The context of this exclusive to MHProNews from Samuel "Sam" Strommen with Knudson Law is found at this link here below.

https://www.manufacturedhomepronews.com/bombshell-buffett-berkshire-clayton-homes-21st-vanderbilt-specific-mhi-members-ripped-felony-monopolization-of-the-american-manufactured-home-industry/

The Monopolization of the American Manufactured Home Industry and the Formation of REITs: *a Rube Goldberg Machine of Human Suffering*

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Antitrust & Consumer Protection

Research Paper

1. **Introduction**

The American manufactured home, known colloquially as a mobile home, a prefab, or, most commonly, a trailer, stands alone as the most widely looked over and denigrated form of residence offered in this country today. In fact, it is the only form of residence in the United States that carries its own pejorative connotation, "trailer trash." An apartment, on the other hand, carries no such connotation, and the utterance of the word allows the reader to envisage a full gamut of possibilities, from rundown urban projects to a posh Fifth Avenue penthouse. Likewise, a house, without context, likely inspires images of the average single-family home, with contextual connotations ranging from a squalid shanty to an opulent mansion.

The manufactured home…for tens of millions of Americans today—a great many of whom hail from the lowest socioeconomic stratum, it is a way of life, the only affordable living situation available, and the only means of achieving home ownership.

Here, in the midst of what could be declared without the merest hint of shame or irony one of the most comprehensive affordable housing gluts in American history, pernicious forces are skulking in the (backdrop): consolidating power, subsuming an industry rife with lack of oversight, and preying upon the vulnerability of the impoverished in a gross, incestuous symbiosis.

Manufacturers and financiers (oftentimes a single streamlined, vertically integrated entity) have taken advantage of, if not sold outright to their customers, a conflation of home ownership and owning a manufactured home. There is, however, a striking distinction between the two: home ownership, in the traditional sense, is to possess real property, along with all of the rights and privileges that are afforded with it. Manufactured homes, on the other hand (for reasons that will be explored later), are by and large personal property—chattels—and come with few of those same rights and protections one would find in a traditional home.

The aim of this paper is thus: to expose a number of antitrust violations—both blatant and subtle—in the form of the increasing monopolization of the manufacturing, financing, and the increasingly consolidating landlords, and to call for reforms within this industry.

Data on the manufactured home industry is scarce—very few studies that would pass any sort of academic muster have been published, and to make matters worse, much of the data appears to be obfuscated, both by the alleged bad actors as well as their critics.

Part of the problem is that manufactured homes go by a number of different aliases: colloquially, they are known as trailers or mobile homes. This is a misnomer. In 1976, the United States Department of Housing and Urban Development (HUD) released the Manufactured Home Construction and Safety Standards Code.[1] As a result, a "mobile home" is any home of the same variety manufactured before the codes were released, and a "manufactured home" is any home manufactured after.

It is unclear if modern publications, when referring to "manufactured homes" and "mobile homes" (oftentimes synonymously) are proffering data applicable to both types of homes, or just the former.

Furthermore, search results for each of the two terms tends to produce radically different results, with searches for "manufactured homes" tending to reveal more accurate, less biased data. To complicate matters, the last rigorous study of the industry by the federal government comes from a 2014 report published by the Consumer Financial Protection Bureau (hereafter CFPB),[2] an independent agency of the United States Federal Government that endeavored to gather as much information as possible about the industry: the geography, demographics, and financial data of the typical manufactured home owner and resident; and the market-share and business practices of the manufacturers. To illustrate the previous point, this report is only available by searching specifically for manufactured housing information; searching for mobile home data does not include this among its higher-ranking search results. While this CFPB report promised in its introduction to continue monitoring the industry, unfortunately, either no new report has been

produced, or, if it has, is exceedingly difficult to locate. The data compiled herein is the most readily accessible and up-to-date as is available.

To fully understand the industry, it would be wise to first look towards the demographic data provided in the CFPB report. As of the time that report was published, manufactured housing accounted for some six percent of all occupied housing in the United States,[3] with some 22 million American residing in manufactured homes as their principal place of residence.[4]

Contrary to what major credible publications such as the *Guardian*[5] or the *Financial Times* [6] state in think-pieces about the industry, the majority of manufactured home owners own both the home and the land, with about 62% of all manufactured home owners owning both the house and the land. This accounts for 48% of all manufactured home residents,[7] with 30% owning just the home but not the underlying land, and another 18% renting both.[8] Somewhere between 25-30% of all manufactured homes are situated in manufactured home communities[9] (commonly referred to…as "trailer parks"). Manufactured homes are concentrated largely in Western and Southern States,[10] and residents skew older,[11] less wealthy,[12] and generally less educated when compared to site-built homeowners.[13]

It is prudent to note, however, that simply because one owns both the home and the underlying land, that does not make the majority of manufactured homes real property, as is the case with site-built homes.[14] The distinction comes from how the home itself is titled, which affects every aspect of the transaction, from the interest rates on the financing, the availability and types of financing, and the eventual appreciation and resale value.[15] Even if the home owner owns both the land and the home, the likelihood that the home itself is titled as real property and not personal property is relatively slim: in 2013, the most recent year from which data is readily available, only 14% of new homes of this variety were titled as real property.[16] In fact, the treatment of manufactured homes as personal—and not real—property is the default rule, with the encumbrance of additional documentation being required for it to be considered otherwise.[17]

The differences between real and personal property are myriad, but for the purposes of this paper, we will restrict the difference to that which is most relevant: the type of financing available. Real property, like a traditional home, qualifies for a more traditional form of financing, like a home mortgage. When a manufactured home sits on property owned by purchaser, generally both the land and the home qualify for a traditional mortgage.[18] The average interest rate on a 30-year fixed-rate mortgage usually hovers around 3%, although this number can fluctuate.[19]

However, if the consumer wishes to place their manufactured home in a land-lease community, other land they do not own, or wish to title the home separately from the land

as personal property or a "chattel," they are only eligible for a chattel loan, the average interest rate for which is between 50 and 500 basis-points higher (around .5%-5%), depending on factors that usually affect interest rates.[20] Moreover, many consumer protection laws such as the Real Estate Settlement Procedures Act (RESPA) apply only to traditional real property home loans, and not to chattel loans.[21] The same is true for many state foreclosure and repossession protection laws.[22] This becomes particularly injurious when it is taken into account that, despite some 48% of all manufactured home owners feasibly qualify for a traditional mortgage, only about 14% of new manufactured homes are titled accordingly.[23]

The United States today faces one of its greatest affordable housing crises in decades. Consumers looking for lower cost alternatives to site-built housing, particularly the thousands of retirees that are selling their site-built homes, have found, at face, manufactured housing to be an attractive, lower-cost alternative.[24]

