



Lending Help

In the wake of the mortgage foreclosure crisis, a Yale Law School clinic fights for the rights of homeowners trying to stay afloat amidst complex and quickly evolving legal realities.

By Debra Kroszner

In the summer of 2007, Ms. Rey was waiting at a traffic light in West Haven when a pick-up truck rear-ended her car. The accident left her with severe back injuries, which affected her ability to perform her job at the United States Postal Service.

With her income diminished after the accident, Rey began to fall behind on her bills, and for the first time in her life, she could not pay her mortgage on time. For twenty-two years, Rey (who preferred not to use her first name) had faithfully made payments on the mortgage for her home in the Hill neighborhood of New Haven where she lived with her son.

Rey's situation was different than the subprime mortgages that dominated the news in 2007 at the beginning of the foreclosure crisis—but like all the homeowners facing the prospect of foreclosure at the time, she was scared and struggled to keep up with her monthly bills.

"I was devastated," said Rey. "I like to think of myself as a very responsible person, so not being able to pay the mortgage was difficult."

After attempting mediation with the bank on her own, Rey was directed by her City Alderman to the Mortgage Foreclosure Litigation Clinic at Yale Law School. The clinic has long been fighting for clients like Ms. Rey, and through aggressive litigation and advocacy, students have been working strategically to counter a mortgage industry they say is under-regulated and lacks any incentive to help borrowers underwater get back to the surface.

"I didn't want to lose my house," said Rey, as her voice broke. "I wanted to provide for my child. And they were willing to help me."

Working with the clinic, Rey came to an agreement with the bank to make extra payments on her mortgage in order to avoid losing her home.

The forbearance agreement required her to make three increased payments toward catching up on her loan, and then return back to her standard monthly amount—an agreement that Ms. Rey clarified with a bank representative over the phone, and then confirmed with a fax. But despite her understanding of the terms of her repayment, the bank abruptly restarted the foreclosure process several months later, claiming Ms. Rey was in breach of contract, according to court documents.



Ms. Rey discusses her victory with Christian Mott '15, a co-director in the Mortgage Foreclosure Litigation Clinic.

"It was very disturbing, very depressing, and I was devastated all over again," recalled Rey. "I couldn't understand why I was getting that letter. I was making my full payments. They were timely payments."

The clinic sprang into action, filing counterclaims in court against the bank, alleging that in regard to the forbearance agreement, the bank had breached the terms, was negligent in informing Rey about her obligations, and had engaged in unfair trade practices.

In court, the bank argued that Rey's counterclaims should be handled in a separate lawsuit because it did not relate to the making, validity, or enforcement of the original mortgage contract, known as the "MVE test." However, on appeal, the clinic argued that applying the MVE test ignored both the language of the court rule describing permissible counterclaims and the equitable nature of foreclosure. They argued that counterclaims that arise from the same transaction as the complaint should be heard.

The Connecticut Appellate Court agreed, allowing Rey's counterclaims to go forward and opening up the possibility that she will receive some compensation for the cost and stress of being subject to wrongful foreclosure.

The decision was a major victory for homeowners in Connecticut and set a new legal precedent.

"Under the old rule, homeowners were barred from bringing these sorts of claims—for mistakes and malfeasance in handling the loan—in the same suit that they were participating in already to save their homes," said Christian Mott '15, a clinic co-director who took the lead in the Rey case together with Renata Strause '14. "That rule made it much more costly and complicated for homeowners to receive any compensation for the bank's wrongful conduct."

"For homeowners, the ruling in Ms. Rey's case means that they will have more opportunities to assert their rights," added Mott. "Banks will have to show that they have treated homeowners fairly before taking their houses."

The Rey case was just one example of the work the clinic takes on, which ranges from defending homeowners in foreclosure cases in Connecticut, to filing affirmative lawsuits against banks for negligence, to working on amicus briefs in complex litigation around the country. This broad range of legal work is done with a central goal in mind—to change the rules in today's securitized mortgage environment to ensure that the consumer has rights and lenders are held accountable.

"The legal system needs to give these lenders greater incentive to care about how they handle individual loans after they've been sold, more incentive to make sure they don't make negligent mistakes," said Allison Drutchas '15, another student director of the clinic.

"We think lenders and servicers should have a common law duty of care to customers, and they should be held responsible for negligence when they fail to fulfill this duty."

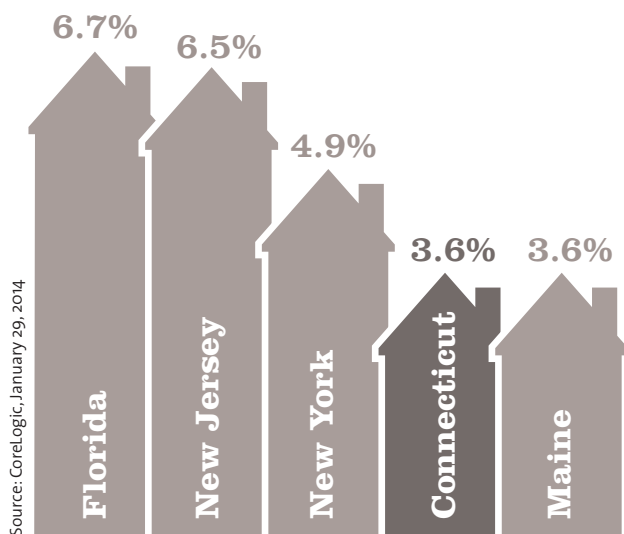
In a bygone era, lenders used to bear the risk of these kinds of mistakes, but with securitized loans, the lender no longer has an incentive to prevent errors and is often more concerned with how to package loans and market them to investors than with helping someone stay in their home, according to the clinic.

