FANNIE MAE AND FREDDIE MAC'S SUBVERSION OF STATE CONSUMER PROTECTION LAW UNDER THE GUISE OF HERA: POST-FORECLOSURE LITIGATION IN MASSACHUSETTS

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In 2008, Congress passed the Housing and Economic Recovery Act (HERA) to rescue Fannie Mae and Freddie Mac from financial collapse. HERA created the Federal Housing Finance Agency (FHFA) and authorized it to act as both regulator and conservator of Fannie Mae and Freddie Mac. The statute grants broad immunities to FHFA when it is acting as conservator—from judicial review and from the imposition of penalties, among others. Fannie Mae and Freddie Mac are now invoking these immunities in their own right, and claiming that they should apply to themselves as well in their roles as owners of occupied residential properties. This Article explores this recent development in the context of two areas of litigation in Massachusetts: whether the Non-Profit Buyback Law, M.G.L. c. 244, § 35C, applies to properties owned by Fannie Mae and Freddie Mac, and whether Fannie Mae and Freddie Mac are liable for multiple damages for unfair and deceptive practices under M.G.L. c. 93A. The Article argues that courts have erroneously interpreted HERA by immunizing Fannie Mae and Freddie Mac from liability in both of these contexts. It further argues that this precedent lays a foundation for Fannie Mae and Freddie Mac to flout state consumer protection law throughout the nation. This result is contrary to the express statutory mission of Fannie Mae and Freddie Mac to promote low- and middle-income housing.[1]

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1 Some defendant names have been changed to protect confidentiality.

INTRODUCTION

In 2008, at the height of the foreclosure crisis, Congress passed the Housing and Economic Recovery Act (HERA) as one of several pieces of "bailout" legislation. HERA was intended to help stabilize the housing market by increasing governmental control over Fannie Mae and Freddie Mac, the two primary backers of the so-called "secondary mortgage market."[2] With the housing market on the brink of collapse, there was widespread concern that if Fannie Mae and Freddie Mac failed, so too would the rest of the country's housing finance system. Thus, HERA created the Federal Housing Finance Agency (FHFA) and empowered it to place Fannie Mae and Freddie Mac ("the Enterprises") into conservatorship, which it did only months after HERA was passed. Conservatorship is "a statutory process designed to stabilize a troubled institution with the objective of returning [it] to normal business operations."[3]

Over the past several years, much academic debate has focused on this changed legal architecture surrounding Fannie Mae and Freddie Mac and its impact on their roles in the secondary mortgage market.[4] This debate, while rich, has largely ignored the significant ways in which the new legal frameworks have also affected the rights and liabilities of the Enterprises as owners of residential property. Indeed, few outside the affordable housing and eviction defense advocacy communities are aware of the sheer volume of occupied residential housing Fannie Mae and Freddie Mac have acquired in the wake of the foreclosure crisis. Under the Enterprises' own business models, and pursuant to their contracts, loan servicers conduct foreclosure sales on mortgages backed by the Enterprises on their behalf, and must sell the properties to the

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[2] Fannie Mae is also known as the Federal National Mortgage Association. Freddie Mac is also known as the Federal Home Loan Mortgage Corporation.

[3] Statement of FHFA Director James B. Lockhart, FED. HOUS. FIN. AGENCY, Sept. 7, 2008, https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-FHFA-Director-James-B--Lockhart-at-News-Conference-Annnouncing-Conservatorship-of-Fannie-Mae-and-Freddie-Mac.aspx [https://perma.cc/7M94-R6QF].

[4] *See, e.g.*, Bruce Arthur, Housing and Economic Recovery Act of 2008, 46 HARV. J. LEGIS. 585 (2009); Evan Page, Federal Housing Help Falls Short: The Housing And Economic Recovery Act of 2008, 21 LOY. CONSUMER L. REV. 249 (2008); David Reiss, Fannie Mae and Freddie Mac and the Future of Federal Housing Finance Policy: A Study of Regulatory Privilege, 61 ALA. L. REV. 907 (2010); David Reiss, An Overview of the Fannie and Freddie Conservatorship Litigation, 10 N.Y.U. J.L. & BUS. 479 (2014).

Enterprises as the highest bidder unless outbid by a third party.[5] In practice, because the defaulted mortgages in Fannie Mae and Freddie Mac's portfolios are often for distressed properties located in low-investment markets, this model means that Fannie Mae and Freddie Mac acquire a substantial portion of the properties they foreclose. As of late 2014, Fannie Mae and Freddie Mac owned a combined total of 121,000 foreclosed homes.[6]

Fannie Mae and Freddie Mac have therefore become, perhaps unwittingly, landlords to thousands of tenants across the country.[7] They have also come to own many properties occupied by former owners who are still fighting to remain in their homes post-foreclosure.[8] These relationships have become the subject of intense legal battles across the nation.[9] The battles have been particularly fierce in Massachusetts, where anti-foreclosure and anti-displacement activism has led to strong protections for tenants and former homeowners alike.[10] Among other protections, tenants living in foreclosed homes may not be evicted without "just cause," and homeowners have the right to repurchase their homes after foreclosure through non-profit institutions.[11] These protections are considered the gold standard of anti-foreclosure advocacy nationwide.[12]

Faced with this landscape of robust occupancy rights, Fannie Mae and Freddie Mac have turned to HERA as a tool to flout the law. They have claimed that certain HERA provisions that insulate FHFA's conservator actions from judicial review and statutory penalties also equivalently shield the actions of Fannie Mae and Freddie Mac. With Massachusetts courts largely accepting their arguments, the result has been that Fannie Mae and Freddie Mac have been insulated from liability under state consumer protection laws—laws often specifically enacted to protect low- and middle-income tenants and homeowners.

This Article will explore the development of the expanded immunity afforded to Freddie Mac and Fannie Mae under the guise of HERA in the specific context of two areas of litigation in Massachusetts. First, the Article will examine Fannie Mae and Freddie Mac's efforts to immunize themselves from the state non-profit buyback law, M.G.L. c. 244, § 35C, which prohibits banks that own occupied foreclosed properties from refusing to sell those properties to certain non-profit organizations. Second, the Article will explore Fannie Mae and Freddie Mac's efforts to insulate themselves from the multiple damages provisions of M.G.L. c. 93A, the state consumer law that,

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5 *See* Fannie Mae Servicing Guide, "Conducting Foreclosure Proceedings" and "Issuing Bidding Instructions," §§ E-3.2-09, E-3.3-04; Freddie Mac Single-Family Seller/Servicer Guide, 9301.31: Delegated Bidding.

6 Dina ElBoghdady, Thousands of People Can Now Buy Back the Homes They Lost to Foreclosure, WASH. POST, Nov. 26, 2014, *available at* https://www.washingtonpost.com/news/wonk/wp/2014/11/26/thousands-of-people-can-now-buy-back-the-homes-they-lost-to-foreclosure/?utm_term=.99deb57ecde3 [https://perma.cc/6VN3-E2SU]. *See generally* Dane,et al., Discriminatory Maintenance of REO Properties as a Violation of the Federal Fair Housing Act, 17 CUNY L. Rev. 383 (2014) (noting "glut" of bank-owned home properties following the foreclosure crisis).

7 *See infra* Sec. II(e).

8 *See*, *e.g.*, *Bank of New York v. Bailey*, 460 Mass. 327 (2011); *Bank of America v. Rosa*, 466 Mass. 613 (2013).

9 *See* Fannie Mae Servicing Guide, *supra*, note 5.

10 *See* Boston Group Helps Homeowners 'Stand Up, Fight Back' Against Foreclosure, PBS NEWS HOUR, Oct. 19, 2010, http://www.pbs.org/newshour/bb/business-july-dec10-foreclosures_10-19/ [https://perma.cc/M43U-3RJA].

11 *See* M.G.L. c. 186A; M.G.L. c. 244, § 35C(h).

12 *See* Tony S. Guo, Tenants at Foreclosure: Mitigating Harm to Innocent Victims of the Foreclosure Crisis, 4 DEPAUL J. SOCIAL JUSTICE 2, 39-40 ("In August of 2010, Massachusetts passed the most comprehensive law in the country for protecting people living in foreclosed-on properties") (internal citations omitted).

inter alia, protects tenants from unfair and deceptive practices of landlords.

Through the lens of these two recent litigation trends, this Article argues that the courts' expansion of immunity to the Enterprises is erroneous. The courts' interpretation of HERA is based on a confused understanding of the conservatorship that conflates FHFA regulatory action, FHFA conservatorship action, and Enterprise action. The distinctions among these actions are clearly outlined in the text of HERA and have been consistently upheld in Circuit Court precedent. They are also well supported by the public statements of FHFA and the sworn testimony of Fannie Mae regarding the structure of the conservatorship.

The result of the collapse of these distinctions is a broad expansion of the applicability of the HERA immunity provisions. Whereas these provisions once applied only to concrete FHFA actions as conservator, they now have been held to apply to activities undertaken independently by the Enterprises with minimal, if any, FHFA involvement. This precedent lays a foundation for Fannie Mae and Freddie Mac to flout state laws enacted to protect low-income homeowners and tenants nationwide. This outcome is a paradox given Fannie Mae and Freddie Mac's explicit mission of promoting affordable housing.[13]

I. HISTORY OF FANNIE MAE AND FREDDIE MAC AND THE CONSERVATORSHIP

A. The Establishment of Fannie Mae and Freddie Mac

Fannie Mae and Freddie Mac are government-sponsored enterprises ("GSEs," or "Enterprises"), created under statutory charters enacted by Congress in 1938 as part of the New Deal and in 1970, respectively.[14] The declared purposes of Congress in establishing Fannie Mae and Freddie Mac were, among other goals, to "provide stability in the secondary market for residential mortgages" and "promote access to mortgage credit. . . by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing."[15] The stated goals also explicitly included promoting access to mortgage financing for low- and moderate-income families even where investment in such financing involves a "reasonable economic return that may be less than the return earned on other activities."[16]

Fannie Mae and Freddie Mac are referred to as government-*sponsored* rather than government-*owned* because both congressionally chartered enterprises were eventually converted, by statute, into publicly traded corporations.[17] Yet, despite these structural changes, the goals of the Enterprises to stabilize mortgages and increase liquidity in the mortgage market remained the same post-privatization.[18] In essence, the business model of Fannie Mae and Freddie Mac is to purchase mortgages issued by commercial banks, and to repackage and sell them as "mortgage

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13 *See infra,* Sec. III.

14 *See* Federal National Mortgage Association Charter Act, 12 U.S.C. § § 1716-1723; Federal Home Loan Mortgage Act, 12 U.S.C. §§ 1451-1459.

15 12 U.S.C. § 1716(3).

16 *Id*.

17 *Perry Capital LLC v. Lew*, 70 F.Supp.3d 208, 215 (D.D.C. 2014). *See* Housing and Urban Development Act, Pub. L. No. 90-448, § 802, 82 Stat. 536-538 (1968); Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. No. 101-73, § 731, 103 Stat. 432-433 (1989).

18 *See* Avni Patel, The Bailout of Fannie Mae and Freddie Mac, 28 REV. BANKING & FIN. L. 21, 22 (2008).

backed securities" to other investors.[19] Thus, Fannie Mae and Freddie Mac do not make loans directly to consumers, but rather purchase mortgages once they are already issued by commercial banks.[20] This purchase and resale of mortgages is known as the "secondary mortgage market." Because banks and other loan originators use the profits from the sales to make new loans, the strength of the secondary mortgage market has traditionally been viewed as critical to securing access to credit for consumers, as well as to ensuring the stability of the housing market as a whole.[21]

B. The Foreclosure Crisis and Fannie Mae and Freddie Mac

While a complete analysis of the causes of the foreclosure crisis is beyond the scope of this Article, a brief discussion of the Enterprises' role in the crisis bears mention. Through their business model, Fannie Mae and Freddie Mac are expected to further their dual mission of providing financing for American home-buyers and increasing profits for shareholders.[22] In 2004, the U.S. Department of Housing and Urban Development (HUD), citing the Enterprises' statutory mission of improving homeownership rates for low- and middle-income families, began explicitly requiring the Enterprises to purchase "affordable" loans made available to low and middle-income borrowers.[23] In exchange, HUD allowed the Enterprises to place billions in subprime loans on their balance sheet.[24] The Enterprises took on a combination of "Alt-A" mortgages ("Alternative-A" mortgages, which lacked data about the borrower's creditworthiness), "interest-only" mortgages (mortgages that allowed the borrower to pay down only the interest, without making payments on principal) and "adjustable rate" mortgages (mortgages with flexible interest rates that increased over time).[25] In its 2007 Annual Report, Freddie Mac reported:

> The proportion of higher risk mortgage loans that were originated in the market during the last four years increased significantly. We have increased our securitization volume of non-traditional mortgage products, such as interest-only loans and loans originated with less documentation in the last two years in response to the prevalence of these products within the origination market. Total non-traditional mortgage products, including those designated as Alt-A and interest-only loans, made up approximately 30% and 24% of our single-family mortgage purchase volume in the years ended December 31, 2007 and 2006, respectively.[26]

Fannie Mae similarly reported in 2007:

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19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at 23.

