

Foreclosure Defense Workshop

GARFIELD CONTINUUM

Companion to Seminars and
Livinglies Blogsite

Presented by
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Florida Bar
Federal Trial Bar
Bankruptcy Bar

With
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Foreclosure Defense Group

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IMPORTANT: The information presented in this workshop is general information and is not specific advice on the law of any state other than Florida.

No decision or action should be undertaken strictly on the basis of the information in this workbook or in the presentation without first consulting a licensed competent attorney in YOUR community or where your property is located.

The accuracy of the information is not guaranteed. State laws vary, and local rules vary from state to state and county to county. The style of pleadings, and the rules of when and how to file objections, motions, pleadings and discovery varies from state to state as well.

The presenters do not purport to know the rules and laws of all 50 states.

The purpose of this presentation is to provide you with informational guidelines about cases and situations OTHER than your own, and what that COULD mean in your case.

You should not use this workbook or this workshop as a basis for advising anyone other than within a jurisdiction in which you licensed to practice law, as it probably would be otherwise considered the Unauthorized Practice of Law (UPL). UPL is a crime in most states and carries substantial penalties and the risk of imprisonment.

WE'RE GOING TO STOP THIS NOW"

Neil F. Garfield, M.B.A., J.D., 61,

is the winner of dozens of academic awards, a popular speaker, and author of technical treatises on law and economics. He has come out of retirement with a bang and financial institutions should take note. He knows them from the inside out, who the deciders are, and how they arrived at a catastrophic scheme to defraud, people, agencies, institutions, and governments all over the world.

The former consumer advocate, trial attorney, and economist says that he "can't watch this meltdown without lending a helping hand to those in distress." Appearing on TV, Radio, multiple blogs, and live appearances, Garfield offers bold and sound advice for dealing with the "largest economic fraud in human history."

His Garfield's Handbooks provide valuable insights to borrowers, community bankers, credit unions, government agencies, law enforcement, and others on how to help save the country from financial disaster and how to profit from the coming recession, dollar devaluations, and revelations about the dangers of centralized banking. Besides providing specific strategies for people who are vulnerable and law enforcement trying to get a grip on the economic meltdown, he is an urgent and ardent advocate of local community banking and credit unions taking back their market share by asserting their power and requiring an even playing field for competition with each other and with larger financial institutions.

Local and state agencies would do well to follow his suggestions, some of them bold enough to raise eye-brows world-wide, and save their local economies even while the rest of the nation's economy falls to pieces around them. Using an extensive knowledge of economic, world and national history, Garfield picks the strategies that have worked in the past and expands upon them so they can be institutionalized.

He is a former investment banker, radio talk show host, trial lawyer, and board member of several financial institutions.

Garfield has appeared as guest commentator on radio, TV, newspapers and magazines. He is currently Chairman emeritus of a consortium of Financial Services Companies, a licensed Attorney, Economist, Financial Analyst, Accountant, and former director of investment banking at a small boutique on Wall Street. His experience on Wall Street makes him the ultimate "insider."

He created the rights to intellectual property including business method and technology in the processing of ATM Transactions, the processing of debit and credit payments, and automatic electronic settlement.

Neil has come out of retirement with one purpose in mind --- to do all he can to counter the effects of the Mortgage Meltdown and save the people and the country from the disaster created by the creation of "free money" using derivative securities that not even experts understood, and targeting the least sophisticated members of society.

Living in Arizona with his wife and dog, Garfield comes from a long line of Garfield creators and innovators: His great-grandfather created the first fully automated pharmaceutical plant in the United States 100 years ago, which now stands as an exhibit in the Smithsonian Institution in Washington, D.C. His cousin, Brian Garfield is a prolific and acclaimed author of fiction and movies (Death Wish, Hopscotch, Kolchak's Gold) and nonfiction (Currently the "War in the Aleutian Islands" is a popular coffee table book). His family funded research in the 1950's that resulted in the worldwide production of lanolin from cholesterol. The Garfield Foundation is a major contributor to wildlife refuge and environmental causes.

For over a year, Neil Garfield in Phoenix, Az has been researching, writing and collecting information about homeowners in distress. After correctly predicting the housing crash right down to the last dotted "i" and crossed "t" he began writing his blog www.livinglies.wordpress.com. Starting with modest results, the blog took on a life of its own and has enjoyed 20 straight weeks of increasing volume, the latest being 10,000 visits in one week.

His basic premise, set forth in his FAQ and Mission statement is that the foreclosure mess was not a situation where millions of people suddenly appeared needing housing, but where Trillions of dollars were in search of people who could be convinced to sign their names.

But Garfield, a former investment banker and former trial attorney, goes further. He says that homeowners can walk into the courthouse in foreclosure and walk back out having foreclosed on their lender and receiving the title to their home free and clear of the mortgage or note. He turns the windfall argument about how unfair it would be for some people to get their homes for free and uncovers the real windfall --- that lenders who have been paid in full and received undisclosed fees, are now foreclosing on property so that they end up with the property, the money, and a deficiency judgment too. It is the ultimate windfall and the misperceptions and ideologies that are in circulation perpetuate the fraud that has been committed on our citizens, our country's place in the world, the erosion of our economy, and the value of our money.

Garfield is now in the process of giving low-cost seminars to lawyers and homeowners on the basics of defending their property and seeks nothing less than to stop All foreclosures on property financed between 2001-2008, which is when Wall Street stepped into the mortgage market and caused a drop in underwriting standards that can only be understood by people like Garfield, who worked there, who created some of these exotic securities. He says the rule is simple: if you want to sell a security make it complicated. If you want to buy a security look for something simple. In the complex there is fraud, in the simple there is usually just fundamental cash flow, finance and economics.

I am inspired to do this out of a profound sense of justice and a sense of calling that tells me I can make a difference --- not only to the people whose lives will be tragically disrupted with a stain and stigma that will follow them through the rest of their lives, but also for the economy and national security of our country.

The typical lawyer, just from referrals off my site can earn easily \$15,000-\$20,000 per month in retainers and more than 3 times that in contingencies or fee recoveries at the end of each case. The problem is they don't see it even when it is presented in black and white in front of them.

Thus homeowners (57% right now) give up and walk away from homes that I believe they could own free and clear if they would just stand up and fight. I can give them the tools but I am not interested in practicing law anymore and I can't appear in 20 million cases.

The World of Securitization and the Breakdown of Underwriting Standards

Brad Keiser, BA, MBA,

is a brilliant innovator in the world of banking, electronic commerce, electronic payment systems, and strategic business planning. His career spans several different industries before he settled on banking 15 years ago. He eventually ended up at Fifth Third Bank one of America's 10 largest banks, and its subsidiary Midwest Payment Systems which is now known as Fifth Third Payment Systems and is one of the nations largest financial data processing centers. Working his way up, Brad became the leader of a management team that took MPS from \$20 million in annual revenues to over \$600 million in annual revenue.

He currently serves as a consultant to a wide array of financial institutions and electronic payment processors. Prior to joining the team, he spent months performing due diligence on the viability of the methods and procedures that were being disclosed and published on the livinglies.wordpress.com blog site. He presently knows more about the substantive law and procedural strategies for foreclosure offense and defense than most attorneys. He serves as an adviser, consultant and confidant to Neil.

A personal friend and fellow strategist of Neil Garfield, he was drafted into the mortgage meltdown movement to protect homeowners whom he knew, by virtue of his explicit knowledge of banking and lending, had been victimized by marketing practices and underwriting practices that fell far short of industry standards, the expectations of regulators and the reasonable belief of consumers that the lender was acting in the best interest of seeing the loan be successfully concluded.

A recognized speaker at banking conferences and author of industry related articles, Brad led the rapid growth of the bank's Financial Institutions Services Group. He strongly believes that the best outcome for all parties involved in the current mortgage meltdown, both in the short and long term is to find a way to keep the homeowner in the house. Toward that end he has led the effort started by Neil to construct an infrastructure that would sustain itself financially, grow in its ability to get the message out, and actively assist lawyers representing homeowners in this war and homeowners who have been victimized by predatory lenders.

Brad will speak about the historical build-up of the current Mortgage Meltdown situation, and identify the players and their motivations, patterns and methods of operations. He also is the one person in charge of access to services, consultation with knowledgeable attorneys including Neil, and assisting attorneys and lay people in pursuing strategies to a successful outcome. Brad is a leader in this movement dedicated to promoting adequate defense in this historical era of homeowners rights and is the switchboard of this "network enterprise.

Judicial Stages of Grief

Judicial Stages of Grief

NOT YET ENTERING TROUBLE ZONE	NOTICE OF DEFAULT	EVICTON FILED
STRAIN APPEARS	NOTICE OF DEFAULT & ACCELERATION	NO ANSWER
PAYMENT DELAY NOT LATE	NO ACTION NO CURE NO PAYOUT	EVICTON ORDER
PAYMENT LATE NOT DELINQUENT	FORECLOSURE FILED AND SERVED	EVICTON
PAYMENT DELINQUENT NO NOTICE	M/SJ FILED AND AFFIDAVIT AND N/H	CASH FOR KEYS
DELINQUENCY NOTICE	DEFAULT JUDGMENT: SALE DATE SET	SECURITIZED?
NO CURE NO NOTICE OF DEFAULT	AUCTION AND SALE TACTICS AND STRATEGY	GOOGLE
WHO RECEIVES MONEY?	TITLE RECORDED	8K AND 10K SEC
CHAIN OF TITLE: NOTE	CHAIN OF TITLE ON MORTGAGE	CLOUDS ON TITLE

PREMISES OF GARFIELD CONTINUUM:

AUTHORITY AND KNOWLEDGE OF THE PARTY SEEKING TO EXERCISE THE REMEDY OF FORECLOSURE

WHEN A PARTY POSTS A NOTICE OF SALE OR FILES A FORECLOSURE SUIT OR SENDS A DEMAND OR DEFAULT LETTER, THE HIGHEST PROBABILITY IS THAT WHOEVER TAKES SUCH ACTION IS COMMITTING FRAUD IN REPRESENTING ITSELF AS THE LENDER OR AS AN AUTHORIZED REPRESENTATIVE OF THE LENDER. THE PARTY IN MOST CASES IS A NOMINEE OR TRUSTEE, OR A MORTGAGE SERVICE PROVIDER, NONE OF WHOM HAVE ANY INTEREST, OWNERSHIP OR CONTROL OVER THE SECURITY INSTRUMENTS OR THE PROMISSORY NOTE EXECUTED AT THE LOAN SECURITY CLOSING.

IN FACT, ANY TRUSTEE OR ATTORNEY IS PROBABLY COMMITTING FRAUD OR MALPRACTICE BY REPRESENTING OTHERWISE AND ANY EVICTION, SALE OR FORECLOSURE SO DONE IS SUBJECT TO BEING SET ASIDE AS A FRAUD UPON THE COURT.

FURTHER, THE LENDER NAMED AT CLOSING IS MOST ASSUREDLY NOT THE LENDER ANY MORE --- HAVING ASSIGNED ITS RIGHTS TO THE SECURITY AND ASSIGNED ITS RIGHTS TO THE REVENUE TO A MORTGAGE AGGREGATOR --- WHO IN TURN MADE ASSIGNMENTS TO AN INVESTMENT BANKER --- WHO IN TURN MADE ASSIGNMENTS TO AN SPV --- WHO IN TURN MADE CONDITIONAL ASSIGNMENTS, ALONG WITH OTHER GUARANTEES AND ASSURANCES TO THE INVESTORS IN THE ABS INVESTMENTS ISSUED BY THE SPV.

It is the editorial opinion and consensus here that Wall Street was too cute by half — they performed a magical act that was intended to put money in their pockets. But what they achieved was far more than that — they separated the security from the security instrument and the revenue from the note. They received payments from the borrower, the investors, insurance carriers, other unrelated borrowers, guarantors and the Federal government.

The total of the payments, profits (from sale of securities), fees, kickbacks, rebates and other revenue received by the middlemen in the transaction between investor and borrower vastly exceeded the funding of the underlying mortgages taken as a whole. Contrary to the requirements of law, only a small portion of the transaction was disclosed to either the investor who was the only source of funding, or the borrower without whose signature the transaction would not have been complete.

Contrary to the representations of the financial services industry players, the transaction was the issuance of an alleged negotiable security by the borrower under false pretenses, the addition of terms, conditions, provisions and parties without the knowledge of the borrower, culminating in the sale of unregulated securities (certificates of asset backed securities) under false pretenses. In both cases (borrower and investor, the false pretesnes were the same --- intentionally appraising the value of the “property” (the home or the security) at an inflated level far beyond the bounds of industry standards or reasonable men and bend the point where reasonable persons could disagree.

THE ULTIMATE DEFENSE OF PAYMENT:

The obligation to pay, having been merged with various other borrowers without disclosure to the borrower, and other third parties who were supposed to “make good” on the revenue flow makes it impossible to determine whether any particular borrower’s note, if it exists, is actually in default. All that can be presented is that the borrower did not make a payment to a party that is frankly not entitled to receive it.

The great likelihood is that third parties made payments that should have been allocated to the pool revenue and thus the borrower’s mortgage and note. The existence and amount those payments is generally unknown to the attorney for the “lender” or his client(s). Attorneys representing borrowers who DO understand this are getting extremely favorable results and settlements. They are also earning substantial fees as the greatest “mistake” (fraud) in Wall Street’s history unfolds and as virtually ALL private debt of every kind, secured, unsecured, guaranteed or not comes into question.

In fact, the revenue stream can be allocated to allege payment by virtue of the merger of revenue streams and the actual payment to the assignors in the assignment instruments. Further, the ultimate recipient of the revenue flow may in fact have been paid, at least as far as the obligation on the original promissory note executed at the real estate closing.

Thus the obligation becomes both contingent and unsecured and therefore dischargeable in bankruptcy, and NOT susceptible to lifting the automatic stay that results from a bankruptcy filing. Current plans to change the provisions of the bankruptcy code, if passed and signed into law, would allow liberal discretion for the Bankruptcy court to “Cram-Down” the mortgage principal, interest and payments. However, the degree of cram-down will no doubt vary from court to court.

The goal and duty of each attorney is to convince the court that the obligation does not exist or, failing that, to create sufficient doubt that the court uses its cram-down authority to the fullest extent. The rewards will go to the attorney (and his/her client) with the most knowledge of securitization and the strategies to challenge standing, chain of title and whether the obligation itself still exists after insurance, cross-collateralization, over-collateralization, reserves and bailouts from the Federal Reserve and U.S. Dept. of Treasury.

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INTRODUCTION

THE BUSINESS CASE:

How to make six figures per month without really trying

- * Hourly Fees
- * Fixed Fees
- * Contingency Fees --- Direct, Indirect, Mentoring
 - * APPRAISER, MORTGAGE BROKER, TITLE AGENT, CLOSING AGENT, LENDER, TITLE INSURANCE POLICY --- financing yourself and the case with early settlements or flipping witnesses
 - * Mortgage modification, nullification
 - * Securitization and TILA: refunds, rebates, interest, points, damages
- * Recovery of Fees and Cost from Lender etc.
- * Advance Retainer
- * Mortgage Audit and Investigation
- * Seminars for Layman and Lawyers, Licensing from Livinglies.wordpress.com
- * REPRESENTATION, ADVICE AND GHOST WRITING

1. **Credere: To trust--->Credit**
2. **Pooling: All banking starts with pooling, and the trust and hope that not everyone will demand their money at the same time. Most of the money is tied up in long-term debt. That's why we need the Fed for Lending and the FDIC for Guarantee.**
3. **BLACK LETTER LAW: Convincing Jurists to listen -- common side effects: laughter, disbelief, indifference**
4. **CONFLICT OF LAWS: FEDERAL V STATE; STATE V STATE; ADMINISTRATIVE**
5. **Fact research: Finding Documents --- GOOGLE Aurora 8k --- get Lehman filings and news. www.sec.gov.**
6. **DAMAGES AND FEES: Bigger than PI**
7. **EVIDENCE: COMPETENCY AND FOUNDATION --- Trial Practice and Real Estate Closings**
8. **IDENTIFYING THE PARTIES; HOLDER IN DUE COURSE**
9. **ECONOMICS: UPSIDE DOWN SECURITIZATION --- The worse the loan the higher the price to investors**

10. **TRUST AND FIDUCIARY LAW: SUBSTITUTIONS**
11. **BURDEN OF PROOF: Keep the Pressure ON**
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 - 13.1. **Single Transaction or multiple independent transactions?**
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 - 22.1. **Pooling and services Agreement**
 - 22.2. **Assignment and Assumption Agreement**
 - 22.3. **Certificates and Trustee**
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27. **IDENTITY THEFT AND PRIVACY**
28. **BANKRUPTCY ---- SECURED V UNSECURED ----**
29. **BANKRUPTCY --- KEEPING THE AUTOMATIC STAY IN PLACE.**
30. **JUDICIAL V NON-JUDICIAL STATES**

GENERIC COMPUTATION OF DAMAGES AND CLAIMS

DESCRIPTION OF CLAIMS AND ANALYSIS		COST	LOSS	
PAR VALUE OF MORTGAGE NOTE AT LOAN CLOSING	\$500,000			
DOWN PAYMENT	\$130,000			
APPRAISAL FRAUD				
Price Paid		\$630,000		
Appraisal			\$650,000	-\$20,000.0
Real Fair Market ASKING PRICE Value as per industry standards			\$490,000	-\$140,000.
TOTAL APPRAISAL INFLATION				-\$160,000.
AVERAGE CURRENT DISCOUNT FROM ASKING PRICE	5.00%	\$24,500		
ACTUAL ESTIMATED CLOSING PRICE			\$465,500	
AVERAGE REAL ESTATE COMMISSION	6.00%	\$27,930		
MISCELLANEOUS SELLING EXPENSES	1.00%	\$4,655		
ACTUAL ESTIMATED COSTS OF CLOSING		\$32,585		
ACTUAL ESTIMATED CLOSING PROCEEDS			\$432,915	-\$57,085.0
TOTAL LOSS DUE TO APPRAISAL FRAUD EXCLUDING INTEREST				-\$377,085.
TILA REFUNDS, REBATES AND DAMAGES				
POINTS TO LENDER		\$15,000		
INTEREST PAID THROUGH OCTOBER 31, 2008		\$49,000		
MISCELLANEOUS CLOSING EXPENSES PAID BY BUYER		\$3,500		
MORTGAGE AUDIT AND EVALUATION		\$1,500		
EXPERT MORTGAGE CONSULTATION		\$1,500		
ATTORNEY FEES THROUGH OCTOBER 31. 2008		\$15,000		
TOTAL KNOWN RELEVANT TILA EXPENSES DUE BORROWER			\$85,500	
LOSS FROM KNOWN RELEVANT TILA EXPENSES DUE BORROWER				-\$85,500.0
TOTAL KNOWN LOSS AND DAMAGES RESULTING FROM TRANSACTION				-\$462,585.

GENERIC ATTORNEY DEMAND LETTER

LETTERHEAD OF ATTORNEY

Certified Mail Return Receipt Requested: Receipt Number

DATE:

SEPARATE LETTER TO EACH OF (some might have performed multiple tasks --- I would send out a different letter to each one for each category of service, so they are getting more than one letter.

Trustee on Deed of Trust in non-judicial state

Lender on mortgage(s)

Mortgage Broker

Real estate Appraiser

Title Agent

Title Carrier

Closing Agent

Escrow Agent

REFERENCE:

BORROWER(S):

PROPERTY ADDRESS:

SETTLEMENT NUMBER(S):

TITLE INSURANCE POLICY NUMBER

LOAN CLOSING DATE

Dear Sir/Madame:

Please be advised that the undersigned attorney represents the above-referenced borrowers in connection with a financial transaction that occurred on the above-referenced date. Based upon information received from our client, an expert mortgage audit report, and our research of the property records, the filings with the UNITED STATES Securities and Exchange Commission and interviews with various mortgage brokers, lenders, appraisers, title agents, and closing agents, we believe there are claims against you and your company for negligence, breach of contract, and breach of fiduciary duty, along with other claims in law and equity which total more in financial damages than the client's equity (down payment), costs of closing, all points and interest paid to date plus the par value of the subject mortgage note(s).

This is a substantial claim that may exceed the policy limits on any and all insurance policies issued that cover the risks in this claim.

Please forward a copy of this letter to any company that has issued a policy of insurance covering errors, omissions, negligence or any other guarantee or indemnification relative to the above-referenced loan "closing." Failure to notify your insurance carrier may result in denial of coverage or denial of the duty to defend.

The above-referenced loan closing involved conflicting documentation and failure to disclose the existence of a Pooling and Service Agreement and Assignment and Assumption Agreement that predated the loan closing and provided for fees, profits and payments that were never intended to be disclosed to the borrower and that were withheld from the borrower before, during and after the subject loan closing. It was not until exhaustive research was performed that the true facts are emerging, and which have caused our client to express an **immediate need and desire to rescind the alleged subject loan transaction.**

Based upon conversations with our client and interviews with people who have knowledge of the practices and policies of the parties to this transaction, it is apparent that, contrary to federal and state law, you have participated in an extended pattern of conduct to further, foster, allow and promote an interstate conspiracy to deceive and defraud persons targeted as prospective borrowers in entire geographic regions of the the United States including but not limited to our client, and were further negligent in your supervision of your officers, directors, agents, affiliates, vendors and employees resulting in substantial financial and other injuries to our client.

Further based upon public filings, it appears that you, your insurance carriers, your agents, servants, vendors and employees must have known all or enough of the true facts to know that our client was not receiving the guidance, protection, due diligence or information to which our client was entitled and had our client been apprised of the true facts, our client would not have executed the papers that were presented as ordinary mortgage loan documents but which in fact were part of an elaborate scheme for the execution of documents purporting to be loan documents but which resulted in the issuance of a negotiable instrument with the intent on your part, and undisclosed and unknown to our client, to change the terms and conditions of payment of the mortgage note from its stated terms, pay fees and profits to a variety of undisclosed third parties who were participating in the fraudulent sale of unregulated securities which purported to be backed by the mortgage note of our client and that appear to have misled investors into believing that the certificates they purchased were also backed by the property of our client.

Further, based upon conversation with our client, we have determined that the appraised value used in the loan closing was not computed in accordance with industry guidelines for using comparable time frames and geography and other indicia of probable value, as opposed to price.

The value reported to our client by the Lender and the Lender's appraiser was intentionally or negligently tied to the contract price and was significantly higher than the real fair market value at that time. This disparity since has been easily corroborated by current values in the area, to wit: concurrent with the collapse of your scheme, the values of the real property of our client declined to the levels that existed before this scheme was initiated.

This indicates a probability that the appraisal review required of the nominal lender was omitted. In fact, based upon preliminary investigation, the appraisal review process was both omitted and intentionally terminated, along with the re-assigned or terminated personnel that would have performed such functions. It also indicates that the cost of the loan was significantly higher than what was reported on the GFE and other disclosure documents at the time of closing.

Further it is apparent that you were aware and participated in the deception by which our client was led to believe that the nominal lender was the actual lender and that the nominal lender was “renting” its registration and charter to third parties who were neither chartered financial institutions nor registered business entities in the state in which the property was located.

The transaction was known by you and the others at the alleged “loan” closing to be a sham through which unregulated, unregistered and unchartered people and businesses engaged in banking and lending contrary to federal and state law.

Taken together with the expert’s finding of deceptive lending practices concerning affordability and tangible benefits, the true term of the loan was significantly overstated, in that the future reset of payments made it highly likely that the loan would go into default at a time much earlier than the expressed term of the mortgage note.

This was a fact known by every participant at the loan closing except our client. Reducing the term of the loan to the time of expected default and adding the inflated appraisal resulted in an APR significantly exceeding the legal interest limit under state law and violate applicable laws on usury entitling our client to nullification of the note, extinguishment of the mortgage, treble damages and attorney fees, in addition to the refunds, rebates and damages stated in the expert’s report.

Based upon reports received from Foreclosure Defense Group legal compliance division, it is apparent from filings with the Securities and Exchange Commission that the “loan” was table funded and that the nominal lender was in fact a stand-in for a series of parties who were not disclosed as the source of the funds, not disclosed as the recipient of fees (including the nominal lender who may have received a fee of 2.5% of the par value of the mortgage note), and not disclosed as the actual lender in the subject loan transaction. Again while all of the participants at the “loan” closing were aware of these facts, our client was kept in the dark. Hence, our client was never notified regarding the identity, authority and regulation, charter, or registration of the actual lender.

Further, it cannot be determined from the filings of the referenced parties, nor the notices to the borrower, who is the current actual holder in due course, who is entitled to payment under the mortgage note, whether additional third party payments were made from insurance products that are reported to have guaranteed either the payments or the principal of the mortgage note, or whether in fact the mortgage note has been prepaid, overpaid, or any balance is owed and if so, to whom. This prevents the

borrower from notifying the true source of funds (the actual lender) of borrower's intent to rescind. It is our determination, based upon these facts, that the loan closing was never completed and that therefore the 3 day right of rescission was neither waived nor did it expire. **Under the Federal Truth in Lending Act the appropriate party must either comply with the rescission or file a declaratory action seeking to avoid the rescission.**

PLEASE GOVERN YOURSELVES ACCORDINGLY.

Very truly yours,

Lawyer's Signature

Lawyer's Name

HOW THEY DID IT AND WHERE THE MONEY WENT

One new answer we are getting when we ask for the identity of the real holder in due course of the note is "that information is confidential. You are not entitled to that." Of course this is ridiculous --- if you signed a note and it has been "assigned" to some third party, you have a right to know where to send your payments and to whom. There is no confidential status under any law or theory, legally, morally or ethically. And you have the right to know if the holder in due course is getting paid if there is a mortgage servicer involved. And if there is a mortgage servicer, you have a right to know whether they are indeed authorized to make collections --- authorized by the real holder of the note, whoever that might be.

Lawsuits in Texas and other states indicate that the distribution reports to investors are vague at best and outright fabrications in other cases.

All of this brings us back to how they did it. How did they sell a \$300,000 mortgage for \$1 million and get away with it? And what happened to all that money? ANSWER: They sold the same mortgage over and over again. That is called fraud. They put the loan documents in pools that were described in tables that were impossible to decipher. See dsvrn.6m.d.htm. They used the excess funds to bribe, kickback and otherwise overwhelm the marketplace with trillions of dollars in fees. And then the investment bankers kept the rest. And now we are stuck in a position where the basic tenet of banking, trust, has been breached in the worst way from the borrower through the investors to the people relying on pensions and retirement from the financial managers that were the investors.

They were able to do this and make it "work" because they wanted and pressured the lenders to give them the worst loans possible carrying the highest interest rates possible with the most onerous terms for prepayment etc. that were possible to insert. That is because these loans were made with a note bearing an interest rate of 16% or more but they were put into pools of assets that contained a few real loans, thus bringing the average STATED return on investment to perhaps 6-8%. This was a fictitious return because none of the 16% loans were paying anything other than zero or teaser rates.

Even though the pool contained numerous loans on homes that were appraised at 50% over market, and terms wherein the "borrower" was paying nothing to nearly nothing on the loan for the first few months or years, the loan went into the pool as a "performing loan" (because nothing was expected from the borrower) and sold as though the 16% income (\$48,000 on a \$300,000 note) was being paid. An unsuspecting investor would put up perhaps \$750,000 to buy certificates for the \$48,000 in income, especially if it was insured and carried a AAA rating. There is a \$450,000 profit on a \$300,000 loan --- available to the investment banker only if the the loan was toxic waste (Z tranche) classified as such because there was no chance whatsoever that it could ever be repaid.

But wait there is more. If you assign the \$48,000 fictitious income into multiple parts (say \$8 parts of \$6,000), you could assign the same note to eight different pools. In other words they were selling the same note multiple times. If you and I did that we have free room and

board courtesy of the state or federal government in a prison of their choosing. But on this scale, despite the clear presence of two sets of victims that were coerced, deceived, cheated and misled (borrowers and investors) the bailout went to the thieves instead of the victims.

*********What this means to foreclosure defense is that your defense goes far beyond the "where's the note" strategy. It goes to whether the note has been paid in full and whether there are multiple parties (investors) who are equity holders in the note and perhaps even the mortgage, all of whom have at least an arguable right to collection --- totaling perhaps 300%-500% of your loan amount. It means that your payments probably went into the wrong pockets. It means that even if you made no payments, they probably paid the investor anyway out of reserves, overcollateralization, cross collateralization or one of several insurance products.

********* The reason the note is gone in most cases (destroyed in 40% of all cases) and lost in most other cases is that the terms of the note do not match up with the description that went up line in the securitization process. That leads to only two possible conclusions:

*********Either the note was separated from the mortgage making the secured obligation into an unsecured obligation thus voiding the power to foreclose OR the "assignments" were invalid because they were undated or otherwise defective leaving the mortgage and note intact --- but PAID in full. Either there are assignees out there who have rights to the note obligation or there are not assignees with any rights.

*********If there are assignees with rights, you need to know who they are, how they got the loan, and whether they are proper holders and if they are still holders in due course and if the seller of your mortgage sold the same deal to other assignees. And if so whether your payments or someone else's payments were properly or improperly allocated to your account --- not at the mortgage servicer level but much higher up at the level of the Trustee for asset backed securities series AAAA2007. You find that in the distribution reports. And if it isn't there you find it through discovery asking for explanations of exactly where the payments went, who got them and why, along with proof of deposits and how they were entered on the books of the receiving party.

*********If there are not assignees with rights, then the case is simple it is defended by one word:*********PAYMENT. The "lender" on the mortgage and note was already paid in full by a third party, plus an undisclosed fee (TILA violation) for "borrowing" the lender's license in a "table funded loan" where the agent (mortgage aggregator) of the investment banker, directed by the CDO Manager (Collateralized debt obligation manager) reached around the apparent lender and placed the money on the table to fund your loan. The apparent lender's name was put on the note and mortgage. Why? Because they wanted to qualify for all the exemptions that apply to banks and lending institutions even though those institutions were not making the loans.

The apparent lender was paid a fee for 2.5% for pretending to underwrite the loan, perform due diligence, confirm the appraisal, confirm the viability of the transaction, confirm the affordability and benefits etc. The lender did no such thing. Brown's lawsuit brought by the Attorney general of California, shows that the people doing the underwriting were under quotas that amounted to approving 70-80 loans PER DAY. 10,000 convicted felons were recruited in Florida to become LICENSED mortgage brokers. A virtual army of people were given scripts and marching orders to get those loans signed no matter what they had to offer or what lie they had to tell.

THIS MEANS THAT EVEN YOUR PRIME MORTGAGE FIXED RATE 30 YEAR AMORTIZATION WITH ESCROW FOR TAXES AND INSURANCE WAS SOLD IN THE SAME WAY BECAUSE IT WAS SOLD AS PART OF A POOL WITH THESE FRAUDULENT ASSETS. ALL THE REMEDIES AND STRATEGIES PROPOSED HERE IN THIS BLOG APPLY TO YOU WHETHER YOU ARE IN TROUBLE ON YOUR MORTGAGE OR NOT.

Bottom Line: Go Get Them. They don't have the goods and can't produce them because if they do produce them it may be an admission of criminal fraud.

COMMENT FROM CAROL ASBURY:
INTENT TO TO SEVER NOTE FROM MORTGAGE
--- EXCELLENT REASONING

I would like you to consider my argument that the Banks' INTENT to sever the Note from the Mortgage is evidenced by the fact that the Banks were only interested in the "revenue stream" of the Note derived from a person's payment NOT in the Land, which is traditionally why Notes are issued (i.e. for the Land). This revenue stream was pooled and then sold off by issuing Certificates to various financial institutions or investors but the revenue stream was protected -- NOT by the value of the Land or the Land itself -- but by insurance policies (AIG, AMBAC, or other third parties) or by derivative swap agreements or other complicated financial tools. It was these third party financial tools that was used by the Banks to ensure the Certificate buyers that the revenue stream would continue despite the fact that there would be some mortgagors not paying on their Notes. Thus, the Banks used the third party instruments to collateralize the NOTES in the securitized pools, which were sold through certificates, and not the Land.

Thus, it is not the fact that they lost the Note that shows the Intent of the Banks to separate the Note from the mortgage but the Banks' ACTIONS that show an INTENT to separate the NOTE from the mortgage. In this securitization scheme cooked up by the Banks the mortgages become irrelevant. What becomes relevant is the revenue stream as collateralized by the insurance policies or other derivative swap agreements, etc. used to guarantee the revenue stream. Thus, the collapse of AIG and, my guess, is AMBAC is not is such a good shape either.

AUDITING AND REVIEW GUIDELINES
AFFIDAVIT AND CERTIFICATION LETTER

SCOPE OF ENGAGEMENT
STANDARD TILA AUDIT

- ☐ GFE -GOOD FAITH ESTIMATE
- ☐ Settlement Statement
- ☐ Tax Returns
- ☐ AFFORDABILITY
- ☐ BENEFITS
- ☐ BEST LOAN

STANDARD SAMPLING REVIEW
TABLE FUNDING

- ☐ TRANSFEREE
- ☐ HOLDER
- ☐ HOLDER IN DUE COURSE
- ☐ PERFECTING TITLE
- ☐ PERFECTING SECURITY
- ☐ SEC
- ☐ SPV
- ☐ POOLING
- ☐ CERTIFICATES OF ASSET BACKED SECURITIES
- ☐ QUALIFIED WRITTEN REQUEST
 - ☐ 20 DAY FOLLOW UP
 - ☐ 60 DAY FOLLOW-UP
 - ▼ ☐ NEGOTIATION
 - ☐ MODIFICATION
 - ☐ NULLIFICATION
 - ☐ DAMAGES
 - ☐ ATTORNEY FEES

DEMAND LETTERS

CHALLENGE LETTERS

SETTLEMENT GUIDELINES

STANDARD EVALUATION REVIEW

- ☐ CAUSES OF ACTION
- ☐ MOTIONS
- ☐ GRIEVANCES TO LICENSING AGENCIES
- ☐ QWR WITH NOTICE, CONTRACT, TACIT PROCURATION AND RECONVEYANCE
- ☐ TRUSTEE(S) AUTHORITY

NON-STANDARD FORENSIC REVIEWS

AUDITS OF LEDGERS

DIAGRAMS

- ☐ CASH FLOW CHARTS
- ☐ FUNDING FLOW CHARTS
- ☐ DOCUMENT FLOW CHARTS

JUDICIAL NOTICE

- ☐ COPIES OF PERTINENT SEC FILINGS
- ☐ STATUTORY LAW

PATTERN OF CONDUCT OF "COLLECTOR/FORECLOSER"

- ☐ SAME STATE: Judgments and Orders
- ☐ DIFFERENT STATES: Judgments and Orders
- ☐ FEDERAL COURT: Judgments and Orders
- ▼ ☐ OTHER LAWSUITS
 - ☐ CLASS ACTION
 - ☐ INDIVIDUAL
- ☐ PRESS ARTICLES
- ☐ COURT READY DEMONSTRATIVE EVIDENCE, GRAPHS AND DIAGRAMS

EXPERT WITNESS TESTIMONY

- ☐ REMOTE DEPOSITION
- ☐ TRAVEL DEPOSITION
- ☐ APPEARANCE AT EVIDENTIARY HEARING(S)

Waiver and Release from other Cases on File

- ☐ Public Domain Anyway
- ☐ No waiver of Attorney Client Privilege
- ☐ NO WAIVER OF ATTORNEY WORK PRODUCT
- ☐ NO WAIVER OF PRIVACY

DESCRIPTION OF TRANSACTION

INVESTOR'S PURCHASE OF MORTGAGE BACKED SECURITY

BORROWER'S ISSUANCE OF NEGOTIABLE INSTRUMENT

GENERAL (GENERIC) DESCRIPTION OF ISSUES AFFECTING

EXISTENCE AND ENFORCEABILITY OF NOTE AND MORTGAGE

- ☐ USE OF NEGOTIABLE INSTRUMENT AS SECURITY OF ISSUANCE OF UNREGULATED SECURITIES
- ☐ DISCLOSURE OF ALLEGED "LENDER" AFTER SECURITIZATION
- ☐ INSURANCE
- ▼ ☐ PAYMENT ISSUES
 - ▼ ☐ LIFE OF LOAN
 - ☐ Stated

- ☐ Actual
- ☐ Affordability
- ☐ Legal Limit
- ☐ Usury
- ☐ BAILOUTS
- ☐ RESERVES
- ☐ COLLATERALIZATION
- ☐ FORGERY
- ☐ LOST NOTE
- ☐ DESTROYED NOTE
- ☐ ALLONGE
- ☐ ASSIGNMENT

▼ **TERMS/EVENTS ADDED AFTER CLOSING**

- ☐ INSURANCE
- ☐ CREDIT SWAP DEFAULTS
- ☐ POOLING
- ☐ COLLATERALIZATION
- ☐ PAYMENT
- ☐ DISTRIBUTION REPORTS
- ☐ WRITEDOWN NOTICES
- ☐ BAILOUTS
- ☐ **COOPERATION OF "LENDER", TRUSTEE AND OTHER PARTIES**

REVIEW **INVESTIGATION**

- ☐ BORROWER
- ☐ PARTIES AT CLOSING

RESCISSION

- ☐ 3 DAY
- ☐ 3 YEAR

▼ ☐ **STATUTORY**

- ☐ TILA
- ☐ PREDATORY LENDING
- ☐ DUTY TO MITIGATE
- ☐ DUTY TO MEDIATE
- ☐ DECEPTIVE PRACTICES
- ☐ DECEPTIVE LENDING
- ☐ FRAUD
- ☐ USURY

TITLE REPORT

- ☐ DEED
- ☐ MORTGAGE
- ☐ NOTE
- ☐ ASSIGNMENT
- ☐ TRANSMITTAL
- ☐ CO-OBLIGORS

SECURITIZATION

▼ ☐ PARTIES

- ☐ BUYER
- ☐ SELLER

▼ ☐ TRUSTEES

- ☐ DEED
- ☐ SIV
- ☐ POOL
- ☐ SPV
- ☐ SUBSTITUTIONS

- ☐ BENEFICIARIES
- ☐ CO-OBLIGORS
- ☐ LENDERS

▼ ☐ MORTGAGE WHOLESALER

- ☐ MORTGAGE AGGREGATOR
- ☐ STRUCTURED INVESTMENT VEHICLE
- ☐ HOMEOWNER REFI
- ☐ HOMEOWNER HELOC

▼ ☐ TABLE FUNDED LOAN

- ☐ DISCLOSED
- ☐ UNDISCLOSED
- ☐ UNDISCLOSED PARTIES

▼ ☐ ECONOMICS

- ☐ FEES AND PROFITS
- ☐ ALLOCATION OF PAYMENTS
- ☐ ALLOCATION OF PROCEEDS FROM INSURANCE RESERVE, COLLATERALIZATION OR BAILOUT
- ☐ INSURANCE
- ☐ COLLATERALIZATION
- ☐ RESERVES
- ☐ BAILOUTS
- ☐ KNOWN DOCUMENTS
- ☐ UNDISCLOSED DOCUMENTS

▼ ☐ INDUSTRY KNOWLEDGE

- ☐ NFG
- ☐ BK
- ☐ INTERVIEWS
- ☐ TREATISES AND BOOKS
- ☐ PRESS

SUMMARY OF FINDINGS

OWNERSHIP

- ☐ PROPERTY
- ☐ OBLIGATION
- ☐ NOTE
- ☐ MORTGAGE
- ☐ HOLDER
- ☐ HOLDER IN DUE COURSE
- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION
- ☐ FORMS

RESCISSION STATUS

- ☐ 3 DAY
- ☐ 3 YEAR

▼ ☐ COMMON LAW

- ☐ FRAUD
- ☐ MUTUAL MISTAKE
- ☐

▼ ☐ STATUTORY

- ☐ DECEPTIVE LENDING
- ☐ DECEPTIVE BUSINESS
- ☐ USURY
- ☐ FAILURE OF CONSIDERATION
- ☐ STATUTE OF LIMITATIONS
- ☐ STATUTE OF FRAUDS
- ☐ RECOMMENDATIONS
- ☐ FORMS

EXECUTION OF DOCUMENTS

Bait and Switch at Closing: GFE and Settlement Statement

- ▼ ☐ Opportunity to Identify real lender
 - ☐ When was "lender" picked
 - ☐ Who identified "lender"
- ▼ ☐ How was that communicated?
 - ☐ To Whom?

AUTHORITY

- ☐ VP Servicer signing as VP MERS

Chain of Title

- ☐ Allonge must be attached to note
- ☐ Assignments
- ☐ Obligation
- ☐ Note
- ☐ Mortgage

Trust Agreements

- ☐ Deed of Trust
- ☐ Pooling and Service Agreement
- ☐ Assignment and Assumption Agreement -SIV
- ☐ Certificate of Asset Backed Security - SPV

FORGERY

- ☐ Handwriting
- ☐ Date
- ☐ Squiggle
- ☐ Executed in Blank --- filled in later
- ☐ Anything Supporting Plausible Deniability
- ☐ Copies Rather than Originals

POSSESSION

- ☐ LOST NOTE
- ☐ DESTROYED NOTE
- ▼ ☐ EXISTING NOTE
 - ☐ ALLONGE
 - ☐ CHAIN OF ASSIGNMENTS
 - ☐ POOLING
 - ☐ TRANCHING
 - ☐ HOLDER
 - ☐ HOLDER IN DUE COURSE
 - ☐ PAYMENT

PREDATORY LENDING

AFFORDABILITY

- ☐ RESETS

- ☐ OPTION ARM
- ☐ TEASER QUALIFICATION

BENEFITS

LIFE OF LOAN

▼☐ RESETS

- ☐ INTEREST
- ☐ AMORTIZATION
- ☐ INSURANCE ESCROW
- ☐ TAX ESCROW
- ☐

APR

- ☐ APPRAISAL ISSUES
- ☐ LIFE OF LOAN
- ☐ RESETS/TERMS
- ☐ LEGAL LIMIT
- ☐ USURY
- ☐ UNDISCLOSED FEES
- ☐ BETTER LOAN AVAILABLE
- ☐ APPRAISAL
 - ☐ PRIOR FAIR MARKET VALUE
 - ☐ CURRENT FAIR MARKET VALUE
- ☐ EXTRA FEES
 - ☐ FORCED PLACED INSURANCE
 - ☐ LATE PAYMENTS
 - ☐ POINTS ADDED TO PRINCIPAL

THIRD PARTY UNDISCLOSED FEES

- ☐ LOAN ORIGATION SHAM CORPORATION
- ☐ COURIERS
- ☐ OTHER NON-PERFORMING SERVICERS

FIDUCIARY DUTIES

- ☐ TRUSTEES AND SUCCESSORS AND SUBSTITUTES AND COMPANIES
- ☐ MORTGAGE BROKER AND COMPANY
- ☐ MORTGAGE BANKER AND COMPANY
- ☐ ORIGINATING "LENDER"
- ☐ TITLE AGENT AND COMPANY
- ☐ ESCROW AGENT AND COMPANY
- ☐ CLOSING AGENT AND COMPANY
- ☐ APPRAISER AND COMPANY
- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

QUALIFIED WRITTEN REQUEST

- ☐ RECOMMENDED SETTLEMENT IN DOLLARS
- ☐ RECOMMENDED MODIFICATION OF LOAN
- ☐ RECOMMENDED NULLIFICATION OF LOAN
- ☐ RECOMMENDED ENFORCEMENT OF LOAN DOCUMENTS
- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

FALSE ADVERTISING

- ☐ Lenders
- ☐ Investment Bankers
- ☐ Appraiser's
- ☐ Mortgage Brokers
- ☐ Title Insurance Company
- ☐ Title Agent
- ☐ Escrow Agent
- ☐ Trustee
- ☐ Web Sites --- Old and New
- ☐ Brochures
- ☐ Newspapers and magazines
- ☐ Professional Publications --- Bar Journals

TILA

- ☐ PATTERN OF CONDUCT
- ☐ DISCLOSED
- ☐ UNDISCLOSED
- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

RESPA

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION
- ☐ Qualified Written Request

HOEPA

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

Federal Fair Debt Collection Procedures Act, 15 U.S.C. Sec. 1692e.

- ☐ Delinquency without knowledge
- ☐ Default without knowledge or Authority
- ▼ ☐ FORECLOSURE
 - ☐ Sale without Authority
 - ☐ Sale under False Pretenses
 - ☐ DEFICIENCY LIABILITY

APPRAISAL

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

Cram Down

- ☐ Bankruptcy
- ☐ Negotiation
- ☐ Short Sales
- ☐ Modification
- ☐ Litigation

AFFORDABILITY

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

LIFE OF LOAN

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

USURY

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

LEGAL LENDING LIMIT

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

APPLICATION OF EXEMPTIONS

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

RECORDATIONS

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

NEGLIGENCE

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

FRAUD

- ☐ FRAUD IN THE INDUCEMENT
- ▼ ☐ FRAUD IN THE EXECUTION
 - ☐ SECURITIES FRAUD
- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION
- ☐ deceptive and misleading representations concerning foreclosing/collecting party's standing to sue the plaintiffs and its interest in the debt
- ☐ falsely represented the status of the debt, in particular, that it was due and owing to defendant foreclosing/collecting party at the time the suit was filed

- ☐ falsely represented or implied that the debt was owing to foreclosing/collecting party as an innocent purchaser for value, when in fact, such an assignment had not been accomplished
- ☐ threatened to take action namely engaging in collection activities and collection and foreclosure suits as trustee that cannot legally be taken by them
- ☐ obtained access to state and federal courts to collect on notes and foreclose on mortgages under false pretenses, namely, that foreclosing/collecting party was duly authorized to engage in such activities as trustee

THEFT

PROPERTY: Personal and Real

- ☐ Improper procedure: Non Judicial
- ☐ False Information
- ☐ False Allegations
- ▼ ☐ Pattern of Conduct after "sale"
 - ☐ Title
 - ☐ Certificate of Title
 - ☐ Sale Proceeds

PAYMENTS MADE

- ☐ By Borrower
- ☐ By Insurer
- ☐ CDS
- ▼ ☐ Collateralization
 - ☐ Cross
 - ☐ Over
 - ☐ Reserve
- ☐ Guarantee and E&O
- ▼ ☐ Government
 - ☐ Federal Reserve
 - ☐ United States Department of the Treasury
 - ☐ FDIC Buyout/Shared Losses
 - ▼ ☐ GSE - Government Sponsored Entity
 - ☐ Fannie Mae
 - ☐ Freddie Mac
 - ☐ HUD
 - ☐ FDIC

SLANDER OF TITLE

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

UNJUST ENRICHMENT

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

THEFT OF IDENTITY

- OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

RICO

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

CONSTRUCTIVE TRUST ON PROFITS

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

PRIVACY

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

INDUSTRY STANDARDS FOR LOAN ORIGINATIONS

**TAKEN FROM 2003 WHITE PAPER BY THIRD PARTIES ON
LIVINGLIES.WORDPRESS.COM**

Red Flags

- Critical loan processing activities, such as verification of income, employment, or deposit, is delegated to brokers.
- Delegated underwriting allowed for correspondents that are new or lack an established track record with the FI.
- A growing number of loans is being repurchased due to misrepresentations by the FI under purchase and sale agreements with secondary market investors. The originating FI may suffer significant financial losses in the event of a large and unforeseen fraud.
- Third party mortgage loan fraud is not covered in standard fidelity bond insurance.
- Tax returns show RE taxes paid but no property is identified as owned.
- Alimony is paid but not disclosed.
- Evidence of white out or other document alterations is observed.
- Type or handwriting varies from other loan file documents or handwriting is the same on documents that should have been prepared by different people or entities.

Internal Controls/Best Practices

- ✓ Review purchase and sales agreements with brokers, correspondents, and secondary market investors to determine if general representations and warranties contain appropriate fraud and misrepresentation provisions.
- ✓ Determine the FI's responsibility for repurchasing and putting back loans that were funded based on misrepresentations.
- ✓ Check whether an endorsement or rider exists to the fidelity bond that provides coverage of third party mortgage fraud.
- ✓ Regularly document the FI's review of insurance coverage.
- ✓ Establish procedures to ensure the bonding company is notified of a possible claim within the policy's specified period.
- ✓

Adopt detailed policies and procedures to ensure effective controls are in place to set, validate, and clear conditions prior to final approval processes.

✓

Base underwriter compensation on loans reviewed and not loans approved.

✓

Establish effective pre-funding and post QC programs that include sampling, portfolio analysis, appraisal, and income/down payment verification practices.

✓

As a part of the pre-funding QC process, use AVMs to corroborate appraised values.

✓

Employ internally developed or vendor-provided fraud detection software.

✓

Institute corporate wide fraud awareness training.

✓

Perform due diligence of brokers and correspondents. Understand the risks in their policies, procedures, and practices before transacting business.

✓

Determine how and when the FI reserves for fraud and ensure compliance with FAS 5.

✓

Review the FI's litigation roster for existing and potential class actions, and threatened litigation that may highlight a problem with a particular broker, correspondent, or internal practices.

✓

Review whistleblower and hot line reports, which may indicate fraudulent activities.

Mortgage Brokers

A mortgage broker is an individual who, for a fee, originates and places loans with an FI or an investor but does not service the loan.

- o Review the broker's financial information as stringently as for other RE borrowers.

- o Ensure the FI's broker agreements require brokers to act as the FI's representative/agent.

- o Independently verify the broker's background information by checking business history outside of given references.

- o Obtain a new credit report for the broker and check for recent debt at other FIs.

- o Obtain resumes of principal officers, primary loan processors, and key employees.

- o Conduct state license verification.

- o Conduct criminal background checks and adverse data base searches, i.e., MARI (fraud repository).

✓

Conduct an annual re-certification of brokers.

✓

Conduct pre-funding reviews on all new production utilizing a pre-funding checklist.

✓

Conduct QC underwriting reviews.

✓

Base broker compensation incentives on something other than loan volume, i.e., credit quality, documentation completeness, prepayments, fraud, and compliance.

✓

Establish measurable criteria that trigger recourse to the broker, such as misrepresentation, fraud, early payment defaults, failure to promptly deliver documents, and prepayments (loan churning).

✓

Hold brokers and third party contract underwriters responsible for gross negligence, willful misconduct, and errors/omissions that materially restrict salability or reduce loan value.

✓

Establish a broker scorecard to monitor volume, prepayments, credit quality, fallout, FICO scores, LTVs, DTIs, delinquencies, early payment defaults, foreclosures, fraud, documentation deficiencies, repurchases, uninsured government loans, timely loan package delivery, concentrations, and QC findings.

✓

Perform detailed vintage analysis, and track delinquencies and prepayments by number and dollar volume.

✓

Closely monitor the total number of loans and products from a single broker.

✓

Establish an employee training program that provides instruction on understanding common mortgage fraud schemes and the roles of a mortgage broker, as well as recognizing red flags.

✓

Establish a periodic audit of the brokered mortgage loan operations with specific focus on the approval process.

✓

Perform social security number validation procedures to validate borrower identity.

Red Flags

•

No attempt is made to determine the financial condition of the broker or obtain references and background information.

•

A close relationship exists between the broker, appraiser, and lender, raising independence questions.

•

The broker acts as an advocate for the borrower instead of serving as the FI's representative/agent.

•

High "yield spread premiums" are paid by the FI.

•

Original documents are not provided to the funding FI within a reasonable time.

•

An unusually high volume of loans with maximum loan to value limits have been originated by one broker.

-

An uncommonly large number of foreclosures, delinquencies, early payment defaults, prepayments, missing documents, fraud, high-risk characteristics, QC findings, or compliance problems exist on loans purchased from any broker.

-

A large volume of loans from one broker arrives using the same appraiser.

-

High repurchase volume exists for a specific broker.

-

Numerous applications from a particular broker are provided possessing unique similarities.

-

A high volume of loans exist in the name of trustees, holding companies, or offshore companies.

-

An unusually large increase is noted in overall volume of loans during a short time period.

Internal Controls/Best Practices

√

Conduct an initial acceptance review and obtain documentation to support broker approval. Examples of actions to be taken include:

Application

The mortgage application is the initial document completed by the borrower that provides the FI with comprehensive information concerning the borrower's identity, financial position and employment history.

Red Flags

-

The application is unsigned or undated.

-

Power of attorney is used. Investigate why the borrower cannot execute documents and if formal supporting documentation exists.

-

Signatures on credit documents are illegible and no supporting identification exists.

-

Price and date of purchase is not indicated.

-

Borrower is selling his current residence, but does not provide documents to support a sale.

-

Down payment is not in cash, i.e., source of deposit is a promissory note or repayment of a personal loan.

-

Borrower has high income with little or no personal property.

-

Borrower's age is not consistent with the number of years of employment.

-

Borrower has an unreasonable accumulation of assets compared to income or has a large amount of unsubstantiated assets.

-

Borrower claims to have no debt.

-

Borrower owns an excessive amount of RE.

-

New housing expense exceeds 150% of current housing expense.

-

A post office box is the only indicated address for the borrower's employer.

-

The same telephone number is used for the borrower's home and business.

-

Application date and verification form dates are not consistent.

-

Patterns or similarities are apparent from applications received from a specific seller or broker.

-

Certain brokers are unusually active in a soft RE market.

-

Concentration of loans to individuals related to a specific project is noted.

-

Borrower does not guarantee the loan or will not sign in an individual capacity.

-

Borrower's income is not consistent with job type.

-

Employer is an unrealistic commuting distance from property.

-

Years of education is not consistent with borrower's profession.

-

Borrower is buying investment properties with no primary residence.

-

Transaction resulted in a large cash-out refi as a percent of the loan amount.

Internal Controls/Best Practices

✓

Establish an employee training program that provides instruction on understanding common mortgage fraud schemes and recognizing red flags.

- ✓
Conduct pre-funding reviews on new production.
- ✓
Closely monitor new brokers, correspondents, and products. Scorecard criteria can be used to track performance. Typical tracking data includes: default rates, pre-purchase cycle times, loan quality indicators such as underwriting exceptions, and key data changes prior to approval.
- ✓
Verify the source of down payment funds by directly contacting the FI where funds are shown deposited.
- ✓
Closely analyze the borrower's financial information for unusual items or trends.
- ✓
Independently verify employment by researching the location and phone number of the business.
- ✓
Employ pre-funding and post-closing reviews to detect any inconsistencies within the transaction.
- ✓
Conduct risk based QC audits prior to funding.
- ✓
Ensure that prior liens are immediately paid from new loan proceeds.
- ✓
Assess the volume of critical post-closing missing documents, determine the potential for repurchase recourse, and evaluate reserve adequacy.
- ✓
Monitor RE markets from the locale in which the FI's mortgage loans originated.
- ✓
Establish a periodic independent audit of mortgage loan operations.
- ✓
Provide fraud updates/alerts to employees.
- ✓
Review patterns on declined loans, i.e., individual social security number, appraiser, RE agent, loan officer, broker, etc.
- ✓
Establish a fraud hotline for anonymous fraud tips.
- ✓
Increase the use of original supporting documentation on third party transactions, i.e., wholesale and correspondent originations.

Appraisals

An appraisal is a written report, independently and impartially prepared by a qualified individual, stating an opinion of market value of a property as of a specific date.

Red Flags

- The appraiser is a frequent or large volume borrower at the FI.
- The appraiser owns property in the project being appraised. This is a violation of the appraisal regulation and raises concerns about appraiser independence and bias.
- The most recent assessed tax value does not correlate with the appraisal's market value.
- An appraiser is used who is not on the institution's designated list of approved appraisers.
- The appraiser is from outside the area and may not be familiar with local property values. Understanding of local market nuances is critical to an accurate property valuation.
- An appraisal is ordered by a party to the transaction other than the FI, such as the buyer, seller, or broker.
- An appraisal is ordered before the sales contract is written.
- Certain information is left blank such as the borrower, client, or occupant.
- The appraised value is contingent upon curing some property defects, i.e., drainage problems or a zoning change.
- Comparables are not verified as recorded or are submitted by a potentially biased party, such as the seller or broker.
- Old comparables (9-12 months old) are used in a “hot” market.
- Comparables are an excessive distance from the subject property or are not in the subject property’s general area.
- Comparables all contain similar value adjustments or are all adjusted in the same direction.
- All comparables are on properties appraised by the same appraiser.
- Unusual or too few comparables are used.
- Similar comparables are used across multiple transactions.
- Comparables and valuations are stretched to attain desired loan-to-value parameters.

- Excessive adjustments are made in an urban or suburban area when the marketing time is less than six months.
- Appreciation is noted in a stable or declining areas.
- Large unjustified valuation adjustments are shown.
- The land constitutes a large percentage of the value.
- The market approach greatly exceeds the replacement cost approach.
- Overall adjustments are in excess of 25%.
- Photos do not match the description of the property.
- Photos of comparables look familiar.
- Photos reveal items not disclosed in the appraisal, such as a commercial property next door, railroad tracks, etc.
- Items with the potential for negative valuation adjustments, i.e., power lines, railroad tracks, landfill, etc., are avoided in appraisal photos.
- Loan amounts are disclosed to the appraiser.
- File documentation is inadequate to determine whether appraisals were properly scrutinized or supported by additional appraisal reviews.
- The appraisal fee is based on a percentage of the appraised value.
- Independent reviews of external fee appraisals are never conducted.
- One or more sales of the same property has occurred within a specified period (6-12 months) and exceeds certain value increases (10% or more value increase).
- A fax of the appraisal is used in lieu of the original containing signature and certification of appraiser.

Internal Controls/Best Practices

✓

Establish an employee training program that provides a good overview of common mortgage fraud schemes, the appraisal regulation, the RE lending standards regulation, appraisal techniques, and red flag recognition.

✓

Implement a strong appraisal and evaluation compliance review process that is incorporated into the pre-funding quality assurance program.

✓

Ensure reviewers identify violations of regulations and noncompliance with RE lending standards and other interagency guidance.

✓

Establish an approved appraiser list for use by retail, broker, and correspondent origination channels. This list should be generated and controlled by a unit independent of production.

✓

Obtain a current copy of each appraiser's license or certificate.

✓

Implement "watch" list and monitoring systems for appraisers who exhibit suspect practices, issues, and values. Include a post-closing review to detect any transaction inconsistencies.

✓

Establish a "suspended" or "terminated" list of appraisers who have provided unreliable valuations or improper practices.

✓

Implement controls to ensure that "terminated" appraisers are prohibited from engaging in future transactions with the FI, and its brokers and correspondents.

✓

Implement third party appraisal controls to ensure compliance with regulatory guidance, specifically as it applies to appraisals and evaluations ordered by loan brokers, correspondents, or other FIs.

✓

Develop appraisal requirements based on transaction risks.

✓

Statistically test the appropriateness of appraisals obtained by brokers and correspondents by obtaining independent AVMs and appraisals.

✓

Establish an independent appraisal review/collateral valuation unit to research valuation discrepancies and provide technical oversight.

✓

Review the appraisal's three-year sales history to determine if land flips are occurring.

✓

Perform detailed research on each appraiser's business history and financial condition.

✓

Physically verify the location and condition of selected subject properties and comparables.

✓

Monitor RE market values in areas that generate a high volume of mortgage loans and where concentrations exist.

✓

Employ pre- and post-closing QC reviews to detect inconsistencies within the transaction and hold production units financially accountable for proper documentation and quality.

✓

Conduct periodic independent audits of mortgage loan operations.

Credit Report

A credit report is an evaluation of an individual's debt repayment

Red Flags

•

The absence of a credit history can indicate the use of an alias and/or multiple social security numbers.

•

A borrower recently paying all accounts in full can indicate an undisclosed consolidation loan.

•

Indebtedness disclosed on the application differs from the credit report.

•

The length of time items are on file is inconsistent with the buyer's age.

•

The borrower claims substantial income but only has credit experience with finance companies.

•

All trade lines were opened at the same time with no explanation.

•

A pattern of delinquencies exists that is inconsistent with the letter of explanation.

•

Recent inquiries from other mortgage lenders are noted.

•

AKA (also known as) or DBA (doing business as) are indicated.

•

The borrower cannot be reached at his place of business.

•

FI cannot confirm the borrower's employment.

•

DTI ratios are right at maximum approval limits.

•

Employment information/history on the loan application is not consistent with the verification of employment form.

•

Credit Bureau alerts exist for Social Security number discrepancies, address mismatches, or fraud victim alerts.

Internal Controls/Best Practices

- ✓
Establish an employee training program that provides instruction on understanding common mortgage fraud schemes, analyzing credit reports, and recognizing red flags.
- ✓
Include an analysis of the credit report in the pre-funding quality assurance program.
- ✓
Make direct inquiries to the borrower and creditors to get an explanation of unusual or inconsistent information.
- ✓
Obtain an updated credit report if the one received is older than six months.
- ✓
Independently verify employment by researching the location and phone number of business.
- ✓
Implement a post-closing review to detect any inconsistencies within the transaction.
- ✓
Establish a periodic independent audit of mortgage loan operations.
- ✓
Define DTI calculation criteria and conduct training to ensure consistency and data integrity.
- ✓
Clarify non-borrower spouse issues, such as community property issues and the impact of bankruptcy and debts on the borrower's repayment capacity.
- ✓
Ensure lease obligations are reflected in borrower debts and repayment capacity.
- ✓
Conduct re-verification of credit to ensure accuracy of broker/correspondent provided credit reports.
- ✓
Obtain more than one report from multiple repositories available to corroborate the initial credit report if data appears questionable.

Escrow/Closing

A closing or settlement is the act of transferring ownership of a property from seller to buyer in accordance with the sales contract.

Escrow is an agreement between two or more parties that requires certain instruments or property be placed with a third party for safekeeping, pending the fulfillment or performance of a specific act or condition.

Red Flags

- Related parties are involved in the transaction.
-

The business entity acting as the seller may be controlled by or is related to the borrower.

•

Right of assignment is included which may hide the borrower's actual identity.

•

Power of attorney is used and there is no documented explanation about why the borrower cannot execute documents.

•

The buyer is required to use a specific broker or lender.

•

The sale is subject to the seller acquiring title.

•

The sales price is changed to "fit" the appraisal.

•

No amendments are made to escrow.

•

A house is purchased that is not subject to inspection.

•

Unusual amendments are made to the original transaction.

•

Cash is paid to the seller outside of an escrow arrangement.

•

Cash proceeds are paid to the borrower in a purchase transaction.

•

Zero funds are due from the buyer.

•

Funds are paid to undisclosed third parties indicating that there may be potential obligations by these parties.

•

Odd amounts are paid as escrow deposits or down payment.

•

Multiple mortgages are paid off.

•

The terms of the closed mortgage differ from terms approved by the underwriter.

•

Unusual credits or disbursements are shown on settlement statements.

•

Discrepancies exist between the HUD-1 and escrow instructions.

•

A difference exists between sales price on the HUD-1 and sales contract.

Internal Controls/Best Practices

√

Establish an employee training program that provides an understanding of common mortgage fraud schemes, proper closing procedures, and recognizing red flags.

√

Provide the closing agent with instructions specific to each mortgage transaction.

✓

Instruct the closing agent to accept certified funds only from the FI that is the verified depository.

✓

Require the closing agent to notify the FI if the agent has knowledge of a previous, concurrent, or subsequent transaction involving the borrower or the subject property.

✓

Obtain a specific transaction closing protection letter from the closing agent.

✓

Implement controls to ensure loan proceeds fully discharge all debts and prior liens as required.

✓

Employ pre- and post-closing reviews to detect any inconsistencies within the transaction.

✓

Conduct periodic independent audits of mortgage loan operations.

✓

Use IRS form 4506 on all loans to facilitate full investigation of future fraud allegations.

FRAUD

Industry studies indicate that a significant portion of the loss associated with residential RE loans can be attributed to fraud. Industry experts estimate that up to 10% of all residential loan applications, representing several hundred billion dollars of the annual U.S. residential RE market, have some form of material misrepresentation, both inadvertent and malicious. An in-depth review by The Prieston Group of Santa Rosa, California of early payment defaults, an indicator of problem loans, revealed that 45-50% of these loans have some form of misrepresentation. Additionally, this study showed that approximately 25% of all foreclosed loans have at least some element of misrepresentation, and losses on loan balance.

The second motive, fraud for profit, is a major concern for the mortgage lending industry. It often results in larger losses per transaction and usually involves multiple transactions. The schemes are frequently well planned and organized. There may also be intent to default on the loan when the profit from the scheme has been realized. Multiple loans and people may be involved and participants, who are often paid for their involvement, do not necessarily have knowledge of the whole scheme.

Fraud for profit can take many forms including, but not limited to:

•

Receipt of an undisclosed or unusually high commission or fee,

•

Representation of investment property as owner-occupied since FIs usually offer more favorable terms on owner-occupied RE, •

Sale of an otherwise unsalable piece of property by concealing undesirable traits, such as environmental contamination, easements, building restrictions, etc.,

-

Attainment of a new loan to redeem a property from foreclosure to relieve a burdensome debt,

-

Rapid buildup of a RE portfolio with an inflated value to perpetrate a land flip scheme,

-

Mortgage of rental RE with the intention of collecting rents and not making payments to the lender, retaining funds for personal use,

-

The advance of loan approvals for customers to benefit from the commission payments, and/or

-

Misrepresentation of personal identity, i.e., use of illegally acquired social security numbers, to illegally obtain a loan, or to sell/take cash out of equity on a property with no intention of repaying the debt.

The third motive, which involves additional criminal purposes beyond fraud, is becoming more of a concern for law enforcement and FIs. This involves taking the profit motive one step further by applying the illegally obtained funds or assets to other crimes, such as:

-

Money laundering through purchase of RE, most likely with cash, at inflated prices,

-

Terrorist activities such as the purchase of terrorist safe houses and,

-

Other illegal activities like prostitution, drug sales or use, counterfeiting, smuggling, false document production and resale, auto chop shops, etc.

PARTICIPANTS

It is important to be aware of the different participants and transaction flows to understand the fraud schemes described in this paper. This section provides background information on various participants and their roles in typical mortgage transactions.

Participants

Common participants in a mortgage transaction include, but are not limited to:

-

Buyer – a person acquiring the property,

-

Seller - a person desiring to convert RE to cash or another type of asset,

- Real Estate Agent – an individual or firm that receives a commission for representing the buyer or seller, •
 - Originator - a person or entity, such as a loan officer, broker, or correspondent, who assists a borrower with the loan application,
 - Processor – an individual who orders and/or prepares items which will be included in the loan package,
 - Appraiser – a person who prepares a written valuation of the property,
 - Underwriter – an individual who reviews the loan package and makes the credit decision,
 - Warehouse Lender – a short term lender for mortgage bankers that provides interim financing using the note as collateral until the mortgage is sold to a permanent investor, and
 - Closing/Settlement Agent – a person who oversees the consummation of a mortgage transaction at which the note and other legal documents are signed and the loan proceeds are disbursed.
- Refer to Appendix A - Glossary for additional and expanded definitions for participants and other terms used throughout this paper.

Mortgage Loan Purchased from a Correspondent

– In this transaction, the borrower applies for and closes his loan with a correspondent of the FI, which can be a mortgage company, small depository institution, or finance company. The correspondent closes the loan with internally generated funds in its own name or with funds borrowed from a warehouse lender. Without the capacity or desire to hold the loan in its own portfolio, the correspondent sells the loan to an FI. The purchasing FI is frequently not involved in the origination aspects of the transaction, and relies on the correspondent to perform these activities in compliance with the FI's approved underwriting, documentation, and loan delivery standards. The purchasing FI reviews the loan for quality prior to purchase. The purchasing FI must also review the appraisal or AVM report and determine that it conforms to the appraisal regulation and is otherwise acceptable. The loan can be booked in the FI's own portfolio or sold.

In “delegated underwriting” relationships, the FI grants approval to the correspondent to process, underwrite, and close loans according to the FI's processing and underwriting requirements. The FI is then committed to purchase those loans. Obviously, proper

due diligence, controls, approvals, QC audits, and ongoing monitoring are warranted for these higher risk relationships.

Financial institutions that generate mortgage loans through correspondents should have adequate policies, procedures, and controls to address: initial approval and annual re-certification, underwriting, pre-funding and QC reviews, repurchases, early prepayments, appraisals, quality and documentation monitoring, fraud, scorecards, timely delivery of loan packages, and utilization of contract underwriters. In addition, FIs should have contractual agreements to demand and enforce repurchase proceedings and other disciplinary actions with correspondents delivering loans outside of product and other contractual agreements.

THIRD PARTY MORTGAGE FRAUD MECHANISMS

There are a variety of mechanisms by which third party mortgage loan fraud can take place. Various combinations of these mechanisms may be implemented in a single fraud. Some of these mechanisms and their uses are described in this section.

Collusion

Collusion involves two or more individuals working in unison to implement a fraud. Various third parties may conspire to perpetrate a fraud against an FI with each generally contributing to the plan. Each person performs his respective role and receives a portion of the illicit proceeds. Often, but not always, third parties recruit or bribe FI employees to take part in the scheme. The scheme may also include additional parties not involved in the planning or aware of all participants, but who are still part of the plan's execution.

Documentation Misrepresentation

Mortgage fraud is generally achieved using fictitious, forged, or altered documents needed to complete a transaction. Pertinent information may also be omitted from documents. The following describes some key documents and ways they can be altered to perpetrate fraud.

Loan Application

- The application captures information needed for an FI to make a credit decision based on the borrower's qualifications such as financial capacity. It may include false information regarding the identity of the buyer or seller, income, employment history, debts, or current occupancy of the property. The information on the final application may have been altered and be materially different than that provided on the initial application.

Appraisal

- An appraisal is a written statement that should be independently and impartially prepared by a qualified practitioner setting forth an opinion of the market value of a specific property as of a certain date, supported by the presentation and analysis of relevant market information. It is an integral component of the collateral evaluation portion of the credit underwriting process.

An appraisal is fraudulent if the appraiser knowingly intends to defraud the lender and/or profits from the deception by receiving more than a normal appraisal fee. This includes accepting a fee contingent on a foregone conclusion of value, or a guarantee for future business in response to the inflated value. The appraiser may inflate comparable values or falsify the true condition of the property, which can allow the defrauder to obtain a larger loan than the property legitimately supports. An appraisal that does not include negative factors affecting the property value can influence the FI to enter into a transaction that it normally would not approve. The defrauder may use comparables that are outdated, fictitious, an unreasonable distance from the subject property, or materially different from the subject property. Photos represented to be of the subject property may be of another property. Inflated appraisal values create high loss potential and contribute to an FI's losses at the time of foreclosure or sale.

Credit Report

- This document contains an individual's credit history which is used to analyze an individual's repayment patterns and capacity. Credit histories can be forged or altered through various methods to repair bad credit or create new credit histories. Fraudsters can also use the credit report of an unknowing individual who has a good credit record.

Perpetrators have been known to scan and alter illegally obtained legitimate credit reports that are then printed and used as originals. Copiers can be similarly used to produce fictitious or altered credit reports. Fraudsters have used computers to hack into credit bureau files and have purchased credit bureau computer access codes from persons who work for legitimate businesses.

Alternate credit reference letters are often used for applicants with limited or no traditional credit history. They are usually in the form of a letter directly from a business such as a utility, small appliance store, etc., to which the applicant is making regular payments. These letters can be easily altered or completely fabricated using the business's letterhead. As lenders expand to provide loans to more diverse income levels, alternate credit references are becoming more common.

Deed – A deed identifies the owner(s) of the property. It can be altered to disguise the true property owner or the legitimate owner's signature can be forged to execute a mortgage transaction. Alteration or forgery of this document allows the fraudster to use a false identity to complete the transaction.

Financial Information - This includes financial statements, tax returns, FI statements, and income information provided during the application process. Any of this data can be falsified to enable the applicant to qualify for a mortgage loan. Inadequate income and employment verification procedures may allow mortgage loan fraudsters to deceive the FI regarding this information. Some perpetrators have been known to set up phone banks to receive verification calls from FIs.

HUD-1 Settlement Statement – The HUD-1 accompanies all residential RE transactions. This is a statement of actual charges, adjustments, and cash due to the various parties in connection with the settlement. Working alone or with accomplices this document can be altered to defraud the parties to the transaction. Information on the original HUD-1 may show entities or persons not noted as lien holders but who still receive payoffs from seller's funds. These individuals may be deleted from the final HUD-1 that is available for review prior to loan closing. This enables individuals involved in the fraudulent scheme to receive funds from the loan disbursement without the FI being aware of such payments. The document may show a down payment when none was made. The document may also include the borrower's forged signature.

Mortgage – A mortgage is a legal agreement that uses real property as collateral to secure payment of a debt. In some locales a deed of trust is used instead. A mortgage can be altered to disguise the true property owner, the legitimate lien holder, and/or the amount of the mortgage. Alteration or forgery of this document allows the fraudster to obtain loan proceeds meant for another party or in an amount that exceeds the legitimate value of the property.

Quitclaim Deed – This is a document used to transfer the named party's interest in a property. The transferring party does not guarantee that he has an ownership interest, only that he is conveying the interest to which he represents he is entitled. Fraud perpetrators may use this document to quickly transfer property to straw or nominee borrowers without a proper title search. Straw borrowers are discussed on page 17 under Third Party Mortgage Fraud Schemes. This technique can disguise the true property owner and allow the mortgage transaction to be completed quickly.

Title Insurance/Opinion – Either of these documents confirms that the stated owner of the property has title to the property and has the right to transfer ownership of that property. They identify gaps in the chain of title, liens, problems with the legal description of the property, judgments against the owner, etc. Title insurance schedules or opinions can be altered to change the insured FI or omit prior liens. This can be part of the falsification that occurs when a perpetrator attempts to obtain multiple loans from different FIs for one mortgage transaction. Alteration of title insurance or opinions occurs in other fraud scenarios, as well.

Identity Theft

Identity theft means the theft of an individual's personal identification and credit information, which is used to gain access to the victim's credit facilities and FI accounts to take over the victim's credit identity. Perpetrators may commit identity theft to execute schemes using fake documents and false information to obtain mortgage loans. These individuals obtain someone's legitimate personal information through various means, i.e., obituaries, mail theft, pretext calling, employment or credit applications, computer hacking, and trash retrieval. With this information, they are able to impersonate homebuyers and sellers using actual, verifiable identities that give the mortgage transactions the appearance of legitimacy.

Mortgage Warehousing

Mortgage warehousing lines of credit are used to temporarily "warehouse" individual mortgages until the mortgage banker, who may be acting as a broker, can sell a group of them to an FI. If a dishonest mortgage banker has warehousing lines with two FIs, he can attempt to warehouse the same mortgage loan on each line. The individual FIs may not be aware of the other's line. One FI may be presented with the original documents, while the delivery of the documents to the other FI is indefinitely delayed. The second FI may fund the line without the documents if previous dealings with the mortgage banker have been satisfactory. It is only after transferring funds that the second lender realizes it has been defrauded. The Mortgage Electronic Registry System (MERS) can also be used as a valuable control tool.

The mortgage warehouse lender often relies on the mortgage banker's internal loan data regarding FICO, loan-to-value (LTV), debt-to-income (DTI), appraised value, credit grade and aging, making them vulnerable to fraud if the provided data is not accurate. The mortgage warehouse lender should have proper procedures and controls to provide ongoing monitoring, verification, and audits of the loans under this line of credit. It may also want to consider scorecards, due diligence, and customer identification policies and procedures.

Negligence

Negligence occurs when people who handle mortgage transactions are careless or inattentive to the accuracy and details of the documents or disregard established processing procedures. This often happens when an FI is experiencing fast growth and uses temporary and part-time employees to process a large volume of mortgages without proper controls or oversight. Inattention to detail provides perpetrators with the opportunity to submit documents containing fraudulent information with the probability that the fraud will not be detected. Fraudsters may target FIs once they identify these weaknesses.

THIRD PARTY MORTGAGE FRAUD SCHEMES

The purpose of this section is to describe some of the most prevalent types of mortgage fraud that have resulted in significant losses to FIs. Fraud schemes using one or more of the mechanisms described earlier are limited only by the imagination of the individuals who initiate them. The following scenarios are not intended to be an all-inclusive list. Specific examples for most of these schemes are detailed in Appendix C.

Appraiser Fraud

A person falsely represents himself as a State-licensed or State-certified appraiser. Appraiser fraud also can occur when an appraiser falsifies information on an appraisal or falsely provides an inaccurate valuation on the appraisal with the intent to mislead a third party or FI. Appraiser fraud is often an integral part of some fraud schemes.

Double Selling

Double selling is a scheme wherein a mortgage loan broker accepts a legitimate application, obtains legitimate documents from a buyer, and induces two FIs to each fully fund the loan. In this scenario, the originator leads each FI to believe that the broker internally funded the loan for a short period. Since there is only one set of documents, one of the funding FIs is led to believe that the proper documentation will arrive any day. Double selling is self-perpetuating because different loans must be substituted for the ones on which documents cannot be provided to keep the scheme going. Essentially, the broker uses a lapping scheme to avoid detection.

Another variation of double selling entails a mortgage loan broker accepting a legitimate application and proper documentation, who then copies the loan file, and presents both sets of documents to two investors for funding. Under this scheme, the broker has to make payments to the investor who received the copied documents or first payment default occurs.

False Down Payment

Another third party mortgage fraud involves false down payments. In this scenario, a borrower colludes with a third party, such as a broker, closing agent, etc., to reflect an artificial down payment. When this scheme is carried out with collusion by an appraiser, the true loan-to-value greatly exceeds 100% and has the potential to cause substantial loss to the FI.

Fictitious Mortgage Loan

A fictitious mortgage loan scheme is perpetrated primarily by mortgage brokers, closing agents, and/or appraisers. In one version of this scheme, the identity of an unsuspecting person is assumed in order to acquire property from a legitimate seller.

The broker persuades a friend or relative to allow the broker to use the friend's or relative's personal credit information to obtain a loan. The FI is left with a property on which it must foreclose and the third parties pocket substantial fees from both the FI and buyer.

Straw Borrower

The straw borrower scheme involves the intentional disguising of the true beneficiary of the loan proceeds. The "straw", sometimes known as a nominee, may be used to:

- conceal a questionable transaction,
- replace a legitimate borrower who may not qualify for the mortgage or intend to occupy the property, or
- circumvent applicable lending limit regulations by applying for and receiving credit on behalf of a third party who may not qualify or want to be contractually obligated for the debt.

The straw borrower scheme is accomplished by enticing an individual, sometimes a friend or relative, to apply for credit in his own name and immediately remit the proceeds to the true beneficiary. The straw borrower may feel there is nothing wrong with this and fully believes that he is helping the third party. He expects the recipient of the loan proceeds to make the loan payments, either directly or indirectly. The recipient may be unable to or may never intend to make the payment. Over time, default would occur with the FI initiating foreclosure proceedings. This scheme can involve FI personnel, as well as other third party participants. The straw borrower may or may not be paid a fee for his involvement or know the full extent of the scheme.

In summary, millions of dollars have been lost because of the mortgage fraud schemes described above. These schemes produce many indicators that are apparent to an educated observer. The next section identifies these red flags and provides best practices that FIs can use to mitigate risk of loss.

RED FLAGS, INTERNAL CONTROLS, and BEST PRACTICES

Prudent risk management practices for third-party originated loans are critical. Strong detective and preventive controls are an integral part of a sound oversight framework, including adequate knowledge of the FI's customers. Knowledgeable, trained employees, coupled with disciplined underwriting and proactive prevention controls, are an FI's best deterrent to fraud. Implementation of strong controls does not prevent human errors or oversight failures, but documentary evidence of QC measures taken by the FI can be a useful defense against a repurchase request from an investor.

As a part of the exam process, examiners should assess actions taken by the FI to document its controls over internal fraud, relative to safe and sound FI practices and

individual agency regulatory requirements. Examiners should also include Patriot Act and SAR requirements in their evaluations.

The following list of red flags, which is not intended to be all-inclusive, may be used to identify and deter misrepresentations or fraud. Other automated systems for fraud detection, if used in conjunction with this list, are dependent on the quality of the input and analysis of the output. The presence of any of these red flags DOES NOT necessarily indicate that a misrepresentation or fraud has occurred, only that further research may be necessary.

APPRAISAL GUIDANCE

Congress enacted Title XI of the Financial Institutions, Reform, Recovery and Enforcement Act of 1989 (FIRREA) requiring member agencies of Federal Financial Institutions Examination Council (FFIEC) to issue RE appraisal regulations to address problems involving faulty and fraudulent appraisals. One of the cornerstones of the regulation was a requirement that a regulated financial institution or its representative select, order, and engage appraisers for federally related transactions to ensure independence. The agencies' expectations on this subject are stated in an interagency statement dated October 27, 2003 entitled Interagency Appraisal and Evaluation Functions. This statement provides clarification of the various agencies' appraisal and RE lending regulations and should be reviewed in conjunction with them.

Specifically, the October 2003 statement primarily addresses the need for appraiser independence. A regulated institution is expected to have board approved policies and procedures that provide for an effective, independent RE appraisal and evaluation program. Basic elements of independence are discussed such as separation of the function from loan production and engagement of the appraiser by the institution, not the borrower. A written engagement letter is encouraged. An effective internal control structure is also necessary to ensure compliance with the agencies' regulations and guidelines. This includes a review process provided by qualified, trained individuals not involved with loan production. The depth of review should be based on the size, complexity, and other risk factors attributable to the transactions under review. For the full text of the October 27, 2003 statement please refer to Appendix G. SEE BLOG

OVERVIEW OF LEGAL, AUDITING, EVALUATION AND BUSINESS ISSUES

Getting Homeowner's Attention

- ☐ livinglies.wordpress.com
- ☐ seminars:
- ☐ press

Personal Issues:

- ☐ embarrassment
- ☐ Marital Problems
- ☐ emotional paralysis
- ☐ distrust
- ☐ cost

Getting Lawyer's Attention

Fees: Avoid Becoming Predatory Lawyer Retainer for Fees and Costs

- ☐ Lump Sum
- ☐ Monthly

Contingency

- ☐ Closing Players: Errors and Omissions and Malpractice
- ☐ Securitization Players: Errors and Omissions and Malpractice
- ☐ Damages: Points, Interest, rebates, Kickbacks
- ▼ ☐ Modification of Loan
 - ☐ Financing Contingency Fee
 - ☐ Value Received: Principal, interest, fixed rate etc.
- ▼ ☐ Nullification of Unenforceability of Loan
 - ☐ Financing Contingency Fee
 - ☐ Value received: Principal, interest, fixed rate etc.
- ☐ Attorney Fee Award

Avoiding Malpractice

Bankruptcy Lawyers: Bad Schedules

Litigation Lawyers: Bad Advice

Transactional Lawyers: Bad Result - TITLE

Cram Down

- ☐ Bankruptcy
- ☐ Negotiation
- ☐ Short Sales
- ☐ Modification

Getting the Court's Attention

21st Century Foreclosure v 20th Century Foreclosure

- ☐ Banker and Borrower
- ☐ Investor Group and Borrower

Telling Story Quickly

- ☐ Investor Group Puts UP Money
- ☐ Borrower Takes DOWN the money for purchase or refi
- ☐ Dozens of Intermediaries claiming and taking fees, points, profits, principal and interest

Intermediaries are filing suit

- ☐ No Money at RISK
- ☐ PAYMENT already made to intermediaries from investor-borrower Transaction
- ☐ Investors: Real Holders in Due Course --- they put up the money

Multiplicity of Litigation

- ☐ Borrower now at Risk: Multiple Claims on the same Obligation and Note
- ☐ Property now at Risk: Multiple Claims on same security instrument (Mortgage, Deed of Trust)
- ☐ Borrower Due Process
 - ☐ Defenses
 - ☐ Affirmative Defenses
 - ☐ Counterclaims

Claim should be heard on MERITS

- ☐ Foreclosing party required to plead its case
- ☐ Foreclosing party required to prove its case
- ☐ No non-judicial sale
- ☐ No Summary Judgment

Credibility

Third Party Reports -- Experts

- ☐ Affidavit
- ▼ ☐ Description of Transaction
 - ☐ Initial Transaction
 - ☐ Terms/Events Added After Closing
- ☐ TILA results
- ☐ QWR
- ☐ Appraisal
- ☐ Recommendations for Resolution

Simplicity

- ▼ ☐ DUE PROCESS --- NON JUDICIAL
 - ☐ CONVERT TO JUDICIAL
- ☐ BURDEN OF PROOF
- ☐ FOUNDATION
- ▼ ☐ COMPETENCY
 - ☐ OATH
 - ▼ ☐ PERCEPTION
 - ☐ PERSONAL KNOWLEDGE
 - ☐ MEMORY
 - ☐ COMMUNICATION

Demonstrative Exhibits

- ☐ DIAGRAMS
- ☐ CHARTS
- ▼ ☐ BLOW-UPS
 - ☐ LAW
 - ☐ OPINIONS
 - ☐ PRESS

BASIC LAW

- ☐ Property recording
- ▼ ☐ UCC
 - ☐ Table Funded Loans
 - ☐ Assignments
- ▼ ☐ Securitization
 - ☐ Payment
 - ☐ Co-Obligors
- ▼ ☐ Insurance
 - ☐ Credit Default Swaps
- ☐ Cross-Collateralization

▼ ☐ Over-Collateralization

- ☐ Reserve
- ☐ Bailouts

▼ ☐ EXECUTION OF DOCUMENTS

▼ ☐ Bait and Switch at Closing: GFE and Settlement Statement

- ▼ ☐ Opportunity to Identify real lender
 - ☐ When was "lender" picked
 - ☐ Who identified "lender"
- ▼ ☐ How was that communicated?
 - ☐ To Whom?

▼ ☐ AUTHORITY

- ☐ VP Servicer signing as VP MERS
- ▼ ☐ Chain of Title
 - ☐ Allonge must be attached to note
 - ☐ Assignments
 - ☐ Obligation
 - ☐ Note
 - ☐ Mortgage
- ▼ ☐ Trust Agreements
 - ☐ Deed of Trust
 - ☐ Pooling and Service Agreement
 - ☐ Assignment and Assumption Agreement -SIV
 - ☐ Certificate of Asset Backed Security - SPV

▼ ☐ FORGERY

- ☐ Handwriting
- ☐ Date
- ☐ Squiggle
- ☐ Executed in Blank --- filled in later
- ☐ Anything Supporting Plausible Deniability
- ☐ Copies Rather than Originals

▼ ☐ POSSESSION

- ☐ LOST NOTE
- ☐ DESTROYED NOTE
- ▼ ☐ EXISTING NOTE
 - ☐ ALLONGE
 - ☐ CHAIN OF ASSIGNMENTS
 - ☐ POOLING
 - ☐ TRANCHING
 - ☐ HOLDER
 - ☐ HOLDER IN DUE COURSE

- ☐ PAYMENT
- ▼ ☐ **PREDATORY LENDING**
 - ▼ ☐ AFFORDABILITY
 - ☐ RESETS
 - ☐ OPTION ARM
 - ☐ TEASER QUALIFICATION
 - ☐ BENEFITS
 - ▼ ☐ LIFE OF LOAN
 - ▼ ☐ **RESETS**
 - ☐ INTEREST
 - ☐ AMORTIZATION
 - ☐ INSURANCE ESCROW
 - ☐ TAX ESCROW
 - ☐
 - ▼ ☐ APR
 - ☐ **APPRAISAL ISSUES**
 - ☐ **LIFE OF LOAN**
 - ☐ **RESETS/TERMS**
 - ☐ **LEGAL LIMIT**
 - ☐ **USURY**
 - ☐ UNDISCLOSED FEES
 - ☐ BETTER LOAN AVAILABLE
 - ▼ ☐ APPRAISAL
 - ☐ **PRIOR FAIR MARKET VALUE**
 - ☐ **CURRENT FAIR MARKET VALUE**
 - ▼ ☐ EXTRA FEES
 - ☐ FORCED PLACED INSURANCE
 - ☐ LATE PAYMENTS
 - ☐ POINTS ADDED TO PRINCIPAL
 - ▼ ☐ THIRD PARTY UNDISCLOSED FEES
 - ☐ LOAN ORIGINATION SHAM CORPORATION
 - ☐ COURIERS
 - ☐ OTHER NON-PERFORMING SERVICERS

OVERVIEW OF SERVICES REQUIRED
CLIENT
INTAKE SHEET
LETTERS OF AUTHORIZATION

- ☐ AUDIT FIRM
- ☐ EXPERT
- ☐ ATTORNEY
- ☐ OTHER
- ☐

JOURNAL
DOCUMENTS
TITLE REPORT
PERSONAL FINANCIAL INFORMATION

- ☐ AT TIME OF LOAN
- ☐ NOW
- ☐ EXPECTED

PROFESSIONALS CONSULTED

- ☐ LAWYERS
- ☐ ACCOUNTANTS
- ☐ "AUDITORS"

-

AUDIT: STANDARDIZED UNIFORM SOFTWARE AND METHODS FOR CERTIFICATION

SWORN AFFIDAVIT AND COMPLIANCE ANALYSIS REPORT

AFFIDAVIT AND CERTIFICATION LETTER

SCOPE OF ENGAGEMENT

STANDARD TILA AUDIT

- ☐ GFE -GOOD FAITH ESTIMATE
- ☐ Settlement Statement
- ☐ Tax Returns
- ☐ AFFORDABILITY
- ☐ BENEFITS
- ☐ BEST LOAN

STANDARD SAMPLING REVIEW

- ▼ ☐ TABLE FUNDING
 - ☐ TRANSFEREE
 - ☐ HOLDER
 - ☐ HOLDER IN DUE COURSE
 - ☐ PERFECTING TITLE
 - ☐ PERFECTING SECURITY
- ☐ SEC
- ☐ SPV
- ☐ POOLING
- ☐ CERTIFICATES OF ASSET BACKED SECURITIES
- ▼ ☐ QUALIFIED WRITTEN REQUEST
 - ☐ 20 DAY FOLLOW UP
 - ☐ 60 DAY FOLLOW-UP
- ▼ ☐ NEGOTIATION
 - ☐ MODIFICATION
 - ☐ NULLIFICATION
 - ☐ DAMAGES
 - ☐ ATTORNEY FEES
- ☐ DEMAND LETTERS
- ☐ CHALLENGE LETTERS
- ☐ SETTLEMENT GUIDELINES

STANDARD EVALUATION REVIEW

- ☐ CAUSES OF ACTION
- ☐ MOTIONS
- ☐ GRIEVANCES TO LICENSING AGENCIES

- ☐ QWR WITH NOTICE, CONTRACT, TACIT PROCURATION AND RECONVEYANCE
- ☐ TRUSTEE(S) AUTHORITY

NON-STANDARD FORENSIC REVIEWS

- ☐ AUDITS OF LEDGERS
- ▼ ☐ DIAGRAMS
 - ☐ CASH FLOW CHARTS
 - ☐ FUNDING FLOW CHARTS
 - ☐ DOCUMENT FLOW CHARTS
- ▼ ☐ JUDICIAL NOTICE
 - ☐ COPIES OF PERTINENT SEC FILINGS
 - ☐ STATUTORY LAW
 - ▼ ☐ PATTERN OF CONDUCT OF "COLLECTOR/FORECLOSER"
 - ☐ SAME STATE: Judgments and Orders
 - ☐ DIFFERENT STATES: Judgments and Orders
 - ☐ FEDERAL COURT: Judgments and Orders
 - ▼ ☐ OTHER LAWSUITS
 - ☐ CLASS ACTION
 - ☐ INDIVIDUAL
 - ☐ PRESS ARTICLES
- ☐ COURT READY DEMONSTRATIVE EVIDENCE, GRAPHS AND DIAGRAMS
- ▼ ☐ EXPERT WITNESS TESTIMONY
 - ☐ REMOTE DEPOSITION
 - ☐ TRAVEL DEPOSITION
 - ☐ APPEARANCE AT EVIDENTIARY HEARING(S)

Waiver and Release from other Cases on File

- ☐ Public Domain Anyway
- ☐ No waiver of Attorney Client Privilege
- ☐ NO WAIVER OF ATTORNEY WORK PRODUCT
- ☐ NO WAIVER OF PRIVACY

DESCRIPTION OF TRANSACTION

INVESTOR'S PURCHASE OF MBS Certificate

BORROWER'S ISSUANCE OF NEGOTIABLE INSTRUMENT

GENERAL (GENERIC) DESCRIPTION OF ISSUES AFFECTING

EXISTENCE AND ENFORCEABILITY OF NOTE AND MORTGAGE

- ☐ USE OF NEGOTIABLE INSTRUMENT AS SECURITY OF ISSUANCE OF UNREGULATED SECURITIES
- ☐ DISCLOSURE OF ALLEGED "LENDER" AFTER SECURITIZATION
- ☐ INSURANCE
- ▼ ☐ PAYMENT ISSUES

LIFE OF LOAN

- ☐ Stated
- ☐ Actual
- ☐ Affordability
- ☐ Legal Limit
- ☐ Usury
- ☐ BAILOUTS
- ☐ RESERVES
- ☐ COLLATERALIZATION
- ☐ FORGERY
- ☐ LOST NOTE
- ☐ DESTROYED NOTE
- ☐ ALLONGE
- ☐ ASSIGNMENT

TERMS/EVENTS ADDED AFTER CLOSING

- ☐ INSURANCE
- ☐ CREDIT SWAP DEFAULTS
- ☐ POOLING
- ☐ COLLATERALIZATION
- ☐ PAYMENT
- ☐ DISTRIBUTION REPORTS
- ☐ WRITEDOWN NOTICES
- ☐ BAILOUTS
- ☐ **COOPERATION OF "LENDER", TRUSTEE AND OTHER PARTIES**

—

REVIEW

▼ □ INVESTIGATION

- □ BORROWER
- □ PARTIES AT CLOSING

▼ □ RESCISSION

- □ 3 DAY
- □ 3 YEAR

▼ □ STATUTORY

- □ TILA
- □ PREDATORY LENDING
- □ DUTY OT MITIGATE
- □ DUTY TO MEDIATE
- □ DECEPTIVE PRACTICES
- □ DECEPTIVE LENDING
- □ FRAUD
- □ USURY

► □ TITLE REPORT

► □ SECURITIZATION

- □ KNOWN DOCUMENTS
- □ UNDISCLOSED DOCUMENTS
- □ INDUSTRY KNOWLEDGE
- □ INTERVIEWS
- □ TREATISES AND BOOKS
- □ PRESS

SUMMARY OF FINDINGS

OWNERSHIP

- ☐ PROPERTY
- ☐ OBLIGATION
- ☐ NOTE
- ☐ MORTGAGE
- ☐ HOLDER
- ☐ HOLDER IN DUE COURSE
- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION
- ☐ FORMS

RESCISSION STATUS

- ☐ 3 DAY
- ☐ 3 YEAR
- ▼ ☐ COMMON LAW
 - ☐ FRAUD
 - ☐ MUTUAL MISTAKE
 - ☐
- ▼ ☐ STATUTORY
 - ☐ DECEPTIVE LENDING
 - ☐ DECEPTIVE BUSINESS
 - ☐ USURY
 - ☐ FAILURE OF CONSIDERATION
 - ☐ STATUTE OF LIMITATIONS
 - ☐ STATUTE OF FRAUDS
- ☐ RECOMMENDATIONS
- ☐ FORMS

EXECUTION OF DOCUMENTS

- ▼ ☐ Bait and Switch at Closing: GFE and Settlement Statement
 - ▼ ☐ Opportunity to Identify real lender
 - ☐ When was "lender" picked
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 - ☐ PAYMENT

PREDATORY LENDING

- ▼ ☐ AFFORDABILITY
 - ☐ RESETS
 - ☐ OPTION ARM
 - ☐ TEASER QUALIFICATION
- ☐ BENEFITS

LIFE OF LOAN

RESETS

- ☐ INTEREST
- ☐ AMORTIZATION
- ☐ INSURANCE ESCROW
- ☐ TAX ESCROW
- ☐

APR

- ☐ APPRAISAL ISSUES
- ☐ LIFE OF LOAN
- ☐ RESETS/TERMS

- ☐ **LEGAL LIMIT**
- ☐ **USURY**
- ☐ **UNDISCLOSED FEES**
- ☐ **BETTER LOAN AVAILABLE**
- ▼ ☐ **APPRAISAL**
 - ☐ **PRIOR FAIR MARKET VALUE**
 - ☐ **CURRENT FAIR MARKET VALUE**
- ▼ ☐ **EXTRA FEES**
 - ☐ **FORCED PLACED INSURANCE**
 - ☐ **LATE PAYMENTS**
 - ☐ **POINTS ADDED TO PRINCIPAL**
- ▼ ☐ **THIRD PARTY UNDISCLOSED FEES**
 - ☐ **LOAN ORIGINATION SHAM CORPORATION**
 - ☐ **COURIERS**
 - ☐ **OTHER NON-PERFORMING SERVICERS**

FIDUCIARY DUTIES

- ☐ **TRUSTEES AND SUCCESSORS AND SUBSTITUTES AND COMPANIES**
- ☐ **MORTGAGE BROKER AND COMPANY**
- ☐ **MORTGAGE BANKER AND COMPANY**
- ☐ **ORIGINATING "LENDER"**
- ☐ **TITLE AGENT AND COMPANY**
- ☐ **ESCROW AGENT AND COMPANY**
- ☐ **CLOSING AGENT AND COMPANY**
- ☐ **APPRAISER AND COMPANY**
- ☐ **OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION**

ABUSE OF PROCESS

- ☐ **FRAUD ON THE COURT**

QUALIFIED WRITTEN REQUEST

- ☐ **RECOMMENDED SETTLEMENT IN DOLLARS**
- ☐ **RECOMMENDED MODIFICATION OF LOAN**
- ☐ **RECOMMENDED NULLIFICATION OF LOAN**
- ☐ **RECOMMENDED ENFORCEMENT OF LOAN DOCUMENTS**
- ☐ **OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION**

FALSE ADVERTISING

- ☐ **Lenders**
- ☐ **Investment Bankers**
- ☐ **Appraiser's**
- ☐ **Mortgage Brokers**
- ☐ **Title Insurance Company**

- ☐ Title Agent
- ☐ Escrow Agent
- ☐ Trustee
- ☐ Web Sites --- Old and New
- ☐ Brochures
- ☐ Newspapers and magazines
- ☐ Professional Publications --- Bar Journals

TILA

- ☐ PATTERN OF CONDUCT
- ☐ DISCLOSED
- ☐ UNDISCLOSED
- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

RESPA

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION
- ☐ Qualified Written Request

HOEPA

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

Federal Fair Debt Collection Procedures Act, 15 U.S.C. Sec. 1692e.

- ☐ Delinquency without knowledge
- ☐ Default without knowledge or Authority

▼ ☐ FORECLOSURE

- ☐ Sale without Authority
- ☐ Sale under False Pretenses
- ☐ DEFICIENCY LIABILITY

▼ ☐ APPRAISAL

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

Cram Down

- ☐ Bankruptcy
- ☐ Negotiation
- ☐ Short Sales
- ☐ Modification
- ☐ Litigation

▼ ☐ AFFORDABILITY

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

▼ ☐ LIFE OF LOAN

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

▼☐ USURY

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

▼☐ LEGAL LENDING LIMIT

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

▼☐ APPLICATION OF EXEMPTIONS

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

▼☐ RECORDATIONS

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

▼☐ NEGLIGENCE

- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

▼☐ FRAUD

- ☐ FRAUD IN THE INDUCEMENT

▼☐ FRAUD IN THE EXECUTION

- ☐ SECURITIES FRAUD
- ☐ OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION
- ☐ deceptive and misleading representations concerning foreclosing/collecting party's standing to sue the plaintiffs and its interest in the debt
- ☐ falsely represented the status of the debt, in particular, that it was due and owing to defendant foreclosing/collecting party at the time the suit was filed
- ☐ falsely represented or implied that the debt was owing to foreclosing/collecting party as an innocent purchaser for value, when in fact, such an assignment had not been accomplished
- ☐ threatened to take action namely engaging in collection activities and collection and foreclosure suits as trustee that cannot legally be taken by them
- ☐ obtained access to state and federal courts to collect on notes and foreclose on mortgages under false pretenses, namely, that foreclosing/collecting party was duly authorized to engage in such activities as trustee

THEFT

▼☐ PROPERTY: Personal and Real

- ☐ Improper procedure: Non Judicial
- ☐ False Information
- ☐ False Allegations
- ▼ ☐ Pattern of Conduct after "sale"
 - ☐ Title
 - ☐ Certificate of Title
 - ☐ Sale Proceeds
- ▼ ☐ **PAYMENTS MADE**
 - ☐ By Borrower
 - ☐ By Insurer
 - ☐ CDS
 - ▼ ☐ Collateralization
 - ☐ Cross
 - ☐ Over
 - ☐ Reserve
 - ☐ Guarantee and E&O
 - ▼ ☐ Government
 - ☐ Federal Reserve
 - ☐ United States Department of the Treasury
 - ☐ FDIC Buyout/Shared Losses
 - ▼ ☐ GSE - Government Sponsored Entity
 - ☐ Fannie Mae
 - ☐ Freddie Mac
 - ☐ HUD
 - ☐ FDIC

SLANDER OF TITLE

OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

UNJUST ENRICHMENT

OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

THEFT OF IDENTITY

OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

RICO

OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

CONSTRUCTIVE TRUST ON PROFITS

OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

PRIVACY

OUTSTANDING QUESTIONS OF FACT AND RECOMMENDED DISPOSITION

EXPERT CREDENTIALS

IDENTIFICATION OF PARTIES

PAYMENT ISSUES

▼ ☐ LIFE OF LOAN

- ☐ Stated
- ☐ Actual

- ☐ Affordability
- ☐ Legal Limit
- ☐ Usury

IDENTIFICATION OF DOCUMENTS ON RECORD

IDENTIFICATION OF POTENTIAL DAMAGES

TITLE REVIEW

TILA

RESPA

HOEPA

QUALIFIED WRITTEN REQUESTS

- ☐ TRACKING AND FOLLOW-UP
- ☐ SETTLE REFUNDS, REBATES, KICKBACKS
- ☐ SETTLE INTEREST, POINTS AND FEES

RICO

Federal Fair Debt Collection Procedures Act, 15 U.S.C. Sec. 1692e.

right to engage in trust business

Receivership

SEC

DECEPTIVE PRACTICES

PREDATORY PRACTICES

▼ ☐ AFFORDABILITY

- ☐ TEASER
- ☐ RESET
- ☐ OPTION ARM
- ☐ 2/28
- ☐ 3/27

▼ ☐ LIFE OF LOAN

- ☐ STATED
- ☐ ACTUAL
- ☐ APR % EFFECT

FRAUD

- ☐ INDUCEMENT
- ☐ EXECUTION
- ☐ deceptive and misleading representations concerning foreclosing/collecting party's standing to sue the plaintiffs and its interest in the debt
- ☐ falsely represented the status of the debt, in particular, that it was due and owing to defendant foreclosing/collecting party at the time the suit was filed

- ☐ falsely represented or implied that the debt was owing to foreclosing/collecting party as an innocent purchaser for value, when in fact, such an assignment had not been accomplished
- ☐ threatened to take action namely engaging in collection activities and collection and foreclosure suits as trustee that cannot legally be taken by them
- ☐ obtained access to state and federal courts to collect on notes and foreclose on mortgages under false pretenses, namely, that foreclosing/collecting party was duly authorized to engage in such activities as trustee

NEGLIGENCE

- ☐ SUPERVISION
- ☐ INDUSTRY STANDARDS
- ☐ FIDUCIARY STANDARDS
- ☐ TILA STANDARDS
- ☐ PROFESSIONAL STANDARDS
- ☐ MALPRACTICE
- ▼ ☐ FRAUD
 - ☐ INSURANCE COVERAGE AND DEFENSE ISSUES

ETHICS

- ☐ UPL - FELONY
- ☐ PROMISES
- ☐ PERFORMANCE

LAWYERS:

STANDARDIZED UNIFORM SOFTWARE AND METHODS FOR CERTIFICATION EVALUATION AND RECOMMENDATIONS

- ☐ CAUSES OF ACTION
- ☐ POTENTIAL DAMAGES
- ☐ TITLE OPINION
- ☐ DEMAND LETTERS
- ☐ MOTIONS
- ☐ LAWSUIT
- ☐ BANKRUPTCY
- ☐ NEGOTIATION
- ☐ MODIFICATION
- ☐ NULLIFICATION
- ☐

FEES

- ☐ LUMP SUM RETAINER
- ☐ MONTHLY PAYMENT
- ☐ CONTINGENCY --- VALUE OF BENEFIT RECEIVED
- ☐ CAUSES OF ACTION: NEGLIGENCE V FRAUD
- ▶ ☐ DEMAND LETTERS: SEARCHING FOR INSURANCE
- ▶ ☐ MORTGAGE AND NOTE

EVIDENCE

ACCOUNTANTS, AUDITORS, ECONOMISTS, **APPRAISERS, LENDERS, MORTGAGE BROKERS** **EXPERT TESTIMONY, REPORTS, EXHIBITS**

- ☐ COSTS
- ☐ EXPENSES
- ☐ TIME
- ☐ EFFORT
- ☐ REWARD

—

CHAPTER 2: Securitization and Predatory Loans

Centralization and Decentralization

- ☐ Community Banks --- Seneca Falls
- ☐ Credit Unions
- ☐

Moral Hazard of Securitization-->Predatory Business

- ☐ Incentive to Lie, Cheat, Steal
- ☐ Lack of Accountability
- ☐ Lack of Personal Relationship

Economics Turned on its Head

- ☐ Underrated Bonds-->Junk Bonds
- ☐ Junk Bonds--->Derivatives
- ☐ Derivatives-->Proprietary Currency
- ☐ Proprietary Currency-->Fiat Currency
- ☐ Money versus Lawful Money

Economics of Mortgage Meltdown **Parties to Securitization Transaction**

- ☐ Seller
- ☐ Buyer or refi
- ☐ HELOC

▼☐ TRUSTEES

- ☐ Deed
- ☐ SIV
- ☐ Pool
- ☐ Securities
- ☐ Substitutions

▼☐ BENEFICIARIES/LENDERS

- ☐ Originating Lender --- Pretender Lender

▼☐ Successors

▼☐ Assignees of obligation

- ☐ Before Pooling
- ☐ After Pooling

▼☐ Assignees of note

- ☐ Before Pooling
- ☐ After Pooling

▼☐ Assignees of mortgage

- ☐ Before Pooling
 - ☐ After Pooling
-

CHAPTER 3: TRIAGE

EMERGENCIES DEFINED

- ☐ Sheriff
- ☐ Hearing
- ▼ ☐ Eviction
 - ☐ Keys for Cash
- ☐ Sale
- ☐ Dismissal Pending
- ▼ ☐ 347 Trustee Meeting of Creditors
 - ☐ Trustee Abandonment
 - ☐
- ▼ ☐ Motion to Lift Stay
 - ☐ Schedules properly filed?
 - ☐ Schedules Amended
 - ☐ Conversion
- ☐ Payments Behind
- ☐ Payments at Risk
- ☐ Payments Current

CHAPTER 4: CLIENTS - Pattern of Conduct

NINJA

Minority --- reverse red line

Elderly

Disabled

Language Challenged

Education Challenged

Sophistication Challenged

Investor

Homeowner

Just Mad

—

CHAPTER 5: LAWYERS

Transaction Lawyers

- ☐ Residential
- ☐ Commercial

Litigation Lawyers

- ☐ Small Claims
- ☐ Complex litigation
- ☐ Jury Trial
- ☐ Bench Trial
- ☐ Administrative Hearing
- ☐ Personal Injury
- ☐ Commercial
- ☐ Real Estate
- ☐ Bankruptcy
- ☐ Other

CHAPTER 6: CASE MANAGEMENT VERSUS "AUDITORS"

Former Bank Regulators and Investigators

Accountants

Title Agents

Mortgage Brokers

Loan Originators (Bird Dogs)

TILA

RESPA

HOEPA

CHAPTER 7: EDUCATION

SEMINARS

- ☐ Lawyers
- ☐ Judges
- ☐ US Trustees
- ☐ Homeowners
- ☐ Press

CERTIFICATION - GARFIELD CONTINUUM

- ☐ AUDITORS
- ☐ LAWYERS
- ☐ U.S. Trustees
- ☐ POLITICS

PART II: STRATEGIES TO WIN

RIGHT, WRONG, WINNING AND LOSING

- ☐ *Minor Playors, limited relief*
- ☐ *Mid level modifiers, mitigators*
- ☐ *High Level major recoveries and large fees earned*****

GOALS

- ☐ Secured-->unsecured
- ☐ Non-Judicial-->Judicial
- ☐ Obligation-->No Obligation
- ☐ Enforceable-->Unenforceable

Out of Court

PRESENTATION OF A CREDIBLE THREAT

Forensic Review

Settlement

Modification

Reconveyance

Rescission

Notice of Non Compliance

In Court

CONFLICT AND COMPARABLE LAWS

VENUE

MOTIONS

Motion to Vacate

- ☐ Judgment
- ☐ Sale
- ☐ Eviction/ Unlawful Detainer

TRO and Motion for Stay

- ☐ EMERGENCY
- ☐ NON-EMERGENCY
- ☐ Standing
- ☐ Fraud Upon the Court
- ☐ Necessary and Indispensable Parties
- ☐ Issues in Dispute: require Judicial Action

Motion to Establish Amount for Redemption

- ☐ EMERGENCY
- ☐ NON-EMERGENCY

Motion to Establish Amount of Payment

- ☐ EMERGENCY
- ☐ NON-EMERGENCY

Motion to Place Money in Court Registry

- ☐ EMERGENCY
- ☐ NON EMERGENCY

Motion for Counsel to Submit Proof of Authority to Represent

- ☐ Conflict of Interest
- ☐ Originating Lender
- ☐ Trustee on Deed of Trust
- ☐ Trustee of Pool
- ☐ Trustee for Owners of Certificates of Mortgage Backed Securities
- ☐ Investors
- ☐ Mortgage Aggregators/Wholesalers
- ☐ Mortgage Broker
- ☐ Title Agent
- ☐ Escrow Agent
- ☐ Closing Agent
- ☐ Appraiser
- ☐ Assignee(s)
- ☐ Insurers
- ☐ Source of Credit Default Swap
- ☐ Other Borrowers in the same Pool

Motion for Accounting

- ☐ Where have payments been sent
- ☐ How have payments been applied
- ☐ Who is custodian of records of payments to investors/holders in due course
- ▼ ☐ what insurance products are in place
 - ▼ ☐ when acquired
 - ☐ cost
 - ☐ how paid
- ▼ ☐ What third party payments have been received
 - ▼ ☐ by Investor
 - ☐ Others

Motion to Dismiss --- Judicial

- ☐ Standing
- ☐ Conflict between exhibits and pleading
- ☐ Conflict in pleading
- ☐ Insufficient Pleading: Payee and Plaintiff
- ☐ Failure to Join Indispensable Parties

- ☐ With Prejudice --- PAYMENT apparent on face of pleading

Motion for Reconveyance or Satisfaction of Mortgage

- ☐ Tacit Procuration
- ▼ ☐ Duty to Respond Under RESPA
 - ☐ Power of Attorney
 - ☐ No Response Consequences
 - ☐ Partial Response Consequences

Motion for Summary Judgment

- ☐ Cross Motion for Summary Judgment
- ☐ Affidavit from Borrower
- ☐ Affidavit and Report from Expert

Motion to Strike

Motion for Expedited Discovery

- ☐ Definite Dates
- ▼ ☐ Consequences
 - ☐ Deemed Admissions
 - ☐ Pleadings Struck as to items demanded
 - ☐ In Limine prohibition for hearings or trial

Motion to Compel

- ☐ Answers to Interrogatories
- ☐ Production
- ☐ Access for Forensic Analysis of Computers
- ☐

Motion for Sanctions

Motion for Removal

Motion for Remand

Motion in Limine

Cram Down

- ☐ Bankruptcy
- ☐ Negotiation
- ☐ Short Sales
- ☐ Modification
- ☐ Litigation

AFFIRMATIVE DEFENSES

- ☐ Failure to Join Indispensable Parties
- ☐ Standing
- ▶ ☐ RECONVEYANCE
- ☐ PAYMENT
- ☐ Offset
- ☐ Usury
- ☐ Failure to record --- condition precedent
- ☐ FRAUD IN THE INDUCEMENT
- ☐ FRAUD IN THE EXECUTION

COUNTERCLAIMS

- ▶ ☐ RESCISSION
- ▶ ☐ RECONVEYANCE
- ☐ SLANDER OF TITLE
- ☐ BREACH OF FIDUCIARY DUTY
- ☐ FRAUD IN THE INDUCEMENT
- ☐ FRAUD IN THE EXECUTION
- ☐ NEGLIGENCE
- ☐ NEGLIGENT SUPERVISION
- ☐ APPRAISAL ERROR OR FRAUD
- ☐ USURY
- ☐ UNJUST ENRICHMENT/ID THEFT
- ☐ HOEPA
- ☐ RESPA
- ☐ TILA
- ☐ RICO
- ▶ ☐ DECEPTIVE PRACTICES
- ▶ ☐ FALSE ADVERTISING
- ☐ SECURITIES FRAUD
- ☐ CONSTRUCTIVE TRUST ON PROFITS
- ☐ BREACH OF PRIVACY

—

DISCOVERY -- FOLLOW THE MONEY

- ▶ ☐ Before, during and after "loan"
- ▶ ☐ M/COMPEL ANSWER TO QWR OR DEEM ADMITTED
- ▶ ☐ REQUEST FOR ADMISSIONS
- ▶ ☐ Interrogatories
- ▶ ☐ REQUEST TO PRODUCE

PART III: Professional Information Sources

ASSOCIATIONS:

- ☐ American Bankers Association (ABA)
- ☐ Independent Community Bankers of America (ICBA)
- ☐ America's Community Bankers (ACB)
- ☐ Community Bankers Association (CBA)
- ☐ Mortgage Bankers Association (MBA)
- ☐ State/Local trade associations
- ☐ Bank Administration Institute (BAI)
- ☐ SourceMedia/American Banker
- ☐ Online Discussion Forums
- ☐ LinkedIn
- ☐ Web seminars provided by consultants/associations/vendors
- ☐ Online job boards, search services

MEDIA SOURCES:

- ☐ Bank Systems & Technology
- ☐ WWW.LIVINGLIES.WORDPRESS.COM
- ☐ American Banker
- ☐ Community Banker
- ☐ Factiva
- ☐ Independent Banker
- ☐ Bank Technology News
- ☐ Banking Strategies
- ☐ Wall Street Journal/WSJ Online
- ☐ Law firm/consultant/association-provided newsletters
- ☐ ABA Banking Journal
- ☐ NewsEdge
- ☐ US Banker
- ☐ Lexis/Nexis
- ☐ Local associations publications
- ☐ Internally provided news feed (DISCOVERY ITEM!)

ONLINE DATABASES:

- ☐ CapitalIQ
- ☐ Accuity
- ☐ IMPLDOMETER.COM
- ☐ Hoover's
- ☐ WALL STREET JOURNAL
- ☐ FactSet

- ☐ **FINANCIAL TIMES**
- ☐ **Highline**
- ☐ **EDGAR --- SEC.GOV**
- ☐ **Bloomberg**
- ☐ **SNL Financial**
- ☐ **Thomson Financial**
- ☐ **BigDough**

CHALLENGE TO LAWYERS

In *Rooker v. Fidelity Trust Company*, 263 U.S. 413, 416 (1923) the Court held that the federal district court had no subject matter jurisdiction to entertain what was essentially an appeal seeking to review the substantive merits of a final state court judgment. The Court noted that the common law bill was merely an attempt to collaterally attack the judgment for alleged errors of law committed in the state court. *Rooker* simply provides that where a final state court judgment has been rendered, after due hearing, by a state trial court, with jurisdiction of the subject matter and parties, and fairly presented to the highest state court in which a decision could be obtained, then only the resort for correction of errors involving federal questions is by certiorari to the United States Supreme Court under 28 U.S.C. § 1257.

Mr. Morse has apparently had some conversation with you which leads to this email. I am the author of a blog site that seeks to aid people who are the victims of illegal lending practices. I have seen your email regarding the case against appraisal companies and it is understandable that you would issue that comment, but nonetheless wrong. My research clearly shows that the three main rating companies --- Fitch, Moody's, and Standard and Poors --- got into a turf war over market share and profitability. The investment banking community stoked the fires as much as possible and ended up negotiating ratings instead of issuing ratings based upon due diligence and industry standard analysis. My blog site will demonstrate that it was a pattern of conduct that existed, evolved and grew over many years, ending up with fishing trips and other perks given to the 'analyst' who was issuing the rating. The threat was that they would take their business else where to get a rating if the issuer did not get what they wanted. This is all documented in writing in articles (Wall Street Journal, NY Times) and testimony. This was not negligence --- it was an effort at plausible deniability.

On the other end of the spectrum there was the same fraudulent activity. The appraisals were of real property. And the appraisers who came in with the high appraisers got the business and were paid bonuses, whereas the honest appraisers were left in the dust with no business because they would not lie. In 2005 8,000 appraisers petitioned congress warning of the impending crisis and the fact that they were being financially damaged because they wouldn't 'play the game.' Just last month, a class action of appraisers against the mortgage originators was filed for exactly that reason. 10,000 convicted felons in Florida were recruited and licensed as mortgage brokers, most of whom had been convicted of economic crimes. I'm sure the same figures hold true in most states that were hard hit by this scheme.

On the one hand, no investor would have purchased a AAA-rated MBS (cash equivalent) if they had known that the rating was based only on the top tier of a pile of junk, which is exactly what happened and is no longer disputed. On the other hand, no borrower would have signed a deal that used his personal identity, credit rating and personal information in an elaborate scheme for selling unregulated securities to defraud investors, based upon a fraudulent appraisal of his property --- an appraisal that he relied upon along with his reasonable reliance (according to black letter law) on the

lender's underwriting, due diligence and appraisal review procedures. All of these people, committees and procedures were condensed into one desk with one person and rubber stamp that approved any loan application including the now infamous NINJA loan -no income, no job, no assets, no problem. A Dog with a note in his mouth could get a \$300,000 loan, because they were all table-funded loans for which the chartered financial institution was not at any risk, where the 'lender' on the note and mortgage had been paid in full in most case BEFORE the loan closing or contemporaneously with the loan closing, AND they had received a 2.5% fee for lending the use of their charter to an unregulated, unregistered entity that was in the home loan business by virtue of an illegal undisclosed pooling and services agreement and an assignment and assumption agreement, most of which violated the express terms of the note, the express terms of the Truth in Lending Act, and banking regulations.

The economics were flipped in the mortgage meltdown period of 2001-2008. The worse the loan, the higher the stated rate of interest on the note, even if the borrower was actually paying a tiny fraction of the interest, was not amortizing the note, and was not paying into escrow for taxes and insurance. Thus some loans had a stated interest rate of 16.5% which was thrown into a pool to lift the overall apparent yield, even though the borrower was paying 1% interest only on an option ARM. Because the MBS certificates were being sold at 8% or lower return the value of the mortgage doubled or tripled when thrown into the pool and that is what it was ultimately sold for --- a \$300,000 NINJA loan could be sold for \$600,000 whereas a \$300,000 conventional fixed rate mortgage to a borrower with an 800 FICO could only be sold for par value (\$300,000). The result was that Wall Street was bottle-necked with around \$10 trillion from the sale of 'mortgage backed securities' for which they had no mortgages, no notes, no backing. So the pressure and rewards, bonuses, rebates, kickbacks and graft was intense as demands were made for loan documents of the highest dollar amounts possible. The sales effort was the most intense the world of financial services has ever seen with armies of mortgage originators (bird dogs) literally sent out to knock on doors, or cold call people from boiler rooms.

FACT: More than half the loans in trouble were refi's NOT requested or solicited by borrowers. This was not a case of shady borrowers pushing the market looking for money. This was a case of money pushing the market looking for anyone who would sign loan documents. As long as the money was pushing the market the appraisals grew for entire neighborhoods and cities by virtue of the sheer enormity of the scheme. The only way to satisfy Wall Street's insatiable appetite for signatures was to either forge them, which they did, fake them, which they did, or lie about them, which they did. The best way to satisfy a demand for another \$100 million in mortgage loans was to inflate a \$50 million portfolio into \$100 million. And that is what they did --- on both ends of the spectrum, from the investor who put up the actual originating funds, to the borrower who thought he was simply financing his house. The clients you can receive in your office are a complete cross section of society from retired nuns, to police chiefs, to professionals and workers of every type who under pressure and clever scripts (some of which Attorney General Gerry Brown in California actually has) they fooled even some pretty sophisticated, educated and experienced people. The reverse red lined area of

low income, low education and no sophistication were red meat and easy prey. People who had owned their houses free and clear were convinced to go into deals where they are now homeless.

Despite clear Federal and State laws to the contrary none of these facts were disclosed to borrower or investor. Incredibly the standard answer we are getting now when we ask for the real holder in due course of the note and mortgage, is that this is 'confidential' information and cannot be revealed to the borrower or any of his representatives.

I could go on of course. The point here is that nearly all the foreclosures are fraudulent, nearly all the sales of mortgage backed securities were fraudulent, nearly all the credit default swaps were leveraged out of any sphere of being honored, and the same holds true with insurance products from AIG, AMBAC etc. In addition, most of the players have errors and omissions policies that cover the losses. The reason the credit markets are in paralysis is not because home values went down, it is because TRUST was destroyed in the financial system. Only \$13 trillion in MBS derivatives out of a total derivative nominal value in the credit markets of \$600 trillion. Even a 40% drop in home values would not account for 1% of the total credit market. The problem is that they all know that this was outright fraud --- like writing NSF checks or checks on a closed account. It cast doubt on all \$600 trillion. Auctions stopped, exchanges ceased operations, and normal credit liquidity was gone. The only difference is that the numbers are larger than the normal paper hanger writing bad checks.

Now add to this mix that 40% of the notes were intentionally destroyed, there is no chain of title recorded, and the proceeds of payments on each note were

Now I write to you to invite you to consider the following premise: that a firm that litigates securities issues is the most likely to gain credibility in front of a Judge in state, Federal or bankruptcy court in explaining these factors. Nearly 4,000 pro se litigants have had the lender tossed out of the foreclosure process and there are some lawyers who have dropped everything else because representing homeowners has turned the graph of their law practice into a hockey stick, making them more money than they ever saw in their lives. And yet.... most lawyers won't listen. I have over 300 cases in Arizona alone to refer without a referral fee expected. I have given seminars in California and Arizona without CLE credits and I got a pretty good turnout both times, but no Arizona-licensed lawyer showed up even to the seminar in Phoenix. So far, I have no Arizona lawyer to refer cases to even though in the surrounding states I have many.

CASES DISMISSED FOR LACK OF STANDING OR NECESSARY PARTIES

AmericanBrokersConduityZAMALLOAJudgeSCHACK11Sep2007

AmericanBrokersConduityZAMALLOAJudgeSCHACK28Jan2008

AuroraLoanServicesvMACPHERSONJudgeFARNETI11Mar2008

BankofNYNAvSINGHJudgeKURTZ14Dec2007

BankofNYNAvTORRESJudgeCOSTELLO11Mar2008

BankofNYNAvOROSCOJudgeSCHACK19Nov2007

CitiMortgageInc.vBROWNJudgeFARNETI13Mar2008

CountrywideMortgagevBERLIUKJudgeCOSTELLO13Mar2008

DeutscheBankv.Barnes-JudgmentEntry

DeutscheBankv.Barnes-WithdrawalofObjectionsandMTD

DeutscheBankvALEMANYJudgeCOSTELLO07Jan2008

DeutscheBankvBenjaminCRUZJudgeKURTZ21May2008

DeutscheBankvYobannaCRUZJudgeKURTZ21May2008

DeutscheBankvCABAROYJudgeCOSTELLO02Apr2008

heBankvCASTELLANOS2007NYSlipOp50978UJudgeSCHACK11May2007

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DeutscheBankvCLOUDEN2007NYSlipOp51767UJudgeSCHACK18Sep2007

DeutscheBankvEZAGUIJudgeSCHACK21Dec2007

DeutscheBankvGRANTJudgeSCHACK25Apr2008

DeutscheBankvHARRISJudgeSCHACK05Feb2008

DeutscheBankv.LaCrosse,Cede,DTCCComplaint

DeutscheBankvNICHOLLSJudgeKURTZ21May2008

DeutscheBankvRYANJudgeKURTZ29Jan2008

DeutscheBankvSAMPSONJudgeKURTZ16Jan2008

GMACMortgageLLCvMATTHEWSJudgeKURTZ10Jan2008

GMACMortgageLLCvSERAFINEJudgeCOSTELLO08Jan2008

HSBCBankUSANAvCIPRIANIJudgeCOSTELLO08Jan2008

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LaSalleBankNAvCHARLEUS.JudgeKURTZ03Jan2008

LaSalleBankNAvSMALLS.JudgeKURTZ03Jan2008

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ServicesLLCvSATTAR2007NYSIipOp51895U.JudgeSCHACK09Oct2007

USBankNAvAUGUSTE.JudgeKURTZ27Nov2007

USBankNAvGRANT.JudgeKURTZ14Dec2007

USBankNAvROUNDTREE.JudgeBURKE11Oct2007

USBankNAvVILLARUEL.JudgeKURTZ01Feb2008

WellsFargoBankNAvHAMPTON.JudgeKURTZ03Jan2008

Wells Fargo,Litton Loan v. Farmer WITH PREJUDICE Judge Schack June2008

Wells Fargo v. Reyes WITH PREJUDICE,Fraud on Court & Sanctions Judge Schack June2008

Deutsche Bank v. Peabody Judge Nolan (Regulation Z)

Florida Foreclosure is Judicial.
Notice of Foreclosure

Florida foreclosure begins when the lender files a lawsuit (Lis Pendens) against the homeowner. The homeowners must be notified of the legal action pending and must file an answer within a specified period of time. If the homeowner does not respond, the court will make a judgment against the homeowner and set an auction date.

Notice of Florida Foreclosure Sale

The notice of sale shall include at least the following information,:

The name, address and telephone number of the person to contact for information regarding the real estate, the address of the property, a legal description of the property, a description of the improvements, the time and place of sale, the times specified in the judgment, the case title, number, and court which the foreclosure was filed, and terms of the sale

Florida foreclosure law states that the notice of sale shall be published at least 3 consecutive weeks, the last such notice not less than 5 days prior to the sale.

Florida Foreclosure Auction

Foreclosure auctions in Florida typically take place 30 days after judgment is filed, at 11:00 am on the county courthouse steps. Winning bidder is required to have 5% down and the balance is due by the end of the day. Upon payment in full of the amount bid, the person conducting the sale shall issue a Certificate of Sale and give to the purchaser.

Redemption Period

Florida foreclosure law states that the homeowner has the right to redeem the property anytime before the day of the sale. After the Certificate of Sale has been issued, there is no right of redemption.

Equity

All mortgages shall be foreclosed in equity. In a mortgage foreclosure action, the court shall sever for separate trial all counterclaims against the foreclosing mortgagee. The foreclosure claim shall, if tried, be tried to the court without a jury.

Legal notice concerning foreclosure proceedings

Whenever a legal advertisement, publication, or notice relating to a foreclosure proceeding is required to be placed in a newspaper, it is the responsibility of the petitioner or petitioner's attorney to place such advertisement, publication, or notice. Florida foreclosure law states that the advertisement, publication, or notice shall be placed directly by the attorney for the petitioner, by the petitioner if acting pro se, or by the clerk of the court.

Order to show cause; entry of final judgment of foreclosure; payment during foreclosure

* (1) After a complaint in a foreclosure proceeding has been filed, the mortgagee may request an order to show cause for the entry of final judgment and the court shall immediately review the complaint. If, upon examination of the complaint, the court finds that the complaint is verified and alleges a cause of action to foreclose on real property, the court shall promptly issue an order directed to the defendant to show cause why a final judgment of foreclosure should not be entered.

(a) Florida foreclosure law states that the order shall:

1. Set the date and time for hearing on the order to show cause. However, the date for the hearing may not be set sooner than 20 days after the service of the order. When service is obtained by publication, the date for the hearing may not be set sooner than 30 days after the first publication. The hearing must be held within 60 days after the date of service. Failure to hold the hearing within such time does not affect the validity of the order to show cause or the jurisdiction of the court to issue subsequent orders.

2. Direct the time within which service of the order to show cause and the complaint must be made upon the defendant.

3. State that the filing of defenses by a motion or by a verified or sworn answer at or before the hearing to show cause constitutes cause for the court not to enter the attached final judgment.

4. State that the defendant has the right to file affidavits or other papers at the time of the hearing and may appear personally or by way of an attorney at the hearing.

5. State that, if the defendant files defenses by a motion, the hearing time may be used to hear the defendant's motion.

6. State that, if the defendant fails to appear at the hearing to show cause or fails to file defenses by a motion or by a verified or sworn answer or files an answer not contesting the foreclosure, the defendant may be considered to have waived the right to a hearing and in such case the court may enter a final judgment of foreclosure ordering the clerk of the court to conduct a foreclosure sale.

7. State that if the mortgage provides for reasonable attorney's fees and the requested attorney's fees do not exceed 3 percent of the principal amount owed at the time of filing the complaint, it is unnecessary for the court to hold a hearing or adjudge the requested attorney's fees to be reasonable.

8. Attach the final judgment of foreclosure the court will enter, if the defendant waives the right to be heard at the hearing on the order to show cause.

9. Require the mortgagee to serve a copy of the order to show cause on the mortgagor in the following manner:

a. If the mortgagor has been served with the complaint and original process, service of the order may be made in the manner provided in the Florida Rules of Civil Procedure.

b. If the mortgagor has not been served with the complaint and original process, the order to show cause, together with the summons and a copy of the complaint, shall be served on the mortgagor in the same manner as provided by law for original process.

Any final judgment of foreclosure entered under this subsection is for in rem relief only. Nothing in this subsection shall preclude the entry of a deficiency judgment where otherwise allowed by law.

(b) The right to be heard at the hearing to show cause is waived if the defendant, after being served as provided by law with an order to show cause, engages in conduct

that clearly shows that the defendant has relinquished the right to be heard on that order. The defendant's failure to file defenses by a motion or by a sworn or verified answer or to appear at the hearing duly scheduled on the order to show cause presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard. If a defendant files defenses by a motion or by a verified or sworn answer at or before the hearing, such action constitutes cause and precludes the entry of a final judgment at the hearing to show cause.

(c) In a mortgage foreclosure proceeding, when a default judgment has been entered against the mortgagor and the note or mortgage provides for the award of reasonable attorney's fees, it is unnecessary for the court to hold a hearing or adjudge the requested attorney's fees to be reasonable if the fees do not exceed 3 percent of the principal amount owed on the note or mortgage at the time of filing, even if the note or mortgage does not specify the percentage of the original amount that would be paid as liquidated damages.

(d) If the court finds that the defendant has waived the right to be heard as provided in paragraph (b), the court shall promptly enter a final judgment of foreclosure. If the court finds that the defendant has not waived the right to be heard on the order to show cause, the court shall then determine whether there is cause not to enter a final judgment of foreclosure. If the court finds that the defendant has not shown cause, the court shall promptly enter a judgment of foreclosure.

* (2) In an action for foreclosure, other than residential real estate, the mortgagee may request that the court enter an order directing the mortgagor defendant to show cause why an order to make payments during the pendency of the foreclosure proceedings or an order to vacate the premises should not be entered.

(a) Florida foreclosure law states that the order shall:

1. Set the date and time for hearing on the order to show cause. However, the date for the hearing shall not be set sooner than 20 days after the service of the order. Where service is obtained by publication, the date for the hearing shall not be set sooner than 30 days after the first publication.

2. Direct the time within which service of the order to show cause and the complaint shall be made upon the defendant.

3. State that the defendant has the right to file affidavits or other papers at the time of the hearing and may appear personally or by way of an attorney at the hearing.

4. State that, if the defendant fails to appear at the hearing to show cause and fails to file defenses by a motion or by a verified or sworn answer, the defendant may be deemed to have waived the right to a hearing and in such case the court may enter an order to make payment or vacate the premises.

