

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

Case No. 09-23507-CIV-GOLD/MCALILEY

Federal Trade Commission,

Plaintiff,

v.

Kirkland Young, LLC, a limited liability  
company,

Attorney Aid, LLC, a limited liability  
company,

David Botton,

April Botton Krawiecki, and

Samy Botton,

Defendants.

**PLAINTIFF FEDERAL TRADE COMMISSION'S RESPONSE TO THE RECEIVER'S  
EMERGENCY MOTION CONCERNING WINDING DOWN OF  
KIRKLAND YOUNG, LLC.**

In his emergency motion, the Temporary Receiver ("Receiver") notifies the Court that he was put on notice by the Office of the Attorney General of Florida ("OAG") that loan modification activities by the Receivership are in violation of Florida law. As a result, the Receiver has ceased loan modification activity and now seeks guidance from the Court as to

what he should do. In order to avoid future violation of state law and preserve funds for potential return to Defendants' victims, Plaintiff Federal Trade Commission respectfully recommends that Receiver be instructed not to resume processing loan modifications on behalf of victims of Defendants in this case.

**I. The Receiver Has Been Warned that His Loan Modification Activities Are In Violation of Florida Law.**

The Ex Parte Temporary Restraining Order ("TRO") authorizes the Receiver to operate the business of the receivership entity lawfully and profitably as long as he in good faith deems it necessary or appropriate. TRO, ¶ XII.M [DE 19]. On May 4, 2010, OAG notified counsel for the Receiver that the Receivership Estate's charging of fees for completion of loan modifications was a continuation of unlawful business practices of Defendant Kirkland that violated Florida Statute § 501.1377.<sup>1</sup> Fla. Stat. § 501.1377(3)(b) prohibits any person performing foreclosure-related rescue services from imposing a fee prior to the completion of the services. Upon learning of OAG's concerns, Plaintiff's counsel promptly notified OAG and counsel for the receiver of Plaintiff's view that continued activity of the receivership must be in compliance with state law. On May 6, 2010, OAG also advised counsel for the receiver that its loan modification activity might also be in violation of statutes concerning licensing of mortgage brokers, Florida Statutes, §§ 494.001, 494.033, 494.0031, 494.0025, and 494.0018. On May 10, 2010, OAG repeated its warnings by telephone conference with counsel for the receiver and confirmed its view that the licensing statutes were being violated by the Receivership's loan

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<sup>1</sup> On December 17, 2009, the State of Florida sued the Defendants, including Defendant Kirkland Young, for violation of Florida law including Florida Statute § 501.1377(3)(b). Receiver's Motion, Exhibit 1.

modification processing. After receiving these warnings, the Receiver wisely suspended the loan modification activity of the Receivership and sought the guidance of the Court.

## **II. OAG Has Warned the Receiver of Two Violations of Florida Law.**

The Court has directed Plaintiff to explain the position of OAG that continued loan modification activity by the receiver violated state law. Plaintiff offers the following summary of OAG's contentions.<sup>2</sup>

Two violations of Florida law are at issue. The first is an issue of licensing. Florida law requires persons who act as mortgage broker businesses and natural persons who act as mortgage brokers to be licensed. Fla. Stat. §§ 494.0031 and 494.0033. Fla. Stat. § 494.001 defines "mortgage brokerage business" to mean "a person acting as a mortgage broker." It also defines "act as a mortgage broker" to include "offering to negotiate the terms or conditions of a new or existing mortgage loan on behalf of a borrower or lender." Defendant Kirkland entered into agreements with customers to seek loan modifications for them. The Receivership Estate has continued the process and requested loan modifications on behalf of those customers. As a result, the Receivership Estate has acted as a mortgage broker business. The receivership, however, is not licensed as a mortgage broker business or a mortgage broker. Fla. Stat. § 494.0025 declares it unlawful for any person to act as a mortgage broker without a current and active license. Knowingly violating Fla. Stat. § 494.0025 is a third degree felony. Fla. Stat. § 494.0018(1).

The second violation of Florida law concerns prepayment for loan modification services. Fla. Stat. § 501.1377(3)(b) provides that "[i]n the course of offering or providing foreclosure-

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<sup>2</sup> Plaintiff also attaches a letter from OAG further explaining its position. Plaintiff's Exhibit 95.

related rescue services, a foreclosure-rescue consultant may not: . . . [s]olicit, charge, receive, or attempt to collect or secure payment, directly or indirectly, for foreclosure-related rescue services before completing or performing all services contained in the agreement for foreclosure-related rescue services.” “Foreclosure-related rescue services’ means any good or service related to, or promising assistance in connection with . . . [c]uring or otherwise addressing a default or failure to timely pay with respect to a residential mortgage loan obligation.” Fla. Stat. § 501.1377(2)(c). Defendants’ services related to addressing customers’ failure to timely pay their loan obligations through seeking modification of those loans. As a result, Defendants’ services were “foreclosure-related rescue services” and within the prohibition of Fla. Stat. § 501.1377(3)(b).