23 *Id.* at 23.

24 *Id*.

25 Thomas H. Stanton, The Failure of Fannie Mae and Freddie Mac and the Future of Government Support for the Housing Finance System, 18 J.L. & POL'Y 217, 223 (2009).

26 Freddie Mac, 2007 Ann. Rep., at 13, http://www.freddiemac.com/investors/ar/pdf/2007annualrpt.pdf.

> We are experiencing high serious delinquency rates and credit losses across our conventional single-family mortgage credit book of business, especially for loans to borrowers with low credit scores and loans with high loan-to-value ("LTV") ratios. In addition, in 2007 we experienced particularly rapid increases in serious delinquency rates and credit losses in some higher risk loan categories, such as Alt-A loans, adjustable-rate loans, interest-only loans, negative amortization loans, loans made for the purchase of condominiums and loans with second liens. Many of these higher risk loans were originated in 2006 and the first half of 2007.[27]

As now has been well documented, these loans were targeted to minority borrowers in particular, with black and Latino borrowers 2.8 and 2.3 times more likely, respectively, to receive high-rate subprime loans.[28]

What is now known as the "foreclosure crisis" began at the end of 2006. The subprime loans' high interest rates and low- and middle-income families' inability to afford payments caused foreclosure rates to soar.[29] From 2006-2011, the City of Boston alone experienced 4,000 foreclosures of residential properties. Throughout the Commonwealth of Massachusetts, more than 45,000 people lost their homes.[30] While precise data on the number of renters versus owners affected by foreclosure is lacking, existing evidence suggests that as of 2008, as many as 46% of the affected units in Massachusetts were renter-occupied.[31]

By 2008, at the height of the crisis, Fannie Mae and Freddie Mac together owned $5.4 trillion of guaranteed mortgage-backed securities. The high foreclosure rates also caused major depreciation of home prices and resulted in substantial losses for Fannie Mae and Freddie Mac.[32] This, in turn, precipitated the loss of investor confidence in the Enterprises.[33] The Bank of China, the largest Chinese holder of Fannie Mae and Freddie Mac securities, reduced its debt held from $20 billion at the end of 2007 to $17.3 billion by June 30, 2008, and sold or matured $4.6 billion of its 2008 holdings.[34]

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[27] Fannie Mae, 2007 Ann. Rep., at 24, *available at* http://www.fanniemae.com/resources/file/ir/pdf/proxy-statements/2007_annual_report.pdf.

[28] Jackelyn Hwang, Racialized Recovery: Post-Foreclosure Pathways in Distressed Neighborhoods in Boston. Joint Center for Housing Studies, Harvard University, at 24 (Feb. 2015).

[29] *See* Patel, *supra* note 18, at 24.

[30] Rebuilding the Commonwealth: Recovering from the Foreclosure Crisis and Setting the Foundation for Future Success, Mass. Atty. Gen., April 2014, *available at* http://www.mass.gov/ago/docs/press/2014/homecorps-report.pdf.

[31] *See* Nick Hartigan, No One Leaves: Community Mobilization as a Response to the Foreclosure Crisis in Massachusetts, 45 HARV. CIV. R. CIV. L. L. Rev. 181, 187 (2010).

[32] Fannie Mae lost $5 billion in the second half of 2007 and another $4.5 billion through the first half of 2008. Freddie Mac lost $3.7 billion in the second half of 2007 and $1 billion during the first half of 2008. *See* "Fannie Mae and Freddie Mac: Where the Taxpayer Money Went," Fed. Hous. Finance Agency Office of Inspector General, WPR—2012-02 at 12 (May 24, 2012), *available at* https://www.fhfaoig.gov/Content/Files/FannieMaeand FreddieMac-WheretheTaxpayersMoneyWent.pdf. *See also* N. Eric Weiss, Cong. Research Serv., R42760, Fannie Mae's and Freddie Mac's Financial Status: Frequently Asked Questions (2013), *available at* http://www.fas.org/sgp/crs/misc/R42760.pdf.

[33] *See* Patel, *supra* note 18, at 24.

[34] *Id.* at 24-25.

C. The Housing and Economic Recovery Act of 2008 (HERA)

To prevent the collapse of Fannie Mae and Freddie Mac, Congress passed the Housing and Economic Recovery Act (HERA) in 2008. HERA represented the first of the so-called "bailout" pieces of legislation that were passed or proposed as an attempt to mitigate the effects of the recession and housing crisis.[35] HERA was passed in "[a]nticipat[ion] [of] the severe ramifications a Fannie Mae or Freddie Mac collapse would have on the fragile housing market - and therefore on the U.S. economy as a whole."[36] HERA has five stated objectives: (1) supporting Fannie Mae and Freddie Mac in their roles as regulators of the mortgage industry; (2) providing relief to lenders and borrowers; (3) stabilizing the housing market; (4) alleviating the social consequences of foreclosures; and (5) "preventing a future housing crisis."[37] To achieve these goals, the statute created the Federal Housing Finance Agency ("FHFA") as a new independent federal agency.[38] The Director of the FHFA is appointed by the President, with the advice and consent of the Senate, for a five-year term.[39]

Much of HERA focuses on the role of the Federal Housing Finance Agency vis-a-vis the Enterprises.[40] Under subchapter I, the FHFA has "[g]eneral supervisory and regulatory authority" over Fannie Mae, Freddie Mac, and the twelve Federal Home Loan Banks.[41] Pursuant to this authority, the FHFA may, through its Director, "issue any regulations, guidelines, or orders necessary to carry out the duties of the Director under this chapter or the authorizing statutes, and to ensure the purposes of this chapter and the authorizing statutes are accomplished."[42] When issuing regulations, the Director of the FHFA is required to give notice and provide opportunity for public comment pursuant to the relevant provisions of the Administrative Procedures Act.[43]

Separate and distinct from its regulatory and supervisory authority, HERA also grants FHFA the power to appoint itself as conservator or receiver of Fannie Mae, Freddie Mac, and/or the Federal Home Loan Banks ""for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity."[44] While a receivership is generally established to wind down a company, conservatorship is typically used to return entities to a sound and solvent condition in which they can continue to operate.[45] On September 6, 2008, following the Enterprises' ""unsuccessful effort to raise capital in the private markets,"," the FHFA placed the Enterprises into conservatorship pursuant to this authority.[46] They remain in conservatorship today.

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35 *See* Arthur, *supra* note 4, at 586.

36 Steele, Fannie, Freddie, and Fairness: Judicial Review of Federal Conservators, 53 HARV. J. ON LEGIS., 417, 421 (2016).

37 *See* Arthur, *supra* note 4, at 586.

38 12 U.S.C. § 4511(a).

39 12 U.S.C. § 4512(b)(1).

40 HERA was modeled largely after the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"),"), passed in response to the savings and loan crisis of the 1980s. *See* Steele, *supra* note 38, at 421. Specifically, "HERA modeled FHFA's regulatory power over the GSEs after those granted in FIRREA to the Federal Deposit Insurance Corporation ('FDIC') to assume control of failing banks and financial institutions." *Id.*

41 12 U.S.C. § 4511(b).

42 12 U.S.C. § 4526(a).

43 12 U.S.C. § 4526(b).

44 12 U.S.C. § 4617(a)(2).

45 *See* Reiss (2014), *supra* note 4, at 483.

46 *Perry Capital LLC*, 70 F.Supp.3d at 216.

D. The Conservatorship

As conservator, FHFA acts as a "successor" to the GSE and, by operation of law, "immediately succeed[s] to (i) all rights, titles, powers, and privileges of the [GSE], and of any stockholder, officer, or director of such [GSE] . . .; and (ii) title to the books, records, and assets of any other legal custodian of [the GSE]."[47]). FHFA may then "operate" Fannie Mae and Freddie Mac by taking over its assets and performing all of its functions.[48]

While FHFA initially took full control of the Enterprises when it placed them into conservatorship in September 2008, it promptly re-delegated to the Enterprises many of their essential functions, including (i) to the board of directors, the authority to oversee the Enterprises, and (ii) to management, the authority to conduct the Enterprises' day-to-day operations.[49] Describing this as "the most efficient structure," FHFA decided that Fannie Mae and Freddie Mac "would continue to be responsible for [their own] normal business activities and day-to-day operations" under the conservatorship.[50] The Director announced that,, "the focus of the conservatorship is not to manage every aspect of the [Enterprises'] operations."[51] Yet as Conservator, FHFA retained its powers under HERA to:

> "take such action as may be—
>
> (i) necessary to put the regulated entity in a sound and solvent condition; and
>
> (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity."[52]

Relevant for the purposes of this article, HERA limits judicial review of FHFA's actions as conservator, stating that "[e]xcept as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or receiver."[53] HERA also provides that FHFA, when acting as a conservator or receiver, ""shall not be liable for any amounts in the nature of penalties or fines, including those

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[47] 12 U.S.C. § 4617(b)(2)(A).

[48] 12 U.S.C. § 4617(b)(2)(B). The statute provides that as conservator FHFA may operate Fannie Mae and Freddie Mac by:

> (i) tak[ing] over the assets of and operat[ing] the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct[ing] all business of the regulated entity;
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> (ii) collect[ing] all obligations and money due the regulated entity;
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> (iii) perform[ing] all functions of the regulated entity in the name of the regulated entity which are consistent with *1278 the appointment as conservator or receiver;
>
> (iv) preserv[ing] and conserv[ing] the assets and property of the regulated entity; and
>
> (v) provid[ing] by contract for assistance in fulfilling any function, activity, action, or duty of the [FHFA] as conservator or receiver. *Id.*

[49] FHFA-Office of the Inspector General, *White Paper: FHFA OIG's Current Assessment of FHFA's Conservatorships of Fannie Mae and Freddie Mac*, WPR-2012-001, at 2, 12 (March 28, 2012), *available at* www.fhfaoig.gov/Content/Files/WPR-2012-001.pdf

[50] FHFA, Annual Report to Congress 2010, at 1 (June 13, 2011), *available at* www.fhfa.gov/AboutUs.

[51] FHFA, Annual Report to Congress 2010, at 1 (June 13, 2011), *available at* www.fhfa.gov/AboutUs.

[52] 12 U.S.C. § 4617(b)(2)(D).

[53] 12 U.S.C. § 4617(f).

arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due."[54]

E. Fannie Mae and Freddie Mac as Owners of Occupied Residential Property

Barely recognized or appreciated during the emergency enactment of HERA, Fannie Mae and Freddie Mac by 2008 had come to own thousands of residential *properties* (not simply the loans underlying the mortgages) throughout the country, many of them occupied.[55] It is Fannie Mae and Freddie Mac's business models to purchase the foreclosed properties whose loans they have underwritten unless they are outbid by a third party purchaser at the foreclosure auction.[56] Because many of the homes that were foreclosed during the crisis were distressed and located in low investment markets, outbidding was rare. Thus, at the time HERA was passed, in 2008, Fannie Mae owned 67,500 foreclosed properties nationwide.[57] That number would only increase in the years to come as the foreclosure crisis gained steady steam throughout the late 2000s and early 2010s. By late 2014, Fannie Mae and Freddie Mac owned a combined total of 121,000 foreclosed homes.[58]

There is no indication that Congress or any of the relevant agencies involved in the crafting of HERA gave any serious consideration to how the conservatorship would affect Fannie Mae and Freddie Mac as owners of occupied properties. Instead, the architects of the law focused on the traditional role of the Enterprises as mortgage financers, and on their primary purpose of providing liquidity to the secondary mortgage market. Specifically, Treasury Secretary Henry M. Paulson Jr. identified the objectives of HERA and the conservatorship as "providing stability to financial markets, supporting the availability of mortgage finance, and protecting taxpayers."[59] He explained that: "Fannie Mae and Freddie Mac are critical to turning the corner on housing. Therefore, the primary mission of these enterprises now will be to proactively work to increase the availability of mortgage finance, including by examining the guaranty fee structure with an eye toward mortgage affordability."[60] The statement went on to enumerate a four-step plan to provide stability to the secondary mortgage market through the conservatorship.[61] The statement made no mention whatsoever of how the conservatorship structure would bear on the Enterprises' status as owners of occupied residential properties. A press release issued by FHFA Director James B. Lockhart on the same day similarly discussed only the Enterprises' role in the secondary mortgage market, ignoring their role as property owners.[62]

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54 12 U.S.C. § 4617(j)(4).

55 Charles Duhigg, *Fannie Mae Lets Renters Stay Despite Foreclosures*, N.Y. TIMES, Dec. 14, 2008, at B1.

56 *See* Fannie Mae Servicing Guide, E-4.01-01; Freddie Mac Single-Family Seller/Servicer Guide, 9301.31: Delegated Bidding. *See supra* note 5.

57 *See* Duhigg, *supra*, note 55.

58 *See* ElBoghdady, *supra*, note 6.

59 *Id*.

60 *Id*.

61 *Id*.

