STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

Attorney General's Report on the Idaho Housing Crisis and How Stakeholders Can Facilitate Cooperative Solutions

Consumer Protection Division

FEBRUARY 2011

LAWRENCE WASDEN
Attorney General
Statehouse
Boise, ID 83720-0010
www.ag.idaho.gov

TABLE OF CONTENTS

Executive Summary 4
OVERSIGHT RESPONSIBILITIES AND DIRECTION OF INVESTIGATION 8
REPORT ORGANIZATION 9

Section 1
OVERVIEW OF HOUSING MARKET CONDITIONS 10

Section 2
MORTGAGE LENDING AND SERVICING 14
MORTGAGE LENDING ISSUES 17
DEFINITION OF A SUBPRIME BORROWER 18
ADJUSTABLE RATE MORTGAGE LOANS (ARMS) 18
INTEREST ONLY (I/O) LOANS 19
BALLOON MORTGAGES 20
THE FALLOUT FROM FAULTY UNDERWRITING STANDARDS 20
MORTGAGE SECURITIZATION 21
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS (MERS) 27

Section 3
IDAHO'S FORECLOSURE STATUTES 29
ENFORCEMENT ISSUES 33

Section 4
FEDERAL LOSS MITIGATION PROGRAMS 35
FEDERAL HOUSING ASSOCIATION (FHA) PROGRAMS 35
FHA Loss Mitigation Program 36
FHA HOPE for Homeowners (FHA-H4H) 37
FHA Home Affordable Mortgage Program (FHA-HAMP) 37
MAKING HOME AFFORDABLE (MHA) PROGRAMS 38
Home Affordable Modification Plan (MHA-HAMP) 39
Home Affordable Refinance Program (MHA-HARP) 43
Home Affordable Foreclosure Alternatives (MHA-HAFA) 43
Second Lien Modification Program (MHA-2MP) 44
Home Affordable Unemployment Program (MHA-UP) 44
Principal Reduction Alternative (MHA-PRA) 45
Protecting Tenants in Foreclosure Act 45
EMERGENCY HOMEOWNER LOAN PROGRAM (EHLP) 46
PROGRESS OF FEDERAL LOSS MITIGATION PROGRAMS 46

Section 5
DEFINING THE CRISIS FROM THE ATTORNEY GENERAL'S PERSPECTIVE: A FIVE-YEAR HISTORY OF COMPLAINTS AND ENFORCEMENT ACTIONS 50
CONSUMER COMPLAINTS AND ENFORCEMENT 50
HISTORY OF CONSUMER COMPLAINTS 51
FORECLOSURE RESCUE COMPANIES 52
Highland Financial, LLC (2007) 53

MORTGAGE MODIFICATION COMPANIES ... 54
Mortgage Assistance Solutions, LLC (2008) ... 55
International Co-op, LLC (2009) ... 56
Best Interest Rate Mortgage Company, LLC (2009) ... 56
Apply 2 Save, Inc. / Derek Oberholtzer / Steven Lux (2009-2010) ... 57
APS Northwest Idaho, LLC (2010) ... 57
CONSUMER COMPLAINT TRENDS ... 58
BEYOND ENFORCEMENT ... 59
Consumer Publications ... 59
Public Service Announcements ... 60
Consumer Alerts ... 60
Mortgage Servicing Complaint Mediation ... 61

Section 6
THE ATTORNEY GENERAL'S CONSUMER COMPLAINT REVIEW ... 61
METHODOLOGY AND SCOPE ... 63
WHAT THE DATA REVEALS ... 64
2008 Complaint Data ... 64
2009 Complaint Data ... 67
2010 Complaint Data ... 70
2010 Complaints Alleging Fraud ... 76

Section 7
THE ATTORNEY GENERAL'S RECOMMENDATIONS TO BETTER PROTECT IDAHO'S HOMEOWNERS NOW AND IN THE FUTURE ... 79
LEGISLATIVE RECOMMENDATIONS ... 79
Written Notice of Postponed Trustee Sale Dates ... 80
Supplemental Foreclosure Notice and Opportunity to Request Modification ... 80
Prohibition Against Most For-Profit Mortgage Modification Services ... 81
CONSUMER ASSISTANCE AND EDUCATION RECOMMENDATIONS ... 82
Full-Time HUD-Certified Housing Counselor ... 82
Regional Foreclosure Prevention Workshops ... 82
Low Cost Mortgage Loan Assistance Attorneys ... 83
Early Warning Notice to At-Risk Borrowers ... 83

APPENDIX A:
RECOMMENDED LEGISLATION ... 84

EXECUTIVE SUMMARY

For Idaho's homeowners, 2010 was a difficult year. More than 19,000 homeowners received a foreclosure filing last year, an 11.23% increase in filings from 2009 and a startling 124.25% increase from 2008.[1] In 2010, Idaho ranked eighth in the nation in the number of foreclosure filings.[2] The Boise-Nampa area was one of the three hardest hit metro markets in the United States that experienced an increase in foreclosure filings as opposed to a decrease between 2009 and 2010.[3] One in every 21 Boise-Nampa properties received a foreclosure filing in 2010.[4]

Statistics, however, fail to chronicle the financial and emotional toll that this crisis has had on Idaho's homeowners, and numbers do not explain how so many homeowners have come to the foreclosure precipice. What led Idaho to this critical point? How did Idaho's housing crisis descend so quickly on homeowners, and what have stakeholders, including the Attorney General, done to address the crisis? Can stakeholders do more to help homeowners and mitigate further fallout from the foreclosure crisis? This report seeks to answer these and other questions while also telling the stories of how the foreclosure crisis has impacted Idaho's homeowners.

---

[1] Source: RealtyTrac U.S. Foreclosure Market Report (Jan. 13, 2011). A "foreclosure filing" includes a notice of default or a notice of trustee sale. RealtyTrac (www.realtytrac.com) is an Internet-based "marketplace of foreclosure properties, with more than 2 million default, auction and bank-owned listings from over 2,200 United States counties, along with detailed property, loan and home sales data."
[2] Source: RealtyTrac U.S. Foreclosure Market Report (Jan. 13, 2011).
[3] Source: RealtyTrac 2010 Year-End Metropolitan Foreclosure Market Report (Jan. 27, 2011). According to the report, 11,289 properties in the Boise-Nampa metro area received foreclosure filings in 2010. RealtyTrac reported that the other two metros that experienced an increase in foreclosures between 2009 and 2010 were Deltona-Daytona Beach-Ormand Beach, FL and Tampa-St. Petersburg-Clearwater, FL.
[4] Source: RealtyTrac 2010 Year-End Metropolitan Foreclosure Market Report (Jan. 27, 2011).

In late 2010, the media reported an increasing number of instances where private litigants had uncovered unlawful court filings related to residential mortgage foreclosures in judicial foreclosure states. In depositions, employees and agents of the foreclosing entities admitted they did not review their affidavits before signing them and that they did not sign them before a notary.[5] Affidavits often contained incorrect information about borrower mortgage loans, which the banks' attorneys failed to verify or correct before filing the affidavits with the courts.

The unknown extent of the problem, the potential legal ramifications for the banks, the public outcry, the increasing severity of media reports, and inquiries from federal and state regulators spurred four of the "Big Five" servicers[6] to suspend foreclosures in the 23 judicial foreclosure states.[7] Only Bank of America, for a brief period, suspended foreclosures in all 50 states.

For the most part, residential property foreclosures in Idaho are accomplished under title 45, chapter 15, Idaho Code, and without court involvement. It is of paramount importance to the Attorney General, however, that mortgage servicers conduct business in Idaho in compliance with *all* applicable state and federal laws and rules. Accordingly, in October 2010, the Attorney General joined a state attorneys general investigation into the servicing industry.

The group includes 50 state and the District of Columbia's attorneys general[8] and numerous state banking regulators, including the Idaho Department of Finance. In cooperation

---

[5] The common term that the media adopted to describe this practice is "robo-signing."

[6] The "Big Five" servicers account for more than 58% of the residential mortgage servicing marketplace. They are (1) Bank of America; (2) Wells Fargo; (3) JPMorgan Chase & Co.; (4) Citigroup, Inc.; and (5) GMAC/Ally Financial. All of the servicers, excluding Wells Fargo, suspended foreclosures in 23 states.

[7] The 23 states that require court-initiated foreclosure are Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Vermont, and Wisconsin.

[8] Iowa Attorney General Tom Miller leads the executive committee that includes the attorneys general of Arizona, California, Colorado, Connecticut, Florida, Illinois, New York, North Carolina, Ohio, Tennessee, Texas, and

with federal regulators, the group is meeting and working with lenders, servicers, investor groups, consumer advocates, policy makers, and homeowners to identify problems and formulate potential solutions. The Attorney General expects to provide a more complete discussion of the group's accomplishments later this year.[9]

The purpose of this report is to explain how, from the Attorney General's perspective, Idaho's housing crisis developed. The Attorney General's viewpoint is unique because it initially forms through multiple consumer contacts establishing that a business has engaged in a pattern of unlawful conduct. It is this pattern or practice, along with public policy issues and other factors that expands the Attorney General's perspective and may lead to further action, including an investigation into the business's activities to determine whether it has complied with state and federal laws and rules.

Following the increased media exposure of alleged mortgage fraud in late 2010, an increasing number of Idaho homeowners contacted the Attorney General's Consumer Protection Division to express concerns about the actions of their mortgage servicers. Some homeowners specifically wrote in their consumer complaint forms that their servicers committed "fraud."

In the complaints filed in November and December 2010, the mortgage servicing activities that homeowners often labeled as fraudulent include:

- Servicers foreclosing on homes while homeowners believe their loan modification applications are pending or foreclosing after homeowners are approved for trial modifications;
- Servicers foreclosing on homes without notifying homeowners before the sale dates; and

Washington. The executive committee also includes the Maryland Office of the Commissioner of Financial Regulation, the New York State Banking Department, and the Pennsylvania Department of Banking.

[9] The investigative activities and results of the group remain confidential at this time.

- Servicers foreclosing on homes when a short sale offer is pending.

Homeowners continue to contact the Attorney General with similar allegations, as well as complaints about customer service issues, account errors, escrow problems, and multiple other concerns.

During the last quarter of 2010, homeowners, consumer advocates, and the media revealed alarming business practices by mortgage servicers, and, while not necessarily unlawful, the alleged pattern of acts and practices necessitated the Attorney General's current investigation into homeowners' complaints and Idaho's housing crisis. Additionally, federal oversight agencies and housing market experts continue to publish reports and provide testimony about the failures of the loss mitigation programs specifically implemented to prevent foreclosures, lessen homeowners' burdens, save communities, boost the economy, and decrease investors' losses.

From this perspective, the Attorney General initiated an in depth review of complaints and other consumer contacts submitted to the Attorney General's Consumer Protection Division between 2008 and 2010 to determine whether the allegations made in the complaints violate laws enforced by the Attorney General and, if so, whether evidence exists to warrant further action as allowed under applicable laws. This required a review and analysis of more than 300 consumer complaints that alleged issues or problems with borrowers' loan servicers.[10]

[10] An additional 414 complaints regarding mortgage modification and foreclosure rescue companies were filed between 2008 and 2010. Mortgage modification companies advertise that they can negotiate a loan modification with the homeowner's servicer if the homeowner pays the company a large fee. Typically the homeowner pays the fee and believes the company is working on a modification. The company, however, has disappeared with

The Attorney General's Report is the result of this review and analysis and includes an examination of the national events leading to Idaho's housing problems, while also discussing the specific areas of concern demonstrated to the Attorney General by Idaho's homeowners, and presenting ways that stakeholders can work together to address and possibly improve Idaho's housing crisis.

Oversight Responsibilities and Direction of Investigation

The Attorney General represents the State of Idaho and acts in furtherance of the state's legal interests.[11] The Attorney General does not base his enforcement activities on the personal interests of individual citizens nor does he provide legal representation to individuals.

Six separate divisions comprise the Attorney General's Office. As the division designated to assist the Attorney General in his enforcement of, among other laws, the Idaho Consumer Protection Act (ICPA),[12] the Consumer Protection Division was designated as the appropriate division to lead the Attorney General's investigation. The ICPA is a civil enforcement statute and does not authorize the Attorney General to impose criminal sanctions.

A deputy attorney general, the division's housing counselor, and an investigator were assigned and continue to work together under the direction of their division chief to compile, review, and analyze consumer complaints, research applicable laws, cases, and programs, and consult with local, state, and federal agencies and consumer advocates regarding

the homeowner's money and the homeowner is served with foreclosure papers. A foreclosure rescue company assumes the consumer's mortgage and the consumer quitclaims the home to the company. The consumer pays rent to live in the home and the company claims it will pay the consumer's mortgage. Eventually the company evicts the consumer who loses any equity in the home.

[11] The Attorney General's duties are detailed in article 4, sections 1, 17, and 18 of the Idaho Constitution and are further defined in Idaho Code §§ 67-1401 to 1409.

[12] Title 48, chapter 6, Idaho Code.

mortgage foreclosure issues. When necessary, the team communicated with homeowners to clarify the information in their complaints and informed homeowners of what action, if any, the Attorney General's Office took on their complaint. In addition, the division's housing counselor continues to triage loan modification complaints, providing homeowners with a conduit to their servicers to facilitate more productive communication.

Report Organization

Section 1 of this report provides background information about the current national and state mortgage market. While Idaho's foreclosure rate differs depending on the source consulted, it is agreed that, in recent months, the state's foreclosure rate has decreased.

In **section 2** of this report the development of the subprime mortgage market, securitization and pooling of mortgages, and the implosion of America's mortgage market are discussed. The rapid expansion of the subprime mortgage market between the late 1990s and into the mid 2000s and the impact that nontraditional mortgages had on the housing market's collapse spurred regulators in July 2010 to place stringent limits on mortgage products that were deemed harmful to consumers or the nation's economic stability.

Section 3 of this report describes Idaho's foreclosure process and addresses applicable enforcement issues under Idaho's foreclosure laws. While borrowers can contest unlawful foreclosures under common law theories, the Attorney General is not authorized to enforce Idaho's foreclosure laws or to intervene in a foreclosure matter.

The report addresses, in **section 4**, the federal government's response to minimize the fallout from the 2006 market collapse. During the past few years, a myriad of federal loss mitigation programs were implemented to help homeowners. Section 4 also presents the progress of the federal programs.

With this background knowledge, in **section 5**, the report delves into the Attorney General's efforts to address allegations of mortgage "fraud," beginning in 2005, when the Consumer Protection Division received its first mortgage modification complaint regarding an Idaho foreclosure rescue company. An outline of the Attorney General's actions through 2010 includes summaries of his enforcement actions, descriptions of his consumer education campaigns, and a discussion of his mortgage mediation program.

Because the foreclosure crisis is not subsiding in the near future and current "fixes" are unlikely to alter the future for thousands of homeowners, it is prudent for stakeholders to consider new approaches to state-specific problems. Accordingly, **section 6** of this report discusses legislative changes and additions, new consumer education programs, and potential cooperative relationships that may address the issues uncovered in our investigation.

SECTION 1
OVERVIEW OF STATE AND NATIONAL HOUSING MARKET CONDITIONS

According to the Mortgage Bankers Association, at the end of the third quarter of 2010, Idaho's rate of seriously delinquent[13] mortgage loans was 6.26%, well below the national average of 8.70% and the 8.73% average of other mountain region states.[14]

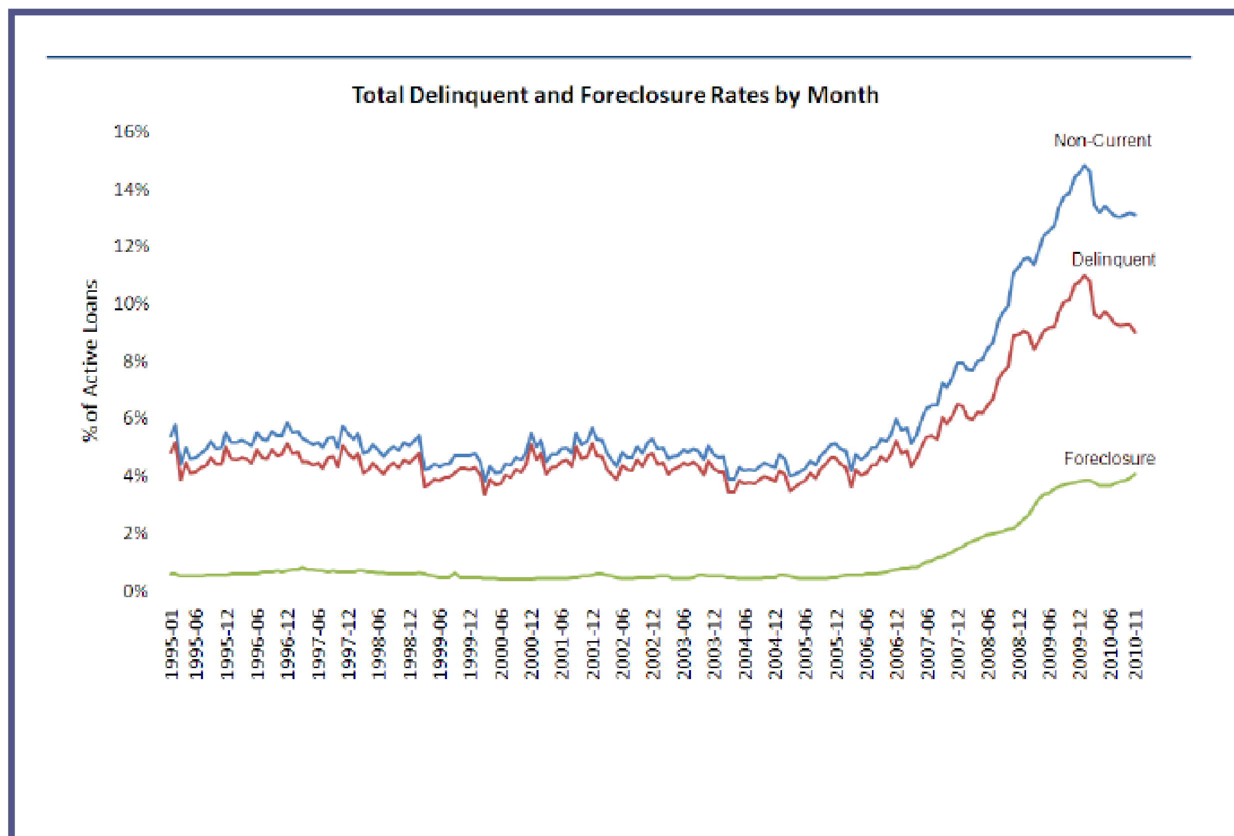
The following chart breaks down the seriously delinquent rate for the third quarter of 2010 by loan type:[15]

Loan Type	Loans Serviced (Idaho)	Seriously Delinquent (Idaho) %	Seriously Delinquent (Nationwide) %
Prime Loans	190,818	4.85	6.43
Fixed Rate	161,787	3.83	4.67
Adjustable Rate	18,826	14.76	17.77

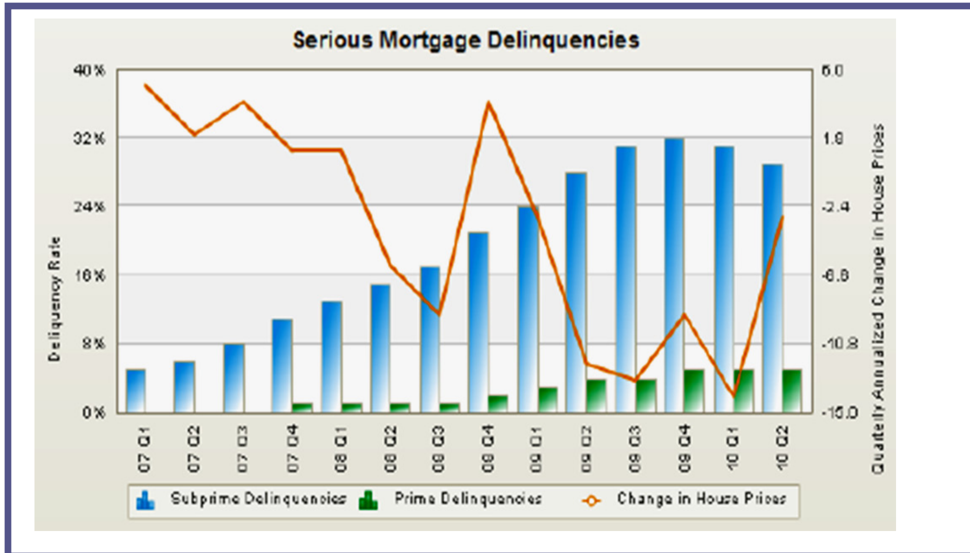
[13] Seriously delinquent loans includes the percentage of loans more than 90 days past due and the percentage of loans in the foreclosure inventory at the end of the quarter.
[14] The mountain region includes Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.
[15] Source: Mortgage Bankers Association, National Delinquency Survey (Nov. 2010).

Loan Type	Loans Serviced (Idaho)	Seriously Delinquent (Idaho) %	Seriously Delinquent (Nationwide) %
FHA	42,021	6.21	8.25
Fixed Rate	31,201	6.10	7.96
Adjustable Rate	804	7.71	9.24
VA	9,097	3.81	4.83
Subprime Loans	16,797	23.69	27.65
Fixed Rate	10,175	17.28	20.34
Adjustable Rate	6,622	32.52	40.17

Nationally, foreclosure filings have increased steadily since 2006 except for a period in 2010 when the number slightly decreased. The following chart[16] indicates that, while foreclosure filings may increase in the future, the number of delinquent loans, which has fallen dramatically since mid-2009, may continue to decrease.



