the problem. Walter Cole said "We must look for the opportunity in every difficulty, instead of being paralyzed at the thought of the difficulty in every opportunity."

As a litigator, I would be remiss if I didn't pay homage to some major litigator, so let's analogize Gerry Spence. From a litigator's point of view he teaches us that THE POWER TO WIN CONSENSUS and BID for CHANGE require:

1. CONFRONTATION OF HONEST DEBATE - because we are conditioned from birth to avoid confrontation or change and to conform our ways to our parents, teachers or preachers.
  - A. We have heard "Don't Cry" from the time we are born to don't be anti social, don't rock the boat, and don't be unpleasant - from the time we were young adults. We all want the same old thing the same old way. We are all creatures of habit. No one wants CHANGE. No one wants a challenge to their belief system or sense of security and accomplishment.
2. OVERCOMING SELF-INTERESTS: POWER TO SAY NO WITH THE RESPONSIBILITY TO SAY YES: One key to consensus and a bid for change is we must give the listener the power to say no with the responsibility to say yes even over his/her own self-interest. But no one will accept an argument for change over one's self interest if it doesn't include an intellectually honest debate of a solution or alternative around that self interest; this is so because there are two obstacles to winning consensus and change – the first of which is self interest and the second of which is defensiveness. If the listener is defensive or boxed in with no way out, emotional security takes hold and consensus and change will fail; but if you engage your listener on a journey to create to a solution to a problem collaboratively, jointly, and comprehensively; then change can take hold.
3. Let's face it. Our old form best practices and management controls need a face lift. Part of our old best practices mentality was: If it works don't fix it. Well this time it's broken and we have to fix it. To fix it this time – we need input and reconciliation from all conflicting interests! Then we need Incentivized Consensus™, Incentivized Change™ or real Change; but it's not Change for the sake of Change – it's motivated and collaborative change. A bid for change must come with incentives. All parties must be motivated to act for their benefit, by receiving something of value, something that resolves a problem, and something that guides them to better times going forward. To date the solutions offered by industry and government have failed to be comprehensively incentivized!

*Spence says: "Successful argument is **a communication** between the acknowledged authority of both parties to the argument."*

*Joke – But the real authority is in the song entitled:*

*“The Things We Do For Love” which says -*

***“Communication is the problem to the answer”***

***“But a compromise will surely help the situation”***

## **Overview of Emergent Realities & Impediments to Solutions**

- **Affordability / Consumer Debt Overload:**
  - Many borrowers are walking away! This is a problem. Borrowers must have an incentive to Stay & Pay!
  - Tensions are rising between Housing Stay & Pay vs. Paying Consumer Debt
  - Inflation has seen a 17 year jump and more and more consumers cannot afford the current debt load in monthly cash terms for consumer debt and housing debt
  - Wealth Effect: The wealth effect is an economic term, referring to an increase in spending that accompanies an increase in wealth (in absolute terms), or merely a perceived increase in wealth (in relative terms). Although debated, when one feels less wealthy in terms of home equity, tensions between Housing Stay & Pay vs. Paying Consumer Debt leads to less (effective) home loss mitigation (per Credit Counselors – CCCS – Acorn - practitioners in the trenches). Twenty percent (20%) of all consumers spending is linked to household wealth.
  - 70% of the economy is fueled by consumers. Consumers are key. Housing is key. Expansion of housing and the economy at the same time are key.
- **Housing creates jobs and tax revenues.** We must remember that about 20% of GDP is related to housing. In 1998, some 50% of all homeowners held 50% of their net worth in home equity. (The State of the Nation’s Housing, Harvard “JtCtr” 2002) **Every 1000 homes built create 2,448 jobs and \$79.4 million in wages and \$42.5 million in federal, state and local tax revenues and fees.** (JtCtr citing National Association of Home Builders 2002 (NAHB)) Every \$1,000 gain realized from a home sale boosts spending by some \$150; \$30-50 from stocks. (JtCtr citing Federal Reserve Board) Homeownership creates a backbone of wealth throughout America like no other financial product to date. We must safeguard our economy from market destruction but at the same time make laws and industry practices that see a steady and voracious growth across the board in new homeownership for decades to come.
- To enhance housing, the industry and the economy at the same time we need new loan products that are more affordable to borrowers – otherwise we continue to wait for housing prices to decline until we reach an acceptable consumer affordability level; but this is done as the economy declines as well.
- Today Re-defaults have reportedly jumped. Loss mitigation and modifications must become truly affordable to the borrower or we will incur unacceptable and greater losses

then necessary.