However, production of manufactured homes hit its apex over twenty years ago, with a maximum production of some 375,000 units in 1998.[25] For much of the past two decades, the average production has dwindled to less than 100,000 new units produced annually, in the midst of an affordable housing crisis.[26] This is directly correlated to how manufactured homes are financed and securitized: in the 1990s, standards for lending in the industry were tempered, and, as a result, the quality of the loans decreased.[27] As sales of manufactured homes spiked, so did their value, with financiers over-appraising the values of homes and doing whatever they could—including filing fraudulent (or at the very least misrepresentative) credit applications on behalf of consumers.[28]

Housing giants Freddie Mac and Fannie Mae, two Government Sponsored Entities (GSEs), were once actively involved in securitizing these loans, with Fannie Mae securitizing some 24% of all manufactured home loans in order to meet its Duty-to-Serve mandate.[29] With relaxed standards, however, these loans were far from investment grade and would, by today's standards, be considered subprime.[30] And despite a once Pollyannaish outlook towards the sector, today, the GSEs today maintain minimal involvement, securitizing few loans for manufactured homes and are arguably more involved in land-lease communities. They have a very limited number of home only or chattel loans, while more are classified as real property.[31]

By the early 2000s, lending in the industry had gone well-beyond its event horizon, with GSEs promptly exiting after losing billions in what could in no uncertain terms be described as a subprime lending crisis.[32] If the aforementioned events sound familiar, it was an almost foreshadowing of sorts to the mid-to-late 2000s subprime mortgage lending crisis, precipitated by the same factors, and reaching a similar conclusion, albeit on a significantly smaller scale. Suffice it to say, that which fails the lowest cantons of society does not augur well for America as a whole.

While the stories of how exactly Berkshire Hathaway came to acquire Clayton Homes vary depending on source, a few things remain certain: in 2003, Berkshire Hathaway purchased Clayton homes for $1.7 billion in cash.[33] Today, there is perhaps no company more vertically integrated than Berkshire Hathaway and Clayton: Clayton uses almost exclusively materials that have been purchased from other Berkshire Hathaway subsidiaries.[34] The paint is supplied by Benjamin Moore, the insulation is supplied by Johns Manville.[35] The two predominant lenders in the industry, 21st Mortgage Corporation and Vanderbilt Mortgage and Finance are themselves both wholly-owned subsidiaries of Berkshire Hathaway as well. So, when a consumer purchases a manufactured home from Clayton Homes, Berkshire Hathaway routinely profits in some form or another at several stages.[36]

While claims that Berkshire Hathaway vis-à-vis Clayton Homes have violated American antitrust law have not been litigated in court, ample evidence that violations are taking place are myriad.

Buffett's own words on his business strategy provide valuable insight into Clayton Homes' strategy in this sector: "A good business is like a strong castle with a deep moat around it," Buffett said on a *CNBC* broadcast, "I want sharks in the moat. I want it to be untouchable."[37] In this analogy, the castle would be the business he has invested in, fortified and standing safe from outside attack. The shark-filled moat is representative of the litany of additional deterrents Buffett-led Berkshire Hathaway has at its disposal to ward off nascent competitors as well as regulators.

In 2002, prior to Berkshire Hathaway's acquisition of Clayton Homes, there were 88 manufacturers scattered across the United States.[38] Today, the number has fallen to less than half that.[39] A report from the now-defunct *Manufactured Home Merchandiser* publication indicates that in 2003, Clayton was the third largest manufactured home fabricator[40] in the United States, and at that time, the top twenty-five manufacturers accounted for 78% of all home production and sales.[41] Today, Clayton, Skyline-Champion, and Cavco, the top three, account for some 80% market share combined.[42] Clayton alone comprises about 51% of manufactured home production.[43] A series of mergers and acquisitions has made this industry increasingly consolidated.

There was a brief increase in production and shipment numbers, apparently due largely to FEMA purchases in 2005 post-Katrina, but the numbers declined following that blip [ibid]. Those numbers nonetheless correlate with that acquisition.[44] The United States, again, is undoubtedly in the midst of an affordable housing crisis, and manufactured homes account for 75% of all homes sold in the United States for less than $125,000.[45] Puzzlingly, while profits for the three largest players in the industry have continued to grow, the industry has yet to come close to producing as many homes as it did before Berkshire Hathaway's

acquisition.[46] To make matters more troubling, intentions, both stated and inferred-by-conduct, of the industry leaders is to increase profitability not by selling more homes, but by eliminating competition.

Lori Hough, one of the vice presidents of Clayton "competitor" Skyline Champion, stated in a shareholder conference call that her company was focused principally on mergers and acquisitions as its primary method of growth.[47] Moreover, since 2009, a pivotal year in the industry, Clayton itself has gone on to acquire the following companies: Schult, Crest, Karsten, Golden West, Norris, Giles, Marlette, SE, Buccaneer, [A] and Cavalier Homes.[48] Cavco, a third member of the industry's "Big 3" has, over the same time span, acquired Destiny, Lexington, Fairmont, Chariot Eagle, Palm Harbor, [A] and Fleetwood Homes.[49]

Clayton's conduct here could be construed as a potential violation of Section 2 of the Sherman Antitrust Act, which states in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony[.]" While monopoly status has yet to be attained, Clayton's growth over the past 17 years has been meteoric: Clayton's market share has gone from a paltry 13.9%[51] to a commanding estimated 51%.[52] The number of firms they and the two other industry leaders have either acquired, merged with, or squeezed out has pushed down the total number of competitors in production-sector of the industry virtually since its inception.

In addition to potentially constituting a violation of Section 2 of the Sherman Act, this may also constitute a separate violation of Section 18 of the Clayton act, which states:

"No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[53]

Here, it would appear that Clayton Homes, Cavco Industries, and Skyline Champion are doing just that: In 2003, when Berkshire Hathaway purchased Clayton Homes, Champion was the largest manufactured home builder.[54] Skyline was the fifth largest, and the two companies have now merged.[55] Of the top twenty-five largest manufactured home builders in 2003, Clayton itself purchased or merged with Oakwood, the fourth largest,[56] Cavalier, the seventh largest,[57] Southern Energy, the ninth largest,[58] and Golden West, the fifteenth largest.[59] Cavco at the time was the twelfth largest,[60] has since merged with or acquired Fleetwood Homes, which was previously the second largest,[61] Palm Harbor, the sixth largest,[62] and Fairmont, the tenth largest.[63] What was previously a top ten has amalgamated into a top three. What the industry has presented as apotheosis is closer to apoptosis.

