**COMMONWEALTH OF MASSACHUSETTS**
**APPEALS COURT**

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| COMMONWEALTH OF MASSACHUSETTS,<br><br>Plaintiff,<br><br>- against -<br><br>FREMONT INVESTMENT & LOAN, And FREMONT GENERAL CORPORATION,<br><br>Defendants. | Appeals Court No.<br><br>(Suffolk County Superior Court, Business Litigation Section Civil Action No. 07-4373-BLS1) |

# BRIEF OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE CONSUMER MORTGAGE COALITION, THE HOUSING POLICY COUNCIL OF THE FINANCIAL SERVICES ROUNDTABLE, AND THE MORTGAGE BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS' PETITION FOR INTERLOCUTORY RELIEF

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## INTEREST OF *AMICI*

This brief is filed by the American Financial Services Association, the Consumer Mortgage Coalition, the Housing Policy Council of the Financial Services Roundtable, and the Mortgage Bankers Association (collectively the "*Amici*").

The American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry protecting access to credit and consumer choice. AFSA's members include, among others, industrial banks, mortgage lenders, credit card companies and diversified financial services firms. AFSA has provided services to its members for over ninety years.

The Consumer Mortgage Coalition ("CMC") is a trade association of national mortgage lenders, mortgage servicers, and mortgage origination-service providers, committed to the nationwide rationalization of consumer mortgage laws and regulations. The CMC regularly appears as *amicus curiae* in litigation with implications for the national mortgage lending marketplace.

The members of the Housing Policy Council of the Financial Services Roundtable ("HPC/FSR") are 23 of

the nation's largest mortgage lenders. It is estimated that the members of the HPC/FSR originate over 65% of mortgages for American home buyers.

The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry, an industry that employs more than 370,000 people in virtually every community in the country. Its membership of over 2,400 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

The *Amici* frequently appear in litigation where the issues raised are of widespread importance and concern to their members. That is the case here, because the lower court's order unjustifiably exposes the residential mortgage industry to significant risks of unquantifiable liability. If a loan complies with federal and Massachusetts law, and if the loan is generally considered fair at the time it is made, lenders must have confidence that the loan complies with Massachusetts law. The lower court's order

destroys this confidence. Given the severe penalties available under G.L. 93A, both in civil damages and equitable remedies, and the likely impact on the residential mortgage market in Massachusetts, this issue is of crucial importance to *Amici*'s members and to the financial services industry generally.

## INTRODUCTION

The superior court's preliminary injunction order --stopping foreclosures on loans it held are valid--is a breathtaking usurpation of the legislative role. The lower court acknowledged that the loans at issue did not violate any of Massachusetts' extensive (and recent) body of statutes or regulations. Neither Massachusetts law then nor now would make the loans originated by Fremont presumptively unfair. The lower court has created a legal requirement that neither the Legislature, the Commissioner of Banks ("Commissioner"), nor even the Attorney General had seen fit to create. Massachusetts law simply does not support such judicial activism.

The lower court's *ex post facto* order is not only wrong as a matter of law, it is wrong as a matter of public policy. The lower court's preliminary injunction order, intended to help a relatively small number of Massachusetts consumers, threatens to harm a much larger number. Because the lower court's order is precedent that loans can violate Massachusetts law even if the loan complies fully with all statutes and regulations, no lender can know at the time a loan is made if the loan complies with Massachusetts law.

This court-created uncertainty might well have devastating effects on Massachusetts consumers.

## BACKGROUND

The lower court reached its unprecedented conclusion that certain loans are "presumed to be structurally unfair" even though it acknowledged that "there was no federal or Massachusetts statute or regulation applicable to all mortgage loans that expressly prohibited" the loans at issue. (Order, at 15, 20.) And it did so notwithstanding its acknowledgement that "the lending conduct this Court describes as unfair was not generally recognized in the industry to be unfair at the time these loans were made." (*Id.* at 22.) And it did so even though the court conceded that "we, as a society," did not consider these loans to be generally unfair. (*Id.* at 25.) The court also found that there was no evidence that Fremont made or knew of any misrepresentations to borrowers. (*Id.* at 12-13.)

