
REMAPPING DEBATE

Asking "Why" and "Why Not"

First, ‘blame the borrowers.’ Now, ‘blame the lawyers.’

Press Criticism | By Greg Marx, Craig Gurian | Wall Street Journal

October 26, 2010 — Ryan Chittum, who covers the business press for the Columbia Journalism Review, has a phrase to describe press coverage that attempts to obscure the central role played by mortgage lenders in creating the housing crisis: [“blame the borrowers.”](#)

Last week, The Wall Street Journal added a new wrinkle to this strategy. Call it “blame the lawyers.”

There is, according to the story’s unmistakable flavor, something irredeemably shifty about these clever foreclosure defense lawyers.

[“Niche Lawyers Spawned Housing Fracas,”](#) declared a front-page, above-the-fold headline in the Oct. 21 Journal. The “fracas,” of course, is the recent freeze in foreclosures adopted by some mortgage holders, and the ensuing confusion about the fate of those homes and their current and prospective residents. (Though, it’s worth noting, the impact on the housing market [may not be quite as widespread](#) as the paper suggests it might be.) This unsettled situation has been “spawned,” the article tells us, not by the practices of the companies that fostered widescale fraud and negligence as they prepared to foreclose on homes and evict residents, but by the lawyers who brought that fraud to light.

The story opens with an anecdote about a free-loading Florida couple still in their home despite not having made a mortgage payment in years. This unnatural situation has been brought about by “the growth of a legal sub-specialty called foreclosure defense that has sown confusion and turmoil in the housing market,” whose practitioners are using — gasp! — “probing depositions” to uncover wrongdoing. Then, before we actually get to hear from any of these scoundrels themselves, there’s this:

The great majority of delinquent borrowers don’t hire lawyers but leave the home right before getting evicted. Some lawyers who represent financial institutions take a dim view of the growing ranks of lawyers pushing for a different outcome.

“There is a movement afoot by [state attorneys general] and private lawyers to use technical problems to avoid foreclosures where the borrower is in default and the foreclosure is in all respects substantively appropriate...” said Andrew L. Sandler, a Washington securities lawyer who represents banks and firms that service mortgages.

Mr. Sandler added: “The class-action lawyers are swarming around this issue right now, because they perceive that it can result in significant fees for them. But they’re not well-founded cases, and the banks will vigorously contest any class action around these issues.”

(It’s shocking to learn that some bank lawyers take a “dim view” of their opponents here, isn’t it?)

Mr. Sandler sounds like he’s channeling the Journal’s own editorial board, which, less than two weeks earlier, opined that this business concerning which anonymous employee signs the paperwork that takes away your house is all much to-do over very little, and that “we’re not aware of a single case so far of a substantive error.”

But it’s not only Mr. Sandler who appears to be doing the channeling. “Niche Lawyers” itself asserts that the “the big risk to banks and the housing market” is not that banks engaged in practices that were either fraudulent or, at the least, clouded clean lines of title, but rather “that more homeowners and lawyers [may] come to see such cases as attractive to fight.” The story, stuck in the “greedy lawyers” frame, never examines why more and more homeowners and attorneys would come to bring these cases, if, as those defending bank practices say, the cases ultimately will be found to be without merit.

The Journal’s editorial writers might be forgiven for missing some of the excellent early reporting on this scandal, such as Andy Kroll’s [muckraking exposé for Mother Jones](#) back in August, which did identify specific homeowners who faced proceedings from foreclosure-mill attorneys despite being current on their mortgages.

But that doesn’t explain why, just last week, a story in the Journal’s news pages was still giving pride of place to the “mere technicalities” line of argument, after accounts of “well-founded cases” about wrongful foreclosures appeared in the [Cleveland Plain-Dealer](#), the [Miami Herald](#), and – just a day earlier – the [Journal itself](#). There is plenty of evidence that some of the “risk” here is incurred by homeowners who would like to retain their lawful hold on their property.

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Ironically, some of the evidence is found in the second half of “Niche Lawyers” itself. One GMAC employee, the article reports, “regularly signed more than 10,000 court affidavits a month without doing the required review of loan files.” GMAC’s counter-attack — trying to get sanctions imposed on one of the lawyers who took a deposition of its employee — was rejected by a state court that found GMAC had submitted the underlying foreclosure affidavits “in bad faith.”

But these facts couldn’t, and didn’t, shake the predetermined trajectory of the story. One never hears — either from a lawyer or from a homeowner — that the work these lawyers were doing was entirely consistent with defending what is often said to be one of the most basic structures of a well-functioning

private property system: the existence of credible and transparent procedures for the determination of property rights. Instead, there is, according to the story's unmistakable flavor, something irredeemably shifty about these clever lawyers.

Indeed, one attorney has managed to make his way from "representing patients in malpractice suits and consumers who said they had purchased faulty products" over to the foreclosure arena. In short, the very villains that the Journal's editorial page points to in arguing that "tort reform" is urgently needed, are polluting other areas of the law.

In the end, even where the facts suggested a headline like "Banks being brought to account for foreclosure shortcuts and fraud largely through efforts of niche lawyers," that story was not brought to light.

The failure to grapple with possibilities didn't end there. Another broad problem at play here is this: even when a borrower actually is delinquent, the loan holder has a choice between moving toward foreclosure or trying to reach some modification of the obligation. Massive foreclosures were only "needed" to the extent that loan holders didn't take the second option seriously. The foreclosure fraud epidemic is, as [William K. Black recently told Dan Froomkin](#), an "echo" of the mortgage fraud epidemic. One was about moving people into homes as quickly as possible, to create the raw material for exotic financial securities; the other is about moving them out as quickly as possible, and, as Kroll showed, tacking on lots of fees along the way.

One key element of framing this story rested on an underlying assumption about how "necessary" mass foreclosures are. If you believe, as some observers apparently do, that the swift and certain displacement of many thousands of families from their homes is an essential prerequisite to getting the housing market functioning again, you might be bothered by anything that slows down that process. The prospect of some of those families actually getting competent legal representation is a risk only where "efficiency" is the sole value.

If, on the other hand, you believe that a step along the path back to a healthier economy could involve finding ways for more of those families to stay in their homes — thus, for example, avoiding the [negative effects of foreclosures](#) on the value of surrounding properties — and that policy decisions to date have not sufficiently taken that into account, a bit of delay might not be such a bad thing. So there really might have been another alternative for the Journal: "Niche Lawyers Spawned Foreclosure Policy Re-evaluation." Imagine that.

(H/t [Chittum](#) for the Plain-Dealer, Herald, and Oct. 20 Journal links.)

This content originally appeared at <http://remappingdebate.org/article/first-blame-borrowers-now-blame-lawyers>