5. Require the mortgagee to serve a copy of the order to show cause on the mortgagor in the following manner:

a. If the mortgagor has been served with the complaint and original process, service of the order may be made in the manner provided in the Florida Rules of Civil Procedure.

b. If the mortgagor has not been served with the complaint and original process, the order to show cause, together with the summons and a copy of the complaint, shall be served on the mortgagor in the same manner as provided by law for original process.

(b) The right to be heard at the hearing to show cause is waived if the defendant, after being served as provided by law with an order to show cause, engages in conduct that clearly shows that the defendant has relinquished the right to be heard on that order. The defendant's failure to file defenses by a motion or by a sworn or verified answer or to appear at the hearing duly scheduled on the order to show cause presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard.

(c) If the court finds that the defendant has waived the right to be heard, the court may promptly enter an order requiring payment in the amount provided in paragraph (f) or an order to vacate.

(d) If the court finds that the mortgagor has not waived the right to be heard on the order to show cause, the court shall, at the hearing on the order to show cause, consider the affidavits and other showings made by the parties appearing and make a determination of the probable validity of the underlying claim alleged against the mortgagor and the mortgagor's defenses. If the court determines that the mortgagee is likely to prevail in the foreclosure action, the court shall enter an order requiring the mortgagor to make the payment described in paragraph (e) to the mortgagee and provide for a remedy as described in paragraph (f). However, the order shall be stayed pending final adjudication of the claims of the parties if the mortgagor files with the court a written undertaking executed by a surety approved by the court in an amount equal to the unpaid balance of the mortgage on the property, including all principal, interest, unpaid taxes, and insurance premiums paid by the mortgagee.

(e) In the event the court enters an order requiring the mortgagor to make payments to the mortgagee, payments shall be payable at such intervals and in such amounts provided for in the mortgage instrument before acceleration or maturity. The obligation to make payments pursuant to any order entered under this subsection shall commence from the date of the motion filed hereunder. The order shall be served upon the mortgagor no later than 20 days before the date specified for the first payment. The order may permit, but shall not require the mortgagee to take all appropriate steps to secure the premises during the pendency of the foreclosure action.

(f) In the event the court enters an order requiring payments the order shall also provide that the mortgagee shall be entitled to possession of the premises upon the failure of the mortgagor to make the payment required in the order unless at the hearing on the order to show cause the court finds good cause to order some other method of enforcement of its order.

(g) All amounts paid pursuant to this section shall be credited against the mortgage obligation in accordance with the terms of the loan documents, provided, however, that any payments made under this section shall not constitute a cure of any default or a waiver or any other defense to the mortgage foreclosure action.

(h) Upon the filing of an affidavit with the clerk that the premises have not been vacated pursuant to the court order, the clerk shall issue to the sheriff a writ for possession which shall be governed by the provisions.

Original Note required: Elements of Proving Lost Note

If you are in **Florida**, please see **FI statute 90.953** and you will be happy by the findings.

In Re: b) The Fourth District Court of Appeals in the state of Florida decided an issue quite pertinent to today's foreclosures; in the case of StateStreetBank and Trust Co., Trustee for Holders of Bear Stearns Mortgage Securities, Inc. Mortgage Pass-Through Certificates, Series 1993-12 v. Harley Lord, et al., 851 So.2d 790 (Fla. 4th DCA 2003). The Court held that StateStreetBank could not maintain a cause of action to enforce a missing promissory note or to foreclose on the related mortgage in the absence of proof that it or its assignor ever held possession of the promissory note. Section 673.3091, Florida Statutes (2002).

c) The Court explained that pursuant to section 90.953, Florida Statutes, (2002), Florida's code of evidence, the plaintiff in a mortgage foreclosure must present the **ORIGINAL PROMISSORY NOTE as a duplicate of a note is not admissible. Otherwise, the plaintiff must meet the requirements of section 673.3091, Florida Statutes to pursue enforcement. W.H. Downing v. First Nat'l Bank of Lake City, 81 So.2d 486 (Fla.1955), Nat'l Loan Investors, L.P. v. Joymar Assocs., 767 So.2d 549, 551 (Fla. 3d DCA 2000).**

d) StateStreetBank was later cited with approval by Dasma Investments, LLC v. Realty Associates Fund III, L.P., 459 F.Supp.2d 1294(S.D.Fla.2006) where the court held that if a party is not in possession of the original note and cannot reestablish it, the party cannot prevail in an action on the note. In Dasma, the court explained that in Florida a promissory note is a negotiable instrument and that a party suing on a promissory note, whether just on the note itself or together with a foreclosure on a mortgage securing the note, must be in possession of the ORIGINAL NOTE or reestablish the note pursuant to Fla. Stat. § 673.3091. See, Shelter Dev. Group, Inc. v. Mma of Georgia, Inc., 50 B.R. 588, 590 (Bkrcty.S.D.Fla.1985).

e) **90.953 Admissibility of duplicates.**--A duplicate is admissible to the same extent as an original, unless:

(1) The document or writing is a negotiable instrument as defined in s. 673.1041, a security as defined in s. 678.1021, or any other writing that evidences a right to the payment of money, is not itself a security agreement or lease, and is of a type that is transferred by delivery in the ordinary course of business with any necessary endorsement or assignment.

(2) A genuine question is raised about the authenticity of the original or any other document or writing.

(3) It is unfair, under the circumstance, to admit the duplicate in lieu of the original.

4. **A promissory note is clearly a negotiable instrument within the definition of section § 673.1041 (1) FS and either the ORIGINAL must be produced, or in the event of a lost note, the document must be re-established under section § 673.3091 (2) FS. In this case, the Plaintiff clearly FAILED to attempt to move Court**

to re-establish the necessary PROMISSORY NOTE under § 673.3091 (2) FS or any other Florida statute upon filing and initiating frivolous complaint.

1. In the event that law permits the enforcement of a lost negotiable instrument section § 673.3091 (2), F.S. applies. Section § 673.3091 (2) F.S., requires a person seeking to enforce a lost negotiable instrument to:

- 1) Prove the terms of the instrument;
- 2) Prove the right to enforce the instrument; and
- 3) Protect the person who has to make payment from other claims to pay the instrument.
- 4) Plaintiff failed to prove ALL conditions above. (1) (2) and (3).
- f) Plaintiff failed to prove “Chain of Title” with their respective assignments assigning the rights to enforce
- g) Information obtained from bill SB 282, sponsored by Senator Posey on February 2, 2004
- h) Why would one lose or destroy a valuable negotiable instrument? Defendants only guess would be to hide fraud.
- i) “Actual Fraud. Deceit. Concealing something or making a false representation with an evil intent [scienter] when it causes injury to another. [see: e.g., Steven H. Gifis, ‘Law Dictionary’, 5th Edition, Happaage: Barron’s Educational Series, Inc., 2003, s.v. “Fraud.

ASSIGNMENTS AND RECORDING UNDER FLORIDA LAW

701.01 Assignment.--Any mortgagee may assign and transfer any mortgage made to her or him, and the person to whom any mortgage may be assigned or transferred may also assign and transfer it, and that person or her or his assigns or subsequent assignees may lawfully have, take and pursue the same means and remedies which the mortgagee may lawfully have, take or pursue for the foreclosure of a mortgage and for the recovery of the money secured thereby.

701.02 Assignment not effectual against creditors unless recorded and indicated in title of document; applicability.--

(1) An assignment of a mortgage upon real property or of any interest therein, is not good or effectual in law or equity, against creditors or subsequent purchasers, for a valuable consideration, and without notice, unless the assignment is contained in a document that, in its title, indicates an assignment of mortgage and is recorded according to law.

(2) This section also applies to assignments of mortgages resulting from transfers of all or any part or parts of the debt, note or notes secured by mortgage, and none of same is effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration without notice, unless a duly executed assignment be recorded according to law.

(3) Any assignment of a mortgage, duly executed and recorded according to law, purporting to assign the principal of the mortgage debt or the unpaid balance of such principal, shall, as against subsequent purchasers and creditors for value and without notice, be held and deemed to assign any and all accrued and unpaid interest secured by such mortgage, unless such interest is specifically and affirmatively reserved in such an assignment by the assignor, and a reservation of such interest or any part thereof may not be implied.

(4) Notwithstanding subsections (1), (2), and (3) governing the assignment of mortgages, chapters 670-680 of the Uniform Commercial Code of this state govern the attachment and perfection of a security interest in a mortgage upon real property and in a promissory note or other right to payment or performance secured by that mortgage. The assignment of such a mortgage need not be recorded under this section for purposes of attachment or perfection of a security interest in the mortgage under the Uniform Commercial Code.

(5) Notwithstanding subsection (4), a creditor or subsequent purchaser of real property or any interest therein, for valuable consideration and without notice, is entitled to rely on a full or partial release, discharge, consent, joinder, subordination, satisfaction, or assignment of a mortgage upon such property made by the mortgagee of record, without regard to the filing of any Uniform Commercial Code financing statement that purports to perfect a security interest in the mortgage or in a promissory note or other right to payment or

performance secured by the mortgage, and the filing of any such financing statement does not constitute notice for the purposes of this section. For the purposes of this subsection, the term "mortgagee of record" means the person named as the mortgagee in the recorded mortgage or, if an assignment of the mortgage has been recorded in accordance with this section, the term "mortgagee of record" means the assignee named in the recorded assignment.

701.03 Cancellation.--Whenever the amount of money due on any mortgage shall be fully paid, the mortgagee or assignee shall within 60 days thereafter cancel the same in the manner provided by law.

701.04 Cancellation of mortgages, liens, and judgments.--

(1) Within 14 days after receipt of the written request of a mortgagor, the holder of a mortgage shall deliver to the mortgagor at a place designated in the written request an estoppel letter setting forth the unpaid balance of the loan secured by the mortgage, including principal, interest, and any other charges properly due under or secured by the mortgage and interest on a per-day basis for the unpaid balance. Whenever the amount of money due on any mortgage, lien, or judgment shall be fully paid to the person or party entitled to the payment thereof, the mortgagee, creditor, or assignee, or the attorney of record in the case of a judgment, to whom such payment shall have been made, shall execute in writing an instrument acknowledging satisfaction of said mortgage, lien, or judgment and have the same acknowledged, or proven, and duly entered of record in the book provided by law for such purposes in the proper county. Within 60 days of the date of receipt of the full payment of the mortgage, lien, or judgment, the person required to acknowledge satisfaction of the mortgage, lien, or judgment shall send or cause to be sent the recorded satisfaction to the person who has made the full payment. In the case of a civil action arising out of the provisions of this section, the prevailing party shall be entitled to attorney's fees and costs.

(2) Whenever a writ of execution has been issued, docketed, and indexed with a sheriff and the judgment upon which it was issued has been fully paid, it shall be the responsibility of the party receiving payment to request, in writing, addressed to the sheriff, return of the writ of execution as fully satisfied.

701.041 Title insurer; mortgage release certificate.--

(1) **DEFINITIONS.--**For purposes of this section:

(a) "Estoppel letter" means a statement of the amount of:

1. The unpaid balance of a loan secured by a mortgage, including principal, interest, and any other charges properly due under or secured by the mortgage.

2. Interest on a per-day basis for the unpaid balance.

(b) "Mortgagee" means:

1. The grantee of a mortgage; or

2. If a mortgage has been assigned of record, the last person to whom the mortgage has been assigned of record.

(c) "Mortgage servicer" means the last person to whom a mortgagor or the mortgagor's successor in interest has been instructed by a mortgagee to send payments on a loan secured by a mortgage. A person transmitting an estoppel letter is the mortgage servicer for the mortgage described in the estoppel letter.

(d) "Mortgagor" means the grantor of a mortgage.

(e) "Record" means to record with the clerk of the circuit court or the comptroller in the county or counties in which the real property securing the mortgage is located.

(f) "Title insurer" means a corporation or other business entity authorized and licensed to transact the business of insuring titles to interests in real property in this state under chapter 624.

(2) CERTIFICATE OF RELEASE.--An officer or duly appointed agent of a title insurer may, on behalf of a mortgagor or a person who acquired from the mortgagor title to all or a part of the property described in a mortgage, execute a certificate of release that complies with the requirements of this section and record the certificate of release in the real property records of each county in which the mortgage is recorded if a satisfaction or release of the mortgage has not been executed and recorded after the date payment in full of the loan secured by the mortgage was made in accordance with a payoff statement furnished by the mortgagee or the mortgage servicer.

(3) CONTENTS.--A certificate of release executed under this section must contain:

(a) The name of the mortgagor, the name of the original mortgagee, and, if applicable, the mortgage servicer; the date of the mortgage; the date of recording; and the volume and page or document number in the real property records in which the mortgage is recorded, together with similar information for the last recorded assignment of the mortgage.

(b) A statement that the mortgage being released is eligible for release under this section.

(c) The name of the title insurer filing the certificate of release, a statement that the person executing the certificate of release is an officer or a duly appointed agent of the title insurer, a statement that the title insurer is authorized and licensed to transact the business of insuring titles to interests in real property in this state under chapter 624 or chapter 626, and, if executed by a duly appointed agent, shall further provide the recording information of the appointment of such agent as required by subsection (4).

(d) A statement that the certificate of release is made on behalf of the mortgagor or a person who acquired title from the mortgagor to all or a part of the property described in the mortgage.

(e) A statement that the mortgagee or mortgage servicer provided an estoppel letter which was used to make payment in full of the unpaid balance of the loan secured by the mortgage.

(f) A statement that payment in full of the unpaid balance of the loan secured by the mortgage was made in accordance with the estoppel letter and that a copy of the certificate of release was sent to the mortgagee or mortgage servicer that provided the estoppel letter.

(4) EXECUTION.--

(a) A certificate of release authorized by subsection (2) must be duly executed, sworn to or affirmed under penalty of perjury before a notary public, and recorded and may be executed by an officer of a title insurer or by a duly appointed agent of a title insurer. Such delegation to an agent by a title insurer shall not relieve the title insurer of any liability for damages caused by the agent for the execution or recordation of a certificate of release.

(b) The appointment of an agent must be duly executed, acknowledged, and recorded by an officer of a title insurer and must state:

1. The title insurer as the principal.

2. The identity of the person, partnership, or corporation authorized to act as agent to execute and record certificates of release provided for in this section on behalf of the title insurer.

3. That the agent has the full authority to execute and record certificates of release provided for in this section on behalf of the title insurer.

(c) A separate appointment of agent shall not be necessary for each certificate of release provided that at least one such appointment is recorded in the county in which the mortgaged property is located. The appointment of agent must be rerecorded where necessary to establish authority of the agent, but such

authority shall continue until a revocation of appointment is recorded in the office of the county recorder in which the appointment of agent was recorded.

(d) After recordation of a title insurer's revocation of appointment in the office of the county recorder in which the appointment was recorded, the agent whose appointment is revoked in such county shall have no further authority to execute or record certificates of release as provided in this section on behalf of that title insurer with respect to any mortgages recorded in that county, and no such certificate of release thereafter executed or recorded by that agent on behalf of that title insurer shall be effective to release any mortgage recorded in that county.

(5) EFFECT.--For purposes of releasing the mortgage, a certificate of release containing the information and statements provided for in subsection (3) and executed as provided in subsection (4) is entitled to be recorded with the county recorder and operates as a release of the mortgage described in the certificate of release. The county recorder shall rely upon the certificate to release the mortgage. Recording of a certificate of release by a title insurer or its agent shall not relieve the mortgagor, or the mortgagor's successors or assigns, from any personal liability on the loan or other obligations secured by the mortgage. A certificate of release recorded pursuant to this section fulfills any other obligation of the mortgagee or mortgage servicer to file a satisfaction or release of the mortgage.

(6) LIABILITY OF TITLE INSURER AND TITLE INSURANCE AGENT.--

(a) In addition to any other remedy provided by law, a title insurer and title insurance agent recording a certificate of release under this section shall be liable to the holder of the obligation secured by the mortgage for actual damage sustained due to the recording of the certificate of release. Reasonable costs and attorneys' fees shall be awarded to the prevailing party.

(b) The title insurer named in a certificate of release filed by a duly appointed agent shall be liable pursuant to this subsection without regard to whether the title insurer authorized the specific certificate of release recorded by the agent.

(c) The title insurer and title insurance agent shall have no liability under this subsection if the title insurer or title insurance agent shows that payment in full of the unpaid balance of the loan secured by the mortgage was made in accordance with the estoppel letter furnished by the mortgagee or the mortgage servicer.

(d) Liability of a title insurer pursuant to this section shall be considered to be a title insurance claim on real property in this state pursuant to s. 627.7865.

(7) RECORDING.--If a mortgage is recorded in more than one county and a certificate of release is recorded in one of such counties, a certified copy of the certificate of release may be recorded in another of such counties with the same effect as the original. In all cases, the certificate of release shall be entered and indexed as satisfactions of mortgage are entered and indexed.

(8) APPLICATION.--This section applies only to a mortgage that secures a loan in the principal amount of \$500,000 or less as determined from the recorded mortgage and contains no disclosure of record that the mortgage secures an open-end or revolving line of credit agreement.

701.06 Certain cancellations and satisfactions of mortgages validated.--All cancellations or satisfactions of mortgages made prior to the enactment of chapter 4138, Acts of 1893, by the mortgagee or assignee of record of such mortgage entering same on the margin of the record of such mortgage in the presence of the custodian of such record and attested by the said custodian and signed by said mortgagee or assignee of record of such mortgage, shall be valid and effectual for every purpose as if the same had been done subsequent to the enactment of chapter 4138, Acts of 1893.

701 should cover assignment of mortgages just as chapter 517 should cover the notes. That being said though the rest of 701 is silent as to the way a transfer should be conducted 701.041 is illustrative of the legislatures concern in adding an orderly system to the process (arguable for the benefit of title agents) however I intend to argue that it should also apply to all assignments. Especially when there is no documentation that the entity that is bringing the action is the proper party. If they are not named in the mortgage then there should be, recorded, a record of the transfer so that the requirement of chapter 701.04 can be met.

I will give a more lengthy explanation later when I have an opportunity to draft it. I realize that this is as new idea but sometimes new ground needs to be plowed. The worst thing that can happen is for the court to tell me no. But I think that if I can argue that this interpretation is necessary to allow some minimum notice to the home owner I may find a sympathetic ear. Just a thought.

Gator Bradshaw

NEIL: I agree with that. And it does add to what I have developed so far. So you are creating a statutory duty to record everything that goes on with the mortgage note because everything that happens to it, produces an effect on the enforcement or enforceability of the mortgage. You are echoing the issue that numerous scholars and academics have raised, as an aside, as to whether mortgage notes were EVER meant to be negotiable instruments at all. Your proposition also raises the level of credibility of the argument in the Creighton Law Journal that there ought not to be a holder in due course, although their argument is a bit twisted and the conclusions obscure.

Perhaps their meaning is that their ought not to be consideration of the status of the holder — in which case your proposition goes from possible or probable to mandatory — i.e., if any holder can enforce the note and foreclose the mortgage, then the original borrower once sued should not be able to be sued again by someone else making a claim through the chain of title even if they are a bona fide purchaser for value (without notice of fraud, statutory violations or other irregularities at the loan closing) and thus a holder in due course. And whoever gets title from either a foreclosure or deed in lieu of foreclosure or short sale, should be able to get title insurance without exceptions for whatever happened in the securitization process.

Your proposition is supported by and lends support in a positive circular way to the notion that the borrower and subsequent title holders of the property or the mortgage (which is an interest in property) is/are entitled to full disclosure and notice, by virtue of state property law, TILA and fiduciary responsibilities of the lender to the borrower and the same fiduciary duties assumed by the Trustee(s) involved — i.e., (Deed Trustee in non-judicial states and perhaps the Pool Trustee of the mortgage aggregator). What I think you are zeroing in on here, Gator, is that the borrower was entitled and continues to be entitled to know who it is that he is doing business with. Clearly an attempt is being made here through slight of hand to distract us from the fiduciary duties of the “lender” and the duties on all participants at closing (title agent, appraiser, mortgage broker, real estate broker, seller etc.) who had knowledge or who come into the knowledge that things were not as they appeared at closing. The idea is to get us to look at the risk of loss rather than the duties of disclosure and fair dealing.

As for criminalization of the conduct, there are statutes in Florida and elsewhere that specifically provide for civil remedies for victims of criminal acts. Thus damages would obtain. However the greater strength of your proposition, as it appears to me, is that the title agent and the lender were under a statutory duty to “report” by way of recording, all transactions relating to the mortgage note. That duty would run all the way up the chain of securitization. Thus when AMBAC was paid a premium to insure the revenue or the principal of the note, this should have been disclosed — something obviously nobody upstream wanted as it would be a disincentive to the borrower to make the payment.

The same would hold true for cross guarantees and credit default swaps or other options, agreements or additional derivative instruments that spread the risk of loss to third parties upon payment and receipt of fees generated out of the single transaction wherein the investor in asset backed securities was the source of the loan and all expenses associated with the loan, which would include those fees paid to offset risk of loss, fees paid to perform the closing, and fees paid for pooling, collateralization and issuance of asset backed securities etc..

FLORIDA DISCOVERY EXAMPLE

In the Circuit Court of the Fifth Judicial Circuit
In and for Hernando County, Florida

WELLS FARGO BANK, N.A., Successor)	
by merger to Wells Fargo Bank Minnesota,)	
National Association, Solely in its capacity)	
as Trustee, under the Pooling and Servicing)	
Agreement dated September 1, 1999,)	
Home Equity Loan Backed Certificates,)	
Series 1999-3)	Case No. CA-08-2364
plaintiff,)	
and defendant on counterclaim,)	
vs.)	Notice of Filing
Samuel Clay Adams, et. al.,)	First Request for Discovery
defendants,)	
vs.)	
Anthony Edward Lipinski,)	
defendant on crossclaim)	

FILED FOR RECORD
KAREN NICOLAI CLERK
HERNANDO COUNTY, FL.
2008 AUG 19 AM 12:44

Notice of Filing

Defendant Samuel Clay Adams hereby gives notice to the Court of the filing of his first request for discovery, including requests for production of documents, requests for admissions, and interrogatories.

Respectfully submitted on this 19th day of August, 2008.



Samuel Clay Adams
c/o 24478 Mae Hight Road
Brooksville, Florida [34601]
phone/fax: 352-799-6290

Certificate of Service

I, Samuel Clay Adams, certify that on the 19th day of August, 2008, a true and correct copy hereof was served upon the attorney for the plaintiff by both mail and facsimile transmission to:

Anthony Edward Lipinski
Law Office of Butler & Hosch, P.A.
3185 South Conway Road, Suite E
Orlando, Florida 32812
Fax no. (407) 381-5577



Samuel Clay Adams

In the Circuit Court of the Fifth Judicial Circuit
In and for Hernando County, Florida

WELLS FARGO BANK, N.A., Successor)
by merger to Wells Fargo Bank Minnesota,)
National Association, Solely in its capacity)
as Trustee, under the Pooling and Servicing)
Agreement dated September 1, 1999,)
Home Equity Loan Backed Certificates,)
Series 1999-3)
 plaintiff,) Case No. CA-08-2364
 and defendant on counterclaim,)
vs.)
Samuel Clay Adams, et. al.,)
 defendants,)
vs.)
Anthony Edward Lipinski,)
 defendant on crossclaim)

FILED FOR RECORD
KAREN NICOLAI CLERK
HERNANDO COUNTY, FL.
2008 AUG 19 AM 12:44

Samuel Clay Adams' First Request for Discovery

To: Named plaintiff, WELLS FARGO BANK, N.A., Successor by merger to Wells Fargo Bank Minnesota, National Association, Solely in its capacity as Trustee, under the Pooling and Servicing Agreement dated September 1, 1999, Home Equity Loan Backed Certificates, Series 1999-3; hereinafter referred to as "WELLS FARGO BANK, N.A"

1. Request for Production of Documents

Pursuant to Florida Rule of Civil Procedure rules 1.280 and 1.351, defendant Samuel Clay Adams hereby requests that named plaintiff WELLS FARGO BANK, N.A. produce the following documents for inspection and copying at a location within the venue of the court, Hernando County Florida, within thirty days of this request. Samuel Clay Adams asks to be informed of the date, time, and place where the requested documents can be copied by his agent; or in the alternative, WELLS FARGO BANK, N.A. may furnish a legible, true and correct copy of each requested document to Samuel Clay Adams at his mailing address as given below, except for the requested promissory note which Samuel Clay Adams requests be presented in open court. The requested documents, excepting the promissory note,¹ are to be served upon Samuel Clay Adams within thirty (30) days after service of this request for production of documents.

¹ Samuel Clay Adams requests that counsel purporting to represent WELLS FARGO BANK, N.A., within 30 days of this request for production of documents, set a hearing with the Court for viewing of the note.

Instructions to Request for Production of Documents:

1. This request for production of documents is directed toward all information known or available to WELLS FARGO BANK, N.A. including information contained in the records and documents in WELLS FARGO BANK, N.A.'s custody or control or available to WELLS FARGO BANK, N.A. upon reasonable inquiry. Where requested documents do not exist, please state that the document does not exist.
2. Each request for production of documents is to be deemed a continuing one. If, after serving any requested document, an authorized officer of WELLS FARGO BANK, N.A. obtains any further documentation pertaining to that request for production, WELLS FARGO BANK, N.A. is requested to serve a supplemental answer setting forth copies of additional documents.

Definitions

1. WELLS FARGO BANK, N.A. includes any and all persons acting for or in concert with WELLS FARGO BANK, N.A..
2. "Document" includes every piece of paper held in WELLS FARGO BANK, N.A.'s possession or generated by WELLS FARGO BANK, N.A.
3. "Samuel Clay Adams" includes all nick-names, pseudonyms and/or misnomers in any papers or documents referencing the defendant or any liability or obligation attributable to him, including Sam Adams, Samuel Adams, Samuel C. Adams, SAMUEL ADAMS, SAMUEL C. ADAMS, and/or SAMUEL CLAY ADAMS.

Documents Requested

1. Subject to the foregoing conditions, produce the original promissory note signed by Samuel Clay Adams and /or alienable in this instant case. If none, state "none."
2. Produce a copy of the allonge attached to the promissory note obligating Samuel Clay Adams and /or alienable in this instant case showing an assignment of the promissory note to WELLS FARGO BANK, N.A. If none, state "none."
3. Produce the Pooling and Servicing Agreement dated September 1, 1999 referenced by the plaintiff in the caption to this action. If none, state "none."
4. Produce the account and general ledger statement of each and every contract WELLS FARGO BANK, N.A. alleges Samuel Clay Adams has with WELLS FARGO BANK, N.A., showing all receipts and disbursements. If none, state "none."

5. Produce all bills of sale, and allonges and agreements illustrating where the promissory note alienable in this instant case was sold or assigned for value. If none, state "none."
6. Produce all insurance claim information relative to the alleged loss of the promissory note alienable in this instant case. If none, state "none."
7. Produce all contracts, agreements, and/or memos illustrating that Anthony Edward Lipinski or the Law Office of Butler and Hosch has delegated authority to represent WELLS FARGO BANK, N.A. in this instant case. If none, state "none."

2. Requests for Admissions

YOU ARE REQUIRED, pursuant to Florida Rule of Civil Procedure rules 1.280 and 1.370, by and through an authorized officer of your company, to answer completely, in writing, and under oath, the following request for admissions, and to return your answers to this request for admissions to Samuel Clay Adams at his mailing address indicated below, within thirty days of the date of service of these request for admissions.

Instructions to Requests for Admissions

1. These requests for admissions are directed toward all information known or available to plaintiff WELLS FARGO BANK, N.A., including information contained in the records and documents in WELLS FARGO BANK, N.A.'s custody or control or available to WELLS FARGO BANK, N.A. upon reasonable inquiry. Your answer to each request for admission shall specifically deny the matter, or set forth in detail the reasons why you cannot truthfully admit or deny the matter. Where requests for admissions cannot be answered in full, they shall be answered as completely as possible and incomplete answers shall be accompanied by a specification of the reasons for the incompleteness of the answer and of whatever actual knowledge is possessed with respect to each unanswered or incompletely answered request for admission.
2. Each request for an admission is to be deemed a continuing one. If, after serving an answer to any request for an admission, an authorized officer for WELLS FARGO BANK, N.A. obtains or becomes aware of any further information pertaining to that request for admission, the authorized officer for WELLS FARGO BANK, N.A. is requested to serve a supplemental answer setting forth such information.

First Request for Discovery - page 3 of 11

3. As to every request for an admission which an authorized officer for WELLS FARGO BANK, N.A. fails to answer in whole or in part, the subject matter of that admission will be deemed confessed and stipulated as fact to the court.²

Definitions

1. "You" and "your" include WELLS FARGO BANK, N.A. and any and all persons acting for or in concert with WELLS FARGO BANK, N.A..
2. "Document" includes every piece of paper held in your possession or generated by you.
3. "Samuel Clay Adams" includes all nick-names, pseudonyms and/or misnomers in any papers or documents referencing the defendant or any liability or obligation attributable to him, including Sam Adams, Samuel Adams, Samuel C. Adams, SAMUEL ADAMS, SAMUEL C. ADAMS, and/or SAMUEL CLAY ADAMS.

Admissions Requested

1. Admit or deny that WELLS FARGO BANK, N.A. is not domestic to the state of Florida.
Admitted ____
Denied ____
2. Admit or deny that WELLS FARGO BANK, N.A. has not registered as a business entity with Florida's Secretary of State or his agent.
Admitted ____
Denied ____
3. Admit or deny that WELLS FARGO BANK, N.A. is not chartered as a bank in Florida.
Admitted ____
Denied ____

² The same holds true if a competent fact witness is not named to corroborate compliance with discovery.

**QUALIFIED EXPERT THIRD
PARTY AUDIT AND CASE
EVALUATIONS UNDER TILA,
RESPA, HOEPA AND
SECURITIZATION**

**LEGAL ANALYSIS OF
SECURITIZATION AND CLAIMS
AGAINST ALL THE PARTIES AT
ALL THE CLOSINGS**

4. Admit or deny that WELLS FARGO BANK, N.A. never at any time took possession of the original promissory note obligating Samuel Clay Adams and/or alienable in this instant case.
- Admitted ____
- Denied ____
5. Admit or deny that the alleged copy of the promissory note submitted as plaintiff's "Exhibit A" attached to the named plaintiff's complaint is not a true and correct copy of any promissory note which WELLS FARGO BANK, N.A. lost or destroyed.
- Admitted ____
- Denied ____
6. Admit or deny that the alleged copy of the promissory note submitted as plaintiff's "Exhibit A" attached to the named plaintiff's complaint includes no allonge showing any assignment to named plaintiff WELLS FARGO BANK, N.A.
- Admitted ____
- Denied ____
7. Admit or deny that no paper showing any assignment of the promissory note alienable in this instant case to named plaintiff WELLS FARGO BANK, N.A. ever existed.
- Admitted ____
- Denied ____
8. Admit or deny that WELLS FARGO BANK, N.A. is not in possession of the account and general ledger statement, authenticated by a competent fact witness, proving a deficiency owed by Samuel Clay Adams.
- Admitted ____
- Denied ____

9. Admit or deny that absent possession of the account and general ledger statement, authenticated by a competent fact witness, proving a deficiency owed by Samuel Clay Adams, WELLS FARGO BANK, N.A. cannot prove a deficiency owed by Samuel Clay Adams.
Admitted ____
Denied ____
10. Admit or deny that it is the practice of WELLS FARGO BANK, N.A. to charge-off and sell notes in arrears after collecting insurance on the outstanding amount of indebtedness.
Admitted ____
Denied ____
11. Admit or deny that after WELLS FARGO BANK, N.A. charges off and sells evidence of indebtedness, the commercial paper illustrating the duty between the mortgagor and mortgagee or assignee becomes legally uncollectible.
Admitted ____
Denied ____
12. Admit or deny that WELLS FARGO BANK, N.A. is not the real party in interest in these proceedings.
Admitted ____
Denied ____
13. Admit or deny that WELLS FARGO BANK, N.A. has not contracted with Anthony Edward Lipinski, of the Law Office of Butler & Hosch, P.A., 3185 South Conway Road, Suite E, Orlando, Florida 32812 to represent WELLS FARGO BANK, N.A. in these proceedings.
Admitted ____
Denied ____

3. Interrogatories

YOU ARE REQUIRED, pursuant to Florida Rule of Civil Procedure rules 1.280 and 1.340, by and through an authorized officer of your company, to answer completely, in writing, and under oath, the following Interrogatories, and to return your answers to these Interrogatories to Samuel Clay Adams at his mailing address indicated below, within thirty days of the date of service of these Interrogatories.

Instructions to Interrogatories

1. These interrogatories are directed toward all information known or available to plaintiff WELLS FARGO BANK, N.A., including information contained in the records and documents in WELLS FARGO BANK, N.A.'s custody or control or available to WELLS FARGO BANK, N.A. upon reasonable inquiry. Where interrogatories cannot be answered in full, they shall be answered as completely as possible and incomplete answers shall be accompanied by a specification of the reasons for the incompleteness of the answer and of whatever actual knowledge is possessed with respect to each unanswered or incompletely answered interrogatory. If sufficient space for your answer is not provided herein, you may attach additional papers with your answers and refer to your attached answers in the space provided herein.
2. Each interrogatory is to be deemed a continuing one. If, after serving an answer to any interrogatory, an authorized officer for WELLS FARGO BANK, N.A. obtains or becomes aware of any further information pertaining to that interrogatory, the authorized officer for WELLS FARGO BANK, N.A. is requested to serve a supplemental answer setting forth such information.

Definitions

1. "You" and "your" include WELLS FARGO BANK, N.A. and any and all persons acting for or in concert with WELLS FARGO BANK, N.A.
2. "Document" includes every piece of paper held in your possession or generated by you.
3. "Samuel Clay Adams" includes all nick-names, pseudonyms and/or misnomers in any papers or documents referencing the defendant or any liability or obligation attributable to him, including Sam Adams, Samuel Adams, Samuel C. Adams, SAMUEL ADAMS, SAMUEL C. ADAMS, and/or SAMUEL CLAY ADAMS.

Interrogatories

1. State the name, job title, and business address of each person providing information in response to these discovery requests.
2. State the type of business organization WELLS FARGO BANK, N.A. is, and name every State of the union in which it is chartered or registered.
3. State the name, job title, and business address of each person who has first hand personal knowledge of the time and/or circumstances under which the promissory note obligating Samuel Clay Adams and/or alienable in this instant case was lost or destroyed as alleged in the complaint.

First Request for Discovery - page 8 of 11

- [illegible]

Interrogatories

1. State the name, job title, and business address of each person providing information in response to these discovery requests.
2. State the type of business organization WELLS FARGO BANK, N.A. is, and name every State of the union in which it is chartered or registered.
3. State the name, job title, and business address of each person who has first hand personal knowledge of the time and/or circumstances under which the promissory note obligating Samuel Clay Adams and/or alienable in this instant case was lost or destroyed as alleged in the complaint.

First Request for Discovery - page 8 of 11

4. State the names of all persons or entities, in order of assignment, who at any time were constructive holders or holders in due course of the promissory note obligating Samuel Clay Adams and/or alienable in this instant case prior to its alleged assignment to WELLS FARGO BANK, N.A.

5. Explain why the alleged copy of the promissory note submitted as "Exhibit A" attached to the named plaintiff's complaint includes no allonge showing any assignment of the note to named plaintiff WELLS FARGO BANK, N.A.

6. Describe in detail when, where and how the promissory note obligating Samuel Clay Adams and/or alienable in this instant case came to be lost or destroyed as alleged in the complaint.

7. If named plaintiff WELLS FARGO BANK, N.A. did not keep or cannot produce a copy of an allonge or other paper showing assignment to WELLS FARGO BANK, N.A. of the promissory note obligating Samuel Clay Adams and/or alienable in this instant case, explain why.

Executed on this _____ day of _____, 2008.

name and title of authorized officer or agent
WELLS FARGO BANK, N.A.

State of: _____

County of: _____

Before me, the undersigned, a Notary Public in and for said County and State on this _____ day of _____, 2008, personally appeared _____, who is () personally known to me, or () proven by proper identification, to be the person who executed the within and foregoing instrument. Type of ID: _____

WITNESS my hand and official seal:

Signature _____
Notary Public (seal)

Request for Discovery prepared and submitted by: _____

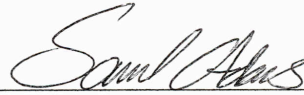
mailing address:


Samuel Clay Adams
c/o 24478 Mae Hight Road
Brooksville, Florida 34601
phone/fax: 352-799-6290

Certificate of Service

I, Samuel Clay Adams, certify that on the 19th day of August, 2008, a true and correct copy hereof was served upon the attorney for the plaintiff by both certified mail and facsimile transmission to:

Anthony Edward Lipinski
Law Office of Butler & Hosch, P.A.
3185 South Conway Road, Suite E
Orlando, Florida 32812
Fax no. (407) 381-5577



Samuel Clay Adams

CERTIFIED TO BE A TRUE COPY
KAREN NICOLAI
CLERK OF THE CIRCUIT COURT



BY: Sonya Sanders D.C.
THIS 19 DAY OF Aug A.D. 2008

ARTICLE BY GRETCHEN MORGENSON

Published: November 1, 2008

AS a senior mortgage underwriter, Keysha Cooper was proud of her ability to spot fraud and other problems in a loan application. A decade of vetting mortgage documents had taught her plenty, she says.

But as a senior mortgage underwriter at Washington Mutual during the late, great mortgage boom, Ms. Cooper says she found herself in a vise. Brokers squeezed her from one side, her superiors from the other, she says, and both pressured her to approve loans, no matter what.

“At WaMu it wasn’t about the quality of the loans; it was about the numbers,” Ms. Cooper says. “They didn’t care if we were giving loans to people that didn’t qualify. Instead, it was how many loans did you guys close and fund?”

Ms. Cooper, 35, was laid off a year ago and is still unemployed. She came forward to discuss her experiences at the bank in order to help shareholders recover money from WaMu executives.

Ms. Cooper is one of 89 employees whose stories fill a voluminous complaint filed against officers of the company by the Ontario Teachers’ Pension Plan board, a big shareholder. Topping the list of defendants is Kerry K. Killinger, the WaMu chief executive who was ousted in mid-September.

WaMu was seized by federal regulators in late September, the biggest bank failure in the nation’s history. It was sold to JPMorgan Chase for \$1.9 billion.

The shareholder complaint depicts WaMu’s mortgage lending operation as a boiler room where volume was paramount and questionable loans were pushed through because they were more profitable to the company.

When underwriters refused to approve dubious loans, they were punished, she says.

MS. COOPER started at WaMu in 2003 and lasted three and a half years. At first, she was allowed to do her job, she says. In February 2007, though, the pressure became intense. WaMu executives told employees they were not making enough loans and had to get their numbers up, she says.

“They started giving loan officers free trips if they closed so many loans, fly them to Hawaii for a month,” Ms. Cooper recalls. “One of my account reps went to Jamaica for a month because he closed \$3.5 million in loans that month.”

Although Ms. Cooper couldn’t see it, the wheels were already coming off the subprime bus.

“If a loan came from a top loan officer, they didn’t care what the situation was, you had to make that loan work,” she says. “You were like a bad person if you declined a loan.”

One loan file was filled with so many discrepancies that she felt certain it involved mortgage fraud. She turned the loan down, she says, only to be scolded by her supervisor.

“She told me, ‘This broker has closed over \$1 million with us and there is no reason you cannot make this loan work,’ ” Ms. Cooper says. “I explained to her the loan was not good at all, but she said I had to sign it.”

The argument did not end there, however. Ms. Cooper says her immediate boss complained to the team manager about the loan rejection and asked that Ms. Cooper be “written up,” with a formal letter of complaint placed in her personnel file.

Ms. Cooper said the team manager told her to “restructure” the loan to make it work. “I said, how can you restructure fraud? This is a fraudulent loan,” she recalls.

Ms. Cooper says that her bosses placed her on probation for 30 days for refusing to approve the loan and that her team manager signed off on the loan.

Four months later, the loan was in default, she says. The borrower had not made a single payment. “They tried to hang it on me,” Ms. Cooper said, “but I said, ‘No, I put in the system that I am not approving this loan.’ ”

Brokers often tried to bribe Ms. Cooper to approve loans, she says. One offered to pay \$900 to send her son to football summer boot camp if she would approve a loan that had been declined by a host of other lenders. “I told him no and not to disrespect me like that again,” Ms. Cooper says.

Hidden fees meant brokers could easily make between \$20,000 and \$40,000 on a \$500,000 loan, Ms. Cooper says.

“WaMu was allowing brokers to get 6 to 8 percent off one loan,” she says. “If I had a loan where the borrower was already tight and then I saw the broker is getting \$10,000 or \$20,000, I would cut their fees back. They would get so upset with me.”

Ms. Cooper says that loans she turned down were often approved by her superiors. One in particular came back to haunt WaMu.

Vetting a loan one day, Ms. Cooper says she became suspicious when a photograph of the house being bought showed one street address while documents deeper in the file

showed a different address. She contacted the appraiser, and recalls that he said that he must have erred and that he would send her the correct documents.

“So then he sent me an appraisal with a picture of the same house but this time with the right number on it,” Ms. Cooper recalls. “I looked the address up in our system and could not find it. I called the appraiser and said, ‘Please investigate.’ ”

The appraiser came back, reporting that a visit to the California property had found everything in order and in agreement with the original appraisal. “I was so for sure that it was fraud I wanted to get on an airplane,” Ms. Cooper says.

The \$800,000 loan was approved, but not by Ms. Cooper. Six months later, it defaulted, she says. “When they went to foreclose on the house, they found it was an empty lot,” she recalls. “I remember clear as day this manager comes over to me and asks, ‘Do you remember this loan?’ I knew just what she was talking about.”

Rejecting loan after loan, however, gave her battle fatigue. “The more you fight, the more you get in trouble,” she says. She was written up three or four times at WaMu.

After WaMu’s mortgage lending unit laid her off, she applied for work in its retail banking division. She was turned down, she suspects, because of the critical letters in her personnel file.

Ms. Cooper’s biggest regret, she says, is that she did not reject more loans. “I swear 60 percent of the loans I approved I was made to,” she says. “If I could get everyone’s name, I would write them apology letters.”

CHAD JOHNSON, a partner at Bernstein, Litowitz Berger & Grossmann, is lead counsel for shareholders in the suit. He said: “Killinger pocketed tens of millions of dollars from WaMu, while investors were left with worthless stock.” With WaMu gone, he added, “it is all the more important that Killinger and his co-defendants are held accountable.”

The lawyer representing WaMu and Mr. Killinger did not return a phone call seeking comment.

Ms. Cooper hopes to return to the mortgage business soon. “I loved underwriting because it’s about being able to put a person in their dream home,” she says. “But messing these borrowers around was wrong.”

CJ-Pro Se Ingenuity

If you didn't get help, this may be worth a try, and I am NOT a lawyer, just another person using legal issues to delay, and hopefully overturn, our own foreclosure...

BTW, I attended the "sale" on the county office steps for the day my home was set to sell, just recently, although I had already successfully bought time with a delay tactic and had the date pushed back...just because I was curious, and wanted to see the kind of people who attended the auctions looking for "deals", as well as see if anyone was there specifically hoping to snag MY home....anyways...

Here is my idea. First, **get up EARLY and fax a demand to any all fax numbers you have for the lender, the trustee company, mortgage servicer, any legal vendor handling the noticing that you have received, or the final "notice of trustee sale" you got 3+ weeks ago.**

In your fax, besides noting your address, loan #, name, contact info, etc. and "URGENT-TRUSTEE SALE DATE TODAY AT xxx A.M (or P.M.), say something like "I immediately request (insist? your call) a suspension of the foreclosure proceedings, especially the trustee sale scheduled for later today at xx a.m., due to (choose something to this effect, per your comfort level with the wording) apparent inconsistencies between the legal notices I have received regarding this default, foreclosure and trustee sale and my original loan documents I signed.

I am extremely serious about my options to pursue legal recourse against any entity, company, loan investor, 3rd party vendor or other related party who participates in finalizing this foreclosure at today's trustee sale, or afterwards.

Please notify me immediately that you are in receipt of this notice."

Now, not being a lawyer, i am loathe to say what will work, BUT, anything to save your home is something you may be into, right? So here is what I am guessing will happen IF you can get that fax into the hands of someone smart enough to know about this new wrinkle in foreclosure lawsuits IN TIME tomorrow:

They hopefully will notify the person handling the sale (the one with the clipboard, there to see if there are any buyers, otherwise they report back into each lender on which properties had new buyers, and which the lenders have to "buy back" themselves) that your property sale has been cancelled for that day by beneficiary request.

If not, or you didn't get your fax to anyone on time (or phone call to any/all phone numbers on your Notice of Trustee Sale-because those generally go TO the company/vendor who has the power to STOP the sale minutes before it occurs), bring a copy of the fax TO THE SALE LOCATION. FIND the person with the clipboard before they start announcing the homes for sale tomorrow, or at least TELL them when they ask if there are any buyers present for YOUR

address that you have a legal issue that might affect the ability to sell it to ANYONE (a new buyer, or reverting back to the lender if no buyer). Ask for 30 seconds of their time privately if possible, and without giving them any sob story, give them the copy of the fax, TELL them you already faxed it off to the lender, trustee, servicer, etc. and that the property may be a legal hot potato, for ALL parties (inferring THEM TOO) if the sale proceeds tomorrow...and that maybe they may want to handle it in a fashion that is conservative regarding what the status may be for LEGALLY continuing with the sale tomorrow.

They may be savvy enough to not want to deal with it, offer it to any new buyer (probably very unlikely anyone will buy your house tomorrow EXCEPT the lender "buying" it back themselves after no buyer shows), or report back to your lender after they get back to their office anything other than, "um, you guys (to your lender) get a fax regarding a legal thing on this address? Because the homeowner showed up and gave me a copy of the fax, and I am pretty uncomfortable with how I fit in here...so....instead of this property reverting to you, maybe you need to look into this before taking it back, and make sure someone in your legal department is seeing this fax?".

Now, as far as I can tell, assuming there is no NEW buyer tomorrow for your home, the "crier" or "cryer" (as in town crier from the olden days) handling the sales tomorrow just returns news to the lenders holding the notes on tomorrow's list of addresses as to which properties had no buyers, i.e. which properties were cleared for the lenders to take back, which ends your foreclosure and ownership. That must happen AFTER the crier reports to them, in some sort of document process that I assume can't just magically occur instantaneously on the "courthouse steps" or whatever location your Sale Notice states...

This means you can possibly STOP tomorrow's sale, even if you see no proof of your success or hear from anyone before the end of the business day. Perhaps the crier will be kind enough to talk to you AFTER their business is done and they have concluded the rest of the list and everyone has dispersed. They may tell you enough to confirm that it isn't THEM that does any paperwork to conclude the foreclosure "repossession", if my assumptions are correct.

Be SUPER respectful of them, their job, and their knowledge. Don't get in their face in any negative, threatening or pathetic (pleading, crying) kind of way. Just get that seed of doubt in them, that they are part of a process that may be going legally awry, since I doubt they want to touch any unusual situation, and I don't even think THEY personally "sell" the home back to the lender either.

If you luck out, you will get an extension on the sale date, and have time to regroup. What I DON'T know is how much to emphasize to the lender (or any party on their side of the foreclosure proceedings) how far you may be considering going legally, or how MUCH you know about possible legal defenses to delay or overturn the foreclosure. In other words, if you tell them too much, and they figure out what your possible plans are, what if that gives them time

to go FIND the original note??? There goes the surprise factor of one of your angles if you take it to court, hoping to overturn the entire thing per the encouraging info from this site.

I am extremely interested in hearing what happens tomorrow, and hope you are reading this in time. Again, PLEASE consider my ideas as well-intentioned and NOT proven, NOT coming from a lawyer and NOT coming from someone who has successfully concluded my own case! I felt I had to respond when I saw your sale date, that's all! I delayed my own date by different means, focusing on other improprieties in the process that I pointed out to the lender, although it was only a few days before the auction date as well.

Good luck, and if you get your delay, read every link to other good sites, including some of my faves:

The Home Equity Theft Report, Homeownership Preservation Foundation, and San Diego Predatory Lending, and even the ABA, who is reporting the "true sale" (who really has the Note) legal defense as REAL and worthy, legally sound, etc. in their attorney forums and news!

OVERVIEW OF SECURITIZATION

*ABSTRACT FROM FORDHAM LAW REVIEW
available in full on blogsite*

Wall Street firms securitize subprime home loans without determining if loan pools contain predatory loans. In the worst situations, secondary market actors have actively facilitated abusive lending. In the most notorious example to date, in 2003, a federal jury held Lehman Brothers liable, as an investment bank and provider of a warehouse line of credit to the subprime lender First Alliance Mortgage Corp. (FAMCO), for aiding and abetting FAMCO's fraud on borrowers. See infra notes 106-107 and accompanying text.

Subprime lenders will try to pass off their worst loans through securitization—the “lemons” problem that George Akerlof described. See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. Econ. 488 (1970).

Securitization inflicts negative externalities on subprime borrowers in at least four ways.

- 1. First, securitization funds small, thinly capitalized lenders and brokers, thus enabling them to enter the subprime market. These originators are more prone to commit loan abuses because they are less heavily regulated, have reduced reputational risk, and operate with low capital, helping to make them judgment-proof.**
- 2. Second, securitization dilutes incentives by lenders and brokers to avoid making loans with excessive default risk by allowing them to shift that risk to the secondary market, which has other ways to protect itself.**
- 3. Third, securitization denies injured borrowers legal recourse against assignees by triggering the holder-in-due-course rule and impeding work-outs.**
- 4. Lastly, securitization drives up the price of subprime loans because investors demand a lemons premium for investing in subprime mortgage-backed securities. *[Editor's Note: This extra cost, added to appraisal inflation, plus undisclosed fees to pretender lenders results in a smorgasbord of undisclosed parties, fees and transaction terms that the***

borrower cannot know because the information was intentional withheld from him/her/ them. Besides the obvious demands for refunds, rebates, points, interest and other payments, and the right to rescission which gets continued indefinitely by the failure to disclose the true lender, the costs of the loan not only to not match the APR on the GFE, they actually total more than even the most liberal usury standards in virtually all states even where there are “exemptions” because the “lender” (hereinafter pretender lender) was a stand-in for an unregistered, unregulated lender that was dictating the terms and conduct of the parties]

The resulting cost to borrowers is substantial. One recent study estimated that lengthy prepayment penalties in securitized subprime loans boosted borrowers' risk of foreclosure by sixteen to twenty percent. Balloon clauses in those loans raised borrowers' risk of foreclosure by an additional fifty percent. Securitization also exacts significant tolls on municipalities by fueling predatory lending. When borrowers, saddled with onerous loan payments, lose or cannot maintain their homes, cities must contend with abandoned and deteriorating properties, which strain city resources and threaten the vitality and stability of neighborhoods. See Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 Conn. L. Rev. 355 (2006) (describing externalities that predatory lending imposes on cities); see also William C. Apgar & Mark Duda, *Collateral Damage: The Municipal Impact of Today's Mortgage Foreclosure Boom* 4 (May 11, 2005), available at http://www.hpfonline.org/PDF/Apgar-Duda_study_final.pdf (estimating that vacant properties from foreclosures cost cities more than \$30,000 per unit in some cases); Family Housing Fund, *Cost Effectiveness of Mortgage Foreclosure Prevention* 16-17 (1998) (estimating that Minneapolis and St. Paul lost \$2000 on average in tax revenues on vacant homes and spent up to \$40,000 per home rehabilitated and \$10,000 per home demolished).

PREDATORY LENDING DEFINED

Predatory lending is a syndrome of loan abuses that benefit mortgage brokers, lenders, and securitizers to the serious detriment of borrowers. Such abuses include the following:

Loans structured to result in seriously disproportionate net harm to borrowers

A major example is asset-based lending, which consists of loans to borrowers whom the lender knows cannot afford the monthly payments. Pushing borrowers to take on more debt than they need, steering prime-eligible borrowers to subprime loans, and refinancing low-interest loans into costlier loans with no justification can also inflict seriously disproportionate net harm on borrowers.

Rent seeking

Numerous subprime loans charge fees and interest rates that are exorbitant compared to the risk that the borrowers present. Rent seeking also encompasses steering and charging prepayment penalties and points without a corresponding cut in the interest rate, as is customary in the prime market.

Loans involving illegal fraud or deception

Many predatory loans involve fraud or deception by brokers or lenders. For example, brokers or lenders may procure inflated appraisals or make false promises to refinance loans down the road on better terms.

Other forms of non-transparency that do not amount to fraud

These occur when lenders or brokers withhold information from borrowers in circumstances that fall short of fraud. For example, subprime lenders keep rate sheets containing their prices secret because they do not want borrowers to shop for better rates. Neither the Truth in Lending Act nor the Real Estate Settlement Procedures Act requires disclosure of rate sheets to borrowers. This secrecy impedes comparison shopping.

[Editors Note: But TILA and RESPA DO require that the disclosure that IS made be true and accurate. By withholding the true nature of the transaction, the true parties in interest, and the true cost of the loan and in fact representing otherwise, this non-disclosure DOES amount to fraud and certainly constitutes violations of regulatory legislation.]

Loans requiring borrowers to waive meaningful legal redress

Subprime loans often contain mandatory arbitration clauses that require borrowers to take disputes to arbitration and preclude them from joining class actions. Such provisions deny borrowers access to the courts.

Lending discrimination

Many predatory loans impose more onerous terms on members of protected groups, resulting in discrimination even after controlling for risk

Servicing abuses

Once loans are securitized, a servicer typically becomes responsible for collecting the loan payments and distributing the proceeds. Some servicers have employed abusive servicing practices, including charging unjustified fees, actively pushing borrowers into default, and employing exploitative collection methods.

Litigation Risk to Investors

Investors face the further risk that borrowers will sue the trusts that hold the securitized loans for wrongdoing in the origination of those loans. Successful borrower litigation, especially litigation that results in large compensatory or punitive damages awards against the trust, can have a negative and serious impact on investors' returns. Thus, securitization deals must be structured to avoid litigation risk altogether or to predict and price it efficiently.

Trusts expose themselves to liability

if they aid or participate in unlawful activities by loan originators, most often by being involved with the actual loan underwriting. Such participation can give rise to liability for violations of an array of laws ranging from consumer protection and credit discrimination statutes to conspiracy and fair housing laws.

Some laws impose liability on assignees even absent active wrongdoing. The Truth in Lending Act (TILA) allows borrowers to recover against assignees for originators' violations if the violations are "apparent on the face of" federal disclosure statements. {15 U.S.C. § 1641(a), (e)(2) (2000). Furthermore, if an originator fails to make the required disclosures to borrowers,

the borrower may exercise the right of rescission against the assignee even if the TILA violation is not apparent on the face of the loan documents.

Id. § 1641(c). 67. Id. §§ 1601-1667. 68. Id. § 1641(d)(1). 69. 16 C.F.R. § 433.2 (2005). This so-called FTC Rule only governs home mortgage loans that involve the sale of goods or services. Id. Some courts have construed the rule to hold, however, that if state consumer protection laws do not permit affirmative relief, consumers are limited to defensive actions against assignees. See, e.g., LaBarre v. Credit Acceptance Corp., 175 F.3d 640 (8th Cir. 1999). 70. See, e.g., N.J. Stat. Ann. § 46:10B-27(b)-(e) (West Supp. 2006); N.Y. Banking Law § 6-l(7), (11)-(13) (McKinney Supp. 2007). See generally Baher Azmy, Squaring the Predatory Lending Circle, 57 Fla. L. Rev. 295 (2005) (surveying state laws). Increasingly, federal regulators have preempted state anti-predatory lending laws that impose assignee liability. See Bank Activities and Operations: Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004) (to be codified at 12 C.F.R. pts. 7, 34) (ruling that OCC } principal federal anti-predatory lending law, the

Home Ownership and Equity Protection Act (HOEPA),

imposes strict liability on assignees who purchase specific high-cost loans. In general, holders of HOEPA loans are "subject to all claims and defenses . . . that the borrower could assert against the originator of the mortgage."

Regulations implementing the Federal Trade Commission Act impose liability on assignees for "all claims and defenses which the debtor could assert against the seller." Lastly, several states have enacted anti-predatory lending laws that impose liability on assignees.

Although these statutes allow for assignee liability, in reality the application of the laws is quite narrow. In some cases, the laws require active participation by the assignees. In others, the laws only apply to a small fraction of loans, as is true for HOEPA.

ASSIGNEES

For most potential claims, however, assignees who have distanced themselves from the unlawful activities of originators can find shelter in the holder-in-due course doctrine, which insulates them from most claims for unconscionability, breach of contract, and fraud. To satisfy the requirements of a holder in due course, the purchaser must be the holder of a negotiable note, who took the note for value, in good faith, and without notice that the note contains certain defects.

Definition of a “holder,”

the assignee must possess the note and the note must be “issued or indorsed to him or to his order or to bearer or in blank.” If a note is payable to an identified person or entity, the note must bear an endorsement or be among a group of loans to which an allonge was attached. When assignees qualify as holders in due course, they take the notes free of most defenses to nonpayment and affirmative claims that borrowers could have pursued against the originators.

Borrowers can defeat assignees’ status as holders in due course.

When an assignee has notice of a potential claim, for example, that a note was obtained through fraud, the assignee is deemed to have sufficient notice to abrogate its status as a holder in due course. Assignees obviously have “notice” if they played a role in the wrongdoing. Notice similarly exists if the borrower brought the claim against the assignor prior to the assignment. In other instances, failures by originators to comply with technical requirements of the holder-in-due-course rule can open the door to assignee liability. Despite the demanding nature of these requirements, failure to comply with the technical requirements of the holder-in-due-course rule is rarely litigated in predatory home loan cases.

Courts have also held that assignees can lose holder-in-due-course protection if their relationships with loan originators were sufficiently close to make the assignees agents of the originators. *See, e.g.,* England v. MG Invs., Inc., 93 F. Supp. 2d 718, 722-23 (S.D. W. Va. 2000) (denying summary judgment on a fraud claim where evidence showed that the originator was acting as an agent of the assignee).

Imputed Knowledge

Even where no agency relationship exists between the originator and the assignee, courts have imputed knowledge of an originator's wrongdoing to an assignee based on the strength and nature of ties between the assignor and the assignee. *See Williams, 974 F. Supp. at 26-27 (imputing knowledge to the assignee where an officer of the originator, who had "direct contact" with the borrower, was alleged to be a principal and shareholder of the assignee).*

To recap, credit risk, prepayment risk, and litigation risk have the potential to make investors gun-shy about investing in securitizations. Allaying these concerns is a central task of structured finance.

The Unholy Alliance of Marginal Lenders and Loan Aggregators

Increasingly, subprime lenders are selling whole loans to outside loan aggregators, who bundle and securitize them. Generally, such aggregators are affiliates of Wall Street investment banks. Major players include Credit Suisse First Boston, Morgan Stanley, Lehman Brothers, Bear, Stearns & Co., Merrill Lynch, Greenwich Capital, UBS, Bank of America, and Deutsche Bank Securities. Subprime aggregation is popular because it offers advantages to both investment banks and lenders. These advantages are particularly strong for small or poorly-capitalized lenders. Aggregation permits these lenders to sell loan pools for securitization that would otherwise be too small to provide diversification.

RENTING THE REPUTATION OR CHARTERS OF BETTER KNOWN 3RD PARTIES

More importantly, **aggregation enables marginal lenders to obtain financing despite obscure or questionable reputations by "renting" the aggregator's reputation for quality securities.** Wall Street prizes aggregation because it helps boost investment banks' underwriting business and helps them assemble diversified loan pools.

Furthermore, it allows investment banks to enjoy subprime profits with reduced legal risk, assuming that the aggregators qualify as holders-in-due course and do not participate in underwriting loans. Because they have minimal exposure to suits, aggregators have reduced incentives to guard against abusive practices.

Lenders Do Not Always Retain an Interest in the Subordinated Tranches

In the process of providing credit enhancements, the lender (through an affiliate) often buys securities in the subordinated tranches, which are rated double- or single-B or are simply unrated. While this makes it appear that the lender retains the riskiest securities, this is not necessarily the case. Instead, outside investors buy many of these so-called "residuals," some at the time of offering and others through later secondary market re-sales. There is strong demand by outside investors (principally real estate investment trusts, hedge funds, and overseas investors) for the double- and single-B subprime tranches. In addition, lenders can resell their subprime residuals to outside investors through bonds known as Collateralized Debt Obligations (CDOs). Essentially, CDOs securitize residuals from RMBS and other assets.

MORAL HAZARD

Significantly, U.S. subprime with RMBS have comprised the single “largest collateral asset class in [CDOs] since the inception of the product in 1999.” A central purpose of residuals is to force lenders to retain the bulk of the credit risk they create. **However, when lenders with subprime residuals shift them off their books through CDOs, they are able to escape the market discipline that residuals were meant to exert.** As one CDO manager put it, **CDOs create “an awful lot of moral hazard in the [subprime RMBS] sector.”** {Allison Pyburn, *CDO Investors Debate Morality of Spread Environment*, Asset Securitization Rep., May 9, 2005; accord Jody Shenn, *MBS Pioneer Has Concerns: Risk-Passing, GSE Reforms, Commercial Realty*, Am. Banker, June 19, 2006, at 1. See, e.g., Beidl, *supra* note 103; Neil J. Morse, *Making and Selling Good Loans*, Mortgage Banking, June 2003, at 107; Morse, *supra* note 99; Shenn, *supra* note 114; GAO, *supra* note 109, at 81}

Recourse Clauses Are Limited in Reach and Are Not Consistently Enforced

Recourse clauses are relatively common and require lenders to take back bad loans. Their practical effect is limited, however, by spotty enforcement. {See Shenn, *supra* note 114 (noting that investors rarely attempt to enforce reps and warranties); Shenn, *supra* note 123, at 1; Interview with Kevin Byers (June 9, 2005). When delinquencies rise, securitized trusts and investment banks are more likely to insist that originators buy back bad loans and that is happening now. Even so, the percentage of affected loans is small. Credit Suisse Group found, for example, that among 208 subprime RMBS bond deals that it studied for 2005 and 2006, the dollar value of mortgages repurchased was “well under 1% of the total value of mortgages in the pools with at least one repurchase” Ruth Simon & Michael Hudson, *Bad Loans Draw Bad Blood*, Wall St. J., Oct. 9, 2006, at C1. Even this limited enforcement of recourse clauses is cyclical in nature and the market has a very short memory. **As one commentator observed, “In a rising market, even a bad loan is a good loan.”** *Id.* (quoting Nate Redleaf, research analyst, Imperial Capital LLC). In the meantime, recent potential buyers of subprime lenders have sought “to avoid inheriting the subprime sellers’ costly obligation of having to buy back the loans already sold in the secondary market because of borrowers’ defaults.” Lingling Wei, *Subprime Lenders Are Hard Sell*, Wall St. J., Dec. 5, 2006, at C5. The dictates of federal bankruptcy law also place limits on the scope of recourse clauses. **Under the bankruptcy code, the sale of loans to the SPV must constitute a “true sale”** in order for the receivables to be excluded from the bankruptcy estate in the event of the originator’s failure. See Schwarcz, *supra* note 38, § 4:1. **If recourse exceeds specific levels—generally defined as historical In some cases, lenders refuse to honor the placement agent does not bear credit risk in the transaction, however, it does not have the same incentives as investors for more thorough risk assessment.**

In some cases, lenders refuse to honor recourse clauses and trustees decide that going to court would be unduly expensive. In other cases, poorly capitalized lenders or brokers have gone out of business or lack the funds to buy back their old, non-performing loans. As a prominent industry attorney observed: “[I]f you purchase loans from small operators, there may not be much water in the well of their repentance. . . .

If you do postclosing due diligence and you find 10 percent of your portfolio is affected, what loan broker, with no capitalization, can take back the loan?"

Even when recourse is successful, investors have to worry about the quality of the replacement collateral. Lenders who accept recourse must substitute new loans for the bad loans. However, ***lenders often obtain deal provisions that allow them unilaterally to substitute collateral. Thus, recourse provisions, which are supposed to give lenders incentives to desist from making predatory loans, actually enable lenders to substitute one bad loan for another.*** *As one analyst warned: Once losses eat through the original equity investment, the trading desk has a huge incentive to stuff the portfolio with high margin, risky assets to maximize the residual cash flows.* If investors choose to participate in these deals, they need to carefully examine the structural handcuffs that will prevent [such] trading

Finally, even if a lender does take back a predatory loan, it will not necessarily lose money. If the borrower still has equity in the home, the lender may persuade him or her to refinance the loan, extract new, large fees, and eventually foreclose.

Retained Servicing Rights Are Not the Norm

It is rare these days for lenders to retain servicing rights. Today, the loan servicing industry is highly concentrated, largely due to economies of scale. Rather than insist that lenders retain servicing rights—as a way to discipline lenders—investors or bond insurers usually press them to employ outside master servicers to ensure a high level of servicing.¹⁷³ As a result, the originator's loan servicing rights are generally sold for a fee to one of a small group of specialist firms in the field. Thus, high potential servicing costs are not disincentives to lenders making predatory loans.

Securitization Impedes Borrowers' Ability to Obtain Relief from Predatory Loans

Thinly capitalized lenders and brokers have the most to gain from securitization because they lack other forms of financing. For undercapitalized firms, securitization has two important effects. First, it enables them to enter the subprime industry by providing them with financing. Second, it enables them to stay in operation despite low capital because they can plow the proceeds from securitization into a fresh set of loans, which in turn can be securitized. In the process, originators can render themselves judgment-proof from lawsuits by borrowers by continually shedding their assets through securitization, distributing the profits to shareholders, and draining the company of capital.

Securitization Impedes Work-outs with Injured Borrowers

Securitization complicates and often blocks work-outs with borrowers who are harmed by predatory loans. This is because the underlying securitization contracts tie the trustee's and servicer's hands if they attempt to negotiate a repayment plan in lieu of foreclosure. The value of the securities and the amount of their returns are based on cash flows that are determined, in part, by the loan terms. **To protect these cash flows, securitization contracts typically prohibit changes to the terms of the underlying loans.** In addition, securitization contracts often prohibit servicers from waiving prepayment penalties and other loan provisions.

Another roadblock arises when subprime lenders securitize prepayment penalties through bonds known as Net Interest Margin Securities (NIMS). **If a borrower seeks reformation of a predatory loan, the reformation could be deemed a prepayment, thus triggering**

prepayment penalties. Theoretically, the prepayment penalties could be waived as part of the work-out. However, if the prepayment penalties have been securitized in a NIMS, contractually they cannot be waived. S&P has assured this by insisting that issuers and servicers provide representations and warranties that they will rigidly enforce the prepayment penalties being securitized.

The Holder-in-due-course rule Creates Inequities

The holder-in-due-course rule also creates inequities when loans are securitized. When loans are sold, borrowers lose the ability to assert various defenses and affirmative claims against the new holders of the loans. Thus, the very fact of the loan sale increases the value of the loan to the assignee with no direct benefit to the borrower. At the same time, the borrower is harmed by the loss of full legal relief for a problem loan. The impact of the holder-in-due-course rule becomes particularly perverse when it prevents borrowers from defending foreclosure actions by assignees. Ultimately, borrowers have no control over whether their loans are sold or held by lenders in portfolio. As a matter of fairness, the law should not prevent borrowers from obtaining complete relief from abusive loans, especially because securitization creates added incentives toward predatory lending.

Subprime Borrowers Lack Effective Bargaining Power

The marketing techniques that subprime lenders and brokers employ often impede borrowers' ability to comparison shop and bargain for loans. The most abusive loans are targeted at unsophisticated people who believe that their ability to borrow money is limited. This targeting, coupled with high pressure tactics, such as promoting time-limited deals that require borrowers to commit or lose the option to borrow at "special" rates, leads borrowers to pay application fees immediately and commit to loans that may not be in their best interests. Once the loan application process begins, borrowers become psychologically committed to the loans and, depending on the size of the application fee and the borrowers' liquid assets, may not be able to afford to apply for another loan.

BAIT AND SWITCH TACTICS

At the time of application, subprime lenders typically reveal only the vaguest of terms to borrowers, waiting until closing to disclose the final provisions. These last-minute changes in loan terms are problematic on several fronts. First, borrowers are boundedly rational in the sense that they are **able to process some, but not all, loan terms**. Typically, they focus on simple price terms, such as the monthly payment amount, and ignore other potentially onerous terms, like prepayment penalties. Lenders can exploit these limits on borrowers' ability to absorb information to their advantage. Second, when the **final loan terms are presented to borrowers at closing, essential terms are often obscured in the shuffle of complicated loan papers. Many borrowers may believe that they are obligated to enter the loan at closing**

even though the law permits them to walk away from the closing or rescind the loan within three days of the closing. Others, who may have experienced credit discrimination or who worry that their access to credit is limited, may fear that they will lose access to future credit if they reject proffered loans. The secondary market benefits from the resulting one-sided contracts and, therefore, should be responsible for some of the damage these contract terms cause.

Indeed, in the Lehman Brothers case, FAMCO's scripted sales materials allegedly coached FAMCO's loan officers on how to make fraudulent sales pitches.

WILL THE REAL PARTY IN INTEREST PLEASE STAND UP?

Classifications Used by the Courts to Distinguish Parties to a Suit

Courts generally classify parties to a lawsuit depending on the nature of the interest the party has in the outcome of the suit. Courts vary on what constitutes the minimum threshold of interest needed for a party to have its citizenship considered for purposes of diversity jurisdiction. The most demanding rule is the real party in interest rule, followed by the capacity to sue rule. Courts will almost never consider a party's citizenship if that party is only a nominal party.⁶³

Real Party in Interest Rule

The most demanding level of interest, required by some courts before they will consider that party's citizenship,⁶⁴ is the real party in interest rule. The real party in interest is the person who has the right to come to court and seek relief, as recognized by the law.⁶⁵ Federal Rule of Civil Procedure 17(a)⁶⁶ invokes this term, although this rule is more procedural than jurisdictional.⁶⁷ Rule 17(a) ensures the finality of a lawsuit and prevents a party that is entitled to recover

matter jurisdiction of federal courts over class actions where at least one plaintiff is diverse from the defendant and where the amount-in-controversy exceeds \$5,000,000).

63. See *infra* Part IV.C (describing how courts handle nominal parties).

64. See *infra* Part VII.C (noting the circuits that have adopted the real party in interest rule).

65. See Charles E. Clark & Robert M. Hutchins, *The Real Party in Interest*, 34 YALE L.J. 259, 261 (1925) (defining what constitutes the real party in interest).

66. See FED. R. CIV. P. 17(a) (adopting the procedural real party in interest definition).

The rule states, in part:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought

Id.

67. See *Airlines Reporting Corp. v. S & N Travel, Inc.*, 58 F.3d 857, 861 n.4 (2d Cir. 1995) (noting that a rough symmetry exists between the jurisdictional and procedural rules, but they do not serve the same purpose).

WILL THE REAL REAL PARTY IN INTEREST PLEASE STAND UP? 687

from bringing a subsequent suit.⁶⁸ On the other hand, the jurisdictional rule intends to prevent collusive joinder to create or defeat diversity jurisdiction.⁶⁹ The Third Circuit has indicated that a party is not the real party in interest in the jurisdictional sense unless it is seeking to protect its own interests rather than just fulfilling obligations to another party.⁷⁰ Often, a party may have the capacity to sue, but the court will find that jurisdiction does not exist because he is not the real party in interest. For instance, guardians are extended the capacity to sue on behalf of minors through many state statutes, but they have no claim to a favorable judgment for the minor.⁷¹ Thus, they are not the real party in interest.

Capacity to Sue Rule

Some jurisdictions recognize a capacity to sue rule for determining whether an agent's citizenship controls the diversity decision.⁷² The capacity to sue is the right to come into court and to be heard.⁷³ Moreover, "[c]apacity relates to a party's personal or official right to litigate the issues presented by the pleadings."⁷⁴ Whether a party has the capacity to sue will often turn on whether there has been a valid legal transfer of interests.⁷⁵ Federal Rule of Civil Procedure 17(b) adopts the procedural capacity to sue rule.⁷⁶ The question of whether a party has the procedural capacity to sue is

68. FED. R. CIV. P. 17(a) advisory committee's note on the 1966 amendment ("[T]he modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.").

69. *See* *Transcon. Oil Corp. v. Trenton Prods. Co.*, 560 F.2d 94, 103 (2d Cir. 1977) (finding that under the mandate of 28 U.S.C. § 1359, the court must look to the real parties in interest to decide whose citizenship controls for purposes of diversity jurisdiction).

70. *See* *Airlines Reporting*, 58 F.3d at 862 (noting that the plaintiff was the real party in interest for procedural purposes but not for jurisdictional purposes because he was merely fulfilling contractual obligations).

71. *See* *infra* Part VI.D (describing how courts handle the interests of guardians).

72. *See* *infra* Part VII.B (noting the circuits that have adopted the capacity to sue rule).

73. *See* *United States v. Ass'n of Am. R.Rs.*, 4 F.R.D. 510, 517 (D. Neb. 1945) (distinguishing, by definition, capacity to sue from cause of action).

74. *Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418, 428 (Iowa 1996).

75. *See, e.g., Moore v. Mitchell*, 281 U.S. 18, 24 (1930) (deciding whether Indiana statutes properly conferred capacity to sue).

76. *See* FED. R. CIV. P. 17(b) (2000) (adopting the capacity to sue definition). The rule states, in part: The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The

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the same as the question of whether that party has the capacity to sue for jurisdictional purposes.⁷⁷

This is different than the real party in interest rule where a separate analysis is used for jurisdictional purposes. Many courts regard a party with merely a capacity to sue as having less of an entitlement to have his citizenship considered for diversity purposes.⁷⁸ **Even so, the Supreme Court recognizes that while a party with capacity to sue may not have a claim to the proceeds of the final judgment, he may still have a significant interest in the outcome of the suit.**⁷⁹

Often, when a party is the real party in interest, that party lacks the capacity to bring suit.⁸⁰ For example, a minor or a mentally incompetent person who is injured in a car wreck is the real party in interest in the outcome of the litigation, but he does not have the capacity to bring suit.⁸¹ Such a party needs a surrogate (other than his lawyer) to stand in for him and make the important decisions relating to the lawsuit. In most circumstances, the real party in interest will also have the capacity to sue,⁸² although he may choose to assign his claim rather than exercise his capacity.

capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held . . . *Id.*

77. *See* *Fallat v. Gouran*, 220 F.2d 325, 328–29 (3d Cir. 1955) (using Rule 17(b) in a jurisdictional context).

78. *See* *infra* Part VII.C (describing those circuits that require a party to be the real party in interest for his citizenship to be considered in deciding whether diversity jurisdiction exists).

79. *See* *Mexican Cent. Ry. Co. v. Eckman*, 187 U.S. 429, 434 (1903) (describing the interests held by a party with the capacity to sue). The Court noted that a party with the capacity to sue: [I]s liable for costs in the event of failure to recover and for attorneys' fees to those he employs to bring the suit, and in the event of success, the amount recovered must be held for disposal according to law, and if he does not pay the same over to the parties entitled, he would be liable therefor[e] on his official bond. *Id.*

80. *See* *Equitable Life Assurance Soc'y of the U.S. v. Tinsley Mill Vill.*, 294 S.E.2d 495, 497 (Ga. 1982) ("A party may have the capacity to sue without being the real party in interest.").

81. *See* *Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418, 428 (Iowa 1996) (describing how a party may not have the capacity to sue even if he has a valid cause of action).

82. *See* 59 AM. JUR. 2D *Parties* § 28 (2007) (noting that the capacity to sue is "closely allied to" being the real party in interest).

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Nominal Parties

Finally, situations arise where a party is named in a lawsuit but has no interest in the outcome.⁸³ Often, these parties are not even required to be present for the lawsuit to take place, but a technical rule requires their name to be present in the record.⁸⁴ For instance, in *McSparran v. Weist*,⁸⁵ the guardian was not actually litigating the suit, his name was only included because the minor lacked capacity.⁸⁶ Courts do not recognize such nominal parties for the purposes of diversity jurisdiction.⁸⁷

Ultimately, these classifications are important because they may determine whether a party can bring suit in the federal forum under diversity jurisdiction. Courts are more likely to find that a party has been collusively joined if the party holds a slight interest in the outcome of the litigation. In those instances, § 1359 deprives the federal court of its jurisdiction.

V. 28 U.S.C. § 1359—Congress's Attempt to Defeat Manufactured Jurisdiction

Most courts choosing the real party in interest rule do so to prevent collusive joinder,⁸⁸ which is more likely to occur under the capacity to sue rule.⁸⁹ To protect against collusive joinder, Congress passed 28 U.S.C. § 1359,⁹⁰ which provides that "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such

83. See *id.* § 8 (defining nominal parties and describing their usual lack of interest in the outcome of a lawsuit).

84. See *Brown v. Jones*, 134 S.W.2d 850, 852 (Tex. App. 1939) (describing how nominal parties are included as a mere technicality, not because they have any interest in the lawsuit).

85. See *McSparran v. Weist*, 402 F.2d 867, 869 (3d Cir. 1968) (holding that diversity jurisdiction did not exist because it would offend § 1359).

86. See *id.* (noting that the plaintiff conceded that the guardian was merely a straw party).

87. See *Farmington v. Pillsbury*, 114 U.S. 138, 143 (1885) (deciding to disregard the citizenship of the nominal party); *Transcon. Oil Corp. v. Trenton Prods. Co.*, 560 F.2d 94, 102 (2d Cir. 1977) (same).

88. See *infra* Part VII.C (describing the rationale behind the Eighth and Second Circuits' adoption of the real party in interest rule).

89. See *infra* notes 166, 168 and accompanying text (describing the fear of some courts that collusive joinder is more likely to occur under the capacity to sue rule).

90. 28 U.S.C. § 1359 (2000) (forbidding collusive joinder to create or defeat diversity jurisdiction).

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court."⁹¹ This statute, based on the original assignee clause of the Judiciary Act of 1789,⁹² ensures that federal courts only hear those cases properly brought within their jurisdiction.⁹³ Parties often invoke this statute in cases where a resident appoints a nonresident solely for the purpose of creating grounds for removal to federal court under diversity jurisdiction.⁹⁴ **Generally, the party opposing removal raises the § 1359 challenge, thereby placing the burden of proof on the party seeking removal to overcome the presumption against the federal court's exercise of jurisdiction.**⁹⁵

While this protection may be good in theory, it is infrequently used in practice. Federal courts usually only look for glaring instances of collusion and rarely inquire into the motives of the parties involved.⁹⁶ On the other hand, some courts find that this lack of inquiry is based on "thin and rather elusive authority."⁹⁷ Regardless, § 1359 has proven relatively ineffective as a protection against collusion.⁹⁸ In practice, if a representative merely holds a valid legal appointment to his position, the federal court will accept that his appointment is not in violation of § 1359.⁹⁹ For this reason, more cases get into federal courts under diversity jurisdiction where the diverse party merely has the capacity to sue but is not the real party in interest. The decision of which

91. *Id.*

92. See 28 U.S.C.A. § 1359 (West 2007) (revision notes and legislative reports) (noting that the original assignee clause "is a jumble of legislative jargon").

93. See *Sowell v. Fed. Reserve Bank*, 268 U.S. 449, 453 (1925) (noting that the original purpose behind the assignee clause, replaced by § 1359, was to "prevent the conferring of jurisdiction on the federal courts, on grounds of diversity of citizenship, by assignment, in cases where it would not otherwise exist").

94. See *McSparran v. Weist*, 402 F.2d 867, 869 (3d Cir. 1968) (describing the party appointed to bring suit as a "straw party").

95. See *id.* at 875 (stating that the burden of proof rests with the party invoking diversity jurisdiction to show that its exercise is proper in this instance).

96. See *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 189 (1931) ("[I]t is clear that the motive or purpose that actuated any or all of these parties in procuring a lawful and valid appointment is immaterial upon the question of identity or diversity of citizenship."); see also Note, *Manufactured Federal Diversity Jurisdiction and § 1359*, 69 COLUM. L. REV. 706, 708 (1969) (noting that motive is mostly irrelevant for jurisdictional purposes).

97. *Vallentine v. Taylor Inv. Co.*, 305 F. Supp. 1104, 1106 (D. Colo. 1969) (citation omitted); *Dougherty v. Oberg*, 297 F. Supp. 635, 638 (D. Minn. 1969).

98. See *Cohan & Tate*, *supra* note 1 at 209 (noting that there have been very few instances of courts actually finding a violation of § 1359).

99. See, e.g., *Jaffe v. Phila. & W. R. Co.*, 180 F.2d 1010, 1012 (3d Cir. 1950), *overruled on other grounds by* *McSparran v. Weist*, 402 F.2d 867, 876 (3d Cir. 1968) (disregarding motive because the administrator was properly appointed); *Greene v. Goodyear*, 112 F. Supp. 27, 28 (M.D. Pa. 1953) (same).

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rule to choose is still left up to the federal district courts, with little guidance from Congress or the Supreme Court.

Trustees

The diversity problem also arises in cases involving trustees. Most courts find that if a trustee is party to the action and exercises real powers over the trust, the federal courts should consider his citizenship in the diversity decision.¹¹⁰ This consideration is based upon the fact that normally a trustee is the real party in interest because he represents the interests of the

105. See *Mississippi ex rel. Shoemaker v. Thames*, 314 U.S. 630, 630 (1941) (denying certiorari).

106. See *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 186–87 (1931) (noting, first, that Mecom's citizenship is determinative because he was the real party in interest, but then noting that the facts from *Mexican Central Railway Co. v. Eckman*, 187 U.S. 429 (1903), are applicable here). In *Eckman*, the Court ruled that if state law gives the guardian the "right to bring suit" (or capacity to sue), then his citizenship controls, even if he is bringing the suit on someone else's behalf. *Mexican Central Ry.*, 187 U.S. at 434; see also *Childress v. Emory*, 21 U.S. (8 Wheat.) 530, 532 (1823) (noting that the citizenship of executors and administrators controls because they are "the real parties in interest," and they are "capable of suing and being sued").

107. See *Schneider v. Eldredge*, 125 F. 638, 640 (N.D. Ill. 1903) ("[T]his court will take into consideration the actual party in interest . . . as though he were the original defendant."); *Chambers v. Anderson*, 58 F.2d 151, 152 (6th Cir. 1932) (considering the administratrix's citizenship because she was the real party in interest).

108. See *Dodge v. Perkins*, 7 F. Cas. 798, 799 (D. Mass. 1827) (No. 3,954) (noting that even though the administrator was suing in his representative capacity, "he sues in his own right as a citizen"); *Roach's Adm'r v. Ohio Nat'l Life Ins. Co.*, 258 S.W. 300, 301 (Ky. Ct. App. 1924) ("It is the residence of the parties actually before the court that gives jurisdiction, and where a party sues in a representative capacity, it is his residence, and not the residence of those he represents, that controls.").

109. *Vallentine v. Taylor Inv. Co.*, 305 F. Supp. 1104, 1105 (D. Colo. 1969).

110. See *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 (1980) (finding that a trustee is a real party to the controversy for purposes of diversity jurisdiction when he has the power to "hold, manage, and dispose of assets for the benefit of others."); see also *Dodge v. Tulleys*, 144 U.S. 451, 456 (1892) (considering the citizenship of the trustee). See generally 32A AM. JUR. 2d *Federal Courts* § 894 (2007).

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NAKED TRUSTEE

beneficiary.¹¹¹ On the other hand, **if the trustee is a "naked trustee . . . [acting] as [a] mere conduit[] for a remedy flowing to others," the diversity decision turns on the citizenship of the underlying party rather than the trustee's citizenship.**¹¹² A trustee, however, is not necessarily a "mere conduit" just because the remedy is going to others.¹¹³ **Although most Supreme Court rulings on the issue of trustees are at least couched in terms of deciding who is the real party in interest,** some lower courts have still interpreted these cases to allow for the adoption of the capacity to sue rule.¹¹⁴

Receivers

The diversity dispute also arises in cases involving receivers. Generally, in an action by or against a receiver serving on behalf of a corporation, the receiver's citizenship matters for diversity jurisdiction.¹¹⁵ The court disregards the citizenship of the underlying corporation or individual.¹¹⁶ As with trustees, lower

courts faced with receivers as parties have relied on the real party in interest rule in some instances¹¹⁷ and the capacity to sue rule in

111. See *Bergkamp v. N.Y. Guardian Mortgage Corp.*, 667 F. Supp. 719, 724 (D. Mont. 1987) ("[T]he trustee represents the interests of the beneficiary so that the trustee alone is the real party in interest.").

112. *Navarro*, 446 U.S. at 465; see also *Boon's Heirs v. Chiles*, 33 U.S. (8 Pet.) 205, 207 (1834) (finding that where a suit is filed in the name of the trustee who is officially the holder of the legal title but has no knowledge of the lawsuit, his citizenship is not considered in the diversity decision); *Bogue v. Chicago B. & Q.R. Co.*, 193 F. 728, 734 (S.D. Iowa 1912) ("[S]uch is not the rule where a person is a mere agent or trustee for the use of another. In such a case the citizenship of the beneficiary controls.").

113. See *Fleet Nat'l Bank v. Trans World Airlines, Inc.*, 767 F. Supp. 510, 514 (S.D.N.Y. 1991) (finding that a trustee still had powers and authority under the law, even though he was acting on behalf of and for the benefit of the beneficiaries).

114. See *infra* Part VII.B and accompanying notes (describing how some circuits have interpreted the Supreme Court rulings to require only the capacity to sue rule for resolution of the diversity dispute).

115. See *Mexican Cent. Ry. Co. v. Eckman*, 187 U.S. 429, 434 (1903) (citing *New Orleans v. Gaines's Administrator* for the same proposition); *New Orleans v. Gaines's Adm'r*, 138 U.S. 595, 606 (1891) (including receivers in the list of parties whose citizenship controls in the diversity decision). But see *Chapman v. St. Louis & S.W. Ry. Co.*, 71 F. Supp. 1017, 1018–19 (N.D. Tex. 1947) (departing from the general rule and disregarding the citizenship of the receiver for public policy reasons).

116. See *Coal & Iron Ry. v. Reherd*, 204 F. 859, 883 (4th Cir. 1913) (disregarding the citizenship of the individual); *Barber v. Powell*, 22 S.E.2d 214, 214 (N.C. 1942) (disregarding the citizenship of the corporation).

117. See *Farlow v. Lea*, 8 F. Cas. 1017, 1018 (N.D. Ohio 1877) (No. 4,649) (finding that the receiver, not the corporation he was representing, was the real party in interest to the lawsuit, so his citizenship should control).

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others.¹¹⁸ This situation arises most often when a receiver takes control of a bankrupt company for the benefit of the creditors.¹¹⁹ If tortious conduct occurs after the takeover, the diversity dispute would not arise because the receiver would also be the real party in interest.¹²⁰ On the other hand, the dispute would arise if the conduct took place before the receiver took control as a result of the actions of the bankrupt company. If the receiver litigates the case, his citizenship may not control. The decision would ultimately depend on whether the conduct occurred in a jurisdiction that relies on the real party in interest rule or in one following the capacity to sue rule. A uniform rule would prevent contradictory conclusions from circuits with different rules.

Assignments

Assignment of interest can also give rise to a dispute over whose citizenship controls. An assignment occurs when one party passes all of its legal interest in a certain property to another party.¹²⁷ Because some parties assign claims solely to manipulate jurisdiction, courts disagree on whether such assignments can serve as a basis for diversity jurisdiction.¹²⁸ The ALI, recognizing this problem, proposed a statutory amendment that would eliminate the practice of assigning claims to prevent removal on diversity grounds.¹²⁹ Federal courts have regularly rejected the real party in interest rule as grounds for ignoring the citizenship of the assignee,¹³⁰ often stating that the assignee

and the ward as having the same citizenship).

124. See *infra* note 157 (describing the facts and holding of *Fallat v. Gouran*, 220 F.2d 325 (3d Cir. 1955)).

125. *Cohan & Tate*, *supra* note 1, at 225.

126. See *Martineau v. City of St. Paul*, 172 F.2d 777, 780 (8th Cir. 1949) (using the minor's citizenship because he was the real party in interest); *Eckman*, 187 U.S. at 434 (referencing the real party in interest rule in a situation involving a guardian).

127. See *Cohan & Tate*, *supra* note 1, at 227 (describing the circumstances giving rise to an assignment of property).

128. See *Lisenby v. Patz*, 130 F. Supp. 670, 674 (E.D.S.C. 1955) (finding that if the assignment is otherwise valid, the motives for the transfer are immaterial, and also noting that Congress, not the courts, should correct this evil). But see *King ex rel. King v. McMillan*, 252 F. Supp. 390, 392 (D.C.S.C. 1966) (finding that if any fraud or collusion existed in connection with the assignment, the state court was the proper forum for resolution of the dispute).

129. See ALI, *supra* note 36, at 22–23 (proposing, in § 1307(b), that assignment be ignored if it is used to create or destroy diversity jurisdiction).

130. See *Provident Sav. Life Assurance Soc'y v. Ford*, 114 U.S. 635, 641 (1885) (rejecting the idea that a mere colorable assignment and a diverse plaintiff who was not the real party in interest were sufficient to dismiss the case from federal court); *Krenzien v. United Servs. Life Ins. Co.*, 121 F. Supp. 243, 245 (D. Kan. 1954) (finding that an assignment to a party who was not the real party in interest but who was diverse was sufficient to create diversity jurisdiction).

could stand on his own citizenship because he has the capacity to sue under state law.¹³¹

Subrogated Claims

A final scenario involves subrogated claims where the subrogee is of a different citizenship than the subrogor. This circumstance most often arises in the insurance field, where an insurance company will compensate the insured for his loss, then become subrogated to the rights of the insured against the tortfeasor.¹³²

Here, the general rule is very similar to the rule with executors and administrators—the subrogee’s citizenship controls.¹³³ Most states only allow the subrogee to sue by himself as the real party in interest if he has paid the insured’s entire amount lost,¹³⁴ although some states do not make such a distinction.¹³⁵ Subrogated claims arise on a fairly regular basis, and a uniform rule is needed to prevent contradictory outcomes based on jurisdiction. Currently, parties desiring a federal forum are likely to forum shop because some circuits require a greater level of interest before a subrogee’s citizenship can control.

VII. Circuit Split

A. The Supreme Court Rulings Have Not Decisively Resolved the Issue

The Supreme Court’s diversity precedents do not resolve whether the real party in interest or capacity rule is preferable, and indeed its decisions on related

131. See *Rosecrans v. William S. Lozier, Inc.*, 142 F.2d 118, 124 (8th Cir. 1944) (ruling that even if the assignee were only a party in order to obtain a judgment and then turn over the proceeds, his citizenship would still control); *Ridgeland Box Mfg. Co. v. Sinclair Ref. Co.*, 82 F. Supp. 274, 276 (E.D.S.C. 1949) (finding that if the assignees were “really [] proper parties and [had] legitimate standing in the court” their citizenship could create diversity).

132. See, e.g., *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 369 (1949) (describing the circumstances giving rise to the subrogated claim).

133. See *New Orleans v. Gaines’s Adm’r*, 138 U.S. 595, 606 (1891) (including subrogees in the list of parties whose citizenship controls in the diversity decision); *Cont’l Cas. Co. v. Ohio Edison Co.*, 126 F.2d 423, 426 (6th Cir. 1942) (“One subrogated to the rights of another may stand in the Federal Courts upon his own citizenship, regardless of the citizenship of the person to whose rights he is subrogated.”).

134. See, e.g., *Liberty Mut. Ins. Co. v. Tel-Mor Garage Corp.*, 92 F. Supp. 445, 446 (S.D.N.Y. 1950) (finding that an insurer who has paid the full amount of the loss is the only real party in interest and must stand on its own citizenship).

135. See, e.g., *Cont’l Cas.*, 126 F.2d at 425–26 (finding that the subrogee’s citizenship controlled despite the fact that he only partially compensated the injured party).

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matters provide support for both sides. In *New Orleans v. Gaines’s Administrator*,¹³⁶ the Court emphasized that the citizenship of parties with assigned claims should control in diversity cases.¹³⁷ **The Court stated that the only time this rule is not applicable is when there is a mere nominal party, whose name is included in the lawsuit for the sole purpose of creating diversity jurisdiction¹³⁸ (Congress later codified this idea in 28 U.S.C. § 1359).¹³⁹ The Court said that in circumstances involving manufactured diversity, the citizenship of the real party in interest controls for the diversity decision.¹⁴⁰ It did not, however, say what to do in circumstances involving a party who is not the real party in interest, but who has legitimate capacity to sue and is not a mere nominal party.**

Later cases exhibited the same lack of clarity. In *Mexican Central Railway Co. v. Eckman*,¹⁴¹ the Court noted that:

136. See *New Orleans v. Gaines’s Adm’r*, 138 U.S. 595, 606 (1891) (ordering courts in federal litigation to respect states’ characterizations of guardians as determinative of which party is the real party in interest). In *Gaines’s Administrator*, the city of New Orleans sold land to a private party, who then sold the same land to various parties. *Id.* at 597. Gaines, claiming that the property was rightfully hers all along, brought a suit against the city on behalf of the parties that would otherwise be liable to her. *Id.* at 600. In addressing the assignments of error, the Court first decided that the circuit court’s jurisdiction was not founded upon diversity but upon Gaines’s equitable right to sue the city. *Id.* at 605. Second, the Court found that the assignment

of the individual parties' rights to Gaines did not destroy her subrogated right to sue the city. *Id.* at 606. In so ruling, the Court noted that representatives "may stand on their own citizenship in the federal courts irrespective[] of the citizenship of the persons whom they represent." *Id.* It distinguished instances where a party to a suit is a mere nominal party, in which case the citizenship of the real party in interest is considered. *Id.* at 607. Finally, the Court found that there was an express warranty in the sales made by the city, and no fraud was proven. *Id.* at 608–09.

137. *See id.* at 606 ("[W]e have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespective[] of the citizenship of the persons whom they represent,—such as executors, administrators, guardians, trustees, receivers . . .").

138. *See id.* (noting that cases brought in federal court based solely on a nominal party's diversity are evils sought to be avoided).

139. *See supra* Part V and accompanying notes (describing the purpose and history of 28 U.S.C. § 1359).

140. *See Gaines's Adm'r*, 138 U.S. at 607 ("[In situations involving a nominal party,] the real party in interest is taken into account on the question of citizenship.").

141. *Mexican Cent. Ry. Co. v. Eckman*, 187 U.S. 429, 434 (1903) (ruling that a guardian has a legal right to bring an action in his own name, and his citizenship controls for purposes of deciding whether diversity jurisdiction exists). In *Eckman*, a guardian sued Mexican Railway Company on behalf of a minor who was injured due to the Company's alleged negligence. *Id.* at 429–31. The Court acknowledged its previous cases held that actions in federal court could be brought in any district where either the plaintiff or the defendant resided, so the only question for consideration was whether the plaintiff here was the guardian or the minor. *Id.* at 432. The Court then reaffirmed the principle from *New Orleans v. Gaines's Administrator* that if a party is merely nominal, the citizenship of the real party in interest is considered for diversity purposes. *Id.* at 433 (citing *New Orleans v. Gaines's Adm'r*, 138 U.S. 595, 606 (1891)). But, the Court said that when a guardian has the legal right to sue in his own name, his citizenship controls. *Id.* at 434. The Court reasoned that, while the guardian may not be the real party in interest, he still may be liable to the real party in interest if he fails to recover on that party's claim. *Id.*

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- If in the state of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff so far as Federal jurisdiction is concerned, even though suit might
- have been instituted in the name of the ward by guardian *ad litem* or next friend. He is liable for costs in the event of failure to recover and for attorneys' fees to those he employs to bring the suit, and in the event of success, the amount recovered must be held for disposal according to law, and if he does not pay the same over to the parties entitled, he would be liable therefor[e] on his official bond.¹⁴²

Here, the Court seemingly indicates that mere capacity to sue is enough for a party's citizenship to control the diversity decision. The Court's reasoning acknowledges that even a party that merely has capacity to sue may still have a significant stake in the outcome of the case. Thus, it would be unfair to ignore that party's citizenship, assuming diversity jurisdiction is a desirable goal in this instance.

In *Mecom v. Fitzsimmons Drilling Co.*,¹⁴³ the Court appeared to reverse course, noting that because Mecom was the real party in interest, his citizenship controls for diversity purposes.¹⁴⁴ But the Court went on to justify this ruling by stating that the rule laid down in *Eckman* was applicable here.¹⁴⁵ This

142. *Id.* at 434.

143. *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 186 (1931) (finding that a suit by an administrator on behalf of the state should have been dismissed from federal court because the citizenship of the administrator, not the decedent, should control for purposes of diversity jurisdiction). In *Mecom*, Fitzsimmons Drilling Company attempted to have a wrongful death suit removed to federal court because, while the administrator was a nondiverse party, the decedent was diverse. *Id.* at 184–85. The Court found that federal courts have jurisdiction over suits by executors and administrators if they are diverse, regardless of the decedent's citizenship. *Id.* at 186. The Court reasoned that the administrator, often required to bring the suit under state statute, is the real party in interest. *Id.* The *Mecom* Court found that the rationale from *Eckman* applied here—a legal right to bring suit brings with it the right to have one's own citizenship control for diversity purposes. *Mecom*, 284 U.S. at 187. The Court rejected Fitzsimmons' assertion that the administrator was chosen solely for the purpose of defeating diversity, noting that the motive of parties in procuring a lawful appointment is immaterial to the diversity question. *Id.* at 189.

144. *See id.* at 186 ("[H]e is the real party in interest and his citizenship, rather than that of the beneficiaries, is determinative of federal jurisdiction. This we think is the correct view.").

145. *See id.* at 187 (restating the rationale from *Eckman* and applying it to the present situation).

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confuses the rule chosen in *Mecom* because the *Eckman* language was more indicative of a capacity to sue rule rather than a real party in interest rule.¹⁴⁶ Later, in *Lumbermen's Mutual Casualty Co. v. Elbert*,¹⁴⁷ this same confusing rule emerged. The Court again said that diversity did exist because the petitioner was "not merely a nominal defendant, but . . . [was] the real party in interest."¹⁴⁸ The Court followed its previous rationales, giving only the two extreme guidelines in the diversity determination. Again, the

Court spoke in terms of the real party in interest but cited to the *Eckman* decision which seemed to turn on capacity to sue.¹⁴⁹

NOMINAL PARTY NOT CONSIDERED IN DIVERSITY

The Supreme Court rulings make abundantly clear that courts should focus on the citizenship of the real party in interest, but they should not consider the citizenship of a nominal party. Parties with mere *capacity to sue* lie somewhere between the two, but the Court has yet to draw the line. The lack of specificity by the Court has divided the circuits. The First Circuit acknowledged the split in *Pramco, LLC ex rel. CFSC Consortium v. San Juan Bay Marina, Inc.*¹⁵⁰ There, the court noted that circuits vary on

146. See *supra* note 141 (describing the rationale relied on by the Court in *Eckman*).

147. *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 51 (1954) (noting that the real party in interest's citizenship controls the decision of whether diversity jurisdiction exists). In *Lumbermen's*, two residents from the same state were involved in a car accident, but the injured party sued the negligent party's nondiverse insurance company in federal court. *Id.* at 49. The Court noted that the insurance company was not merely a nominal defendant but was the real party in interest because the company would have to pay any judgment against the negligent party. *Id.* at 51. The Court rejected the claim that the negligent driver was an indispensable party because the court could give a final decree without his joinder. *Id.* Finally, the Court rejected the insurance company's call for the federal courts to decline to exercise jurisdiction here, as the Court noted this was a case that fell squarely within the lower court's congressional grant of jurisdiction. *Id.* at 52. In his concurrence, Justice Frankfurter noted that this was an abuse of diversity jurisdiction that "has no business in federal court." *Id.* at 56 (Frankfurter, J., concurring). He then went on to give a scathing review of diversity jurisdiction in general, which he saw as clogging up federal courts. *Id.* at 57 (Frankfurter, J., concurring).

148. *Id.* at 51.

149. See *McSparran v. Weist*, 402 F.2d 867, 870 (3d Cir. 1968) (noting the confusing rule that emerged when the court referred to the *Eckman* case with approval but characterized the guardian as the real party in interest).

150. See *Pramco, LLC ex rel. CFSC Consortium v. San Juan Bay Marina, Inc.*, 435 F.3d 51, 55 (1st Cir. 2006) (noting that the lower court must first determine whether there are any nondiverse members in the LLC before the First Circuit can determine whether that party's citizenship matters for jurisdictional purposes). In *Pramco*, the Court of Appeals for the First Circuit considered whether the district court had proper jurisdiction to rule on the validity of a settlement agreement. *Id.* at 54–55. Here, the plaintiffs were both LLCs, and the defendants were citizens of Puerto Rico. *Id.* The *Pramco* court noted that the citizenship of an LLC is determined by the citizenship of all of its members. *Id.* It then noted that the agent's citizenship may matter in this situation, and while the circuits split over this issue, it was an issue of first impression for this court. *Id.* The court then remanded to the district court to determine the citizenship of each member of the LLC's. *Id.* at 56.

B. Circuits Applying the Capacity to Sue Rule

Although many variations exist among the circuit and district courts, two general positions are apparent. The first, illustrated by the court in *Hart v. Bayer Corp.*,¹⁵³ finds the agent's citizenship to control if he has the capacity to sue.¹⁵⁴ There, the court reasoned that if an agent has legal standing to sue or be sued, then he has sufficient status for consideration of his citizenship.¹⁵⁵ The original intent of diversity jurisdiction supports this position, namely that a party forcibly engaged in a lawsuit will fall victim to local bias in state court.¹⁵⁶

This courtroom bias affects the party that is actually in the courtroom, acting under his legal capacity to sue (the agent); therefore, his citizenship controls. In *Fallat v. Gouran*,¹⁵⁷ the Third Circuit supported this position. The court again focused on the agent or subrogee's legal capacity to sue in deciding

citizenship of each member of the LLC's. *Id.* at 56.

151. *Id.* at 55 (noting that the Eighth and Second Circuits believe an agent's citizenship is not considered, while the Third Circuit disagrees and favors using the agent's citizenship).

152. *Id.* at 56 (remanding for determination of the citizenship of each member of the LLCs involved in the litigation).

153. See *Hart v. Bayer Corp.*, 199 F.3d 239, 247–48 (5th Cir. 2000) (finding that if an agent is in some way liable for the commission of a tort, his citizenship controls for purposes of diversity jurisdiction, despite the agency relationship). In *Hart*, the Court of Appeals for the Fifth Circuit considered whether the presence of an agent, joined in a lawsuit involving the misrepresentation of pesticide chemicals, could create diversity jurisdiction. *Id.* at 242–43. The lawsuit was brought in Mississippi, and all parties resided there except for the agent. *Id.* The *Hart* court first found that the statute involved did not completely preempt all state or local regulations of pesticides. *Id.* at 244. Second, the court found no indication of anything in the language or legislative history that suggested preemption of local regulations, which would create federal jurisdiction. *Id.* at

245. Finally, the *Hart* court found that for the agent to be joined in the lawsuit, he would need some sort of direct, personal participation in the tort, and if this was the case, then his citizenship controls for purposes of deciding whether diversity jurisdiction exists. *Id.* at 246–47.

154. *Id.* at 247 (commenting that the agency relationship is irrelevant here).

155. *Id.* (noting that if an agent is directly liable to the extent that he is being joined in the lawsuit, his citizenship controls for jurisdictional purposes).

156. *See supra* Part II and accompanying notes (describing the purpose behind the congressional enactment of 28 U.S.C. § 1332).

157. *See Fallat v. Gouran*, 220 F.2d 325, 326 (3d Cir. 1955) ("[I]t is not the citizenship of the incompetent, . . . which governs but the citizenship of the guardian, provided he has the capacity to sue."). In *Fallat*, the Court of Appeals for the Third Circuit decided whether, in a lawsuit over an automobile accident, the citizenship of the nondiverse victim, or his diverse guardian, controls for jurisdictional purposes. *Id.* at 325–26. The *Fallat* court cited the Supreme Court in *New Orleans v. Gaines's Administrator* for the proposition that "'representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent.'" *Fallat*, 220 F.2d at 326 (quoting *New Orleans v. Gaines's Adm'r*, 138 U.S. 595, 606–07 (1891)). Here, the *Fallat* court declined to follow the view of the Eighth Circuit and instead held that presuming the guardian has the legal capacity to sue, his citizenship, and not the citizenship of the represented party, should control on the issue of diversity jurisdiction. *Id.* at 327.

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whether his citizenship controls for diversity purposes.¹⁵⁸ Not only does this position provide adequate protection to the foreign party, but it also aims to defeat collusive efforts to create jurisdiction as prohibited by 28 U.S.C. § 1359.¹⁵⁹ It is not a complete protection, though, because presumably a party could still artificially create jurisdiction by subrogating his claim to a diverse agent with the capacity to sue.¹⁶⁰ Competent district court judges, though, would undoubtedly recognize these attempts.¹⁶¹ The Third Circuit later ruled, in *McSparran v. Weist*,¹⁶² that the citizenship of the ward, rather than the guardian, should control in the diversity determination.¹⁶³ The court, however,

158. *Id.* at 327 ("Thus, the means for determining the existence of diversity jurisdiction in a situation such as this is not by looking to the citizenship of the incompetent but to the citizenship of the guardian, if he has capacity to sue.").

159. 28 U.S.C. § 1359 (2000) (prohibiting collusion among the parties for the purposes of intentionally creating or defeating diversity jurisdiction).

160. *See, e.g., Dweck v. Japan CBM Corp.*, 877 F.2d 790, 791 (9th Cir. 1989) (describing a situation where an assignee brought a breach of contract claim even though he was not party to the contract).

161. *See, e.g., Green & White Constr. Co. v. Cormat Constr. Co.*, 361 F. Supp. 125, 128 (N.D. Ill. 1973) (finding a lack of diversity jurisdiction because the plaintiff was an assignee that lacked any interest in the outcome of the lawsuit).

162. *See McSparran v. Weist*, 402 F.2d 867, 876 (1968) (holding that diversity jurisdiction did not exist because it would offend § 1359 and disapproving of *Fallat v. Gouran* to the extent that it "indicates approval of manufactured diversity" (citation omitted)). In *McSparran*, the Court of Appeals for the Third Circuit considered whether a guardian's citizenship controlled in a diversity suit on behalf of the ward, even though he acknowledged that his appointment was solely for the purpose of creating diversity. *Id.* at 868–69. The court first acknowledged the confusion resulting from the inconsistent Supreme Court rulings in these cases. *Id.* at 870. It then distinguished this case, which did not consider whose citizenship controlled, but instead whether the appointment of the guardian violated § 1359. *Id.* at 871. It noted that none of the considerations that usually justify using the guardian's citizenship applied here because the nominal guardian would relinquish all of his responsibilities at the end of the suit. *Id.* at 872. The court then noted that despite the Supreme Court ruling in *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931), the Court had difficulty entirely ignoring motive in determining whether there was a violation of § 1359. *McSparran*, 402 F.2d at 874. Here, the court found that the plaintiff did not adequately prove that diversity jurisdiction existed, so it dismissed the case. *Id.* at 876.

163. *Id.* at 876 ("We hold therefore that the attempt to confer diversity jurisdiction in the present case offends against § 1359. *Jaffe . . . [is] hereby overruled, and Fallat v. Gouran is disapproved to the extent that it indicates approval of 'manufactured' diversity.*").

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distinguished *Fallat* because here the guardian was a mere "straw" party,¹⁶⁴ which reduced his status to that of a "nominal party."¹⁶⁵ Based on these three decisions, the capacity rule controls diversity decisions in cases arising in the Third and Fifth Circuits.

C. Circuits Applying the Real Party in Interest Rule

On the other hand, several courts only consider an agent's citizenship when the agent is the real party in interest. For instance, the Eighth Circuit, in *Associated Insurance Management Corp. v. Arkansas General Agency, Inc.*,¹⁶⁶ found that "'the citizenship of the represented individuals control[s] for diversity purposes [because] they are real and substantial parties to the dispute.'"¹⁶⁷

The Second Circuit in *Airlines Reporting Corp. v. S & N Travel, Inc.*¹⁶⁸ took the same position. There, the court's decision turned on the fact that the

164. *Id.* at 871.

165. *Id.*

166. *See* Associated Ins. Mgmt. Corp. v. Ark. Gen. Agency, Inc., 149 F.3d 794, 797 (8th Cir. 1998) (holding that the citizenship of the real party in interest controls for jurisdictional purposes). In *Associated Insurance*, the Court of Appeals for the Eighth Circuit considered whether the citizenship of the party suing under power of attorney or the citizenship of the underlying party controls for purposes of diversity jurisdiction. *Id.* at 796. The *Associated Insurance* court said the citizenship of the real party in interest controls for diversity purposes.

Id. at 797. Here, the court decided that the lawsuit had merely been assigned to the collection agency, and the agency did not have any real interest in the dispute. *Id.* at 797–98. Thus, the court held that the district court did not have subject matter jurisdiction, and the matter must be dismissed. *Id.* at 798.

167. *Id.* at 798 (quoting *Airlines Reporting Corp. v. S & N Travel, Inc.*, 58 F.3d 862, 862 (2d Cir. 1995)).

168. *See* *Airlines Reporting Corp. v. S & N Travel, Inc.*, 58 F.3d 857, 862 (2d Cir. 1995) (stating that the citizenship of the real party to the dispute controls for purposes of diversity jurisdiction). In *Airlines Reporting*, the Court of Appeals for the Second Circuit considered whether the citizenship of a collection agency or the party on whose behalf it was suing controlled for jurisdictional purposes. *Id.* at 859–60. The *Airlines Reporting* court relied on the Supreme Court proposition that "'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy." *Id.* at 861 (quoting *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460 (1980)). The court was careful to distinguish between the jurisdictional real party in interest rule, and the "real party in interest" rule set forth in Fed. R. Civ. P. 17(a). *Id.* at 862. Here, the *Airlines Reporting* court found that the party alleging diversity was merely an agent representing the interest of others, and for that reason, his citizenship could not be considered. *Id.*

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agent was merely representing the interest of another party.¹⁶⁹ The court, however, made sure to distinguish between its rule of looking to the real party in interest for jurisdictional purposes, and **Federal Rule of Civil Procedure 17(a), which requires that a lawsuit be brought in the name of the real party in interest.**¹⁷⁰ **Rule 17(a) is merely a procedural requirement that has no bearing whatsoever on subject matter jurisdiction in federal courts.**¹⁷¹ The court noted that, while there is a "'rough symmetry' between the 'real party in interest' standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy . . . the two rules serve different purposes and need not produce identical outcomes in all cases."¹⁷²

So, the Second and Eighth Circuits would conduct a second inquiry, independent of the Rule 17(a) procedural inquiry, as to who is the real party in interest.¹⁷³ These courts would then use that party's citizenship for deciding whether diversity jurisdiction exists.¹⁷⁴ **Most circuits would agree that if the agent, subrogee, or assignee is the real party in interest, his citizenship controls in deciding whether diversity jurisdiction exists. The split, however, occurs when it comes to agents that merely have the capacity to sue but are not the real parties in interest.**

Courts Should Adopt the Capacity to Sue Rule

A. It Is Time for Either the Supreme Court or Congress to Choose a Uniform Rule

The determination of which rule to use in the diversity dispute will rarely matter because a party with the capacity to sue is, in most instances, the real party in interest as well.¹⁷⁵ Also, until recently there was "little reason to stir

169. *Id.* at 861 (using the real party in interest rule for the diversity decision).

170. *See* Fed. R. Civ. P. 17(a) (describing how to determine the real party in interest for procedural purposes).

171. *See supra* Part IV.A (describing the difference between the procedural and jurisdictional identification of the real party in interest).

172. *Airlines Reporting*, 58 F.3d at 861 n.4 (quoting *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 462 (1980)).

173. *See supra* notes 166, 168 and accompanying text (describing the process used by the Eighth and Second Circuits for deciding whose citizenship controls for purposes of diversity jurisdiction).

174. *See id.* and accompanying text (describing the approach used by the Eighth and Second Circuits).

175. *See* *Harper v. Norfolk & W.R. Co.*, 36 F. 102, 104 (W.D. Va. 1887) (noting the likelihood that a party with the capacity to sue is also a real party in interest). The court noted: But apart from the legal right conferred by statute on the administrator to bring this action, is he in nowise a party in interest? Is he not liable, as the administrator, for the costs of this action, in the event of his failure to recover, and for attorney's fees to those he has employed to bring this suit? In the event of the death of the widow and children, the amount recovered would be assets in his hands, as administrator, for disposal according to law. If he succeeds in this action, and collects the money of the defendant, and fails to pay the same to the parties entitled thereto, clearly he will be liable on his official bond therefor[e]. *Id.*

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otherwise calm waters" in this area of the law, as most circuits used the real party in interest rule.¹⁷⁶ The waters have not been so calm as of late—a circuit split has developed over what rule applies in situations where a party with the capacity to sue is not the real party in interest.¹⁷⁷ With the myriad of different situations in which this dispute arises and circuits going in different directions on what rule controls, the Supreme Court must choose a rule that will prevail in all diversity disputes occurring in federal courts. A variety of policy concerns support the idea of a uniform rule. First, uniformity in federal courts is important to ensure that the jurisdictional reach is the same regardless of where the parties sue. The present situation, with different circuits deciding whether diversity exists based on different rules, encourages forum shopping by plaintiffs. Forum shopping is generally considered an "evil" by Congress and the courts, as it avoids the jurisdiction of the most appropriate court and may allow a plaintiff to alter the outcome of the lawsuit.¹⁷⁸ Congress has passed several statutes with the underlying purpose of preventing forum shopping.¹⁷⁹ It is pointless to have a statute such as § 1359 that prevents collusion to create or defeat diversity if it is just as easily created or defeated based on where the claim is brought. Furthermore, wavering rules are extremely inefficient, both for the parties to the suit and for the courts in the administration of justice. Parties will not want to incur the additional costs of litigating jurisdictional matters arising from lack of guidance provided by the Supreme Court decisions.¹⁸⁰ The Supreme Court has recently shown favor for adopting clear jurisdictional rules rather

176. See *Cohan & Tate*, *supra* note 1 at 225–26 (noting that in 1956 most circuits agreed on the real party in interest rule).

177. See *supra* Part VII (describing the current circuit split).

178. See, e.g., *In re BankAmerica Corp. Sec. Litig.*, 95 F. Supp. 2d 1044, 1050 (E.D. Mo. 2000) (describing the negative results of forum shopping).

179. See 28 U.S.C. § 1404 (2000) (allowing for the change of venue when an alternate venue would be more convenient); see also 28 U.S.C. § 1359 (prohibiting collusive manufacture or defeat of diversity to prevent forum shopping).

180. See *supra* Part VII.A (describing the lack of clarity resulting from Supreme Court decisions considering the diversity dispute).

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than uncertain rules that can lead to years of additional litigation.¹⁸¹ The Court noted that "whether destruction or perfection of jurisdiction is at issue, the policy goal of minimizing litigation over jurisdiction is thwarted whenever a new exception . . . is announced, arousing hopes of further new exceptions in the future."¹⁸² A uniform rule in diversity disputes would remove hope of exceptions and significantly cut down on jurisdictional litigation. Moreover, federal judges already complain that they are overburdened with diversity cases.¹⁸³ It only aggravates the matter to have extensive jurisdictional hearings to determine whether removal was even proper in the first place. Also, a party may not have brought suit in the first place if the party knew in advance that jurisdiction would not exist in federal court. The Supreme Court observed that "[w]hen the stakes remain the same and the players have been shown each other's cards, they will not likely play the hand all the way through just for the sake of the game."¹⁸⁴ A uniform rule will keep the "stakes" the same, and parties will realize that it is in their best interest to settle when they would have otherwise brought suit in hopes of arguing for the application of a different diversity jurisdiction rule. Finally, one of the main rationales behind the creation of diversity jurisdiction is to guarantee a fair trial without local bias to potential litigants from other states.¹⁸⁵ This intended reliability is not present if parties have to concern themselves with whether they are in a capacity to sue or a real party in interest jurisdiction. The clear solution to the problem would be to choose one national rule.

181. See *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 582 (2004) (noting that the two additional years of jurisdiction litigation would have been better spent litigating the merits or engaging in settlement talks).

182. *Id.* at 580–81.

183. See *supra* note 46 and accompanying text (listing instances of judges criticizing diversity jurisdiction because it congests federal courts' caseloads).

184. *Grupo*, 541 U.S. at 581.

185. See *supra* note 31 and accompanying text (describing one of the justifications for diversity jurisdiction).

NOTICE OF NON-COMPLIANCE FILED IN COUNTY RECORDS

The term "instrument" as used in Cal. Gov't Code § 27280 is defined in Cal. Gov't Code § 27279(a), as a written paper signed by a person or persons transferring the title to, or giving a lien on real property, or giving a right to a debt or duty. Three categories are thus presented. A recordable instrument is one which either a) transfers title, b) gives a lien, or c) gives a right or duty.

"Instrument" means some written paper, or instrument, signed and delivered by one person to another, transferring the title to, or creating a lien on, property, or giving a right to a debt or duty. *Hoag v. Howard* (1880) 55 Cal 564, 1880 Cal LEXIS 323; *De Wolfskill v. Smith* (1907, Cal App) 5 Cal App 175, 89 P 1001, 1907 Cal App LEXIS 199; *Hale v. Pendergrast* (1919, Cal App) 42 Cal App 104, 183 P 833, 1919 Cal App LEXIS 720.

Gov. Code, § 27280, subd. (a), providing that "[a]ny instrument or judgment affecting the title to or possession of real property may be recorded ..." did not authorize a homeowners association to record, in a county's land title records, a document asserting that homeowners were in violation of the association's covenants, conditions, and restrictions by painting their house an unauthorized color. A recordable "instrument" is one that either transfers title, "gives" a lien, or "gives" a right or duty (Gov. Code, § 27279, subd.(a)), and the notice of noncompliance did none of those. Even assuming that the notice of noncompliance were an "instrument" as defined by Gov. Code, § 27279, it would be recordable only if, pursuant to Gov. Code, § 27280, it affected "title to" or "possession of" the real property, but the notice of noncompliance did not affect title to the property or possession.

The notice simply created uncertainty about whether the association would be able to force the homeowners (or their successors) to repaint their home. *Ward v. Superior Court* (1997, Cal App 2d Dist) 55 Cal App 4th 60, 63 Cal Rptr 2d 731, 1997 Cal App LEXIS 394, review denied (1997, Cal) 1997 Cal LEXIS 5230. *Ward v. Superior Court* (1997, Cal App 2d Dist) 55 Cal App 4th 60, 63 Cal Rptr 2d 731, 1997 Cal App LEXIS 394, review denied (1997, Cal) 1997 Cal LEXIS 5230. BHA relies on the third category of the "instrument" definition. BHA argues that the notice of noncompliance is a recordable instrument "because it is in writing and gives 'a right to a debt or duty' in that it provides petitioners and any successors notice of their duty to bring their property into compliance."

Clearly there is a major difference between providing notice of a duty, and "giving" or creating that duty. To the extent that BHA has the "right" to dictate the color of a wall or garage door, that "right" was given to BHA by the CC&R's. If the right exists, it exists whether or not a notice of noncompliance is recorded to give public notice of BHA's claim. In this case, for example, BHA filed suit to enforce this claimed right, something BHA could have done without recording a notice of noncompliance. Thus BHA's notice of noncompliance does not come within the third category of the "instrument" definition.

Even assuming that the notice of noncompliance were an "instrument" as defined by Government Code section 27279, it would be recordable only if--pursuant to Government Code section

27280--it affected "title to" or "possession of" the real property. As discussed above, the notice of noncompliance does not affect title to the property. Nor does it affect possession. Petitioners retain possession as well as title. Legally speaking, petitioners can freely transfer title and possession. The constraints petitioners are experiencing on transfer of title and possession are practical ones, not legal limitations. For example, property subject to a lis pendens remains freely transferable as a legal matter. (See, e.g., *Stagen v. Stewart-West Coast Title Co.* (1983) 149 Cal. App. 3d 114, 122 [196 Cal. Rptr. 732].) The notice of noncompliance involved here has no legal effect on title or possession, or on transfers of title or possession. Instead, the notice simply creates uncertainty about whether BHA will be able to force petitioners (or their successors) to repaint their home. It is because few purchasers or lenders would likely be willing to assume this risk that transfer or encumbrance of the property might be impeded.

In this case, the Notice does effect title and possession of real property. You have tried to give notice to the lender, but have been unable to, therefore you have no other way to give notice to the lender of their "duty" to negotiate with you or to give them your offer but through this recordation.

While I disagree with the reasoning, it is nonetheless reality. So what I would do is insert additional wording into the notice of non-compliance that says something like this: 'By virtue of this notice and the non-compliance of XXXXX, and the mortgage terms in the Deed of Trust recorded at (Insert Recording information and date), the mortgage and beneficial interest of XXXX have been extinguished and satisfied. This instrument is notice of a Satisfaction of Mortgage, and that all who would take title from the Trustee in said deed of trust, do so subject to the satisfaction of mortgage. '

FORM FOR NOTICE OF NON-COMPLIANCE

Notice of Non Compliance
Recording requested by

When recorded mail to

Space above this line for recorder's use

NOTICE OF NON COMPLIANCE

of California Civil Code § 2923.5

NOTICE IS HEREBY GIVEN: That _____ of the following described property:

APN: _____ And with a legal description of:

Lot ____ of Tract No. _____, in the City of _____, County of _____,
State of California, as per Map recorded in Book _____, Pages ____ and ____ of Maps, in the
Office of the County Recorder of said County

has not complied with civil code 2923.5. As such all notices of default and or trustee sales and
such other recordings and actions are void as a matter of law.

I have in good faith attempted to mediate the loan and the true beneficiary has refused to negotiate in
good faith. They have not complied with the provisions in which they were to meet with me in
person or by telephone in order to assess the borrower's financial situation and explore options for
the borrower to avoid foreclosure. During the initial contact, the mortgagee, Beneficiary, or
authorized agent shall advise the borrower that he or she has the right to request a subsequent
meeting and, if requested, the mortgagee, beneficiary, or authorized agent shall schedule the meeting
to occur within 14 days. The assessment of the borrower's financial situation and discussion of
options may occur during the first contact, or at the subsequent meeting scheduled for that purpose.

If we had met the property would have reflected a value of _____. I am willing to pay an interest rate of
_____ and I will be able to make monthly payments of _____.

The principal balance of my loan should be reduced the present market value of _____.
In the event this is not acceptable I hereby exercise my right to have the security interest in this
property rescinded pursuant to the Truth in Lending Act.

Dated: _____ Signature: _____

CALIFORNIA ALL-PURPOSE
CERTIFICATE OF ACKNOWLEDGMENT

State of California

County of _____

On _____ before me,

(Here insert name and title of the officer)

personally appeared

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are
subscribed to
the within instrument and acknowledged to me that he/she/they executed the same in his/her/
their authorized
capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity
upon behalf of
which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the
foregoing paragraph
is true and correct.

(Notary Seal)

WITNESS my hand and official seal.

Signature of Notary Public

ADDITIONAL OPTIONAL INFORMATION
DESCRIPTION OF THE ATTACHED DOCUMENT

(Title or description of attached document)

(Title or description of attached document continued)

Number of Pages _____ Document Date _____

(Additional information)

CAPACITY CLAIMED BY THE SIGNER

- ☐ Individual (s)
☐ Corporate Officer

(Title)

- ☐ Partner(s)
- ☐ Attorney-in-Fact
- ☐ Trustee(s)
- ☐ Other _____

INSTRUCTIONS FOR COMPLETING THIS FORM

Any acknowledgment completed in California must contain verbiage exactly as appears above in the notary section or a separate Acknowledgment form must be properly completed and attached to that document. The only exception is if a document is to be recorded outside of California. In such instances, any alternative acknowledgment verbiage as may be printed on such a document so long as the verbiage does not require the notary to do something that is illegal for a notary in California (i.e. certifying the authorized capacity of the signer). Please check the document carefully for proper notarial wording and attach this form if required.

- State and County information must be the State and County where the document signer(s) personally appeared before the notary public for acknowledgment.
- Date of notarization must be the date that the signer(s) personally appeared which must also be the same date the acknowledgment is completed.
- The notary public must print his or her name as it appears within his or her commission followed by a comma and then your title (notary public).
- Print the name(s) of document signer(s) who personally appear at the time of notarization.
- Indicate the correct singular or plural forms by crossing off incorrect forms (i.e. he/she/they, is /are) or circling the correct forms. Failure to correctly indicate this information may lead to rejection of document recording.
- The notary seal impression must be clear and photographically reproducible. Impression must not cover text or lines. If seal impression smudges, re-seal if a sufficient area permits, otherwise complete a different acknowledgment form.
- Signature of the notary public must match the signature on file with the office of the county clerk.
Additional information is not required but could help to ensure this acknowledgment is not misused or attached to a different document. Indicate title or type of attached document, number of pages and date.
Indicate the capacity claimed by the signer. If the claimed capacity is a corporate officer, indicate the title (i.e. CEO, CFO, Secretary).
- Securely attach this document to the signed document

DISCUSSION OF NOTICE OF NON-COMPLIANCE

The following represents a discussion between readers in which I inserted my comments. The principal issue is whether you CAN file a notice of non-compliance in the county recorder's office. And the sub-issue is whether the County recorder has any discretion. My answer is that the County Recorder has NO discretion and that the ONLY way the document can be removed from the title records is through a court order, which of course is the point --- we want to convert a proceeding that is non-judicial and improper just for that reason (because of the presence of necessary and indispensable parties and standing issues) into a judicial proceeding where the parties --- all of them --- can be heard on the merits of their respective claims.

The objective here is not to WIN something by filing the notice of non-compliance, but rather to force the foreclosing party into alleging, under oath the facts upon which they would have assumed in a non-judicial proceeding. The use of the non-judicial proceeding is a ruse to avoid the requirements of due process, which simply means that everyone should have their say in court if they have some meritorious claim.

I agree in part and disagree in part. With the caveat that I am not a California Lawyer and that this involves California law with which I am familiar but have not included in my practice of law.

First there IS a difference between "filing" which generally means sending a document to the clerk of the court for entry into the docket of a case in litigation and "recording" which means sending a document to the clerk of the county records office for entry into the title records and therefore gives "notice" of something that affects the actual title of a particular piece of property.

However, the notice of non-compliance, if phrased properly, and perhaps with a few additions relating to a recitation of rescission by the homeowner DOES affect future transfers of title. It says in essence that anyone who takes title at auction does so at their peril, same as with a mortgage encumbrance. The defense of failure to follow statutory requirements for pursuing modification and for rescission will survive the sale, in my opinion. This could reach as far as a third party who buys the property at arm's length at auction, or after auction from the REO inventory of the bank. Adding the non-compliance with RESPA and TILA and the recitation that the mortgage has been rescinded means that by operation of law the mortgage is extinguished and that this notice of non-compliance operates as a satisfaction of mortgage. In addition, the failure to comply with the new California statute creates a cloud on title.

It is therefore my opinion, subject to the opinion of licensed California counsel, that the filing of a notice of non-compliance must be accepted by the county recording office as a document that affects an interest in a particular piece of real property. My suggestion is that the issue be brought up before the "County Recorder" responsible for filings in that office. I have not seen any discretionary language that allows the County recorder or any of his/her clerks the option of interpreting a document submitted for recording.

Neil F. Garfield, Esq.
livinglies.wordpress.com

From: darrellmcdonald@hotmail.com
To: saldanna@gmail.com; bluedawnrealprop@yahoo.com
CC: drdan@rockstarinlife.com; libertynow@warpmail.net; youtout4fun@yahoo.com;
99libra@gmail.com; ngarfield@msn.com
Subject: RE: California Recorders Office
Date: Sun, 2 Nov 2008
you are using the terms record and file interchangeably and it is confusing.

Filings are done with the court and must be done on pleading paper with a proper caption that must match the caption of the original filed court documents.

Recording is done at the recorder's office where title documents and marriage licenses and such are recorded. The document you have attached appears to be for recording at the recorder's office and should be ok for that purpose only.

Date: Thu, 30 Oct 2008 00:08:36 -0700
From: saldanna@gmail.com
To: bluedawnrealprop@yahoo.com
Subject: Re: California Recorders Office
CC: DrDan@rockstarinlife.com; libertynow@warpmail.net; darrellmcdonald@hotmail.com;
youtout4fun@yahoo.com; 99libra@gmail.com; ngarfield@msn.com

I made this form exactly like the form used by the Lender to Record their Notice of Rescission. It is therefore in their format.

The term "instrument" as used in Cal. Gov't Code § 27280 is defined in Cal. Gov't Code § 27279(a), as a written paper signed by a person or persons transferring the title to, or giving a lien on real property, or giving a right to a debt or duty. Three categories are thus presented. A recordable instrument is one which either a) transfers title, b) gives a lien, or c) gives a right or duty.

"Instrument" means some written paper, or instrument, signed and delivered by one person to another, transferring the title to, or creating a lien on, property, or giving a right to a debt or duty. Hoag v. Howard (1880) 55 Cal 564, 1880 Cal LEXIS 323; De Wolfskill v. Smith (1907, Cal App) 5 Cal App 175, 89 P 1001, 1907 Cal App LEXIS 199; Hale v. Pendergrast (1919, Cal App) 42 Cal App 104, 183 P 833, 1919 Cal App LEXIS 720.

Gov. Code, § 27280, subd. (a), providing that "[a]ny instrument or judgment affecting the title to or possession of real property may be recorded ..." did not authorize a homeowners association to record, in a county's land title records, a document asserting that homeowners were in violation of the association's covenants, conditions, and restrictions by painting their house an unauthorized color. A recordable "instrument" is one that either transfers title, "gives" a lien, or "gives" a right or duty (Gov. Code, § 27279, subd.(a)), and the notice of noncompliance did none of those (Editor's Note: For reasons above, I disagree with that conclusion).

Even assuming that the notice of noncompliance were an "instrument" as defined by Gov. Code, § 27279, it would be recordable only if, pursuant to Gov. Code, § 27280, it affected "title to" or "possession of" the real property, but the notice of noncompliance did not affect title to the property or possession. (Editor's Note: I disagree with that conclusion applied in the context of a mortgage of foreclosure) The notice simply created uncertainty about whether the association

would be able to force the homeowners (or their successors) to repaint their home. Ward v. Superior Court (1997, Cal App 2d Dist) 55 Cal App 4th 60, 63 Cal Rptr 2d 731, 1997 Cal App LEXIS 394, review denied (1997, Cal) 1997 Cal LEXIS 5230. Ward v. Superior Court (1997, Cal App 2d Dist) 55 Cal App 4th 60, 63 Cal Rptr 2d 731, 1997 Cal App LEXIS 394, review denied (1997, Cal) 1997 Cal LEXIS 5230.

BHA relies on the third category of the "instrument" definition. BHA argues that the notice of noncompliance is a recordable instrument "because it is in writing and gives 'a right to a debt or duty' in that it provides petitioners and any successors notice of their duty to bring their property into compliance." Clearly there is a major difference between providing notice of a duty, and "giving" or creating that duty. To the extent that BHA has the "right" to dictate the color of a wall or garage door, that "right" was given to BHA by the CC&R's. If the right exists, it exists whether or not a notice of noncompliance is recorded to give public notice of BHA's claim. In this case, for example, BHA filed suit to enforce this claimed right, something BHA could have done without recording a notice of noncompliance. Thus BHA's notice of noncompliance does not come within the third category of the "instrument" definition.

Even assuming that the notice of noncompliance were an "instrument" as defined by Government Code section 27279, it would be recordable only if--pursuant to Government Code section 27280--it affected "title to" or "possession of" the real property. As discussed above, the notice of noncompliance does not affect title to the property. Nor does it affect possession. Petitioners retain possession as well as title. Legally speaking, petitioners can freely transfer title and possession.