Even though the loans violated no provision of Massachusetts' extensive statutory or regulatory regime, the court looked to the "spirit" of the law rather than its plain language. (*Id.* at 16-17.) The Predatory Home Loan Practices Act (the "PHLPA") is

expressly limited to "high cost mortgage loans." G.L. c. 183C, § 2. The lower court acknowledged that the loans at issue are not "high cost mortgage loans" and therefore not subject to the PHLPA. (Order, at 17.)

Notwithstanding the plain language of the statute, the lower court resorted to what it believed the Legislature "thought" and "imagined" when enacting the PHLPA. (*Id.* at 21.) And based on its belief of what the Legislature "thought" and "imagined"--but never said, much less passed into law--the lower court made the leap that the Legislature somehow created an unarticulated "concept of unfairness" that applies to "any mortgage loan." (*Id.* at 20 (emphasis in original).) Then, looking to "the penumbra of that concept of unfairness," the court made another leap and found that loans with the four characteristics it selected are presumptively unfair. (*Id.*)

Thus, in spite of the plain language of the PHLPA, the lower court divined a previously unknown "concept of fairness" based solely on what it thought the Legislature would do (but did not do), and from the "penumbra" of that newly divined concept created new law that applies to the entire mortgage lending industry. Not only is the lower court's order bad

law, but it threatens to cause significant harm to Massachusetts consumers and the Massachusetts mortgage market generally.

## ARGUMENT

### I. THE LOWER COURT'S ORDER IS CONTRARY TO MASSACHUSETTS LAW.

The court recognized that the loans at issue did not violate any Massachusetts statute or regulation. Massachusetts has one of the most (if not the most) comprehensive and expansive bodies of law governing mortgage lending of any state. The Massachusetts Legislature has enacted numerous statutes that impose many significant requirements on mortgage lenders,[1] including substantive limitations on loan structures and fees. *See, e.g.*, G.L. ch. 183, §§ 60-63. The Commissioner also has issued numerous regulations and extensive guidance applicable to mortgage lending,[2]

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[1] *See, e.g.*, G.L. c. 183C (Predatory Home Loan Practices Act); G.L. c. 255E (Licensing of Certain Mortgage Lenders and Brokers Act); G.L. c. 140D, §§ 1 et seq. (state Truth in Lending Act), G.L. c. 93, § 58-60 (state Credit Reporting Reform Act); G.L. c. 93, § 24-28 (state Fair Debt Collection Act).

[2] *See, e.g.*, 209 CMR 18.00 (Conduct of the Business of Debt Collectors and Loan Servicers); 209 CMR 31.00 (Disclosure of Consumer Credit Costs and Terms); 209 CMR 40.00 (Unfair and Deceptive Practices in Consumer Transactions); 209 CMR 42.00 (Licensing of Mortgage Lenders and Mortgage Brokers). The Commissioner has also issued numerous Regulatory and Administrative Bulletins providing comprehensive guidance on mortgage lending and other financial issues. The Commissioner's Regulatory Bulletin Manual is available on the Division of Banks' website.

including guidance regarding adjustable rate mortgages ("ARMs") like those at issue here. *See, e.g.*, Reg. Bull. 1.3-101. The Attorney General has also issued extensive regulations applying Chapter 93A's prohibitions on unfair and deceptive acts or practices to mortgage lending. *See* 940 CMR 8.00.[3]

Given this extensive statutory and regulatory framework governing mortgage lending, the lower court's order is directly contrary to Chapter 93A itself. Section 3 of Chapter 93A expressly provides that "[n]othing in this chapter shall apply to transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the Commonwealth or of the United States." G.L. c. 93A, § 3 (emphasis added). There can be no question that Massachusetts' comprehensive and expansive legal regime qualifies under Section 3. Consequently, when lenders comply with the myriad statutes and regulations governing mortgage lending--as the court concedes Fremont has done here--they are exempt from Chapter 93A. *See, e.g., Rini v. United Van Lines, Inc.*, 903 F. Supp.

