I want to begin by thanking the Loyola University Chicago Consumer Law Review for hosting this excellent and timely conference, and for honoring me with this invitation to speak. I was particularly honored when I saw the line-up of esteemed professors on the panels. I have personally worked with and learned much from several of them, and I know they all have a lot of valuable insight to share. These are not just “ivory tower academics”: their work is of great practical importance in the critical arenas of mortgage lending and foreclosure prevention.

For those of you who traveled here from out of town, welcome to our fair city, the City of Broad Shoulders where we make no small plans (such as the Chicago Spire) and leave no small holes (such as the huge hole dug to build the Chicago Spire). I begin with this image of the Chicago Spire, which, at 120 stories, was supposed to be the tallest residential building in the world, a wondrous crystalline structure twisting upward toward the heavens. Instead it became a hole, and a lawsuit. In the context of today’s symposium, the Chicago Spire serves a double purpose: its untimely demise was both caused by, and an apt metaphor for, the subprime debacle.

One morning a few weeks ago I left my Rogers Park two-flat, headed for the el, and hopped on the Red Line. Settling into my seat I

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popped open my *Chicago Tribune* and began reading. On that particular morning, I was struck by three related news items.

The first was a report focusing on a disturbing aspect of the increasing wealth gap in our nation. A report from the Corporation for Enterprise Development offered new statistics on the asset poor, meaning those who do not have three months’ worth of savings. The *liquid* asset poor might have three months’ worth of savings, but only if forced to sell illiquid assets like a house or car, hard to do in a pinch. These are people who are living on the edge: one serious blow, like a reduction in work hours or a serious medical problem, will send them over the edge into virtual or actual bankruptcy. The staggering figure contained in this report: almost one out of every two Americans is liquid asset poor.

The second news item from that morning’s *Trib* indicated that Chicago now ranks as the most segregated large city in America. The third item informed Chicagoans that their home values have now dropped to 2001 levels. My two-flat is now worth about a flat and a third.

These three news items have been rattling around in my head ever since. They bear a number of connections to one another, and to cases I’ve handled over the years.

One of my favorites involves a client named Mabel. Mabel’s case dates from what I think of as the Gilded Age of Subprime. The era of the late 1990s and early 2000s when, as they say, all you needed was a pulse to get a loan—and sometimes not even that. For a long time, most of our practice involved cases like Mabel’s.

Mabel was 79 years old. (By the way, I have changed some of the names and details of this and other cases “to protect the innocent”—but, in this case, I will *not* be changing the name of the lender, Countrywide).

Mabel lived in a tidy South Side bungalow which she’d owned for nigh on 40 years. She was widowed. Having lost her husband’s income, she was struggling to keep up on her mortgage payments. She could easily have qualified for a reverse mortgage, a special mortgage available for seniors funded solely from home equity, and not requiring monthly payments. With such a loan, Mabel could have paid off her old mortgage, but the broker who “helped” Mabel did not advise her of this. Instead, he took advantage of her trusting nature and her mild senile dementia. Specifically, he sold her on a refinance loan of the stated income variety, that wonderful product of yesteryear where the lender doesn’t have to verify the income, but can rely solely on the income figures written down on a
loan application. The numbers are written down by a mortgage broker, and are routinely inflated, hence the industry’s own name for these mortgages: liar loans. Often, the borrower does not even realize what is going on. Or, if the borrower does notice the flaky numbers, the broker greases the wheels of the transaction by saying something along the lines of, “Don’t worry, this is how it’s done all the time.”

Unfortunately, that last part was true.

In Mabel’s case the loan application stated that she made $7,000 a month working as a housekeeping supervisor at The Manors, written to look like some kind of retirement home or other institutional setting. In fact, Mabel made $700 a month, working a day or two a week cleaning the home of her neighbors, John and Susan Manor. To me the most interesting part of this fabrication was the amount by which the broker inflated the income. Four thousand a month would have been enough to justify this loan on paper, so why go all the way to seven? It’s like, what, the broker’s thinking, “if I get caught I can always say, oops, I guess I just accidentally wrote down one zero too many?”