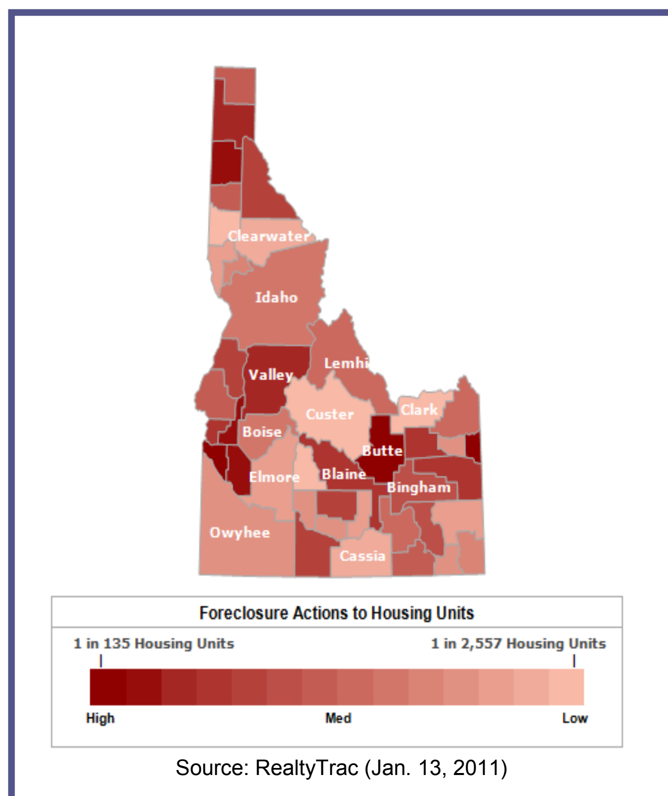
[16] Source: LPS Applied Analytics (LPS Mortgage Monitor: November 2010).



Idaho's delinquency rate increased after 2006, but, much like the national model, beginning in 2010, the number of serious delinquent mortgage loans began to fall. The above chart[17] from Freddie Mac includes the rates of delinquency in Idaho for Freddie Mac prime and subprime loans. It compares the rates of delinquency to corresponding drops and rises in Idaho's housing prices.[18]

As for foreclosures, Idaho experienced a dramatic flux in the number of foreclosure filings in the fourth quarter of 2010. In September 2010, the state's foreclosure filing rate increased 7.75% from August 2010, but in October 2010, the rate plunged 27%.[19] In November 2010 it dropped only 7%.[20] Most likely, the decrease in the number of foreclosure filings is based on some servicers[21] temporarily stopping foreclosures in response to the attorneys general's multistate investigation, pressure from banking regulators, threats of litigation from consumer groups, and bad press.

[17] Source: CoreLogic and Freddie Mac (Conventional Mortgage Home Price Index).
[18] Source: Freddie Mac: State-by-State (Nov. 2010).
[19] Source: RealtyTrac U.S. Foreclosure Market Report (Jan. 13, 2011).
[20] Source: RealtyTrac U.S. Foreclosure Market Report (Jan. 13, 2011).
[21] In October 2010, Bank of America stopped foreclosures in Idaho.

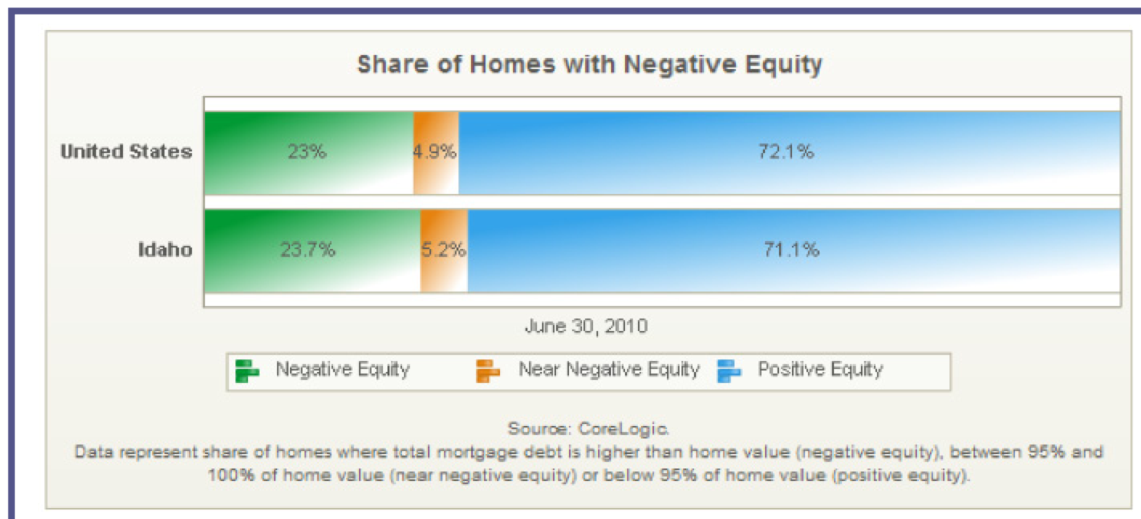


Source: RealtyTrac (Jan. 13, 2011)

December's slight foreclosure rate decrease of 2.67%[22] reflects the foreclosure moratorium's dissolution, while including seasonal factors like the government sponsored enterprises' (GSEs)[23] brief moratorium on foreclosures during Christmas. At the end of 2010, Idaho ranked eighth in the nation in the number of foreclosure filings.[24] Over 19,000 properties received foreclosure filings in 2010, an 11.23% increase from 2009 and a 124.25% increase from 2008.[25] In December 2010, Ada County had the greatest number of foreclosure activity, with Canyon County, Kootenai County, Bonneville County, and Twin Falls County completing the top five.[26]

In addition to Idaho's foreclosure activity, the number of homes with negative or near negative equity also is a strong economic indicator. Based on information from Freddie Mac, it appears that Idaho is slightly above the national average when it comes to homes with negative equity or near negative equity:[27]

[22] Source: RealtyTrac U.S. Foreclosure Market Report (Jan. 13, 2011).
[23] As referenced in this report, a government-sponsored enterprise is a privately owned entity chartered by the federal government to perform credit functions. Freddie Mac and Fannie Mae are GSEs. In September 2008, the federal government placed the GSEs in conservatorship because of their financial losses.
[24] Source: RealtyTrac U.S. Foreclosure Market Report (Jan. 13, 2011).
[25] Source: RealtyTrac U.S. Foreclosure Market Report (Jan. 13, 2011).
[26] Source: RealtyTrac U.S. Foreclosure Market Report (Jan. 13, 2011).
[27] Source: Freddie Mac: State-by-State (Nov. 2010).



Idaho's overall economic health and its housing industry are interdependent. Without a stable economy, the housing industry suffers and, without a stable housing market, Idaho's economy cannot fully recover.[28] It therefore is imperative that stakeholders work cooperatively to help homeowners avoid, when possible, mortgage delinquencies and foreclosures, address the weaknesses in Idaho's current laws and programs, and resolve problems that may cause ongoing economic harm to Idaho and its citizens.

SECTION 2
MORTGAGE LENDING AND SERVICING

Before the invention of the collateralized mortgage obligation in 1983, mortgage lending was a transaction between a bank and borrower who, for the life of the loan or until the borrower sold the home, made payments to the same bank each month. If the borrower questioned the bank's accounting, the borrower knew who to call for assistance, and if the borrower defaulted on the loan, the borrower knew the bank had legal authority to foreclose on its security interest because the bank owned and possessed the note.

[28] Other factors outside the housing market, like high consumer debt and unemployment, diminishing social services, insufficient education and training, and a multitude of other economic, social, and psychological factors, impact Idaho's economy in varying degrees. But those matters are beyond the scope of this report.

But borrowers also had limited loan options. For conventional loans, banks required a 20% down payment. First-time buyers who met strict requirements could pay three percent down and obtain an FHA-insured loan, and military personnel and veterans could pay zero down if they met the strict VA-insured loan requirements. These stringent borrowing requirements, along with high loan rates, put homeownership beyond the reach of many Americans and brought the housing marketing to a standstill.

The mortgage lending landscape changed with the introduction of collateralized mortgage obligations (CMOs)[29] in 1983. The regulatory restrictions on banks relaxed or disappeared throughout the 1980s and 1990s. Allowing mortgage loans to be bought and sold as a commodity boosted the popularity of "subprime" lending and soon adjustable rate, interest only, zero-down, and stated income loans became a part of the industry's lexicon.

During the 1990s, mortgage originations increased at a moderate rate, but between 2000 and 2003, originations shot from approximately seven million to over 20 million and continued at a high rate through 2007. Consumers with damaged credit or other financial issues (so-called subprime borrowers) usually qualified for these riskier loans and, because of large commissions, brokers even steered prime borrowers toward the loans. Homes, which increased exponentially in value, became easy-access piggy banks as borrowers took out home equity loans to pay consumer debts. Credit was easy to find and home values continued to explode.

When the housing market collapsed and credit dried up, subprime borrowers were the first to see their American dream disappear. Due to interest rate resets and corresponding

[29] A "collateralized mortgage obligation" (CMO) is a type of mortgage backed security (MBS), a bond backed by a pool of mortgages. CMOs are divided into classes and each class differs in the order they receive principal payments. CMOs were created in June 1983 by the investment banks of Salomon Brothers and First Boston for Freddie Mac.

monthly payment spikes, subprime borrowers found themselves with unaffordable loans and very few options.

Faced with imminent default or foreclosure, consumers have contacted the Attorney General's Office in increasing numbers to voice concerns about the terms of their mortgage loans. Some consumers allege predatory lending, claiming their lenders knew the mortgage loans they approved were unaffordable. Other consumers believed they would be able to refinance their adjustable rate mortgages before the introductory rate reset. Some consumers simply have contacted the Attorney General's Office because they do not know or understand their rights or obligations under their mortgage contracts or their legal options.

The causes of Idaho's housing crisis, however, extend beyond the four corners of the mortgage contract and how the lender advertised or negotiated it. Mortgage loan servicing is a multi-trillion dollar business and one that generates the majority of home loan complaints with the Attorney General. Consumers report that servicers charge consumers miscellaneous fees without explaining the purpose of the fee, fail to refund escrow balances in a timely manner, fail to respond to requests for information about consumers' accounts, fail to credit timely payments, as well as a multitude of other issues.

Section 2 of this report provides an overview of the mortgage industry, beginning with mortgage lending issues, including subprime lending and mortgage backed securities. An explanation of how a residential mortgage loan finds its way to the secondary mortgage market follows, as well as a brief discussion about the Mortgage Electronic Registration Systems (MERS) and its role in the transfer and assignment of mortgage loans.

Mortgage Lending Issues

Deregulation of the mortgage lending market occurred in 1983 when the Comptroller of the Currency declared that "regulatory restrictions are unnecessary to ensure the safety and soundness of national banks' real estate lending activities."[30] Accordingly, rather than implementing mandatory regulations, regulators[31] issued guidelines that banks, thrifts, and their subsidiaries[32] referenced in developing internal real estate lending policies. As a result, bank management, rather than federal agencies, was charged with ensuring the safety and soundness of the bank's real estate lending practices.

In the 1990s, federal policy makers pushed the GSEs (Freddie Mac and Fannie Mae) to expand their programs and prodded banks to lend to underserved populations. The goal was to increase the homeownership rate from 50% to 70%,[33] and one way to achieve that number was for the Federal Housing Administration, Treasury Department, Federal Deposit Insurance Corporation, and Department of Housing and Urban Development to encourage and, in some instances, force the GSEs and banks deeper into the subprime lending market.

As subprime lending increased, so did the profits of entities like Countrywide Home Loans, New Century, and the Money Store – originators that served subprime borrowers and then sold the loans to fund more loans. The Federal Reserve estimated that, between 1994 and 1999, the number of loans issued by subprime lenders increased from 138,000 to

[30] Real Estate Lending by National Banks, 48 Fed. Reg. 40699-40670 (Sept. 9, 1983).
[31] In 1992, the Comptroller of the Currency issued guidelines for national banks and their subsidiaries. The Office of Thrift Supervision began issuing guidelines for thrifts, savings associations, and their subsidiaries in 1996.
[32] The agencies' guidelines did not apply to the banks' or the thrifts' affiliates because, according to regulators, the affiliates' actions did not place the FDIC at risk and because secondary market investors established underwriting requirements for the affiliates. *See* Real Estate Lending Standards, 57 Fed. Reg. 62894 (Dec. 31, 1992).
[33] By 1999, the homeownership rate equaled 66.8%, just shy of the 70% goal.

approximately 856,000, a dollar amount of $35 billion to $160 billion, and accounting for almost 13% of all mortgage originations.[34]

To understand how the degradation of subprime lending standards and safeguards in the early 2000s have led to increasing defaults and foreclosures requires a brief discussion of subprime borrowers and those loan products typically labeled as "subprime."[35]

Definition of a Subprime Borrower

In the Interagency Expanded Guidance for Subprime Lending Programs, federal banking regulators define a subprime borrower as a person who has:

- Two or more 30-day delinquencies in the last 12 months or one or more 60-day delinquencies in the last 24 months;
- A judgment, foreclosure, repossession, or charge-off in the prior 24 months;
- A bankruptcy in the last five years;
- Relatively high default probability as evidenced by a credit bureau risk score of 660 or below[36] or other bureau or proprietary scores with an equivalent default probability likelihood; or
- A debt service-to-income ratio of 50% or greater or otherwise limited ability to cover family living expenses after deducting total monthly debt-service requirements from monthly income.

Adjustable Rate Mortgage Loans (ARMs)

The most common adjustable rate mortgages (ARMs) before 2007 were loans with "teaser rates." The introductory interest rates were kept low for the first two or three years of the 30-year loan to entice borrowers who may not have understood the consequences of

[34] *See* Bethany McLean & Joe Nocera, *All the Devils Are Here*, pp. 34-35 (2010).
[35] The majority of all subprime loans, however, were not made to new homeowners. On the contrary, 82% of subprime loans went to borrowers who wanted to refinance their existing mortgage loans. In many cases borrowers refinanced in order to obtain additional cash. Accordingly, when the mortgage crisis hit in 2006 and home values subsequently dropped, homeowners with large loans quickly sank.
[36] According to a study by the Fair Isaac Corporation, which has a scoring index from 300 to 850, the national median FICO score in October 2009 was 711. Experian's credit scoring index uses a scale from 330 to 830. In December 2010, the national average credit score was 692, while Idaho consumers had an average credit score of 705. Source: Experian National Score Index.

future rate resets. The lenders may have told the borrower that, before the interest rate reset, the borrower would be able to refinance the loan at a fixed rate. But in 2007, borrowers whose rates reset to the market rate could not refinance because of credit blemishes, unexpected unemployment or reduced income, more stringent lending criteria, and the banks' unwillingness to make new loans. Unable to afford the new and much higher monthly payment, borrowers began to default.

A variation of the regular ARM is the pay option ARM (POM), which allows the borrower, in any given month, to pay a low minimum amount, an interest only payment, or the 15-year or 30-year fixed rate payment. POMs were designed originally for borrowers with sporadic income, such as self-employed or seasonal workers, but were marketed to borrowers with high debt-to-income ratios that could not afford a fully-indexed interest rate payment. Accordingly, POMs were one of the most destructive loans available because most borrowers could afford only the minimum payment each month. This resulted in negative amortization.[37] When the loan was recast two or three years later, the payment was too high for the borrower to afford and default was inevitable.

Interest Only (I/O) Loans

An interest only (I/O) loan allows the borrower to pay only the accumulated monthly interest on the loan and none of the principal for a specified term. I/O loans keep monthly payments lower, but assuming the borrower elects not to pay an amount toward the principal during the interest-only period, the loan amount never decreases. Some loans require a large

[37] Option ARMs also are referred to as negative amortization (NegAm) loans because the balance on the loan increases before the required payment amount resets to the fully amortizing rate. This occurs because the borrower pays less interest than what is being charged on the loan. The unpaid interest is added to the principal, leaving the borrower owing more than he or she originally borrowed. Assuming the property's value increases, the borrower can sell the property and possibly recover some equity. However, according to Freddie Mac's 2010 report for Idaho, 23.7% of Idaho's homes have negative equity.

balloon payment at the end of term and, unless a home's value increases substantially in value, the homeowner will have no equity in the property at the end of the interest-only period.

Balloon Mortgages

As with POM loans, a borrower with a balloon mortgage pays less than the fully amortizing payment amount each month. At the end of a fixed period, the borrower must make a large payment -- a "balloon payment" -- to pay off the loan balance. Borrowers may find it difficult to afford a large payment all at once.

The Fallout from Faulty Underwriting Standards

Lenders reported that they qualified borrowers for subprime hybrid ARMs based on the borrower's ability to afford the initial low payment rather than the payment at the reset rate. Performance of these loans further reflects a substandard underwriting practice. When hybrids reset, the number of loan prepayments increases, often resulting in steep prepayment penalties and increasing defaults. By underwriting hybrid loans based on the borrower's ability to pay the initial rate, lenders increased the probability that a subprime borrower had to sell, refinance, or default when the loan reset. The lender was more concerned with asset values and generating prepayment penalty fees than on the overall performance of its loans.[38]

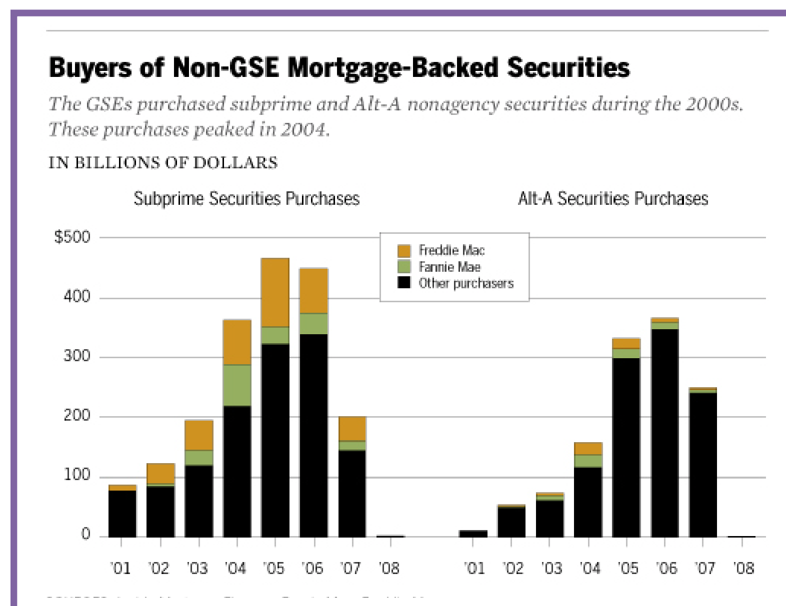
Between 2004 and 2008, POM, I/O, and balloon loans comprised a relatively minor share of the total number of originated mortgages. Option ARMs peaked at 9% in 2006, while I/O loans peaked at 20% in 2007 and balloon loans increased to a high of only 3% in 2006.[39] After 2008, those percentages decreased to a total percentage of 7%.[40]

[38] *See* Senator Charles Schumer, Chairman, Report and Recommendations by the Majority Staff of the Joint Economic Committee, The Subprime Lending Crisis: The Economic Impact on Wealth, Property Values and Tax Revenues, and How We Got Here (Oct. 25, 2007).
[39] *See* Financial Crisis Inquiry Commission, Preliminary Staff Report - The Mortgage Crisis (Apr. 7, 2010).
[40] *See* Financial Crisis Inquiry Commission, Preliminary Staff Report - The Mortgage Crisis (Apr. 7, 2010).

While they did not comprise a majority of the loans originated in the early 2000s, subprime and option ARM loans did account for a significant number of the early loan delinquencies.[41] Option ARMs currently eclipse other loans in the number of foreclosures,[42] and as additional ARMs and option ARMs reset in 2011 and 2012, the number of defaults and foreclosures are predicted to increase.[43]

Mortgage Securitization

First created in 1977, mortgage-backed securities (MBS) allowed banks to sweep illiquid mortgage loans from their books and free up credit to grant more mortgage loans to borrowers. In a monetary round-robin, investors purchased the right to receive the borrowers' principal and interest payments and became the primary funders of new borrowers' mortgage loans.



Today, Freddie Mac, Fannie Mae, and Ginnie Mae purchase the largest amount of mortgage-backed securities. Private-label securitization or "non-agency" decreased dramatically beginning in 2007.[44] While the securitization process is more technical and complicated in practice and

[41] Source: LPS Applied Analytics (LPS Mortgage Monitor: Nov. 2010).
[42] Source: LPS Applied Analytics (LPS Mortgage Monitor: Nov. 2010).
[43] Source: Credit Suisse, Loan Performance.
[44] Securitization markets began closing in 2007 and nearly closed in 2008. In early 2009, most securitization markets remained shut to all but conforming mortgages. *See* Chairman Ben S. Bernanke's Testimony before the Senate Committee on Banking, Housing and Urban Affairs, *Semiannual Monetary Policy Report to the Congress* (Feb. 24, 2009).

terminology, to keep things simple, this section of the report highlights the basic steps in the securitization process.

First, a sponsor assembles a pool of mortgage loans by originating them or by purchasing them from another originator.[45] The sponsor then creates and transfers the loans into a special purpose vehicle.[46]

A pooling and servicing agreement[47] outlines how the assets and income are serviced. The master mortgage servicer – the entity that originated the loans for the pooled trust – retains the mortgage servicing rights[48] for the pooled loans. The pooling and servicing agreement, however, usually allows the master mortgage servicer to appoint a primary, secondary, default, or sub-servicer to service and collect on the loan. Even the mortgage servicing assets[49] can be sold, assigned, and securitized, which is why borrowers may have multiple servicers during the lifetime of their mortgage loans.

To manage risk, the special purpose vehicle can issue different classes of mortgage-backed securities (MBS) that give investors the rights to the available cash flows. The special purpose vehicle creates different levels of risk or "tranches" within an MBS through

[45] In 2007 the top ten sponsors, which accounted for 56% of all placements, were (1) Countrywide Financial; (2) Lehman Brothers; (3) Wells Fargo & Co.; (4) Washington Mutual; (5) Bear Stearns; (6) JPMorgan Chase; (7) Deutsche Bank; (8) Residential Funding Corp.; (9) Merrill Lynch; and (10) Morgan Stanley. *See* Financial Crisis Inquiry Commission, Securitization and the Mortgage Crisis (Apr. 7, 2010).