[3] Subsections 15-18 of 940 CMR 8.06 were added on October 17, 2007.

224, 231 (D. Mass. 1995) ("The rationale behind the exemption [in Section 3] is to ensure that a business is not subjected to 93A liability if it relies on activity permitted by law."), *rev'd on other grounds*, 104 F.3d 502 (1st Cir. 1997).

Not only is mortgage lending exempt from the purview of Chapter 93A, the court's order is squarely at odds with Massachusetts statutes. As Fremont correctly notes in its Petition, the Massachusetts Legislature enacted the PHLPA in 2004 after loans such as those at issue were commonplace and had been the subject of much regulatory attention. (Fremont's Br., at 10-11.) The lower court cannot expand the statute beyond the limits the Legislature has set. *See, e.g., Suliveres v. Commonwealth*, 449 Mass. 112, 116-117 (2007).

The court's order also goes well beyond the Commissioner's recent regulatory action. Just this month, the Commissioner updated its regulatory bulletin regarding the origination of subprime ARMs to first-time borrowers.[4] In its update, the Commissioner

[4] *See Updated Regulatory Bulletin 1.3-104 Subprime Adjustable Rate Mortgage Loans to First Time Home Loan Borrowers* (Mar. 12, 2008).

did not declare any category of loans to be presumptively unfair.

The court's order also goes well beyond--and is fundamentally inconsistent with--the Attorney General's own rules. In October of last year, the Attorney General amended its mortgage regulations to address additional mortgage lending practices.[5] The Attorney General--the plaintiff in this case--did not declare any category of loans to be presumptively unfair. Indeed, the Attorney General's new regulations provide that unfairness is determined "based on information known at the time the loan is made" and on what the lender "reasonably believes at the time the loan is expected to be made." 940 CMR 8.06(15) (emphasis added). The lower court reached its conclusion in spite of what everyone believed at the time the loans were made.

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[5] *See Notice of Public Hearing: Mortgage Lenders and Brokers Regulations, available at* http://www.mass.gov.

## II. THE LOWER COURT'S ORDER WILL HAVE SEVERE NEGATIVE CONSEQUENCES FOR CONSUMERS.

### A. The Lower Court's Order Creates Enormous Uncertainty in the Mortgage Industry and Will Constrict the Availability of Mortgage Credit to Consumers.

After the lower court's order, even lenders who comply fully with all federal and Massachusetts statutes and regulations, and who make only loans considered fair at the time, will not know if any loan could be found to be presumptively unfair years later. If the lower court's order is allowed to stand, lenders will always face the risk that a court could expand statutory or regulatory provisions based on "penumbras" of previously unknown "concepts of fairness"--as did the lower court here.[6] Such "Monday morning quarterbacking" is fundamentally inconsistent both with principles of American law and with the Attorney General's own regulations. *See* 940 CMR 8.06(15).

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[6] For example, Massachusetts law prohibits both prepayment penalties and balloon loan payments in "high cost mortgage loans." *See* G.L. ch. 183C, §§ 5, 8. In other loans, such terms are not prohibited by federal or Massachusetts law--indeed, are commonplace--and provide important benefits to consumers. Under the lower court's reasoning, however, such provisions could perhaps be found to be unfair--and in violation of Massachusetts law--based on a "penumbra" of a "concept of fairness" contained in the high cost mortgage loan law (or some other statute or regulation).

Lenders will now be unable to evaluate accurately the legal risk associated with any given loan.[7] This unquantifiable risk will significantly restrict the availability of affordable mortgage credit in Massachusetts. Those lenders who hold loans in their portfolios will be unwilling to make loans subject to unquantifiable liability. Indeed, they may be prohibited from doing so because making loans subject to such unquantifiable liability likely would be deemed an unsafe and unsound practice. Those lenders who sell most of their loans rather than hold them in portfolio (which includes most lenders) will not make such loans because they will not be able to sell them.