(Editor's Note: In my opinion this case does not apply to the recordation of a notice of non-compliance in the context of mortgages, notes, foreclosures and evictions. In the context of mortgages, foreclosures and evictions, this is exactly the point of most of the defenses raised under securitization, TILA and RESPA --- the absence of a chain of good title on the note and mortgage clouds the title of the deed and the trustee's authority under the deed in a non-judicial state. The frauds and deceptive lending practices contrary to statute allow the "borrower" to rescind or even nullify the note and mortgage. Both possession and title are at risk for ANYONE seeking to obtain title or possession, or maintain title or possession under such circumstances, until a judicial determination is made as to the merits of the claims)

The constraints petitioners are experiencing on transfer of title and possession are practical ones, not legal limitations. For example, property subject to a lis pendens remains freely transferable as a legal matter. (See, e.g., Stagen v. Stewart-West Coast Title Co. (1983) 149 Cal. App. 3d 114, 122 [196 Cal. Rptr. 732].) The notice of noncompliance involved here has no legal effect on title or possession, or on transfers of title or possession. Instead, the notice simply creates uncertainty about whether BHA will be able to force petitioners (or their successors) to repaint their home. It is because few purchasers or lenders would likely be willing to assume this risk that transfer or encumbrance of the property might be impeded.

In this case, the Notice does effect title and possession of real property. You have tried to give notice to the lender, but have been unable to, therefore you have no other way to give notice to the lender of their "duty" to negotiate with you or to give them your offer but through this recordation.

Sal

"I AM NOT AN ATTORNEY LICENSED TO PRACTICE LAW AND MAY NOT GIVE LEGAL ADVICE OR ACCEPT FEES FOR LEGAL ADVICE. ANY INFORMATION PROVIDED IS FOR INFORMATIONAL PURPOSES ONLY AND IS NOT A SUBSTITUTE FOR SEEKING ADVICE FROM A LICENSED ATTORNEY"

Wed, Oct 29, 2008 at 2:58 PM, Jan McClinton <bluedawnrealprop@yahoo.com> wrote:

Hi,

Just got back from the Riverside recorders office. They will not record. They say they "may" record under the 27280 code, but it does not fit their format so they won't! until it fits their needs. Any more suggestions?

Have a Great Day!

Janice

--- On Tue, 10/28/08, sal danna <saldanna@gmail.com> wrote:

From: sal danna <saldanna@gmail.com>

Subject: Re: California Recorders Office

To: bluedawnrealprop@yahoo.com

Cc: "RockStar Dr Dan" <DrDan@rockstarinlife.com>, "Liberty" <libertynow@warppmail.net>, "Darrell McDonald" <darrellmcdonald@hotmail.com>, youtout4fun@yahoo.com, "Steve Cisko" <99libra@gmail.com>, "Neil" <ngarfield@msn.com>

Date: Tuesday, October 28, 2008, 11:13 PM

Here is the provision that authorizes the recording.

Cal Gov Code 27280.

Instruments and judgments recordable; Change in ownership statement

(a) Any instrument or judgment affecting the title to or possession of real property may be recorded pursuant to this chapter.

On Tue, Oct 28, 2008 at 9:51 PM, Jan McClinton <bluedawnrealprop@yahoo.com> wrote:

Yes, that is exactly what I tried to file...with my info of course, and the Riverside recorder gave me a paper saying: "We have found no provision in the California State Law authorizing recording of the enclosed document(s)." I have it notarized and all. I am wondering if we need something else to go with this. Any thoughts?

JUDGE BUFORD BANKRUPTCY COURT RULES ON CAPACITY TO SUE

Judge Samuel Bufford, Presiding

Courtroom 1575 Calendar

United States Bankruptcy Court

Central District of California

Los Angeles

Tuesday, October 28, 2008 Hearing Room 1575

9:30 am

7

Chapter

Ramiro Rivera and Miriam Rivera

2:08-23592

Hearing

RE: [9] Notice of motion and motion for relief from the automatic stay
with

supporting declarations PERSONAL PROPERTY RE: 2004 FORD

EXPEDITION; VIN 1FMRU17W54LB88364 . Exhibit A-D) (Kim, John)

#11.00

Docket #: 9

Continue – no assignment of note to movant (movant is not lienholder
of record)

Tentative Ruling:

Party Information

Debtor(s):

Ramiro Rivera Represented By

Eric-Douglas Johnson

Joint Debtor(s):

Miriam Rivera Represented By

Eric-Douglas Johnson

Movant(s):

Wells Fargo Financial California, Inc. Represented By

John H Kim

Trustee(s):

David L Ray

Generic Complaint

NATURE OF THE ACTION

This case arises out of Defendants' egregious and ongoing and far reaching fraudulent schemes for improper use of Plaintiff's identity, fraud in the inducement, fraud in the execution, usury, and breaches of contractual and fiduciary obligations as Mortgagee or "Trustee" on the Deed of Trust, "Mortgage Brokers," "Loan Originators," "Loan Seller," "Mortgage Aggregator," "Trustee of Pooled Assets", "Trustee or officers of Structured Investment Vehicle", "Investment Banker", "Trustee of Special Purpose Vehicle/Issuer of Certificates of 'Asset-backed Certificates'", "Seller of 'Asset-Backed' Certificates (shares or bonds)," "Special Servicer" and Trustee, respectively, of certain mortgage loans pooled together in a trust fund. The participants in the securitization scheme described herein have devised business plans to reap millions of dollars in profits at the expense of Plaintiff and other investors in certain trust funds.

In addition to seeking compensatory, consequential and other damages, Plaintiff seeks declaratory relief as to what (if any) party, entity or individual or group thereof is the owner of the promissory note executed at the time of the loan closing, and whether the Deed of Trust (Mortgage) secures any obligation of the Plaintiff, and A Mandatory Injunction requiring reconveyance of the subject property to the Plaintiff or, in the alternative a Final Judgment granting Plaintiff Quiet Title in the subject property.

FACTS

Summary of the Facts of this Case

Plaintiff is the nominal payor on the subject promissory Note. The Loan Seller is a financial institution that was paid a fee to pose as a residential mortgage lender, when in fact the source of loan funds and the actual lender (Investors in Certificates) and underwriter (Mortgage Aggregator and Investment Banker) were other parties whose identities and receipt of fees and profits were withheld from Plaintiff at Closing and despite numerous requests continue to be withheld from Plaintiff by the Defendants contrary to the requirements of Federal Law and applicable State Law.

Unknown to Plaintiff, the Loan Seller, acting as principal in its relationships with the "independent appraiser" of the property and the mortgage broker and mortgage originator, induced the Plaintiff into a transaction that did not and could not meet normal underwriting standards for a residential mortgage. The Loan Seller posed as a conventional mortgage lender thus leading Plaintiff to reasonably believe that the Loan Seller, the mortgage broker, and the loan originator had an interest in the success(repayment of the loan) of the transaction that Plaintiff was induced to believe was being executed at the time of the "closing" of the subject loan transaction.

In fact, the Loan Seller, mortgage broker, appraiser, loan originator, title agent, escrow agent and Trustee on the Deed of Trust, had no financial stake (i.e., liability) in the transaction and no interest other than obtaining Plaintiff's signature on a "loan" that could never be repaid, contrary to representations and assurances from the conspiring participants in this fraudulent scheme. In fact, the "Appraisal" was intentionally and knowingly inflated along with other loan data to justify the closing of the "loan transaction." Plaintiff relied upon the due diligence of the apparent "Lender" (i.e., actually the Loan Seller) in executing the and accepting the closing documents. In fact, no "lender" was involved in the closing in the sense of an entity performing due diligence and evaluation pursuant to national standards for underwriting and evaluating risk of loaning money in a residential loan closing. Thus no bank or other financial institution actually performing under the standards, rules and regulations governing such institutions was the "lender" which is the basis for Plaintiff's cause of action for usury, to wit: that the inflated appraisal added an undisclosed cost to the loan which when added to the other terms, disclosed and undisclosed, and amortized over the real expected life of the "loan" exceeds the limits set by the State legislature for usury and is not subject to exemption because the presence of a financial institution in the transaction was a ruse in which the form of the

transaction covered over and mislead the Plaintiff as to the real parties in interest and the fees generated by the production of the subject “loan transaction.”

Their purpose was solely to collect fees, rebates, kickbacks and profits that were never disclosed to Plaintiff and have only recently been discovered by Plaintiff through consultation with experts in securitization of residential mortgage loans, and diligent research including the filings of some parties with the Securities and exchange Commission which disclose the normal manner of operating this fraudulent scheme.

The Loan Seller was named as the Payee on the subject promissory note and the beneficiary under the mortgage terms allegedly securing the performance under the subject note. The “Trustee” was named as the Trustee on the Deed of Trust executed at the time of the alleged “closing” of the “loan transaction.” In accordance with State law, the Deed and terms of security were recorded in the county records.

Notwithstanding the above, and without the knowledge of the Plaintiff, the Loan Seller had entered into Assignment and Assumption Agreements with one or more parties and Pooling and Service Agreements with one or more parties including but not limited to the mortgage aggregator prior to or contemporaneously with the “Closing” of the subject “loan transaction.” Under the terms of these agreements, the Loan Seller received a sum of money, usually on receiving an application for a loan equal to the gross amount of the loan sought by Plaintiff plus a fee of 2.5% or more which was allocated to the subject loan transaction.

Contrary to the documents presented before and during the “closing” of the “loan transaction” the Loan Seller was neither the source of funding nor the “Lender.” Thus at the time of recording, the source of funding and the “Lender” was a different entity than the nominal mortgagee or beneficiary under the deed of trust and was neither named nor disclosed in any fashion. The security for the “loan” thus secured an obligation that had been paid in full by a third party. Said third party(ies) was acting as a financial institution or “Lender” without even having been chartered or registered to do so despite regulations to the contrary from laws and rules of State or Federal authorities and/or agencies.

Some form of documentation represented by the Loan Seller to the Mortgage Aggregator was presented before or contemporaneously with the “closing” of the loan transaction. In some cases the documentation included actual copies of the documents presented at “Closing.” In most cases it consisted of either forged blank notes or vague descriptions of the content of the notes that were placed into the pool of assets that would be “securitized.” Plaintiff has discovered numerous cases in which the “loan closing” either did not take place at all or included documentation substantially different than the original offer and acceptance and substantially different than what could have been reported to the Mortgage Aggregator prior to the “closing.” Plaintiff has discovered numerous cases in which foreclosure has proceeded despite the fact that no loan closing was ever consummated, no papers were ever signed, or the loans were properly rescinded properly under law.

Plaintiff does not know what version of documentation was presented to the Mortgage Aggregator and if the Mortgage Aggregator took one or more varying descriptions of the alleged “loan documents” into more than one pool of assets which was eventually sold for the purpose of securitizing the assets of the pool which included the subject loan transaction either once or more than once. Plaintiff has requested such information numerous times only to be met with complete silence from the Defendants.

There is no assignment of the subject mortgage in the county records, but there is a non-recorded Pooling and Services” Agreement and a non-recorded Assignment and Assumption Agreement which appears to substitute the Trustee over the pooled assets for the nominal Trustee in the Deed of Trust. The powers of this second Trustee were in turn transferred to either a Trustee for a Special Investment Vehicle (which performed the accounting and reporting of the pool assets) or to an investment bank Collateral Debt Obligation manager whose department

performed the accounting and reporting of the pool assets. The reporting of the pool assets consisted principally of descriptions of the notes “signed” by borrowers and limited descriptions of the general terms of the note such that the note appeared to be more valuable than the initial terms of payment by the “borrower.”

The note from the subject “loan transaction” was eventually allocated into a new corporation (Special Purpose Vehicle) formed for the express purpose of holding the pooled assets under certain terms. The terms included the allocation of payments from one note to pay any deficiency in payment of another note in unrelated “loan transactions” contrary to the terms of each such note which required payments to be allocated to the principal, interest, escrow and fees associated with only that specific “loan transaction.” Whether such “deficiency” was caused by the difference between the higher general terms of description of the note or the lower actual payment requirements from the “borrower” is not known, despite numerous requests for accounting and the refusal of Defendants to provide any such information.

The Investment Banking firm arranged through payment for a false inflated appraisal of the certificates and/or issuer of the certificates that would be sold to investors in much the same way as it had procured the false appraisal of the property that “secured” the “loan transaction.” In addition, insurance was purchased from proceeds of this transaction, credit default swaps were purchased from proceeds of this transaction, the investors investments were “oversold” to create a reserve pool from which the SPV could pay deficiencies in payments, and the SPV created cross-collateralization agreements and overcollateralization of the pool assets to assure payments to the investors, thus creating co-obligors on the payment stream due from the Plaintiff on the subject “loan transaction.”

The pool assets, including the Plaintiff’s subject “loan transaction “ were pledged completely to the owners of the “asset-backed securities.” All the certificates were then transferred to a Seller who in turn sold the certificates in varying denominations, each of which had slightly different terms depending upon which segment of the pool (tranche) secured the investment.

If there is a holder in due course of the Plaintiff’s note arising from the subject “loan transaction” it is the investors who purchased said securities (certificates). Some of said securities are held by the original purchaser thereof, others were sold at weekly auction markets, others were paid by re-sales of property that was “secured”, others were paid from prepayments, others were paid by sale at full or partial price to the investment bank that originated the entire transaction, some of which might be held by the Federal Reserve as non-recourse collateral, and others might have been paid by one or more of the insurance, credit default swaps, cross guarantees or cross collateralization of the segment of the pool that secured the relevant investor who owned certificates backed by a pool of assets that included the subject “loan transaction.”

It is doubtful that any of the Defendants have any knowledge or have made any effort to determine whether the putative holders in due course have been paid in whole or in part. It can only be said with certainty that these Defendants seek to enforce loan documents for which they have already been paid in full plus illegal fees for participating in an illegal scheme. These Defendants seek to add insult to injury by demanding ownership of the property in addition to the receipt of payment in full long before any delinquency or default even allegedly occurred.

In order for these Defendants to maintain legal standing in connection with the subject loan transaction they are required to show the entire chain of title of the note and the entire chain of title of the mortgage. They have refused to do this despite numerous requests, leading Plaintiff to conclude that the Defendants cannot produce such evidence of a complete chain of title or are intentionally withholding the information that would show breaks in such chain.

Plaintiff is left in the position of being in an adversary proceeding with ghosts. While these Defendants have informally offered or considered providing indemnification for any third party claims, the fact remains that any relief

awarded these defendants, any standing allowed to these defendants would expose the Plaintiff to multiple claims and suits from an unknown number of parties and entities that all claim, possibly correctly, to the holders in due course. Any grant of a certificate of title to an entity other than Plaintiff or the nominal mortgagee creates an incurable defect in title.

There is no recording of any document in the county records which predates the Defendants' attempt to initiate foreclosure and/or eviction or which would authorize them to proceed.

Significance of REMIC

Mortgage backed Securities (MBS) Certificates are "pass through Certificates," where the Trust has elected to be treated as a Real Estate Mortgage Investment Conduit ("REMIC") to enjoy the tax exempt status allowed under 15 U.S.C. §§806A-G. REMIC regulations impose very strict limitations as to the nature of the investments a REMIC trust may make (i.e. "permitted investments") and transactions which it may not undertake (i.e. "prohibited transactions"). Any violation of REMIC regulations has significant tax implications for the Trust, as well as all Certificate holders. For example, any income realized by the Trust from a "prohibited transaction" is taxed at 100%. The REMIC regulations also provide that any entity that causes the REMIC regulations to be violated is liable to the Trust and the Certificate holders for the entire amount of the tax.

Only income from "qualified mortgages" and "permitted investments" may enter a REMIC trust. A "qualified mortgage" is an obligation (i.e. mortgage) which is principally secured by an interest in real property which (1) was transferred to the Trust on the startup date, (2) was purchased by the REMIC Trust within 3 months after the startup date or (3) any qualified replacement mortgage.

Permitted investments are limited to:

- a. Cash Flow Investments (i.e. temporary investment where the Trust holds money it has received from qualified mortgages pending distribution to the Certificateholders);
- b. Qualified Reserve Assets (i.e. any *intangible* property which is held for investment and is part of a reasonably required reserve to provide for full payment of expenses of the REMIC or amounts due on regular interests in the event of defaults on qualified mortgages or lower than expected returns on cash flow investments. These investments are for very defined purposes and are to be passive in nature. They must be "reasonably required."
- c. Liquidation Proceeds from "foreclosed property" which is acquired in connection with the default or imminent default of a "qualified mortgage" held by the Trust.

In order to maintain the REMIC status, the Trustee and the Servicers must ensure that the REMIC receives no income from any asset that is not a "Qualified Mortgage" or a "Permitted Investment." 26 U.S.C. § 806F(a)(2)(B).

Prohibited Transactions include the disposition of a qualified mortgage (except where the disposition is "incident to" the foreclosure, default, or imminent default of the mortgage); or the receipt of any income from an asset that is not a Qualified Mortgage or a Permitted Investment. 26 U.S.C. § 860F(a)(2)(B).

Prohibited Transactions are taxed in an amount 100% of the REMIC's net income from such prohibited transaction. 26 U.S.C. § 860F(a)(1).

Contributions of any "property" – e.g., cash, mortgages, etc. – made to the REMIC are taxed at 100% of the contribution, except for the four following exceptions:

- a. Contributions to facilitate a "clean up call" (i.e. the redemption of a class of regular interest, when by reason of prior payments with respect to those interests the administrative costs associated with servicing that class outweigh the benefits of maintaining the class). Reg. § 1.860G-2(j)(1).
- b. Any cash payment in the nature of a guarantee, such as payments to the REMIC. Any violation of REMIC regulations will defeat the privileged tax status and will subject the REMIC to 100% taxation, plus penalties and interest. These taxes and penalties are ultimately borne by the Certificate holders, under a surety bond, letter of credit or insurance policy.
- c. Any cash contribution during the three month period after the start-up day; and
- d. Any cash contribution to a qualified reserve fund made by a holder of a residual interest.

On a monthly basis, the Investment Banking firm and/or its agents, servants or employees compiled, individually and in concert, oversaw and approved all the information contained in the Distribution Reports and electronically sent same to certain parties. The data regarding the number of bankruptcies, aggregate Special Servicing Fees, and aggregate Trust Fund Expenses was routinely incomplete, false, and/or misleading.

The Distribution Reports are supposed to accurately reflect the "financial health of the trust," and provide Certificate holders, with important data such as the number of loans in bankruptcy, the aggregate amount of special servicing fees, and the aggregate amounts of trust fund expenses. Each and every one of these categories is essential for to assess its profit and loss potential in the REMIC entity. Furthermore, this data is used by bond rating agencies to assess the value of the Certificates.

Based upon the filings and information of the Plaintiff it appears that no accurate accounting has ever been presented to anyone and that therefore the identity and status of any putative holder in due course is completely shrouded in secrecy enforced by these Defendants, their agents, servants and employees. Unreported repurchases of certificates or classes of certificates would and did result in a profit to the REMIC that went unreported, and which was not credited to Borrowers where the repurchase was, as was usually the case, the far less than the original investment. While the Plaintiff would never have entered into a transaction in which the true nature of this scheme was revealed, any profits, refunds, rebates, fees, points, costs or other income or gain should be credited on some basis to said borrowers including Plaintiff herein.

The end result of the false and misleading representations and material omissions of Defendants as to the true nature of the mortgage loan actually being processed, which said Defendants had actual knowledge was in direct conflict with the original Uniform Residential Loan Application, early TIL, and Plaintiffs' stated intentions and directions to said Defendants at the time of original application for the loan, fraudulently caused Plaintiffs to execute predatory loan documents.

At no time whatsoever did Defendants ever advise Plaintiffs that:

- (a) the mortgage loan being processed was not in their best interest;
- (b) the terms of the mortgage loan being processed were less favorable than the fixed-rate loan which Defendants previously advised Plaintiffs that they qualified for;
- (c) that the adjustable rate mortgage loan was an inter-temporal transaction (transaction where terms, risks, or provisions at the commencement of the transaction differ at a later time) on which Plaintiffs had only qualified at the initial “teaser” fixed rate but had not and could not qualify for the loan once the interest rate terms changed after year 2;
- (d) that as a result of the change in interest rate after year 2 that Plaintiffs would not be able to meet their financial obligations on the loan given their income and expense history previously provided to Defendants;
- (e) that Plaintiffs would likely be placed in a position of default, foreclosure, and deficiency judgment upon not being able to meet their increased loan obligations once the fixed rate interest period expired and the adjustable rate applied;
- (f) that the originating “lender”, that being Defendant ENCORE, had no intention of retaining ownership interest in the mortgage loan or fully servicing same and in fact may have already presold the loan, prior to closing, to a third party mortgage aggregator;
- (g) that the mortgage loan was actually intended to be repeatedly sold and assigned to multiple third parties, including one or more mortgage aggregators and investment bankers (including but not limited to Defendants DOES 1-10), for the ultimate purpose of bundling the Plaintiffs’ mortgage with hundreds or perhaps thousands of others as part of a companion, support, or other tranche in connection with the creation of a REMIC security known as a Collateralized Mortgage Obligation (“CMO”), also known as a “mortgage-backed security” to be sold by a securities firm (and which in fact ended up as collateral for Asset-Backed Securities Certificates, created the same year as the closing);
- (h) that the mortgage instrument and Promissory Note may be sold, transferred, or assigned separately to separate third parties so that the later “holder” of the Promissory Note may not be in privity with or have the legal right to foreclose in the event of default;
- (i) that in connection with the multiple downline resale and assignment of the mortgage and Promissory Note that assignees or purchasers of the Note may make “paydowns” against the Note which may effect the true amount owed by the Plaintiffs on the Note;
- (j) that a successive assignee or purchaser of the Note and Mortgage may not, upon assignment or purchase, unilaterally impose property insurance requirements different from those imposed as a condition of the original loan (also known as prohibition against increased forced-placed coverage) without the Plaintiffs’ prior notice and consent;

As a result of the closing and in connection therewith, Defendants placed the Plaintiffs into a sub-prime adjustable rate mortgage program, with Defendants intentionally misleading Plaintiffs and engaging in material omissions by failing to disclose to Plaintiffs the fact that the nature of the mortgage loan application had been materially changed without Plaintiffs’ knowledge or consent and that Plaintiffs were being placed into an adjustable rate mortgage program despite not being fully qualified for such a program.

Prior to the closing, Defendant failed to provide to Plaintiffs the preliminary disclosures required by the Truth-In-Lending Act pursuant to 12 CFR (also known as and referred to herein as “Regulation Z”) sec. 226.17 and 18, and failed to provide the preliminary disclosures required by the Real Estate Settlement Procedures Act (“RESPA”) pursuant to 24 CFR sec. 3500.6 and 3500.7, otherwise known as the GFE.

Defendant also intentionally failed and/or refused to provide Plaintiffs with various disclosures which would indicate to the Plaintiffs that the consumer credit contract entered into was void, illegal, and predatory in nature due in part to the fact that the final TIL showed a “fixed rate” schedule of payments, but did not provide the proper disclosures of the actual contractually-due amounts and rates.

Defendants failed and/or refused to provide a HUD-1 Settlement Statement at the closing which reflected the true cost of the consumer credit transaction. As Defendants failed to provide an accurate GFE or Itemization of Amount Financed (“IOAF”), there was no disclosure of a Yield Spread Premium (“YSP”, which is required to be disclosed by the Truth-In-Lending Act) and thus no disclosure of the true cost of the loan.

As a direct and proximate result of these failures to disclose as required by the Truth-In-Lending Act, Defendant MORTGAGE BROKER received a YSP in a substantial amount of without preliminary disclosure, which is a *per se* violation of 12 CFR sec. 226.4(a), 226.17 and 18(d) and (c)(1)(iii). The YSP raised the interest rate which was completely unknown to or approved by the Plaintiffs, as they did not received the required GFE or IOAF.

In addition, the completely undisclosed YSP was not disclosed by Defendant in their broker contract, which contract was blank in the area as to fees to be paid to Defendant. This is an illegal kickback in violation of 12 USC sec. 2607 as well as State law which gives rise to all damages claims for all combined broker fees, costs, and attorneys’ fees.

The Amount Financed within the TIL is also understated which is a material violation of 12 CFR sec. 226.17 and 18, in addition to 15 USC sec. 1602(u), as the Amount Financed must be completely accurate with no tolerance.

Defendants were under numerous legal obligations as fiduciaries and had the responsibility for overseeing the purported loan consummation to insure that the consummation was legal, proper, and that Plaintiffs received all legally required disclosures pursuant to the Truth-In-Lending Act and RESPA both before and after the closing.

Plaintiffs, not being in the consumer lending, mortgage broker, or residential loan business, reasonably relied upon the Defendants to insure that the consumer credit transaction was legal, proper, and complied with all applicable laws, rules, and Regulations.

At all times relevant hereto, Defendants regularly extended or offered to extend consumer credit for which a finance charge is or may be imposed or which, by written agreement, is payable in more than four (4) installments and was initially payable to the person the subject of the transaction, rendering Defendants “creditors” within the meaning of the Truth-In-Lending Act, 15 U.S.C. sec. 1602(f) and Regulation Z sec. 226.2 (a)(17).

At the closing of the subject “loan transaction”, Plaintiffs executed Promissory Notes and Security Agreements in favor of Defendants as aforesaid. These transactions, designated by Defendants as a Loan, extended consumer credit which was subject to a finance charge and which was initially payable to the Defendants. As part of the consumer credit transaction the subject of the closing, Defendants retained a security interest in the subject property which was Plaintiffs’ principal residential dwelling.

Defendants engaged in a pattern and practice of defrauding Plaintiffs in that, during the entire life of the mortgage loan, Defendants failed to properly credit payments made; incorrectly calculated interest on the accounts; and have failed to accurately debit fees. At all times material, Defendants had actual knowledge that the Plaintiffs’ accounts were not accurate but that Plaintiffs would make further payments based on Defendants’ inaccurate accounts.

Plaintiffs made payments based on the improper, inaccurate, and fraudulent representations as to Plaintiffs’ accounts.

As a direct and proximate result of the actions of the Defendants set forth above, Plaintiffs overpaid in interest.

Defendants also utilized amounts known to the Defendants to be inaccurate to determine the amount allegedly due and owing for purposes of foreclosure.

Defendants' violations were all material in nature under the Truth-In-Lending Act.

Said violations, in addition to the fact that Plaintiff did not properly receive Notices of Right to Cancel, constitute violations of 15 USC sec. 1635(a) and (b) and 12 CFR sec. 226.23(b), and are thus a legal basis for and legally extend Plaintiffs' right to exercise the remedy of rescission.

Defendants assigned the Note and mortgage to parties who did not take these instruments in good faith or without notice that the instruments were invalid or that Plaintiffs had a claim in recoupment. Pursuant to ORC sec. 1303.32(A)(2)(b)(c) and (f), Defendants are not a holder in due course and is thus liable to Plaintiffs, individually, jointly and severally.

On information and belief and given that the consumer credit transaction was an inter-temporal transaction with multiple assignments as part of an aggregation and the creation of a REMIC tranche itself a part of a predetermined and identifiable CMO, all Defendants shared in the illegal proceeds of the transaction; conspired with each other to defraud the Plaintiffs out of the proceeds of the loan; acted in concert to wrongfully deprive the Plaintiffs of their residence; acted in concert and conspiracy to essentially steal the Plaintiffs' home and/or convert the Plaintiffs' home without providing Plaintiffs reasonably equivalent value in exchange; and conducted an illegal enterprise within the meaning of the RICO statute.

On information and belief and given the volume of residential loan transactions solicited and processed by the Defendants, the Defendants have engaged in two or more instances of racketeering activity involving different victims but utilizing the same method, means, mode, operation, and enterprise with the same intended result.

C. Claims for Relief

COUNT I: VIOLATIONS OF HOME OWNERSHIP EQUITY PROTECTION ACT

Plaintiffs reaffirm and reallege the above paragraphs hereinabove as if set forth more fully hereinbelow.

In 1994, Congress enacted the Home Ownership Equity Protection Act ("HOEPA") which is codified at 15 USC sec. 1639 et seq. with the intention of protecting homeowners from predatory lending practices targeted at vulnerable consumers. HOEPA requires lenders to make certain defined disclosures and prohibits certain terms from being included in home loans. In the event of noncompliance, HOEPA imposes civil liability for rescission and statutory and actual damages.

Plaintiffs are "consumers" and each Defendant is a "creditor" as defined by HOEPA. In the mortgage loan transaction at issue here, Plaintiffs were required to pay excessive fees, expenses, and costs which exceeded more than 10% of the amount financed.

Pursuant to HOEPA and specifically 15 USC sec. 1639(a)(1), each Defendant is required to make certain disclosures to the Plaintiffs which are to be made conspicuously and in writing no later than three (3) days prior to the closing.

In the transaction at issue, Defendants were required to make the following disclosure to Plaintiffs by no later than three (3) days prior to said closing:

“You are not required to complete this agreement merely because you have received these disclosures or have signed a loan application. If you obtain this loan, the lender will have a mortgage on your home. You could lose your home and any money you have put into it, if you do not meet your obligation under the loan.”

Defendants violated HOEPA by numerous acts and material omissions, including but not limited to:

- (a) failing to make the foregoing disclosure in a conspicuous fashion;
- (b) engaging in a pattern and practice of extending credit to Plaintiffs without regard to their ability to repay in violation of 15 USC sec. 1639(h).

By virtue of the Defendants’ multiple violations of HOEPA, Plaintiffs have a legal right to rescind the consumer credit transaction the subject of this action pursuant to 15 USC sec. 1635. This Complaint is to be construed, for these purposes, as formal and public notice of Plaintiff’s Notice of Rescission of the mortgage and note.

Defendants further violated HOEPA by failing to make additional disclosures, including but not limited to Plaintiff not receiving the required disclosure of the right to rescind the transaction; the failure of Defendants to provide an accurate TIL disclosure; and the amount financed being understated.

As a direct consequence of and in connection with Plaintiffs’ legal and lawful exercise of their right of rescission, the true “lender” is required, within twenty (20) days of this Notice of Rescission, to:

- (a) desist from making any claims for finance charges in the transaction;
- (b) return all monies paid by Plaintiffs in connection with the transaction to the Plaintiffs;
- (c) satisfy all security interests, including mortgages, which were acquired in the transaction.

Upon the true “lenders” full performance of its obligations under HOEPA, Plaintiffs shall tender all sums to which the true lender is entitled.

Based on Defendants’ HOEPA violations, each of the Defendants is liable to the Plaintiffs for the following, which Plaintiffs demand as relief:

- (a) rescission of the mortgage loan transactions;
- (b) termination of the mortgage and security interest in the property the subject of the mortgage loan documents created in the transaction;
- (c) return of any money or property paid by the Plaintiffs including all payments made in connection with the transactions;
- (d) an amount of money equal to twice the finance charge in connection with the transactions;
- (e) relinquishment of the right to retain any proceeds; and
- (f) actual damages in an amount to be determined at trial, including attorneys’ fees.

COUNT II: VIOLATIONS OF REAL ESTATE SETTLEMENT PROCEDURES ACT

Plaintiffs reaffirm and reallege paragraphs above herein as if specifically set forth more fully hereinbelow.

As mortgage lenders, Defendants are subject to the provisions of the Real Estate Settlement Procedures Act (“RESPA”), 12 USC sec. 2601 et seq.

In violation of 12 USC sec. 2607 and in connection with the mortgage loan to Plaintiffs, Defendants accepted charges for the rendering of real estate services which were in fact charges for other than services actually performed.

As a result of the Defendants’ violations of RESPA, Defendants are liable to Plaintiffs in an amount equal to three (3) times the amount of charges paid by Plaintiffs for “settlement services” pursuant to 12 USC sec. 2607(d)(2).

COUNT III: VIOLATIONS OF FEDERAL TRUTH-IN-LENDING ACT

Plaintiffs reaffirm and reallege paragraphs above hereinabove as if set forth more fully hereinbelow.

Defendants failed to include and disclose certain charges in the finance charge shown on the TIL statement, which charges were imposed on Plaintiffs incident to the extension of credit to the Plaintiffs and were required to be disclosed pursuant to 15 USC sec. 1605 and Regulation Z sec. 226.4, thus resulting in an improper disclosure of finance charges in violation of 15 USC sec. 1601 et seq., Regulation Z sec. 226.18(d). Such undisclosed charges include a sum identified on the Settlement Statement listing the amount financed which is different from the sum listed on the original Note.

By calculating the annual percentage rate (“APR”) based upon improperly calculated and disclosed amounts, Defendants are in violation of 15 USC sec. 1601 et seq., Regulation Z sec. 226.18(c), 18(d), and 22.

Defendants’ failure to provide the required disclosures provides Plaintiffs with the right to rescind the transaction, and Plaintiffs, through this public Complaint which is intended to be construed, for purposes of this claim, as a formal Notice of Rescission, hereby elect to rescind the transaction.

COUNT IV: VIOLATION OF FAIR CREDIT REPORTING ACT

Plaintiffs reaffirm and reallege paragraphs above as if set forth more fully hereinbelow.

At all times material, Defendants qualified as a provider of information to the Credit Reporting Agencies, including but not limited to Experian, Equifax, and TransUnion, under the Federal Fair Credit Reporting Act. 65. Defendants wrongfully, improperly, and illegally reported negative

information as to the Plaintiffs to one or more Credit Reporting Agencies, resulting in Plaintiffs having negative information on their credit reports and the lowering of their FICO scores.

Pursuant to 15 USC sec. 1681(s)(2)(b), Plaintiffs are entitled to maintain a private cause of action against Defendants for an award of damages in an amount to be proven at the time of trial for all violations of the Fair Credit Reporting Act which caused actual damages to Plaintiffs, including emotional distress and humiliation.

Plaintiffs are entitled to recover damages from Defendants for negligent non-compliance with the Fair Credit Reporting Act pursuant to 15 USC sec. 1681(o).

Plaintiffs are also entitled to an award of punitive damages against Defendants for their willful noncompliance with the Fair Credit Reporting Act pursuant to 15 USC sec. 1681(n)(a)(2) in an amount to be proven at time of trial.

COUNT VII: FRAUDULENT MISREPRESENTATION

Plaintiffs reaffirm and reallege paragraphs above as if set forth more fully hereinbelow.

Defendants knowingly and intentionally concealed material information from Plaintiffs which is required by Federal Statutes and Regulations to be disclosed to the Plaintiffs both before and at the closing.

Defendants also materially misrepresented material information to the Plaintiffs with full knowledge by Defendants that their affirmative representations were false, fraudulent, and misrepresented the truth at the time said representations were made.

Under the circumstances, the material omissions and material misrepresentations of the Defendants were malicious.

Plaintiffs, not being investment bankers, securities dealers, mortgage lenders, mortgage brokers, or mortgage lenders, reasonably relied upon the representations of the Defendants in agreeing to execute the mortgage loan documents.

Had Plaintiffs known of the falsity of Defendants' representations, Plaintiffs would not have entered into the transactions the subject of this action.

As a direct and proximate cause of the Defendants' material omissions and material misrepresentations, Plaintiffs have suffered damages.

COUNT VIII: BREACH OF FIDUCIARY DUTY

Plaintiffs reaffirm and reallege paragraphs above as if set forth more fully hereinbelow.

Defendants, by their actions in contracting to provide mortgage loan services and a loan program to Plaintiffs which was not only to be best suited to the Plaintiffs given their income and expenses but by which Plaintiffs would also be able to satisfy their obligations without risk of losing their home, were "fiduciaries" in which Plaintiffs reposed trust and confidence, especially given that Plaintiffs were not and are not investment bankers, securities dealers, mortgage lenders, mortgage brokers, or mortgage lenders.

Defendants breached their fiduciary duties to the Plaintiffs by fraudulently inducing Plaintiffs to enter into a mortgage transaction which was contrary to the Plaintiffs' stated intentions; contrary to the Plaintiffs' interests; and contrary to the Plaintiffs' preservation of their home.

As a direct and proximate result of the Defendants' breaches of their fiduciary duties, Plaintiffs have suffered damages.

Under the totality of the circumstances, the Defendants' actions were willful, wanton, intentional, and with a callous and reckless disregard for the rights of the Plaintiffs justifying an award of not only actual compensatory but also exemplary punitive damages to serve as a deterrent not only as to future conduct of the named Defendants herein, but also to other persons or entities with similar inclinations.

COUNT IX: UNJUST ENRICHMENT

Plaintiffs reallege and reaffirm paragraphs above as if set forth more fully hereinbelow.

Defendants had an implied contract with the Plaintiffs to ensure that Plaintiffs understood all fees which would be paid to the Defendants to obtain credit on Plaintiffs' behalf and to not charge any fees which were not related to the settlement of the loan and without full disclosure to Plaintiffs.

Defendants had full knowledge that a "bait and switch" adjustable rate predatory mortgage with an increase in the interest rate due to the YSP paid to the Broker for the "up sell" was not in the Plaintiffs' best interests.

Defendants cannot, in good conscience and equity, retain the benefits from their actions of charging a higher interest rate, fees, rebates, kickbacks, profits and gains and YSP fee unrelated to the settlement services provided at closing.

Defendants have been unjustly enriched at the expense of the Plaintiffs, and maintenance of the enrichment would be contrary to the rules and principles of equity.

Plaintiffs thus demand restitution from the Defendants in the form of actual damages, exemplary damages, and attorneys' fees.

COUNT X: CIVIL CONSPIRACY

Plaintiffs reaffirm and reallege paragraphs above as if set forth more fully hereinbelow.

In connection with the application for and consummation of the mortgage loan the subject of this action, Defendants agreed, between and among themselves, to engage in actions and a course of conduct designed to further an illegal act or accomplish a legal act by unlawful means, and to commit one or more overt acts in furtherance of the conspiracy to defraud the Plaintiffs.

Defendants agreed between and among themselves to engage in the conspiracy to defraud for the common purpose of accruing economic gains for themselves at the expense of and detriment to the Plaintiffs.

The actions of the Defendants were committed intentionally, willfully, wantonly, and with reckless disregard for the rights of the Plaintiffs.

As a direct and proximate result of the actions of the Defendants in combination resulting in fraud and breaches of fiduciary duties, Plaintiffs have suffered damages.

Plaintiffs thus demand an award of actual, compensatory, and punitive damages.

COUNT XI: CIVIL RICO

Plaintiffs reaffirm and reallege paragraphs above as set forth more fully hereinbelow.

Defendants are “persons” as defined by ORC sec. 2923.31(G).

The conspiracy the subject of this action has existed from date of application to the present, with the injuries and damages resulting therefrom being continuing.

Defendants’ actions and use of multiple corporate entities, multiple parties, and concerted and predetermined acts and conduct specifically designed to defraud Plaintiffs constitutes an “enterprise”, with the aim and objective of the enterprise being to perpetrate a fraud upon the Plaintiffs through the use of intentional nondisclosure, material misrepresentation, and creation of fraudulent loan documents.

Each of the Defendants is an “enterprise Defendant”.

As a direct and proximate result of the actions of the Defendants, Plaintiffs have and continue to suffer damages.

RELIEF SOUGHT

WHEREFORE, having set forth numerous legally sufficient causes of actions against the Defendants, Plaintiffs pray for the entry of Final Judgment against all Defendants jointly and severally in an amount not yet quantified but to be proven at trial and such other amounts to be proven at trial, and for costs and attorneys’ fees; that the Court find that the transactions the subject of this action are illegal and are deemed void; that the foreclosure which was instituted be deemed and declared illegal and void and that further proceedings in connection with the foreclosure be enjoined; and for any other and further relief which is just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand trial by jury of all matters so triable as a matter of right.

Respectfully submitted,

QUIET TITLE

It is our theory that the real party in interest on the lender side is the owner of the asset backed security issued by the SPV. The security is usually a "securitized" bond deriving its value from the underlying mortgages of which yours is one. Thus a quiet title action against "John Doe" and served by publication might eliminate the mortgage and note. Here is a form which you can use at your own risk. It is probably wise to state rescission, fraud and offset as reason for the quiet title It is from a law firm in _____:

(Name, Address Of Party or attorney)

State Bar No: _____

(____) _____ - _____

Attorney for _____ (Or "In Pro Per")

SUPERIOR COURT OF THE STATE OF _____

COUNTY OF _____

[PLAINTIFF(S) NAMES]

Plaintiffs,

v.

[DEFENDANT(S) NAMES]

Defendants

CASE NO: _____

COMPLAINT TO QUIET TITLE TO REAL PROPERTY

Plaintiff complains and for causes of action alleges as follows:

FIRST CAUSE OF ACTION

(For _____ Against ____)

◇. Defendant __, __ is __, and at all times herein mentioned was __, a resident __ of the City of __, County of __, State of _____.

◇. Defendant __, __, is __, and at all times herein mentioned, was __ a Corporation organized and existing under the laws of the State of _____ with principle offices located at __, in the City of __, County of ____.

◇. Plaintiff __ is __ ignorant of the true names and capacities of defendants sued herein as DOES I through X, inclusive, and therefore sues __ these defendants by such fictitious names. Plaintiff __ will amend this complaint to allege their true names and capacities when ascertained.

◇. Plaintiff __ is __ informed and believes __ and thereon alleges __ that, at all times herein mentioned, each of the defendants sued herein was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment.

◇. Plaintiff __ is __ not and at all times herein mentioned the owner and/or entitled to possession of the property located at _____.

◇. Plaintiff __ is __ informed and believe __ and thereupon allege __ that _____, and each of them, claim __ an interest in the property adverse to plaintiff herein. However, the claim of said Defendant __ is __ without any right whatsoever, and said Defendant __ have __ not legal or equitable right, claim, or interest in said property.

◇. Plaintiff __ therefore seek __ a declaration that the title to the subject property is vested in plaintiff __ alone and that the defendant __ herein, and each of them, be declared to have no estate, right, title or interest in the subject property and that said defendant __, and each of them, be forever enjoined from asserting any estate, right, title or interest in the subject property adverse to plaintiff herein.

WHEREFORE, plaintiff __ pray __ judgment against defendant __ and each of them, as follows:

◇. For an order compelling said Defendant __, and each of them, to transfer legal title and possession of the subject property to Plaintiff __ herein;

◇. For a declaration and determination that Plaintiff __ is __ the rightful holder of title to the property and that Defendant __ herein, and each of them, be declared to have no estate, right, title or interest in said property;

◇. For a judgment forever enjoining said defendants, and each of them, from claiming any estate, right, title or interest in the subject property;

◊. For costs of suit herein incurred;

◊. For such other and further relief as the court may deem proper

DATED: _____
(Signature)

VERIFICATION

I, ____, am a ____ in the above-entitled action. I have read the foregoing ____ and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Long Beach, _____.

DATED: _____

USURY

General Allegations:

The subject loan, note, and mortgage was structured so as to create the appearance of a higher value of the real property than the actual fair market value.

Defendants disguised the transaction to create the appearance of the lender being a properly chartered and registered financial institution authorized to do business and to enter into the subject transaction when in fact the real party in interest was not disclosed to Plaintiff, as aforesaid, and neither were the various fees, rebates, refunds, kickbacks, profits and gains of the various parties who participated in this unlawful scheme. Said real party in interest, i.e., the source of funding for the loan and the person to whom the note was transmitted or eventually "assigned" was neither a financial institution nor an entity or person authorized, chartered or registered to do business in this State nor to act as banking, lending or other financial institution anywhere else.

As such, this fraudulent scheme, (which was in actuality a plan to trick the Plaintiff into signing what would become a negotiable security used to sell unregulated securities under fraudulent and changed terms from the original note) was in fact a sham to use Plaintiff's interest in the real property to collect interest in excess of the legal rate.

The transaction involved a loan of money pursuant to a written agreement, and as such, subject to the rate limitation set forth under state and federal law. The "formula rate" referenced in those laws was exceeded by a factor in excess of 10 contrary to the applicable law and contrary to the requirements for disclosure under TILA and HOEPA.

Under Applicable law, the interest charged on this usurious mortgage prevents any collection or enforcement of principal or interest of the note, voids any security interest thereon, and entitles the Plaintiff to recovery of all money or value paid to Defendants, plus treble damages, interest, and attorney fees.

Under Applicable Law Plaintiffs are also entitled and demand a permanent injunction be entered against the Defendants (a) preventing them from taking any action or making any report in furtherance of collection on this alleged debt which was usurious, as aforesaid (b) requiring the records custodian of the county in which the alleged mortgage and other instruments are recorded to remove same from the record, (c) allowing the filing of said order in the office of the clerk of the property records where the subject property, "Loan transaction" and any other documents relating to this transaction are located and (d) dissolving any lis pendens or notice of pendency relating to the Defendants purported claim.

FLORIDA STATUTE EXAMPLE:

Section 687.02(1), Florida Statutes, provides that contracts for the payment of interest exceeding 18 percent per annum are usurious.[2] Interest exceeding 25 percent per annum is criminal usury.[3] Section 687.03(1), Florida Statutes, states that an unlawful rate of interest exists if a person reserves, charges or takes, directly or indirectly, a rate of interest exceeding that amount for any loan, advance of money, line of credit or forbearance to enforce the collection of any sum of money or other obligation. This provision affects any rate of interest charged:

"[B]y way of commission for advances, discounts, or exchange, or by any contract, contrivance, or device whatever whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of the equivalent of 18 percent per annum simple interest."

Since the purpose of usury laws is to protect needy borrowers by penalizing unconscionable money lenders, courts will look beyond the form of a transaction to its substance when

considering usury calculations.[4] Thus, the mere form of a transaction becomes immaterial, and a court will consider whether the transaction in effect exacts an interest rate higher than that allowed by law.[5]

In *Medina v. Lamonica*,[6] the jury found that Medina had charged Lamonica a usurious rate of interest when Medina loaned Lamonica 500,000 Venezuelan bolivares and Lamonica gave Medina a postdated check in the amount of \$122,000 from which the loan was to be repaid. The postdated check exceeded the principal amount of the loan in an amount sufficient to allow the jury to determine that the rate of interest was between 18 percent and 25 percent, and thus usurious. More recently in *FastFunding The Company, Inc. v. Betts*,[7] the court held that it should first determine whether a payday loan violated the state's usury laws before sending the case to arbitration: "If Ms. Betts is correct in her complaint that the contract violates the usury laws, then the contract is illegal and an arbitrator could not require Ms. Betts to perform under the contract."

An agreement, whether express or implied, whereby a person, rather than merely cashing a check for a fee, agrees to hold the check for a certain time period for the advance of money, would appear to constitute forbearance to enforce the collection of the money. Thus, such agreements would constitute a loan subject to the usury statutes.

Companies providing payday loan services are generally registered under Part II or Part III of Chapter 560, Florida Statutes, the Money Transmitters Code. Part II of Chapter 560, Florida Statutes, addresses payment instruments and funds transmission while Part III provides for check cashing and foreign currency exchange. Those registered under Part II are authorized to engage in the activities authorized under Part III.[8] While a Part II registrant may engage in check cashing services of the nature authorized in Part III, such activities must be consistent with the provisions of that part.

Part II of Chapter 560, Florida Statutes, the "Payment Instruments and Funds Transmission Act," authorizes registered persons to sell payment instruments and to transmit funds to another location. An examination of the legislative history surrounding the adoption of Part II, Chapter 560, clearly indicates that Part II was intended to address the registration and regulation of persons who sell money orders, traveler's checks, drafts, warrants, and checks, and persons who transmit funds to another location via wire, facsimile, electronic transfer, or courier.[9] Nothing in Part II contemplates that the act will be used to accomplish a loan. While a registered person may sell payment instruments, to the extent the transaction includes an agreement to delay the enforcement of collecting any sum of money or obligation, such a transaction would be a loan subject to the usury provisions of Chapter 687, Florida Statutes.

Part III, Chapter 560, Florida Statutes, constitutes the "Check Cashing and Foreign Currency Exchange Act" (act). Section 560.309(4), Florida Statutes, provides that, exclusive of the direct costs of verification that shall be established by Department of Banking and Finance rule, no check casher shall:

"(a) Charge fees, except as otherwise provided by this part, in excess of 5 percent of the face amount of the payment instrument, or 6 percent without the provision of identification, or \$5, whichever is greater;
(b) Charge fees in excess of 3 percent of the face amount of the payment instrument, or 4 percent without the provision of identification, or \$5, whichever is greater, if such payment instrument is the payment of any kind of state public assistance or federal social security benefit payable to the bearer of such payment instrument; or
(c) Charge fees for personal checks or money orders in excess of 10 percent of the face amount of those payment instruments, or \$5, whichever is greater."

Rule 3C-560.801(1), Florida Administrative Code, provides that in addition to the fees established in section 560.309(4), Florida Statutes, a check casher may collect the direct costs associated with verifying a payment instrument holder's identity, residence, employment, credit history, account status, or other necessary information prior to cashing the payment instrument, provided that the verification fee may only be collected when verification is required and shall not exceed \$5 per transaction. A check casher may not charge a customer more than one verification fee per diem, regardless of whether the check casher is cashing or has cashed more than one of the customer's payment instruments that day.

The Department of Banking and Finance has also adopted Rule 3C-560.803, Florida Administrative Code, which states that a check casher may accept a postdated check, subject to the fees established in section 560.309(4), Florida Statutes.

Accordingly, Chapter 560, Florida Statutes, as implemented by rule of the Department of Banking and Finance, authorizes the acceptance of a postdated check to be cashed at the end of a specified period of time. Further, the act directs what fees may be imposed. For a personal check, the fee may not exceed 10 percent of the face value of the check and the verification fee may not exceed \$5. The fees authorized by Part III of Chapter 560, Florida Statutes, and by the administrative rules would apply regardless of whether the personal check received in the transaction is deposited immediately or deposit is deferred until a later date. Nothing in Chapter 560, Florida Statutes, however, recognizes that such arrangements may be deferred from presentment in order to be extended, renewed, or continued in any manner with the imposition of additional fees.[10] Moreover, an examination of the legislative history surrounding the amendment of Chapter 560 in 1994, when Parts II and III were adopted, fails to reveal any evidence that the Legislature contemplated that such transactions could "roll over." [11]

Thus, to the extent that a transaction comports with the provisions of this act, it would not violate the usury provisions in Chapter 687, Florida Statutes. In the absence of statutory authorization for these types of transactions, cashing a check or exchanging currency for a fee outside the scope of Chapter 560, Florida Statutes, would constitute a loan, subject to the usury provisions of Chapter 687, Florida Statutes.

Accordingly, I am of the opinion that a "payday loan" or like transaction whereby a company provides cash to the consumer who, in return, provides a personal check that is

held by the company for a certain time period and covers the amount of cash provided as well as a fee charged for advancing the cash, constitutes a loan subject to the usury laws. A company registered under Chapter 560, Florida Statutes, however, may cash personal checks for the fees prescribed in that chapter without violating the usury laws if such transactions are concluded without being extended, renewed, or in any way continued with the imposition of additional fees.

RAB/tall

[1] See, Opinion of the Attorney General of Maryland to Thomas L. Bronwell, dated November 24, 1999, and Opinion of the Indiana Attorney General to Charles W. Philips, dated January 19, 2000.

[2] And see, s. 516.02(2)(a), Fla. Stat., of the Florida Consumer Finance Act, stating:

"A person who is engaged in the business of making loans of money, except as authorized by this chapter or other statutes of this state, may not directly or indirectly charge, contract for, or receive any interest or consideration greater than 18 percent per annum upon the loan, use, or forbearance of money, goods, or chooses in action, or upon the loan or use of credit, of the amount or value of \$25,000 or less."

[3] See, s. 687.071(2) and (3), Fla. Stat.

[4] Rollins v. Odom, 519 So. 2d 652 (Fla. 1st DCA 1988). And see, Dixon v. Sharp, 276 So. 2d 817, 820 (Fla. 1973) (purpose of usury law is "to bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans").

[5] See, Beacham v. Carr, 166 So. 456 (Fla. 1936)(a court will not permit the use of a form designed to evade the evident purpose of the usury laws). And see, Mindlin v. Davis, 74 So. 2d 789 (Fla. 1954); Rebman v. Flagship First National Bank of Highlands County, 472 So. 2d 1360 (Fla. 2d DCA 1985); Jersey Palm-Gross v. Paper, 639 So. 2d 664 (Fla. 4th DCA 1994), approved, 658 So. 2d 531 (Fla. 1995); Gilbert v. Doris R. Corporation, 111 So. 2d 682, 684 (Fla. 3d DCA 1959); Party Yards, Inc. v. Templeton, 751 So. 2d 121 (Fla. 5th DCA 2000); Bermil Corporation v. Sawyer, 353 So. 2d 579 (Fla. 3d DCA 1977).

[6] 492 So. 2d 809 (Fla. 3d DCA 1986).

[7] 758 So. 2d 1143 (Fla. 5th DCA 2000). Judge Dauksch, in his concurring opinion, suggested that the Attorney General "may be interested" in this matter.

[8] Section 560.204(2), Fla. Stat.

[9] See, e.g., Florida House of Representatives Committee on Commerce Final Bill Analysis & Economic Impact Statement on HB 2653 (as passed by the Legislature as Ch. 94-354, Laws of Florida), dated April 22, 1994.

[10] See generally, *Alsop v. Pierce*, 19 So. 2d 799, 805-806 (Fla. 1944) (a legislative directive as to how a thing should be done is, in effect, a prohibition against its being done in any other way; where the Legislature has prescribed the mode, that mode must be observed).

[11] See, n. 9, *supra*.

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PREDATORY PRACTICES FOR FORECLOSURE “RESCUE”

Equitable Mortgage & Usury In Sale Buyback Deals In Florida

The following collection of Florida court cases address issues of equitable mortgage and/or usury in the context of real estate sale-buyback transactions; considerations are made whether to treat these transactions as disguised loans.

Mears v. Mayblum

96 So.2d 223

(Fla.1957)

In this case, the Florida Supreme Court was asked to address a real estate transaction that involved a sale by one, Mears, of a partial (1/3) interest in real estate to a certain Mayblum, for \$12,000, coupled with an agreement to "buy back" the interest for \$15,000, payable by 11 monthly payments of \$350, and a final payment of \$11,150. The Florida high court held that the transaction was an equitable mortgage under the provisions of the Florida Statutes, Section 697.01 (and citing *Markell v. Hilpert*, 140 Fla. 842, 192 So. 392 (Fla. 1939) as authority).

Further, the court ruled that:

* "The circumstances surrounding the transaction between Mears and Mayblum and the instruments executed by these parties present an arrangement which we think was a "contrivance" to circumvent the statutes penalizing usury."

* "He [Mayblum] did violate Sec. 687.03 making it unlawful to charge interest of more than ten per cent [under the then-existing statute] per annum by any "contrivance or device," and should be penalized under Sec. 687.04 for the infraction."

The usury statute that was violated in this case was Florida's civil usury statute, Section 687.03, which currently sets a maximum 18% per annum interest, and applies to advances up to \$500,000. On loans in excess of \$500,000, only the criminal usury statutes apply. See Sec. 687.071, below.

The current language of the Sec. 687.03 prohibits:

* "a rate of interest greater than the equivalent of 18 percent per annum simple interest, either directly or indirectly, by way of commission for advances, discounts, or exchange, or by any contract, contrivance, or device whatever whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of the equivalent of 18 percent per annum simple interest." (my emphasis added)

The court in *Mears v. Mayblum* ruled that the sale and the contemporaneously executed buyback agreement on deferred payments was such a "contrivance".

The penalty for violating the civil usury statute is found in Section 687.04, which essentially says that, generally, (1) any right to interest is forfeited, (2) double the amount of any interest already paid shall be forfeited back to the debtor, and (3) only the actual principal sum of such usurious contract can be enforced, either at law or in equity.

In addition, Florida has two criminal usury statutes, both of which can be found in Section 687.071. The misdemeanor usury statute generally applies on interest willfully and knowingly charged in excess of 25% per annum but not exceeding 45% per annum, and is found at Sec. 687.071(2); the felony usury statute applies to interest willfully and knowingly charged in excess of 45% per annum, and is at Sec. 687.071(3).

The criminal usury statutes provide that, in addition to the penalties commonly associated with misdemeanors and felonies, "no extension of credit made in violation [thereof] shall be an enforceable debt in the courts of this state." Section 687.071(7).

The court in *Mears v. Mayblum* also indicated, in dicta, that "A person violating [the criminal usury] statute must forfeit the principal and interest and is subject to criminal prosecution"; however, since it ruled that the interest charged did not subject the arrangement to the criminal usury statute, it was unnecessary for the court to reach any determination as to the willfulness or the knowledge with which the loan in question was made.

REMOVAL OF USURY CLAIMS AGAINST NATIONAL BANKS TO FEDERAL COURT

Usury claims against national banks can be removed to federal court even if plaintiffs did not rely on federal law *Beneficial Nat'l Bank v. Anderson*, 123 S. Ct. 2058 (2003).

The U.S. Supreme Court held that usury claims against national banks can be removed to federal court, as the National Bank Act, 12 U.S.C. [sec][sec] 85 et seq., provides the exclusive remedy for such claims.

Here, 26 taxpayers sued a national bank, charging that the interest rates on its tax refund anticipation loans were usurious. Defendant removed the case to federal court. The Eleventh Circuit Court of Appeals held that the removal had been improper.

Reversing, the Court observed that a state claim may be removed to federal court in two circumstances-when Congress expressly provides for it, or when a federal statute wholly displaces the state law cause of action through complete preemption. When the federal statute completely preempts the state law cause of action, the Court continued, a claim that comes within the scope of that cause of action-even if pleaded in terms of state law-is, in reality, based on federal law.

In this case, plaintiffs' complaint sought relief for "usury violations" and claimed that defendant charged excessive interest "in violation of the common law usury doctrine." The complaint relied on an Alabama statute and did not mention the National Bank Act.

The federal statute, however, sets forth the substantive limits on the rates of interest that national banks may charge, sets forth the elements of a usury claim against a national bank, and prescribes the remedies available to borrowers, the Court found. Because federal law completely defines what constitutes usury by a national bank, such claims should be removable to federal court, the Court said.

The Court added that uniform rules limiting the liability of national banks, and prescribing exclusive remedies for their overcharges, are an integral part of a banking system that historically needed protection from possible unfriendly state legislation. The same federal interest that supports protecting national banks from state taxation also supports the established interpretation of the preemptive force of the National Bank Act. Consequently, there is no such thing as a state law claim of usury against a national bank, even if a plaintiff's complaint makes no mention of federal law.

IDENTITY THEFT MIGHT BE THE KEYSTONE

Foreclosure Offense and Defense: Identity Theft Might be the Keystone

September 20, 2008 · No Comments

Based upon the submission from Sal, it would appear that the identity theft statutes apply in every element. It might behoove you to go down to the police station and file a complaint for ID theft, in addition to including it in your defensive pleadings and counterclaim against the party foreclosing or attempting to foreclose your property:

1. Any person who willfully obtains personal identifying information of another person and attempts to obtain credit, goods, services, or medical services without consent shall be guilty of a wobbler misdemeanor/felony. **[In most cases, the mortgage broker, appraiser and "lender" obtained your personal information under false pretenses for the purpose of obtaining credit (the mortgage loan, and the proceeds of sale from investors in mortgage backed securities which are now universally recognized as worthless because the representations attendant to their sale were untrue.)]**

2. The 2002 amendment also expanded liability beyond "willfully obtaining" the personal identifying information of another person to include as a misdemeanor offense the transfer or retention of that information with "the intent to defraud." **[This is easier than it sounds. The "lender" received 102.5% of the principal amount due on the loan from a third party on a loan that all participants knew included inflated appraisals and failed tangible benefit test and affordability.]**

* **VALUATION: LET'S LOOK AT SOME VARIATIONS ON THIS THEME. START WITH A SUB-SUB-PRIME LOAN OR NINJA LOAN.**

* **No income, no job, and no assets. No down payment, no insurance escrow, no tax escrow. The loan has a stated value of \$500,000 because that is the amount owed on the note.** By falsifying the loan application data, the mortgage broker and "lender" find a figure that the borrower could pay if he had a job or other income. **WHY WOULD ANY LENDER APPROVE SUCH A LOAN, KNOWING THAT THE TRANSACTION WILL AND MUST FAIL?**

* The monthly payment figure they choose is based upon web-based statistics that merely take the "income" from the kind of work the prospective borrower would be making if he was working, using average demographics in the geographical area where the house is located.

* The interest rate is 10.5%, adjustable every three months, with a stiff prepayment penalty. With adjustments and resets, the interest rate will zoom to 16.5%. The first payment for the first month is only \$500.00, which means that the borrower has a **reverse amortization loan --- one where the amount he owes goes up with each passing month.** The actual interest on the loan is \$55,000 per year or \$583 per month, without provision for taxes, insurance or principal amortization.

* So on an annual basis he is paying \$6,000 based upon the first payment, and his loan will be increased by \$49,000 to \$549,000, up from the original \$500,000. The interest alone is more than twice any amount the prospective borrower ever made in his life.

* **The prospects for a successful outcome are zero. The likelihood of foreclosure is 100%.**

* The cost of the foreclosure and the cost of maintenance on the house, plus the costs of selling the house are around \$35,000.

* Add to that the right of the mortgage servicer (possible the "lender" or MERS -Mortgage Electronic Registration Systems) was sold or reserved for a service payment of 1.5%, which means that the mortgage servicer would be receiving \$7500 in annual fees, plus late fees and other bogus charges on annual "payments" of \$6,000 from the borrower (whom we now know might not even make the first payment much less the payments of the year). **Thus the transaction STARTS with a negative cash flow and gets worse as time goes on.**

* **Hence the true value of this "paper" is a minus figure (-\$35,000), which means that a "buyer" of the paper would receive \$35,000 just to take it off the bank's books. Instead, the Buyer pays \$512,500.**

Part I WHITE COLLAR CRIMES AND OFFENSES

Chapter 1 Complex Theft Offenses

1.900 IDENTITY THEFT

In 1997, the California Legislature added Penal Code section 530.5 to create the explicit offense of "identity theft," and expanded the statute in 1998 and again in 2002. Any person who willfully obtains personal identifying information of another person and attempts to obtain credit, goods, services, or medical services without consent shall be guilty of a wobbler misdemeanor/felony. The statute includes common identification indicia in its list of "personal identifying information," i.e., name, address, telephone number, driver's license number, social security number, place of employment, employee ID number, mother's maiden name, bank and credit account numbers. The statute was amended in 2002 to expand identification indicia further to include, among other things, checking account numbers, passport numbers, date of birth, credit card number, biometric data (including fingerprint, facial scan identifiers, voice print, retina or iris image, or other unique physical representation), and personal identification numbers or passwords. (Pen. Code, 530.5(b).) The 2002 amendment also expanded liability beyond "willfully obtaining" the personal identifying information of another person to include as a misdemeanor offense the transfer or retention of that information with "the intent to defraud." (Pen. Code 530.5(d).)

In 2001, the law was amended to eliminate the "without consent" element (AB245 (Wyland)). Hence, as of 2002, the use of such information "for an unlawful purpose" constituted a violation. A person could therefore consent to the taking of some personal information for a consented purpose—and its expropriation for another (unlawful) purpose would be a violation.

Also in 2001, the Legislature enacted SB125 (Alpert) to allow victims of identity theft to file a police report and obtain information from financial institutions and credit card companies about false identification in their name—overcoming Right to Financial Privacy Act impediments.

Elimination of "without consent" makes this an actionable offense, even if there was any question about its application before the change.

In the beginning there
was nothing

In the middle there was
money, lots and lots of
it, too much of it

In the end there was
nothing

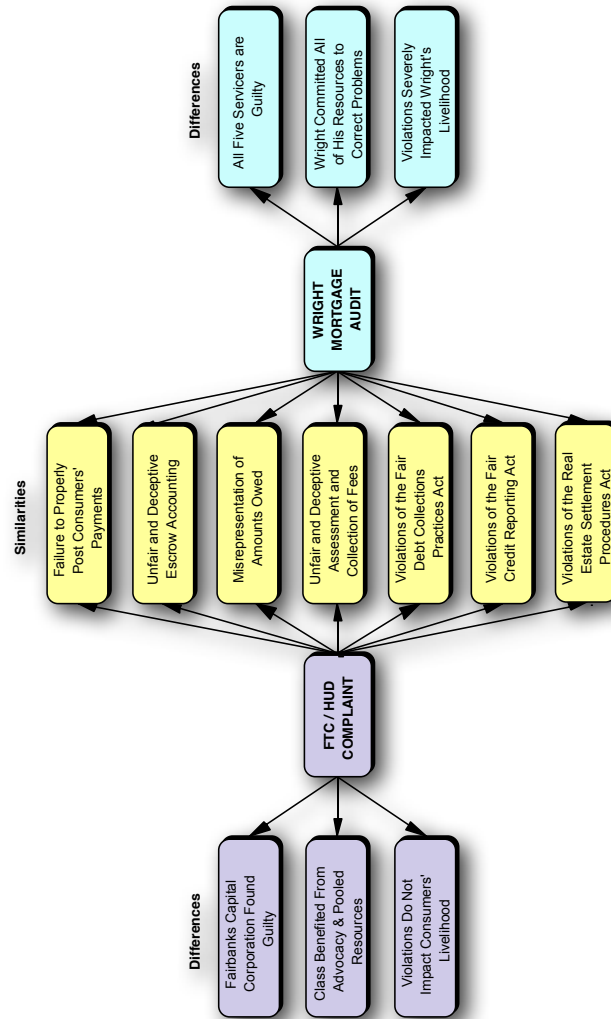
INVESTOR

SPV

PREDATORY LENDING,
FRAUD

BORROWER

Abusive Mortgage Servicing Practices FTC & HUD Findings v. Wright Findings



Maria McDermott
 (C) THE MORTGAGE COUNSELOR 2004

PREDATORY STRUCTURED FINANCE

*Christopher L. Peterson**

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INTRODUCTION

Predatory home loans, like all home mortgages, are increasingly subject to assignment. Now, more than ever before, a market in assignment of loans casts a shadow over how those loans are originated and serviced. While assignment of loans has always been common, relatively new and complex patterns, alternatively referred to as structured finance or securitization, have rendered the assumptions of traditional assignment law quaintly over-generalized.¹ Today mortgage

¹ The finance industry does not have a universally agreed upon definition of the terms "securitization" or "structured finance." See Henry A. Davis, *The Definition of Structured Finance: Results from a Survey*, 11 J. STRUCTURED FIN., Fall 2005, at 5. However, for purposes of this Article "securitization" will refer to the process of pooling assets, such as mortgage loans, and then reselling them to investors. ANDREW DAVIDSON ET AL., SECURITIZATION: STRUCTURING AND INVESTMENT ANALYSIS 3 (2003). "Structured finance," in turn, refers to the process by which securitized assets are made more desirable to investors, such as by dividing the income into securities with different credit risks and maturation dates, or by isolating the assets from the risk that the originator of the assets will declare bankruptcy. *Id.* In practice, the notions of securitizing and structuring are often used interchangeably. See, e.g., STEVEN L. SCHWARCZ, STRUCTURED FINANCE: A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION (Adam D. Ford ed., 3d. ed. 2002 & Supp 2005); JAMES A. ROSENTHAL & JUAN M. OCAMPO, SECURITIZATION OF CREDIT: INSIDE THE NEW TECHNOLOGY OF FINANCE 3-5 (1988) ("Credit securitization is the carefully structured process whereby loans and other receivables are packaged, underwritten, and sold in the form of securities (instruments called asset-backed securities)."). Cf. Providing capital to companies in financial stress is one of the central motivations of securitization.

loans, particularly more expensive loans marketed to those with poor credit histories, are likely to be purchased by investment trusts, bundled into large geographically diverse pools with many other loans, and sold as securities to investors.² Unlike the law, which has been slow to react to this trend, mortgage lenders, brokers, and servicers now actively bargain with a shrewd eye on the ultimate destination of the loans they facilitate.³ Many scholars of mortgage lending and secured credit have for the past several years gone about the project of explaining, predicting, and attempting to influence this secondary market in home mortgages.⁴ Some have pointed out that lenders no longer “lend” in the

SECURITIZATION OF FINANCIAL ASSETS § 1.02 (Jason H.P. Kravitt ed., 2002 & Supp.).

² Jeremy Carter, *Highlights from Securitization News*, 10 J. STRUCTURED FIN., Winter 2005, at 97.

³ See, e.g., Maura B O'Connor & James Bryce Clark, *Ten Easy Ways to Make a Loan Nonsecuritizable*, in COMMERCIAL REAL ESTATE FINANCING: WHAT BORROWERS AND LENDERS NEED TO KNOW NOW 2001, at 11, 13-14 (PLI Real Est. L. & Practice, Course Handbook Series No. 470, 2001) (describing common broker and originator documentation errors); Henry T. Greely, *Contracts as Commodities: The Influence of Secondary Purchasers on the Form of Contracts*, 42 VAND. L. REV. 133, 147-48, 168-70 (1989) (emphasizing the influence of secondary market purchasers on the form and terms of residential mortgage loans); Jess Lederman, *Techniques for Selling Loans to Conduits*, in THE SECONDARY MORTGAGE MARKET: A HANDBOOK OF STRATEGIES, TECHNIQUES AND CRITICAL ISSUES IN CONTEMPORARY MORTGAGE FINANCE 77 (Jess Lederman ed., 1987) (discussing the profitability of different strategies in assigning mortgages to private label mortgage securitization structures).

⁴ Rafael Diaz-Granados, *A Comparative Approach to Securitization in the United States, Japan, Germany, and France*, 4 WILLAMETTE BULL. INT'L L. & POL'Y 1 (1996); Kurt Eggert, *Held Up in Due Course: Codification and the Victory of Form Over Intent in Negotiable Instrument Law*, 35 CREIGHTON L. REV. 363 (2002) and Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503 (2002); Robert Dean Ellis, *Securitization Vehicles, Fiduciary Duties, and Bondholders' Rights*, 24 J. CORP. L. 295 (1999); Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1317-37 (2002); Kathleen C. Engel & Patricia A. McCoy, *Predatory Lending: What Does Wall Street Have to Do with It?* 15 HOUSING POL'Y DEBATE 715 (2004); Thomas J. Gordon, Comment, *Securitization of Executory Future Flows as Bankruptcy Remote True Sales*, 67 U. CHI. L. REV. 1317 (2000); Greely, *supra* note 3; Lynn M. Lopucki, *The Death of Liability*, 106 YALE L.J. 1, 23-30 (1996); Stephen Lubben, *Beyond True Sales: Securitization and Chapter 11*, 1 N.Y.U. J.L. & BUS. 89 (2004); Louis R. Lupica, *Revised Article 9, Securitization Transactions and the Bankruptcy Dynamic*, 9 AM. BANKR. INST. L. REV. 287 (2001); Lois R. Lupica, *Circumvention of the Bankruptcy Process: The Statutory Institutionalization of Securitization*, 33 CONN. L. REV. 199 (2000); Lois R. Lupica, *Asset Securitization: The Unsecured Creditor's Perspective*, 76 TEX. L. REV. 595 (1998); Robin Paul Malloy, *The Secondary Mortgage Market—A Catalyst for Change in Real Estate Transactions*, 39 SW. L.J. 991, 992 (1986); Peter L. Mancini, Note, *Bankruptcy and the UCC as Applied to Securitization: Characterizing a Mortgage Loan Transfer as a Sale or a Secured Loan*, 73 B.U. L. REV. 873 (1993); Jonathan Remy Nash, *Environmental Superliens and the Problem of Mortgage-Backed Securitization*, 59 WASH. & LEE L. REV. 127 (2002); Thomas E. Plank, *The Security of Securitization and the Future of Security*, 25 CARDOZO L. REV. 1655 (2004); Georgette C. Poindexter, *Subordinated Rolling Equity: Analyzing Real Estate Loan Default in the Era of Securitization*, 50 EMORY L.J. 519 (2001); Steven L. Schwarcz, *Securitization Post-Enron*, 25 CARDOZO L. REV. 1539 (2004); Steven L. Schwarcz, *Structured Finance: The New Way to Securitize Assets*, 11 CARDOZO L. REV. 607 (1990); Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J.L. BUS. & FIN. 133 (1994); Steven L.

sense that they themselves expect repayment.⁵ Rather they manufacture a commercial product—borrowers—that are measured, sold, and at times discarded by a consuming capital market. Many of today's mortgage lenders are assignment production companies that create income streams for the nation's capital markets.

Several scholars have demonstrated significant benefits from this process.⁶ Collectively, investors have large amounts of capital, but a limited ability to originate and monitor individual loans. Conversely, mortgage lenders are well situated to make loans, but are typically constrained in the number of loans they can make by their limited access to capital. Provided they can surmount hurdles like trust, information asymmetry, transaction costs, and taxes, these two groups have much to offer each other by way of mutually beneficial exchange. The engineering of securitization conduits is a financial science of overcoming the hurdles separating these two groups.⁷ All this is well and good, in that homeowners receive new access to cheap capital, making (other things being equal) home ownership more affordable at the margins.⁸ When everything goes according to plan, society has much to gain from securitization of home mortgage loans.

But sadly, like many new technologies, securitization comes with a dark side. The contours of this side began to emerge, like so many other consumer problems, in the caseloads of legal aid lawyers serving the working poor. In the late 1980s and early 1990s, legal aid lawyers began seeing growth in the volume of families and senior citizens losing their homes to loan terms and marketing practices removed in degree from theft only ever so slightly by the black magic of boilerplate. Horror stories of breathtaking creditor avarice became common features

Schwarcz, *The Parts are Greater Than the Whole: How Securitization of Divisible Interests Can Revolutionize Structured Finance and Open The Capital Markets to Middle Market Companies*, 1993 COLUM. BUS. L. REV. 139; Joseph C. Shenker & Anthony J. Colletta, *Asset Securitization: Evolution, Current Issues and New Frontiers*, 69 TEX. L. REV. 1369 (1991).

⁵ See, e.g., Maura B. O'Connor & James Bryce Clark, *Ten Easy Ways to Make a Loan Nonsecuritizable*, in COMMERCIAL REAL ESTATE FINANCING: WHAT BORROWERS AND LENDERS NEED TO KNOW NOW 2001, at 11, 16-17 (PLI Real Est. L. & Practice, Course Handbook Series No. 470, 2001) ("A traditional lender lends money from its own balance sheet. . . . A securitizing lender, on the other hand, goes out into the capital markets to get someone else's money to lend to the borrower.").

⁶ Plank, *supra* note 4, at 1667; SCHWARCZ, *STRUCTURED FINANCE*, *supra* note 1, at § 11-1; Shenker & Colletta, *supra* note 4, at 1428-29.

⁷ ROSENTHAL & OCAMPO, *supra* note 1, at 3-5 (suggesting credit securitization is a technological advance comparable to "[s]uperconductors, gene-splicing, artificial intelligence, [and] robotic-driven manufacturing"); Manuel Utset, *Producing Information: Initial Public Offerings, Production Costs, and the Producing Lawyer*, 74 OREGON L. REV. 275, 310 (1995) (arguing lawyers act as "production cost engineers" in bringing initial public offerings of securities to market).

⁸ SCHWARCZ, *STRUCTURED FINANCE*, *supra* note 1, at §11-2; ROSENTHAL & OCAMPO, *supra* note 1, at 12-13.

2008 Mortgage Meltdown Explained - by Brad Keiser

2008 Mortgage Meltdown

How Wall Street wrecked
Main Street and is Stealing
the American Dream



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Stupid or Lying ?



Henry Paulson
US Secretary of the Treasury

- *"Treasury Secretary Henry Paulson delivered an upbeat assessment of the economy, saying growth was healthy and the housing market was nearing a turnaround. 'All the signs I look at' show 'the housing market is at or near the bottom,' Paulson said in a speech to a business group in New York. The U.S. economy is 'very healthy' and 'robust,' Paulson said. (CBS Marketwatch April 2007)*
- *"We've got strong financial institutions...Our markets are the envy of the world. They're resilient, they're... innovative, they're flexible. I think we move very quickly to address situations in this country, and, as I said, our financial institutions are strong." (April 2008)*

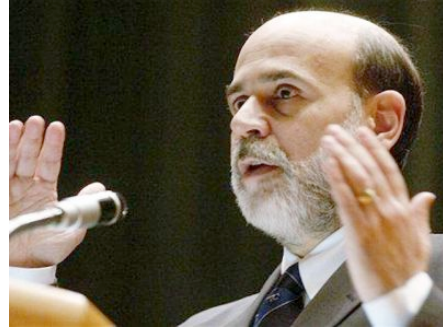
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Fortitude of an Ostrich

- *"At this juncture, the impact on the broader economy and financial markets of the problems in the **subprime market seems likely to be contained.**" (Congressional Testimony March 2007)*
- *"We will follow developments in the subprime market closely. However, fundamental factors—including solid growth in incomes and relatively low mortgage rates—should ultimately support the demand for housing, and at this point, the troubles in the subprime sector seem **unlikely to seriously spill over to the broader economy or the financial system.**" (June 2007)*
- *"It is not the responsibility of the Federal Reserve—nor would it be appropriate—to protect lenders and investors from the consequences of their financial decisions. But developments in financial markets can have broad economic effects felt by many outside the markets, and the Federal Reserve must take those effects into account when determining policy." (August 2007)*



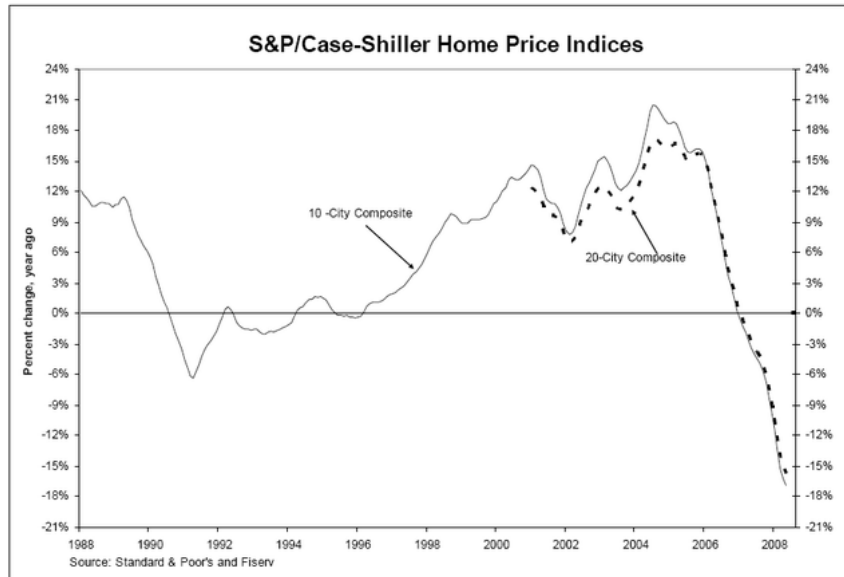
Ben Bernanke
Chairman of the Federal Reserve Bank

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Price index incorporates inflation



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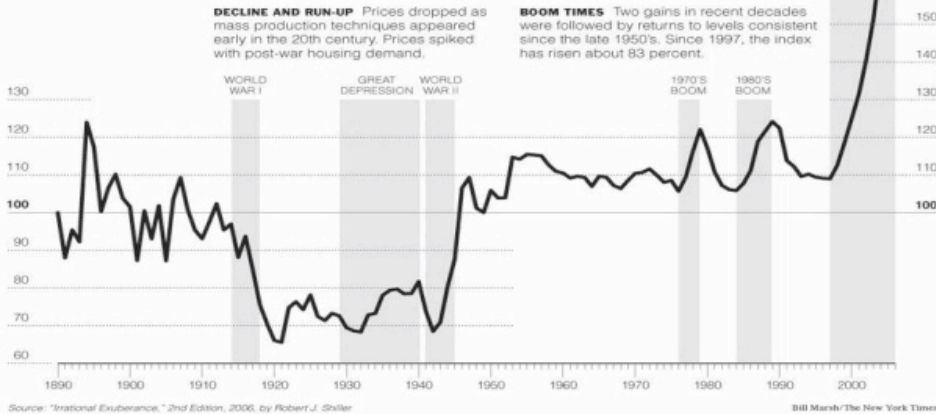


More than an just an aberration

A History of Home Values

The Yale economist Robert J. Shiller created an index of American housing prices going back to 1890. It is based on sale prices of standard existing houses, not new construction, to track the value of housing as an investment over time. It presents housing values in consistent terms over 116 years, factoring out the effects of inflation.

The 1890 benchmark is 100 on the chart. If a standard house sold in 1890 for \$100,000 (inflation-adjusted to today's dollars), an equivalent standard house would have sold for \$66,000 in 1920 (66 on the index scale) and \$199,000 in 2006 (199 on the index scale, or 99 percent higher than 1890).



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NASDAQ 2000 meltdown



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Something a little stronger than Tylenol



Ben Bernanke
Chairman of the Federal Reserve Bank

- Now you can see why this guy has a splitting headache
- Take two and call me in the morning will not solve this guys problem

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Is the worst over?

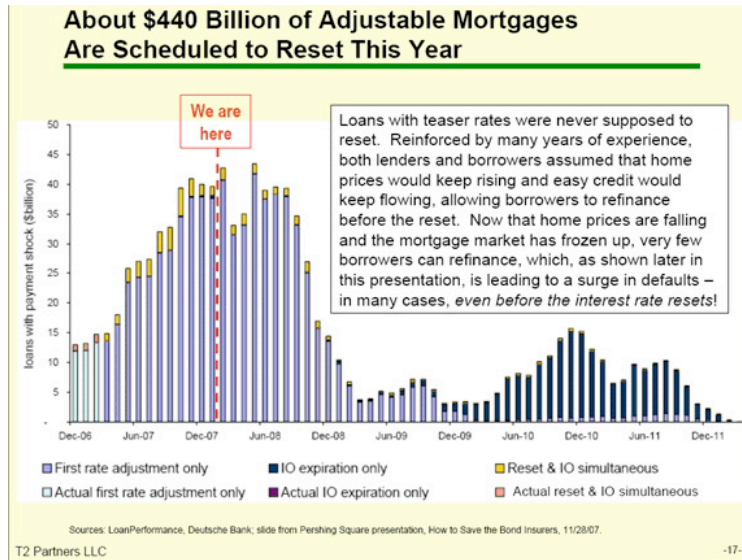
- \$440 billion of adjustable mortgages resetting this year.
- Majority of foreclosures will not occur until 2009
- Banks will still be writing off billions of mortgage debt in 2009
- Reversion to the mean for housing prices and the continued avalanche of foreclosures is not a recipe for a banking recovery
- Home prices have another 15% to go on the downside.

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Only the 2nd inning of a long game



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What is a Level 3 Asset?

Other banks have been moving assets to Level 2 and Level 3 in order to put off the inevitable losses. The definitions of these levels according to FAS 157 are as follows:

1. Level 1 Assets that have observable market prices.
2. Level 2 Assets that don't have an observable prices, but they have inputs that are based upon them.
3. Level 3 Assets where one or more of the inputs don't have observable prices. Reliant on management estimates. Also known as mark to model.

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Something else is spiking 100%-300%

Financial Institution	Level 3 Assets as a % of Capital
Bear Stearns	314%
Morgan Stanley	235%
Merrill Lynch	225%
Goldman Sachs	192%
Lehman	171%
Fannie Mae	161%
Citigroup	125%
Prudential	119%
Hartford	109%

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NASDAQ 2000 meltdown



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?? Simple Securitization ??

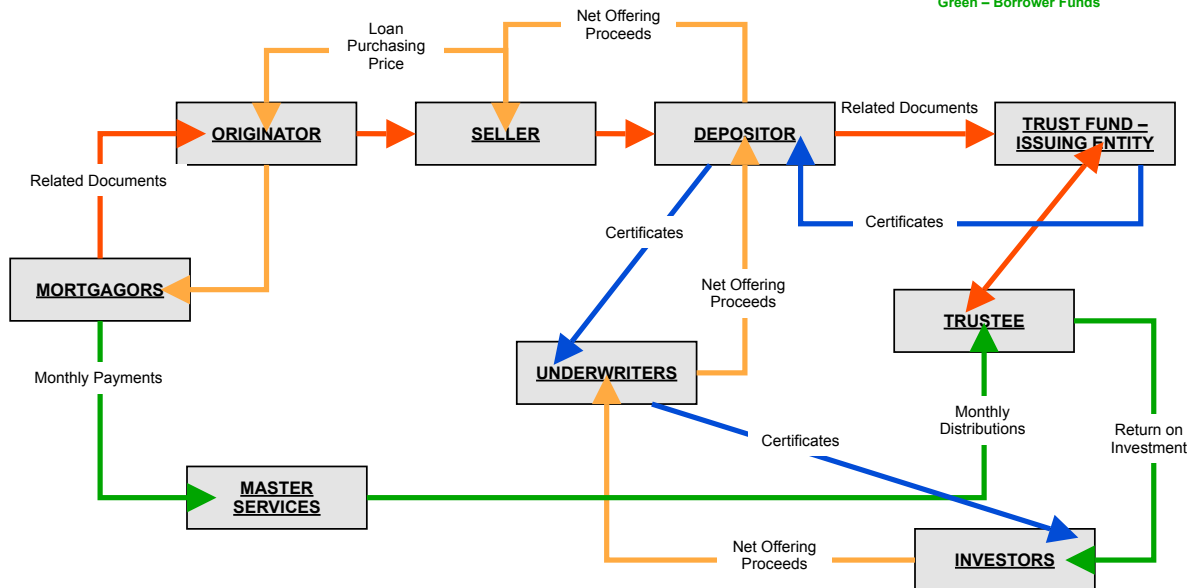
- Sub prime borrower
- Sub prime lender
- Investment bank or Securitizer
- Investors who bought MBS

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Securitization Flow Chart

ARROW LEGEND
Red – Mortgage Documents
Orange – Investor Funds
Blue – Securities Certificates
Green – Borrower Funds



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In Conclusion

- Sooo, the managements of the banks that loaned money to people who could never pay them back are now responsible for estimating what these assets are worth
- *The game of "everything's contained" continues, albeit in a different form*
- *The game is still in the early innings*

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Truth in Lending and RESPA

Using a qualified 3rd party
Mortgage Loan Audit as
Initial Discovery



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Truth in Lending Act (TILA)

- TILA 15 USC 1601 et. Seq
- Regulation Z 12 CFR 226
 - Definitions, Disclosure rules, Prohibited practices
- Administrative enforcement belongs to FTC
- Federal Reserve Bank
 - Official Staff Commentary

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Prohibited Acts or Practices

- § 226.34 (a)(4)
 - Engage in a pattern or practice of extending credit without regard to consumers repayment ability including consumers current and expected income, obligations and employment.
 - There is a presumption the creditor has violated this paragraph (a)(4) if the creditor engages in a pattern or practice of making loans with out verifying AND documenting consumers repayment ability.

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Problematic Loan Types

- NINJA – no income, no job, no assets
- Alt- A or no doc/low doc loans
- Non-Amortizing loans
- Interest only loans
- 1yr/2yr ARMs and Option ARMs
- Table loans, presold or sold forward loans

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§131 Liability of Assignees

- Notice required from mortgage sellers to mortgage buyers of assumption of liability
- Consumers right to rescind loan against assignee
- Assignee subject to all claims and defenses consumer could assert versus lender

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Servicers

- Are not to be treated as assignee unless they are the actual owner of the mortgage/note
- Servicer cannot be treated as owner for "Administrative convenience"
- Obligated to provide the obligor with the name, address and telephone number of the actual owner.

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Rescission in 3 “easy” steps

- Notice by consumer: “I WISH TO CANCEL”
- Creditor has 20 days to:
 - Dispute via filing for a declaratory judgement
 - Comply with statute

Refund and extinguish security interest and note
Negotiate tender from consumer AFTER compliance

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Tolling of Right of Rescission

- Fraud and Fraud in the inducement
- Non-compliance with statutory laws
- Lender initiates foreclosure proceedings
- Equitable tolling

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Voiding of Security Interest

- Statute 15 USC 1635 and Regulation Z § 226.15
 - Notice of rescission automatically voids security interest, note or lien by operation of law
- FRB – Official Staff Commentary
 - “Creditors interest in the property is automatically negated whether or not their interest is recorded or perfected.”

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Real Estate Settlement Procedures Act

- Objectives
 - Applies to lenders, brokers and servicers
 - Disclosure of costs associated with credit or closing
 - Protects against abusive practices, kickbacks, escrow accounting
 - Implemented by HUD

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Coverage and Exemptions

- Applies to residential 1-4 family and mfg. homes
- Exempts 25+ acre even with residence
- Exempts business and commercial property
- Applies to “table funded” loans
 - Loan is funded by contemporaneous advance of loan funds and assignment of the loan to the entity advancing the funds

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GFE or Good Faith Estimate – HUD 1

- Must be provided within specific timeframes
- Changes to loan terms require new GFE
- Disclosure of an P.O.C or paid outside closing fees and parties
- Retention requirements of 5 years includes:
 - Lenders
 - Assignees
 - Servicers

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Prohibition against Kickbacks and Fees

- Defined as either fees or “anything of value”
- Civil liability of 3x \$dollar amount involved
- Reasonable attorney fees
- Fines and imprisonment

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Required Responsiveness

- Qualified Written Request – QWR
- Requires written “acknowledgement” in 20 days
- Specific actions to “resolve” matter within 60 days
- During resolution period may not provide info to consumer reporting agencies
- Failure to comply constitutes a violation

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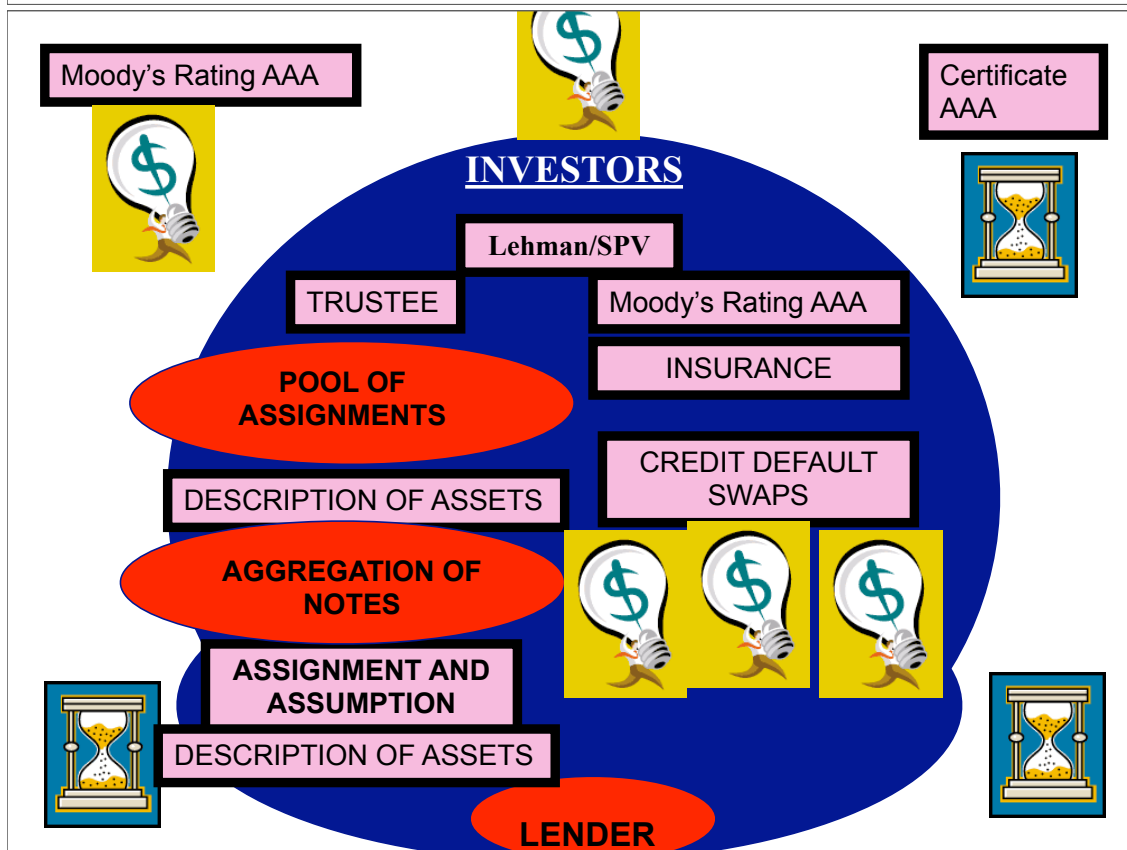
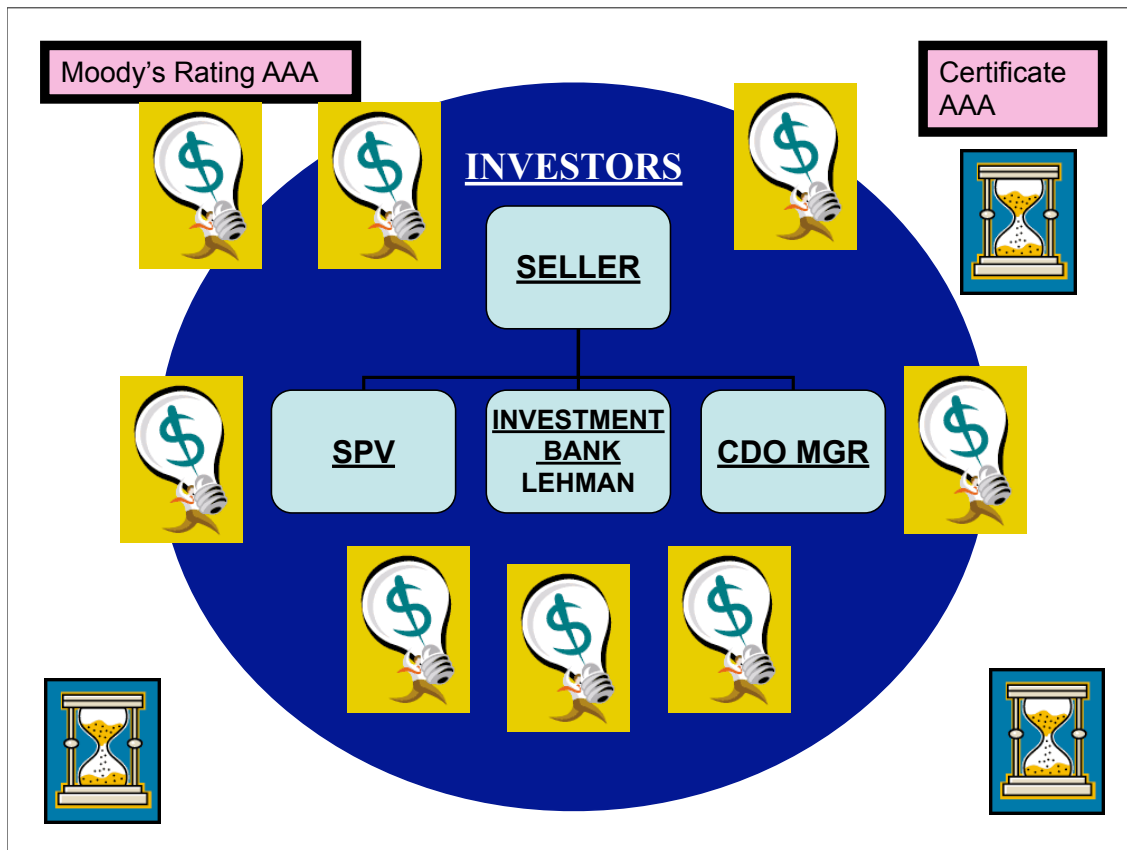


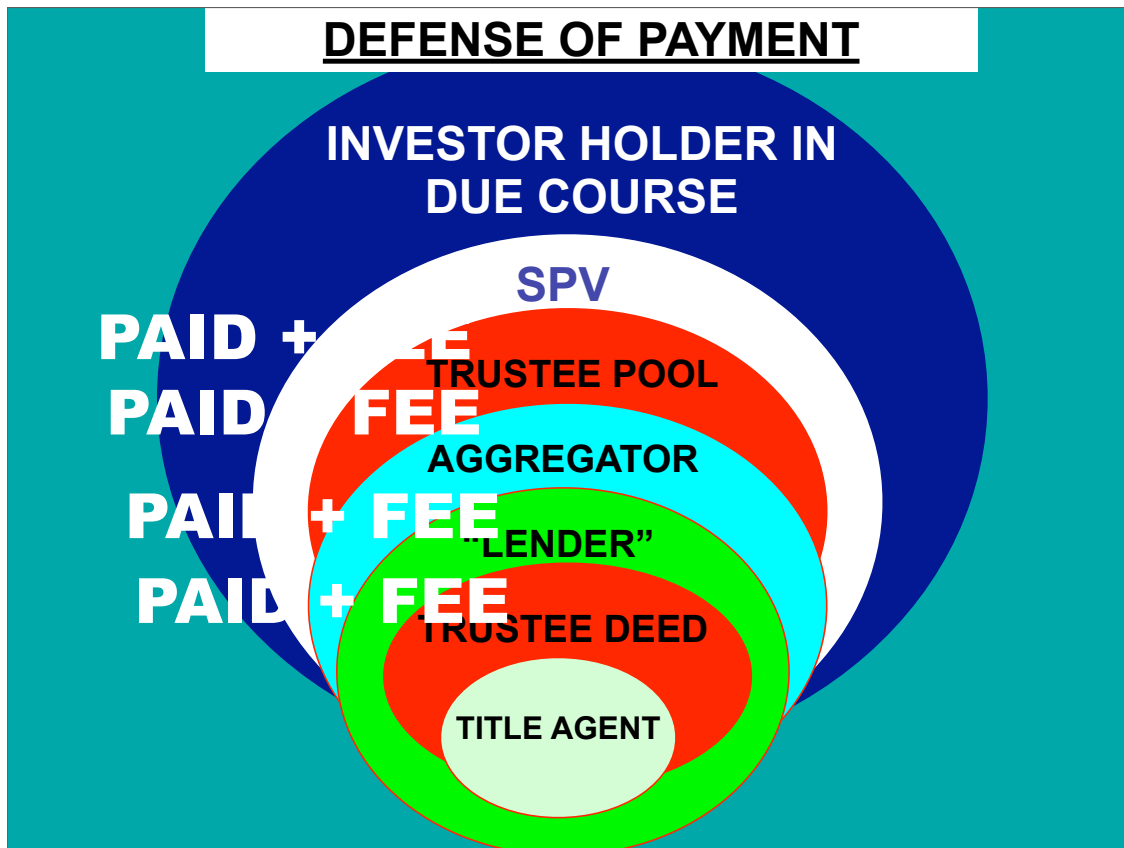
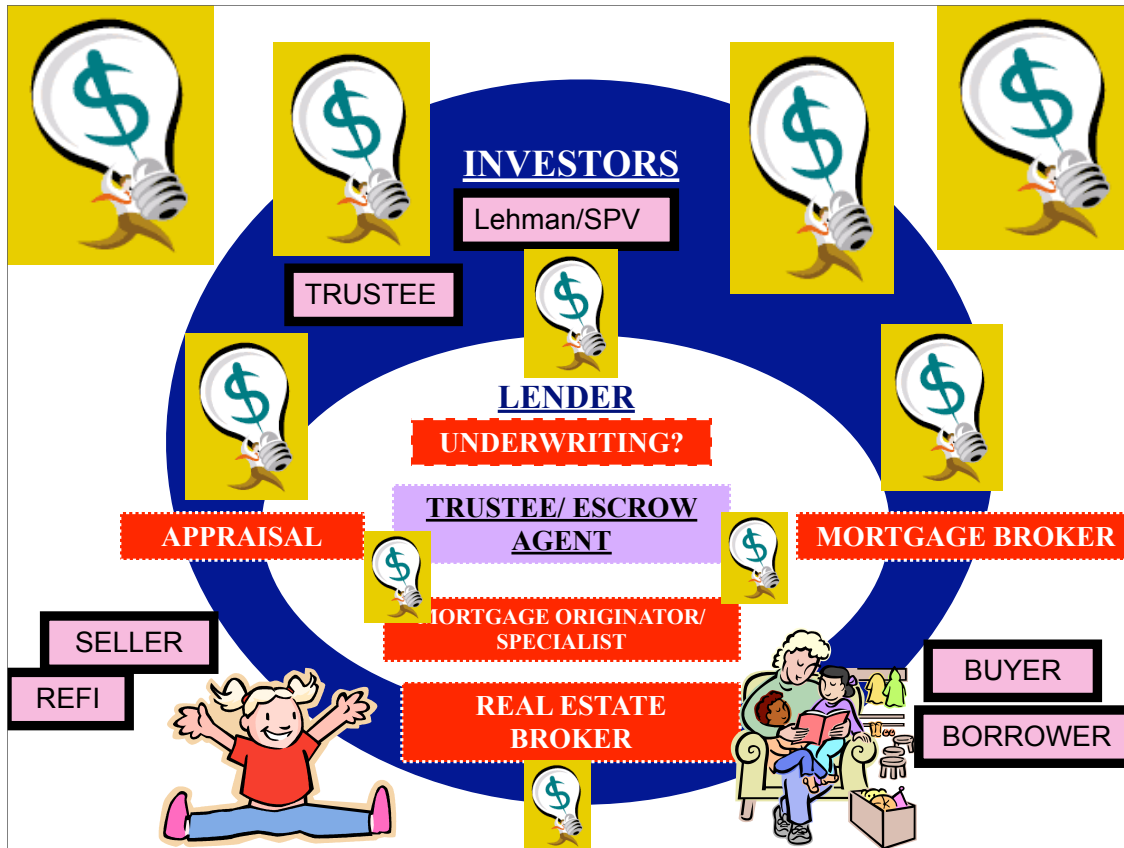
Mortgage Loan Audit Services

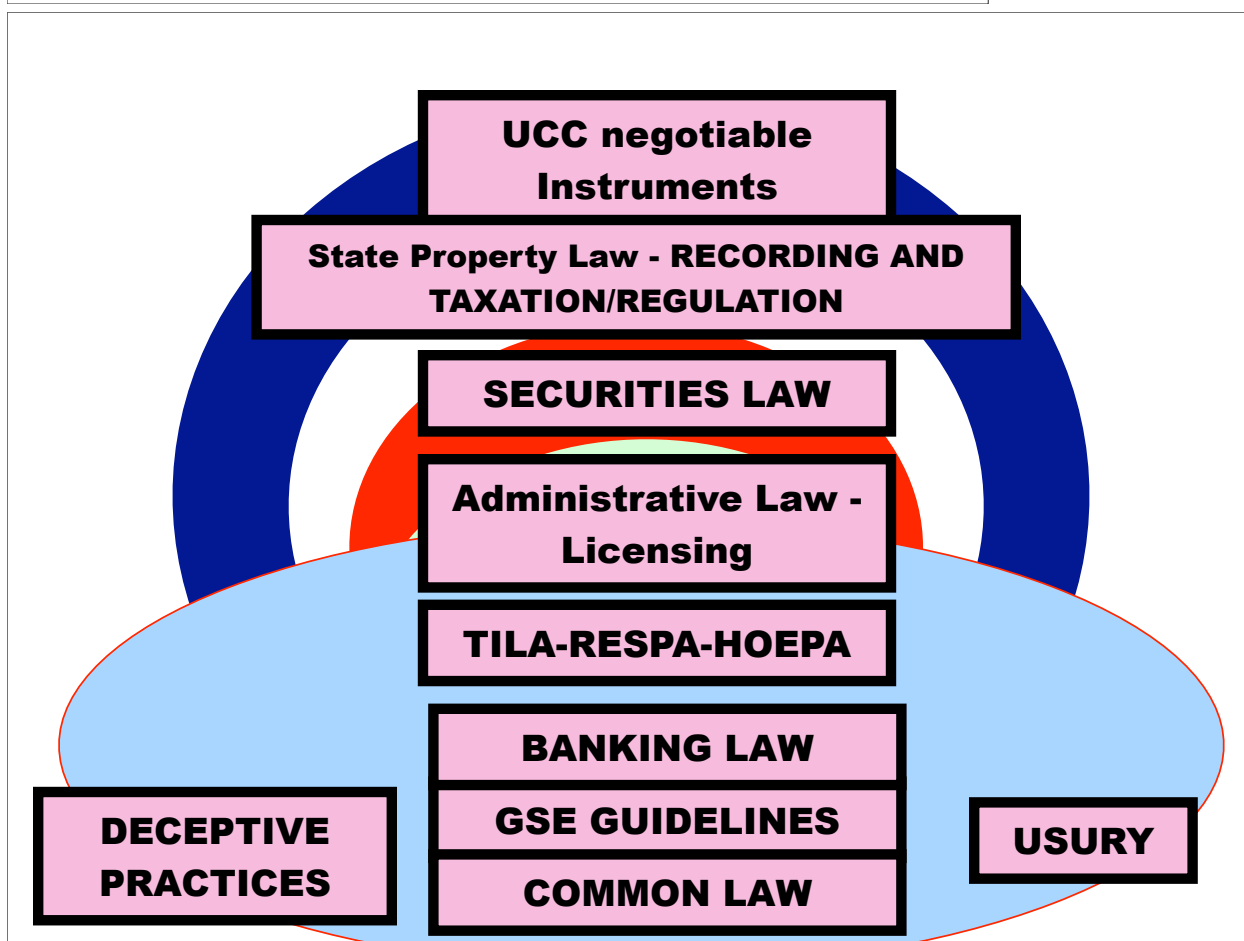
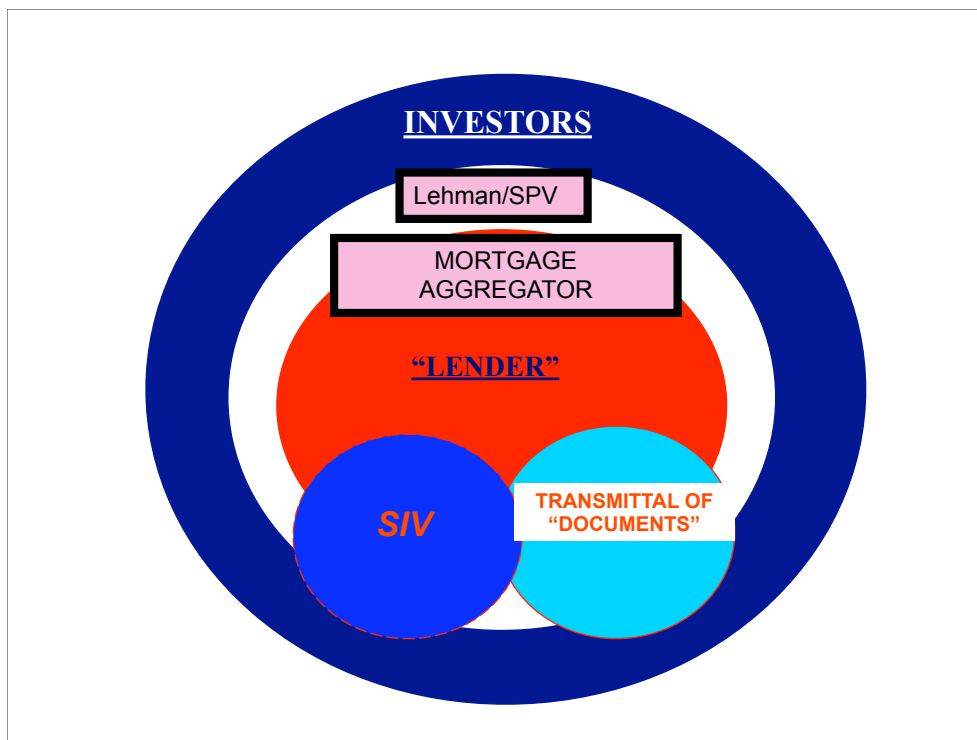
- Do it yourself vs. outsource
 - Time, expense, qualifications for lender interactions
 - Documentation of timelines, certified mail RRR
- Use to screen prospective clients
- Cost effective assimilation of fact pattern
- Identify potential claims and assertions

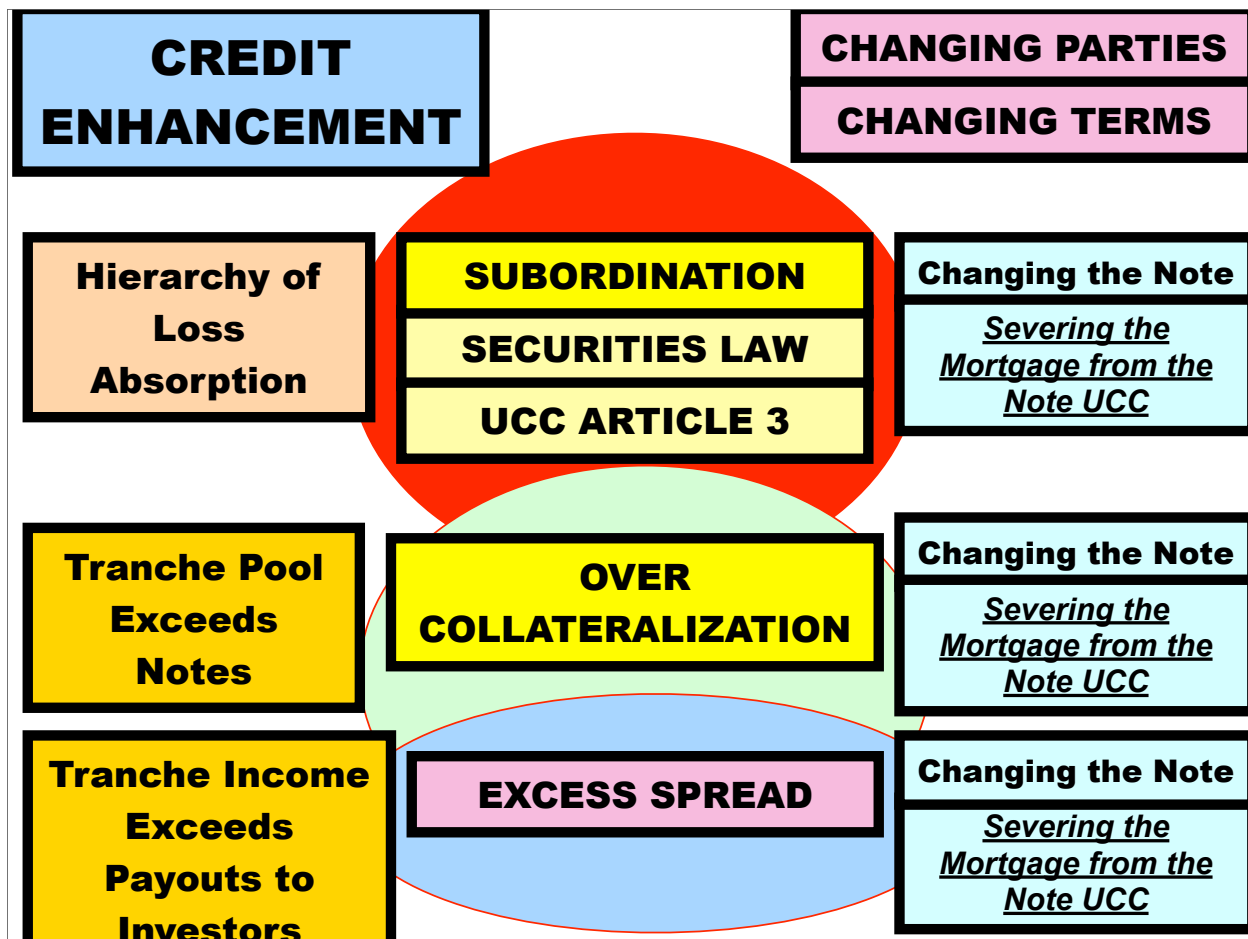
FORECLOSURE DEFENSE INSTITUTE

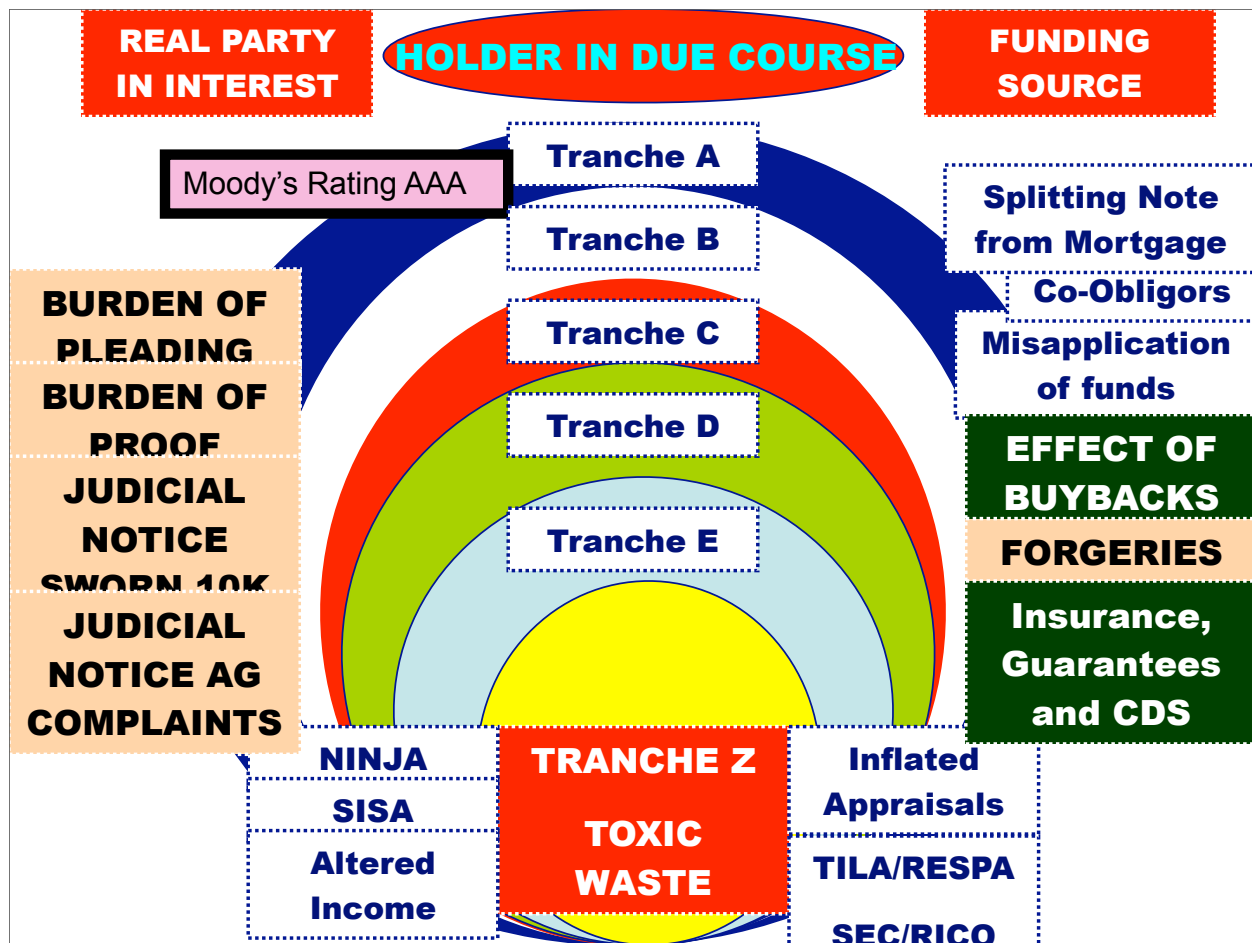












PLAN OF ENGAGEMENT

FORENSIC AUDIT

**Demands Settlement and
Documents**

Correspondence

LITIGATION

Objections to Sale

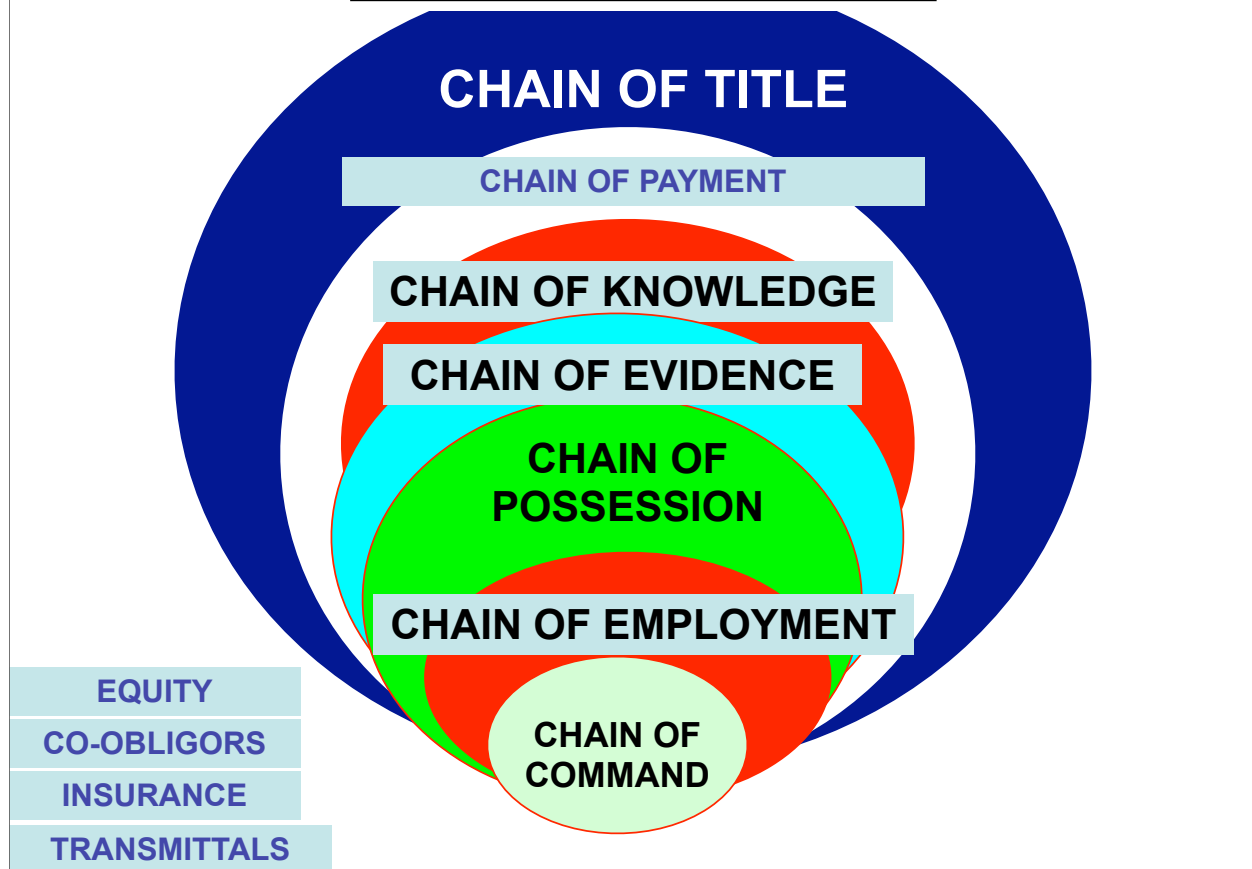
Emergency Motions

Lawsuit Federal/State

Expedited Discovery

Quiet title

SINGLE TRANSACTION



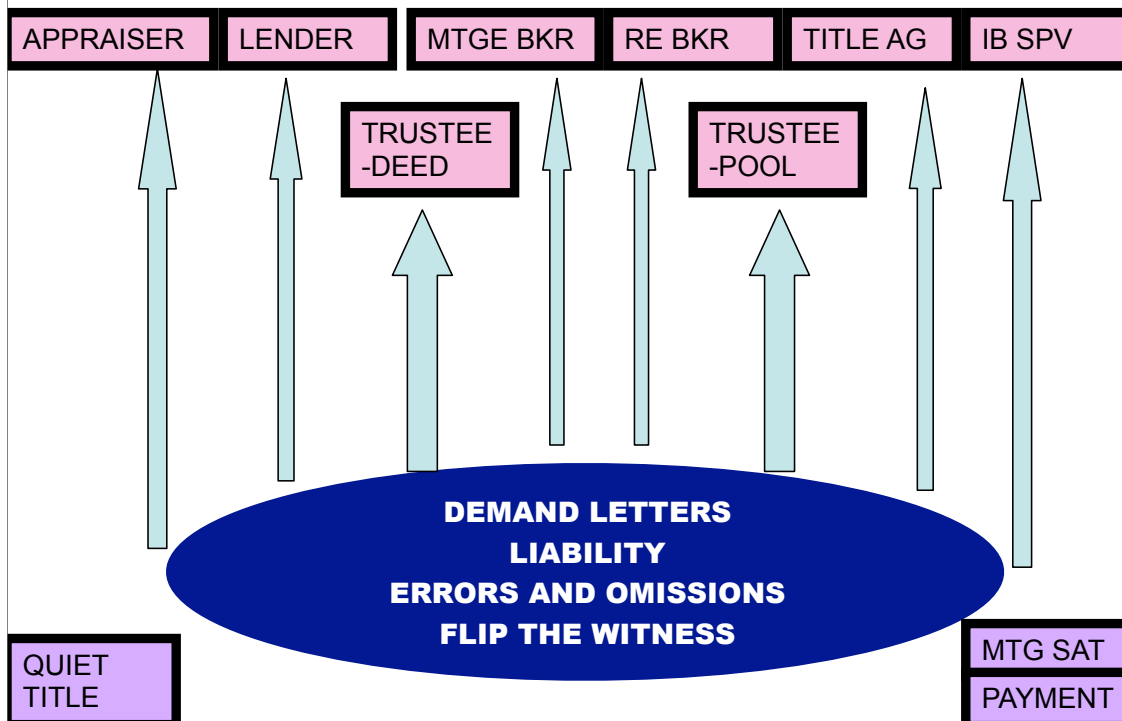
The single transaction "theory" presented here as FACT is simple: an investor put up the money and the borrower received a loan. Everyone else in between took fees, made promises and otherwise was involved in making representations about the loan or the security that the investor bought, all of which were untrue, tainted or misleading.

The point of the single transaction theory, which is supported by UCC and other sources, is that one thing would not have happened without the other thing. No investor buying security, no loan. No loan signed by borrower, no security.

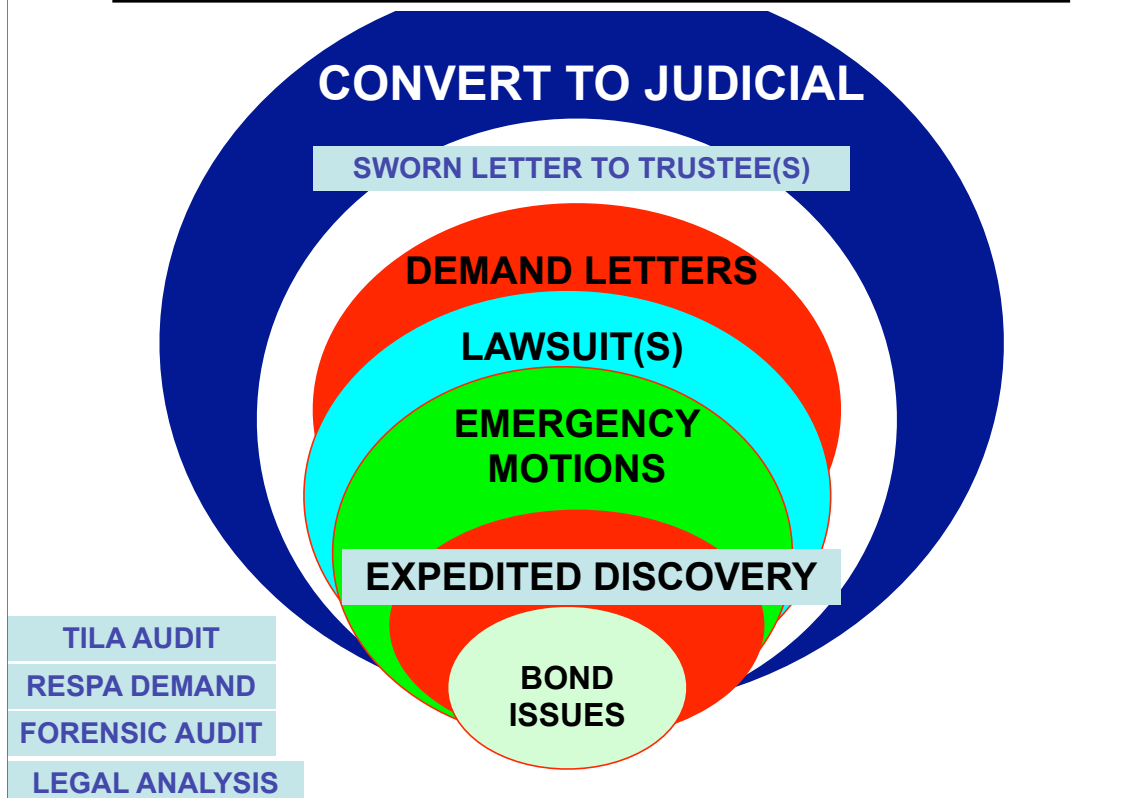
Thus the issuance of the note at the loan closing was a trick to get the borrower to become the issuer in what was an elaborate but obvious securities scheme, which is why the certificates on asset backed securities are being re-purchased for tens of billions of dollars when everyone knows they are worthless.

The issuance of these securities, including the negotiable instruments (note and mortgage) were part of the a securities scheme.

PLAN OF ENGAGEMENT



WIN AT THE BEGINNING NOT IN THE END



EVIDENCE is any matter of fact that a party to a lawsuit offers to prove or disprove an issue in the case. A system of rules and standards that is used to determine which facts may be admitted, and to what extent a judge or jury may consider those facts, as proof of a particular issue in a lawsuit.

Evidence

Assumptions and Presumptions Litigation vs. Rubber Stamping

Mortgage servicers

- It is often difficult for mortgage servicers, particular if they are not the original lender, to prove the true status of an account. Affidavits are often submitted to prove default that are conclusory and insufficient. *Manufacturers & Traders Trust Co. v. Medina*, 01 C 768, 2001 WL 1558278 (N.D.Ill., Dec. 5, 2001); *Cole Taylor Bank v. Corrigan*, 230 Ill.App.3d 122, 595 N.E.2d 177, 181 (2d Dist.

Bank Records

- Computer-generated bank records or testimony based thereon are often offered without proper foundation, or are summarized without being introduced.

Manufacturers & Traders Trust Co. v.
Medina, supra, 01 C 768, 2001 WL
1558278 (N.D.Ill., Dec. 5, 2001); FDIC v.
Carabetta, 55 Conn.App. 369, 739 A.2d 301
(1999).

Testimony

- Testimony, whether live or in the form of an affidavit, to the effect that the witness has reviewed a loan file and that the loan file shows that the debtor is in default is hearsay and incompetent;

Proper Foundation

- The records must be introduced after a proper foundation is provided. *New England Savings Bank v. Bedford Realty Corp.*, 238 Conn. 745, 680 A.2d 301, 308-09 (1996), later opinion, 246 Conn. 594, 717 A.2d 713 (1998); *Cole Taylor Bank v. Corrigan*, supra, 230 Ill.App.3d 122, 595 N.E.2d 177, 181 (2d Dist. 1992).

Business Records

- It is the business records that constitute the evidence, not the testimony of the witness referring to them. In re A.B., 308 Ill.App. 3d 227, 719 N.E. 2d 348 (2d Dist. 1999).

Affidavit

- Nor is such an affidavit made sufficient by omitting the fact that it is based on a review of loan records, if it appears that the affiant did not personally receive or observe the reception of all of the borrower's payments. *Hawaii Community Federal Credit Union v. Keka*, 94 Haw. 213, 11 P.3d 1, 10 (2000).

Voluminous records

- If the underlying records are voluminous, a person who has extracted the necessary information may testify to that fact, but the underlying records must be made available to the court and opposing party. *In re deLarco*, 313 Ill.App.3d 107, 728 N.E.2d 1278 (2d Dist. 2000).

Challenge Don't Assume

- Counsel should challenge any such testimony or affidavits. Counsel should not simply assume that the mortgage company must be right in claiming a default

- There are reported decisions in which it turned out that the lender's right hand did not know what the left hand was doing and that there was really no basis for a claimed default. In re Hart, 246 B.R. 709 (Bankr. D.Mass. 2000); In re McCormack, 96-81-SD, 1996 WL 753938 (D.N.H. 1996).

Cure or Payment May Have Already Occurred

- See also, FNMA v. Bryant, 62 Ill.App.3d 25, 378 N.E.2d 333 (5th Dist. 1978), where the court found that the lender had foreclosed too quickly and that the default had been cured.

Mortgage Servicers Do Not Follow the Terms

- Frequently, mortgage servicers attempt to service loans without consulting the loan documents, with the result that they depart from the their terms.

Acceleration by Non Holder

- In other cases, mortgage companies have been unable to prove that they actually own the loan and gave notice of acceleration as required by the loan documents. In re Kitts, 2002 WL 416912 (Bankr. E.D.Tenn. Feb. 28, 2002).

The Logic Has Changed

- There is a common assumption that mortgage companies desire performing loans, not to foreclose and acquire real estate. This assumption is no longer well founded.

Scavenging After the Kill

- There are an increasing number of "scavengers" that buy bad debts, including mortgages, for a fraction of face value and attempt to enforce them. Such entities profit by foreclosure.

Insult to Injury

- "Mortgage sources confide that some unscrupulous lenders are purposely allowing certain borrowers to fall deeper into a financial hole from which they can't escape. Why? Because it pushes these consumers into foreclosure, whereupon the lender grabs the house and sells it at a profit." Robert I. Heady, The People's Money, "Foreclosure, You Must Avoid It," South Florida Sun-Sentinel, Feb. 25, 2002, 2002 WL 2949282.

Guaranteed Profit

- In addition, particularly if the loan is guaranteed (by private mortgage insurance or the government), a mortgage company may find it more profitable to foreclose and make a claim on the guarantee rather than work with a "difficult" borrower.

Devil in the Details

- Production of original records and registers, entries and reports to SEC, FDIC banking agency, shareholders etc., often reveals unauthorized charges AND CHANGES and other improprieties that may give rise to a claim or defense against the mortgage company.

I have been thinking about this as the questions pile in. Here are my thoughts so far ---

1. Be careful with the Lehman bankruptcy and any other bankruptcy filing by one of the financial services companies that was even tangentially related to the process of the securitization of mortgages. Bankruptcy law has some features that are not apparent or even comprehensible to layman and even many lawyers who do not regularly practice in bankruptcy court. If you even hear that a company went bankrupt, you should consult with a competent bankruptcy practitioner in your area and ask him whether you need to file a proof of claim or some other paper that tells the Federal Court where the bankruptcy was filed that you have claims and defense regarding your mortgage and note, that you do not intend to waive them, and that if anyone buys our note or mortgage they take it subject to your claims and defenses.

2. How this might affect your claims and defenses. The burden is still on the party seeking to foreclose on your mortgage. They must allege that they are the lender, the holder of the note and that the note is in default, subject to acceleration pursuant to the terms of the mortgage indentures and the terms of the note. As with any other situation involving foreclosure if you snooze you lose. Do nothing and the Court is allowed to and required to assume and proceed as though you have no claims or defenses. Do nothing and your house will be sold at auction and then you will be scrambling to set the sale

aside, which has been done, as we have reported here, but it sure makes your position more precarious than if you act proactively before anything happens.

ASSUME NOTHING AND CHALLENGE EVERYTHING:

* Just because a letter was sent out declaring a default doesn't mean that the person who signed it knew anything about the account or that they were properly authorized to send it, or even that their company was the proper party to declare the default, or, even that their company knew or had performed any due diligence to determine if payments to the true holder in due course (holders of mortgage backed securities) had been paid by co-obligors acquired as the loan went up through the chain of securitization.

3. Proof and evidence: The failure of a bank and the takeover by another bank creates several opportunities for borrowers that did not exist before, if you know how to navigate the system. The time is NOW to act proactively, get your audit done, announce rescission, demand satisfaction of your mortgage and note, and to file for quiet title.

4. You ALWAYS want to keep the burden on the "lender" or those claiming through the "lender." Do everything you can to keep the burden on THEM to produce the note, produce ALL the assignments that show proper chain of title on the note and mortgage, and produce the Assignment and Assumption of Mortgage Agreement(S), and the Pooling and Service Agreement(s).