While a precise history of the industry's mergers, acquisitions, and outright failure of competition is less than perfectly discernible, it is quite clear that the year 2009 had a

devastating impact on competition. It was in this year that 21st Mortgage Corporation Century Mortgage, a Clayton Homes sister-brand and Berkshire Hathaway subsidiary that provides financing within the industry to independent retailers, sent out a letter to its retailers indicating that it was no longer capable of finding sufficient sources to sustain their then-current levels of reliable financing. As a result, financing through 21st Mortgage was no longer going to be offered to mortgage brokers.[64] Furthermore, outside of FHA-insured loans, only 21st Century [Mortgage] repossessions and homes built by Clayton or one of its subsidiaries would be eligible [for 21st lending]—retailers also had to be approved.[65] Prior to this letter being sent, there were still 61 total manufactured housing corporations in the United States.[66] Within two years, twenty-one competitors either failed, or were acquired.[67] The true content of the message was made manifest not by what it said, but rather the implied consequences: capitulate to Berkshire Hathaway, or fail.[68]
In public, Buffett boasted through a rictus that Clayton and its financing arm were performing a good deed, saying:

"Lenders other than Clayton have come and gone. With Berkshire's backing, however, Clayton steadfastly financed home buyers throughout the panic days of 2008-2009. Indeed, during that period, Clayton used precious capital to finance dealers who did not sell our homes. The funds we supplied to Goldman Sachs and General Electric at that time produced headlines; the funds Berkshire quietly delivered to Clayton both made home ownership possible for thousands of families and kept many non-Clayton dealers alive."[69]
As has become thematic throughout the course of this paper, however, it was what was left unsaid that was more telling: shortly after this, in the midst of the subprime lending crisis, Clayton and 21st switched course. While its Vanderbilt subsidiary always appears to have been a captive lender to Clayton, this was not the case for 21st.[70]
The [Tim Williams/21st] letter itself appears to be another clear violation of Section One of the Sherman Act, as well as Section Three of the Clayton Act, which prohibit what is colloquially called "tying." This section of the Clayton Act states in relevant part:
"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for the sale of goods…on the agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods…of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in the line of commerce."[71]
Here, Clayton [Homes and their affiliated lending] have done exactly that: from 2009 going forward, outside of loans insured by the FHA, if a retailer was going to offer 21st Mortgage financing, that financing was only going to be available for homes built by its parent company. To elaborate, in *Jefferson Parish Hospital District No. 2 v. Hyde,*[72] *and Eastman Kodak Co. v. Image Technical Serves., Inc.,*[73] The Supreme Court has established four elements for identifying unlawful tying arrangements:

1. Whether the seller is selling two separate products that may be tied together;[7][4]

2. The sale or lease of an item on the condition that the buyer make all his purchases of a separate tied product from the seller;[7][5]
3. The seller has the market power to tie the products, i.e. "the power to force the purchaser to do something he would not do in a competitive market";[7][6] and
4. A "not insubstantial amount of interstate commerce in the tied market is affected."[7][7]

Let us examine each of these elements in a vacuum, and then as an aggregate. For element one: through 21st, Clayton is selling homes and mortgages for those home, which are two separate products (in traditional home buying, these are rarely, if ever, tied together). For element two: in the letter, 21st stated and followed through by choking off credit to retailer that did not sell Clayton homes, or for any homes the retailer sold that were not Clayton homes. For element three: the seller has inordinate market power to force retailers to accept the tying arrangement, whether they liked it or not. Finally, and most clearly, a not insubstantial amount of interstate commerce has been affected: Clayton, its subsidiaries, and its two chief competitors have functionally eradicated any serious, cognizable competitor from the industry. If the last element is met, that alone may be sufficient to constitute a per se violation of the Sherman and Clayton Acts.[78]

The record makes it clear: Clayton Homes and its subsidiaries, Vanderbilt and 21st, backed by Berkshire Hathaway capital, are the runaway giants in the chattel mortgage sector that dominates financing in the manufactured housing sector. Some reports indicate that they provide more financing in the manufactured housing industry by a factor of seven.[79] In fact, the third largest financier in the industry is Wells Fargo.[80] As it stands, 21st and Vanderbilt's ultimate parent company, Berkshire Hathaway, is the fifth largest stakeholder in Wells Fargo.[81] Prior to Berkshire Hathaway's divestment of some 46% of its Wells Fargo shares, it was the single largest stakeholder.[82] As recently as 2017, it held some 13% of Wells Fargo shares, far and away more than the next largest shareholder.[83] There is even some indication that the loans Wells Fargo is making in this industry are themselves backed by Berkshire Hathaway.[84] With such a suffocating control over the financial side of the industry, Berkshire Hathaway has enabled Clayton Homes to go from one of many in an industry with stiff competition to dominant force in a market it has not only vertically integrated, but is in the midst of horizontally integrating as well.

The expungement of competition has borne a demonstrably negative effect on consumers as well. Most Americans derive the majority of their net worth from the equity in their homes.[85] As noted above, however, titling one's manufactured home as a chattel not only restricts the availability of financing to usurious Berkshire Hathaway-backed loan, but chattel depreciation has a tendency to counteract the appreciation of the real property it sits on, if the consumer in fact owns both.[86] In what is potentially another claim for tying under the Sherman and Clayton Acts, much like retailers, consumers are pushed to only finance through Clayton lenders.[87] Other options, including traditional mortgages, may be obfuscated altogether.[88] Former independent retailers have indicated they received kickbacks or discounts on their own financing for pressuring customers to take chattel

mortgages through Clayton.[89] Customers are [purportedly] often made to believe that it was either the best option available, or the only option available.[90] This is despite the fact that some 93% of these loans have such high interest that Federal law requires additional disclosure.[91] Industry consultants and experts believe that about 28% of these loans are in default.[92] While courts have held that traditionally anticompetitive behavior may justify skirting antitrust law if there is an economic efficiency available to consumers,[93] here, there is not.

Berkshire Hathaway and its subsidiaries' anticompetitive behavior is quite clearly injurious to consumer, but in this matter, they are not alone. It would appear that Cavco Industries and Skyline Champion are willing [de facto allies]. An additional [possible] antitrust violation, in the form of a conspiracy under Section 1 of the Sherman Act, would at this point seem [like a] fait accompli. This section declares: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[94] However, this begs the question not of the method but the mode by which the three industry leaders are using to accomplish this. The answer to that would appear to be the industry trade association, the Manufactured Housing Institute. The Manufactured Housing Institute [MHI] acts not only as the public mouthpiece of the Big 3 manufacturers (in the name of the industry) but also appears to act directly on its behalf in its various lobbying endeavors.[95]

In the year 2000, Congress passed the Manufactured Housing Improvement Act.[96] This act authorized "enhanced preemption," which superseded all state and municipal standards, allowing manufacturers to deliver and install manufactured homes in separate jurisdictions provided they meet HUD standards.[97] In 2008, the Federal Housing Financing Authority [FHFA], under the authority of the Housing and Economic Recovery Act of 2008, implemented an expanded Duty to Serve regulation, requiring Fannie Mae and Freddie Mac to facilitate home financing for very low-, low-, and moderate-income families.[98] It should follow logically, then, that it should be cheaper and easier for residents of any state to finance and acquire a manufactured home. Unfortunately, this is not the case.