Anyhow, it worked, and the loan, massively unaffordable, went through. Like thousands of others that year, and the next, and the next, and the next, until the whole subprime monster collapsed in on itself. Liar loans like this made many a broker a hefty pile of cash, and generated happy car dealers all up and down Western Avenue. There were many other types of fraudulent and irresponsible loan practices and products used during the subprime boom, but liar loans were, for my money, the most egregious and the most directly related to the rotten core of the subprime mortgage industry.

There was clearly a level of shared responsibility for liar loans. Brokers pushed them, but the lenders behind the brokers knew they were doing so. Indeed, I’ve heard brokers describe how lenders would come to them and train them in how to sell irresponsible new products like stated income loans. So, even when it was not clear on the face of the paperwork contained in the loan file, lenders knew what was going on. It was the business model. It was all about volume. Many loans were doomed to fail, but, for a while, lenders were making too much money to care.

We advocates knew this, but it was often hard to translate that knowledge into legal relief. In a typical case, the borrower defaults, and the lender – or the lender’s distant assignee, like the trustee of a giant loan pool – forecloses. We may know the broker fabricated income, but it can be hard to find and serve such a broker, or, if we do, the broker may no longer be solvent.

In Mabel’s case we were lucky. We were able to find and
bring the broker into the case, and he still had some cash. Equally important, we were able to show that the lender, Countrywide, actually had reason to know what was going on. Once we served discovery on Countrywide we found a document in the loan file called a “Verification of Employment,” or VOE. The VOE was a clever ploy – a so-called due diligence document purporting to show that the lender had done more than simply rely on the loan application submitted by the broker. The VOE indicated that someone from Countrywide had called to verify Mabel’s employment. But Countrywide did not verify her income. The income line did not show a number, but rather the hand-written word “stated.”

While the VOE may have passed someone’s muster, it did not pass ours. We knew that, if pushed, there was no way Countrywide was going to produce a witness to testify it had used the VOE in good faith. We felt it showed, instead, that Countrywide was aiding and abetting the broker’s fraud.

With this document, we were able to settle. We knocked off tens of thousands of dollars of mortgage debt and got Mabel the reverse mortgage she should have gotten in the first place.

Thousands of Chicago homeowners have not been so lucky. Before the subprime boom, back in the mid 1990s, annual foreclosure filings in the Chicago area were in the four-digit range – five or so thousand per year. Since the bust, in 2007, the number of foreclosures has been 50,000 a year. Even at a low estimate of one-third, this means 15,000 completed foreclosures per year – 15,000 homes lost to foreclosure. In certain neighborhoods you can see board-ups all up and down the street. The economic and human costs have been staggering.

In the spring of 2006 I testified before the Federal Reserve Board here in Chicago. I shared Mabel’s story and others of homeowners sucked into hopeless mortgages, be they stated income, low doc, no doc, or my favorite acronym from that era: NINJA, meaning “No Income, Job, or Assets.” Advocates testified at Fed hearings around the country. Two years later, in 2008, the Fed finally used its regulatory authority to outlaw stated income loans for so-called higher-cost mortgage loans. A welcome step—except that the market for higher-cost loans had collapsed a year earlier.

Another client of ours I will call Keisha. Keisha’s case is of a different sort. It is what we call a foreclosure rescue fraud case.

In the early 2000s the subprime bubble began to expand in earnest. Many of us working on behalf of homeowners saw this as an indication that the bubble would soon burst, but this was not yet a
common perception. As the bubble expanded, foreclosures began to rise. But home values were still going up, so many of those facing foreclosure still had equity in their homes.

This was the perfect recipe for a new kind of mortgage scam known as foreclosure rescue fraud, a/k/a deed theft. These cases made up a large part of our practice beginning around 2005.

Keisha owned a two-flat on the West Side. She was working as a security guard and collecting rent from her second-floor tenant, trying to keep up with her bills and put her son through college. She fell behind on her mortgage when her tenant stopped making payments. Worse, it soon became clear that her tenant was involved in drug activities when the police raided her apartment. Keisha had to evict her, which was both costly and time-consuming. She fell further behind on her mortgage and a foreclosure case was filed.