Defendants required prepayment for their services in the form of fees and payments in escrow. Requiring these prepayments violated Fla. Stat. § 501.1377(3)(b). After assuming his post, the Receiver has sought and obtained modifications for some customers of the Defendants. Receiver’s Motion, pp. 4, 7. The Receiver takes the position that the Receivership Estate would be entitled to collect fees of approximately \$207,000 from its work on these loan modifications as provided in the service agreements with the customers. *Id.*, p. 4. According to the Receiver, “[a] substantial portion of these fees were previously collected in advance by Kirkland Young prior to the entry of the Court’s TRO.” *Id.*, pp 4-5. These are the escrow funds that were required by Defendant Kirkland in violation of Fla. Stat. § 501.1377(3)(b). It is the contention of OAG that, to the extent the Receiver seeks to satisfy claims from the escrow payments or otherwise, he would be continuing the illegal activity initiated by the Defendants.

### **III. Plaintiff Recommends that the Receiver Should Not Resume Loan**

#### **Modification Activities.**

Plaintiff believes that OAG's interpretation of the statutes it is charged to enforce is reasonable and Plaintiff defers to it. Also, as a practical matter, a legal battle between the Receiver and the State of Florida would be a drain on the assets of the Receivership Estate and should be avoided. As a result, permanent suspension of the loan modification activities of Receivership Estate is the best course.

The Receiver should also not resume processing loans because continued expenses incurred in that activity reduce the pool of assets for potential distribution to victims of the Defendants. The Receivership has already taken control of bank accounts of Defendant's Kirkland Young and Attorney Aid and accounts into which escrow funds were deposited. Receiver's Second Report, pp. 9-10 [DE 120]. When the Receiver speaks in his motion of earning fees, he is referring to monies from the escrow accounts that are already in his possession and control. No new funds are being added to the Receivership Estate. In order to earn those fees, the Receiver has necessarily incurred expenses processing the loan modifications. At the same time, no new money has been or will be added to the Receivership Estate. Instead, the incurred expenses are diminishing the funds available for potential distribution to victims. In the end, a benefit for some victims (loan modification) should not outweigh the harm being done to the many other victims. As a result, the Receiver's loan modification activity should not resume, so that funds are preserved for potential return to Defendants' victims and the victims are treated equally.

The Receiver has rightfully expressed concern about the welfare of consumer victims of the Defendants, but the circumstances giving rise to his concern cannot supercede the strictures

of Florida law. Even though the Receivership should no longer process loan modifications, consumers are not without recourse. Consumers can always seek loan modification on their own. In addition, they could contact HUD-approved housing counseling agencies,<sup>3</sup> such as the Homeownership Preservation Foundation (“HPF”),<sup>4</sup> for assistance. In the end, however, the financial circumstances of consumers determine whether they are eligible for loan modification because lenders have their own criteria for modifications. Defendant Kirkland or any other loan modification service cannot transform a consumer who is unfortunately not qualified into one who is.

For these reasons, the Receiver’s should be directed not to resume loan modification activities.

Respectfully submitted,

WILLARD K. TOM  
General Counsel

Dated: May 17, 2010

/s/Chris M. Couillou  
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<sup>3</sup> The following website can be used to identify HUD-approved housing counselors: <http://www.hud.gov/offices/hsg/sfh/hcc/fc/>. Also HOPE NOW Alliance of mortgage servicers, mortgage market participants and counselors is another resource for consumers seeking foreclosure counseling. It operates a hotline (1.888.995.HOPE) and a website, [www.hopenow.com](http://www.hopenow.com), providing more information.

<sup>4</sup> HPF is nonprofit organization offering free, bilingual, personalized assistance to counsel homeowners in danger of foreclosure. Its website is [www.995hope.org](http://www.995hope.org). HPF is a member of the HOPE NOW Alliance.

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**Certificate of Service**

I hereby certify that on May 17, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Chris M. Couillou  
Chris M. Couillou  
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May 14, 2010

**DELIVERED VIA E-MAIL & U.S. MAIL**

Chris M. Couillou, Esq.  
Federal Trade Commission  
225 Peachtree St., NE, Suite 1500  
Atlanta, GA 30303

**Re: FTC v. Kirkland Young, David Botton, April Krawiecki and Samy Botton, Case No.: 09-23507, U.S. District Court SDFL**

**OAG, DLA, State of Florida v. Kirkland Young, David Bolton, Bridget Grant, ABK Consultants, April Botton Krawiecki, Samy Botton, Michael Botton, Ryan Matthew Grant, and Brian Michael Rokaw, Case No.: 09-90945CA03, Circuit Court, Miami-Dade County, Florida**