- Since Price must be paid for risk, especially enhanced risk, the challenge is to create new loan products backed by new credit enhancement products that pay for enhanced risk with non cash equivalents. To reach true borrower affordability, we must create new products that pay for this enhanced risk, but not necessarily in monthly cash terms. New products will be necessary to reach affordability with non-cash or cash-equivalents - with the use of Equivalent Risk Pricing (ERP).
- In the immediate and long term, new loan products will have to incorporate new incentivized modification concepts that allow for built-in affordability in the event of default or delinquency – just as required currently to solve the present back log in loss litigation and modification efforts with the new Principal reduction, forgiveness or quarantined-modification products. These and other self-adjusting loss mitigation solutions will eventually be built into loan originations as contractual safe harbors. Who knows, it might even be called: Safe Harbor Intelligent Loan Options or SHILO™ for short.
- As such new credit enhancement products, and new loan products should be coordinated with Credit Rating Agencies, new credit enhancement product developers, and regulators including Treasury.

#### **Lack of En Mass or Efficient Loss Mitigation & Modifications:**

##### Modifications Are Now Paramount if not Public Policy!

**MortgageOrb™** reported on July 3, 2008 that Hope Now estimates (in pertinent part) that: “The total number of foreclosures prevented by mortgage servicers since July 2007 has risen to more than 1.7 million; Mortgage servicers provided loan workouts for approximately 170,000 at risk borrowers in May; and:

**Approximately 100,000 of the prime and subprime loan workouts provided by mortgage servicers in May were repayment plans, while approximately 70,000 were loan modifications.**

Loss mitigation devices from repayment plans to modifications must be truly affordable. They have not been to date. Re-defaults are up. We need more affordable and incentivized loss mitigation devices, namely Incentivized Modifications™.

#### **Why are we not there yet?**

Lack of Uniform Authorities, Guidelines & Solutions:

We do not have consensus on:

- § Numerous Voluntary Programs
- § Interpretations of Pooling & Servicing Agreements, Treasury Rev Proc 2008 28:

At the heart of reaching certainty in the ability to effect efficient or en mass MODIFICATIONS is a proposed tax regulation REV PROC 2008 28 that defines the grounds upon which modified mortgage loans violate

the tax exempt status of the summit of securitization: the REMIC, the CONDUIT, and ASSIGNEE TRUST. Is this revenue procedure sufficient to support loan efficient and en mass modifications? Does it supply sufficient Safe Harbors to practice? Maybe not. It is a series of exceptions that make the general rule. So it can be interpreted as sufficient modification authority but does it support new products and solutions? Probably not. The CONSEQUENCE for violating 2008 28 per IRC Section 860F(a)(1) is the imposition of a tax on a REMIC equal to 100 percent of the net income derived from “prohibited transactions”

- § Guidelines from ASF, Treasury, Investors, Conduits, Servicers and Borrowers
  - The Standoff between Mandatory Plans vs. Sanctity of Contract
  - Tensions between MBA (Lenders/Servicers) and BK Court
  - Lack of Industry Best Practices
  - Lack of an Industry Voice
  - Lack Uniform Accounting & Reporting Rules
  - Fair Value Rules not uniformly understood, applied or used.
  - Unreconciled differences and power struggles between International and Domestic Accounting & Reporting Rules and Boards
  - Lack of effective Loan Workout – Modification Software
- § WFB CSC Early Resolution
- § [HotNeutral™](#) - [LitigationFreeZone™](#) - [OptinMods™](#)
  - Lack of Certainty in Regulations and Regulators
- § Non-Reconciled Regulator Tensions
- § New Legislation pending for a New Regulator
- § Current Numerous & Various Regulators Unsure of duties and responsibilities or politically stymied
- § A regulatory scheme that: Precludes effective use of powers? Precludes effective product Innovation?
- § Various new bills conflicting with each other, covering part and pieces but not comprehensively reconciled including proposals to MERGE regulators, and create one world class regulator prior to reaching consensus on agency functions, critical processes, and the appropriate regulatory approach. House Financial Services Chairman, Barney Frank announced last week the Treasury Secretary Paulson and the Fed Chairman, Ben Bernanke will appear in a series of hearings on policy implications of the transformation of domestic and international financial markets with a focus on the rise in potential systemic risk

associated with the growth in assets held outside the commercial banking system, complex arrangements that link firms that are regulated differently or not at all and the increasing amount of leverage. The committee will explore the adequacy of current oversight and regulatory tools and the extent to which existing structures are adequate to respond to future problems and:

- Current state of the regulatory system in the US and abroad and ways to measure and limit risks without stifling innovations and improve market liquidity and breadth
- Implications of providing investment banks and others access to the discount window
- Proposals to improve the regulatory structure to better assess and mitigate systemic risk to avoid a similar or more serious crisis in the future
- The need for enhanced capital and reserve requirements for financial firms
- The adequacy of current powers of the Federal Reserve and other regulatory agencies to protect the financial system, and the taxpayers.

Our regulations as this one (Rev Proc 2008-28) typically leave the industry scrambling to fit function into form. The Form should follow function. New functional solutions should design the “form” of regulation. The regulations should not design the “function” and solutions in the 21st Century. To effectively reconcile all diverse conflicting self-interests, for the betterment of housing and the economy at large, we must first consider all such interests in a comprehensive forum. The results of such discussions will yield principles-based standards with objectively obtainable safe harbors. New solutions allowable in such a framework, would lessen risks, and enhance certainty for all industry participants, including borrowers.

#### **THE CASE FOR BEST PRACTICES IN GENERAL:**

Joke - There are 2 schools of thought and it goes like this:

- Love em
- Hate em

Although best practices are not mandatory or law, it can set a reasonable standard, act as a risk mitigator and a litigation defense device. We need to embrace new best practices not as operational limitations but as “operational certainty controls”. Generally, best practices can call for Subjective or Objective Standards.

**Subjective Standards:** The Plaintiffs Bar loves using plain old NEGLIGENCE principles to show that Defendant failed to use Reasonable Alternatives! A subjective standard lends itself to more litigation uncertainty. Standards that are so subjective or uncertain may create factual questions that survive procedural challenges including summary judgment. Subjectivity creates factual disputes in want of a jury’s decision; for example on whether or not defendants failed to use

reasonable alternatives or management controls. Of course the plaintiffs bar would love to have a simple breach per se of an objective at law standard as well.

**Objective Standards:** The industry should embrace Objective Standards that allow for “Obtainable Safe Harbors™”. Otherwise the industry will get legislative best practices with potentially non obtainable subjective and objective standards!

“Obtainable Safe Harbors™” not only provide sensible operational management controls (like the NACTT New Best Practices (Deb Miller) and the New Standard & Poor’s Best Practices, (Ed Highland), which lead to a more refined, efficient and fair operation, but “Obtainable Safe Harbors™” can lessen LITIGATION AND OPERATIONAL RISKS and act as a DEFENSIVE TOOL in civil and criminal litigation and governmental investigations.

#### **UNCERTAINTY IN LOSS MITIGATION AND MODIFICATIONS BY FORECLOSURE BAR**

Although the TFC issued a general ruling in acquiescence of Foreclosure Attorneys as Debt Collectors offering solutions to borrowers, such conduct remains vulnerable without sufficient Obtainable Objective Standards™. Additional Protections are necessary going forward.

#### **UNCERTAINTY IN FAILED LOAN ORIGINATIONS AS A LITIGATION THREAT TO THE FORECLOSURE BAR**

Emerging foreclosure litigation exposures are converging with loan origination risks.

There is **RED FLAG WARNING** that failed loan originations may be passed to the foreclosure bar for justification.

Why is the conceptual threat contained in M&T Mortgage v FOY and Junkersfeld v. Bank of Manhattan Co so potentially important to the PLAINTIFFS BAR? In M&T Mortgage v FOY citing Junkersfeld v. Bank of Manhattan Co the court held that (May 1, 2008) :

“Equity will not enforce discriminatory practices.”