Keisha reached out for help. She heard an ad on her favorite local gospel radio station. The ad was for a company that said it could help save people’s homes from foreclosure. The name of the company was comforting: “Eyes Have Not Seen,” a variation on a New Testament bible verse.

Keisha wrote down the number, called, and the next day, she received a visit from a man who, I am happy to say, was recently sentenced to 22 years in federal prison. But, before he was, he persuaded Keisha and hundreds of homeowners like her that, as her “brother” – both religiously and racially – he could help her in ways that “others” were not willing to. He would put her in a special program enabling her to get out of foreclosure, buy her time to repair her credit, and then, after 12 months, help her qualify for a new, affordable loan. What he didn’t tell her was that out of the hundreds of homeowners his company had “helped,” none of them ever got that new loan.

Several of our clients testified at the trial. They helped establish the shoddy nature of the business, and how they were duped. But the focus of the trial was the fraud committed against the banks. White had to falsify the status and the income of the so-called purchasers of the homes, the straw buyers who took out the newer, higher, equity-stripping mortgages. The straw buyers had no real interest in the property and never made payments on the new loans. The only payments made were the first 12 payments funded by an escrow created by the loan itself. Like the rescue deals themselves, these straw buyer loans were doomed to fail.

Why did lenders make these loans? They will argue they were duped by the Charles Whites of the world. There is some truth to this, but I also believe that, as with the avalanche of no doc, low doc,
stated income, and NINJA loans I mentioned earlier, lenders generally turned a blind eye in issuing these rescue fraud loans. And they did so for the same reasons: for a long time, while the bubble was still expanding, they were doing just fine.

In any event, I am happy that, in this case, the interest or our clients and the banks converged. We both wanted to nail Charles White, who recently arrived for an extended stay at FCI Milan. I know, it sounds like he’s gone to play soccer in Europe, but, no, FCI stands for “Federal Correctional Institution,” and this Milan is in Michigan.

As for Keisha, we’ve been able to settle her case and save her home. The current owner of the rescue mortgage, which is willing to let Keisha assume the mortgage and renegotiate its terms, is willing to reduce principal all the way down to current market value. And—amazingly—we’ll be reducing the interest rate all the way down to zero. This is one of the best outcomes we’ve achieved. I’m not quite sure how we got it—unless it has something to do with FCI Milan.

Fast forward to 2009, implementation year for HAMP, the Home Affordable Mortgage Program. Since that time a growing number of our cases have involved efforts to get HAMP loan modifications. It was in the spring of that year that the Obama administration rolled out the Making Home Affordable Program, one dimension of which requires lenders to offer loan modifications under certain circumstances. To be clear, it is actually servicers who are covered by HAMP. Servicers are the companies which service the loan accounts on behalf of the ultimate owners, or investors.

Under the HAMP program, borrowers paying more than 31% of their income toward housing costs are able to apply for a modification of their existing loan, in hopes of reducing their payments to 31%. This is achieved through a combination of reducing the interest rate, amortizing payments over a longer period of time, and deferring a portion of principal owed to the back of the loan where it sits, bearing zero percent interest, until the date of maturity.

HAMP was a game-changer. We’d sought loan modifications in the past, but HAMP mandated them, or at least mandated that servicers process HAMP applications and offer them in most cases, so long as a given HAMP mod is more economically advantageous than the alternative—foreclosure. Recipients of government largess in the form of TARP funds had to participate. Fannie and Freddie loans were covered. Eventually, most large servicers signed up, so most of the market was covered.

HAMP mods can cut payments in half, sometimes even more.
When you can get them, they can make all the difference in saving a home.

It’s the “when you can get them” that is the problem. Initially, several million families were supposed to get HAMP mods. It has turned out to be less than a million. To some extent, the original estimate was overly optimistic, in terms of affordability. After HAMP was implemented, the economy kept getting worse. More people than anticipated simply couldn’t afford their homes, with or without a HAMP mod.