5. Thus far it appears as though there is only ONE set of master agreements executed by the lender, the mortgage aggregation and the trustee of the pool of assets. The date of these agreements will almost always precede the date the mortgage and note came into existence and will without exception predate the date of default. For lawyers, this presents a number of arguments that can be used to throw the other side into disarray as to what assignment, if any, was valid, and whether they were hiding third parties at the loan closing (violation of TILA) and whether they were hiding third party payments at closing (TILA violation).

6. It also gives you grounds for saying that since the REAL lender was not disclosed, the three day rescission right continued up to and including the date when the REAL lender was disclosed. Either they disclose the REAL lender and then you have all your remedies against both the pretender lender and the real lender (probably unchartered as bank or lender and even unregistered as business to do business in the state) or they don't disclose it and you push the issue of non-disclosure by demanding the records of the mortgage servicer and the mortgage originator and the title/escrow agent to track where the money came from and where it went after closing.

LAWYERS TAKE WARNING:

First of all remember that the competency of a witness contains four elements (oath, perception, memory and communication) and that proof can only be offered upon a proper foundation. It is here where these overnight mergers, the firings of thousands of people, and the locations of records is going to be a real challenge to the lenders.

DO NOT TAKE LENDER AFFIDAVITS FOR GRANTED.

THEY ARE MOST LIKELY OUTRIGHT FRAUD, FORGED, OR SIGNED BY SOMEONE WITH DUBIOUS AUTHORITY. IN ALMOST ALL CASES EVEN IF THE AUTHORITY is established by a competent witness though the presentation of a proper foundation, IT IS SIGNED WITHOUT ANY PERSONAL KNOWLEDGE --- WHICH IS WHY I MENTION THE ELEMENTS OF COMPETENCY OF A WITNESS AND PROPER FOUNDATION. THIS IS BASIC BLACK LETTER LAW. YOU CAN WIN, NOT MERELY DELAY CASES. AND YOU CAN DO THEM ON CONTINGENCY FEES THAT WILL ENABLE YOU TO EARN SUBSTANTIAL FEES THAT YOUR CLIENTS WILL HAPPILY PAY.

EVIDENCE DEFINED

EVIDENCE. That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue; 3 Bl. Com. 367; or it is whatever is exhibited to a court or jury, whether it be by matter of record, or writing, or by the testimony of witnesses, in order to enable them to pronounce with certainty; concerning the truth of any matter in dispute; Bac. Ab. Evidence, in pr.; or it is that which is legally submitted to a jury, to enable them to decide upon the questions in dispute or issue, as pointed out by the pleadings and distinguished from all comment or argument. 1 Stark. Ev. 8.

2. Evidence may be considered with reference to, 1. The nature of the evidence. 2. The object of the evidence. 3. The instruments of evidence. 4. The effect of evidence. 1. As to its nature, evidence may be considered with reference to its being 1. Primary evidence. 2. Secondary evidence. 3. Positive. 4. Presumptive. 5. Hearsay. 6. Admissions.

4.-1. Primary evidence. The law generally requires that the best evidence the case admits of should be given; B. N. P. 293; 1 Stark. Ev. 102, 390; for example, when a written contract has been entered into, and the object is to prove what it was, it is requisite to produce the original writing if it is to be attained, and in that case no copy or other inferior evidence will be received.

5. To this general rule there are several exceptions. 1. As it refers to the quality rather than to the quantity of evidence, it is evident that the fullest proof that every case admits of, is not requisite; if, therefore, there are several eye-witnesses to a fact, it may be sufficiently proved by one only.

2. It is not always requisite, when the matter to be proved has been reduced to writing, that the writing should be produced; as, if the narrative of a fact to be proved has been committed to writing, it may yet be proved by parol evidence. A receipt for the payment of money, for example, will not exclude parol evidence of payment. 14 Esp. R. 213; and see 7 B. & C. 611; S. C. 14 E. C. L. R. 101; 1 Campb. R. 439; 3 B. & A. 566; 6 E. C. L. R. 377.

6.-2. Secondary evidence. That species of proof which is admissible on the loss of primary evidence, and which becomes by that event the best evidence. 3 Yeates, Rep. 530.

7. It is a rule that the best evidence, or that proof which most certainly exhibits the true state of facts to which it relates, shall be required, and the law rejects secondary or inferior evidence, when it is attempted to be substituted for evidence of a higher or superior nature. This is a rule of policy, grounded upon a reasonable suspicion, that the substitution of inferior for better evidence arises from sinister motives; and an apprehension that the best evidence, if produced, would alter the case to the prejudice of the party. This rule relates not to the measure and quantity of evidence, but to its quality when compared with some other evidence of superior degree. It is not necessary in point of law, to give the fullest proof that every case may admit of. If, for example, there be several eye witnesses to a fact, it may be proved by the testimony of one only.

8. When primary evidence cannot be had, then secondary evidence will be admitted, because then it is the best. But before such evidence can be allowed, it must be clearly made to appear that the superior evidence is not to be had. The person who possesses it must be applied to, whether he be a stranger or the opposite party; in the case of a stranger, a subpoena and attachment, when proper, must be taken out and served; and, in the case of a party, notice to produce such primary evidence must be proved before the secondary evidence will be admitted. 7 Serg. & Rawle, 116; 6 Binn. 228; 4 Binn. R. 295, note; 6 Binn. R. 478; 7 East, R. 66; 8 East, R. 278 3 B. & A. 296; S. C. 5 E. C. L. R. 291.

9. After proof of the due execution of the original, the contents should be proved by a counterpart, if there be one, for this is the next best evidence; and it seems that no evidence of a mere copy is admissible until proof has been given that the counterpart cannot be produced. 6 T. R. 236. If there be no counterpart, a copy may be proved in evidence. by any witness who knows that it is a copy, from having compared it with the original. Bull. N. P. 254; 1 Keb. 117; 6 Binn. R. 234; 2 Taunt. R. 52; 1 Campb. R. 469 8 Mass. R. 273. If there be no copy, the party may produce an abstract, or even give parol evidence of the contents of a deed. 10 Mod. 8; 6 T. R. 556.

10. But it has been decided that there are no degrees in secondary evidence: and when a party has laid the foundation for such evidence, he may prove the contents of a deed by parol, although it appear that an attested copy is in existence. 6 C. & P. 206; 8 Id. 389.

11.-3. Positive or direct evidence is that which, if believed, establishes the truth of a fact in issue, and does not arise from any presumption. Evidence is direct and positive, when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. 1 Phil. Ev. 116 1 Stark. 19. In one sense, there is but little direct or positive proof, or such proof as is acquired by means of one's own sense, all other evidence is presumptive but, in common acceptance, direct and positive evidence is that which is communicated by one who has actual knowledge of the fact.

12.-4. Presumptive evidence is that which is not direct, but where, on the contrary, a fact which is not positively known, is presumed or inferred from one or more other facts or circumstances which are known. Vide article Presumption, and Rosc. Civ. Ev. 13; 1 Stark. Ev. 18.

13.-5. Hearsay, is the evidence of those who relate, not what they know themselves, but what they have heard from others.

14. Such mere recitals or assertions cannot be received in evidence, for many reasons, but principally for the following: first, that the party making such declarations is not on oath and, secondly, because the party against whom it operates, has no opportunity of cross-examination. 1 Phil. Ev. 185. See, for other reasons, 1 Stark. Ev. pt. 1, p. 44. The general rule excluding hearsay evidence, does not apply to those declarations to which the party is privy, or to admissions which he himself has made. See Admissions.

15. Many facts, from their very nature, either absolutely, or usually exclude direct evidence to prove them, being such as are either necessarily or usually, imperceptible by the senses, and therefore incapable of the ordinary means of proof. These are questions of pedigree or relationship, character, prescription, custom, boundary, and the like; as also questions which depend upon the exercise of particular skill and judgment. Such facts, some from their nature, and others from their antiquity, do not admit of the ordinary and direct means of proof by living witnesses; and, consequently, resort must be had to the best means of proof which the nature of the cases afford. See Boundary; Custom; Opinion; Pedigree; Prescription.

16.-6. Admissions are the declarations which a party by himself, or those who act under his authority, make of the existence of certain facts. Vide Admissions.

17.- 2. The object of evidence is next to be considered. It is to ascertain the truth between the parties. It has been discovered by experience that this is done most certainly by the adoption of the following rules, which are now binding as law: 1. The evidence must be confined to the point in issue. 2. The substance of the issue must be proved, but only the substance is required to be proved. 3. The affirmative of the issue must be proved.

18.-1. It is a general rule, both in civil and criminal cases, that the evidence shall be confined to the point in issue. Justice and convenience require the observance of this rule, particularly in criminal cases, for when a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction, which forms the subject of the indictment, and, which alone he has come prepared to answer. 2 Russ. on Cr. 694; 1 Phil. Ev. 166.

19. To this general rule, there are several exceptions, and a variety of cases which do not fall within the rule. 1. In general, evidence of collateral facts is not admissible; but when such a fact is material to the issue joined between the parties, it may be given in evidence; as, for example, in order to prove that the acceptor of a bill knew the payee to be a fictitious person; or that the drawer had general authority from him to fill up bills with the name of a fictitious payee, evidence may be given to show that he had accepted similar bills before they could, from their date, have arrived from the place of date. 2 H. Bl. 288.

20.-2. When special damage sustained by the plaintiff is not stated in the declaration, it is not one of the points in issue, and therefore, evidence of it cannot be received; yet a damage which is the necessary result of the defendant's breach of contract, may be proved, notwithstanding it is not in the declaration. 11 Price's Reports, 19.

21.-3. In general, evidence of the character of either party to a suit is inadmissible, yet in some cases such evidence may be given. Vide article Character.

22.-4. When evidence incidentally applies to another person or thing not included in the transaction in question, and with regard to whom or to which it is inadmissible; yet if it bear upon the point in issue, it will be received. 8 Bingh. Rep. 376; S. C. 21 Eng. C. L. R. 325 and see 1 Phil. Ev. 158; 2 East, P. C. 1035; 2 Leach, 985; S. C. 1 New Rep. 92; Russ. & Ry. C. C. 376; 2 Yeates, 114; 9 Conn. Rep. 47.

23.-5. The acts of others, as in the case of conspirators, may be given in evidence against the prisoner, when referable to the issue; but confessions made by one of several conspirators after the offence has been completed, and when the conspirators no longer act in concert) cannot be received. Vide article Confession, and 10 Pick. 497; 2 Pet. Rep. 364; 2 Brec. R. 269; 3 Serg. & Rawle, 9; 1 Rawle, 362, 458; 2 Leigh's R. 745; 2 Day's Cas. 205; 3 Serg. & Rawle, 220; 3 Pick. 33; 4 Cranch, 75; 2 B. & A. 573-4 S. C. 5. E. C. L. R. 381.

24.-6. In criminal cases, when the offence is a cumulative one, consisting itself in the commission of a number of acts, evidence of those acts is not only admissible, but essential to support the charge. On an indictment against a defendant for a conspiracy, to cause himself, to be believed a man of large property, for the purpose of defrauding tradesmen after proof of a representation to one tradesman, evidence may therefore be given of a representation to another tradesman at a different time. 1 Campb. Rep. 399; 2 Day's Cas. 205; 1 John. R. 99; 4 Rogers' Rec. 143; 2 Johns. Cas. 193.

25.-7. To prove the guilty knowledge of a prisoner, with regard to the transaction in question, evidence of other offences of the same kind, committed by the prisoner, though not charged in the indictment, is admissible against him. As in the case where a prisoner had passed a counterfeit dollar, evidence that he had other counterfeit dollars in his possession is evidence to prove the guilty knowledge. 2 Const. R. 758; Id. 776; 1 Bailey, R. 300; 2 Leigh's R. 745; 1 Wheeler's Cr. Cas. 415; 3 Rogers' Rec. 148; Russ. & Ry. 132; 1 Campb. Rep. 324; 5 Randolph's R. 701.

26.-2. The substance of the issue joined between the parties must be proved. 1 Phil. Ev. 190. Under this rule will be considered the quantity of evidence required to support particular averments in the declaration or indictment.

27. And, first, of civil cases. 1. It is a fatal variance in a contract, if it appear that a party who ought to have been joined as plaintiff has been omitted. 1 Saund. 291 b, n.; 2 T. R. 282. But it is no variance to omit a person who might have been joined as defendant, because the non-joinder ought to have been pleaded in abatement. 1 Saund. 291 d, n. 2. The consideration of the contract must be proved but it is not necessary for the plaintiff to set out in his declaration, or prove on the trial, the several parts of a contract consisting of distinct and collateral provisions; it is sufficient to state so much of the contract as contains the entire consideration of the act, and the entire act to be done in virtue of such consideration, including the time, manner, and other circumstances of its performance. 6 East, R. 568; 4 B. & A. 387; 6 E. C. L. R. 455.

28.-Secondly. In criminal cases, it may be laid down, 1. That it is, in general, sufficient to prove what constitutes an offence. It is enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified. 2 Campb. R. 585; 1 Harr. & John. 427. If a man be indicted for robbery, he may be found guilty of larceny, and not guilty of the robbery. 2 Hale, P. C. 302. The offence of which the party is convicted, must, however, be of the same class with that of which he is charged. 1 i Leach, 14; 2 Stra. 1133.

29.-2. When the intent of the prisoner furnishes one of the ingredients in the offence, and several intents are laid in the indictment, each of which, together with the act done, constitutes an offence, it is sufficient to prove one intent only. 3 Stark. R. 35; 14 E. C. L. R. 154, 163.

30.-3. When a person or thing, necessary to be mentioned in an indictment, is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved. 3 Rogers' Rec. 77; 3 Day's Cas. 283. For example, if a party be charged with stealing a black horse, the evidence must correspond with the averment, although it was unnecessary to make it. Roscoe's Cr. Ev. 77 4 Ohio, 350.

31.-4. The name of the prosecutor, or party injured; must be proved as laid, and the rule is the same with reference to the name of a third person introduced into the indictment, as. descriptive of some person or thing.

32.-5. The affirmative of the issue must be proved. The general rule with regard to the burthen of proving the issue, requires that the party who asserts the, affirmative should prove it. But this rule ceases to operate the moment the presumption of law is thrown into the other scale. When the issue is on the legitimacy of a child therefore, it is incumbent on the party asserting the illegitimacy to prove it. 2 Selw. N. P. 709. Vide Onus Probandi; Presum 2 Gall. R. 485 and 1 McCord, 573.

33.-3. The consideration of the instruments of evidence will be the subject of this head. These consist of records, private writings, or witnesses.

34.-1. Records are to be proved by an exemplification, duly authenticated, (Vide Authentication, in all cases where the issue is nul tiel record. In other cases, an examined copy, duly proved, will, in general, be evidence. Foreign laws as proved in the mode pointed out under the article Foreign laws.

35.-2. Private writings are proved by producing the attesting witness; or in case of his death, absence, or other legal inability to testify, as if, after attesting the paper, he becomes infamous, his handwriting may be proved. When there is no witness to the instrument, it may be proved by the evidence of the handwriting of the party, by a person who has seen him write, or in a course of correspondence has become acquainted with his hand. See Comparison of handwriting, and 5 Binn. R. 349; 10 Serg. & Rawle, 110; 11 Serg. & Rawle, 333 3 W. C. C. R. 31; 11 Serg. & Rawle, 347 6 Serg. & Rawle, 12, 812; 1 Rawle, R. 223; 3 Rawle, R. 312; 1 Ashm. R. 8; 3 Penn. R. 136.

36. Books of original entry, when duly proved, are prima facie evidence of goods sold and delivered, and of work and labor done. Vide original entry.

37.-3. Proof by witnesses. The testimony of witnesses is called parol evidence, or that which is given viva voce, as contra-distinguished from that which is written or documentary. It is a general rule, that oral evidence shall in no case be received as equivalent to, or as a substitute for, a written instrument, where the latter is required by law; or to give effect to a written instrument which is defective in any particular which by law is essential to its validity; or to contradict, alter or vary a written instrument, either appointed by law, or by the contract of the parties, to be the appropriate and authentic memorial of the particular facts it recites; for by doing so, oral testimony would be admitted to usurp the place of evidence decidedly superior in degree. 1 Serg. & Rawle, 464; Id. 27; Addis. R. 361; 2 Dall. 172; 1 Yeates, 140; 1 Binn. 616; 3 Marsh. Ken. R. 333; 4 Bibb, R. 473; 1 Bibb, R. 271; 11 Mass. R. 30; 13 Mass. R. 443; 3 Conn. 9; 20 Johns. 49; 12 Johns. R. 77; 3 Camp. 57; 1 Esp. C. 53; 1 M. & S. 21; Bunb. 175.

38. But parol evidence is admissible to defeat a written instrument, on the ground of fraud, mistake, &c., or to apply it to its proper subject matter; or, in some instances, as ancillary to such application, to explain the meaning of doubtful terms, or to rebut presumptions arising extrinsically. In these cases, the parol evidence does not usurp the place, or arrogate the authority of, written evidence, but either shows that the instrument ought not to be allowed to operate at all, or is essential in order to give to the instrument its legal effect. 1 Murph. R. 426 4 Desaus. R. 211; 1 Desaus. R. 345 1 Bay, R. 247; 1 Bibb, R. 271 11 Mass. R. 30; see 1 Pet. C. C. R. 85 1 Binn. R. 610; 3 Binn. R. 587: 3 Serg. Rawle, 340; Poth. Obl. Pl. 4, c. 2.

39.-4. The effect of evidence. Under this head will be considered, 1st. The effect of judgments rendered in the United States, and of records lawfully made in this country; and, 2d. The effect of foreign judgments and laws.

40.-1. As a general rule, a judgment rendered by a court of competent jurisdiction, directly upon the point in issue, is a bar between the same parties: 1 Phil. Ev. 242; and privies in blood, as an heir 3 Mod. 141; or privies in estate 1 Ld. Raym. 730; B. N. P. 232; stand in the same situation. as those they represent; the verdict and judgment may be used for or against them, and is conclusive. Vide Res Judicata.

41. The Constitution of the United States, art. 4, s. 1, declares, that "Full faith and credit shall be given, in each state, to the public acts, records, and judicial proceedings of every other state. And congress may, by general laws, prescribe the manner in which Such acts, records and proceedings, shall be proved, and the effect thereof." Vide article Authentication and 7 Cranch, 481; 3 Wheat. R. 234 10 Wheat. R. 469; 17 Mass. R. 546; 9 Cranch, 192; 2 Yeates, 532; 7 Cranch, 408; 3 Bibb's R. 369; 5 Day's R. 563; 2 Marsh. Kty. R. 293.

42.-2. As to the effect of foreign laws, see article Foreign Laws. For the force and effect of foreign judgments, see article Foreign Judgments. Vide, generally, the Treatises on Evidence, of Gilbert, Phillips, Starkie, Roscoe, Swift, Bentham, Macnally, Peake, Greenleaf, and Bouv. Inst. Index, h.t.; the various Digests, h.t. Until 1975, the law of evidence was largely a creature of the Common Law: Evidence rules in most jurisdictions were established by cases rather than by organized, official codifications. Legal scholars long pushed for legislation to provide uniformity and predictability to the evidentiary issues that arise during litigation. Following a lengthy campaign begun by the American Law Institute, which drafted its Model rules of evidence in 1942, and the National Conference of Commissioners on Uniform State Rules, which drafted the Uniform Rules of Evidence in 1953, Congress in 1975 adopted the Federal Rules of Evidence. The Federal Rules of Evidence are the official rules in federal court proceedings. Most states now also have codified rules of evidence based on these federal rules. Both state and federal rules of evidence serve as a guide for judges and attorneys so that they can determine whether to admit evidence—that is, whether to allow evidence to be observed by the judge or jury making factual conclusions in a trial.

One important benchmark of admissibility is relevance. Federal Rule of Evidence 402 states, in part, "All relevant evidence is admissible, except as otherwise provided." The goal of this rule is to allow parties to present all of the evidence that bears on the issue to be decided, and to keep out all evidence that is immaterial or that lacks Probative

value. Evidence that is offered to help prove something that is not at issue is immaterial. For example, the fact that a defendant attends church every week is immaterial, and thus irrelevant, to a charge of running a red light. Probative value is a tendency to make the existence of any material fact more or less probable. For instance, evidence that a murder defendant ate spaghetti on the day of the murder would normally be irrelevant because people who eat spaghetti are not more or less likely to commit murder, as compared with other people. However, if spaghetti sauce were found at the murder scene, the fact that the defendant ate spaghetti that day would have probative value and thus would be relevant evidence.

Witnesses

The most common form of evidence is the testimony of witnesses. A witness can be a person who actually viewed the crime or other event at issue, or a witness can be a person with other relevant information—someone who heard a dog bark near the time of a murder, or who saw an allegedly injured plaintiff lifting weights the day after his accident, or who shared an office with the defendant and can describe her character and personality. Any competent person may testify as a witness, provided that the testimony meets other requirements, such as relevancy.

The Federal Rules of Evidence

COMPETENCY OF A WITNESS

THE FEDERAL RULES OF EVIDENCE contain broad competency requirements. To testify, a witness must swear or affirm that he or she will testify truthfully; possess personal knowledge of the subject matter of the testimony; have the physical and mental capacity to perceive accurately, record, and recollect fact impressions; and possess the capacity to understand questions and to communicate understandably, with an interpreter if necessary. When an issue of state law is being determined, the state rules of evidence govern the competency of a witness. States that have not adopted the Federal Rules of Evidence may have other grounds for Incompetency, such as mental incapacity, immaturity, religious beliefs, and criminal convictions. The Federal Rules of Evidence and most jurisdictions state that jurors and presiding judges are not competent to testify in the case before them.

PERSONAL KNOWLEDGE

To be admissible, testimony must be limited to matters of which the witness has personal knowledge, meaning matters that the witness learned about using any of his or her senses. Second, the witness must declare under oath or affirmation that the testimony will be truthful. The purpose of this requirement is to "awaken the witness' conscience and impress the witness' mind with the duty to [be truthful]" (Fed. R. Evid. 603). The oath or affirmation requirement also serves as a ground for perjury if the witness does not testify truthfully. Although the oath frequently invokes the name of God, the witness need not possess any religious beliefs; a secular affirmation is sufficient.

Witnesses may be called to testify by any party to the lawsuit. The party who calls a witness to testify generally questions the witness first, in what is known as direct examination. The judge may exercise reasonable control over the questioning of witnesses in order "(1) to make the interrogation and presentation effective for the ascertainment of the truth; (2) to avoid needless consumption of time, and (3) to protect the witnesses from harassment, or undue embarrassment" (Fed. R. Evid. 611(a)). Thus, the judge may prevent a witness from rambling in a narrative fashion and may require an attorney to ask specific questions in order to ascertain the truth quickly and effectively.

The federal rules and most jurisdictions discourage the use of leading questions on direct examination. These are questions that are designed to elicit a particular answer by suggesting it. For example, the question "Didn't the defendant then aim the gun at the police officer?" is a leading question, and normally it would not be permitted on direct examination. By contrast, "What did the defendant do next?" is a nonleading question that would be permitted on direct examination. In most cases, questions that can be answered with either "Yes" or "No" are considered to be leading questions. Courts generally will permit leading questions during direct examination if the witness is adverse or hostile toward the questioning party.

Leading questions are permitted, and are common practice, during cross-examination. Once a party conducts a direct examination, the opposing party is entitled to cross-examine the same witness. The scope of questions asked during cross-examination is limited to the subject matter that was covered during direct examination, and any issues concerning the witness's credibility. Attorneys use cross-examination for many purposes, including eliciting from a witness favorable facts; having the witness modify, explain, or qualify unfavorable versions of disputed facts elicited during direct examination; and impeaching, or discrediting, the witness.

If a witness is a lay witness (i.e., not testifying as an expert), the witness generally may testify as to facts and not as to opinions or inferences, unless the opinions or inferences are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue" (Fed. R. Evid.). For example, a witness may not testify that she smelled marijuana unless she can sufficiently establish that she knows what marijuana smells like. Lay witnesses commonly testify about such things as the speed that a car was going, or someone's approximate age, but these types of inferences are less likely to be permitted the more closely they address critical issues in the case.

Expert Witnesses

"If scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise" (Fed. R. Evid. 702). The admissibility of Expert Testimony hinges on whether such testimony would help the judge or jury, and whether the witness is properly qualified as an expert. Expert witnesses may, and usually do, testify in the form of an opinion. The opinion must be supported by an adequate foundation of relevant facts, data, or opinions, rather than by conjecture. Thus, an expert frequently relies on firsthand or secondhand observations of facts, data, or opinions perceived prior to trial, or presented at trial during testimony or during a hypothetical question posed by an attorney. Courts do not require experts to have firsthand knowledge of facts, data, or opinions because experts in the field do not always rely on such firsthand knowledge. For instance, physicians routinely make diagnoses based on information from several sources, such as hospital records, X-ray reports, and opinions from other physicians.

INTERROGATORIES

1. Please state the name, address, current employment status and telephone number of each person who answered these interrogatories and each person who assisted, including attorneys, accountants, employees of third party entities, or any other person consulted, however briefly, on the content of any answer to these interrogatories.
2. For each of the above persons please state their employment history (attach pages if necessary) and whether they have personal knowledge regarding the subject loan transaction.
3. Please state the date of the first contact between your company and the borrower in the subject loan transaction, the name and address and telephone number of the person(s) in your company who were involved in that contact, the manner of the contact (web, telephone, letter, application, solicitation, advertisement etc.).
 - 3.1. Please state the Name(s), addresses, email addresses and telephone numbers of all persons having knowledge, possession, custody, control or possession of any script used by any person on behalf of any of the Defendants in this lawsuit, in connection with or in furtherance of selling or conveying any information about the lender, the mortgage broker, the appraiser, the terms or prospective terms of the note, mortgage, deed of trust, good faith estimate or any other document(s) related to the prospective or actual loan.
4. Please state the name and address and phone number of the person at your company who is the custodian of any media concerning the advertisements, solicitations, scripts, digital or audio or visual media intended to bring new customers to your company.
5. Please state the name of the person(s) involved in the underwriting of the subject loan. "Underwriting" refers to any person who approved the loan, made or confirmed representations, evaluations or appraisals of value of the home, value of the security instruments, ability of the borrower to pay including, with respect to such underwriting person(s), their names, addresses, current employment status, and phone number.
 - 5.1. Please state printed source of any underwriting standards used to perform due diligence, underwriting evaluation, representations, or appraisals.
6. Please state the name and address and phone numbers of any person(s) who had any contact with any third party regarding the securitization, sale, transfer, assignment, hypothecation or any document or agreement, oral, written or otherwise, that would effect the funding of the subject loan, the closing of the subject loan, the receipt of money from a third party in a transaction that referred to the subject loan.
7. Please state the name and address and phone number of any person known or believed by anyone in your company to have received either physical possession of the note, the mortgage, or any document (including but not limited to assignment, endorsement, allonge, Pooling and Service Agreement, Assignment and Assumption Agreement, Trust Agreement, letters or emails or faxes of transmittals including attachments), that refers to or incorporates terms regarding the securitization, sale,

transfer, assignment, hypothecation or any document or agreement, oral, written or otherwise, that would effect the funding of the subject loan, the closing of the subject loan, the receipt of money from a third party in a transaction that referred to the subject loan, and whether such money was allocated to principal, interest or other obligation related to the subject loan.

- 7.1. Please state the name, address, telephone number, email address, fax number of the contact person who is or who represents the holder in due course of the note in the subject loan transaction.
- 7.2. Please state the name, address, telephone number, email address, fax number of the contact person who is or who represents the mortgagee in the subject loan transaction.
8. Please state the name and address and phone number of all persons known or believed by anyone in your company to have participated in the securitization of the subject loan including but not limited to mortgage aggregators, mortgage brokers, financial institutions, Structured Investment Vehicles, Special Purpose Vehicles, Trustees, Managers of derivative securities, managers of the company that issued an asset backed security, and the names of any person or entity that purchased the asset backed security.
9. Please state the name, address and phone number of the person(s) or entities that are entitled, directly or indirectly to the stream of revenue from the borrower in the subject loan.
10. Please state the name and address of the person(s) in custody of any document that identifies the loan servicer(s) in the subject loan transaction.
11. Please state the name, address and phone number of any person(s) in custody of any document which refers to any instruction or authority to enforce the note or mortgage in the subject loan transaction.
12. Other than people identified above, please state the name, address, phone number and employment status of any and all persons who have or had personal knowledge of the subject loan transaction, underwriting of the subject loan transaction, securitization, sale, transfer, assignment or hypothecation of the subject loan transaction, or the decision to enforce the note or mortgage in the subject loan transaction.
13. Please state the names, addresses and phone numbers of any party, person or entity known or suspected by you or any of your officers, employees, independent contractors or other agents, or servants of your company who might possess or claim rights under the subject loan or mortgage and/or note.
14. Please identify the custodian of the records, including name, address and phone number that would show all entries regarding the flow of funds regarding the closing on the subject loan transaction. If this person does not have personal knowledge of the transaction, then please identify in like fashion the person who worked for your company and had custody of the accounting or bookkeeping registers or records identifying said flow of funds in the closing of the subject loan transaction. Flow of funds, means (a) any record of money received, (b) any record of money paid out and (c) any bookkeeping or accounting entry, general ledger and accounting treatment of the subject loan transaction at your company including but not limited to whether the subject loan transaction was ever entered into any category on the

balance sheet at any time or times, whether any reserve for default was ever entered on the balance sheet, and whether any entry, report or calculation was made regarding the effect of this loan transaction on the capital reserve requirements of your company. It also includes any item, entry, calculation or note to any category on either the balance sheet or the income statement of your company whether in draft form, or in final form.

16. Please identify the custodian of the records, including name, address and phone number that would show all entries regarding the flow of funds regarding the subject loan transaction prior to or after closing of the subject loan transaction. If this person does not have personal knowledge of the transaction, then please identify in like fashion the person who worked for your company and had custody of the accounting or bookkeeping registers or records identifying said flow of funds after or before the closing of the subject loan transaction. Flow of funds, means (a) any record of money received, (b) any record of money paid out and (c) any bookkeeping or accounting entry, general ledger and accounting treatment of the subject loan transaction at your company including but not limited to whether the subject loan transaction was ever entered into any category on the balance sheet at any time or times, whether any reserve for default was ever entered on the balance sheet, and whether any entry, report or calculation was made regarding the effect of this loan transaction on the capital reserve requirements of your company.
17. Please identify the name, address and phone number of the auditor and/or accountant of your financial statements or tax returns.
18. Please identify the name, address and phone number of any attorney with whom you consulted or who rendered an opinion regarding the subject loan transaction or any pattern of securitization that may have effected the subject loan transaction directly or indirectly.
19. Please identify the name, address and telephone number of any person who served as an officer or director with your company commencing with 6 months prior to closing of the subject loan transaction through the present. This interrogatory is limited only to those people who had knowledge, responsibility, or otherwise made or received reports regarding information that included the subject loan transaction, and/or the process by which solicitation, underwriting and closing of residential mortgage loans, or the securitization, sale, transfer or assignment or hypothecation of residential mortgage loans to third parties
18. Please state the name, address, telephone number, email address and fax number of any person known to you, your agents, servants or employees to have acted in the capacity of a mortgage aggregator in which any document relating to the subject loan was transferred, assigned, pledged or hypothecated to a third party (i.e., a party other than the borrower, the lender, the trustee or any other party specifically identified by name in the instruments presented at the closing of the subject loan. **This request specifically refers to any Trustee operating within or outside the boundaries of the United States either as Trustee, officer, employee, agent, servant or affiliate, including but not limited to any entity commonly referred to or which fits the description of a structured investment vehicle.**

- 18.18. Please identify the document(s) utilized in said transfer, assignment, pledge or hypothecation with sufficient specificity to be described and produced in a request to produce in this action.
19. Please state the Name(s), addresses, email addresses and telephone numbers of all persons having knowledge, possession, custody, control or possession of any script used by any person on behalf of any of the Defendants in this lawsuit, in connection with or in furtherance of selling or conveying any information about the lender, the mortgage broker, the appraiser, the terms or prospective terms of the note, mortgage, deed of trust, good faith estimate or any other document(s) related to the prospective or actual loan.
20. Please state the name, address, telephone number, email address and fax number of any person known to you, your agents, servants or employees to have acted in the capacity of a trustee of any aggregation or pool of assets in which any document relating to the subject loan was transferred, assigned, pledged or hypothecated to a third party (i.e., a party other than the borrower, the lender, the trustee or any other party specifically identified by name in the instruments presented at the closing of the subject loan. **This request specifically refers to any Trustee operating within or outside the boundaries of the United States either as Trustee, officer, employee, agent, servant or affiliate, including but not limited to any entity commonly referred to or which fits the description of a structured investment vehicle.**
- 20.18. Please identify the document(s) created or utilized in said transfer, assignment, pledge or hypothecation with sufficient specificity to be described and produced in a request to produce in this action.
- 20.19. Please state the Name(s), addresses, email addresses and telephone numbers of all persons having knowledge, possession, custody, control or possession of any script used by any person on behalf of any of the Defendants in this lawsuit, in connection with or in furtherance of selling or conveying any information about the lender, the mortgage broker, the appraiser, the terms or prospective terms of the note, mortgage, deed of trust, good faith estimate or any other document(s) related to the prospective or actual loan.
21. Please state the name of the person(s) involved or having knowledge of any analysis or creation of spreadsheets, notes, memoranda or other media, whether electronic or in hard copy, wherein the composition of a pool, tranche or other aggregation of assets was created or described and which included or referred to the subject loan. "Analysis" refers to any person who suggested or approved the composition of the pool or aggregation, made or confirmed representations, evaluations or appraisals of value of the home, value of the security instruments, ability of the borrower to pay including, with respect to such analysis person(s), their names, addresses, current employment status, and phone number.
- 21.18. Please state printed source(s) of any analysis standards used to perform due diligence or analysis and whether any independent verification or due diligence was performed utilizing such printed source(s).
- 21.19. Please identify the document(s) created or utilized in said process with sufficient specificity to be described and produced in a request to produce in this action.

22. Please state the name of the person(s) involved or having knowledge of any analysis or creation of spreadsheets, notes, memoranda or other media, whether electronic or in hard copy, wherein the composition of a pool, tranche or other aggregation of assets was created or described and which included or referred to the subject loan and wherein a description of the pool or aggregation was transmitted, transferred, assigned, pledged or hypothecated to any investment banking entity including but not limited to any subsidiary, affiliate or company or entity created at the direction of said investment banking firm including but not limited to any special purpose vehicle or any entity that could be described as a special purpose vehicle. A person who "transmitted, transferred, assigned, pledged or hypothecated" refers to any person who suggested, approved, received or accepted the composition of the pool or aggregation, made or confirmed representations, evaluations or appraisals of value of the home, value of the security instruments, ability of the borrower to pay including, with respect to such analysis person(s), their names, addresses, current employment status, and phone number.
- 22.18. Please state printed source(s) of any analysis standards used to perform due diligence or analysis and whether any independent verification or due diligence was performed utilizing such printed source(s).
- 22.19. Please identify the document(s) created or utilized in said process with sufficient specificity to be described and produced in a request to produce in this action.
23. Please state the name of the person(s) involved or having knowledge of any analysis or creation of spreadsheets, notes, memoranda or other media, whether electronic or in hard copy, wherein the composition of a pool, tranche or other aggregation of assets was created or described and which included or referred to the subject loan and wherein a description of the pool or aggregation was allocated, transmitted, transferred, assigned, pledged or hypothecated to any part, division, or tranche of an entity or investment banking entity including but not limited to any subsidiary, affiliate or company or entity including but not limited to any special purpose vehicle or any entity that could be described as a special purpose vehicle. A person who "allocated, transmitted, transferred, assigned, pledged or hypothecated" refers to any person who suggested, approved, received or accepted the composition of the pool or aggregation, made or confirmed representations, evaluations or appraisals of value of the home, value of the security instruments, ability of the borrower to pay including, with respect to such analysis person(s), their names, addresses, current employment status, and phone number.
- 23.18. Please state printed source(s) of any analysis standards used to perform due diligence or analysis and whether any independent verification or due diligence was performed utilizing such printed source(s).
- 23.19. Please identify the document(s) created or utilized in said process with sufficient specificity to be described and produced in a request to produce in this action.
24. Please state the name of the person(s) involved or having knowledge of any analysis or creation of any offering circular, spreadsheets, notes, memoranda or other media, whether electronic or in hard copy, wherein the composition of a pool, tranche or other aggregation of assets was created or described and which included

or referred to the subject loan and wherein a description of the pool or aggregation was transmitted, transferred, assigned, pledged or hypothecated to any buyer or prospective buyer, investor or prospective investor including any entity including but not limited to any subsidiary, affiliate or company or entity created at the direction of said buyer or prospective buyer, investor or prospective investor and/or investment banking firm including but not limited to any special purpose vehicle or any entity that could be described as a special purpose vehicle. A person who "transmitted, transferred, assigned, pledged or hypothecated" refers to any person who suggested, approved, received or accepted the composition of the pool or aggregation, made or confirmed representations, evaluations or appraisals of value of the home, value of the security instruments, ability of the borrower to pay including, with respect to such analysis person(s), their names, addresses, current employment status, and phone number.

24.18. Please state printed source(s) of any analysis standards used to perform due diligence or analysis and whether any independent verification or due diligence was performed utilizing such printed source(s).

24.19. Please identify the document(s) created or utilized in said process with sufficient specificity to be described and produced in a request to produce in this action.

25. Please state the name of the person(s) involved or having knowledge of any rating or evaluation of any securities or certificates, or any entity acting as an issuer of any securities or certificates and describe with specificity the name, address, telephone number, fax number, and email address of the person(s) as such rating entity (which might include Moody's, Fitch or Standard and Poor's) based upon an analysis or creation of spreadsheets, notes, memoranda or other media, whether electronic or in hard copy, wherein the composition of a pool, tranche or other aggregation of assets was created or described and which included or referred to the subject loan and wherein a description of the pool or aggregation was transmitted, transferred, assigned, pledged or hypothecated to any entity or buyer. A person who "transmitted, transferred, assigned, pledged or hypothecated" refers to any person who suggested, approved, received or accepted the composition of the pool or aggregation, made or confirmed representations, evaluations or appraisals of value of the home, value of the security instruments, ability of the borrower to pay including, with respect to such analysis person(s), their names, addresses, current employment status, and phone number.

25.18. Please state printed source(s) of any analysis standards used to perform due diligence or analysis and whether any independent verification or due diligence was performed utilizing such printed source(s).

25.19. Please identify the document(s) created or utilized in said process with sufficient specificity to be described and produced in a request to produce in this action.

26. Please state the name of the person(s) involved or having knowledge of any credit default swap or other instrument hedging the risk of default as to any person or entity acting as an issuer of any securities or certificates and describe with specificity the name, address, telephone number, fax number, and email address of the person(s) of the parties to such instrument and whether such instrument was based upon an analysis or creation of spreadsheets, notes, memoranda or other media, whether electronic or in hard copy, wherein the composition of a pool, tranche or other aggregation of assets was created or described and which included or referred to the subject loan and wherein a description of the pool or aggregation was transmitted, transferred, assigned, pledged or hypothecated to any entity or buyer. A person who "transmitted, transferred, assigned, pledged or hypothecated" refers to any person who suggested, approved, received or accepted the composition of the pool or aggregation, made or confirmed representations, evaluations or

appraisals of value of the home, value of the security instruments, ability of the borrower to pay including, with respect to such analysis person(s), their names, addresses, current employment status, and phone number.

26.18. Please state printed source(s) of any analysis standards used to perform due diligence or analysis and whether any independent verification or due diligence was performed utilizing such printed source(s).

26.19. Please identify the document(s) created or utilized in said process with sufficient specificity to be described and produced in a request to produce in this action.

27. Please state the name of the person(s) involved or having knowledge of any insurance policy or product, plan or instrument describing overcollateralization, cross collateralization or guarantee or other instrument hedging the risk of default as to any person or entity acting as an issuer of any securities or certificates and describe with specificity the name, address, telephone number, fax number, and email address of the person(s) of the parties to such instrument and whether such instrument was based upon an analysis or creation of spreadsheets, notes, memoranda or other media, whether electronic or in hard copy, wherein the composition of a pool, tranche or other aggregation of assets was created or described and which included or referred to the subject loan and wherein a description of the pool or aggregation was transmitted, transferred, assigned, pledged or hypothecated to any entity or buyer. A person who "transmitted, transferred, assigned, pledged or hypothecated" refers to any person who suggested, approved, received or accepted the composition of the pool or aggregation, made or confirmed representations, evaluations or appraisals of value of the home, value of the security instruments, ability of the borrower to pay including, with respect to such analysis person(s), their names, addresses, current employment status, and phone number.

27.18. Please state printed source(s) of any analysis standards used to perform due diligence or analysis and whether any independent verification or due diligence was performed utilizing such printed source(s).

27.19. Please identify the document(s) created or utilized in said process with sufficient specificity to be described and produced in a request to produce in this action.

KINDLY ATTACH ADDITIONAL SHEETS AS REQUIRED IDENTIFYING THE INTERROGATORY BEING ANSWERED

YOU HAVE A CONTINUING OBLIGATION TO UPDATE THE INFORMATION IN THESE INTERROGATORIES AS YOU ACQUIRE NEW INFORMATION. IF NO SUCH UPDATE IS PROVIDED IN A REASONABLE PERIOD OF TIME FROM THE TIME YOU ACQUIRED SUCH INFORMATION, IT MAY BE EXCLUDED AT TRIAL OR HEARING

MORE ON EVIDENCE

When an expert offers a scientific fact as substantive evidence or as the basis of his or her opinion, the court must determine the reliability of the scientific fact by looking at such things as the validity of the underlying scientific principle, the validity of the technique applying that principle, adherence to proper procedures, the condition of instruments used in the process, and the qualifications of those who perform the test and interpret the results. Issues frequently arise over such scientific tools and techniques as lie detectors, DNA testing, and hypnosis. Some scientific tests, such as drug tests, radar, and Paternity blood tests, generally are accepted as reliable, and their admissibility may be provided for by statute.

In *Kumho Tire Co. v. Carmichael* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (U.S.Ala., Mar 23, 1999) (NO. 97-1709), a tire on the vehicle driven by Carmichael blew out, and the vehicle overturned, killing one passenger and injuring others. The survivors and decedent's representative brought a diversity suit against Kumho, the tire's maker, and its distributor. Their claim that the tire was defective relied mainly upon the depositions of a tire-failure analyst, whose expert testimony was to have been that a defect in the tire's manufacture or design caused the blow-out. The expert's opinion was based upon an inspection of the tire and upon the theory that in the absence of certain symptoms indicating tire abuse, a failure of the sort that occurred was caused by a defect. Kumho moved to exclude the expert's testimony, claiming that his methodology failed to satisfy Federal Rule of Evidence 702, which does not distinguish between "scientific" knowledge and "technical" or "other specialized" knowledge. **The U.S. Supreme Court disagreed and ruled that the trial judge has the power to test the reliability of all expert testimony, whether by a scientific expert or by an expert who is not a scientist. The court held that Rule 702 does not address the testimony of scientists only, but that it applies to any type of expert testimony.**

The American Medical Association maintains guidelines for physicians who testify both as treating physician experts and as nontreating expert witnesses. Many state medical associations also have guidelines for doctors who testify.

Hearsay

The credibility of any witness's testimony depends upon three factors: (1) whether the witness accurately perceived what he or she described; (2) whether the witness retained an accurate memory of that perception; and (3) whether the witness's narration accurately conveys that perception. In order to be allowed to testify, the witness generally must take an oath, must be personally present at the trial, and must be subjected to cross-examination. These conditions promote the factors that lend themselves to the witness's credibility. The rule against Hearsay further bolsters the oath, personal presence, and cross-examination requirements.

Hearsay is a statement, made out of court, offered in court to prove the truth of the matter asserted. The statement may be oral or written, or it may be nonverbal conduct

intended as an assertion, such as pointing to a crime suspect in a police line-up. The act of pointing in response to a request for identification is the same as stating, "He did it." Not all nonverbal conduct is intended as an assertion, of course. For example, a person usually opens an umbrella to stay dry, not to make the assertion, "It is raining."

Sometimes, statements made out of court are not hearsay because they are not offered for the purpose of proving the truth of the matter asserted.

PLAINTIFF claims that a collision between his car and a truck rendered him unconscious files a lawsuit against the truck driver for Negligence. The truck driver wishes to introduce as evidence a statement that the man made seconds after the accident: "I knew I should have gotten my brakes fixed; they haven't been working for weeks!" If the purpose of offering the statement is only to prove that the man was conscious and talking following the accident, the statement is not hearsay. However, if the statement is offered to prove that the man's brakes were not working and therefore that he caused the accident, then the statement is offered for its truth, and it is hearsay.

The Federal Rules of Evidence state generally that hearsay is not admissible evidence. The reason is that it is impractical, and in most cases simply impossible, to cross-examine the declarant of an out-of-court statement, or to have the declarant take an oath prior to making the statement. Thus, the credibility of an out-of-court statement cannot be easily ascertained. But the hearsay doctrine is extremely complex. Under the federal rules, for example, most **admissions of guilt are not considered hearsay** and are therefore admissible, even though they might be stated out of court and then offered as evidence. The federal rules list more than 25 exceptions to the general hearsay prohibition. These exceptions apply to circumstances believed to produce trustworthy assertions.

Some exceptions to the hearsay rule require that the person who made the statement be unavailable to testify at trial. One example of this is when a person who is mortally wounded makes a statement about the cause of her death, just before dying. Under this hearsay exception, the victim's statement assigning guilt or causation is made admissible because the victim is not available to testify at trial, and the need for the information is given greater weight than the fear that she lied. Some have argued that the Dying Declaration exception exists at least in part because of the belief that persons would not waste their last breaths to utter a falsehood. One federal court commented, "More realistically, the **dying declaration** is admitted because of compelling need for the statement, rather than any inherent trustworthiness" (United States v. Thevis, 84 F.R.D. 57 [N.D. Ga. 1979]). This exception proved noteworthy in the October 1995 trial and ultimate conviction of Yolanda Saldivar, who was accused of gunning down tejana singing star Selena Quintanilla Perez in a Corpus Christi, Texas, motel. Motel employees testified that Selena's last words before collapsing and dying were, "Lock the door! She'll shoot me again!" and "Yolanda Saldivar in Room 158." Saldivar received a sentence of life in prison following her conviction of murdering the 23-year-old recording artist.

Under some circumstances, the availability of the declarant to testify is immaterial. For example, the **excited-utterance exception** to the hearsay rule allows the admission of an out-of-court statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" (Fed. R. Evid.803(2)). The premise for this exception is that excitement caused by the event or condition leaves a declarant without sufficient time or capacity for reflection to fabricate, thus the statement is considered truthful. An example of an admissible excited utterance is the statement, "Look out! That green truck is running a red light and is headed toward that school bus!" Other examples of hearsay exceptions include statements of medical diagnosis, birth and marriage certificates, business records, and statements regarding a person's character or reputation.

Objections

Evidentiary Objections

At every trial or hearing requiring the admission of evidence, attorneys have the duty to object to evidence that the rules of court deem inadmissible. Objections must be made in a timely fashion, as soon as the witness or opposing party attempts to improperly introduce evidence. **An attorney who fails to immediately recognize and object to inadmissible evidence faces serious consequences: the evidence may be admitted for the judge or jury to consider, and should the case be appealed, the appellate court will allow it to stand as admitted.** On the other hand, an attorney who makes frequent objections to proper, admissible evidence runs the risk of alienating the jury or angering the judge. A trial lawyer therefore must learn to quickly recognize and correctly object to inadmissible evidence.

Once an attorney objects, the judge must decide whether to sustain the objection and disallow the evidence, or overrule the objection and permit the evidence. To assist this decision, ***the attorney must generally tell the judge the legal basis for the objection.***

Objections to Questions

Objection	Legal Basis

Calls for an irrelevant answer	The answer to the question would not make the existence of any consequential fact more or less probable.

Calls for an immaterial answer	The answer to the question would have no logical bearing on an issue in the case.

Is asked of an incompetent witness	The witness is disqualified by statute from testifying, owing to age, lack of knowledge, or mental illness.

BEST EVIDENCE RULE AND CRIMINAL FRAUD

*****Violates the **best evidence rule** The original document, rather than testimony, contains the best evidence. Show us the note, the assignments, the allonges, the pooling and service agreement, the assignment and assumption agreement, the certificate issued to investors, any trustee authorization, dated at the time of the transaction, signed by an authorized signatory. Examine these instruments to determine if there is any writing placed directly on the instrument. **LINE THEM UP AND MAKE SURE THAT A COMPLETE CHAIN OF TITLE EXISTS. IN VIRTUALLY ALL CASES THERE IS NO COMPLETE CHAIN OF TITLE.** Get the actual check registers and accounting entries between the parties and ask for any information, letter, or memorandum that relates to the subject note in any way --- especially letters of transmittal in which payments were made or received by third parties (including the U.S. Treasury or the Federal Reserve). *Bottom Line: They don't have the goods because if the the true parties step forward with the evidence, they will be admitting criminal fraud.*

Calls for **privileged communication** The information sought is Privileged Communication, such as that between attorney and client, physician and patient, or husband and wife, and is barred from disclosure.

Calls for a **conclusion** The question improperly asks the witness to reach a legal conclusion, which is a job reserved for the judge or jury.

Calls for an **opinion**. Generally, only expert witnesses may render their opinions; lay witnesses must testify only regarding their observations.

Calls for a **narrative answer**. Witnesses must respond concisely to individual questions, not give a long, rambling explanation.

Calls for **hearsay** The answer would be inadmissible hearsay.

Is **leading**. The questioning attorney may not frame a question in such a way that it suggests the answer.

Is **repetitive** (or has already been asked and answered) The question has already been asked and answered.

Is beyond the scope **On cross-examination, questions normally may not address matters not covered on direct examination.**

OBJECTION; FOUNDATION --- ASSUMES FACTS NOT IN EVIDENCE

******* Assumes facts not in evidence** Part of the question assumes that certain facts are true, when such facts have not been admitted into evidence or their existence is in dispute. ***This is the only way a foreclosing party can win a foreclosure --- by getting the Judge or jury to ASSUME facts that would ordinarily be obvious (and which have been obvious in their prior experience) but are NOT true in foreclosures initiated for securitized mortgages during the mortgage meltdown period of 2001-2008. Extreme vigilance is required when the foreclosing party attempts to put on evidence.***

Is **confusing (or misleading or ambiguous or vague or unintelligible)** A question must be posed in a manner that is specific and clear enough that the witness reasonably knows what information the examiner seeks.

Calls for speculation Questions that ask the witness to guess or speculate are improper.

Is **compound** The question brings up two or more separate facts, and any simple answer would be unclear.

Is **argumentative** The question is essentially an argument to the judge or jury; it elicits no new information but rather states a conclusion and asks the witness to agree with it.

Is an **improper characterization** For example, the question calls the defendant a spoiled brat, greedy pig, or frenzied dog; characterization is something the jury or judge, not a witness or attorney, should infer.

Mistakes evidence (or misquotes the witness) Misstating or distorting evidence, or misquoting a witness, is improper.

Is **cumulative** When numerous witnesses testify to the same facts or numerous exhibits demonstrate the same things, without adding anything new, the evidence is objectionable.

Constitutes an **improper impeachment** Rules surrounding the impeachment of a person's character or credibility are highly technical. For example, evidence of a prior inconsistent statement made by a witness may be used only if the statement is materially inconsistent and is offered in the proper context.

PAROL EVIDENCE RULE

Violates the parol evidence rule The Parol Evidence rule bars evidence of oral, or verbal, modifications or contradictions of a written contract that is complete and clear on its face. **here is another place where the foreclosing party may try to skim by the evidence by attempting to have the judge or jury accept a document for “what it is” without providing a proper foundation for how it came into existence, who signed it, and in what context it was signed. BEWARE OF FORGERIES. THEY EXIST. YOU MIGHT NOT GET THEM IN DISCOVERY BUT THEY ARE OUT THERE. THE PARTIES TO SECURITIZATION FREQUENTLY SQUIGGLED A SIGNATURE OF A “BORROWER” AFTER LOAN APPLICATION BUT BEFORE CLOSING ON THE THEORY THAT THE BORROWER WAS GOING TO SIGN THE NOTE ANYWAY. THEY DID THIS TO SPEED THE PROCESS OF SECURITIZATION (COVERING THE FORWARD SALES OF THE INVESTMENT BANKERS WHO SOLD MBS CERTIFICATES WITHOUT THE MORTGAGES OR NOTES TO BACK THEM UP). In many cases the loan closing never took place or was rescinded. But the “note” was sold anyway and eventually was foreclosed much to the surprise of the non-existent borrower and the current owner of the property.**

Is unresponsive (or volunteered) An answer that does not directly respond to a question is objectionable as unresponsive; an answer that goes beyond what is necessary to answer the question is objectionable as volunteered. Only the attorney who called the witness may object on these grounds.

Objections to Answers

OBJECTION: LACKS PROPER FOUNDATION

Lacks proper foundation (or lacks foundation, or has no foundation) Before exhibits can be admitted into evidence, attorneys must establish the necessary foundation, or the facts that indicate the exhibit is what it purports to be. For a photograph of a crime scene, this might include calling the person who took the picture as a witness and asking whether she was at the crime scene, had a camera, and took a picture, and whether the exhibit is that picture. **In a foreclosure case the foreclosing party might be called to introduce a note, allonge, assignment, computer records showing payment, etc. All the issues regarding competency of the witness are called into play here --- Oath, Perception (personal Knowledge), Memory and Communication. Remember that most of the people involved in these loan closings are now either unemployed or working elsewhere. It is doubtful that a chain of custody can be established. DON'T LET THE WITNESS TESTIFY ABOUT WHAT IS IN THE EXHIBIT UNLESS THE EXHIBIT IS ADMITTED. THEY PROBABLY KNOW NOTHING IN THEIR PERSONAL KNOWLEDGE OF WHO PREPARED THE DOCUMENT, WHY IT WAS PREPARED, WHEN IT WAS PREPARED, FROM WHAT INFORMATION OR ANYTHING ELSE.**

OBJECTION LACKS AUTHENTICATION

Lacks authentication Writings and conversations must be authenticated, or shown to have been executed by a party or that party's agent. For example, before testifying about a telephone conversation, a witness must demonstrate his knowledge of who was speaking on the other end of the telephone.

Is prejudicial The exhibit's prejudicial effect outweighs its Probative value. This objection is often raised with photo exhibits. A color photo of a murder victim may so prejudice the jury, without adding information helpful to determining the murderer, that the judge may disallow the photo as evidence.

Contains inadmissible matter Exhibits in the forms of charts, diagrams, and maps must not disclose otherwise inadmissible material to the jury. For example, in most jurisdictions, evidence that a defendant in a personal injury case has insurance that may pay for the plaintiff's damages is inadmissible. A chart, shown to the jury, that conveys the name of the defendant's insurance company is improper and objectionable.

Contains hearsay

Nonevidentiary Objections

Attorneys may also object to situations that arise during a trial or hearing that do not concern matters of evidence. During Voir Dire, or jury selection, attorneys may not argue to prospective jurors the law or the facts that will arise at trial; if they do, they will likely receive an objection from opposing counsel. Likewise, attorneys often object to arguments made during opening statements, because opening statements are limited to a discussion of the evidence that will be presented during the trial. An attorney's personal opinion on any evidentiary matter is also objectionable because it places the attorney's credibility directly at issue. And a personal attack by an attorney against a party, witness, or opposing counsel is unprofessional and will almost always result in a sustainable objection.

Further readings Park, Roger C. 2001. Trial Objections Handbook 2d. St. Paul, Minn.: West Group.

Authentication and Identification

Evidence is not relevant unless its authenticity can be demonstrated. A letter in which the defendant admits her guilt in a tax-fraud trial is inadmissible unless the prosecution can first show that the defendant actually wrote it. Blood-stained clothing is irrelevant without some connection to the issues of the trial, such as evidence that the clothing belonged to the accused murderer. The process of linking a piece of evidence to a case —of authenticating or identifying the evidence—is frequently referred to as laying a foundation. Under the Federal Rules of Evidence, a foundation is sufficient if a reasonable juror would find it more probably true than not true that the evidence is what the party offering it claims it to be.

The most basic way to lay an evidentiary foundation is to demonstrate that a witness has personal knowledge. For example, the witness may testify that he wrote the letter, or that he saw the plaintiff sign the contract, or that he found the bullet in the kitchen. When the evidence is an object, the witness must testify that the object introduced at the trial is in substantially the same condition as it was when it was witnessed.

Objects that are not readily identifiable often must be authenticated through chain-of-command testimony. In the case of a blood sample, a proper foundation would include

testimony from each individual who handled the blood—from the nurse who drew the blood, to the lab technician who tested it, to the courier who delivered it to the courthouse for trial. Unless each individual can testify that the blood sample's condition remained substantially the same from the time it was drawn until the time it was offered as evidence (accounting for any loss in amount, due to testing), the court could sustain an objection from the other side. The sample then would be inadmissible for lack of authentication.

Under the Federal Rules of Evidence, some evidentiary items are self-authenticating and need no additional authentication before being admitted. Documents containing the official seal of a government unit within the United States, and certified copies of public records such as birth certificates, are self-authenticating, as are newspapers and congressional documents.

Polygraph Tests

In *United States v. Scheffer*, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (U.S., Mar 31, 1998) (NO. 96-1133), the U. S. Supreme Court upheld a military court evidence rule, Rule 707, which prohibits the use of Polygraph, or lie detector, test results in military trials. Scheffer, a military investigator, took a routine urine test, which came back positive for amphetamines. Scheffer then asked for, and was given, a polygraph test which showed that he had no knowledge of amphetamine use. At his trial on drug-use charges based on the urine test, Scheffer tried to introduce evidence of his favorable lie-detector results. The court refused to admit this evidence on the basis of military evidence Rule 707. Scheffer appealed, claiming that he should have been able to introduce the test results as part of his constitutional right "to prepare a defense". The Court upheld the exclusion of the lie-detector test on the grounds that there is too much controversy about the reliability of lie-detector test results; that lie-detector tests might undercut the role of the jury in assessing witness credibility; and that lie-detector tests create too much possibility of side issues about the reliability of the test.

The Best-Evidence Rule

The Best-evidence rule is a misleading name for the courts' preference for original writings, recordings, and photographs over copies, when the contents are sought to be proved. The purpose of this rule at common law was to avoid the potential for inaccuracies contained in handmade copies. The current rule contained in the Federal Rules of Evidence requires the use of original writings, recordings, and photographs (including X-rays and motion pictures), but the rule defines original to include most photocopies or prints from the same negative. The risk of inaccuracies from these types of duplicates is almost non-existent. When the original evidence is lost, destroyed, unobtainable, or in the possession of the opponent, the court will not require a party to produce the original.

Journalists' Privilege

In 1972, information leaked to the Washington Post by a confidential informant, set the stage for the fall of a U.S. president. A source they called "Deep Throat," told journalists Bob Woodward and Carl Bernstein that several improprieties, including a break-in at the

Democratic National Committee headquarters in Washington, D.C., had been orchestrated by a committee to reelect President Richard M. Nixon. News articles that Woodward and Bernstein wrote based on that information marked the beginning of Watergate, a scandal that led to Nixon's resignation in 1974 in the face of impeachment. Almost 30 years later, the true identity of Deep Throat remains unknown.

Reliance on anonymous news sources can create problems when lawyers, judges, or juries seek information during a judicial proceeding. It is a basic principle in the U.S. legal system that "the public has a right to every [person's] evidence" (8 J. Wigmore, *Evidence* § 2192 [McNaughton rev. 1961]). With very few exceptions, individuals who possess knowledge or information that may help a judge or jury, must testify or produce the information in court. Journalistic privilege, where recognized, is the right of journalists to withhold from the court certain sources, notes, or materials used to gather news. It is not among the privileges commonly recognized by courts, such as Attorney-Client Privilege or marital privilege.

Since the 1850s, journalists have sought a privilege to protect the identity of news sources or to protect the newsgathering process from discovery at trial. As the number of reporters subpoenaed (ordered by a court to testify) increased dramatically in the 1960s and 1970s, so did their efforts. Reporters argue that to effectively gather vital information and disseminate it to the public, they must have the legal right to withhold the identity of a source. Without such a privilege, sources who fear the disclosure of their name will be less likely to talk with reporters. Reporters who fear reprisal, or who simply do not wish to testify or hire a lawyer, will be less likely to print or broadcast sensitive information. Journalists argue that this chilling effect on reporters' willingness to print or broadcast sensitive information will ultimately harm the public, which relies on reporters to relay even the most sensitive and secretive news and information.

In resisting subpoenas, journalists usually invoke the First Amendment, which prohibits laws abridging a free press. Unlike the Fifth Amendment, which explicitly grants individuals the right to refuse to testify against themselves, the First Amendment contains no explicit language protecting journalists from having to testify. Nonetheless, reporters have long argued that the purpose of the First Amendment is to allow the news media to freely gather and report the news, without encumbrances by the government. Forcing reporters to testify, they argue, violates the First Amendment.

A divided U.S. Supreme Court rejected this argument in the landmark decision *Branzburg v. Hayes*, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972). *Branzburg* involved the appeals of three reporters who had been ordered in three separate incidents to testify before a Grand Jury (a jury convened to determine whether to indict a criminal suspect). In all three cases, prosecutors wanted to know what the reporters had observed or to whom they had spoken. One reporter had written an article about the process of converting marijuana into hashish; the other two were covering the militant Black Panther organization, believed to be planning guerrilla warfare to support its cause. In all three cases, the reporters had promised to keep their sources' identities secret or not to divulge their observations. The reporters refused to answer certain

questions and provide certain information, arguing that doing so would jeopardize or destroy their working relationships with news sources and, ultimately, their ability to disseminate vital information to the public. The Supreme Court pointed out that the duty to testify has roots as deep as the First Amendment's guarantee of a free press, and refused to find a First Amendment privilege protecting reporters from being forced to testify before a grand jury.

According to the Court in *Branzburg*, the First Amendment does not override all other public interests, or exempt reporters from the same obligations to testify imposed on other citizens, merely because the news-gathering process may become more difficult if confidential sources are revealed. "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability," the Court stated. The Court also acknowledged the importance of a free press to the country's welfare, and recognized that to be effective, the First Amendment must protect not only the dissemination of information but the news-gathering process itself. Yet, the Court made the point that a requirement to testify or otherwise disclose information to a judicial body is not a prohibition on the press's ability to employ confidential sources. The Court stated, "[N]o attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request."

Justices Potter Stewart, William J. Brennan Jr., and Thurgood Marshall dissented in *Branzburg*, emphasizing that the independence of the press becomes threatened when journalists are called upon as "an investigative arm of government." When reporters are forced to testify in courtrooms, the three justices found, their constitutionally protected functions are impaired. Such impairment will, "in the long run, harm rather than help the administration of justice." The Court's dissenters stressed that the Constitution protects journalists not for the benefit of journalists but for the benefit of society. "Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society," stated the dissenting opinion.

The *Branzburg* decision held that the First Amendment does not protect journalists from grand jury subpoenas seeking evidence in criminal cases, and that there is no testimonial privilege for reporters who witness crimes. The decision did not address whether the Constitution protects reporters' notes, tape recordings, or other news-gathering items; whether there can be a privilege if there is no reason to think the reporter observed illegal activity; and whether reporters are entitled to a privilege in civil actions or other legal proceedings besides grand juries.

Despite the uncertainty, reporters since *Branzburg* have successfully invoked privileges. In some jurisdictions, they have been helped by Shield Laws, which are statutes allowing journalists to withhold certain information. Even in state jurisdictions without shield laws, many courts have upheld a reporter's claim of privilege using a three-part test championed in the *Branzburg* dissent: a reporter may be forced to reveal confidences only when the government demonstrates (1) that there is Probable Cause

to believe that the journalist has information clearly relevant to a specific legal violation, (2) that the same information is not available by alternative means less destructive to the First Amendment, and (3) that there is a compelling and overriding interest in the information. Yet other courts have interpreted *Branzburg* as prohibiting state courts from creating reporter privileges at all (*Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791 [1977]; *In re Roche*, 381 Mass. 624, 411 N.E.2d 466 [1980]).

More than half the states have passed shield laws, making the reporters' privilege statutory. Shield laws range in their coverage: some protect only the identities of confidential sources; others protect everything from sources, notes, videotapes, and film negatives to the reporter's thought processes. At least 14 states and most federal jurisdictions recognize the privilege based on Common Law, state Constitutional Law, or the First Amendment. These jurisdictions generally apply a version of the three-part test outlined in the *Branzburg* dissent. Even where the privilege is recognized, it is rarely absolute. Courts may order reporters to disclose information under certain compelling circumstances, and a reporter who refuses to obey the court faces a charge of Contempt and fines or imprisonment.

Journalists react differently to the threat of incarceration. Los Angeles radio station manager Will Lewis, in 1973, initially refused to comply with a federal grand jury subpoena seeking the originals of a letter and a tape recording sent to him by radical groups claiming inside knowledge of the Kidnapping of Patty Hearst. Lewis was held in contempt and sent to Terminal Island Federal Prison, where he spent 16 days in solitary confinement before being released pending his appeal. He lost (*In re Lewis*, 377 F. Supp. 297 [C.D. Cal. 1974], *aff'd* 501 F.2d 418 [9th Cir.]). Faced with returning to prison, Lewis turned over the documents.

But William Farr, a reporter for the Los Angeles Herald-Examiner, spent two months in jail rather than name his source. Farr had received a copy of a deposition transcript from a prosecuting attorney in the case of serial murderer Charles Manson. The judge in the case had forbidden officers of the court to publicize the case, which contained particularly gruesome facts. When the judge ordered Farr to name the individual who leaked the information, Farr refused (*Farr v. Superior Court of Los Angeles County*, 22 Cal. App. 2d 60, 99 Cal. Rptr. 342 [Ct. App. 1971]).

Many reporters and their attorneys view the threat of contempt as an opportunity to educate the public on the issue. In 1990, Tim Roche was a 21-year-old reporter for a Florida newspaper, the *Stuart News*, when he was subpoenaed to disclose the name of a confidential source who had shown him a sealed (confidential) court order in a Child Custody battle. Roche refused to comply, maintaining that he had promised the source confidentiality. He was found in contempt of court and received a 30-day jail sentence.

Attorneys for Roche appealed, but both the Florida Supreme Court and the U.S. Supreme Court declined to hear the case. Roche then sought clemency (an act to lower or moderate the sentence) from Governor Lawton M. Chiles, of Florida. Chiles refused the plea for clemency, but offered Roche three hundred hours of community service as

an alternative to jail. Roche declined the offer, stating that he would not compromise his principles, as he had done nothing wrong. The governor retorted that he also would not compromise his principles, and that no one is above the law. On March 16, 1993, Roche entered the Martin County Jail, where he served 19 days. National publicity surrounding Roche's plight led to the introduction and passage of a Florida bill designed to protect reporters and their confidential sources. Chiles, however, vetoed the Tim Roche Bill on May 14, 1993.

Vanessa Leggett holds the dubious distinction of being the journalist incarcerated for the longest period of time in United States history over such an issue. In 2001 and 2002, Leggett spent 168 days in federal detention in Texas, a state without a shield law, for refusing to comply with a sweeping subpoena for confidential source materials. Leggett had been working on a nonfiction book about the killing of Houston socialite Doris Angleton, who was found shot to death in April 1997. Mrs. Angleton's millionaire husband, Robert, was accused of paying his brother, Roger, to kill his wife. Both brothers were charged with capital murder. In the course of her research, Leggett conducted a series of prison interviews with Roger Angleton, who subsequently committed suicide.

Leggett initially turned over tapes of her interviews with Roger to a grand jury. However, after Robert Angleton was acquitted in state court, a federal investigation into his activities was launched. In November 2000, the Federal Bureau of Investigation (FBI) contacted Leggett about becoming an informant. She declined, citing a possible loss of her integrity and objectivity as a reporter, and expressed a concern over the loss of confidentiality with her sources. Leggett was then subpoenaed to testify in front of the grand jury. She agreed to do so after the FBI assured her she would not have to reveal the sources of her information. However, the federal grand jury subpoenaed all of Leggett's tape-recorded conversations with anyone she had interviewed about the Angleton case. She claimed reporter's privilege protected her from being forced to disclose confidential sources. On July 6, 2001, U.S. District Judge Melinda Harmon ruled that the Fifth Circuit does not recognize such a privilege as protecting a journalist from divulging confidential or nonconfidential information in a criminal case. Leggett was ruled in contempt, and on July 20, 2001, was ordered imprisoned without bail for 18 months or until termination of the grand jury.

In August 2001, while avoiding the question of whether Leggett is a journalist entitled to a reporter's privilege (the government had argued she was not), the Court of Appeals for the Fifth Circuit upheld the ruling that no reporter's privilege exists against a grand jury subpoena. In November 2001, the same court declined to reconsider the case or release Leggett on bond until she had exhausted her appeals. On January 2, 2002, Leggett's attorney filed an appeal on her behalf to the U.S. Supreme Court. Two days later, Leggett was released after the federal grand jury completed its term, in compliance with her original sentence.

Leggett's ordeal raised several important legal issues, including the definition of who is and who is not a journalist for purposes of claiming the privilege, the extent to which

journalists are able to protect confidential sources in stories relating to criminal proceedings, the differences among state shield laws, and the lack of shield protection under federal law. Leggett also proved that journalists will risk jail sentences to protect their reputation as well as their sources: a reporter who is known to have identified a source after promising confidentiality may have a difficult time obtaining information from other sources in the future.

Opponents of the reporters' privilege, however, argue that journalists who ignore requests for evidentiary information breach other important societal interests. For example, the Sixth Amendment guarantees a criminal defendant the right to a fair trial. This right is lost when a reporter who possesses information that may help prove the defendant's innocence refuses to testify. The same argument applies to society's interest in prosecuting criminals, who may go free when incriminating evidence is withheld by a journalist.

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Cross-references

Judicial Notice

Some matters that are relevant to a trial are so obvious that a court will not require evidence to prove them—for example, that it is dark outside at midnight, or that April 30, 1995, fell on a Sunday. To prevent wasting a court's time, the rules of evidence permit courts to take Judicial Notice of such matters; that is, to accept them as true without formal evidentiary proof. Courts may take judicial notice of facts that are generally known to be true (e.g., that gasoline is flammable) or facts that are verifiable from dependable sources (e.g., that Des Moines, Iowa, is in Polk County, which can be verified on a map). As a matter of course, courts judicially notice the contents of laws of and within the United States. **JUDICIAL NOTICE SHOULD BE USED FOR FILINGS WITH THE SECURITIES AND EXCHANGE COMMISSION, ESPECIALLY 8K FILINGS AND EXHIBITS AND 10K FILINGS AND EXHIBITS AS THEY ARE SIGNED BY THE THE MOST SENIOR OFFICERS OF THE COMPANIES AND ARE SUBJECT TO CRIMINAL PENALTIES.**

Privileges

It is a basic tenet in U.S. Jurisprudence that "the public ... has a right to every [person's] evidence," and that parties in litigation should avail themselves of all rational means of ascertaining truth (*Trammel v. United States*, 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186 [1980]). Yet courts view certain interests and relationships to be of such importance that they protect those interests and relationships from certain efforts to gather evidence. These protections, or exclusions from the general rule of free access to evidence, are known as privileges.

Federal courts recognize several types of privileges. To encourage clients to communicate freely with their lawyers and to fully disclose any information that may enable their lawyers to provide appropriate legal advice, courts allow clients to refuse to disclose and to prevent any other person from disclosing confidential communications made when seeking legal services. This privilege applies to clients' communications with their attorneys and with the attorneys' office staff. It protects only confidential communications, not communications made to friends or acquaintances in addition to an attorney.

The Attorney-Client Privilege applies to the client, not the attorney. Thus, the client, but not the attorney, has the right to waive the privilege and to testify regarding protected communications. The privilege does not terminate even when the attorney-client relationship does. The privilege does not apply to a client's allegations of a breach of duty by the attorney.

To promote open communication within marital relationships, the rules of evidence also recognize a marital privilege. In criminal cases, a person has the privilege to refuse to testify against a spouse. This privilege covers only evidentiary matters that would incriminate the non-testifying spouse (i.e., the defendant), as other matters are not likely to jeopardize the marriage relationship. The non-testifying spouse does not have the right to assert the privilege; the privilege belongs only to the testifying spouse.

In criminal and civil cases, testimony about any confidential communications between spouses is also afforded a privilege. Either spouse, not just the testifying spouse, may assert this privilege. Unlike the testifying-spouse privilege, the confidential-marital-communications privilege survives the termination of the marriage by death or Divorce, but it does not apply to permanently separated spouses.

Courts also recognize a political-vote privilege, a clergy-penitent privilege, and qualified privileges for trade secrets, state secrets, and the identity of an informant. Some courts also recognize a physician-patient privilege, an accountant-client privilege, and a privilege granted to journalists seeking to protect their news sources.

Past Bad Acts

Generally, evidence of past bad acts by a criminal defendant is not admissible to prove that the defendant is a bad person and therefore committed the crime charged.

However, evidence of past bad acts will be admitted for other purposes such as to show motive, intent, preparation, plan, knowledge, identity, or absence of a mistake or accident. Such evidence is also admissible for Impeachment purposes, (for example, if a defendant takes the stand) and when a defendant seeks to introduce the evidence in his or her defense.

In *Ohler v. United States*, 529 U.S. 753, 120 S.Ct. 1851, 146 L.Ed.2d 826 (U.S. Cal., May 22, 2000) (NO. 98-9828), the defendant Ohler was tried for importation of marijuana and possession of marijuana with the intent to distribute. After the trial court granted the government's motion to admit evidence of her previous conviction for methamphetamine possession, as impeachment evidence under Federal Rule of Evidence 609(a)(1), Ohler decided to bring out her prior conviction under direct examination, in order to "remove the sting" from the prosecutor's possible elicitation of the conviction on cross-examination. (Under the trial court's ruling, the prior conviction was only admissible in the event that Ohler testified.) The jury convicted Ohler on both counts, and she appealed, claiming that the trial court erred in admitting her prior conviction. The U.S. Court of Appeals for the Ninth Circuit and the United States Supreme Court affirmed her conviction, holding that Ohler had waived her objection to the evidence by introducing it herself.

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Cross-references

Attorney-Client Privilege; Best Evidence; Character Evidence; Circumstantial Evidence; Cumulative Evidence; Derivative Evidence; Direct Evidence; DNA Evidence; Documentary Evidence; Exclusionary Rule; Extrinsic Evidence; Forensic Science; Parol Evidence; Privileged Communication; Polygraph.

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evidence n. every type of proof legally presented at trial (allowed by the judge) which is intended to convince the judge and/or jury of alleged facts material to the case. It can include oral testimony of witnesses, including experts on technical matters, documents, public records, objects, photographs, and depositions (testimony under oath taken before trial). It also includes so-called "circumstantial evidence" which is intended to create belief by showing surrounding circumstances which logically lead to a conclusion

of fact. Comments and arguments by the attorneys, statements by the judge, and answers to questions which the judge has ruled objectionable are not evidence. Charts, maps and models which are used to demonstrate or explain matters are not evidence themselves, but testimony based upon such items and marks on such material may be evidence. Evidence must survive objections of opposing attorneys that it is irrelevant, immaterial, violates rules against "hearsay" (statements by a party not in court), and/or other technicalities. (See: circumstantial evidence, hearsay, demonstrative evidence, object, relevancy, deposition)

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EVIDENCE, CIRCUMSTANTIAL.

The proof of facts which usually attend other facts sought to be, proved; that which is not direct evidence. For example, when a witness testifies that a man was stabbed with a knife, and that a piece of the blade was found in the wound, and it is found to fit exactly with another part of the blade found in the possession of the prisoner; the facts are directly attested, but they only prove circumstances, and hence this is called circumstantial evidence.

2. Circumstantial evidence is of two kinds, namely, certain and uncertain. It is certain when the conclusion in question necessarily follows as, where a man had received a mortal wound, and it was found that the impression of a bloody left hand had been made on the left arm of the deceased, it was certain some other person than the deceased must have made such mark. 14 How. St. Tr. 1324. But it is uncertain whether the death was caused by suicide or by murder, and whether the mark of the bloody hand was made by the assassin, or by a friendly hand that came too late to the relief of the deceased. Id. Vide Circumstances.

EVIDENCE, CONCLUSIVE. That which, while uncontradicted, satisfies the judge and jury it is also that which cannot be contradicted.

2. The record of a court of common law jurisdiction is conclusive as to the facts therein stated. 2 Wash. 64; 2 H. 55; 6 Conn. 508, But the judgment and record of a prize court is not conclusive evidence in the state courts, unless it had jurisdiction of the subject-matter; and whether it had or not, the state courts may decide. 1 Conn. 429. See as to the conclusiveness of the judgments of foreign courts of admiralty, 4 Cranch, 421, 434; 3 Cranch, 458; Gilmer, 16 Const. R. 381 1 N. & M. 5 3 7.

EVIDENCE, DIRECT. That which applies immediately to the factum probandum, without any intervening process; as, if A testifies he saw B inflict a mortal wound on C, of which he, instantly died. 1 Greenl. Ev. Sec. 13.

EVIDENCE, EXTRINSIC.

External evidence, or that which is not contained in the body of an agreement, contract, and the like.

2. It is a general rule that extrinsic evidence cannot be admitted to contradict, explain, vary or change the terms of a contract or of a will, except in a latent ambiguity, or to rebut a resulting trust. 14 John. 1; 1 Day, R. 8; 6 Conn. 270.

Computer Evidence Defined

Since the invention of the personal computer in 1981, new computer technologies have provided unintended benefits to criminals in the commission of both traditional crimes and computer crimes. Today, computers are used in every facet of life to create messages, compute profits, transfer funds, access bank accounts and to browse the Internet for good and bad purposes. Notebook computers provide computer users with the benefits of portability as well as remote access to computer networks. Computer users today have the benefits of super computer speeds and fast Internet communications on a worldwide basis. Computers have increased productivity in business but they also increase the likelihood of company policy abuses, government security breaches and criminal activity.

In the past, documentary evidence was primarily limited to paper documents. Copies were made with carbon paper or through the use of a photo copy machine. Most documents today are stored on computer hard disk drives, floppy diskettes, zip disks and other types of removable computer storage media. This is where potential computer evidence may reside and it is up to the computer forensics specialist to find it using sophisticated computer forensics tools and computer evidence processing methodologies. Paper documents no longer are considered the best evidence.

Computer evidence is quite unique when compared with other forms of 'documentary evidence.' Unlike paper documentation, computer evidence is fragile and a copy of a document stored in a computer file is identical to the original. The legal 'best evidence' rules change when it comes to the processing of computer evidence. Another unique aspect of computer evidence is the potential for unauthorized copies to be made of important computer files without leaving behind a trace that the copy was made. This situation creates problems concerning the investigation of the theft of trade secrets, e.g., client lists, research materials, computer-aided design files, formulas, and proprietary software.

Industrial espionage is alive and well in the cyber age and the computer forensics specialist relies upon computer evidence to prove the theft of trade secrets. Sometimes, the unauthorized copying of proprietary files can also be documented through the analysis of ambient computer data. The existence of this type of computer evidence is typically not known to the computer user and the element of surprise can provide the computer forensics investigator with the advantage in the interview of suspects in such cases. Because of the unique features associated with computer evidence, special knowledge is required by the computer forensics specialist and the lawyers who may be relying upon the computer evidence to support their position in civil or criminal litigation. All of these issues are covered in NTI's 5 Day Computer Forensics Training Course.

Computer evidence is relied upon more and more in criminal and civil litigation actions. It was computer evidence that helped identify the now infamous 'Blue Dress' in the Clinton impeachment hearings. Oliver North got into some of his trouble with the U. S.

Congress when erased computer files were recovered as computer evidence. Computer evidence is also used to identify Internet account abuses. In the past, much wasted government and company staff time was attributed to the playing of the Windows Solitaire Game on company time. Thanks to the popularity of the Internet, Windows Solitaire has taken a back seat to unauthorized Internet browsing by employees of pornography web sites. Internet access by employees has also created new problems associated with employees operating side businesses through the unauthorized use of company and government Internet accounts. These types of problems are becoming more frequent as more businesses and government agencies provide employees with Internet accounts. Computer forensics tools and methodologies are used to identify and document computer evidence associated with these types of computer abuses and activities.

Computer evidence is unique in other ways as well. Most individuals think that computer evidence is limited to data stored just in computer files. Most of the relevant computer evidence is found in unusual locations that are usually unknown to the computer users. Computer evidence can exist in many forms. On Microsoft Windows and Windows NT-based computer systems, large quantities of evidence can be found in the Windows swap file. In Windows NT-based computer systems the files are called Page Files and the file is named PAGEFILE.SYS by the operating system.

Computer evidence can also be found in file slack and in unallocated file space. These unique forms of computer data fall into a category of data called ambient computer data. As much as 50% of the computer hard disk drive may contain such data types in the form of E-Mail fragments, word processing fragments, directory tree snapshots and potentially almost anything that has occurred in past work sessions on the subject computer. Ambient computer data can be a valuable source of computer evidence because of the potentially large volume of data involved and because of the transparent nature of its creation to the computer user.

Timelines of computer usage and file accesses can be valuable sources of computer evidence. The times and dates when files were created, last accessed and/or modified can make or break a case. NTI covers these issues in its 5 Day Computer Forensics Training Course. Students also leave our training course with a computer forensic tool that creates computer usage time lines.

THE WOMAN WHO CALLED WALL STREET'S MELTDOWN AND WHAT SHE SEES
NEXT --- FROM FORTUNE MAGAZINE

Auth: Neil

From: Iris

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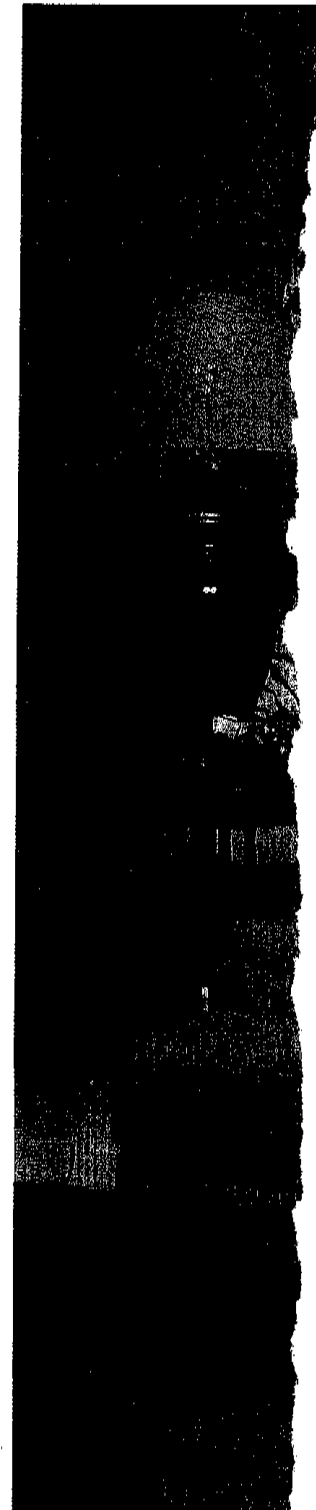
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Special Report)

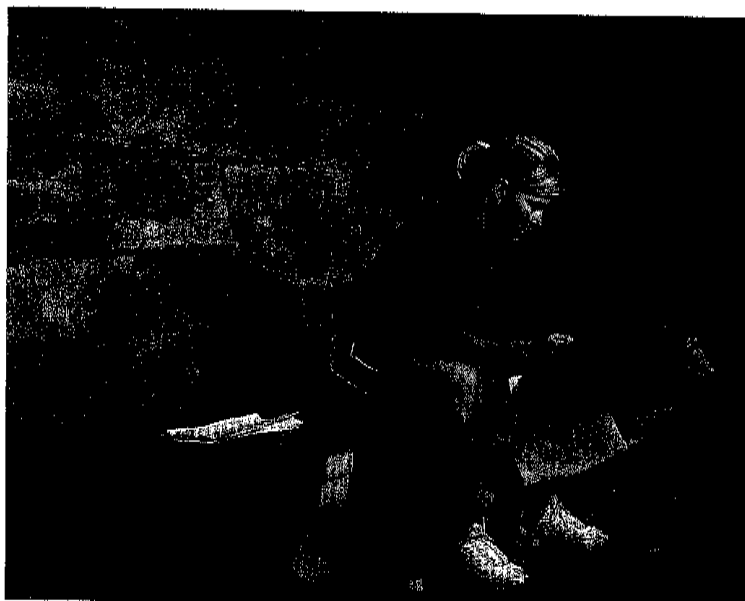
**THE
WOMAN
WHO
CALLED WALL
STREET'S
MELTDOWN
AND WHAT
SHE SEES
NEXT...**

Star bank analyst Meredith Whitney says
the economy is about to sink into a deep recession.

BY JON BIRGER

Photographs by
Robyn Twomey





KEEPING UP
Whitney, in
Central Park,
where she often
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tions of losses
and write-downs.

It's

the first time I've seen Wall Street's toughest analyst look rattled. I'm sitting ringside at the WWE's Great American Bash at New York's Nassau Coliseum with Meredith Whitney—the Oppenheimer & Co. analyst renowned for her smackdowns of America's biggest banks. Though she and I are there to see her husband, pro wrestling star John Layfield (“JBL”), the evening's most compelling match turns out to be not Layfield's but a brutal-looking showdown between rivals Chris Jericho and Shawn Michaels. Midway through the bout, Michaels appears to suffer a bloody cut near his eye and begins stumbling around the ring as if he's just been lobotomized.

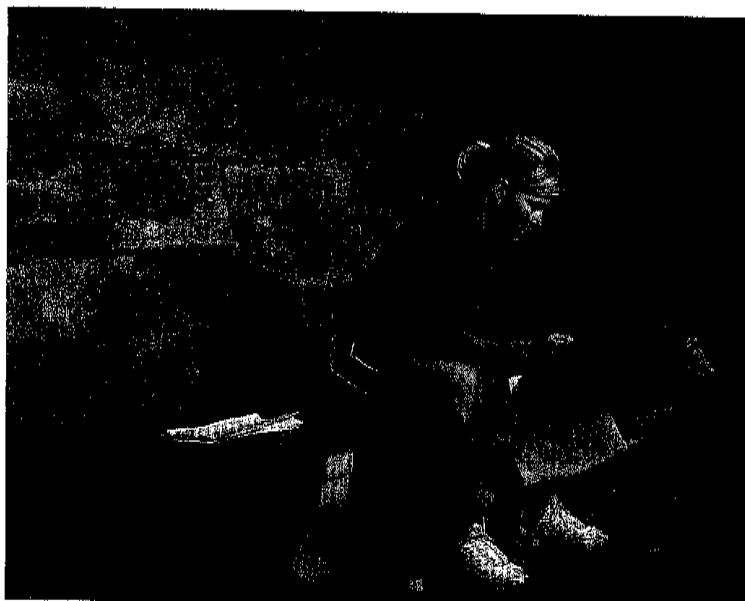
I'm more bemused than worried—every match thus far has ended with the vanquished looking broken and semiconscious. Whitney, however, is shielding her eyes. Maybe it's because her husband once sustained a cracked vertebrae during a match, but she's absolutely convinced that this time around, the semichoreographed mayhem in the WWE ring has taken a sickeningly painful turn. “No, I'm telling you, it's real,” Whitney says of Michaels's injuries, which included (or so Jericho would claim) a detached retina. Or maybe not: “He's fine,” WWE vice president Gary Davis would later tell me.

GOOD THING FOR INVESTORS THAT WHITNEY TAKES
a more skeptical approach to banks than to pro wrestling. In less

than a year she has transformed herself from a Wall Street backbencher—someone once known less for her research than for her marriage to Layfield and her stint as a stock commentator on Fox News—into the most influential stock analyst in America. And certainly the most bearish.

Whitney's rise to prominence began last October when she dropped jaws from New York to London with her audacious (yet spot on) prediction that Citigroup would be forced to cut its dividend to prop up its leaky balance sheet. She followed that call with forecasts of more losses and write-downs at the likes of Bank of America, Lehman Brothers, and UBS, as well as some insightful tangents on how the implosion of the bond insurers would threaten banks' bottom lines. Sometimes she seems steps ahead of management. On a Merrill Lynch conference call in mid-July, she asked CEO John Thain why the company wasn't unloading damaged assets and boosting capital. Thain demurred, but less than two weeks later, Merrill did just that. It agreed to sell more than \$30 billion of CDOs (collateralized debt obligations) for 22 cents on the dollar and sold stock to raise \$8.5 billion in fresh capital.

Whereas her peers keep searching for some sort of light at the end of the tunnel, Whitney thinks the tunnel is about to collapse. Bank stock investors will get crushed if they jump back in now, she contends, because the banks are facing much, much bigger credit losses than what they've reported so far. Moreover, Whitney is convinced that the economy is about to sink into an “early 1980s-style” recession that will devastate the 10% of the population that became overextended during the housing boom. “It feels like I'm at the epicenter of the biggest financial crisis in history,” says Whitney.



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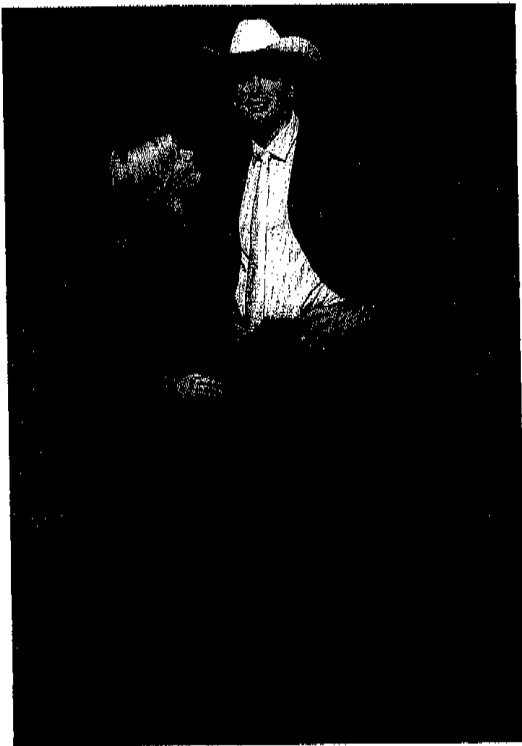
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combo to pull off, but Whitney perfected the balancing act at a young age. Case in point: She was once the youngest paper carrier in *Washington Post* history, landing the job at age 8. A self-described "route baron"—she grew her earnings to \$200 a week by buying up other kids' paper routes—Whitney hit on a creative way to cope with the extra workload on Sundays, when the heftier papers took longer to deliver. "I would have shumber parties on Saturday nights, so I had a work force to help me in the morning," she says. "We'd play music, and Mom would make pancakes in the morning." Did she pay her friends for their help? "No way. But they kept coming back."

Thirty years later little has changed. Whitney still works weekends but takes her fun seriously too. "I always tell people Meredith has never met a conga line she didn't lead," says Taylor, who can't visit her sister in Manhattan without being dragged out dancing till the wee hours of the morning. "She's truly larger than life."

Where does Whitney get all her energy? Exercise and (relatively) clean living, she says. She recently gave up coffee, and she works out twice a day, often under the supervision of rapper 50 Cent's personal trainer, whom she met last year

POWER COUPLE
Whitney met Layfield when they were both talking stocks on Fox News.



at Bikini Boot Camp. (It's a fitness retreat, not a reality show. That said, Whitney's longtime friend Mary Fitzgibbon reveals that she and Whitney almost became reality-show fodder 15 years ago. A Lawrenceville buddy who was a producer for talk show host Maury Povich persuaded them to appear on a "when good girls go bad" episode. "Meredith thought it would be funny," Fitzgibbon recalls. Whitney's mom did not and talked them out of it just hours before taping. "Her mom called up and said, 'Are you girls out of your minds? You're just starting careers!'")

Whitney is fond of playing matchmaker, but she wasn't making much headway in her own personal life until she met Layfield. In addition to playing one of the WWE's most entertaining villains—he's basically the J.R. Ewing of pro wrestling—Layfield moonlights as a stock market pundit on Fox News, which is where he and Whitney first met. The relationship got off to a rocky start when Whitney mocked Layfield on air for recommending bank stocks at a time when the Fed was hiking rates. But Layfield wasn't discouraged—he's taken worse hits—and the couple married in 2005.

With most of these tales, it's the beauty who reforms the beast, not the other way around. And yes, Layfield does credit his wife for smoothing out some of his Texas-country-boy rough edges. "I know what fork to use now at the dinner table, and I drink my beer from a glass," he told the Sunday wedding section of the *New York Times* back in 2005. Of course, as with anything WWE-related, it's not always clear where reality ends and fable begins. Layfield didn't exactly grow up the son of a dirt farmer—his dad was CEO of a community bank—and when I ask him about the fork-and-beer story, Layfield smiles and concedes he might have been exaggerating.

Whether any of Whitney's upper-crust upbringing actually rubbed off on Layfield, it's apparent the WWE has rubbed off on Whitney. Her insider's view has given her great respect for pro wrestlers' work ethic and their willingness to lay everything on the line as performers, athletes, and stuntmen. What might have seemed risky—e.g., putting out a critical report on a sacred cow like Citi—no longer feels so dicey. "I think when you're around successful people like that, it makes you more renegade," she says.

Another eye opener for Whitney has been how gracious most wrestlers are—at least when the cameras aren't rolling—in comparison with the viper-pit culture on Wall Street. It sounds absurd—the world of high finance being less collegial than an industry in which employees belt each other in the face. But based on the time I spent backstage before the Great American Bash, Whitney has a point.

The wrestlers I met—from John Cena to Mark Henry to Paul "Big Show" Wight—all greeted Whitney like family. Henry, who plays a particularly nasty brute in the WWE story line, could not have been any nicer. For Whitney the upshot is this: She's much less inclined to take guff from Wall Streeters intent on berating her for predictions they don't like. "Life's too short," she says.

ABOUT THAT SECOND QUESTION—HOW DID WHITNEY go from virtual anonymity to Wall Street stardom in a matter of months? Her Citigroup call was certainly the launching pad, but Whitney's ascent didn't happen in a vacuum. Her prominence may be the best proof yet of how much the equity research game has changed since the start of the decade.

The catalyst was the settlement imposed on Wall Street in 2003 by then-New York Attorney General Eliot Spitzer, who alleged that the lure of underwriting and M&A fees was preventing analysts from giving honest appraisals of companies that were also their firms' investment-banking clients. Spitzer's solution: Erect a legal barrier that prevents analyst compensation from being tied to investment-banking revenue.

Since 2002 the percentage of ratings that are buys has fallen from 75% in 2000 to 50%, according to Starmine and Bloomberg data. The percentage of sells has risen from 1.5% to 6%. Nevertheless, it's hard to assess how much credit for this turnabout should go to the now disgraced former attorney general. The increase in sell ratings coincided with a downturn in IPOs and other stock offerings, meaning there's less for analysts to be conflicted about. "Now that corporate finance has dried up, research is freer to express its opinion," says Richard Bove, a bank analyst with

Ladenburg Thalmann & Co. and a 30-year Wall Street veteran.

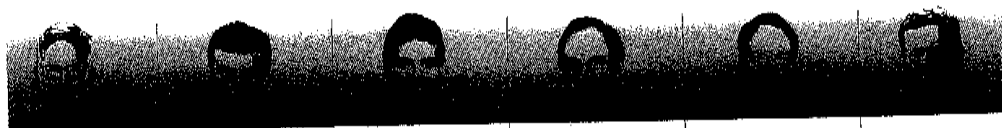
Another factor emboldening analysts has been the emergence of hedge funds as the biggest source of trading-commission revenue. Hedge funds crave "actionable" information, and unlike mutual fund managers, they're just as happy betting that a stock will fall as they are betting that one will rise. So, says Bove, "the analyst had better tell them what they don't like as well as what they like."

OF COURSE, WHAT WHITNEY DOESN'T LIKE IS JUST about everything these days. Her bearishness has deep roots. In fact, she was the first analyst to sound the alarm loudly about subprime mortgages, predicting back in October 2005 that there would be "unprecedented credit losses" for subprime lenders. The problem, as she saw it, was that loose lending standards and the proliferation of teaser-rate mortgage products had artificially inflated the U.S. home-ownership rate to 69% from the more natural level of 64%.

A lot of the new homeowners were in over their heads. They'd put little or no money down and thus had little incentive—and often little ability—to keep making their monthly payments when home prices started to fall and their teaser rates got bumped up. "Low equity positions in their homes, high revolving-debt balances, and high commodity prices make for the ingredients of a credit implosion,

Six Who Saw a Crisis Coming

These observers were ahead of the pack in spotting serious trouble in the financial system. By Katie Benner



THE RATINGS GADFLY Sean Egan Egan-Jones Ratings

A vocal critic of rival rating agencies Moody's, Fitch, and Standard & Poor's, Egan told investors to shun subprime-mortgage-backed bonds, even while the Big Three said they were investment-grade credits. He says the credit pain will soon spread from financial services firms to automakers and airline companies. "We are bailing out institutions, but we're not requiring companies to be truly creditworthy."

THE ECONOMIST Nouriel Roubini NYU

In 2005, Roubini said home prices were riding a speculative wave that would soon sink the economy. His current forecast is equally apocalyptic: a protracted recession with up to \$2 trillion in credit losses and a systemic banking crisis. "The FDIC spent 10% of its reserves to bail out IndyMac, and that was the first in a wave of failures," Roubini says. "Will we soon have to bail out the FDIC?"

THE SHORT-SELLER David Einhorn Greenlight Capital

He famously shorted Lehman stock this year, but Einhorn has long worried about the amount of leverage employed by financial companies. To strengthen the system, he thinks we need to stop relying on credit-rating agencies: "They had a responsibility to monitor our financial institutions and force them to maintain reasonable leverage ratios or suffer rating downgrades. They failed, and we are all paying."

THE INVESTOR Robert Rodriguez First Pacific Advisors

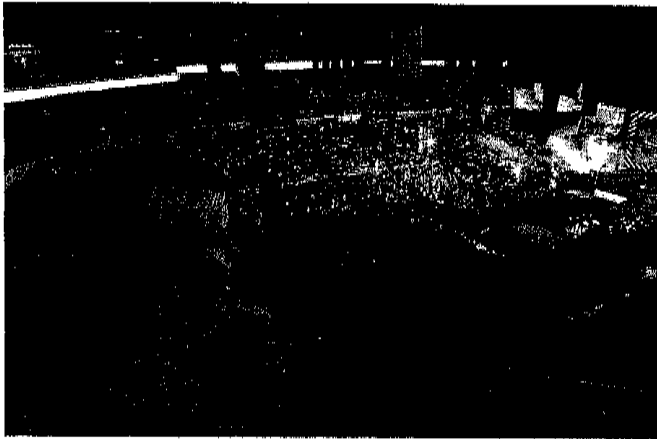
Anticipating an economic slowdown, Rodriguez began moving his stock mutual funds into cash in 2004. One big warning sign for him was the mania in the mortgage market. "We clearly no longer had lending standards," he says. He is still not buying stocks, expecting the slump to last a long time as the credit crisis that began in the housing sector spills into other areas.

THE POLITICIAN Richard Baker Managed Funds Association

Before heading this hedge fund lobbying group, Baker served in Congress, where he wrote legislation to impose restrictions on Fannie Mae and Freddie Mac. The Republican from Louisiana charged that they were getting too big, taking on too much risk, and needed a stronger regulator. The Baker bill never passed, and last month the government had to bail them out.

THE REGULATOR William Poole Former president, St. Louis Federal Reserve

He warned in 2002 that Fannie and Freddie didn't have the capital necessary to weather a storm, and he's pessimistic about their future. "They can limp along because they are now explicitly backed by the government, but they should be wound down," he says. He believes the Fed's strategy of keeping rates low will backfire: "To avoid a mild recession now, we're risking a much deeper recession later."



SMACKDOWN
Whitney, in a luxury box, watches the wrestling action at the WWE's Great American Bash at the Nassau Coliseum in July.

particularly at this point in the consumer cycle," Whitney wrote. That report didn't turn her into a star—though it should have—but it did land her an invitation to present her findings to the FDIC.

What Whitney didn't fully appreciate back in 2005 was how the proliferation of interest-only, negative-amortization, and other exotic mortgages would transform many prime borrowers into subprime credit risks. As she wrote last December, the crucial mistake many lenders made was relying on FICO credit scores to gauge default risk, regardless of the size of the down payment or the type of loan. Many prime customers who took on mortgages with 90% or 100% loan-to-home-value ratios (LTVs) are now "performing closer to subprime loans," she wrote. The reason: Any borrower who's upside down in his mortgage—i.e., the size of his mortgage is bigger than the value of his home—is likely to make car and credit card payments before paying his home loan. "The hierarchy of payments has totally shifted," Whitney now says.

One of Citigroup's problems was that of all the banks, it had the greatest exposure in dollar terms to high-LTV mortgages. When housing prices turned south, the delinquency rate on Citi's home loans soared—rising 53% during the third quarter of 2007 (over the third quarter of 2006). Whitney says it was obvious that Citi would have to shore up its balance sheet. The bank's \$10.8 billion in annual dividend payments was a clear source of potential savings. Less than three months after Whitney put out her report, Citi announced a 41% dividend cut designed to save the company \$4.4 billion a year.

Whitney's current concern is that banks aren't slashing costs and cutting losses in their loan portfolios fast enough. On the cost side, she says, banks have yet to come to terms with the disappearance of the securitization market, which she believes will stay in hibernation for the next three years.

Why does this matter? From 2001 through 2005, for every dollar of bank capital used to make mortgage loans, ten were supplied via investors in mortgage securities. All that secondary-

market capital is now sidelined, but the staffing levels of bank lending departments don't yet reflect it. By Whitney's reckoning, banks have laid off about 7% of their employees; she thinks the cuts need to reach 25%. "These companies have got to resize their businesses," she says. "Right now their expenses do not match their revenues."

She also argues that banks need to "get real" about how they're valuing their problem mortgage-related debt, much as Merrill Lynch has now done. And her idea of "real" is pretty drastic. Whereas most banks are estimating 20% to 25% peak-to-trough declines in housing prices, the Case-Shiller housing futures traded on the Chicago Mercantile Exchange portend a much steeper 33% decline, she points out. In fact, Whitney thinks the actual declines will be worse—closer to 40%—because of the loss of the securitization market and the paucity of mortgage credit available. And that means more defaults: "The consumer's ability to refinance his way out of trouble has diminished greatly."

This is where Whitney's critics start licking their chops. Thomas Brown, a veteran bank analyst and co-founder of bankstocks.com (with Hill, coincidentally), disagrees sharply with Whitney's contentions that banks need to rid themselves of problem loans and that their stocks won't rebound until the write-downs abate.

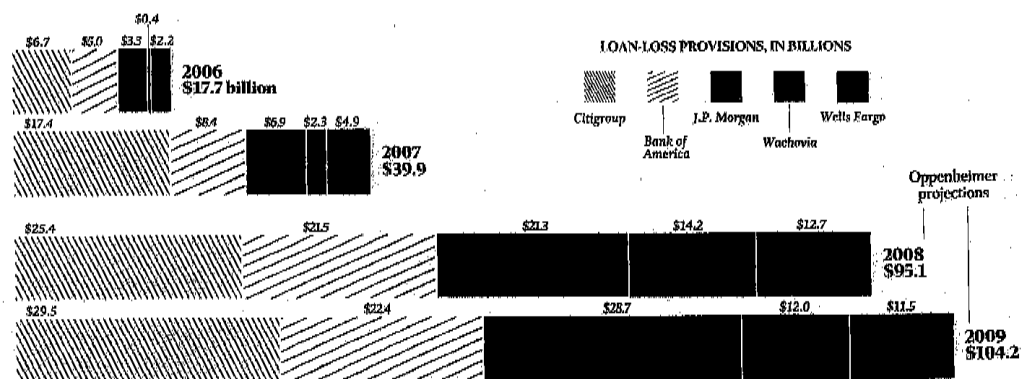
Brown counters that the numbers Whitney keeps trotting out are actually lagging indicators. "During the last credit crisis the stocks hit bottom in November 1990, and the losses and nonperforming assets didn't peak until well into 1991," he says. "Every cycle there's one analyst who races to be the most bearish, and this time it's her. Honestly, I think we'll look back and see that Meredith Whitney's credibility peaked on July 15"—the day many bank stocks hit their low point for the year (so far at least).

Brown goes a step further, alleging that it's "incredibly arrogant" of Whitney to tell banks and investment banks either to unload their problem loans and mortgage securities or to "get real" about how they're valued. He says there's plenty of history to indicate that holding tight may be the wisest course of action. "In the last cycle," Brown says, "Morgan Stanley made a fortune buying written-down commercial real estate assets from banks at 40 cents on the dollar." What peeves Brown most about Whitney is her unwillingness to assign a fair market valuation for the stocks she's trashing: "The only explanation I can see is, she has no idea how to evaluate the possible downside risks."

To be fair, Whitney has never said bank stocks are worthless. She would buy Wachovia at \$5, for instance. (It's now \$16.) But with his salvo Brown has actually restated, albeit pejoratively, a core

Loss Reserves Keep Growing

Whitney believes that banks will have to set aside billions to cover bad loans.



part of Whitney's thesis. If she has no idea how to properly value bank stocks right now, it's because the metrics don't work. Price-to-earnings ratios are useless when earnings are nonexistent. And valuing banks on price-to-book ratios is just as futile. Those book values—which reflect underlying assets and liabilities—are moving targets. "Citibank has lost 50% of its book value since last year," Whitney says. "The point is, I do not think we are near the end of write-downs, so I continue to see capital levels going lower, capital raises diluting existing shares further, and stocks going lower."

Another negative: two little-talked-about regulatory changes Whitney says will stymie banks' recoveries. One is a new accounting rule known as FAS 141R. Given the depth of the crisis, Whitney expects to see bank regulators arranging shotgun marriages between well-capitalized institutions and foundering ones. Problem is, any such deals would have to happen before FAS 141R takes effect in December. The new rule, she says, "will make it almost impossible to do bank mergers." The rule demands that an acquirer not only immediately mark to market the portfolio of the company being bought—and remember, bids for mortgage assets are now few and far between—but also mark to market its own portfolio as well. "Nobody's going to want to do that," Whitney says.

Another regulatory change that may wreak havoc: Starting next year, the Office of Thrift Supervision will bar credit card issuers from using outside credit information to reset interest rates. For instance, Wells Fargo couldn't increase the rate on your Visa just because you were late on an electric bill. While Whitney thinks the OTS proposal is well intentioned, she's convinced that

it will force banks to reduce the amount of credit they extend to consumers, dimming a business that has been a rare bright spot. With their credit lines trimmed, consumers will cut back even more on spending, deepening the recession. "When this takes effect," she says, "it's basically going to amount to a pay cut for the average American consumer."

WHITNEY'S ABILITY TO FIND CONSUMER PERIL IN A proposal ostensibly so consumer-friendly speaks volumes about the darkness of her view. Indeed, she's so far out on a limb and so unequivocal in her bearishness, it's hard to envision how she

could reverse course without losing credibility. It's a predicament similar to the one Abby Joseph Cohen faced in 2000 and 2001—one that left her with egg on her face when the stock market faltered.

Fitzgibbon says she recently asked Whitney how it would all end, and Whitney's answer was fatalistic: "I'll make a bad call, and that'll be it." When I ask Whitney what's next for her, career-wise, she isn't sure. Getting into management holds some interest. Joining a hedge fund—a common next step for star analysts—does not. "All I know is, I want to do something big. I want

to earn the right to be at the table with the smartest people."

Whatever her future holds, Whitney says she doesn't spend time fretting about whether her epic call on banks might be wrong. "Look, I always worry about what I might have missed, which is why I work so many hours and get so little sleep," she says. "But the numbers speak for themselves. And what they're all saying is, this is far, far from over." ■

FINDBACK jbirger@fortunemail.com

**"EVERY CYCLE
THERE'S
ONE ANALYST
WHO RACES
TO BE THE
MOST BEARISH,"
SAYS A CRITIC.
"THIS TIME
IT'S HER."**

CASE DECISIONS

Monday, August 25, 2008

Breathing Life Into A Stale, Time-Barred Truth In Lending Act Claim

Earlier this year, an article in the law firm Stroock, Stroock & Lavan's Subprime Task Force Special Bulletin(1) contained a discussion on the 2008 California Federal Court decision in Monaco v. Bear Stearns Residential Mortgage Corp.(2) which, it appears to me, illustrates a way how, in California and possibly other states having similar state laws, claims for damages on account of conduct that constitutes violations of the Federal Truth In Lending Act ("TILA") can be pursued even if the one-year TILA statute of limitations has expired. A few excerpts from the article:

*** In Monaco, a federal court in California found that standard option-ARM loan documents are "ambiguous," potentially subjecting the lender to liability for trying to enforce the loan's terms. Making matters more difficult for the lender, the court further held that the lender's alleged violation of the federal Truth In Lending Act ("TILA") could create liability under California's Unfair Competition Law ("UCL"), which provides for greater penalties than allowed under TILA, even though the borrower's TILA claim was barred by the statute of limitations.**

* Plaintiffs [Monaco & others] seek to rescind their loans by reason of alleged violations of TILA, including failure to disclose the actual interest rate and negative amortization, and, using the alleged TILA violations as a predicate, demand damages and restitution under California's UCL.

* Bear Stearns moved to dismiss the TILA claims on the grounds that plaintiffs were not entitled to have their loans rescinded because the option-ARMs were refinancings of prior loans and because TILA's one-year statute of limitations had expired. Second, defendants moved to dismiss the UCL claims on the grounds that TILA preempts California's UCL and will not permit plaintiffs to win damages and penalties not permitted under TILA.

* Although the California court agreed that plaintiffs could not use TILA to rescind their loans and the TILA claim was barred by the statute of limitations, it nevertheless rejected defendants' preemption argument:

* A State law is inconsistent with TILA if it requires a creditor to make disclosures or take actions that contradict the requirements of the Federal law. Here, Plaintiffs' second cause of action under the UCL is based solely on Defendants' alleged TILA violations. Nowhere do Plaintiffs suggest that Defendants failed to make certain disclosures or take certain actions not encompassed by TILA. Plaintiffs invoke the UCL solely for the additional remedies offered thereunder. Additional penalties are not inconsistent with

TILA, but merely provide greater protection to consumers. (Monaco, page 7, at lines 9 through 17).

* Thus, the UCL's longer statute of limitations enabled the Monaco plaintiffs to pursue their otherwise time-barred TILA claim and to obtain penalties that would not be permitted under TILA.(3)

For more, see Courts Act to Protect Borrowers on Option-ARM and Subprime Loans.

For the court decision, see Monaco v. Bear Stearns Residential Mortgage Corp.

For those of you who are interested, the article also contains a discussion of another pro-borrower decision referred to in this blog earlier this year, the New York decision in LaSalle Bank, N.A. v Shearon, No. 100255/2007 (Sup. Ct. Richmond County, Jan. 28, 2008).

See The Stroock Public Service Project for more on the firm's service to pro bono matters, organizations and advocacy. The Public Service Project provides a broad array of legal assistance, with a special focus on underserved and under-resourced communities in New York City.

For other posts on homeowners using Federal & state consumer protection statutes to try and undo bad mortgage loans, Go Here, Go Here, and Go Here.

(1) By Julia B. Strickland, a Partner in the Class Action/Financial Services Litigation Practice Group of Stroock & Stroock & Lavan LLP, and Curtis C. Mechling, a Partner in Stroock's Litigation Practice Group, both of whom are members of Stroock's Subprime Task Force.

(2) No. CV 07-05607 SJO (CTx) (U.S.D.C. Central District of California, Jan. 28, 2008).

(3) My guess is that, if TILA violations can be used as a predicate for damages under state consumer protection laws of other states, a similar result could be reached in those other states.

Kentucky Appeals Court Affirms Lower Court "Kibosh" On Arbitration Clause In Mortgage; Homeowners Facing Foreclosure To Have TILA Claims Heard
In Richmond, Kentucky, The Richmond Register reports:

* The Kentucky Court of Appeals has ruled in favor of a Waco couple who were the subject of a foreclosure action by Bank of New York Trust Company and Mortgage Electronic Registration Systems. The litigants, who lost their case against Donald Wayne and Roxane Abner in Madison Circuit Court, had sought to force the Abners into an arbitrated settlement over a \$40,000 mortgage.

* The Abners, represented by Addison Parker of the Appalachian Research and Defense Fund, a legal service group, filed a counterclaim, alleging that the mortgage's

10.125 percent interest represented a “predatory high-cost loan” that violated the federal Home Ownership Equity Protection Act. The act provides for rescinding mortgages that violate the federal Truth In Lending Act as well as awarding both statutory and enhanced damages.

* The Abner’s mortgage contract called for waiving any damages as well as for arbitration. On July 25, the appeals court affirmed the trial court’s finding that the arbitration clause was “unconscionable and unenforceable.”

* The Abners’ allegations of predatory lending practices may be valid the appellate judges said, but the mortgage contract’s arbitration cause was the only issue on appeal.

For more, see Couple wins foreclosure appeal against N.Y. bank.

To view the appellate decision, see Mortgage Electronic Registration Systems v. Abner (Case #2007-CA-000574, Ky. Court of Appeals; July 25, 2008).

For other posts on homeowners using Federal & state consumer protection statutes to try and undo bad mortgage loans, [Go Here](#), [Go Here](#), and [Go Here](#). undo mortgage loans TILA batallion UndoMortgageLoans TILAdelta

GARFIELD'S CONTINUUM CHECKLIST

CHALLENGE EVERYTHING

Challenge everything --- monthly statements, letters, delinquency notices, default notices, sale notices, eviction and unlawful detainer, and even go after the house you lost and vacated. Write letters and file pleadings. Letters should be certified return receipt requested. Make reference to THEIR sworn filings with the SEC (10k annual report etc.). GET A FORENSIC MORTGAGE AUDIT. In California and other states a sworn pleading must be answered by a sworn pleading from the other side. This could end the case quickly. Just because you get a sworn affidavit doesn't mean the person who signed it knows anything or any part of the trail of loan origination and securitization of your loan. Ask questions.

PRELIMINARY CHECKLIST FOR FORECLOSURE DEFENSE AND OFFENSE:

Possible stages at which a borrower can find him/herself

1. Loan not in default but TILA claims can still be made.
2. Loan approaching default.
3. Loan in default
4. Foreclosure suit filed or sale date published
5. Judgment entered
6. Sale occurred to either third party or the lender. I have advised people to go to the sale and inform all potential bidders that the matter is in dispute which usually stops anyone from bidding.
7. Notice to Vacate
8. Eviction notice from Sheriff
9. Evicted --- but TILA claims survive for (a) recovery of money and (b) possibly recovery of house from lender

Origination of loan:

1. REAL BANK THAT GIVES MORTGAGE AND HOLDS NOTE THEMSELVES. Direct relationship between the lender and borrower and it is not sold, migrated or otherwise transferred in any manner shape or form. Borrower gave honest information, tax returns etc. My guess is that the only claim here would be fraudulent appraisal but even that is weak because the bank is actually at risk.
2. Mortgage broker steering borrower to worst deal for highest fees. Inflated income and appraisals submitted. Lender is selling off or has entered agreements to provide "inventory" to mortgage aggregators who will sell the aggregated loan portfolio to investment bank who in turn will sell "derivative" securities (CMO - collateralized Mortgage Obligations or CDO --- Collateralized Debt Obligations) to investors who are defrauded by representations from the lender, appraiser, mortgage aggregator, investment bank, and intermediate sellers of securities. Bank is NOT in any relationship with borrower but that is not disclosed. Bank has no risk or interest in whether borrower pays on loan or not.

3. MOST COMMON: A "bank" that is actually a front for one of the major players. In actuality the bank is a mortgage broker steering customers to worst loans for highest fees.

4. While the "lender" takes the position that they were defrauded by the borrower, the mortgage broker and the appraiser, the truth is that they intentionally defrauded themselves by setting up the structure and giving themselves the position of "plausible deniability." Their intent was to create a plausible record for the mortgages and notes they were selling to mortgage aggregators and investment bankers.

Types of Loans:

1. Fixed rate 30 year mortgage fully amortized.
2. Fixed rate 30 year mortgage amortized but partially negative --- i.e. the borrower is paying less than the full payment and the balance owed on the note is going up. Possible TILA violation.
3. Fixed rate mortgage interest only, negative amortization. Clear TILA violations in most cases.
4. Adjustable rate mortgage fully amortized. First adjustment after teaser rate in 1, 3, 6, 12 or more months. Borrower "qualifies" for mortgage because income figures support paying the teaser rate. At the first or second adjustment however, they no longer qualify and the lender knows it by definition. TILA violation, fraud, etc.
5. Adjustable rate interest only, negative amortization --- OPTION ARMS, TEASER 2/28, 3/27 ETC.
6. Multiple mortgages and notes for multiple properties for speculators --- usually involves falsifying information that buyer is going to use the house as primary residence, falsifying income and falsifying appraised values. TILA, fraud etc.

APPRAISAL FRAUD

Everyone at the closing and hidden behind curtains that you didn't even know were there had a vested interest in you signing the papers --- to justify their sale and collection of funds from investors. Because of the volume of money generated by sales to "qualified" (big) investors, and because of the need to keep appearances of an upward, active market, appraisals were vastly inflated beyond the real value of the property.

- **As early as 2005 honest appraisers signed a petition to require that all appraisers follow industry standards because the honest appraisers weren't getting any business.**
- **The difference between the inflated appraisal (made as instructed and paid for by the "lender" who really was standing in for the true source of funds) and the real market value was on average about 25% of the appraised value.**
- **Thus, a house appraised at \$300,000 was really worth \$225,000 at most. In many cases the figure was 40% and so our example would be a true fair market value of \$180,000.**
- **This excess accounted for the entire down payment of most buyers and a substantial portion of the debt they acquired when they signed the loan papers. In our example, the borrower/buyer might have suffered a loss of \$120,000.**

- **Adding this cost to the points, interest (APR) the violations of all federal and state laws multiply exponentially.**
- **Principally, it raises the specter of usury, which makes the loan voidable or void, and provides a basis for recovery of attorney fees, and might allow for treble or punitive damages.**

Authority and ownership of loans --- Legal Standing and Jurisdiction

1. Originating lender still servicing the loan, holds note and mortgage. No assignment, sale or other fancy financial tricks.
2. Originating lender is actually mortgage broker, loan migrates to senior lending institution, to mortgage aggregator to investment banker to seller of securities to investor.
3. Trustee in non-judicial sale states posts notice of sale based upon information from a source that (a) does not service the loan and therefore does not know if the borrower is in default or not and/or (b) does not own the mortgage or cannot prove that it owns the mortgage and/or (c) does not own the note or cannot prove that it owns the note. IN most cases an investor owns the mortgage and note and the people involved in the foreclosure don't have a clue as to which bundle of mortgages went into which bundle of securities and how many investors bought into that bundle of securities, and there are no proper assignment documents that were designed much less signed in anticipation of being able to establish legal standing in sale, foreclosure or eviction.
4. Originating lender files foreclosure or posts notice of sale and does not have servicing rights, ownership of mortgage or ownership of note.

FORENSIC AUDITS:

1. DOCUMENTS AT AND BEFORE CLOSING
2. TILA COMPLIANCE AUDIT AND OTHER LEVELS
3. FULL FORENSIC AUDIT --- POSSIBLY NEEDED FOR LITIGATION ONLY

Potential Pleadings:

1. Federal Claim for TILA, Respa, RICO, fraud, USURY etc.
2. QUIET TITLE AGAINST NOMINAL LENDER, ALL OTHER KNOWN PARTIES WHO MIGHT CLAIM INTEREST IN MORTGAGE OR NOTE AND ALL UNKNOWN (JOHN DOES 1-100) PARTIES WHO MIGHT CLAIM AN INTEREST IN MORTGAGE OR NOTE).
2. Memorandum of Law in support of complaint.
3. State Court claim for Fraud
4. State court action for stay of sale, eviction etc.
5. Emergency Petition for temporary Injunctions- State and Federal Courts and memorandums in support thereof.
6. Motion to expedite discovery.
7. Interrogatories
8. Requests for admission
9. Request to Produce
- 10 Notice of deposition duces tecum

11. Adversary proceeding in Bankruptcy Court - BE CAREFUL ABOUT WHAT YOU PUT ON SCHEDULES.
- 12 Memorandum and pleading in opposition to Motion for lifting stay
13. Demand letter to Originating lender -- for documents tracing where the mortgage went and for refunds and damages, enclosing TILA audit.
- 14 Rescission letter
15. Form retainer agreement for audit an checklist for retaining auditor
16. Form retainer agreement for attorney and checklist for retaining attorney

FACT INVESTIGATIONS

1. MORTGAGE AUDIT
 - 1.1. TILA AUDIT AND RESPA DEMAND
 - 1.2. FORENSIC AUDIT INCLUDING LEDGERS - TRACING MONEY AND DOCUMENTS
2. ALL PUBLIC COMPANIES: OR GOOGLE FOR CONNECTIONS WITH PUBLIC COMPANIES
 - 2.1. SEC FILINGS, 10K, 8K, PRESS RELEASES,
3. RISK FACTORS --- PROSPECTUS, ANNUAL REPORT
4. AD FOR MORTGAGE ORIGINATORS/SPECIALISTS
5. ADVERTISEMENTS AND PROMOTIONAL BROCHURES
 - 5.1. NOTE CONTACT NAME AND PHONE NUMBER --- WHERE IS IT?
 - 5.2. WHO ANSWERS NOW?
6. TRUSTEE AND TRUSTEE DEED
 - 6.1. POSSESSION OR TRANSMITTAL OF NOTE AND MORTGAGE
 - 6.2. NAME OF PERSON(S) AND CURRENT LOCATION
 - 6.2.1. LICENSING HISTORY
 - 6.2.2. CRIMINAL HISTORY
 - 6.2.3. INSURANCE BROKER AND CARRIER
 - 6.3. COMPANY NAME ETC.
 - 6.3.1. DECISION MAKERS
 - 6.3.1.1. EMAIL AND META DATA, HOST SERVER
 - 6.3.1.2. EMPLOYMENT HISTORY
 - 6.3.2. LICENSING HISTORY
 - 6.3.3. CRIMINAL HISTORY OF PRINCIPALS
 - 6.3.4. INSURANCE BROKER AND CARRIER
7. TITLE AGENT AND ESCROW AGENT
 - 7.1. POSSESSION OR TRANSMITTAL OF NOTE AND MORTGAGE
 - 7.2. NAME OF PERSON(S) AND CURRENT LOCATION
 - 7.2.1. LICENSING HISTORY
 - 7.2.2. CRIMINAL HISTORY
 - 7.2.3. INSURANCE BROKER AND CARRIER
 - 7.3. COMPANY NAME ETC.
 - 7.3.1. DECISION MAKERS
 - 7.3.1.1. EMAIL AND META DATA, HOST SERVER
 - 7.3.1.2. EMPLOYMENT HISTORY
 - 7.3.2. LICENSING HISTORY
 - 7.3.3. CRIMINAL HISTORY OF PRINCIPALS
 - 7.3.4. INSURANCE BROKER AND CARRIER

- 8. AGREEMENT WITH APPRAISER
 - 8.1. NAME OF APPRAISER AND CURRENT LOCATION
 - 8.1.1. LICENSING HISTORY
 - 8.1.2. CRIMINAL HISTORY
 - 8.1.3. INSURANCE BROKER AND CARRIER
 - 8.2. COMPANY NAME ETC.
 - 8.2.1. DECISION MAKERS
 - 8.2.1.1. EMAIL AND META DATA, HOST SERVER
 - 8.2.1.2. EMPLOYMENT HISTORY
 - 8.2.2. LICENSING HISTORY
 - 8.2.3. CRIMINAL HISTORY OF PRINCIPALS
 - 8.2.4. INSURANCE BROKER AND CARRIER
- 9. AGREEMENT WITH MORTGAGE BROKER
 - 9.1. NAME OF EMPLOYEE/OFFICER AND CURRENT LOCATION
 - 9.1.1. LICENSING HISTORY
 - 9.1.2. CRIMINAL HISTORY
 - 9.2. COMPANY NAME ETC.
 - 9.2.1. DECISION MAKERS
 - 9.2.1.1. EMAIL AND META DATA, HOST SERVER
 - 9.2.1.2. EMPLOYMENT HISTORY HISTORY
 - 9.2.2. CRIMINAL HISTORY OF PRINCIPALS
 - 9.2.3. INSURANCE BROKER AND CARRIER
 - 9.3. AGREEMENTS WITH LENDER
 - 9.3.1. PRINCIPALS
 - 9.3.2. INSURANCE BROKER AND CARRIER
 - 9.3.3. AUDITORS --- TREATMENT OF LOANS ON BALANCE SHEET OR INCOME STATEMENT
 - 9.3.3.1. WORKSHEETS
 - 9.3.3.2. COMPANY NAME AND NAMES OF AUDITORS AND BOOKKEEPERS WHO PERFORMED ANY WORK
 - 9.3.3.3. INSURANCE BROKER AND CARRIER
 - 9.3.3.4. REPORTS TO REGULATORS
 - 9.3.3.4.1. FED
 - 9.3.3.4.2. FDIC
 - 9.3.3.4.3. STATE
 - 9.3.3.4.4. BUSINESS
 - 9.3.4. SHAREHOLDERS
 - 9.3.5. MINUTES OF BOARD MEETINGS
 - 9.3.6. SECRETARY
- 10. POOLING AND SERVICES AGREEMENT

- 11. MORTGAGE AGGREGATOR/TRUSTEE
 - 11.1. NAME OF EMPLOYEE/OFFICER AND CURRENT LOCATION
 - 11.1.1. LICENSING HISTORY
 - 11.1.2. CRIMINAL HISTORY
 - 11.2. COMPANY NAME ETC.
 - 11.2.1. DECISION MAKERS
 - 11.2.1.1. EMAIL AND META DATA, HOST SERVER
 - 11.2.1.2. EMPLOYMENT HISTORY
 - 11.2.2. CRIMINAL HISTORY OF PRINCIPALS
 - 11.2.3. INSURANCE BROKER AND CARRIER
- 12. SPV
 - 12.1. NAME OF EMPLOYEE/OFFICER AND CURRENT LOCATION
 - 12.1.1. LICENSING HISTORY
 - 12.1.2. CRIMINAL HISTORY
 - 12.2. COMPANY NAME ETC.
 - 12.2.1. DECISION MAKERS
 - 12.2.1.1. EMAIL AND META DATA, HOST SERVER
 - 12.2.1.2. EMPLOYMENT HISTORY
 - 12.2.2. CRIMINAL HISTORY OF PRINCIPALS
 - 12.2.3. INSURANCE BROKER AND CARRIER
 - 12.3. AMBAC ETC INSURANCE
 - 12.4. CROSS AGREEMENTS WITH OTHER SPV
 - 12.5. CREDIT DEFAULT SWAPS AND OTHER AGREEMENTS
 - 12.6. AUDITOR
 - 12.7. TREATMENT OF INCOME FLOW
 - 12.8. POSSESSION OF NOTE AND MORTGAGE
- 13. INVESTMENT BANK
 - 13.1. NAME OF EMPLOYEE/OFFICER AND CURRENT LOCATION
 - 13.1.1. LICENSING HISTORY
 - 13.1.2. CRIMINAL HISTORY
 - 13.2. COMPANY NAME ETC.
 - 13.2.1. DECISION MAKERS
 - 13.2.1.1. EMAIL AND META DATA, HOST SERVER
 - 13.2.1.2. EMPLOYMENT HISTORY
 - 13.2.2. CRIMINAL HISTORY OF PRINCIPALS
 - 13.2.3. INSURANCE BROKER AND CARRIER
- 14. ASSIGNMENT AND ASSUMPTION
 - 14.1. TRANSMITTAL LETTERS
 - 14.2. ALLONGE
- 15. CORRESPONDENCE AND EMAILS

16. SALES MATERIALS INVESTMENT BANK-SPV-INVESTORS
17. EXISTENCE OF SIV -- CAYMAN --- WHO WAS INTERMEDIARY
18. NAMES AND EMPLOYMENT HISTORY OF EXECUTING PARTIES
19. SPREADSHEETS FROM INVESTMENT BANK CDO MGR
20. EMAILS AND META DATA BETWEEN SPV AND SELLERS OF CERTIFICATES
21. DESCRIPTIONS OF MORTGAGES REPORTED BY MORTGAGE AGGREGATOR, LENDER ETC.
22. DISCOVERY OF FORGED DOCUMENTS
 - 22.1. HISTORY OF FORECLOSING ON LOANS THAT NEVER CLOSED
 - 22.2. HISTORY OF SELLING FORWARD
23. SUBSEQUENT HISTORY OF BUYBACKS, INSURANCE PAYMENTS, EXERCISE OF CDS, OPTIONS ETC.

Research in Filings with Securities and Exchange Commission

The information you are looking for as to the method of operations concerning sales or transfers of mortgages and notes is described in various places within 10k and 8k filings with the Securities and Exchange Commission in Washington, DC www.sec.gov

SEC Prospectus Section to look in: “USE OF PROCEEDS” You will find either a direct or indirect statement on the establishment of a reserve to pay back the investor out of his own money in this section. The significance of this in the mortgage meltdown era 2001-2008, is that this reserve was actually utilized to make payments to the holders of certificates on mortgage backed securities and some money was applied to all or part of the payments that were not made by the borrower, or allocated upstream to the real holder in due course by the mortgage servicer.

The mortgage servicer may or may not have forwarded payment to the pool trustee or to the special purpose vehicle and the officers or trustee of the special purpose vehicle may or may not have made payments or allocated payments amongst the divisions (tranches) within the SPV entity and these officers may or may not have actually paid the true holders in due course (holders of asset-backed securities) either from the proceeds of sales of asset backed securities, the reserve pool established for late or delinquent payments, the insurance company that guaranteed payment, principal or both, the credit default swap that guaranteed the payment, principal or both, or from overcollateralization or cross collateralization with unrelated assets (unrelated to the your Mortgage loan).

So it is possible your mortgage payment or the entire note was paid without your knowledge and even without the knowledge of the mortgage servicer which is why the objections to the documentation presented or used in the foreclosure are not merely technical objections. If you don't make the objections and you don't attack them in earnest, the property could easily be sold to a party posing as a lender in a foreclosure procedure of either non-judicial or judicial nature but who never lent you money, paid for the note or otherwise parted with any money at all.

This confusion was purposefully created to construct a system of plausible deniability and “mistaken” accounting entries. In fact, it covered up a liar's poker game wherein each of the participants contributed to cheating you and then went about cheating each other. Here is some language that is used in the 8k prospectus of one such offering:

“Substantially all of the net proceeds to be received from the sale of certificates will be applied by the company to finance the purchase of, or to repay short-term loans incurred to finance the purchase of, the mortgage loans and/or mortgage securities in the respective mortgage pools and to pay other

expenses.

The company expects that it will make additional sales of securities similar to the offered securities from time to time, but the timing and amount of any such additional offerings will be dependent upon a number of factors, including the volume of mortgage loans purchased by the company, prevailing interest rates, availability of funds and general market conditions.”