There may be no greater indicator of collusion by the industry Big 3 through the MHI than HUD's ongoing failure to implement enhanced preemption and for the [FHFA to compel the] GSEs to follow through on the Duty to Serve mandate. To call this ongoing failure a coincidence is a risible proposition: promotion of these runs contrary to the Big 3—and Clayton's—interests in particular. The stated purpose of the GSEs is to securitize mortgages by purchasing them from lenders, packaging them together, and selling them as mortgage backed securities to investors. By alleviating lenders of the burden of having their capital tied up in loans that tend to amortize over periods of decades, liquidity—and thus allocable credit—is freed up, making credit cheap and lending competitive.

Clayton Homes [and their affiliated lenders] would suffer a detriment if [the] GSEs were to re-enter the chattel mortgage industry: it [apparently] does not need nor want capital from a large pool of investors, it accesses the capital through its parent company, Berkshire Hathaway.[100] If GSEs undertook their Duty to Serve, it is hardly speculative to assert that

Clayton—and Berkshire Hathaway's—bottom lines would suffer, both from a new volume of competitors entering the market, as well as lower interest rates from more competitive lending. Accordingly, there is evidence to suggest that MHI has lobbied against any efforts that would threaten to disrupt the profitable and vertically integrated complex Clayton has developed.[101] In fact, as recently as 2012, when major reforms were last announced, objections by the MHI led to manufactured housing being exempted.[102]

After exiting the manufactured housing market in the early 2000s, the two GSEs have yet to return in any meaningful sense.[103] There are indications that the GSEs have securitized [only a limited number of manufactured home loans] in the industry since their departure after the aforementioned subprime lending crisis that occurred in the late 1990s.[104] The MHVillage's [MHInsider], which serves as an unofficial trade publication for the Manufactured Housing Institute, has heralded in several of its recent issues that the MHI has made great inroads with the GSEs, particularly in their implementation of the MHAdvantage and Choice Home programs. However, for the two GSEs to securitize these loans, the price range must be between $200,000-$250,000, and they must be titled as real property, [nor are] and they available to homes that will be placed in land lease communities. With a broader view of the industry in mind, these programs essentially serve no one, and certainly do not fall within the scope of the GSEs' Duty to Serve mandate. In the same issue, Tim Williams, the same gentlemen from 21st Mortgage [and former MHI Chairman] who authored the letter that may be a violation of tying mentioned above, stated that they (Manufactured Housing Institute members) "are better suited to serve communities than GSEs."[109]

Furthermore, while MHI claims to represent the industry as a whole, a look at the incestuous nature of the Big 3 and MHI make it clear whose interests are actually being represented: currently, half of the MHI executive [committee board members] are former employees of Clayton Homes.[110] As mentioned above, MHI (and MHInsider) has touted programs such as MHAdvantage and ChoiceHomes.[111] However, these programs benefit a single new, trademarked class of manufactured housing: CrossMod™ homes.[112] A cross-reference on the U.S. Patent Office's website indicates that MHI is the holder of the CrossMod trademark.[113] The only manufacturers (in principal) able to produce—and thus take advantage of programs such as MHAdvantage and ChoiceHomes are [essentially] MHI members.[114] It would appear that MHI's lobbying efforts are done less to serve the industry as a whole, but rather to keep competitors—and consumers—from accessing competitive rates on lending if the Duty to Serve were properly implemented.

MHI's relationship with HUD and the GSEs is no secret: most recent issues of MHVillage['s MHInsider] touts some form of progress.[115] And yet, only a few loans for this new class of home have been securitized by GSEs.[116] MHIs lobbying of the FHFA, or for that matter HUD, seems to invariably result in in policies that either benefit the Big 3, or at the very least, mitigate detriment. The outcome of these lobbying efforts is stultifying at best, and an abject failure at worst.

For as heavily as MHI has promoted CrossMod™ homes, sales appear to be stagnant, particularly when demand in the sector remains focused on traditional manufactured

housing.[117] This begs the question: when lobbying [FHFA on the Duty to Serve], was MHI acting in good-faith? The U.S. Supreme Court has held in *Eastern Railroad Presidents' Conference v. Noerr Motor Freight Inc*.,[118] and *United Mineworkers v. Pennington*[119] that the use of governmental processes such as lobbying or litigating by private [enterprise] is covered by the First Amendment right to free expression and the right to petition. That right extends even if the use of said processes is done to achieve an anti-competitive purpose that would otherwise be unlawful under antitrust law. The famous Noerr-Pennington doctrine is not without exceptions, however. In *California Motor Transport Co. v. Trucking Unlimited,* the Court identified that there is a "sham" exception to the doctrine's protections.[112] While the Court has never elucidated what exactly constitutes a sham, it is essentially an attempt to disguise the anticompetitive, purely business-related behavior as political—antitrust legislation is designed, after all, to regulate the sphere of business alone. The Federal Trade Commission published a guide for regulators in 2006 that serves to elaborate on what is—and is not—protected by the *Noerr-Pennington* doctrine.[123] The document outlines three activities that constitute a sham within the *Noerr-Pennington* context: filings that seek only a ministerial response,[124] misrepresentations,[125] and repetitive petitioning.[126] Of these, MHI's behavior, if indeed done to mislead or defraud the government, most closely resembles the misrepresentation exception. The deciding factor as to whether misrepresentations are afforded *Noerr* protection is if they are done to achieve a specific political outcome, even if that outcome is anticompetitive, or if there is an abuse of the process itself to hinder competition.[127] In its *Union Oil Co. of Cal. (Unocal)* opinion, the FTC identified three elements for a petitioning or lobbying effort to lose *Noerr* protection: the representation must be (1) deliberate,[128] (2) subject to factual verification,[129] and (3) central to the legitimacy of the affected governmental proceeding.[130]

The author of this paper submits that the MHI's conduct in obfuscation judicious decision-making by the [FHFA and HUD] constitutes a conspiracy to restrain trade under Section 1 of the Sherman Act, and by virtue of the misrepresentative nature of the conduct, should not be afforded *Noerr* protection. The intent of the MHI to influence [FHFA and] HUD to act in a particular way, or omit to act in a certain way, would be protected—however, the chief misrepresentation is that lobbying efforts are representative of an industry and not a select few companies. The data supplied to governmental officials is likely erroneous,[131] and the attempts by the MHI to obtain governmental intercession on the industry's behalf is likely a ruse.