But it is also true that servicers have often done a terrible job of processing HAMP mod applications. Improper denials or failures to approve HAMP mods have led to wrongful foreclosures and improper sales. Many thousands of homeowners have lost their homes when they should have received HAMP mods instead.

For anyone who deals with servicers day-in, day-out seeking HAMP loan modifications, the word that leaps to mind is “Kafkaesque.” And so, for this segment of our docket, instead of detailing one particular story, I will offer up a sampling of Kafkaesque vignettes.

This first one comes from a colleague of mine. The servicer rejected Doris’ HAMP mod application because the name on the loan account was John, her husband. But John had died. The servicer asked for a death certificate. Fair enough. The attorney obtained one and sent it in. Further information was requested. The information was provided on a new form that was sent in. The form was returned, since it hadn’t been signed by John. The attorney reminded the servicer that John was dead. The servicer asked for a death certificate. The servicer was reminded that a death certificate had already been sent in. The servicer couldn’t find it. Wasn’t there some designation of death on the account? No, the servicer needed another death certificate. So another copy was faxed. This went on and on – a total of seven times. Now, I understand that servicers need updated pay stubs, which go stale after 60 days. But, what, are they afraid that after 60 days a dead person may no longer be dead?

Numerical repetition is a theme in this line of work. One of my attorneys recently suggested we coin the phrase, “Fifth time’s a charm,” when her client’s fifth loan application was finally approved, after four denials, all for different reasons. This suggests that, sometimes, if you just keep reapplying, they will finally run out of reasons to say no.

Another client had entered into a TPP, or trial period plan, a short-term plan requiring three payments, after which a borrower is supposed to be automatically converted to a permanent modification.
But after his third payment, the servicer started to return the payments. Confused, we called and sought an explanation. The servicer stated they were sorry the homeowner had decided not to continue with the plan. “What do you mean?” We asked. “Well,” responded the servicer, “the borrower wrote us a letter telling us they had changed their mind and no longer wanted the mod.” Our client was, of course, quite surprised to learn that he had written such a letter. But perhaps he had, and had mailed it—in his sleep, say. It was possible. Yet, not surprisingly, the servicer was unable to produce any such somnambulistic missive.

Another favorite of mine was a request from a servicer that we fax a document to help sort out a dispute. Our paralegal reached someone on the phone—always a small miracle in itself. She had just faxed the document. She offered to hold while the servicer representative went to get the fax and look at it, so they could work out the problem. The servicer rep demurred. Our paralegal asked why. The rep sheepishly admitted he could not walk from his cubicle in Bangalore to pick up the fax from the machine in Florida.

My all-time favorite, though, is the time one of our attorneys, having almost given up after being on hold for half an hour, was told that he would be transferred to a different department after another “short” hold. He was put on hold a second time, and, while waiting, his other line rang. He debated whether to put the first line on hold from his end, fearing that, if he did so, he could miss making his connection. But he decided to do so. After he put the first line on hold and picked up on his second line, he heard a familiar voice—his own. Yes, he had been transferred to himself. Unfortunately, he hung up before realizing that he could have asked for any terms he wanted that day.

This is but a sampling. Any advocate who does loan mod work can tell you these stories. Certainly, there are borrowers who get loan mods on their own, some with ease. But there are many more where homeowners and their advocates experience these Kafkaesque scenarios. Servicers lose paperwork. They refuse to honor loan mods entered into before a loan account is transferred. Three different servicer reps give three conflicting pieces of information. The servicer sits on paperwork for 60 days and says it can’t use information more than 60 days old. And on and on. Every day we do cases like this which are like nothing so much as pulling teeth. It is our new legal niche: loan mod dentistry.

Now let’s talk solutions, or at least suggestions. There are, of course, no easy solutions, nor is there any single fix. Probably there are no ten measures which, if implemented, would fix everything that
is currently wrong with the housing market. But as I was preparing these comments, three suggestions came quickly to mind.

**Number One:** Do everything possible to require principal reductions where homeowners are underwater.

**Number Two:** Do everything possible to enforce the servicing standards included in the nationwide settlement with the Attorneys General.