While the lower court's action is unprecedented, there are precedents of state legislatures prospectively creating unquantifiable liability for mortgage lenders and loan purchasers. Whenever a state law has created such unquantifiable liability, that law has choked off the availability of affordable mortgage credit to consumers in that state. For example, Georgia enacted a law in 2002 that provided

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[7] Liability under Ch. 93A is substantial: treble damages plus attorneys fees and costs per violation. G.L. ch. 93A, § 11. Additionally, injunctions like the one fashioned by the lower court impose severe financial costs on lenders and servicers.

for unquantifiable assignee liability.[8] As a result, many lenders substantially increased the price of loans to Georgia borrowers[9] while others left Georgia altogether.[10] The decreased availability of affordable mortgage credit was so harmful to consumers that the Georgia legislature quickly repealed the offending provision in 2003.[11] New Jersey had the same experience.[12]

Massachusetts' fate will be no better--and perhaps will be worse.[13] Massachusetts' experience could be worse both because the lower court's order

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[8] Ga. Laws 2002, p.455, § 1.

[9] *See, e.g.*, Testimony of Larry Craig, Chairman, The Bond Market Association, Before the Special Committee on Aging, United States Senate (Feb. 24, 2004) (noting that interest rates jumped approximately 250 basis points as lenders withdrew from Georgia); Harold Cunliffe, *Fair Lending Legislation Has Unintended Fallout*, ATL. J. CONST., Jan. 27, 2003, at A9; Robert Luke & Henry Unger, *Mortgage Loan Law Problems Start to Hit Home With Buyers*, ATL. J. CONST., Feb. 15, 2003, at F3.

[10] *See, e.g.*, Government Accountability Office, Testimony Before the Special Committee on Aging, United States Senate (Feb. 24, 2004).

[11] Ga. Laws 2003, Act 1, § 1.

[12] *See* Standard & Poor's, *Standard & Poor's Addresses New Jersey Predatory Lending Law* (May 2, 2003). The offending provision was quickly repealed as the adverse results became evident. *See* N.J. Laws 2004, ch. 84, § 4.

[13] Indeed, the uncertainty created by the Attorney General's new mortgage regulations--which arguably create less risk than the lower court's order--has even prompted some prominent banking lawyers to suggest that the regulations are tantamount to an invitation for lenders to stay out of Massachusetts. *See* Laurence E. Platt & Nanci L. Weissgold, *Don't Fence Me Out: Massachusetts Encourages Lenders to Stay Away* (Nov. 2007), *available at* http://www.klgates.com/files/Publication/f7f4d854-6f60-45eb-8954-1ef77e0f86b0/Presentation/PublicationAttachment/4a709abd-0abe-4ca4-9cdf-21dd3224fdb5/MBA_1107.pdf.

prevents mortgage holders from foreclosing on delinquent borrowers and because of the retroactive nature of the action. Interest rates on mortgage loans are much lower than for unsecured loans (like credit cards) because mortgage loans are secured.[14] No rational investor would pay secured-loan prices for an unsecured loan--or for loans with unenforceable security interests. And while current market conditions have limited the availability of some loan products, this increased uncertainty will further limit that availability and prevent them from being offered more broadly when market conditions improve.

### B. The Uncertainty Caused by the Lower Court's Order Will Have Potentially Devastating Consequences for Massachusetts Consumers.

It is hard to imagine this reduction in the availability and affordability of mortgage credit happening at a worse time. Many Massachusetts consumers--not just subprime borrowers--received ARM loans with the intention of refinancing the loan once

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[14] The Federal Reserve Board's most recent report indicates that the average interest rate for a 24-month personal credit card is 12.16%. *See* Federal Reserve Board, Statistical Release G.19 (Consumer Credit) (Mar. 7, 2008), *available at* http://www.federalreserve.gov/releases/g19/Current. In contrast, the average interest rate for a conventional mortgage is 6.13%. *See* Federal Reserve Board, Statistical Release H.15 (Selected Interest Rates) (Mar. 17, 2008), *available at* http://www.federalreserve.gov/releases/h15/current.

the loan changed from a fixed to variable rate. With declining home values[15] and current market volatility, many of these borrowers already will find it difficult to refinance in the near future. The lower court's order will only make it more difficult for ARM borrowers to refinance. Ironically, the lower court's order likely will exacerbate borrowers' distress and likely increase their rates of delinquency.