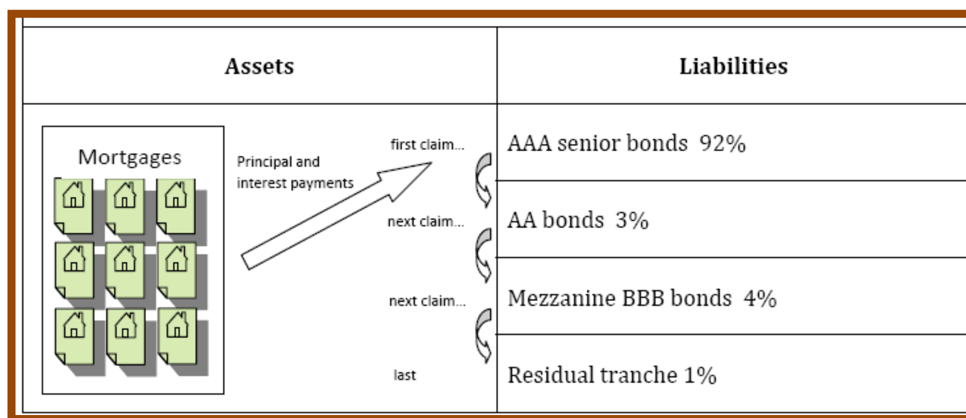
[46] A special purpose vehicle is an entity created to fulfill a narrow or temporary objective. It typically holds a portfolio of assets, such as mortgage-backed securities or other debt obligations, and often is used because of regulatory and bankruptcy advantages.

[47] A mortgage pooling and servicing agreement outlines the terms and conditions that apply to the servicing of pooled loans and to the distribution of proceeds and losses to the bondholders.

[48] The mortgage servicer has the right to collect payments from borrowers and to deduct a fee from the payments before forwarding the money to the mortgage lender.

[49] Mortgage servicing assets result from contracts to service loans secured by real estate (that have been securitized or are owned by others) for which the benefits of servicing are expected to more than adequately compensate the servicer for performing the servicing.

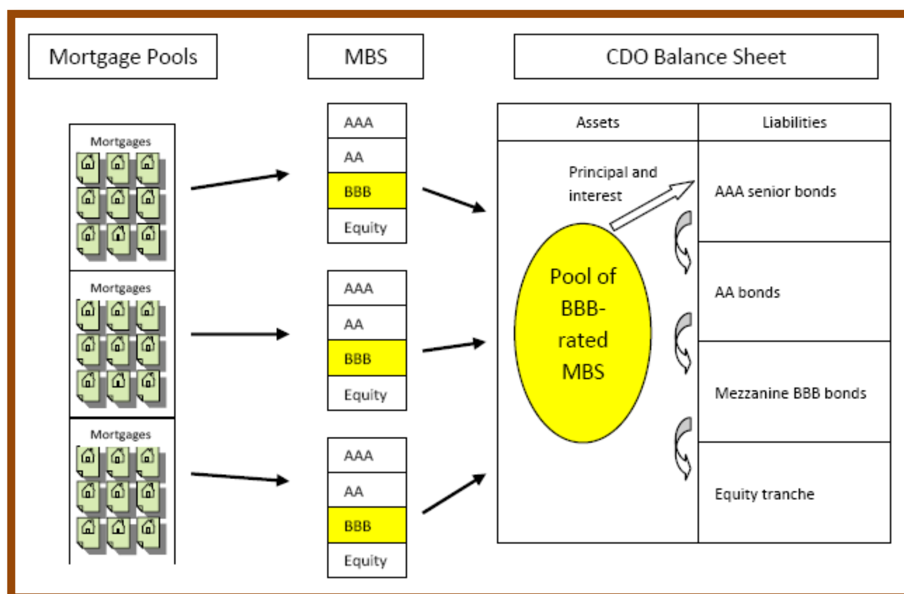
overcollateralization and bond ratings.[50] For example, the senior tranche is comprised of AAA- and AA-rated bonds. In theory, these bonds are considered low-risk and therefore highly desired by investors with portfolios that require minimal risk investments. The mezzanine or junior tranche, on the other hand, is high-risk because it is comprised of BBB-rated bonds. Bonds excluded from the junior tranche are dumped into the residual tranche. Depending on the rate of loan default, it is possible that only the AAA-rated bond holders receive payment, leaving the AA-rated and BBB-rated bond holders empty-handed. The following graphic from the federal Financial Crisis Inquiry Commission demonstrates a hypothetical balance sheet of an MBS and how claims would be allocated:[51]



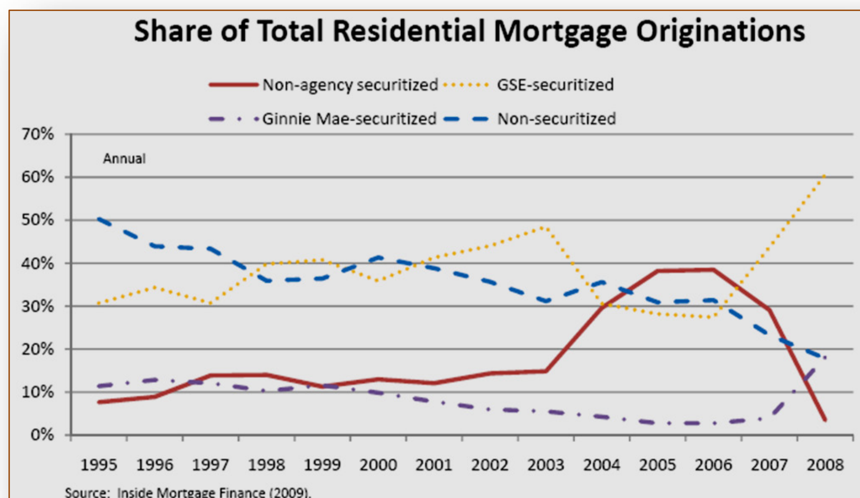
Typically, the bonds that comprise the junior tranches of different MBS are pooled together to create collateralized debt obligations.[52] The securitization process is repeated but the former BBB-rated bonds are given an AAA rating. This issue has induced investors to question the credibility of the ratings agencies' bond ratings. This illustration represents how

[50] Bond rating agencies, such as Standard and Poor's, rate bonds on a scale using alphabetical representations. For example, Standard and Poor's rates investment-grade bonds as AAA and junk bonds as BBB. Other agencies use different letter combinations. Investors rely on these ratings when making investment decisions.
[51] *See* Financial Crisis Inquiry Commission, Securitization and the Mortgage Crisis (Apr. 7, 2010).
[52] A collateralized debt obligation is a type of security often composed of the riskier portions of mortgage-backed securities.

high-risk mortgage-backed securities are transformed, through a collateralized debt obligation, into investment-grade bonds:[53]



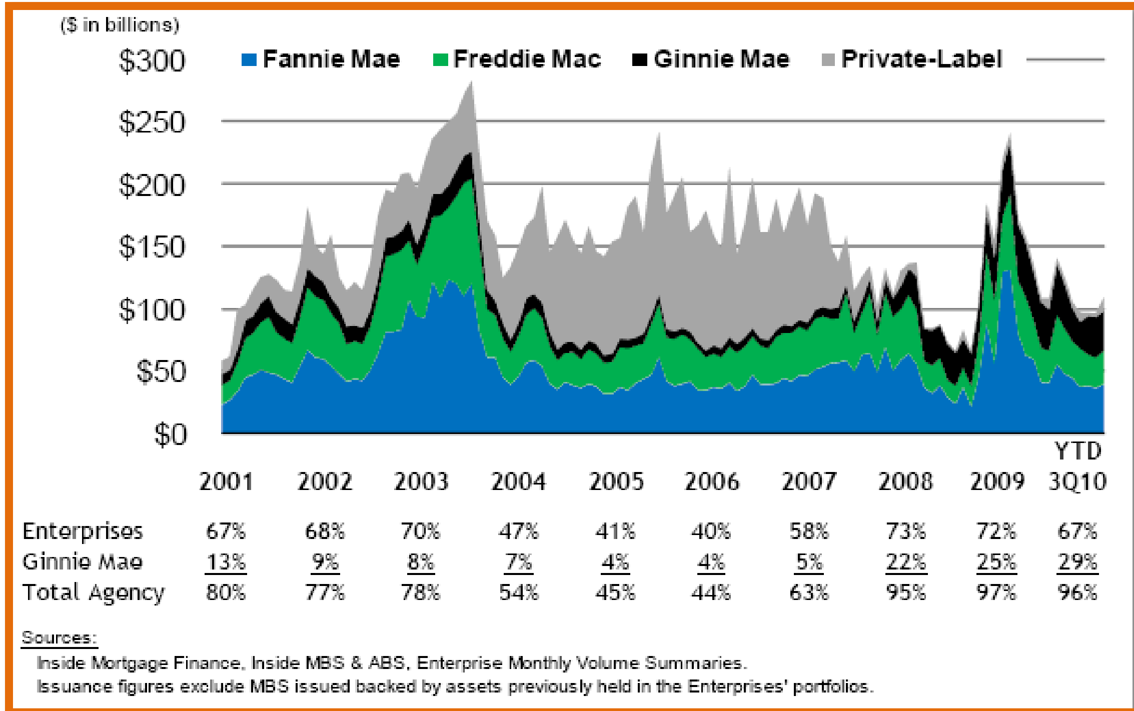
The following chart[54] illustrates the increase in the number of non-agency securitizations in the early 2000s, their rapid decline after 2006, and subsequent collapse in 2008:



[53] *See* Financial Crisis Inquiry Commission, Securitization and the Mortgage Crisis (Apr. 7, 2010).
[54] *See* Financial Crisis Inquiry Commission, Securitization and the Mortgage Crisis (Apr. 7, 2010).

To prevent the government-sponsored enterprises' (Freddie Mac and Fannie Mae) financial failure and the "devastating consequences"[55] their collapse would have on the housing market, the Federal Housing Finance Agency, acting under the Housing and Economic Recovery Act of 2008 (HERA),[56] placed Freddie Mac and Fannie Mae in conservatorship[57] in September 2008. The Department of Treasury's additional financial commitment to Freddie and Fannie helped calm investors' fears that their mortgage-backed securities (MBS) lacked the "guaranteed" capital support the investors believed their investments had when they purchased them.[58] To further stabilize the secondary mortgage market, the Department of Treasury purchased $200 billion in agency MBS in 2009 and the Federal Reserve purchased $1.2 trillion in agency MBS that year.[59] With the dissipation of private capital, Freddie Mac and Fannie Mae, through their securitization and guarantee activities, financed or guaranteed over 70% of single-family loans in 2009.[60] The Federal Housing Administration, Department of Veterans Affairs, and Department of Agriculture accounted for another 25% of originations.[61] In a recent conservator's report regarding Freddie's and Fannie's performance, the Federal Housing Finance Agency illustrated Freddie's and Fannie's predominant market share for MBS issuance volume compared to Ginnie Mae's and the private-label's market share:[62]

[55] The government-sponsored enterprises (GSEs) reported a combined loss of over $5 billion in 2007. In 2008, the GSEs reported a combined loss of more than $108 billion. *See* Timothy Geithner's Testimony before the House Financial Services Committee (Mar. 23, 2010).
[56] Pub. L. No. 110-289, 122 Stat. 2654 (Jul. 30, 2008).
[57] Originally, the Department of Treasury pledged $200 billion to each of the GSEs, but later amended the fixed cap with a formulaic cap.
[58] Although the GSEs guaranteed investors timely payments on their MBS, contrary to popular belief, the investments were not guaranteed by the federal government.
[59] *See* Timothy Geithner's Testimony before the House Financial Services Committee (Mar. 23, 2010).
[60] In 2009 the GSEs acquired $1.159 trillion in single-family loans in 2009, a 27% increase from 2008. *See* Federal Housing Finance Agency, Annual Housing Report (Oct. 2009).
[61] *See* Timothy Geithner's Testimony before the House Financial Services Committee (Mar. 23, 2010).
[62] *See* Federal Housing Finance Agency, Annual Housing Report, (Oct. 2010).



	2001	2002	2003	2004	2005	2006	2007	2008	2009	YTD 3Q10
Enterprises	67%	68%	70%	47%	41%	40%	58%	73%	72%	67%
Ginnie Mae	13%	9%	8%	7%	4%	4%	5%	22%	25%	29%
Total Agency	80%	77%	78%	54%	45%	44%	63%	95%	97%	96%

Critics of mortgage securitization blame its creation, in part, for the mortgage crisis, expressing three valid concerns:[63]

1. **The ethical perils inherent in eliminating the originate-to-hold lending model.** Because originators could sweep loans off of their books they had less incentive to make good underwriting decisions. The borrower's default risk became someone else's problem before the borrower's signature on the promissory note was even dry. Meanwhile, originators could portfolio their low-risk loans. Opponents to this theory argue, however, that because of market transparency and bond rating standards, investors knew the quality of the loans they were purchasing, which was reflected in the price they paid. Furthermore, originators had to follow strict underwriting requirements to sell to the GSEs.

2. **The hazards of too much available credit.** Securitization provided originators with another source of credit, making borrowing cheaper for consumers and easier for those with blemished credit. As more consumers bought houses between 2003 and 2006, housing prices increased to an unsustainable level. Eventually, the "bubble" had to break and when it did, homes lost value.

3. **The personal disconnect that comes from faceless loans being pooled with millions of others and sold to faceless investors.** When banks held onto the loans they originated, they also maintained a relationship with borrowers. Today, however, homeowners must do business through a loan servicer that may or

[63] *See* Financial Crisis Inquiry Commission, Securitization and the Mortgage Crisis (Apr. 7, 2010).

may not own their loan. Homeowners attempting to modify their loans are often told that the "investor" will not approve a modification, yet the servicer provides no information about this phantom investor to the homeowner. The servicer's goals in modifying a homeowner's loan do not always reflect the investor's, yet the homeowner must accept that the servicer and the investor are speaking as one. Despite investors expressing a desire for servicers to negotiate more modifications with homeowners, their wishes are ignored and more borrowers lose their homes without justification.[64]

Mortgage Electronic Registration Systems (MERS)

The Mortgage Electronic Registration Systems (MERS)[65] is a central electronic system created by the mortgage banking industry to "streamline" changes in the ownership and servicing of mortgage loans.[66] MERS acts as the mortgage originator's nominee, as well as its assignee in the county recorder's records. The originator (or its assignee), however, always retains the beneficial interest in the loan,[67] and no matter how many times the loan is traded after it is registered, MERS remains the nominal mortgagee of record.[68]

Recently, controversies over recording residential mortgages in the name of MERS have evolved. Issues that Idahoans have brought to the Attorney General's attention include:

- **Avoidance of County Recording Fees.** At least one county recorder's office has voiced concerns about MERS members' ability to avoid paying a recording fee for each mortgage transfer. Before MERS, transfers were filed with the recorder's office and the party recording the transfer was charged a

[64] Another concern is that senior and junior investors have competing interests. While investors with senior tranche bonds may receive payment from a foreclosure sale, investors holding junior tranche bonds will not. Junior investors are more likely to see a return on their investment if the mortgage is modified and the borrower continues to make principal and interest payments.
[65] Mortgage Electronic Registration Systems, Inc., is a shell corporation organized in Delaware. MERSCORP, Inc.'s members include the Mortgage Bankers Association, the GSEs, and 25 mortgage lenders and servicers. Members of MERS pay membership fees and transaction fees to use MERS as a nominee and to access MERS's database.
[66] MERSCORP, Inc. maintains the database that tracks the servicing rights of mortgage loans and, if provided by investors, the ownership rights. In 2007, approximately 60% of all home mortgage loans were recorded in MERS's name. Kate Berry, *Foreclosures Turn up Heat on MERS*, Am. Banker, Jul. 10, 2007, at 1. MERS also maintains a "Servicer Identification System" at www.mersinc.org. Borrowers can look up their loans on the System and identify their servicers.
[67] *See* American Securitization Forum, *White Paper: Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market*, at 8 (Nov. 16, 2010).
[68] www.mersinc.org.

fee. One of the stated purposes for creating MERS is to avoid paying the recording fees, thereby decreasing costs for MERS's members.

- **Separation of Promissory Note from Deed of Trust.** The Attorney General is aware of concerns as to whether a trustee, on behalf of a beneficiary, has authority to foreclose when MERS is designated as the beneficiary's nominee. In property law, it is an accepted principle that one person holds both the promissory note and the deed of trust. If the two documents are separated, the note becomes unsecured, making it impossible for the note holder to foreclose unless the holder of the deed of trust is the note holder's agent. Consumer advocates assert, therefore, that because MERS does not hold the promissory note, its future assignments of the deed of trust to new assignees separate from the note have no legal force.

Legal challenges to MERS also have increased, particularly court actions in which borrowers assert that MERS lacks standing to represent or assert legal rights on behalf of an originator's unnamed successor or assignee.[69] Idaho's bankruptcy court has agreed with this contention and denied motions to lift automatic stays because MERS cannot demonstrate possession of the promissory note or its authority to enforce the note.[70]

Outside of bankruptcy court, no other Idaho court has taken the position that MERS lacks standing to act as an originator's nominee. Furthermore, Idaho law does not prohibit foreclosures in the name of MERS.[71] Although some courts may disqualify MERS as a

[69] Although JPMorgan Chase uses MERS, it stopped foreclosing in its name in 2007 and 2008. As of May 1, 2010, Fannie Mae directed its servicers to cease naming MERS as a plaintiff in any foreclosure action on a mortgage loan that Fannie Mae owns or securitized. *See* Fannie Mae Announcement SVC-2010-05: Miscellaneous Servicing Policies (Mar. 30, 2010).

[70] *See In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009).

[71] Courts routinely dismiss MERS as a defendant in wrongful foreclosure, UDAP, state licensing, FDCPA, and other legal actions. *See Vawter v. Quality Loan Service Corporation of Wash.*, 707 F.Supp.2d 1115 (W.D. Wash. 2010); *In re Mortgage Elect. Registration Sys., Litigation*, 2010 WL 4038788 (D. Ariz. Sept. 30, 2010); *Commonwealth Property Advocates, LLC v. Mortgage Elect. Registration Sys., Inc.*, 2010 WL 3743643 (D. Utah Sept. 20, 2010); *Taylor v. Deutsche Bank Nat'l Trust Co.*, 2010 WL 3056612 (Fla. App. Aug. 6, 2010); *Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp.2d 1177 (N.D. Cal. 2009); *Blau v. America's Servicing Co.*, 2009 WL 3174823 (D. Ariz. Sept. 29, 2009); *Trent v. Mortgage Elec. Registration Sys., Inc.*, 618 F.Supp.2d 1356 (M.D. Fla. 2007); *Robey v. Shapiro, Marianos & Cejda, LLC*, 434 F.3d 1208 (10th Cir. 2006); *U.S. Bank, N.A. v. Flynn*, 897 N.Y.S.2d 855 (N.Y. Sup. Ct. 2010); *Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W.2d 487 (Minn. 2009); *Crum v. LaSalle Bank, N.A.*, 2009 WL 2986655 (Ala. Civ. App. Sept. 18, 2009); *Bank of New York v. Dobbs*, 2009 WL 2894601 (Ohio Ct. App. Sept. 8, 2009); *Mortgage Elec. Registration Sys., Inc. v. Romaine*, 861 N.E.2d 81 (N.Y. 2006); *Mortgage Elec. Registration Sys., Inc. v. Nebraska Dep't of Banking*, 704 N.W.2d 784 (Neb. 2005).

beneficiary of a deed of trust, it is unlikely any court would invalidate a mortgage loan or cancel the underlying debt -- the remedies borrowers seek -- because MERS is named as the "nominee." Likewise, challenges to MERS's ability to act simply as a central system to track changes in the ownership and servicing of loans are likely to fail.

Certainly a central registration electronic system that tracks the millions of mortgages and their transfers in servicing rights is a valuable tool within the industry, but it is only as good as the information that lenders provide. Unless MERS's members mitigate the criticisms and problems that borrowers, policy makers, consumer advocates, and others have voiced, legal challenges will persist and MERS will continue to operate under a veil of public suspicion.[72]

Section 3

IDAHO'S FORECLOSURE STATUTES

Like 27 other states, Idaho is a non-judicial foreclosure state, which means its primary method of foreclosure is by power of sale.[73] Idaho allows a trustee[74] to foreclose on a trust deed by advertisement and sale if the trustee meets certain requirements outlined in Idaho's foreclosure statutes.

The following documents must be recorded with the recorder's office in the county where the property is located: (a) the trust deed, (b) any assignments of the trust deed by the trustee or the beneficiary,[75] and (c) any appointment of a successor trustee. The trust deed[76]

[72] Following the October 2010 discovery of judicial foreclosure improprieties, the Office of the Comptroller of the Currency, in coordination with the Federal Reserve, the Federal Deposit Insurance Corporation, and the Federal Housing Finance Agency, initiated an investigation into MERS to evaluate its conformance with established law and legal principals. The OCC is expected to announce the results of its investigation in early 2011.

[73] *See* Idaho Code § 45-1503(1).

[74] A "trustee" is a person to whom the legal title to real property is conveyed by trust deed or his successor in interest. Idaho Code § 45-1502(4).

[75] A "beneficiary" is a person named in a trust deed as the individual for whose benefit a trust deed is given or the person's successor in interest and who is not the trustee. Idaho Code § 45-1502(1).

[76] See Idaho Code § 45-1502(3) for the formal definition of "trust deed." The trust deed, along with the promissory note, allows the foreclosure for non-performance of the borrower's obligation.

is the document that the borrower ("grantor")[77] executed to convey the home to the trustee in trust and which requires the borrower to pay the beneficiary (the owner of the loan).