Under *Noerr*, if obtaining securitization of loans for CrossMod™ homes is in fact MHI's desired political outcome, its lobbying efforts to support that would be protected under the First Amendment. However, this would appear to be a strategy not dissimilar to the old cup-and-ball trick: a misdirection by MHI at the behest of its principal benefactors—the Big 3—an act of skillful subterfuge to misdirect the government in one area, allowing the Big 3 to engage in anticompetitive in another area unabated. This is supported by more than simple inference: industry leaders have lauded GSEs failure,[132] sales of CrossMod™ homes remain

far below that of traditional manufactured homes,[133] and that seemingly every time reform in the industry or intrusion by GSEs is proposed, in nearly the same breath it vanishes.
The manufactur[ing] and lending sectors of the industry are rife with potential antitrust violations, from the Sherman Act, to the Clayton Act, to potential violations of the *Noerr-Pennington* Doctrine. It is clear that the Federal Trade Commission and United States Department of Justice should investigate these companies. The American consumer can ill-afford to pretermit manufactured housing as a viable option in the midst of an affordable housing crisis. Traditional site-built homes have continued to increase in price since the mid-2000s subprime mortgage crisis, and industry experts are predicting that the joblessness caused by the COVID-19 pandemic will fuel a second foreclosure crisis in America. Clayton Homes, et al. have gotten demonstrably more profitable. Why has manufacturing yet to cross the 100,000 unit threshold, much less come anywhere close to its most recent 1998 peak?

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The footnotes by Strommen from the above are as shown below.

[1] 42 U.S.C. §5402

2 U.S. Consumer Financial and Protection Bureau, *Manufactured-Housing Consumer Finance in the United States (2014), available a**t*** https://files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf.
3 *Id.*, at 6.
4 *Industry Trends & Statistics*, MHInsider (July 2020), at 38, available at https://www.mhvillage.com/pro/print/july-august-2019/.
5 Rupert Neale, *America's Trailer Parks: The Residents May Be Poor but the Owners Are Getting Rich*, The Guardian, May 3, 2015, *available at* https://www.theguardian.com/lifeandstyle/2015/may/03/owning-trailer-parks-mobile-home-university-investment.
6 Rana Foroohar, *Why Big Investors Are Buying Up American Trailer Parks*, Financial Times, Feb. 7, 2020, *available at* https://www.ft.com/content/3c87eb24-47a8-11ea-aee2-9ddbdc86190d.
7 CFPB, *supra* note 2, at 21.
8 *Id.*
9 *Id.*
[10] *Id. see* Figure 1: Manufactured Housing Share of Occupied-Housing Units, by State.
[11] *Id.*, *see* Figure 3: Head-of-Household Age Distribution.
[12] *Id.*, *see* Table 3: Selected Family Financial Characteristics by Type of Housing.

[13] *Id.*, *see* Table 2: Highest Level of Educational Attainment by Residents Ages 25 or Older in Owner-Occupied Households.
[14] *Id.*, at 6.
[15] *Id.* at 23.
[16] *Id.*
[17] *Id.* at 10.
[18] Jeff Ostrowski, *30-Year Interest Rates,* Nov. 9, 2020, *available at* https://www.bankrate.com/mortgages/rates/30-year-rates-for-monday-november-9-2020/.
[19] J.B. Maverick, *The Most Important Factors that Affect Mortgage Rates*, Jun. 25, 2019, *available at* https://www.investopedia.com/mortgage/mortgage-rates/factors-affect-mortgage-rates/
[20] CFPB, *supra* note 2, at 6.
[21] *Id.* at 24.
22 *Id.*
[23] CFPB, *supra* note 16.
[24] See graphic download linked here: https://www.manufacturedhomepronews.com/wp-content/uploads/2020/11/ManufacturedHousingMarketDataProductionShipmentsComparisonsToConventionalHousingRentalsNationalAssocRealtorsScholasticaGayCororatonMHProNewsInfographic.jpg
[25] CFPB, *supra* note 3, at 26.
[26] MHVillage, *supra* note 4.
[27] CFPB, *supra* note 3, at 26.
[28] *Id.*
[29] *Id.* at 28.
[30] *Id.* at 6.
[31] *Id.* at 37.
[32] *Id.*
[33] The prevailing public narrative is that Mr. Buffett sought ought Clayton, but this is subject to dispute. The Berkshire Hathaway acquisition of Clayton Homes for $12.50 a share was met with a shareholder lawsuit. Investors thought the industry had already hit its nadir and was in the process of rebounding, rendering the offer from Berkshire Hathaway too low. It was alleged that a local bank under-valued the company, and that independent advisors pegged the worth between $15.80 and $17.20 a share. It was subsequently alleged that the Claytons' were "speaking out of both sides of their mouths," telling Berkshire Hathaway the positive position of both the company and the industry, all-the-while telling investors how bad things were. See Jennifer Reingold, *The Ballad of Clayton Homes, Fast Company*, Jan 01, 2004, available at https://www.fastcompany.com/48214/ballad-clayton-homes.
[34] *Financial Times,* supra note 6.
[35] Id.
[36] Id.

[37] This quote and variations are found in abundance. It has also been repeated by Clayton CEO and namesake Kevin Clayton on a number of occasions. Mr. Clayton's reasons for favoring this strategy, and perhaps targeting Berkshire Hathaway (supra note 33) will become clear later in the paper. See Tae Kim, Warren Buffett Believes This Is 'the Most Important Thing' to Find in a Business, *CNBC*, May 7, 2018, available at https://www.cnbc.com/2018/05/07/warren-buffett-believes-this-is-the-most-important-thing-to-find-in-a-business.html.

[38] CPFB, supra note 3, at 39.

[39] This is taken from the 2014 CFPB report. More recent data is not currently available. Id.

[40] A huge debt of gratitude is owed by the author of this paper to the author of the article linked. L. A. "Tony" Kovach, Clayton Homes, Skyline Champion, Cavco Industries, Other Leading HUD Code Manufactured Housing Industry Market Share Data, Jun 24, 2020, *MHProNews*, available at https://www.manufacturedhomepronews.com/clayton-homes-skyline-champion-cavco-industries-other-leading-hud-code-manufactured-housing-industry-market-share-data/.

[41] Id.

[42] Id.

[43] As Mr. Kovach duly noted, the discrepancies between the market share reported both by Clayton Homes itself, as well as the official figures presented by the Manufactured Housing Institute. This speaks to a level of potential collusion that will be addressed below. [Kovach cited Statistical Surveys, an independent research firm, for the most accurate known market-share data.] Id.

[44] See https://www.manufacturedhomepronews.com/manufactured-housing-comparisons-data-sets-vs-existing-and-new-single-family-housing-sales-rvs-auto-facts-potent-insights-for-mh-professionals-investors and https://www.manufacturedhomelivingnews.com/affordable-housing-needed-corporate-corruption-and-manufactured-homes-time-to-get-federal-officials-fully-involved.

[45] Jennifer Brown *and* Kevin Simpson, *Mobile Home Parks Move from Mom-and-Pop to Corporate*, Sept. 16, 2019, Associated Press, *available at* https://apnews.com/article/de31aa729f514f48b934bf23ebd3f641.