The lower court's order will also make it much harder for many borrowers with equity in their homes to tap into that equity to help them weather tough times. For most homeowners, their largest financial asset is the equity in their home. In the past, when these homeowners experienced financial difficulties (e.g., job loss, medical expenses, etc.) they could draw on the equity to help them through those difficulties. However, borrowers with financial difficulties are more likely to pose higher credit risks and, therefore, less likely to qualify for conventional mortgage products. As a result, many

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[15] For example, the Office of Federal Housing Enterprise Oversight's Housing Price Index shows that Worcester, Massachusetts experienced at least a 1% decline in housing prices during each quarter of 2007 compared to the previous year, with the decline reaching 3.10% in the fourth quarter of 2007. *See* http://www.ofheo.gov/hpi_city.aspx.

Massachusetts consumers who otherwise would have been able to remain in their homes during difficult periods will have little choice but to sell--and, given current housing prices, potentially for a loss.[16]

The lower court's order also threatens to stifle innovation and prevent many Massachusetts consumers in the future from participating in the American dream of homeownership. Innovations in the mortgage market have enabled more Americans to own their own home than at any time in our nation's history. Many of the products we now think of as conventional--including the 30-year fixed mortgage--were once radical departures from established lending practices.[17] Several noted housing economists have argued forcefully that innovations in the mortgage market have made homeownership available to more Americans--

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[16] *Amici* are concerned that if Massachusetts consumers cannot obtain affordable mortgage financing from legitimate lenders, they may turn to illegitimate sources. For example, many consumers in Massachusetts and nationwide have fallen victim to foreclosure rescue scams. The Attorney General recently issued emergency regulations aimed at preventing such foreclosure rescue scams. *See* 940 CMR 25.00. It would indeed be tragic if the lower court's order had the effect of driving Massachusetts consumers into the arms of con artists.

[17] *See, e.g.*, LENDOL CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT ch. 6 (1999) (recounting the introduction of 20- and 30-year fixed rate mortgages when previously only short term (e.g., 5 yr.) mortgages with large down payment requirements were available).

including people with low- and moderate-incomes--than ever before.[18]

The lower court's order will turn back the clock on this innovation--and the cost of this regression will fall particularly hard on low- and moderate-income consumers.[19] Professor Rosen of Princeton has explained that "[t]he main thing that innovations in the mortgage market have done over the past 30 years is to let in the excluded: the young, the discriminated against, the people without a lot of money in the bank to use for a down payment."[20]

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[18] *See, e.g.*, Kristopher Gerardi, Harvey S. Rosen, & Paul Willen, *Do Households Benefit from Financial Deregulation and Innovation: The Case of the Mortgage Market*, Federal Reserve Public Policy Paper Discussion Paper No. 06-6 (Sept. 2006), *available at* http://www.bos.frb.org/economic/ppdp/2006/ppdp066.pdf. Additionally, Austan Goolsbee, a prominent housing economist and Senator Obama's senior economic advisor, has noted that even though each new form of innovation has been greeted by a chorus of criticism, each has "tended to expand the pool of people who qualify" for mortgage credit and homeownership. Austan Goolsbee, *'Irresponsible' Mortgages Have Opened Doors to Many of the Excluded*, N.Y. TIMES, Mar. 29, 2007.

[19] *See, e.g., id.* (explaining that "the historical evidence suggests that cracking down on new mortgages may hit exactly the wrong people").