You can also find software that helps you sift through the mountains of information in 10k and 8k filings at <http://www.tenkwizard.com/>

BANKRUPTCY CONSIDERATIONS

Most bankruptcy lawyers still don't "get it." They are mechanically preparing the schedules of their clients as if these mortgages were real encumbrances on the property of the Petitioner, that the Note is owed to the "lender" named on the note, or worse, that it is owed to the mortgage servicer who has no interest in the note and no interest in passing the proceeds received from the bankruptcy estate to any of the true holders in due course of your note. So the first thing they do is ADMIT that say Countrywide is the a secured lender for \$500,000. The Petition is filed and at the moment of filing it is stamped with the words "RELIEF GRANTED" which means that an automatic stay is in effect. This "stay" is an Order of the Federal Court that stops any and all creditors from taking any action whatsoever that is related to the collection of a debt from the Petitioner. But in the case of secured creditors, they are permitted to file a motion for "relief from Stay." All they have to do is make the statement that they are the secured creditor named in the Petitioner and that they wish to pursue foreclosure on the property. The Court takes a look at the Petition filed and sees that yes indeed this creditor is listed as as secured and is entitled to receive priority treatment which means they have the right to foreclose on the property. The Order is then entered lifting the automatic stay and the creditor goes back to foreclosure, sells the property, takes the money and runs. They run because they were never entitled to the property or the money.

The Petition in bankruptcy SHOULD have shown the house as an asset with an unknown value. It SHOULD have shown Countrywide as a party that might make a claim, but it is contested and it is unsecured. THEN when Countrywide comes in with their standard Motion for Order Lifting Automatic Stay, the Court looks at the pleadings and says to them "You are not shown here as a secured creditor. Your motion is denied." Countrywide (or whoever the creditor is in your case that is seeking foreclosure) must then file papers that assert they are a secured creditor. Depending upon which way the Judge looks at it, either Countrywide or you must file an adversary proceeding, which is exactly where you want to be --- in a judicial proceeding that is deciding exactly who Countrywide is in this transaction, whether they have an interest in the note or mortgage and whether they have any claim against you or your property. Since your note and mortgage have been scattered to the four winds by securitization and now ownership of shares of the note and mortgage have been cut into pieces and sold as shares so tat there are now thousands of owners of your note and thousands more whose notes, although unrelated to you or your property have been pledged to secure your debt through cross guarantees, overcollateralization and cross collateralization as seen above.

The intricacies of this will be easily understood by most bankruptcy court judges. They will ask the simple question: "Countrywide: Did you loan this borrower any money?" If they answer yes, then the question is going to be "Did you get payments from parties other than this petitioner on the principal or interest of this note.?" And the answer MUST be yes,

which is the end of their case both because they were paid in full and because they didn't bring with them the other co-obligors who were attached to your note as it went up the securitization ladder. If experience is any way to predict what happens next, you won't ever hear from anyone ever again about the mortgage or note on your house and you will be able to secure clear title through the filing of a quiet title action in state court or as part of the adversary proceeding.

Be careful here. Now that you have gotten rid of the mortgage and note you have probably taken yourself out of bankruptcy. So you might need to dismiss your bankruptcy because your assets exceed your liabilities. And once again, after seeing all of this, you can easily see how you need a lawyer who is experienced in these matters, licensed in the proper jurisdictions and who knows both the local rules (which frequently are not published anywhere), and the local people in the bankruptcy "club" --- US Trustee, attorney for US Trustee, and bankruptcy Judge as well as other bankruptcy lawyers.

And the converse is true. If any of the parties in your chain of securitization is in bankruptcy you want to file whatever is necessary to preserve your claims of fraud etc., so that your defenses are not discharged in THEIR bankruptcy. Those of you who think you are not affected by the bankruptcy of Lehman Brothers, are probably wrong. Lehman was intertwined with virtually every lender directly or indirectly. Look at my blog under People, Players and Resources and you will see their schedules and how each one had their left hand in the one person's pocket while the right hand was yet in another. There is a German expression that roughly translates as "With the Left hand in the right pocket." This game of twister is specifically designed to screw every borrower in every mortgage --- by preventing them from raising most of their best potential defenses against foreclosure and preventing ALL their claims for affirmative relief (money damages etc.). Their bankruptcy COULD be used to wipe out legitimate defenses you have unless you act unilaterally by filing a proof of claim in the bankruptcy court.

PENDING MOTIONS IN LEHMAN BANRUPTCY
UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: : **Chapter 11**
:
LEHMAN HOLDINGS INC. et al., :
DEBTOR : **Jointly Administered**
: **Under Case No. 08-13555 (JMP)**
:
:
:
: **AFFIDAVIT OF KATHLEEN ARNOLD,**
: **CREDITOR**
:
:

**OBJECTION AND MOTION TO BLOCK TRANSFER/SALE OF ALL CORE ASSETS
THAT DO NOT CONTAIN STANDING ORDER BY THIS COURT AND, THAT THUS
ORDERS A PROVISION UNDER THE BANKRUPTCY ABUSE PREVENTION &
CONSUMER PROTECTION ACT OF 2005, 11 U.S.C. §363(o), SUBJECTING ALL SALE
OR TRANSFERS TO BE TAKEN BY NEW PURCHASER SUBJECT SAID PROVISION
AND SUBJECT ALL CONSUMER TRUTH IN LENDING CLAIMS PENDING OR TO
BE BROUGHT AGAINST DEBTOR,
LEHMAN HOLDINGS INC., et al.**

The undersigned Affiant, Kathleen Arnold, hereby states and deposes as follows:

1. Affiant, Kathleen Arnold, advocating on behalf of all borrowers whose loans are held by Lehman Brothers Holdings Inc., or any division, assignee, assignors or purported asset holders and moves now on behalf of all consumers and borrowers whose mortgage loans were originated or are currently held in any Lehman Holdings Inc., debtor or non-debtor entity, affiliates, subsidiary, or are held in any known or unknown financing partners companies or LLC's , including but not limiting to, any privately held LLC's by anyone affiliated with anyone

or any executive of Lehman Holdings Inc. et al., and for which loans are, or where ever serviced

by Lehman Holdings Inc. or any conduit therein.

2. Ms. Arnold is representing and advocating on behalf of all borrowers to have a voice in very important issues, which affect us, being addressed in this bankruptcy court.

3. On behalf of all borrowers, Affiant asserts that any claims of fraud are not protected from relief under the bankruptcy code. The Bankruptcy Code has long prohibited debtors from discharging liabilities incurred on account of their fraud, carrying forth a basic policy of affording relief only to an "honest, but unfortunate debtor."

3. Congress clearly intended perpetrators of fraud should not be given the opportunity to wipe out debts in bankruptcy thereby Plaintiff's/Creditors, action against them should be allowed to go forward. Congress did not favor giving perpetrators of fraud a fresh start (by allowing them to wipe out their debts in bankruptcy) over the interest in protecting victims of fraud when it wrote the Bankruptcy Laws. Accordingly, Section 523(a)(2)(A) of the Bankruptcy Code excepts from discharge in bankruptcy "any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A).

4. The Supreme court has ruled that it is not just the value of the property, but that also includes treble and punitive damages.

5. Affiant asserts debts which are non-dischargeable include:

- (a) Debts incurred due to false statements made with the intent to deceive
- (b)
- (c) Fraud committed in a fiduciary capacity, such as embezzlement or larceny
- (d)
- (e) Punitive damage claims for "willful and malicious" acts
- (f)

6. The bankruptcy Court protection cannot protect Lehman Brothers Holdings Inc. from allegations of Fraud, including Statutory or regulatory remedies, punitive and treble damages.

7. Borrower's statutory remedy of rescission and relief cannot be avoided in any way as statutory and regulatory remedies are not protected by bankruptcy.

8. As borrowers and "legal owners" of property, our Deeds of Trust and Mortgage Notes are an asset to the Debtors estate, and as such borrowers hold an equity interest in the Debtors estate. As borrowers we represent an untold amount of loans with outstanding principal balances totaling in the possible Trillions of Dollars. This asset far outweighs any other asset of this Debtor or the creditors of the estate. Property of the estate includes, but is not limited to, all of the debtor's legal or equitable property interests and most community property, as well as interests in property either recovered by a trustee, preserved for the benefit of the estate, or ordered transferred to the estate, such as avoidable preferences and fraudulent transfers. See 11 U.S.C. §541 (aX1-7).

9. Our Notes are Secured Claims, secured claims are defined as including "liens," 11 U.S.C. § 101(37), "security," 11 U.S.C. § 101(49), "security interest," 11 U.S.C. § 101(51), "security agreement" 11 U.S.C. § 101(50), and "secured claim," 11 U.S.C. § 506(a). Allowed claims secured by a lien on property in which the estate has an interest, or that is subject to

setoff, is a "secured claim" to the extent of the value of the creditor's interest which is the estate's interest in the property, or the amount subject to setoff. 11 U.S.C. § 506(a). A secured claim carries the right to "adequate protection" of collateral. 11 U.S.C. §§ 361-364; see *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988). This right is being exercised and asserted here and now by Ms. Arnold and for all similarly situated borrowers alike hereinafter.

10. Moreover, should the note is to be sold to another entity, borrowers have the right to protection of what personally identifiable information as defined in U.S.C. §741(3) may be provided to that entity in the process, Ms. Arnold now request said protections for all borrowers hereinafter. Borrowers also have the right to assert claims and preserve claims against any entity who purchases the note, Ms. Arnold now request said protections for all borrowers hereinafter.

11. Important issues need to be addressed concerning "customer property" as defined under U.S.C. §741(4)et seq., including the security, and proceeds of such security, property, received, acquired, or held by or for the account of the debtor, from or for the securities account of a customer or any said holder. Property such as deeds of trust, securities, and escrow accounts which may have been unlawfully converted, is and remain the lawful property of the estate.

12. Borrowers have the right to disclosure of any known and unknown parties of interest in their deeds of trust, notes, riders etc., including but not limited to any and all loan financing partners, credit default swap partners, guarantors, master loan servicer, credit insurers,

credit enhancement providers, whether that party insures an individual loan or an entire loan pool, including any party who as defined under 741 (7) (A)(i) which owns a security interests or provides insurance associated with a particular loan or loan pool that carries any credit enhancements, or any guarantee as defined under 741 (A)(ix).

13. These assets, upon information and belief of the affiant, may be either transferred or in the process of being transferred in the Barclay's sale or pending transactions without any liabilities attached. These Courts know, Lehman Holdings Inc. cannot use the bankruptcy court and transfers of assets to avoid allegations of Fraud and wrongdoing. Once it is established that specific money or property has been obtained by fraud, "any debt" arising therefrom is excepted from discharge as follows:

1) §523(a)(2)(A) excepts from discharge all liability arising from fraud, treble damages (plus attorney's fees and costs) awarded on account of the debtor's fraud fall within the scope of the exception. The most straightforward reading of §523(a)(2)(A) is that it prevents discharge of "any debt" respecting "money, property, services, or ... credit" that the debtor has fraudulently obtained. See *Field v. Mans*, 516 U.S. 59, 61, 64.

2) An obligation to pay treble damages satisfies the threshold condition that it constitute a "debt." That word is defined as liability on a "claim," §101(12), which in turn is defined as a "right to payment," §101(5)(A), which this Court has said means an enforceable obligation, *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 559. An award of treble damages is an enforceable obligation of the debtor, and the creditor has a corresponding right to payment. Moreover, the phrase "to the extent obtained by" in §523(a)(2)(A) modifies "money, property, services, or ... credit"—not "any debt"—so that the exception encompasses "any debt ... for money, property, [etc.], to the extent [that the money, property, etc., is] obtained by" fraud.

3) The Court rejects petitioner's argument that a "debt for" money, property, etc., is necessarily limited to the value of the "money, property, services, or ... credit" the debtor obtained by fraud, such that a restitutionary ceiling would be imposed on the extent to which a debtor's liability for fraud is nondischargeable. That argument is at odds with the meaning of "debt for" in parallel exceptions to discharge set forth in §523(a), which use "debt for" to mean

“debt as a result of,” “debt with respect to,” “debt by reason of,” and the like. The Court’s reading of §523(a)(2)(A) is also reinforced by the fraud exception’s history.

4) Moreover, §523(a)’s various exceptions from discharge reflect Congress’ conclusion that the creditors’ interest in recovering full payment of debts in these categories outweighs the debtors’ interest in a complete fresh start, see *Grogan v. Garner*, 498 U.S. 279, 287. Pp. 4—10.106 F.3d 52, affirmed. O’Connor, J., delivered the opinion for a unanimous Court.

5) **The extended right of rescission lasts 3 years from the date of the closing of the loan. 12 C.F.R. 226.23(a)(3). *Semar v. Platte Valley Fed. S&L. Assn.*, 791 F.2d 699 (9th Cir. 1986)**

6) **The rescission remedy runs against any assignee: “Any consumer who has the right to rescind a transaction under section 1635 of this title may rescind the transaction as against any assignee of the obligation.” 15 U.S.C. § 1641(c). *Mount v. LaSalle Bank Lake View*, 926 F.Supp. 759 (N.D.Ill. 1996); *Stone v. Mehlberg*, 728 F.Supp. 1341 (W.D.Mich. 1989).**

7) **Upon rescission, “the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge” (step one). 12 C.F.R. 226.23(d)(1). Within 20 days the creditor must take any action required to cancel the security interest and must return any money paid on the loan (step two). 12 C.F.R. 226.23(d)(2). Liability for TILA claims for monetary damages runs against assignees where the violation is apparent on the face of the loan documents. 15 U.S.C. §1641(a).**

Affiant sent a RESPA Qualified Written Requests which Lehman Holdings Inc., or their assignees in this particular instance and the debtor, through their agents, negligently failed to answer and as was required to do so under Federal law. Lehman Holdings Inc., failed to live up to their contractual duty and it has frustrated the borrower’s ability to perform on (or reinstate) the contracts therefore breaching the contract or its duty of good faith and fair dealing, which is implied in every contract. **The parties to a contract, i.e., assignees, assignors, investors and any party of interest, have a duty to honor their obligations thereunder, and they also have an implied duty of good faith and fair dealing.**

14. This affidavit and document will serve as public notice to any purchaser of the

Deeds of Trust or Mortgage Notes or security interest therein, that liability for common law fraud can be extended, from the lender to a third Party, *if that third party knowingly accepts the “fruits of the fraud.”* as Barclays surely would so be doing, thus, accepting Lehman Holdings Inc.’s fruits of his fraud if in fact any of these instruments were or are being sold in the order awarded Lehman Holdings Inc. by these honorable courts on September 19, 2008 and contained in said order thereof.

15. Borrower’s issues in this action constitute the enforcement of regulatory powers pursuant to § 362(b)(4): permits commencement or continuation of action to enforce police or regulatory powers.

16. Affiant asserts many causes of action carry criminal fines and penalties and even incarceration and as so being, Ms. Arnold asks the court recognize the criminal dimension now presented to these honorable courts and on behalf of all borrowers unidentified as of yet.

RELIEF REQUESTED

INDEPENDENT TRUSTEE OR EXAMINER

17. Affiant Arnold, respectfully moves this court pursuant to §1104(a)(1)(2) for an appointment of independent Trustee or Examiner (1) for causes, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before, during or after the commencement of the case, or similar cause; (2) such appointment is in the interest of creditors, equity security holders, and other interests of the

estate, known and unknown parties of interest.

18. Affiant Arnold, further moves this court pursuant to §1106 (3) and request, this court appoint an independent examiner to investigate the acts, conduct, assets, liabilities and, overall operation of the debtor's business leading up to and causing the debtor to have cause to be forced to seek Title 11 protection and, further moves an examination and desirability analyses be conducted as to the further continuance of such business, but, with particularity, the debtors predatory lending practices and subprime lending businesses and also, all to include matters relevant to the formation of a successful plan under §1106 (4)(A)(B).

19. Affiant Arnold, moves this court to file a statement of any investigation conducted under paragraph (3), including and facts ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate and transmit a summary of any such findings, facts, and statements pursuant to §1106 (4)(B).

SUPREME COURT

20. Affiant Arnold, moves this court to stop protecting this Debtor against fraud as stated by the Supreme Court of the United States. It is not only the actual value of the "money, property, services, or . . . credit" the debtor obtained through fraud that is non-dischargeable in bankruptcy, but also treble "punitive damages", attorneys fees and costs related to the fraud. Our honorable supreme courts made this painfully clear when handing down their ruling on

March 25, 1998 and contained in their decision in Cohen v. de la Cruz, citing particularly, “Debts which can’t be discharged in bankruptcy....(1) Debts incurred due to false statements and made with the intent to deceive, (2) Fraud committed in a fiduciary capacity, such as embezzlement or larceny and (3) Punitive damage claims for "willful and malicious" acts. These acts of treason have been committed against Affiant Arnold and all similarly situated creditors/borrowers and represented herein now by Affiant Arnold.

CONSUMER PRIVACY OMBUDSMAN

21. On behalf of all borrowers we request the appointment of a Consumer Privacy Ombudsman pursuant to U.S.C. § 332.

22. Affiant Arnold, moves this court to protect borrowers personal information, which is being shared with a variety of other entities and potential bidders for the Lehman Brothers Holdings Inc., business and loan pools such as Barclays.

23. The trustee pursuant to U.S.C. § 363 (b)(1) is required to protect the personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell personally identifiable information to any person unless(A) such sale or such lease is consistent with such policy; or (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale (I) giving due consideration to the facts, circumstances, and conditions of such sale; and(ii) finding that no showing was made that such sale would violate applicable nonbankruptcy law. (2) If

notification is required under subsection of section 7A of the Clayton Act in the case of a transaction under this subsection, then, (A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor and shall otherwise be given by the trustee; individual Consumer's have the right to know that personal information is being protected, loan files are being protected, documents related to potential claims are being secured and protected, and private information is not transferred to unknown entities as maybe have occurred under the sale of core assets to Barclays.

. 33. Plaintiff further moves this court to appoint a Consumer privacy ombudsman pursuant to U.S.C. § 332 et seq. in order to protect personal information and property rights pursuant to U.S.C. §363 et seq. of all borrowers whose loans are now part of Lehman Holdings Inc. or any subsidiary thereto and this courts obligation to protect the interest of all borrowers in reference to currently pending sales of negotiable instruments, documents of title, deposit accounts, and other assets of the estate under §363(a)(b)(1), which may or may not include Ms. Arnold's property.

US TRUSTEE

34. Affiant moves this court, for the bankruptcy trustee as the representative of the estate, pursuant to U.S.C. §323 (a) and U.S.C. §363 (a) to protect all negotiable instruments, documents of title, securities, deposit accounts, whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, or profits of property and the fees, charges, accounts or other payments for the use or occupancy, whether existing before or after the commencement of a case.

35. In this capacity the bankruptcy trustee pursuant to §323 (b) has the capacity to sue and to be sued. The relief requested will protect the Debtor's estate from further legal action due to the negligent actions of Lehman Holdings Inc., and their agents, assignees, assignors, John Doe and any party claiming an interest in said assets etc., and during the pendancy of the Chapter 11 liquidation process.

PROTECTION OF RIGHTS OF BORROWERS

24. Affiant Arnold moves this court rightfully to block any and all attempts to transfer loans to purchasers of any kind free and clear of pending litigation or any liabilities incurred by the Debtors act of fraud or mortgage fraud. On behalf of all borrowers therefore, affiant Arnold requests and demand all borrower rights are and to further be protected under "all" State and Federal laws applicable to consumer credit transactions including but not limited to:

TILA
RESPA
ECOA
DBPA
HOEPA

TRUTH IN LENDING ACT (TILA) 15 USC 1601-1667f
Sec. 1607 - Administrative enforcement
Sec. 1640. - Civil liability
Sec. 1641. - Liability of assignees;
Sec. 1635. - Right of rescission.

a) Any consumer who has the right to rescind a transaction under section 1635 of this title may rescind the transaction as against any assignee of the obligation. **(d)** Rights upon assignment of certain mortgages

25. Affiant Arnold further moves this court as they are so lawfully bound to uphold the

Bankruptcy Code through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005), 11 U.S.C. §363(o) provides as follows:

b) Notwithstanding (11 USC §383(f)), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act (“TILA”) or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transactions or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

26. Affiant request on behalf of all borrowers, that this court slow the process down and not allow important sales of assets to be conducted in a timeline that no one can even begin to ascertain the value of assets or ensure that legal protections for property owners, investors, creditors, and Note holders can be enforced.

27. On September, 16, 2008 Lehman Holdings Inc., filed a 49 page document that with notable vagueness, outlined the sale of core Lehman Holdings Inc. assets. These honorable courts rushed to rule on September 19, 2008 to allow this sale to Barclays however said order is devoid of any standing order with regard to Bankruptcy Code through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005), 11 U.S.C. §363(o) and, as so being, Affiant Arnold now rightfully request on her own behalf and on the behalf of all similarly situated borrowers that an immediate revision of said order be made by these honorable courts and that said revised order include the lawful provisions thereof in said order as the honorable courts are so bound under 11 U.S.C. §363(o) and as set out by congress and law that would stipulate any consumer transaction **must** be sold with said lawful provisions of 11 U.S.C. §363(o).

28. This court, US Trustee, and secured and unsecured creditors committee, needs to define and clearly understand what core assets Barclays is buying as it is in no way clear in the debtors 49 page motion to allow Barclays to purchase core assets. Moreover, affiant Arnold maintains she and all similarly situated borrowers also too have a stake in this as being creditors who have yet listed and identified due to the pending bar date and thus must protect their rights under rescission of fraudulent and onerous loans obtained by Lehman Holdings Inc., and thus secured by their residential properties.

DEMAND FOR IDENTITY AND TRUE OWNER OF THE NOTES

29. On behalf of all borrowers we request Lehman Holdings Inc., and their servicing conduits therein, immediately and without further delay, malice or negligence provide any borrower who request the information, be provided with the true and real owner of the note as required by law TILA 1641(f)(2):

(f) Treatment of servicer

(2) Servicer not treated as owner on basis of assignment for administrative convenience A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as the owner of the obligation for purposes of this section on the basis of an assignment of the obligation from the creditor or another assignee to the servicer solely for the administrative convenience of the servicer in servicing the obligation. **Upon written request by the obligor, the servicer shall provide the obligor, to the best knowledge of the servicer, with the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation.**

(3) "Servicer" defined

For purposes of this subsection, the term "servicer" has the same meaning as in section 2605(i)(2) of title 12.

Affiant Arnold further sayeth naught;

"Under penalties of perjury, I declare that I have personally prepared and read the forgoing document and that the facts stated in it are true."

_____ Date: _____
Affiant Kathleen Arnold

Send to the following:

Epiq Bankruptcy Solutions, LLC
757 Third Avenue, 3rd Floor
New York, NY 10017

AFFIRMATIVE DEFENSES

Further answering, Defendant pleads the following affirmative defenses:

1. As his first affirmative defense, Defendant pleads the failure of the plaintiff to comply with the rules and regulations of the Department of Housing and Urban Development (HUD) in regard to this mortgage. Specifically, the rules and regulations of HUD require that prior to acceleration of and foreclosure of the subject note and mortgage, that the mortgagee, Plaintiff herein, is required to notify the mortgagor, Defendant herein, of the mortgagor's right to cure any alleged default and to seek a modification and/or forbearance agreement, including adding the alleged arrearages to the back of the mortgage and to otherwise assist Defendant in retaining the property. Plaintiff never provided said notice prior to acceleration of the note and foreclosure of the note and mortgage and is in violation of HUD rules and regulations.

2. As his second affirmative defense, Defendant pleads the failure of Plaintiff to comply with all conditions precedent prior to the filing of this mortgage, including but not limited to failing to comply with the terms and conditions of the note and mortgage and failure to comply with the HUD and other governmental rules and regulations. Therefore, the filing of the foreclosure was premature, unless and until such time as Plaintiff complies with all applicable conditions precedent, this action should be dismissed.

3. As and for his third affirmative defense, Defendant pleads the right of the Borrower to reinstate after acceleration as more fully set forth in paragraph 19 of the subject Security Instrument.

4. As and for his fourth affirmative defense, Defendant pleads the failure of Plaintiff to comply with paragraph 22 of the subject mortgage. Said paragraph provides that the Lender shall give 30 days notice to Borrower **prior** to acceleration. Plaintiff Attorney's letter notice, attached to this Complaint as an exhibit, dated September 20, 2007, in which letter Plaintiff's attorney advises, to wit: "...our client has accelerated all sums due and owing," does not meet the 30 day notice requirement, is fatally defective and violates paragraph 22 of the mortgage. Further, the letter does not specify (a) the default (b) the action required to cure the default (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument foreclosure by judicial proceeding, and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or **any other defense of Borrower to acceleration and foreclosure** (emphasis added). Plaintiff attorney's letter notice does not meet any of the requirements of paragraph 22 of the mortgage. All of the terms and conditions as set forth in Defendant's affirmative defenses set forth above, are conditions precedent which must be met by Plaintiff prior to the filing of the foreclosure.

WHEREFORE, having fully answered and affirmatively defended Plaintiff's Complaint, Defendant respectfully prays that this Honorable Court deny and dismiss Plaintiff's Complaint, with all costs and fees assessed against Plaintiff.

Your Name
Street Address
City, State, Zip

Lender's Name
Street Address
City, State, Zip

Certified Mail #
Date:

**QUALIFIED WRITTEN REQUEST, COMPLAINT, DISPUTE OF DEBT AND
VALIDATION OF DEBT LETTER, TILA REQUEST**

This letter is a “qualified written request” in compliance with and under the Real Estate Settlement Procedures Act, 12 U.S.C. Section 2605(e).

Reference: Account # _____ (hereinafter the subject loan and is the reference for all questions and requests described below).

Dear Sir or Madam:

I am writing to you to complain about the accounting and servicing of this mortgage and my need for understanding and clarification of various sale, transfer, funding source, legal and beneficial ownership, charges, credits, debits, transactions, reversals, actions, payments, analyses and records related to the servicing of this account from its origination to the present date.

To date, the documents and information I have, that you have sent me, and the conversations with your service representatives have been unproductive and have not answered my questions.

Needless to say, I am very concerned. With all the news lately regarding the stories of predatory lending, you have left me feeling that there is something you are trying to hide. I worry that potential fraudulent and deceptive practices by unscrupulous mortgage brokers; sales and transfers of mortgage servicing rights; deceptive and fraudulent servicing practices to enhance balance sheets; deceptive, abusive and fraudulent accounting tricks and practices may have also negatively affected any credit rating, mortgage account and/or the debt or payments that I am currently, or may be legally obligated to.

I hereby demand absolute 1st hand evidence from you of the original uncertificated or certificated security regarding account # _____. In the event you do not supply me with the very security it will be a positive confirmation on your part that you never really created and owned one.

I also hereby demand that a chain of transfer from you to wherever the security is now be promptly sent to me as well. Absent the actual evidence of the security I have no choice but to dispute the validity of your lawful ownership, funding, entitlement right, and the current debt you say I owe. By debt I am referring to the principal balance you claim I owe; the calculated monthly payment, calculated escrow payment and any fees claimed to be owed by you or any trust or entity you may service or sub-service for.

To independently validate this debt, I need to conduct a complete exam, audit, review and accounting of this mortgage account from its inception through the present date. Upon receipt of this letter, please refrain from reporting any negative credit information (if any) to any credit-reporting agency until you respond to each of the requests.

I also request that you conduct your own investigation and audit of this account since its inception to validate the debt you currently claim I owe. I would like you to validate the debt so that it is accurate to the penny!

Please do not rely on previous servicing companies or originators records, assurances or indemnity agreements and refuse to conduct a full audit and investigation of this account.

I understand that potential abuses by you or previous servicing companies could have deceptively, wrongfully, unlawfully, and/or illegally:

Increased the amounts of monthly payments;

Increased the principal balance I owe;

Increased the escrow payments;

Increased the amounts applied and attributed toward interest on this account;

Decreased the proper amounts applied and attributed toward the principal on this account; and/or

Assessed, charged and/or collected fees, expenses and miscellaneous charges I am not legally obligated to pay under this mortgage, note and/or deed of trust.

I request you insure that I have not been the victim of such predatory servicing and lending practices.

To insure this, I have authorized a thorough review, examination, accounting and audit of mortgage account # _____ by mortgage auditing and predatory servicing or lending experts. This exam and audit will review this mortgage account file from the date of initial contact, application and the origination of this account to the present date written above.

Again, this is a Qualified Written Request under the Real Estate Settlement Procedures Act, codified as Title 12 section 2605(e) of the United States Code as well as a request under the Truth In Lending Act 15 U.S.C. section 1601. RESPA provides substantial penalties and fines for non-compliance or failure to answer my questions provided in this letter within sixty (60) days of its receipt.

In order to conduct the examination and audit of this loan, I need to have full and immediate disclosure including copies of all pertinent information regarding this loan. The documents requested and answers to my questions are needed by myself and others to ensure that this loan:

1-Was originated in lawful compliance with all federal and state laws, regulations including, but not limited to Title 62 of the Revised Statutes, RESPA, TILA, Fair Debt Collection Practices Act, HOEPA and other laws;

2-That the origination and/or any sale or transfer of this account or monetary instrument, was conducted in accordance with proper laws and was a lawful sale with complete disclosure to all parties with an interest;

3-That you disclose the claimed holder in due course of the monetary instrument/deed of trust/asset is holding such note in compliance with statutes, State and Federal laws and is entitled to the benefits of payments;

4-That all good faith and reasonable disclosures of transfers, sales, Power of Attorney, monetary instrument ownership, entitlements, full disclosure of actual funding source, terms, costs, commissions, rebates, kickbacks, fees etc. were and still are properly disclosed to me, including but not limited to the period commencing with the original loan solicitation through and including any parties, instruments, assignments, letters of transmittal, certificates of asset backed securities and any subsequent transfer thereof;

5-That each servicers and/or sub-servicers of this mortgage has serviced this mortgage in accordance with statute, laws and the terms of mortgage, monetary instrument/deed of trust, including but not limited to all accounting or bookkeeping entries commencing with the original loan solicitation through and including any parties, instruments, assignments, letters of transmittal, certificates of asset backed securities and any subsequent transfer thereof;

6-That each servicers and/or sub-servicers of this mortgage has serviced this mortgage in compliance with local, state and federal statutes, laws and regulations commencing with the original loan solicitation through and including any parties, instruments, assignments, letters of transmittal, certificates of asset backed securities and any subsequent transfer thereof ;

7-That this mortgage account has been credited, debited, adjusted, amortized and charged correctly and disclosed fully commencing with the original loan solicitation through and including any parties, instruments, assignments, letters of transmittal, certificates of asset backed securities and any subsequent transfer thereof ;

8-That interest and principal have been properly calculated and applied to this loan;

9-That any principal balance has been properly calculated, amortized and accounted for;

10-That no charges, fees or expenses, not obligated by me in any agreement, have been charged, assessed or collected from this account or any other related account arising out of the subject loan transaction.

In order to validate this debt and audit this account, I need copies of pertinent documents to be provided to me. I also need answers, certified, in writing, to various servicing questions. For each record kept on computer or in any other electronic file or format, please provide a paper copy of all information in each field or record in each computer system, program or database used by you that contains any information on this account or my name.

As such, please send to me, at the address above, copies of the documents requested below as soon as possible. Please also provide copies, front and back, of the following documents regarding account # _____:

1-Any certificated or uncertificated security used for the funding of this account;

2-Any and all “Pool Agreement(s)” or “servicing agreements” between the nominal lender at the loan closing and any party or parties who could claim an interest in the loan closing or documents pertaining thereto and any government sponsored entity, hereinafter GSE or other party;

3-Any and all “Deposit Agreement(s)” between the nominal lender at the loan closing and any party or parties who could claim an interest in the loan closing or documents pertaining thereto and any GSE or other party;

4-Any and all “Servicing Agreement(s)” between the nominal lender at the loan closing and any party or parties who could claim an interest in the loan closing or documents pertaining thereto and any GSE or other party;

5-Any and all “Custodial Agreement(s)” between the nominal lender at the loan closing and any party or parties who could claim an interest in the loan closing or documents pertaining thereto and any GSE or other party;

6-Any and all “Master Purchasing Agreement(s)” between the nominal lender at the loan closing and any party or parties who could claim an interest in the loan closing or documents pertaining thereto and any GSE or other party;

7-Any and all “Issuer Agreement(s)” between the nominal lender at the loan closing and any party or parties who could claim an interest in the loan closing or documents pertaining thereto and any GSE or other party;

8-Any and all “Commitment to Guarantee” agreement(s) between the nominal lender at the loan closing and any party or parties who could claim an interest in the loan closing or documents pertaining thereto and any GSE or other party;

9-Any and all “Release of Document” agreement(s) between the nominal lender at the loan closing and any party or parties who could claim an interest in the loan closing or documents pertaining thereto and any GSE or other party;

10-Any and all “Master Agreement for Servicer’s Principal and Interest Custodial Account” between the nominal lender at the loan closing and any party or parties who could claim an interest in the loan closing or documents pertaining thereto and any GSE or other party;

11-Any and all “Servicer’s Escrow Custodial Account” between the nominal lender at the loan closing and any party or parties who could claim an interest in the loan closing or documents pertaining thereto and any GSE or other party;

12-Any and all “Release of Interest” agreement(s) between the nominal lender at the loan closing and any party or parties who could claim an interest in the loan closing or documents pertaining thereto and any GSE or other party;

13-Any Trustee agreement(s) between the nominal lender at the loan closing and any party or parties who could claim an interest in the loan closing or documents pertaining thereto and trustee(s) regarding this account or pool accounts with any GSE or other party;

Please also send me copies, front and back, of:

1-Any documentation evidencing any trust relationship regarding the Mortgage/Deed of Trust **and** any Note in this matter;

2-Any and all document(s) establishing any Trustee of record for the Mortgage/Deed of Trust **and** any Note;

3-Any and all document(s) establishing the date of any appointment of Trustee Mortgage/Deed of Trust **and** any Note, including any and all assignments or transfers or nominees of any substitute trustees(s);

4-Any and all document(s) establishing any Grantor for this Mortgage/Deed of Trust **and** any Note;

5-Any and all document(s) establishing any Grantee for this Mortgage/Deed of Trust **and** any Note;

6-Any and all document(s) establishing any Beneficiary for this Mortgage/Deed of Trust **and** any Note;

7-Any documentation evidencing the Mortgage/Deed of Trust is **not** a constructive trust or any other form of trust;

8-All data, information, notations, text, figures and information contained in your mortgage servicing and accounting computer systems including, but not limited to Alltel or Fidelity CPI system, or any other similar mortgage servicing software used by you, any servicers, or sub-servicers of this mortgage account from the inception of this account to the date written above.

9-All descriptions and legends of all Codes used in your mortgage servicing and accounting system so the examiners and auditors and experts retained to audit and review this mortgage account may properly conduct their work.

10-All assignments, transfers, allonge, or other documents evidencing a transfer, sale or assignment of this mortgage, deed of trust, monetary instrument or other document that secures payment by me to this obligation in this account from the inception of this account to the present date including any such assignment on MERS.

11-All records, electronic or otherwise, of assignments of this mortgage, monetary instrument or servicing rights to this mortgage including any such assignments on MERS.

12-All deeds in lieu, modifications to this mortgage, monetary instrument or deed of trust from the inception of this account to the present date.

13-The front and back of each and every canceled check, money order, draft, debit or credit notice issued to any servicers of this account for payment of any monthly payment, other payment, escrow charge, fee or expense on this account.

14-All escrow analyses conducted on this account from the inception of this account until the date of this letter.

15-The front and back of each and every canceled check, draft or debit notice issued for payment of closing costs, fees and expenses listed on any and all disclosure statements including, but not limited to, appraisal fees, inspection fees, title searches, title insurance fees, credit life insurance premiums, hazard insurance premiums, commissions, attorney fees, points, etc.

16-Front and back copies of all payment receipts, checks, money orders, drafts, automatic debits and written evidence of payments made by others or me on this account.

17-All letters, statements and documents sent to me by your company.

18-All letters, statements and documents sent to me by agents, attorneys or representatives of your company.

19-All letters, statements and documents sent to me by previous servicers, sub-servicers or others in your account file or in your control or possession or in the control or possession of any affiliate, parent company, agent, sub-servicers, servicers, attorney or other representative of your company.

20-All letters, statements and documents contained in this account file or imaged by you, any servicers or sub-servicers of this mortgage from the inception of this account to the present date.

21-All electronic transfers, assignments and sales of the note/asset, mortgage, deed of trust or other security instrument.

22-All copies of property inspection reports, appraisals, BPOs and reports done on my property.

23-All invoices for each charge such as inspection fees, BPOs, appraisal fees, attorney fees, insurance, taxes, assessments or any expense which has been charged to this mortgage account from the inception of this account to the present date.

24-All checks used to pay invoices for each charge such as inspection fees, BPOs, appraisal fees, attorney fees, insurance, taxes, assessments or any expense which has been charged to this account from the inception of this account to the present date.

25-All agreements, contracts and understandings with vendors that have been paid for any charge on this account from the inception of this account to the present date.

26-All account servicing records, payment payoffs, payoff calculations, ARM audits, interest rate adjustments, payment records, transaction histories, account histories, accounting records, ledgers, and documents that relate to the accounting of this account from the inception of this account to the present date.

27-All account servicing transaction records, ledgers, registers and similar items detailing how this account has been serviced from the inception of this account to the present date.

Further, in order to conduct the audit and review of this account, and to determine all proper amounts due, I need the following answers to questions concerning the servicing and accounting of this mortgage account from its inception to the present date. Accordingly, please provide me, in writing, the answers to the following questions:

In regards to Account Accounting and Servicing Systems:

1-Please identify for me each account accounting and servicing system used by you and any sub-servicers or previous servicers from the inception of this account to the present date so that experts can decipher the data provided.

2-For each account accounting and servicing system identified by you and any sub-servicers or previous servicers from the inception of this account to the present date, please provide the name and address of the company that designed and sold the system.

3-For each account accounting and servicing system used by you and any sub-servicers or previous servicers from the inception of this account to the present date, please provide the complete transaction code list for each system so that I, and others can adequately audit this account.

In regards to Debits and Credits:

1-In a spreadsheet form or in letter form in a columnar format, please detail for me each and every credit on this account from the date such credit was posted to this account as well as the date any credit was received.

2- In a spreadsheet form or in letter form in a columnar format, please detail for me each and every debit on this account from the date such debit was posted to this account as well as the date any debit was received.

3-For each debit and credit listed, please provide me with the definition for each corresponding transaction code you utilize.

4-For each transaction code, please provide the master transaction code list used by you or previous servicers.

In regards to Mortgage and Assignments:

1-Has each sale, transfer or assignment of this mortgage, monetary instrument, deed of trust or any other instrument I executed to secure this debt been recorded in the county property records in the county and state in which my property is located from the inception of this account to the present date? Yes or No?

2-If not, why?

3-Is your company the servicer of this mortgage account or the holder in due course and beneficial owner of this mortgage, monetary instrument and/or deed of trust?

4-Have any sales, transfers or assignments of this mortgage, monetary instrument, deed of trust or any other instrument I executed to secure this debt been recorded in any electronic fashion such as MERS or other internal or external recording system from the inception of this account to the present date? Yes or No?

5-If yes, please detail for me the names of the seller, purchaser, assignor, assignee or any holder in due course to any right or obligation of any note, mortgage, deed of trust or security instrument I executed securing the obligation on this account that was not recorded in the county records where my property is located whether they be mortgage servicing rights or the beneficial interest in the principal and interest payments.

In regards to Attorney Fees:

For purposes of the questions below dealing with attorney fees, please consider attorney fees and legal fees to be one in the same.

1-Have attorney fees ever been assessed to this account from the inception of this account to the present date? Yes or No?

2-If yes, please detail each separate assessment, charge and collection of attorney fees to this account from the inception of this account to the present date and the date of such assessments to this account.

3-Have attorney fees ever been charged to this account from the inception of this account to the present date? Yes or No?

4- If yes, please detail each separate charge of attorney fees to this account from the inception of this account to the present date and the date of such assessments to this account.

5-Have attorney fees ever been collected from this account from the inception of this account to the present date? Yes or No?

6-If yes, please detail each separate collection of attorney fees to this account from the inception of this account to the present date and the date of such assessments to this account.

7-Please provide me with the name and address of each attorney or law firm that has been paid any fees or expenses related to this account from the inception of this account to the present date.

8-Please identify for me in writing the provision, paragraph, section or sentence of any note, mortgage, deed of trust or any agreement I signed that authorized the assessment, charge or collection of attorney fees.

9-Please detail and list for me in writing each separate attorney fee assessed from this account and for which each corresponding payment period or month such fee was assessed from the inception of this account to the present date.

10- Please detail and list for me in writing each separate attorney fee collected from this account and for which each corresponding payment period or month such fee was collected from the inception of this account to the present date.

11-Please detail and list for me in writing any adjustments in attorney fees assessed and on what date such adjustment was made and the reason for such adjustment.

12- Please detail and list for me in writing any adjustments in attorney fees collected and on what date such adjustment was made and the reason for such adjustment.

13-Has interest been charged on any attorney fees assessed or charged to this account? Yes or No?

14-Is interest allowed to be assessed or charged on attorney fees charged or assessed to this account? Yes or No?

15-How much total in attorney fees have been assessed to this account from the inception to the present date?

16-How much total in attorney fees have been collected from this account from the inception to the present date?

17-How much total in attorney fees have been charged to this account from the inception to the present date?

18-Please send me copies of all invoices and detailed billing statements from any law firm or attorney that has billed such fees that have been assessed or collected from this account from the inception to the present date.

In regards to Suspense/Unapplied Accounts:

For purposes of this section, please treat the term suspense account and unapplied account as one in the same.

1-Has there been any suspense or unapplied account transactions on this account from the inception of this account until the present date? Yes or No?

2-If yes, please explain the reason for each and every suspense transaction that occurred on this account. If no, please skip the questions in this section dealing with suspense and unapplied accounts.

3-In a spreadsheet or in letter form in a columnar format, please detail for me each and every suspense or unapplied transaction, both debits and credits that has occurred on this account from the inception of this account to the present date.

In regards to late fees:

For purposes of my questions below dealing with late fees, please consider the terms late fees and late charges to be one in the same.

1-Have you reported the collection of late fees on this account as interest in any statement to me or to the IRS? Yes or No?

2-Has any previous servicers or sub-servicers of this mortgage reported the collection of late fees on this account as interest in any statement to me or to the IRS? Yes or No?

3-Do you consider the payment of late fees as liquidated damages to you for not receiving payment on time? Yes or No?

4-Are late fees considered interest? Yes or No?

5-Please detail for me in writing what expenses and damages you incurred for any payment I made that was late.

6-Were any of these expenses or damages charged or assessed to this account in any other way? Yes or No?

7-If yes, please describe what expenses or damages were charged or assessed to this account.

8-Please describe for me in writing what expenses you or others undertook due to any payment I made, which was late.

9- Please describe for me in writing what damages you or others undertook due to any payment I made, which was late.

10-Please identify for me in writing the provision, paragraph, section or sentence of any note, mortgage, deed of trust or any agreement I signed that authorized the assessment or collection of late fees.

11-Please detail and list for me in writing each separate late fee assessed to this account and for which corresponding payment period or month such late fee was assessed from the inception of this account to the present date.

12-Please detail and list for me in writing each separate late fee collected from this account and for which corresponding payment period or month such late fee was collected from the inception of this account to the present date.

13-Please detail and list for me in writing any adjustments in late fees assessed and on what date such adjustment was made and the reason for such adjustment.

14-Has interest been charged on any late fee assessed or charged to this account? Yes or No?

15-Is interest allowed to be assessed or charged on late fees to this account? Yes or No?

16-Have any late charges been assessed to this account? Yes or No?

17-If yes, how much in total late charges have been assessed to this account from the inception of this account to the present date?

18-Please provide me with the exact months or payment dates you or other previous servicers or sub-servicers of this account claim I have been late with a payment from the inception of this account to the present date.

19-Have late charges been collected on this account from the inception of this account to the present date? Yes or No?

20-If yes, how much in total late charges have been collected on this account from the inception of this account to the present date?

In regards to Property Inspections:

For the purpose of this section property inspection and inspection fee refer to any inspection of property by any source and any related fee or expense charged, assessed or collected for such inspection.

1-Have any property inspections been conducted on my property from the inception of this account to the present date? Yes or No?

2-If your answer is no, you can skip the rest of the questions in this section concerning property inspections.

3-If yes, please tell me the date of each property inspection conducted on my property that is the secured interest for this mortgage, deed of trust or note.

4-Please tell me the price charged for each property inspection.

5-Please tell me the date of each property inspection.

6-Please tell me the name and address of each company and person who conducted each property inspection on my property.

7-Please tell me why property inspections were conducted on my property.

8-Please tell me how property inspections are beneficial to me.

9-Please tell me how property inspections are protective of my property.

10-Please explain to me your policy on property inspections.

11-Do you consider the payment of inspection fees as a cost of collection? Yes or No?

12-If yes, why?

13-Do you use property inspections to collect debts? Yes or No?

14-Have you used any portion of the property inspection process on my property to collect a debt or inform me of a debt, payment or obligation I owe? Yes or No?

15-If yes, please answer when and why?

16-Please identify for me in writing the provision, paragraph, section or sentence of any note, mortgage, deed of trust or any agreement I signed that authorized the assessment or collection of property inspection fees.

17-Have you labeled in any record or document sent to me a property inspection as a miscellaneous advance? Yes or No?

18-If yes, why?

19-Have you labeled in any record or document sent to me a property inspection as a legal fee or attorney fee? Yes or No?

20-If yes, why?

21-Please detail and list for me in writing each separate inspection fee assessed to this account and for which corresponding payment period or month such fee was assessed from the inception of this account to the present date.

22- Please detail and list for me in writing each separate inspection fee collected from this account and for which corresponding payment period or month such fee was collected from the inception of this account to the present date.

23-Please detail and list for me in writing any adjustments in inspection fees assessed and on what date such adjustment was made and the reasons for such adjustment?

24- Please detail and list for me in writing any adjustments in inspection fees collected and on what date such adjustment was made and the reasons for such adjustment?

25-Has interest been charged on any inspection fees assessed or charged to this account? Yes or No?

26-If yes, when and how much was charged?

27-Is interest allowed to be charged on inspection fees charged or assessed to this account? Yes or No?

28-How much total in inspection fees has been assessed to this account from the inception of this account to the present date?

29-How much total in inspection fees has been collected on this account from the inception of this account to the present date?

30-Please forward to me copies of all property inspections made on my property in this mortgage account file.

31-Has any fee charged or assessed for property inspections been placed into an escrow account? Yes or No?

In regards to BPO Fees:

1-Have any BPOs (Broker Price Opinions) been conducted on my property? Yes or No?

2- If your answer is no, you can skip the rest of the questions in this section concerning BPOs.

3-If yes, please tell me the date of each BPO conducted on my property that is the secured interest for this mortgage, deed of trust or note.

4-Please tell me the price of each BPO.

5-Please tell me who conducted the BPO.

6-Please tell me why BPOs were conducted on my property.

7-Please tell me how BPOs are beneficial to me.

8-Please tell me how BPOs are protective of my property.

9-Please explain your policy on BPOs.

10-Have any BPO fees been assessed to this account? Yes or No?

11-If yes, how much in total BPO fees have been charged to this account?

12-Please identify for me in writing the provision, paragraph, section or sentence of any note, mortgage, deed of trust or any agreement I signed that authorized the assessment, charge or collection of a BPO fee from me.

13-Please send to me copies of all BPO reports that have been done on my property.

14-Has any fee charged or assessed for a BPO been placed into an escrow account? Yes or No?

In regards to Force-Placed Insurance:

1-Have you placed or ordered any force-placed insurance policies on my property?

2-If yes, please tell me the date of each policy ordered or placed on my property that is the secured interest for this mortgage, deed of trust or note.

3-Please tell me the price of each policy.

4-Please tell me the agent for each policy.

5-Please tell me why each policy was placed on my property.

6-Please tell me how the policies are beneficial to me.

7-Please tell me how the policies are protective of my property.

8-Please explain to me your policy on force-placed insurance.

9-Have any force-placed insurance fees been assessed to this account? Yes or No?

10-If yes, how much in total force-placed insurance fees have been assessed to this account?

11-Have any force-placed insurance fees been charged to this account? Yes or No?

12-If yes, how much in total force-placed insurance fees have been charged to this account?

13-Please identify for me in writing the provision, paragraph, section or sentence of any note, mortgage, deed of trust or any agreement I signed that authorized the assessment, charge or collection of force-placed insurance fees from me.

14-Do you have any relationship with the agent or agency that placed any policies on my property? If yes, please describe.

15-Do you have any relationship with the carrier that issued any policies on my property? If yes, please describe.

16-Has the agency or carrier you used to place a forced-placed insurance on my property provided you any service, computer system, discount on policies, commissions, rebates or any form of consideration? If yes, please describe.

17-Do you maintain a blanket insurance policy to protect your properties when customer policies have expired? Yes or No?

18-Please send to me copies of all forced-placed insurance policies that have been ordered on my property from the inception of this account to the present date.

In regards to Servicing:

For each of the following questions listed below, please provide me with a detailed explanation in writing that answers each question. In addition, I need the following answers to questions concerning the servicing of this account from its inception to the present date.

1-Did the originator or previous servicers of this account have any financing agreements or contracts with your company or an affiliate of your company?

2-Did the originator or previous servicers of this account have any financing agreements or contracts with your company or an affiliate of your company?

3-Did the originator or previous servicers of this account receive any compensation, fee, commission, payment, rebate or other financial consideration from your company or affiliate of your company for handling, processing, originating or administering this loan? If yes, please describe and itemize each and every form of compensation, fee, commission, payment, rebate or other financial consideration paid to the originator of this account by your company or any affiliate.

4-Please identify for me where the originals of this entire account file are currently located and how they are being stored, kept and protected.

5-Where is the original monetary instrument or mortgage I signed located? Please describe its physical location and anyone holding this note as a custodian or trustee if applicable.

6-Where is the original deed of trust or mortgage and note I signed located? Please describe its physical location and anyone holding this note as a custodian or trustee if applicable.

7-Since the inception of this account, has there been any assignment of my monetary instrument/asset to any other party? If the answer is yes, identify the names and addresses of each and every individual, party, bank, trust or entity that has received such assignments.

8-Since the inception of this account, has there been any assignment of the deed of trust or mortgage and note to any other party? If the answer is yes, identify the names and addresses of each and every individual, party, bank, trust or entity that has received such assignments.

9- Since the inception of this account, has there been any sale or assignment of the servicing rights to this mortgage account to any other party? If the answer is yes, identify the names and addresses of each and every individual, party, bank, trust or entity that has received such assignments or sale.

10-Since the inception of this account, have any sub-servicers serviced any portion of this mortgage account? If the answer is yes, identify the names and addresses of each and every individual, party, bank, trust or entity that has sub-serviced this mortgage account.

11-Has this mortgage account been made a part of any mortgage pool since the inception of this loan? If yes, please identify for me each and every account mortgage pool that this mortgage has been a part of from the inception of this account to the present date.

12-Has each and every assignment of my asset/monetary instrument been recorded in the county land records where the property associated with this mortgage account is located?

13-Has there been any electronic assignment of this mortgage with MERS (Mortgage Electronic Registration System) or any other computer mortgage registry service or computer program? If yes, identify the name and address of each and every individual, entity, party, bank, trust or

organization or servicers that have been assigned to mortgage servicing rights to this account as well as the beneficial interest to the payments of principal and interest on this loan.

14-Have there been any investors (as defined by your industry) who have participated in any mortgage-backed security, collateral mortgage obligation or other mortgage security instrument that this mortgage account has ever been a part of from the inception of this account to the present date? If yes, identify the name and address of each and every individual, entity, organization and/or trust.

15-Please identify for me the parties and their addresses to all sales contracts, servicing agreements, assignments, alonges, transfers, indemnification agreements, recourse agreements and any agreement related to this account from the inception of this account to the present date.

16-Please provide me with copies of all sales contracts, servicing agreements, assignments, alonges, transfers, indemnification agreements, recourse agreements and any agreement related to this account from the inception of this account to the present date.

17-How much was paid for this individual mortgage account by you?

18-If part of a mortgage pool, what was the principal balance used by you to determine payment for this individual mortgage loan?

19-If part of a mortgage pool, what was the percentage paid by you of the principal balance above used to determine purchase of this individual mortgage loan?

20-Who did you issue a check or payment to for this mortgage loan?

21-Please provide me with copies of the front and back of the canceled check.

22-Did any investor approve of the foreclosure of my property? Yes or No?

23-Has HUD assigned or transferred foreclosure rights to you as required by 12 USC 3754?

24-Please identify all persons who approved the foreclosure of my property.

Please provide me with the documents I have requested and a detailed answer to each of my questions within the lawful time frame. Upon receipt of the documents and answers, an exam and audit will be conducted that may lead to a further document request and answers to questions under an additional RESPA Qualified Written Request letter.

Copies of this Qualified Written Request, Validation of Debt, TILA and request for accounting and legal records, Dispute of Debt letter are being sent to FTC, HUD, Thrift Supervision, and all relevant state and federal regulators; and other consumer advocates; and my congressman.

It is my hope that you answer this RESPA request in accordance with law and the questions, documents and validation of debt to the penny and correct abuses or schemes uncovered and documented.

Default Provisions under this QUALIFIED WRITTEN REQUEST

(Lender's Name) or any agents, transfers, or assigns omissions of or agreement by silence of this RESPA REQUEST via certified rebuttal of any and all points herein this RESPA REQUEST, agrees and consents to including but not limited by any violations of law and/or immediate terminate/remove any and all right, title and interest (liens) in (Your Name) or any property or collateral connected to (Your Name) or account #_____ and waives any and all immunities or defenses in claims and or violations agreed to in this RESPA REQUEST including but not limited by any and all:

1-(Your Name)'s right, by breach of fiduciary responsibility and fraud and misrepresentation revocation and rescinding any and all power of attorney or appointment (Lender's Name) may have or may have had in connection with account #_____ and any property and/or real estate connected with account #_____.

2-(Your Name)'s right to have any certificated or uncertificated security re-registered in (Your Name)'s, and only (Your Name)'s name.

3-(Your Name)'s right of collection via (Lender's Name)'s liability insurance and/or bond.

4-(Your Name)'s entitlement in filing and executing any instruments, as power of attorney for and by (Lender's Name), including but not limited by a new certificated security or any security agreement perfected by filing a UCC Financing Statement with the Secretary of State in the State where (Lender's Name) is located.

5-(Your Name)'s right to damages because of (Lender's Name)'s wrongful registration, breach of intermediary responsibility with regard to (Your Name)'s asset by (Lender's Name) issuing to (Your Name) a certified check for the original value of (Your Name)'s monetary instrument.

6-(Your Name)'s right to have account #_____ completely set off because (Lender's Name)'s wrongful registration, breach of intermediary responsibility with regard to (Your Name)'s monetary instrument/asset by (Lender's Name) sending confirmation of set off of wrongful liability of (Your Name) and issuing a certified check for the difference between the original

value of (Your Name)'s monetary instrument/asset and what (Your Name) mistakenly sent to (Lender's Name) as a payment for such wrongful liability.

(Lender's Name) or any transfers, agents or assigns offering a rebuttal of this RESPA REQUEST must do so in the manner of this RESPA REQUEST in accordance of and in compliance with current statutes and/or laws by signing in the capacity of a fully liable man or woman being responsible and liable under the penalty of perjury while offering direct testimony with the official capacity as appointed agent for (Lender's Name) in accordance with (Lender's Name)'s Articles of Incorporation, By Laws duly signed by a current and duly sworn under oath director(s) of such corporation/ Holding Corporation/ National Association. Any direct rebuttal with certified true and complete accompanying proof must be posted with the Notary address herein within sixty days. When no verified rebuttal of this RESPA REQUEST is made in a timely manner, a "Certificate of Non-Response" serves as (Lender's Name)'s judgment and consent/ agreement by means of silence with any and all claims and/or violations herein-stated in the default provisions or any other law.

Power of Attorney: When (Lender's Name) fails by not rebutting to any part of this RESPA REQUEST (Lender's Name) agrees with the granting unto (Your Name)'s unlimited Power of Attorney and any and all full authorization in signing and endorsing (Lender's Name)'s name upon any instruments in satisfaction of the obligations of this RESPA REQUEST/Agreement or any agreement arising from this agreement. Pre-emption of or to any Bankruptcy proceeding shall not discharge any obligations of this agreement. Consent and agreement with this Power of Attorney by (Lender's Name) waives any and all claims of (Your Name), and/or defenses and remains in effect until the satisfaction of all obligations by (Lender's Name) have been satisfied.

Sincerely,
Your Name
(Your Signature)

STATE OF New York)
)
COUNTY OF New York)

AFFIDAVIT OF MICHAEL McCABE

I, Michael McCabe, being first duly sworn and placed under oath depose and state that I am over 18 years of age and if called upon to do so I would testify competently as follows:

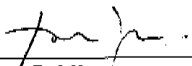
1. I am the Global Records Manager for Lehman Brothers Bank ("Lehman") and sign this Affidavit on behalf of Aurora Loan Services LLC ("Aurora") a wholly owned subsidiary of Lehman Aurora Loan Services LLC ("Aurora"), and have been since 2007. My responsibilities at Aurora include the management and organization of Aurora's documentary records, including original notes and security instruments for mortgage loans serviced by Aurora.
2. I have personal knowledge of the matters set forth in this Affidavit due to the performance of my duties as an employee of Lehman.
3. A true and correct copy of the note evidencing the loan extended to Victoria Vanransom and secured by the real estate commonly known as 28212 Rey De Copas Lane, Malibu, CA 90265 is attached to this Affidavit as Exhibit A (the "Note").
4. As appears on the copy attached as Exhibit A, the original Note is indorsed in blank.
5. The original executed and indorsed Note is in Aurora's possession, custody and control.

AFFIANT STATES NOTHING FURTHER.



Michael McCabe
Vice President,
Lehman Brothers Bank on behalf of Aurora Loan Services LLC

SUBSCRIBED AND SWORN TO
before me this 12 day of
August, 2008.



Notary Public

TONI BRAGA
Notary Public State of New York
Qualified in Queens County
01BR6116475
Comm. Exp. 10/04/2009

FIXED/ADJUSTABLE RATE NOTE(LIBOR One-Year Index (As Published In *The Wall Street Journal*-Rate Caps)

THIS NOTE PROVIDES FOR A CHANGE IN MY FIXED INTEREST RATE TO AN ADJUSTABLE INTEREST RATE. THIS NOTE LIMITS THE AMOUNT MY ADJUSTABLE INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY.

September 22, 2006
(Date)

LAKE SUCCESS
(City)

New York
(State)

26212 REY DE COPAS LANE, MALIBU, CA 90265
(Property Address)

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$ 619,500.00 (this amount is called "Principal"); plus interest, to the order of Lender, Lender is POWER EXPRESS MORTGAGE BANKERS

I will make all payments under this Note in the form of cash, check or money order.

I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 6.6250 %. The interest rate I will pay may change in accordance with Section 4 of this Note.

The interest rate required by this Section 2 and Section 4 of this Note is the rate I will pay both before and after any default described in Section 7(B) of this Note.

3. PAYMENTS**(A) Time and Place of Payments**

I will pay principal and interest by making a payment every month.

I will make my monthly payments on the first day of each month beginning on November 1, 2006

I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If on October 1, 2036 I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at 1111 MARCUS AVENUE, 3RD FLOOR, LAKE SUCCESS, NY 11042

or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments

Each of my initial monthly payments will be in the amount of U.S. \$3,966.73. This amount may change.

(C) Monthly Payment Changes

Changes in my monthly payment will reflect changes in the unpaid principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 of this Note.

4. ADJUSTABLE INTEREST RATE AND MONTHLY PAYMENT CHANGES**(A) Change Dates**

The initial fixed interest rate I will pay will change to an adjustable interest rate on the first day of October, 2013, and the adjustable interest rate I will pay may change on that day every 12th month thereafter.

308815

MULTISTATE FIXED/ADJUSTABLE RATE NOTE - WSJ One-Year LIBOR - Single Family - Fannie Mae Uniform Instrument

100N 10/08

Form 382R 8/01

WWW.MORTGAGEFORMS.COM 3/05/01 7281

Page 1 of 2

NEW DRGT

Initial



Date: Thu Jun 19, 2003 8:09 pm
Subject: Lehman Aided in Loan Fraud, Jury Says

Lehman Aided in Loan Fraud, Jury Says
New York Times

Print Media Edition: Late Edition (East Coast)
New York, N.Y.
Jun 17, 2003

Authors: Diana B. Henriques

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Full Text:

A federal jury in California concluded late yesterday that Lehman Brothers knowingly assisted in fraudulent activities by providing financial backing to an aggressive home equity lender, the First Alliance Corporation, despite warnings about its questionable business practices.

The verdict, which is sure to be widely studied on Wall Street, came after more than a month of deliberations in a class-action lawsuit tried before Judge David O. Carter of Federal District Court in Santa Ana.

The plaintiffs in the case represent more than 7,500 homeowners who got high-cost home equity loans from First Alliance between January 1999 and March 2000. That was when the company ceased operations and filed for bankruptcy after its lending practices were described in an article in The New York Times, in collaboration with the ABC News program "20/20."

The questions put to the jurors were whether First Alliance had defrauded homeowners, whether Lehman Brothers knew of that fraudulent behavior when it provided financing to the lender, and whether Lehman Brothers "substantially assisted First Alliance in perpetrating the fraud." In each case, the jurors answered yes. Lehman Brothers underwrote \$400 million in mortgage-backed securities for First Alliance and provided it with a \$150 million line of credit.

The jury awarded the plaintiffs \$50.9 million in damages, but held Lehman Brothers responsible for only 10 percent of that amount. First Alliance, its founder, Brian Chisick, and other company executives and directors were held responsible for 85 percent of the damage award. The remaining 5 percent was assessed against MBIA Inc., which insured some of the mortgage-backed securities. MBIA could not be reached last night for comment.

A Lehman Brothers spokeswoman, Hannah Burns, said in a statement that the firm was "disappointed with the jury's finding on the question of liability. We continue to believe that no one at Lehman Brothers was aware of any

wrongdoing that may have been committed by individual loan officers at First Alliance."

Citing the small portion of blame assigned to the firm, she said the company was "pleased that the jury understood how minimal Lehman Brothers' involvement was in any wrongdoing." Ms. Burns said she could not comment on whether Lehman would appeal the verdict.

Richard F. Scruggs, who represented plaintiffs in the three-month trial, said he was disappointed in the assignment of blame but believed that the decision was nevertheless a landmark.

"It establishes the principle that lenders are responsible for what borrowers do with their money, and that is the first time that's ever happened," he said.

The jury's decision was hailed by consumer advocates as a significant victory in their efforts to hold Wall Street responsible for the practices of what they call predatory lenders. Like First Alliance, many such lenders, consumer groups contend, rely heavily on the mortgage-backed securities marketplace to obtain fresh capital to make high-cost, deceptively structured loans.

"The whole concept of federal law has been that the secondary market was in a better position to police the marketplace, and I think that is what the jury has just confirmed," said Kathleen Keest, an assistant attorney general and consumer protection director in Iowa.

"Due diligence means that you should know your customer," she said, "and given the nature of the evidence against First Alliance, Lehman's concept of due diligence clearly was not what it should have been."

Cathy Lesser Mansfield, a law professor at Drake University who specializes in consumer lending issues, said that the verdict might send a chill through the vast Wall Street mortgage market. "But it is a good thing if it discourages this kind of investment," Professor Mansfield said. "Investing in predatory lending is bad for everybody -- borrowers, lenders and institutional investors. You can't be an investor and have a blindfold on."

Lehman Brothers continued to provide financing for First Alliance even after the lender's business practices had been cited in numerous consumer lawsuits, including one filed by AARP, and in regulatory actions by attorneys general in various states. Those cases -- like the one just concluded -- accused the company of preying on homeowners, many of them senior citizens, by using a high-pressure sales pitch that concealed the high fees, or points, that the company charged for its home-equity loans.

Few conventional lenders charge origination fees of more than 2 points on a loan -- that is, 2 percent of the total amount borrowed. Many state regulators consider fees of more than 8 points to be indefensible. But First Alliance charged up to 25 points on its loans, substantially increasing the monthly payments and putting some homeowners at risk of foreclosure.

During the recent trial, Mr. Scruggs quoted extensively from internal Lehman documents from the mid-1990's that described First Alliance's business practices in scathing terms.

One Lehman executive, Eric Hibbert, visited the company and later described it in a memorandum as "the used car salesperson" of the subprime credit

market. "It is a requirement to leave your ethics at the door," Mr. Hibbert wrote in one of his evaluations of the company.

Helen Duncan, who defended Lehman Brothers in the case, argued that Mr. Hibbert's comments, in 1995, were taken out of context and that the company had substantially improved its business practices by the time Lehman began handling its mortgage financing business in early 1999.

Prudential Financial, which had provided financing to First Alliance until December 1998, was excluded from the homeowners' lawsuit by Judge Carter, who ruled that any claims against it would violate the three-year statute of limitations.

In March 2002, First Alliance agreed to pay up to \$60 million to settle accusations by the Federal Trade Commission that it had defrauded roughly 18,000 people by concealing its extremely high fees and escalating interest rates. At the time, the settlement was by far the largest the federal agency had ever obtained in a predatory lending case. That settlement also called for Mr. Chisick and his wife, the founders of First Alliance and its largest shareholders, to personally contribute \$20 million to a compensation fund for defrauded homeowners.

Yesterday's verdict, while the latest chapter in the long legal saga involving First Alliance and Lehman Brothers, is not the last chapter. Judge Carter has yet to rule on a potentially more expensive lawsuit filed against Lehman Brothers on behalf of the court-approved trustee overseeing the liquidation of First Alliance's assets in bankruptcy court.

That case seeks to retrieve \$77 million, plus interest, that Lehman Brothers collected as a creditor in First Alliance's bankruptcy case. Phillip Steinbock, who represents the trustee in that case, said that Judge Carter could rule "fairly quickly" in that separate matter now that the jury has reached its verdict.

If Judge Carter rules against Lehman Brothers in the trustee's case, it could cost the company as much as \$83 million, including interest, Mr. Steinbock said. After the payment of First Alliance's various trade creditors, the money would be added to the fund set up to provide compensation for homeowners.

So far, the fund has collected about \$65 million and could receive about another \$13 million in tax refunds owed to First Alliance as a result of a change in the tax laws in 2001, Mr. Steinbock said.

ASSIGNMENT AND ASSUMPTION AGREEMENT

EXECUTION COPY

ASSIGNMENT AND ASSUMPTION AGREEMENT

ASSIGNMENT AND ASSUMPTION AGREEMENT, dated as of February 27, 2006, between Residential Funding Corporation, a Delaware corporation ("RFC") and Residential Asset Mortgage Products, Inc., a Delaware corporation (the "Company").

Recitals

- A. RFC has entered into seller contracts ("Seller Contracts") with the seller/servicers pursuant to which such seller/servicers sell mortgage loans to RFC.
 - B. The Company wishes to purchase from RFC certain Mortgage Loans (as hereinafter defined) originated pursuant to the Seller Contracts.
 - C. The Company, RFC, as master servicer, and JPMorgan Chase Bank, N.A., as trustee (the "Trustee"), are entering into a Pooling and Servicing Agreement dated as of February 1, 2006 (the "Pooling and Servicing Agreement"), pursuant to which the Trust will issue Mortgage Asset-Backed Pass-Through Certificates, Series 2006-RZ1 (the "Certificates") consisting of fifteen classes designated as Class A-1, Class A-2, Class A-3, Class M-1, Class M-2, Class M-3, Class M-4, Class M-5, Class M-6, Class M-7, Class M-8, Class M-9, Class SB, Class R-I and Class R-II, representing beneficial ownership interests in a trust fund consisting primarily of a pool of fixed and adjustable rate one- to four-family mortgage loans identified on Exhibit F to the Pooling and Servicing Agreement (the "Mortgage Loans").
 - D. In connection with the purchase of the Mortgage Loans, the Company will assign to RFC a de minimis portion of the Class R-I and Class R-II Certificates (the "Retained Certificates").
 - E. In connection with the purchase of the Mortgage Loans and the issuance of the Certificates, RFC wishes to make certain representations and warranties to the Company.
 - F. The Company and RFC intend that the conveyance by RFC to the Company of all its right, title and interest in and to the Mortgage Loans pursuant to this Agreement shall constitute a purchase and sale and not a loan.
- NOW THEREFORE, in consideration of the recitals and the mutual promises herein and other good and valuable consideration, the parties agree as follows:
- 1. All capitalized terms used but not defined herein shall have the meanings assigned thereto in the Pooling and Servicing Agreement.

2. Concurrently with the execution and delivery hereof, RFC hereby assigns to the Company without recourse all of its right, title and interest in and to the Mortgage Loans, including all interest and principal received on or with respect to the Mortgage Loans after the Cut-off Date (other than payments of principal and interest due on the Mortgage Loans in the month of the Cut-off Date). In consideration of such assignment, RFC will receive from the Company, in immediately available funds, an amount equal to \$476,746,593.75, including accrued interest, and the Retained Certificates. In connection with such assignment and at the Company's direction, RFC has in respect of each Mortgage Loan endorsed the related Mortgage Note (other than any Destroyed Mortgage Note, as defined in the following sentence) to the order of the Trustee and delivered an assignment of mortgage in recordable form to the Trustee or its agent. A Destroyed Mortgage Note means a Mortgage Note the original of which was permanently lost or destroyed.

The Company and RFC intend that the conveyance by RFC to the Company of all its right, title and interest in and to the Mortgage Loans pursuant to this Section 2 shall be, and be construed as, a sale of the Mortgage Loans by RFC to the Company. It is, further, not intended that such conveyance be deemed to be a pledge of the Mortgage Loans by RFC to the Company to secure a debt or other obligation of RFC. Nonetheless, (a) this Agreement is intended to be and hereby is deemed to be a security agreement within the meaning of Articles 8 and 9 of the Minnesota Uniform Commercial Code and the Uniform Commercial Code of any other applicable jurisdiction; (b) the conveyance provided for in this Section shall be deemed to be a grant by RFC to the Company of a security interest in all of RFC's right (including the power to convey title thereto), title and interest, whether now owned or hereafter acquired, in and to (A) the Mortgage Loans, including the Mortgage Notes, the Mortgages, any related insurance policies and all other documents in the related Mortgage Files, (B) all amounts payable pursuant to the Mortgage Loans in accordance with the terms thereof and (C) any and all general intangibles consisting of, arising from or relating to any of the foregoing, and all proceeds of the conversion, voluntary or involuntary, of the foregoing into cash, instruments, securities or other property, including, without limitation, all amounts from time to time held or invested in the Certificate Account or the Custodial Account, whether in the form of cash, instruments, securities or other property; (c) the possession by the Trustee, the Custodian or any other agent of the Trustee of Mortgage Notes or such other items of property as constitute instruments, money, payment intangibles, negotiable documents, goods, deposit accounts, letters of credit, advices of credit, investment property, certificated securities or chattel paper shall be deemed to be "possession by the secured party", or possession by a purchaser or a person designated by such secured party, for purposes of perfecting the security interest pursuant to the Minnesota Uniform Commercial Code and the Uniform Commercial Code of any other applicable jurisdiction (including, without limitation, Sections 8-106, 9-313 and 9-106 thereof); and (d) notifications to persons holding such property, and acknowledgments, receipts or confirmations from persons holding such property,

shall be deemed notifications to, or acknowledgments, receipts or confirmations from, financial intermediaries, bailees or agents (as applicable) of the Trustee for the purpose of perfecting such security interest under applicable law. RFC shall, to the extent consistent with this Agreement, take such reasonable actions as may be necessary to ensure that, if this Agreement were deemed to create a security interest in the Mortgage Loans and the other property described above, such security interest would be deemed to be a perfected security interest of first priority under applicable law and will be maintained as such throughout the term of this Agreement. Without limiting the generality of the foregoing, **RFC shall prepare and deliver to the Company not less than 15 days prior to any filing date, and the Company shall file, or shall cause to be filed, at the expense of RFC, all filings necessary to maintain the effectiveness of any original filings necessary under the Uniform Commercial Code as in effect in any jurisdiction to perfect the Company's security interest in or lien on the Mortgage Loans including without limitation (x) continuation statements, and (y) such other statements as may be occasioned by (1) any change of name of RFC or the Company, (2) any change of location of the place of business, state of formation or the chief executive office of RFC, or (3) any transfer of any interest of RFC in any Mortgage Loan.**

3. Concurrently with the execution and delivery hereof, the Company hereby assigns to RFC without recourse all of its right, title and interest in and to the Retained Certificates as part of the consideration payable to RFC by the Company pursuant to this Agreement.

4. RFC represents and warrants to the Company that on the date of execution hereof (or, if otherwise specified below, as of the date so specified):

(a) The information set forth in the Mortgage Loan Schedule for such Mortgage Loans is true and correct in all material respects as of the date or dates respecting which such information is furnished;

(b) Each Mortgage Loan constitutes a qualified mortgage under Section 860G(a)(3)(A) of the Code and Treasury Regulations Section 1.860G-2(a)(1);

(c) Immediately prior to the conveyance of the Mortgage Loans to the Company, ***RFC had good title to, and was the sole owner of, each Mortgage Loan free and clear of any pledge, lien, encumbrance or security interest (other than rights to servicing and related compensation) and such conveyance validly transfers ownership of the Mortgage Loans to the Company free and clear of any pledge, lien, encumbrance or security interest;***

(d) Each Mortgage Note constitutes a legal, valid and binding obligation of the Mortgagor enforceable in accordance with its terms except as limited by bankruptcy, insolvency or other similar laws affecting generally the enforcement of creditors' rights;

(e) To the best of RFC's knowledge as of the Cut-off Date, there is no default, breach, violation or event of acceleration existing under the terms of any Mortgage Note or Mortgage and no event which, with notice and expiration of any grace or cure period, would constitute a default, breach, violation or event of acceleration under the terms of any Mortgage Note or Mortgage, and no such default, breach, violation or event of acceleration has been waived by RFC or by any other entity involved in servicing a Mortgage Loan;

(f) As of the Cut-off Date, none of the Mortgage Loans are 30 days or more delinquent in payment of principal and interest;

(g) None of the Mortgage Loans are buydown Mortgage Loans;

(h) To the best of RFC's knowledge, there is **no delinquent tax or assessment lien against any related Mortgaged Property**; *(Editor's Note: MERS and other accommodation holders were formed for the express purpose of tax evasion to avoid paying the taxes, stamps and recording fees for assignment of mortgages and interests in mortgages).*

(i) No Mortgagor has any valid right of offset, defense or counterclaim as to the related Mortgage Note or Mortgage, except as may be provided under the Relief Act;

(j) No Mortgage Loan provides for payments that are subject to reduction by withholding taxes levied by any foreign (non-United States) sovereign government;

(k) (1) The proceeds of each Mortgage Loan have been fully disbursed and (2) to the best of Seller's knowledge, there is no requirement for future advances thereunder and any and all requirements as to completion of any on-site or off-site improvements and as to disbursements of any escrow funds therefor (including any escrow funds held to make Monthly Payments pending completion of such improvements) have been complied with. **All costs, fees and expenses incurred in making, closing or recording the Mortgage Loans were paid**; *(Editor's Note: MERS and other accommodation holders were formed for the express purpose of tax evasion to avoid paying the taxes, stamps and recording fees for assignment of mortgages and interests in mortgages).*

(l) To the best of RFC's knowledge, with respect to each Mortgage Loan, there are no mechanics' liens or claims for work, labor or material affecting any Mortgaged Property which are or may be a lien prior to, or equal with, the lien of the related Mortgage, **except such liens that are insured or indemnified against by a title insurance policy**; *(Editor's NOTE: TICOR and other title insurers are alleging fraud in the origination of the loans, negligent delays in recording and other tactics which they allege relieve them of the responsibility of paying anything on the title policy issued).*

(m) With respect to each Mortgage Loan, a **policy of title insurance** was effective as of the closing of each Mortgage Loan, is valid and binding, and remains in full force and effect, unless the Mortgaged Properties are located in the State of Iowa and an attorney's certificate has been provided; ***(Editor's NOTE: TICOR and other title insurers are alleging fraud in the origination of the loans, negligent delays in recording and other tactics which they allege relieve them of the responsibility of paying anything on the title policy issued).***

(n) To the best of RFC's knowledge, each Mortgaged Property is free of damage and in good repair and no notice of condemnation has been given with respect thereto and ***RFC knows of nothing involving any Mortgaged Property that could reasonably be expected to materially adversely affect the value or marketability of any Mortgaged Property; (Editor's NOTE: Intentionally inflated appraisals, known by all parties to this agreement, create a ruse by which plausible deniability can be raised by not sustained).***

(o) ***Each Mortgage contains customary and enforceable provisions which render the rights and remedies of the holder adequate to realize the benefits of the security against the Mortgaged Property,*** including (i) in the case of a Mortgage that is a deed of trust, by trustee's sale, or (ii) by judicial foreclosure or, if applicable, non-judicial foreclosure, and to the best of RFC's knowledge, there is no homestead or other exemption available to the Mortgagor that would interfere with such right to sell at a trustee's sale or right to foreclosure, subject in each case to applicable federal and state laws and judicial precedents with respect to bankruptcy and right of redemption;

(p) ***To the best of RFC's knowledge, with respect to each Mortgage that is a deed of trust, a trustee duly qualified under applicable law to serve as such is properly named, designated and serving, and except in connection with a trustee's sale after default by a Mortgagor, no fees or expenses are payable by the seller or RFC to the trustee under any Mortgage that is a deed of trust;***

(q) If the improvements securing a Mortgage Loan are located in a federal designated special flood hazard area, flood insurance in the amount required under the Program Guide covers such Mortgaged Property (either by coverage under the federal flood insurance program or by coverage from private insurers);

(r) ***With respect to each Mortgage Loan, any appraisal made in connection with the origination of the Mortgage Loan was made by an appraiser who meets the minimum qualifications for appraisers as specified in the Program Guide; [Editor's NOTE: Intentionally inflated appraisals, known by all parties to this agreement, create a ruse by which plausible deniability can be raised by not sustained. In addition, appraiser's are not necessarily licensed nor members of a professional association. In 2005 8,000 certified appraisers petitioned congress to require enforcement of industry appraisal standards***

because all the business was going to those “appraisers” who came back with MAI (Made as Instructed) hyper inflated property values using obvious improper standards and dropping all normal industry standards for appraisals. The petition was ignored. In addition, contracts obtained from Chevy Chase Bank and other lenders show that appraisers were paid more than their usual rates during the mortgage meltdown period of 2001-2008, they were paid more for higher value appraised, and they were not fired or not hired again if they failed to conform to the “expected” value given to them by the lender’s agents or employees. This caused the borrower to suffer an undisclosed increase in points, interest rates and balloon payment far in excess of fair market value increasing the cost of the loan far beyond the limits permitted by usury statutes. Thus the loan in most states is voidable or void, plus the participants are liable for treble damages and attorneys fees in addition to criminal prosecution.]

(s) Each Mortgage Loan is covered by a standard hazard insurance policy;

(t) ***To the best of RFC's knowledge, any escrow arrangements established with respect to any Mortgage Loan are in compliance with all applicable local, state and federal laws and are in compliance with the terms of the related Mortgage Note; [Editor's Note: Many loans were issued on the premise that the first 1 or 2 payments, or the first one or two years, the borrower could pay an option payments which was less than the interest due, included no principal and included no provision for insurance or taxes. The loan was “qualified” and :”underwritten” based upon the borrower’s alleged ability to pay the first payment knowing that future payments were out of reach of the borrower and that the loan would fail.]***

(u) No Mortgage Loan was originated on or after October 1, 2002 and before March 7, 2003, which is secured by property located in the State of Georgia; [Editor’s Note: Georgia passed a law regarding the production of notes and other procedures which restricted the ability of the participants in the chain of securitization (chain of deception) to use descriptions of mortgages and notes that did not yet exist, with “signed” (squiggle) assignment from officers who were not employed by the assignor, attaching notes “signed” (squiggle) by a borrower whose name was either picked at random or used from his mortgage application before closing.]

(v) As of the Cut-off Date, none of the Mortgage Loans are secured by a leasehold estate. If any of the Mortgage Loans are secured by a leasehold interest, with respect to each leasehold interest: the use of leasehold estates for residential properties is an accepted practice in the area where the related Mortgaged Property is located; residential property in such area consisting of leasehold estates is readily marketable; the lease is recorded and no party is in any way in breach of any provision of such lease; the leasehold is in full force and effect and is not subject to any prior lien or encumbrance by which the leasehold could be terminated or subject to any charge or penalty; and the remaining term of the lease does not

terminate less than ten years after the maturity date of such Mortgage Loan;

(w) **Each Mortgage Loan as of the time of its origination complied in all material respects with all applicable local, state and federal laws, including, but not limited to, all applicable predatory lending laws; *[Editor's Note: The parties were well aware of NINJA loans and other predatory practices described in these notes and elsewhere on www.livinglies.wordpress.com. Thus they were not holders in due course because they knew of defects in the title of the negotiable instruments]***

(x) *None of the Mortgage Loans are subject to the Home Ownership and Equity Protection Act of 1994. None of the Mortgage Loans are loans that, under applicable state or local law in effect at the time of origination of the loan, are referred to as (1) "high cost" or "covered" loans or (2) any other similar designation if the law imposes greater restrictions or additional legal liability for residential mortgage loans with high interest rates, points and/or fees;*

(y) **To the best of RFC's knowledge, the Subservicer for each Mortgage Loan has accurately and fully reported its borrower credit files to each of the Credit Repositories in a timely manner;**

(z) *None of the proceeds of any Mortgage Loan were used to finance the purchase of single premium credit insurance policies;*

(aa) **No loan is a High Cost Loan or Covered Loan, as applicable (as such**

terms are defined in the then current Standard & Poor's LEVELS(R)Glossary which is now Version 5.6c Revised, Appendix E) (attached hereto as Exhibit A)); provided that no representation and warranty is made in this clause (aa) with respect to any Mortgage Loan secured by a Mortgaged Property located in the States of Kansas or West Virginia; and provided further that no Qualified Substitute Mortgage Loan shall be a High Cost Loan or Covered Loan (as such terms are defined in Appendix E of the Standard & Poor's Glossary For File Format For LEVELS(R) in effect on the date of substitution, *with such exceptions thereto as the Company and Standard & Poor's may reasonably agree*);

(bb) *No Mortgage Property consists of a mobile home or a manufactured housing unit that is not permanently affixed to its foundation;*

(cc) **The proceeds of the Mortgage Loan have been fully disbursed, there is no requirement for future advances thereunder; *[Editor's Note: The "proceeds of the loan" in actuality constitute the entire proceeds generated by the creation or origination of the loan application or the completion of the securities sale of asset backed securities by the late (subsequent) signature of an actual borrower long after the "loan" had been "sold." These proceeds were not***

disclosed to either the borrower at the loan closing nor the investor at the time of sale of the certificate on the asset backed security. Thus the failure to disclose the true parties in interest to either the borrower (TILA) or the investor (SEC) constitutes a failure to disburse fully under this paragraph and thus leaves a reserve pool, which is a standard part of every SPV structured pool and tranche.]

(dd) With respect to each Mortgage Loan, either (i) each Mortgage Loan contains a customary provision for the acceleration of the payment of the unpaid principal balance of the Mortgage Loan in the event the related Mortgaged Property is sold without the prior consent of the mortgagee thereunder or (ii) the Mortgage Loan is assumable pursuant to the terms of the Mortgage Note;

(ee) No Mortgage Loan has a prepayment penalty term that extends beyond five years after the date of origination;

(ff) No Mortgage Loan provides for deferred interest or negative amortization; and

(gg) Each Mortgage Loan listed on the attached Exhibit B has an original term to maturity of 360 months and an original amortization term of 480 months.

Upon discovery by RFC or upon notice from the Company or the Trustee of a breach of the foregoing representations and warranties in respect of any Mortgage Loan, or upon the occurrence of a Repurchase Event as described in Section 5 below, which materially and adversely affects the interests of any holders of the Certificates or the Company in such Mortgage Loan (notice of which breach or occurrence shall be given to the Company by RFC, if it discovers the same), RFC shall, ***within 90 days after the earlier of its discovery or receipt of notice thereof, [Editor's Note: Neither the Trustee nor the Nominal Lender, or anyone else for that matter actually knows at any one point whether, and to what extent this provision has been triggered and whether it affects one particular loan or dozens, hundreds or thousands. At any one time, one could find themselves in the 90 period wherein the title to the note, the mortgage or the enforcement rights of either the note or mortgage might be clouded by the 90 period or any period of breach that occurs or is the subject of dispute or litigation thereafter].*** either cure such breach or Repurchase Event in all material respects or, except as otherwise provided in Section 2.04 of the Pooling and Servicing Agreement, either (i) **purchase** such Mortgage Loan from the Trustee or the Company, as the case may be, at a price equal to the Purchase Price for such Mortgage Loan or (ii) **substitute** a Qualified Substitute Mortgage Loan or Loans for such Mortgage Loan in the manner and subject to the limitations set forth in Section 2.04 of the Pooling and Servicing Agreement. If the breach of representation and warranty that gave rise to the obligation to repurchase or substitute a Mortgage Loan pursuant to this Section 4 was the representation set forth in clause (w) of this Section 4, then RFC shall

pay to the Trust Fund, concurrently with and in addition to the remedies provided in the preceding sentence, an amount equal to any liability, penalty or expense that was actually incurred and paid out of or on behalf of the Trust Fund, and that directly resulted from such breach, or if incurred and paid by the Trust Fund thereafter, concurrently with such payment.

5. *With respect to each Mortgage Loan, a repurchase event ("**Repurchase Event**") shall have occurred if it is discovered that, as of the date hereof, the related Mortgage was not a valid first lien on the related Mortgaged Property subject only to (i) the lien of real property taxes and assessments not yet due and payable, (ii) covenants, conditions, and restrictions, rights of way, easements and other matters of public record as of the date of recording of such Mortgage and such other permissible title exceptions as are listed in the Program Guide and (iii) other matters to which like properties are commonly subject which do not materially adversely affect the value, use, enjoyment or marketability of the Mortgaged Property. In addition, with respect to any Mortgage Loan as to which the Company delivers to the Trustee or the Custodian an affidavit certifying that the original Mortgage Note has been lost or destroyed, if such Mortgage Loan subsequently is in default and the enforcement thereof or of the related Mortgage is materially adversely affected by the absence of the original Mortgage Note, a Repurchase Event shall be deemed to have occurred and RFC will be obligated to repurchase or substitute for such Mortgage Loan in the manner set forth in Section 4 above.*

RFC hereby represents and warrants to the Company that, with respect to each Mortgage Loan, the REMIC's tax basis in each Mortgage Loan as of the Closing Date is equal to or greater than 100% of the Stated Principal Balance thereof.

[Signature Page Follows]

This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, and no other person shall have any right or obligation hereunder.

IN WITNESS WHEREOF, the parties have entered into this Assignment and Assumption Agreement as of the date first above written.

RESIDENTIAL FUNDING CORPORATION

By:

Name:

Title:

RESIDENTIAL ASSET MORTGAGE
PRODUCTS, INC.

By:

Name:

Title:

EXHIBIT A

APPENDIX E OF THE STANDARD & POOR'S GLOSSARY FOR
FILE FORMAT FOR LEVELS(R)VERSION 5.6

REVISED July 11, 2005

APPENDIX E - STANDARD & POOR'S PREDATORY LENDING CATEGORIES

Standard & Poor's has categorized loans governed by anti-predatory lending laws in the Jurisdictions listed below into three categories based upon a combination of factors that include (a) the risk exposure associated with the assignee liability and (b) the tests and thresholds set forth in those laws. Note that certain loans classified by the relevant statute as Covered are included in Standard & Poor's High Cost Loan Category because they included thresholds and tests that are typical of what is generally considered High Cost by the industry.

STANDARD & POOR'S HIGH COST LOAN CATEGORIZATION

State/Jurisdiction	-----	
	Name of Anti-Predatory Lending Applicable Anti-Predatory Lending Law/Effective Date	Category under

Arkansas	Arkansas Home Loan Protection Act, Ark. Code Ann.ss.ss.23-53-101 et seq. Effective July 16, 2003	High Cost Home Loan

Cleveland Heights, OH	Ordinance No. 72-2003 (PSH), Mun. Code	Covered Loan
	ss.ss.757.01 et seq.	
	Effective June 2, 2003	

Colorado	Consumer Equity Protection, Colo.	Covered Loan
	Stat. Ann.ss.ss.5-3.5-101 et seq.	
	Effective for covered loans offered or	
	entered into on or after January 1,	
	2003. Other provisions of the Act took	
	effect on June 7, 2002	

Connecticut	Connecticut Abusive Home Loan Lending	High Cost Home
Loan		
	Practices Act, Conn. Gen. Stat.ss.ss.	
	36a-746 et seq.	
	Effective October 1, 2001	

District of Columbia	Home Loan Protection Act, D.C. Codess.ss.	Covered Loan
	26-1151.01 et seq.	
	Effective for loans closed on or after	
	January 28, 2003	

Florida	Fair Lending Act, Fla. Stat. Ann.ss.ss.	High Cost Home Loan
	494.0078 et seq.	
	Effective October 2, 2002	

Georgia (Oct. 1, 2002 -	Georgia Fair Lending Act, Ga. Code	High Cost Home
Loan		
Mar. 6, 2003)	Ann.ss.ss.7-6A-1 et seq.	

Effective October 1, 2002 - March 6,
2003

Georgia as amended (Mar. 7, 2003 - current) Georgia Fair Lending Act, Ga. Code Ann.ss.ss.7-6A-1 et seq.
Loan Effective for loans closed on or after
March 7, 2003

HOEPA Section 32 Home Ownership and Equity Protection Act of 1994, 15 U.S.C.ss.1639, 12 C.F.R.ss.ss.226.32 and 226.34
High Cost Loan Effective October 1, 1995, amendments
October 1, 2002

Illinois High Risk Home Loan Act, Ill. Comp. Stat. tit. 815,ss.ss.137/5 et seq.
High Risk Home Loan Effective January 1, 2004 (prior to
this date, regulations under
Residential Mortgage License Act
effective from May 14, 2001)

Kansas Consumer Credit Code, Kan. Stat. Ann. ss.ss.16a-1-101 et seq.
High Loan to Value Consumer Loan (id.ss.
16a-3-207) and;
Sections 16a-1-301 and 16a-3-207
became effective April 14, 1999;
Section 16a-3-308a became effective
July 1, 1999

High APR Consumer Loan
(id.ss.16a-3-308a)

Kentucky 2003 KY H.B. 287 - High Cost Home Loan High Cost Home
Loan

Act, Ky. Rev. Stat.ss.ss.360.100 et seq.
Effective June 24, 2003

Maine Truth in Lending, Me. Rev. Stat. tit. High Rate High Fee
 9-A,ss.ss.8-101 et seq. Mortgage

Effective September 29, 1995 and as
amended from time to time

Massachusetts Part 40 and Part 32, 209 C.M.R.ss.ss. High Cost Home
Loan

32.00 et seq. and 209 C.M.R.ss.ss.40.01
et seq.
Effective March 22, 2001 and amended
from time to time

Nevada Assembly Bill No. 284, Nev. Rev. Stat. Home Loan
 ss.ss.598D.010 et seq.

Effective October 1, 2003

New Jersey New Jersey Home Ownership Security Act High Cost Home
Loan

of 2002, N.J. Rev. Stat.ss.ss.46:10B-22
et seq.
Effective for loans closed on or after
November 27, 2003

New Mexico	Home Loan Protection Act, N.M. Rev. Stat.ss.ss.58-21A-1 et seq. Effective as of January 1, 2004; Revised as of February 26, 2004	High Cost Home Loan

New York	N.Y. Banking Law Article 6-I Effective for applications made on or after April 1, 2003	High Cost Home Loan

North Carolina	Restrictions and Limitations on High Cost Home Loans, N.C. Gen. Stat.ss.ss. 24-1.1E et seq. Effective July 1, 2000; amended October 1, 2003 (adding open-end lines of credit)	High Cost Home Loan

Ohio	H.B. 386 (codified in various sections of the Ohio Code), Ohio Rev. Code Ann. ss.ss.1349.25 et seq. Effective May 24, 2002	Covered Loan

Oklahoma	Consumer Credit Code (codified in various sections of Title 14A) Effective July 1, 2000; amended effective January 1, 2004	Subsection 10 Mortgage

South Carolina Loan	South Carolina High Cost and Consumer Home Loans Act, S.C. Code Ann.ss.ss. 37-23-10 et seq.	High Cost Home

Effective for loans taken on or after
January 1, 2004

West Virginia	West Virginia Residential Mortgage Lender, Broker and Servicer Act, W. Va. Code Ann.ss.ss.31-17-1 et seq. Effective June 5, 2002	West Virginia Mortgage Loan Act Loan

STANDARD & POOR'S COVERED LOAN CATEGORIZATION

State/Jurisdiction	Name of Anti-Predatory Lending Applicable Anti-Predatory Lending Law Law/Effective Date	Category under
Georgia (Oct. 1, 2002 - Mar. 6, 2003)	Georgia Fair Lending Act, Ga. Code Ann.ss.ss.7-6A-1 et seq. Effective October 1, 2002 - March 6, 2003	Covered Loan

New Jersey Loan	New Jersey Home Ownership Security Act of 2002, N.J. Rev. Stat.ss.ss.46:10B-22 et seq. Effective November 27, 2003 - July 5, 2004	Covered Home

STANDARD & POOR'S HOME LOAN CATEGORIZATION

State/Jurisdiction	Name of Anti-Predatory Lending Applicable Anti-Predatory Lending	Category under

	Law/Effective Date	Law
Georgia (Oct. 1, 2002 - Mar. 6, 2003)	Georgia Fair Lending Act, Ga. Code Ann.ss.ss.7-6A-1 et seq. Effective October 1, 2002 - March 6, 2003	Home Loan
New Jersey	New Jersey Home Ownership Security Act of 2002, N.J. Rev. Stat.ss.ss.46:10B-22 et seq. Effective for loans closed on or after November 27, 2003	Home Loan
New Mexico	Home Loan Protection Act, N.M. Rev. Stat.ss.ss.58-21A-1 et seq. Effective as of January 1, 2004; Revised as of February 26, 2004	Home Loan
North Carolina	Restrictions and Limitations on High Cost Home Loans, N.C. Gen. Stat.ss.ss. 24-1.1E et seq. Effective July 1, 2000; amended October 1, 2003 (adding open-end lines of credit)	Consumer Home Loan
South Carolina Loan	South Carolina High Cost and Consumer Home Loans Act, S.C. Code Ann.ss.ss. 37-23-10 et seq. Effective for loans taken on or after January 1, 2004	Consumer Home

Memo on SINGLE TRANSACTION and Step Transaction Doctrine

Neil Garfield

7-31-08

In the homeowner's war, the battlefield is taking shape, A prime area of engagement is whether the securitization process represents a series of independent transactions (lender's position) or that all the transactions should be aggregated (BORROWER'S POSITION) into a single transaction. Beware of the argument that you are attempting to enforce the intermediate steps contracts. You are not. You are merely recognizing they exist. If the parties in the chain of securitization wish to state that the contracts don't do what you say they do, let THEM prove it.

For reasons explained more fully below, it is our opinion that the transactions should be aggregated into a single transaction under the three tests used by the courts to determine whether a tax event should be considered to have occurred. Given the fraudulent and deceptive practices used before and at closing, plus the TILA and other violations, the single transaction would create only one possibility for a holder in due course out of all the "holders" in the chain --- the investor who actually put up the money that was used to fund the loan.

We predict that there will be instances where the investor actually did know what was going on at the loan origination and loan closing stage and participated because of the temporary boost to the manager's performance rating in a pension fund, hedge fund or other entity. Certainly these were all, by definition, "qualified investors" who by definition are presumed to have knowledge sophistication and access to information that the borrower did not have and could not have and which the parties intentionally concealed. Thus it is possible that investors, even if they were found, might not be able to sustain their burden of showing their clean hands. If so, they might be doubly challenging for anyone to locate and tie to a particular transaction --- the information for which is within the sole care, custody and control of the participants in the chain of securitization.

- However, due to pre-selling and fulfilling the requirements of the tranches AFTER investment, it is entirely possible that one investor actually put up the money that was loaned and eventually given to the Seller in a specific purchase transaction or a specific borrower in a specific refi, while another investor received delivery of a certificate of asset backed securities that were unrelated to the trail of money downstream to a particular transaction.

- **All other parties may have been "holders" but not holders in due course under the UCC, Article 3, since the bad behavior including fraud in the inducement and fraud the execution etc. travels with the instrument unless the holder can prove they were innocent and had no knowledge. Since these parties were in many ways so interrelated, intertwined, and co-owned or operated through common service agents, it is difficult to conceive how they would meet this challenge.**

BINDING COMMITMENT TEST

Under the **binding commitment test**, we look at whether there was a binding commitment to enter into a later agreement. This is determined by looking at the agreements of the parties in "privity" and by the conduct of the parties and their obvious intent. Clearly the intent of the mortgage broker was to initiate the mortgage application with the intent that it would be accepted by an originating lender, knowing that the loan was either pre-sold, or would be sold on the application terms, or would be sold after the

loan documents themselves.

SELLING FORWARD PRESUMES SECURITIZATION

- The very existence of “selling forward” presumes securitization and the existence of one or more investors at the other end of the chain, who probably were not told that they were buying loans that did not yet exist. In fact, it appears at least in some cases, that these investors were misled in much the same way as the borrowers were down line. Many report, and some lawsuits filed by State and County authorities assert that ABS certificates were sold under the guise of securities that were ultra-short term, could not fluctuate in value and could be liquidated at par at weekly auction. See New York State Attorney General Andrew Cuomo and related suits.
- Even where the loans were completed, the description of them was at variance with reality but the intent to convey and pledge an interest in the mortgage and note is clear from the behavior of the parties.
- Dropping the underwriting and appraisal standards in order to satisfy the insatiable appetite of Wall Street for paper, regardless of how worthless it was, is also a clear indication that there was a commitment intended to be fulfilled. The behavior of the “lender” in creating high risk loans and masquerading them otherwise surely indicates that the “lender” did not perceive itself at risk, thus implying a continuing transaction in the chain wherein a third party would receive the risk.
- The payment of 2.5% premium over the total amount of the mortgage, instead of the usual practice of discounting loans, together with the accounting treatment where these transactions were kept “off balance sheet” is a clear indication that they were providing a service in chain that was leading upward to investment bankers and investors.

END RESULT TEST

Under the **end result test** the case gets even easier. The investor put up the money and the borrower signed the documents. Under the investor deal, it was backed by the borrowers' signatures and under the loan documents, it was based on money that came from the investor.

INTERDEPENDENCE TEST

Under the **interdependence test** the argument is complete. There would be no reason for any of the actions of any of the parties in the chain but for the investor purchasing securities with money that would be used for the loan. Nor would there have been any loan without the money from the investor. Had the investor funds not been the source, the underwriting, appraisal and closing standards would have complied with industry regulations and expectations.

[illegible]

The step transaction doctrine is a rule of substance over form that treats a series of formally separate but related steps as a single transaction if the steps are in substance integrated, interdependent, and focused toward a particular result. *Penrod v. Commissioner*, 88 T.C. 1415, 1428 (1987). Because the Tax Court has applied the step transaction doctrine even where it did not find a sham transaction, this doctrine should be considered in addition to the economic substance argument discussed above. See *Packard v. Commissioner*, 85 T.C. 397 (1985).

In characterizing the appropriate tax treatment of the end result, the doctrine combines steps; however it does not create new steps, or recharacterize the actual transactions

into hypothetical ones. *Greene v. United States*, 13 F.3d 577, 583 (2nd Cir. 1994); *Esmark v. Commissioner*, 90 T.C. 171, 195-200 (1988), *aff'd per curiam*, 886 F.2d 1318 (7th Cir. 1989).

Some lease stripping transactions may lend themselves to being collapsed. If so, the question is whether the transitory steps added anything of substance or were nothing more than intermediate devices used to enable the subsidiary corporation to acquire the lease property stripped of its future income, leaving the remaining rental expense and depreciation deductions to be used to offset other income. See *Helvering v. Alabama Asphaltic Limestone Co.*, 315 U.S. 179, 184-185 (1942).

Courts have developed **three tests** to determine when separate steps should be integrated. The most limited is the "**binding commitment**" test. If, when the first transaction was entered into, there was a binding commitment to undertake the later transaction, the transactions are aggregated. *Commissioner v. Gordon*, 391 U.S. 83 (1968); *Penrod*, 88 T.C. at 1429. If, however, there was a moment in the series of transactions during which the parties were not under a binding obligation, the steps cannot be integrated using the binding commitment test, regardless of the parties' intent.

Under the "**end result**" test, if a series of formally separate steps are prearranged parts of a single transaction intended from the outset to achieve the final result, the transactions are combined. *Penrod*, 88 T.C. at 1429. This test relies on the parties' intent at the time of the transactions, which can be derived from the actions surrounding the transactions. For example, a short time interval suggests the intervening transactions were transitory and tax-motivated. A short time interval, however, is not dispositive.

A third test is the "**interdependence**" test, which considers whether the steps are so interdependent that the legal relations created by one transaction would have been fruitless without completing the series of transactions. *Greene*, 13 F.3d at 584; *Penrod*, 88 T.C. at 1430. One way to show interdependence is to show that certain steps would not have been taken in the absence of the other steps. Steps generally have independent significance if they were undertaken for valid business reasons.

In this transaction, the nature of B and C's involvement may support the conclusion that steps involving B and C should be eliminated from the transaction. In this event, D could be required to recognize the accelerated income arising from the purported sale of the rent stream to the bank. Therefore, through the consolidated return, E would recognize the income, and thereby match the income with the deductions.

The "step transaction doctrine," under which "interrelated yet formally distinct steps in an integrated transaction may not be considered independently of the overall transaction," forms a vital part of our tax law.

The scope of this extra-statutory "doctrine" in particular cases can be quite uncertain; nevertheless, the parameters of its application in some transactional forms have become well-accepted and, in those cases, some certainty has been attained by taxpayers and the Internal Revenue Service ("IRS") regarding which individual steps of a "larger" transaction would and would not be granted independent significance for tax purposes. In Revenue Ruling 2001-46 (October 15, 2001), however, the IRS arguably changed its approach to analyzing one common form of corporate asset acquisition, described below, under the step transaction doctrine.

An acquiring corporation ("X") wishing to effect an acquisition of the assets of a widely-held target corporation ("T") may form a wholly owned subsidiary ("Y"). Pursuant to an overall "plan," Y will merge into T, with the shareholders of T tendering their T stock in exchange for cash, stock, or securities of X (or some combination thereof), following which T will merge into X.

Under longstanding guidance from the IRS, the "transitory steps" of the formation of Y and its merger into T were ignored; these transactions in which X became, at least momentarily, the sole shareholder of T were treated as an acquisition of T stock by X directly from the shareholders of T. By contrast, in analyzing the consequences of that "direct acquisition" of stock, the subsequent "upstream" merger of T into X was treated as a separate transaction, rather than as part of an overall "plan."

The effect of this analysis was to permit, in those cases in which the portion of the consideration received by the shareholders of T which did not consist of stock in X was sufficiently preponderant, treatment of the acquisition as a "qualified stock purchase" and the making by X of an election under section 338 of the Internal Revenue Code ("Code") to "step-up" the basis of T's assets to X's acquisition cost.

In Rev. Rul. 2001-46, however, the IRS held that all the steps described above, including the merger of T into X, would be treated as a single transaction, which could then be treated a statutory merger of T into X, if, under the circumstances, an actual merger of T into X would have qualified as a nontaxable reorganization under Code section 368(a)(1)(A).

EXECUTION COPY

ASSIGNMENT AND ASSUMPTION AGREEMENT

ASSIGNMENT AND ASSUMPTION AGREEMENT, dated as of February 27, 2006, between Residential Funding Corporation, a Delaware corporation ("RFC") and Residential Asset Mortgage Products, Inc., a Delaware corporation (the "Company").

Recitals

- A. RFC has entered into seller contracts ("Seller Contracts") with the seller/servicers pursuant to which such seller/servicers sell mortgage loans to RFC.
- B. The Company wishes to purchase from RFC certain Mortgage Loans (as hereinafter defined) originated pursuant to the Seller Contracts.
- C. The Company, RFC, as master servicer, and JPMorgan Chase Bank, N.A., as trustee (the "Trustee"), are entering into a Pooling and Servicing Agreement dated as of February 1, 2006 (the "Pooling and Servicing Agreement"), pursuant to which the Trust will issue Mortgage Asset-Backed Pass-Through Certificates, Series 2006-RZ1 (the "Certificates") consisting of fifteen classes designated as Class A-1, Class A-2, Class A-3, Class M-1, Class M-2, Class M-3, Class M-4, Class M-5, Class M-6, Class M-7, Class M-8, Class M-9, Class SB, Class R-I and Class R-II, representing beneficial ownership interests in a trust fund consisting primarily of a pool of fixed and adjustable rate one- to four-family mortgage loans identified on Exhibit F to the Pooling and Servicing Agreement (the "Mortgage Loans").

“The MERS situation seems to have resulted from the establishment of the corporation and agreements with lenders without the participation of the Florida Legislature or the Supreme Court in its rule making role. The fact that the market might find it easier to operate with the real party in interest somewhere in the background of a foreclosure lawsuit is not a compelling reason to modify the traditional requirements of a party to establish status to bring litigation.”
In the end, the court concluded that “beneficial interest to sue” cannot exist separately from other beneficial interests in the note.

Daily Development for **Friday, September 16, 2005**

by: Patrick A. Randolph, Jr.

Elmer F. Pierson Professor of Law

UMKC School of Law

Of Counsel: Blackwell Sanders Peper Martin

Kansas City, Missouri

dirt@umkc.edu

MORTGAGES; FORECLOSURE; PROCEDURE; STANDING TO FORECLOSE:

Florida trial court rules that MERS lacks status to foreclose as representative of lender even when MERS holds the note.

In re Mortgage Electronic Registrations Systems, Inc., Cir. Ct. Pinellas County, Fla., Walt Logan, Judge, 8/18/05) (Numerous case numbers)

As most readers of this list know, the **Mortgage Electronic Registration System, MERS, was established about fifteen years ago to facilitate the rapid transfer of mortgages for the purpose of developing large pools to support securitization of**

mortgages. All parties participating in the MERS system (primarily mortgage bankers) agree to recognize as the owner of a note and mortgage that party shown on the MERS register. Although, originally, MERS functioned without recording and without taking possession of the note, more recently MERS has both recorded itself as the record owner of the mortgage at the time of the original loan funding, or shortly thereafter, and has also begun to take possession of a note endorsed in blank.

One assumes that the various parties who rely upon MERS as the registry of ownership of mortgage loans that they make sign agreements that make very plain the powers that MERS has to foreclose in their name. Use of MERS has become the standard for residential mortgages, over 95% of which are securitized, and for securitized commercial mortgage as well. But this Florida case puts at least MERS' foreclosure arrangements very much at issue.

This order dismissed foreclosures in 28 pending foreclosures brought by MERS in Pinellas County. In each case, MERS was listed as a plaintiff or co-plaintiff seeking to collect on a note via mortgage foreclosure. In the end, the court dismissed all 28 cases for want of a proper party plaintiff.

ATTORNEY FEES

your foreclosure could cost \$100,000?!?

August 22, 2008 · No Comments

In answer to a reader's question to me after receiving a comment from an attorney along those lines, I answered—

100K? If the defensive and offensive strategies proposed in my site are correct, then the cost of defense and offense should not approach that figure. If the fees DO approach that figure it would be the result of failure of the Court to agree with what I perceive to be the essential, basic elements and requirements of commercial, property and securities law. In that event, defensive maneuvering for purposes of delay COULD bring fees up to that level, but I would question whether it was worth it. Naturally I defer, as you should, to the judgment of your local counsel. However, the essence of the strategies I endorse all force the burden onto the party seeking enforcement of the note and mortgage. If successful, this will most likely happen at the very beginning of the case and lead to early resolution or settlement.

As for burrowing through my blog, I confess that it evolved a little too quickly and is somewhat chaotic in its user interaction — i.e., finding what you want — and we are working on that. However, unless your attorney is satisfied that he has a thorough knowledge of securitization of liabilities and the resulting intersection of the logistics of transferring ownership, possession or rights to a note and mortgage, and that he has a thorough understanding of the revenue flow and the creation of co-obligors as one moves up the chain of securitization, then it would behoove him to make the effort, or to use Lexis or some other research service to get up to speed. What we have found, to our dismay, is that the predilection of attorneys to follow the normal chain events, as they existed prior to the mortgage meltdown of 2001-2008, has caused them to overlook the reality facing their clients and undermined their confidence and ability to force the opposition (lenders or mortgage servicers) to face that reality.

In any event, a quick look through the blog or some search engine that catches this sort of things would reveal that everything I have alleged, proposed, suggested and even hypothesized has been and is being used by everyone from pro se homeowners to attorney generals of many of the States, all so far, to great success. I therefore would recommend that you have a frank and earnest discussion with your attorney about these successes in many states and that the issue of the state of things prior to 2001 be explored and understood to be virtually irrelevant to current foreclosure litigation. Then, remembering that you are not just the client, you are the boss, you could decide whether you have the right “diagnosis” and you are pursuing the right “treatment.”

Letter of Objection to Trustee in Non-Judicial Sale States

The Trustee has an obligation of fair dealing with both the borrower and the lender. All too often the Trustee's loyalties follow the money, for it is the Lender that pays the bills. A Notice of Non-Judicial sale is very much like a Motion for Summary Judgment in Judicial Foreclosure States. It is designed to take the case off the docket and get the sale over with as little trouble as possible --- where the facts are not in dispute, the borrower is in default, the lender has followed all the necessary procedures, and the Lender is in fact collecting on a debt that is owed. The Lender, by having the property sold is recovering part or all of the debt owed to the lender.

In the Mortgage Meltdown context however, everything is turned on its head for mortgages originated between 2001-2008. The Lender has already been paid, doesn't own the note and is attempting to score a windfall by getting the property in addition to the money it received from the REAL source of the financing. And the Lender has received an undisclosed fee of around 2.5% of the total "loan." The mortgage broker, the appraiser and other participants were also overpaid by as much as seven or eight times their normal fees to keep their mouths shut. The borrower's reliance on the good faith of these people was misplaced.

Thus when a property owner receives a notice of delinquency, notice of default or notice of sale, the borrower should write a letter that says something along these lines (subject to checking the verbiage with local counsel):

Dear Trustee:

I am in receipt of (fill in the notice you have received) dated (fill in the date). I hereby object to the Notice and request that you send a copy of this letter to your insurance carrier and all other interested parties as described herein for the following reasons:

1. There is no delinquency or default. The Lender has been paid in full plus a fee for standing in for an undisclosed third party lender that was not properly registered or regulated as a financial institution or lender at the time the transaction took place.

2. The Lender has failed to state the name or address of the holder in due course, John Does 1-1000, being the holders of certificates of asset backed securities, which are backed by the security instrument (mortgage) on the subject residential property.

3. The Lender does not own, possess or control the note or the mortgage, which has been satisfied in full. Demand is herewith made for satisfaction of mortgage to be filed in the appropriate county records.

4. Your authority as Trustee has also been transferred to the Trustee of the pooled mortgages and/or notes on various properties, real and personal, that

were included in an asset pooled that was eventually securitized and sold to investors, who along with others in the chain of securitization acquired rights and obligations to the note, mortgage, and stream of revenue eventually due to the investor.

5. Because of the known presence of necessary and indispensable parties to any dispute that the true holders in due course might have against me, only a judicial proceeding in which all parties are included will provide a fair determination of the rights, obligation and title to the property, mortgage and note.

6. The “loan closing” was in fact a scheme to trick me into issuing a negotiable instrument that was pre-sold to investors as an unregulated security. The parties and their fees were not revealed nor was the true APR disclosed, as it was inflated considerably by the intentional overstatement of the appraisal on the property.

7. The title agent, which might well be the same as the Trustee also has insurance for errors and omissions and the title insurance company that issued the policy will have total liability for this fraudulent transaction to the extent it had knowledge through its agents of the fraudulent scheme.

The totality of the transaction violates numerous state and federal laws including usury, Truth in Lending, deceptive business practices, and administrative standards for the practice of professions.

Therefore, please confirm the filing and recording of the satisfaction of mortgage, send the original note back to me (or tell me where it is), and confirm the retraction of the attempt to collect a debt which is incorrectly stated, improperly computed, improperly obtained, and fraudulently produced and transmitted.

Sincerely,

FLORIDA STATUTE 57.105 LETTER TO ATTORNEY
LETTERHEAD

TODAY'S DATE

VIA FAX AND MAIL
FAX NUMBER

LAWYER ADDRESS

Re: NAME OF CASE AND CASE NUMBER, IF ANY: **FORMAL STATUTORY
DEMAND TO DISMISS FORECLOSURE ACTION WITH PREJUDICE, CLEAR
TITLE TO REAL PROPERTY, REFUND MONIES PAID, AND FOR PAYMENT
OF ATTORNEYS' FEES AND COSTS PURSUANT TO FLA.STAT. SEC. 57.105**

Dear LAWYER'S NAME:

This letter is being provided to you, the Law Offices of NAME OF FIRM, and your client NAME OF "LENDER" (Plaintiff in the Action identified herein) as formal notice, pursuant to the matters herein and Fla.Stat. sec. 57.105, of this Firm's client NAME OF BORROWER (hereinafter Borrower) demand that you immediately and forthwith dismiss, with prejudice, that certain civil action styled COMPLETE STYLE OF CASE E.G. JONES BANK V SMITH, CASE # IN THE 20TH CIRCUIT OF THE COUNTY OF XXXXX, STATE OF XXXXX, hereafter referred to as the "Action"); to provide clear title to the real property the subject of the Action; for refund of all monies paid by Borrower incident to the alleged "loan" the subject of the Action; and for payment of attorneys' fees and costs which are awardable under various Federal and state statutes violated by your filing of the Action. This letter is also being sent as formal notice of Borrower's Motion for Sanctions (copy attached hereto) which will be filed and set for hearing unless, pursuant to Fla.Stat. sec. 57.105(4), within twenty-one (21) days of today, Borrower's demands as set forth herein are not complied with in writing confirmed by fax receipt, by this Firm, of this notice of this date necessary documents to legally effect the demands made herein.

The facts supporting this demand and the attached Motion are as follows, which are admissions by you, as an agent of the above-referenced Law Offices , in the Complaint which you filed:

- (a) On or about DATE, you, as an agent and attorney of the above-referenced Law Offices, caused a civil action for foreclosure and to "enforce loan documents" to be filed in the xxth Judicial Circuit in and for XXXXXXXXX County, Florida, which has been assigned case number XXXXXXXXXXXXX;
- (b) In paragraph "X." of Count X of the Complaint, you affirmatively represent to the Court that "The Plaintiff owns and holds the Note and Mortgage";
- (c) In paragraph "X" of Count X, you affirmatively represent to the Court that the mortgage was "subsequently" assigned to the Plaintiff "by virtue of an assignment to be recorded" (that being some time in the future);
- (d) In paragraph "XX" of Count XX, you affirmatively represent to the Court that "The Plaintiff is not presently in possession of the Note and Mortgage" and "the Plaintiff cannot reasonably obtain possession of the Note and Mortgage because THEIR whereabouts cannot be determined (original emphasis);
- (e) In paragraph "XX" of Count XX, you affirmatively represent to the Court that "The Plaintiff will agree to the entry of a Final Judgment of Foreclosure wherein it will be required to indemnify and hold harmless the Defendant(s) from any loss they [sic] may occur by reason of a claim by another person to

enforce the lost Note and Mortgage.”; [Editor’s note: So far this is a very unique allegation. It probably does not appear in your pleadings].

(f) The Action thus inconsistently but affirmatively alleges, in Count X, that “Plaintiff owns and holds the Note and Mortgage” when in fact the admissions in Count II demonstrate, by the allegations of paragraphs “XX” and “XX” of the Complaint, that the Plaintiff **DOES NOT** and **CANNOT** legally establish possession or ownership of the Note or the Mortgage and that same is/are in the possession of an unknown party or parties;

(g) A copy of the Note is not even attached to the Complaint (only an alleged “ledger of loan”);

(h) By virtue of the admissions of the Plaintiff in paragraphs “XX”, “XX”, and “XX” of the Complaint, the Plaintiff has actual knowledge that it never, at any time material, had possession of either the mortgage or the note as same were sold, assigned, or transferred as part of the single-transaction securitization process which resulted in the subject mortgage and/or note being sold as parceled obligations and becoming part of one or more tranches within a special investment vehicle;

(i) that the Plaintiff cannot establish that the subject note or mortgage is owned or controlled by the Plaintiff “indenture trustee” for unnamed holders of a series of asset-backed bonds (a copy of which are not even attached to the Complaint);

(j) As a direct and proximate result of the transaction referred to in paragraph “h” above, the Plaintiff does not and cannot establish legal standing to even institute a foreclosure action;

(k) As such, the allegation by the Plaintiff in paragraph “5” of the Complaint constitutes matters which are completely devoid of factual or legal support and are thus “frivolous” within the meaning of Fla.Stat. sec. 57.105;

(l) As the primary and threshold issue of legal standing to institute the Action cannot be satisfied (which was known to you, the Law Offices of David J. Stern, P.A., and the Plaintiff at the time that the Action was instituted), the Action is a patently frivolous claim within the meaning of Fla.Stat. sec 57.105 and the filing and prosecution thereof constitutes a fraud upon the Court.

Your client and your Firm are thus charged with actual notice of the filing of an frivolous claim, as you, your client, and the Law Offices of David J. Stern, P.A. knew or should have known that the Action was both not supported by the material (and record) facts necessary to establish the claim for foreclosure and would not (and could not) be supported by the application of then-existing law to the material (and record) facts.

As such, this Firm has been directed to file and set for hearing, after the expiration of twenty-one (21) days from today (that being DATE), the attached Motion for Sanctions and to seek attorneys’ fees from both your client and your Firm if the demands set forth herein for immediate dismissal of the Action with Prejudice, providing of clear title to the property the subject of the action, refund of all monies paid by Borrower in connection with the original “loan” the subject of the Action, and payment of all attorneys’ fees and costs associated with this demand are not complied with in writing by the close of business (5:00 p.m.) DAY, DATE.

Sincerely,

AFFIRMATIVE DEFENSES TO FORECLOSING PARTY'S CLAIM OF "LOST NOTE"

A common thread which is emerging in foreclosure cases is the claim of the plaintiff (a/k/a the "foreclosing party") that they have "lost the note and/or mortgage". In such a case, the foreclosing party may file a Affidavit as to the lost note and mortgage in a purported attempt to cure the material defect of proof of ownership and production of the original note and mortgage. This position should be met with a vigorous challenge based on what is being discovered in case after case: that the "plaintiff" does not and never had the original note OR mortgage, which was probably sold or assigned more than once and may today be somewhere in the Cayman Islands as part of a specialized investment vehicle.

Thus, when a borrower or borrower's attorney is met with such a position, several defenses should be considered. These "affirmative defenses" may take the form of or be asserted along the following lines, provided they are asserted in good faith:

1. Upon information and belief, the mortgage note has been paid in whole or in part by one or more undisclosed third party(ies) who, prior to or contemporaneously with the closing on the "loan", paid the originating lender in exchange for certain unrecorded rights to the revenues arising out of the loan documents.
2. Upon information and belief and in connection with the matters the subject of paragraph "1" above, Plaintiff (foreclosing party) has no financial interest in the note or mortgage.
3. Upon information and belief, the original note was destroyed or was transferred to a structured investment vehicle which may be located offshore, which also has no interest in the note or mortgage or revenue thereunder.
4. Upon information and belief, the revenue stream deriving from the note and mortgage was eviscerated upon one or more assignments of the note and mortgage to third parties and parsing of obligations as part of the securitization process, some of whom were joined as co-obligors and co-obligees in connection with the closing.
5. To the extent that Plaintiff has been paid on the underlying obligation or has no legal interest therein or in the note or mortgage, or does not have lawful possession of the note or mortgage, Plaintiff's allegations of possession and capacity to institute foreclosure constitute a fraud upon the court.
6. Based upon one or more of the affirmative defenses set forth above, Defendant (borrower's name) is entitled to a release and satisfaction of the note and mortgage and dismissal of the foreclosure claim with prejudice

2009 California Rules of Court

Rule 3.1320. Demurrers

(a) Grounds separately stated

Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses.

(Subd (a) amended effective January 1, 2007.)

(b) Demurrer not directed to all causes of action

A demurrer to a cause of action may be filed without answering other causes of action.

(Subd (b) adopted effective January 1, 2007.)

(c) Notice of hearing

A party filing a demurrer must serve and file therewith a notice of hearing that must specify a hearing date in accordance with the provisions of Code of Civil Procedure section 1005.

(Subd (c) amended and relettered effective January 1, 2007; adopted as subd (b) effective January 1, 1984; previously amended effective July 1, 2000.)

(d) Date of hearing

Demurrers must be set for hearing not more than 35 days following the filing of the demurrer or on the first date available to the court thereafter. For good cause shown, the court may order the hearing held on an earlier or later day on notice prescribed by the court.

(Subd (d) amended and lettered effective January 1, 2007; adopted as part of subd (b) effective January 1, 1984.)

(e) Caption

A demurrer must state, on the first page immediately below the number of the case, the name of the party filing the demurrer and the name of the party whose pleading is the subject of the demurrer.

(Subd (e) amended and relettered effective January 1, 2007; adopted as subd (c) effective January 1, 1984.)

(f) Failure to appear at hearing

When a demurrer is regularly called for hearing and one of the parties does not appear, the demurrer must be disposed of on the merits at the request of the party appearing unless for good cause the hearing is continued. Failure to appear in support of a special demurrer may be construed by the court as an admission that the demurrer is not meritorious and as a waiver of all grounds thereof. If neither party appears, the demurrer may be disposed of on its merits or dropped from the calendar, to be restored on notice or on terms as the court may deem proper, or the hearing may be continued to such time as the court orders.

(Subd (f) amended and relettered effective January 1, 2007; adopted as subd (d) effective January 1, 1984.)

(g) Leave to answer or amend

Following a ruling on a demurrer, unless otherwise ordered, leave to answer or amend within 10 days is deemed granted, except for actions in forcible entry, forcible detainer, or unlawful detainer in which case 5 calendar days is deemed granted.

(Subd (g) amended and relettered effective January 1, 2007; adopted as subd (e) effective January 1, 1984.)

(h) Ex parte application to dismiss following failure to amend

A motion to dismiss the entire action and for entry of judgment after expiration of the time to amend following the sustaining of a demurrer may be made by ex parte application to the court under Code of Civil Procedure section 581(f)(2).

(Subd (h) amended and relettered effective January 1, 2007; adopted as subd (f) effective January 1, 1984; previously amended effective July 1, 1995.)

(i) Motion to strike late-filed amended pleading

If an amended pleading is filed after the time allowed, an order striking the amended pleading must be obtained by noticed motion under Code of Civil Procedure section 1010.

(Subd (i) amended effective January 1, 2009; adopted as part of subd (f) effective January 1, 1984; previously amended effective July 1, 1995; previously amended and lettered effective January 1, 2007.)

(j) Time for motion to strike, demur, or otherwise plead after demurrer

Unless otherwise ordered, defendant has 10 days to move to strike, demur, or otherwise plead to the complaint or the remaining causes of action following:

(1) The overruling of the demurrer;

(2) The amendment of the complaint or the expiration of the time to amend if the demurrer was sustained with leave to amend; or

(3) The sustaining of the demurrer if the demurrer was sustained without leave to amend.

(Subd (j) amended and relettered effective January 1, 2007; adopted as subd (g) adopted effective July 1, 1984.)

Rule 3.1320 amended effective January 1, 2009; adopted as rule 325 effective January 1, 1984; previously amended effective July 1, 1984, July 1, 1995, and July 1, 2000; previously amended and renumbered effective January 1, 2007.

Rule 3.1327. Motions to quash or to stay action in summary proceeding involving possession of real property

(a) Notice

In an unlawful detainer action or other action brought under chapter 4 of title 3 of part 3 of the Code of Civil Procedure (commencing with section 1159), notice of a motion to quash service of summons on the ground of lack of jurisdiction or to stay or dismiss the action on the ground of inconvenient forum must be given in compliance with Code of Civil Procedure sections 1013 and 1167.4.

(b) Opposition and reply at hearing

Any opposition to the motion and any reply to an opposition may be made orally at the time of hearing or in writing as set forth in (c).

(c) Written opposition in advance of hearing

If a party seeks to have a written opposition considered in advance of the hearing, the written opposition must be filed and served on or before the court day before the hearing. Service must be by personal delivery, facsimile transmission, express mail, or other means consistent with Code of Civil Procedure sections 1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties no later than the close of business on the court day before the hearing. The court, in its discretion, may consider written opposition filed later.

Rule 3.1327 adopted effective January 1, 2009.

Rule 3.1347. Discovery motions in summary proceeding involving possession of real property

(a) Notice

In an unlawful detainer action or other action brought under chapter 4 of title 3 of part 3 of the Code of Civil Procedure (commencing with section 1159), notice of a discovery motion must be given in compliance with Code of Civil Procedure sections 1013 and 1170.8.

(b) Opposition and reply at hearing

Any opposition to the motion and any reply to an opposition may be made orally at the time of hearing or in writing as set forth in (c).

(c) Written opposition in advance of hearing

If a party seeks to have a written opposition considered in advance of the hearing, the written opposition must be served and filed on or before the court day before the hearing. Service must be by personal delivery, facsimile transmission, express mail, or other means consistent with Code of Civil Procedure sections 1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties no later than the close of business on the court day before the hearing. The court, in its discretion, may consider written opposition filed later.

Rule 3.1347 adopted effective January 1, 2009.

Rule 3.1351. Motions for summary judgment in summary proceeding involving possession of real property

(a) Notice

In an unlawful detainer action or other action brought under chapter 4 of title 3 of part 3 of the Code of Civil Procedure (commencing with section 1159), notice of a motion for summary judgment must be given in compliance with Code of Civil Procedure sections 1013 and 1170.7.

(b)Opposition and reply at hearing

Any opposition to the motion and any reply to an opposition may be made orally at the time of hearing or in writing as set forth in (c).

(c)Written opposition in advance of hearing

If a party seeks to have a written opposition considered in advance of the hearing, the written opposition must be filed and served on or before the court day before the hearing. Service must be by personal delivery, facsimile transmission, express mail, or other means consistent with Code of Civil Procedure sections 1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties no later than the close of business on the court day before the hearing. The court, in its discretion, may consider written opposition filed later.

Rule 3.1351 adopted effective January 1, 2009.

WHY THE LENDERS HAVE A PROBLEM THEY CAN'T SOLVE AND HOW THAT BENEFITS HOMEOWNERS

I like to eat. I think a lot of people do. And I like the food processor in my kitchen. So while I was thinking about how to make the Wall Street scheme simple, I came upon the following recipe:

Suppose you took your food processor out, took the cover off and threw in a whole apple. Then toss in a whole orange, some broccoli, a chicken breast, a piece of filet Mignon, some carrots, onions and a few cloves of garlic. Now put the cover back on and set it on puree for about 3 minutes. Now take the cover off and try to take out the apple --- the whole apple, just like it was before you put into the processor. You can't do it. In foreclosure litigation that is the lost note and lost assignment. You might bits and pieces, but finding the whole thing is very unlikely.

Of course the mortgage fraud was much more complicated than that. But just imagine you called the concoction you just made Gourmet Luscious Organic Pate, whose acronym would appropriate be called GLOP. On Wall Street they called it certificates of asset backed securities. And among insiders it was later referred to as "toxic waste." You package it up in a beautiful container, sell it in only the best upscale stores for \$29.95 for 2 ounces. You list the ingredients and proudly proclaim the value proposition: great food, nice and tasty, and certified organic. The buyer has paid about 100 times the cost. A really great business.

Now assume you are wildly successful and you run out of ingredients that are fresh. So to cut corners and not interrupt the growth of your budding business you get to the point where you are buying ingredients that are passed expiration date and because of the sudden growth of your business, your handling of the food is not exactly up to par with some food items laying around unrefrigerated for longer than they should be.

So now, to make sure you don't get in trouble if anyone gets sick you get an "independent" assessment of the quality of your food together with the growers' certification that the food is organic and was grown only the best conditions. In Wall Street they call these independent security ratings from Moody's Fitch et al and on the Real Estate side, they call this an independent "appraisal."

You have achieved plausible deniability, the cornerstone of Wall Street finance. As demand increases for the GLOP, and you are collecting more and more money, you need to give the buyers something for their money even if it wasn't what they thought they were buying. So you cut more and more corners substituting ingredients, leaving some out and generally turning out a stinking mess that eventually makes a lot of people sick. But it takes a while for them to realize what made them sick and in the meanwhile you sell the company for millions, move to Bora Bora, and live your life in leisure.

The "free market" enthusiasts see nothing wrong with that. I'm afraid I don't agree.

Comment: "Foreclosure Defense: Why People are Ignoring Their Rights"

I had court today, the judge will be making a decision, I'm hoping to stay the case. I want to see the note, if they actually produce it then i may be screwed, if they don't produce it then I will have some options. My attorney thought it would be good to have the note delivered to the

banks attorney and we can go to his office to inspect it, what do you think? so much to learn in so little time.

ANSWER: Well you might be screwed and you might not. Probably not.

First of all the Lenders are on the run now. No where to hide. We have tried to come up with possible defenses, and the only one that comes up is if they roll over on the mortgage aggregators, investment bankers and others. Not likely unless they are granted immunity by DOJ and local law enforcement.

Just because they get the note doesn't mean they can enforce it and doesn't mean they can avoid fraud charges.

The note itself should be endorsed to an assignee, if there was one. In 99.9% of all cases there was an assignee. In most cases the note itself does not contain the endorsement.

The usual scenario is to attach the "note" to an assignment. To be effective the "assignment" must be recorded. If it isn't recorded and the note is not endorsed, then the money the lender has received for the note is payment in full by a third party. The third party might and might not have rights to enforce the note but the lender definitely doesn't because the lender has been paid in full.

The third party is probably barred from enforcement because of prima facie non-disclosure of the real party in interest (the source of funding) the fact that the "lender" was a stand-in for an unregulated and illegal "financial institution" and the fact that the "lender" received a fee equal to 2.5% (industry average) of the entire balance of the note.

The third party is further barred because the third party re-assigned the "note" which was eventually placed in a financial food processor with thousands of other obligations (including other "mortgages," auto loans, student loans etc.) and then the GOOP was scooped out to fill tranches in an SPV. Frequently the documents referring to a particular loan transaction were pooled, sliced, diced and pureed and then divided into multiple tranches of the same SPV and into multiple tranches of multiple SPVs.

The result was that the investor (the only one in the chain who has a possible claim to being holder in due course if he/she/it didn't know what was going on) who purchased the certificates on "asset-backed" security purchased thin air. But for a while they still got paid because some of the proceeds of the security sale was put in a reserve pool and some of the payments were insured by AMBAC et al, and some were paid by virtue of credit default swaps. The investor paid a premium far above the value of the note you signed. That money was used to pay fees that were undisclosed to him and the borrower to pay the investor back.

Thus in almost every case the figure claimed as being in default is either false or not susceptible of being proved. Because the party attempting to foreclose in fact does not have any document from an actual holder in due course giving him the right to enforce the note. Nor does the "lender" admit to being potentially liable on counterclaims that relate to the behavior not only of the "lender" but all the parties (fraudster) upstream in this largest Ponzi scheme of all time.

Now why did I put "note" in quotations? Because the document attached to the assignments was NOT the real note in many or most cases. It was a blank note forged in blank with the signature of a person who somewhere signed at least a mortgage application and probably closed, but included people who never closed (see Wells Fargo Case on News Page this Blog). **So the note that was assigned was not your note, it was a forged substitution. Why else would all these notes disappear? It's like holding money. why would you rip up a ten dollar bill unless you had told someone that it was a \$100 bill and now had to show it. The notes were destroyed because they were evidence of criminal and civil fraud.**

Bottom Line: Don't get stalled by production of the note. It might not be real, and possession only means they are a holder. Being a holder creates a presumption of being a holder in due course which is easily rebutted by demonstrating that there is probable cause to believe that the loan documents were procured by fraud, deceit and non-disclosure --- an easy task in this environment, especially by reference to sworn filings on public record with the SEC.

