Supplemental Comments of the Center for Economic Justice

To the NAIC Creditor-Placed Insurance Model Act Review Working Group

June 6, 2017

In our June 5, 2017 comments to the working group, we deferred comments on Sections 10 and 11. We now provide comments on these proposed sections and supplement our comments on Sections 12 and 17.

Section 10

As noted in our June 5, 2017 comments, since the proposed Model is limited to that LPI for which a separate charge is made to the debtor, CEJ recommends a prohibition against single-interest LPI. If a debtor is reimbursing the creditor for the insurance, the coverage should be dual interest to provide the debtor with some rights. Based on our proposed prohibition against single interest LPI for which a separate charge is made to the debtor, CEJ suggests deleting Sections 10A(3) and (4). We suggest deleting 10A(3) because claim settlement based on net debt does not adequately protect the debtor. A debtor's vehicle or home could be damaged and, based on a net debt claim settlement, the creditor could take the claim payout and abandon the vehicle or property serving as collateral for the loan, leaving the debtor without a drivable vehicle or inhabitable home. The purpose of LPI is to protect the creditor and the debtor by protecting the vehicle or property serving as collateral for the loan. Claim settlement based on cost to repair or actual cash value returns the vehicle or property to the necessary state to continue to serve as collateral for the loan.

Based on our recommendation to prohibit single interest LPI, section 10A(4) should be deleted. Our proposed edits follow:

Section 10. Claims

A. In the event of a loss under the creditor-placed insurance policy, the insurer shall pay, at a minimum, the least of the following, the value of which shall be determined as of the date of loss:

(1) The cost to repair or replace the collateral less any applicable deductible;

(2) The actual cash value of the collateral, less any applicable deductible;

~~(3) The net debt, less any applicable deductible. The method of calculation of net debt payable pursuant to this paragraph shall be identical to the method of calculation of net debt for payment of premiums pursuant to Section 5A of this Act; or~~

~~(4) If single interest insurance is provided, the amount by which the creditor's interest is impaired less any applicable deductible~~.

B. The ~~net debt or~~ actual cash value amounts in Subsection A may be reduced by the value of salvage if the insurer does not take possession of the insured property.

C. In the event of a loss, no subrogation shall run against the debtor from the insurer.

D. Whenever a claim is made on a creditor-placed insurance policy, the insurer shall furnish to the named insureds~~claimant~~ a written statement of the loss explaining the settlement amount and the method of settlement.

E. A creditor or insurer may not abandon salvage to a towing or storage facility in lieu of payment of storage fees without the consent of the facility and the claimant. The insurer shall be responsible for the payment of towing and storage charges for a covered loss occurrence from the time the claim is reported to the insurer in accordance with the terms of the policy to the time the claim is paid. The insurer shall give written notice to the claimant prior to the date ~~when~~ the claim is paid that the claimant may incur storage charges after the date the claim is paid.

Section 11

The provisions of Section 11 – requirements for a creditor or servicer to place LPI – are closely related to the provision of Sections 4 and 5 which also deal with requirements for a creditor or servicer before a charge can be assessed on a debtor. We suggest moving the provisions of Section 11 to a revised Section 4 which consolidates provisions in Sections 4, 5 and 11. In our June 5 comments, we discussed consolidation of Sections 4 and 5 (

We proposed adding a subsection stating that a federal law or regulation establishing requirements related to the provision of this (what would be now a combined Section 4, 5 and 11) section has precedence. In the mortgage space, there are both federal statutes – the Flood Disaster Protection Act – and regulations – the Consumer Financial Protection Bureau's mortgage servicing rules – that should take precedence to ensure uniformity in mortgage instruments and disclosures regarding required insurance and LPI. Our proposed Section 11 C may be more appropriate as its own section or as a subsection in Section 2 – Scope.

Section 11. Rights and Obligations of the Parties

A. In order for the creditor or servicer to place insurance on the collateral pledged by the debtor and charge the debtor for ~~pass~~ the cost of the insurance ~~on to the debtor~~:

(1) The creditor or servicer must have a security interest in the collateral property;

(2) The credit agreement must require the debtor to maintain insurance on the collateral to protect the creditor's interest;

(3) The credit agreement must authorize the creditor to place the insurance if the debtor fails to provide evidence of the insurance; and

(4) These requirements must be clearly disclosed to the debtor at the inception of the credit transaction.

B. The debtor shall ~~always~~ have a continuing ~~the~~ right to provide required insurance by ~~through existing policies of insurance owned or controlled by the debtor or of~~ procuring and furnishing the required coverage through an insurer authorized to transact insurance within this state. However, a creditor may establish maximum acceptable deductibles, insurer solidity standards and other reasonable conditions with respect to the required insurance.

C. To the extent a federal law or regulation establishes requirements on a creditor or servicer related to the requirements in this section, the federal law or regulation shall have precedence.