“This Court further holds that the lender who has brought this proceeding to foreclose the mortgage must demonstrate by a fair preponderance of the evidence that the mortgage was not the product of unlawful discrimination. [Since it is the lender-plaintiff who seeks equitable relief from this Court, the onus is upon the lender to satisfy the requisites of equity and come to this Court with “clean hands.” Junkersfeld v. Bank of Manhattan Co., 250 A.D.646 (1st Dept. 1937). This is a threshold action is of no moment.”

So - if cases hold that the FORECLOSURE BAR effectively has to justify that the LOAN ORIGINATIONS were NOT UNFAIR or DISCRIMINATORY – and the plaintiffs bar files and obtains class certification of large pools per lender commonality, then the plaintiffs bar would potentially and effectively STAY or cause great DELAYS in obtaining foreclosure.

#### **Emerging Reality**

We can keep fighting these forces in court, winning some, losing some, but the trend as dictated by the changing public policy will likely favor more barriers to foreclosure; increasing the costs and losses to the industry. Business sense dictates that the lender and servicer seek more efficient means of reaching the goal. The goal in an environment of swelling REOs, falling home prices, rising consumer debt loads, and new best practices for servicers, lenders and REMICS (from Hope

[Now, S&P, NACTT, ASF, Treasury \(and Rev Proc 2008-28\)](#)) is not for quicker foreclosures, but for accurate foreclosures based upon defensible originations only after loss mitigation procedures yield no alternative.

For a list of new or pending Best Practices visit: [Obtainable Safe Harbors™](#) or [Zone of Foreclosure™](#)

#### **CASE UPDATES:**

For more cases re foreclosure, related bankruptcy, litigation, and insurance coverage issues visit [www.e-afn.org](http://www.e-afn.org) and:

##### **[Zone of Foreclosure™](#)**

The Mortgage Industry Foreclosure Debate Site for Executives, Servicers, Attorneys, Judges & Trustees  
By Invitation Only

##### **[Zone of Bankruptcy™](#)**

The Mortgage Industry Bankruptcy Debate Site for Directors, Officers, Attorneys, Judges & Trustees  
By Invitation Only

##### **[Zone of Coverage™](#)**

The Mortgage Industry Insurance Coverage & BuyBack Repurchase Insurance Debate Site  
By Invitation Only

##### **[Zone of Litigation™](#)**

The Mortgage Industry Litigation Debate Site for Plaintiffs, Defendants, Investors, Lenders, Mortgage Bankers, Pensions, Assignee Trusts, Directors, Officers, Attorneys, Judges & Trustees  
By Invitation Only

#### **Special Case Updates: 2008 Decisions >**

RE TILA Reg Z Violations > Disclosure re APR Cost of Loan > By Adding disclosure info of the “first monthly payment” rate of 1.950% violated TILA > “Defendant’s failure to clearly and conspicuously disclose the payment period, the annual percentage rate and the variable interest rate feature all involve material disclosures for purposes of the right of rescission.” Posture Summary Judgment > “Thus, plaintiffs may avail themselves of the remedy of rescission.” > Class may be certified for rescission; “then each class member, individually, and not as a member of the class, would have the option to exercise his or her right to seek rescission.”

\* **WARNING: POTENTIAL FOR RESCISSION FOR NUMEROUS LOANS! SEE CASE: [ANDREWS v. CHEVY CHASE BANK](#) (USDC SD Wisconsin)**