When a borrower defaults on a mortgage obligation, it usually means the borrower failed to perform under the requirements of the mortgage obligation and the failure continued for 30 days.[78] At this point, a notice of default is recorded with the recorder's office in the county where the property is located.[79] The notice of default identifies the deed of trust and states: (a) the name(s) of the trustor(s); (b) the book and page where the property is recorded or a description of the trust property; (c) a statement that a breach of the obligation for which the transfer in trust is security has occurred; (d) a statement of the nature of the breach; and (e) a statement of election to sell or cause to be sold the property to satisfy the obligation.[80] The trustee must mail[81] the default notice to the borrower[82] and include a copy of Idaho's foreclosure rescue scam notice.[83]

The date on which the notice of default is recorded is important because the borrower has 115 days from that date to cure the default.[84] This requires the borrower to pay the beneficiary "the entire amount due under the terms of the deed of trust," including costs and expenses incurred in enforcing the mortgage obligation, a reasonable trustee's fee, and attorney's fees as provided in the promissory note.[85]

[77] See Idaho Code § 45-1502(2) for the definition of "grantor."
[78] The default period should be defined in the borrower's mortgage contract. The 30-day rule-of-thumb is based on the definition of "default" in 24 C.F.R. § 203.330.
[79] *See* Idaho Code § 45-1505(3)(a).
[80] *See* Idaho Code § 45-1505(3)(b).
[81] The default notice must be sent by registered or certified mail, return receipt requested. *See* Idaho Code § 45-1505(3).
[82] Copies of the default notice must also be mailed to those who request notice pursuant to Idaho Code § 45-1511 and to anyone who owns an interest in the property. *See* Idaho Code § 45-1505(3)(b).
[83] *See* Idaho Code § 45-1505(3)(b).
[84] Idaho Code § 45-1506(12).
[85] Idaho Code § 45-1506(12).

Assuming the borrower does not cure the default, the next step in the foreclosure process is mailing a notice of trustee sale to the borrower. The notice must be mailed[86] at least 120 days before the date of the sale and the notice must contain:

a) the names of the grantor, trustee, and beneficiary in the trust deed;

b) a description of the property covered by the trust deed;

c) the book and page of the mortgage records or the recorder's instrument number where the trust deed is recorded;

d) the default for which the foreclosure is made;

e) the sum owing on the obligation secured by the trust deed; and

f) the date, time, and place[87] of the sale, which must be after 9 a.m. and before 4 p.m. in the county where the property is located.[88]

The notice of trustee sale also must be served personally on the borrower or posted at the property if the borrower is unavailable.[89] Over a period of seven different days, "at least three good faith attempts"[90] must be made to serve an adult occupant of the property with the notice at least 30 days before the sale date.[91] If the borrower is unavailable, the person serving the notice must post the notice in a conspicuous place.[92]

Once a week for four consecutive weeks, a copy of the sale notice also is "published in a newspaper of general circulation"[93] in the county where the property is located. The last

[86] The notice must be mailed by registered or certified mail, return receipt requested, to the last known address of the grantor, any person requesting notice, any successor in interest of the grantor, and any person having a lien or interest subsequent to the interest of the trustee in the trust deed. *See* Idaho Code § 45-1506(2)(a) to (c).
[87] Sales usually occur at 11:00 a.m. or 1:00 p.m. at local title companies.
[88] *See* Idaho Code § 1506(4)(a)-(f).
[89] *See* Idaho Code § 1506(5).
[90] The phrase "good faith attempt" is not defined.
[91] Idaho Code § 45-1506(5).
[92] *See* Idaho Code § 45-1506(5).
[93] The phrase "newspaper of general circulation" is not defined. Courts, however, are hesitant to preclude trade publications that appeal to a specific audience or industry from the definition of a "newspaper of general circulation."

publication must be at least 30 days before the sale.[94] An affidavit of mailing, serving (or posting), and publishing the notice of sale must be recorded with the recorder's office in the county where the property is located at least 20 days before the sale.[95]

Any person may bid at the sale and the trustee or the attorney for the trustee must sell the property to the highest bidder.[96] The trustee must apply the proceeds of the sale as follows: (a) to the expenses of the sale; (b) to the obligation secured by the trust deed; and (c) to any persons who recorded liens subsequent to the interest of the trustee in the trust deed.[97] Any surplus from the sale is paid to the grantor.[98]

Within three months of the sale, the beneficiary can seek a deficiency judgment against the borrower if the trustee sale fails to cover the expenses of the sale or the obligation secured by the trust deed.[99] In its complaint, the beneficiary can request a reasonable charge by the trustee and a reasonable attorney's fee incurred up to the time of sale, interest accrued from the date of sale to the date of judgment at the rate provided in the promissory note, and costs of the action for a deficiency and reasonable fees incurred in the action.[100] Ultimately, however, the judgment may not exceed the difference between the sale price and the entire amount of the indebtedness secured by the deed of trust.[101] The beneficiary may not institute a deficiency action if it failed to properly foreclose by advertisement and sale as outlined in the foreclosure statutes.[102]

[94] *See* Idaho Code § 45-1506(6).
[95] *See* Idaho Code § 45-1506(7).
[96] *See* Idaho Code § 45-1506(8).
[97] *See* Idaho Code § 45-1507(1)-(3).
[98] *See* Idaho Code § 45-1507(4).
[99] *See* Idaho Code § 45-1512.
[100] *See* Idaho Code § 45-1512. *See also Farber v. Howell*, 111 Idaho 132, 721 P.2d 731 (Ct. App. 1986).
[101] *See* Idaho Code § 45-1512.
[102] *See* Idaho Code § 45-1503(1)(a).

At the request of the beneficiary, the trustee may postpone the sale for 30 days. The trustee must announce the date and time of the postponed sale at the sale.[103] Further notice or publication of the postponed sale date is not required.

The trustee's sale terminates the former homeowner's interest in the property, and, under Idaho law, the homeowner has no right to redeem the property from a bona fide purchaser.[104] The purchaser may take possession of the property on the tenth day following the sale.[105] Any failure to comply with Idaho Code § 45-1506 does not affect the validity of the sale to a good faith purchaser or to any subsequent purchaser.[106]

Enforcement Issues

The Attorney General does not have statutory authority to enforce title 45, chapter 15, Idaho Code. The chapter also does not provide the Attorney General with authority to act via the Idaho Consumer Protection Act (ICPA) because the chapter does not designate that the failure to comply with the notice requirements constitutes an unfair or deceptive act or practice under title 48, chapter 6, Idaho Code.[107]

Because the act of "foreclosure" does not constitute "trade and commerce" under the ICPA, as drafted, the ICPA and Idaho's foreclosure laws appear incompatible. The Idaho Rules of Consumer Protection further define a seller's acts or practices that are deemed unfair and deceptive when conducted in trade or commerce. Specifically, "it is an unfair and

[103] *See* Idaho Code § 45-1506(8).
[104] *See* Idaho Code § 45-1508.
[105] *See* Idaho Code § 45-1506(11).
[106] *See* Idaho Code § 45-1508.
[107] *See* IDAPA 04.02.01.33.01. As an example, the Consumer Foreclosure Protection Act, title 45, chapter 16, Idaho Code, provides for penalties under the Idaho Consumer Protection Act, title 48, chapter 6, Idaho Code:

> **45-1605. Penalties. –** In addition to any other penalty provided by law, any person who violates the provisions of this chapter shall be liable for penalties and damages in accordance with chapter 6, title 48, Idaho Code.

deceptive act or practice for any seller to engage in trade or commerce if in so doing the seller" violates an Idaho statute "that identifies conduct in trade and commerce as unfair or deceptive or a violation of the" ICPA.[108]

A "seller"[109] is a person engaged in trade and commerce, which is defined to include "advertising, offering for sale, selling, leasing, renting, collecting debts arising out of the sale or lease of goods or services, or distributing goods or services, at any point in the marketing chain, either to or from locations within the State of Idaho, directly or indirectly affecting the people of [Idaho]."[110] A trustee is not a seller because the trustee, acting on behalf of the beneficiary, is not advertising, offering for sale, selling, leasing, renting or distributing goods or services and is not collecting debts.[111]

Without regulatory recourse or a statutory remedy that aggrieved borrowers can utilize to address violations of Idaho's foreclosure laws, they are left with the option to file a private cause of action asserting the common law tort of "wrongful foreclosure."[112] To sustain a wrongful foreclosure action, however, the borrower must establish that he or she was not in default.[113] For example, a borrower may have an action against a servicer that forecloses on

[108] IDAPA 04.02.01.33.01.
[109] IDAPA 04.02.01.20.44.
[110] Idaho Code § 48-602(2).
[111] While foreclosure may be perceived as the collection of a debt, some courts view foreclosure as enforcing a security interest. *See Fong v. Professional Foreclosure Corp.*, 2005 WL 3134059 (W.D. Wash. Nov. 22, 2005) (granting summary judgment to trustee who commenced foreclosure on property pursuant to deed of trust as trustee was not debt collector as defined by FDCPA as it was enforcing security interest); *Bergs v. Hoover, Bax & Slovacek*, *LLP*, 2003 WL 22255679 (N.D. Tex. Sept. 24, 2003) (stating that foreclosure proceedings do not constitute the collection of debt); *Hulse v. Ocwen Fed. Bank, FSB*, 195 F.Supp.2d 1188 (D. Or. 2002) (holding that foreclosing on a trust deed is not the collection of a debt because it is not an attempt to force the debtors to pay money).
[112] In addition to alleging "wrongful foreclosure," while not always successful, borrowers typically include an allegation for breach of contract, fraudulent conveyance, unjust enrichment, and claims for emotional distress.
[113] *See Wantowski v. Taylor Bean & Whitaker*, 2010 WL 5141745 (D. Nev. Dec. 13, 2010) (relying on long-standing law for holding that a claim for wrongful foreclosure must allege and establish that no breach existed that would have authorized the exercise of the power of sale under the deed of trust). Courts reject actions against servicers based on attempted wrongful foreclosure because the borrower has not sustained any damages. *See Engel v. First American Title Ins. Co.*, 2010 WL 3819372 (W.D. Wash. Sept. 30, 2010).

the borrower's home despite communications from the borrower informing the servicer that the borrower is not in default.[114]

Section 4

FEDERAL LOSS MITIGATION PROGRAMS

If it is possible for a homeowner to retain his or her home through a loan modification or some other reasonable means, it not only helps the homeowner, it benefits the investor, the community, the state, and the economy. Of course, extending the inevitable or throwing good money after bad benefits no one, ultimately causing a person more heartbreak, frustration, and economic distress than any four walls are worth.

When the mortgage crisis began, the federal government responded with a bevy of programs intended to ease homeowners' financial difficulties. State and local governments provided additional solutions while consumer advocates contributed their own ideas and resources.

Section 4 outlines the loss mitigation options that are available to borrowers whose mortgage loans are in default and borrowers who are at risk of default. The history, legislative or otherwise, for each program is discussed, along with the programs' eligibility requirements, expiration dates (if applicable), and directives. Most importantly, Section 4 compiles data from various sources to illustrate the successes and failures of the programs to address the national housing crisis.

Federal Housing Association (FHA) Programs

To help distressed borrowers retain their homes and reduce losses to the Federal Housing Administration's insurance funds, mortgage loans insured by the FHA are subject to special loss mitigation regulations. Regulations also set forth temporary programs, including

[114] *See Hauf v. HomEq Servicing Corp.*, 2007 WL 486699 (M.D. Ga. Feb. 9, 2007).

HOPE for Homeowners and the Home Affordable Modification Program, that apply specifically to FHA-insured loans. This subsection explains each of those programs.

a. FHA Loss Mitigation Program

Under the standard FHA Loss Mitigation Program,[115] lenders have discretion to determine the appropriate loss mitigation strategy. Lenders, however, are subject to lost incentive payments or other sanctions if they fail to comply with the Program.

Eligibility requirements for the Program are straight-forward. The prerequisite, however, is that the borrower's loan must be in default, which is defined as "a [borrower's] failure to perform under any covenant of the mortgage and the failure continues for 30 days."[116] Additional requirements, some of which have exceptions, include:

- The borrower must occupy the property as his or her principal residence;[117]
- The borrower cannot have an ownership interest in other property subject to FHA insurance;[118]
- The borrower cannot be a borrower on a prior loan on which an FHA claim was paid in the last three years;
- The loan cannot be co-insured unless the 60th payment was received;[119] and
- The borrower cannot have filed bankruptcy.[120]

Lenders are expected to act proactively and aggressively when borrowers enter default. If the borrower wants to stay in the home, the lender must consider three reinstatement options

[115] Department of Housing and Urban Development Mortgagee Letter 2005-5 (Jan. 19, 2000).
[116] 24 C.F.R. § 203.330.
[117] The FHA-insured property may not be vacant or abandoned. Lenders can make reasonable accommodations for borrowers who own residences that are occupied by tenants as long as the rental period was less than 12 months and the property was not purchased as investment property.
[118] Lenders can make exceptions for borrowers who own FHA-insured property through an inheritance or who co-signed for another borrower on an FHA loan.
[119] The borrower who has not made at least 60 payments on a co-insured loan may still qualify for a special forbearance.
[120] Borrowers whose bankruptcy was dismissed or discharged are eligible.

in the following order: (1) special forbearance;[121] (2) loan modification; or (3) partial claim.[122] If the borrower cannot cure the default, lenders must consider a: (1) pre-foreclosure sale;[123] or (2) deed-in-lieu.[124] All of the programs have special eligibility requirements and may provide monetary incentives to borrowers. For all mortgages, lenders must implement a loss mitigation option or initiate foreclosure within six months of the default date.

b. FHA HOPE for Homeowners (FHA-H4H)

The Housing and Economic Recovery Act of 2008 (HERA)[125] created HOPE for Homeowners, a temporary program[126] that allows eligible borrowers to reduce the principal balance and interest rate of their loans by refinancing into an FHA-insured, 30-year, fixed-rate mortgage.[127] The Helping Families Save Their Homes Act of 2009[128] changed the program as to loans made after January 1, 2010. Lender participation in the program is voluntary.

c. FHA Home Affordable Mortgage Program (FHA-HAMP)

Under the Helping Families Save Their Homes Act of 2009,[129] the Federal Housing Administration (FHA) was given authority to develop an FHA Home Affordable Mortgage Program (FHA-HAMP) to provide borrowers whose FHA insured mortgages are in default[130]

[121] A special forbearance allows the homeowner additional time to reinstate a delinquent loan.
[122] Under the partial claim option, the lender advances the funds to cure the delinquency. The borrower signs a no-interest promissory note and subordinate mortgage payable to HUD. Their note becomes due when the borrower pays off the first mortgage or no longer owns the property.
[123] The homeowner must market his or her home for four to six months during which time the lender will not foreclose. The proceeds from the sale satisfy the mortgage debt even if they are less than the amount owed.
[124] A deed-in-lieu allows the homeowner to deed the home to HUD in exchange for a release from all obligations under the mortgage.
[125] Pub. L. No. 110-289, 122 Stat. 2654 (2008).
[126] HOPE for Homeowners expires on September 30, 2011.
[127] 12 U.S.C. § 1715z-23.
[128] Pub. L. No. 111-22 (2009).
[129] Pub. L. No. 111-22 (2009).
[130] Default is defined as one payment past due more than 30 days. To be eligible under the program, however, the borrower cannot be more than 12 payments past due.

with the opportunity to reduce their payments to a reasonable amount.[131] The FHA-HAMP is available only if the borrower does not qualify for the FHA Loss Mitigation Program.

The program allows the use of a partial claim up to 30% of the unpaid principal balance as of the date of default combined with a loan modification.[132] The borrower must complete a three-month trial modification payment plan to confirm the borrower's ability to make the new payments. If the borrower's default is incurable, the borrower is offered other options, including a pre-foreclosure sale or a deed-in-lieu of foreclosure.

The mortgagee may not proceed with a foreclosure sale until the borrower is evaluated for the FHA-HAMP. If the borrower is eligible for the program and an offer to participate is extended but not accepted, the mortgagee must consider the borrower for other loss mitigation actions before foreclosing.

Making Home Affordable (MHA) Programs

The Department of Treasury is authorized under the Emergency Economic Stabilization Act of 2008[133] and the Troubled Asset Relief Program (TARP) to develop initiatives in response to the housing crisis. In February 2009, the Obama Administration created the Homeowner Affordability and Stability Plan (HASP), a program intended to assist up to nine million families restructure or refinance their mortgages. As part of HASP, the Making Home Affordable (MHA) program encompasses a number of programs to assist homeowners who are in default or who are at risk of defaulting on their home loans.

---

[131] Department of Housing and Urban Development, Mortgagee Letter 2009-23 (Jul. 30, 2009).
[132] The mortgagee may receive an incentive fee of up to $1,250 ($500 for the partial claim and $750 for the loan modification).
[133] Pub. L. No. 110-343 (Division A) (2008).

a. Home Affordable Modification Plan (MHA-HAMP)

Designed by the Department of Treasury, the Home Affordable Modification Plan (HAMP) is one of the primary components of the MHA program. Fannie Mae acts as Treasury's financial agent to administer the HAMP and Freddie Mac serves as the Program's compliance agent. For all GSE owned or guaranteed loans, servicer participation is required. Participation in the HAMP is voluntary for servicers and investors of non-GSE loans. To participate in the program servicers had to sign a contract with Fannie Mae, as Treasury's financial agent, agreeing to review every potentially eligible borrower who requests consideration for the program.[134]

The HAMP is designed to reduce eligible borrowers' mortgage payments to affordable levels in order to avoid foreclosure. The HAMP reduces a homeowner's monthly mortgage payment to 31% of the homeowner's verified gross income.

The program, however, was not designed to help every borrower who is struggling financially or who is facing foreclosure. Preliminarily, to qualify[135] for the HAMP, the borrower must:

1. Own a one- to four-unit home that is the borrower's primary residence;
2. Have received the mortgage loan on or before January 1, 2009;
3. Have a mortgage payment (including principal, interest, taxes, insurance, and homeowners association dues) that is more that 31% of the borrower's gross monthly income; and
4. Owe an amount that is less than or equal to $729,750 on the borrower's first mortgage for a one-unit property. Higher limits apply for two- to four-unit properties.[136]

[134] *See* Commitment to Purchase Financial Instrument and Servicer Participation Agreement.
[135] Meeting the eligibility requirements for the HAMP does not guarantee that a borrower will receive a loan modification.
[136] Supplemental Directive 09-01: Introduction of the Home Affordable Modification Guidelines (Apr. 6, 2009).

Servicers are expected to reach out to delinquent borrowers or those who are at imminent risk of default.[137] Since the HAMP began, the federal government, the states, and consumer advocate groups have informed homeowners about the program through websites, public service announcements, educational materials, and other resources to inform at-risk borrowers about the program.

A borrower seeking a modification under the HAMP must complete the standardized documents[138] available from the borrower's servicer or on the Making Home Affordable web portal.[139] The borrower must submit the forms to the servicer, which is required to notify the borrower within ten days that it received the forms. At that time, the servicer also requests all additional documentation, such as paystubs, to verify the borrower's income. Once the servicer has gathered the required information, it has 30 days to offer or reject the borrower's modification request.[140]

While the servicer is evaluating[141] a borrower's application, it may not refer the borrower's loan to foreclosure. If the servicer has begun the foreclosure process and the borrower applies for a modification before the trustee's sale, the servicer may continue the foreclosure process, but it may not sell the home.[142] In certain instances, if the servicer rejects

[137] Supplemental Directive 10-02: Home Affordable Modification Program – Borrower Outreach and Communication (Mar. 24, 2010).
[138] The required documents are the Request for Modification and Affidavit, the IRS 4506T-EZ Form, and applicable proof of income documents.
[139] The MHA web portal is located at www.makinghomeaffordable.gov.
[140] Supplemental Directive 10-01: Home Affordable Modification Program – Program Update and Resolution of Active Trial Modification (Jan. 28, 2010). Based on reports to the Attorney General's Office, servicers rarely respond to a borrower's modification request within 30 days. In fact, some borrowers have waited 18 months or longer for a decision.
[141] The servicer is required to evaluate a multitude of financial factors before approving or rejecting an application. The NPV Test compares the impact of the modification concessions to the investor with the estimated loss if the loan is foreclosed. If the modification is less costly than foreclosure, it is approved. The NPV Test ensures that modifications mitigate the loss for investors.
[142] One of the primary problems with the HAMP is the dual-track process whereby loans undergoing modification consideration simultaneously continue on the path to foreclosure. While the servicer works with the borrower to modify a loan, a trustee (or an attorney) in a different state auctions off the borrower's home.

the borrower's modification request, the servicer must wait 30 days from the date of notification before selling the home.[143]

Once the servicer verifies the borrower's income eligibility, it capitalizes any unpaid interest and fees and, in order to reach the 31% threshold, first reduces the borrower's interest rate to as low as 2 percent. If an interest rate reduction is insufficient, the servicer may extend the payment term for up to 40 years. Servicers also can offer principal forbearances.

Assuming the borrower meets the eligibility criteria, loans that are at risk of imminent default or are delinquent by two or more payments must undergo a net present value (NPV) test.[144] A complicated series of inputs and calculations, the NPV test determines the financial benefit to the investor if the loan is modified. A positive result demonstrates that the investor is better off financially if the loan is modified rather than foreclosed. If the test generates a negative result and Freddie Mac or Fannie Mae does not own the loan, modification is optional.[145]

If the borrower qualifies for a modification, the borrower first must complete a three- or four-month trial payment period[146] to demonstrate the borrower's ability to make the new payments. Assuming the borrower completes the trial payment period successfully and meets

[143] The 30-day foreclosure sale restriction does not apply when the reason for the servicer's non-approval is (1) ineligible mortgage, (2) ineligible property, (3) offer rejected by borrower/request withdrawn, or (4) the loan was previously modified under the HAMP. Supplemental Directive 10-02: Home Affordable Modification Program – Borrower Outreach and Communication (Mar. 24, 2010).

[144] Borrowers often question what factors comprise the NPV test and how those factors are weighed to produce a calculation that determines the fate of a borrower's modification application. The Department of Treasury has reported it is developing an Internet-based NPV calculator that will be available to the public in the spring of 2011. Until then, borrowers can request that MHA-Help or Treasury's HAMP Solution Center complete the NPV analysis on their behalf.

[145] A borrower who believes the servicer improperly denied the borrower's modification application can request a reevaluation. The instructions for requesting a reevaluation are provided with the non-approval notice.

[146] The servicer may extend the trial payment period.

any additional requirements, the servicer usually offers the borrower a permanent modification that remains in place for five years.[147]

After five years, if the modified interest rate was below the 30-year conforming fixed rate, the modified interest rate may increase up to 1 percent each successive year until it reaches the 30-year conforming fixed rate that was effective at the time of the modification. The borrower also can earn $1,000 in principal reduction every year . that the loan remains current for up to five years.