62 *See* Statement of the Honorable James B. Lockhart III, Director Federal Housing FinanceFed. Hous. Fin. Agency Before the House CmteComm. on Financial ServicesFin. Servs. (Sept. 25, 2008), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-James-B-Lockhart-III-Director-FHFA-Before-the-US-House-Committee-on-Financial-Services.aspx [https://perma.cc/S2G5-LFD8]. A subsequent statement issued by James B. Lockhart on September 25, 2008 similarly discussed only the Enterprises' roles in the secondary mortgage market and made no mention of the

II. THE NON-PROFIT BUYBACK LAW, M.G.L. C. 244, § 35C

While the legislative history of HERA fails to indicate any Congressional intention to affect the rights and obligations of Fannie Mae and Freddie Mac as owners of residential property, the Enterprises were quick to invoke the law in that context in an effort to shield themselves from state consumer protection laws with which they did not wish to comply. In the wake of the housing and global financial crisis, in 2012 the Massachusetts legislature enacted "An Act Preventing Unlawful and Unnecessary Foreclosures."[63] The statute "extends a layer of consumer protection to homeowners saddled with the riskiest subprime mortgages and seeks to curb abusive foreclosure practices on the part of some mortgage purchasers."[64] The Act was intended both to prevent foreclosures and to reduce unnecessary vacancies following foreclosure.[65] The provisions require creditors include requirements for a creditor to extend a loan modification offer to a borrower in certain circumstances, and to provide strict notice to requirements for borrowers facing foreclosure.[66] The statute also authorizes, and punishments for creditors who make false statements in a court of law about their compliance with the statute or about the borrower's payment history.[67]

Most relevant here, one provision of the law expressly concerns resales of foreclosed properties through a model established by a local non-profit organization, Boston Community Capital (BCC).[68] In 2009, BCC launched the Stabilizing Urban Neighborhoods (SUN) Initiative with the goal of revitalizing inner-city neighborhoods that had been hard hit by "underwater" mortgages and vacant properties.[69] "Underwater" mortgages are defined as mortgages in which the amount owed on the mortgage exceeds the current fair market value of the property. In the wake of the foreclosure crisis, it was extremely common for properties to be purchased at foreclosure for an amount that was significantly lower than the amount the original owner owed on the mortgage, thus signaling that the home was underwater. BCC observed that in many instances, owners would be able to afford payments on a new mortgage at the current market value (i.e., an amount at or near the foreclosure purchase price), but were not able to access credit through traditional financial lending institutions to obtain one.[70] They also were unable to obtain new mortgages from their current banks because most large financial institutions, including Fannie Mae and Freddie Mac, refused to offer principal production.[71] Thus, these borrowers would face displacement despite being able to afford their home at its current market value.

Enterprises as property owners..

[63] *See* 2012 Mass. Acts ch. 194 (codified as Mass. G. Laws ch. 244, §§ 14, 35B- 35C (Foreclosure Law).)).

[64] *See* Massachusetts v. Fed. Hous. Fin. Agency, 54 F.Supp.3d 94, 95-96 (D. Mass. 2014).

[65] *See* Final Report of the Foreclosure Impacts Task Force, Massachusetts Office of the Attorney General at 5 (June 2014).

[66] *See* M.G.L. c. 244, §§ 14, 35B-35C.

[67] *Id*. *See* M.G.L. c. 244, §§ 14, 35B-35C.

[68] *See* M.G.L. c. 244, § 35C(h).

[69] *See* Mass. v. Fed. Hous. Fin. Agency, 54 F. Supp. 3d at 96.

[70] Fannie Mae and Freddie Mac's own financing rules impose a three-year waiting period for borrowers to qualify for a mortgage after a foreclosure. *See* ElBoghdady, *supra*, note 6.

[71] *See* Final Report of the Foreclosure Impacts Task Force, s*upra*, note 68 at 9. Principal reduction – reducing the amount of principal owed on a mortgage as part of a loan modification – would be a more direct mechanism for enhancing the affordability of mortgages and allowing borrowers the opportunity to remain in their homes. *See id*. *See also* ElBoghdady, *supra* note 6.

The SUN Initiative addressed this gap by creating a model in which BCC purchases foreclosed homes at fair market value (usually from the bank that purchased the home at foreclosure) and then immediately resells them to the original owner for roughly the same price, with only a slight mark-up to cover costs. Thus, the Initiative creates a unique opportunity for individuals in this situation to remain in their homes as owners. Since 2009 and as of the date of this writing, the SUN Initiative claims to have kept close to 750 Massachusetts families in their homes through this model, reducing their monthly mortgage payments and principal balances by an average of thirty-five percent.[72]

Yet the SUN Initiative encountered a significant roadblock in 2010 when Fannie Mae and Freddie Mac introduced "arm's-length" sales policies, which prohibited sales to non-profit institutions if the non-profit intends to resell or otherwise allow a former homeowner to continue to occupy the property.[73] The policies required that purchasers of foreclosed properties from Fannie Mae and Freddie Mac execute an affidavit stating that the sale is an arm's length transaction and that the borrower would not continue to occupy the property for longer than 90 days after the sale or subsequently repurchase the home from the buyer.[74] An additional policy provided that resale of a property to the original borrower, or an entity working on its behalf, would be permitted only if the borrower "makes whole" the Enterprise by paying back the full amount due under the original loan.[75] The stated purpose behind the policies was to prevent underwater borrowers who *could* afford their mortgages from "strategically defaulting" in order to obtain a buyback sale from a nonprofit institution that would reduce their monthly mortgage payment.[76]

These policies frustrated dozens, if not more, potential BCC sales throughout Massachusetts. As a result, the Legislature passed what is now known as the "Nonprofit Buyback Provision," codified at M.G.L. c. 244 § 35C(h). The Provision specifically targets and makes illegal Freddie Mac and Fannie Mae's arm's-length transaction sales policies. It provides:

> In all circumstances in which an offer to purchase either a mortgage loan or a residential property is made by an entity with a tax-exempt filing status under 501(c)(3) of the Internal Revenue Code, or an entity controlled by an entity with such tax-exempt filing status, no creditor shall require as a condition of sale or

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72 *See* Boston Community Capital, SUN Initiative, www.bostoncommunitycapital.org/programs-services/sun-initiative (last accessed March 31, 2017).

73 *See Massachusetts*, 54 F. Supp. 3d at 97 (noting that these policies were included in Fannie Mae and Freddie Mac's "Servicing Guides to banks and other entities with whom they contract to service the mortgages under guarantee and/or to manage any foreclosed properties")..

74 *Id*. The policies also prohibit sales in which there is an agreement or contract providing that the original borrower will later have a right of first-refusal when the property is sold. *Id*.

75 *Id*. Thus if, for example, the fair market value of the property is $100,000 at foreclosure but the original mortgage loan still has a balance of $250,000, the original borrower could only repurchase the property (either directly or through a third-party purchaser like BCC) by paying the $150,000 difference, in addition to the $100,000 purchase price. *See id*.

76 The FHFA also expressed concern that allowing buyback sales would foster the creation of sham nonprofits and cause homeowners to decline loan modifications that they could afford and instead "repurchase from a nonprofit at a larger discount." *See* Letter from FHFA General Counsel Alfred Pollard to Massachusetts Assistant Attorney General Lisa Dyen (Jan. 29, 2013).

> transfer to any such entity any affidavit, statement, agreement or addendum limiting ownership or occupancy of the residential property by the borrower.[77]

The statute explicitly includes Fannie Mae and Freddie Mac by name in the definition of "creditor."[78]

A. Fannie Mae and Freddie Mac's Response to the Non-Profit Buyback Provision

Fannie Mae and Freddie Mac blatantly ignored M.G.L. c. 244 § 35C and continued to refuse buyback sales to BCC after the law went into effect on November 1, 2012. In early 2013, the Massachusetts Office of the Attorney General sent a letter to the General Counsel of the Federal Housing Finance Agency urging reversal of the Enterprises' policies to bring them into compliance with the state law.[79] The FHFA, in a response letter, defended the Enterprises' policies on the grounds that they were necessary to prevent the rise of sham nonprofits and strategic defaults (i.e., in which borrowers strategically opt for foreclosure in order to later obtain a buyback sale).[80] In a second letter, the Attorney General addressed the General Counsel's concerns about moral hazard but pointed out that, "you provide no information, evidence, or statistics to support this speculation."[81] The Letter further noted, "based on our actual experience in Massachusetts, the buybacks facilitated by area non-profit groups have helped stabilize neighborhoods and keep qualified homeowners in their homes, at no additional cost to the creditor or its investors (who receive the fair market value price)."[82] The Letter implored that, "We cannot accept that a [Government Sponsored Enterprise] would prefer taking an approach that would leave a family homeless and keep a distressed property on its books rather than accept a non-profit's purchase offer at fair market value."[83] Despite this concerted advocacy, the policies remained in place and both Fannie Mae and Freddie Mac continued to refuse fair market value purchase offers from BCC.

Following these letters, two high-profile federal lawsuits directly challenged Fannie Mae and Freddie Mac's blatant violations of M.G.L. c. 244 § 35C.[84] First, homeowners Ramon and

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[77] M.G.L. c. 244, §35C(h).

[78] M.G.L. c. 244, § 35C(a).

[79] *See* Letter from Massachusetts Assistant Attorney General M. Claire Masinton to Alfred M. Pollard (Feb. 11, 2013), *infra* note 81.

[80] Letter from FHFA General Counsel Alfred Pollard to Massachusetts Assistant Attorney General Lisa Dyen, January 29, 2013.

[81] Letter from Assistant Attorney General M. Claire Masinton to Alfred M. Pollard, February 11, 2013, *supra* note 76.

[82] *Id*.

[83] *Id*.

[84] *See* Suero v. Fed. Home Loan Mortg. Corp., 123 F.Supp.3d 162 (D. Mass. 2015);), *and* Massachusetts v. Fed. Hous. Fin. Agency et al., 54 F.Supp.3d 94 (D. Mass 2014). These lawsuits received significant media attention. *See e.g.*, Shaila Dewan, *Massachusetts Sues Fannie and Freddie Over Foreclosure Law*, N.Y. TIMES, June 2, 2014, at B3; Jennifer Taub, *A Second Chance to Help Families Save Their Homes*, N.Y. TIMES, June 13, 2014, *available at* https://dealbook.nytimes.com/2014/06/13/a-second-chance-to-help-families-save-their-homes/;/ [https://perma.cc/Y7Y6-MW8F]; Jennifer Taub, *New Policy Goes Only Partway in Helping Struggling Homeowners*, N.Y. TIMES, Dec. 12, 2014, *available at* https://dealbook.nytimes.com/2014/12/12/new-policy-goes-only-partway-in-helping-struggling -homeowners/?_r=0; [https://perma.cc/F2LS-5G73]; Paul McMorrow, *Can Freddie Mac Skirt Mass. Consumer Law?*, BOSTON GLOBE, May 13, 2014, *available at* https://www.bostonglobe.com/opinion/2014/05/13/freddie-mac-foreclosure-

Rosanna Suero ("the Sueros[85]"), Dominican immigrants who owned a small condominium in the Dorchester neighborhood of Boston,[86] sued Freddie Mac after it refused several fair market value offers from BCC to purchase their home.[87] The Sueros purchased their condominium in 2005 through a mortgage for $283,000, and in 2007 refinanced for a $298,000 mortgage.[88] Unable to afford the high mortgage payments, in September 2010 their home was foreclosed.[89] Freddie Mac, which was the underlying investor in the mortgage loan, purchased the property as the highest bidder at foreclosure for $110,000.[90] The Sueros then applied and were approved by BCC for a buyback sale.[91] BCC extended four fair market value offers to purchase the Sueros' home between November 1, 2012, the day M.G.L. c. 244, § 35C went into effect, and August 15, 2013.[92] Freddie Mac rejected all four offers. In the course of the litigation, it admitted in sworn statements that it rejected all four offers because it knew that BCC intended to resell to the Sueros, citing its arm's-length transaction and make-whole policies.[93] Throughout this entire post-foreclosure period, the Sueros continued living in their home but were fighting eviction by Freddie Mac in Boston Housing Court.[94]

B. The Suero and Attorney General Suits for Noncompliance with the Non-Profit Buyback Law

The Sueros sued Freddie Mac under M.G.L. c. 93A, a broad state consumer protection law. The law provides a cause of action to consumers injured by a commercial or business entity's violation of a statute intended to protect the public's "health, safety, or welfare."[95] The Sueros alleged that Freddie Mac violated the letter and/or spirit of M.G.L. c. 244 § 35C by refusing to sell their home to BCC solely because of BCC's intention to resell to them in a buyback sale.[96]

battle-hits-close-home/BkGm0ARBhJUpoD0cChOa4K/story.html. [https://perma.cc/V6GT-4X8L]. *See also* Paul McMorrow, *Housing Recovery? Not For All*, BOSTON GLOBE, Feb. 5, 2013, at http://www.bostonglobe.com/opinion/2013/02/05/housing-recovery-leaves-marginalized-behind/nvhK5xfDWI20gulXC0rmeJ/story.html [https://perma.cc/H4FP38JK] (reporting on earlier litigation in the Suero case in Boston Housing Court).