### Misc. AFN Conference Lessons and Observations: July 2008

1. Speed will lessen in importance; Quality and Accuracy will become paramount;
2. Quality Control and Oversight functions will emerge as key organizational risk mitigation procedures – in all areas but notably in Bankruptcy, Foreclosure and In-house Counsel functions.
3. The Plaintiffs bar will use the fallout of Speed (e.g. errors, lack of reasonable alternatives, or unfair and false acts) as an ever-prying justification to prove up existing and new causes of action.
4. Best Practices should be embraced in every aspect of the business; not only as management efficiency “controls” but as “litigation defensive measures” and “risk mitigation devices”.
5. Credit agencies, the ultimate operational arbiter, will separate the weak from the strong by expanded review of best practices controls including: quality controls and comprehensive and enterprise risk analysis. (Everyone should review the Best Practice guidelines set forth by Ed Highland from [S&P](#))
6. [Litigation Exposure: Trustee Lawsuits have new and serious enhanced risk exposure;](#)
7. Bankruptcy will not preempt RESPA, (see [Debra L. Miller, Trustee, and Dale Thomas Laskowski, Plaintiffs v. Ameriquest Mortgage Company, Defendant, Bankruptcy No. 01-35157 HCD, Adversary No. 07-3047](#), Feb. 27, 2008) (and to my knowledge, as of today – TILA (per [In Re: Jaaskelainen](#), Ernest E., et al. wherein two Chapter 13 debtors seek rescission of a mortgage refinancing. The request was granted based on this court's finding that the lender has not proven compliance with the requirements of the local consumer law and finding that Option One holds an **unsecured claim** in the amount of \$142,806.68." (Lawyers Weekly No. 04-048-08) (31 pages) (Hillman, J.) (USBC) (Chapter 13 Case No. 07-12832-WCH; Adversary Proceeding No. 07-01242) (July 7, 2008)) plan or contractual breach causes of action, etc. - Holdings: "In the absence of any credible evidence proving that each Debtor received two copies of the NOR, I find that they did not. ..." "In the present case, the Defendants have not demonstrated that the failure to provide each Debtor with two copies of the NOR was the result of bona fide error. "In this case, Debtors sent a valid notice of rescission to the Defendants during the extended rescission period afforded them by the Defendants' failure to provide each of them with two copies of the NOR. As such, the Defendants' security interest is void and they hold nothing more than an unsecured claim which will receive the same dividend as other unsecured claims under the Debtors' Chapter 13 plan. Moreover, the Debtors are only liable for the principal of the loan, minus the \$16,143.32 which the parties stipulated was given by the Debtors in connection with the Refinancing, as they are no longer liable for any finance or other charges. While this circuit does not apply a hyper-technical standard of compliance to TILA, it nonetheless remains a strict liability statute. "It is undisputed that the Debtors have not suffered any actual damages. They are, however, each entitled to statutory damages in the amount of \$1,000 each due to Option One's failure to provide each Debtor two copies of the NOR. ..." "As the Debtors are also entitled to reasonable

attorney's fees in connection with this litigation, the Court shall consider such an award upon the filing of a fee application which comports with the requirements of MLBR 2016-1. ... "In light of my findings with respect to the Debtors' CCCDA claims, the Objection is sustained. I find that Option One holds an unsecured claim in the amount of \$142,806.68." In Re: Jaaskelainen, Ernest E., et al. (Lawyers Weekly No. 04-048-08) (31 pages) (Hillman, J.) (USBC) (Chapter 13 Case No. 07-12832-WCH; Adversary Proceeding No. 07-01242) (July 7, 2008).

**\* WARNING: OTHER CASE POTENTIAL FOR RESCISSION FOR NUMEROUS LOANS! CASE: [ANDREWS v. CHEVY CHASE BANK](#) (USDC SD Wisconsin)**

8. Servicers must revise their practices to assure compliance with BK Escrow Administration procedures including annual compliance with Escrow Statements, Analysis and Notices ('SAN').
  - A. In recent cases, Chapter 13 Trustees and (Unsigned) Debtors have standing to bring claims on a confirmed plan on contract principles. RESPA and (Implied/Good Faith) contract claims against Lender/Servicers are not preempted by bankruptcy. Regulation (or plan) exemptions from providing an Annual Escrow Account "Statement" does NOT EXCUSE the Servicer from conducting Annual Escrow "Analysis" and providing "Notice" of account deficiencies or shortages at least once a year per 24 CFR Section 3500.17(a).(c)(3),(f)(5),(i)(1,2). In other recent cases, the courts have denied punitive damages claims against banks/lenders who have "revised" their practices. (see [Debra L. Miller, Trustee, and Dale Thomas Laskowski, Plaintiffs v. Ameriquest Mortgage Company, Defendant, Bankruptcy No. 01-35157 HCD, Adversary No. 07-3047](#), Feb. 27, 2008)
9. NACTT best practices should be reviewed and implemented as procedural controls (Everyone should review the [NACTT Best Practices](#) as championed by Deb Miller)
10. The Debtors & Consumer Bars running in parallel with the Plaintiffs Bar may be able to threaten, stay or delay foreclosures by using forward Class Actions based upon the FOY/Junkersfeld prohibition to enforce "unfair" or "discriminatory" loan originations. See [M&T Mortgage v FOY](#) and [Junkersfeld v. Bank of Manhattan Co.](#)
11. The Foreclosure Bar will take on enhanced burdens to justify loan originations under the FOY/Junkersfeld prohibition to enforce "unfair" or "discriminatory" loan originations. See [M&T Mortgage v FOY](#) and [Junkersfeld v. Bank of Manhattan Co.](#)
12. The Foreclosure Bar should take extreme caution when entering the Loss Mitigation services space and consider inherent, actual and perceived conflicts of interests not only with the borrower but with the servicer/lender and multi tiered investors.
13. The Plaintiffs Bar will launch enhanced attacks against loss mitigation efforts including for example: predatory loss mitigation, failed short sales based on fraud and concealment of actual foreclosure sale, predatory modifications, predatory refi's, breach of financial