**Number Three:** Do everything possible to support a strong and independent Consumer Financial Protection Bureau.

Let me say more about each of these in turn.

**Number One:** Do everything possible to require principal reductions where homeowners are underwater.

Three years ago I stood outside on a cold winter’s day alongside a client of mine whom we were representing in a foreclosure case. Diana and her husband Edgar had adopted several children and were in the process of getting licensed to run a day care center. They fell behind when, though no fault of their own, there was a lapse in DCFS adoption support payments. They came to us for help. They had taken out a loan with one of the big, bad subprime lenders of yesteryear – Ameriquest – which had overcharged them on fees and underdisclosed the true cost of the loan. We filed claims under the Truth in Lending Act, but we also sought a loan mod. Indeed, Diana and Edgar had at one point been promised a loan mod, but then the loan account was transferred and the new servicer reneged on the deal. On top of all this, Diana and Edgar were underwater: their debt exceeded the value of their home, which is now the case with about 1 in 3 Chicago homeowners.

Diana and I were standing outside in the cold as part of a press conference held by Senator Dick Durbin, who was promoting a bill to allow judicial modifications of mortgage debt in bankruptcy. Under the bill, underwater homeowners would be able to file bankruptcy petitions and have their mortgage debt reduced to the amount of the fair market value of their home. Judges would also be able to adjust interest rates down from predatory – or just plain outdated – levels to current, lower levels that would still provide a fair return to the lender.

Allowing such modifications would serve as a valuable legal tool for homeowners who could afford to make payments on their homes in line with current economic realities. It would prevent homeowners from walking away from underwater homes they couldn’t afford, where it now made little sense to pay on a mortgage worth more than the home. It would allow homeowners to make realistic payments. This would benefit lenders, too, since in most
cases the alternative would be foreclosing on a home, a costly venture in which lenders usually lose out. Indeed, one Chicago study found the average total losses on a completed foreclosure sale to be $70,000.

By the way, most other kinds of property can be judicially modified in bankruptcy. A car, even a luxury car. A yacht. A vacation home, time share, or other type of second home or investment property. All the kinds of properties that more affluent bankruptcy filers can modify downward to help save their property. But if all you have is your primary residence, you’re out of luck.

The bankruptcy bill would have helped homeowners forced to file bankruptcy, but it also would have helped other homeowners. Just the knowledge that a homeowner could modify in bankruptcy would have changed the equation. It would have given homeowners more leverage. Lenders would have been more willing to reduce principal on their own, knowing that, if they didn’t, they could get tangled up in bankruptcy where a judge would make them do so.

No surprise: the industry fought this bill tooth and nail. In the early days of the Obama administration, the bill failed to pass on largely partisan grounds.

One aspect of the relief included in the recently announced AG settlement is a measure of principal reduction for some underwater loans. The relief is only partial, and it only applies to some servicers, and it only applies to some of those servicers’ loans. But it is a step in the right direction, and it is a direction in which we need to move more aggressively.

One servicer, Ocwen, is doing so. Its program includes a shared appreciation feature. If a borrower’s principal is reduced to home value, and the home value later increases, and the borrower sells and realizes that higher value, Ocwen gets back a percentage of the appreciated value. This is a reasonable compromise. Other servicers have not followed suit, apparently because Fannie Mae and Freddie Mac will not allow principal reductions. This policy needs to change.

Number Two: Do everything possible to enforce the servicing standards included in the nationwide settlement with the Attorneys General.

A couple of years ago we began to hear about “robo-signing.” It was learned that national mortgage servicers were mass-producing fraudulent affidavits in support of foreclosure judgments so as to keep up with all the foreclosures they were seeking. The chickens were coming home to roost. All those mass-produced bad subprime loans doomed to fail were now failing, and lenders wanted to
foreclose on them, and they needed a mass-produced way to do so. Hence robo-signing.

State Attorneys General began conducting investigations into robo-signing, as well as other fraudulent and unfair servicer practices, like the loan mod madness I described earlier. After many months of investigations, and negotiations, the AGs recently announced a nationwide settlement. As currently announced, the settlement would provide an estimated $25 billion of payments or credits to help certain categories of aggrieved homeowners, or former homeowners. The settlement would also establish broad new servicing guidelines for the industry.