MOTION TO DISMISS FOR LACK OF JURISDICTION

To challenge them from even defending, you say that they have no right to be there. Your objective is to force them to go to judicial foreclosure from non-judicial on the basis that (1) they have no interest, ownership or authority to foreclose and (2) because the loan was securitized and the real parties in interest are the ones who provided the funding for the transaction and to whom the note and mortgage have been transferred through their ownership of certificates of asset backed securities (the asset backing them being your mortgage). If they have no problem producing the real parties in interest then they should have no problem with doing a judicial foreclosure. But their problem is going to be that there are about dozen links in the chain of blame and each link has acquired rights and obligations with respect to the title to the note and mortgage and the stream of revenue. Some of the links not only collected money but are obligated to pay it — thus putting the case at issue as to whether the investor has in fact been paid the monthly payments or more.

Bottom Line: Trustee owes duty to borrower too; Trustee knows that lender was paid in full plus a fee of 2.5%. Lender has ordered foreclosure anyway, thus seeking not only the money which they have had from the beginning, but the property too plus unauthorized fees and costs. You want to position yourself to be saying that you are preventing a windfall to the Trustee and the nominal lender who is giving the instructions to foreclose on the property. Avoid the argument that YOU are seeking the windfall by saying that at this juncture, although we have plenty of defenses, we are not contesting the existence of the note and mortgage nor of the obligation — we are contesting whether THESE people trying to foreclose are entitled to get the property in addition to having already been paid by a third party — and that the third party might have the same claim against the same borrower (you), which is why there is an absence of necessary and indispensable parties and why they MUST go into judicial foreclosure.

predatory-lending-practices-cardozo-law-review-ssrn-id929118

**FLORIDA MOTION TO DISMISS FOR LACK OF SUBJECT MATTER
JURISDICTION**

**IN THE CIRCUIT COURT OF THE 9TH JUDICIAL CIRCUIT, IN AND FOR ORANGE
COUNTY, FLORIDA**

CASE NO. XXXXX
XXXXXX
Plaintiff,
v.
XXXXXXXXX
Defendant.

_____/

**DEFENDANT'S MOTION TO DISMISS FOR LACK
OF SUBJECT MATTER JURISDICTION**

Defendant, XXXX X XXX, moves the Court to dismiss for lack of subject matter jurisdiction under authority of Florida Rules of Civil Procedure, rule 1.140(b)(1) and shows:

1. This Court lacks subject matter jurisdiction to proceed. Subject matter jurisdiction has never been established on the record. The jurisdictional question can be raised at any time and can never be time-barred. DeClaire v. Yohanan, 453 So. 2d 375 (Fla. 1984).
2. The Court should dismiss this action pursuant to Rules 1.210(a) and 1.140(7) of the Florida Rules of Civil Procedure because the record is clear from the promissory note submitted as evidence that a person other than Plaintiff is the true owner of the claim sued upon and that Plaintiff is not the real party in interest and is not shown to be authorized to maintain this foreclosure action.
3. In Florida, the prosecution of a foreclosure action is by the owner and holder of the mortgage and the note. Plaintiff is not entitled to maintain this action in which it seeks to foreclose on a note which Plaintiff does not own. Your Construction Center, Inc. v. Gross, 316 So. 2d 596 (Fla. 4th DCA 1975)
4. Plaintiff, Midland Mortgage Co., alleges that it owns and holds the subject note and mortgage pursuant to an assignment. There is no evidence or testimony supporting this. In fact, all evidence and testimony specifically and conclusively demonstrates the opposite.
5. Rule 1.210(a) of the Florida Rules of Civil Procedure provides, in pertinent part: Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought... Plaintiff in this action meets none of these criteria.
6. Standing requires that the party prosecuting the action have a sufficient stake in the outcome and that the party bringing the claim be recognized in the law as being a real party in interest entitled to bring the claim. This entitlement to prosecute a claim in Florida courts rests exclusively in those persons granted by substantive law, the power

to enforce the claim. *Kumar Corp. v Nopal Lines, Ltd, et al*, 462 So. 2d 1178, (Fla. 3d DCA 1985)

7. No Florida case holds that a separate entity can maintain suit on a note payable to another entity unless the requirements of Rule 1.210(a) of the Florida Rules of Civil Procedure and applicable Florida law are met. *Corcoran v. Brody*, 347 So. 2d 689 (Fla. 4th DCA 1977)

8. Fla.R.Civ.P. Rule 1.130(a) requires a Plaintiff to attach copies of all bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought to its complaint. Plaintiff has failed to attach any document that supports its pleadings.

9. As a result, although Plaintiff names Midland Mortgage Co. as the owner of the promissory note, the promissory note submitted as evidence conflicts with this allegation, making no mention of Midland. Plaintiff's own witness, Jason Lane, has testified at his deposition and in a hearing that Midland merely services the mortgage for an unknown entity.

10. When exhibits are inconsistent with Plaintiff's allegations of material fact as to who the real party in interest is, such allegations cancel each other out. *Fladell v. Palm Beach County Canvassing Board*, 772 So.2d 1240 (Fla. 2000); *Greenwald v. Triple D Properties, Inc.*, 424 So. 2d 185, 187 (Fla. 4th DCA 1983); *Costa Bella Development Corp. v. Costa Development Corp.*, 441 So. 2d 1114 (Fla. 3rd DCA 1983).

11. Plaintiff is not the real party in interest and is not shown to be authorized to bring this action. In re: *Shelter Development Group, Inc.*, 50 B.R. 588 (Bankr.S.D.Fla. 1985) [It is axiomatic that a suit cannot be prosecuted to foreclose a mortgage which secures the payment of a promissory note, unless the Plaintiff actually holds the original note, citing *Downing v. First National Bank of Lake City*, 81 So.2d 486 (Fla. 1955)]; *Your Construction Center, Inc. v. Gross*, 316 So. 2d 596 (Fla. 4th DCA 1975), See also 37 Fla. Jur. Mortgages and Deeds of Trust '240 (One who does not have the ownership, possession, or the right to possession of the mortgage and the obligation secured by it, may not foreclose the mortgage)

12. Plaintiff's pleadings fail to contain sufficient facts to establish who the actual Plaintiff is and its relationship to Defendant and to the claim for foreclosure of the subject promissory note. The record also fails to sufficiently identify who Plaintiff is and fails to allege facts sufficient to determine the standing of Plaintiff.

13. The record does not show that Midland Mortgage Co. has standing to maintain an action in the State of Florida. It is not registered to do business in the state. In order for a Court to have in personam jurisdiction over the parties, the record, if challenged, must show that the challenged party has sufficient minimum contacts with the forum state to bestow in personam jurisdiction on the Court. Florida Rules of Civil Procedure, rule 1.120(A).

14. The record does not show that Midland Mortgage Co. is authorized as an entity to own a promissory note. It claims to be a mortgage servicer not a lender. Plaintiff appears to be operating ultra vires in this action.

15. Neither Midland Mortgage Co. nor its attorneys, Richard McIver and Kass, Shuler, Solomon, Spector, Foyle & Singer, P.A., have validated the alleged debt as required by the Fair Debt Collection Practices Act. They refuse to identify the owner of the alleged debt and refuse to provide an accurate accounting of the alleged debt. Such lack of validation prohibits these debt collectors from taking any action to collect on the alleged

debt.

16. Plaintiff has refused to apply many thousands of dollars in timely mortgage payments from Defendant. Plaintiff has accepted other amounts, particularly those paid through Defendant's bankruptcy and insurance proceeds, yet has continued its attempts to foreclose without proper consideration for those payments. There is no evidence that Plaintiff has forwarded any payments to the actual owner of the note, who the evidence suggests may have been defrauded by Plaintiff.

17. Plaintiff has added sums to the amount allegedly owed that are not authorized by any agreement or court order. Furthermore its attorney has written to Defendant saying that he will seek additional attorney's fees even after the foreclosure is concluded.

18. Plaintiff has repeatedly filed ex parte motions to reschedule foreclosure sale depriving Defendant of an opportunity for hearing. Several times, these motions were not even served on Defendant and Defendant learned of their existence only upon receiving a Court order for an imminent foreclosure sale. These affronts to due process impose jurisdictional failings on the Court requiring the action's dismissal with prejudice.

19. The record does not verify that Plaintiff has suffered any damages other than those directly attributable to their own deliberate and ongoing frauds. Claim of damages, to be admissible as evidence, must incorporate records such as a general ledger and accounting of an alleged unpaid promissory note and the person responsible for preparing and maintaining the account general ledger must provide a complete accounting which must be sworn to and dated by the person who maintained the ledger. Plaintiff has adamantly refused to provide any accounting to Defendant.

20. This action has been used as a vehicle for the so-called Plaintiff and its attorneys to attack and harass Defendant unmercifully for almost six years in an attempt to silence his substantiated claims of their crimes and misdeeds. The Plaintiff's action in refusing to allow insurance proceeds to be used for repairs and twice breaking into the property have prevented Defendant from being able to use the property in any way for more than four years.

21. The record is replete with Plaintiff and its attorneys committing numerous frauds upon the Court. The evidence and the testimony of Defendant and his witness specifying these frauds remain entirely unrefuted. Based on the record, the Court should conclude that this action amounts to nothing less than criminal extortion and attempted grand theft by Plaintiff against Defendant. The Court cannot be in a position of enabling Plaintiff and its attorneys to commit felony crimes.

WHEREFORE, Defendant requests that this action be dismissed for lack of subject matter jurisdiction

Respectfully submitted this 19th day of May, 2008.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been delivered by e-mail to X

FLORIDA LAWS ON FRAUDULENT TRANSACTIONS ETC.

Here are the Florida rules governing this type of situation and you can bet that most states have similar laws and rules:

517.301 Fraudulent transactions; falsification or concealment of facts.--

(1) It is unlawful and a violation of the provisions of this chapter for a person:

(a) In connection with the rendering of any investment advice or in connection with the offer, sale, or purchase of any investment or security, including any security exempted under the provisions of s. 517.051 and including any security sold in a transaction exempted under the provisions of s. 517.061, directly or indirectly:

1. To employ any device, scheme, or artifice to defraud;
2. To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
3. To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a person.

(b) To publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, communication, or broadcast which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received directly or indirectly from an issuer, underwriter, or dealer, or from an agent or employee of an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount of the consideration.

(c) In any matter within the jurisdiction of the office, to knowingly and willfully falsify, conceal, or cover up, by any trick, scheme, or device, a material fact, make any false, fictitious, or fraudulent statement or representation, or make or use any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry.

(2) For purposes of ss. 517.311 and 517.312 and this section, the term "investment" means any commitment of money or property principally induced by a representation that an economic benefit may be derived from such commitment, except that the term "investment" does not include a commitment of money or property for:

(a) The purchase of a business opportunity, business enterprise, or real property through a person licensed under chapter 475 or registered under chapter 498; or

(b) The purchase of tangible personal property through a person not engaged in telephone solicitation, where said property is offered and sold in accordance with the following conditions:

1. There are no specific representations or guarantees made by the offeror or seller as to the economic benefit to be derived from the purchase;
2. The tangible property is delivered to the purchaser within 30 days after sale, except that such 30-day period may be extended by the office if market conditions so warrant; and
3. The seller has offered the purchaser a full refund policy in writing, exercisable by the purchaser within 10 days of the date of delivery of such tangible personal property, except that the amount of such refund in no event shall exceed the bid price in effect at the time the property is returned to the seller. If the applicable sellers' market is closed at the time the property is returned to the seller for a refund, the amount of such refund shall be based on the bid price for such property at the next opening of such market.

517.311 False representations; deceptive words; enforcement.--

(1) It is unlawful for any person in issuing or selling any security within the state, including any security exempted under the provisions of s. 517.051 and including any transaction exempted under the provisions of s. 517.061, to misrepresent that such security or company has been guaranteed, sponsored, recommended, or approved by the state or any agency or officer of the state or by the United States or any agency or officer of the United States.

(2) It is unlawful for any person registered or required to be registered, or subject to the notice requirements, under any section of this chapter, including such persons and issuers within the purview of ss. 517.051 and 517.061, to misrepresent that such person has been sponsored, recommended, or approved, or that her or his abilities or qualifications have in any respect been passed upon, by the state or any agency or officer of the state or by the United States or any agency or officer of the United States.

(3) It is unlawful and a violation of this chapter for a person in connection with the offer or sale of any investment to obtain money or property by means of:

(a) A misrepresentation that the investment offered or sold is guaranteed, sponsored, recommended, or approved by the state or any agency or officer of the state or by the United States or any agency or officer of the United States; or

(b) A misrepresentation that such person is sponsored, recommended, or approved, or that such person's abilities or qualifications have in any respect been passed upon, by the state or any agency or officer of the state or by the United States or any agency or officer of the United States.

(4)(a) No provision of subsection (1) or subsection (2) shall be construed to prohibit a statement that a person or security is registered or has made a notice filing under this chapter if such statement is required by the provisions of this chapter or rules promulgated thereunder, if such statement is true in fact, and if the effect of such statement is not misrepresented.

(b) Any statement that a person is registered made in connection with the offer or sale of any security under the provisions of this chapter shall include the following disclaimer: "Registration does not imply that such person has been sponsored, recommended, or approved by the state or any agency or officer of the state or by the United States or any agency or officer of the United States."

1. If the statement of registration is made in writing, the disclaimer shall immediately follow such statement and shall be in the same size and style of print as the statement of registration.

2. If the statement of registration is made orally, the disclaimer shall be made or broadcast with the same force and effect as the statement of registration.

494.0025 Prohibited practices.--It is unlawful for any person:

(1) To act as a mortgage lender in this state without a current, active license issued by the office pursuant to ss. 494.006-494.0077.

(2) To act as a correspondent mortgage lender in this state without a current, active license issued by the office pursuant to ss. 494.006-494.0077.

(3) To act as a mortgage broker in this state without a current, active license issued by the office pursuant to ss. 494.003-494.0043.

(4) In any practice or transaction or course of business relating to the sale, purchase, negotiation, promotion, advertisement, or hypothecation of mortgage transactions, directly or indirectly:

(a) To knowingly or willingly employ any device, scheme, or artifice to defraud;

(b) To engage in any transaction, practice, or course of business which operates as a fraud upon any person in connection with the purchase or sale of any mortgage loan; or

(c) To obtain property by fraud, willful misrepresentation of a future act, or false promise.

(5) In any matter within the jurisdiction of the office, to knowingly and willfully falsify, conceal, or cover up by a trick, scheme, or device a material fact, make any false or

fraudulent statement or representation, or make or use any false writing or document, knowing the same to contain any false or fraudulent statement or entry.

(6) To violate s. 655.922(2), subject to ss. 494.001-494.0077.

(7) Who is required to be licensed under ss. 494.006-494.0077, to fail to report to the office the failure to meet the net worth requirements of s. 494.0061, s. 494.0062, or s. 494.0065 within 48 hours after the person's knowledge of such failure or within 48 hours after the person should have known of such failure.

(8) To pay a fee or commission in any mortgage loan transaction to any person or entity other than a mortgage brokerage business, mortgage lender, or correspondent mortgage lender, operating under an active license, or a person exempt from licensure under this chapter.

(9) To record a mortgage brokerage agreement or any other document, not rendered by a court of competent jurisdiction, which purports to enforce the terms of the mortgage brokerage agreement.

(10) To use the name or logo of a financial institution, as defined in s. 655.005(1), or its affiliates or subsidiaries when marketing or soliciting existing or prospective customers if such marketing materials are used without the written consent of the financial institution and in a manner that would lead a reasonable person to believe that the material or solicitation originated from, was endorsed by, or is related to or the responsibility of the financial institution or its affiliates or subsidiaries.

TILA RIGHT OF RESCISSION and CONSEQUENCES

TRUTH IN LENDING

FEDERAL CIVIL COURT, FEDERAL BANKRUPTCY, STATE COURT INFORMATION

THIS RELATES ONLY TO RESCISSION UNDER TILA. IT SHOULD BE REMEMBERED THAT THERE ARE MULTIPLE GROUNDS FOR RESCISSION AND CANCELLATION OF THESE NOTES AND POSSIBLY TREBLE DAMAGES FOR USURY. SEE HOLDER IN DUE COURSE IN GLOSSARY. SEE USURY.

1. TILA Rescission is self enforcing. It automatically extinguishes the lien and the liability. The time for rescission does not run until you actually knew the full scope of the violation. That is tantamount to it never running out.

2. YOU CAN ASSERT AND SHOULD ASSERT TILA VIOLATIONS IF YOU CAN BEFORE YOU ARE IN FORECLOSURE OR EVEN IF YOU ARE CURRENT IN YOUR PAYMENTS.

3. Judge is required to look for authority himself if you are representing yourself without a lawyer (pro se). This provision in effect makes the Judge your lawyer and your Judge. Pretty good combination for you.

4. Judge has no discretion to deny damages, refunds etc to Borrower once a violation of TILA, no matter how small, is discovered.

5. TILA Rescission is NOT barred before during or after other proceedings unless those other proceedings specifically mention rescission as an issue to be tried.

6. Federal Action for injunction against the players to require them to file documents canceling the documents of record and providing judgment for damages and refunds is probably the best action since that is what is contemplated.

7. If in bankruptcy, it should be pled in an adversary proceeding. But if the bankruptcy is primarily related to the foreclosure the better practice would be to file in the same Federal Court, Civil Division, a complaint for violation of TILA rescission.

8. A Quiet Title Action in State Court would probably also be a good idea before, during or after the Federal action. It clears up any doubt whatsoever about the status of title or the lender's lien or encumbrances.

9. THIS IS INFORMATION YOU NEED BECAUSE THE LATEST LENDER STRATEGY SEEMS TO BE FOR THE LENDER TO IGNORE THE RESCISSION NOTICE. THE LENDER IS BETTING YOU WON'T KNOW WHAT TO DO.

10. Suggestion: If you are in Court and you have opted or are ordered to settlement, try to get a paragraph in the mediation order that requires all decision-makers to be present, whether they are parties or not. This would include the holders of securities who are the ultimate owners of the mortgage. (You may get a pleasant surprise. We have reports that the lenders sometimes can't

trace them down, in which case, the foreclosure action or sale is dismissed and you have no mortgage).

TILA & Res Judicata

A rescission action may not be barred by prior or subsequent TIL litigation which did not involve rescission (Smith v. Wells Fargo Credit Corp., 713 F. Supp. 354 (D. Ariz. 1989) (state court action involving, inter alia TIL disclosure violations did not bar a subsequent action based on rescission notice violations in conjunction with same transaction which were not alleged or litigated in prior action) (See also In re Laubach, 77 B.R. 483 (Bankr. E.D. Pa. 1987) (doctrine of merger bars raising state and federal law claims arising from a transaction on which a previous successful federal TILA action was based; merger does not bar, however, rescission-based on the same transaction)).

IX. Timely Notified Lenders/Attorneys of TILA Right of Rescission

YOU, Pro Se have filed or will file a copy of the notice of rescission letter (See Exhibit 5) in the bankruptcy court or other court of competent jurisdiction in which either you or the “lender” has filed an action putting the foreclosure “at issue” which means in litigation, notifying the attorneys representing DanversBank, Ameriquist Mortgage, Commonwealth Land Title Insurance Company, New Century Mortgage and Chase Home Finance as well as having certified receipt return of proof of delivery to the Lawyers including are proof of notification according to the Official Staff Commentary, 226.2(a)(22)-2 as authorizing service on attorney.

The Truth-in-Lending law empower YOU Pro Se to exercise his right in writing by notifying creditors of his cancellation by mail to rescind the mortgage loan transactions per (Reg. Z §§ 226.15(a)(2), 226.23(a)(2), Official Staff Commentary § 226.23(a)(2)-1) and 15 U.S.C. § 1635(b).

Equitable Tolling

The filing of Bankruptcy tolls or extends the rescission time. There are other reasons for equitable tolling like the lender or trustee hiding the fact from you that you were unable to discover without considerable effort.

Also, the principle of equitable tolling does apply to TILA 3 years period of rescission since despite due diligence, YOU, Pro Se could not have reasonably discovered the concealed fact of TILA violations in-depth and explicitly until September 17, 2006 at about 5 a.m. in reading the Truth-in-Lending book by the National Consumer Law Center.

The equitable tolling principles are to be read into every federal statute of limitations unless Congress expressly provides to the contrary in clear and ambiguous language, (See Rotella v. Wood, 528 U.S. 549, 560-61, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000)). Since TILA does not

evidence a contrary Congressional intent, its statute of limitations must be read to be subject to equitable tolling, particularly since the act is to be construed liberally in favor of consumers.

Security Interest is Void

The statute and regulation specify that the security interest, promissory note or lien arising by operation of law on the property becomes automatically void. (15 U.S.C. § 1635(b); Reg. Z §§ 226.15(d)(1), 226.23(d)(1)).

As noted by the Official Staff Commentary, the creditor's interest in the property is "automatically negated regardless of its status and whether or not it was recorded or perfected." (Official Staff Commentary §§ 226.15(d)(1)-1, 226.23(d)(1)-1.).

Also, the security interest is void and of no legal effect irrespective of whether the creditor makes any affirmative response to the notice. Also, strict construction of Regulation Z would dictate that the voiding be considered absolute and not subject to judicial modification.

This requires DanversBank, Ameriquest Mortgage, Commonwealth Land Title Insurance Company, New Century Mortgage and Chase Home Finance to submit canceling documents creating the security interest and filing release or termination statements in the public record. (Official Staff Commentary §§ 226.15(d)(2)-3, 226.23(d)(2)-3.)

Extended Right of Rescission

The statute and Regulation Z make it clear that, if YOU, Pro Se has the extended right and chooses to exercise it, the security interest and obligation to pay charges are automatically voided. (Cf. Semar v. Platte Valley Fed. Sav. & Loan Ass'n, 791 F.2d 699, 704-05 (9th Cir. 1986) (courts do not have equitable discretion to alter substantive provisions of TILA, so cases on equitable modification are irrelevant)).

The statute, section 1635(b) states: "When an obligor exercises his right to cancel..., any security interest given by the obligor... becomes void upon such rescission". Also, it is clear from the statutory language that the court's modification authority extends only to the procedures specified by section 1625(b).

The voiding of the security interest is not a procedure, in the sense of a step to be followed or an action to be taken.

The statute makes no distinction between the right to rescind in three day or extended in three years for federal and four years under Mass. TILA, as neither cases nor statute give courts equitable discretion to alter TILA's substantive provisions.

Since the rescission process was intended to be self-enforcing, failure to comply with the rescission obligations subjects DanversBank, Ameriquest Mortgage, Commonwealth Land Title Insurance Company, New Century Mortgage and Chase Home Finance to potential liability.

XIII. Non-Compliance

Non-compliance is a violation of the act which gives rise to a claim for actual and statutory damages under 15 USC 1640. TIL rescission does not only cancel a security interest in the property but it also cancels any liability for the homeowner, Pro Se to pay finance and other charges, including accrued interest, points, broker fees, closing costs and that the lender must refund to borrower/homeowner, Pro Se all finance charges and fees paid.

In case DanversBank, Ameriquest Mortgage, Commonwealth Land Title Insurance Company, New Century Mortgage and Chase Home Finance do not respond to this default letter, YOU, Pro Se have the option of enforcing the rescission right in the federal, bankruptcy or state court (See S. Rep. No. 368, 96th Cong. 2 Sess. 28 at 32 reprinted in 1980 U.S.C.A.N. 236, 268 (“The bill also makes explicit that a consumer may institute suit under section 130 [15 U.S.C., 1640] to enforce the right of rescission and recover costs and attorney fees”).

TIL rescission does not only cancel a security interest in the property but it also cancels any liability for the borrower, Pro Se to pay finance and other charges, including accrued interest, points, broker fees, closing costs and the lender must refund to the borrower, Pro Se all finance charges and fees paid.

Thus, DanversBank, Ameriquest Mortgage, Commonwealth Land Title Insurance Company, New Century Mortgage and Chase Home Finance are obligated to return those charges to Mr. Pierre R. Augustin, Pro Se (Pulphus v. Sullivan, 2003 WL 1964333, at *17 (N.D. Apr. 28, 2003) (citing lender’s duty to return consumer’s money as reason for allowing rescission of refinanced loan); McIntosh v. Irving Union Bank & Trust Co., 215 F.R.D. 26 (D. Mass. 2003) (citing borrower’s right to be reimbursed for prepayment penalty as reason for allowing rescission of paid-off loan).

XIV. Sources of Law in Truth in Lending Cases

“These include TILA itself, the Federal Reserve Board’s Regulation Z which implements the Act, the Official Staff Commentary on Regulation Z, and case law. Except where Congress has explicitly relieved lenders of liability for noncompliance, it is a strict liability statute. (Truth-In-Lending, 5th Edition, National Consumer Law Center, 1.4.2.3.2, page 11)

XV. Synopsis of How Rescission Works

The process starts with the consumer’s notice to the creditor that he or she is rescinding the transaction. As the bare bones nature of the FRB model notice demonstrates, it is not necessary to explain why the consumer is canceling. The FRB Model Notice simply says: “I WISH TO CANCEL,” followed by a signature and date line (Arnold v. W.D.L. Invs., Inc., 703 F.2d 848,

850 (5th cir. 1983) (clear intention of TILA and Reg. Z is to make sure that the creditor gets notice of the consumer's intention to rescind)).

The statute and Regulation Z states that if creditor disputes the consumer's right to rescind, it should file a declaratory judgment action within the twenty days after receiving the rescission notice, before its deadline to return the consumer's money or property and record the termination of its security interest (15 USC 1625(b)). Once the lender receives the notice, the statute and Regulation Z mandate 3 steps to be followed.

XVI. Step One of Rescission

First, by operation of law, the security interest and promissory note automatically becomes void and the consumer is relieved of any obligation to pay any finance or other charges (15 USC 1635(b); Reg. Z-226.15(d)(1), 226.23(d)(1)). See Official Staff Commentary § 226.23(d)(2)-1. (See *Willis v. Friedman*, Clearinghouse No. 54,564 (Md. Ct. Spec. App. May 2, 2002) (Once the right to rescind is exercised, the security interest in the borrower's property becomes void ab initio)).

Thus, the security interest is void and of no legal effect irrespective of whether the creditor makes any affirmative response to the notice. (See *Family Financial Services v. Spencer*, 677 A.2d 479 (Conn. App. 1996) (all that is required is notification of the intent to rescind, and the agreement is automatically rescinded)).

It is clear from the statutory language that the court's modification authority extends only to the procedures specified by section 1635(b). The voiding of the security interest is not a procedure, in the sense of a step to be followed or an action to be taken.

The statute makes no distinction between the right to rescind in 3-day or extended as neither cases nor statute give courts equitable discretion to alter TILA's substantive provisions. Also, after the security interest is voided, secured creditor becomes unsecured. (See Exhibit #6)

XVII. Step Two of Rescission

Second, since the borrower has legally rescinded the loans transaction, the mortgage holders (DanversBank, Ameriquet Mortgage, Commonwealth Land Title Insurance Company, New Century Mortgage and Chase Home Finance) must return any money, including that which may have been passed on to a third party, such as a broker or an appraiser and to take any action necessary to reflect the termination of the security interest within 20 calendar days of receiving the rescission notice which has expired.

The creditor's other task is to take any necessary or appropriate action to reflect the fact that the security interest was automatically terminated by the rescission within 20 days of the creditor's receipt of the rescission notice (15 USC 1635(b); Reg. Z-226.15(d)(2), 226.23(d)(2)).

XIII. Step Three of Rescission

Borrower is prepared to discuss a tender obligation, should it arise, and satisfactory ways in which to meet this obligation, subject to claims for offsets and damages. The termination of the security interest is required before tendering and step 1 and 2 have to be respected by DanversBank, Ameriquet Mortgage, Commonwealth Land Title Insurance Company, New Century Mortgage and Chase Home Finance

XIV. Conclusion

I am requesting an itemized statement of my payment record to DanversBank, Ameriquet Mortgage, Commonwealth Land Title Insurance Company, New Century Mortgage and Chase Home Finance. When the borrower rescinds within the appropriate context, courts have held that the rescission effectively voids the security interest, rendering the debt, if any, unsecured (See Exhibit #6). (See in re Perkins, 106 B.R. 863, 874 (Bankr. E.D.Pa. 1989); In re Brown, 134 B.R. 134 (Bankr. E.D.Pa. 1991); In re Moore, 117 B.R. 135 (Bankr.E.D. Pa. 1990)).

Once the court finds a violation such as not responding to the TILA rescission letter, no matter how technical, it has no discretion with respect to liability (in re Wright, supra. At 708; In re Porter v. Mid-Penn Consumer Discount Co., 961 F.2d 1066, 1078 (3d. Cir. 1992); Smith v. Fidelity Consumer Discount Co., Supra. At 898. Any misgivings creditors may have about the technical nature of the requirements should be addressed to Congress or the Federal Reserve Board, not the courts.

USURY

It is a central point of the discussion on securitization that usury lies at the heart of every claim. Unfortunately many states have eliminated usury laws but still maintain maximum interest laws, which can be used to state that the loan violates the state law on the maximum interest that can be charged.

The advantage of the usury defense is that most states (a) void the debt, (b) allow treble damages for the original "debt", (c) allow attorney fees, costs and interest from the date of the first payment and (d) criminalize the offense.

While the limits vary widely from 5% to 45%, the basic calculation is the same and produces the same results, to wit:

- (1) the real APR was not disclosed,
- (2) the interest charged was greater than state law permitted,
- (3) the intentionally inflated appraisal lifted the APR far above any disclosed or permissible limits on interest when amortized over the known and likely life of the loan and
- (4) no exemptions apply for "financial institutions" or other "licensed" (e.g. pawnbroker lending organizations because the real source of the loan in a table-funded loan was not only lacking a bank charter or lending license, they were most probably not registered to do business in the state.
- (5) The pattern of cheating the state out of the revenues for registration and evading the taxes and revenues to the state by not recording the alleged "assignments" of the loans despite state law to the contrary, demonstrates that the fraudulent scheme of tricking borrowers into signing papers they would not have signed if they were aware of the true facts so that their identities could be stolen and used to sell unregulated and fraudulent securities, but that the state was also a victim of this fraud.

As you will see below, there are approximately 29 states in which usury can be alleged and another 5 states where consumer protections exist by statute that can be alleged and argued in connection with mortgages and deeds of trust that ended up costing the homeowner his home and all his net worth, a fact that was well-known to the "experts" and "fiduciaries" that engineered the loan closing. Thus if it was obvious to everyone other than the borrower that at the first reset there was no ability to pay, THAT is the known and expected life of the loan and the costs, including the inflated appraisal are thus amortized over 6-24 months rather than 30 years. In most cases this will result in a cost of the loan far in excess of anything permitted by law.

The argument that a national charter or other protection will shield the loan transaction from this attack is completely specious. The protected entity acted not as a lender but merely rented its charter or license for the purpose of providing unregulated, unauthorized and illegal cover for an entity that lacked any authority to be in the home loan business.

Many state's laws provide that you cannot lend money at an interest rate in excess of a certain statutory maximum. This is a "**usury limit.**" Unless Otherwise Stated, The Rates

Are Simple, Not Compound Interest. Further We Are Stating The ****Present**** Limits, the ones applicable at the time that this research was completed. Many states have had lower limits in the past. Further, in most states a late charge or other fee exacted from someone who owes another money is also counted as interest.

"But my car loan is higher than that"; "But I'm paying way more than that on my credit cards." That's right! Banks have separate rules. In fact, due to high inflation, in 1980, the federal government passed a special law which allowed national banks (the ones that have the word "national" or the term "N.A." in their name, and savings banks that are federally chartered) to ignore state usury limits and pegged the rate of interest at a certain number of points above the federal reserve discount rate. In addition, specially chartered organizations like small loan companies and installment plan sellers (like car financing companies) have their own rules.

The usury limit which is stated as the general usury limit is the rate that can be charged by one person or corporation to another, in other words, if you lend your next door neighbor \$ 100.00, the rate stated is the limit. **To charge more you must get a banking, pawnbroking, or whatever license.** This also means that special kinds of loans, like those from pawnbrokers or small loan companies are not stated.

In some states we also have a **"legal rate."** In such states, as a general rule, if you have a contractual obligation that provides simply for interest without a specific term, or "interest at the highest legal rate" then the "legal rate" what applies.

In other instances we have stated a **"judgment rate."** That's the rate that final judgments bear. In states without a usury limit, there still may be a federally imposed limit because at certain astronomical rates of interest "loan sharking" will be inferred by the federal government.

Usury Is A Complicated Area Of Law. Transactions that a person would not consider to be affected by usury often are, for example, repurchase agreements, or sales with an option to repurchase are often found to be loans. A word of caution. Before trying to lend someone money or "invest" with a guaranteed return, see an attorney to make sure that you don't run afoul of the usury laws. In state's that specify one limit for consumers and one limit for non-consumers, you cannot avoid the usury limit by creating a sham business deal. In a supplement that is now being prepared and will be available soon, we will review the penalties for usury in each state and point out special circumstances in each state.

****ALABAMA**, the legal rate of interest is 6%; the **general usury limit is 8%**. The judgment rate is 12%.

****ALASKA**, the legal rate of interest is 10.5%; the **general usury limit is more than 5% above the Federal Reserve interest rate on the day the loan was made.**

***ARIZONA**, the legal rate of interest is 10%.

****ARKANSAS**, the legal rate of interest is 6%; **for non-consumers the usury limit is 5% above the Federal Reserve's interest rate; for consumers the general usury limit is 17%.** Judgments bear interest at the rate of 10% per annum, or the lawful agreed upon rate, whichever is greater.

****CALIFORNIA**, the legal rate of interest is 10% for consumers; the **general usury limit for non-consumers is more than 5% greater than the Federal Reserve Bank of San Francisco's rate.**

****COLORADO**, the legal rate of interest is 8%; the **general usury limit is 45%.** The maximum rates to consumers is 12% per annum.

****CONNECTICUT**, the legal rate of interest is 8%; the **general usury rate is 12%.** In civil suits where interest is allowed, it is allowed at 10%.

DELAWARE, the legal rate of interest is 5% over the Federal Reserve rate.

****DISTRICT OF COLUMBIA**, the legal rate of interest is 6%; the **general usury limit is in excess of 24%.**

****FLORIDA**, the legal rate of interest is 12%; **the general usury limit is 18%. On loans above \$ 500,000 the maximum rate is 25%.**

****GEORGIA**, the legal rate of interest is 7%; On loans below \$ 3,000 the usury limit is 16%. **On loans above \$ 3,000, the limit appears to be 5% per month.** As to loans below \$ 250,000 the interest rate must be specified in simple interest and in writing.

****HAWAII**, the legal rate of interest is 10%. **The usury limit for consumer transactions is 12%.**

IDAHO, the legal rate of interest is 12%. Judgments bear interest at the rate of 5% above the U.S. Treasury Securities rate.

****ILLINOIS**, the legal rate of interest is 5%. **The general usury limit is 9%.** The judgment rate is 9%.

INDIANA, the legal rate of interest is 10%. Presently there is no usury limit; however, legislation is pending to establish limits. The judgment rate is also 10%.

***IOWA**, the legal rate of interest is 10%. **In general consumer transactions are governed at a maximum rate of 12%.**

KANSAS, the legal rate of interest is 10%; the **general usury limit is 15%.** Judgments bear interest at 4% above the federal discount rate. On consumer transactions, the maximum rate of interest for the first \$ 1,000 is 18%, above \$ 1,000, 14.45%.

KENTUCKY, the legal rate of interest is 8%; the general usury limit is more than 4% greater than the Federal Reserve rate or 19%, whichever is less. On loans above \$ 15,000 there is no limit. Judgments bear interest at the rate of 12% compounded yearly, or at such rate as is set by the Court.

****LOUISIANA**, the legal rate of interest is one point over the average prime rate, not to exceed 14% nor be less than 7%. **Usury limit for individuals is 12%,** there is no limit for corporations. (As warned, you cannot evade the limit by forming a corporation when the loan is actually to an individual.)

MAINE, the legal rate of interest is 6%. Judgments below \$ 30,000 bear 15%, otherwise they bear interest at the 52 week average discount rate for T-Bills, plus 4%.

****MARYLAND**, the legal rate of interest is 6%; the **general usury limit is 24%.** There are many nuances and exceptions to this law. Judgments bear interest at the rate of 10%.

****MASSACHUSETTS**, the legal rate of interest is 6%; the **general usury rate is 20%**. Judgments bear interest at either 12% or 18% depending on whether the court finds that a defense was frivolous.

****MICHIGAN**, the legal rate of interest is 5%; the **general usury limit is 7%**. Judgments bear interest at the rate of 1% above the five year T-note rate.

****MINNESOTA**, the legal rate of interest is 6%. The judgment rate is the "secondary market yield" for one year T-Bills. **Usury limit is 8%**.

****MISSISSIPPI**, the legal rate of interest is 9%; the **general usury limit is more than 10%, or more than 5% above the federal reserve rate**. There is no usury limit on commercial loans above \$ 5,000. The judgment rate is 9% or a rate legally agreed upon in the underlying obligation.

***MISSOURI**, the legal and judgment rate of interest is 9%. Corporations do not have a usury defense. (Remember that a corporation set up for the purpose of loaning money to an individual will violate the usury laws.)

****MONTANA**, the legal rate of interest is 10%; the **general usury limit is above 6% greater than New York City banks' prime rate**. Judgments bear interest at the rate of 10% per annum.

****NEBRASKA**, the legal rate of interest is 6%; the **general usury limit is 16%**. Accounts bear interest at the rate of 12%. Judgments bear interest at the rate of 1% above a bond yield equivalent to T-bill auction price.

NEVADA, the legal rate of interest is 12%; there is no usury limit.

NEW HAMPSHIRE, the legal rate of interest is 10%; there is no general usury rate.

****NEW JERSEY**, the legal rate of interest is 6%; the **general usury limit is 30%** for individuals, 50% for corporations. There are a number of exceptions to this law.

NEW MEXICO, the legal rate of interest is 15%. Judgment rate is fixed by the Court.

****NEW YORK**, the legal rate of interest is 9%; the **general usury limit is 16%**.

****NORTH CAROLINA**, the legal interest rate and the **general usury limit is 8%**.

However, there is a provision for a variable rate, which is 16% or the T-Bill rate for non-competitive T-Bills. Above \$ 25,000 there is no express limit. However, the law providing for 8% is still on the books- be careful and see a lawyer!

****NORTH DAKOTA**, the legal rate of interest is 6%; the **general usury limit is 5 1/2% above the six-month treasury bill interest rate**. The judgment rate is the contract rate or 12%, whichever is less. A late payment charge of 1 3/4% per month may be charged to commercial accounts that are overdue provided that the charge is revealed prior to the account being opened and that the terms were less than thirty days, that is, that the account terms were net 30 or less.

****OKLAHOMA**, the legal rate of interest is 6%. **Consumer loans may not exceed 10% unless the person is licensed to make consumer loans. Maximum rate on non-consumer loans is 45%**. The judgment rate is the T-Bill rate plus 4%.

OREGON, the legal rate is 9%, the judgment rate is 9% or the contract rate, if lawful, whichever is higher. The general usury rate for loans below \$ 50,000 is 12% or 5% above the discount rate for commercial paper.

****PENNSYLVANIA**, the legal rate of interest is 6%, and this is the general usury limit for loans below \$ 50,000, except for: loans with a lien on non-residential real estate; loans to corporations; loans that have no collateral above \$ 35,000. Judgments bear interest at the legal rate. **It is criminal usury to charge more than 25%**.

PUERTO RICO, the legal rate of interest is 6%; all other rates are set by the Finance Board of Office of Commissioner of Financial Institutions. Judgments bear interest at the same rate as the underlying debt.

****RHODE ISLAND**, the legal rate of interest and judgment rate is 12%. **The general usury limit is 21% or the interest rate charged for T- Bills plus 9%.**

***SOUTH CAROLINA**, the legal rate of interest is 8.75%, and judgments bear interest at the rate of 14%. Subject to federal criminal laws against loan sharking there is no general usury limit for non- consumer transactions. **The South Carolina Consumer Protection code provides regulations for maximum rates of interest for consumer transactions.** Please consult with counsel for the latest rates.

SOUTH DAKOTA, the legal rate of interest is 15%, judgments bear interest at the rate of 12%. There is no other usury limit. There are certain limitations on consumer loans below \$ 5,000.00.

****TENNESSEE**, the legal rate and judgment rate of interest is 10%. **The general usury limit is 24%, or four points above the average prime loan rate, WHICHEVER IS LESS.**

***TEXAS**, the legal rate of interest is 6%. Interest does not begin until 30 days after an account was due. The judgment rate of interest is 18% or the rate in the contract, whichever is less. There are a number of specific ceilings for different types of loans, please see counsel for information.

UTAH, the legal rate of interest is 10%. Judgments bear interest at the rate of 12%, or a lawfully agreed upon rate. There are floating rates prescribed for consumer transactions. Please see counsel for information.

****VERMONT**, the legal rate of interest and judgment rate of interest is 12%. On retail installment contracts the maximum rate is 18% on the first \$ 500, 15% above \$ 500.

The general usury limit is 12%.

***VIRGINIA**, the legal rate of interest is 8%. Judgments bear interest at the rate of 8%, or the lawful contract rate. Corporations and business loans do not have a usury limit, and loans over \$ 5,000 for "business" or "investment" purposes are also exempt from usury laws. **Consumer loans are regulated and have multiple rates.**

WASHINGTON, the legal rate is 12%. **The general usury limit is 12%, or four points above the average T-Bill rate for the past 26 weeks, whichever is greater.** (The maximum rate is announced by the State Treasurer.) Judgments bear interest at the rate of 12% or the lawful contract rate, whichever is higher.

****WEST VIRGINIA**, the legal rate of interest is 6%. **The maximum "contractual" rate is 8%; Commissioner of Banking issues rates for real estate loans, and, may establish maximum general usury limit based on market rates.**

WISCONSIN, the legal rate of interest is 5%. There are a myriad of rates for different type of loans. There is no general usury limit for corporations. Note that a loan to an individual, even if a corporation is formed, will violate the law. The judgment rate of interest is 12%, except for mortgage foreclosures, where the rate will be the lawful contract rate.

WYOMING, the legal rate and judgment rate of interest is 10%. If a contract provides for a lesser rate, the judgment rate is the lesser of 10% and the contract rate.

Florida Usury Laws

Usurious lending practices have long been condemned, even before specific laws were enacted banning the practice. For example, in "The Divine Comedy," Dante actually places lenders that charge usurious interest rates in what is known in the work as the Seventh Circle of Hell. This is a level in hell that ranks even below the place where people have committed suicide are condemned.

With that in mind, Florida actually has enacted a pretty liberal system when it comes to usurious lending practices at the present time. It ranks as one of the most liberal laws in the country when it comes to what lenders can charge in the way of interest on personal loans.

The State of Florida has established a two tier system when it comes to usury limitations on personal loans. On personal loans under \$500,000, the general usury limit that has been established in Florida is at 18%.

In considering loans above \$500,000, the general usury limitation has been set at 25%. As mentioned, this is one of the highest usury maximum rates to be found anywhere in the United States at this point in time. The rationale behind this interest rate generally is founded upon the idea that the lender has a great deal more at risk with a person loan of this magnitude. Therefore, a more substantial interest rate is suitable and appropriate to the circumstances. With that said, however, it is not common for interest rate on traditional personal loans to reach this interest rate level.

The statutory proscriptions against usurious interest rates generally are set forth in Title 39 of the Florida Code, as amended. There are also some relative statutory provisions that impact lending practices in Florida in Title 33 of the Florida Code.

Generally speaking, Florida courts are fairly restrictive when it comes to dealing with issues involving usury and lending practices. In this regard, if a loan agreement or contract that is brought before a court in Florida, and if that loan agreement calls for an interest rate that runs afoul of and counter to the statutory provisions and restrictions pertaining to interest rates, such an agreement will be struck down in most instances as illegal and unenforceable.

FLORIDA USURY STATUTES

687.02 "Usurious contracts" defined.--

(1) All contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18 percent per annum simple interest are hereby declared usurious. However, if such loan, advance of money, line of credit, forbearance to enforce the collection of a debt, or obligation exceeds

\$500,000 in amount or value, then no contract to pay interest thereon is usurious unless the rate of interest exceeds the rate prescribed in s. 687.071.

(2) As amended by chapter 79-592, Laws of Florida, chapter 79-274, Laws of Florida, which amended subsection (1):

(a) Shall apply only to loans, advances of credit, or lines of credit made on or subsequent to July 1, 1979, and to loans, advances of credit, or lines of credit made prior to that date if the lender has the legal right to require full payment or to adjust or modify the interest rate, by renewal, assumption, reaffirmation, contract, or otherwise; and

(b) Shall not be construed as diminishing the force and effect of any laws applying to loans, advances of credit, or lines of credit, other than to those mentioned in paragraph (a), completed prior to July 1, 1979.

History.--s. 1, ch. 4022, 1891; GS 3104; s. 1, ch. 5960, 1909; RGS 4850; CGL 6937; s. 1, ch. 29705, 1955; s. 1, ch. 73-298; ss. 12, 15, ch. 79-274; s. 1, ch. 79-592; s. 1, ch. 80-310.

687.03 "Unlawful rates of interest" defined; proviso.--

(1) Except as provided herein, it shall be usury and unlawful for any person, or for any agent, officer, or other representative of any person, to reserve, charge, or take for any loan, advance of money, line of credit, forbearance to enforce the collection of any sum of money, or other obligation a rate of interest greater than the equivalent of 18 percent per annum simple interest, either directly or indirectly, by way of commission for advances, discounts, or exchange, or by any contract, contrivance, or device whatever whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of the equivalent of 18 percent per annum simple interest. However, if any loan, advance of money, line of credit, forbearance to enforce the collection of a debt, or obligation exceeds \$500,000 in amount or value, it shall not be usury or unlawful to reserve, charge, or take interest thereon unless the rate of interest exceeds the rate prescribed in s. 687.071. The provisions of this section shall not apply to sales of bonds in excess of \$100 and mortgages securing the same, or money loaned on bonds.

(2)(a) The provisions of this section and of s. 687.02 shall not apply to loans or other advances of credit made pursuant to:

1. A commitment to insure by the Federal Housing Administration.
2. A commitment to guarantee by the United States Department of Veterans Affairs.
3. A commitment to purchase a loan issued by the Federal National Mortgage Association; Government National Mortgage Association; Federal Home Loan Mortgage

Corporation; any department, agency, or instrumentality of the Federal Government; or any successor of any of them, pursuant to any provision of the acts of Congress or federal regulations.

(b) This act shall apply only to loans or advances of credit made subsequent to the effective date of this act. All present laws shall remain in full force and effect as to loans or advances of credit made prior to the effective date of this act.

(c) Notwithstanding any other provision of this section, any lessor or merchant, or any person who lends money or extends any other form of credit, who is regularly engaged in the business of selling or leasing merchandise, goods, or services which are for other than personal, family, or household purposes, or any assignee of such lessor, merchant, or person who lends money or extends any other form of credit, who is the holder of a commercial installment contract, each of which persons or entities is subject to the laws of any jurisdiction of the United States, any state, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession of the United States, may, if the contract so provides, charge a delinquency charge on each installment which is in default for a period of not less than 10 days in an amount not in excess of 5 percent of such installment. However, only one such delinquency charge may be collected on any installment, regardless of the period during which it remains in default. A delinquency charge imposed pursuant to this paragraph shall not be deemed interest or a finance charge made incident to or as a condition to the grant of the loan or other extension of credit and shall not be included in determining the limit on charges, as provided by this section, which may be made in connection with the loan or other extension of credit as provided by law of this state.

(3) For the purpose of this chapter, the rate of interest on any loan, advance of money, line of credit, forbearance to enforce the collection of a debt, or other obligation to pay interest shall be determined and computed upon the assumption that the debt will be paid according to the agreed terms, whether or not said loan, advance of money, line of credit, forbearance to enforce collection of a debt, or other obligation is paid or collected by court action prior to its term, and any payment or property charged, reserved, or taken as an advance or forbearance, which is in the nature of, and taken into account in the calculation of, interest shall be valued as of the date received and shall be spread over the stated term of the loan, advance of money, line of credit, forbearance to enforce collection of a debt, or other obligation for the purpose of determining the rate of interest. The spreading of any such advance or forbearance for the purpose of computing the rate of interest shall be calculated by first computing the advance or forbearance as a percentage of the total stated amount of such loan, advance of money, line of credit, forbearance to enforce collection of a debt, or other obligation. This percentage shall then be divided by the number of years, and fractions thereof, of the loan, advance of money, line of credit, forbearance to enforce collection of a debt, or other obligation according to its stated maturity date, without regard to early maturity in the event of default. The resulting annual percentage rate shall then be added to the stated annual percentage rate of interest to produce the effective rate of interest for purposes of this chapter. Moreover, for the purposes of this chapter, a loan, advance of

money, line of credit, forbearance, or other obligation shall be deemed to exceed \$500,000 in amount or value if:

(a) The outstanding principal indebtedness of such loan, advance of money, line of credit, forbearance, or other obligation initially exceeds \$500,000; or

(b) The aggregate principal indebtedness of such loan, advance of money, line of credit, forbearance, or other obligation may reasonably be expected to exceed \$500,000 during the term thereof, notwithstanding the fact that less than that amount in the aggregate is initially or at any time thereafter advanced in one transaction or a series of related transactions; or

(c) Such loan, advance of money, line of credit, forbearance, or other obligation exceeds \$500,000 at any time, notwithstanding the fact that such indebtedness is or is not subsequently reduced to less than \$500,000 and thereafter additional amounts are advanced in one transaction or a series of related transactions which in the aggregate do not exceed \$500,000.

(4) If, as provided in subsection (3), a loan, advance of money, line of credit, forbearance, or other obligation exceeds \$500,000, then, for the purposes of this chapter, interest on that loan, advance of money, line of credit, forbearance, or other obligation shall not include the value of property charged, reserved, or taken as an advance or forbearance, the value of which substantially depends on the success of the venture in which are used the proceeds of that loan, advance of money, line of credit, forbearance, or other obligation. Stock options and interests in profits, receipts, or residual values are examples of the type of property the value of which would be excluded from calculation of interest under the preceding sentence.

(5) As amended by chapter 79-592, Laws of Florida, chapter 79-274, Laws of Florida, which amended subsection (1):

(a) Shall apply only to loans, advances of credit, or lines of credit made on or subsequent to July 1, 1979, and to loans, advances of credit, or lines of credit made prior to that date if the lender has the legal right to require full payment or to adjust or modify the interest rate, by renewal, assumption, reaffirmation, contract, or otherwise; and

(b) Shall not be construed as diminishing the force and effect of any laws applying to loans, advances of credit, or lines of credit, other than to those mentioned in paragraph (a), completed prior to July 1, 1979.

History.--s. 2, ch. 4022, 1891; GS 3105; s. 2, ch. 5960, 1909; RGS 4851; CGL 6938; s. 2, ch. 29705, 1955; s. 1, ch. 70-331; s. 2, ch. 73-298; s. 1, ch. 74-232; ss. 1, 2, ch. 76-124; s. 1, ch. 77-374; s. 1, ch. 78-211; ss. 13, 15, ch. 79-274; s. 258, ch. 79-400; s. 1, ch. 79-592; s. 2, ch. 80-310; s. 34, ch. 93-268; s. 4, ch. 95-234.

687.0303 "Line of credit" defined.--

(1) The term "line of credit," whenever used in this chapter, means an arrangement under which one or more loans or advances of money may be made available to a debtor in one transaction or a series of related transactions.

(2) The Legislature hereby declares that, as a matter of law, "line of credit," as such term is defined in this section, is deemed to have been included in and governed by the provisions of this chapter as it existed prior to, on, and subsequent to July 1, 1979.

History.--ss. 2, 3, ch. 80-310.

687.0304 Credit agreements.--

(1) DEFINITIONS.--For the purposes of this section:

(a) "Credit agreement" means an agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation.

(b) "Creditor" means a person who extends credit under a credit agreement with a debtor.

(c) "Debtor" means a person who obtains credit or seeks a credit agreement with a creditor or who owes money to a creditor.

(2) CREDIT AGREEMENTS TO BE IN WRITING.--A debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor.

(3) ACTIONS NOT CONSIDERED AGREEMENTS.--

(a) The following actions do not give rise to a claim that a new credit agreement is created, unless the agreement satisfies the requirements of subsection (2):

1. The rendering of financial advice by a creditor to a debtor;
2. The consultation by a creditor with a debtor; or
3. The agreement by a creditor to take certain actions, such as entering into a new credit agreement, forbearing from exercising remedies under prior credit agreements, or extending installments due under prior credit agreements.

(b) A credit agreement may not be implied from the relationship, fiduciary, or otherwise, of the creditor and the debtor.

History.--s. 1, ch. 89-130.

687.031 Construction, ss. 687.02 and 687.03.--Sections 687.02 and 687.03 shall not be construed to repeal, modify or limit any or either of the special provisions of existing statutory law creating exceptions to the general law governing interest and usury and specifying the interest rates and charges which may be made pursuant to such exceptions, including but not limited to those exceptions which relate to banks, Morris Plan banks, discount consumer financing, small loan companies and domestic building and loan associations.

History.--s. 3, ch. 29705, 1955.

687.04 Penalty for usury; not to apply in certain situations.--Any person, or any agent, officer, or other representative of any person, willfully violating the provisions of s. 687.03 shall forfeit the entire interest so charged, or contracted to be charged or reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at law or in equity; and when said usurious interest is taken or reserved, or has been paid, then and in that event the person who has taken or reserved, or has been paid, either directly or indirectly, such usurious interest shall forfeit to the party from whom such usurious interest has been reserved, taken, or exacted in any way double the amount of interest so reserved, taken, or exacted. However, the penalties provided for by this section shall not apply:

(1) To a bona fide endorsee or transferee of negotiable paper purchased before maturity, unless the usurious character should appear upon its face, or unless the said endorsee or transferee shall have had actual notice of the same before the purchase of such paper, but in such event double the amount of such usurious interest may be recovered after payment, by action against the party originally exacting the same, in any court of competent jurisdiction in this state, together with an attorney's fee, as provided in s. 687.06; or

(2) If, prior to the institution of an action by the borrower or the filing of a defense under this chapter by the borrower or receipt of written notice by the lender from the borrower that usury has been charged or collected, the lender notifies the borrower of the usurious overcharge and refunds the amount of any overcharge taken, plus interest on the overcharge taken at the maximum lawful rate in effect at the time the usurious interest was taken, to the borrower and makes whatever adjustments in the appropriate contract or account as are necessary to ensure that the borrower will not be required to pay further interest in excess of the amount permitted by s. 687.03.

History.--s. 3, ch. 4022, 1891; GS 3106; s. 3, ch. 5960, 1909; RGS 4852; CGL 6939; s. 1, ch. 79-90.

687.05 Provisions for payment of attorney's fees.--No provision for the payment of attorney's fees, or charge for exchange or similar charge shall render such instrument

subject to the terms of any statute of this state, limiting the amount of interest which shall be charged on such instrument.

History.--s. 2, ch. 4374, 1895; GS 3107; RGS 4853; CGL 6940.

687.06 Attorney's fee in enforcing nonusurious contracts; proviso; insurance premiums; attorney's fee provided in note.--This chapter shall not be so construed as to prevent provision for the payment of such attorney's fees as the court may determine in cases brought before the court to be reasonable and just for legal services rendered in enforcing nonusurious contracts, either at law or in equity. This chapter shall not be construed so as to prohibit mortgagees from contracting for or collecting premiums for insurance actually issued on the property mortgaged, with the usual loss payable or mortgage clause attached thereto; provided further, that it shall not be necessary for the court to adjudge an attorney's fee, provided in any note or other instrument of writing, to be reasonable and just, when such fee does not exceed 10 percent of the principal sum named in said note, or other instrument in writing.

History.--s. 4, ch. 5960, 1909; s. 1, ch. 6870, 1915; RGS 4854; CGL 6941; s. 26, ch. 73-334.

687.071 Criminal usury, loan sharking; shylocking.--

(1) DEFINITIONS.--The following words and phrases, as used in this section, shall have the following meanings:

(a) "Person" shall be construed to be defined as provided in s. 1.01.

(b) "Creditor" means any person who makes an extension of credit or any person claiming by, under, or through such person.

(c) "Debtor" means any person who receives an extension of credit or any person who guarantees the repayment of a loan of money for another person.

(d) "Extension of credit" means to make or renew a loan of money or any agreement for forbearance to enforce the collection of such loan.

(e) "Extortionate extension of credit" means any extension of credit whereby it is the understanding of the creditor and the debtor at the time an extension of credit is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(f) "Loan shark" or "shylock" means any person as defined herein who lends money unlawfully under subsection (2), subsection (3), or subsection (4).

(g) "Loan sharking" or "shylocking" means the act of any person as defined herein lending money unlawfully under subsection (2), subsection (3), or subsection (4).

(2) Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take, or receive interest thereon at a rate exceeding 25 percent per annum but not in excess of 45 percent per annum, or the equivalent rate for a longer or shorter period of time, whether directly or indirectly, or conspires so to do, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(3) Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take or receive interest thereon at a rate exceeding 45 percent per annum or the equivalent rate for a longer or shorter period of time, whether directly or indirectly or conspire so to do, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) Any person who shall knowingly and willfully make an extortionate extension of credit to any person or conspire so to do shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. In any prosecution under this subsection, evidence that the creditor then had a reputation in the debtor's community for the use or threat of use of violence or other criminal means to cause harm to the person, reputation, or property of any person to collect extensions of credit or to punish the nonrepayment thereof shall be admissible.

(5) Books of account or other documents recording extensions of credit in violation of subsections (3) or (4) are declared to be contraband, and any person, other than a public officer in the performance of his or her duty, and other than the person charged such usurious interest and person acting on his or her behalf, who shall knowingly and willfully possess or maintain such books of account or other documents, or conspire so to do, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(6) No person shall be excused from attending and testifying or producing any books, paper, or other document before any court upon any investigation, proceeding, or trial, for any violation of this section upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of the person may tend to convict him or her of a crime or subject the person to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he or she may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against the person upon any criminal investigation or proceeding.

(7) No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state.

History.--s. 1, ch. 69-135; s. 676, ch. 71-136; s. 747, ch. 97-102.

687.08 Person lending money to give borrower receipt for payments; contents of receipt; penalty for violation.--

(1) Every person, or the agent, officer, or other representative of any person, lending money in this state upon security shall, whenever the borrower of such money makes a payment of any money, either principal or interest, immediately upon such payment being made, give to the borrower a receipt, dated of the date of such payment, which receipt shall state the amount paid and for what such payment is made. If such payment is for interest on the sum borrowed, the receipt shall so state. If the sum so paid is to be applied to the payment of the principal sum borrowed, the receipt shall so state. Every such receipt shall be duly and properly signed by the person, or the agent, officer, or other representative of the person, to whom such money is paid. In lieu of providing such receipt, a lender may furnish to the borrower an annual statement showing the amount of interest paid on the loan during the previous year as well as the remaining balance on the loan; except that a simple receipt shall be given to the borrower for each payment which is made in cash or for any payment for which receipt is requested in writing by the borrower.

(2) Whoever refuses, upon demand, to give a receipt or statement complying with the requirements of this section shall forfeit the entire interest upon such principal sum to the borrower.

History.--s. 6, ch. 5960, 1909; RGS 4856; CGL 6943; s. 4, ch. 84-193.

687.09 Persons accepting chattel mortgage as security for loans under \$100 to cause amount as principal, interest, and fees to be inserted.--Every mortgagee accepting a mortgage on personal property as security for the repayment of a loan of money less than \$100 shall cause to be stated in such mortgage, separately and distinctly, the several amounts secured as principal, interest and fees, and any mortgagee willfully violating the provisions of this section shall forfeit all interest and fees secured by such mortgage, and be entitled to recover only the principal sum.

History.--s. 7, ch. 5960, 1909; RGS 4857; CGL 6944.

687.10 Not applicable to chartered banks, trust companies, building and loan associations, savings and loan associations, or insurance companies.--The provisions of ss. 687.08 and 687.09 shall not apply to chartered banks, state or national, trust companies, building and loan associations or to savings and loan associations, whether chartered under state or federal statutes, or insurance companies.

History.--s. 8, ch. 5960, 1909; RGS 4858; CGL 6945; s. 1, ch. 59-50.

687.12 Interest rates; parity among licensed lenders or creditors.--

(1) Any lender or creditor licensed or chartered under the provisions of chapter 516, chapter 520, chapter 657, chapter 658 or former chapter 659, former chapter 664 or former chapter 656, chapter 665, or part XV of chapter 627; any lender or creditor located in the State of Florida and licensed or chartered under the laws of the United States and authorized to conduct a lending business; or any lender or creditor lending through a licensee under ss. 494.006-494.0077, shall be authorized to charge interest on loans or extensions of credit to any person as defined in s. 1.01(3), or to any firm or corporation, at the maximum rate of interest permitted by law to be charged on similar loans or extensions of credit made by any lender or creditor in the State of Florida, except that the statutes governing the maximum permissible interest rate on any loan or extension of credit, and other statutory restrictions relating thereto, shall also govern the amount, term, permissible charges, rebate requirements, and restrictions for a similar loan or extension of credit made by any lender or creditor.

(2) This section shall be construed to permit any lender or creditor which is otherwise authorized to make a particular loan or extension of credit to charge interest at a rate permitted to be charged by other lenders or creditors on similar loans or extensions of credit, but shall not be construed to grant any lender or creditor the power or authority to make any particular type of loan or extension of credit which it is not otherwise authorized to make. For purposes of this section, direct loans for the purchase of goods or services, and extensions of credit for the acquisition of goods or services by the seller or provider thereof, shall be deemed to be similar loans or extensions of credit.

(3) In making loans or extensions of credit, lenders or creditors shall be subject only to the licenses, examinations, regulations, documents, procedures, and disclosures required by the respective laws under which each lender or creditor is licensed or organized, and not to those required by laws governing other lenders or creditors.

(4) In making loans or extensions of credit at a rate of interest that, but for this section, would not be authorized, lenders or creditors shall indicate on the promissory note or other instrument evidencing the loan or extension of credit the specific chapter of the Florida Statutes authorizing the interest rate charged.

History.--s. 1, ch. 77-371; s. 259, ch. 79-400; s. 474, ch. 81-259; s. 60, ch. 91-245; s. 206, ch. 92-303.

687.125 Compounding of interest.--Interest or finance charges on any loan or extension of credit secured by a mortgage which contains a provision for the compounding of interest may be compounded provided the total amount of interest received by the lender as a result of such compounding, including interest upon interest, produces an effective yield which does not exceed any interest rate limitation imposed by applicable law.

History.--s. 47, ch. 82-214.

687.13 International transactions.--

(1) The provisions of this chapter, other than s. 687.071, shall not apply to any loan made by any international bank agency or any bank, including an Edge Act corporation, organized under the laws of the United States or this state to borrowers who are neither residents nor citizens of the United States if such loan is clearly related to, and usual in, international or foreign business.

(2) The provisions of this chapter shall not apply to any international banking facility "deposit," "borrowing," or "extension of credit," as those terms are defined by the commission pursuant to s. 655.071.

History.--s. 1, ch. 79-138; s. 10, ch. 81-179; s. 1872, ch. 2003-261.

687.14 Definitions.--As used in this act, unless the context otherwise requires:

(1) "Advance fee" means any consideration which is assessed or collected, prior to the closing of a loan, by a loan broker.

(2) "Borrower" means a person obtaining or desiring to obtain a loan of money, a credit card, or a line of credit.

(3) "Commission" means the Financial Services Commission.

(4) "Loan broker" means any person, except any bank or savings and loan association, trust company, building and loan association, credit union, consumer finance company, retail installment sales company, securities broker-dealer, real estate broker or sales associate, attorney, federal Housing Administration or United States Department of Veterans Affairs approved lender, credit card company, installment loan licensee, mortgage broker or lender, or insurance company, provided that the person excepted is licensed by and subject to regulation or supervision of any agency of the United States or this state and is acting within the scope of the license; and also excepting subsidiaries of licensed or chartered consumer finance companies, banks, or savings and loan associations; who:

(a) For or in expectation of consideration arranges or attempts to arrange or offers to fund a loan of money, a credit card, or a line of credit;

(b) For or in expectation of consideration assists or advises a borrower in obtaining or attempting to obtain a loan of money, a credit card, a line of credit, or related guarantee, enhancement, or collateral of any kind or nature;

(c) Acts for or on behalf of a loan broker for the purpose of soliciting borrowers; or

(d) Holds herself or himself out as a loan broker.

(5) "Principal" means any officer, director, partner, joint venturer, branch manager, or other person with similar managerial or supervisory responsibilities for a loan broker.

(6) "Office" means the Office of Financial Regulation of the commission.

History.--s. 1, ch. 91-87; s. 35, ch. 93-268; s. 748, ch. 97-102; s. 57, ch. 2003-164; s. 1873, ch. 2003-261.

687.141 Loan brokers; prohibited acts.--No loan broker shall:

(1) Assess or collect an advance fee from a borrower to provide services as a loan broker.

(2) Make or use any false or misleading representations or omit any material fact in the offer or sale of the services of a loan broker or engage, directly or indirectly, in any act that operates or would operate as fraud or deception upon any person in connection with the offer or sale of the services of a loan broker, notwithstanding the absence of reliance by the buyer.

(3) Make or use any false or deceptive representation in its business dealings or to the office or conceal a material fact from the office.

History.--s. 2, ch. 91-87; s. 1874, ch. 2003-261.

687.142 Responsibility of principals.--Each principal of a loan broker may be sanctioned for the actions of the loan broker, including its agents or employees, in the course of business of the loan broker.

History.--s. 3, ch. 91-87.

687.143 Loan brokers; investigations; cease and desist orders; administrative fines.--

(1) The office may investigate the actions of any person for compliance with this act.

(2) The office may order a loan broker to cease and desist whenever the office determines that the loan broker has violated or is violating or will violate any provision of this act, any rule of the commission, order of the office, or written agreement entered into with the office.

(3) The office may impose and collect an administrative fine against any person found to have violated any provision of this act, any rule of the commission, order of the office, or written agreement entered into with the office in any amount not to exceed \$5,000 for each such violation. All fines collected hereunder shall be deposited in the Bureau of Financial Investigations Administrative Trust Fund.

History.--s. 4, ch. 91-87; s. 3, ch. 97-60; s. 1875, ch. 2003-261.

TLPJ Successfully Argues That Court Must Decide Whether Payday Loan Agreement is Legal Before Enforcing Agreement's Arbitration Clause

IMPORTANT FLORIDA SUPREME COURT CASE RECASTING LOAN SUBSTANCE OVER FORM:

The Supreme Court of Florida has refused to enforce a binding mandatory arbitration clause in a payday loan contract charging interest rates of up to 1,300 percent, and ruled that low income borrowers can not be forced to arbitrate their claims that the loans violated state usury laws. Trial Lawyers for Public Justice (TLPJ) and a team of consumer advocates representing borrowers are challenging the legality of the high interest "payday loan" rates charged by Buckeye Check Cashing – a nationwide company with over 90 locations – and successfully argued that consumers cannot be forced out of court and into arbitration.

The Court's January 20, 2005, decision held that Florida courts must first decide whether a legal agreement exists before enforcing the agreement's binding mandatory arbitration (BMA) clause. The 5 to 1 ruling overturned the decision of Florida's Fourth District Court of Appeals, which held that Buckeye's BMA clause should be enforced even though the plaintiffs were challenging the legality of the entire payday loan contract.

"Payday lending companies like Buckeye that charge interest rates up to 1,300 percent should not be allowed to shield these illegal loan-sharking schemes by forcing borrowers into private arbitration," said TLPJ Staff Attorney F. Paul Bland, Jr., who argued the appeal. "The Florida Supreme Court was completely correct that companies cannot use an illegal contract to force consumers to give up their day in court." "Payday lending companies like Buckeye that charge interest rates up to 1,300 percent should not be allowed to shield these illegal loan-sharking schemes by forcing borrowers into private arbitration."

Plaintiffs John Cardegna, Donna Reuter, and thousands of other Florida residents borrowed money from Buckeye and received immediate payments of cash in exchange for post-dated personal checks for substantially greater sums of money. When the time came for Buckeye to cash the checks, borrowers who could not afford the greater amount due were allowed to "roll over" the loan by paying an additional "fee" equal to the difference between the amount owed and the amount borrowed, even though they did not receive any additional loan. These added "fees" on deferred payments produced interest rates between 137 percent and 1,317 percent.

Cardegna and Reuter filed suit against Buckeye on behalf of all its Florida borrowers, alleging that Buckeye's "deferred check-cashing" transactions were actually usurious consumer loans wherein low income borrowers were required to pay exorbitant interest rates in violation of numerous state consumer protection statutes. Buckeye responded by moving to compel arbitration, arguing that all of its borrowers should be forced out of

court and into individual private arbitration proceedings pursuant to the BMA clause in its loan contracts.

"Buckeye wanted to force our clients into secret arbitration proceedings so no court could ever issue a binding judgment saying that its 'check-cashing' business is an illegal scheme to commit usury," said Richard M. Fisher of Cleveland, Tennessee, who is co-lead counsel for the plaintiffs. "If Buckeye had pulled off this gambit, it would have been impossible for us to publicly vindicate the rights of thousands of Floridians."

The Florida trial court initially denied Buckeye's motion for arbitration, but the Fourth District Court of Appeals reversed and held that the plaintiffs' claims that Buckeye's loan contracts were illegal and void had to be resolved through arbitration. The state supreme court granted review and then reversed the appeals court, holding that "an arbitration provision in a contract which is void under Florida law cannot be separately enforced while there is a claim pending . . . that the contract containing the arbitration provision is itself illegal and void ab initio."

"We are pleased that the Supreme Court found that our clients are entitled to their day in court," said Chris Casper of James, Hoyer, Newcomer & Smiljanich in Tampa, who is also co-lead counsel for the plaintiffs. "Now, we have the chance to hold Buckeye accountable for its repeated violations of Florida's usury and consumer protection laws."

In addition to Bland, Fisher, and Casper, plaintiffs were also represented by E. Clayton Yates of Fort Pierce, Florida.

CHEVY CHASE ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

**SUSAN and BRYAN ANDREWS,
Plaintiffs,**

v.

Case No. 05C0454

**CHEVY CHASE BANK, FSB,
Defendant.**

DECISION AND ORDER

Plaintiffs Susan and Bryan Andrews bring this putative class action against defendant Chevy Chase Bank, FSB alleging that defendant violated the Truth in Lending Act ("TILA"), 15 U.S.C. 1601 et seq., in a number of respects. Before me now are the parties' cross-motions for summary judgment and plaintiffs' motion for class certification.

I. FACTS

In June 2004, plaintiffs obtained a loan from defendant, a federally chartered bank, to refinance their home in Cedarburg, Wisconsin. In April 2004, defendant provided plaintiffs with preliminary disclosures about the loan, including a consumer handbook on adjustable rate mortgages, an adjustable rate mortgage ("ARM") disclosure and a preliminary Truth in Lending Disclosure Statement. At the closing, defendant provided plaintiffs with additional disclosures, including an Adjustable Rate Note ("ARN"), a Truth in Lending Disclosure Statement ("TILDS") and an Adjustable Rate Rider ("ARR").

Plaintiffs state that when they obtained the loan, they believed that the payments and the interest rate were fixed for five years and became variable thereafter. However, although

the minimum monthly payment was fixed for five years,¹ the interest rate was not. The loan carried a discounted or “teaser” interest rate of 1.950 percent, but that rate applied only to the first monthly payment, after which the interest rate increased every month according to a formula. As the interest rate increased, an ever increasing portion of the minimum monthly payment of \$701.21 was needed to cover interest, and the minimum payment itself soon became insufficient to cover accrued interest.

I will discuss additional facts in the course of the decision. In addition, to facilitate reader understanding, I include defendant’s TILDS as Exhibit A at the end of this decision.

II. SUMMARY JUDGMENT MOTIONS

I will address the parties’ summary judgment motions first and then proceed to plaintiffs’ motion for class certification. See Cowen v. Bank United of Tex. FSB, 70 F.3d 937, 941 (7th Cir. 1995).

A. Applicable Law

1. Summary Judgment Standard

Summary judgment is required “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The mere existence of some factual dispute does not defeat a summary judgment motion; “the requirement is that there be no genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). For a dispute to be genuine, the evidence must be such that a “reasonable jury could return a verdict for the

¹Plaintiffs had the option of paying more than the fixed minimum monthly payment.

nonmoving party.” Id. For the fact to be material, it must relate to a disputed matter that “might affect the outcome of the suit.” Id.

In evaluating a motion for summary judgment, I must draw all inferences in a light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, I am “not required to draw every conceivable inference from the record—only those inferences that are reasonable.” Bank Leumi Le-Israel, B.M. v. Lee, 928 F.2d 232, 236 (7th Cir.1991). Where, as here, both parties move for summary judgment, both are required to show that no genuine issues of fact exist, taking the facts in the light most favorable to the party opposing each motion. If issues of fact exist, neither party is entitled to summary judgment. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 349 (7th Cir.1983).

2. TILA

Congress enacted TILA to assure meaningful disclosure of credit terms to enable consumers to become informed about the cost of loans and to compare the credit options available to them. 15 U.S.C. § 1601(a). Congress delegated broad authority to the Federal Reserve Board (“Board”) to implement TILA, and the Board has exercised such authority by promulgating Regulation Z, see Regulation Z, 12 C.F.R. § 226 et seq., and through its interpretations and official staff commentary. The Board’s pronouncements are entitled great weight. Ford Motor Credit Co. v. Miholin, 444 U.S. 555, 565-70 (1980).

TILA requires lenders to disclose certain information about the terms of the loan to prospective borrowers. 15 U.S.C. § 1638; 12 C.F.R. § 226.17. If a loan contains a variable rate feature, lenders must provide certain preliminary disclosures, 12 C.F.R. § 226.19, and also disclose the existence of the feature at closing. 12 C.F.R. § 226.18. Lenders must

group information required to be disclosed by § 226.18 and segregate it from other information. 12 C.F.R. § 226.17(a). Lenders often place such information on a separate sheet known as a Truth in Lending Disclosure Statement or TILDS.

All required disclosures must be clear and conspicuous. 15 U.S.C. § 1632(a); 12 C.F.R. § 226.17. A disclosure is clear if it is reasonably understandable. “If a disclosure is capable of more than one plausible interpretation, it is not clear.” Elizabeth Renuart & Kathleen Keest, Truth In Lending § 4.2.4 (5th ed 2003); see also Handy v. Anchor Mortgage Corp., 464 F.3d 760, 764 (7th Cir. 2006). A disclosure is conspicuous if it “draws the consumer’s attention.” Renuart & Keest, supra, § 4.2.4. Thus, a lender may not disclose information so as to “obscure the relationship of the terms to each other.” Commentary 226.17(a)(1).

The “sufficiency of TILA-mandated disclosures is to be viewed from the standpoint of an ordinary consumer, not the perspective of a Federal Reserve Board member, federal judge, or English professor.” Smith v. Cash Store Mgmt., 195 F.3d 325, 328 (7th Cir.1999). The standard for determining whether a disclosure is sufficient is an objective one. Smith v. Check-N-Go of Ill., Inc., 200 F.3d 511 (7th Cir. 1999). Further, “whether a particular disclosure is clear for purposes of TILA is a question of law that depends on the ‘contents of the form, not on how it affects any particular reader.’” Handy, 464 F.3d at 764 (quoting Check-N-Go of Ill., Inc., 200 F.3d at 515). Similarly, whether a disclosure is conspicuous is a question of law. Check-N-Go of Ill., Inc., 200 F.3d at 515.

TILA is a remedial statute, thus, consistent with its plain language, it must be construed liberally in favor of consumers. Rossman v. Fleet Bank, 280 F.3d 384, 390 (3d Cir. 2002). A lender must comply with the letter as well as the spirit of TILA. Handy, 464 F.3d at 764.

“[A] misleading disclosure is as much a violation of TILA as a failure to disclose at all.”
Barnes v. Fleet Nat'l Bank, 370 F.3d 164, 174 (1st Cir. 2004) (quoting Smith v. Chapman, 614 F.2d 968, 977 (5th Cir.1980)).

I will discuss certain requirements of TILA in greater detail in the course of the decision.

B. Alleged TILA Violations

1. Disclosure of Payment Schedule

Plaintiffs first allege that defendant failed to disclose information concerning the loan's payment schedule as required by TILA. Title 15 U.S.C. § 1638(a)(6) requires lenders to disclose “the number, amount and due dates or period of payments scheduled to repay the total of payments.” The disclosure must “reflect the terms of the legal obligations of the parties.” 12 C.F.R. § 226.17(c)(1). Where, as here, a loan involves both a variable interest rate and scheduled variations in payment amounts, the schedule of payments should “disclose the amount of any scheduled initial payments followed by an adjusted level of payments based on the initial interest rate.” Commentary § 226.17(c)(1)-12. Lenders specifying the period of payments scheduled to repay a loan “as a general rule . . . must disclose the payment intervals or frequency, such as ‘monthly’ or ‘bi-weekly,’ and the calendar date that the beginning payment is due.” Commentary § 226.18(g).

Information concerning the number, amount and periods of payments must be disclosed clearly and conspicuously. § 1632(a); 12 C.F.R. § 227.17. Further, lenders must group such information, see Commentary § 226.18(g) and model forms (App. H No. 12, 13), and conspicuously segregate it “from all other terms, data, or information provided in connection with a transaction.” § 1638(b)(1). Lenders may group and segregate the

information by enclosing it in a box, using bold print, dividing lines or setting it off in some other way. Commentary § 226.17(a)(1)-2; see also 12 C.F.R. § 226.17.

In the present case, as to the number and amount of payments, defendant properly disclosed that plaintiffs had to make sixty payments of \$701.21, followed by three hundred payments at an adjusted level of \$983.49. Defendant also properly based the adjusted level of payments on the initial interest rate. See Commentary § 226.17(c)(1)-12.

With respect to payment periods, however, defendant disclosed the due dates of the first and last payments in a column in a box (known as the “federal box”) on its TILDS but did not disclose the payment periods, i.e., that payments were due monthly, in either the column or the box. Thus, it would appear that defendant failed to disclose the period of payments as required by TILA. Defendant argues that its disclosures satisfy TILA because it included a sentence on its TILDS stating that “[t]his loan program allows you to select the type of payment you may make each month, in accordance with disclosures provided to you earlier,” and because it provided plaintiffs with other documents indicating that they had to make monthly payments. I agree with plaintiffs.

First, the sentence on which defendant relies does not focus on payment periods but on a borrower’s right to select a type of payment. The words “each month” modify the borrower’s right to select. Thus, an ordinary consumer would not conclude that the sentence established an obligation to make monthly payments. Further, to the extent that the sentence relates to payment periods, it is ambiguous. An ordinary consumer would interpret the sentence’s authorization to “select the type of payment you make each month” as permission to decide for herself whether to make a payment each month and in what amount. Thus, the sentence does not clearly require a borrower to pay monthly.

The sentence does not satisfy the clear and conspicuous requirement for other reasons as well. Defendant printed it in very small print and sandwiched it between the bottom of the federal box and information regarding the loan's lack of a demand feature, which defendant printed in larger print. Thus, the sentence would not draw the attention of an ordinary consumer. For this reason also, it is not conspicuous. See Van Jackson v. Check 'N Go of Ill., Inc., 193 F.R.D. 544, 548-49 (N.D. Ill. 2000) (finding TILA violation where disclosure was outside the federal box); see also Leathers v. Peoria Toyota-Volvo, 824 F. Supp. 155, 158 (C.D. Ill. 1993) (same).

In addition, because defendant located the sentence in a different place than the information concerning the number and amounts of payments, it did not group and segregate the disclosure as TILA requires, and it “obscure[d] the relationship of the terms to each other.” Commentary § 226.17(a)(1).

Similarly, defendant's statements in other documents, the ARN and the ARR, that plaintiffs had to make monthly payments do not satisfy the segregation requirement. This is so because the statements would not draw the ordinary consumer's attention and because defendant did not group them with information regarding the number and amounts of payments, did not segregate the information concerning the payment schedule from the other terms of the loan and obscured the relationship of the terms regarding payment to each other.²

²In Hamm v. Ameriquet Mortgage Co., No 05C0227, 2005 WL 2405804 (N.D. Ill. Sept. 27, 2005), the court held that a defendant's failure to include the period of payments in its TILDS did not violate TILA because the defendant provided the information in other documents and because there was no evidence that the plaintiff was confused by the omission. However, disclosures concerning the payment schedule must be “grouped together . . . segregated from everything else.” 12 C.F.R. § 226.17. Further, whether or not the

For the foregoing reasons, defendant's disclosure of the period of payments portion of the payment schedule does not comply with TILA.

2. Disclosures of Cost of Loan as Annual Percentage Rate and Variable Interest Rate Feature

Plaintiffs also argue that defendant's disclosures of the cost of the loan as an annual percentage rate ("APR") and the loan's variable interest rate feature are not clear as required by TILA. I will consider both of plaintiffs' arguments in this section because the challenged disclosures are related and because the analyses of their clarity are largely similar.

a. Disclosure of Cost of Loan as Annual Percentage Rate

Section 1638(a)(4) requires disclosure of the cost of a loan to the borrower "as an 'annual percentage rate' using that term." Further, where, as here, a loan's initial interest rate is subsequently adjusted, the APR must "reflect a composite annual percentage rate based on the initial rate for as long as it is charged and, for the remainder of the term, the rate that would have been applied using the index or formula at the time of consummation." Commentary § 226.17(C)-6. In addition, § 1638(a)(8) requires lenders to provide a brief "descriptive explanation[]" of the APR. See also § 226.18(e). TILA's clear and conspicuous requirement applies to the disclosure and explanation of the cost of the loan as an annual percentage rate. Commentary § 226.17(a)(1)-1.

On its TILDS, defendant stated that the APR was 4.047 percent and explained that this figure reflected the cost of the loan "as a yearly rate." Plaintiffs contend that defendant provided other information in its TILDS and other disclosures that strongly implied that the

borrower is confused is irrelevant. Handy, 464 F.3d at 764. Thus, Hamm appears to have been wrongly decided. See Washington v. Ameriquet Mortgage Co., No. 05C1007, 2006 WL 1980201(N.D. Ill. July 11, 2006) (rejecting Hamm).

cost of the loan expressed as a yearly rate was 1.950 percent and that therefore defendant's APR disclosure is unclear. I agree. An ordinary consumer reading defendant's disclosures would be confused about the cost of the loan, expressed as an annual percentage rate.

I note first that "a misleading disclosure is as much a violation of TILA as a failure to disclose at all." Barnes, 370 F.3d at 174. Further, in determining whether a disclosure is clear as required by TILA, I may consider all of the information in a defendant's disclosures. Renuart & Keest, supra, § 4.2.4 (stating that TILA's clear and conspicuous standard requires that disclosures be understandable and that a lender which provides conflicting information about a transaction violates such standard); see also Handy, 464 F.3d at 764 (holding that where a lender provided a borrower with a correct disclosure but also provided the borrower with an incorrect form, the disclosure was unclear); Roberts v. Fleet Bank (R.I.), 342 F.3d 260, 267-68 (3d Cir. 2003) (stating that in determining whether a required disclosure is clear, a court may consider the other information that the lender provided to the borrower); Ralls v. Bank of N.Y., 230 B.R. 508, 516 (Bankr. E.D. Pa. 1999) (stating that where there was a contradiction between TILA disclosures and other information provided by the lender, the disclosures were unclear); Affatato v. Beneficial Corp., No. 96 CV 5376(NG), 1998 WL 472494 (E.D.N.Y. Aug. 7, 1998) (denying motion to dismiss where the borrower alleged that the lender provided additional information which conflicted with the disclosures).

Defendant made several statements that conflicted with its disclosure that the cost of the loan as an annual percentage rate was 4.047 percent. Defendant stated on its TILDS and in other disclosures, including its preliminary disclosures (the ARM and the preliminary TILDS) and documents that it provided at the closing (the ARN and the ARR), that the loan carried an interest rate of 1.950 percent. In no disclosure did defendant mention any other interest

rate. Further, in its ARN, defendant stated that the 1.950 percent rate was a “yearly rate,” the identical phrase that it used to define the APR. Thus, in addition to stating that the cost of the loan as a yearly rate was 4.047 percent, defendant suggested that the cost of the loan as a yearly rate was 1.950 percent. As previously indicated, however, the 1.950 percent rate was, in fact, a discounted or teaser rate, which applied only to the first monthly payment. However, defendant also muddled up this fact by failing to disclose, as it was required to do under § 226.19, that the rate was discounted, stating instead in its ARM only that the rate “may” have been discounted. Defendant’s repeated references in its disclosures to the 1.950 percent rate, its characterization of such rate as a yearly rate and its lack of forthrightness about the discounted nature of the rate would both confuse and mislead an ordinary consumer about the cost of the loan as an annual percentage rate.³

Finally, on the back of its TILDS, defendant made another misleading statement, which in the context of its repeated references to the 1.950 percent rate could only add to an ordinary consumer’s confusion as to the cost of the loan as an annual percentage rate. Defendant stated “if interest was the only Finance Charge, then the interest rate and the Annual Percentage Rate would be the same.” In fact, even if interest were the only finance charge, the annual percentage rate would not be 1.950 percent. Rather, the annual percentage rate was based on a composite of the discounted interest rate (1.950 percent) for as long as it was applied (one month) and the interest rate without the discount feature, which

³Where the interest rate and the APR are merely different ways of calculating the cost of a loan as a yearly rate, disclosure of the interest rate might not confuse an ordinary consumer. See, e.g., *Smith v. Anderson*, 801 F.2d 661, 663-64 (4th Cir. 1986); *In re Lewis*, 290 B.R. 541, 549 (E.D. Pa. 2003); *Robinson v. First Franklin Fin. Corp.*, No. 05-6652, 2006 WL 2540777, at *4 (E.D. Pa. Aug. 31, 2006). As discussed, however, in the present case, the 1.950 percent figure was a teaser rate and not the interest rate on the loan.

was much higher.

For the foregoing reasons, defendant's disclosure of the cost of the loan as an annual percentage rate was unclear.

b. Disclosure of Variable Interest Rate Feature

Plaintiffs also allege that defendant did not clearly disclose that the loan had a variable interest rate feature. If a loan has such a feature, the lender must make certain preliminary disclosures and also disclose the existence of the feature on its TILDS. 12 C.F.R. § 226.18(f). Plaintiffs allege that although defendant stated on its TILDS that the loan had a variable interest rate feature, it also included information on the TILDS which misleadingly implied that the feature did not take effect until after the first five years of the loan. I agree.

I again note that a lender may cause a disclosure to become unclear by including conflicting information in its disclosures. See Handy, 464 F.3d at 764; Barnes, 370 F.3d at 174; Roberts, 342 F.3d at 267-68; In re Ralls, 230 B.R. at 516; Affatato, 1998 WL 472494, at *3. In the present case, defendant included information on its TILDS from which an ordinary consumer could easily infer that the interest rate on the loan was fixed for five years and became variable thereafter. Specifically, defendant stated on its TILDS that plaintiffs' loan was a "5-year fixed" loan. This statement was confusing because although it is true that the payments on the loan were fixed for five years, the interest rate was not. Defendant could easily have indicated this by including the word "payments" after the word "fixed" on its TILDS, but it did not do so. Rather than narrowing the application of "fixed," defendant used the word to describe the general nature of the loan. Further, defendant placed the "5-year fixed" language immediately above its statement that the interest rate was 1.950 percent and thus strengthened the implication that the five-year fixed language applied to the interest rate. An

ordinary consumer reading defendant's TILDS could easily conclude that the interest rate was fixed for five years and variable in the last twenty-five. Further, defendant misleadingly stated in its ARN and ARR that in August 2004 the interest rate "may" change not that, as defendant well knew, it would change.

Defendant responds that it stated in other disclosures as well as the TILDS that the loan had a variable rate feature. However, to be unclear, TILA requires only that a disclosure be capable of being plausibly interpreted in more than one way. An ordinary consumer reading defendant's TILDS could plausibly conclude that the loan had a variable interest rate feature which took effect after the first five years of the loan. Therefore, defendant's disclosure violated TILA.

3. Information Added to TILDS

TILA bars a lender from adding information to its TILDS that is not "directly related" to required information. 12 C.F.R. 226.17(a). Plaintiffs argue that defendant's statement on its TILDS that the loan's interest rate was 1.950 percent violated this prohibition. In determining whether information is directly related to required information, I ask whether the added information is meaningfully connected to the required information and whether it is likely to be useful to an ordinary borrower. *See, e.g., Goldberg v. Del. Olds, Inc.*, 670 F. Supp. 125, 129 (D. Del. 1987), *aff'd*, 845 F.2d 1011 (3d Cir. 1988). TILA does not require a lender to disclose a loan's interest rate. Further, in the present case, defendant was most assuredly not required to disclose the 1.950 percent rate, which applied only to the first monthly payment. However, as discussed, defendant included the 1.950 percent rate on its TILDS. Yet the 1.950 percent figure had virtually no relation to any information required to be disclosed on the TILDS, much less a direct relation. The 1.950 percent rate had no significant

connection to the cost of the loan. Moreover, a reference to the 1.950 percent rate would not be useful to an ordinary borrower because it would cause the loan to appear more attractive than it actually was and serve no useful purpose. Thus, by adding information to its TILDS that was not directly related to that required, defendant violated TILA.

4. Disclosure of Possibility of Negative Amortization

Finally, plaintiffs allege that defendant did not sufficiently disclose the consequences of negative amortization. The Commentary to 226.19(b)(2)(v) explains that "[a] creditor must disclose, where applicable, the possibility of negative amortization." Where, as here, a loan permits a borrower to make payments at a fixed level, "the creditor must fully disclose the rules relating to the option, including the effects of exercising the option (such as negative amortization will occur and the principal balance will increase)." Commentary § 226.19(2).

In its ARM disclosure, defendant stated that:

Interest Rate changes and your ability to make less than a Fully Amortizing Payment each month, or a combination of the two, may result in the accumulation of accrued but unpaid interest ('Deferred Interest Balance').

Each month that the payment option you choose is less than the entire interest portion, we will add the Deferred Interest Balance to your unpaid principal. We will also add interest on the Deferred Interest Balance to your unpaid principal each month. The interest rate on the Deferred Interest Balance will be the Fully Indexed Rate.

Although defendant did not use the language suggested by the commentary, it did inform borrowers as to what would occur if they made only the minimum monthly payments. Thus, defendant's disclosure satisfied TILA.

C. Available Remedies

As remedies for defendant's TILA violations, plaintiffs seek (1) statutory damages; (2)

a declaration that they may rescind the loan; and (3) attorneys fees. Plaintiffs do not seek actual damages. Defendant argues that the remedies that plaintiffs seek are unavailable.

1. Statutory Damages

A TILA plaintiff may recover statutory damages “only” if the defendant fails “to comply with the requirements of section 1635 . . . or of paragraph (2) (insofar as it requires a disclosure of the ‘amount financed’), (3), (4), (5), (6), or (9) of section 1638(a).” 15 U.S.C. § 1640(a). In Brown v. Payday Check Advance, Inc., 202 F.3d 987, 991 (7th Cir. 2000), the Seventh Circuit held that § 1640(a)’s use of the word “only” . . . confines statutory damages to a closed list” of violations of § 1638. See also Baker v. Sunny Chevrolet, Inc., 349 F.3d 862, 869 (6th Cir. 2003) (stating that § 1640(a) “creates two types of violations: (a) complete non-disclosure of enumerated items in § 1638(a), which is punishable by statutory damages; and (b) disclosure of the enumerated items in § 1638(a) but NOT in the manner required by the Regulation and § 1638(b)(1), which is not subject to statutory damages”).

As previously discussed, defendant violated §§ 1632 and 1638(b) by failing to clearly and conspicuously disclose and segregate information relating to the payment schedule, by failing to clearly disclose the APR and the existence of a variable interest rate feature, and by adding to its TILDS information not directly related to required information. Neither violations of § 1632 or § 1638(b) are among the TILA violations enumerated in § 1640(a) for which statutory damages are available. Therefore, plaintiffs are not entitled to statutory damages.

2. Rescission

Under some circumstances, a TILA plaintiff may rescind a loan. 15 U.S.C. § 1635; 12

C.F.R. § 226.23. Generally, a borrower has three days to rescind after the closing or receipt of notice of the right to rescind along with all material disclosures. If a lender fails to provide a borrower with notice of the right to rescind or if the lender fails to make a material disclosure, the period in which a plaintiff may exercise the right to rescind is extended. “Material disclosures” are “the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total payments, [and] the payment schedule.” 12 C.F.R. § 225.23(2). “Failure to provide information regarding the annual percentage rate also includes failure to inform the consumer of the existence of a variable rate feature.” Commentary § 23(2)(3)-2. Defendant’s failures to clearly and conspicuously disclose the payment period, the annual percentage rate and the variable interest rate feature all involve material disclosures for purposes of the right of rescission.⁴ 12 C.F.R. § 226.23. Thus, plaintiffs may avail themselves of the remedy of rescission.

3. Attorneys’ Fees

A TILA plaintiff may obtain attorneys’ fees and costs if she is “determined to have a right of rescission under section 1635.” 15 U.S.C. § 1640(3). Because I have determined that plaintiffs have a right of rescission, they are entitled to attorneys’ fees.

III. MOTION FOR CLASS CERTIFICATION

A. Availability of Class Certification

In the present case, on behalf of themselves and putative class members, plaintiffs seek a declaratory judgment that they may rescind the loan. Defendant argues that a TILA plaintiff seeking a declaratory judgment that she is entitled to rescission may not utilize the

⁴Defendant’s addition of information on its TILDS not directly related to required information does not involve a material disclosure. 12 C.F.R. § 226.23(a)(3)(n.48).

class action mechanism. Although courts have analyzed the class action issue differently insofar as it relates to the right to rescind, compare James v. Home Construction of Mobile, Inc., 621 F.2d 727, 730 (5th Cir. 1980), with McKenna v. First Horizon Home Loan Corp., 429 F. Supp. 2d 291, 296 (D. Mass 2006); and Latham v. Residential Loan Ctrs. of Am., Inc., No. 03C7094, 2004 WL 1093315, at *5 (N.D. Ill. May 6, 2004), I conclude that a TILA plaintiff seeking a declaration that she may rescind a loan may represent a class.

First, “there is nothing in the language of TILA which precludes the use of the class action mechanisms provided by Rule 23 to obtain a judicial declaration whether an infirmity in the documents, common to all members of the class, entitles each member of the class individually to seek rescission.” Rodrigues v. Members Mortgage Co., Inc., 226 F.R.D. 147, 153 (D. Mass. 2005) (quoting Williams v. Empire Funding Corp., 183 F.R.D. 428, 436 (E.D. Pa. 1998)). I do not find it significant that Congress referred to class actions when in 1974 it amended § 1640 to set a damages cap but made no comparable reference when it subsequently amended § 1635, which governs rescission claims. It is just as likely that Congress did not intend to limit rescission claims in any way. McKenna, 429 F. Supp. 2d at 291.

Second, assuming a TILA plaintiff can satisfy the requirements of Fed. R. Civ. P. 23, public policy strongly favors allowing class actions in cases like the present one. Class actions serve the purpose of providing compensation in cases involving public wrongs and widespread injuries. There is no reason why a plaintiff who alleges that a defendant has violated TILA and caused widespread injuries should not be able to bring a class action. Denial of class action status would reward defendants who may have committed wrongs and leave victims who may have been wronged uncompensated. Note, Class Actions Under the

Truth in Lending Act, 83 Yale L.J. 1416, 1435 (1974).

B. Requirements for Class Certification

In order to obtain class certification, plaintiffs must satisfy several requirements. First, they must have standing to sue. Rozema v. Marshfield Clinic, 174 F.R.D. 425, 432 (W.D. Wis. 1997). The facts previously discussed indicate that plaintiffs have standing. In addition, plaintiffs must satisfy the criteria in Fed. R. Civ. P. 23. Rule 23(a) requires plaintiffs to establish (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. If they satisfy these requirements, they must also meet one of the requirements of Rule 23(b). In addition, it is implicit in Rule 23 that plaintiffs establish the existence of a definable class. Rosario v. Livaditis, 963 F.2d 1013, 1017 (7th Cir. 1992).

1. Fed. R. Civ. P. 23(a)

a. Numerosity

Rule 23(a)(1) requires that potential class members be “so numerous that joinder of all members is impracticable.” To satisfy this requirement, a plaintiff need only show that joinder would be difficult or inconvenient. Robidoux v. Celani, 987 F.2d 931, 935 (2nd Cir. 1993). A plaintiff will generally meet the requirement by showing that the putative class consists of forty or more. Clarke v. Ford Motor Co., 220 F.R.D. 568, 578 (E.D. Wis. 2004). In the present case, plaintiffs present evidence that defendant extended about 7,000 loans in which the TILA disclosure contained some or all of the deficiencies discussed above. Thus, plaintiffs satisfy the numerosity requirement.

b. Commonality

Rule 23(a)(2) requires the existence of “questions of law or fact common to the class.”

Generally, the presence of a single common legal or factual question is sufficient. Clarke, 220 F.R.D. at 579 (stating that the commonality requirement is not demanding because it may be satisfied by a single common issue). Rule 23(a)(2) generally looks to whether the defendant's conduct is common to class members, rather than to whether the result of the conduct is uniform among class members. Rosario, 963 F.2d at 1018. In the present case, whether defendant's disclosures of the payment schedule, the cost of the loan as an annual percentage rate and the variable interest rate feature of the loan violated TILA is a question common to the class.

Defendant argues that plaintiffs fail to establish commonality because rescission is a personal and equitable remedy, which is only available based on the particular facts of a case. However, plaintiffs do not seek rescission of an entire class of transactions but only a declaration that each class member may rescind if he or she wishes to do so. See, e.g., Williams, 183 F.R.D. at 435; see also McIntosh v. Irwin Union Bank & Tr. Co., 215 F.R.D. 26, 33 (D. Mass 2003). As the Williams court explained:

plaintiffs only seek a declaration that . . . each member of the class is entitled to seek rescission. Should the Court declare that, indeed, plaintiffs are entitled to seek rescission because of certain infirmities in the TILA disclosure documents, then each class member, individually, and not as a member of the class, would have the option to exercise his or her right to seek rescission.

183 F.R.D. at 435-36. Further, as to any member of the class who sought to exercise his or her statutory right to rescind, defendant would be entitled to exercise any right it had under the statute.

Thus, plaintiffs satisfy the commonality requirement.

c. Typicality

Rule 23(a)(3) requires that the claims of the class representative be "typical of the

claims . . . of the class.” Typicality does not require a complete identity of claims. Clarke, 220 F.R.D. at 579 (stating that typicality does not require that the named plaintiff be in the same position as every member of the class). Rather, the critical inquiry is whether the class representative’s claims have the same essential characteristics as those of the putative class. Id. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality. Since the claims only need to share the same essential characteristics and need not be identical, the typicality requirement is not highly demanding. Id. In the present case, plaintiffs’ claims and those of members of the putative class arise out of the same documents and are based on the same legal theory. Therefore, plaintiffs meet their burden of establishing typicality.

d. Adequacy of Representation

Rule 23(a)(4) requires that the representative parties “fairly and adequately protect the interests of the class.” In determining the adequacy of representation, courts consider the adequacy of the class representative and of class counsel. Retired Chi. Police Ass’n v. City of Chi., 7 F.3d 584, 596 (7th Cir. 1993). The interest of the representative must not conflict with those of the class and class counsel must be qualified. In the present case, both plaintiffs and class counsel present evidence supporting their adequacy. Plaintiffs submit affidavits attesting to their commitment to the class, and counsel submits evidence of prior relevant experience. Thus, plaintiffs satisfy the requirement of Rule 23(a)(4).

2. Rule 23(b)

In order to obtain class certification, a plaintiff must also satisfy the requirements of one of the subsections of Rule 23(b). In the present case, plaintiffs seeks certification under Rule

23(b)(2) or, alternatively, under Rule 23(b)(3).

There are significant distinctions between class actions certified under Rule 23(b)(2) and those certified under subdivision (b)(3). Rule 23(b)(3) is so general that it encompasses all class actions, whereas actions certified under subdivision (b)(2) represent specialized categories of class actions. Unlike actions certified under Rule 23(b)(3), in Rule 23(b)(2) actions, it is not mandatory to give notice of the pendency of the action to class members, class members do not have the right to opt out of the action prior to judgment on the merits, and certification is less burdensome on the parties and the court. Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 4:19 (4th ed. 2002).

Thus, actions that qualify for class certification under subdivision (b)(2) should not generally be certified under subdivision (b)(3). Id.; VanGemert v. Boeing Co., 259 F. Supp. 125, 130-31 (S.D.N.Y. 1966) (articulating principle that actions under subdivisions (b)(1) and (b)(2) are preferred over suits under (b)(3)); see also Specialty Cabinets & Fixtures, Inc. v. Am. Equitable Life Ins. Co., 140 F.R.D. 474, 477 (S.D. Ga. 1991) (stating that it is desirable to certify class actions under subdivisions (b)(1) or (2) because its members do not have right to exclude themselves from binding effect of class action judgment). Thus, I ask first whether the present action is certifiable under subdivision (b)(2).

Rule 23(b)(2) provides that an action may be maintained as a class action if “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” Thus, in the present case, certification is proper under the rule if defendant’s inaction with respect to plaintiffs affected the entire class and if declaratory relief would be appropriate for the entire class. Plaintiffs allege that defendant has contested

their TILA claims and that defendant's arguments would be largely the same with respect to each class member. Thus, defendant has "refused to act on grounds generally applicable to the class," id., and the first requirement of Rule 23(b) is satisfied.

I now ask whether declaratory relief is appropriate with respect to the entire class. The principal criteria for determining whether declaratory relief is appropriate are whether the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and whether it will terminate the uncertainty giving rise to the proceeding. Gammon v. GC Servs. Ltd. P'ship, 162 F.R.D. 313, 320 (N.D. Ill. 1995). In the present case, a declaratory judgment would settle the issue of whether defendant violated TILA and, if so, whether such violation gives rise to the right to rescind. Therefore, declaratory relief is appropriate with respect to the entire class.

Thus, I conclude that plaintiffs are entitled to class certification under Rule 23(b)(2).

C. Definition of Class

The definition of a class must be precise enough to enable the court to determine whether at any given time a particular individual is or is not a member of the class. See Alliance to End Repression v. Rochford, 565 F.2d 975, 977 (7th Cir. 1977). A court must be able to resolve the question of an individual's membership by reference to objective criteria. Elliott v. ITT Corp., 150 F.R.D. 569, 574 (N.D. Ill. 1992). However, when a plaintiff attempts to certify a class under Rule 23(b)(2) for the purpose of seeking injunctive or declaratory relief, a precise class definition is less critical. See Battle v. Commonw. of Pa., 629 F.2d 269, 271 n.1 (3rd Cir. 1980). The fact that a class includes persons who will become members in the future does not render it impermissibly indefinite. Probe v. State Teacher's Ret. Sys., 780 F.2d 776, 780 (9th Cir. 1986).

In the present case, I conclude that it is appropriate to include in the class those persons (1) who obtained an adjustable rate mortgage from defendant on their primary residence, (2) between April 20, 2004 and the date of class certification, and (3) who received a TILDS that contained language identical to that of any one of the three material disclosures⁵ that I have found deficient.

D. Notice to Class Members

Although it is not mandatory to notify members of a class certified under Rule 23(b) of the pendency of the action, it is necessary to provide such notice in the present case so that class members will learn of their right to rescind. Moreover, I am authorized to make an appropriate order regarding notice under Rule 23(d)(2)a. However, before entering such an order, I wish to hear from the parties concerning what sort of notice is appropriate. Therefore, plaintiffs should file a proposal regarding notice by **February 2, 2007**. Defendant may file a response by **February 16, 2007**, and plaintiffs may reply by **March 2, 2007**.

IV. CONCLUSION

Therefore, for the reasons stated,

IT IS ORDERED that plaintiffs' and defendant's motions for summary judgment are **GRANTED IN PART AND DENIED IN PART** as stated above.

IT IS FURTHER ORDERED that plaintiffs' motion for class certification is **GRANTED**

⁵Defendant argues that some borrowers received a TILDS which included "pa" or "pay" next to the "5-year fixed" language, and that I should not include such borrowers in the class because the additional language might change both the clarity and the typicality analyses. Although neither party has provided me with a copy of a TILDS containing such language or discussed the matter in depth, I tend to agree with defendant. Therefore, I decline to include persons who received disclosures of this type in the class.

as stated above.

FINALLY, IT IS ORDERED that the parties advise the court concerning notification of class members as stated above.

Dated at Milwaukee, Wisconsin this 16 day of January, 2007.

/s _____
LYNN ADELMAN
District Judge

ADMINISTRATIVE ACTIONS--- COMPLAINTS TO LICENSING AND REGULATION

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**STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL INSTITUTIONS
DIVISION OF CONSUMER SERVICES**

IN THE MATTER OF DETERMINING
Whether there has been a violation of the
Consumer Loan Act of Washington by:

WMC MORTGAGE CORP.,
AMY C. BRANDT, Principal Owner, President
and CEO,
MARK E. WALTER, Principal Owner and
Executive Vice President, and
MARC E. BECKER, Principal Owner and
Director,

Respondents.

NO. C-07-557-08-SC01

STATEMENT OF CHARGES and NOTICE OF
INTENTION TO ENTER AN ORDER TO
REVOKE LICENSE, PROHIBIT FROM
INDUSTRY, IMPOSE FINE, ORDER
RESTITUTION AND COLLECT
INVESTIGATION FEE

INTRODUCTION

Pursuant to RCW 31.04.093 and RCW 31.04.165, the Director of the Department of Financial Institutions of the State of Washington (Director) is responsible for the administration of chapter 31.04 RCW, the Consumer Loan Act (Act). After having conducted an investigation pursuant to RCW 31.04.145, and based upon the facts available as of the date of this Statement of Charges, the Director, through his designee Division of Consumer Services Director Deborah Bortner, institutes this proceeding and finds as follows:

I. FACTUAL ALLEGATIONS

1.1 Respondents.

A. Respondent WMC Mortgage Corp. (WMC) was licensed by the Department of Financial Institutions of the State of Washington (Department) to conduct business as a consumer lender on March 20, 2001, under license # 520-CL-18415. On October 6, 2006, Respondent WMC voluntarily surrendered its consumer loan license to the Department and started lending as a wholly owned subsidiary of GE Bank.

B. Respondent Amy C. Brandt (Brandt) is President, CEO and a Principal Owner of Respondent WMC Mortgage Corp.

C. Respondent Mark E. Walter (Walter) is Executive Vice President and a Principal Owner of

STATEMENT OF CHARGES
C-07-557-08-SC01
WMC MORTGAGE CORP., MARK E.
WALTER, MARC E. BECKER, and AMY C. BRANDT

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DEPARTMENT OF FINANCIAL INSTITUTIONS
Division of Consumer Services
150 Israel Rd SW
PO Box 41200
Olympia, WA 98504-1200
(360) 902-8703

1 Respondent WMC Mortgage Corp.

2 **D. Respondent Marc E. Becker (Becker)** is Director and a Principal Owner of Respondent
3 WMC Mortgage Corp.

4 **1.2 Investigation.** In November, 2007, the Department conducted an on-site examination of another
5 licensee who had purchased loans from Respondent WMC. The Department inspected loan documents
6 covering the time prior and up to October 6, 2006. There were 86 files reviewed by the Department for the
7 purposes of this investigation. As a result of the investigation, the Department discovered violations of the Act.

8 **1.3 Disclosures to Borrowers.** The Department discovered 76 loan files in which Respondent WMC did
9 not provide the borrowers the initial Good Faith Estimate or the Annual Percentage Rate (APR) and the
10 existence of a prepayment penalty within three days receipt of the borrowers' applications.

11 **1.4 Deceptive and Unfair Practices.**

12 **A.** Respondent WMC originated loans that were closed without providing the borrowers a copy
13 of the Final HUD1/HUD1A Settlement Statement at the time of settlement. The Department
14 discovered 74 loan files in which the borrowers were requested, by Respondent WMC, to sign
15 a "Waiver of Borrower(s) Right to Receive Hud1-1 at Settlement" form at closing. All of the
16 borrowers signed the waivers. Without the HUD1/HUD1A, borrowers did not have the
17 charges and fees information and would not be able to make a rescission determination.

18 **B.** In addition, in 28 of the 74 loans previously mentioned, Respondent WMC printed out and
19 disclosed to borrowers the Notice of the Right to Cancel on the day after their right to cancel
20 the loan had expired. This practice did not allow the borrowers to exercise their right of
21 rescission.

22 **C. Loan #11454916 – Inaccurate dates.** Respondent WMC originated loan # 11454916 with
23 incorrect dates on the Note, Notice of Right to Cancel, Final Truth-in-Lending Statement and
24 RESPA servicing disclosure. All of the documents indicate the transaction occurred in
25 January 2005, but all of the other documents affiliated with the loan indicate the transaction

1 occurred in January 2006.

2 **D. Loan # 11573857 – Inaccurate Settlement Statement.** Respondent WMC did not provide
3 the borrower in loan # 11573857 an accurate final HUD1 Settlement Statement. The error on
4 loan # 11573857 occurred when a courier fee was deleted from the dollar amount line of 1304
5 of the final HUD1 Settlement Statement, and the Total Settlement Charges on line 1400 was
6 not recalculated. The total on line 1400 states \$7,902.24, but should state \$7,821.24. The
7 borrower was shorted the difference of \$81.00.

8 **1.5 Use of Unlicensed or Unregistered Mortgage Broker.** Respondent WMC originated a loan brokered
9 by EMT Consulting d/b/a MTM Mortgage at 1595 Northwest Gilman Boulevard, Suite 6, Issaquah,
10 Washington, an unregistered and unlicensed entity under the Mortgage Broker Practices Act.

11 **1.6 Non-Disclosure of Yield Spread Premium (YSP).** The Department discovered ten loans in which
12 Respondent WMC received payments to the mortgage broker from the lender (YSP) that had not been
13 previously disclosed to the borrowers on their GFE by Respondent WMC.

14 **1.7 Incorrect Finance Charges.** Respondent WMC did not disclose the correct amount of the finance
15 charges on loans 11338873 and 11530913. Respondent WMC had understated amounts relating to payments
16 made to the escrow company for document preparation fees and settlement fees. As a result, the Truth-in-
17 Lending statement for the two loans was understated by more than \$100.

18 **1.8 Inaccurate Annual Percentage Rate (APR) Disclosure.** Respondent WMC did not correctly disclose
19 the amount of finance charges to the borrower of loan # 333725235. Respondent WMC disclosed an APR of
20 11.0960% to the borrower when the actual APR was 11.4141%. The difference between the two rates is
21 beyond the allowed 1/8 of 1 percent deviation rate pursuant to Regulation Z, 12 C.F.R., Section 226.22(a)(2)
22 (2004) of the Truth in Lending Act.

23 **1.9 Servicing Disclosure Statements.** Respondent WMC did not provide servicing disclosure statements
24 to 40 different borrowers at the time they submitted an application or within 3 business days after submitting an
25 application.

1 **1.10 No Adjustable Rate Disclosures.** Respondent WMC did not provide adjustable rate disclosures at the
2 time of application or within 3 business days of an application for an adjustable rate loan on 39 different loans.

3 **1.11 Broker Fees Incorrectly Disclosed on GFE and HUD1/1A Settlement Statements.** Respondent
4 WMC used line 801 of the GFE and HUD1/1A Settlement Statement to record mortgage broker fees on eight
5 loans. Line 801 is to be used to record the fees a Lender may charge for processing or originating a loan.

6 **1.12 Ongoing Investigation.** The Department's investigation into the alleged violations of the Act by
7 Respondents continues to date.

8 II. GROUNDS FOR ENTRY OF ORDER

9 **2.1 Deceptive and Unfair Practices.** Based upon the Factual Allegations set forth in Section I above, the
10 Respondents are in apparent violation of RCW 31.04.027(1),(2), and (3) for directly or indirectly employing
11 any scheme, device, or artifice to defraud or mislead any borrower, to defraud or mislead any lender, or to
12 defraud or mislead any person, for directly or indirectly engaging in any unfair or deceptive practice toward any
13 person, and for directly or indirectly obtaining property by fraud or misrepresentation.

14 **2.2 Disclosures.** Based on the Factual Allegations set for in Section I above, Respondents are in apparent
15 violation of RCW 31.04.027(6) and (1), RCW 31.04.102(2) and (3), WAC 208-620-505, WAC 208-620-510,
16 Regulation X, 24 C.F.R. Sec. 3500.7(a)(b), 3500.10, and 3500.21(b)(1) (2005), Regulation Z, 12 C.F.R. Sec.
17 226.5b and 226.19(b) (2005), for understating finance charges, failing to provide initial variable rate disclosures
18 for adjustable rate mortgage loans, for listing broker fees as origination fees in the Good Faith Estimate and
19 HUD-1, for failing to timely disclose the Good Faith Estimate, Annual Percentage Rate (APR) and prepayment
20 penalty, and for failing to timely disclose the Yield Spread Premium.

21 **2.3 Unlicensed Activity.** Based upon the Factual Allegations set forth in Section I above, Respondents are
22 in apparent violation of WAC 208-620-170 for failing to ensure that persons or companies making loans on
23 behalf of Respondent WMC were authorized to do business in the State of Washington.

24 //

25 //

- 1 d. Respondents WMC, Mark E. Walter, Marc E. Becker and Amy C. Brandt, jointly and severally
2 refund all monetary fees paid or incurred by the borrowers affiliated with the violations outlined
3 herein;
4 e. Respondents WMC, Mark E. Walter, Marc E. Becker and Amy C. Brandt, jointly and severally
5 pay an investigation fee which as of the date of these charges totals \$19,322.80 calculated at
6 \$69.01 per hour for 280 staff hours devoted to the investigation;
7 f. Respondent WMC maintain records in compliance with the Act and provide the Director with the
8 location of the books, records, and other information relating to Respondent WMC's consumer
9 loan company business, and the name, address, and telephone number of the individual responsible
10 for maintenance of such records in compliance with the Act.

11 **V. AUTHORITY AND PROCEDURE**

12 This Statement of Charges and Notice of Intention to Enter an Order to Revoke License, Prohibit from
13 Industry, Impose Fine, Order Restitution, and Collect Investigation Fee (Statement of Charges) is entered
14 pursuant to the provisions of RCW 31.04.093, RCW 31.04.165, RCW 31.04.202 and RCW 31.04.205, and is
15 subject to the provisions of chapter 34.05 RCW (The Administrative Procedure Act). Respondents may make a
16 written request for a hearing as set forth in the NOTICE OF OPPORTUNITY TO DEFEND AND
17 OPPORTUNITY FOR HEARING accompanying this Statement of Charges.

18 Dated this 4th day of June, 2008.

19 
20 DEBORAH BORTNER
21 Director
22 Division of Consumer Services
23 Department of Financial Institutions

24 Presented by:

25 
26 WILLIAM HALSTEAD
27 Financial Legal Examiner

28 Approved by:

29 
30 JAMES R. BRUSSELBACK
31 Enforcement Chief



Business Risk Factors

The risk factors that may influence the management performance, stock price, and financial position of the Resona Group are described in the following paragraphs.

For Resona to make the transformation to sustainable profitability during the intensive revitalization period, sweeping measures were taken, principally during the interim period ended September 30, 2003, to minimize future risk inherent in the Group's activities. As a result, the Group has substantially reduced its exposure to the risks arising from nonperforming loans (NPLs), stockholdings in client companies for relationship purposes, fixed assets, deferred tax assets, trust banking products with contractual principal compensation features, retirement benefit obligations, and other risks.

Forward-looking statements in this section are based on judgments made by the Group at the end of the fiscal year covered by the consolidated financial statements.

(1) Risks of Nonperforming Loans

Regarding NPLs, the Group has made sufficient financial provisions so as not for a substantial rise in credit costs to occur again even when we reinforce further the support for the early revitalization of problem borrowers and accelerate the measures to clean NPLs from the balance sheet. Along with this, the Group has strengthened its credit risk management systems and has moved forward with steps to monitor and prevent deterioration in the credit standing of problem borrowers as well as to disperse risk.

However, there is a risk that—depending on future trends in the domestic economy, fluctuations in real estate and stock prices, and changes in the management condition of borrowers—the Group may have to make loan write-offs and provisions larger than is currently expected. This would have a detrimental effect on the Group's performance, financial position, and its shareholders' equity.

(a) Deterioration in Conditions of Borrowers

To attain the objectives in the Group's Business Revitalization Plan, the Group is moving forward with measures to make the final resolution of NPLs; however, as of March 31, 2004, the four Group subsidiaries engaged in banking business had total NPLs of ¥1,884.1 billion as disclosed under criteria of the Financial Reconstruction Law. In addition, exposure classified as normal may also have latent risk. The Group conducts accurate self-assessments of its assets and makes write-offs and provisions that are deemed to be appropriate. However, among major borrowers, there are some customers undergoing restructuring with the assistance of financial institutions, and there are some customers in industries experiencing stagnation, including real estate, construction, nonbank financial services, and retail/wholesaling sectors. Going forward, depending on the environment these borrowers may confront, including changes in economic conditions and alterations in the policies of the principal financial institutions of these customers, the Group banks may be requested to forfeit their claims or the number of business failures may increase. In such cases, there is a possibility that the Group's NPLs and credit costs may increase.

Moreover, the Group's principal customer base is small and medium-sized enterprises (SMEs) and individuals. These customer segments account for a substantial portion of the Group's loan portfolio, and their performances are easily influenced by economic trends. Accordingly, there is a possibility that the levels of the Group's NPLs and credit costs may exceed the expected levels, depending on trends in the domestic economy.

(b) Decline in the Value of Collateral

In making write-offs and provisions, the Group makes strict evaluations of collateral, making the assumption that the collateral will actually be

sold in the market. However, there is a possibility that the levels of NPLs and credit costs may rise, depending on the degree of fluctuations in real estate and stock prices.

(c) Increase in Bankruptcies due to Deterioration in Local Economies

The Group's principal bases of operations are the greater Tokyo metropolitan area, centered on the city of Tokyo and Saitama Prefecture, and the Kansai metropolitan area, centered around the city of Osaka. These two areas account for a high percentage of the Group's credit portfolio. If economic conditions deteriorate in these areas, there is a possibility that the Group's NPLs and credit costs may rise, as a result of an increase in bankruptcies, a decline in the value of collateral, and other adverse circumstances.

In addition, because of the prolonged lackluster economic conditions and other factors, the performances of public-sector enterprises with private participation and public-sector enterprises have shown signs of rising instability. Depending on future trends, there is a possibility that the Group's NPLs and credit costs arising from exposure to these enterprises may increase. Moreover, as a result of the deterioration in local economies, there is a risk that the financial position of local credit guarantee associations may decline. If the impact of this decline is substantial, it is possible that this would present an obstacle to the Group's efforts to deal with NPLs because of delays in receiving compensation under guarantees provided to the Group by these associations. There is also a possibility that the Group's costs would rise because of the need for higher contributions from the Group to support these associations.

(d) Increase in Credit Costs Accompanying Resolution of the NPL Issue

As previously mentioned, the Group is moving forward toward the final resolution of the NPL issue under its Business Revitalization Plan. The Group is making write-offs and provisions as deemed appropriate, but in removing NPLs from the balance sheet, losses may exceed provisions, resulting in additional net credit losses and giving rise to a possibility that credit costs may increase.

(2) Market Operations Risk

The members of the Group handle financial products whose value is influenced by movements in market indicators, including long- and short-term interest rates, bonds, and foreign currencies. In particular, the Group has major investments in bonds, principally Japanese government bonds (JGBs). To manage this risk, the Group sets upper limits on the risks it will take, taking into account computations of value-at-risk (VaR), which are based on historical data on market fluctuations and calculated using statistical techniques. Taking this approach, the Group is able to contain losses due to market fluctuations within set limits.

Nevertheless, when market fluctuations substantially exceed the forecast range, as they did at the time of Black Monday and on other occasions, especially in the case of sharp rises in interest rates, the value of bond holdings may decline significantly more than anticipated. Under these circumstances, there is a possibility that the Group's performance and financial condition will be seriously affected.

(3) Risks Accompanying the Limitation of Government Deposit Guarantees

As part of preparations for the removal of the blanket guarantees provided by the Japanese government on bank deposits (and their replacement by upper limits on deposit guarantees), the Group is actively disclosing information on its management and performance to help customers better understand the Group's condition.

In addition to collecting information on customer trends and the periodic monitoring of activities at Group branches, the Group is making other preparations that include the development of a broader range of deposit products, including settlement-type deposit accounts.

However, in the event that serious concern arises regarding the Japanese financial system and financial institutions, including the Group, as the removal of government guarantees, which is scheduled for April 2005, approaches, there is a possibility that the Group may be the subject of malicious rumors. These circumstances might lead to an unexpectedly large outflow of deposits, thus having a detrimental impact on the Group's liquidity position.

(4) Risk of Declines in Stock Prices

The Group has worked to eliminate the impact of a decline in stock prices on its performance and to create a business base to generate sustained profits. To this end, under the Business Revitalization Plan, the Group sets a quantitative goal of reducing its portfolio of stocks held for customer-relationship purposes to ¥400 million. The Group is, therefore, moving forward with the sale of equity holdings to meet this goal during the year ending March 31, 2005.

Nevertheless, even if this goal is attained, such stocks held for relationship purposes will still represent a certain percentage of the Group's capital accounts. Accordingly, there is a possibility that actual losses or valuation losses will occur as a result of fluctuations in stock prices and may have an adverse impact on the Group's performance and financial position.

(5) Risk of Regulatory Changes

The Group conducts its activities in compliance with relevant laws and regulations. Therefore, in the event that changes occur in government policies, laws, business practices, and their interpretations or new regulations are introduced, such developments may have an adverse impact on the Group's performance and financial position.

(6) Risk of Impairment in Value of Fixed Assets

The Group is working to enhance the transparency of its management and strengthen its capabilities for dealing financially with changes in the external environment. To this end, the Group introduced new accounting standards for the impairment of fixed assets, which are scheduled to go into effect in fiscal 2005, during fiscal 2003, ended March 31, 2004.

However, depending on trends in the economic environment and fluctuations in real estate prices, the Group may be obliged to make further write-downs of the value of its fixed assets, and this may have an impact on the Group's performance and financial position.

(7) Systems Integration Risk

Some of the member banks of the Group are scheduled to implement the integration of their computer systems beginning in fiscal 2005. To ensure that this integration project proceeds smoothly, the Group has formed a Systems Integration Committee headed by the representative executive officers of the Group, which will have responsibility for creating the appropriate systems for managing this transition and monitoring progress.

Nevertheless, if unforeseen issues arise before and after the completion of the integration process, and computer systems become temporarily inoperative or malfunction, this will have a detrimental impact on customer services. This, in turn, may have an adverse impact on the Group's performance and financial position as a result of damage to customer relationships.

(8) Deferred Tax Assets

The Group made conservative assessments of the irretrievability of its deferred tax assets and reversed a substantial portion of these assets for the interim period ended September 30, 2003. However, the computation of deferred tax assets requires making various forecasts and assumptions, including future flows of taxable income. Actual results may differ from the assumptions and forecasts. If this happens, deferred tax assets may decline, and this may have an adverse impact on the Group's financial condition.

(9) Compensation for Trust Products with Contractual Principal Compensation Features

Resona Bank, Ltd., a subsidiary of Resona Holdings, Inc., has concluded compensation contracts covering the principal amount of certain trust products: namely, those entrusted in certain jointly operated designated money trusts. The funds placed in these trust products are used for making loans, purchasing securities, and other investment purposes. When loans made from these trust products become impaired or investment losses arise, even if allowances for covering write-offs of claims are drawn on, if the principal entrusted in those trust accounts with contractual principal compensation features is lost, it will be necessary to make compensation payments.

In addition, although the ratio of dividends paid on a half-yearly basis to beneficiaries of jointly operated designated money trusts (the scheduled dividend rate) is reviewed every six months, if the investment environment deteriorates, the trust fees received by Resona Bank from such jointly operated designated money trusts decrease, and this may result in deterioration in the Group's performance.

(10) Retirement Benefit Obligations

During the interim period ended September 30, 2003, the Group took steps to lower future costs by returning the substitutional portion of the employee welfare pension fund to the Japanese government and making a lump-sum disposal of part of the remaining unfunded retirement benefit liabilities arising from a change in accounting standards. However, an unrecognized actuarial difference may arise in the event of one or more of the following: (1) the market value of the Group's pension assets declines, (2) the rate of return on plan assets falls below the expected level, or (3) the assumptions and estimates that form the basis for calculating retirement benefit obligations change. In addition, retirement benefit obligations for employees' prior service may arise as a result of changes in the retirement and pension systems.

(11) Risks Borne by the Holding Company

Since Resona Holdings is a bank holding company, the dividends it receives from its banking subsidiaries under specified circumstances are subject to a number of regulations and contractual restrictions. Therefore, in certain cases, the amount of dividends that the banking subsidiaries can pay to the holding company may be restricted. In addition, if the subsidiaries cannot generate sufficient profit, the holding company may not receive any dividends, and the holding company, in turn, may have to suspend its dividend payments.

Moreover, for the fiscal year ended March 31, 2004, the holding company reported an extraordinary loss of ¥1,480,358 million due to the decline in the value of its holdings of shares in its banking subsidiaries. This left a loss carried forward of ¥921,272 million. At the Regular General Meeting of Shareholders, held on June 25, 2004, it was decided to give approval for a reduction in capital to allow the holding company to take the necessary steps to dispose of the loss.

FLORIDA MOTION TO VACATE JUDGMENT

IN THE CIRCUIT COURT OF THE
XXXXXXXXXX JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA,
IN AND FOR XXXXXXXXX COUNTY
WELLS FARGO....

Plaintiff,

Case No.: XX-CA-XXXXXX

V.

NAME OF HOMEOWNERS

Defendants.

_____ /

DEFENDANT'S MOTION TO VACATE JUDGMENT

Comes now the defendant, [insert Defendant name], by and through undersigned counsel, and hereby files their motion to vacate foreclosure judgment, pursuant to Rules 1.540(b) Fla. R. Civ. P., states:

1. Florida Rule of Civil Procedure 1.540(b) provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons:... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court.

2. The plaintiff's complaint fails to contain sufficient facts to establish who the plaintiff is and its relationship to the defendant and to the claim for foreclosure of a promissory note, including the date of the alleged assignment of the mortgage and note, and the identity of the owner of the subject promissory note. The complaint fails to sufficiently identify who the plaintiff is and fails to allege facts sufficient to determine the standing of the plaintiff.

3. Florida Rule of Civil Procedure 1.130(a) provides in pertinent part: "All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading."

4. Plaintiff attaches documents to its complaint that conflict with the allegations of material facts in the complaint in which the plaintiff claims that it "owns the Note" and Mortgage by virtue of an unrecorded assignment that does not allege when the assignment occurred. These allegations conflict with the mortgage attached to the complaint that identifies [name original mortgagee], as the lender with the security interest. These allegations therefore constitute serious misrepresentations and could be construed as a fraud upon the court.

5. Additionally plaintiff makes allegations in its complaint that conflict with the documents attached thereto as to who owned the subject note at the time the note was allegedly lost.

6. When exhibits are inconsistent with the plaintiff's allegations of material fact as to whom the real party in interest is, such allegations cancel each other out. *Fladell v. Palm Beach*

County Canvassing Board, 772 So.2d 1240 (Fla. 2000); *Greenwald v. Triple D Properties, Inc.*, 424 So. 2d 185, 187 (Fla. 4th DCA 1983); *Costa Bella Development Corp. v. Costa Development Corp.*, 441 So. 2d 1114 (Fla. 3rd DCA 1983).

7. Florida Rule of Civil Procedure 1.130(b) provides in pertinent part: “Any exhibit attached to a pleading shall be considered a part thereof for all purposes.” Because the facts revealed by Plaintiff’s exhibit are inconsistent with Plaintiff’s allegations as to its ownership of the subject note and mortgage, those allegations are neutralized and Plaintiff’s complaint is rendered objectionable. *Greenwald v. Triple D Properties, Inc.*, 424 So. 2d 185, 187 (Fla. 4th DCA 1983).

8. Florida Rule of Civil Procedure 1.210(a) provides in pertinent part: “Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person’s own name without joining the party for whose benefit the action is brought.”

9. The Plaintiff in this action meets none of those criteria. Because the exhibit attached to Plaintiff’s complaint is inconsistent with Plaintiff’s allegations as to ownership of the subject promissory note and mortgage, Plaintiff has failed to establish itself as the real party in interest and has failed to state a cause of action.

10. In Florida, the prosecution of a foreclosure action is by the owner and holder of the mortgage and the note. *Your Construction Center, Inc. v. Gross*, 316 So. 2d 596 (Fl. 4th DCA 1975)

11. The Defendants recognize the precedent set in *WM Specialty Mortgage, LLC v. Salmon*, 874 So.2d 680 (Fla 4th DCA 2004) regarding the assignment of a mortgage. However as the Second District Court of Appeals noted, standing requires that the party prosecuting the action have a sufficient stake in the outcome and that the party bringing the claim be recognized in the law as being a real party in interest entitled to bring the claim as of the date of the commencement of the action. The plaintiff’s failure to meet the standing requirements as of the commencement of this foreclosure action renders the complaint fatally defective and, therefore constitutes misrepresentation as to who the Plaintiff really is. The assignment cannot post date the filing of this action if assignment does not relate back to the commencement of the litigation. *Progressive Express Insurance Company v. McGrath Community Chiropractic*, 913 So.2d 1281 (Fla. 2nd DCA 2005).

12. The Plaintiff, in its complaint alleges that it “owns the Note and Mortgage” however it has failed to produce any material evidence to support its claim. In the absence of this evidence the Plaintiff is clearly misrepresenting themselves as the real party in interest and the holder in due course with legal standing to bring this cause of action against the defendant.

13. The Plaintiff alleges that it is the holder in due course on the subject mortgage and note yet it is the belief of the Defendant that the note was part of larger securitization process and sold to several un-named parties and beneficial owners and any claims by Plaintiff, in the absence of the original note endorsed to Plaintiff, are a clear misrepresentation of the actual facts.

14. It is the position of the Defendant that if the courts were to allow a Plaintiff to bring a cause of action in a scenario where the Plaintiff alleges that it owns a certain note and mortgage but fails to provide any evidence to the courts that this, in fact true, the courts would open the door to incredible harm to any homeowner whose home is secured by a mortgage.

15. If the court were to allow the Plaintiff in this case to prevail in light of serious

misrepresentation and fraud upon the court, it would result in a major injustice to the Defendant. The Court cannot be in a position of enabling Plaintiff and its attorneys to commit material misrepresentation or felony crimes.

WHEREFORE, Defendant requests this court grant Defendant's motion for vacating judgment and for all other relief to which these defendants prove themselves entitled.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via regular U.S. Mail to: OPPOSING LAWYER, ADDRESS on this XXth day of XXXXX, 2008.

Your Name

Pro Se

ADDRESS

Phone

Fax

Your NAME

OHIO MOTION FOR STAY

**COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO**

LASALLE NATIONAL BANK AS TRUSTEE	)	CASE NO. 2005-CV-03869
FOR CERTIFICATE HOLDERS OF BEAR	)	
STEARNS ASSET-BACKED SECURITIES	)	Judge Durkin
LLC ASSET-BACKED SECURITIES SERIES	)	
2004-HE5,	)	DEFENDANTS RONALD
J.		