Borrowers who fail the trial payment period are left with the original terms of their loans. The borrower must pay the difference between the original mortgage payment amount and the trial payment amount, along with late fees that accrued because the borrower made reduced (rather than regular) payments during the trial period.

Aggrieved borrowers can bring escalated cases to their servicers' attention directly or through other resources, including housing counselors, the Department of Treasury, and elected officials.[148] If the servicer cannot resolve an escalated case within 30 days of receiving it, the servicer must provide the borrower with a status report at the end of the 30-day period and every 15 days thereafter. If the servicer does not change its original decision, the case is referred to a staff member of the Office of Financial Stability's Homeownership Preservation Office. The office reviews the servicer's actions and may refer it to a senior point of contact for further consideration. Ultimately, however, the decision whether to modify a loan rests with the servicer.[149]

[147] Supplemental Directive 10-01: Home Affordable Modification Program – Program Update and Resolution of Active Trial Modification (Jan. 28, 2010).
[148] The HOPE Hotline provides "MHA Help" for borrowers disputing the contents of a servicer's non-approval notice. The Department of Treasury also offers the HAMP Solution Center to manage escalated case referrals from housing counselors and government offices.
[149] While the Department of Treasury has authority to impose financial sanctions on servicers that violate directives, the department has never imposed any sanctions or clawed-back any incentive payments.

b. Home Affordable Refinance Program (MHA-HARP)

Homeowners who are current on their loans but who are unable to qualify for traditional refinancing can take advantage of the Home Affordable Refinance Program (HARP).[150] The refinance must improve the stability and long-term affordability of the borrower's loan. To qualify for refinancing under the HARP, a borrower must:

1. Own a one- to four-unit home that is the borrower's primary residence;
2. Have a mortgage owned or guaranteed by Fannie Mae or Freddie Mac;
3. Be current on all payments and not more than 30 days late making a payment within the past 12 months;
4. Have a first mortgage not exceeding 125% of the home's current market value; and
5. Have sufficient income to make the new payments.

c. Home Affordable Foreclosure Alternatives (MHA-HAFA)

The Home Affordable Foreclosure Alternatives (HAFA) program is designed for borrowers who can no longer afford to stay in their homes but who want to avoid the negative effects of foreclosure. Borrowers have the option of completing a short sale or a deed-in-lieu of foreclosure. Servicers also provide borrowers with $3,000 to assist them in transitioning from their homes to more affordable living arrangements. A borrower is eligible for the HAFA program if:

1. The borrower does not qualify for a trial payment plan under the HAMP;
2. The borrower fails to complete a trial payment plan under the HAMP;
3. The borrower misses two consecutive payments during the HAMP modification; or

[150] The HARP was scheduled to expire on June 30, 2010, but was extended through June 30, 2011.

4. The borrower requests a short sale or deed-in-lieu of foreclosure.[151]

d. Second Lien Modification Program (MHA-2MP)

Homeowners who are struggling to make two mortgage payments may qualify for the Second Lien Modification Program (2MP). Under the 2MP, if the borrower's first-lien mortgage is modified under the HAMP and the borrower's second lien mortgage servicer participates in the 2MP, the servicer may:

1. Reduce the interest rate to 1 percent on second mortgage loans that require payment of interest and principal;

2. Reduce the interest rate to 2 percent for I/O second mortgage loans;

3. Extend the loan term to 40 years;

4. Forbear the same proportion of principal on the second loan as was deferred on the first loan;

5. Forgive at least (or more than) the same amount of principal that was forgiven on the first loan; or

6. Extinguish the second loan.[152]

e. Home Affordable Unemployment Program (MHA-UP)

Mortgage servicers that participate in MHA may offer a forbearance period to homeowners who are having difficulties paying their mortgages due to unemployment. The homeowner's monthly payment can be reduced or suspended for a minimum of three months while the homeowner looks for employment. The servicer has discretion to extend the forbearance period depending on investor and regulatory guidelines. In addition to meeting

[151] Supplemental Directive 09-09 Revised: Home Affordable Foreclosure Alternatives – Short Sale and Deed-in-Lieu of Foreclosure Update (Mar. 26, 2010). In December 2010, the Department of Treasury eliminated some of the more restrictive requirements of the program. For example, beginning February 1, 2011, servicers no longer have to verify the borrower's financial information or determine if the borrower's total monthly mortgage payment exceeds a 31% debt-to-income ratio. *See* Supplemental Directive 10-18: Home Affordable Foreclosure Alternatives – Policy Update (Dec. 28, 2010).

[152] Supplemental Directive 09-05 Revised: Update to the Second Lien Modification Program (2MP) (Mar. 26, 2010).

the HAMP requirements, eligibility is based on the borrower receiving or qualifying for unemployment benefits. The borrower's loan payments also may not be more than three months past due.[153]

f. Principal Reduction Alternative (MHA-PRA)

On October 1, 2010, the principal reduction alternative (PRA) was added to MHA.[154] Intended to assist financially distressed borrowers whose homes are worth less than what they owe on their loans, the PRA allows servicers,[155] over a three-year period, to reduce the loan principal down to 115% of the loan-to-value ratio.[156] Initially treated as a forbearance, for every year that the borrower's loan is in good standing, one-third of the original PRA forbearance amount is reduced.[157] The reduced amount is applied to the loan's unpaid principal balance.[158]

g. Protecting Tenants in Foreclosure Act

The Protecting Tenants at Foreclosure Act of 2009 (PTFA)[159] was enacted in May 2009 under the Helping Families Save Their Homes Act of 2009[160] to address the growing problem of tenants who, with no prior notice, find themselves in foreclosed homes and suddenly being evicted by the property's new owner. To ensure that tenants receive sufficient notice of a foreclosure and are allowed adequate time to relocate, an immediate successor in interest[161] of a foreclosed residential property must take the property subject to any existing lease

[153] Supplemental Directive 10-04: Home Affordable Unemployment Program (UP) (May 11, 2010).
[154] Supplemental Directive 10-05: Modification of Loans with Principal Reduction Alternative (Jun. 3, 2010).
[155] Servicers are not required to reduce a borrower's loan principal. This program is not available to borrowers whose loans are held by GSEs.
[156] Supplemental Directive 10-05: Modification of Loans with Principal Reduction Alternative (Jun. 3, 2010).
[157] Supplemental Directive 10-05: Modification of Loans with Principal Reduction Alternative (Jun. 3, 2010).
[158] Supplemental Directive 10-05: Modification of Loans with Principal Reduction Alternative (Jun. 3, 2010).
[159] 12 U.S.C. § 5220 note. Pub. L. No. 111-22, tit. VII, § 702, 123 Stat. 1632, 1660-62 (2009), as amended by Pub. L. No. 111-203, tit. XIV, § 1484 (2010).
[160] Pub. L. No. 111-22 (2009).
[161] A "successor in interest" is usually the purchaser of the residential property.

agreement[162] and give the current tenant a notice to vacate at least 90 days before the date on which the successor in interest wants the tenant to vacate the property. Unless the successor in interest is a purchaser who will occupy the property as the purchaser's primary residence, the term of any bona fide lease entered into before receiving the 90-day notice and extending beyond 90 days remains in effect.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[163] (Dodd-Frank) amended the PTFA and extended it until December 31, 2014. Dodd-Frank also defined when the "date of notice of foreclosure" occurs as "the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court." [164]

Emergency Homeowner Loan Program (EHLP)

Dodd-Frank designated $1 billion to the Department of Housing and Urban Development to fund the Emergency Homeowner Loan Program (EHLP).[165] Eligible borrowers can apply for up to $50,000 in bridge loans to pay arrearages, including delinquent taxes and insurance, and up to 24 months of mortgage payments. The loan is deferred with no interest and a declining balance.

Progress of Federal Loss Mitigation Programs

Homeowners, commentators, and consumer groups have voiced a great deal of frustration with Making Home Affordable and, in particular, the participating servicers' failure or refusal to comply with the MHA directives. As the following consumers' stories[166] demonstrate, Idaho has seen foreclosure sales conducted while homeowners waited for their

[162] The existing lease must be a "bona fide lease" which means a lease where (1) the mortgagor (or child, spouse, or parent) is not the contracting tenant; (2) the lease or tenancy resulted from an arms-length transaction; and (3) the lease or tenancy requires payment of fair market or government subsidized rent.
[163] Pub. L. No. 111-203 (2010).
[164] Pub. L. No. 111-203, tit. XIV, § 1484 (2010).
[165] HUDNo.10-176 (Aug. 10, 2010).
[166] To maintain conciseness, clarity, and consumers' privacy, the stories included in this section have been modified from the original reports provided to the Attorney General.

modification agreements or the consistent failure of servicers to communicate with homeowners during the modification process:

On Jul. 11, 2009, we signed a modification agreement and began making our new payments. On Oct. 19, 2010, we received a letter stating our loan was referred to foreclosure. The sale date was Mar. 7, 2011. The servicer said in Nov. 2010 that it reviewed our loan on Jul. 22, 2009, for the Making Home Affordable program. The loan didn't qualify so the modification agreement we signed was cancelled. We have to start the application process all over.

~ Hailey Consumer (pending complaint)

We completed the [Making Home Affordable] packet on Feb. 2, 2010. On Sept. 2, 2010, they sent us a letter stating we were being considered for a modification under the Making Home Affordable program and that during that review period we would need to make timely monthly trial-period payments. The letter also stated that during the evaluation period the home would not be sold at foreclosure. On Sept. 29, 2010, we had a notice rolled up in our door handle [stating] that Fannie Mae was now the owner of the property! We never received notice of the sale. It took place without our knowledge. We were doing all that we were told to do and in a very timely manner and were led to believe that a modification was pending. We have been residing in the home for 15 ½ years.

~ Eagle Consumer (pending complaint)

We were not delinquent on our loan in March 2010, but knew we would be unable to pay next month. We called our servicer but were told that we didn't qualify for a modification because our loan wasn't delinquent. After it became delinquent, the servicer called us and said the loan qualified for a modification. We sent the loan modification package and additional paperwork to the servicer. During the review, we sent more documents to the servicer when it couldn't locate the prior ones. In July 2010, we told the servicer that if a loan modification wasn't possible, we would make arrangements to bring the loan current. The servicer's representative told us not to make any payments and said our property would not go into foreclosure while we were in the loss mitigation process. In Sept. 2010, we received a notice to foreclose. The representative asked for more documents and assured us that the modification was approved. On Dec. 6, 2010, the servicer told us the investor denied our modification because we had so many back fees and missed payments. The property is scheduled for a foreclosure sale on Jan. 3, 2011.

~ Chubbuck Consumer (closed complaint)

On Apr. 28, 2009, I began negotiations for a modification. On Nov. 25, I received information that the servicer would reduce my payment by $300 for a three month period, and then on Nov. 30 they said they could not help me. I think a 7-month wait is a bit excessive and after that long we just ran out of money and patience.

Meridian Consumer (closed complaint)

While the federal government's intentions in creating the MHA program are commendable, its success depends upon the full and honest commitment of all servicers and without such commitment homeowners will continue to suffer.

At the end of 2010, the number of permanent loan modifications in place does not reflect the seven million homeowners that the federal government originally wanted to reach with the MHA program. Of the 1,426,833 trial payment plans started, 549,620 homeowners had received permanent modifications as of November 2010.[167] However, 44,972 of those modifications were canceled, leaving only 504,648 active permanent modifications.[168] The average monthly payment reduction was $524.41.[169]

Foreclosure Prevention & Refinance Activities

	2Q10	3Q10
HAMP Active Trials	202,408	88,197
HAMP Permanent - Cumulative	224,570	259,974
HARP - Cumulative	379,723	479,894
Completed Foreclosure Prevention Actions		
Loan Modifications *	171,176	146,507
Repayment Plans	46,353	33,964
Forbearance Plans	20,585	13,863
Charge-offs In Lieu	756	992
HomeSaver Advance *(Fannie)*	1,783	794
Home Retention Actions	**240,653**	**196,120**
Short Sales	29,375	29,465
Deeds-in-lieu	1,506	1,728
Home Forfeiture Actions	**30,881**	**31,193**
TOTAL	**271,534**	**227,313**

* Includes HAMP permanent modifications

According to the Federal Housing Finance Agency (FHFA), in the third quarter of 2010, for GSE held mortgage loans, the cumulative number of permanent HAMP modifications equaled 259,974 and the cumulative number of HARP refinances totaled 479,894.[170] Additional foreclosure prevention and refinance activities by the GSEs are detailed in this table.

[167] Making Home Affordable Program Servicer Performance Report through November 2010.
[168] Making Home Affordable Program Servicer Performance Report through November 2010.
[169] Making Home Affordable Program Servicer Performance Report through November 2010.
[170] Federal Housing Finance Agency, Foreclosure Prevention and Refinance Report, Third Quarter 2010, FHFA Federal Property Manager's Report.

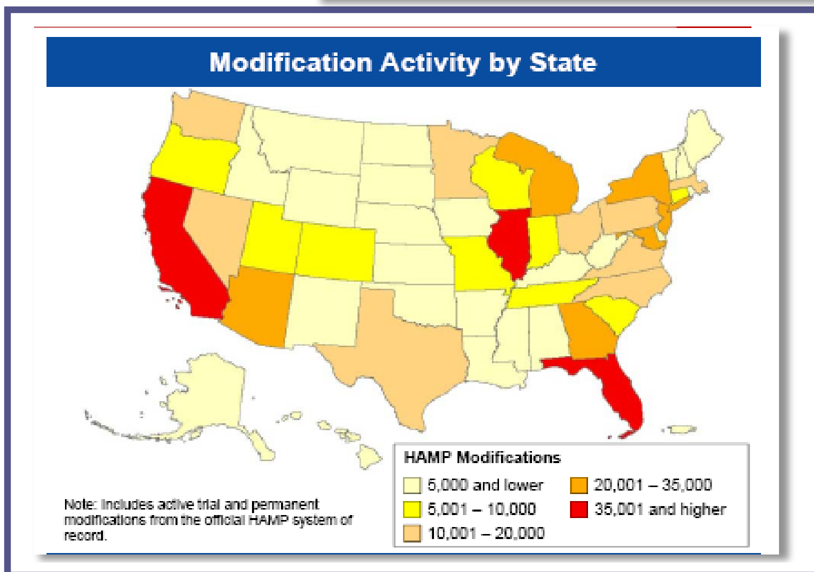
With Bank of America leading in the number of total modifications, the following table of the largest servicers shows the number of modifications by investor type:[171]

Modifications by Investor Type (Large Servicers)

Servicer	GSE	Private	Portfolio	Total
Bank of America, NA[1]	81,336	42,845	6,327	130,508
JP Morgan Chase NA[2]	39,266	31,996	13,961	85,223
Wells Fargo Bank, NA [3]	45,859	12,933	26,269	85,061
CitiMortgage, Inc.	40,793	4,407	16,236	61,436
GMAC Mortgage, LLC	22,213	5,682	10,292	38,187
Ocwen Financial Corporation, Inc.	6,841	22,912	277	30,030
OneWest Bank	12,681	11,288	1,892	25,861
American Home Mortgage Servicing Inc	1,270	23,334	0	24,604
Select Portfolio Servicing	487	16,338	1,845	18,670
Saxon Mortgage Services Inc.	1,508	11,862	1,139	14,509
Aurora Loan Services, LLC	7,230	6,865	211	14,306
Nationstar Mortgage LLC	9,311	4,977	16	14,304
US Bank NA	7,346	19	3,517	10,882
Litton Loan Servicing LP	1,075	9,337	0	10,412
PNC Mortgage[4]	4,655	243	441	5,339
Remainder of HAMP Servicers	70,087	6,436	6,897	83,420
Total	**351,958**	**211,474**	**89,320**	**652,752**

[1] Bank of America, NA Includes Bank of America, NA, BAC Home Loans Servicing LP, Home Loans Services and Wilshire Credit Corporation.
[2] J.P. Morgan Chase Bank, NA Includes EMC Mortgage Corporation.
[3] Wells Fargo Bank, NA Includes all loans previously reported under Wachovia Mortgage, FSB.
[4] Formerly National City Bank.

Note: Figures reflect active trials and permanent modifications.



Idaho's modification activity remains relatively low with 657 active trial modifications as of November 2010 and 1,883 permanent modifications.[172] The total number of modifications reported was 2,540.[173]

[171] Making Home Affordable Program Servicer Performance Report through November 2010.
[172] Making Home Affordable Program Servicer Performance Report through November 2010.
[173] Making Home Affordable Program Servicer Performance Report through November 2010.

Section 5

DEFINING THE CRISIS FROM THE ATTORNEY GENERAL'S PERSPECTIVE: A FIVE-YEAR HISTORY OF COMPLAINTS AND ENFORCEMENT ACTIONS

Between 2005 and the end of 2010, the Attorney General's Consumer Protection Division experienced an increase in consumer complaints and other contacts in which consumers expressed problems with housing or mortgage-related issues. Interestingly, these complaints arrived in "surges," establishing patterns of conduct that peaked and subsequently declined over time. Through its investigation of the complaints, the Consumer Protection Division, in many instances, was able to take action against businesses that engaged in unlawful acts or practices under the Idaho Consumer Protection Act. [174]

Through a discussion of the complaints the Consumer Protection Division received between 2005 and 2010, Section 5 of this report outlines the history of Idaho's housing crisis from the Attorney General's perspective. This section also summarizes what actions the Attorney General has taken in response to the developing crisis.

Consumer Complaints and Enforcement

Before delving into the five-year history of the Attorney General's housing complaints, it is important to understand the complaint submission process, as well as its purpose and significance to the Attorney General's enforcement activities. Idaho and out-of-state consumers may submit a completed complaint form[175] to the Consumer Protection Division and request that their complaint be considered for the division's informal dispute resolution program.[176] If the consumer's complaint is appropriate for the program,[177] it is forwarded to

[174] All of the Attorney General's actions under the Consumer Protection Act are set forth in his Opinions and Annual Reports and are available at www.ag.idaho.gov.
[175] Complaint forms are available on the Attorney General's website at www.ag.idaho.gov. However, consumers are not required to complete a complaint form in order to participate in the Consumer Protection Division's dispute resolution process.
[176] Consumers also can submit complaint forms for informational purposes only.

the business for its review and written response.[178] The business's response is then provided to the consumer. In many instances, by facilitating productive communication between the parties, the division is able to resolve the consumer's complaint to the benefit of both parties.[179]

The "enforcement" process can occur at any time the Attorney General has reason to believe that a person has violated the Idaho Consumer Protection Act (ICPA). An enforcement action may include, among other things, issuing an investigative demand,[180] negotiating an assurance of voluntary compliance[181] or consent judgment,[182] or filing a court action.[183] The Attorney General also has authority to issue subpoenas and conduct hearings.[184] When the circumstances make an enforcement action unnecessary, the Attorney General also may conduct an informal inquiry of a business.

History of Consumer Complaints

In the Attorney General's history of housing crisis complaints, complaints regarding foreclosure rescue companies and mortgage modification companies preceded complaints about mortgage servicing and foreclosure issues. It was not until late 2009 and 2010 that the number of complaints concerning mortgage servicers reached a volume similar to complaints filed against mortgage modification companies.

[177] Due to budget constraints, at this time, the Consumer Protection Division offers its dispute resolution program to Idaho consumers only.
[178] The Consumer Protection Division cannot force a business to respond to a consumer's complaint. However, the division generally is successful in obtaining a response.
[179] The Consumer Protection Division cannot force a business to resolve a consumer's complaint.
[180] *See* Idaho Code § 48-611.
[181] *See* Idaho Code § 48-610.
[182] *See* Idaho Code § 48-606(4).
[183] *See* Idaho Code § 48-606.
[184] *See* Idaho Code § 48-612.

Foreclosure Rescue Companies

Foreclosure rescue companies popularized what became known as the "tenant buy-back scheme." Companies advertise via direct mail, the Internet, and billboards and other roadside signs, targeting homeowners in financial distress. They persuade homeowners to quitclaim their homes to the company and, in exchange, the company promises to make the monthly mortgage payment with the former homeowner's rental payment.

Homeowners believe they can repurchase their homes from the company once they qualify for refinancing. What usually happens, however, is the homeowner falls behind on the excessively high rent payments, and the rescue company evicts the homeowner under the terms of the lease. The company keeps all of the rent while the now evicted homeowner, who loses any equity, remains responsible for the mortgage loan. The company may disappear with the rent money or pay off the borrower's loan and flip the house for a substantial profit.

The Consumer Protection Division received its first foreclosure rescue complaint in July 2005 and a second complaint against the same company was filed approximately one year later. The following table summarizes the 14 complaints, their outcome, and the number of other consumer contacts the division received between 2005 and 2010:

Year	Complaints Received	Outcome of Complaint	Other Contacts[185]	
2005	1	Closed (factual dispute)	0	
2006	1	Closed (consumer filed private action)	0	
2007	1	Assurance of Voluntary Compliance[186]	0	
2008	1	Closed (forwarded to Dept. of Finance)	4	
2009	1	Closed (factual dispute)	2	
2010	1	Pending (dispute resolution program)	2	
Totals	**6**		**8**	**14**

[185] Other contacts include consumer complaints that were submitted to the division for informational purposes only.
[186] *In re Highland Financial, LLC*, Kootenai County Dist. Ct. Case No. CV 2007-9254, Assurance of Voluntary Compliance (Jan. 23, 2008).

Highland Financial, LLC (2007)

In 2007, the Attorney General initiated an investigation into the business practices of Highland Financial, a Post Falls, Idaho company that advertised it could help financially distressed consumers end the “stress,” “worries,” and “hassles” of foreclosure, bad credit, and eviction. The Attorney General alleged the company failed to make certain disclosures and may have misrepresented to homeowners that the company could help homeowners retain ownership of their homes and improve their credit when that was not the case.