privacy, and self-dealing, etc.

- A. The lesson of such suits will be the implementation of Best Practices and controls to afford (1) Uniform Notice Procedures between the Servicer, Foreclosure Attorney, and Borrower (rep) (2) Minimum Disclosure and standards of the borrower's loss mitigation choices,

14. The Plaintiffs Bar will launch enhanced attacks against Qualified Written Requests:

- A. Until the industry responds with regulatory or narrowed RESPA defined "Objectively Obtainable Best Practices"<sup>™</sup> – with uniform coding, the Servicer's counsel will continue jumping through the fishing expedition hoop!

15. Recent cases continue to teach us that liability exposure can be found when we "communicate" or fail to communicate, and when we "disclose" and fail to disclose. The industry lesson from such decisions should be to get out in front of the courts by adopting Best Practices that predefine reasonable conduct.

16. The Secret Weapon: In re Jones and other cases teach us that "revised" best practices can avoid sanctions and punitive damages. See [Michael L. Jones v. Wells Fargo Home Mortgage 2007 WL 2480494 Bankruptcy No. 03-16518 Adversary No. 06-01093 \(Slip Copy\)](#) The Judges are screaming from the rooftops to the industry to step up and teach them the standards.

- a. **Forewarned Is Forearmed.** [Knowledge of imminent danger can prepare us to overcome it. The Latin version is 'Praemonitus, praemunitus.' The proverb has been traced to 'Treatises of Fistula' (c. 1425) by J. Arderne. In 1615, it was used by Cervantes in 'Don Quixote.' First attested in the United States in 'History of New Hampshire' (1685). The proverb is found in many forms: Forewarned, forearmed; Forewarned is quite often forearmed; To be forewarned is to be forearmed, etc."]

**b. Call To Action:**

**It is now time for the entire industry, individually and collectively, to step up and put forth its best practices and live or die by them.** I've heard 2 objections to implementing best practices during this conference:

1. if you can't compel someone to accept a solution it will fail
2. we don't have the tools to implement best practices

My response is:

1. if you obtain incentivized consensus, change will take hold – it starts with leadership with those who step up and have the audacity to offer the 1st draft and/or accept the challenge of debate - leaders like Deb Miller, George Stevenson, Hank Hildebrand, Edward Highland, Judge Raymond Lyons, and William Leroy
2. the tools or analytic's will follow the best practices – the industry will fill the void as needed; but the industry must have a voice

**17. Call To Action: To obtain the missing tools to implement enhanced controls and best practices; each respective business function should first develop its own set of “Objectively Obtainable Best Practices”™ reconciled with “Optimal Operational Controls”™.**

- A. No one knows better than you. You are each the functional experts of your practice area. The plaintiffs bar would pay top dollar to have each of you on its litigation team – so they could tap into your practice know-how.
- B. The biggest defensive or check-mate move that the industry can take is to reach deep down into the functional knowledge base of its members; have each develop its respective best practices; and then have the industry comprehensively reconcile those controls and best practices.
- C. The AFN and the Coalition for Mortgage Industry Solutions will stand ready to comprehensively reconcile such controls and best practices in its working groups if you – the experts – will step up and agree to produce an outline of your best practice suggestions. You may reach me at rrydstrom@gmail.com

18. New Solutions: New and refined “neutral” loss mitigation services will emerge to more efficiently administer that function, and equally critical, to limit liability exposures and curtail litigation.