[46] See Figure 1. L. A. "Tony" Kovach, *Prima Facie Cases Against Manufactured Housing Institute, Richard A. 'Dick' Jennison, Tim Williams, 21st Mortgage, Kevin Clayton, Tom Hodges – Clayton Homes, Et Al*, MHProNews, Jan 7, 2020, *available at* https://www.manufacturedhomepronews.com/masthead/prima-facie-cases-against-manufactured-housing-institute-richard-a-dick-jennison-tim-williams-21st-mortgage-kevin-clayton-tom-hodges-clayton-homes-et-al/.

[47] Motley Fool Transcribers, *Skyline Champion Corp (SKY) Q3 2020 Earnings Call Transcript*, Jan 29, 2020 *available at* https://www.fool.com/earnings/call-transcripts/2020/01/29/skyline-champion-corp-sky-q3-2020-earnings-call-tr.aspx.

[48] *MHProNews*, *supra* note 46.

[49] It is also worth noting that Cavco Chairman and CEO Joe Stegmayer and Cavco under under investigation by the securities and exchange commission. Source for data may be

found *supra* note 46, information on the Cavco investigation may be retrieved here https://sec.report/Document/0000278166-20-000066/.

[50] 15 U.S.C. § 2.

[5[1]] *MHProNews, supra* note 40.

[52] *Id.*

[53] Within the ascribed meaning and definition of the Act, "person" includes "corporation." 15 U.S.C. § 18.

[54] It is important to note that it is unclear how the companies in the following footnotes came together, if by merger, acquisition, or some combination of both.

MHProNews, *supra* note 46.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *MHProNews*, *supra* note 40.

[65] This is retrieved from MHProNews, *supra* note 40, but also corroborated by the CFPB study mentioned, *supra* note 3 at 14.

[66] L. A. "Tony" Kovach, *Bridging Gap$, Affordable Housing Solution Yields Higher Pay, More Wealth, But Corrupt, Rigged Billionaire's Moat is Barrier*, MHLivingNews, (article undated), *available at https://www.manufacturedhomelivingnews.com/bridging-gap-affordable-housing-solution-yields-higher-pay-more-wealth-but-corrupt-rigged-billionaires-moat-is-barrier/*.

[67] It would also appear this is a separate violation of 15 U.S.C. § 14 *infra* note 71. *Id.*

[68] While it is outside the scope of this paper to explore or analyze at length, it has been alleged that this may constitute a predicate offense of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961.

[69] Warrant Buffett, *Annual Shareholder Letter, 2015*, at 17, Feb. 27, 2016, *available at https://www.berkshirehathaway.com/letters/2015ltr.pdf*.

[70] *Moody's Assesses Vanderbilt Mortgage and Finance, Inc. as 'Average' Originator of Residential Conventional Manufactured Home Loans,* Feb. 28, 2011, *available at* https://www.moodys.com/research/Moodys-Assesses-Vanderbilt-Mortgage-and-Finance-Inc-as-Average-Originator–PR_214886.

[71] 15 U.S.C. § 14.

[72] *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2.

[73] *Eastman Kodak Co. v. Image Tech. Servs*., 504 U.S. 45.

[74] *Id.* at 462.

[75] *Id.* at 488.
[76] *Id.*
[77] *Supra* note 72, at 8.
[78] *Id.* at 23.
[79] Kori Hale, *Warren Buffett's Exploitative Mobile Home Investment*, Forbes, Apr. 18, 2019, *available at* https://www.forbes.com/sites/korihale/2019/04/18/warren-buffets-exploitative-mobile-home-investment/?sh=2c33848b1507.
[80] Daniel Wagner & Mike Baker, *Warren Buffett's Mobile Home Empire Preys on the Poor*, Center for Public Integrity, Apr. 6, 2015, *available at* https://publicintegrity.org/inequality-poverty-opportunity/warren-buffetts-mobile-home-empire-preys-on-the-poor/.
[81] *Wells Fargo & Company (WFC) Top Institutional Holders*, Nov. 3, 2020, *available at* https://finance.yahoo.com/quote/WFC/holders?p=WFC.
[82] Theron Mohamed, *Warren Buffett's Berkshire Hathaway Cuts Wells Fargo Stake to 17-year Low*, Business Insider, Sep. 7, 2020, *available at* https://markets.businessinsider.com/news/stocks/warren-buffett-berkshire-hathaway-cuts-wells-fargo-stake-17-years-2020-9-1029566739.
[83] *Id.*
[84] Get source.
[85] Scott Burns, *Americans Love Their Homes – Maybe Too Much*, Dallas Morning News, Nov. 13, 2020, *available at* https://www.dallasnews.com/business/personal-finance/2020/11/13/americans-love-their-homes-maybe-a-little-too-much/.
[86] CFPB *supra* note 3, at 25.
[87] CPI, *supra* note 80.
[88] *Id.*
[89] This article cites an interview with Kevin Carroll, a former owner of a Clayton-affiliated dealership who described receiving discounts on his own business loan, which was financed by Clayton Homes, for steering customers to work only with 21st Mortgage. *Id.*
[90] *Id.*
[91] Ninety-nine percent of these loans also had such high interest as to warrant placement in the Federal Government's "higher-priced mortgage loan" (HPML) status required under 12 U.S.C. § 2801. *Id.*
[92] This figure is highly disputed. Warren Buffett alleged this rate was a mere 3%, but that figure is measuring the total number of failed loans Clayton originated in a single year, not the total number of defaulted loans in the portfolio. *See* Mike Baker & David Wagner, *Buffett's Mobile-Home Company He Controls Made Record Profits Last Year While Foreclosing on More Than 8,000 Customers*, Seattle Times, Feb. 29, 2016, *available at* https://www.seattletimes.com/seattle-news/times-watchdog/buffetts-mobile-home-empire-makes-record-profits-while-foreclosing-on-8444-homes/.
[93] Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210.
[94] 15 U.S.C. § 1.
[95] Also note the progressive increase in money spent by the MHI on lobbying efforts after Berkshire Hathaway's acquisition of Clayton Homes in 2003. *Client Profile: Manufactured*