The Attorney General reached a settlement agreement[187] with Highland Financial in December 2007 that requires the company to inform consumers in writing of certain important facts before the consumer agrees to transfer ownership of their homes to a third party. Under the settlement, the company must:

- Explain to the homeowner the effect of a due-on-sale clause in an existing mortgage agreement. A due-on-sale clause may require the homeowner to pay off the mortgage when any interest in the property is transferred to another.
- Provide the consumer with his or her home’s current fair market value as determined by a real estate appraiser, the county assessor, or by another method agreed upon by the consumer.
- Disclose the approximate amount of equity that the consumer might lose, which must be calculated by subtracting the value of the home’s existing liens from the home’s fair market value.
- Inform homeowners that the Department of Housing and Urban Development (HUD) offers information to consumers about how to avoid foreclosure and that HUD maintains a current list of approved housing counseling agencies.

Highland Financial also paid the State of Idaho $1,000 in civil penalties and reimbursed the Attorney General’s Office $2,000 in fees and costs.

[187] *In re Highland Financial, LLC*, Kootenai County Dist. Ct. Case No. CV 2007-9254, Assurance of Voluntary Compliance (Jan. 23, 2008).

Mortgage Modification Companies

With the introduction of the federal Making Home Affordable program in 2009, fraudulent mortgage modification companies proliferated, advertising primarily through deceptive websites and Internet ads. Modification companies claim they can negotiate a modification of the borrower's loan with the servicer. However, it costs the borrower an upfront fee of several hundred or even thousands of dollars before the company will assist the borrower. In most situations, charging an upfront fee for loan modification services is unlawful[188] and rarely does the modification company actually follow through with submitting any documentation to the servicer. Homeowners regularly report to the Consumer Protection Division that they believed a company was negotiating a modification on their behalf only to find out later they are in foreclosure or their home was sold.

The Consumer Protection Division began tracking mortgage modification complaints in 2007, and in 2009, they ranked as the number one consumer complaint category.[189] The majority of the complaints generated in 2009 concerned Apply 2 Save, Inc., a company that operated for less than a year in north Idaho. While the Attorney General received substantially fewer complaints in 2010 than in 2009, the 2010 complaints identified ten new for-profit companies that charged consumers upfront fees, were not licensed to provide mortgage modification services, or took consumers' money for services never performed.

[188] Idaho Code § 26-31-210 prohibits persons subject to the Idaho Residential Mortgage Practices Act, title 26, chapter 31, Idaho Code, from receiving a fee prior to the completion of a loan modification. The statute allows the person, however, to charge an application fee, a cancellation fee, and other designated charges.

[189] The Attorney General annually report consumer complaints and actions taken thereto. These Annual Reports are available at www.ag.idaho.gov.

Year	Complaints Received	Other Contacts[190]	New Businesses Identified[191]
2007	1	0	1
2008	4	0	2
2009	353	9	23
2010	38	5	33
Totals	**396**	**14**	**59**

Mortgage Assistance Solutions, LLC (2007-2008)[192]

The Attorney General initiated an investigation of Mortgage Assistance Solutions after receiving consumer complaints about the Florida company's direct-mail ads. The company, which claimed consumers' homes were "scheduled to be sold at auction," sent ads to consumers who were not in foreclosure. Consumers were instructed to call Mortgage Assistance Solutions to avoid the foreclosure. When consumers called the company, a representative demanded an upfront payment of $1,200 just to discuss the consumers' options. The ad also contained false property recording information and identified a fake bank as the entity associated with the foreclosure.

Based on the egregious nature of the company's contact, the Attorney General required a settlement[193] in which the company agreed to stop operating in Idaho. If Mortgage Assistance Solutions is found doing business in Idaho, it is subject to a $10,000 civil penalty. The company also paid the Attorney General $1,700 in fees and costs.

[190] Other contacts include consumer complaints that were submitted to the division for informational purposes only.
[191] This column includes the number of new mortgage modification companies that consumers complained against each year. In other words, if complaints were filed in all three years against the same company, the company is counted only one time.
[192] The Attorney General received two consumer complaints against Mortgage Assistance Solutions, LLC – one in late 2007 and one in early 2008.
[193] *In re Mortgage Assistance Solutions, LLC*, Ada County Dist. Ct. No. CVOT 2008-05292, Assurance of Voluntary Compliance (Apr. 1, 2008).

International Co-op, LLC (2009)[194]

Paul Clarence Aughtry, IV, operated International Co-Op, LLC, a for-profit Meridian, Idaho mortgage modification company that required up-front payments from consumers to negotiate loan modifications with the consumers' mortgage servicers. Aughtry was not licensed with the Department of Finance to offer loan modifications and failed to perform the services that consumers purchased. The Attorney General and the Department of Finance conducted a joint investigation into Aughtry and his business that resulted in settlement agreements[195] requiring Aughtry to pay $12,400 in consumer restitution and cease his loan modification activities in Idaho.

Best Interest Rate Mortgage Company, LLC (2009)[196]

The Attorney General's investigation of Best Interest Rate Mortgage Company, LLC, began after a consumer filed a complaint about a direct-mail ad he received that was labeled as a "Form 009-S Payment Reduction Notification." The ad listed the consumer's address and a "total loan amount" of $150,000. It referred to a "Buyout Program" and stated that the consumer could qualify for a "special modification program" under the "Economic Stimulus Act of 2008."

The ad's appearance suggested it came from the government, which is unlawful under the Idaho Consumer Protection Act. The New Jersey company charged several Idahoans an upfront fee ranging from $1,000 to $1,800 to perform unlicensed mortgage modification services.

[194] Three consumers filed complaints in 2009 against International Co-Op, LLC.
[195] *In re International Co-Op, LLC, et al.*, Ada County Ct. No. CVOT 2009-23483, Assurance of Voluntary Compliance (Dec. 11, 2009).
[196] The Attorney General received one complaint regarding Best Interest Rate Mortgage Company, LLC. The egregious nature of the direct-mail ad prompted the Attorney General to launch an immediate investigation into the company.

The Attorney General banned Best Interest Rate Mortgage Company, LLC, from operating in Idaho and required the company to pay $19,710 in consumer restitution. The company is subject to additional penalties if it ever does business in Idaho again.[197]

Apply 2 Save, Inc. / Derek Oberholtzer / Steven Lux (2008-2010)

Beginning in 2008, hundreds of consumers nationwide filed complaints against Apply 2 Save, Inc., a mortgage modification company in Coeur d'Alene, Idaho, claiming the company defrauded them. Consumers complained that Apply 2 Save and its owner, Derek Oberholtzer, took hundreds of thousands of dollars from them in a massive modification scam.

The Attorney General sued Apply 2 Save and Oberholtzer in April 2009, alleging the defendants accepted payments from consumers for modification services that they never performed. Steven Lux, a former officer of the company, settled with the Attorney General and paid $45,000 in consumer restitution and $5,000 in attorney's fees and costs.[198]

Apply 2 Save and Oberholtzer filed Chapter 7 bankruptcy soon after the Attorney General sued them. After receiving a discharge of his debts, Oberholtzer entered into a settlement agreement[199] with the Attorney General prohibiting him from acting as a debt or credit counselor and prohibiting him from engaging in mortgage lending, brokering, or loan modification activities within Idaho or with Idaho consumers.

APS Northwest Idaho, LLC (d/b/a HomeModifier) (2009-2010)

The Attorney General received complaints from six consumers, including four Idahoans, who paid APS Northwest Idaho for modification assistance that they did not receive. Although APS Northwest Idaho negotiated a few modifications for its clients, it did so without proper

[197] *In re Best Interest Rate Mortgage Company, LLC*, Ada County Ct. No. CVOT 2009-23489, Assurance of Voluntary Compliance (Dec. 16, 2009).
[198] *State of Idaho v. Steven Lux*, Kootenai County Dist. Ct. No. CV 2009-5306, Consent Judgment (Jul. 14, 2009).
[199] *State of Idaho v. Apply 2 Save, Inc., et al.*, Kootenai County Dist. Ct. No. CV 09-3154 (Sept. 7, 2010). An order dismissing Apply 2 Save as a defendant was entered on October 4, 2010.

licensing through the Idaho Department of Finance. And, like many for-profit modification operations, it soon found itself in financial distress.

Following an investigation into APS Northwest Idaho's business practices and attempts to negotiate a settlement, in November 2009, the Attorney General sued the company and its three owners for multiple violations of the Idaho Consumer Protection Act.[200] In August 2010, the three owners agreed to a settlement[201] that prohibited them from engaging in loan modification activities in Idaho or with Idaho consumers. They also paid $7,000 in restitution to reimburse six consumers and $1,000 to cover the state's attorney's fees and costs. A civil penalty of $30,000 is held in abeyance pending each of the owner's compliance with the settlement agreement.

Consumer Complaint Trends

The Attorney General continues his diligent enforcement of Idaho's consumer protection laws as they apply to unlicensed[202] mortgage modification companies. While the number of complaints decreased in 2010, the number of new businesses generating those complaints increased.

Complaint trends also indicate that more out-of-state law offices or companies associated with attorneys[203] are joining the ranks of scam mortgage modification

[200] *State of Idaho v. APS Northwest Idaho, LLC, d/b/a HomeModifier, et al.*, Kootenai County Dist. Ct. No. CV09-9069, Complaint (Nov. 2, 2009).
[201] *State of Idaho v. APS Northwest Idaho, LLC, d/b/a HomeModifier, et al.*, Kootenai County Dist. Ct. No. CV09-9069, Consent Judgment and Order (Aug. 17, 2010).
[202] The Idaho Department of Finance has regulatory authority over licensed mortgage modification companies and, unless otherwise agreed, the Attorney General defers to the Department's judgment in cases involving its licensees.
[203] Licensed attorneys and persons subject to the Idaho Real Estate License Law, title 54, chapter 2, Idaho Code, are excluded from regulation under the Idaho Residential Mortgage Practices Act, which includes the up-front fee prohibition of Idaho Code § 26-31-210.

negotiators.[204] By the time the Attorney General receives the homeowner's complaint it is likely that the company has ceased operating and the state bar association where the attorney practices already disciplined or is in the process of disciplining the attorney.[205]

Beyond Enforcement

The decrease in consumer complaints against mortgage modification and foreclosure rescue companies demonstrates the success of educational campaigns aimed at informing distressed homeowners about their options and where they can go for help. As consumers become savvy to the tricks and unlawful methods of predatory companies, consumers stop using them and the companies' profit base dries up. Through educational efforts and an effective use of resources, the Attorney General has given Idaho's homeowners the knowledge and tools to help themselves and end for-profit mortgage modification companies for good.

Consumer Publications

The Attorney General's Office published its first housing and mortgage modification handbook for consumers in 2008. The handbook underwent a complete revision in October 2009 and was separated into two manuals. "Buying a Home" educates consumers about the home-buying process and how they can protect their homes from loss due to deceptive business practices. The second manual, "Foreclosure Prevention and Foreclosure Scams: How to Tell the Difference," provides information about loan modification programs, advises consumers about fraudulent rescue schemes, and helps consumers tell the difference. Both manuals are available on the Attorney General's website and are distributed to interested

[204] In 2010, Idaho consumers filed complaints against nine out-of-state attorney-operated mortgage modification companies. This is seven more than in 2009.
[205] The Consumer Protection Division provides a copy of the consumer's complaint to the appropriate state bar association for whatever action it deems appropriate.

consumers during public outreach events.[206] All publications are available to consumers free of charge.

Public Service Announcements

Idaho consumers viewed or heard three public service announcements about housing issues during 2010. The Attorney General developed and broadcasted television and radio announcements regarding (1) home foreclosures; (2) rental foreclosures; and (3) buying a home.[207] Approximately 30 seconds in length, the announcements warned consumers about mortgage modification scams and directed them to the Attorney General's website for additional information.

Consumer Alerts

The Attorney General first warned Idaho consumers about the perils of foreclosure rescue schemes in June 2007. In cooperation with the Idaho Department of Finance, the Attorney General issued a consumer alert, explaining that foreclosure rescue companies operate by promising to save a consumer's home from foreclosure, either for a fee or by securing the property's title to the rescue company. However, the rescue company often ends up owning the home, while the consumer loses the home and the equity in the home. The Attorney General said, "The possibility of losing one's home to foreclosure is, to say the least, frightening for anyone . . . . Foreclosure rescue scam operators take advantage of this fear to their own profit and the consumer's loss. Many of these schemes are designed to fail so that consumers lose their homes to the so-called rescue company."

[206] During 2010 representatives from the Attorney General's Office visited dozens of locales throughout Idaho to speak with consumers and provide educational materials.
[207] The public service announcements are available to view or listen to on the Attorney General's website at www.ag.idaho.gov.

A second consumer alert was published in May 2010[208] regarding "forensic loan auditors." The alert explained that these companies, which use many titles – forensic auditors, mortgage loan auditors, and foreclosure prevention auditors charge upfront fees ranging from $1,000 to $1,500 to review consumers' mortgage documents and determine whether lenders complied with mortgage lending laws. Companies advertise that consumers can use the audit reports to avoid foreclosure, accelerate the loan modification process, reduce their loan principal, or even cancel their loans. All of these claims are false and intended only to bilk consumers out of their money.

Mortgage Servicing Complaint Mediation

In early 2009, the Attorney General's Consumer Protection Division implemented an alternative dispute resolution procedure to address complaints in which consumers explained difficulties in communicating with their mortgage servicers about the status of the consumers' mortgage modification applications. The division designated a part-time staff member to help facilitate better communication between consumers and their servicers and to address consumers' concerns about a variety of housing issues. The division has attempted to establish cooperative working relationships directly with each servicer's case escalation contact in order to speed along modification reviews and avoid unnecessary foreclosures.

Section 6

THE ATTORNEY GENERAL'S CONSUMER COMPLAINT REVIEW

Following the Attorney General's settlement with Countrywide Home Loans, LLC, homeowners began contacting the Consumer Protection Division to express the difficulties they experienced or were experiencing in communicating with their mortgage servicers. While

[208] The consumer alert was published in cooperation with the Idaho Department of Finance.

a majority of the complaints involved Countrywide or its successor, Bank of America, N.A., gradually the division received complaints against many of the top 25 servicers.

Homeowners described dozens of frustrating, oftentimes heartbreaking, scenarios in their complaints – stories of never-ending modification negotiations, lost paperwork, misleading representations, unaffordable modification offers, and communication difficulties. Essentially, consumers' complaints showed that America's mortgage servicers were demonstrating the quintessence of customer disservice. For example, a Hailey consumer complained to the Consumer Protection Division that, after 18 months, he still did not know whether his loan modification was approved. Each time he spoke to a representative he was told something different. Now he owes over $25,000 in late payments.

A consumer in Idaho Falls reported that he applied for a modification in October 2010, but the process was delayed because he could not provide the servicer with a "rental agreement" for the property that he owned and in which he resided. Eventually, in mid-December 2010, the servicer offered him an unaffordable modification that *added* $8,100 to his outstanding balance and *increased* his monthly payment $62 each month. His interest rate and payment term remained the same. He rejected the servicer's offer. The servicer subsequently revised its offer, which gives the consumer time to consider his other options.

A Hayden consumer expressed similar frustrations, indicating that she applied for a modification of her second mortgage in June 2009 and submitted copies of the same paperwork to the servicer over 20 times. In March 2010, the servicer offered her a modification with an interest rate of 9 percent and added $11,981 in unpaid principal, interest, escrow, and fees to her outstanding balance. The additional fees included a $500 "modification fee." Because the modification was unaffordable, she rejected it.

The goal in addressing consumer complaints was to facilitate immediate and productive communication between the servicer and the homeowners. Oftentimes homeowners were facing imminent foreclosure and required assistance within 24 to 48 hours. At that point in time, a comprehensive review of complaints to identify potential legal issues was neither a priority nor was it necessary for mediation purposes.

When servicers, however, acknowledged improprieties within judicial foreclosure states and the Attorney General joined the multistate task force inquiring the mortgage servicing industry, the Attorney General determined that a second review of all complaints from an enforcement perspective would help the state and stakeholders better understand the nature of the mortgage crisis in Idaho. This section presents the results of that review.

Methodology and Scope

The Attorney General's review is limited to complaints and other consumer contacts (collectively "complaints") filed with the Consumer Protection Division between January 1, 2008, and December 31, 2010. In addition, the division reviewed consumer complaints only about mortgage servicing[209] issues. Accordingly, complaints concerning banking[210] or lending[211] issues are excluded from this report. The division also excluded:

- complaints filed by out-of-state consumers, and[212]
- complaints filed against non-servicers.[213]

[209] Mortgage servicing includes three business processes: processing transactions (i.e., receiving monthly payments); (2) managing default (i.e., collections and foreclosure); and (3) mitigating loss (i.e., loan modifications).
[210] Complaints concerning banking issues are those that allege problems with the customer's checking, savings, or other deposit account, as well as issues about credit and debit cards.
[211] Complaints regarding lending allege issues with obtaining a loan.
[212] Many times consumers from other states copy their correspondence to multiple attorneys general. Those contacts are not included in this report.
[213] For example, complaints filed against title companies, trustee offices, mortgage modification companies, real estate agents, and other entities that do not provide mortgage servicing services are excluded.

The division identified 376 mortgage servicing complaints for the years 2008, 2009, and 2010.[214] The data that the division obtained and the conclusions that are discussed in this section are based on these 376 complaints. The division, however, devoted additional time to reviewing complaints in which consumers allege that servicers:

- engaged in deceptive or misleading practices;
- violated Idaho's foreclosure laws;
- violated other state or federal laws; or
- failed to comply with the Department of Treasury's directives.

Situations where the division obtained evidence substantiating the consumers' allegations are discussed individually and, when available, any further actions that the division took in those matters are identified.

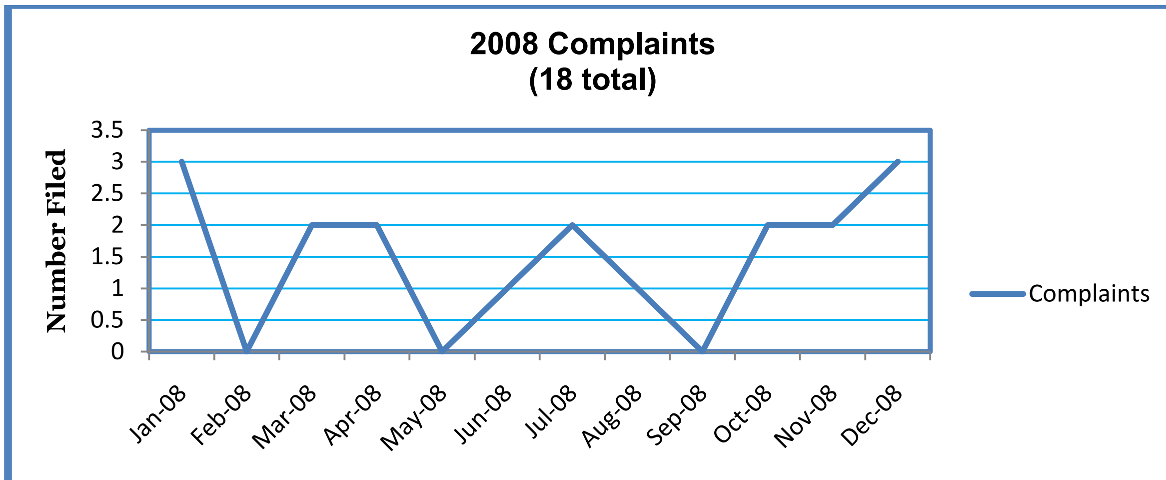
What the Data Reveals

Mortgage servicing complaints have increased substantially in the past three years. In 2008, the Consumer Protection Division received 18 complaints, and in 2009, the number of complaints increased to 100. At the end of 2010, the number of complaints filed that year totaled 258. The increase in complaint numbers between 2008 and subsequent years is attributable to consumers' inability to obtain timely and sustainable mortgage relief from their servicers under the federal loan modification and refinancing programs.

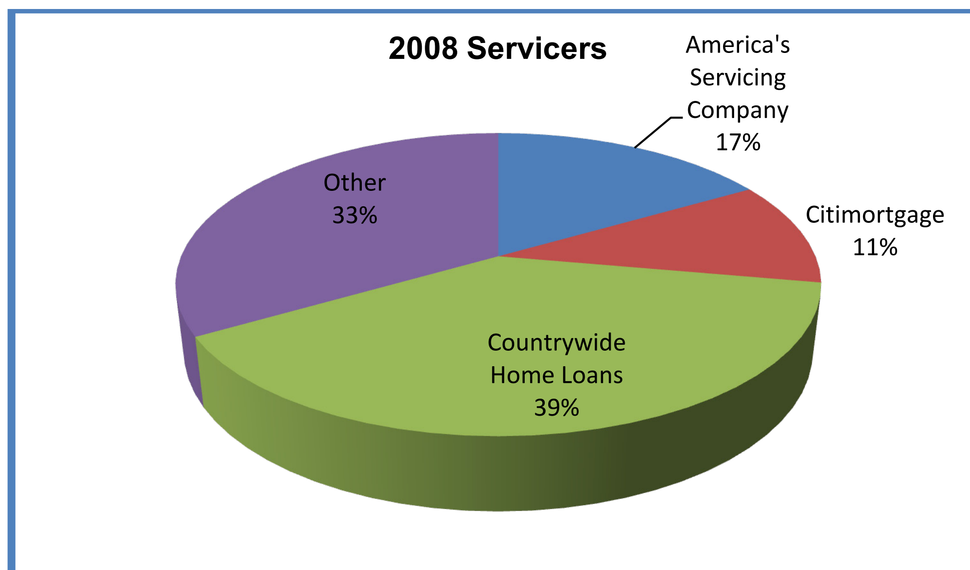
2008 Complaint Data

The number of servicing complaints received in 2008 remained consistent throughout the year, hovering between zero and three each month.

[214] The division identified these complaints through multiple electronic searches of the Consumer Protection Division's proprietary consumer complaint database.



The complaints concerned a number of different servicers, but the majority involved servicers affiliated with national banks:[215]



More than half of the 18 complaints filed in 2008 -- before the implementation of the MHA programs -- involved consumers expressing frustration about their servicers' failure to work cooperatively in facilitating a modification of the consumers' mortgage loans. Some of these complaints followed the Attorney General's announcement of a potential settlement agreement with Countrywide Financial in early October 2008.

[215] America's Servicing Company is a division of Wells Fargo Home Mortgage. CitiMortgage is a member of Citigroup. Bank of America owns Countrywide Home Loans.