It is these servicing standards on which I want to focus. On paper, they look great. If followed, they will eliminate the type of Kafkaesque experiences mentioned earlier, and they will impose sanity on the entire loss mitigation and foreclosure process, including the application process for HAMP mods. No more robo-signing. No more dual-tracking, that is, simultaneously processing a loan mod and advancing a foreclosure, to the utter confusion of the borrower. Better information, better responsiveness, more reasonable foreclosure fees. On and on goes the list, 10 pages in all. One of my favorites, as a huge fan of Star Trek, is the required Single Point of Contact, whose acronym is “SPOC.” How better to introduce logic into an illogical system?

I do want to emphasize, however, that my suggestion is to do everything possible to enforce all of these new standards. Many of them are already required of servicers, to no avail. Servicers are already required to comply with HAMP, and with, for instance, the Servicemembers Civil Relief Act, which takes up a page of the AG standards. The bottom line is that, from everything we have seen over the years, servicers are not going to voluntarily comply with all of these good measures on their own. Their record of compliance with applicable laws has been a poor one, and there is no reason to suppose they will change overnight. It will take external pressure, vigilance, and enforcement.

By the Attorneys General, first and foremost, and by the independent monitors required by the settlement. Also by other government agencies and policymakers. By the courts, and by judges, and by attorneys, both private and public.

So, our loan mod dentistry continues. Hopefully we now have a more powerful drill.

**Number Three:** Do everything possible to support a strong and independent Consumer Financial Protection Bureau.

The Consumer Financial Protection Bureau, or the CFPB, is
the legislative highlight of the past few years, along with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which created the CFPB.

I first heard about the idea of this bureau in 2004, when I attended a consumer law conference and had the pleasure to hear a keynote address given by none other than Elizabeth Warren.

(I know what you’re thinking right now. You’re feeling cheated. You only got me. I understand.)

But at least I can give a report on “Elizabeth Warren: The Early Days.” Back then, Professor Warren was just starting to go public with her radical idea of a federal consumer finance protection agency. She noted that you can’t buy a can of creamed corn that isn’t regulated, for fear of botulism. You can’t buy an unregulated toaster, for fear it might explode if your toast is too thick. But, you can get a mortgage and put your home and your greatest asset at risk, and the product you’re getting is almost entirely unregulated in any meaningful way.

Well, Professor Warren’s idea may have sounded radical to some, and that is certainly how the mortgage lending industry characterized it, and still characterizes it, but it was an idea whose time had come. And so was born the CFPB, despite all the opposition from the consumer finance industry.

Already, the CFPB is doing some amazing work. Through its web site and town halls and other forms of outreach it is modeling the practice of testing, and surveying, and seeking extensive public feedback, all before promulgating new consumer disclosure forms. The CFPB is showing that it intends to be an agency of the people, by the people, and for the people.

But, ironically, the consumer finance is no less powerful today than it was 5 years ago, on the eve of the subprime collapse. The industry continues to fight to defang the CFPB. The first gambit was to keep the agency leaderless. Now, the CFPB has a leader, but opponents will continue to seek to weaken the agency through lack of funding and lack of independence. We can’t let that happen. Moving forward, we can’t forget the economic disaster that was created by the unregulated profit-seeking of the industry. We need to maintain a strong CFPB.

I finish by returning to the image of the Chicago Spire. We here in Chicago are rightly proud of our great architectural and economic heritage. I don’t think we should stop dreaming big. But in this case we can learn a lesson in humility from a surprising source – none other than Donald Trump. The Trump Tower Chicago was originally going to be taller than the Sears Tower, well over 100
stories. Economic realities downsized it to a mere 92 floors. Donald Trump predicted the Spire would be a flop. He was right, and, unlike the Spire, his tower actually got built, and has done well.

Sometimes less is better. Hopefully that is a lesson we have all learned from the subprime mess, and will put to good use in the future. Thank you.