[20] *Id.* (quoting Professor Harvey S. Rosen); *see also* Alan Greenspan, Chairman of the Board of Governors of the Federal Reserve Board, Speech at the Federal Reserve System's Fourth Annual Community Affairs Research Conference (Apr. 8, 2005) ("[I]nnovation and structural change in the financial services industry have been critical in providing expanded access to credit for the vast majority of consumers, including those with limited means. Without these forces, it would have been impossible for lower-income consumers to have the degree of access to credit markets that they now have."); Alan Greenspan, Chairman of the Board of Governors of the Federal Reserve Board, Speech at the Credit Union National Association 2004 Governmental

Mortgage innovations have allowed the excluded "access to mortgages whereas lenders would have once just turned them away."[21] Unfortunately, the uncertainty created by the lower court's order will make lenders reticent to introduce beneficial innovations in Massachusetts. Indeed, the lower court's order threatens to return Massachusetts to the days when many hard working Massachusetts families were "shut out" from traditional sources of mortgage credit.[22]

The lower court's order will also harm consumers by increasing the price for mortgage credit. Lenders' liability exposure from class action lawsuits could be overwhelming. G.L. c. 93A provides for statutory damages, treble damages, attorneys' fees and costs per violation and permits class actions. G.L. c. 93A, § 9. The lower's courts flawed conclusion that loans otherwise compliant with Massachusetts law can be presumptively unfair threatens to open the floodgates of class action lawsuits against even the most

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Affairs Conference (Feb. 23, 2004) ("American consumers might benefit if lenders provided greater mortgage product alternatives to the traditional fixed-rate mortgage. To the degree that households are driven by fears of payment shocks but are willing to manage their own interest rate risks, the traditional fixed-rate mortgage may be an expensive method of financing a home.").

[21] Goolsbee, *supra.*

[22] Laura A. Kiernan, *Cash-Poor Look Past Traditional Banks,* BOSTON GLOBE, Mar. 8, 1993.

responsible lenders. These litigation costs will be passed on to consumers in the form of higher prices.

While subprime lending is now disparaged in the popular press, it has been a key factor in increasing homeownership among many of the "excluded" who otherwise would not have access to mortgage credit.[23] While the recent rate of default among subprime borrowers is undeniably a cause for concern, it is crucial to remember that the large majority of subprime borrowers continue to make their mortgage payments and enjoy the benefits of homeownership.[24] While seeking to protect a small number of borrowers from foreclosure, the lower court's order threatens to "wreck the ability of [the majority of subprime borrowers] to obtain mortgages."[25]

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[23] *Id; see also* Board of Governors of the Federal Reserve System, *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit* (Aug. 2007), *available at* http://www.federalreserve.gov/boarddocs/RptCongress/creditscore/creditscore.pdf. Because of lower credit scores, many borrowers cannot qualify for conventional Fannie Mae, Freddie Mac, or FHA loans.

[24] *See, e.g.*, Eric S. Rosengren, President and Chief Executive Officer, Federal Reserve Bank of Boston, speech to the Massachusetts Institute for a New Commonwealth (Dec. 3, 2007) (explaining that 87% of subprime ARM borrowers are not seriously delinquent), *available at* http://www.bos.frb.org/news/speeches/rosengren/2007/120307.htm.

[25] Goolsbee, *supra*.

### C. The Lower Court's Order Applies to Far More Than Fremont.

The lower court's order is not limited to Fremont alone. The Attorney General's recent filing in this case underscores that servicers (i.e., those who accept the payments from consumers on mortgage loans on behalf of investors) unrelated to the making of loans face risk of substantial losses. After Fremont announced it was selling its servicing portfolio, the Attorney General filed a motion on March 21 seeking to block that sale unless the new servicer agreed to the same limitations imposed on Fremont by the lower court.[26] In so doing, the Attorney General dramatically expands the potential scope of the injunction from a single lender that is alleged to have engaged in wrongful acts to any servicer that agrees to service loans that even the lower court stated are valid.