85 The author tells the Sueros' story with their permission.

86 The Dorchester neighborhood was particularly hit hard hit by the foreclosure crisis. *See* Hartigan, *supra*, note 33 at 187. *See also* Laura Crimaldi, Foreclosure Crisis Hits Dorchester Renters Hard, Feb. 1, 2009, *available at* http://www.bostonherald.com/news_opinion/local_coverage/2009/02/foreclosure_crisis_hits_dorchester_renters_hard. [https://perma.cc/T8H5-7WBT].

87 *See Suero v. Fed. Home Loan Mortg. Corp., et al.*, 123 F. Supp. 3d 162 (2015).

88 *Id.* at 166.

89 *Id*.

90 *Id*.

91 *Id*.

92 *Id*. at 167. The first two offers were for $90,000, an amount a BCC appraiser had determined to be fair market value based on the amounts identical condominiums in the same building had sold for within the past year. During the course of the litigation, a Senior REO Sales Manager at Freddie Mac attested in an affidavit that fair market value for the Sueros' condominium was between $110,000 and $115,000. BCC then made offers for $110,000 and $115,000. *Id*.

93 *See* Suero SOF, Statement 19.

94 In Massachusetts, former homeowners have a right to continue living in their home after foreclosure until the new owner (i.e., the purchaser at foreclosure) obtains a final judgment of eviction through a summary process action. *See Bank of New York v. Bailey*, 460 Mass. 327 (2011). Homeowners have a right to challenge validity of the foreclosure in the eviction proceedings. *See id.*

95 *See* M.G.L. c. 93A, s. 2(a); 940 C.M.R. 3.16(3).

96 It is well established that a practice may be considered a violation of M.G.L. c. 93A if it is "within at

The Sueros sought declaratory and injunctive relief, namely an order requiring Freddie Mac to sell their home to BCC for fair market value free of any restrictions on resale.[97] Although the Sueros brought the action in state court, Freddie Mac promptly removed to federal court pursuant to a provision of HERA granting the Enterprises an unconditional right to removal.[98]

The Sueros were granted a preliminary injunction upon a federal court's finding of likelihood of success on the merits.[99] The injunction prohibited Freddie Mac from evicting the Sueros and also from selling the property to a third party while the litigation was ongoing.[100] Shortly thereafter, the Massachusetts Attorney General filed a separate suit against Fannie Mae, Freddie Mac, and the Federal Housing Finance Agency (FHFA) alleging widespread noncompliance with the nonprofit buyback provision of M.G.L. c. 244 § 35C.[101] The suit claimed that Fannie Mae and Freddie Mac's blanket refusal to engage in buyback programs like those offered by BCC unfairly and illegally was causing Massachusetts residents to lose their homes.[102] The Complaint cited several instances in which Fannie Mae and Freddie Mac refused buyback offers from BCC to purchase foreclosed homes at fair market value based on their arms'-length transaction and make-whole policies.[103] The suit sought a declaration that Freddie Mac and Fannie Mae's policies violate M.G.L. c. 244 § 35C, as well as an order enjoining the Enterprises from carrying out their arm's-length transaction and make-whole policies in Massachusetts.[104] Also originally filed in State superior court, the defendants again removed to the federal system. Around the same time, FHFA intervened in the Suero matter, taking the position that it had an interest in the litigation due to its role as conservator of Freddie Mac.

The federal courts ultimately issued judgments in favor of Freddie Mac, Fannie Mae, and FHFA in both cases.[105] In the Attorney General litigation, the Court granted the entities' motion to dismiss, and in the Suero matter the Court granted summary judgment for Freddie Mac and FHFA on the Sueros' M.G.L. c. 244 § 35C claim.[106] [107] In both cases, the Court found that the

least the penumbra of some common-law, statutory, or other established concept of unfairness." *PMP Assoc., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 596 (1975). In *Commonwealth v. Fremont Investment & Loan*, a predatory lending case, the Supreme Judicial Court affirmed that conduct that results in an outcome with a similar "element of unfairness" as that which a statute prohibits is also unfair and deceptive and in violation of M.G.L. c. 93A. 452 Mass. 733 (2008).

[97] *See Suero*, 123 F.Supp.3d at 163, 174-175164.

[98] *Id.* at 164.

[99] *See* Suero v. Federal Home Loan Mortg. Corp., 2013 WL 6709001 (D. Mass, Dec. 17, 2013).

[100] *Id.* at *8.

[101] *See Massachusetts*, 54 F.Supp.3d at94, 97.

[102] *Id*.

[103] *Id*. at 97.

[104] *Id*. at 97.

[105] In response to enormous pressure from the media and the public after the rulings in *Suero* and *Massachusetts*, FHFA subsequently directed Fannie Mae and Freddie Mac to reverse their arm's-length transaction and make-whole policies and would allow nonprofit buyback sales. *See* FHFA Directs Fannie Mae and Freddie Mac to Change Requirement Relating to Sales of Existing REO, Fed. Hous. Fin. Agency Press Release, Nov. 25, 2014, *available at* Steve Meacham, A Huge Victory for Homeowners in Crisis, and the Struggle Continues, *available at* http://righttothecity.org/a-huge-victory-for-homeowners-in-crisis-and-the-struggle-continues/./ [https://perma.cc/X25B-KEPP].

[106] The Sueros brought several other claims against Freddie Mac in the same matter. These claims included other unfair and deceptive practices claims under M.G.L. c. 93A and violation of the covenant of good faith and fair dealing. Summary judgment was granted solely on the Sueros' violation of M.G.L. c. 244 § 35C claim (brought under M.G.L. c. 93A). *See* Complaint, *Suero*, 123 F.Supp.3d 162at 175. The other claims were later resolved in a settlement between the parties.

Anti-Injunction Provision of HERA, 12 U.S.C. § 4617(f) ("the Anti-Injunction Provision"), barred the Court from granting the declaratory and injunctive relief sought. The Anti-Injunction Provision expressly prohibits any "court [from] tak[ing] any action to restrain or affect the exercise of powers or functions of [FHFA] as conservator. . ."[108]

FHFA, Fannie Mae, and Freddie Mac initially took the position that the Anti-Injunction Provision prohibited the courts from enjoining the reversal of Fannie Mae and Freddie Mac's arm's-length transaction and make-whole policies because the policies were the result of a "directive" from FHFA.[109] FHFA, they initially argued, directed Fannie Mae and Freddie Mac to "implement and enforce" the policies in its capacity as conservator, and therefore the Anti-Injunction Provision applied.[110] The Commonwealth and the Sueros countered that there was no evidence that FHFA directed or took any affirmative action with regard to Fannie Mae and Freddie Mac's adoption of the arm's-length transaction and make-whole policies, and therefore the Anti-Injunction Provision could not apply.[111]

The Enterprises and FHFA changed their position after the Commonwealth and the Sueros pointed to the lack of FHFA involvement in the policies. In both cases, the Enterprises and FHFA abandoned their claim that a supposed FHFA "directive" regarding the policies had been issued, which therefore triggered the Anti-Injunction Provision. Instead, they argued that the mere fact that the policies existed within the conservatorship structure warranted application of the Provision. In the *Commonwealth* litigation, FHFA and the Enterprises took the position that:

> The [arm's-length transaction] requirement and make-whole policy protect the assets of the Enterprises from risks that FHFA has identified and are therefore within the powers and functions of the Conservator. By seeking to enjoin Defendants from implementing those prudential policies, the Commonwealth demands relief that would 'restrain or affect' the Conservator's exercise of its powers. . . .[112]

In the *Suero* matter, Freddie Mac and FHFA strikingly argued that *all* Freddie Mac decisions and operations represent an exercise of the conservator's powers simply by virtue of Freddie Mac's status in conservatorship, and that *all* Freddie Mac practices are therefore shielded from judicial review under the Anti-Injunction Provision.[113] They stated that, "this Court is without jurisdiction to grant the requested relief regardless of whether FHFA has already

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[107] The two cases were decided by different judges, both in the U.S. District Court for the District of Massachusetts. Judge Richard Stearns presided over *Mass.* v. *Fed. Hous. Fin. Agency et al*., and Magistrate Judge Judith Dein presided over *Suero v. Fed. Home Loan Mortg. Corp*.

[108] 12 U.S.C. § 4617(f).

[109] *Massachusetts*, 54 F.Supp.3d at94, 97.

[110] *Id*. at 9799. In the Suero matter, the defendants pointed to a July 3, 2012 email from FHFA to Fannie Mae and Freddie Mac related to short sales as evidence of an FHFA "directive." *See Suero*, 123 F.Supp.3d at 171. The email contained no reference to the arm's-length transaction or make whole policies, and did not relate to post-foreclosure practices. *Id.*

[111] *Suero* at 171.

[112] Combined Reply Brief of Fed. Hous. Fin. Agency, Fannie Mae, and Freddie Mac in Support of Def. Motion to Dismiss, *Massachusetts*, at 2.

[113] Combined Reply Brief of Fed. Hous. Fin. Agency and Freddie Mac in Support of Def. Cross-Motion for Summ. J, *Suero*.

exercised its powers. . . All of Freddie Mac's acts embody exercise of the Conservator's statutory power to operate the Enterprise as its successor. . ."[114] They further argued that any "injunction compelling Freddie Mac to sell the property at issue to BCC for resale to the Sueros necessarily restrains the Conservator's ability to dispose of an asset of the conservatorship on the terms that the Conservator deems appropriate."[115]

In both cases, the Courts declined to extend the applicability of the Anti-Injunction Provision to the scope urged by FHFA and the Enterprises. Yet they determined that there had been sufficient FHFA action in relation to the Enterprises' arm's-length transaction and make-whole policies to trigger application of the Anti-Injunction Provision in these cases. In the *Commonwealth* litigation, the Court concluded that FHFA had "acted" as conservator in relation to the policies when it endorsed the restrictions in its January 2013 letter to the Commonwealth, and also by "vigorously defending" the policies in the present litigation.[116] The Court reasoned that, "FHFA 'acts' by affirmatively supporting the continued application of the restrictions."[117] The *Suero* Court adopted this reasoning, declaring that the applicability of HERA's Anti-Injunction Provision "is not confined to situations in which FHFA engages in affirmative acts by issuing specific directives or statements instructing [Fannie Mae and Freddie Mac] to implement specified policies."[118] While conceding that FHFA "may not have 'acted' by issuing a formal directive relative to sales of foreclosed homes," the *Suero* Court agreed with the *Commonwealth* Court that FHFA's January 2013 letter and its efforts to defend Freddie Mac against the present legal challenge to the policies totaled a sufficient level of involvement to support application of the Anti-Injunction Provision.[119]

The Courts also found that FHFA took this loosely-defined "action" in its capacity as conservator. FHFA has duties as both conservator and regulator, but the Anti-Injunction Provision states only that, "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as *conservator or receiver*." Pursuant to this statutory language, only FHFA action taken within its capacity as conservator (or receiver, in the case of a receivership) is shielded from judicial review.[120] As Conservator, FHFA has the power to take only such action as is both "(i) necessary to put [Fannie Mae and Freddie Mac] in a sound and solvent condition; and (ii) appropriate to. . . preserve. . . [their] assets and property."[121] Unless these criteria are met, an FHFA action is considered to be regulatory.[122]

The Courts in both cases concluded that FHFA's defense of Fannie Mae and Freddie

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114 *Id*.

115 *Id*.

116 *Massachusetts*, 54 F.Supp.3d at 99.

117 *Id*.

118 *Suero*, 123 F.Supp.3d at 171.

119 *Suero*, at 171-173.

120 *See* 12 U.S.C. § 4617(f) ("no court may take any action to restrain or affect the exercise of powers or functions of the Agency as conservator or receiver"). *See also Leon County, Fla. v. Fed. Hous. Fin. Agency*, 700 F.3d 1273, 1278 (11th Cir. 2012).

121 12 U.S.C. § 4617(b)(2)(D).

122 Regulatory action requires compliance with the relevant provisions of the APA and is subject to judicial review. *See Leon County*, 700 F.3d at 1278 ("Although it may appear at first blush that many of the functions of the FHFA as regulator and as conservator overlap, we consider both the concept and function of a conservatorship and the overall statutory scheme to determine whether the actions of the FHFA. . . should be deemed an act taken by the FHFA as conservator, insulated from judicial review, or an act of rulemaking within its function as a regulator").

Mac's arm's-length transaction and make-whole policies was within the scope of its conservatorship powers, pursuant to this statutory provision. The Court in the Commonwealth matter pointed to FHFA's characterization of the policies during the course of the litigation as "protective measures against perceived risks that [that fall] squarely within FHFA's power as conservator," and noted that FHFA had articulated, again in the course of the litigation, a "potential risk of financial loss in abiding by [the non-profit buyback provision of M.G.L. c. 244 s. 35C]." The Court concluded that, based on these positions, "the decision to reject [the terms of the statute] may be fairly characterized as a business judgment intended to 'preserve and conserve the [GSE's] assets and property,'" and therefore was a conservator action that was shielded from judicial review.[123] The *Suero* Court adopted the same reasoning, emphasizing that Freddie Mac and FHFA, "have demonstrated how FHFA's adoption of the [arm's-length transaction] and Make-Whole policies furthers its statutory mission as a protective conservator."[124]

C. Anti-Injunction Provision Precedent: PACE Program Litigation

The *Suero* and *Commonwealth* decisions drastically misconstrue HERA's Anti-Injunction Provision and expand its scope to shield from judicial review a much broader array of activity than ever previously sanctioned. It is well established, and indeed the Courts in the *Suero* and *Commonwealth* cases do not dispute, that the Anti-Injunction Provision does not insulate all Freddie Mac and Fannie Mae actions from judicial review, but rather exempts only those actions taken by FHFA as conservator.[125] Yet courts previously had much more narrowly- and rigorously-defined interpretations of what actions qualify as "taken by FHFA as conservator."