Plaintiff,	)	SMITH'S AND NANCY L. SMITH'S
	)	MOTION FOR STAY OF
v.	)	FORECLOSURE SALE PENDING
	)	DETERMINATION OF FEDERAL
RONALD J. SMITH, et al,	)	ACTION FOR VIOLATIONS OF
	)	FEDERAL TRUTH-IN-LENDING
Defendants.	)	ACT, FEDERAL REAL ESTATE
	)	SETTLEMENT PROCEDURES ACT,
	)	CIVIL RICO, AND OTHER RELIEF

Defendants RONALD J. SMITH and NANCY L. SMITH, through undersigned counsel, move this Court to enter an Order staying the foreclosure sale in this case pending the full determination of their Federal action for Violations of the Federal Truth-In-Lending Act, the Federal Real Estate Settlement Procedures Act, Civil RICO under the Ohio RICO statute, and for other relief.

The grounds for this Motion are more fully set forth in the attached Memorandum in Support.

Respectfully submitted,

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that a true and correct copy of the foregoing has been forwarded, via U.S. Mail, to NAME AND ADDRESS OF LENDER'S ATTORNEY on this _____ day of MONTH, 2008.

OHIO MEMO IN SUPPORT OF MOTION FOR STAY
COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

LASALLE NATIONAL BANK AS TRUSTEE) CASE NO. 2005-CV-03869
FOR CERTIFICATE HOLDERS OF BEAR) Judge Durkin
STEARNS ASSET-BACKED SECURITIES)
LLC ASSET-BACKED SECURITIES SERIES) **MEMORANDUM IN SUPPORT OF**
2004-HE5,) **DEFENDANTS RONALD**
J.

Plaintiff,) **SMITH'S AND NANCY L. SMITH'S**
) **MOTION FOR STAY OF**
v.) **FORECLOSURE SALE PENDING**
) **DETERMINATION OF FEDERAL**
RONALD J. SMITH, et al,) **ACTION FOR VIOLATIONS OF**
) **FEDERAL TRUTH-IN-LENDING**
Defendants.) **ACT, FEDERAL REAL ESTATE**
) **SETTLEMENT PROCEDURES ACT,**
) **CIVIL RICO, AND OTHER RELIEF**

Defendants RONALD J. SMITH and NANCY L. SMITH, through undersigned counsel, file this Memorandum in Support of their Motion to Stay Foreclosure Sale Pending Determination of [their] Federal action for Violations of the Federal Truth-In-Lending Act, the Federal Real Estate Settlement Procedures Act, Civil RICO under the Ohio RICO statute, and for other relief, and as grounds state as follows:

1. This Court previously entered an Order which provides for a foreclosure sale of the Plaintiffs' primary residence to take place on Tuesday, June 24, 2008.
2. Plaintiffs have filed an action in the United States District Court for the Northern District of Ohio, Eastern Division (copy of filed Complaint attached hereto and incorporated herein by reference) sounding in violations of the Federal Truth-In-Lending Act, the Federal Real Estate Settlement Procedures Act, Civil RICO under the Ohio RICO statute, and other relief.
3. Pursuant to the Ohio Civil RICO statute (ORC sec. 2929.34), the Court is authorized, in connection with the prosecution of the civil RICO claim, to grant injunctive relief without the necessity of a showing of special or irreparable injury to the plaintiff, and that pending the determination of the civil RICO action that the court may issue a Temporary Restraining Order or Temporary Injunction upon showing of significant injury to the plaintiff (ORC sec. 2929.34(D)).
4. As set forth in the attached Complaint, Plaintiffs have and continue to suffer significant and ongoing injuries and damages, including the loss of their home, if emergency injunctive relief is not granted.
5. The Ohio Civil RICO statute also provides, as part of the relief afforded to a plaintiff, that the defendant's interest in any real property is to be divested when said interest has been acquired through a pattern of corrupt activity. ORC sec. 2929.34(B)(1) and 2929.32(A)(2).

6. As set forth in the attached Complaint, the Defendants named in the Federal action acquired an interest in the Plaintiffs' residential real property through a pattern of corrupt conduct and activity.

7. Defendants RONALD J. SMITH and NANCY L. SMITH thus request that this Court immediately grant a stay of all further proceedings in or arising out of this action including a stay of the foreclosure sale pending the full determination of the Federal action.

8. The granting of a stay pending the litigation of rights in another forum has been previously approved by the Ohio Legislature and case law in connection with the granting of a stay of state court proceedings pending arbitration. ORC sec. 2711.02; Harlament v. Fishcher Attached Homes, Ltd., 2003 OH 694, OHCA 2003, citing Harper v. J.D. Byrider of Canton, 148 Ohio App.3d 122, 2002-Ohio-2657, 772 N.E. 2d 190.

9. The same rationale, purpose, and grounds for the stay of state court proceedings pending arbitration are applicable here, where Plaintiffs have challenged the legality of the entire underlying loan process and have sought relief under multiple Federal Statutes, State Statutes, and common law, including the Ohio RICO Statute which provides for injunctive relief pending determination of the RICO claim and for the relief of divesting a defendant from its interest in real property if that interest was found to have been acquired by a pattern of corrupt conduct.

10. If the instant Motion is not granted, Plaintiffs will suffer irreparable injury, including in the form of the loss of their home and eviction therefrom.

11. Any alleged prejudice to the Plaintiff (a bank Trustee for a group of unnamed holders of investment securities who may in fact not even have legal title to the Plaintiffs' mortgage and who, in all likelihood, never had standing to institute the foreclosure proceeding herein *ab initio*) with the granting of this Motion is greatly outweighed by the severe prejudice to the Smith family with the denial of this Motion.

12. This Motion is being filed in good faith based on Federal and State law legal grounds for relief and not for any purpose of delay.

13. Under the circumstances where the purported Plaintiff in this action may not have (and may never have had) actual legal standing to bring the foreclosure in the first instance and may in fact not be the true or real party in interest at all, no bond should be required as a prerequisite to this Court's granting of a stay.

WHEREFORE, Plaintiffs respectfully request that this Court grant the relief requested herein for the reasons set forth, and for any other and further relief which is just and proper.

Respectfully submitted,

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that a true and correct copy of the foregoing has been forwarded, via U.S. Mail, to NAME AND ADDRESS FOR LENDER'S ATTORNEY on this _____ day of MONTH, 2008.

Maurus G. Malvasi

California Statutes

33-808. Notice of trustee's sale

A. The trustee shall give written notice of the time and place of sale legally describing the trust property to be sold by each of the following methods:

1. Recording a notice in the office of the recorder of each county where the trust property is situated.
2. Giving notice as provided in section 33-809 to the extent applicable.
3. Posting a copy of the notice of sale, at least twenty days before the date of sale in some conspicuous place on the trust property to be sold, if posting can be accomplished without a breach of the peace. If access to the trust property is denied because a common entrance to the property is restricted by a limited access gate or similar impediment, the property shall be posted by posting notice at that gate or impediment. Notice shall also be posted at one of the places provided for posting public notices at any building that serves as a location of the superior court in the county where the trust property is to be sold. Posting is deemed completed on the date the trust property is posted. The posting of notice at the superior court location is deemed a ministerial act.
4. Publication of the notice of sale in a newspaper of general circulation in each county in which the trust property to be sold is situated. The notice of sale shall be published at least once a week for four consecutive weeks. The last date of publication shall not be less than ten days prior to the date of sale. Publication is deemed completed on the date of the first of the four publications of the notice of sale pursuant to this paragraph.

B. The sale shall be held at the time and place designated in the notice of sale on a day other than a Saturday or legal holiday between 9:00 a.m. and 5:00 p.m. mountain standard time at a specified place on the trust property, at a specified place at any building that serves as a location of the superior court or at a specified place at a place of business of the trustee, in any county in which part of the trust property to be sold is situated.

C. The notice of sale shall contain:

1. The date, time and place of the sale. The date, time and place shall be set pursuant to section 33-807, subsection D. The date shall be no sooner than the ninety-first day after the date that the notice of sale was recorded.
2. The street address, if any, or identifiable location as well as the legal description of the trust property.
3. The county assessor's tax parcel number for the trust property or the tax parcel number of a larger parcel of which the trust property is a part.
4. 4. The original principal balance as shown on the deed of trust. If the amount is not shown on the deed of trust, it shall be listed as "unspecified".
5. 5. The names and addresses, as of the date the notice of sale is recorded, of the beneficiary and the trustee, the name and address of the original trustor as stated in the deed of trust, the signature of the trustee and the basis for the trustee's qualification pursuant to section 33-803, subsection A, including an express statement of the paragraph under subsection A on which the qualification is based.

6. The address of the beneficiary shall not be in care of the trustee.
7. The telephone number of the trustee.
8. The name of the state or federal licensing or regulatory body or controlling agency of the trustee as prescribed by section 33-803, subsection A.

9. D. The notice of sale shall be sufficient if made in substantially the following form:

Notice of Trustee's Sale

The following legally described trust property will be sold, pursuant to the power of sale under that certain trust deed recorded in docket or book _____ at page _____ records of _____ county, Arizona, at public auction to the highest bidder at (specific place of sale as permitted by law) _____, in _____ county, in or near _____, Arizona, on _____, _____, at _____ o'clock ____m. of said day:

(street address, if any, or identifiable

location of trust property)

(legal description of trust property)

Tax parcel number _____

Original principal balance \$ _____

Name and address of beneficiary _____

Name and address of original trustor _____

Name, address and telephone number of trustee _____

Signature of trustee _____

Manner of trustee qualification _____

Name of trustee's regulator _____

Dated this _____ day of _____, ____.

(Acknowledgement)

E. Any error or omission in the information required by subsection C or D of this section, other than an error in the legal description of the trust property or an error in the date, time or place of sale, shall not invalidate a trustee's sale. Any error in the legal description of the trust property shall not invalidate a trustee's sale if considered as a whole the information provided is sufficient to identify the trust property being sold. If there is an error or omission in the legal description so that the trust property cannot be identified, or if there is an error in the date, time or place of sale, the trustee shall record a cancellation of notice of sale. The trustee or any person furnishing information to the trustee shall not be subject to liability for any error or omission in the information required by subsection C of this section except for the wilful and intentional failure to provide such information. This subsection does not apply to claims made by an insured under any policy of title insurance.

F. The notice of trustee sale may not be rerecorded for any reason. This subsection does not prohibit the recording of a new or subsequent notice of sale regarding the same property.³³⁻⁷²¹.
Foreclosure of mortgage by court action

Mortgages of real property and deeds of trust of a type not included in the definition of deed of trust provided in section 33-801, notwithstanding any other provision in the mortgage or deed, shall be foreclosed by action in a court.

33-702. Mortgage defined; admissibility of proof that transfer is a mortgage

A. Every transfer of an interest in real property, other than in trust, or a trust deed subject to the provisions of chapter 6.1 of this title, made only as a security for the performance of another act, is a mortgage. The fact that a transfer was made subject to defeasance on a condition may, for the purpose of showing that the transfer is a mortgage, be proved except against a subsequent purchaser or encumbrancer for value and without notice, notwithstanding that the fact does not appear by the terms of the instrument.

B. A mortgage or trust deed may provide for an assignment to the mortgagee or beneficiary of the interest of the mortgagor or trustor in leases, rents, issues, profits or income from the property covered thereby, whether effective before, upon or after a default under such mortgage or trust deed or any contract secured thereby, and such assignment may be enforced without regard to the adequacy of the security or the solvency of the mortgagor or trustor by any one or more of the following methods:

1. The appointment of a receiver.
2. The mortgagee or beneficiary taking possession of the property, or without the mortgagee or beneficiary taking possession of the property.
3. Collecting such monies directly from the parties obligated for payment.
4. Injunction.-

33-703. Effect of mortgage as lien; right to possession of mortgaged property; rights of mortgagee in property acquired by mortgagor after execution of mortgage

A. A mortgage is a lien upon everything that would pass by a grant of the property, but does not entitle the mortgagee to possession of the property unless authorized by the express terms of the mortgage. After execution of the mortgage, the mortgagor may agree to a change of possession without a new consideration.

B. Title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security as if acquired before the execution.

33-722. Election between action on debt or to foreclose

If separate actions are brought on the debt and to foreclose the mortgage given to secure it, the

plaintiff shall elect which to prosecute and the other shall be dismissed.

33-801. Definitions

In this chapter, unless the context otherwise requires:

1. "Beneficiary" means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the person's successor in interest.
2. "Business day" means any day other than a Saturday or a legal holiday.
3. "Cash" means United States currency.
4. "Contract" means a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty, including but not limited to a note, a promissory note or provisions of any trust deed.
5. "Credit bid" means a bid made by the beneficiary in full or partial satisfaction of the contract or contracts which are secured by the trust deed. Such credit bid may only include an amount up to the full amount of the contract or contracts secured by the trust deed, less any amount owing on liens or encumbrances with interest which are superior in priority to the trust deed and which the beneficiary is obligated to pay under the contract or contracts or under the trust deed, together with the amount of other obligations provided in or secured by the trust deed and the costs and expenses of exercising the power of sale and the sale, including the trustee's fees and reasonable attorney fees actually incurred.
6. "Force majeure" means an act of God or of nature, a superior or overpowering force or an event or effect that cannot reasonably be anticipated or controlled and that prevents access to the sale location for conduct of a sale.
7. "Parent corporation" means a corporation which owns eighty per cent or more of every class of the issued and outstanding stock of another corporation or, in the case of a savings and loan association, eighty per cent or more of its issued and outstanding guaranty capital.
8. "Trust deed" or "deed of trust" means a deed executed in conformity with this chapter and conveying trust property to a trustee or trustees qualified under section 33-803 to secure the performance of a contract or contracts, other than a trust deed which encumbers in whole or in part trust property located in Arizona and in one or more other states.
9. "Trust property" means any legal, equitable, leasehold or other interest in real property which is capable of being transferred, whether or not it is subject to any prior mortgages, trust deeds, contracts for conveyance of real property or other liens or encumbrances.
10. "Trustee" means an individual, association or corporation qualified pursuant to section 33-803, or the successor in interest thereto, to whom trust property is conveyed by trust deed. The trustee's obligations to the trustor, beneficiary and other persons are as specified in this chapter, together with any other obligations specified in the trust deed.
11. "Trustor" means the person conveying trust property by a trust deed as security for the performance of a contract or contracts, or the successor in interest of such person.-806.01.
Trustor's right to transfer; transfer fee limit; interest rate increase limit
 - A. Nothing in this article shall be construed to prevent or limit the right of a trustor to transfer his interest in the trust property, or authorize a beneficiary or trustee to arbitrarily withhold his consent to a transfer by the trustor of his interest in the trust property.
 - B. When a trustor transfers his interest in the trust property, no beneficiary or trustee shall charge a fee on the transfer of more than one hundred dollars or one per cent of the balance due on the obligation secured by the trust deed, whichever is greater.
 - C. When a trustor transfers his interest in the trust property, no beneficiary or trustee shall increase the interest rate on the obligation secured by such trust deed unless the transferring

trustor is released from all liability thereon and in no event shall the amount of such increase exceed one-half of one percent per annum more than the interest rate paid by the transferring trustor.

D. This section shall be applicable only to trust property of two and one-half acres or less which is not used for commercial purposes and which is limited to and utilized for dwelling units, not to exceed four single-family units.

33-807. Sale of trust property; power of trustee; foreclosure of trust deed

A. By virtue of his position, a power of sale is conferred upon the trustee of a trust deed under which the trust property may be sold, in the manner provided in this chapter, after a breach or default in performance of the contract or contracts, for which the trust property is conveyed as security, or a breach or default of the trust deed. At the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property in which event chapter 6 of this title governs the proceedings. The beneficiary or trustee shall constitute the proper and complete party plaintiff in any action to foreclose a deed of trust. The power of sale may be exercised by the trustee without express provision therefor in the trust deed.

B. The trustee or beneficiary may file and maintain an action to foreclose a deed of trust at any time before the trust property has been sold under the power of sale. A sale of trust property under the power of sale shall not be held after an action to foreclose the deed of trust has been filed unless the foreclosure action has been dismissed.

C. The trustee or beneficiary may file an action for the appointment of a receiver according to sections 12-1241 and 33-702. The right to appointment of a receiver shall be independent of and may precede the exercise of any other right or remedy.

D. The power of sale of trust property conferred upon the trustee shall not be exercised before the ninety-first day after the date of the recording of the notice of the sale. The sale shall not be set for a Saturday or legal holiday. The trustee may schedule more than one sale for the same date, time and place.

E. The trustee need only be joined as a party in legal actions pertaining to a breach of the trustee's obligation under this chapter or under the deed of trust. Any order of the court entered against the beneficiary is binding upon the trustee with respect to any actions that the trustee is authorized to take by the trust deed or by this chapter. If the trustee is joined as a party in any other action, the trustee is entitled to be immediately dismissed and to recover costs and reasonable attorney fees from the person joining the trustee.

-809. Request for copies of notice of sale; mailing by trustee; disclosure of information regarding trustee sale

A. A person desiring a copy of a notice of sale under a trust deed, at any time subsequent to the recording of the trust deed and prior to the recording of a notice of sale pursuant thereto, shall record in the office of the county recorder in any county in which part of the trust property is situated a duly acknowledged request for a copy of any such notice of sale. The request shall set forth the name and address of the person or persons requesting a copy of such notice and shall identify the trust deed by setting forth the county, docket or book and page of the recording data thereof and by stating the names of the original parties to such deed, the date the deed was recorded and the legal description of the entire trust property and shall be in substantially the following form:

Request for Notice

Request is hereby made that a copy of any notice of sale under the trust deed recorded in docket or book _____ at page _____, records of _____ county, Arizona,

_____, _____,

(legal description of trust property)

Executed by _____ as trustor, in which _____ is named as beneficiary and _____ as trustee, be mailed to _____ at

_____.
Dated this _____ day of _____, ____.

Signature

(Acknowledgement)

B. Not later than thirty days after recording the notice of sale, the trustee shall mail by certified or registered mail, with postage prepaid, a copy of the notice of sale that reflects the recording date together with any notice required to be given by subsection C of this section, addressed as follows:

1. To each person whose name and address are set forth in a request for notice, which has been recorded prior to the recording of the notice of sale, directed to the address designated in such request.
2. To each person who, at the time of recording of the notice of sale, appears on the records of the county recorder in the county in which any part of the trust property is situated to have an interest in any of the trust property. The copy of the notice sent pursuant to this paragraph shall be addressed to the person whose interest appears of record at the address set forth in the document. If no address for the person is set forth in the document, the copy of the notice may be addressed in care of the person to whom the recorded document evidencing such interest was directed to be mailed at the time of its recording or to any other address of the person known or ascertained by the trustee. If the interest that appears on the records of the county recorder is a deed of trust, a copy of the notice only needs to be mailed to the beneficiary under the deed of trust. If any person having an interest of record or the trustor, or any person who has recorded a request for notice, desires to change the address to which notice shall be mailed, the change shall be accomplished by a request as provided under this section.

C. The trustee, within five business days after the recordation of a notice of sale, shall mail by certified or registered mail, with postage prepaid, a copy of the notice of sale to each of the persons who were parties to the trust deed except the trustee. The copy of the notice mailed to the parties need not show the recording date of the notice. The notice sent pursuant to this subsection shall be addressed to the mailing address specified in the trust deed. In addition, notice to each party shall contain a statement that a breach or nonperformance of the trust deed or the contract or contracts secured by the trust deed, or both, has occurred, and setting forth the nature of such breach or nonperformance and of the beneficiary's election to sell or cause to be sold the trust

property under the trust deed and the additional notice shall be signed by the beneficiary or the beneficiary's agent. A copy of the additional notice shall also be sent with the notice provided for in subsection B, paragraph 2 of this section to all persons whose interest in the trust property is subordinate in priority to that of the deed of trust along with a written statement that the interest may be subject to being terminated by the trustee's sale. The written statement may be contained in the statement of breach or nonperformance.

D. No request for a copy of a notice recorded pursuant to this section, nor any statement or allegation in any request, nor any record of request, shall affect the title to the trust property or be deemed notice to any person that a person requesting a copy of notice of sale has or claims any interest in, or claim upon, the trust property.

E. At any time that the trust deed is subject to reinstatement pursuant to section 33-813, but not sooner than thirty days after recordation of the notice of trustee's sale, the trustee shall upon receipt of a written request, provide, if actually known to the trustee, the following information relating to the trustee's sale and the trust property:

1. The unpaid principal balance of the note or other obligation which is secured by the deed of trust.
2. The name and address of record of the owner of the trust property as of the date of recordation

of the notice of trustee's sale.

3. A list of the liens and encumbrances upon the trust property as of the date of recordation of the notice of trustee's sale, excluding those matters set forth in section 33-438, subsection A.

If the trustee elects to charge a fee for providing the information requested, the fee shall not exceed five per cent of the amount the trustee may charge pursuant to section 33-813, subsection B, paragraph 4, except that the trustee shall not charge a fee that is more than one hundred dollars or be required to accept a fee that is less than thirty dollars but may accept a lesser fee at the trustee's discretion. The trustee, or any other person furnishing information pursuant to this subsection to the trustee, shall not be subject to liability for any error or omission in providing the information requested, except for the wilful and intentional failure to provide information in the trustee's actual possession.

F. Beginning at 9:00 a.m. and continuing until 5:00 p.m. mountain standard time on the last business day preceding the day of sale and beginning at 9:00 a.m. mountain standard time and continuing until the time of sale on the day of the sale, the trustee shall make available the actual bid or a good faith estimate of the credit bid the beneficiary is entitled to make at the sale. If the actual bid or good faith estimate is not available during the prescribed time period, the trustee shall postpone the sale until the trustee is able to comply with this subsection.

G. In providing information pursuant to subsections E and F of this section, the trustee, without obligation or liability for the accuracy or completeness of the information, may respond to oral requests, respond orally or in writing or provide additional information not required by such subsections. With respect to property that is the subject of a trustee's sale, the beneficiary of such deed of trust or the holder of any prior lien may, but shall not be required to, provide information

concerning such deed of trust or any prior lien that is not required by subsection E or F of this section and may charge a reasonable fee for providing the information. The providing of such information by any beneficiary or holder of a prior lien shall be without obligation or liability for the accuracy or completeness of the information.

-810. Sale by public auction; postponement of sale

A. On the date and at the time and place designated in the notice of sale, the trustee shall offer to sell the trust property at public auction for cash to the highest bidder. The trustee may schedule more than one sale for the same date, time and place. The attorney or agent for the trustee may conduct the sale and act at such sale as the auctioneer for the trustee. Any person, including the trustee or beneficiary, may bid at the sale. Only the beneficiary may make a credit bid in lieu of cash at sale. The trustee shall require every bidder except the beneficiary to provide a ten thousand dollar deposit in any form that is satisfactory to the trustee as a condition of entering a bid. The trustee or auctioneer may control the means and manner of the auction. Every bid shall be deemed an irrevocable offer until the sale is completed, except that a subsequent bid by the same bidder for a higher amount shall cancel that bidder's lower bid. To determine the highest price bid, the trustor or beneficiary present at the sale may recommend the manner in which the known lots, parcels or divisions of the trust property described in the notice of sale be sold. The trustee shall conditionally sell the trust property under each recommendation, and, in addition, shall conditionally sell the trust property as a whole. The trustee shall determine which conditional sale or sales result in the highest total price bid for all of the trust property. The trustee shall return deposits to all but the bidder or bidders whose bid or bids result in the highest bid price. The sale shall be completed on payment by the purchaser of the price bid in a form satisfactory to the trustee. The subsequent execution, delivery and recordation of the trustee's

deed as prescribed by section 33-811 are ministerial acts. If the trustee's deed is recorded in the county in which the trust property is located within fifteen business days after the date of the sale, the trustee's sale is deemed perfected at the appointed date and time of the trustee's sale. If the highest price bid at a completed sale is less than the amount of that bidder's deposit, the amount of the deposit in excess of the bid price shall be refunded by the trustee at the time of delivery of the trustee's deed.

B. The person conducting the sale may postpone or continue the sale from time to time or change the place of the sale to any other location authorized pursuant to this chapter by giving notice of the new date, time and place by public declaration at the time and place last appointed for the sale. Any new sale date shall be a fixed date within ninety calendar days of the date of the declaration. After a sale has been postponed or continued, the trustee, on request, shall make available the date and time of the next scheduled sale and, if the location of the sale has been changed, the new location of the sale until the sale has been conducted or canceled and providing this information shall be without obligation or liability for the accuracy or completeness of the information. No other notice of the postponed, continued or relocated sale is required except as provided in subsection C of this section.

C. A sale shall not be complete if the sale as held is contrary to or in violation of any federal statute in effect because of an unknown or undisclosed bankruptcy. A sale so held shall be deemed to be continued to a date, time and place announced by the trustee at the sale and shall comply with subsection B of this section or, if not announced, shall be continued to the same place and at the same time twenty-eight days later, unless the twenty-eighth day falls on a Saturday or legal holiday, in which event it shall be continued to the first business day thereafter. In the event a sale is continued because of an unknown or undisclosed bankruptcy, the trustee shall notify by registered or certified mail, with postage prepaid, all bidders who provide their names, addresses and telephone numbers in writing to the party conducting the sale of the continuation of the sale.

D. A sale is postponed by operation of law to the next business day at the same scheduled time and place if an act of force majeure prevents access to the sale location for the conduct of the sale.

CALIFORNIA SENATE BILL 1137

TEN REALITY QUESTIONS & ANSWERS

Ronald D. Roup, Esq.

Legislative Chairperson

UNITED TRUSTEES ASSOCIATION

July 11, 2008

Q1. - When does this bill take effect and become law?

A1. - SB 1137 passed the California Senate and Assembly as urgency legislation to take effect upon execution by Governor Schwarzenegger. The Governor signed the bill on July 8, 2008 and the statute took effect immediately. However, the new requirements in Section 2 for Notices of Default and Notice of Sale and Section 4 for Notices of Sale become operative 60 days after the effective date, or September 8, 2008.

Q2. - If I already have a Notice of Default recorded, do I have to start over?

A2. - No. You can proceed as before the enactment of SB 1137 as long as your Notice of Sale is not posted and published after September 8, 2008. Beware of documents prepared in advance.

Q3. - What if I have an existing Notice of Default and the Notice of Sale will be after September 8, 2008?

A3. - If your security is (1) residential owner occupied property on a loan made from January 1, 2003 to December 31, 2007, and the Notice of Sale will be after September 8, 2008, you will need to comply with the Section 2 requirements adding CC §2923.5 for a Notice of Sale declaration of contact or list the efforts made at contact, or (2) if your security is residential property and if the billing address "for the note" is different from the property address, you will need to comply with the Section 4 requirements adding CC §2824.8 for the posting and mailing of the Notice to Residents, regardless if the loan was made between January 1, 2003 and December 31, 2007.

Q4. - If on September 8, 2009 I already have a Notice of Sale posted and published, can I proceed with my sale?

A4. - Yes. Although not specifically addressed in the bill, we are advised that there will be a letter lodged in the Senate Journal stating that the provisions of the bill do not affect a foreclosure subject to an existing Notice of Sale when Section 2 and Section 4 become effective on September 8, 2008. UTA plans to obtain a copy of the exact language of the Senate Journal when available.

Q5. - If the billing address is different from the property address, where does the trustee get the Spanish, Chinese, Tagalog, Vietnamese and Korean language translations of the Notice to Residents required to be posted and mailed to the resident of the property with the Notice of Sale if the billing address is different from the property address?

A5. - The State of California is to provide these translations. The UTA will advise its membership upon the state making these translations available.

Q6. - Is there any harm in treating all residential loans assigned for foreclosure as being an owner occupied loan made from January 1, 2003 to December 31, 2007 and complying with the Section 2 requirements adding CC §2923.5, rather than making that determination for each residential loan going into foreclosure?

A6. - Probably not, however the Section 2 requirements are only for owner-occupied residential properties. You would still have to comply with the new Section 4

requirements of posting and mailing the Notice to Residents in all six languages for loans where the “note address” is different from the mailing address, and the Section 4 notice is regardless of the date when the loan was made.

Q7. - Is there any harm in treating all foreclosures of loans secured by residential properties as having a “note address” different from the mailing address and complying with the Section 4 Notice to Residences requirement to avoid differentiating between loans?

A7. Again, probably not. The statute places different foreclosure requirements in Section 2 on owner occupied residential properties with loans made within a certain period than in Section 4 on a residential property with a different billing address regardless of when the loan was made, which can be problematic. It would seem understandable to want a standardized process.

Q8. - Who is to sign the declaration re Contact, Due Diligence, or Surrender to be included in a Notice of Default filed after September 8, 2008?

A8. - The beneficiary or their authorized agent. Since all the requirements are to be made at least 30 days prior to initiating foreclosure, the beneficiary or servicer will usually be performing these requirements as part of their pre-foreclosure loss mitigation program. However, this is a complicated question that may require that the trustee consult with experienced legal counsel to integrate this new declaration procedure into its policies, practices and forms. Different trustee's and beneficiaries have different systems relating to who actually signs notices of default, etc and passage of SB 1137 should trigger a review of those policies, practices and forms prior to the September 8, 2008 effective date.

Q9. - If the trustee-to-be is requested to execute the Section 2 Notice of Default declaration re Contact, Due Diligence, or Surrender as the authorized agent, similar to the execution of many current Notices of Default, will it affect the trustee's ability to claim the protections of Civil Code §2924l to file a Declaration of Nonmonetary Status in a subsequent civil action?

A9. - Not by merely executing the declaration. Civil Code §294l protects the trustee and the acts of an authorized agent performing duties within CC §2924, et. seq. and named in a civil action. However, the authorized agent would be relying upon the beneficiary or their servicer as to the validity of the declaration and any authorized agent should review their power of attorney or agency documents and may wish to consult their legal counsel regarding indemnification.

Q10. - Can the Section 2 declaration required re Contact, Due Diligence, or Surrender to be included in the Notice of Default be added to the language of the Notice of Default or does it have to be a separate declaration?

A10. There is no requirement in SB 3711 that the Notice of Default declaration re Contact, Due Diligence, or Surrender be a separate document, or that it be notarized.

DISCLAIMER - The above Questions and Answers are intended as guidelines for the UTA membership regarding the implementation of the new statute and are not to be construed or relied

upon as the offering of legal advice by the author or the United Trustees Association. Each trustee should consult with its own legal counsel to determine how to implement the changes mandated by the passage of SB 1137.

Title firm ready to do battle

Suit over Chicago house could set up national showdown

By Susan Chandler | Chicago Tribune reporter

August 17, 2008

It could be the tip of an iceberg.

Ticor Title, one of the largest title insurance firms in the country, is suing Countrywide Home Loans, the nation's largest home lender, saying it shouldn't have to pay out on a title policy because of Countrywide's gross negligence.

The suit, filed last month in Cook County Chancery Court, concerns just one Chicago mortgage made by Countrywide in 2007, but the implications are enormous, say real estate and title insurance experts.

If title insurers refuse to honor their policies, "You would have chaos," predicts Chicago real estate attorney Tom McNulty of Neal, Gerber & Eisenberg. The fate of tens of thousands of troubled properties around the country would be thrown into limbo while lenders and title insurers duke it out. Other deals would be held up because buyers and sellers would be reluctant to move forward without title insurance to protect their investment.

When it works smoothly, title insurance protects lenders and borrowers against losses arising from flaws in the property's title, which traces the chain of ownership. Problems can arise from forged signatures, unpaid taxes or liens. When fraud is involved and a clean title never passes to the new owner, the title insurer may be on the hook for the entire amount of the mortgage loan plus legal fees.

The case that Ticor has drawn a line in the sand over concerns a \$360,000 first mortgage on a graystone Victorian in the Kenwood neighborhood on the South Side. The story of that loan was told in a front-page Tribune story in February, several weeks after a clothed, mummified male corpse was discovered in the boarded-up house by a real estate speculator who had purchased the property from Countrywide in a foreclosure auction.

The corpse was later identified as Randy Johnson, who had grown up in the house and continued to live there until he disappeared in late 2005.

The gruesome discovery prompted Cook County Public Administrator Michael Bender to look into the case. Bender's staff quickly determined the backdated deed that had transferred the home from Johnson's deceased mother, Arrellia Johnson, to a woman named Rhonda Evans was a fake, and not all that hard to spot.

Arrellia Johnson's name was spelled two ways and the alleged 1996 warranty deed was created on the stationery of Recorder of Deeds Eugene Moore, who did not take office until 1999. Another warning sign: The deed was notarized by Mae Evans, who is the mother of Rhonda Evans.

Three months after the fraudulent deed was recorded, Evans sold the house to Donald Franklin of Harvey for \$450,000. Franklin borrowed the entire amount in two simultaneous mortgages from Countrywide.

The public administrator, who handles the affairs of people with assets who die without wills, moved to intervene in Countrywide's foreclosure case and asked the court to restore the property's title to Arrellia Johnson's heirs. Four days later, Countrywide asked its title insurer, Ticor, to represent its interest in the case.

Ticor refused.

In the suit, Ticor argues Countrywide was "reckless and grossly negligent in its underwriting of the Franklin mortgage." That carelessness is the only cause of any loss suffered by the lender, Ticor alleges.

Its claims go further: Ticor alleges that Countrywide "adopted corporate policies that resulted in the abandonment of proper underwriting standards as part of its effort to increase market share, and in the short term, profits."

Ticor's allegations

Because the Franklin loan never should have gotten out of Countrywide's underwriting department, the suit says, Ticor "has no duty to defend Countrywide in connection with this matter and owes no other duties to Countrywide under the policy."

The lawsuit reveals some details the Tribune did not have in February that show the Evans family was even more deeply involved in the transaction than was previously known.

For instance, Franklin didn't apply directly to Countrywide. His application was made to E&I Funding, a mortgage broker owned by Rhonda Evans' brother, Edwin Evans, and his wife, Iva. The loan was transferred to Countrywide the same day and Countrywide immediately confirmed a "lock" on Franklin's package.

On his application, Franklin described himself as a 28-year-old single man earning almost \$12,000 a month as an excavator for Class Act Construction. A quick search of Class Act would have shown that firm also was owned by Edwin Evans.

Four days after it received the application, Countrywide issued an underwriting report noting Franklin's credit was "acceptable" and his ability to repay was "good," according to the lawsuit. It also called out several things that had to be resolved before the loan would go through, including verification of Franklin's employment and an explanation of where \$14,500 in a savings had come from.

Meanwhile, Countrywide hired Ticor Title to do a title search of the property. The housing market was still going great guns at this point, and Ticor was so busy, it subcontracted the title search to a Lombard firm called Tri-Star Title.

Necessary and indispensable parties in all foreclosure cases.

The security instruments (mortgages) were virtually and actually merged) and so were the notes. By combining them into one portfolio with a series of tranches, all the borrowers became co-borrowers and all the investors became co-investors. Keeping in mind that the ABS was a bond and not stock, the lien rights migrate directly to the investors. Add to that the false appraisals from real estate appraisers and from security rating agencies, and you join the borrower and the investor as c-victims in a pandemic Ponzi scheme. Then add the Carriers for E&O and malpractice for the parties (middlemen) and the auditors of the middlemen and you can really have a party.

[Editor's Note: The significance of this is that besides the borrower's obligation to pay and the investor's right to receive revenue from the note payments, there were co-obligors that received fees in exchange for their guarantee or warranty or contractual obligation to make payments to the SPV on behalf of the investor holding the certificate of asset backed security. Thus the pooling activity is very close to the pooling of rights discussed in this case. And the cross currents that result from attempting to parse up the chain of securitization into multiple independent contracts becomes evident. The fact is the money came from the investor and was loan to the borrower. The single stream of revenue from the note payments and the multiple pools and reserves at the level of pooling and servicing, assignment and assumption and contingency SPV reserve, require an accounting as to whether the note in question was paid in whole or in part and whether it is in default at all, even if the borrower has not made the payments. If the holder in due course is the investor, and the investor received the payments, then no breach has occurred and no notice of delinquency, default, sale or foreclosure would be appropriate or could be prosecuted without running into Rule 11 of frivolous pleading sanctions.]

(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest Fed. R. Cir. P. 19(a).

If the absentee is necessary, the Court then evaluates whether the action should proceed or be dismissed because the absentee is indispensable. Fed. R. Cir. P. 19(b). In making this latter determination the Court undertakes a four-part analysis, looking at (1) prejudice to any party or the absent party resulting from a judgment; (2) whether relief can be shaped to lessen the prejudice; (3) whether an adequate remedy, even if incomplete, can be awarded without the absent party; and (4) whether there exists an alternative forum, Id.; Quileute Indian Tribe v.

Babbitt, 18 F.3d 1456, 1458 (9th Cir. 1994). If the party is necessary, cannot be joined, and is indispensable, then dismissal is warranted. Quileute Indian Tribe,

FORMS AND COMMENTS
Necessary and Indispensable Parties
STANDING

18 F.3d at 1458.

Rule 19's primary purpose affords unnamed necessary and indispensable parties the opportunity to join a lawsuit that could have a potentially detrimental effect on their legal interests. See Lincoln Property Co. v. Roche, 546 U.S. 81, 90 (2005) ("Rule 19 provides for the joinder of parties who should or must take part in the litigation to achieve a '[j]ust [a]djudication.' See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118-123 ... (1968)."). Providing the opportunity for affected parties to present their arguments in court is a longstanding principle of due process. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 309, 314 (1950).

STANDING VERSUS NECESSARY AND INDISPENSABLE PARTIES FLORIDA 2D DCA HOLDS that fact that mortgagee MERS lacked the beneficial interest in note did not deprive it of standing to sue Azize but leaves open dismissal for other reasons

I'M AWARE OF CASE. STANDING IS DIFFERENT ISSUE FROM NECESSARY AND INDISPENSABLE PARTIES --- but related. THEY CAN BRING THE ACTION BECAUSE THAT IS WHAT THE CONTRACT SAYS, BUT THEY CAN'T DEFEND THE AFFIRMATIVE DEFENSES AND COUNTERCLAIMS. Motion to dismiss for failure to join indispensable parties. They are trying to make it a non-judicial proceeding and put the burden on the borrower to bring the suit against the other parties to the transaction --- parties that were intentionally hidden from the borrower at closing so he would not know that his right to rescind had been compromised by the fact that the real lender was an unregistered unchartered entity to be doing business, lending or banking in State of Florida. His three day right of rescission was thus continued until discovery of the true facts. Now he wants to rescind.

If this is what Florida wanted they would have gone non-judicial. They didn't. So MERS has standing to bring the action just like non-judicial sale is valid if nobody objects, but as soon as you state you have affirmative defenses and counterclaims the other parties must be joined and the argument I would make is that MERS knows or must know or should know or has access to the information as to who all the indispensable parties are. I would add copies of the sec filings to your motion to dismiss for failure to join indispensable parties because MERS can only represent the named lender. If the named lender has no interest in the mortgage and note because it was securitized (i.e., it was a table funded loan where "lender" was paid 102.5% of the principal of the note) then the standing of MERS could still be challenged because the contract does not allow MERS to represent every Tom and Dick and Harry that might have an interest in this mortgage and note now. The real parties in interest, i.e., the holders in due course are the holders of certificates of mortgage backed securities which represent shares in the subject mortgage and note.

Also MERS doesn't know whether the payments were received or not. MERS is not collecting the money. MERS is not disbursing the money. And MERS does not know if co-obligors who were attached to this obligations as securitization moved up-line, made payments. Like AMBAC, AIG, credit swap defaults, SPV reserves, overcollateralization and cross collateralization between inferior and superior tranches in the SPV.

Date: Wed, 24 Sep 2008 09:30:26 -0400

From: princeddonnahe@usa.net

To: Ken@WJBLegal.com; dawnmrap@gmail.com; auerbach@hollywood-law.com

Subject: Help with thoughts on how to distinguish please

Some help with thoughts on how to distinguish this case would be appreciated. If they don't have an assignment of mortgage, but come up with the original note before SJ, I am taking this case to indicate that they may have standing to proceed anyway.

965 So.2d 151, 32 Fla. L. Weekly D546

Briefs and Other Related Documents

District Court of Appeal of Florida,

Second District.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant,

v.

George AZIZE; Unknown Spouse of George Azize; John Doe, Jane Doe as Unknown Tenant(s) In Possession of the Subject Property # 1; John Doe, Jane Doe as Unknown Tenant(s) In Possession of the Subject Property # 2, Appellees.

No. 2D05-4544.

Feb. 21, 2007.

Background: Mortgagee that alleged that it was the owner and holder of lost note secured by the mortgage brought action against mortgagor and others to reestablish the note and foreclose the mortgage. The Circuit Court, Pinellas County, Walt Logan, J., dismissed the complaint with prejudice for failure to state a cause of action, finding that mortgagee lacked standing. Mortgagee appealed.

Holding: The District Court of Appeal, Davis, J., held that fact that mortgagee lacked the beneficial interest in note did not deprive it of standing.

Reversed and remanded.

District Court of Appeal reviews a trial court's decision to dismiss a complaint de novo.

MERS CASES

District Court of Appeal reviews a trial court's findings regarding standing de novo.

In most circumstances, the trial court's dismissal of a complaint for failure to state a cause of action should be without prejudice to the plaintiff's amendment of the complaint to cure the deficiencies.

Fact that mortgagee lacked the beneficial interest in note that was secured by mortgage did not deprive mortgage of standing to enforce the note and foreclose the mortgage; mortgagee was the owner and holder of note as nominee for the lender, and mortgagee could enforce the note on lender's behalf. West's F.S.A. RCP Rule 1.210(a).
The holder of a note has standing to seek enforcement of the note.

Standing to enforce a note is broader than just actual ownership of the beneficial interest in the note.

The Florida real party in interest rule permits an action to be prosecuted in the name of someone other than, but acting for, the real party in interest. West's F.S.A. RCP Rule 1.210(a).

*151 Robert M. Brochin of Morgan, Lewis & Bockius LLP, Miami, for Appellant.

No appearance for Appellees.

John R. Hamilton of Foley & Lardner, LLP, Orlando, for Amicus Curiae Federal National Mortgage Association.

Elliot H. Scherker of Greenberg Traurig, P.A., Miami, for Amicus Curiae Chase Home Finance LLC.

*152 William P. Heller of Akerman Senterfitt, Fort Lauderdale, for Amicus Curiae Countrywide Home Loans, Inc.

Michael Ray Gordon and Kenton W. Hambrick, McLean, VA, for Amicus Curiae Federal Home Loan Mortgage Corporation.

W. Bard Brockman of Powell Goldstein, LLP, Atlanta, GA, for Amicus Curiae Mortgage Bankers Association.

April Carrie Charney, Jacksonville, for Amicus Curiae Jacksonville Area Legal Aid, Inc.

DAVIS, Judge.

Mortgage Electronic Registration Services, Inc. (MERS), appeals the trial court's dismissal with prejudice of its complaint seeking reestablishment of a lost note and the foreclosure of a mortgage. The trial court determined that MERS was not a proper party

to bring the action and dismissed the complaint with prejudice for failure to state a cause of action. We reverse.

On May 27, 2004, George Azize executed and delivered a promissory note and a mortgage as part of the closing in the purchase of real property in Pinellas County. The note listed Aegis Lending Corporation as payee. However, **the mortgage given to secure the note identified MERS as the mortgagee. The mortgage further specified that in this capacity MERS was serving as the nominee for the lender, which was identified as Aegis. The mortgage included the following language:**

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

The mortgage also specified, "MERS is the mortgagee under this Security Instrument."

In February 2005, MERS filed a complaint seeking to reestablish a promissory note and to foreclose a mortgage. **The complaint identified the plaintiff as "Mortgage Electronic Registration Systems, Inc. as nominee for Aegis Lending Corporation."** The complaint alleged that Azize was in default of the note and mortgage for failing to make the payment due on September 1, 2004, and all payments due subsequent to that date. In count one of the two-count complaint, **MERS alleged that it was the owner of the note and that the note had been lost or destroyed after MERS acquired it. Specifically, MERS alleged that because the note was in its possession when it was lost, MERS was entitled to enforce the note.** The complaint also explained that the loss of the note was not due to a transfer by MERS or a lawful seizure. **The complaint did not allege the circumstances by which MERS came into possession of the note, specifying only that MERS was the owner and holder of the note. MERS asked the trial court to reestablish the lost note.**

In count two, MERS sought foreclosure of the mortgage based on the default by Azize. MERS alleged that it owned the note and mortgage and that the note was secured by the mortgage.

No answer or responsive pleading was filed by Azize. The trial court, however, sua sponte issued an order to show cause why complaint should not be dismissed for lack of proper plaintiff. In this order, the trial court noted that multiple cases were pending in which MERS was seeking foreclosure *153 of mortgages and that, in each case, the plaintiff was either MERS, individually, or MERS acting as nominee for another plaintiff.FN1 Because the trial court questioned how MERS could file as plaintiff in the capacity of nominee of another corporation, the order set a show

cause hearing to allow MERS to demonstrate that it was a proper party to bring the action.

FN1. The same trial court order of dismissal was filed in twenty separate mortgage foreclosure actions.

Although counsel for MERS filed a memorandum of law addressing the general issue raised by the trial court's order and appeared at the hearing, neither Azize nor anyone on his behalf was present at the hearing. Following the hearing, the trial court dismissed all of the pending cases in which MERS sought mortgage foreclosures, entering a specific order in this case that referred to a much longer general order that addressed the common issue of all the cases. Although many issues were discussed at the hearing and in the general order, this court need not address all of those issues as the case sub judice is limited to the issues presented by the pleadings and addressed by the trial court, which present the question of whether MERS is the owner of the note.

[1] Headnote Citing References[2] Headnote Citing References[3] Headnote Citing References This court reviews a trial court's decision to dismiss a complaint de novo. Trotter v. Ford Motor Credit Corp., 868 So.2d 593 (Fla. 2d DCA 2004). Similarly, this court reviews findings regarding standing de novo. Fox v. Prof'l Wrecker Operators of Fla., Inc., 801 So.2d 175 (Fla. 5th DCA 2001). In most circumstances, the trial court's dismissal of a complaint for failure to state a cause of action should be without prejudice to the plaintiff's amendment of the complaint to cure the deficiencies. See Wittington Condo. Apartments v. Braemar Corp., 313 So.2d 463, 466 (Fla. 4th DCA 1975) (stating that a pleading's failure to allege the proper representation is not a basis for a final dismissal until an opportunity to amend has been granted).

The trial court's decision, as reflected in its general order, is based on its finding that MERS could never, under any circumstances, be the proper plaintiff to bring the foreclosure action. Specifically, the trial court found that because MERS was not the owner of the beneficial interest in the note, even if the lost note was reestablished and MERS proved that it was the owner and holder of the note, MERS could not properly bring the foreclosure action.

We disagree. The holder of a note has standing to seek enforcement of the note. See Troupe v. Redner, 652 So.2d 394 (Fla. 2d DCA 1995); see also Philogene v. ABN Amro Mortgage Group, Inc., 948 So.2d 45, 45 (Fla. 4th DCA 2006) (“[W]e conclude that ABN had standing to bring and maintain a mortgage foreclosure action since it demonstrated that it held the note and mortgage in question.”). Furthermore, standing is broader than just actual ownership of the beneficial interest in the note. **“The Florida real party in interest rule, Fla. R. Civ. P. 1.210(a), permits an action to be prosecuted in the name of someone other than, *but acting for*, the real party in interest.”** Kumar Corp. v. Nopal Lines, Ltd., 462 So.2d 1178, 1183 (Fla. 3d DCA 1985).

Here, MERS's counsel explained to the trial judge at the hearing that, in these transactions, the notes are frequently transferred to MERS for the purpose of foreclosure without MERS actually obtaining the beneficial interest in the note. Although*154 the complaint does not allege how or why MERS came to be the owner and holder of the note, the trial court's dismissal was not based on this deficit.FN2 Rather, the trial court found that even if MERS was the holder of the note based on a transfer by the lender or a servicing agent, MERS could never be a proper plaintiff because it did not own the beneficial interest in the note.FN3 This was an erroneous conclusion.

FN2. Since the trial court did not base its ruling on this issue, we offer no opinion as to whether the complaint fails to properly plead a cause of action without this information being alleged.

FN3. MERS's counsel explained to the trial court at the hearing that notes such as the one executed in this case are frequently sold on the secondary mortgage market and then often sold again to investors, such as insurance companies or mutual funds. As such, technically, there may be several owners of the beneficial interest in a note. Additionally, to facilitate the handling of these transactions, the owners contract with a servicing agent to collect the payments and distribute the proceeds to the owners. MERS's counsel advised the court that such collection agents have been determined to have standing to seek enforcement of such notes for the benefit of the owners. See *Greer v. O'Dell*, 305 F.3d 1297 (11th Cir.2002).

MERS alleged that it is the owner and holder of the note and mortgage, and that allegation has not been contested by responsive pleading. Assuming that the complaint properly states a cause of action to reestablish the note and that MERS can show prima facie proof of such allegations, MERS would have standing as the owner and holder of the note and mortgage to proceed with the foreclosure. We also note that the trial court's conclusion that MERS further lacked standing because one corporation cannot serve as the agent for another corporation is incorrect. See 2 Fla. Jur.2d Agency and Employment § 3 (2005). Although the trial judge was particularly concerned about MERS's status as nominee of Aegis, in light of the allegations of the complaint, the language contained in the note and mortgage, and Azize's failure to contest the allegations, the issue of MERS's ownership and holding of the note and mortgage was not properly before the trial court for resolution at this stage of the proceedings. Accordingly, we reverse the dismissal and remand for further consideration.

Reversed and remanded.

NORTHCUTT and SILBERMAN, JJ., Concur.

Fla.App. 2 Dist.,2007.
Mortgage Electronic Registration Systems, Inc. v. Azize
965 So.2d 151, 32 Fla. L. Weekly D546

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FILED

2008 JUN 19 P 2:45

K. TORRE, CLERK OF THE SUPERIOR COURT
COUNTY OF CONTRA COSTA, CALIF.
BY: J. MYOVICH, DEPUTY CLERK

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF CONTRA COSTA - UNLIMITED JURISDICTION

11 KIMBERLY CROMWELL,

CASE NO. 08-01603

12 Plaintiff,

13 v.

EX PARTE APPLICATION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE RE PRELIMINARY
INJUNCTION

14 NDEX WEST LLC, AMERICA'S
15 SERVICING COMPANY, DEUTSCHE
16 BANK NATIONAL TRUST COMPANY,
17 AS TRUSTEE FOR THE MORGAN
18 STANLEY LOAN TRUST 2006-NC2, and
19 all persons unknown, claiming any legal or
20 equitable right, title, estate, lien or interest in
21 the property described in this complaint
22 adverse to Plaintiff's title thereto, and DOES
23 1 through 30, inclusive,

Date: June 19, 2008
Time: 1:30 p.m.
Dept.: 60
Complaint filed: June 19, 2008

24 Defendants.

25
26 APPLICATION

27 Plaintiff KIMBERLY CROMWELL (hereinafter "Plaintiff") applies for a temporary restraining
28 order for good cause against Defendants NDEX WEST LLC, AMERICA'S SERVICING COMPANY,
and DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR THE MORGAN
STANLEY LOAN TRUST 2006-NC2 (hereinafter "Defendants") and their agents, servants, trustees and
employees, from the following acts, and an order to show cause why a preliminary injunction should not
be granted enjoining Defendants and their agents from foreclosing on real property located at 2405
Shelbourne Way, Antioch, Contra Costa County, California 94531, APN 052-333-017 (hereinafter

Ex Parte Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction

1 “Property”), Trustee’s Sale Number 200813400091, and holding a Trustee’s Sale during the pendency
2 of this action.

3 This ex parte application is made for good cause on the ground that Plaintiff will suffer great and
4 irreparable injury if the status quo is not preserved until this matter can be adjudicated in a court of law.
5 (Declaration of Kimberly Cromwell in Support of Ex Parte Application, ¶ 4.) This application is made
6 based on the Complaint on file in this case, the Declarations of Kimberly Cromwell and Caroline Gegg
7 regarding notice to the Defendants, the Memorandum of Points and Authorities, and on such other
8 arguments and evidence as may be presented by counsel at the hearing.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 An ex parte application must comply with California Rule of Court 379 which provides that it
11 must be made for good cause. Good cause exists for an order on the ex parte application because
12 Plaintiff’s real Property is unique and Plaintiff stands to lose the Property at the Trustee’s Sale, which
13 is currently scheduled to be held on June 23, 2008. (Cromwell Dec. ¶ 4.)

14 Plaintiff is the equitable owner and sole title holder of the Property, which is also otherwise
15 identified as Trustee’s Sale Number 200813400091. (Cromwell Dec. ¶ 2.) Plaintiff’s Deed of Trust is
16 currently held in a trust held by trustee Morgan Stanley and serviced by a “Pooling and Servicing
17 Agreement” which specifically prevents modifications of Deeds of Trust, like Plaintiff’s. (Cromwell
18 Dec. ¶ 6.)

19 On or about November 9, 2007, Plaintiff received a letter from Defendant ASC notifying her of
20 an interest rate increase on her adjustable rate mortgage resulting in approximately an additional five
21 hundred and fifty dollars (\$550.00) more per month. (Cromwell Dec. ¶ 9.) Plaintiff immediately
22 contacted Defendant ASC, at which time an employee informed her that she could apply for some
23 options for modifying the loan through the Borrower Counseling Program. (Cromwell Dec. ¶ 9.) Because
24 Plaintiff was informed by ASC that it would not consider a modification of her loan unless she were
25 three (3) months in arrears, Plaintiff, who was two months in arrears at that time due to a dispute
26 regarding commissions from her work, did not pay the next monthly payment on the loan. (Cromwell
27 Dec. ¶ 9.)

28 On or about December 18, 2007, Plaintiff applied in writing to Defendant ASC’s Borrower

1 Counseling Program and informed ASC in writing of the circumstances regarding her delinquency and
2 requested a modification. (Cromwell Dec. ¶ 10.) At some time in early January 2008, Plaintiff received
3 a Notice of Default and Election to Sell Under Deed of Trust informing her that the Property would be
4 foreclosed if she did not pay \$14,512.03 to stop the foreclosure and that she was to contact ASC in care
5 of NDEX for information regarding the foreclosure. (Cromwell Dec. ¶ 11.)

6 On or about January 14, 2008, Defendant Deutsche, which now purports to be the Beneficiary,
7 executed a Substitution of Trustee whereby NDEX was substituted on the Deed of Trust as the new
8 Trustee. (Cromwell Dec. ¶ 5.) However, official records in the Contra Costa County Recorder's Office
9 reflect that Defendant Deutsche, the purported beneficiary of the Deed of Trust, has never recorded an
10 assignment of the Deed of Trust. (See Request for Judicial Notice.) The lack of a recorded assignment
11 renders the Notice of Default, Notice of Trustee's Sale and Substitution of Trustee void and of no force
12 or effect because Defendants lack standing and have no right or authority to foreclose on the Property
13 because NDEX, the purported substituted Trustee, was substituted in by Deutsche, the purported
14 beneficiary. However, the purported beneficiary, Deutsche, never recorded the purported assignment
15 of the Deed of Trust or served Plaintiff with notice of the purported assignment and, therefore, Deutsche,
16 the purported beneficiary, has no standing to conduct a foreclosure sale.

17 Additionally, the express terms of the Pooling and Servicing Agreement prohibit the type of
18 modification that Defendant attempted to effect.

19 From January 2008 until April 2008, Plaintiff had a number of discussions with representatives
20 from ASC and submitted and resubmitted numerous documents regarding her financial situation to stop
21 the foreclosure and become eligible for the loan modification program, and ASC continued to represent
22 to Plaintiff that it was in the process of reviewing her documents for eligibility. (Cromwell Dec. ¶ 12.)
23 On April 30, 2008, Plaintiff was shocked to receive a Notice of Trustee's Sale, at which time she
24 promptly called Defendant ASC by telephone and was finally informed by an employee that she was
25 eligible for the forbearance option, and that ASC would stop the foreclosure proceedings if she complied
26 with certain specified terms and conditions. (Cromwell Dec. ¶ 15.)

27 On April 30, 2008, Plaintiff and Defendant ASC, through an authorized employee, entered into
28 an oral Forbearance Agreement ("Agreement") whereby Plaintiff agreed to make four (4) payments to

1 ASC consisting of \$5,707.88 by May 6, 2008, and payments of \$4,775.08 each by June 6, July 6, and
2 August 6, 2008. In exchange, Defendant ASC agreed (1) to stop the foreclosure proceedings including
3 the sale of the Property, (2) the arrearages of the previous months would be rolled into the balance of
4 the loan, and (3) beginning September 2008, Plaintiff would begin making monthly payments of \$3,200
5 a month based on the original interest rate of 7.05%. (Cromwell Dec. ¶ 16.)

6 On May 1, 2008, Plaintiff called Defendant ASC and spoke with a supervisor named Meritta and
7 confirmed the oral Agreement that she had made with ASC on the previous day. (Cromwell Dec. ¶ 17.)
8 During that discussion, the ASC supervisor orally informed Plaintiff that the May 22, 2008 sale date
9 would be postponed to June 23, 2008, and the sale date would continue to be postponed until Plaintiff
10 had completed the four (4) payments, at which time the original interest rate would revert to the original
11 7.05% thereby reducing her monthly payments. (Cromwell Dec. ¶ 17.) By May 3, 2008, Plaintiff had
12 still not received the Agreement but, based on her understanding of the Agreement with ASC on April
13 30, 2008, which was confirmed on May 1, 2008, Plaintiff made a payment to ASC on May 5, 2008 by
14 Cashier's Check in the mutually agreed amount of \$5,707.88. (Cromwell Dec. ¶ 18.)

15 On or about May 10, 2008, Plaintiff discovered that Defendant ASC had breached its Agreement
16 when she received the written Agreement which included terms that were different from what Plaintiff
17 and ASC had agreed to on April 30, 2008, in that it provided for only a four-month forbearance period
18 and a balloon payment of \$37,588.70 which was due on September 6, 2008 and made no mention that
19 the interest rate would revert to 7.05%. (Cromwell Dec. ¶ 19.)

20 Defendant ASC accepted Plaintiff's good faith payment of \$5,707.88 but further breached the
21 Agreement by refusing to stop the foreclosure proceedings and the Trustee's Sale on the Property which
22 is currently scheduled to be held for a short sale on June 23, 2008, for \$340,000 on Property which
23 Plaintiff purchased for \$637,000. (Cromwell Dec. ¶ 20.)

24 Plaintiff has never received any written notification of the June 23, 2008 Trustee's Sale and was
25 able to obtain this information only through an automated voice mail system when she attempted to
26 contact Defendant ASC. (Cromwell Dec. ¶ 21.)

27 If a temporary restraining order is not issued, Defendants will sell Plaintiff's Property, which
28 would cause her irreparable injury because the Property is unique.

1 There is no prejudice to Defendants because if Defendants have an enforceable security interest
2 in the Property contrary to Plaintiff's interests, they will have the opportunity to foreclose after the trial.

3
4 Plaintiff is ready, willing and able to make payments according to the parties' Agreement of April
5 30, 2008.

6 Plaintiff has not previously applied to any judicial officer for similar relief.

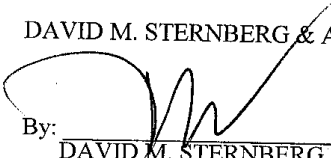
7 As an undertaking, Plaintiff agrees to make the three additional monthly payments at the higher
8 interest rate for the months of June, July and August 2008, on the respective due dates, and then will
9 make regular monthly payments pursuant to her original agreement with ASC based on the original
10 interest rate of 7.05%. (Cromwell Dec. ¶ 22.)

11 Plaintiff requests that this Court issue a temporary restraining order to restrain Defendants from
12 selling the Property at the Trustee's Sale on June 23, 2008 until a hearing on the preliminary injunction
13 and order to show cause why Defendants should not be enjoined from going forward with the foreclosure
14 proceedings and the Trustee's Sale of the Property.

15
16 Dated: June 18, 2008

Respectfully submitted,

DAVID M. STERNBERG & ASSOCIATES

By: 

DAVID M. STERNBERG
Attorneys for Plaintiff
KIMBERLY CROMWELL

1 DAVID M. STERNBERG (SBN 96107)
2 DAVID M. STERNBERG & ASSOCIATES
3 540 Lennon Lane
4 Walnut Creek, California 94598
5 Telephone: (925) 946-1400
6 Facsimile: (925) 932-6986
7 Attorneys for Plaintiff KIMBERLY CROMWELL

FILED

2008 JUN 19 P 2:52

K. TORRE, CLERK OF THE SUPERIOR COURT
COUNTY OF CONTRA COSTA, CALIF.
BY: J. MYOVICH, DEPUTY CLERK

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF CONTRA COSTA - UNLIMITED JURISDICTION

10 KIMBERLY CROMWELL,
11 Plaintiff,

CASE NO. C 08-01603

12 v.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION

13 NDEX WEST LLC, AMERICA'S
14 SERVICING COMPANY, DEUTSCHE
15 BANK NATIONAL TRUST COMPANY,
16 AS TRUSTEE FOR THE MORGAN
17 STANLEY LOAN TRUST 2006-NC2, and
18 all persons unknown, claiming any legal or
equitable right, title, estate, lien or interest in
the property described in this complaint
adverse to Plaintiff's title thereto, and DOES
1 through 30, inclusive,

Date: July 5, 2008
Time: 9:05 a.m.
Dept.: 9
Complaint filed: June 19, 2008

19 Defendants.
20 _____/

21 I. INTRODUCTION

22 Plaintiff KIMBERLY CROMWELL (hereinafter "Plaintiff") applies for a preliminary injunction
23 maintaining the status quo and preventing Defendants NDEX WEST LLC (hereinafter "NDEX"),
24 AMERICA'S SERVICING COMPANY (hereinafter "ASC"), and DEUTSCHE BANK NATIONAL
25 TRUST COMPANY, AS TRUSTEE FOR THE MORGAN STANLEY LOAN TRUST 2006-NC2
26 (hereinafter "Deutsche Bank") (hereinafter collectively "Defendants"), and their agents, servants
27 trustees, and employees from going forward with foreclosure proceedings and conducting a Trustee'
28 Sale on June 23, 2008 on real property located at 2405 Shelbourne Way, Antioch, Contra Costa County

Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction
1

1 California 94531, APN 052-333-017, and requests that Defendants and their agents be enjoined from
2 these acts during the pendency of this action.

3 This motion is made on the ground that Plaintiff will suffer great and irreparable injury before
4 the matter can be heard on its merits if the injunction is not granted. Plaintiff has no way to stop the
5 foreclosure proceedings and sale on June 23, 2008, because Defendants have failed to cooperate and
6 have breached their Agreement with Plaintiff. Furthermore, the Notice of Default and Notice of
7 Trustee's Sale are void and of no effect because Defendants have no power of sale because the
8 assignment to Defendant Deutsche Bank, the purported beneficiary, has never been recorded and
9 Plaintiff has never received notice of the purported assignment. Defendants further lack standing because
10 Defendant Deutsche Bank is part of a Pooling and Servicing Agreement, and Plaintiff's Deed of Trust
11 is one of the securities in the pool but, by the terms of the Trust, it cannot modify Plaintiff's Deed of
12 Trust or legally buy or sell or make profits from the trust.

13 **II. STATEMENT OF FACTS**

14 This is a case regarding Defendants' attempts to foreclose on Plaintiff's Property and hold a
15 Trustee's Sale, which is currently scheduled for June 23, 2008, when they have no authority or power
16 of sale. Defendants also had no right to modify Plaintiff's loan which ultimately resulted in the current
17 foreclosure proceedings. Defendants have also made misrepresentations to Plaintiff and breached their
18 agreement with her that they would stay the foreclosure proceedings and the sale pending her compliance
19 with the terms and conditions of their agreement, but they have refused to do so.

20 Plaintiff is the true equitable owner and sole title holder of real property located at 2405
21 Shelbourne Way, Antioch, Contra Costa County, California 94531, APN 052-333-017 (hereinafter the
22 "Property"). (Declaration of Kimberly Cromwell ¶ 2.) Plaintiff is also the Trustor of a deed of trust
23 which was recorded on November 15, 2005, as Instrument No. 2005-0441030-00 (hereinafter "Deed of
24 Trust"), in the Office of the Recorder in Contra Costa County, California, which names New Century
25 Mortgage Company as the Beneficiary of the Deed of Trust. (Cromwell Dec. ¶ 3.)

26 Defendant NDEX is a Delaware Limited Liability Company registered to do business in
27 California with a business address of 15000 Surveyor Blvd., Ste. 100, Addison, Texas 75001. (Cromwell
28 Dec. ¶ 5.) On or about January 14, 2008, NDEX was purportedly substituted as the Trustee on the Deed

1 of Trust. (Cromwell Dec. ¶ 5.) However, official records in the Contra Costa County Recorder's Office
2 reflect that Defendant Deutsche Bank, the purported beneficiary of the Deed of Trust, has never recorded
3 an assignment of the Deed of Trust in violation of Civil Code section 2932.5. (See Request for Judicial
4 Notice.)

5 Defendant ASC, a division of Wells Fargo Bank, is an agent for NDEX and is in the business
6 of servicing loans. Wells Fargo Bank is the purported attorney in fact for Deutsche Bank.

7 Defendant Deutsche Bank is the purported beneficiary of the Deed of Trust and is purported to
8 be part of a "Pooling and Service Agreement" which holds securitized bonds, of which Plaintiff's Deed
9 of Trust is one of many.

10 On or about November 9, 2007, Plaintiff received a letter from Defendant ASC notifying her of
11 an interest rate increase on her adjustable rate mortgage resulting in approximately an additional five
12 hundred and fifty dollars (\$550.00) payment per month. (Cromwell Dec. ¶ 9.) Plaintiff immediately
13 contacted ASC, at which time an employee informed her that she could apply for some options for
14 modifying the loan through the Borrower Counseling Program. (Cromwell Dec. ¶ 9.) Because Plaintiff
15 was informed by ASC that it would not consider a modification of her loan unless she were three (3)
16 months in arrears, Plaintiff, who was two months in arrears at that time due to a dispute regarding
17 commissions from work, did not pay the next monthly payment on the loan. (Cromwell Dec. ¶ 9.)

18 On or about December 18, 2007, Plaintiff applied in writing to Defendant ASC's Borrower
19 Counseling Program and informed ASC of the circumstances regarding her delinquency and requested
20 a modification of the loan. (Cromwell Dec. ¶ 10.) On January 9, 2008, ASC responded by requesting
21 additional information needed for the loan modification. (Cromwell Dec. ¶ 10.)

22 At some time in early January 2008, Plaintiff received a Notice of Default and Election to Sell
23 Under Deed of Trust informing her that the Property would be foreclosed if she did not pay \$14,512.03
24 to stop the foreclosure and that she was to contact ASC in care of NDEX for information regarding the
25 foreclosure. (Cromwell Dec. ¶ 11.)

26 On or about January 14, 2008, Deutsche Bank purportedly executed a Substitution of Trustee
27 whereby NDEX was substituted on the Deed of Trust as the new Trustee. (Cromwell Dec. ¶ 5.)
28 However, official records in the Contra Costa County Recorder's Office reflect that Defendant Deutsche,

1 the purported beneficiary of the Deed of Trust, has never recorded an assignment of the Deed of Trust
2 and Plaintiff was never served with notice of the purported assignment. (See Request for Judicial
3 Notice.) From January 2008 until April 2008, Plaintiff had a number of discussions with
4 representatives from ASC and submitted and resubmitted numerous documents regarding her financial
5 situation to stop the foreclosure and become eligible for the loan modification program, and ASC
6 continued to represent to Plaintiff that it was in the process of reviewing her documents for eligibility.
7 (Cromwell Dec. ¶ 12.) During this time, an ASC employee informed Plaintiff that a lot of the confusion
8 regarding the procedure for determining and granting eligibility for the loan modification program
9 resulted because many of the ASC employees were new and unfamiliar with the rules and the
10 procedures. (Cromwell Dec. ¶ 13.)

11 On April 19, 2008, Plaintiff wrote a letter to Defendant ASC requesting the name of the mortgage
12 holder pursuant to 15 U.S.C. § 1641(f)(2), but, as of the date of the filing of this Complaint, ASC has
13 refused to respond and provide Plaintiff with the requested information. (Cromwell Dec. ¶ 14.)

14 On April 30, 2008, Plaintiff was shocked to receive a Notice of Trustee's Sale, at which time she
15 promptly called Defendant ASC by telephone and was finally informed by an employee that she was
16 eligible for the forbearance option and that ASC would stop the foreclosure proceedings if she agreed
17 to certain specified terms. (Cromwell Dec. ¶ 15.)

18 On April 30, 2008, Plaintiff and Defendant ASC, through an authorized employee, entered into
19 a Forbearance Agreement ("Agreement") whereby Plaintiff agreed to make four (4) good faith payments
20 to ASC consisting of \$5,707.88 by May 6, 2008, and payments of \$4,775.08 each by June 6, July 6, and
21 August 6, 2008. In exchange, Defendant ASC agreed: (1) to stop the foreclosure proceedings including
22 the sale of the Property; (2) that the arrearages would be added to the balance of the loan; and (3) that
23 beginning September 2008, Plaintiff could begin making monthly payments of \$3,200 a month based
24 on the original interest rate of 7.05%. (Cromwell Dec. ¶ 16.)

25 On May 1, 2008, Plaintiff called Defendant ASC and spoke with a supervisor named Meritta and
26 confirmed the Agreement that she had made with ASC on the previous day. During that discussion, the
27 ASC supervisor orally informed Plaintiff that the May 22, 2008 sale date would be postponed to June
28 23, 2008, and that the sale date would continue to be postponed until Plaintiff had completed the four

1 (4) good faith payments, at which time the interest rate would be reduced and revert to the original
2 7.05% thereby reducing her monthly payments. (Cromwell Dec. ¶ 17.) By May 5, 2008, Plaintiff had
3 still not received the Agreement but, based on her understanding of the Agreement with ASC on April
4 30, 2008, which was confirmed on May 1, 2008, Plaintiff made a payment to ASC on May 5, 2008 by
5 Cashier's Check in the mutually agreed amount of \$5,707.88. (Cromwell Dec. ¶ 18.)

6 On or about May 10, 2008, Plaintiff received the written Agreement from Defendant ASC which
7 included terms that were different from what Plaintiff and ASC had agreed to on April 30, 2008, because
8 it provided for only a four-month forbearance period and a balloon payment of \$37,588.70, which was
9 due on September 6, 2008 and made no mention that the interest rate would revert to 7.05%. (Cromwell
10 Dec. ¶ 19.)

11 Defendant ASC accepted Plaintiff's good faith payment of \$5,707.88 but refused to stop the
12 foreclosure proceedings and the Trustee's Sale on the Property which is currently scheduled to be held
13 for a short sale on June 23, 2008 for \$340,000 on Property which Plaintiff purchased for \$637,000.
14 (Cromwell Dec. ¶ 20.) Plaintiff has never received any written notification of the June 23, 2008
15 Trustee's Sale and was able to obtain this information only through an automated voice mail system
16 when she attempted to contact Defendant ASC. (Cromwell Dec. ¶ 21.)

17 **III. LEGAL ARGUMENT**

18 Plaintiff requests that this Court issue a temporary restraining order to restrain Defendants from
19 going forward with the foreclosure proceedings and selling the Property at the Trustee's Sale on June
20 23, 2008 until a hearing on the preliminary injunction and order to show cause why Defendants should
21 go forward with the foreclosure proceedings and sell the Property.

22 **A. AN INJUNCTION IS APPROPRIATE IN THIS CASE.**

23 California Code of Civil Procedure section 526(2) authorizes an injunction "when it appears by
24 the complaint or affidavits that the commission or continuance of some act during the litigation would
25 produce waste, or irreparable injury, to a party in the action." California Code of Civil Procedure section
26 527(a) provides that a preliminary injunction "may be granted at any time before judgment upon a
27 verified complaint or upon affidavits if the complaint in one case, or the affidavit in the other, show
28 satisfactorily that sufficient grounds exist therefor"

1 The test most commonly applied by courts in determining whether to issue a preliminary
2 injunction is as follows:

3 (a) The likelihood that the plaintiff will succeed on the merits of trial; and
4 (b) The interim harm that the plaintiff will suffer if the injunction is not issued
5 compared to the interim harm that the defendant will suffer if it is. (*Cohen v. Board of Supervisors*
6 (1985) 40 Cal. 3d 277, 286.) The analysis of this situation, which is set forth below, makes it clear that
7 an injunction should be granted in this case.

8 **B. PLAINTIFF IS LIKELY TO PREVAIL ON THIS MATTER.**

9 **1. Defendant ASC Breached Its Agreement With Plaintiff.**

10 On April 30, 2008, an authorized employee of Defendant ASC informed Plaintiff that she was
11 eligible for a loan modification, and Plaintiff and Defendant entered into an oral Agreement which ASC
12 agreed to memorialize in writing. According to the terms of the oral Agreement, Plaintiff was to make
13 four monthly payments at the higher interest rate and then, beginning in September 2008, those four
14 payments would be rolled back into the principal and the monthly payments would revert to the original
15 interest rate of 7.05%.

16 Plaintiff performed on the Agreement by making a payment by Cashier's Check of \$5,707.88 on
17 May 5, 2008, but when Plaintiff finally received the written Agreement from ASC several days later, the
18 terms were completely different and included a balloon payment of \$37,588.70 in September 2008 and
19 made no mention of the reduced interest rate. Defendant ASC has refused to stop the foreclosure
20 proceedings and is going forward with the Trustee's Sale on June 23, 2008.

21 **2. The Notice of Default and Notice of Trustee's Sale are Void and are of No**
22 **Force and Effect Because Deutsche Bank, the Purported Beneficiary, Never**
23 **Recorded an Assignment of the Deed of Trust.**

24 Civil Code section 2932.5 provides that a deed of trust is an instrument with a power of sale, and
25 an assignee cannot be vested with a power of sale unless it is duly recorded.

26 In the instant proceeding, New Century Mortgage Corporation was the original beneficiary of
27 the Deed of Trust. (See Complaint, Exhibit B.) On or about January 14, 2008, NDEX was purportedly
28 substituted as the Trustee on the Deed of Trust. Defendant Deutsche Bank purports to be the new
beneficiary and assignee of the Deed of Trust but official records from the Contra Costa County

1 Recorder's Office reflect that no such assignment was ever made in violation of Civil Code section
2 2932.5. (See Request for Judicial Notice, Exhibit A.) Furthermore, Plaintiff never received any notice
3 of the purported assignment. The effect of this lack of recorded assignment and lack of notice to Plaintiff
4 means that Defendants have no power to foreclose on the Property and the sale and the Notice of Default
5 and Notice of Trustee's sale are void and of no force or effect.

6 Because no assignment of the Deed of Trust was ever recorded, Defendants have no power to
7 foreclose or power of sale, and the Notice of Default and Notice of Trustee's Sale are void and of no
8 effect.

9 **3. The Pooling and Servicing Agreement Prohibits Modification of Plaintiff's Loan.**

10 Plaintiff is informed and believes that her Deed of Trust is part of a Pooling and Servicing
11 Agreement of which Defendant Deutsche Bank is a Trustee. The specific terms of the Pooling and
12 Servicing Agreement provide that Plaintiff's loan, which is under the Morgan Stanley Loan Trust 2006-
13 NC2, cannot be modified. (See Request for Judicial Notice, Exhibit B.) Defendants' attempt to increase
14 Plaintiff's interest rate on her loan is contrary to the express provisions of the Pooling and Servicing
15 Agreement in which her Deed of Trust is held, which renders the increased interest rate illegal and the
16 resulting foreclosure proceedings null and void.

17 C. **PLAINTIFF WILL BE IRREPARABLY HARMED IF A PRELIMINARY**
18 **INJUNCTION IS NOT ISSUED AND THERE WILL BE NO HARM TO**
DEFENDANTS.

19 The purpose of a preliminary injunction is to preserve the status quo pending a trial on the merits.
20 *Continental Baking Co. v. Katz* (1968) 68 C.2d 512, 528. In the present case, Plaintiff seeks a temporary
21 restraining order and an order to show cause why a preliminary injunction should not be issued which
22 would maintain the status quo until Plaintiff's action is heard on the merits.

23 In balancing the respective burdens of Plaintiff and Defendants, it is clear that Plaintiff would
24 suffer more. If a preliminary injunction is not issued, Defendants would go forward with the foreclosure
25 proceedings and sell Plaintiff's Property, which would cause her irreparable injury because the Property
26 is unique.

27 There is no prejudice to Defendants if the foreclosure is enjoined because the Property has
28 significant value, Defendants have an enforceable security interest in the Property contrary to the

1 Plaintiff's interests, and they will have the opportunity to foreclose after the trial.

2 Plaintiff remains ready, able and willing to perform on the Agreement which should allay
3 Defendants' damages.

4 Furthermore, Plaintiff is willing and able to pay a bond, but believes for the reasons just stated,
5 it should be minimal.

6 **D. THE UNDERTAKING SHOULD BE MINIMAL BECAUSE THE DEFENDANTS'**
7 **CLAIM IS FULLY SECURED**

8 Under Code of Civil Procedure § 529, an undertaking must be given in an amount equal to the
9 damages that the enjoined party will suffer if the injunction is improper. In this case, Defendants will
10 not suffer any additional damages. If Defendants prevail at trial by having the Court declare they have
11 not breached the Agreement, and that they have standing and the authority to continue with the
12 foreclosure proceedings and sell Plaintiff's Property, the obligation will be fully secured.

13 As an "undertaking," Plaintiff agrees to make the three additional monthly payments at the higher
14 interest rate for the months of June, July and August 2008, on the respective due dates, and then will
15 make regular monthly payments pursuant to her original Agreement with ASC that payments will be
16 based on the interest rate of 7.05%.

17 Any delay damages will be covered by the payments at the higher interest rate. Defendants'
18 attorneys' fees should be minimal because Plaintiff is ready, willing and able to perform on the
19 Agreement.

20 **IV. CONCLUSION**

21 A preliminary injunction must be granted prohibiting Defendants from going forward with the
22 foreclosure proceedings and selling Plaintiff's Property which would maintain the status quo until the
23 matter can be adjudicated on the merits at trial. If an injunction is not issued, Plaintiff will be irreparably
24 injured because the Property is unique and Plaintiff will suffer further unjust hardship.

25 Dated: June 18, 2008

DAVID M. STERNBERG & ASSOCIATES

26
27 By: 

28 DAVID M. STERNBERG
Attorneys for Plaintiff
KIMBERLY CROMWELL

2	Fiduciary Bonds																									
Applicant's Age: _____ Applicant's Net Worth: _____ How long have you been with your current employer? _____ Active or retired? _____ Date of your appointment: _____ Name of Estate: _____ What is your relationship (personal and/or financial) with the deceased/incompetent/minor/beneficiary? _____ Are you indebted to the estate of the deceased/incompetent/minor/beneficiary? ☐ No ☐ Yes If Yes, in what amount and what are the terms of repayment: _____ Attorney's name and address: _____ Court jurisdiction (Obligee) in which bond will be filed: _____ Is there an ongoing business? ☐ No ☐ Yes If Yes, provide details: _____ <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th style="width: 30%;">Inventory of the Assets:</th> <th style="width: 10%;">Cash:</th> <th style="width: 20%;">Securities:</th> <th style="width: 20%;">Real Estate:</th> <th style="width: 20%;">Other:</th> </tr> <tr> <td style="text-align: center;">Name of Heirs/Beneficiaries</td> <td style="text-align: center;">Age</td> <td style="text-align: center;">Relationship to the deceased</td> <td style="text-align: center;">Share of the Estate</td> <td style="text-align: center;">Residence (state)</td> </tr> <tr><td> </td><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td><td> </td></tr> </table>		Inventory of the Assets:	Cash:	Securities:	Real Estate:	Other:	Name of Heirs/Beneficiaries	Age	Relationship to the deceased	Share of the Estate	Residence (state)															
Inventory of the Assets:	Cash:	Securities:	Real Estate:	Other:																						
Name of Heirs/Beneficiaries	Age	Relationship to the deceased	Share of the Estate	Residence (state)																						
Attach a copy of the Will, Trust or Court Order for ALL bonds greater than or equal to \$100,000.																										
2a	Complete for Administrator, Executor, Personal Representatives, etc.																									
Date of Death: _____ Is the estate insolvent? ☐ No ☐ Yes Are there any disputes among the heirs? ☐ No ☐ Yes																										
2b	Complete for Guardianship, Conservatorship, Trustee, etc.																									
This is in regard to a: ☐ Minor <i>and/or</i> ☐ Incompetent ☐ Beneficiary Age: _____ Where does minor/incompetent reside? _____ Will any assets be under court restrictions? ☐ No ☐ Yes If Yes, provide details: _____ Will joint control be used to restrict expenditures or distributions of assets? ☐ No ☐ Yes Will professional accounting, investment or legal services be provided on an ongoing basis? ☐ No ☐ Yes Does the presiding court require that an annual accounting be filed? ☐ No ☐ Yes Is the estimated duration of the bond anticipated to be longer than 3 years? ☐ No ☐ Yes																										
3	Receiver, Bankruptcy Trustee, Assignee Bonds																									
Debtor: _____ Address: _____ Type of Action: ☐ Liquidation ☐ Reorganization ☐ Receiver of Rents ☐ Other Do you carry Fidelity coverage? ☐ No ☐ Yes If Yes, in what amount? _____ Carrier: _____ Do you carry Professional Liability or E & O coverage? ☐ No ☐ Yes If Yes, in what amount? _____ Carrier: _____ Attach copy of Court Order, Judgment and/or other documents ☐ Copies attached																										
4	Court: Judicial Bonds																									
Judgment / Claim Amount: \$10,000.00 Type of Action: Preliminary Injunction Case Number: MSC08-1603 Court Jurisdiction: Superior Attorney's name and address: David M. Sternberg & Assoc. 540 Lennon Lane Walnut Creek, CA 94598 Summary of the Action: _____ Does the case involve a domestic dispute? ☒ No ☐ Yes																										

BOYCO DECISION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE FORECLOSURE CASES) CASE NO. NO.1:07CV2282

) 07CV2532
) 07CV2560
) 07CV2602
) 07CV2631
) 07CV2638
) 07CV2681
) 07CV2695
) 07CV2920
) 07CV2930
) 07CV2949
) 07CV2950
) 07CV3000
) 07CV3029
)

) JUDGE CHRISTOPHER A. BOYKO
)
)
)
)

) OPINION AND ORDER
)
)

CHRISTOPHER A. BOYKO, J.:

On October 10, 2007, this Court issued an Order requiring Plaintiff-Lenders in a number of pending foreclosure cases to file a copy of the executed Assignment demonstrating Plaintiff was the holder and owner of the Note and Mortgage *as of the date the Complaint was filed*, or the Court would enter a dismissal. After considering the submissions, along with all the documents filed of record, the Court dismisses the captioned cases without prejudice. The Court has reached today's determination after a thorough review of all the relevant law and the briefs and arguments recently presented by the parties, including oral arguments heard on Plaintiff Deutsche Bank's Motion for Reconsideration. The decision, therefore, is applicable from this date forward, and shall not have retroactive effect.

LAW AND ANALYSIS

A party seeking to bring a case into federal court on grounds of diversity carries the burden of establishing diversity jurisdiction. *Coyne v. American Tobacco Company*, 183 F. 3d 488 (6th Cir. 1999). Further, the plaintiff "bears the burden of demonstrating standing and must plead its components with specificity." *Coyne*, 183 F. 3d at 494; *Valley Forge Christian*

College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982). The minimum constitutional requirements for standing are: proof of injury in fact, causation, and redressability. *Valley Forge*, 454 U.S. at 472. In addition, “the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted.” *Coyne*, 183 F. 3d at 494 (quoting *Pestak v. Ohio Elections Comm’n*, 926 F. 2d 573, 576 (6th Cir. 1991)). To satisfy the requirements of Article III of the United States Constitution, the plaintiff must show he has ***personally suffered some actual injury*** as a result of the illegal conduct of the defendant. (Emphasis added). *Coyne*, 183 F. 3d at 494; *Valley Forge*, 454 U.S. at 472. In each of the above-captioned Complaints, the named Plaintiff alleges it is the holder and owner of the Note and Mortgage. However, the attached Note and Mortgage identify the mortgagee and promisee as the original lending institution — one other than the named Plaintiff. Further, the Preliminary Judicial Report attached as an exhibit to the Complaint makes no reference to the named Plaintiff in the recorded chain of title/interest. The Court’s Amended General Order No. 2006-16 requires Plaintiff to submit an affidavit along with the Complaint, which identifies Plaintiff either as the original mortgage holder, or as an assignee, trustee or successor-in-interest. Once again, the affidavits submitted in all these cases recite the averment that Plaintiff is the owner of the Note and Mortgage, without any mention of an assignment or trust or successor interest. Consequently, the very filings and submissions of the Plaintiff create a conflict. In every instance, then, Plaintiff has not satisfied its burden of demonstrating standing at the time of the filing of the Complaint.

Understandably, the Court requested clarification by requiring each Plaintiff to submit a copy of the Assignment of the Note and Mortgage, executed as of the date of the Foreclosure Complaint. In the above-captioned cases, ***none*** of the Assignments show the named Plaintiff to be the owner of the rights, title and interest under the Mortgage at issue as of the date of the Foreclosure Complaint. The Assignments, in every instance, express a present intent to convey all rights, title and interest in the Mortgage and the accompanying Note to the Plaintiff named in the caption of the Foreclosure Complaint upon receipt of sufficient consideration on the date the Assignment was signed and notarized. Further, the Assignment documents are all prepared by counsel for the named Plaintiffs. These proffered documents belie Plaintiffs’ assertion they own the Note and Mortgage by means of a purchase which pre-dated the Complaint by days, months or years.

Plaintiff-Lenders shall take note, furthermore, that prior to the issuance of its October 10, 2007 Order, the Court considered the principles of “real party in interest,” and examined Fed. R. Civ. P. 17 — “Parties Plaintiff and Defendant; Capacity” and its associated Commentary. The Rule is not *apropos* to the situation raised by these Foreclosure Complaints. The Rule’s Commentary offers this explanation: “The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the

Astoundingly, counsel at oral argument stated that his client, the purchaser from the original mortgagee, acquired complete legal and equitable interest in land when money changed hands, even before the purchase agreement, let alone a proper assignment, made its way into his client’s possession. proper party to sue is difficult or when an understandable mistake has been made. ... It is, in cases of this sort, intended to insure against forfeiture and injustice ...” Plaintiff-Lenders do not allege mistake or that a party cannot be identified. Nor will Plaintiff-Lenders suffer

forfeiture or injustice by the dismissal of these defective complaints otherwise than on the merits.

Moreover, this Court is obligated to carefully scrutinize all filings and pleadings in foreclosure actions, since the unique nature of real property requires contracts and transactions concerning real property to be in writing. R.C. § 1335.04. Ohio law holds that when a mortgage is assigned, moreover, the assignment is subject to the recording requirements of R.C. § 5301.25. *Creager v. Anderson* (1934), 16 Ohio Law Abs. 400 (interpreting the former statute, G.C. § 8543). “Thus, with regards to real property, before an entity assigned an interest in that property would be entitled to receive a distribution from the sale of the property, their interest therein must have been recorded in accordance with Ohio law.” *In re Ochmanek*, 266 B.R. 114, 120 (Bkrtcy.N.D. Ohio 2000) (citing *Pinney v. Merchants’ National Bank of Defiance*, 71 Ohio St. 173, 177 (1904)).¹

This Court acknowledges the right of banks, holding valid mortgages, to receive timely payments. And, if they do not receive timely payments, banks have the right to properly file actions on the defaulted notes — seeking foreclosure on the property securing the notes. Yet, this Court possesses the independent obligations to preserve the judicial integrity of the federal court and to jealously guard federal jurisdiction. Neither the fluidity of ² Plaintiff’s reliance on Ohio’s “real party in interest rule” (ORCP 17) and on any Ohio case citations is misplaced. Although Ohio law guides federal courts on substantive issues, state procedural law cannot be used to explain, modify or contradict a federal rule of procedure, which purpose is clearly spelled out in the Commentary. “In federal diversity actions, state law governs substantive issues and federal law governs procedural issues.” *Erie R.R. Co. v. Tompkins*, 304 U.S. 63 (1938); *Legg v. Chopra*, 286 F. 3d 286, 289 (6th Cir. 2002); *Gafford v. General Electric Company*, 997 F. 2d 150, 165-6 (6th Cir. 1993).

³
Plaintiff’s, “Judge, you just don’t understand how things work,” argument reveals a condescending mindset and quasi-monopolistic system where financial institutions have traditionally controlled, and still control, the foreclosure process. Typically, the homeowner who finds himself/herself in financial straits, fails to make the required mortgage payments and faces a foreclosure suit, is not interested in testing state or federal jurisdictional requirements, either *pro se* or through counsel. Their focus is either, “how do I save my home,” or “if I have to give it up, I’ll simply leave and find somewhere else to live.”

In the meantime, the financial institutions or successors/assignees rush to foreclose, obtain a default judgment and then sit on the deed, avoiding responsibility for maintaining the property while reaping the financial benefits of interest running on a judgment. The financial institutions know the law charges the one with title (still the homeowner) with maintaining the property. There is no doubt every decision made by a financial institution in the foreclosure process is driven by money. And the legal work which flows from winning the financial institution’s favor is highly lucrative. There is nothing improper or wrong with financial institutions or law firms making a profit — to the contrary, they should be rewarded for sound business and legal practices. However, unchallenged by underfinanced opponents, the institutions worry less about jurisdictional requirements and more about maximizing returns. Unlike the focus of financial institutions, the federal courts must act as gatekeepers, assuring that only those who meet diversity and standing requirements are allowed to pass through. Counsel for the institutions are not without legal argument to support their position, but their

arguments fall woefully short of justifying their premature filings, and utterly fail to satisfy their standing
-5-

the secondary mortgage market, nor monetary or economic considerations of the parties, nor the convenience of the litigants supersede those obligations.

Despite Plaintiffs’ counsel’s belief that “there appears to be some level of disagreement and/or misunderstanding amongst professionals, borrowers, attorneys and

members of the judiciary,” the Court does not require instruction and is not operating under any misapprehension. The “real party in interest” rule, to which the Plaintiff-Lenders continually refer in their responses or motions, is clearly comprehended by the Court and is not intended to assist banks in avoiding traditional federal diversity requirements.² Unlike Ohio State law and procedure, as Plaintiffs perceive it, the federal judicial system need not, and will not, be “forgiving in this regard.”³

-6-

CONCLUSION

For all the foregoing reasons, the above-captioned Foreclosure Complaints are dismissed without prejudice.

IT IS SO ORDERED.

DATE: October 31, 2007

S/Christopher A. Boyko

CHRISTOPHER A. BOYKO

United States District Judge

and jurisdictional burdens. The institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally put to the test, their weak legal arguments compel the Court to stop them at the gate.

The Court will illustrate in simple terms its decision: “Fluidity of the market” — “X” dollars, “contractual arrangements between institutions and counsel” — “X” dollars, “purchasing mortgages in bulk and securitizing” — “X” dollars, “rush to file, slow to record after judgment” — “X” dollars, “the jurisdictional integrity of United States District Court” — “Priceless.”

← Foreclosure Defense: 11 Year Ohio Fight Keeps Going — Persistence Pays FORECLOSURE DEFENSE:
MEMO ON SINGLE TRANSACTION — DISCUSSION AT WORKSHOP IN SANTA MONICA →
Foreclosure Defense: King's County, New York Case Thrashes Lenders
July 31, 2008 · 1 Comment

King's County Case:

Editor's Note: For those who are dubious about the legal positions and theories suggested in this blog, this case will be at least somewhat instructive. It is not just a technicality. It is reality. Nobody on the lender's side can actually trace your note and mortgage to the real party in interest or anyone with actual personal knowledge of the assignments or the effect of those assignments.

This goes directly to the the issue of denying that payment was not made and the affirmative defense that the entire mortgage was prepaid by a third party who does not have any security rights in the property, was not disclosed to the borrower, and who possesses other assignments and cross guarantees through which payments were made, part of which was attributable to the revenue that was assigned. Note that the note itself has vanished in most cases, has not been assigned and neither has the mortgage. This is a picture of "smart" people eviscerating the "asset" from which an ABS supposedly derived its value thus hoisting a crowd of people up on their own petards.

HSBC Bank USA, N.A. v. Valentin
N.Y.Sup.,2008.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, Kings County, New York.

HSBC BANK USA, N.A., as Indenture Trustee for the Registered Noteholders of Renaissance Home Equity Loan Trust 2005-3, Renaissance Home Equity Loan Asset-Backed Notes, Series 2005-3,, Plaintiff,
v.

Candida VALENTIN, Candide Ruiz, et. al., Defendants.
No. 15968/07.

Jan. 30, 2008.

Vincent P. Surico, Esq., De Rose & Surico, Bayside, for Plaintiff.

No Opposition submitted by defendants to plaintiff's Judgment of Foreclosure and Sale.

ARTHUR M. SCHACK, J.

*1 Plaintiff's application, upon the default of all defendants, for an order of reference, for the premises located at 572 Riverdale Avenue, Brooklyn, New York (Block 3838, Lot 39, County of Kings) is denied without prejudice. The "affidavit of merit" submitted in support of this application for a default judgment is not by an officer of the plaintiff or someone with a power of attorney from the plaintiff. Leave is granted to plaintiff, HSBC BANK USA, N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2005-3 (HSBC), to renew its application for an order of reference upon presentation to the Court of compliance with the statutory requirements of CPLR § 3215(f), with "an affidavit of facts" executed by someone who is an officer of HSBC or has a valid power of attorney from HSBC. Further, the Court, upon renewal of the application for an order of reference requires a satisfactory explanation to questions with respect to: the assignment of the instant nonperforming mortgage loan from the original lender, Delta Funding Corporation to HSBC Bank; the employment history of one Scott Anderson, who assigned the instant mortgage to HSBC, yet in a case I decided last month, HSBC Bank, N .A. v. Cherry, 18 Misc.3d 1102(A), swore in an affidavit to be HSBC's servicing agent; and the relationship between HSBC, Ocwen Federal Bank, FSB (OCWEN), Deutsche Bank and Goldman Sachs, who all seem to share office space at 1661 Worthington Road, Suite 100, West Palm Beach, Florida 33409 (Suite 100).

Background

Defendants, Candida Valentin and Candide Ruiz, borrowed \$340,000 from Delta Funding Corporation, on June 23, 2005. The note and mortgage were recorded in the Office of the City Register, New York City Department of Finance on July 14, 2005, at City Register File Number (CRFN) 2005000395517. Delta Funding Corporation, by MortgageElectronicRegistrationSystems, Inc. (MERS), its nominee for the purpose of recording the mortgage, assigned the note and mortgage to plaintiff HSBC, on May 1, 2007, with the assignment recorded on June 13, 2007 at CRFN 2007000306260.

Plaintiff's moving papers for an order of reference fails to present an "affidavit made by the party," pursuant to CPLR § 3215(f). The application contains an April 23, 2007-affidavit by Jessica Dybas, who states that she is "a Foreclosure Facilitator of OCWEN LOAN SERVICING, LLC, servicing agent and attorney in fact to the holder of the bond and mortgage sought to be foreclosed herein." On that date, the note and mortgage were still held by MERS, as nominee of Delta Funding Corporation. For reasons unknown to the Court, MERS, as nominee of Delta Funding Corporation, or plaintiff HSBC failed to provide any power of attorney authorizing OCWEN to go forward with the instant foreclosure action. Further, even if HSBC authorized OCWEN to be its attorney in fact, Ms. Dybas is not an officer of OCWEN. She is a "Foreclosure Facilitator," a job title unknown to this Court. Therefore, the proposed order of reference must be denied without prejudice. Leave is granted to plaintiff HSBC to comply with CPLR § 3215(f) by providing an "affidavit made by the party," whether by an officer of HSBC or someone with a valid power of attorney from HSBC.

*2 Further, according to plaintiff's application, the default of defendants Valentin and Ruiz began with the nonpayment of principal and interest due on January 1, 2007. Yet, four months later, plaintiff HSBC was willing to take an assignment of the instant nonperforming loan. The Court wonders why HSBC would purchase a nonperforming loan, four months in arrears?

Additionally, plaintiff HSBC must address a third matter if it renews its application for an order of reference. In the instant action, as noted above, Scott Anderson, as Vice President of MERS, assigned the instant mortgage to HSBC on May 1, 2007. Doris Chapman, the Notary Public, stated that on May 1, 2007, "personally appeared Scott Anderson, of 1661 Worthington Road, Suite 100, West Palm Beach, Florida 33409." In *HSBC Bank, N.A. v. Cherry*, at 3, I observed that:

Scott Anderson, in his affidavit, executed on June 15, 2007, states he is Vice President of OCWEN. Yet, the June 13, 2007 assignment from MERS to HSBC is signed by the same Scott Anderson as Vice President of MERS. Did Mr. Anderson change his employer between June 13, 2007 and June 15, 2007. The Court is concerned that there may be fraud on the part of HSBC, or at least malfeasance. Before granting an application for an order of reference, the Court requires an affidavit from Mr. Anderson describing his employment history for the past three years.

Lastly, the court notes that Scott Anderson, in the MERS to HSBC assignment gave his address as Suite 100. This is also the address listed for HSBC in the assignment. In a foreclosure action that I decided on May 11, 2007 (*Deutsche Bank Nat. Trust Company v. Castellanos*, 15 Misc.3d 1134[A]), Deutsche Bank assigned the mortgage to MTGLQ Investors, L.P. I noted, at 4-5, that MTGLQ Investors, L.P.:

According to Exhibit 21.1 of the November 25, 2006 Goldman Sachs 10-K filing with the Securities and Exchange Commission ... is a "significant subsidiary" of Goldman Sachs.... [T]he January 19, 2007 assignment has the same address for both the assignor Deutsche Bank and the assignee MTGLQ Investors, L.P., at 1661 Worthington Road, Suite 100, West Palm Beach, Florida 33409. The Court will not speculate about why two major financial behemoths, Deutsche Bank and Goldman Sachs share space in a West Palm Beach, Florida office suite

In the instant action, with HSBC, OCWEN and MERS, joining with Deutsche Bank and Goldman Sachs at Suite 100, the Court is now concerned as to why so many financial goliaths are in the same space. The Court ponders if Suite 100 is the size of Madison Square Garden to house all of these financial behemoths or if there is a more nefarious reason for this corporate togetherness. If HSBC seeks to renew its application for an order to reference, the Court needs to know, in the form of an affidavit, why Suite 100 is such a popular venue for these corporations.

Discussion

Real Property Actions and Proceedings Law (RPAPL) § 1321 allows the Court in a foreclosure action, upon the default of the defendant or defendant's admission of mortgage payment arrears, to appoint a referee "to compute the amount due to the plaintiff." In the instant action, plaintiff's application for an order of reference is a preliminary step to obtaining a default judgment of foreclosure and sale. (*Home Sav. Of Am., F.A. v. Gkanios*, 230 A.D.2d 770 [2d Dept 1996]).

***3 Plaintiff has failed to meet the requirements of CPLR § 3215(f) for a default judgment.**

On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party... Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney. [Emphasis added].

Plaintiff has failed to submit "proof of the facts" in "an affidavit made by the party." The affidavit is submitted by Jessica Dybas, "a Foreclosure Facilitator of OCWEN LOAN SERVICING, LLC, servicing agent and attorney in fact to the holder of the bond and mortgage sought to be foreclosed herein." There must be an affidavit by an officer of HSBC or a servicing agent, possessing a valid power of attorney from HSBC for that express purpose. Additionally, if a power of attorney is presented to this Court and it refers to pooling and servicing agreements, the Court needs a properly offered copy of the pooling and servicing agreements, to determine if the servicing agent may proceed on behalf of plaintiff. (*EMC Mortg. Corp. v. Batista*, 15 Misc.3d 1143(A) [Sup Ct, Kings County 2007]; *Deutsche Bank Nat. Trust Co. v. Lewis*, 14 Misc.3d 1201(A) [Sup Ct, Suffolk County 2006]).

Also, the instant application upon defendants' default must be denied because even though it contains a verified complaint, the attorney's verification is insufficient to meet the requirements of CPLR § 3215(f). The Court, in *Mullins v. Di Lorenzo*, 199 A.D.2d 218 [1st Dept 1993], instructed that "a complaint verified by counsel amounts to no more than an attorney's affidavit and is therefore insufficient to support entry of judgment pursuant to CPLR 3215." Citing *Mullins v. Di Lorenzo*, the Court, in *Feffer v. Malpeso*, 210 A.D.2d 60, 61 [1st Dept 1994], held that a complaint with not more than an attorney's affidavit, for purposes of entering a default judgment "was erroneous and must be deemed a nullity." Professor David Siegel, in his *Practice Commentaries* (McKinney's Cons Laws of NY, Book 7B, CPLR C3215: 16) explains that *Mullins v. Di Lorenzo*

is in point here. Perhaps the verified complaint can do service as an affidavit for various purposes within the litigation while the contest is on ... but it will not suffice to put an end to the contest with as drastic a step as a default at the outset. It must be kept in mind that even an outright "affidavit" by the plaintiff's attorney on the merits of the case-except in the relatively rare circumstances in which the attorney happens to have first-hand knowledge of the facts-lacks probative force and is usually deemed inadequate by the courts to establish the merits. A fortiori, a verified pleading tendered as proof of the merits would also lack probative force when the verification is the attorney's. [Emphasis added]

***4 In *Blam v. Netcher*, 17 AD3d 495, 496 [2d Dept 2005], the Court reversed a default judgment granted in Supreme Court, Nassau County, holding that:**
In support of her motion for leave to enter judgment against the defendant upon her default in answering, the plaintiff failed to proffer either an affidavit of the facts or a complaint verified by a party with personal knowledge of the facts (see CPLR 3215(f): *Goodman v. New York City Health & Hosps. Corp.* 2 AD3d 581 [2d Dept 2003]; *Drake v. Drake*, 296 A.D.2d 566 [2d Dept 2002]; *Parratta v. McAllister*, 283 A.D.2d 625 [2d Dept 2001]). Accordingly, the plaintiff's motion should have been denied, with leave to renew on proper papers (see *Henriquez v. Purins*, 245 A.D.2d 337, 338 [2d Dept 1997]).

(See *Hazim v. Winter*, 234 A.D.2d 422 [2d Dept 1996]; *Finnegan v. Sheahan*, 269 A.D.2d 491 [2d Dept 2000]; *De Vivo v. Spargo*, 287 A.D.2d 535 [2d Dept 2001]; *Peniston v. Epstein*, 10 AD3d 450 [2d Dept 2004]; *Taebong Choi v. JKS Dry Cleaning Equip. Corp.*, 15 AD3d 566 [2d Dept 2005]; *Matone v. Sycamore Realty Corp.*, 31 AD3d 721 [2d Dept 2006]; *Crimmins v. Sagona Landscaping, Ltd.*, 33 AD3d 580 [2d Dept 2006]).

Therefore, the instant application for an order of reference is denied without prejudice, with leave to renew. The Court will grant plaintiff HSBC an order of reference when it presents: an affidavit by either an officer of HSBC or someone with a valid power of attorney from HSBC, possessing personal knowledge of the facts; an affidavit from Scott Anderson clarifying his employment history for the past three years and what corporation he serves as an officer; and, an affidavit by an officer of HSBC explaining why HSBC would purchase a nonperforming loan from Delta Funding Corporation, and why HSBC, OCWEN, MERS, Deutsche Bank and Goldman Sachs all share office space in Suite 100.

Conclusion

Accordingly, it is

ORDERED, that the application of plaintiff, HSBC BANK N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2005-3, for an order of reference for the premises located at 572 Riverdale Avenue, Brooklyn, New York (Block 3838, Lot 29, County of Kings), is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff, HSBC BANK N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2005-3, to renew its application for an order of reference for the premises located at 572 Riverdale Avenue, Brooklyn, New York (Block 3838, Lot 39, County of Kings), upon presentation to the Court, within forty-five (45) days of this decision and order, of: an affidavit of facts either by an officer of HSBC or someone with a valid power of attorney from HSBC, possessing personal knowledge of the facts; an affidavit from Scott Anderson, describing his employment history for the past three years; an affidavit from an officer of plaintiff HSBC BANK N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSET-BACKED NOTES, SERIES 2005-3, explaining why plaintiff would purchase a nonperforming loan from Delta Funding Corporation and why plaintiff

*5 HSBC BANK N.A., shares office space at Suite 100, 1661 Worthington Road, West Palm Beach, Florida 33409, with Ocwen Federal Bank FSB, Mortgage Electronic Registration Systems, Inc., Deutsche Bank and Goldman Sachs.

This constitutes the Decision and Order of the Court.

N.Y.Sup., 2008.

HSBC Bank USA, N.A. v. Valentin

Slip Copy, 18 Misc.3d 1123(A), 2008 WL 239932 (N.Y.Sup.), 2008 N.Y. Slip Op. 50164(U)

END OF DOCUMENT

From the HSBC v Donohue Motion for Reconsideration before Judge Dowd in Ohio:

“Plaintiff’s acknowledge and respect the court’s duty To exercise only proper jurisdiction. Plaintiff’s ask for nothing more.. The Equal Protection Clause of the 14th amendment to the Constitution, however, prevents courts from identifying classes of litigants and departing from established rule either to raise or lower the bar for their admission to court. This court lacks the discretion to apply the law differently so as to place additional jurisdictional burdens on the limited class of foreclosure Plaintiffs.”

FAQ

Our mission is to provide information that will enable people to keep their homes and give them relief from what I believe is the biggest economic fraud in history. Over the last 25 years our economy has changed from actually making things of value and doing things of value to being financial enterprise driven by debt as the means for creation of money. The money has ended up in the wrong hands and this time, unless someone shreds the constitution, homeowners will end up getting the longer end of the stick.

Over a period of nearly one year we have researched, written and collected data, cases, statutes and decisions that will help lawyers argue their cases, homeowners understand their rights, and borrowers either get a lawyer or be able to say something in court that might stop the foreclosure and give them relief.

Question: Who is paying for all this work?

Answer: At the moment, the editor and a couple of dozen volunteers who are more tired now than the participants in a political campaign. We have not received one penny in compensation from anyone for any entry on this web site. We do hope to get donations, and we hope to make some money selling workbooks, seminars, DVD's, etc. to fund continued expansion of this site into the best possible source for lawyers and homeowners who are in foreclosure, in distress, or in an emergency. The information also applies to people who are able to pay their mortgage but understand that they have been tricked into signing papers to justify the sale of unregistered securities to unsuspecting investors, based upon false hyper-inflated appraisals of the property and the securities.

Question: what is Your Objective?

Answer: TO CREATE A LEGAL AND POLITICAL MOVEMENT THAT STOPS HOME FORECLOSURES AND RETURNS WEALTH TO THE PEOPLE FROM WHOM IT WAS ILLEGALLY TAKEN:

First to Stop all foreclosures on all property financed, refinanced or subject to HELOC during 2001-2008.

Second to at least force the lenders and Wall Street firms into reasonable terms that compensate homeowners of every type for the inflated appraisals arranged and paid for by the lenders, and the other predatory practices employed in order to create an outlet for the all the money Wall Street collected by selling more securities than there were mortgages to back them up.

Third we want to see homeowners get money --- damages, rebates of points, closing costs, refunds of payments and undisclosed kickbacks and fees that are required to be disclosed by law.

And fourth, the nuclear option --- we believe that it highly possible that there is no "holder in due course" or that the only holder in due course could be the investor who purchased certificates on asset backed securities. We believe that the assets that backed these securities were scrambled in financial blenders into a puree that cannot be traced. Where that is the case, it is highly probably, as dozens of people have already learned in their own cases, that homeowners could end up with their homes free and clear of the mortgage and note forever.

Question: If you are right, won't that be the end of the economy?

Answer: Mortgage backed securities only account for 2-3% of all derivatives in the world. Sure financial institutions will take a hit that is well-deserved. Someone must pay for this fraud --- but certainly not the victims. The lawsuits and notices of sale are all designed to leave the lender in the windfall position of having been PAID IN FULL within days of closing on your loan, PLUS being paid an undisclosed fee of approximately 2.5%, and now they are foreclosing so they will have the money AND the property. In addition they might seek "deficiency judgments" that are also fraudulent on their face. Allowing people to regain their only source of wealth --- their homes --- is the ultimate stimulus package. We are not seeking to destroy anything, just save the economy, save you and save your home.

Question: A lot of States are having their attorney generals file suit against the major mortgage culprits --- Countrywide, OCWEN, Wells Fargo etc. Won't that help me?

Answer: In some cases, like the San Diego lawsuit to stop Countrywide from foreclosing, you might be helped. But mostly these suits are about damages and frankly there is no damage settlement on the horizon that will take care of this problem. This problem is at least a \$13 to \$15 trillion problem. The settlements are in the hundreds of millions which means the benefits rolling down to homeowners are less than 1/100 of 1%. Put another way, most homeowners during this period probably suffered damages of at least \$100,000. The AG actions would get you \$10.00. You need to be proactive and help yourself. Depending upon government intervention is probably unwise.

cw-brown-moving-toward-limited-settlement-on-foreclosures

Question: How do I know You Can Help Me?

Answer: First of all there are no guarantees in life and this is no exception. **EVERYTHING ON THIS SITE IS COMPLETELY VERIFIABLE BY YOU, YOUR ATTORNEY OR ANYONE ELSE.**

We can give you information and you can hire an attorney.

You can and should get a mortgage audit which will help any attorney represent you, and you can use the information you get here to take to an attorney who can help you file pleadings in your own name, known in the legal field as Pro se.

Many Pro se litigants have been able to get their foreclosures dismissed --- hundreds of them.

Most attorneys are just learning about the rights of homeowners and the fact that there is "money in them thar hills." Most of them are not yet up to speed and advising clients to give up the keys when there are valuable meritorious defenses and offensive strategies that are already working all over the country. we prefer you get a lawyer, but if you can't get one who is on your side and who will demand the missing note, etc., then you might have to help yourself.

kings-county-case-lenders-affidavit-must-be-on-personal-knowledge

QUESTION:

> Date: Fri, 15 Aug 2008 14:54:40 +0000

> New comment on your post #838 "Foreclosure Defense: Wachovia Knows About Fraud"

> E-mail : mdepauw9849@wideopenwest.com

> Could you please address the single transaction approach in regards to the mortgage process. If in your mortgage it states that they may or may not sell your mortgage does that release them from any misdeeds, also do you need an attorney versed in tax and securities law for this. Very important to me is how to stop eviction after a sheriffs sale ,I requested the original note before the sheriffs sale and was given the recorded copy from the county and a payment schedule from the lender,is this the same. What if any thing can be done to have this taken away from the courts.Attorneys have just said that although I was duped legally when I signed the mortgage I did sign it .I have not been able to secure a job so bankruptcy is not an option. In Michigan no one including the AG and the governor seem to be involved. Homeowners are just walking away because they cannot do anything,200 homes were at the sheriffs sale in may and there's an auction in sept. for another 850. Anything?!

ANSWER:

This is WAR --- The Homeowner's War. If you do nothing, the worst will happen, If you act proactively then you have a chance of saving your home, collecting damages, getting your attorney paid, and even clearing your title of the mortgage and note.

First of all, if there is a sale, it is a good idea apparently from what has been reported to me by others, to go to the sale and announce that this property is subject to litigation, that title is not clear because of the securitization of the loan, and that anyone who buys this property is probably going to be named in a lawsuit.

Secondly, the mortgage papers (somewhere) probably reveal that they can assign, transfer or sell your loan to a third party. This is not the point. Those provisions were always there dating back decades. The difference here is that they sold or transferred the mortgage and didn't tell you who the new owner was. If they did give you a notice that the mortgage was assigned or that the mortgage service rights had been assigned according to the pooling and service agreement, they neglected to tell you that whoever it was that "bought" your mortgage re-sold it to someone else who in turn did the same thing and that eventually through pooling and securitization the real owners of your mortgage are thousands of investors. This leaves you in the position of not knowing if your payments are going to those investors who are the real owners of your loan. And it leaves your mortgage servicer with an obligation to answer the question. And it leaves you title clouded by the foreclosure, the sale and even a sale to an innocent third party after foreclosure.

Thirdly, I would get some press and put in an ad for everyone who wants to join you at the sheriff's sale to tell everyone they are contesting the sales, and the entire foreclosure process. If you can group together some people, you can afford to hire a lawyer whom we can ghost write for and guide through the process even if he/she has not been trained in one of your seminars. It sounds like the procedure would be similar to one used in Ohio where the suit was filed in federal Court, and then an emergency petition was filed to stay the eviction/sale in state court based upon the pendency of the Federal Court action. It worked. See blog for forms.

QUESTION:

New comment on your post #701 'QUESTION FOR READERS: HOW MANY OF YOU WOULD LIKE TO ATTEND A SEMINAR ON 9/3/08 IN SANTA MONICA FOR LAYMAN ONLY'

E-mail : isellthem@gmail.com

> Neil thank you so much for putting this information out to the public for free. It has been so hard trying to find foreclosure defense strategies online in one place.

>

> I have been helping a friend take actions against his lender and servicer in Michigan pro se but this has become too difficult for him to understand. We settled on an attorney and are looking to use rescission for TILA violations as a negotiating point for a loan workout. I'm not satisfied with that and want the lender and servicer to prove standing.

>

> Every attorney we spoke with has told us that Michigan is the most difficult state to contest foreclosure and that the holder in due course defense won't work here and has been tried unsuccessfully. Apparently servicing companies are granted the rights of holder in due course as long as the assignment was properly recorded, no original note is necessary. There are also some rules of evidence that allow for anyone to complete the lender's affidavit without personal knowledge if it is in an action that occurs as part of everyday business.

>

> The mortgage was only assigned once, from the original broker to the servicer. How can I make this strategy work when every attorney I speak with says it won't in Michigan?

>

> Also, I came across a 17 page RESPA request for documents that could be requested in discovery. It is very thorough and I'd be happy to forward it to you or anyone who needs it.

>

> You can see all comments on this post here:

> <http://livinglies.wordpress.com/2008/08/09/question-for-readers-how-many-of-you-would-like-to-attend-a-seminar-on-9308-in-santa-monica-for-layman-only/#comments>

ANSWER: >

We had the same problem in Ohio. The way we got around it was by (1) filing the action in Federal Court (2) filing emergency stay in State court based on the pendency of the Federal action. See Ohio Forms on blog. The stay was granted and "holder in due course" while affected by State Law won't help them on TILA and common law fraud. There is case law to support that. See the Rookman decision on the blog. It is also one thing to say they can collect and another to say they can enforce. More case law and decisions on blog about this. For one thing, if you have counterclaims, what do you do? AND you DO have counterclaims. My

suggestion is find a Michigan Lawyer who understands what I am talking about and run it past him. I think you have a winner here.

> Date: Tue, 12 Aug 2008 13:41:45 +0000

> To: ngarfield@msn.com

> Subject: [Livinglies's Weblog] Comment: 'QUESTION FOR READERS: HOW MANY OF YOU WOULD LIKE TO ATTEND A SEMINAR ON 9/3/08 IN SANTA MONICA FOR LAYMAN ONLY'

Question:

I requested assistance at this website for an attorney than can take my foreclosure case in Fort Lauderdale on contingency. A Lawyer responded, but after a wasting a couple of days with her, she informed me that she needed a \$3,000 retainer. I talked to another attorney in Fort Lauderdale and mentioned this blog and he responded this seems like another internet scam. He said it's impossible for any judge to give you a property free and clear. If you guys are so sure you can win those cases, then why do you need a retainer anyway? After all, if you do your job right, you are going to get paid by the lender. I guess, if you collect \$3,000 from a bunch of people, you are going to make a lot of money even if you lose every case. It definitely sounds like a scam.

Answer:

You're upset and you are not thinking clearly. If we were soliciting you, it would be much different. This is YOUR case and YOUR house. If you want the help of a professional you need to pay them, pure and simple. You act as though you deserve a contingency fee because you were screwed by the mortgage company. No lawyer you contact did this to you. THEY have no axe to grind except to do their job and get paid for it. As for anyone who thinks this is a scam, they are entitled to their opinion. More than 100 people nationwide have already been reported to have received their title free and clear. It's fact, not a theory. And you can Google it yourself. What is impossible is for you get services for free unless you qualify from some agency. If you go to a private attorney, you will be charged. Lawyers need money to pay their staff and their other expenses while they litigate. Clients create that revenue. That is why a retainer is so important.

CREDIT CARD INTRODUCTION AND SUMMARY

Introduction and Summary

T

he U.S. credit card market is showing signs of trouble just as the home mortgage crisis surges to unprecedented heights across the United States and throughout the global financial marketplace. Against the backdrop of record-high numbers of home foreclosures, lenders are tightening mortgage lending standards, making it harder for families to maintain their consumption in the face of weakening income growth. At the same time, credit card issuers present their all-too-convenient lending product as a much needed but inevitably dangerous pressure valve for cash-strapped borrowers. As borrowing in the mortgage market slows, credit card borrowing is accelerating—a dangerous trend because borrowers still face weak income growth. That means the credit card market could eventually run into the same problems that now afflict the subprime mortgage market.

The lending industry that no longer aggressively issues subprime mortgages continues to aggressively market credit cards, especially credit cards with subprime-like lending terms, such as a variety of higher fees that are poorly disclosed. In the end, more and more borrowers could end up defaulting on their credit card debt because they do not fully understand the terms and conditions of their new plastic, which could prove detrimental to their financial health. Déjà vu all over again!

The consequences could deliver further uncertainty to financial markets and additional turmoil to the economy as more consumers file for bankruptcy, driving down the value of securitized credit card receivables. Evidence of these consequences is now emerging. Specifically:

Growth in mortgages slowed as the subprime crisis unfolded, but simul-



taneously credit card debt began to rise again. Between April 2006 and December 2007, the last month for which complete data are available, inflation-adjusted credit card debt accelerated at a rate four times faster than between March 2001, when the last business cycle ended, and April 2006. This increase in credit card debt compensated for a substantial part of the slowdown in mortgages.

Banks tightened access to mortgages, but at the same time continue to



aggressively offer credit cards. Lenders tightened mortgage standards in 2007 more than at any point since 1991. At the same time, lenders continued to push credit cards with a particular emphasis on subprime-like credit cards.

High fees, heavy interest rate burdens, and complex terms may

lead to increased default. Credit card debt tends to carry substantially higher costs than other forms of credit due to myriad fees in addition to high interest rates. The result is that many borrowers unwittingly slide deeper and deeper into debt as they fall prey to the lack of transparency in credit cards.

Already the share of credit card



debt that is written off by banks has risen sharply. Between March 2006 and September 2007, the last month for which this data is available, the share of credit card debt that was charged off by credit card lenders rose from 3.0 percent to 4.0 percent—a growth rate of 34.2 percent in less than two years.

Increased defaults could unravel



the \$915 billion in securitized debt backed by credit card receivables, just as delinquencies in the housing market unraveled the \$900 billion in mortgaged-backed securities.¹ Just like mortgage-backed securities, credit card debt is packaged and sold to investors. An increase in defaults could lead to losses not just for the credit card lenders, but also for pension funds and investors who bought the debt.

A possible unraveling of the U.S. credit card market, with all the attendant costs to global financial markets, could be partially nipped in the bud with improved transparency for credit cards. Policymakers should take two approaches.

First, implement a credit card safety rating system that can give consumers better information about their credit cards and thus help them make better decisions. This system would be similar to the five-star crash test rating system for new cars. Credit cards would be awarded stars based on a points system, with cards

earning points for consumer-friendly terms and losing them for terms designed to get consumers into trouble.

Such a system has already been introduced in the Senate by Sen. Ron Wyden (D-OR) as the Credit Card Safety Star Act. The safety rating system would not preclude additional regulation or legislation that will eliminate other features that may be considered abusive or unfair.

Second, in addition to a credit card safety rating system Congress should go further to mandate a higher level of fairness in credit card terms. Several members of Congress have introduced bills that would do that. Rep. Carolyn Maloney (D-NY), with the backing of House Financial Services Committee Chair Rep. Barney Frank (D-MA), recently introduced the Credit Cardholders' Bill of Rights Act. This bill takes a balanced approach to banning several of the most abusive credit card practices.

Another balanced approach was introduced by Sen. Carl Levin (D-MI) as the Stop Unfair Practices in Credit Cards Act, which also contains limits on many of the most unfair practices. These bills would eliminate the most common pitfalls consumers face and could help them make better decisions with their debt.

In the pages that follow, we will examine in detail the relationship between slowly growing U.S. mortgage markets, the suddenly aggressive growth of credit card debt, and what both trends could mean to borrowers, their lenders, and global financial markets. With this analysis in hand, it becomes increasingly clear that the credit card disclosure reforms we suggest are timely and necessary.

CAPITAL ONE MULTI-ASSET EXECUTION TRUST

CAPITAL ONE MULTI-ASSET EXECUTION TRUST as Issuer and THE BANK OF NEW YORK as Indenture Trustee CLASS A(2005-8) TERMS DOCUMENT dated as of August 26, 2005 to CARD SERIES INDENTURE SUPPLEMENT dated as of October 9, 2002 to ASSET POOL 1 SUPPLEMENT dated as of October 9, 2002 to INDENTURE dated as of October 9, 2002

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THIS CLASS A(2005-8) TERMS DOCUMENT (this “Terms Document”), by and between CAPITAL ONE MULTI-ASSET EXECUTION TRUST, a statutory trust created under the laws of the State of Delaware (the “Issuer”), having its principal office at E. A. Delle Donne Corporate Center, Montgomery Building, 1011 Centre Road, Wilmington, DE 19805 and THE BANK OF NEW YORK, a New York banking corporation, as Indenture Trustee (the “Indenture Trustee”), is made and entered into as of August 26, 2005.

Pursuant to this Terms Document, the Issuer shall create a new tranche of Class A Notes and shall specify the principal terms thereof.

ARTICLE I

Definitions and Other Provisions of General Application

Section 1.01. Definitions. For all purposes of this Terms Document, except as otherwise expressly provided or unless the context otherwise requires:

(1) the terms defined in this Article have the meanings assigned to them in this Article, and include the plural as well as the singular;

(2) all other terms used herein which are defined in the Indenture Supplement, the Asset Pool 1 Supplement or the Indenture, either directly or by reference therein, have the meanings assigned to them therein;

(3) all accounting terms not otherwise defined herein have the meanings assigned to them in accordance with generally accepted accounting principles

and, except as otherwise herein expressly provided, the term “generally accepted accounting principles” with respect to any computation required or permitted hereunder means such accounting principles as are generally accepted in the United States of America at the date of such computation;

(4) all references in this Terms Document to designated “Articles,” “Sections” and other subdivisions are to the designated Articles, Sections and other subdivisions of this Terms Document;

(5) the words “herein,” “hereof” and “hereunder” and other words of similar import refer to this Terms Document as a whole and not to any particular Article, Section or other subdivision;

(6) in the event that any term or provision contained herein shall conflict with or be inconsistent with any term or provision contained in the Indenture Supplement, the Asset Pool 1 Supplement, the Indenture or the Transfer and Administration Agreement, the terms and provisions of this Terms Document shall be controlling;

(7) each capitalized term defined herein shall relate only to the Class A(2005-8) Notes and no other Tranche of Notes issued by the Issuer; and

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(8) “including” and words of similar import will be deemed to be followed by “without limitation.”

“Accumulation Period Amount” means \$41,666,666.67; provided, however, if the Accumulation Period Length is determined to be less than twelve (12) months pursuant to Section 3.10(b)(ii) of the Indenture Supplement, the Accumulation Period Amount shall be the amount specified in the definition of “Accumulation Period Amount” in the Indenture Supplement.

“Accumulation Reserve Funding Period” shall mean, (a) if the Accumulation Period Length is determined to be one (1) month, there shall be no Accumulation Reserve Funding Period and (b) otherwise, the period (x) commencing on the earliest to occur of (i) the Monthly Period beginning three (3) calendar months prior to the first Distribution Date for which a budgeted deposit is targeted to be made into the Principal Funding sub-Account of the Class A(2005-8) Notes pursuant to Section 3.10(b) of the Indenture Supplement, (ii) the Monthly Period following the first Distribution Date following and including the September 2006 Distribution Date for which the Quarterly Excess Spread Percentage is less than 2%, but in such event the Accumulation Reserve Funding Period shall not be required to commence earlier than 12 months prior to the first Distribution Date for which a budgeted deposit is targeted to be made into the Principal Funding sub-Account for the Class A(2005-8) Notes pursuant to Section 3.10(b) of the

Indenture Supplement, (iii) the Monthly Period following the first Distribution Date following and including the March 2007 Distribution Date for which the Quarterly Excess Spread Percentage is less than 3%, but in such event the Accumulation Reserve Funding Period shall not be required to commence earlier than 6 months prior to the first Distribution Date for which a budgeted deposit is targeted to be made into the Principal Funding sub-Account for the Class A(2005-8) Notes pursuant to Section 3.10(b) of the Indenture Supplement, and (iv) the Monthly Period following the first Distribution Date following and including the May 2007 Distribution Date for which the Quarterly Excess Spread Percentage is less than 4%, but in such event the **Accumulation Reserve Funding Period shall not be required to commence earlier than 4 months prior to the first Distribution Date for which a budgeted deposit is targeted to be made into the Principal Funding sub-Account for the Class A(2005-8) Notes** pursuant to Section 3.10(b) of the Indenture Supplement and (y) ending on the close of business on the last day of the Monthly Period preceding the earlier to occur of (i) the Expected Principal Payment Date for the Class A(2005-8) Notes and (ii) the date on which the Class A(2005-8) Notes are paid in full.

“Asset Pool 1 Supplement” means the Asset Pool 1 Supplement dated as of October 9, 2002, by and between the Issuer and the Indenture Trustee, as amended and supplemented from time to time.

“Base Rate” means, with respect to any Monthly Period, the sum of (a) the Card Series Servicing Fee Percentage and (b) the weighted average (based on the Outstanding Dollar Principal Amount of the related Card Series Notes) of the following:

(i) in the case of a Tranche of Card Series Dollar Interest-bearing Notes with no Derivative Agreement for interest, the rate of interest applicable to such Tranche for the period from and including the Monthly Interest Accrual Date for such Tranche of Card Series Dollar Interest-bearing Notes in such Monthly Period to but excluding the Monthly Interest Accrual Date for such Tranche of Card Series Dollar Interest-bearing Notes in the following Monthly Period;

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(ii) in the case of a Tranche of Card Series Discount Notes, the rate of accretion (converted to an accrual rate) of such Tranche for the period from and including the Monthly Interest Accrual Date for such Tranche of Card Series Discount Notes in such Monthly Period to but excluding the Monthly Interest Accrual Date for such Tranche of Card Series Discount Notes in the following Monthly Period;

(iii) in the case of a Tranche of Card Series Notes with a Performing Derivative Agreement for interest, the rate at which payments by the Issuer to the applicable Derivative Counterparty accrue (prior to the netting of such payments, if applicable) for the period from and including the Monthly Interest Accrual Date for such Tranche of Card Series Notes in such Monthly Period to but excluding the Monthly Interest Accrual Date for such Tranche of Card Series Notes in the following Monthly Period; provided, however, that in the case of a Tranche of Card Series Notes with a Performing

Derivative Agreement for interest in which the rating on such Tranche of Card Series Notes is not dependant upon the rating of the applicable Derivative Counterparty, the amount determined pursuant to this clause (iii) will be the higher of (1) the rate determined pursuant to this clause (iii) above and (2) the rate of interest applicable to such Tranche for the period from and including the Monthly Interest Accrual Date for such Tranche of Card Series Notes in such Monthly Period to but excluding the Monthly Interest Accrual Date for such Tranche of Card Series Notes in the following Monthly Period; and

(iv) in the case of a tranche of Card Series Notes with a non-Performing Derivative Agreement for interest, the rate specified for that date in the related Terms Document.

“Class A(2005-8) Adverse Event” means the occurrence of any of the following: (a) an Early Redemption Event with respect to the Class A(2005-8) Notes or (b) an Event of Default and acceleration of the Class A(2005-8) Notes.

“Class A(2005-8) Note” means any Note, substantially in the form set forth in Exhibit A-1 to the Indenture Supplement, designated therein as a Class A(2005-8) Note and duly executed and authenticated in accordance with the Indenture.

“Class A(2005-8) Noteholder” means a Person in whose name a Class A(2005-8) Note is registered in the Note Register.

“Class A(2005-8) Termination Date” means the earliest to occur of (a) the Principal Payment Date on which the Outstanding Dollar Principal Amount of the Class A(2005-8) Notes is paid in full, (b) the Legal Maturity Date and (c) the date on which the Indenture is discharged and satisfied pursuant to Article VI thereof.

“Excess Spread Percentage” shall mean, with respect to any Distribution Date, the amount, if any, by which the Portfolio Yield for the preceding Monthly Period exceeds the Base Rate for such Monthly Period.

“Expected Principal Payment Date” means October 15, 2008.

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“Initial Dollar Principal Amount” means \$500,000,000.

“Indenture” means the Indenture dated as of October 9, 2002, by and between the Issuer and the Indenture Trustee, as amended and supplemented from time to time.

“Indenture Supplement” means the Card Series Indenture Supplement dated as of October 9, 2002, by and between the Issuer and the Indenture Trustee, as amended and supplemented from time to time.

“Interest Payment Date” means the fifteenth day of each month commencing in September 2005, or if such fifteenth day is not a Business Day, the next succeeding Business Day.

“Interest Period” means, with respect to any Interest Payment Date, the period from and including the previous Interest Payment Date (or in the case of the initial Interest Payment Date, from and including the Issuance Date) through the day preceding such Interest Payment Date.

“Issuance Date” means August 26, 2005.

“Legal Maturity Date” means August 15, 2011.

“Maximum Subordination Amount of Class B Notes” means, for the Class A(2005-8) Notes for any date of determination, an amount equal to the product of (a) Adjusted Outstanding Dollar Principal Amount of the Class A(2005-8) Notes on such date of determination and (b) the percentage equivalent of a fraction, the numerator of which is 10 and the denominator of which is 81.25.

“Note Interest Rate” means a rate per annum equal to 4.40%.

“Paying Agent” means The Bank of New York.

“Portfolio Yield” means, with respect to any Monthly Period, the annualized percentage equivalent of a fraction:

(a) the numerator of which is equal to the sum of:

(i) the aggregate amount of Finance Charge Amounts allocated to the Card Series with respect to such Monthly Period; plus

(ii) the aggregate amount of Interest Funding sub-Account Earnings on all Tranches of Card Series Notes for such Monthly Period; plus

(iii) any amounts to be treated as Card Series Finance Charge Amounts pursuant to Sections 3.20(d) and 3.27(a) of the Indenture Supplement; minus

(iv) the excess, if any, of (1) the sum of the PFA Prefunding Earnings Shortfall plus the PFA Accumulation Earnings Shortfall over (2) the sum of the aggregate amount to be treated as Card Series Finance Charge Amounts for such

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Monthly Period pursuant to Sections 3.04(a)(ii) and 3.25(a) of the Indenture Supplement plus any other amounts applied to cover earnings shortfalls on amounts in the Principal Funding sub-Account for any tranche of Card Series Notes for such Monthly Period; minus

(v) the Card Series Default Amount for such Monthly Period; and

(b) the denominator of which is the numerator used in the calculation of the Card Series Floating Allocation Percentage for such Monthly Period.

“Quarterly Excess Spread Percentage” means, with respect to the September 2006 Distribution Date and each Distribution Date thereafter, the percentage equivalent of a fraction the numerator of which is the sum of the Excess Spread Percentages with respect to the immediately preceding three Monthly Periods and the denominator of which is three.

“Record Date” means, for any Distribution Date, the last Business Day of the preceding Monthly Period.

“Required Accumulation Reserve sub-Account Amount” means, with respect to any Monthly Period during the Accumulation Reserve Funding Period, an amount equal to (i) 0.5% of the Outstanding Dollar Principal Amount of the Class A(2005-8) Notes as of the close of business on the last day of the preceding Monthly Period or (ii) any other amount designated by the Issuer; provided, however, that if such designation is of a lesser amount, the Note Rating Agencies shall have provided prior written confirmation that a Ratings Effect will not occur with respect to such change.