Housing Institute, Center for Responsive Politics, Nov. 12, 2020, *available at* https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2020&id=D000000458.
[96] 42 U.S.C. § 5401.
[97] *Id.*
[98] 12 U.S.C. § 4565
[99] Gerald Lins, Marie Picard, & Thomas Lemke, *Mortgage Backed Securities*, 2013.
[100] Doug Ryan, *Time to End the Monopoly Over Manufactured Housing*, American Banker, Feb. 23, 2016, *available at* https://www.americanbanker.com/opinion/time-to-end-the-monopoly-over-manufactured-housing.
[101] Juliet Eilperin, *A Once Obscure Office at HUD is the Subject of an Unusually Intense Lobbying Effort*, Washington Post, May 1, 2018, *available at* https://www.washingtonpost.com/politics/a-once-obscure-office-at-hud-is-the-subject-of-unusually-intense-lobbying-effort/2018/04/30/3dfc7ba0-3841-11e8-acd5-35eac230e514_story.html.
[102] CPI, *supra* note 80.
[103] CFPB, *supra* note 28.
[104] See https://www.manufacturedhomepronews.com/tim-williams-ceo-of-berkshire-owned-21st-mortgage-corp-and-manufactured-housing-institute-board-member-makes-stunning-admission/
[105] There is substantial overlap between MHI directors and MHInsider magazine editors. *Supra* note 4, at 28.
[106] *Id.*
[107] Bear in mind that only 14% of loans for manufactured homes are titled as real property, even though a far larger number may be eligible. *Id.*
[108] *Id.*
[109] *Id.* at 56.
[110] Note that, beyond the Chairman and Treasurer, another 5 board seats are held by Big 3 members, with the rest constituted mostly of state-level affiliate directors or REIT representatives. Manufactured Housing Institute, *MHI Board of Directors*, Nov. 12, 2020, *available at* https://www.manufacturedhousing.org/board-of-directors/.
[111] *Supra* note 4.
[112] *Id.*
[113] U.S. Trademark Application Serial No. 88/497,913 (filed Feb. 7, 2019).
[114] See https://www.manufacturedhomepronews.com/pro-mhi-members-other-sources-sound-off-on-crossmodtm-homes-manufactured-housing-traction-or-distraction-new-insider-facts-exclusive/
[115] MHVillage, *supra* note 4. *See also:* https://www.mhvillage.com/pro/print/ for online sources of print editions.
[116] Renan Cunha, *Manufactured Housing Securitization*, Duke Journal of Economics, Oct. 14, 2016, *available at https://sites.duke.edu/djepapers/files/2016/10/renan-cunha-dje.pdf*.
[117] *Id.* at 6.

[118] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961).
[119] *United Mine Workers v. Pennington*, 381 U.S. 657.
[120] *Id.*
[121] *Id.*
[122] *California Motor Transport Co. v. Trucking Unlimited*, 1971 U.S. LEXIS 1810
[123] FTC, *Enforcement Perspective on the Noerr-Pennington Doctrine*, 2006, *available at* https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf.
[124] *Id.* at 4.
[125] *Id.* at 4.
[126] *Id.* at 4.
[127] *Id.* at 22.
[128] *Id.* at 25.
[129] *Id.* at 25.
[130] *Id.* at 25.
[131] L. A. "Tony" Kovach, *FHFA, GSEs—High Cost to Minorities, All Americans—Due to Asserted Failures to Follow Duty to Serve Affordable Housing, Existing Federal Laws*, *Manufactured Home Living News*, Dec. 11, 2019, *available at https://www.manufacturedhomelivingnews.com/fhfa-gses-high-cost-to-minorities-all-americans-due-to-asserted-failures-to-follow-duty-to-serve-affordable-housing-existing-federal-laws/*.

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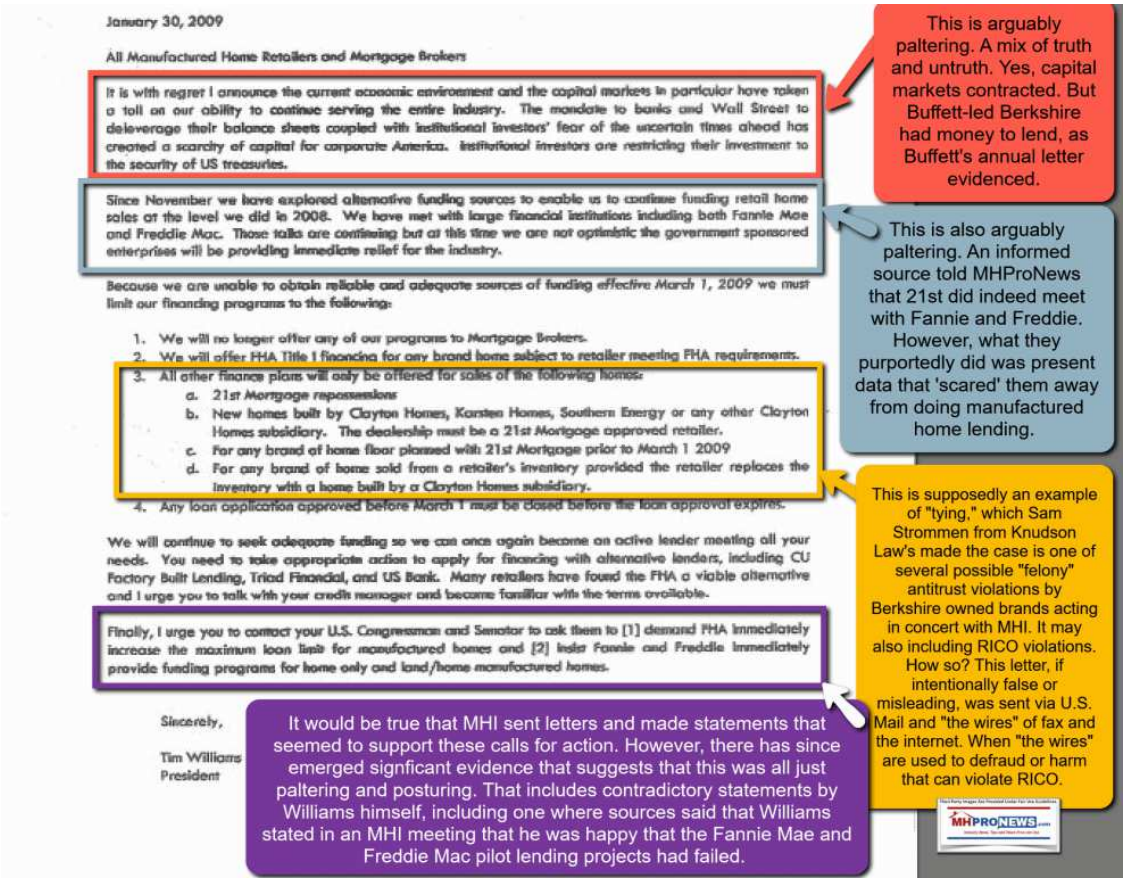
Note: *the graphics and links below are provided by MHProNews and was not in the original report by Strommen, above. That noted, these illustrate several of Strommen's points.*



January 30, 2009

All Manufactured Home Retailers and Mortgage Brokers

It is with regret I announce the current economic environment and the capital markets in particular have taken a toll on our ability to continue serving the entire industry. The mandate to banks and Wall Street to deleverage their balance sheets coupled with institutional investors' fear of the uncertain times ahead has created a scarcity of capital for corporate America. Institutional investors are restricting their investment to the security of US treasuries.

Since November we have explored alternative funding sources to enable us to continue funding retail home sales at the level we did in 2008. We have met with large financial institutions including both Fannie Mae and Freddie Mac. Those talks are continuing but at this time we are not optimistic the government sponsored enterprises will be providing immediate relief for the industry.