Most cases relating to the interpretation of the Anti-Injunction Provision involve an FHFA directive related to the Property Assessed Clean Energy (PACE) program. In the 2000s, many local governments established PACE programs to "assist[] citizens in obtaining funds to finance home improvements aimed at achieving energy efficiency."[126] To secure repayment of these funds, properties are encumbered with a lien that, in certain jurisdictions, takes priority over all other liens.[127] On July 6, 2010, FHFA issued a formal statement instructing Fannie Mae and Freddie Mac to take certain "prudential actions" aimed at preventing the acquisition of mortgages encumbered with first-priority PACE liens.[128] To comply with this directive, Fannie Mae and Freddie Mac announced that they would stop purchasing mortgages encumbered with first-priority PACE liens originating after July 6, 2010.[129]

Shortly thereafter, several local governments sued FHFA, claiming that its directive would destroy the PACE program.[130] The suits sought declaratory and injunctive relief to prohibit

123 12 U.S.C. § 4617(b)(2)(D)(ii).

124 *Suero*, at 174.

125 *See Fed. Hous. Fin. Agency v. City of Chicago*, 926 F.Supp.2d 1044, 1059 (N.D.Ill. 2014) ("HERA expressly prohibits other federal agencies and states from interfering with *actions taken by FHFA* as conservator") (emphasis added); *Town of Babylon v. FHFA*, 699 F.3d 221, 229 (2d Cir. 2012) (holding that HERA "excludes judicial review of 'the *exercise of powers or functions' given to FHFA* as conservator") (quoting *Leon County*, 700 F.3d at 1278) (emphasis added).

126 *Leon County* at 1276; *County of Sonoma v. Fed. Hous. Fin. Agency*, 710 F.3d 987, 990 (9th Cir. 2013).

127 *See id*.

128 *See Town of Babylon*, at 225-26; *see also Leon County*, at 1276.

129 *Leon County*, at 1276.

130 *Id*.

Fannie Mae and Freddie Mac from implementing the announced restrictions.[131] FHFA filed motions to dismiss on the ground that the Anti-Injunction Provision barred the courts from granting the relief sought. These motions were uniformly granted and upheld on appeal. As a preliminary matter, the courts accepted that FHFA has separate roles as regulator and conservator of Fannie Mae and Freddie Mac, and that only its actions taken as conservator are shielded from judicial review under the Anti-Injunction Provision.[132] Pursuant to its regulatory authority, the FHFA may "issue any regulations, guidelines, or orders necessary to carry out the duties of the Director under this chapter [of HERA] or the authorizing statutes, and to ensure the purposes of this chapter and the authorizing statutes are accomplished."[133] When issuing regulations, the FHFA must comply with the relevant provisions of the Administrative Procedures Act, such as notice and the opportunity for public comment.[134] As discussed *supra*, as conservator, the FHFA is empowered only to "take such action as may be (i) necessary to put [Fannie Mae or Freddie Mac] in a sound and solvent condition; and (ii) appropriate to carry on the business of [Fannie Mae or Freddie Mac] and preserve and conserve the assets of [Fannie Mae or Freddie Mac]."

To determine whether the PACE directive was issued by FHFA in its role as conservator or as regulator, the courts closely examined how the directive aligned with "both the concept and function of a conservatorship and the overall statutory scheme [of HERA]," and considered "all relevant factors" including "its subject matter, its purpose, its outcome, and whether it involves a matter in which public comment might be relevant, appropriate, useful or intended by

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131 *Id*.

132 *Id.* at 1278 ("Although it may appear at first blush that many of the functions of the FHFA as regulator and as conservator overlap, we consider both the concept and function of a conservatorship and the overall statutory scheme to determine whether the actions of the FHFA in issuing its directive regarding PACE mortgages should be deemed an act taken by the FHFA as conservator, shielded from judicial review, or an act of rulemaking within its function as regulator").

133 12 U.S.C. § 4526(a); 12 U.S.C. § 4513(a)(1)(B). *See Leon County* at 1276. The full text of the provision states that the "principal duties" of the FHFA as regulator are:

> (A) to oversee the prudential operations of each regulated entity; and
>
> (B) to ensure that—
>
> (i) each regulated entity operates in a safe and sound manner, including maintenance of adequate capital and internal controls;
>
> (ii) the operations and activities of each regulated entity foster liquid, efficient, competitive, and resilient national housing finance markets (including activities relating to mortgages on housing for low—and moderate-income families involving a reasonable economic return that may be less than the return earned on other activities);
>
> (iii) each regulated entity complies with this chapter and the rules, regulations, guidelines, and orders issued under this chapter and the authorizing statutes;
>
> (iv) each regulated entity carries out its statutory mission only through activities that are authorized under and consistent with this chapter and the authorizing statutes; and
>
> (v) the activities of each regulated entity and the manner in which such regulated entity is operated are consistent with the public interest.

12 U.S.C. § 4513(a)(1)(B). As regulator, FHFA also has the duty to "establish criteria governing the portfolio holdings of [Fannie Mae and Freddie Mac], to ensure that the holdings are backed by sufficient capital and consistent with the mission and the safe and sound operations of [Fannie Mae and Freddie Mac]."12 U.S.C. § 4624(a).

134 12 U.S.C. § 4526(b).

Congress."[135] The Courts found that the FHFA issued its PACE directive in its capacity as conservator because the directive applied to a relatively small number of residential mortgages available to Fannie Mae and Freddie Mac in the mortgage market as a whole, had a very narrow field of operation, and "did not establish a general set of criteria to be applied across the board by Fannie Mae and Freddie Mac to their mortgage transactions in general."[136] The directive, rather, appeared to be a "discrete management decision by a conservator."[137] The Ninth Circuit also emphasized that the directive fell within the conservatorship powers because it "related directly to the soundness of the Enterprises' assets" because PACE liens substantially increase the risk of acquiring a mortgage.[138]

D. Expansion of the Anti-Injunction Provision Through the Non-Profit Buyback Law Litigation

The *Suero* and *Commonwealth* Courts' reasoning and conclusions represent a sharp departure from the PACE Courts' precedent. First, whereas the Anti-Injunction Provision was applied in the PACE context where there was clear and unambiguous action taken by FHFA, in the buyback context FHFA's "action" was vague, amorphous, and post-hoc. Both the instructions and the binding force were explicit in the PACE directive..On July 6, 2010, FHFA announced, "Today, FHFA is directing Fannie Mae, Freddie Mac, and Federal Home Loan Banks to undertake the following prudential actions. . ."[139] The directive went on to enumerate three specific actions it was requiring the Enterprises to take concerning the PACE programs, one of which had several subparts and included an instruction to the Enterprises to issue additional guidance as needed.[140] On July 14, 2010, FHFA issued a subsequent statement that "[i]n keeping with [its] safety and soundness obligations," it would "defend vigorously" its policies laid out in the July 6, 2010 statement.[141] In total, FHFA issued <u>five</u> formal statements and letters to the Enterprises, servicers, state bank supervisors, credit union supervisors, mortgage lenders, state governors and legislatures, and the public regarding the PACE directive, reflecting careful, conscious, and deliberate decision-making.[142]

By contrast, in the buyback context, FHFA had been silent on Fannie Mae and Freddie Mac's arm's-length transaction and make-whole policies until the *Massachusetts* litigation began.[143] Fannie Mae and Freddie Mac adopted the policies on their own, without any involvement by FHFA. Unlike the explicit and specific directive at issue in the PACE cases, FHFA never made any formal statement about the Enterprises' buyback policies, never gave any specific instructions to the Enterprises, and never made any statement of binding force regarding

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135 *Leon County*, at 1278.

136 *Id*.

137 *Id*. *See also* County of Sonoma, 710 F.Supp.3d at 993 ("A decision not to buy assets that FHFA deems risky is within its conservator power to 'carry on' the Enterprises' businesses and to 'preserve and conserve the assets and property of the [Enterprises]'"), quoting 12 U.S.C. § 4617(b)(2)(D)(ii).

138 *See County of Sonoma*, 710 F.Supp.3d at 993.

139 Fed. Hous. Fin. Agency, Statement on Certain Energy Retrofit Home Loan Programs (2010).

140 *Id.*

141 FED. HOUS. FIN. AGENCY, STATEMENT OF DIRECTOR EDWARD J. DEMARCO ON PACE PROGRAMS (2010).

142 *See County of Sonoma*, 710 F.3d at 990-92.

143 Massachusetts, 54 F. Supp. 3d at 99; Suero, 123 F. Supp. 3d at 171.

these, or any other, residential property sales policies.[144] At most, FHFA stated that it supported the buyback policies once the policies were challenged in litigation, and articulated a rationale for choosing to do so.[145]

This broadening of the requisite FHFA "action" necessary to trigger the Anti-Injunction Provision represents a significant expansion of the Provision's meaning and scope. FHFA's acts as conservator have involved significant initiatives directed at correcting systemic flaws in the Enterprises' business models. These have included building a Common Securitization Platform for issuing mortgage-backed securities, reducing the risk-exposure associated with the Enterprises' single-family mortgage credit guarantee business, and reducing the Enterprises' retained and multifamily portfolios.[146] Because FHFA re-delegated to Fannie Mae and Freddie Mac control of their day-to-day operations and normal business activities, it logically follows that FHFA's conservator actions have been limited to larger directives such as these. And the application of the Anti-Injunction Provision, up until the *Massachusetts* and *Suero* decisions, had consistently tracked these types of actions. Thus, the meaning of the language of the provision, "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as conservator. . ." had meant that no court may enjoin conservator directives or other initiatives.[147]

With *Massachusetts* and *Suero*, however, the meaning of this Provision expanded to prohibit courts from enjoining any action taken by Fannie Mae or Freddie Mac that FHFA later chooses to defend as a legitimate business interest. Thus, no longer is the Anti-Injunction Provision limited to shielding from judicial review only actions clearly and affirmatively taken by FHFA. Now, any action undertaken by an Enterprise may be insulated from review so long as FHFA, once the action is challenged, comes to its defense. Such an expansion poses a serious threat to the fate of state consumer protection laws as they apply to Fannie Mae and Freddie Mac—now, whenever the Enterprises wish to flout such laws, they may make their own decision to do so and later obtain immunity if FHFA takes their side.

Second, *Massachusetts* and *Suero* significantly weaken the analytical rigor with which the conservatorship (versus regulator) action test is applied. As previously described, in the PACE program cases, the courts applied a multifactorial test for determining whether the action taken by FHFA falls within its capacity as conservator or regulator, including assessing whether the action meets the statutory standard for conservatorship action as "(i) necessary to put the [Enterprises] in a sound and solvent condition; and (ii) appropriate to carry on the business of the [Enterprises] and preserve and conserve the assets and property of the [Enterprises]."[148] Whereas the PACE Courts assessed FHFA's action in terms of "its subject matter, its purpose, its outcome, and whether it involves a matter in which public comment might be relevant, appropriate, useful[,] or intended by Congress[,]"[149] the absence of any clearly defined FHFA "action" in the nonprofit buyback law litigation eluded such analysis.

Instead of undertaking a rigorous assessment of the factors deemed relevant by the courts

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144 *See generally Massachusetts*, 54 F. Supp. 3d 94; *Suero*, 123 F. Supp. 3d 162.

145 *See Massachusetts*, 54 F. Supp. 3d at 101.

146 FED. HOUS. FIN. AGENCY, ANNUAL REPORT TO CONGRESS 2013, at 1-5 (2014), *available at* https://www.fhfa.gov/AboutUs. [https://perma.cc/DE64-2W2Y].

147 *See* 12 U.S.C. § 4617(f) ("no court may take any action to restrain or affect the exercise of powers or functions of the Agency as conservator or receiver").

148 12 U.S.C. 4617(f).