Dear Mr. Couillou:

I am writing with regard to the above referenced cases. It is the Florida Office of Financial Regulation's ("OFR") understanding from its review of the pleadings and orders in these cases that Kirkland Young, L.L.C., is in receivership. It is also OFR's understanding that Kirkland is, or may be, continuing to process loan modifications, and otherwise engaging in business as a mortgage broker and mortgage brokerage business, but is not licensed to perform these activities under the Florida Mortgage Brokerage and Lending Act, Chapter 494, Florida Statutes, ("the Act"). OFR has reviewed the "Receiver's Emergency Motion for Instructions Concerning the Winding Down of Kirkland and Young, LLC" filed in the FTC's case. OFR is concerned and would oppose any request for entry of an order to the extent that such an order authorizes Kirkland and its agents to engage in unlicensed activity in violation of Florida law. Moreover, OFR would support any position of the FTC to require Kirkland to cease and desist further unlicensed activity and to refund or disgorge any consumer funds collected in violation of Florida law.

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Letter to Chris M. Couillou, Esq.  
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As you may know, the OFR is the state agency responsible for the administration and enforcement of the Act as it relates to mortgage brokerage and lending in Florida.<sup>1</sup> Presently, the prevention of unlicensed loan modification activities is a top priority for OFR. During the 2009 legislative session, the Florida Legislature refined the Act to prohibit both individuals and companies from providing loan modification services without an active license.<sup>2</sup> Any individual or company who provides loan modification services without a license after January 1, 2010, commits unlicensed activity in violation of the Act.<sup>3</sup> **Moreover, any person or entity that knowingly acts as a mortgage broker, offering or providing loan modification services, without an active license in Florida is guilty of a felony of the third degree, which is punishable by term of imprisonment up to five years and a fine up to \$5,000.<sup>4</sup> If the total value of the money unlawfully obtained exceeds \$50,000.00 and there are five or more victims, the offense is a felony of the first degree punishable by term of imprisonment up to thirty years.<sup>5</sup>**

In addition to the licensure requirements, the Legislature also enacted a number of prohibited acts specifically directed at loan modification services.<sup>6</sup> The prohibited acts include any attempt to collect, directly or indirectly, an upfront fee.<sup>7</sup> The new provisions related to loan modifications also require contracts for loan modification services to include similar disclosures and consumer protections to those that were already in place pursuant to the Foreclosure Rescue Fraud Prevention Act that is enforced by the Florida Office of the Attorney General.<sup>8</sup> Therefore, allowing any company or individual to claim they are entitled to keep fees that were collected illegally is troubling to the OFR. Moreover, attempting to enforce terms of an illegal contract for loan modification services that does not meet the heightened requirements for consumer disclosures under Chapters 501 and 494, Florida Statutes, is a violation of Florida law.

Finally, I would note that the OFR has been aggressively pursuing unlicensed companies and individuals that are providing loan modification services and requiring them to refund any consumer money they have collected. While OFR recognizes the potential relief a loan modification provides to a consumer, the OFR opposes unlicensed activity, and the use of ill-gotten consumer proceeds to further continue illegal unlicensed activity. The OFR would note that under the federal Making Home Affordable Program, homeowners that qualify for a loan modification are

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<sup>1</sup> § 494.0011(1), Fla. Stat.

<sup>2</sup> § 494.001(3), Fla. Stat. (defining acting as a mortgage broker to include negotiating or offering to negotiate the terms of a new or existing loan).

<sup>3</sup> §§ 494.0031(1), Fla. Stat. (requiring licensure of each person who acts as a mortgage brokerage business); 494.0033, Fla. Stat., (requiring licensure of each person who acts as a mortgage broker and further requiring such individual to be affiliated with a licensed mortgage brokerage business or mortgage lender); 494.0025(3), Fla. Stat. (stating that is unlawful for any person to act as a mortgage broker in this state without a current, active license).

<sup>4</sup> § 494.0018(1), Fla. Stat.

<sup>5</sup> § 494.0018(2), Fla. Stat.

<sup>6</sup> § 494.00296, Fla. Stat.

<sup>7</sup> § 494.00296(1)(c), Fla. Stat.

<sup>8</sup> §§ 501.1377(4)&(5), Fla. Stat.; 494.00296(2), Fla. Stat.

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not required to pay any modification fees and, in fact, can be entitled to incentive payments for timely making payments on their modified loans.

If the OFR may be of further assistance, please feel free to contact me at (850) 410-9896 or at [gregg.morton@flofr.com](mailto:gregg.morton@flofr.com).

Cordially,

A handwritten signature in black ink, appearing to read "Gregg Riley Morton", with a long horizontal line extending to the right.

Gregg Riley Morton  
Chief Finance Counsel

cc: George E. Rudd, Assistant Attorney General