Because we are unable to obtain reliable and adequate sources of funding *effective March 1, 2009* we must limit our financing programs to the following:

1. We will no longer offer any of our programs to Mortgage Brokers.
2. We will offer FHA Title I financing for any brand home subject to retailer meeting FHA requirements.
3. All other finance plans will only be offered for sales of the following homes:
   a. *21st Mortgage repossessions*
   b. New homes built by Clayton Homes, Karsten Homes, Southern Energy or any other Clayton Homes subsidiary. The dealership must be a 21st Mortgage approved retailer.
   c. For any brand of home floor planned with 21st Mortgage prior to March 1 2009
   d. For any brand of home sold from a retailer's inventory provided the retailer replaces the inventory with a home built by a Clayton Homes subsidiary.
4. Any loan application approved before March 1 must be closed before the loan approval expires.

We will continue to seek adequate funding so we can once again become an active lender meeting all your needs. You need to take appropriate action to apply for financing with alternative lenders, including CU Factory Built Lending, Triad Financial, and US Bank. Many retailers have found the FHA a viable alternative and I urge you to talk with your credit manager and become familiar with the terms available.

Finally, I urge you to contact your U.S. Congressman and Senator to ask them to [1] demand FHA immediately increase the maximum loan limit for manufactured homes and [2] insist Fannie and Freddie immediately provide funding programs for home only and land/home manufactured homes.

Sincerely,

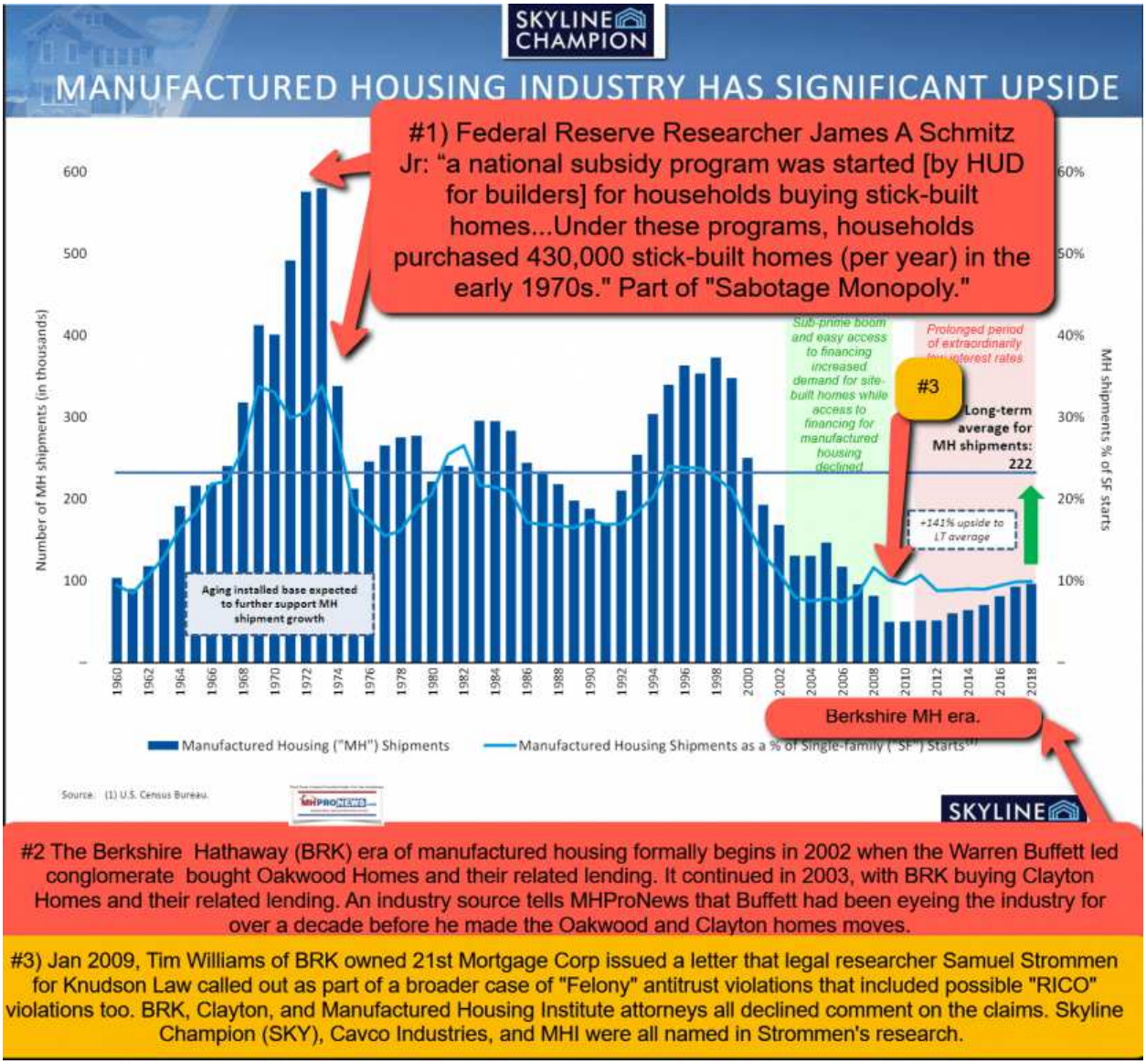
Tim Williams
President

This is arguably paltering. A mix of truth and untruth. Yes, capital markets contracted. But Buffett-led Berkshire had money to lend, as Buffett's annual letter evidenced.

This is also arguably paltering. An informed source told MHProNews that 21st did indeed meet with Fannie and Freddie. However, what they purportedly did was present data that 'scared' them away from doing manufactured home lending.

This is supposedly an example of "tying," which Sam Strommen from Knudson Law's made the case is one of several possible "felony" antitrust violations by Berkshire owned brands acting in concert with MHI. It may also including RICO violations. How so? This letter, if intentionally false or misleading, was sent via U.S. Mail and "the wires" of fax and the internet. When "the wires" are used to defraud or harm that can violate RICO.

It would be true that MHI sent letters and made statements that seemed to support these calls for action. However, there has since emerged signficant evidence that suggests that this was all just paltering and posturing. That includes contradictory statements by Williams himself, including one where sources said that Williams stated in an MHI meeting that he was happy that the Fannie Mae and Freddie Mac pilot lending projects had failed.



MHProNews/MHLivingNews editors' note. Following the above, Berkshire Hathaway, Clayton Homes, MHI and several of their allied brands and attorneys were given an opportunity to react, rebut, or otherwise comment.

https://www.manufacturedhomelivingnews.com/machine-of-human-suffering-berkshire-hathaways-clayton-homes-manufactured-housing-institute-attorneys-response-to-allegations-felony-abuses-knudson-law/