149 *Leon County*, 700 F.3d at 1278.

in the PACE cases, the Courts in *Suero* and *Massachusetts* engaged in a superficial analysis that diluted the test to a determination of whether FHFA's position "may be fairly characterized as a business judgment intended to 'preserve and conserve [the Enterprises'] assets and property.'"[150] The Court in *Massachusetts* began by noting that "[c]ourts have uniformly held that the FHFA is acting as the [Enterprises]' conservator when it evaluates the risks of certain business transactions and takes prudential action to avoid those that it deems undesirable."[151] It then cited to FHFA's positions regarding Fannie Mae and Freddie Mac's buyback policies as stated in their memorandums of law, submitted in the course of the instant litigation, as evidence that it had performed such a risk evaluation.[152] It concluded that, "[b]ecause defendants have articulated a potential risk of financial loss in abiding by the restrictions of the Non-Profit Buyback Provision, the decision to reject these terms may be fairly characterized as a business judgment intended to preserve and conserve [the Enterprises]' assets and property," and declared that the Anti-Injunction Provision applied.[153]

This is precisely the sort of weak analysis the PACE courts expressly rejected. "Congress[,]" the Eleventh Circuit noted, "did not intend that the nature of the FHFA's actions would be determined based upon the FHFA's self-declarations because the distinction between regulator and conservator would be one without a meaning or effect. The FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp."[154] Here, FHFA's self-serving declaration in litigation and pre-litigation statements that Fannie Mae and Freddie Mac's buyback policies are a business necessity is a thinly-veiled "conservator stamp." It is clear from the evidence set forth in both *Massachusetts* and *Suero*, and indeed it is undisputed, that FHFA never engaged in any business analysis of the buyback policies. The materials submitted in litigation were devoid of, for example, any affidavits from persons in authority at FHFA, or any other evidence, indicating a financial risk assessment was ever performed. What is clear, rather, is that FHFA jumped to the Enterprises' defense once it was clear that the legality of their policies was threatened by state consumer protection law, and merely by labeling the policies as a business necessity succeeded in shielding Fannie Mae and Freddie Mac's own decisions from judicial review. Such decisions suggest, contrary to all precedent and statutory language, that any Fannie Mae or Freddie Mac policy may be insulated from review wherever FHFA articulates a business justification for it in litigation. If other jurisdictions choose to follow this rule, Fannie Mae and Freddie Mac essentially will be given *carte blanche* to flout state consumer protection laws whenever either of them, and FHFA *post hoc*, so choose..

III. FANNIE MAE AND FREDDIE MAC'S FIGHT AGAINST LIABILITY FOR MULTIPLE DAMAGES UNDER M.G.L. C. 93A, MASSACHUSETTS' UNFAIR AND DECEPTIVE PRACTICES ACT

A. Fannie Mae and Freddie Mac as Landlords in Massachusetts

While this Article has thus far analyzed how Fannie Mae and Freddie Mac have wrongfully invoked HERA to subvert homeowner protections, it will now turn to how they have

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150 *Massachusetts*, 54 F. Supp. 3d at 101, (citing 12 U.S.C. 4617(b)(2)(D)(ii)).

151 *Id.* at 100.

152 *Id.*

153 *Id.* at 101

154 *Leon County*, 700 F.3d at 1278.

similarly misused the statute to undermine tenant rights. In Massachusetts, where a property is foreclosed and purchased by the foreclosing bank at auction,[155] existing tenants have a right to continue renting until the property is sold to a *bona fide* third party.[156] Tenants may be evicted for failure to pay rent or for otherwise violating a term of the tenancy, but may not be evicted for "no cause," i.e., at the expiration of a lease term or upon the landlord's election to terminate the monthly tenancy, as is normally permissible under Massachusetts law.[157] Because it is Fannie Mae and Freddie Mac's business models to purchase the homes they foreclose unless they are outbid by a third party purchaser, the effect of this law is that the Enterprises have become landlords to hundreds if not thousands of tenants across the Commonwealth.

As has now been well documented by academia and the media alike, Fannie Mae and Freddie Mac do an extremely poor job at maintaining basic habitable conditions in the properties they come to own after foreclosure (known as "real estate owned" or REO properties).[158] One federal lawsuit, filed in late 2016 by the National Fair Housing Alliance and twenty local fair housing groups across the country, alleges that Fannie Mae purposefully neglects REO properties located in black and Latino neighborhoods, and takes relatively better care of equivalent homes in working- and middle-class white areas.[159] The lawsuit followed years of investigation into Fannie Mae's REO properties across the country, which uncovered persistent and widespread neglect of properties located in minority neighborhoods.[160] As just a few examples, the groups found that nationwide, of Fannie Mae REO properties located in communities of color, 24% had ten or more maintenance or marketing deficiencies, 39% had trash visible on the property, 24.9% had unsecure or broken doors, and 41.5% had damaged, boarded, or unsecured windows.[161] These figures were all significantly higher than their equivalents in white neighborhoods.[162]

In addition to the data collected by the fair housing groups, a 2015 study of housing conditions in post-foreclosure properties in Boston specifically found that from 2011-2013, bank-

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155 Under the Enterprises' own business models, and pursuant to their contracts, loan servicers conduct foreclosure sales on mortgages owned by the Enterprises on their behalf, and must sell the properties to the Enterprises as the highest bidder unless outbid by a third party. *See supra* note 58.

156 *See*.MASS. GEN. LAWS. ch. 186A, § 2 (2010) ("Tenant Protections in Foreclosed Properties."").

157 *See id*. Note that the Massachusetts statute provides significantly greater protections than were provided by the federal Protecting Tenants at Foreclosure Act of 2009 (PTFA), which allowed foreclosing purchasers to evict tenants for no cause, but required a 90-day notice period prior to doing so.

158 Editorial Board, *The Housing Crisis Lives on for Minorities*, N.Y. TIMES, Dec. 26, 2016, http://www.nytimes.com/2016/12/26/opinion/the-housing-crisis-lives-on-for-minorities.html?smid=fb-share&_r=1; [https://perma.cc/UDR4-4LYS]; Carrie Wells, *Fannie Mae Accused of Neglecting Foreclosures in Minority Neighborhoods*, BALT. SUN, May 13, 2015, http://www.baltimoresun.com/business/real-estate/wonk/bs-bz-fannie-mae-housing-complaint-20150513-story.html; [https://perma.cc/7BSQ-DV5P?type=image]; Mark Matthews, *Tenants Accuse Fannie Mae of Being a Slumlord*, ABC 7 NEWS, Oct. 28, 2011, http://abc7news.com/archive/8410525/./ [https://perma.cc/69KT-BEH2]. *See also* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, EVICTION (WITHOUT) NOTICE: RENTERS AND THE FORECLOSURE CRISIS 26 (2012).

159 *See* Complaint and Jury Demand, Nat'l. Fair Housing Alliance, et al. v. Fed. Nat'l. Mortg. Ass'n ("Fannie Mae*"),*"), No. 3:16-cv-06969 (N.D. Cal. Filedfiled Dec. 5, 2016).

160 *See id.* According to the Complaint, the research was conducted between July, 2011, and October, 2015. *See* Complaint, *id.*, at ¶ 3.

161 *See* Complaint, *id.*, at ¶ 10.

162 *See id.* In predominantly white neighborhoods, only 6% of REO properties had ten or more maintenance or marketing deficiencies, 14.9% had visible trash on the property, 11.1% had unsecured or broken doors, and 19.1% had damaged, boarded, or unsecured windows. *Id.*

owned properties had disproportionately higher rates of Inspectional Service Department requests related to housing maintenance, property neglect, and human-generated problems.[163] It also found a disproportionately high number of citations for Housing Code violations as compared to post-foreclosure properties owned by owner-occupants or investors.[164] While the study does not break down data by specific post-foreclosure landlord, it concluded that larger entities, such as banks or trusts, "do a worse job at property upkeep than smaller or local investors."[165] And were there any doubt about the applicability of this study to Fannie Mae and Freddie Mac, the sheer volume of conditions-based claims filed by tenants against them in Massachusetts Housing Courts serves as a miner's canary.[166]

B. Litigating Poor Housing Conditions in Massachusetts

In Massachusetts, tenants have numerous options to assert claims against their landlords when they suffer conditions of disrepair in their homes. Generally speaking, tenants have a right to withhold rent for bad conditions, and also have a cause of action against their landlord, which they may assert in several different forums including Housing Court.[167] The common law implied warranty of habitability and the covenant of quiet enjoyment statute, MASS. GEN. LAWS. ch. 186, § 14, both provide protections against poor housing conditions and entitle tenants to damages when their landlords fail to make necessary repairs.[168] Damages for breach of the implied warranty of habitability are measured by "the difference between the value of the dwelling as warranted and the value of the dwelling as it exists in its defective condition."[169] Mass. Gen. Laws c. 186, § 14, entitles tenants to damages in the amount of actual damages, equivalent to the implied warranty of habitability damages, or three months' rent, whichever is greater.[170]

Yet the strongest habitability protection is arguably provided under state consumer protection law M.G.L. c. 93A ("Chapter 93A"). This statute generally prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[171] In the landlord-tenant context, it is well established that Chapter 93A prohibits landlords from leasing premises with poor conditions.[172] While in many ways duplicative of the

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[163] *See Hwang, supra* note 28, at 24-25.

[164] *See id.*

[165] *See id.*

[166] *See e.g. Fed. Nat. Mortg. Ass'n v. Horsley,* Boston Hsg. Ct. No. 13-SP-130 (Sept. 11, 2015); *Fed. Nat. Mortg. Ass'n v. Phillips*, Bost. Hsg. Ct. No. 13-SP-2217 (March 19, 2015).

[167] M.G.L c.MASS. GEN. LAWS. ch. 239, § 8A; M.G.L c.MASS. GEN. LAWS. ch. 286, § 14; St. 1979, c. 72, § 3, codified as M.G.L.A. c.MASS. GEN. LAWS. ch. 185C, § 3.

[168] *See* Cruz Mgmt. Co., Inc. v. Wideman, 417 Mass. 771, 775 (1994); *Haddad v. Gonzalez*, 410 Mass. 855, 872 (1991); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 199 (1973).

[169] *Hemingway,* 363 Mass. at 203 (footnote omitted).

[170] *See* Cruz Mgmt. Co., Inc. v. Thomas, 417 Mass. 782 n.7 (1994), citing M.G.L. c. 186 § 14 (1992 ed.).

[171] M.G.L. c. 93A, § 2(a).

[172] *See* 940 Code Mass. Regs. § 317; *Haddad v. Gonzalez,* 410 Mass. 855 (1991). Note that Chapter 93A only imposes liability against landlords who rent three or more units, and does not apply to government entities (e.g., public housing authorities). *See Boston Hous. Auth. v. Howard*, 427 Mass. 537 (1998) (Chapter 93A does not apply to housing authorities); *Billings v. Wilson*, 397 Mass. 614 (1986) (Chapter 93A does not apply to a landlord of an owner-occupied two-family dwelling); *Young v. Patukonis*, 24 Mass. App. 907 (1987) (rescript) (Chapter 93A does not apply to landlord of owner-occupied three-family dwelling).

protections contained in M.G.L. c. 186 § 14 and the implied warranty of habitability, the unique strength of the Chapter 93A protections lies in the statute's damage provisions. Whereas M.G.L. c. 186 § 14 damages are capped at the greater of actual damages or three months' rent, and warranty of habitability damages are limited to actual damages only, Chapter 93A allows for multiple damages. Specifically, successful Chapter 93A claimants are entitled to actual damages or twenty-five dollars, whichever is greater, and if a judge determines that the violation was "willful" or "knowing," the claimant is entitled to not less than double and not more than triple the amount of actual damages.[173] For this reason, it is well understood that tenants with persistent and serious defective conditions have their strongest legal anchor in Chapter 93A, rather than the other overlapping statutory and common law grounds.[174]

Conditions-based claims are particularly important in the overall context of tenants' rights in Massachusetts because they serve as both defenses and counterclaims in an eviction action.[175] Under Massachusetts law, where a landlord seeks to evict a tenant for no fault[176] or non-payment of rent, the tenant is entitled to possession if the value of his or her claims exceeds the amount of rent owed, if any.[177] Thus, for example, if a landlord establishes that a tenant owes $2,000 in rent, but the value of the tenant's conditions-based and other claims against the landlord are determined to be $2,001 or higher, the tenant is entitled to possession. The tenant is also entitled to a money judgment in the amount of the difference.[178]

Thus, by significantly amplifying the potential value of tenants' conditions-based claims with its double or treble damages provisions, Chapter 93A provides a strong legal hook to tenants both to defend against an eviction for non-payment of rent and/or to recover significant money damages.[179] And importantly, from a public policy perspective, these provisions serve as a powerful bulwark against the inclination of landlords, particularly in poor communities, to allow property conditions to deteriorate. [180]

C. Fannie Mae and Freddie Mac's Legal Challenges to Chapter 93A Multiple Damages

Since 2014, Fannie Mae and Freddie Mac have asserted in dozens of cases in Massachusetts Housing Courts that they cannot be held liable for double or treble damages under

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[173] M.G.L. c. 93A, § 9(3). *See also* Dorgan v. Loukas, 19 Mass. App. Ct. 959 (1985).

[174] For example, if a tenant in a $1,200 per month apartment suffers actual damages for bad conditions equal to $4,000 and a judge determines that the persistence of bad conditions was willful or knowing, the tenant is entitled to at least $8,000 and up to $12,000 under Chapter 93A. Under the implied warranty of habitability, damages are $4,000 and under M.G.L. c. 186, § 14, damages are $4,800 (three months' rent).

[175] *See* M.G.L. c. 239, § 8A.