Lenders and servicers historically have protected themselves from potential liability either by imposing higher prices--that ultimately are passed on to consumers--or by refusing to lend or service in the state. If lenders and servicers continue doing

business in Massachusetts in this new and unpredictable legal environment, their risk of exposure to severe losses will be substantial.

**III. SUCH POLICY-MAKING SHOULD BE LEFT TO LAWMAKERS.**

The lower court's order is a classic example of why law and policy-making should be left to lawmakers who have the resources and access to experts needed to make well-informed decisions in such a complex area. It has long been recognized that courts are ill-suited to perform such analyses. *See, e.g., United States v. Philadelphia Nat'l Bank*, 347 U.S. 321, 371 (1963) (explaining that balancing "economic debits and credits . . . [is] beyond the ordinary limits of judicial competence").

The lower court's order is not only wrong as matter of law and a matter of public policy, but its timing is highly unfortunate. Federal and state lawmakers--in partnership with many participants in the mortgage industry--are and have been hard at work in efforts to protect consumers, keep borrowers in their homes when possible, and preserve an efficient

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[26] *See* Commonwealth's Emergency Motion to Modify the Preliminary Injunction (filed Mar. 21, 2008).

mortgage market for the benefit of all consumers.[27] Because the lower court's order is inconsistent with established Massachusetts law and creates enormous uncertainty in the mortgage market, it actually impedes rather than furthers these efforts.

Additionally, the U.S. Department of Treasury and the Department of Housing and Urban Development have taken the lead in forming the HOPE NOW alliance, an alliance of mortgage servicers, counselors, investors, and other mortgage market participants--including *Amici* and many of their members. This alliance has successfully worked out over 1,000,000 loans since July of last year and has accomplished over three

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[27] *See, e.g.*, Mass. House No. 4387; *Interagency Guidance on Nontraditional Mortgage Product Risks*, 71 Fed. Reg. 58609 (Oct. 4, 2006); *Statement on Subprime Lending*, 72 Fed. Reg. 37569 (July 10, 2007); Proposed Rule, 73 Fed. Reg. 1672 (Jan. 9, 2008); *Statement on Working with Mortgage Borrowers* (Apr. 17, 2007), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20070417a1.pdf; *Industry Letter Regarding Regulatory Bulletin 5.1-103: Guidance on Non-Traditional Mortgage Product Risks* (Jan. 2, 2007), *available at* http://www.mass.gov; *Industry Letter on Final Subprime Lending Guidance, Amendments to 209 CMR 42.00 and Proposed Regulatory Bulletin on Bond for Licensed Lenders and Brokers* (Sept. 10, 2007), *available at* http://www.mass.gov; *Updated Regulatory Bulletin 1.3-104 Subprime Adjustable Rate Mortgage Loans to First Time Home Loan Borrowers* (Mar. 12, 2008), *available at* http://www.mass.gov; *Notice of Public Hearing: Mortgage Lenders and Brokers Regulations*, *available at* http://www.mass.gov.

times more workouts that keep borrowers in their homes than foreclosure sales.[28]

## CONCLUSION

For the reasons discussed above, *Amici* respectfully urge this Court to grant Defendants/Petitioners' Petition for Interlocutory Relief and reverse the lower court's order.

Respectfully submitted,

Dated: March 25, 2008

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## RULE 16(k) CERTIFICATION

I, Robert B. Serino, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, except that, to the extent that the brief is subject to the 15 page limit applicable to the parties' briefs, counsel has addressed the need for a lengthier brief in the accompanying motion.

Robert B. Serino

[28] *See HOPE NOW: Industry Tops ONE MILLION Loan Workouts Since July '07* (Mar. 3, 2008), *available at* http://www.fsround.org/hope_now/pdfs/17-28FebruaryRelease.pdf.

**ACKNOWLEDGEMENT OF SERVICE**

I, Robert B. Serino, hereby acknowledge under penalty of perjury that, on March 25, 2008, I caused two true copies of the foregoing to be served by Federal Express Overnight Delivery upon the following:

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