State of Idaho v. Countrywide Financial, LLC

The 2008 Countrywide Financial settlement provided $700,000 in mortgage foreclosure relief to Idaho homeowners and assisted 2,000 eligible customers of Countrywide Financial. An eligible consumer had to have the ability to afford the modified payments and had to have a loan that:

- was a subprime loan, such as a pay option ARM;
- had a first payment due between January 1, 2004, and December 31, 2007;
- was in default;
- was secured by owner-occupied property and serviced by Countrywide Financial or one of its affiliates; and
- had a balance of 75% or more of the current value of the home.

In addition to waiving late fees and prepayment penalties, Countrywide Financial agreed to reduce borrowers' interest payments and principal balances.

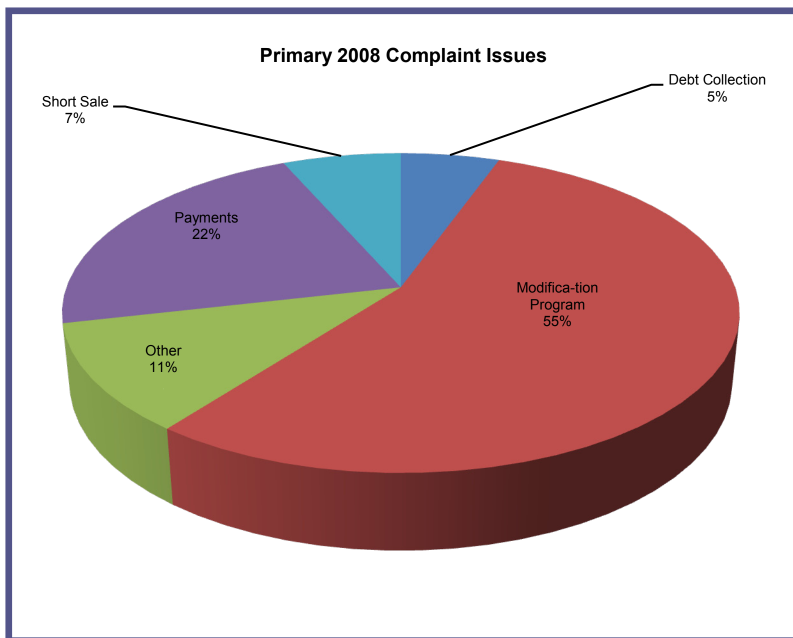
Consumers contacted the Attorney General for assistance in obtaining a loan modification under Countrywide's Homeowner Retention Program, which promised to give eligible Idaho homeowners the opportunity to modify their high-risk loans, including pay option ARMs, into more affordable and stable loans. The final settlement agreement was filed with the court in late December 2008.[216]

Because Bank of America, N.A., purchased Countrywide's loan portfolio in mid-2008, Bank of America assumed responsibility for fulfilling the terms of the settlement agreement. The Consumer Protection Division referred consumer complaints regarding the program to Bank of America, which assigned a point-of-contact within Bank of America for the consumer. Further modification negotiations occurred directly between the servicer and the consumer. If the consumer experienced additional problems in communicating effectively with Bank of America, they could contact the division for further assistance.

The second most common complaint concerned servicers failing to credit their mortgage payments correctly. For example, one consumer alleged that, on February 28, 2008, he paid his monthly mortgage payment, which was due on March 1, 2008. On March 3,

[216] *State of Idaho v. Countrywide Financial, LLC*, Ada County Dist. Ct. No. CVOT 2008-24037, Stipulation and Consent Judgment (Dec. 22, 2008).

2008, the payment was deducted from his checking account. The consumer alleged that the servicer did not apply the payment to the consumer's account until March 28, 2008, and charged him a late fee.[217]

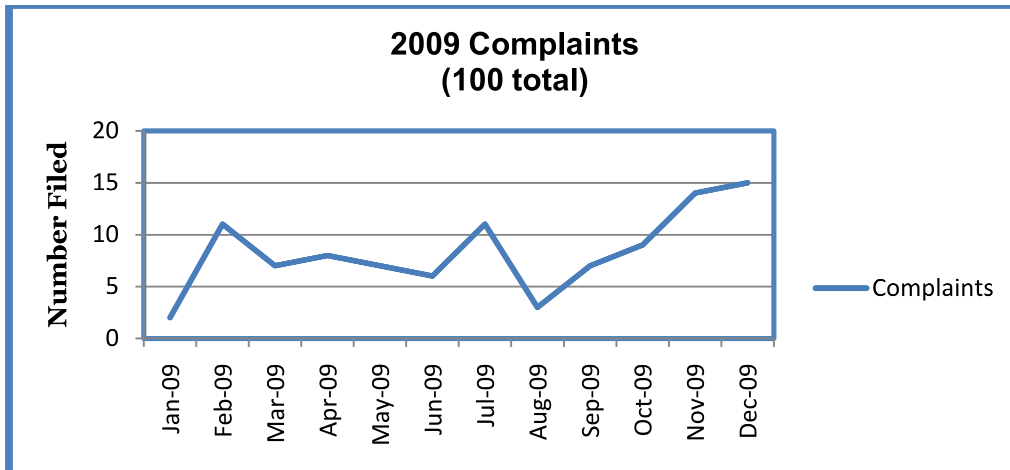


Consumers also filed complaints about servicers not acting promptly on short sale offers so the consumers could avoid potential foreclosure. One consumer also complained that a servicer attempted to collect on a debt that resulted from the parties' differing interpretations of a short sale contract.[218]

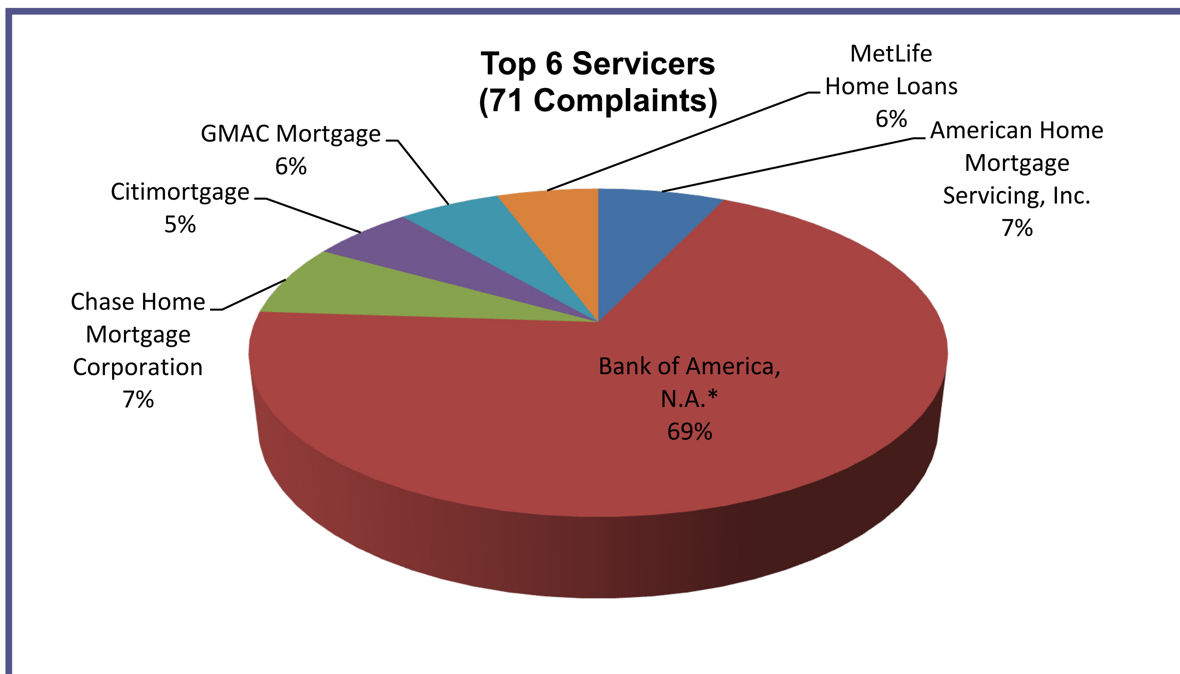
2009 Complaint Data

The Consumer Protection Division received 100 mortgage servicing-related complaints in 2009. With the introduction of the Making Home Affordable programs, along with Countrywide Home Loan's implementation of its proprietary Homeowner Retention Program, consumers began expressing greater levels of frustration in communicating with their servicers.

[217] The Consumer Protection Division mediated the complaint and received a response from the servicer explaining that the consumer's payment amount increased in February 2008, but the consumer failed to remit the full payments in February or March. The servicer applied the partial payments to the consumer's account, but also charged the consumer a late fee because of the insufficient payments. Based on the servicer's response, the division closed the complaint without further action.
[218] The servicer responded to the consumer's complaint and stated that the consumer paid the money that was due the servicer under the short sale contract 30 days late. The servicer, therefore, declined to remove the negative credit reporting information from the consumer's credit reports. The Consumer Protection Division closed the consumer's complaint without further action.



As in 2008, consumers filed the largest number of complaints in 2009 against servicers that are national banks or are affiliated with national banks. The six servicers with the most complaints in 2009 are:



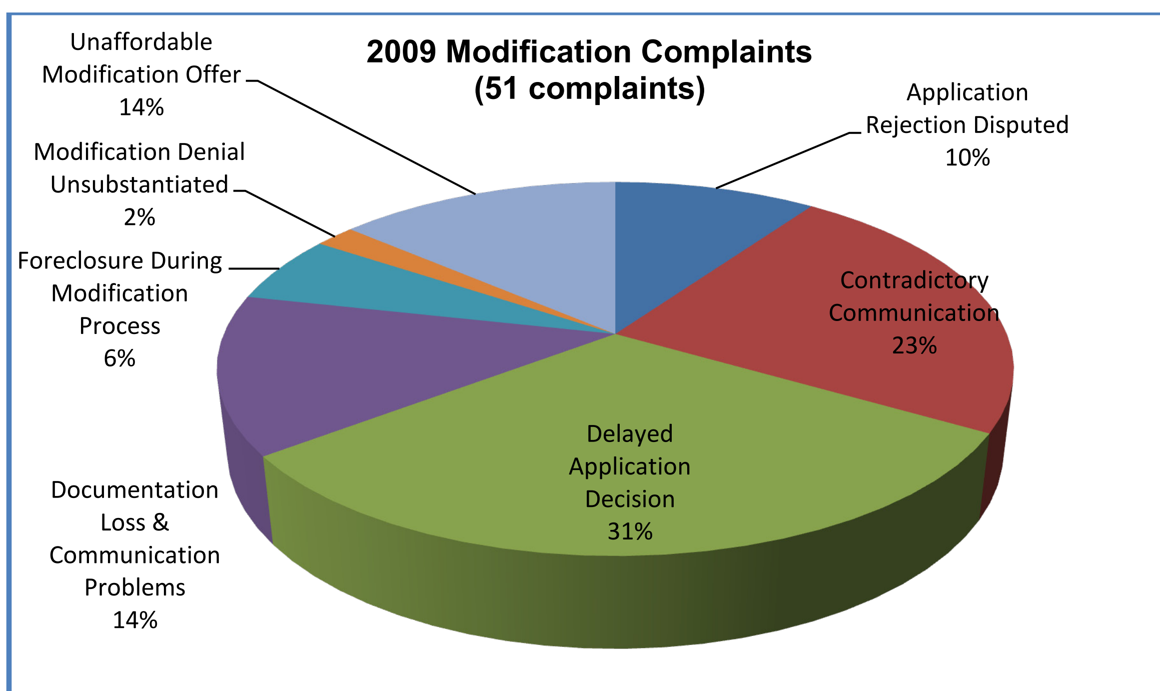
With the Attorney General's 2008 settlement agreement with Countrywide Financial and because, in 2009, Bank of America was the nation's largest mortgage servicer,[219] complaints filed against Bank of America account for almost one-half of the 100 complaints filed in 2009.

[219] With $2 trillion in its servicing portfolio, Bank of America was ranked as the top mortgage servicer in 2009. Wells Fargo, Chase, Citi, and GMAC rounded out the top five.

None of the other servicers came close to generating that volume of consumer complaints, including Wells Fargo, which ranked as the second largest loan servicer in 2009.

The issues that consumers raised in their complaints remained relatively consistent between 2008 and 2009 with problems related to mortgage modifications surpassing other complaint issues. In addition to general frustration with the modification process, of the 51 complaints about loan modification issues, the greatest number of those complaints specifically expressed ongoing problems with servicers:

- Failing to make a final decision as to the consumer's eligibility for a modification;
- Providing conflicting information about the MHA program requirements or the status of the consumer's modification application;
- Offering consumers unaffordable modifications; or
- Losing consumers' paperwork and not communicating with consumers.



In the 51 complaints that concerned issues other than those related to loan modifications, consumers raised a variety of concerns, including situations where consumers unexpectedly found themselves in foreclosure. One consumer, whose loan was transferred to a new servicer while she was negotiating a modification, received notice from the new servicer that her home was in foreclosure because her payments were delinquent. According to the consumer, however, she had made her payments, but her new servicer's records were incorrect. While attempting to straighten out her account with her servicer, it scheduled her home for a foreclosure sale.[220]

Another consumer informed the Consumer Protection Division that she had submitted a short sale offer to her servicer, which made a counteroffer that the buyer accepted. Despite the buyer's acceptance, the servicer closed the consumer's file without finalizing the short sale.[221]

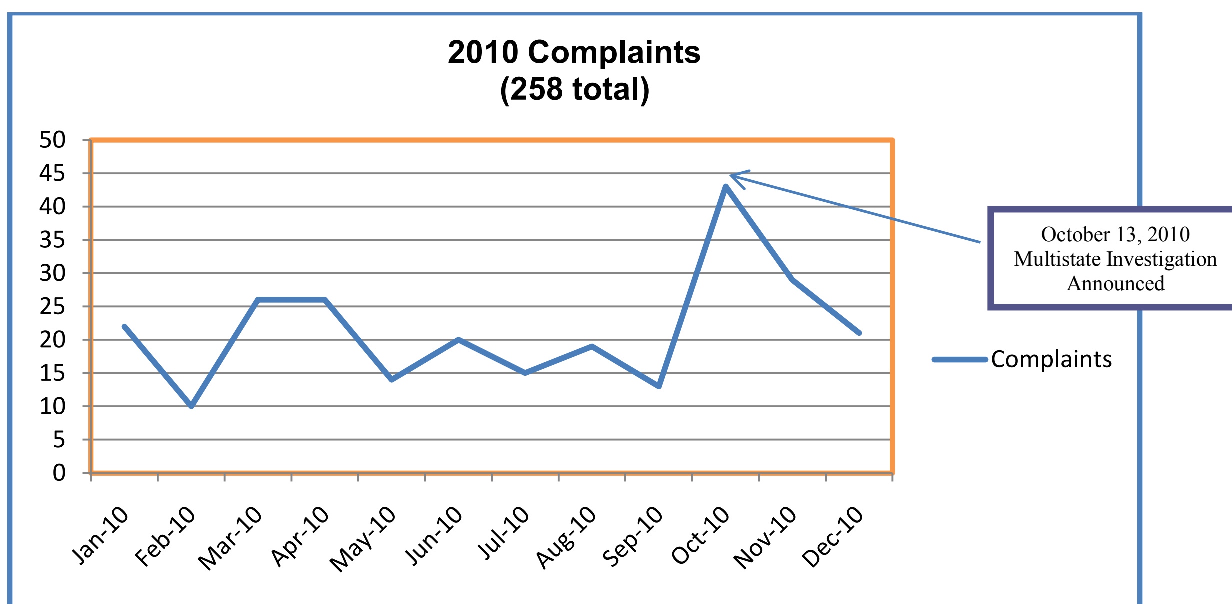
Consumers also reported, among other problems: (1) servicers refusing to provide their loan payoff amounts; (2) servicers misapplying consumers' payments; (3) receiving unwarranted collection calls; and (4) poor customer service. When appropriate, the Consumer Protection Division attempted to obtain responses to consumers' complaints from servicers. The division did not initiate any enforcement actions based on the allegations in any of the 100 complaints filed during 2009.

2010 Complaint Data

The number of servicing complaints that the Consumer Protection Division received in 2010 increased 158% from 2009. This increase is due to more Idaho consumers applying for

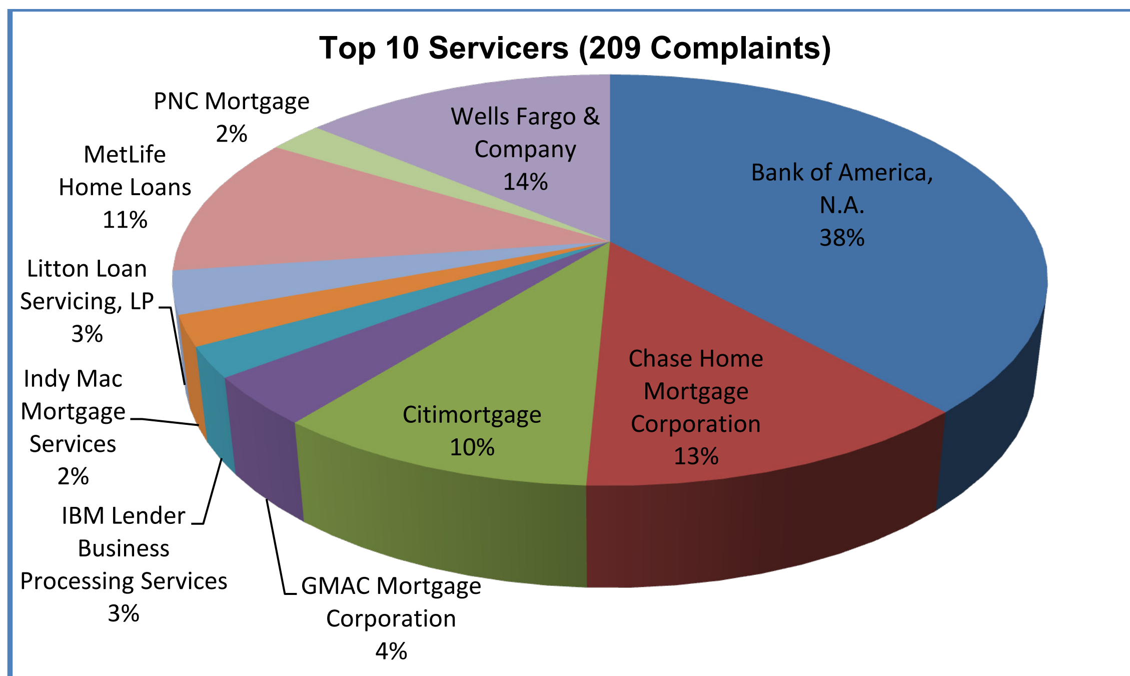
[220] The Consumer Protection Division contacted the servicer about the consumer's complaint, but was unable to reach a resolution. The consumer informed the division she hired private counsel to represent her and the division took no further action on her complaint.
[221] By contacting the servicer, the Consumer Protection Division was able to assist the consumer in finalizing the short sale. Closing occurred approximately 30 days later.

modifications and having difficulties with the process, and more consumers becoming aware of the division's housing counselor. The division also experienced a surge in complaints following the Attorney General's October 2010 announcement of his participation in the multistate mortgage servicing investigation.

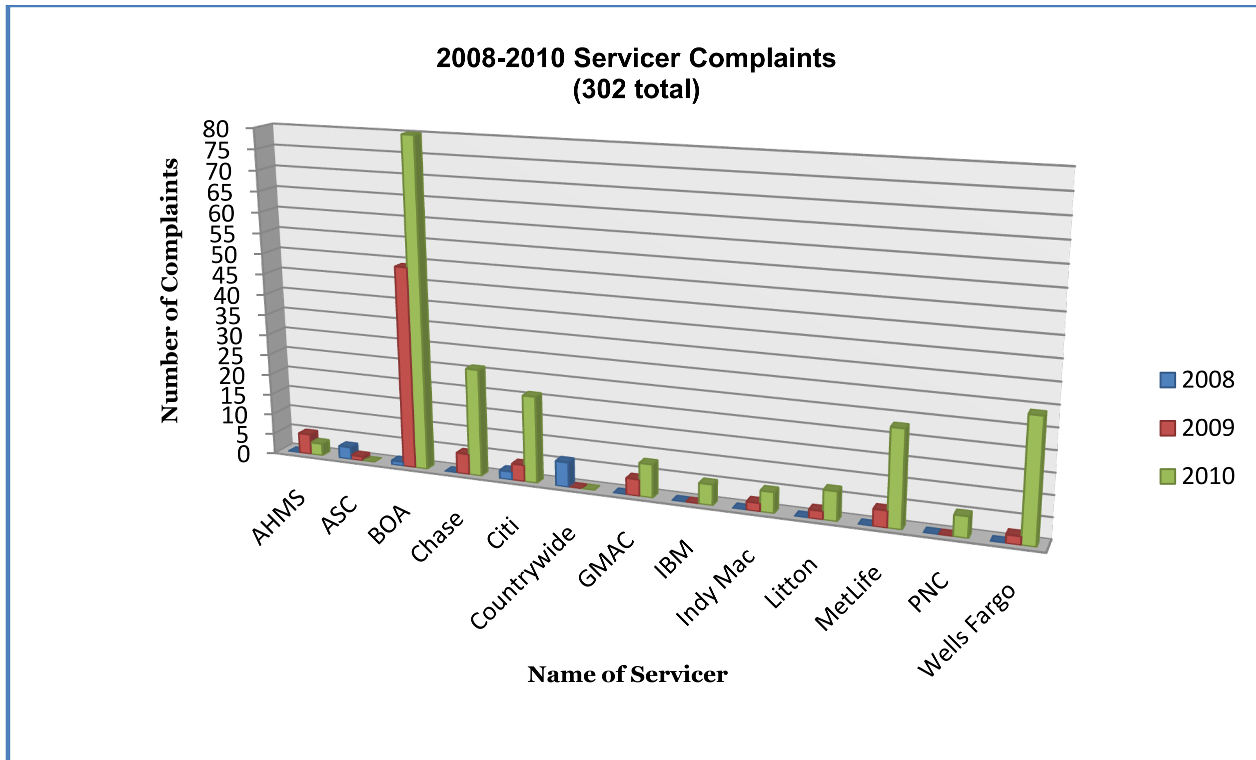


The 2010 complaints involved over 35 mortgage servicers and included both large and small entities and both MHA-participating and non-participating servicers.[222] The following chart compares the volume of complaints received for those servicers that garnered the most complaints:

[222] A list of participating servicers is provided on the Making Home Affordable website at www.makinghomeaffordable.gov.