[176] A no fault eviction is an eviction action brought at the expiration of a lease or upon the termination of a term (e.g. month-to-month) tenancy.

[177] *See* M.G.L. c. 298, § 8A.

[178] If the value of the tenant's claims is found to be less than the rent owed, but the Court determines that the tenant withheld rent in good faith (because of defective conditions), the tenant is entitled to a ten-day post-judgment cure period. *See id.* If the tenant pays the remaining money owed within the period, she retains possession. *Id.*

[179] Former homeowners are also entitled to assert counterclaims and defenses under M.G.L. c. 93A in eviction actions. *See* Bank of America, N.A. v. Rosa, 466 Mass. 613, 626 (2013).

[180] *See Haddad,* 410 Mass. at 869 ("deterrence is an important goal of the multiple damages provisions of [Chapter] 93A, including within the landlord tenant context").

Chapter 93A pursuant to the HERA "Anti-Penalty Provision."[181] The Provision provides, in relevant part:

> (1) Applicability: The provisions of this subsection shall apply with respect to the Agency in any case in which the Agency is acting as conservator or receiver. . . .
>
> (4) Penalties and fines: The Agency shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.[182]

The "Agency" is defined by the statute as the Federal Housing Finance Agency (FHFA).[183] Procedurally, the Enterprises seek immunity by filing motions to strike or dismiss multiple damages in the early stages of eviction actions in which the tenant had asserted claims under Chapter 93A in his or her answer. Fannie Mae and Freddie Mac argue that they are exempt from punitive damages while in conservatorship pursuant to federal law, which preempts any state law to the contrary. Specifically, they argue that, because FHFA as conservator has succeeded to the assets of the Enterprises, "while under conservatorship with the FHFA, [the Enterprises are] statutorily exempt from taxes, penalties, and fines to the same extent that the FHFA is."[184] For support, they cite to *Nevada ex rel. Hager v. Countrywide Home Loans Servicing, LP* and *Higgins v. BAC Home Loans Servicing LP*, two cases in which courts held that the anti-penalty provision of HERA exempted the Enterprises from liability for statutory multiple damages.

D. Housing Courts' Adoption of Ex. Rel. Hager and Higgins Precedent

Massachusetts Housing Courts have nearly uniformly granted the Enterprises' motions, accepting the argument that the Anti-Penalty Provision immunizes Fannie Mae and Freddie Mac from Chapter 93A multiple damages. They have provided little reasoning for their conclusions aside from citations to *Hager* and *Higgins*. In *Hager*, the Court granted Fannie Mae immunity from penalties under Nevada's False Claims Act pursuant to the Anti-Penalty Provision.[185] The entirety of the Court's reasoning was provided in three sentences:

"Congress also exempted the FHFA, when acting as conservator, from any penalties and

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[181] *See, e.g.*, *Fed. Nat'l Mortg. Ass'n v. Horsley*, Boston Hsg. Ct. No. 13-SP-130 (Sept. 11, 2015); *Fed. Nat'l Mortg. Ass'n v. Phillips*, Boston Hsg. Ct. No. 13-SP-2217 (March 19, 2015); *Fed. Nat'l Mortg. Ass'n v. Lorenus et al.*, Boston Hsg. Ct. No. 14-SP-1763 (Feb. 6, 2015); *Fed. Nat'l Mortg. Ass'n v. Donahue et al.*, Boston Hsg. Ct. No. 14-SP-3882 (March 25, 2015); *Fed. Nat'l Mortg. Ass'n v. Key et al.*, Boston Hsg. Ct. No. 13-SP-47 (May 22, 2015); *Fed. Nat'l Mortg. Ass'n v. Rangel et al.*, Boston Hsg. Ct. No. 13-SP-3274 (Oct. 15, 2014); *Fed. Nat'l Mortg. Ass'n v. Eaton,* Boston Hsg. Ct. No. 14-SP-3994 (June 17, 2015); *Fed. Nat'l Mortg. Ass'n v. Lavigne*, 14-SP-3630 (March 30, 2015); *Fed. Nat'l Mortg. Ass'n v. Mejia,* Chelsea Dist. Ct. No. 1414-SU-330 (Oct. 2, 2014).

[182] 12 U.S.C. § 4617(j)(1), (4).

[183] 12 U.S.C.A. § 4502(2).

[184] Nevada ex rel. Hager v. Countrywide Home Loans Servicing, LP, 812 F.Supp.2d 1211, 1218 (D. Nev. 2011).

[185] Nevada ex rel. Hager v. Countrywide Home Loans Servicing, LP, 812 F. Supp.2d 1211, 1218 (D. Nev. 2011).

fines. Congress provided that the FHFA 'shall not be liable for any amounts in the nature of penalties and fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.' As such, the Court finds that while under conservatorship with the FHFA, Fannie Mae is statutorily exempt from taxes, penalties, and fines to the same extent FHFA is."[186]

In *Higgins*, the Court similarly granted Fannie Mae immunity from penalties associated with a Kentucky recording statute.[187] Although the Court provided more reasoning than the Court in *Hager*, its logic is entirely faulty. The Court explained that the prohibition against imposing penalties applies "'in any case in which the Agency is acting as conservator or receiver.'"[188] It then concluded that, "[w]hen the Agency is acting in that role, there is essentially no distinction between the Agency and Fannie Mae" because "when the Agency acts as conservator, it acts with complete control over Fannie Mae's assets," and thus, "[b]y prohibiting the imposition of fines and penalties on the Agency 'in any case in which the Agency is acting as conservator or receiver,' HERA necessarily prohibits the imposition of fines and penalties on Fannie Mae also."[189]

E. The Housing Courts' Erroneous Interpretations of the Anti-Penalty Provision

The Housing Courts' rulings and their logic, as well as those of the precedents they cite, are erroneous and contrary to the plain language of HERA. The Anti-Penalty Provision of HERA explicitly confers immunity from liability for amounts in the nature of fines or penalties upon FHFA, not upon the Enterprises under its conservatorship. The first sub-section of the Anti-Penalty Provision, titled "Applicability," states:

(1) Applicability: The provisions of this subsection shall apply with respect to *the Agency* in any case in which the *Agency* is acting as conservator or receiver.

(4) Penalties and fines: The *Agency* shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.[190]

"Agency" is defined explicitly as FHFA.[191] Fannie Mae and Freddie Mac are referred to under a separate defined term throughout the statute as "Enterprise."[192] The Enterprises' argument in effect is that (a) during the conservatorship, (b) FHFA's immunity to penalties, (c) applies to the Enterprises, for (d) all the Enterprises' actions. If such were the case, Congress would have instead written 12 U.S.C. § 4617(j) as the following:

Applicability: The provisions of this subsection shall apply with respect to the Agency <u>and the Enterprises</u> whenever the Enterprises are under conservatorship or receivership.

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186 *Id*.,. at 1218, citing 12 U.S.C. § 4617(j)(4).

187 *Higgins*, at *4, *v. BAC Home Loans Servicing LP*, No. 12-CV-183, 2014 WL 1332825 (E.D. Ky. Mar. 31, 2014), citing 12 U.S.C. § 4617(j)(4).

188 *Higgins*, at *4, citing 12 U.S.C. § 4617(j)(4).

189 *Id.* at 2,3.

190 12 U.S.C. § 4617(j)(4) (emphasis added).

191 12 U.S.C. § 4502(2) ("the term 'Agency' means the Federal Housing Finance Agency").").

192 12 U.SC. § 4502(10) ("(2008) ("the term 'Enterprise' means the Federal National Mortgage Association [Fannie Mae] and any affiliate thereof, and the Federal Home Loan Mortgage Corporation [Freddie Mac] and any affiliate thereof").").

Penalties and fines: Whenever the Enterprises are under conservatorship or receivership, the Agency <u>and the Enterprises</u> shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.

But Congress did not write the statute this way. No part of the statute limits the liability of the Enterprises for penalties; liability is only limited for FHFA. The Anti-Penalty Provision expressly applies "with respect to the Agency." Based on this clause alone, the Anti-Penalty Provision applies only with respect to liability imposed on FHFA, and expressly does not apply where liability is imposed on Fannie Mae or Freddie Mac.

1. The Anti-Penalty Provision Does Not Apply in Chapter 93A Conditions Cases Because FHFA Does Not Act

In addition to the clear Agency-only restriction, the plain language of the applicability section— "shall apply with respect to the Agency in any case in which the Agency is acting as conservator" —imposes two requirements for application of the Anti-Penalty Provision: (1) FHFA must "act," and (2) that action must be in its capacity as conservator (or receiver).[193] Neither of the two conditions is met in these eviction cases. Specifically, Fannie Mae has admitted in sworn testimony that decisions regarding whether to repair defective conditions, and regarding property management more generally, are made by the Enterprises without any FHFA involvement.[194] Fannie Mae also made clear in its testimony that FHFA has nothing to do with its rental unit or eviction process, and that FHFA, "do[es] not have direct control of the operations [of Fannie Mae]."[195]

In order to satisfy the clear "Agency action" requirement of the statute, the argument that the Anti-Penalty Provision applies to Fannie Mae and Freddie Mac must therefore necessarily rest on the assumption that merely because the Enterprises are under conservatorship, all of their actions are equivalent to FHFA action. This assumption is false. HERA outlines FHFA's powers to "operate the regulated entity." This provision states that "[t]he Agency ***may***, as conservator or receiver (i) take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers and conduct all business of the regulated entity; (ii) conduct all obligations and money due the regulated entity; (iii) perform all functions of the regulated entity in the name of the regulated entity which are consistent with the appointment as conservator or receiver; (iv) preserve and conserve the assets and property of the regulated entity; and (v) provide by contract for assistance in fulfilling any function, activity, action, or duty of the

[193] 12 U.S.C. § 4617(j)(1) (2008) ("[t]he provisions of this subsection shall apply with respect to the Agency in any case in which *the Agency is acting as conservator* or receiver") (emphasis added). FHFA has not put the Enterprises under receivership, and therefore this Article will only address whether it met the requirement for acting in its capacity as conservator.

[194] *See* Transcript of Dep. of Fannie Mae (hereinafter "FNMA Tr.") 231, 5-10, on file with author. *Fed. Nat. Mortg. Ass'n v. Smith*, N.E. Hsg. Ct. No. 13-SP-4346. ("Q. Does FHFA ever weigh in on the issues about what to repair [or] what not to repair? A. Oh. No. No. Q. Okay. So FHFA didn't in this case then [?] A. No. FHFA wouldn't. In that 90,0000 example with Jake [referring to a previously discussed hypothetical example where a property needed $90,000 worth of repairs], they would have no idea about that. They would never see that… FHFA wouldn't be involved in any level of repair, really. They—those decisions are made well beneath them [FHFA]").

[195] FNMA Tr. 398, 22; 56-57 ("Q. Are you aware of any FHFA directives concerning the rental unit in particular?... A. No, not really. Q. Are you aware of any directives related to the eviction process when the property's in the eviction unit? A. No.").

Agency as conservator or receiver."[196] The key word in this provision is "may," which indicates that the conservator is permitted to take the enumerated actions, but is not obligated to do so, which would instead be indicated by the word "shall."[197]

The language and meaning of § 4617(b)(2)(B) are critical because FHFA in fact has chosen *not* to invoke the full extent of the authority available for operation of the Enterprises. While FHFA at first availed itself of the full authority allowed under § 4617(b)(2)(B) when it established the conservatorship in September 2008, it shortly thereafter, in November 2008, re-delegated much of this authority to the Enterprises. With this re-delegation, FHFA explicitly chose "for the Enterprises to 'continue to be responsible for normal business activities and day-to-day operations'" and "not to manage every aspect of the Enterprises' operations."[198], [199] FHFA retained its authority as conservator only over "selected business decisions."[200] For these business decisions, FHFA controls the Enterprises' conduct either by issuing directives or requiring Enterprise approval for policy changes.[201] This operational structure has been affirmed by Fannie Mae in sworn testimony.[202] When asked about FHFA's involvement in repairing defective conditions and other matters related to managing tenant-occupied properties, Fannie Mae responded: "I think you have the role of FHFA wrong, maybe. I mean, they have oversight of Fannie Mae—but not direct control of the operationsFalse So yeah, the questions relative to them would always be answered with a—you know, wouldn't have been involved at that level. . . those decisions are made well beneath them."[203]

FHFA's issuance of "directives" to the Enterprises and its requirements that the Enterprises obtain approval for select business decisions also reflect the fact that the Enterprises

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196 12 U.S.C. § 4617(b)(2)(B) (2008).

197 *See, e.g.*, Commonwealth v. Dalton, 467 Mass. 555, 558 (2014) ("the word 'may' in a statute is generally permissive, reflecting the Legislature's intent to grant discretion or permission to make a finding or authorize an act"); *see also School Comm'n of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 79, 81 (1982) ("the word 'may' does not impose a mandate but simply authorizes an act").

198 *FHFA's Conservator Approval Process for Fannie Mae and Freddie Mac Business Decisions* ("Conservator Approval Process"), FED. HOUS. FIN. AGENCY, OFFICE OF INSPECT. GEN. (Sept. 27, 2012), fhfaoig.gov/Content/Files/AUD-2012-008_2.pdf. [https://perma.cc/KSM8-NZZT].