19. New solutions to consumer credit card debt will become immediately critical.

20. New solutions to liquidity and credit availability will be found in new and refined tradable mortgage insurance and investment products, including use of the covered bond vehicles.

21. New solutions to borrower affordability will be found in new loan products and have its DNA taken from the final solutions on the horizon to en mass modifications; namely principal reduction, forgiveness and quarantined principal devices as well as preset contractual Safe Harbor Intelligent Loan Options [and expanded Freddie Mac Net Present Value Upfront Loss programs].

22. Regulators will eventually merge or realign duties and responsibilities.

23. International finance and accounting rules will take a prominent seat at our mortgage finance industry.

**In Closing** – we need the Bar and its clients to both reach for higher standards. We don't need naysayers [objector: somebody who speaks against something, especially somebody who habitually expresses contrary opinions] and excuses.

**Excuses lie on the floor til we sweep them away!**

*Joke - Yes for those still awake – another song lyric!*

We need the framework of the solution which is functional and Obtainable Objective Best Standards and the forum to reconcile those standards which is the AFN. The Coalition for Mortgage Industry Solutions will also make itself available.

§ Solutions

- Industry Needs a Comprehensive Voice of Change – willing to accept the burden of comprehensive reconciliation for all industry participants including borrowers.
- Industry Needs Comprehensive Reconciliation Solutions Providers – to view innovation and solutions in a comprehensive manner.
- Need to update Regulations and Regulators to the 21st Century.
- Industry Needs a Comprehensive Reconciliation Regulator – to avoid preclusion of innovative products and solutions based upon compartmentalized regulating authority.

§ Specific Solutions Example:

1. We need default referrals as pre-foreclosure referrals ([Default Referral™](#)) and en masse or more effective modifications including principal reduction or incentivized modification solutions
2. We need mitigation or elimination of litigation risks solutions like
  - i. Settlements within a legal safe zone:
3. We need mitigation with controls over operational & credit risk solutions like
  - i. The implementation of new best practices and controls like

1. [OptinSettlements™](#)

2. [LitigationFreeZones™](#)

[OptinSafeHarbors™ with revised best practices](#)

We need to reach true affordability for borrowers.

We need to reach true price for risk for investors and insurers.

We need new products that allow true (and enhanced) price to be paid for (enhanced) risk but not only in monthly cash burdens, but with non-cash equivalents, external credit enhancements, insurance, and new flexible tradable mortgage insured investment funds, for example:

[FMII™ - Foreclosure Mortgage Insured Investment Funds™](#)

[DMII™ - Default Mortgage Insured Investment Funds™](#) -

[BMII™ - Bankruptcy Mortgage Insured Investment Funds™](#)

[IMII™ - Investors Mortgage Insured Investment Funds™](#)

§ In Conclusion:

We must spark a renaissance of innovative best practices and loan, credit enhancement and analytical products; products that are in tune with the industry as a whole. We must have a system of regulation and/or regulators that inspire new product innovation without unreasonable hindrance. The industry can not be responsible for innovation if it is not allowed to innovate. However, we must do so responsibly. We must refine our thinking to yield responsible innovation in a free but responsible open market. By definition our innovations must be more comprehensive in nature. We need to update and refine our regulatory system as well as our product and origination systems. We must refine and innovate. Not primarily from a product-focused orientation, but we must go back to the basics starting with the identification of the need or use for such products, including the exposures that need to be hedged or mitigated, and do so not only in terms of the use for the company, but in terms of the industry as a whole, including the borrower, and the stability of the markets and the assets or instruments intended to support such markets. We don't need less creative products, for products sake, we need more refined products. We don't need more disclosures for disclosures sake, we need more intelligent disclosures. We don't need more regulations and laws for regulations and legislation sake, we need more comprehensive self-regulation in part through product innovation and self-certification, and updated laws and regulations that fill the gaps with principles-based changes that bring us into the 21st Century and beyond. Form should follow function. We need to stimulate innovation but assure consumer protection.

Thank you for having me – I can be reached through the AFN and at [www.procouncil.com](http://www.procouncil.com) and at [rrydstrom@gmail.com](mailto:rrydstrom@gmail.com)

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