"Virtually all of the banks failed to handle the real estate fallout from the financial crisis effectively," said J.L. Pottenger, Jr. '75, who has co-supervised the clinic since 2009.

"The tsunami of foreclosures was marked by scandals of robo-signing; under-staffing; lost papers and payments; and a shell game of ineffectively transferred notes and mortgages."

Working to correct these problems, the clinic has been successful in affirmative cases against lenders and servicers for negligence, breach of contract, and violation of the Connecticut Unfair Trade Practices Act.

Although the total number of homes in foreclosure is down from the peak in 2010, Connecticut has one of the highest rates of foreclosure inventory in the country.



**STATES WITH THE HIGHEST FORECLOSURE INVENTORY
AS A PERCENTAGE OF ALL MORTGAGED HOMES**

Source: CoreLogic, January 29, 2014

“Our clients have achieved significant relief, ranging from modified, affordable mortgages to substantial monetary settlements, to years and years of extra time in their homes,” said Pottenger.

In the affirmative cases, Sparky Abraham ’14 said the clinic saw a need to advocate for the consumer, since many homeowners choose to represent themselves and are unlikely to litigate over the harm they suffer.

“Abusing homeowners through the foreclosure process is often a low-cost, low-risk activity,” explained Abraham, who worked with the clinic until graduating in May 2014. “What we were able to do in our affirmative suits is show banks and their attorneys that there can be back-end consequences to treating homeowners poorly.”

Outside of Connecticut, the clinic has made an impact in several complex foreclosure cases around the country, advocating for more consumer-friendly lending practices. Most recently, students submitted amicus briefs in cases in North Carolina, California, and Maine.

“In the amicus briefs, we are mostly advocating that loan servicers should have a state law duty of care to their customers, and failing to live up to that duty of care is actionable negligence,” said Drutchas.

In the California case, the bank involved in the foreclosure lawsuit argued that it owed no duty as a matter of law and so it could not be found negligent, according to the clinic.

Working with two legal services outfits in California, students argued that banks should not get a judicially sanctioned free pass for being negligent, since the housing market has changed radically in recent years.

“The California appellate court agreed with us in a big way, and quoted a large chunk of our amicus brief in its opinion,” said Abraham, noting that the amicus project has been a great source of pride for him.

“There are a lot of people working on these issues all over the country, and it can often be hard to connect because each state has a lot of differences,” Abraham said. “But many of the problems span state lines. Doing the amicus briefs helps us identify the big issues, immensely helps local attorneys who are often outgunned by banks’ law firms, and helps build our profile in Connecticut and around the country.”

Having the ability to make that kind of impact in the courtroom—not just in Connecticut, but also around the country—provides an extremely valuable legal experience, students said. But what makes the clinic work truly meaningful is being able to make a positive difference in the lives of their clients.

“I was drawn to the Mortgage Foreclosure Litigation Clinic in particular because I really sympathize with our clients’ commitment to staying rooted in their neighborhoods and communities,” said Drutchas. “For some of our clients, the houses they’re fighting for have been their homes for decades.”

“The clinic’s work has struck a very nice balance between being theoretically interesting and actually making a difference in people’s lives,” added Mott. “On top of that, it has given me several opportunities to participate in a wide variety of court proceedings—mostly mediation and motion practice in

Connecticut state court, but also in argument before the state appellate court and in one earlier motion before the federal District Court.”

For Abraham, the rewarding clinical work motivated him to pursue a career in this field. He is now applying his experience to help veterans and service members with consumer debt problems like foreclosure through a two-year Equal Justice Works fellowship with Housing and Economic Rights Advocates.

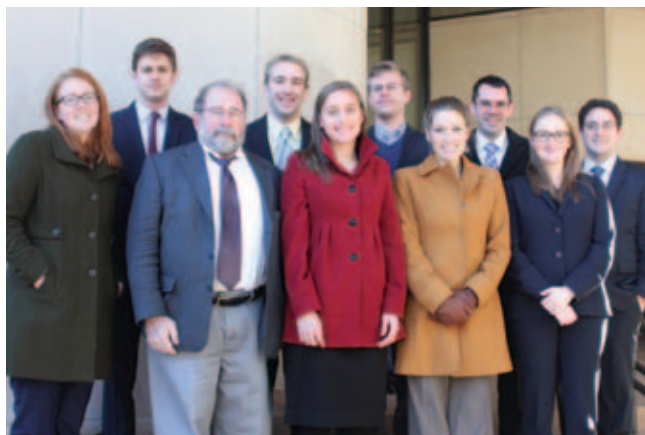
“I love working with the clients, and doing what I can to

help them navigate this really stressful process,” said Abraham. “It’s really incredible how much of a difference you can make just by being on someone’s side in situations like this.”

And in most cases, like that of Ms. Rey, that difference means a person who might have otherwise lost their home is given the chance to stay.

Today, Ms. Rey is less than a year away from paying off her mortgage completely, with no worry of foreclosure weighing on her. When she thinks about the years of work the clinic poured into her case, she finds herself overwhelmed with emotion.

“I can’t put it into words, but my experience has been so great,” she said, as her eyes began to well up. “I just let them do their jobs, because I have that much faith in them and they have shown me that much respect. My whole purpose was to have something done about what happened to me so that other people won’t have to go through the same thing.” Y



J. L. Pottenger Jr. '75, the Nathan Baker Clinical Professor of Law, and members of the Mortgage Foreclosure Litigation Clinic in front of the New Haven County Courthouse