The mortgage servicers with the greatest number of complaints also appear in the 2009 Top 6 Servicers chart and two servicers, Bank of America and Citimortgage, also appear in the 2008 Servicer chart. The following graphic compares how complaints have increased or decreased over the past three years against the identified servicers:



As in 2009, Idaho consumers continued in 2010 to express immense frustration and disappointment with servicers' inability to evaluate consumers' modification applications in an organized manner and render a prompt and final eligibility decision. Lingering in a perpetual state of delinquency or pending foreclosure takes an emotional and financial toll on families, and, according to Idaho consumers, some servicers' business practices only reinforce the uncertainty of the modification application process. The following excerpts[223] from complaints that the Consumer Protection Division received from consumers illustrates what consumers throughout Idaho have experienced during the loan modification process.

[223] To maintain conciseness, clarity, and consumers' privacy, the stories included in this section have been modified from the original reports provided to the Attorney General.

In December 2008 my husband was laid off. We contacted the servicer, but because we were not behind on our payments they would not help us. We called again in the spring 2009 before I went on maternity leave. Again we weren't more than 30 days late. We fell behind in May 2009 and the servicer said we didn't qualify for a refinance or modification due to our debt to income ratio. The end of June 2009 we met with a HUD counselor and sent a hardship letter to the servicer. We have been calling and calling for the last 4 months and still no response from the servicer. There is a foreclosure date of 2/25/2010 on our home. We have done everything we have been asked to do, including sending them updated paystubs and bank statements. We don't want to lose our house.

~ Boise Consumers

These Boise consumers filed their complaint with the Consumer Protection Division in mid January 2010. The division's housing counselor subsequently contacted the servicer about the consumers' concerns. On February 4, 2010, the consumers signed an agreement with their servicer modifying the terms of their mortgage loan.

In April 2009 I received a letter stating we were eligible for the MHA program. I called and gave them all of my information. I was told we would receive a packet in about 6 weeks with all the paperwork and to fill it out and return it. At approximately 8 weeks I called and reported I had not received the packet. I was told I should receive it within 3 weeks. I was told to continue to pay what I could on my payment. In September I called again and was told this time that I was not eligible for the MHA program but was eligible for the modification program. I expressed my concern that I was scared we could lose our home. She told me not to worry that would not happen because I was doing everything they asked me to and the loan was up for modification. In December we received a foreclosure notice for April 11, 2010, so I called immediately, the person I spoke with stated the modification was denied because they never received my information that was requested.

~ Kootenai Consumer

The division received the Kootenai consumers' complaint on March 3, 2010, and forwarded it to their servicer for a response. On April 10, 2010, the servicer suspended the foreclosure and offered the consumers a traditional loan modification beginning on June 1st.

We contacted the servicer in the spring 2009 and explained we were having a problem making our payment. After we provided our information we were advised that we qualified for a modification and the servicer would mail out a package. We were told it would take 60 days for a specialist to be assigned to our account. The servicer confirmed in October 2009 that it had everything it needed. In November we advised the servicer that the modification program failed us and we decided to file bankruptcy. In February 2010 the servicer advised us our account had been turned over to an attorney to begin the foreclosure process. We are extremely frustrated that this has taken over one year with no resolution. If they had modified our loan six months ago, we would not be in this position today.

~ Twin Falls Consumer

The above Twin Falls consumers first contacted the Consumer Protection Division about their complaint in late December 2009. Within two days, the division's housing counselor contacted the servicer. On January 25, 2010, the consumers notified the division that the servicer approved their loan modification. The final modification documents, which the consumers signed, were provided to the consumers on February 6th.

In May 2009 we received a letter from the servicer stating we were approved for a lower interest rate for 5 years and payments of $1,472.48. We called in September 2009 when we had not received any more information. In November 2009 we called again and were told our modification was in negotiations and it would take up to 120 days. In January 2010 we received a letter saying we were in danger of foreclosure. In February 2010 we were told we needed to make three payments of $1,459. We immediately sent two payments, but the servicer returned one payment. In April 2010 we were told the servicer would not take any payments because we were in foreclosure. Our house was scheduled for sale on July 6, 2010.

The servicer was not willing to listen or look over our information, or even try to answer our questions and concerns. It truly was a lost cause. After 16 months of fighting with them, and sending page after page of documents and many nights spent crying, we moved on. We no longer live in the home where we raised our children. We moved out of the area where we lived for over 24 years. We moved away from my father, who lived next door. We left a lot of memories. But we could not take the chance of our house being sold the next day, and not having a place to live or move into.

~ Wilder Consumer (complaint pending)

We applied for a loan modification in the fall of 2008, spring 2009, and in November 2009. The reason we requested the loan modification was because it was getting harder to keep up with the 7.9% interest rate and payments of $2,198. We made numerous calls to clarify information. Each time we called we met with unknowledgeable employees who transferred us to other departments. One employee told us one thing and the next employee told us something completely opposite.

This whole thing has been very stressful, but none so much as when we found out our account was being reported as delinquent to the credit companies because our payments were not being applied to the loan. We have tried very hard to maintain our credit standing with a good credit score. On April 10, 2010, a representative told us we were 90 days past due and owed $2,798.04 for the April payment. We asked how we could be delinquent when we made all of our payments on time. On June 1, 2010, we canceled the modification application. This experience has been tremendously detrimental causing extreme stress and elevated worries about our credit.

~ Idaho Falls Consumer (complaint pending)

The servicer could not explain why I had not been notified if I was approved or denied for the modification since I had applied on 6/09 even though I had been told I qualified. The last few months when checking on the status of my modification I had been told it was being processed by the underwriters. I have been out of work for nineteen months since my injury at work, depleted my retirement fund, depleted my workman's comp settlement, borrowed ten thousand dollars from family and have had to take a loan out on the truck that I had owned. After trying for a loan modification with the servicer for a year and a half I am being offered a chance to start the process over again. I had not been late or missed a payment in the nine years I have been in the home. I am doing all that I can to try to keep my home and keep my family of four in a house. It is upsetting after what I have been through to be told I am going to have to start again and I am no further with any help than a year and a half ago.

~ Nampa Consumer (complaint pending)

2010 Complaints Alleging Fraud

The October 2010 media reports of mortgage servicers allegedly filing false affidavits with courts in some judicial foreclosure states prompted consumers to contact their attorneys general if consumers experienced or had knowledge of similar unlawful conduct. Although Idaho is one of 27 non-judicial foreclosure states and, therefore, does not require a servicer (or other entity) to file a court action to foreclose on a deed of trust, consumers equated the robo-signing allegations in other states to servicers' actions in Idaho.

In 2010, the Consumer Protection Division received 17 complaints in which consumers alleged that a servicer engaged in fraudulent activities while servicing the consumer's loan. Because such allegations may implicate the Idaho Consumer Protection Act, the division afforded these complaints special attention. The following summarizes the primary allegations raised in these complaints:

Description of Allegation	No. of Complaints
The servicer foreclosed on the consumer's home while the consumer was negotiating a modification of his or her loan or during the consumer's trial payment period.	7
The servicer failed to provide the consumer with notice of the trustee sale.	3
The servicer failed to make a timely decision on whether the consumer qualified for a loan modification.	1
The consumer wanted to finalize a short sale but the servicer foreclosed instead.	1
The foreclosure notices that the consumer received from the servicer contained robo-signatures or incorrect information.	3
The servicer's failure to apply the consumer's monthly payments placed the consumer in default status.	2

Based on information that the consumers provided to the Consumer Protection Division, of the 17 consumers who filed "fraud" complaints, servicers foreclosed on 13 of them. Two others had trustee sales scheduled.

It is not evident from any of these complaints that the servicers named in the complaints engaged in deceptive or misleading conduct under the Idaho Consumer Protection Act. The seven consumers who reported being foreclosed upon during the modification process were in default on their original mortgage obligation or, according to the servicer, violated the

conditions of their trial payment program. In at least one instance, the servicer rescinded the foreclosure sale and offered the consumer a loan modification.

The MHA program directives instruct participating servicers not to initiate a foreclosure sale while a modification is pending. However, enforcement of the directives rests with the Department of Treasury. The Attorney General lacks authority to enforce these directives.

The division's review of the three complaints in which consumers reported not receiving notice of the trustee sale revealed that the consumers had received proper notice under Idaho's foreclosure laws.

A servicer's delayed modification procedure or refusal to accept a short sale is not deceptive. The time requirements for acting on a consumer's modification application are, in this situation, contractual obligations between the servicer and the Department of Treasury. The consumers who alleged "robo-signing violations" did not provide any evidence that the foreclosure notices they received were forged or otherwise unlawfully executed.

The final two complaints concerned confusion about the servicers' application of the consumers' payments to their mortgage loans. After inquiring with the servicers about the consumers' complaint, the Consumer Protection Division received information that the consumers had failed to make one or more timely monthly payments. Accordingly, the division concluded that the consumers' allegations were unsubstantiated.

Section 7

ATTORNEY GENERAL'S RECOMMENDATIONS TO BETTER PROTECT IDAHO'S HOMEOWNERS NOW AND IN THE FUTURE

The Attorney General's review of over 300 mortgage servicing complaints and his history in investigating and bring enforcement actions against foreclosure rescue and mortgage modification companies has revealed a need for legislative, educational, and other initiatives to assist Idaho's homeowners in:

- preventing foreclosures;
- finding free and reliable housing counselors to answer questions;
- knowing all of their loss mitigation options;
- taking proactive steps to help themselves; and
- obtaining affordable and sustainable loan modifications when feasible.

The recommendations outlined in this section are based on the data obtained from the Attorney General's complaint review. Certainly these recommendations are not all-inclusive or static. Just as Idaho's housing market remains in a state of change, so must any ideas or suggestions for improving it.

Legislative Recommendations

The legislative recommendations that follow address three of the primary complaints that consumers reported to the Attorney General: (1) not receiving notice of the date and time of postponed trustee sales; (2) foreclosures occurring before consumers have an opportunity to negotiate a loan modification; and (3) losing money, time, and in some instances their homes to fraudulent foreclosure rescue and mortgage modification companies.

Title 45, Chapter 15 (Idaho Foreclosure Statute)
Written Notice of Postponed Trustee Sale Dates

Homeowners repeatedly expressed to the Attorney General's Consumer Protection Division that servicers sold the borrower's home without the borrower's knowledge. In the division's review of consumer complaints, however, it found no evidence that servicers failed to comply with the notice provisions of Idaho's foreclosure statute. In instances where consumers alleged they did not receive notice, they did receive a notice of trustee sale for the first sale date.

However, many borrowers obtained multiple postponements of their initial sale dates. The 30-day postponements allowed servicers time to review the borrowers' modification applications. If the borrower did not qualify for a modification, however, the servicer proceeded with the sale on the next scheduled date.

Requiring the servicer to provide the borrower the date, time, and location of the postponed sale in the servicer's final written communication with the borrower before the date of the postponed sale would allow borrowers additional time to prepare for an imminent sale.

Title 45, Chapter 15, Idaho Code (Idaho Foreclosure Statute)
Supplemental Foreclosure Notice and Opportunity to Request Modification

A financially distressed homeowner is barraged with letters and telephone calls from creditors, junk mail offering debt management, realty and foreclosure assistance, and legal notices. Homeowners become so overwhelmed by their situation that the easiest thing for them to do is nothing. Of course this is the worst option a homeowner can choose. However, if the servicer is required to provide the homeowner with a form in which he or she can request that the servicer review the homeowner's loan for a modification, the homeowner may be more likely to take a proactive approach to saving his or her home.

The Attorney General recommends adding a section to title 45, chapter 15, Idaho Code, that requires the foreclosing party to include two documents with the notice of default that is mailed to the grantor.[224] The first is a notice, provided below, which stresses the seriousness of the foreclosure process and invites the grantor to meet with the beneficiary or its agent to discuss a possible loan modification. The second document is a modification request form, which the beneficiary or its agent designs. If the grantor wants to apply for a modification, the grantor must complete and return the form to the beneficiary with any required financial records within 30 days. To ensure compliance with the statute, the trustee must record an affidavit from the beneficiary or its agent testifying to how the beneficiary complied with the statute.

Title 45, chapter 15, Idaho Code, does not include a section authorizing a private cause of action or remedies for a violation of the chapter. Grantors are limited to filing a wrongful foreclosure action, but only if the grantor was not in default at the time of foreclosure. Therefore, in subsection (6) of the draft statute in Appendix A, enforcement of its provisions is limited to the authority and remedies available to the Attorney General under the Idaho Consumer Protection Act.

Title 48, Chapter 6 (Idaho Consumer Protection Act)
Prohibition Against Most For-Profit Mortgage Modification Services

Persons who do not hold an appropriate license from the Idaho Department of Finance, or who do not hold a valid license from the Idaho State Bar or the Idaho Real Estate Commission, should be prohibited from charging consumers any fees for mortgage modification services. The financial and emotional damage that mortgage modification companies have inflicted on consumers is immeasurable. The best way to minimize future

[224] The two documents are in addition to the “Notice Required by Idaho Law.” *See* Idaho Code § 45-1505(3).

problems, while also allowing regulated licensees to assist consumers, is to stop for-profit mortgage modification negotiators from viewing Idahoans as potential cash registers. To accomplish this goal, the Attorney General recommends amending the Idaho Consumer Protection Act to include a new section as provided in Appendix A to prohibit such conduct.

Consumer Assistance and Education Recommendations

The following recommendations are intended to address the lack of assistive resources available to Idaho consumers when they face the potential loss of their home. Because education is the best method for preventing consumer fraud the Attorney General also recommends continuing educational initiatives[225] to better inform consumers about their options and their legal rights.

Full-Time HUD-Certified Housing Counselor

The Attorney General's appointment of a part-time staff member to assist consumers with housing issues has benefitted distressed homeowners while also developing relationships with mortgage servicers, other government agencies, consumer advocates, and local attorneys. Additional funding for a full-time housing counselor with HUD-approved training/certification would allow the Attorney General's Consumer Protection Division to expand its services beyond emergency triage for after-the-fact crises to pre-loan education and foreclosure prevention counseling.

Regional Foreclosure Prevention Workshops

Hosting two-day (Friday-Saturday) foreclosure prevention workshops in western, northern, southern, central, and eastern Idaho would provide homeowners access to in-person education and legal resources while also giving borrowers the opportunity to meet face-to-face

[225] Beginning in the spring of 2011, the Attorney General's Office will broadcast public service announcements regarding foreclosure issues.

with servicing representatives about loan modifications. Working in conjunction with housing agencies, consumer advocate groups, attorneys, and servicers, other states and cities have held successful foreclosure prevention workshops.

Low Cost Mortgage Loan Assistance Attorneys

Consumers lose money to mortgage modification companies because consumers would rather hire an "expert" to take care of their problems than face confusing or uncomfortable situations on their own. Unfortunately, the companies that consumers turn to for help are not experts and have no interest in helping consumers face or overcome their problems. If consumers had access to low-cost (e.g., sliding fee scale) attorneys with experience or training in the mortgage lending field, consumers would be more likely to seek local, face-to-face assistance rather than give their credit card number to a suspicious company advertising on the Internet. Oftentimes, consumers simply need an independent, but knowledgeable, third-party who listens, reviews their documents, and provides direction.

Early Warning Notice to At-Risk Borrowers.

Homeowners who fail to pay their property taxes may be facing financial difficulties, making them their mortgage loans more susceptible to imminent default. County treasurers could insert with their delinquent tax notices a standard one-page form that includes a warning about foreclosure rescue scams and encourages homeowners to seek prompt assistance from a certified housing counselor. The Attorney General's Office proposes to design a form and work with the counties to facilitate implementation of this program.

Appendix A

RECOMMENDED LEGISLATION

Title 45, Chapter 15, Idaho Code (Idaho Foreclosure Statute)
Supplemental Foreclosure Notice and Opportunity to Request Modification

Idaho Code § 45-1506C (a new section):

(1) In the case of a deed of trust that secures a residential property, the notice contained in this section shall accompany the notice of default provided to the grantor. The notice shall be printed in at least 14-point type and substantially conform to the following form.

IMPORTANT NOTICE:
YOU ARE IN DANGER OF LOSING YOUR PROPERTY
IF YOU DO NOT TAKE ACTION IMMEDIATELY

This notice concerns the mortgage loan for your property at [enter the complete address].

You have failed to fulfill your contractual obligations under the terms of your mortgage loan. Under Idaho law, the holder of your loan ("the beneficiary") can sell your property to satisfy your obligation.

As of [enter the date], you needed to pay $[enter the amount owed] to bring your mortgage loan current. That amount may have increased since that date.

The beneficiary can provide you with the exact amount that you owe, but you have to ask. Call [enter the toll-free telephone number] to find out the exact amount you must pay to bring your mortgage loan current and to obtain other details about your loan. You also can send a written request for this information by certified mail to: [enter the complete address].

LOAN MODIFICATION ASSISTANCE

If you want to save your home from foreclosure but you cannot afford your current loan payments, you need to contact the beneficiary immediately to ask about its loss mitigation programs. You may qualify for a forbearance, loan modification, deed-in-lieu of foreclosure, or another alternative to foreclosure.

You may request to meet with the beneficiary to discuss options for modifying your loan.

IF YOU WANT TO APPLY FOR A MODIFICATION OF YOUR LOAN, YOU MUST COMPLETE AND RETURN THE ENCLOSED "MODIFICATION REQUEST FORM." THE BENEFICIARY MUST RECEIVE THE FORM ON OR BEFORE [enter the date], WHICH IS 30 DAYS AFTER THE DATE BELOW.

WARNING: You may get offers from people who tell you they can help you keep your property. Never pay someone to help you obtain a loan modification. Help is available for free from housing counselors who are certified through the Department of Housing and Urban Development. Visit www.hud.gov for a current list of certified housing counselors in Idaho.

DATED: [enter the date]
Trustee name: [print name]
Trustee signature: [sign name]
Trustee telephone number: [enter the toll-free telephone number]

---

(2) (a) The notice required under subsection (1) of this section must be accompanied by a form to request a loan modification. The form must include the address to which and state the date by which the grantor must return the form. The date must be thirty (30) days after the date on which the trustee signs the notice. The form may state that the grantor must disclose current information about the grantor's income and expenses, the grantor's address, phone number and electronic mail address and other facts that may affect the grantor's eligibility for a loan modification.

(b) If the trust deed, or any assignments of the trust deed, is in the Spanish language, the notice required under subsection (1) of this section and the form identified in paragraph (2)(a) of this subsection shall be in the Spanish language.

(3) If a grantor returns the form identified in subsection (2) to the beneficiary by the date specified on the form, the beneficiary or the beneficiary's agent shall review the information the grantor provided in the form and, in good faith, shall process the grantor's request. The beneficiary or the beneficiary's agent, as soon as reasonably practicable but not later than forty-five (45) days after receiving the form, shall notify the grantor whether the beneficiary approves or denies the request or requires additional information. A trustee's sale for the property subject to the loan may not occur until after the beneficiary or the beneficiary's agent timely responds to the grantor. During the forty-five (45)-day period, the beneficiary or the beneficiary's agent may request the grantor to provide additional information required to determine whether the loan can be modified.

(4)(a) Except as provided in paragraph (b) of this subsection, if the grantor timely requests a meeting with the beneficiary, the beneficiary or the beneficiary's agent shall meet with the grantor in person or shall speak to the grantor by telephone before the beneficiary or the beneficiary's agent responds to the grantor's request to modify the loan. If the grantor requests the meeting, the beneficiary or the beneficiary's agent shall take reasonable steps to schedule the meeting by contacting the grantor at the grantor's last

known address or telephone number or at the grantor's electronic mail address, if the grantor indicates on the loan modification form that the beneficiary or the beneficiary's agent can contact the grantor at the electronic mail address.

(b) A beneficiary or the beneficiary's agent complies with the provisions of paragraph (a) of this subsection even if the beneficiary or beneficiary's agent does not speak to or meet with the grantor if, within seven (7) business days after the beneficiary or beneficiary's agent attempts to contact the grantor, the grantor does not respond.

(c) The beneficiary or the beneficiary's agent that meets with the grantor shall have or be able to obtain authority to modify the loan.

(5) At least twenty (20) days prior to the date of sale, the trustee shall file for record in the office of the recorder in each county wherein the trust property, or some part or parcel, is situated, an affidavit from the beneficiary or the beneficiary's agent that states how the beneficiary or the beneficiary's agent has complied with the provisions of this section.

(6) The attorney general and district court shall have the same authority in enforcing and carrying out the provisions of this section as is granted the attorney general and district court under the Idaho consumer protection act, chapter 6, title 48, Idaho Code.

(7) All penalties, costs and fees received or recovered by the attorney general shall be remitted to the consumer protection account and expended pursuant to subsection (5) of section 48-606, Idaho Code.

Title 48, Chapter 6 (Idaho Consumer Protection Act)
Prohibition Against Most For-Profit Mortgage Modification Services

Idaho Code § 48-603(F) (a new section)

(1) For purposes of this section, unless the context otherwise requires:

(a) "Fee" means any item of value, including, but not limited to, goods or services.

(b) "Loan modification activities" is defined in section 26-31-201(3), Idaho Code.

(2) It is unlawful for any person to charge or collect any fee for loan modification activities unless such activities are performed by:

(a) Subject to the restrictions imposed by section 26-31-210, Idaho Code, persons licensed under chapter 31, title 26, Idaho Code;

(b) Persons licensed under chapter 2, title 54, Idaho Code, provided the license held by such persons is in an active status;

(c) Persons licensed under chapter 1, title 3, Idaho Code, provided the license held by such person is in an active status;

(d) Persons determined by the Internal Revenue Service to be tax exempt pursuant to section 501(c)(3) of the Internal Revenue Code.