Section 12:

We supplement our prior comments on this section. Specifically, we recommend adding the phrase "directly or indirectly" to the prohibitions against paying commissions to persons or entities affiliated with the creditor or servicer or persons or entities not appropriately license as a producer.

We make this suggestion because we are aware of at least one instance in which a servicer and LPI vendor sought to evade the prohibition against a LPI insurer paying a commission to a servicer-affiliated producer by

1. the creditor or servicer selling the affiliated producer agency to the LPI insurer for the amount of commissions the LPI insurer would have paid the servicer-affiliated producer over the life of the LPI contract; or

2. the creditor or servicer selling the affiliated producer agency to a third party for an amount equal to the commissions the LPI vendor would have paid over the life of the contract coupled with an agreement by the LPI vendor to continue to pay commissions to this now-unaffiliated agency.

These schemes are simply an indirect method of paying prohibited commissions to an entity affiliated with the creditor or servicer. While we believe the current language clearly prohibits these practices, adding the "directly or indirectly" may make it clearer to the creditor or servicer and LPI insurer that agency purchase schemes are not permissible.

Section 17:

We supplement our prior comments on the Penalties section. The proposed model includes requirements of creditors or services and of insurers and includes prohibitions against specific practices. The requirements of insurers include filing of rates and forms, the contents of coverage documents and what may be included in rates. The requirements of creditors include a reasonable basis for placing LPI, specific notices before charging a debtor for LPI and timely refunds of LPI charges. The proposed model prohibits insurers from offering or giving and creditors or servicers from seeking or taking any consideration other than protection of the vehicle or property serving as collateral for the loan in exchange for selecting or securing LPI coverage. The penalties and approaches to violations of requirements and of prohibitions should differ.

For the anti-kickback provisions, we have previously recommended a private cause of action. This is consistent with the anti-kickback provisions of the Real Estate Settlement and Procedures Act (RESPA). RESPA provides for a private cause of action, for the parties to the referral scheme to be jointly and severally liable and, for private enforcement, damages of three times the amount of the amount of the settlement charge. CEJ recommends similar provisions for the proposed model for violations of the anti-kickback provisions – private cause of action, joint and several liability and treble damages plus attorney fees. For enforcement by the commissioner, we recommend joint and several liability, treble damages, reimbursement of the cost of investigation and enforcement and a civil penalty.

In addition, we recommend criminal penalties for violation of the anti-kickbck provisions. As former Commissioner of the New York Department of Financial Services Lawsky wrote to other commissioners, the LPI market is permeated by a "kickback culture." As long as the penalties for illegal kickbacks are seen as simply a cost of doing business, that kickback culture will continue. The threat of jail may deter the offer or acceptance of kickbacks.

It is useful to point out the scale of LPI kickbacks in the recent past. QBE made a $10 million payment to a servicer, yet was unable to explain the purpose of the payment during the NY DFS hearing. Chase reaped hundreds of millions of dollars from placing LPI through a captive reinsurance scheme. Producers affiliated with large servicers were paid tens of millions of dollars in "commissions." LPI vendors provided hundreds of millions of dollars in free-or below costs services or "expense reimbursements." Clearly, putting a small penalty cap on such practices will not deter the practices.

With regard to violations of disclosure requirements, the penalties should be a maximum monetary penalty per violation, no cap on the total penalty and a complete refund of any LPI charges assessed by the creditor or servicer if notice requirements were not met. The maximum penalty per violation should automatically increase with inflation.

With regard to violations of rate provisions, the penalties should be a premium refund to the creditor or servicer – and subsequent refund of the LPI charge to the debtor – of the amount of the prohibited expense included in the rate that was used by the LPI insurer. In addition, there should be a requirement for a LPI rate filing to be accompanied by a sworn certification by the chief executive officer and chief actuary of the insurance company that the proposed rates do not contain any prohibited expenses coupled with penalty provisions that the chief executive officer and chief actuary are personally responsible for a civil penalty in the amount of any prohibited expenses plus $100,000.

The penalty option to suspend or revoke the insurer's license should remain, with the addition of a similar penalty against a creditor or servicer for violating the Act. We note that suspending or revoking an insurer's license may reasonably be limited to the LPI insurer's sale of LPI. In our earlier comments, we explained that, in addition to purchasing LPI from a LPI vendor, creditors or servicers typically outsource a number of insurance-related servicing functions to the LPI vendor. Prohibiting a LPI insurer from providing these outsourced services – like insurance tracking, loss drafts and escrow administration – may be quite disruptive to the

servicing of the loan. On the other hand, prohibiting a LPI insurer only from selling LPI requires the creditor or servicer only find another LPI insurer willing to sell LPI. As long as the offending LPI insurer continues to provide the outsourced services, the use of a new LPI insurer to provide the LPI can be accomplished without disruption to servicing loans.