199 Enterprise actions fall under the scope of conservator review only by three prescribed methods. *Id.* First, the Enterprises are required to submit for approval certain proposed actions involving "critical matters." *Id.* "Critical matters" fall into eight general categories, termed "non-delegated authorities, " which include actions involving capital stock, actions related to the creation of any subsidiary or affiliate, and settlements involving over $50 million. *Id.* at 5-7. Second, FHFA may unilaterally elect to review an Enterprise action. *Id.* at 7. Finally, an Enterprise may independently choose to submit for review or consultation an activity even if it falls outside the mandatory eight areas requiring approval. *Id.* The Conservatorship Reports make clear that if an Enterprise activity does not reach FHFA by one of these three methods, FHFA has not exercised any power or function as conservator. *See id.*

200 Conservator Approval Process, *supra* note 206, at 5; *see also White Paper: FHFA-OIG's Current Assessment of FHFA's Conservatorship of Fannie Mae and Freddie Mac* ("Current Assessment of Conservatorship"), FED. HOUS. FIN. AGENCY, OFFICE OF INSPECT. GEN. (Mar. 28, 2012), http://www.fhfaoig.gov/Content/Files/WPR-2012-001.pdf. [https://perma.cc/EE3B-TJLA].

201 *See id.*

202 FNMA Tr. 56 ("A. Well, we answer to FHFA in DC, but that would be through our DC group. But if they gave, you know, directives to the DC group management, then, if that affected REO, some of those directives -- which it could -- then they would flow down to us, I'm sure.").

203 FNMA Tr. 398, 18-22; 399, 3-9.

operate independently most of the time.[204] Were FHFA in fact availing itself of the full authority allowed under § 4617(b)(2)(B), i.e. "perform[ing] all functions of the regulated entity" and "operat[ing] the entity with all the powers of the shareholders, directors, and the officers," there would be no need for directives because FHFA would already be fully controlling the operations of the companies. Likewise, no review or approval process would be necessary.[205] Indeed, however, those processes *are* necessary to the conservatorship because FHFA is not exercising its full § 4617(b)(2)(B) authority and operating the Enterprises.

Thus, because FHFA has *not* invoked the full authority, there is no basis to presume that actions taken by the Enterprises are equivalent to or reflect FHFA action. The cases that the Courts rely on—*Nevada ex rel. Hager v. Countrywide Home Loans Servicing, LP*, 812 F.Supp.2d 1211 (D. Nev. 2011) and *Higgins v. BAC Home Loans Servicing, LP*, 2014 WL 1332825 (E.D. Ky. 2014)—are based on faulty understandings of § 4617(b)(2)(B) and make the wrongful presumptions described above. The Courts in those cases ignore the word "may" and presume that because the provision authorizes FHFA as conservator to undertake the enumerated actions to operate the Enterprises, FHFA has in fact availed itself of that authority and is undertaking all operations. In *Nevada ex rel. Hager,* the Court omits the word "may" in its citation to the statute and instead improperly links the enumerated operational powers of § 4617(b)(2)(B) to the word "shall" used in the previous provision of the statute, suggesting that FHFA is required to undertake, and therefore has undertaken, all operational authority.[206] This misconstruing of the statutory language blinds courts to an appropriate factual analysis of the extent to which FHFA has actually invoked its operational powers, and instead allows it to leap directly to its conclusion that "while under conservatorship with the FHFA, Fannie Mae is statutorily exempt from taxes, penalties, and fines to the same extent that FHFA is."[207] The only logical way in which courts could reach this conclusion is by assuming that FHFA is fully operating the Enterprises, which, of course, after the November 2008 re-delegation, is false.

The *Higgins* court likewise makes an illogical leap from the assertion that "when the Agency acts as conservator, it acts with complete control over Fannie Mae's assets," to the conclusion that, "[b]y prohibiting the imposition of fines and penalties on the Agency 'in any case in which the Agency is acting as a conservator or a receiver,' HERA necessarily prohibits the imposition of fines and penalties on Fannie Mae also."[208] This conclusion is illogical because it presumes that the Agency is always acting as conservator, and therefore is always controlling Fannie Mae's assets (i.e. Fannie Mae's every move). This presumption is false. FHFA clearly

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[204] Some examples of recent FHFA directives to the Enterprises are to not acquire mortgages on properties encumbered with PACE liens and to allow fair market value buybacks of Real Estate Owned properties to former mortgagors. Fannie Mae attested at its deposition that the nonprofit buyback "directive" is the only "directive" of which it is aware that affects Real Estate Owned properties. *See* FNMA Tr. 56-57.

[205] The entire concept of "conservatorship approval" would be nonsensical if all Enterprise action were equivalent to Enterprise action. Indeed, FHFA's own statements and reports indicate that it distinguishes between FHFA, as conservator, decisions to approve a given action and Enterprise actions taken independently. For example, FHFA-OIG determined that Fannie Mae "executed seven insurance settlements totaling over $306 million that should have been approved by FHFA in advance. *See* FHFA-OIG" Conservator Approval Process,.*supra* note 206, at 2. The report reprimanded Fannie Mae for not seeking approval. *Id.* Such reprimand would be nonsensical and unnecessary if all Fannie Mae actions were FHFA actions.

[206] Nevada ex rel. Hager v. Countrywide Home Loans Servicing, LP, 812 F.Supp.2d 1211, 1218 (D. Nev. 2011).

[207] *Nevada ex rel. Hager*, 812 F. Supp. 2d at 1218.

[208] *Id.* at *3

does not control Fannie Mae's every move.[209] FHFA exerts its authority as conservator at distinct moments—by issuing a directive or approving a practice or policy—while Fannie Mae controls its own assets and operations most of the time. FHFA has not assumed complete operational powers as conservator, nor does § 4617(b)(2)(B) require it to do so.[210]

2. The Anti-Penalty Provision Does Not Apply in Chapter 93A Conditions Cases Because FHFA Does Not Act in its Capacity as Conservator

FHFA also fails to meet the second requirement for applicability of the Anti-Penalty Provision, as no action was taken in FHFA's capacity *as conservator*.[211] HERA expressly defines what actions may qualify as actions taken as "conservator." Section 4617(b)(2)(B) outlines FHFA's "powers as conservator" as follows: "[t]he agency may, as conservator, take such action as may be—(i) necessary to put the regulated entity in a sound and solvent condition; *and* (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity" (emphasis added).[212] Thus, in order for the second requirement of the Anti-Penalty Provision to be met, there must not only be action by FHFA, but that action must also be both (i) necessary to put the enterprises in a sound and solvent condition, and (ii) appropriate to carry on the business of the enterprises and preserve and conserve their assets.

Thus, even if FHFA has taken some action regarding tenants' poor property conditions, Courts would then be required to ask whether that action was within the scope of the powers of the conservatorship, i.e., whether the failure to repair the defective was both (1) necessary to put FHFA in a sound and solvent condition and (2) appropriate to carry on the business of FHFA and preserve and conserve its assets. And indeed, one would be hard pressed to put forth any logical analysis that would lead to affirmative answers to these questions, as failure to repair defective conditions at a property erodes, rather than preserves and conserves, the value of real property. It is likewise difficult to imagine how foregoing needed repairs at individual properties, likely totaling somewhere in the tens of thousands of dollars, would be "necessary" to put Fannie Mae or Freddie Mac—multi-billion dollar entities—in a sound and solvent condition.

IV. CONCLUSION

The non-profit buyback and Chapter 93A multiple damages litigation represent attempts by Fannie Mae, Freddie Mac, and FHFA to afford immunities to the Enterprises that were clearly never intended to extend to them. These attempts have been successful largely because of the Courts' lack of understanding of the conservatorship structure. The Courts, through Fannie Mae,

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[209] *See* FNMA Tr. 398, 18-22 ("[FHFA has] oversight of Fannie Mae… but not direct control of the operations.").

[210] The *Higgins* Court also assumes that Fannie Mae liability is FHFA liability, and therefore that FHFA immunity is Fannie Mae immunity. *See Higgins*, 2014 WL 1332825 (E.D. Ky. 2014). But this assumption is also false: if Congress had intended that FHFA's immunities would always extend to Fannie Mae, the statute would have said that the Enterprises are immune from penalties. Since the statute only says that FHFA is immune, it is only applicable in situations where FHFA would actually be liable for penalties awarded against Fannie Mae.

[211] *See* 12 U.S.C. § 4617(j)(1) (2008) ("shall apply with respect to the Agency in any case in which the Agency is acting as conservator").

[212] *Id.*

Freddie Mac, and FHFA's urging, have collapsed key distinctions between FHFA regulator action, FHFA conservatorship action, and action taken by the Enterprises. These distinctions are supported by Circuit Court precedent, formal documents issued by FHFA, and sworn testimony, as well as by the plain language of HERA. The Courts' blurring reflects a muddied interpretation of the statute and a superficial analysis of the FHFA conservatorship structure as enacted.

While FHFA chose parts of the conservatorship structure, (it could have, for instance, never re-delegated control to the Enterprises), it appears to have done so with the intention of having the best of all worlds. On the one hand, FHFA has deflected the enormous responsibilities of running the day-to-day operations of the trillion-dollar Enterprises, reserving for itself only the more limited role of overseeing critical initiatives and operations. Yet on the other hand, it seeks to afford those day-to-day operations and decisions the same level of insulation permitted where FHFA undertakes a conservator action. Nothing in the text or purpose of HERA supports such a far-ranging grant of immunity.

By succeeding in extending these immunities, Fannie Mae, Freddie Mac, and FHFA are quietly undermining state laws intended to protect low-income tenants and homeowners, and are creating precedent that will allow them to continue to do so. In the nonprofit buyback litigation, the Enterprises and FHFA obtained permission to violate a state law intended to prevent displacement and restore homeownership among low- and middle-income families who had been hard-hit by the foreclosure crisis. Through their inaccurate portrayal of the conservatorship structure, they succeeded in setting precedent that allows Fannie Mae and Freddie Mac to flout consumer protection laws and obtain immunity whenever FHFA post-hoc jumps to their defense. In the Chapter 93A litigation, Fannie Mae succeeded in insulating the Enterprises from statutory multiple damages that are among the most powerful tenant protections against violations of the state sanitary code. Under this precedent, Fannie Mae and Freddie Mac are shielded from all penalties imposed under state consumer protection law—penalties which are typically imposed to deter conduct the Legislature deems particularly egregious.

Not only are these Courts' decisions reflective of an erroneous interpretation of HERA, but their result is all the more ironic given that they harm the very same low-income tenants and homeowners that Fannie Mae and Freddie Mac are mission-bound to protect and support. The Enterprises have an express statutory mission of preserving and improving housing affordability for low- and middle-income families.[213] This mission was reiterated with the passage of HERA and its creation of the Housing Trust Fund, which was established with the goal of increasing rentals and homeownership for extremely low- and very low-income families.[214] Since the passage of HERA, FHFA has frequently referred to and invoked the Enterprises' affordable housing mission in press releases and statements to the public.[215] In early 2015, FHFA even adopted a final rule establishing a goal for the Enterprises' creation of affordable rental housing.[216]

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213 *See* Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476.

214 *See* 12 U.S.C.A. § 4568(a)(1) - (c)(3) (2008). HERA obligates Fannie Mae and Freddie Mac to "set aside an amount equal to 4.2 basis points for each dollar of the unpaid principal balance of its total new business purchases" to support affordable housing initiatives. 12 U.S.C. § 4567(a)(1)(A) (2008). According to observers, when HERA was passed it was "understood" that this set-aside would generate $500 million each year for these initiatives. *See* Reiss, "Overview" *supra* note 5 at 485. However, the FHFA suspended all payments upon the establishment of the conservatorship, and no funds have ever been deposited into the Housing Trust Fund. *Id*.

215 *See, e.g.*, Melvin L. Watt, Director of FHFA, Remarks at the Bipartisan Policy Center (Feb. 18, 2016) *in* FED. HOUS. FIN. AGENCY, Feb. 2016.

216 *FHFA Adopts Final Rule on 2015-2017 Housing Goals for Fannie Mae and Freddie Mac*, FED. HOUS.

It is now time for the Courts and the public to hold Fannie Mae, Freddie Mac, and FHFA accountable to this public mission. Doing so will require a rigorous interpretation of HERA that ensures the extraordinary judicial immunities granted by the statute are applied only as properly allowed under the statute's language and history. It will also require courts to attend carefully to the complex conservatorship structure to discern where and when FHFA is "acting as conservator." The litigation in Massachusetts reveals that as Fannie Mae and Freddie Mac extend their roles outside of the secondary mortgage market and into the domain of landlord and property owner, proper interpretation of HERA is crucial to protecting low- and middle-income housing throughout the United States.

FIN. AGENCY (Aug. 19, 2015,), https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Adopts-Final-Rule-on-2015-to-2017-Housing-Goals-for-Fannie-Mae-and-Freddie-Mac.aspx. [https://perma.cc/DY2G-NXKL].