“Required Subordinated Amount of Class B Notes” means, for the Class A(2005-8) Notes for any date of determination, an amount equal to the product of (a) the Required Subordinated Percentage of Class B Notes for such Class A(2005-8) Notes on such date of determination and (b) the Adjusted Outstanding Dollar Principal Amount of such Class A(2005-8) Notes on such date of determination; provided, however, that such an amount shall not exceed the Maximum Subordination Amount of Class B Notes for the Class A(2005-8) Notes; provided further, however, that for any date of determination on or after the occurrence and during the continuation of a Class A(2005-8) Adverse Event, the Required Subordinated Amount of Class B Notes for the Class A(2005-8) Notes will

be the greater of (x) the amount determined above for such date of determination and (y) the amount determined above for the date immediately prior to the date on which such Class A(2005-8) Adverse Event shall have occurred.

“Required Subordinated Amount of Class C Notes” means, for the Class A(2005-8) Notes for any date of determination, an amount equal to the product of (a) the Required Subordinated Percentage of Class C Notes for such Class A(2005-8) Notes on such date of determination and (b) the Adjusted Outstanding Dollar Principal Amount of such Class A(2005-8) Notes on such date of determination; provided, however, that for any date of determination, unless (i) the Prefunding Target Amount for any Tranche of Card Series Notes on such date of determination is greater than zero or (ii) any prefunded amounts are on deposit in a Principal Funding sub-Account on such date of determination for any Tranche of Card Series Notes, the Required Subordinated Amount of Class C Notes for the Class A(2005-8) Notes will not be less than an amount equal to (i) 3.0% of the Initial Dollar Principal Amount of the Class A(2005-8)

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Notes, minus (ii) the Required Subordinated Amount of Class D Notes for the Class A(2005-8) Notes; provided, further, however, that for any date of determination on or after the occurrence and during the continuation of a Class A(2005-8) Adverse Event, the **Required Subordinated Amount of Class C Notes for the Class A(2005-8) Notes** will be the greater of (x) the amount determined above for such date of determination, (y) the amount determined above for the date immediately prior to the date on which such Class A(2005-8) Adverse Event shall have occurred and (z) unless (i) the Prefunding Target Amount for any Tranche of Card Series Notes on such date of determination is greater than zero or (ii) any prefunded amounts are on deposit in a Principal Funding sub-Account on such date of determination for any Tranche of Card Series Notes, the amount determined pursuant to the preceding proviso.

“Required Subordinated Amount of Class D Notes” means, for the Class A(2005-8) Notes for any date of determination, an amount equal to the product of (a) the Required Subordinated Percentage of Class D Notes for such Class A(2005-8) Notes on such date of determination and (b) the Adjusted Outstanding Dollar Principal Amount of such Class A(2005-8) Notes on such date of determination; provided, however, that for any date of determination, unless (i) **the Prefunding Target Amount for any Tranche of Card Series Notes on such date of determination is greater than zero** or (ii) **any prefunded amounts are on deposit in a Principal Funding sub-Account on such date of determination for any Tranche of Card Series Notes**, the Required

Subordinated Amount of Class D Notes for the Class A(2005-8) Notes will not be less than an amount equal to 1.8462% of the Initial Dollar Principal Amount of the Class A(2005-8) Notes, provided further, however, that for any date of determination on or after the occurrence and during the continuation of a Class A(2005-8) Adverse Event, the Required Subordinated Amount of Class D Notes for the Class A(2005-8) Notes will be the greatest of (x) the amount determined above for such date of determination, (y) the amount determined above for the date immediately prior to the date on which such Class A(2005-8) Adverse Event shall have occurred and (z) unless (i) the Prefunding Target Amount for any Tranche of Card Series Notes on such date of determination is greater than zero or (ii) any prefunded amounts are on deposit in a Principal Funding sub-Account on such date of determination for any Tranche of Card Series Notes, the amount determined pursuant to the preceding proviso.

“Required Subordinated Percentage of Class B Notes” means, for the Class A(2005-8) Notes, 12.3077%, subject to adjustment in accordance with Section 2.02.

“Required Subordinated Percentage of Class C Notes” means, for the Class A(2005-8) Notes, 8.9231%, subject to adjustment in accordance with Section 2.02.

“Required Subordinated Percentage of Class D Notes” means, for the Class A(2005-8) Notes, 1.8462%, subject to adjustment in accordance with Section 2.02.

“Stated Principal Amount” means \$500,000,000.

Section 1.02. Governing Law. THIS TERMS DOCUMENT WILL BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY THE LAWS OF THE STATE OF NEW YORK, INCLUDING SECTION 5-1401 OF THE GENERAL OBLIGATION LAW, WITHOUT REFERENCE TO ITS CONFLICT OF LAW PROVISIONS AND THE OBLIGATIONS, RIGHTS AND REMEDIES OF THE PARTIES HEREUNDER SHALL BE DETERMINED IN ACCORDANCE WITH SUCH LAWS.

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Section 1.03. Counterparts. This Terms Document may be executed in any number of counterparts, each of which so executed will be deemed to be an original, but all such counterparts will together constitute but one and the same instrument.

Section 1.04. Ratification of Indenture, Asset Pool 1 Supplement and Indenture Supplement. As supplemented by this Terms Document, each of the Indenture, the Asset Pool 1 Supplement and the Indenture Supplement is in all respects ratified and confirmed and the Indenture as so supplemented by the Asset Pool 1 Supplement as so supplemented by the Indenture Supplement as so supplemented and this Terms Document shall be read, taken and construed as one and the same instrument.
[END OF ARTICLE I]

ARTICLE II

The Class A(2005-8) Notes

Section 2.01. Creation and Designation. There is hereby created a tranche of Card Series Class A Notes to be issued pursuant to the Indenture, the Asset Pool 1 Supplement and the Indenture Supplement to be known as the “Card Series Class A(2005-8) Notes.”

Section 2.02. Adjustments to Required Subordinated Percentages.

(a) On any date, the **Issuer may change the Required Subordinated Percentage of Class B Notes or the Required Subordinated Percentage of Class C Notes, in each case for the Class A(2005-8) Notes, without the consent of any Noteholders or any Note Rating Agencies, provided that, after giving effect to such change, (x) the sum of the Required Subordination Percentage of Class B Notes and the Required Subordinated Percentage of Class C Notes, in each case, for the Class A(2005-8) Notes after giving effect to such change is equal to or greater than the sum of the Required Subordination Percentage of Class B Notes and the Required Subordinated Percentage of Class C Notes, in each case, for the Class A(2005-8) Notes immediately prior to giving effect to such change and (y) the Required Subordinated Amount of Class B Notes for the Class A(2005-8) Notes does not exceed the Maximum Subordinated Amount of Class B Notes.**

(b) On any date, the ***Issuer may change the Required Subordinated Percentage of Class B Notes, the Required Subordinated Percentage of Class C Notes or the Required Subordinated Percentage of Class D Notes, in each case for the Class A(2005-8) Notes, such that after giving effect to all changes to such percentages on such date the sum of the Required Subordination Percentage of Class B Notes, the Required Subordinated Percentage of Class C Notes and the Required Subordinated Amount of Class D Notes, in each case, for the Class A(2005-8) Notes after giving effect to such change is less than the sum of the Required Subordination Percentage of Class B Notes, the Required Subordinated Percentage of Class C Notes and the Required Subordinated Amount of Class D Notes, in each case, for the Class A(2005-8) Notes immediately prior to giving effect to such change, without the consent of any Noteholders, provided that the Issuer has (i) received written confirmation from each Note Rating Agency that has rated any Outstanding Notes of the Card Series that the change in such percentage will not result in a Ratings Effect with respect to any Outstanding Class A(2005-8) Notes and (ii) delivered to the Indenture Trustee and the Note Rating Agencies a Master Trust Tax Opinion for each Master Trust and an Issuer Tax Opinion.***

Section 2.03. Interest Payment.

(a) For each Interest Payment Date, the amount of interest due with respect to the Class A(2005-8) Notes shall be an amount equal to one-twelfth of the product of (i) the Note Interest Rate, times (ii) the Outstanding Dollar Principal Amount of the Class A(2005-8) Notes determined as of the Record Date preceding the related Distribution Date; provided, however, that for the first Interest Payment Date the amount of interest due is \$1,161,111.11. Any interest on the Class A(2005-8) Notes will be calculated on the basis of a 360-day year and twelve 30-day months.

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(b) Pursuant to Section 3.03 of the Indenture Supplement, on each Distribution Date, the Indenture Trustee shall deposit into the Class A(2005-8) Interest Funding sub-Account the portion of Card Series Finance Charge Amounts allocable to the Class A(2005-8) Notes.

Section 2.04. [Reserved].

Section 2.05. Payments of Interest and Principal.

(a) Any installment of interest or principal, if any, payable on any Class A(2005-8) Note which is punctually paid or duly provided for by the Issuer and the Indenture Trustee on the applicable Interest Payment Date or Principal Payment Date shall be paid by the Paying Agent to the Person in whose name such Class A(2005-8) Note (or one or more Predecessor Notes) is registered on the Record Date, by wire transfer of immediately available funds to such Person's account as has been designated by written instructions received by the Paying Agent from such Person not later than the close of business on the third Business Day preceding the date of payment or, if no such account has been so designated, by check mailed first-class, postage prepaid to such Person's address as it appears on the Note Register on such Record Date, except that with respect to Notes registered on the Record Date in the name of the nominee of Cede & Co., payment shall be made by wire transfer in immediately available funds to the account designated by such nominee.

(b) The right of the Class A(2005-8) Noteholders to receive payments from the Issuer will terminate on the first Business Day following the Class A(2005-8) Termination Date.

Section 2.06. Form of Delivery of Class A(2005-8) Notes; Depository; Denominations.

(a) The Class A(2005-8) Notes shall be delivered in the form of a global Registered Note as provided in Sections 202 and 301(i) of the Indenture, respectively.

(b) The Depository for the Class A(2005-8) Notes shall be The Depository Trust Company, and the Class A(2005-8) Notes shall initially be registered in the name of Cede & Co., its nominee.

(c) The Class A(2005-8) Notes will be issued in minimum denominations of \$100,000 and integral multiples of \$1,000 in excess of that amount.

Section 2.07. Delivery and Payment for the Class A(2005-8) Notes. The Issuer shall execute and deliver the Class A(2005-8) Notes to the Indenture Trustee for authentication, and the Indenture Trustee shall deliver the Class A(2005-8) Notes when authenticated, each in accordance with Section 303 of the Indenture.

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Section 2.08. Targeted Deposits to the Accumulation Reserve Account.

The deposit targeted to be made to the Accumulation Reserve Account for any Monthly Period during the Accumulation Reserve Funding Period will be an amount equal to the Required Accumulation Reserve sub-Account Amount.

Section 2.09. [Reserved].

[END OF ARTICLE II]

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IN WITNESS WHEREOF, the parties hereto have caused this Terms Document to be duly executed, all as of the day and year first above written.

CAPITAL ONE MULTI-ASSET EXECUTION TRUST,

by DEUTSCHE BANK TRUST COMPANY

DELAWARE, not in its individual capacity, but solely as

Owner Trustee on behalf of the Trust

By:

/s/ Michele H.Y. Voon

Name:

Michele H.Y. Voon

Title:

Attorney-In-Fact

THE BANK OF NEW YORK, as Indenture Trustee

and not in its individual capacity

By:

/s/ Ryan Bittner

Name:

Ryan Bittner

Title:

Assistant Treasurer

[Signature Page to the Class A(2005-8) Terms Document]

Dates Referenced Herein This 8-K Filing	and Date	Documents Incorporated By Reference Other Filings

10/9/02	8-K
For The Period Ended	8/26/05
Filed On / Filed As Of	8/29/05
10/15/08	
8/15/11	

SEC RESEARCH AND USE OF PROCEEDS, DISTRIBUTION REPORTS ETC

The information you are looking for as to the method of operations concerning sales or transfers of mortgages and notes is described in various places within 10k and 8k filings with the Securities and Exchange Commission in Washington, DC www.sec.gov

SEC Prospectus Section to look in: “USE OF PROCEEDS” You will find either a direct or indirect statement on the establishment of a reserve to pay back the investor out of his own money in this section. The significance of this in the mortgage meltdown era 2001-2008, is that this reserve was actually utilized to make payments to the holders of certificates on mortgage backed securities and some money was applied to all or part of the payments that were not made by the borrower, or allocated upstream to the real holder in due course by the mortgage servicer.

The mortgage servicer may or may not have forwarded payment to the pool trustee or to the special purpose vehicle and the officers or trustee of the special purpose vehicle may or may not have made payments or allocated payments amongst the divisions (tranches) within the SPV entity and these officers may or may not have actually paid the true holders in due course (holders of asset-backed securities) either from the proceeds of sales of asset backed securities, the reserve pool established for late or delinquent payments, the insurance company that guaranteed payment, principal or both, the credit default swap that guaranteed the payment, principal or both, or from overcollateralization or cross collateralization with unrelated assets (unrelated to the your Mortgage loan).

So it is possible your mortgage payment or the entire note was paid without your knowledge and even without the knowledge of the mortgage servicer which is why the objections to the documentation presented or used in the foreclosure are not merely technical objections. If you don't make the objections and you don't attack them in earnest, the property could easily be sold to a party posing as a lender in a foreclosure procedure of either non-judicial or judicial nature but who never lent you money, paid for the note or otherwise parted with any money at all.

This confusion was purposefully created to construct a system of plausible deniability and “mistaken” accounting entries. In fact, it covered up a liar's poker game wherein each of the participants contributed to cheating you and then went about cheating each other. Here is some language that is used in the 8k prospectus of one such offering:

“Substantially all of the net proceeds to be received from the sale of certificates will be applied by the company to finance the purchase of, or to repay short-term loans incurred to finance the purchase of, the mortgage loans and/or mortgage securities in the respective mortgage pools and to pay other

expenses.

The company expects that it will make additional sales of securities similar to the offered securities from time to time, but the timing and amount of any such additional offerings will be dependent upon a number of factors, including the volume of mortgage loans purchased by the company, prevailing interest rates, availability of funds and general market conditions.”

You can also find software that helps you sift through the mountains of information in 10k and 8k filings at <http://www.tenkwizard.com/>

EXAMPLE OF COUNTRYWIDE SEC FILINGS

STRUCTURED PRODUCTS CORP.,
on behalf of

CorTS Trust For Countrywide Capital I

(Exact name of registrant as specified in its charter)

Delaware	13-3692801
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)

388 Greenwich Street
New York, New York 10013
(Address of principal executive offices) (zip code)

Registrant's telephone number including area code:

212-816-7496

Structured Products Corp. (the "Depositor") is the depositor under the Base Trust Agreement, dated as of May 21, 1999, as supplemented by the CorTS Supplement 1999-5, dated as of November 16, 1999, by and between the Depositor and U.S. Bank Trust National Association, as Trustee (the "Trustee"), providing for the issuance of the CorTS Trust For Countrywide Capital I, Corporate-Backed Trust Securities (CorTS) Certificates (the "Certificates") and is the depositor for the Certificates (the "Registrant"). The Certificates do not represent obligations of or interests in the Depositor or the Trustee.

The issuer(s) of the underlying securities, or guarantor thereof, or successor thereto, as applicable, is subject to the information reporting requirements of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). For information on the issuer(s) of the underlying securities, or guarantor thereof, or successor thereto, as applicable, please see its periodic and current reports filed with the Securities and Exchange Commission (the "Commission"). Such reports and other information required to be filed pursuant to the Exchange Act, by the issuer(s) of the underlying securities, or guarantor thereof, or successor thereto, as applicable, may be inspected and copied at the public reference facilities maintained by the Commission at 450 Fifth Street, N.W., Washington, D.C. 20549. The Commission also maintains a site on the World Wide Web at "<http://www.sec.gov>" at which users can view and download copies of reports, proxy and information statements and other information filed electronically through the Electronic Data Gathering, Analysis and Retrieval system, or "EDGAR." Neither the Depositor nor the Trustee has participated in the preparation of such reporting documents, or made any due diligence investigation with respect to the information provided therein. Neither the

Depositor nor the Trustee has verified the accuracy or completeness of such documents or reports. There can be no assurance that events affecting the issuer(s) of the underlying securities, or guarantor thereof, or successor thereto, as applicable, or the underlying securities have not occurred or have not yet been publicly disclosed that would affect the accuracy or completeness of the publicly available documents described above. The chart below lists each trust, the issuer(s) or guarantor, or successor thereto, of the related underlying security, and its respective Exchange Act file numbers, if applicable.

I, Mark C. Graham, certify that:

1. I have reviewed this annual report on Form 10-K, and all reports on Form 8-K containing distribution or servicing reports filed in respect of periods included in the year covered by this annual report, of Structured Products Corp., on behalf of CorTS Trust For Countrywide Capital I;
2. Based on my knowledge, the information in these reports, taken as a whole, does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading as of the last day of the period covered by this annual report;
3. Based on my knowledge, the distribution or servicing information required to be provided to the depositor by the trustee under the pooling and servicing, or similar agreement, for inclusion in these reports is included in these reports; and
4. I am responsible for reviewing the activities performed by the depositor and the trustee under the pooling and servicing, or similar agreement and based upon my knowledge and the annual compliance review required under that agreement, and except as disclosed in the reports, the depositor and trustee have each fulfilled its obligations under that agreement.

In giving the certifications above, I have reasonably relied on information provided to me by the following unaffiliated parties: U.S. Bank Trust National Association.

By: /S/ MARK C. GRAHAM

Name: Mark C. Graham

Title: Assistant Secretary, Assistant Vice President

and Finance Officer

Date: March 24, 2006

PART I

Item 1. Business

Overview

Countrywide Financial Corporation ("Countrywide") is a holding company which, through its subsidiaries (collectively, the "Company"), is engaged in mortgage lending and other real estate finance-related businesses, including mortgage banking, banking and mortgage warehouse lending, dealing in securities and insurance underwriting.

During 2007, significant disruptions occurred in the U.S. mortgage market and the global capital markets, both of which we have historically relied upon to finance our mortgage production and operations. The combination of a weakening housing market and concern over certain industry-wide product offerings negatively impacted the expectations of future performance and the value investors assign to mortgage loans and securities. Because of this, investor demand for non-agency mortgage-backed securities ("MBS") abruptly declined and participants in the debt markets substantially curtailed financing of our and others' mortgage loan inventories.

Mortgage lenders, including Countrywide, responded by adjusting their loan program and underwriting standards, which had the effect of reducing the availability of mortgage credit to borrowers. These developments further weakened the housing market and affected mortgage loan performance.

As a result of all of these factors, we and other industry participants have recorded increased credit losses and inventory valuation adjustments in 2007.

As more fully detailed in a Current Report on Form 8-K filed with the Securities and Exchange Commission on January 17, 2008, and the Registration Statement on Form S-4 of Bank of America Corporation ("Bank of America") filed on February 12, 2008, we entered into an agreement and plan of merger (the "Merger Agreement") with Bank of America. The Merger Agreement provides for Countrywide to merge (the "Merger") with and into a wholly-owned merger subsidiary of Bank of America ("Merger Sub"), with Merger Sub continuing as the surviving company.

The terms of the Merger Agreement provide for the conversion of each share of Countrywide common stock into 0.1822 of a share of Bank of America common stock. Consummation of the Merger, which is currently anticipated to occur in the third quarter of 2008, is subject to certain conditions, including, among others, Countrywide stockholder and regulatory approvals.

The Merger Agreement contains certain termination rights for Countrywide and Bank of America, as the case may be, applicable upon the occurrence of certain events specified in the Merger Agreement. The Merger Agreement provides that, in the event of the termination of the Merger Agreement under specified circumstances, Countrywide may be required to pay Bank of America a termination fee equal to \$160 million.

The Merger Agreement provides for both Countrywide and Bank of America to conduct their respective businesses in the ordinary course until the Merger is completed and not to take certain actions during the period from the date of the Merger Agreement until the date of completion of the Merger.

We manage our business through five business segments—Mortgage Banking, Banking, Capital Markets, Insurance and Global Operations. We primarily conduct the following operations in these segments:

- Mortgage Banking—We originate, purchase, sell and service non-commercial mortgage loans nationwide.
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- Banking—We take deposits and invest in mortgage loans and home equity lines of credit, sourced primarily through our mortgage banking operation and, to a lesser extent, through purchases from non-affiliates. We also invest in MBS, commercial real estate and construction loans and provide short-term secured financing to mortgage lenders.
- Capital Markets—We operate an institutional broker-dealer that primarily specializes in trading and underwriting MBS. We also trade U.S. Treasury securities, bank certificates of deposit and debt issued by government agencies. We operate other companies which broker futures contracts, provide asset management services and originate for sale loans secured by commercial real estate. Within this segment, we also manage the acquisition and disposition of mortgage loans on behalf of the Mortgage Banking Segment and we engage in the trading of derivative contracts.
- Insurance—We offer property, casualty, life and disability insurance as an underwriter and as an insurance agency. We also provide reinsurance coverage to primary mortgage insurers.
- Global Operations—We license and support proprietary technology to mortgage lenders in the UK. We also perform certain of the Company's administrative and loan servicing functions through operations in India and Costa Rica. Our India operation also provides certain IT support and development services for the Company.

Mortgage banking is our core business, generating 50% of our revenues before provision for loan losses in 2007. We are a real-estate lending-centered company and have built upon our mortgage banking operations in recent years to capitalize on

meaningful related opportunities with the intent of stabilizing our consolidated earnings profile. For financial information about our segments, see the Management's Discussion and Analysis of Financial Condition and Results of Operations—Operating Segment Results section and Note 27—Segments and Related Information in the financial statement section of this Report.

Available Information

We have a Website located at www.countrywide.com on which we make our Annual Reports on Form 10-K, Quarterly Reports on Form 10-Q, Current Reports on Form 8-K and all exhibits and amendments to these reports available, free of charge, as soon as reasonably practicable after such material is electronically filed with, or furnished to, the Securities and Exchange Commission ("SEC"). Our Corporate Governance Guidelines, our Code of Business Ethics, the charters of the committees of our Board of Directors and all amendments and updates to these documents are also available on our Website and printed copies are available upon request.

Loan Production

We produce residential and commercial mortgage loans within the Mortgage Banking, Banking and Capital Markets Segments. A significant amount of the mortgage loans that we originate or purchase in our Mortgage Banking and Capital Markets Segments are sold into the secondary mortgage markets, primarily in the form of securities and to a lesser extent in the form of loans. We generally perform the ongoing servicing functions related to the residential mortgage loans that we produce. Loans produced in our Banking Segment are generally held for investment.

Types of Products

The majority of our loan production consists of Prime Mortgage Loans. Prime Mortgage Loans include conventional mortgage loans, loans insured by the Federal Housing Administration ("FHA") and loans guaranteed by the Veterans Administration ("VA"). A significant portion of the conventional loans we produce qualify for inclusion in guaranteed mortgage securities backed by Fannie Mae or

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Freddie Mac ("conforming loans"). Some of the conventional loans we produce either have an original loan amount in excess of the Fannie Mae and Freddie Mac loan limit for single-family loans or otherwise do not meet Fannie Mae or Freddie Mac guidelines. Loans that do not meet Fannie Mae or Freddie Mac guidelines are referred to as "nonconforming loans." In certain tables and elsewhere in this Report, FHA and VA loans may be referred to as Government Loans.

We have historically originated and purchased mortgage loans that generally fall into one of the following four categories:

- Prime Mortgage Loans—These are prime credit quality first-lien mortgage loans secured by single-family residences. References to loans secured by single-family residences in this document include loans secured by one-to-four-dwelling-unit residential real estate.
- Prime Home Equity Loans—These are prime credit quality second-lien mortgage loans, including home equity lines of credit, secured by single-family residences.
- Nonprime Mortgage Loans—These are first- and second-lien mortgage loans secured by single-family residences, made to individuals with credit profiles that do not qualify them for a prime loan.
- Commercial Real Estate Loans—These are prime credit quality mortgage loans secured by commercial properties, such as apartment buildings, retail properties, office buildings, industrial sites, hotels and other commercial properties.

During 2007, secondary mortgage market demand for non agency-eligible loans (nonconforming Prime Mortgage Loans, Prime Home Equity Loans and Nonprime Mortgage Loans) was substantially curtailed. Accordingly we revised our underwriting standards and product offerings to reflect these changes and de-emphasized non agency-eligible loans.

Mortgage Banking Segment

Our Mortgage Banking Segment produces mortgage loans through a variety of channels on a national scale. The mortgage loans we produce in this segment are generally sold into the secondary mortgage market, primarily in the form of securities, and to a lesser extent in the form of loans. We typically perform the ongoing servicing functions related to the mortgage loans that we produce. We also provide various loan closing services such as escrow, flood determination and appraisal. Historically, mortgage banking loan production has occurred in Countrywide Home Loans ("CHL"). Over the past several years, we have been transitioning this production to our bank subsidiary, Countrywide Bank, FSB ("Countrywide Bank" or the "Bank"). As of December 31, 2007, over 90% of our monthly mortgage loan production occurred in Countrywide Bank. Effective January 1, 2008, our production channels have moved into the Bank, completing the migration of substantially all of our loan production activities from CHL to the Bank. The mortgage loan production, the related balance sheet and the income relating to the holding and sale of these loans is included in our Mortgage

Banking Segment regardless of whether the activity occurred in CHL or Countrywide Bank. We group the activities of our Mortgage Banking Segment into three business sectors—Loan Production, Loan Servicing and Loan Closing Services.

Loan Production

We source mortgage loans through three production channels: the Retail Channel (Consumer Markets and Full Spectrum Lending), the Wholesale Lending Channel and the Correspondent Lending Channel.

Retail Channel

The Retail Channel consists of the Consumer Markets Division ("CMD") and the Full Spectrum Lending Division ("FSLD"). CMD generally originates prime loans through existing relationships with customers and organizations that influence the placement of mortgage services, while FSLD focuses on new customer acquisitions through Internet, direct mail and mass media marketing channels.

For 2007, Countrywide was ranked by Inside Mortgage Finance as the third largest retail lender, in terms of volume, among residential retail mortgage lenders nationwide. (Reprinted with the permission of Inside Mortgage Finance Inc. ("IMF") Copyrighted. All rights reserved by IMF.)

Consumer Markets Division

CMD originates mortgage loans through three business groups: the Distributed Retail group, the Business-to-Consumer group and the Strategic Business Alliances group.

The Distributed Retail group is the branch network which originates loans through relationships with consumers, builders and Realtors® and through joint ventures. As of December 31, 2007, this group consisted of 661 branch offices in 48 states and the District of Columbia. This group has a sales force of 6,136, which includes those dedicated to joint venture relationships. The Distributed Retail group originated 72% of CMD's total volume for the year ended December 31, 2007.

The Business-to-Consumer group primarily originates mortgage loans directly from existing customers through the Internet and through our call centers. The Business-to-Consumer group focuses on customer retention through marketing and by providing our existing customers with an efficient and convenient means to obtain financing for a new home, refinancing for their existing mortgage or a home equity loan. As of December 31, 2007, the Business-to-Consumer group consisted of five call centers with a sales staff of 1,090. This group accounted for 26% of CMD's total volume for the year ended December 31, 2007.

The Strategic Business Alliance group facilitates and manages the development of new sources of loans through relationships with organizations that influence the placement of mortgage services. This group focuses primarily on developing revenue-sharing arrangements such as joint ventures, third party outsourcing, relocation lending, marketing service agreements and brokered-in agreements. This group accounted for 2% (excluding Distributed Retail volume from joint venture relationships) of CMD's total volume for the year ended December 31, 2007.

Full Spectrum Lending Division

FSLD originates Prime Mortgage Loans with the primary focus on refinance and home equity products. FSLD operates through a network of 94 retail branch offices located in 37 states, as well as four call centers. The branches and call centers of FSLD are supported by two fulfillment centers for processing, underwriting and funding of these mortgage loans. FSLD also originated Nonprime Mortgage Loans until Nonprime Mortgage Loan production was discontinued in late 2007.

FSLD's mortgage production is generated through customer retention efforts directed to Countrywide's nonprime servicing portfolio and new customer acquisition through Internet, direct mail and mass media marketing channels. FSLD also employed a network of sales associates who were dedicated to the fulfillment of referrals of Nonprime Mortgage Loan customers from CMD until late 2007.

Wholesale Lending Channel

Our Wholesale Lending Channel ("WLD") underwrites and funds mortgage loans sourced by mortgage loan brokers and other financial intermediaries. WLD sources loans through approximately 30,000 mortgage loan brokers nationwide. WLD offers a wide variety of Prime Mortgage Loans and Prime Home Equity Loan products. Business is solicited through a sales force, the Internet and advertising.

As of December 31, 2007, WLD operated 39 wholesale loan centers and three regional loan centers in various parts of the United States. WLD also originated Nonprime Mortgage Loans until Nonprime Mortgage Loan production was discontinued in late 2007.

For 2007, Countrywide was ranked by Inside Mortgage Finance as the largest wholesale originator, in terms of volume, among residential wholesale mortgage lenders nationwide. (Reprinted with the permission of IMF. Copyrighted. All rights reserved by IMF.)

Correspondent Lending Channel

Our Correspondent Lending Channel ("CLD") purchases mortgage loans from other lenders, which include mortgage bankers, commercial banks, savings and loan

associations, home builders and credit unions. As of December 31, 2007, this Channel had correspondent relationships with approximately 1,760 lenders, who are subject to initial and ongoing credit evaluation and monitoring. CLD operates in all 50 states.

For 2007, Countrywide was ranked by Inside Mortgage Finance as the largest correspondent lender, in terms of volume, among residential correspondent mortgage lenders nationwide. (Reprinted with the permission of IMF. Copyrighted. All rights reserved by IMF.)

Loan Servicing

When we sell or securitize mortgage loans, we generally retain the rights to service these loans. In servicing mortgage loans, we collect and remit loan payments, respond to customer inquiries, account for principal and interest, hold custodial (impound) funds for payment of property taxes and insurance premiums, counsel delinquent mortgagors and supervise foreclosures and property dispositions. We receive servicing fees and other remuneration in return for performing these functions.

Mortgage Servicing Rights, Retained Interests and the Servicing Hedge

We recognize the value of the servicing rights we retain when the servicing rights are contractually separated from the loans either through sale of the loans or when the loans are securitized. The value we assign to servicing rights is referred to as mortgage servicing rights ("MSRs"). Our MSRs arise from contractual agreements between us and investors (or their agents) in MBS and mortgage loans. We may also retain financial interests ("retained interests") when we securitize mortgage loans. We include the value of these retained interests on our balance sheet. The Loan Servicing Sector statement of operations includes the changes in value related to our MSRs and retained interests, as well as the revenues and expenses arising from servicing the mortgage loans. Although MSRs generally arise from the sale or securitization of mortgage loans that we originate, we also occasionally purchase MSRs from others. For a more complete description of MSRs, see Note 3—Loan Sales in the financial statement section of this Report.

MSRs and retained interests are generally subject to a loss in value when mortgage rates decline. To moderate the effect on earnings caused by a rate-driven decline in the value of MSRs and retained interests, we maintain a portfolio of financial instruments, primarily derivative contracts, which generally increase in value when interest rates decline. This portfolio of financial instruments is referred to as the "Servicing Hedge." See Note 4—Derivative Financial Instruments—Risk Management Activities Related to Mortgage Servicing Rights (MSRs) and Retained Interests in the financial statement section of this Report for a further discussion of our Servicing Hedge.

Loan Servicing Operations

The various functions within our loan servicing operations are briefly described in the following paragraphs. These operations are performed primarily in nine locations using the same systems and processes: two in California, three in Texas, one in Arizona, two in India and one in Costa Rica.

Customer Service

Our customer service call centers managed nearly 61 million contacts with customers in 2007. These contacts were primarily handled through our customer service representatives, automated phone system and website (www.customers.countrywide.com). This division also prints monthly statements and oversees outbound customer correspondence.

Remittance Processing

Our Remittance Processing division processes all payments, loan payoffs and payoff demand statements. Approximately 48% of our customers make their monthly payments electronically using various automated payment methods.

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Investor Accounting

Our Investor Accounting department reconciles custodial accounts, processes investor remittances and maintains accounting records on behalf of our mortgage investors, including Fannie Mae, Freddie Mac and the Government National Mortgage Association ("Ginnie Mae"), as well as private investors.

Home Retention

Our Home Retention unit works with delinquent borrowers to bring their mortgages back to current status and avoid foreclosure if possible. Our objective in the loss mitigation process is to develop foreclosure prevention options that have the highest probability of successful resolution for the borrower and ultimately the investor. Countrywide uses multiple tools to evaluate borrower needs and reconcile them with investor guidelines in order to offer the borrower the most advantageous workout possible. These options include, but are not limited to: payment plans, payment forbearance, loan modification, acceptance of deed to the collateral property in lieu of foreclosure and acceptance of the net proceeds from the borrower's sale of the property (also referred to as a short sale).

Loss mitigation is most effective when we are able to establish early contact with the borrower. When a loan becomes delinquent, we attempt to communicate with our borrowers through frequent outreach efforts throughout the collection process using tools such as brochures, housing fairs, counseling letters, telephone calls and DVD mailings.

When contact is established with a borrower, Countrywide attempts to obtain information from the borrower relating to the borrower's financial condition and obtains an estimate of the value of the property securing the loan. Based on this information, Countrywide assesses the borrower's short-term ability to reinstate the loan to current status and evaluates the options available based on that assessment. If that is not possible, we determine what sort of assistance the borrower needs. This includes understanding their current debt to income ratio, as well as analyzing the borrower's future ability to pay. Modification and payment capitalization transactions are focused on borrowers who have demonstrated the capacity and incentive to perform successfully under the new terms of the loan. We have also developed loan modification programs designed to assist borrowers with refinancing their adjustable-rate mortgage ("ARM") and pay-option ARM loans before their loans reset. Alternative options such as short sales and acceptance of deeds in lieu of foreclosure are considered only after it has been determined that the borrower has no viable ability to remain in the home.

These efforts are tailored to the specific circumstances of a borrower and comply with the requirements of the mortgage investor. Our Home Retention division proactively works to preserve homeownership by aligning with consumer advocacy groups, providing customer outreach and supporting early intervention.

Foreclosure and Bankruptcy

Foreclosure and bankruptcy are complex processes that are subject to federal and state laws and regulations, as well as mortgage investor and insurer requirements. Our workflow-based systems facilitate consistent and compliant processing of defaulted mortgage loans, as well as an efficient flow of data between internal and external business partners. We use our own companies in support of many of our foreclosure and bankruptcy activities to minimize related costs and to increase efficiency.

Related Services

We perform several loan servicing functions internally that other loan servicers commonly outsource to third parties. Our integrated services include performing property tax payment processing, property inspections, and insurance tracking and premium payment processing. We believe the integration of these functions gives us a competitive advantage by lowering overall servicing costs from

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what would otherwise be incurred and enabling us to provide a high level of service to our mortgage customers and mortgage investors.

Loan Closing Services Sector

We provide loan closing products and services such as credit reports, flood determinations, appraisals and title reports through our LandSafe, Inc. group of companies. We provide these services primarily to customers referred by our loan production channels and our business units and also to third parties.

Capital Markets Segment

Our Capital Markets Segment primarily operates as a registered securities broker-dealer, which is also a primary dealer of U.S. Treasury securities. We also operate a residential mortgage loan manager, a commercial mortgage loan originator, a broker-dealer in Hong Kong, an introducing broker of futures contracts, an asset manager, and a broker of MSRs. During 2007, we ceased the operations of broker-dealers in Japan and the United Kingdom and significantly downsized our trading of derivatives as a result of the market disruption. With the exception of our commercial mortgage activities, we transact primarily with institutional customers, such as banks, other depository institutions, insurance companies, asset managers, mutual funds, pension plans, other broker-dealers and governmental agencies. Customers of our commercial real estate finance business are the owners or sponsors of commercial properties, who can be individuals or institutions.

Our Capital Markets activities consist of the following:

Conduit

Conduit activities include the purchase, warehousing and ultimate disposition of residential mortgage loans on behalf of CHL. In our conduits, we manage both Prime Mortgage Loans and Nonprime Mortgage Loans which are either acquired from third parties or originated in our Mortgage Banking Segment. We accumulate these loans for disposition either in the form of securitizations or loan sales. We also manage the acquisition and disposition of delinquent or otherwise illiquid residential mortgage loans, some of which have been originated under FHA and VA programs. We attempt to cure the loans, using the operations of our Servicing Sector, with the intent to securitize those loans that become eligible for securitization. The remaining loans are serviced through foreclosure and liquidation, which includes the collection of government insurance and guarantee proceeds relating to defaulted FHA and VA program loans. Our conduit activities have been severely constrained in the latter part of 2007 amid significant turmoil in the U.S. mortgage market and the global capital markets.

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Underwriting

Capital Markets participates in both competitive bid and negotiated underwritings and performs underwriting services for CHL, Countrywide Bank

and third parties. Underwriting activities may encompass the assumption of the market risk of buying a new issue of securities from the issuer and reselling the securities to investors, either directly or through dealers. Capital Markets primarily underwrites mortgage-related debt securities and certificates of deposit. Capital Markets earns an underwriting spread that is the difference between the amount paid to the issuer of securities and the offering price to investors, net of expenses. The spread earned on each transaction and the level of market risk assumed may vary based upon the nature of the market and the terms of the underwriting agreement. Our underwriting activities have also been severely constrained in the latter part of 2007 as a result of the market disruption.

Securities Trading

Securities trading activities include the trading of debt securities in the secondary market after the original issuance of the security and, to a much lesser extent, trading of derivative financial instruments. We generally trade mortgage-related fixed-income securities, including MBS, collateralized mortgage obligations and asset-backed securities ("ABS") issued by Fannie Mae, Freddie Mac, Ginnie Mae and other financial institutions, including CHL. We also trade securities issued by the U.S. Department of Treasury and other governmental agencies. As a result of the market disruption in 2007, our non agency trading activities have been significantly constrained.

Origination and Sale of Commercial Mortgage Loans

Capital Markets originates and sells commercial mortgage loans. Commercial mortgages are mortgages secured by commercial properties, such as apartment buildings, retail properties, office buildings, industrial sites and hotels. As a result of the market disruption in 2007, our commercial lending activities have been significantly constrained.

Brokering

Brokering activities include brokerage, in an agent capacity, of residential mortgage loan transactions, MSRs and exchange traded futures and commodity options contracts. The brokerage of residential mortgage loans, MSRs and futures and options contracts may be between third parties or between CHL or Countrywide Bank and third parties.

Asset Management

Asset management activities are conducted for the benefit of investors. This includes managing a private equity fund and a collateralized debt obligation. We receive fees, including performance fees, for providing these services. We may also share in the results of the funds when we hold an investment interest in the fund.

Insurance Segment

Our Insurance Segment's primary activities are:

- **Offering property, casualty, life and disability insurance as an underwriter and as an insurance agent, offering insurance tracking services affiliated with our lender-placed insurance programs and offering an array of commercial insurance products through our agency ("Insurance Operations").**
- **Providing reinsurance coverage to primary mortgage insurers ("Reinsurance Operations").**

We manage these activities through two business units—Balboa Insurance Group and Balboa Reinsurance Company.

Insurance Operations

Our insurance operations include our insurance underwriters/carriers and their affiliated businesses, and our agency operations.

We underwrite property, casualty, life and disability insurance in 50 states and the District of Columbia through the insurers that make up Balboa Insurance Group. Our retail insurance products are offered by select general insurance agents serving the consumer market, including our insurance agency.

Our insurance operations offer the following insurance product lines:

- **Lender-Placed Property and Automobile—We offer lender-placed real-property hazard insurance and lender-placed automobile insurance. Such insurance is provided on behalf of mortgage and automobile lenders when borrowers fail to have agreed-upon insurance coverage in place to protect the lender's security interest. We also provide insurance tracking services, which alert a lender when there is a lapse in a borrower's insurance, for almost 21.9 million loans, including 9.0 million loans serviced within our Mortgage Banking Segment.**
- **Voluntary Homeowners and Automobile—We underwrite retail homeowners and automobile insurance for consumers under the Countrywide Insurance Group brand.**
-

Life, Disability and Credit—We underwrite term life, credit disability and credit life insurance products. Our retail insurance products are offered by select general insurance agents servicing the consumer market, including our affiliated agency.

Our Insurance Operations' property and casualty division has received an "A (Excellent)" rating from A.M. Best Company, an insurance company rating and information service. Our life insurance operations maintain an "A- (Excellent)" rating from A.M. Best Company. The "Excellent" rating is defined by the A.M. Best Company as having "an excellent ability to meet ongoing obligations to policy holders."

Our insurance agencies provide consumers, in particular our mortgage customers, with homeowners, life, disability, automobile and various other insurance products. Our insurance agencies also operate a full-service commercial insurance program that offers a comprehensive menu of products and services to meet the insurance needs of small, mid-size and large businesses. The commercial insurance group distributes a wide array of competitively priced property and casualty and employee benefits programs in specialty niche markets, including home builders, mortgage brokers and bankers, real estate brokers and commercial property owners, through call centers, Internet, independent agents and captive agents in retail mortgage branch offices.

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Reinsurance Operations

We provide mortgage reinsurance to the insurance companies that provide primary mortgage insurance ("PMI") on loans in our servicing portfolio. This reinsurance covers losses in excess of a specified percentage of the principal balance of a given pool of mortgage loans, subject to a contractual limit, in exchange for a portion of the pools' mortgage insurance premium. We provide this coverage with respect to substantially all of the loans in our portfolio that are covered by PMI, which generally includes all conventional loans with an original loan amount in excess of 80% of the property's appraised value.

Competition

The lender-placed insurance market is dominated by a small number of providers, competing on policy terms and conditions, service, technological innovation, compliance capability, loan tracking ability and price.

The homeowners, automobile, term life, credit-life and credit-disability marketplaces are dominated by large, well-known providers. Consumers select

such insurance based on price, service and the efficiency and effectiveness of marketing and underwriting operations.

We compete generally by providing high-quality service and pricing our products at competitive rates, as well as by leveraging our residential mortgage loan customer base.

Financing of Operations

Uses of Financing

We have significant financing needs. Our short-term financing needs arise primarily from the following:

- Warehousing of mortgage loans pending sale
- Trading activities of our broker-dealer
- Providing mortgage warehouse credit to others.

Our long-term financing needs arise primarily from the following:

- Investments in mortgage loans
- Investments in MSRs and interests that we retain when we securitize mortgage loans
- Financial instruments acquired to manage the interest rate risk associated with our long-term investments in MSRs and financial instruments.

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Sources of Financing

Recent disruptions in the public corporate debt and secondary mortgage markets have resulted in changes in our financing needs and how we finance our operations. Before August 2007, a substantial portion of our financing needs was met by the issuance of unsecured and asset-backed commercial paper and by the sale of mortgage loans into the secondary mortgage market, primarily in the form of MBS and ABS. The current lack of liquidity in those markets, particularly for

non agency-eligible mortgage loans, has resulted in an increase in our financing needs as we have to hold certain loans for longer periods of time pending sale and hold loans for investment that have become nonsalable due to market disruptions. To meet those increased needs, we took the following actions:

- Accelerated the integration of our mortgage banking activities into Countrywide Bank, which has more stable funding and more access to reliable sources of funds that are less dependent on the capital markets during periods of market stress, providing more reliable liquidity
- Significantly changed our product offerings and underwriting guidelines, focusing our current loan production on loans that are available for direct sale to or securitization into programs sponsored by the government-sponsored agencies (Fannie Mae, Freddie Mac and Ginnie Mae)
- Borrowed \$11.5 billion under unsecured revolving credit agreements
- Arranged \$12.5 billion in new reliable secured borrowing capacity
- Issued \$2.0 billion of 7.25% convertible cumulative preferred stock
- Implemented a campaign to attract and retain bank deposits, including significant expansion of our network of financial centers.

As a result of these changes, our funding model more closely resembles that of a thrift holding company. We now meet our financing needs primarily through the following means:

- Deposit gathering
- FHLB advances
- Committed, unsecured revolving lines of credit
- Committed, secured revolving lines of credit

- **Short-term repurchase agreements**
- **Unsecured medium-term notes**
- **Unsecured subordinated debt and unsecured junior subordinated debentures, the latter of which includes high equity content debt securities**
- **Retained earnings.**

We use short-term deposits, unsecured revolving lines of credit, secured revolving lines of credit and repurchase agreements to finance a significant portion of our inventory of mortgage loans held for sale and securities trading portfolio. Mortgage loans held for investment are financed with a combination of deposit liabilities and secured FHLB advances.

We rely on the secondary mortgage market as a source of long-term capital to support our mortgage banking operations. In response to the recent decline in secondary mortgage market liquidity for non agency-eligible mortgage loans, we have modified our product offerings such that the majority of loans we originate are eligible for sale to Fannie Mae, Freddie Mac or Ginnie Mae. At this time, virtually all non agency-eligible loans are being held on our balance sheet.

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Our strategy to ensure our ongoing access to the secondary mortgage market is to consistently produce quality mortgages and service those mortgages at levels that meet or exceed secondary mortgage market standards. We make significant investments in personnel and technology to ensure the quality of our mortgage loan production.

While the short-term public corporate debt markets are no longer a practical source of financing for us, access to the medium-term debt and equity markets will remain an important source of financing to us when market conditions permit. Our continued access to those markets is dependent on maintaining investment-grade credit ratings. Investment grade ratings are also important for counterparty retention and maintaining escrow deposits. Among other considerations, maintenance of our current investment-grade ratings requires that we have high levels of liquidity, including access to alternative sources of funding such as deposits, FHLB advances and committed lines of credit provided by highly-rated banks. We also must maintain adequate capital that meets or exceeds current rating agency requirements. We currently have investment grade ratings from all three rating agencies.

As of December 31, 2007, our credit ratings are as follows:

Countrywide Financial Corporation				Countrywide Home	
Loans	Countrywide Bank				
Rating Agency	Short-Term	Long-Term	Rating Outlook(1)	Short-Term	Long-Term
Term	Long-Term	Rating Outlook(1)			
Term	Rating Outlook(1)				
Standard & Poor's	A-2	BBB+	Credit Watch Negative		
	A-2	BBB+	Credit Watch Negative		A-2
	A-	Credit Watch Negative			
Moody's Investors Service		P3	Baa3	Negative	
	P3	Baa3	P2	Baa1	
	Negative				
Fitch	F2	BBB+	Negative	F2	BBB+
	Negative	F2	BBB+	Negative	

(1)

On January 11, 2008, following the announcement of our pending acquisition by Bank of America, all three rating agencies placed our ratings on some form of positive watch to reflect the likely upgrade to our ratings following completion of the Merger.

Our primary source of equity capital is retained earnings. We supplement our equity capital with subordinated debt and junior subordinated debentures that receive varying degrees of "equity treatment" from rating agencies, bank lenders and regulators. From time to time, we may issue common stock or other debt securities that receive high equity treatment as a means of supplementing our capital base and supporting our growth. To this end, during 2007, we issued \$2.0 billion of preferred stock which ranks senior to our common stock with respect to payment of dividends and distribution upon liquidation.

For a further discussion of our liquidity and capital management see the section in this Report entitled Management's Discussion and Analysis of Financial Condition and Results of Operations—Liquidity and Capital Resources.

Interest Rate Risk

We typically bear interest rate risk from the time we commit to make a loan at a specified interest rate through the sale or repayment of the loan. We also bear interest rate risk related to the interests we retain in the loans we sell, which are typically in the form of MSRs and retained interests, and to the extent that our loan and securities investment portfolios' yields change on a different basis or at different times than the rates we pay on our borrowings. For a further discussion of our interest rate risk and how this risk is managed, see the section in this

Report entitled Management's Discussion and Analysis of Financial Condition and Results of Operations—Quantitative and Qualitative Disclosures About Market Risk.

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Credit Risk

One significant risk for the Company is credit risk, which is the risk that a borrower will not repay the loan's balance as agreed and the risk that the proceeds from liquidation of the collateral securing the loan will not be adequate to repay the loan's balance. Historically, our primary source of credit risk has been the continuing investments and/or obligations we retain either in the form of credit-enhancing subordinated interests, corporate guarantees or representations and warranties issued when we sell or securitize loans and through the structure of certain of our securitizations. In addition, as our portfolio of investment loans has grown, our portfolio credit risk has also grown. We also have credit risk that a counterparty will not perform in accordance with contractual terms and we will not realize uncollateralized gains that have been recorded. For a further discussion of our exposure to credit risk and how we manage this risk, see the section in this Report entitled Management's Discussion and Analysis of Financial Condition and Results of Operations—Credit Risk Management.

Operational Risk

Countrywide, like all large corporations, is exposed to many types of operational risk, including the risk of fraud by employees or outsiders, unauthorized transactions by employees or operational errors, including clerical or record-keeping errors or those resulting from faulty or disabled computer or telecommunication systems.

For a further discussion of our operational risk and how we manage this risk see the section in this Report entitled Management's Discussion and Analysis of Financial Condition and Results of Operations—Operational Risk.

Regulations

Regulations Applicable to Financial Institutions and their Holding Companies

General

As a savings and loan holding company, Countrywide is supervised and regulated by the Office of Thrift Supervision ("OTS"), as is its federal savings bank subsidiary, Countrywide Bank. Because it is an FDIC-insured institution, Countrywide Bank also is subject to regulation by the FDIC. Countrywide Bank's

relationship with its depositors and borrowers also is regulated to a great extent by both federal and state laws, especially in matters concerning the ownership of deposit accounts and the form and content of Countrywide Bank's loan documents. As a regulated financial services firm, our relationships and good standing with regulators are of fundamental importance to the continuation and growth of our businesses. The OTS, the SEC and other regulators have broad enforcement powers and powers to approve, deny, or refuse to act upon our applications or notices to conduct new activities, acquire or divest businesses or assets or reconfigure existing operations.

There are numerous rules governing the regulation of financial services institutions and their holding companies, including Countrywide and its subsidiaries, some of which are summarized below. Accordingly, the following discussion is general in nature and does not purport to be complete or to describe all of the laws and regulations that apply to us. The laws and regulations should be referenced for more information. Failure to comply with applicable laws and regulations could result in a range of sanctions and enforcement actions, including the imposition of civil money penalties, formal agreements, and cease and desist orders.

Regulations Applicable to Savings and Loan Holding Companies

Limitation on Activities: As a unitary savings and loan holding company, Countrywide is limited to business activities that are permitted under applicable provisions of the Home Owners' Loan Act and regulations promulgated thereunder.

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Regulatory Capital Requirements: As a unitary savings and loan holding company, Countrywide is not subject to any regulatory capital requirements. However, the OTS expects savings and loan holding companies to maintain capital that is sufficient to support the holding company's business activities, and the risks inherent in those activities. Furthermore, Countrywide Bank, as a federal savings association, is subject to OTS capital requirements as described further below under "Federal Savings Bank Regulatory Capital Requirements."

Enforcement: The OTS has the power to take enforcement action against savings and loan holding companies and their affiliates to the extent that any action or business taken or conducted by the holding company or affiliate threatens the safety, soundness or stability of the subsidiary insured institution. Formal enforcement action may range from the issuance of a capital directive or cease and desist order, to removal of officers or directors of the institution, receivership, conservatorship, or the termination of deposit insurance. Civil money penalties may be imposed for a wide range of violations and actions.

Regulations Applicable to Countrywide Bank as a Federal Savings Bank

General: As a federal savings bank, Countrywide Bank is subject to regulation and examination by the OTS. The Bank's deposits are insured by the Deposit Insurance Fund of the FDIC to the extent provided by applicable federal law. The OTS is empowered to issue cease and desist orders against a federal savings bank if it determines that activities of the institution represent unsafe and unsound banking practices or violations of law or regulation. The OTS has the power to impose upon federal savings banks and certain affiliated parties civil money penalties for violations of banking statutes and regulations. In addition, the FDIC has the authority to recommend to the Director of the OTS that enforcement action be taken with respect to a particular savings association. If action is not taken by the OTS, the FDIC has authority to take action under specified circumstances. These authorities are primarily intended to protect the depositors of the federal savings bank and the Deposit Insurance Fund of the FDIC, not shareholders or other creditors of the federal savings bank or its holding companies.

Federal Savings Bank Regulatory Capital Requirements: The OTS regulations require savings associations to meet three minimum capital standards: at least: an 8% risk-based capital ratio; a 4% leverage ratio (3% for institutions receiving the highest supervisory rating); and a 1.5% tangible capital ratio. The risk-based capital ratio is defined as the ratio of total capital to risk-weighted assets. Risk-weighted assets include risk-weighted off-balance sheet activities, risk-weighted recourse obligations, direct credit substitutes and certain other positions, all as computed in accordance with OTS regulations. The OTS' leverage ratio is defined as the ratio of core capital to adjusted total assets. The tangible capital ratio is defined as the ratio of tangible capital (the components of which are very similar to those of core capital) to adjusted total assets.

In addition to the foregoing, the OTS, the FDIC and other federal banking agencies possess broad powers under current federal law to take "prompt corrective action" in connection with depository institutions that do not meet minimum capital requirements. For this purpose, the law establishes five capital categories for insured depository institutions: "well capitalized," "adequately capitalized," "undercapitalized," "significantly undercapitalized," and "critically undercapitalized." To be considered "well capitalized," an institution must maintain a Total Risk-Based capital ratio of 10% or greater, a Tier 1 Risk-Based capital ratio of 6% or greater, a leverage capital ratio of 5% or greater, and not be subject to any order or written directive to meet and maintain a specific capital level for any capital measure. An "adequately capitalized" institution must have a Tier 1 Risk-Based capital ratio of at least 4%, a Total Risk-Based capital ratio of at least 8%, and a leverage (or "Tier 1") capital ratio of at least 4%.

If an institution fails to meet the adequate capitalization requirements, progressively more severe restrictions are placed on the institution's operations, management and capital distributions, depending on the capital category in which an institution is placed. At December 31, 2007, Countrywide Bank exceeded the OTS regulatory capital requirements to be classified as "well capitalized," with a Tier 1 capital ratio of 7.2% and a Total Risk-Based capital ratio of 14.4%.

Basel II Capital Standards: We may be required to comply with, or decide to adopt, certain new capital and other regulatory requirements proposed by the Basel Committee on Banking Supervision, as proposed and to be implemented in the United States. The federal banking agencies have approved a final rule, effective April 1, 2008, to implement new risk-based capital requirements in the United States. These new requirements, which are often referred to as the Basel II Accord, will, among other things, modify the capital charge applicable to credit risk and incorporate a capital charge for operational risk. The Basel II Accord also places greater reliance on market discipline than current standards. The Basel II standards will be mandatory with respect to banking organizations with total banking assets of \$250 billion or more or total on-balance-sheet foreign exposure of \$10 billion or more. The threshold for mandatory adoption is determined by reference to the federal savings bank subsidiary. Based on Countrywide Bank's total banking assets at December 31, 2007, Countrywide would not be required to adopt the Basel II standards. Basel II's framework offers banks a choice of three methodologies for determining risk weights—(1) a "Standardized" approach, (2) an advanced internal ratings-based approach, and (3) an advanced measurements approach. Mandatory organizations will have to use Basel II's most advanced methods only.

Organizations that do not meet the size criteria of a mandatory organization may choose voluntarily to comply with the more advanced requirements specified under the new capital framework and are called "opt in" organizations. Institutions that choose not to opt in will continue to operate under existing risk-based capital rules, subject to any changes made to those standards.

The banking agencies have issued a proposal that would allow the voluntary adoption of the Standardized approach to offer general organizations a set of regulatory capital requirements that have more risk sensitivity than the current Basel I rules, but less complexity than the Basel II advanced standards. The federal banking regulatory agencies are considering revised capital standards that would apply to all financial institutions that are not subject to the Basel II Accord ("Basel 1A"), with the expressed intention to align those standards more closely with those that would be applicable to Basel II institutions. At this time, Countrywide cannot predict the final form the optional Basel II Standardized approach will take, when it will be implemented, the effect that it might have on Countrywide Bank's financial condition or results of its operations, or how these effects might impact Countrywide Financial Corporation. We are monitoring the evolution of the Basel II Standardized approach, whether we will be required or

elect to adopt Basel II, its potential impact on the Bank, Countrywide Financial Corporation and the industry at large. If Countrywide Financial Corporation adopts the Basel II Advanced approach, voluntarily or mandatorily, or the Basel II Standardized approach, the Basel II Accord requirements would replace existing risk-based capital requirements, but not the leverage capital requirements imposed under U.S. law and regulation.

Qualified Thrift Lender Test: As a federal savings bank, Countrywide must comply with the Qualified Thrift Lender ("QTL") Test. The QTL Test requires that a savings association, including a federal savings bank, have assets designated as "qualified thrift investments" constituting no less than 65% of its "portfolio assets" in at least nine months of the most recent 12-month period. "Portfolio assets" generally means total assets of a savings association, less the sum of certain specified assets. Qualified thrift investments are defined to include residential mortgage lending assets and certain consumer and small business related assets. If an institution does not meet the QTL Test, it may be precluded from interstate branching and engaging in any new activities, and may be subject to certain other restrictions.

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Deposit Insurance and Assessments: The FDIC insures deposit accounts in Countrywide Bank generally up to a maximum of \$100,000 per separately-insured depositor, and up to a maximum of \$250,000 per separately-insured depositor for certain retirement accounts. The FDIC uses a risk-based assessment system to determine assessment rates to be paid by member institutions such as the Bank. In addition, the FDIC collects funds from insured institutions sufficient to pay interest on debt obligations of the Financing Corporation. The Financing Corporation is a government-sponsored entity that was formed to borrow the money necessary to carry out the closing and ultimate disposition of failed thrift institutions by the Resolution Trust Corporation. The current annual rate established by the FDIC for the Financing Corporation assessment is 1.14 basis points.

Loans to One Borrower: Federal law imposes restrictions on the amount of loans that a federal savings bank can lend to one borrower. The maximum amount that a federal savings bank may loan to one borrower generally is limited to 15% of the bank's capital, plus an additional 10% for loans fully secured by readily marketable collateral, as such term is defined in applicable regulation.

Limitations on Transactions with Affiliates: Countrywide Bank is subject to restrictions on transactions with affiliates that are the same as those applicable to commercial banks under Sections 23A and 23B of the Federal Reserve Act, as well as certain additional restrictions imposed on federal savings associations by the Home Owners' Loan Act. The term "affiliate" under these laws means any company that controls or is under common control with a savings association

and includes Countrywide and its non-bank subsidiaries. Transactions between Countrywide Bank and certain affiliates are restricted to an aggregate percentage of Countrywide Bank's capital, and where required must be collateralized with certain specified assets. Permissible transactions with affiliates must be on terms that are at least as favorable to the savings association as comparable transactions with non-affiliates.

Countrywide Bank also is restricted in its ability to extend credit to its directors, executive officers and 10% shareholders, as well as to entities controlled by such persons, to the same extent as such restrictions apply to commercial banks.

Payment of Dividends: As a federal savings bank, the Bank is subject to the provisions of the OTS regulations and the Federal Deposit Insurance Act ("FDIA") relating to dividends and it is not permitted to pay dividends if it is undercapitalized or if payment would cause it to become undercapitalized. The OTS has prescribed that the Company and its affiliates are not authorized to receive, and Countrywide Bank is not authorized to pay the Company or its affiliates, capital distributions without receipt of prior written OTS non-objection.

Bank Secrecy Act: Countrywide Bank is subject to extensive anti-money laundering provisions and requirements, which require the institution to have in place a comprehensive customer identification program and an anti-money laundering program and procedures. These laws and regulations also prohibit financial institutions from engaging in business with foreign shell banks; require financial institutions to have due diligence procedures and, in some cases, enhanced due diligence procedures for foreign correspondent and private banking accounts; and improve information sharing between financial institutions and the U.S. government. Countrywide Bank has established policies and procedures intended to comply with these provisions.

Community Reinvestment Act ("CRA"): The Bank is subject to the CRA and implementing regulations. CRA regulations establish the framework and criteria by which the bank regulatory agencies assess an institution's record of helping to meet the credit needs of its community, including low- and moderate- income neighborhoods. The OTS is required to assess a saving association's record of compliance with the CRA, and to assign one of four possible ratings to an institution's CRA performance, including "outstanding," "satisfactory," "needs to improve," and "substantial noncompliance." CRA ratings are taken into account by regulators in reviewing certain applications made by the Company and its banking subsidiaries. A savings association's failure to comply with the

provisions of the CRA could, at a minimum, result in regulatory restrictions on its activities. As of December 31, 2007, Countrywide Bank's CRA rating was "satisfactory."

Fair Lending Laws: The Equal Credit Opportunity Act and the Fair Housing Act prohibit lenders from discriminating in their lending practices on the basis of characteristics specified in those statutes. A savings association's failure to comply with the Equal Credit Opportunity Act and the Fair Housing Act could result in enforcement actions by the OTS, as well as other federal regulatory agencies and the Department of Justice.

Federal Home Loan Bank System: Countrywide Bank is a member of the Federal Home Loan Bank of Atlanta, which is one of the 12 regional banks in the FHLB System. The primary purpose of the FHLBs is to provide funding to their members for making housing loans as well as for making affordable housing and community development lending. As a member of the Federal Home Loan Bank of Atlanta, Countrywide Bank is required to acquire and hold FHLB shares in an amount at least equal to 0.2% of Countrywide Bank's assets, up to a maximum of \$25.0 million, plus 4.5% of total FHLB advances.

Other Regulations Applicable to Countrywide Bank

Regulation of Other Activities: The investments and activities of the Bank as a federally chartered savings bank are also subject to regulation by federal banking agencies with respect to:

- Investments in subsidiaries
- Investments for the Bank's account (including limitations on investments)
- Unsecured commercial paper and medium-term notes
- Security requirements
- Anti-tying limitations
- Truth-in-lending
- Home mortgage disclosure

- **Fair credit reporting**
- **Fair debt collection**
- **Electronic funds transfers**
- **Trust department operations**
- **Brokered deposits**
- **Audit requirements**

Interagency Statement on Subprime Mortgage Lending: On July 10, 2007, the federal bank regulatory agencies issued a final interagency statement to address issues and questions related to certain subprime mortgage products and lending practices. The guidance addresses concerns with so called "2/28," "3/27," and similar ARMs that can expose borrowers to significant payment shock once introductory rates expire. The statement set forth expectations for sound lending practices and clear communications with borrowers, addressing, among other things, the following lending practices of concern: (1) initial payments based on an introductory interest rate that is substantially lower than the fully-indexed rate, (2) very high or no limits on payment or interest-rate increases, (3) limited documentation of a borrower's income, and (4) substantial prepayment penalties and/or prepayment penalties that extend beyond the initial interest rate adjustment period. The statement also addresses concerns that borrowers may not be adequately informed of the product features, material loan terms,

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and product risks by stating that communications with consumers should provide clear and balanced information about the relative benefits and risks of such products. The statement supplements the Interagency Guidance on Nontraditional Mortgage Product Risks issued by the federal bank regulatory agencies on residential mortgage products that allow borrowers to defer repayment of principal and/or interest, including "interest-only" mortgage loans and "payment option" adjustable-rate mortgages, that have the potential for negative amortization. The guidance requires that an institution's management assess a borrower's ability to repay the loan, including any additional principal

balances resulting from negative amortization which occurs when deferred interest payments are added to the principal balance. In particular, the guidance requires that for all nontraditional mortgage loan products, an institution's analysis of a borrower's repayment capacity should include an evaluation of the ability to repay the debt at final maturity at the fully indexed rate, assuming a fully amortizing repayment schedule. In addition, for products that permit negative amortization, the repayment analysis should be based upon the initial loan amount plus any balance increase that may accrue from the negative amortization features. The guidance contains further steps which must be taken with respect to loans that have additional risk-layering features, such as reduced documentation programs and simultaneous second liens. The guidance also articulates portfolio management measures that should be taken by institutions that originate or invest in nontraditional mortgage products. Finally, the guidance also requires that financial institutions provide customers sufficient information to clearly understand the loan terms and associated risks prior to a customer's choosing a nontraditional mortgage product.

Proposed Federal and State Laws and Regulations

Various legislation, including proposals to change substantially the financial institution regulatory system, is from time to time proposed for adoption. Currently, there are a number of proposed and recently enacted federal, state and local laws and regulations and guidance addressing mortgage lending and servicing practices. Congress is considering several bills to combat abuses in the mortgage lending market and to provide substantial new protections to mortgage consumers. While it is not possible to predict which of these bills may pass, key provisions of the bills under consideration would:

- establish a federal duty of care owed by mortgage originators to mortgage applicants and borrowers
- prohibit steering of borrowers into subprime loans if they qualify for prime loans
- establish minimum federal standards for licensing or registration of mortgage originators, including brokers and bank loan officers
- establish minimum underwriting standards for all mortgages, including requiring lenders to determine that borrowers have a reasonable ability to repay and that loans provide borrowers a tangible net benefit
-

extend limited liability to secondary market securitizers who acquire, package and sell interest in home mortgage loans that do not meet these standards

- establish new loan servicing and appraisal standards, and imposes penalties for violations of these standards**
- expand and enhance consumer protections for certain "high-cost loans."**

Also, Congress is considering changes to federal bankruptcy laws that would, if passed, allow judges presiding in Chapter 13 bankruptcy cases to modify the terms of mortgages secured by a borrower's principal residence, including but not limited to, the interest rate, loan maturity and principal balance.

In addition to these consumer protection efforts, Congress is also considering expanding federal housing finance programs to address liquidity concerns and improve consumer access to mortgage

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credit. Legislation to reform the FHA's home loan programs has passed both the U.S. House of Representatives and U.S. Senate. The bills would lower down payment requirements and increase FHA loan limits in high cost markets. Congress may also attempt to pass legislation to reform oversight of the government sponsored enterprises that would include provisions to increase the loan limits for Fannie Mae and Freddie Mac in high cost areas. These efforts may proceed notwithstanding recent enactment of "economic stimulus" legislation that included temporary loan limit increases.

At the state level, legislation building on the passage of mortgage lending restrictions in 2007 in states such as Minnesota, Maine, and North Carolina may appear in a number of jurisdictions. State bills attempting to establish new consumer protections governing loan servicing practices and foreclosure procedures also are expected in 2008.

The Federal Reserve Board also has proposed changes to Regulation Z (Truth in Lending) to protect consumers from unfair, deceptive or abusive home mortgage lending and advertising practices. The proposal includes four key protections for "higher-priced mortgage loans" secured by a consumer's principal dwelling: (1) creditors would be prohibited from engaging in a pattern or practice of extending credit without considering a borrower's ability to repay the loan; (2) creditors would be required to verify the income and assets they rely upon in making a loan; (3) prepayment penalties would only be permitted if

certain conditions are met, including the condition that no penalty will apply for at least sixty days before any possible payment increase; and (4) creditors would have to establish escrow accounts for taxes and insurance. In addition, the following protections would apply to all loans secured by a consumer's principal dwelling, regardless of the loan's APR: (a) lenders would be prohibited from making payments, directly or indirectly, to mortgage brokers, including through "yield-spread premiums" unless the broker previously entered into a written agreement with the consumer disclosing the broker's total compensation and other facts; (b) creditors and mortgage brokers would be prohibited from coercing a real estate appraiser to misstate a home's value; and (c) companies that service mortgage loans would be prohibited from engaging in certain practices. While the final form of the rules cannot be predicted, it is expected the Federal Reserve Board will issue final regulations by mid-2008.

Finally, the U.S. Treasury Department convened meetings of the major mortgage servicers and mortgage securities investors in late 2007. The group developed and has begun implementing a framework for modifying certain first-lien subprime residential ARMs to provide a five-year extension of their starter interest rates. The plan applies to subprime residential adjustable rate mortgages originated between January 1, 2005 and July 31, 2007, which: (1) have an initial fixed rate period of 36 months or less; (2) face an initial interest rate reset between January 1, 2008 and July 31, 2010; and (3) are currently included in securitized pools. Borrowers are eligible for the five-year extension if they are current in their mortgages, and are determined to not be able to afford the reset mortgage and meet certain other established criteria that will allow a streamlined assessment of the likelihood of default. However, in the face of concerns about increasing delinquency and foreclosure rates and the pace of industry loss mitigation efforts, this voluntary plan may be revised and/or federal and state mandates may emerge that impose additional or different loss mitigation and servicing requirements.

In general, there are a number of federal and state proposals that could impose new loan disclosure requirements; restrict or prohibit certain loan terms, fees and charges such as prepayment penalties; may require borrower counseling; and increase penalties for non-compliance. We cannot reasonably predict the final content of the legislative proposals, if any, that will be enacted or the regulatory proposals, if any, that will be adopted. Therefore, we cannot predict the potentially adverse impact that they, or any implementing regulations, could have on the Company's business, results of operations or financial condition. We also cannot reasonably predict the impact that the U.S. Treasury Department plan, subsequent revisions, or other loss mitigation and servicing proposals could have on the Company.

Other Regulations Applicable to Us and Our Non-Bank Subsidiaries

Our non-bank subsidiaries are subject to supervision by the OTS and may be subject to the supervision of, and regulation and licensure by, other state and federal regulatory agencies. In addition, certain federal, agency and state laws apply to specific business segment activities, whether performed by Countrywide Bank or the non-bank subsidiaries.

In addition, we are subject to a number of federal, state and local laws aimed at protecting a consumer's privacy. Generally, privacy laws cover a wide range of issues including limiting a company's ability to share information with third parties or affiliates, providing stronger identity theft protection, victim's assistance programs and security breach notification, providing the ability to avoid telemarketing solicitations through "do-not-call" lists, and limiting e-mail and fax advertising. These laws also impose penalties for non-compliance.

Mortgage Banking Segment

Our mortgage banking business is subject to the rules, regulations or guidelines of, and/or examination or investigation by, the following entities with respect to the processing, originating, selling and servicing of mortgage loans:

- The OTS**
- HUD**
- The FHA**
- The Department of Veteran Affairs**
- Fannie Mae, Freddie Mac and Ginnie Mae**
- The Federal Trade Commission**
- State regulatory authorities and Attorneys General**
- Regulation AB of the SEC.**

The rules, regulations and requirements of these entities, among other things, impose licensing obligations on the Company or its subsidiaries; establish standards for advertising as well as processing, underwriting and servicing mortgage loans and appraisal practices; prohibit discrimination; restrict certain loan features in some cases and fix maximum interest rates and fees in some states.

As an FHA lender, we are required to submit to the FHA Commissioner, on an annual basis, audited financial statements. Ginnie Mae, HUD, Fannie Mae and Freddie Mac require the maintenance of specified net worth levels (which vary among the entities). Our affairs are also subject to examination by the Federal Housing Commissioner to assure compliance with FHA regulations, policies and procedures.

Mortgage origination activities are subject to the Fair Housing Act, Equal Credit Opportunity Act, Truth-in-Lending Act, Home Mortgage Disclosure Act, the Real Estate Settlement Procedures Act and the Home Ownership Equity Protection Act and the regulations promulgated under those statutes, as well as other federal laws and other regulations. These laws prohibit discrimination, require the disclosure of certain basic information to mortgagors concerning credit terms and settlement costs, prohibit referral fees and require the maintenance and disclosure of information regarding the disposition of mortgage applications based on race, gender, geographical distribution, income level and annual percentage rate over certain thresholds.

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Capital Markets Segment

Securities broker-dealer operations in the United States are subject to federal and state securities laws, as well as the rules of the SEC and the Financial Industry Regulatory Authority. Our securities broker-dealer operations in Hong Kong are subject to the rules of the Securities and Futures Commission of Hong Kong. Our introducing futures broker is regulated by the National Futures Association, the Commodities and Futures Trading Commission and the Chicago Mercantile Exchange. State, federal and foreign securities laws govern many aspects of a broker-dealer's business, including the maintenance of required levels of capital, the establishment of segregated cash or securities accounts for the benefit of customers, the monthly and annual reporting of operating and financial data to regulators, the approval and documentation of trading activity, the retention of records and the governance of the manner in which business may be conducted with customers. Our discontinued broker-dealer operations in Japan were subject to the regulations of the Financial Services Agency of Japan and the Japan Securities Dealers Association. The operations of our discontinued securities broker-dealer in the United Kingdom were subject to the regulation of the Financial Services Authority of the United Kingdom. Commercial loan

originations are subject to the licensing and regulations of various individual states.

Insurance Segment

Countrywide, by virtue of its ownership of insurance companies, is a member of an insurance holding company group pursuant to the provisions of the Insurance Holding Company Acts (collectively the "Holding Company Acts"). The insurance company entities are subject to the various state insurance departments' broad regulatory, supervisory and administrative powers. These powers relate primarily to: the standards of capital and solvency which must be met and maintained; the licensing of insurers and their agents; the nature and limitation of insurers' investments; the approval of rates, rules and forms; the issuance of securities by insurers; periodic examinations of the affairs of insurers; and the establishment of reserves required to be maintained for unearned premiums, losses and other purposes.

Pursuant to the Holding Company Acts, the Company must provide state insurance departments with certain financial information. In addition, certain transactions specified by the Holding Company Acts may not be effected without the prior notice and/or approval of the applicable insurance department. Examples of transactions that may require prior approval include, but are not limited to, sales, purchases, exchanges, loans and extensions of credit, and dividends and investments between the insurance company entity and other entities within the holding company group.

Our decision to retain more loans in our portfolio of loans held for investment has increased our credit exposure and could increase our exposure to additional credit losses

As a result of disruptions in the debt and secondary mortgage market conditions, we have retained, and expect to continue to retain, more loans in our portfolio held for investment or to hold additional loan or security inventory until market conditions improve. In 2007, we increased our

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portfolio of loans held for investment by 28.1% to \$100.4 billion, compared to \$78.3 billion in 2006. These factors may expose us to higher credit losses compared to the past due to a higher proportion of loans held for investment, and may expose us to the potential of increased loan delinquencies and defaults and further write-downs of loans in our held for investment portfolio.

We may continue to experience increased credit losses due to downward trends in the economy and in the real estate market and increases in delinquency rates of borrowers

Significant disruptions in the U.S. mortgage market and global capital market conditions caused us to reduce our loan products offered, tighten underwriting standards and adjust loan pricing. These actions, along with those of other mortgage lenders, had the effect of reducing the availability of mortgage credit to borrowers. This lack of mortgage credit contributed to a weakening of the housing market and may have contributed to the significant increase in the number of homeowners who became delinquent on their home loans. Continued disruptions in the U.S. mortgage market and global capital market conditions and additional weakening in the housing market could further depress mortgage loan performance and continue to increase our credit costs.

Another factor that may contribute to higher delinquency and default rates is the increase in monthly payments on adjustable rate mortgage loans. Any increase in prevailing market interest rates may result in increased payments for borrowers who have adjustable rate mortgage loans. Moreover, with respect to hybrid mortgage loans after their initial fixed rate period, and with respect to mortgage loans with a negative amortization feature which reach their negative amortization cap, additional borrowers will experience a substantial increase in their monthly payment even without an increase in prevailing market interest rates. The increase in the monthly payment amount increases the risk that borrowers will become delinquent and ultimately default on their loans.

Our profitability in our Mortgage Banking, Banking and Capital Markets Segments is impacted by the ability of our customers to repay their loans. Our Banking Segment is impacted if the borrowers in their portfolio of loans held for investment are unable to repay their loans. The Mortgage Banking and Capital Markets Segments are impacted by the credit risk that we retain when we sell the loans that we produce. When we sell loans, we retain credit risk in the form of subordinated mortgage-backed securities, including residual and mezzanine securities, and through the representations and warranties made to the issuing trusts for mortgage-backed securities issued by us or purchasers of loans we have sold, through the issuance of corporate guarantees and through the cash flow prioritization structure of certain securitizations. A significant portion of our portfolio of mortgage-backed securities consists of subordinated securities that absorb all or a disproportionately high percentage of the losses realized on the loans in the related mortgage pool. The buyers of our loans are expected to make more claims against our corporate guarantees and mortgage loan representations and warranties if more of our borrowers default on their loans. Higher borrower defaults can also lead to reprioritization of cash flow in certain of our securitizations that subordinate our rights to cash from the securitizations. While we estimate and provide for credit losses accruing to our portfolio of loans held for investment and mortgage-backed securities and record liabilities for our obligations, worsening economic and real estate market conditions could further negatively impact our allowance for loan losses, the fair value of the mortgage-backed securities we retain and increase our liabilities.

Part of our strategy to mitigate credit exposure is to obtain mortgage insurance coverage. Although we purchase credit enhancement from those mortgage insurance providers that have an AA- rating or equivalent from the credit rating agencies, our credit losses would increase if the mortgage insurance companies were unable to fulfill their contractual obligations.

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Disruptions in our sources of financing and continued disruption in the secondary mortgage market could continue to adversely impact our earnings and financial condition

We have significant financing needs that we historically have met through the capital markets, including the debt and secondary mortgage markets. These markets are currently experiencing unprecedented disruptions, which have had and may continue to have an adverse impact on the Company's earnings and financial condition. Current conditions in the debt markets, which have increased the cost and significantly reduced the availability of debt, may continue or worsen in the future.

Since we are highly dependent on the availability of credit to finance our operations, a reduction in available credit or other financing sources, such as through the FHLB or from deposits to Countrywide Bank, could have an adverse impact on our earnings and financial condition, particularly in the short term. If we were restricted from obtaining additional advances from the FHLB or unable to pledge certain assets that we have historically pledged, it could adversely affect our liquidity and operations.

The secondary mortgage markets are also currently experiencing unprecedented disruptions resulting from reduced investor demand for mortgage loans and mortgage-backed securities and increased investor yield requirements for those loans and securities. These conditions may continue or worsen in the future. A prolonged period of secondary market illiquidity may continue to impact our loan production volumes and could have an adverse impact on our future earnings and financial condition through reduced loan margins.

Dependence on Fannie Mae and Freddie Mac Relationships

We have substantial relationships with Fannie Mae and Freddie Mac, including loan sale and servicing arrangements that are material to our business. A significant portion of the conventional loans that we originate or purchase qualify for inclusion in guaranteed mortgage securities backed by Fannie Mae or Freddie Mac. We also derive other material financial benefits from these relationships, including the government-sponsored enterprises ("GSEs") assumption of credit risk on loans included in such securities in exchange for

payment of guarantee fees; benefits to revenues and liquidity from escrow and account funds deposited with Countrywide Bank and other financial institutions, and the avoidance of certain loan inventory finance costs through streamlined loan funding and sale procedures. A substantial reduction in the volume of loans that Fannie Mae and Freddie Mac agree to purchase or the loss of our servicing rights or the other material financial benefits we receive from these entities could have a material adverse effect on our results of operation and financial condition.

As government-sponsored enterprises, Fannie Mae and Freddie Mac are subject to extensive regulation and oversight by governmental agencies. Changes in the manner in which the GSEs conduct business in the marketplace or with Countrywide in particular could have a material adverse effect on our business, operations or prospects. Changes in regulations or the occurrence of other events that adversely impact the business, operations or prospects of Fannie Mae or Freddie Mac could have a material adverse effect on our business, operations or prospects.

It we were to suffer a significant credit rating downgrade, it could have a substantial adverse impact on our operations

Three credit rating agencies follow Countrywide. Moody's Investor Services has assigned us an investment grade rating of Baa3, which is the lowest investment grade rating, while Fitch Ratings and Standard & Poor's have each assigned us an investment grade rating of BBB+. As of December 31, 2007, all three credit rating agencies had placed us on some form of negative outlook. These ratings reflect the credit agencies' concern that continued stresses in the mortgage markets will continue to present financial challenges for us in the near term. If we were to be downgraded by any of these

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ratings agencies and lose our investment grade rating, such downgrade could potentially result in the acceleration of certain secured debt obligations and adversely affect our ability to conduct trading applicable to the management and hedging of our MSR assets, retained interests, inventory of loans, commitments to originate and purchase loans and our broker-dealer operations. Additionally, such downgrade would increase our financing costs and have a potential negative impact on our ability to attract and retain bank deposits.

If the Bank were to lose its investment grade rating, it could adversely affect its ability to hold custodial accounts on deposits and retain commercial deposits. As of December 31, 2007, up to \$4.2 billion of our custodial deposits may be subject to placement with another bank if the Bank's credit rating was reduced below investment grade.

The volatility of interest rates may significantly affect our earnings

The level and volatility of interest rates significantly affect the mortgage industry. For example, a decline in mortgage rates has historically increased the demand for home loans as borrowers refinance, but also has historically led to accelerated payoffs in our mortgage servicing portfolio, which has negatively impacted the value of our MSRs.

We attempt to manage interest rate risk in our mortgage banking business primarily through the natural counterbalance of our loan production and servicing operations. In addition, we also use derivatives extensively to manage the interest rate, or price, risk inherent in our assets, liabilities and loan commitments. Our main objective in managing interest rate risk is to moderate the impact of changes in interest rates on our earnings over time; however, our interest rate risk management strategies may result in significant earnings volatility in the short term. The success of our interest rate risk management strategies is largely dependent on our ability to predict the earnings sensitivity of our loan servicing and loan production operations in various interest rate environments. There are many market factors that impact the performance of our interest rate risk management activities including interest rate volatility, the shape of the yield curve and the spread between mortgage interest rates and Treasury or swap rates. The success of this strategy impacts our net income. This impact, which can be either positive or negative, can be material.

The industries in which we operate are highly competitive

We operate in highly competitive industries that could become even more competitive as a result of economic, legislative, regulatory and technological changes. Competition to produce mortgage loans comes primarily from large commercial banks, savings institutions and investment banks.

We face competition in such areas as mortgage product offerings, rates and fees, and customer service, both at the retail and institutional level. In addition, technological advances and heightened e-commerce activities have increased consumers' accessibility to products and services generally. This has intensified competition among banking as well as nonbanking companies in offering financial products and services.

Negative public opinion could damage our reputation and adversely impact our earnings

Reputation risk, or the risk to our business, earnings and capital from negative public opinion, is inherent in our business. Negative public opinion can result from our actual or alleged conduct in any number of activities, including lending practices, corporate governance, and from actions taken by government regulators and community organizations in response to those activities. Negative public opinion can also result from media coverage, whether accurate or not.

Negative public opinion can adversely affect our ability to attract and retain customers, trading counterparties and employees and can expose us to litigation and regulatory action. Because virtually all of our businesses operate under the "Countrywide" brand, actual or alleged conduct by one business can result in negative public

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opinion about other Countrywide businesses. Although we take steps to minimize reputation risk in dealing with our customers and communities, as a large diversified financial services company with a relatively high industry profile, this risk will always be present in our organization.

Our failure to comply with federal, state or local laws or regulations or any examination downgrade could adversely impact our operations, growth or profitability

Our failure to comply with any federal, state and local laws or regulations, whether actual or alleged, could expose us to fines, penalties or potential litigation liabilities, including costs, settlements and judgments, any of which could adversely affect our earnings. Any failure to comply with such applicable laws and regulations also could result in a range of sanctions and enforcement actions, including the imposition of civil money penalties, formal agreements, and cease and desist orders.

Countrywide and its subsidiaries are subject to examination by regulators such as the OTS, which results in examination reports and supervisory ratings (which are not publicly available) that can impact the conduct and growth of our businesses. Our supervisory ratings are based on compliance with applicable laws and regulations, capital levels, asset quality and risk, management ability and performance, earnings, liquidity, and various other factors. A supervisory rating downgrade by any of our federal bank regulators potentially can result in the imposition of significant limitations on our activities and growth. These regulatory agencies generally have broad discretion to impose restrictions and limitations on the operations of a regulated entity where the agencies determine, among other things, that such operations are unsafe or unsound, fail to comply with applicable law or are otherwise inconsistent with laws and regulations or with the supervisory policies of these agencies. This supervisory framework could materially impact the conduct, growth, and profitability of our operations.

Changes in legal, regulatory and legislative environments in which we operate could adversely impact our business

We are regulated by banking, mortgage lending and insurance laws at the federal, state and local levels, and proposals for further regulation of the financial services industry are continually being introduced. We also are subject to many

other federal, state and local laws and regulations that affect our business, including those regarding taxation and privacy. Congress and state legislatures, as well as federal and state regulatory agencies and local governments, review such laws, regulations and policies and periodically propose changes or issue guidance that could affect us in substantial and unpredictable ways. Such changes could, for example, limit the types and value of financial services and products we offer, alter our liability or increase our cost to offer such services and products. It is possible that one or more legislative proposals may be adopted or regulatory changes may be implemented that would have an adverse effect on our business.

We depend on the accuracy and completeness of information about customers and counterparties

In deciding whether to extend credit or enter into other transactions with customers and counterparties, we may rely on information furnished to us by or on behalf of customers and counterparties, including financial statements and other financial information. We also may rely on representations of customers and counterparties as to the accuracy and completeness of that information and, with respect to financial statements, on reports of independent auditors. For example, in deciding whether to extend credit to borrowers under certain loan programs, we assume that the information provided by a customer is accurate and complete and we do not independently verify that information. Our financial condition and results of operations could be negatively impacted to the extent we rely on customer information that is not complete or accurate.

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We are exposed to operational risks

Countrywide, like all large corporations, is exposed to many types of operational risk, including the risk of fraud by employees or outsiders, misinterpretation or misapplication of rules, regulations or other requirements, unauthorized transactions by employees or operational errors, including clerical or record-keeping errors or those resulting from faulty or disabled computer or telecommunication systems. Given the high volume of transactions at Countrywide, certain errors may be repeated or compounded before they are discovered and successfully corrected. Our dependence upon automated systems to record and process transaction volume may further increase the risk that technical system flaws, or employee tampering or mistakes or manipulation of those systems will result in losses that are difficult to detect. We may be subject to disruptions of our systems arising from events that are wholly or partially beyond our control (including, for example, computer viruses or electrical or telecommunications outages), which may give rise to losses in service to customers and to loss or liability. We are exposed to the risk that our external vendors may be unable to fulfill their contractual obligation to us (or will

be subject to the same risk of fraud or operational errors by their respective employees as we are), and to the risk that our (or our vendors') business continuity and data security systems prove not to be adequate to allow us to resume operations in the event of a disruption to our (or our vendors') operations. We also face the risk that the design of our controls and procedures prove inadequate or are circumvented, thereby causing delays in detection or errors in information. Although we maintain a system of controls designed to manage operational risk at appropriate levels, there can be no assurance that we will not suffer losses from operational risks in the future that may be material in amount.

Our accounting policies and methods are fundamental to how we report our financial condition and results of operations, and they may require management to make estimates about matters that are inherently uncertain

We have identified several accounting policies as being "critical" to the presentation of our financial condition and results of operations because they involve major aspects of our business, they require management to make judgments about matters that are inherently uncertain and because of the likelihood that materially different amounts would be recorded under different conditions or using different assumptions. These critical accounting policies relate to the computation of our allowance for loan losses; valuation of MSRs and retained interests; accounting for gain on sale of loans and securities, including the valuation of loans and securities pending sale; valuation of liabilities incurred in sale or securitization of loans; determination of impairment related to future funding obligation under rapid amortization; and accounting for derivatives and our related interest rate risk management activities. Because of the inherent uncertainty of the estimates associated with these critical accounting policies, we cannot provide any assurance that we will not make significant subsequent adjustments to the related amounts recorded. For more information, please refer to the Management's Discussion and Analysis of Financial Condition and Results of Operations—Critical Accounting Policies section in this Report.

Changes in U.S. GAAP could adversely affect our business

Our financial reporting complies with U.S. GAAP, and U.S. GAAP is subject to change over time. If new rules or interpretations of existing rules require us to change our financial reporting, our reported results of operations and financial condition could be affected substantially, including requirements to restate historical financial reporting.

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Our business could suffer if we fail to attract and retain a highly skilled workforce

Our success depends, in large part, on our ability to attract and retain a highly skilled workforce. Competition for the best people in most activities we engage in can be intense. If we are unable to attract and retain such people, our business and financial results could be adversely impacted.

Other Factors

The above description of risk factors is not exhaustive. Other factors that could cause actual results to differ materially from historical results or those anticipated include, but are not limited to:

- **Unforeseen cash or capital requirements**
- **A reduction in government support of homeownership**
- **The ability of management to effectively implement the Company's strategies and business plans**
- **The occurrence of natural disasters or other events or circumstances that could impact our operations or could impact the level of claims in the Insurance Segment.**

Other risk factors are described elsewhere herein as well as in other reports and documents that we file with or furnish to the SEC. Other factors that could also cause results to differ from our expectations may not be described in any such report or document. Each of these factors could by itself, or together with one or more other factors, adversely affect our business, results of operations and/or financial condition.

Item 1B. Unresolved Staff Comments

None.

Item 2. Properties

We have 39 office locations that support our administrative activities. These locations are office buildings or space in office buildings and most are located in Southern California, Dallas-Fort Worth, Texas, Tampa, Florida and Chandler, Arizona. Of these locations, we own 22 properties and lease 17 properties, which are generally on one- to ten-year terms. These locations are primarily used in our Mortgage Banking and Banking Segments, with approximately 11 being used by our Capital Markets and Insurance Segments. We have two locations in the U.K.,

one in Costa Rica and four in India that are primarily used by our Global Operations Segment. We also have retail branch offices throughout the United States, which are generally leased on two- to five-year terms and which are used primarily by our Mortgage Banking Segment.

Item 3. Legal Proceedings

We are defendants in various legal proceedings involving matters generally incidental to our businesses.

In addition, various lawsuits alleging claims for derivative relief on behalf of the Company and securities, retirement plan, and other class action suits have recently been brought against us and certain of our current and former officers, directors and retirement plan administrators in either federal district court in Los Angeles, California, or state superior court in Los Angeles, or state court in Delaware. Among other things, these lawsuits allege breach of state law fiduciary duties and violation of the federal securities laws and the Employee Retirement Income Security Act of 1974 ("ERISA"). These cases allege, among other things, that we did not disclose complete and accurate information about our mortgage lending practices and financial condition. The shareholder derivative cases brought in federal court are brought on our behalf and do not seek recovery of damages from us. Two

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consolidated cases alleging claims for derivative relief on behalf of the Company are also pending in federal district court in Delaware, and allege, among other things, that certain of our proxy filings contain incorrect statements relating to the compensation of our Chief Executive Officer.

Various class action lawsuits relating to our proposed merger with Bank of America have been filed in the state courts of California and Delaware on behalf of a proposed class of Countrywide shareholders against the Company, our directors and Bank of America. The class action lawsuits filed in state court in California have been removed to federal court in Los Angeles. These lawsuits allege that the Company's directors breached their fiduciary duties to the Company's shareholders by entering into the merger agreement with Bank of America and that Bank of America allegedly aided and abetted those alleged breaches. Similarly, the plaintiffs in the shareholder derivative lawsuits brought in California state and federal court recently have amended their complaints to add similar class action allegations relating to the proposed merger with Bank of America.

Although we believe we have meritorious defenses to each of these actions and intend to defend them vigorously, it is difficult to predict the resulting

outcome of these proceedings, particularly where investigations and proceedings are in early stages. Given the inherent difficulty in predicting the outcome of our legal proceedings, we cannot estimate losses or ranges of losses for legal proceedings where there is only a reasonable possibility that a loss may be incurred, such as those discussed in the two immediately preceding paragraphs. We provide for potential losses that may arise out of legal proceedings to the extent such losses are deemed probable and can be estimated. Although the ultimate outcome of the legal proceedings discussed above cannot be ascertained at this time, we believe that any resulting liability will not materially affect our consolidated financial position; such resolution, however, could be material to our operating results for a particular future period depending upon the outcome of the proceedings and the operating results for a particular period. Our assessment is based, in part, on the existence of insurance coverage.

(1)

The carrying value of mortgage loans includes the outstanding principal balance of the loans, net of deferred origination costs and fees, any premiums or discounts and any basis adjustment resulting from hedge accounting.

Valuation of Loans Held for Sale

As a result of the market disruption in the latter part of 2007, the precise market value of our non-conforming prime, Prime Home Equity and Nonprime Loans was not readily determinable. These loans represent approximately 44% of mortgage loans originated or purchased for resale excluding loans secured by commercial real estate at December 31, 2007. In addition, we transferred approximately \$21.8 billion of mortgage loans from held for sale to held for investment in 2007. The loans transferred were primarily non-conforming prime, Prime Home Equity and Nonprime Loans and were transferred at the lower of cost or fair value, resulting in a write-down of such loans in the amount of \$1.1 billion.

The Company generally estimates the fair value of mortgage loans based on quoted market prices for securities backed by similar types of loans. If quoted market prices are not available, fair value is estimated based on other relevant factors, including dealer price quotations, prices available for similar instruments, and valuation models intended to approximate the amounts that would be received from a third party. We regularly compare the values developed from our valuation models to executed trades to assure that the valuations are reflective of actual sale prices. However, due to the illiquidity of the mortgage marketplace prevalent at December 31, 2007, which resulted in a lack of executed trades that could be used to assure that the valuations are reflective of fair value, it was necessary to look for

alternative sources of value, including the whole loan purchase market for similar loans, and to apply more judgment to the valuations of non-conforming prime, home equity and nonprime loans.

Based on our analysis of available market data for non agency-eligible loans during the fourth quarter of 2007, we determined that the whole loan purchase market was the most appropriate market for products traded in that market, including Prime Home Equity and prime non-conforming fixed-rate and hybrid ARM loans. For the portion of such loans that did not meet the specific loan level requirements of this market, we estimated the value of these loans using a valuation model. The key assumptions used in the valuation model are prepayment speeds, loss estimates and the discount rate. We develop prepayment and credit loss assumptions based on the historical performance of the loans in our servicing portfolio adjusted for the current economic environment as appropriate. The discount rate used in these valuations was derived from the whole loan purchase market, adjusted for our estimate of the required yield for these loans. We believe that such assumptions are consistent with assumptions that other major market participants use in determining such assets' fair values.

The remainder of our prime non-conforming loans, most significantly pay-option ARMs, and our Nonprime Loans was valued using required subordination levels combined with required yields available for securities backed by similar product type and credit grades where observable trades existed. We use a third party vendor model to determine the required subordination levels. We estimate required yields by reference to actual trades where available combined with adjustments to the observable yields based on historical spreads, adjusted for the illiquidity in the current environment. We believe that such assumptions are consistent with assumptions that other major market participants use in determining such loans' fair values.

Valuation of MSRs and Retained Interests

The precise market value of MSRs and retained interests cannot be readily determined because these assets are not actively traded in stand-alone markets. Considerable judgment is required to determine the fair values of our MSRs and retained interests, and the exercise of such judgment can significantly impact the Company's earnings. Small changes in the assumptions used to estimate the value of MSRs and retained interests can have a significant effect on our estimates of value. Similarly, relatively small changes in value of these assets can have a material effect on earnings for a particular period. As a result, senior financial management exercises extensive and active oversight of this process. The Company's Asset/Liability Committee, which is comprised of several of our senior financial executives, ultimately approves the valuation of MSRs and retained interests.

Our MSR valuation process combines the use of a discounted cash flow model and extensive analysis of current market data to arrive at an estimate of fair value at each balance sheet date. The cash flow assumptions and prepayment assumptions used in our discounted cash flow model are based on market factors and encompass the historical performance of our MSRs. We perform research and analysis to assure that the assumptions we use are consistent with assumptions and data used by market participants valuing similar MSRs. The key assumptions used in the valuation of MSRs include mortgage prepayment speeds and the discount rate (projected London Inter Bank Offering Rate ("LIBOR") plus option-adjusted spread). These variables can, and generally do, change from quarter to quarter as market conditions and projected interest rates change. The current market data utilized in the MSR valuation process and in the assessment of the reasonableness of our valuation is obtained from peer group MSR valuation surveys, MSR market trades, MSR broker valuations and prices of interest-only securities.

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The following table shows the key assumptions we used to determine the fair values of our MSRs at December 31, 2007 and the value sensitivity of our MSRs to changes in such assumptions.

MSRs

(dollar amounts in thousands)

Fair value of MSRs	\$	18,958,180		
Fair value as a percentage of MSR portfolio			1.40	%
Weighted-average service fee		0.35	%	
Multiple of net service fee		4.0		
Weighted-average life (in years)			6.4	
Weighted-average annual prepayment speed				17.9 %
Impact of 5% adverse change	\$	417,503		
Impact of 10% adverse change	\$	812,734		
Impact of 20% adverse change	\$	1,543,224		
Weighted-average OAS(1)		6.2	%	
Impact of 5% adverse change	\$	171,217		
Impact of 10% adverse change	\$	339,005		
Impact of 20% adverse change	\$	664,784		

(1)

Option-adjusted spread over LIBOR.

The yield implied in the market value of the MSRs was 10.9% at December 31, 2007.

For our retained interests, we also estimate fair value through the use of discounted cash flow models. The key assumptions used in the valuation of our retained interests include mortgage prepayment speeds, discount rates, and for retained interests containing credit risk, the net lifetime credit losses. For further discussion of credit risk, see section in this Report entitled Management's Discussion and Analysis of Financial Condition and Results of Operations—Credit Risk Retained in Loan Sales. We develop cash flow, prepayment and net lifetime credit loss assumptions based on the historical performance of the loans underlying our retained interests adjusted for the current economic environment as appropriate. We believe that such assumptions are consistent with assumptions that other major market participants use in determining such assets' fair values. The process for estimating lifetime credit losses used in the valuation of residual interests or the valuation of liabilities incurred is similar. See the section following entitled Valuation of Liabilities Incurred in Sale of Loans for additional discussion of estimated lifetime credit losses.

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The following table shows the key assumptions we used to determine the fair values of our retained interests at December 31, 2007, and the fair value sensitivity of our retained interests to changes in such assumptions.

Retained Interests

(dollar amounts in thousands)

Fair value of retained interests	\$	2,450,397		
Weighted-average life (in years)		6.4		
Weighted-average annual prepayment speed			21.0	%
Impact of 5% adverse change	\$	58,405		
Impact of 10% adverse change	\$	104,890		
Impact of 20% adverse change	\$	188,018		
Weighted-average annual discount rate			17.3	%
Impact of 5% adverse change	\$	47,641		
Impact of 10% adverse change	\$	92,599		
Impact of 20% adverse change	\$	174,999		
Weighted-average net lifetime credit losses			10.9	%
Impact of 5% adverse change	\$	55,679		
Impact of 10% adverse change	\$	103,286		
Impact of 20% adverse change	\$	182,934		

These sensitivities shown for MSRs and retained interests are solely for illustrative purposes and should be used with caution. This information is furnished to provide the reader with a basis for assessing the sensitivity of the values presented to changes in key assumptions. As the figures indicate, changes in fair value based on a given percentage variation in individual assumptions generally cannot be extrapolated. In addition, in the above tables, the effect of a variation in a particular assumption on the fair value of the MSRs or retained interests is calculated without changing any other assumption. In reality, changes in one factor may coincide with changes in another, which could compound or counteract the sensitivities.

Valuation of Liabilities Incurred in Sale of Loans

We incur liabilities in our loan sales and securitizations through representations and warranties we make or through other recourse provisions, such as corporate guarantees. An active market to transfer the liabilities relating to representations and warranties and corporate guarantees does not exist. Therefore, management must estimate the fair value of such liabilities. When credit risk is retained through liabilities incurred in the sale or securitization of loans, the lifetime credit losses are estimated as follows and are discounted at a risk-free rate of return.

- Lifetime credit losses are developed by estimating when and how many loans will default and multiplying that amount by how much of the loan will be uncollectible ("loss severity").

- Default rates are estimated using default curves used for pricing securities backed by the type of loans for which the obligation is being retained.

- Loss severities are estimated using multi-attribute severity models similar in nature to those used to calculate probability of default.

Our process for estimating lifetime credit losses benefits from the extensive history and experience we have developed from our mortgage loan servicing portfolio. This estimation process is also subject to the uncertainty that reliance on historical factors giving rise to losses and offsetting recoveries does not accurately reflect current conditions or predict future events. We address this risk by considering current economic and market conditions. Based on our assessments of current conditions, we make appropriate adjustments to our historically developed assumptions when necessary to adjust historical

factors to account for present conditions. The effect of changes in certain key assumptions on our estimated liability for representations and warranties and corporate guarantees is as follows:

Liability for Representations and Warranties and Corporate Guarantees

(in thousands)

Liability for representations and warranties and corporate guarantees at December 31, 2007 \$ 685,839

Impact of a change in default rates on the liability of a:

5% adverse change \$ 15,608

10% adverse change \$ 31,215

20% adverse change \$ 62,431

Impact of a change in loss severity on the liability of a:

5% adverse change \$ 20,340

10% adverse change \$ 40,680

20% adverse change \$ 81,360

Credit risk is an integral consideration in the valuation of retained interests. The impact of changes in credit loss assumptions on the value of retained interests is included in the section, Valuation of MSRs and Retained Interests.

Impairment Related to Future Funding Obligation under Rapid Amortization

Under the terms of the Company's home equity line of credit securitizations, Countrywide makes advances to borrowers when they request a subsequent draw on their line of credit and Countrywide is reimbursed for those advances from the cash flows in the securitization. This reimbursement normally occurs within a short period after the advance. However, in the event that loan losses requiring draws on monoline insurer's policies (which protect the bondholders in the securitization) exceed a specified threshold or duration, reimbursement of Countrywide's advances for subsequent draws occurs only after other parties in the securitization (including the senior bondholders and the monoline insurer) have received all of the cash flows to which they are entitled. This status, known as rapid amortization, has the effect of extending the time period for which the Company's advances are outstanding, and may result in Countrywide not receiving reimbursement for all of the funds advanced. During 2007, Countrywide recorded impairment losses of \$704.1 million related to estimated future draw obligations on the securitization deals that have entered or are expected to enter rapid amortization status.

We estimate the impairment losses related to future draw obligations through the use of discounted cash flow models. This estimate requires

projections of future expected funding obligations under a rapid amortization event compared to the expected fair value of the amount to be recovered as of the required funding date. The resulting amount is then discounted to a present value amount based on an appropriate risk-free interest rate to arrive at the amount of our funding obligation. The key assumptions used in our estimation process include mortgage prepayment speeds, additional draws on home equity lines of credit, discount rates, and net lifetime credit losses. As discussed in the preceding section entitled Valuation of MSRs and Retained Interests, we develop cash flow, prepayment and net lifetime credit loss assumptions based on the historical performance of the loans underlying our retained interests adjusted for the current economic environment, as appropriate, and our assumptions of additional draws on home equity lines of credit are developed in a similar manner. The process for estimating lifetime credit losses used in the valuation of residual interests, the valuation of liabilities incurred and our estimated impairment losses related to future draw obligations is similar. See the preceding section entitled Valuation of Liabilities Incurred in Sale of Loans for additional discussion of estimated lifetime credit losses.

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Allowance for Loan Losses

The allowance for loan losses is our best estimate of the credit losses incurred in our loan investment portfolio.

We continually assess the credit quality of our portfolios of loans held for investment to identify and provide for losses incurred. Once a loan is included in our investment portfolio, how we assess loan credit quality is based on whether the loan is part of a pool of homogeneous loans or is individually evaluated for impairment.

Homogeneous Loan Pools

Our mortgage loan portfolios are comprised primarily of large groups of homogeneous loans secured by residential real estate and made to consumers. We do not evaluate individual homogenous loans for impairment. We estimate the losses incurred in our homogeneous loan pools by estimating how many of the loans will default and how much of the loans' balances will be lost in the event of default.

We estimate how many of our homogeneous loans will default based on the loans' attributes (occupancy status, loan-to-value ratio,

borrower credit score, etc.) which is further broken down by present collection status (whether the loan is current, delinquent, in default or in bankruptcy). This estimate is based on our historical experience with our loan servicing portfolio. Our estimate is adjusted to reflect our assessment of environmental factors not yet reflected in the historical data underlying our loss estimates, such as trends in real estate values, local and national economic trends, changes in underwriting standards and changes in the regulatory environment.

The likelihood of default is based on analysis of movement of loans with the measured attributes from either current or each of the delinquency categories to default over a twelve-month period. Loans 90 or more days past due or those expected to migrate to 90 or more days past due within the twelve-month period are assigned a rate of default that measures the percentage of such loans that will default over their lives as we assume that the condition causing the ultimate default presently exists. We estimate how much of the defaulted loans' balances will be lost based on our estimate of the average loss severity for defaulted loans by type (Prime Mortgage, Nonprime Mortgage or Prime Home Equity Loans).

Loan losses are charged off against the allowance for loan losses when management believes the loss is confirmed. We make an initial assessment of whether a charge-off is required on our mortgage loans no later than the 180th day of delinquency.

Individually Evaluated Loans

On a regular basis, we individually evaluate loans in our warehouse and commercial lending portfolios for impairment based on borrower-provided financial information and our assessments of collateral. We have an internally-developed loan rating system for our warehouse lending and other commercial loans that is used to determine when an allowance is required for a loan. We charge off losses in individually evaluated loans when the loss is confirmed. The charge-off is based on our estimate of value of the collateral securing the loan. We develop an allowance for losses on warehouse lending loans for which specific losses have not been identified. This allowance is developed by applying credit loss factors applicable to the individual loan's assigned ratings.

We also individually evaluate mortgage loans in our portfolio of loans held for investment when we agree to modification of the loans' contractual terms that we make because we, for economic or other reasons related to the borrower's financial difficulties, grant a concession to the borrower that we would not otherwise consider. We classify these loans as troubled debt restructurings. Troubled debt restructurings may include changing repayment terms, reducing the stated interest rate, reducing the

loan's principal balance or accrued interest, or extending the maturity date of the loan. Upon completion of a troubled debt restructuring, we establish a valuation allowance to recognize the impairment of the loan.

The amount of the impairment valuation allowance is established based on whether the loan is collateral dependent and delinquent when the loan is modified:

- Impairment valuation allowances relating to loans that are collateral dependent and delinquent when they are modified are established with reference to the difference between the loan's carrying value and the estimated fair value of the collateral securing the loan reduced by the cost to sell the collateral;
- Impairment valuation allowances relating to loans that are not collateral dependent or are collateral dependent but not delinquent when they are modified are established with reference to the difference between the loan's carrying value and the present value of the estimated cash flows of the loan under its modified terms discounted at the loan's effective interest rate.

Loan losses are charged against the allowance when management believes the loss is confirmed. We make an initial assessment of whether a charge-off is required on our mortgage loans no later than the 180th day of delinquency.

Sensitivity of Estimates

Our allowance estimation process benefits from the extensive history and experience we have developed in our mortgage loan servicing activities. However, this process is subject to risks and uncertainties, including reliance on historical loss information that may not represent current conditions and the proper identification of factors giving rise to credit losses. For example, new products may have default rates and loss severities which differ from those products we have historically offered and upon which our estimates are based. We address this risk by actively monitoring the delinquency and default experience of our homogenous pools by considering current economic and market conditions. Based on our assessments of current conditions, we make appropriate adjustments to our historically developed assumptions when necessary to adjust historical factors to account for present conditions. Our senior management is actively involved in the review and approval of our allowance for loan losses.

Derivatives and Interest Rate Risk Management Activities

We use derivatives extensively in connection with our interest rate risk management activities. We record all derivative instruments at fair value.

We may qualify some of our interest rate risk management activities for hedge accounting. A primary requirement to qualify for hedge accounting is the documented expectation and demonstration, both initially and on an ongoing basis, that our interest rate risk management activity is highly effective. We use standard statistical measures to determine the effectiveness of our hedging activity. If we are unable to, or choose not to, qualify certain interest rate risk management activities for hedge accounting, then a possible earnings mismatch may be created because, unlike the derivative instruments, the change in fair value of the related asset or liability may not be reflected in current-period earnings. This issue is potentially most significant with our inventory of loans held for sale, which is required to be carried at the lower of amortized cost or estimated fair value and our debt instruments and other liabilities that are carried at historical cost. With the market disruption in late 2007, we were not able to qualify a significant portion of our non-conforming Prime Mortgage Loan inventory for hedge accounting.

In connection with our mortgage loan origination activities, we issue commitments to make or purchase loans (also referred to as interest rate lock commitments or "IRLCs"). An IRLC guarantees a loan's terms, subject to credit approval, for a period typically between seven and 75 days. The majority of our IRLCs qualify as derivative instruments and, therefore, are required to be recorded at fair value with changes in fair value reflected in current-period earnings. However, there is no active market for

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IRLCs that can be used to determine their fair value and as a result we utilize an alternative method for estimating the fair value of our IRLCs.

We estimate the fair value of an IRLC based on the change in estimated fair value of the underlying mortgage loan, adjusted for the probability that the loan will fund within the terms of the IRLC. The change in fair value of the underlying mortgage loan is measured from the date we issue the commitment. Therefore, at the time of issuance the estimated fair value of an IRLC is zero. After issuance, the value of an IRLC can be either positive or negative, depending on the change in value of the underlying mortgage loan. The Company generally estimates the fair value of the underlying loan based on quoted market prices for securities backed by similar types of loans. If quoted market prices are not available, fair value is estimated based on other relevant factors, including dealer price quotations, prices available for similar instruments, and valuation models

intended to approximate the amounts that would be received from a third party. We regularly compare the values developed from our valuation models to executed trades to assure that the valuations are reflective of actual sale prices. However, due to the illiquidity of the mortgage marketplace prevalent at December 31, 2007 and a lack of executed trades that could be used to assure that the valuations are reflective of fair value, it was necessary to look for alternative sources of value, including the whole loan purchase market for similar loans, and to apply more judgment to the valuations of non-conforming prime, home equity and nonprime loans.

The primary factor influencing the probability that the loan will fund within the terms of the IRLC is the change, if any, in mortgage rates subsequent to the commitment date. In general, the probability of funding increases if mortgage rates rise and decreases if mortgage rates fall. This is due primarily to the relative attractiveness of current mortgage rates compared to the applicant's committed rate. The probability that a loan will fund within the terms of the IRLC also is influenced by the source of the application, age of the application, purpose for the loan (purchase or refinance) and the application approval rate. We have developed closing ratio estimates using empirical data that take into account all of these variables, as well as renegotiations of rate and point commitments that tend to occur when mortgage rates fall. These closing ratio estimates are used to calculate the aggregate balance of loans that we expect to fund within the terms of the IRLCs.

During 2006, the Capital Markets Segment generated revenues totaling \$394.6 million from its conduit activities, primarily managing the acquisition and sale or securitization of loans on behalf of the Mortgage Banking Segment. Conduit revenues for the reporting period increased 31% in comparison to 2005 because of an increase in volume and margins of adjustable-rate products offset by a decline in margins on nonprime products.

Underwriting revenues increased \$22.9 million over the prior year because of increased securitization volume, primarily adjustable-rate products.

Securities trading revenue increased 23% over the prior year due to an increase in trading margins and volume, partially offset by lower net interest income due to a tightening of net spreads resulting from the flattening and inversion of the yield curve.

During 2006, the commercial real estate finance activities of the Capital Markets Segment generated revenues totaling \$104.0 million primarily from sales of Commercial Real Estate Loans compared to \$67.3 million in 2005. The increase in revenue was due to an increase in the volume of loans sold and an increase in net interest income related to a higher balance in loan inventory partially offset by a decrease in margins resulting from price competition and a change in the mix of loans sold.

Liquidity and Capital Resources

We meet our financing requirements using a combination of debt and equity capital. Our short-term financing needs arise primarily from our holding of mortgage loans pending sale, the trading activities of our broker-dealer and our warehouse lending business. Our long-term financing needs arise primarily from our investments in our mortgage loan portfolio, MSRs and retained interests and the financial instruments acquired to manage the interest rate risk associated with those investments. The structure and mix of our debt and equity capital are primarily driven by our strategic objectives but are also influenced by regulatory and credit rating agency requirements as well as capital markets conditions. These factors affect the type of financing we are able to obtain and the rate at which we are able to grow.

Our primary sources of debt include deposits taken by our Bank, FHLB advances, the public corporate debt markets, unsecured bank lines, repurchase agreements and the secondary mortgage market. Our primary source of equity capital is retained earnings. From time to time, we may issue common or preferred stock, subordinated debt or other high-equity content securities as a means of increasing our capital base and supporting our growth. To this end, in the third quarter we issued 20,000 shares of 7.25% Series B non-voting convertible preferred stock, par value \$0.05 per share, for an aggregate price of \$2.0 billion. The preferred stock ranks senior to our common stock with respect to payment of dividends and distribution upon liquidation. We also have \$2.2 billion outstanding in junior subordinated debentures that receive varying degrees of "equity treatment" from rating agencies, bank lenders and regulators. In addition, we have a \$5.9 billion deferred tax liability related to our MSRs that would offset a portion of any realized loss in the value of our MSRs, and which is generally offset against our MSRs in determining our capital requirements.

In connection with a share repurchase program authorized by our Board of Directors, we entered into an agreement to purchase 60.1 million shares of our outstanding common stock for an aggregate purchase price of \$2.4 billion under an accelerated share repurchase program. The transaction was subject to a market price adjustment payment based on the actual volume-weighted average price of our common stock during the repurchase period. The price adjustment payment was settled, at our election by the delivery to us of an additional 124,512 shares of our common stock in the second quarter of 2007.

Liquidity Management

Liquidity risk is the risk that we will be unable to meet our obligations as they come due because of an inability to liquidate assets at prices approximating book value or obtain adequate funding because of inadequate market depth or market disruptions. We manage our liquidity on a legal entity basis, as appropriate, due to debt covenants and regulatory requirements.

We have developed a comprehensive Liquidity Management Plan ("LMP") to moderate liquidity risk with the goal of maintaining adequate, appropriate and cost-effective sources of liquidity under all market conditions. A key element of the LMP is the requirement that we maintain sufficient sources of contingent liquidity to fund our business in the event of market disruptions of varying severities and duration. Contingent liquidity sources include credit facilities or financing programs under which our creditors are committed to fund in a stressed environment or are otherwise deemed to be reliable. They also include highly liquid, unencumbered assets that can be converted to cash, via sale or financing, within 30 days.

Another key element of the LMP is to finance our assets in a manner consistent with their liquidity profile. Liquid assets are those that can be liquidated within 30 days under all market conditions by sale (at prices no less than values reported on our balance sheet prepared in accordance with generally accepted accounting principles) or are readily able to be financed. These assets primarily consist of mortgage loans held for sale, trading securities, available-for-sale securities and warehouse advance lines. Liquid assets are financed using a combination of committed warehouse financing

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programs including unsecured and secured revolving lines of credit, federal funds, repurchase agreements and short-term deposits.

Less liquid assets are those that are not readily saleable into active markets or, as in the case of our investments in mortgage loans, are not intended to be

sold. These assets primarily consist of mortgage loans held for investment, MSRs and retained interests. Less liquid assets are financed with long-term capital, which we define for this purpose as equity and debt, including long-term deposits, with a maturity greater than six months.

We regularly forecast our potential operating cash needs over a rolling twelve-month horizon, taking into account, among other things, loan commitments, debt maturities and potential peak balance sheet levels under several interest rate scenarios. We also forecast our potential operating cash needs in various stress scenarios to determine our contingent liquidity needs. Based on these forecasts, we size our existing financing programs and, if necessary, establish new ones to meet expected future operating cash requirements. The forecasts are also used to size our contingent liquidity sources, which are credit facilities or financing programs under which our creditors are committed to fund or depositors are expected to participate.

Our ability to finance our operations is subject to the risk that expected sources of financing become unavailable to us because of market events or of changing perceptions of Countrywide's creditworthiness. For example, in the event our credit ratings were to drop below "investment grade," our access to the public corporate debt markets could be severely limited and our ability to attract and retain commercial deposits and arrange other sources of financing would become constrained.

Liquidity risk was highlighted during the second half of 2007, when the non-agency segments of the secondary mortgage market were severely restricted by illiquidity driven by wider credit spreads. The commercial paper and repurchase agreement segments of the public corporate debt markets were also severely restricted, particularly for mortgage companies and other financial institutions. These conditions have not abated through the date of this Report.

In response to severe disruption in the secondary mortgage market and short-term and unsecured debt markets in the second half of 2007, we took the following actions to enhance our liquidity and capital position:

- Accelerated the integration of our mortgage banking activities into our bank subsidiary which has access to stable, non-capital markets based funding**
- Significantly changed our underwriting standards to focus the majority of our loan production on loans that are available for direct sale to or securitization into programs sponsored by the government-sponsored agencies**
-

Modified our funding structure by significantly reducing our reliance on the public debt and non-agency secondary mortgage markets and instead relied on our reliable contingent liquidity sources to fund our business, including drawing the full \$11.5 billion amount of our committed revolving credit facilities established to provide liquidity in the event of a disruption in the commercial paper market.

As a result of these changes, our funding structure has evolved such that it more closely resembles that of a thrift holding company rather than that of a finance company with a banking subsidiary.

We believe that we have adequate liquidity to meet our obligations, including—but not limited to—our commitments to lend, maturities of debt and obligations to fund rapid amortization events. At December 31, 2007, we estimate that we have available liquidity totaling \$36.6 billion. We classify a facility as reliable when the facility is provided by a government-sponsored enterprise or when it is contractually committed to us and we have paid a commitment fee in exchange for the facility. While current market conditions present challenges to us, the funding structure that we have migrated toward has allowed us to change our sources of funding away from those that have higher refinancing risk toward more stable and reliable sources such as deposits and FHLB advances. We supplement these

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sources with committed secured and unsecured revolving credit facilities provided by highly rated banks.

Deposit Liabilities

We offer both retail and commercial deposit accounts which provide an important source of liquidity to us. These deposits are sourced through our banking centers, call centers, website and through deposit brokers and our in-house sales force. To enhance our deposit gathering activities following the disruption in the public debt and secondary mortgage markets, we opened 95 new banking centers during the year ended December 31, 2007.

As of December 31, 2007, our deposit balances were \$60.2 billion, \$12.6 billion of which were custodial funds that relate to our loan servicing portfolio.

Federal Home Loan Bank Advances

Our Bank is a member of the FHLB of Atlanta and is able to participate in certain member financing programs. Under these programs, we typically pledge a security interest in certain mortgage loans to the FHLB in exchange for financing. The amount the FHLB advances against the collateral varies depending on the

lien status of the mortgages securing the advance. The FHLB also requires that we purchase a certain percentage of its stock for every dollar we borrow. Our current stock purchase requirement is equal to 0.2% of the Bank's assets up to a maximum of \$25.0 million, plus 4.5% of total advances we have outstanding with the FHLB.

Our FHLB advances generally have maturities of 1-5 years, consistent with the weighted average expected life of our mortgage loans held for investment. Our access to such financing is currently limited to no more than 50% of our Bank's ending assets for the prior month. The FHLB's financing support is uncommitted and requests for additional advances are evaluated at the time they are received. Our funding capacity is also uncommitted and may be reduced to less than 50% of the Bank's ending assets of the prior month at the FHLB's discretion. While we normally consider uncommitted financing programs to be less reliable sources of funding, given the FHLB's status as a government sponsored entity and its mandate to provide a stable source of funds to support the residential mortgage market, we classify FHLB advances as a reliable source of contingent liquidity. As of December 31, 2007, we believe that we were in compliance with the FHLB stock purchase and collateral requirements.

Unsecured Public Corporate Debt Markets

The public corporate debt markets have historically been a key source of financing for us, due to their efficiency and low cost. We have accessed these markets by issuing unsecured commercial paper and unsecured medium-term notes. We also have issued unsecured convertible debt, subordinated debt and junior subordinated debentures. At December 31, 2007, we had a total of \$26.3 billion in public corporate debt outstanding.

Following the disruptions in the public debt and secondary mortgage markets and our related liquidity constraints in August of 2007, the major credit agencies downgraded our debt ratings. While we have maintained investment grade ratings, at our current short-term ratings the public corporate debt markets are no longer a practical source of short-term inventory financing. Our access to the public debt markets has also been restricted by the substantial increase in credit spreads for all participants in the U.S. mortgage market.

In the event of a ratings downgrade below investment grade, the cost of access to the unsecured public corporate debt markets would increase to levels that would make this source of funds unattractive to us if and when the current disruption abates. Furthermore, we would likely be unable to retain all of our existing bank credit commitments beyond the then-existing maturity dates. Consequently, our relative cost of financing would rise significantly and we would find ourselves at a competitive disadvantage in pursuing some of our capital-intensive activities, such as our ongoing investment in our portfolio of mortgage loans held for investment, MSRs and retained interests. Investment grade ratings are also

important to counterparties with which we engage in normal-course trading and financing activities and our ratings affect the availability and cost of credit extensions for such activities, as well as impacting our retention of escrow and commercial deposits.

Unsecured Commercial Paper

Due to current market conditions and our current short-term credit ratings, the unsecured commercial paper market is not currently a viable source of funding for us. As of December 31, 2007, we had no commercial paper outstanding. For the year ended December 31, 2007, our average unsecured commercial paper outstanding totaled \$4.8 billion. For the year ended December 31, 2006, our average unsecured commercial paper outstanding totaled \$6.8 billion.

Asset-Backed Commercial Paper Market

From early 2003 through August 2007, the asset-backed commercial paper market was one of our most significant sources of funding. We formed two special purpose entities (Park Granada and Park Sienna) to finance certain of our mortgage loans held for sale. The entities issued commercial paper in the form of extendible maturity short-term secured liquidity notes ("SLNs"). In the quarter ended September 30, 2007, liquidity in the extendible SLN segment of the commercial paper market became so severely constrained that it is no longer a viable market. We repaid all remaining outstanding SLNs effective October 31, 2007 and formally terminated both funding programs on December 20, 2007.

Unsecured Revolving Lines of Credit

As of December 31, 2007, we had unsecured credit agreements (revolving credit facilities) with a group of commercial banks permitting us to borrow a maximum total amount of \$11.5 billion with various maturities through 2011. At December 31, 2007, we had fully utilized these facilities. No amount was outstanding under these facilities at December 31, 2006.

The terms of the credit agreements require us to maintain at all times a consolidated net worth (as calculated in conformance with GAAP) of \$7.7 billion. Our actual consolidated net worth as of December 31, 2007 was \$14.7 billion. Our failure to comply with this requirement could result in termination of the facilities by the lending banks.

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Secured Revolving Lines of Credit

We have formed a special purpose entity (Park Monaco) to finance inventory with funding provided by a group of commercial bank-sponsored conduits that are financed through the issuance of asset-backed commercial paper. The entity incurs interest based on prevailing money market rates approximating the cost of asset-backed commercial paper. At December 31, 2007, we had aggregate commitments from the banks that sponsor the conduits to provide alternative financing in the event that their respective conduits were unable to issue asset-backed commercial paper totaling \$10.4 billion and had \$1.5 billion in outstanding borrowings, secured by \$0.3 billion of mortgage loans held for sale and \$1.9 billion of mortgage loans held for investment. For the year ended December 31, 2007, the average borrowings under this facility totaled \$1.5 billion and the weighted-average interest rate was 5.60%. At December 31, 2007, the weighted-average interest rate was 5.47%.

For the year ended December 31, 2006, the average borrowings under this facility totaled \$1.0 billion and the weighted-average interest rate was 4.81%. At December 31, 2006, the weighted-average interest rate was 5.35%.

In 2006, we entered into a \$4.0 billion master trust facility to finance Countrywide Warehouse Lending ("CWL") receivables backed by mortgage loans through the sale of such receivables to a multi-asset conduit finance company financed by issuing extendible maturity asset-backed commercial paper. Following the disruption in the extendible maturity asset-backed commercial paper segment of the public corporate debt markets, the facility was no longer viable. We terminated this facility on October 10, 2007.

Repurchase Agreements

We also use short-term repurchase agreements as a means of financing securities and mortgage loans pending sale. To ensure continued access to this segment of the capital markets, we have arranged to have \$12.5 billion of repurchase facilities available to us on a committed basis through various maturities in 2008.

Secondary Mortgage Market

Historically, we have relied substantially on the secondary mortgage market as a source of long-term capital to support our mortgage banking operations. Our ability to access that market is dependent on investor demand for the types of mortgage-backed securities we produce. In 2007, we saw an increase in investor required yields, first for nonprime loans or securities followed by Prime Home Equity Loans and then non-conforming loans, together with a lessening in the liquidity of such loans and securities caused by reduced investor demand. In the second half of the year, the secondary mortgage market for nonagency loans was virtually illiquid. In addition, certain credit rating agencies have downgraded their securitization ratings of large numbers of mortgage-backed securities. These

factors have combined to severely impact demand for a large portion of the products we have historically produced. In response to these developments, we have tightened our underwriting and program guidelines, including reductions in the availability of reduced documentation loans and loans on investor-owned properties and a reduction in the maximum loan-to-value or combined loan-to-value ratios. The impact of these changes was most significant to Nonprime Mortgage, Prime Home Equity and non-conforming Prime Mortgage Loans, which significantly reduced our production of non agency-eligible loans and thereby reduced our reliance on the secondary mortgage market as a source of financing.

As a result of the changes to our underwriting and program guidelines, the vast majority of the mortgage loans that we now originate are eligible for sale directly to Fannie Mae, Freddie Mac or Ginnie Mae or for securitization into MBS guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae (collectively, "Agency MBS"). Before the disruption in the secondary mortgage market, we also issued non-Agency or "private-label" MBS and ABS. Private-label MBS and ABS are registered with the SEC and have separate credit ratings. Private-label MBS and ABS generally require some form of credit enhancement, such as over-collateralization, senior-subordinated structures, primary mortgage insurance, Countrywide guarantees and/or private surety guarantees.

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Capital Management

Our capital management framework is designed to ensure that the risk-taking activities by our business are supported by an adequate capital base, consistent with approved investment guidelines and risk tolerances. Our capital adequacy monitoring gives consideration to regulatory and rating agency requirements and to our estimated economic capital requirements.

Economic Capital

We use economic capital concepts for assessing safety and soundness of the entire Company. We are integrating economic capital consumption into business segment performance assessments. Business segment economic capital calculations ensure that the capital allocations are consistent, elicit disciplined risk taking, and facilitate business segment performance comparisons by senior management.

We define economic capital as the amount of capital required to absorb unexpected losses given our risk profile and risk management strategies. We estimate unexpected losses based on the level of losses that we are likely to incur in severe scenarios. We establish the severity of the scenarios based on our risk tolerances and target credit ratings for public debt market access ("debt market access standards").

For unhedged risks, our capital adequacy is assessed at the consolidated level. We continue to refine our economic capital calculations and improve our estimates of required capital. We emphasize a comprehensive measurement of company-wide hedged and un-hedged risks within the context of maintaining approved debt market access targets in our capital adequacy measurement processes. For 2008, our economic capital estimates were adjusted to reflect changes in business practices due to changing market conditions.

A significant proportion of our risk management strategies and risk evaluation relies on internally developed and externally procured models. Further, in certain areas of our risk management we use models to establish strategies aimed at eliminating much of the risk due to fluctuations in market factors. Thus we have significant exposure to the risk that our models may be inaccurate and therefore expose us to loss. We manage model risk throughout Countrywide using a variety of techniques including: independent reviews of model documentation and appropriateness at the time of model development and introduction; ongoing model monitoring through back testing and validation, and benchmarking to peer models. Ongoing model performance results are reviewed at governance forums attended by model developers and users of the models. At present, we assess model risk exposure using scenario analysis.

Our estimates of economic capital rely on a combination of internally developed risk measurement methods, external models and benchmarks. We measure and hold economic capital for the following primary risks: credit, market, operational and insurance. In addition, we explore capital sensitivity to modeling and economic uncertainty via scenario analysis.

Credit risk: This is risk of loss due to borrower defaults or declines in asset values due to changes in credit conditions. Credit capital is calculated at debt market access standards for the unexpected losses in excess of those we have provided for in our asset valuations and reserve calculations. Our credit risk loss estimation process considers the seasoning profile of our assets with credit risk to ensure capital sufficiency through the business cycle. Estimates of credit capital are developed separately for retail mortgage, commercial mortgage and counterparty exposures. The amounts outstanding at the time of default (exposures at default) are constructed using a combination of historical data and forward simulation techniques and include the use of rating agency models that are broadly used in the mortgage-backed securities market. Once the economic capital amounts are determined they are adjusted for the risk transfer benefits associated with mortgage pool insurance policies that the Company purchases on certain loan portfolios. These pool insurance policies absorb a

certain portion of loan losses according to the terms of the specific policy. We estimate our credit risk as follows:

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Retail credit risk: We base our estimates of credit risk on projections using internal data and external models. We estimate subordination levels on the credit portfolio using rating agency models and review subordination levels on market transactions to determine the required capital. We also review loss development under various stress scenarios to ensure the adequacy of the capital requirement.

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Commercial credit risk: We base our estimates of credit risk on internal data and benchmarks derived from market transactions.

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Counterparty credit risk: For non-derivative counterparty exposures, we base our estimates of credit risk on our internal risk evaluation assignments and capital assessments by type of exposure mapped to rating agency-style scales. We estimate our capital requirement for derivative counterparty exposures using a similar process as well as by calculating current and potential exposure estimates using projected movements in underlying market rates.

Market risk: Market risk is the risk of loss in asset value due to variations in underlying market variables such as the yield curve and market prices, which for us is predominately interest rate driven. We assess capital separately for our trading financial instruments, which includes the activities of Capital Markets, and the non-trading financial instruments by computing estimates of market value loss over a one-year horizon at a confidence level consistent with our debt market access standards. Our assessments take into consideration the probabilities of large movements in underlying driver variables over the one year horizon. Our estimates of value loss are calculated using internally developed and externally sourced risk measurement technologies. Risk measurement focuses on estimating the extent of un-hedged risks. Market value changes are also developed using plausible but unlikely scenarios and these scenarios are given consideration in the assessment of our market risk capital requirements.

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Trading financial instruments: We use a value-at-risk measurement to estimate the potential loss in market value of an asset to a 99% confidence level. This estimate is scaled to reflect exposure over a one year period. Our value-at-risk measure facilitates comparisons of our market risk exposure estimates and our daily trading results over time. We use back-testing in our trading unit to verify the predictive power of our value-at-risk calculations. In the back-testing procedures, we compare actual profits and losses against losses indicated by the estimates from our value-at-risk model.

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Non-trading financial instruments: We compute the aggregate market risk exposure for our non-trading financial instruments by developing a detailed representation of our positions, and identification and modeling of the driver variables. We calculate market risk capital for the aggregated non-trading book by computing the equivalent of a one-year value-at-risk loss estimate consistent with debt market access standards. For risk management purposes, value-at-risk loss measurements are computed over monthly horizons and a market risk profile consistent with desired debt market access standards is maintained. We look at the sensitivity of the non-trading financial instruments on a variety of parallel and historical scenarios to assess the vulnerabilities in the risk profile.

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Stress Testing: While our value-at-risk estimate supplies forecasts for potentially large losses under normal market conditions, we also perform stress tests in which we value the portfolios under stylized economic scenarios of the driver risk variables outside the value-at-risk models. We use market risk information provided by the stress scenarios to adjust our economic capital requirements as needed. We develop the stress scenarios using historical information and management judgment.

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Operational risk: Operational risk is the risk of loss due to inadequate or failed processes or systems. We have begun the process of collecting loss data for the development of our economic capital requirement, which is not yet complete. Until we complete the development of our operational loss estimation models, we are basing our estimates of required capital on an approach permitted by the international Basel II accord.

Insurance risk: Insurance risk arises from unexpectedly high payouts on insurance liabilities. Our insurance operations are exposed to a variety of risks including operational, market, counterparty and catastrophic risks. These risks arise due to our underwriting activities, portfolio investments, reinsurance transfers and exposure to catastrophic natural disasters. The bulk of the capital allocated to the insurance business is to cover catastrophic risks, the largest component of which is hurricane risk. Our insurance operations partially manage the risks by reinsuring portions of the risks. The reinsurance activities are considered while assessing allocated capital requirements.

Cash Flow

Year Ended December 31, 2007 compared to 2006

Cash used by operating activities was \$1.5 billion for 2007, compared to \$3.1 billion for 2006. Cash used by operating activities includes the cash used for the origination and purchase of mortgage loans held for sale and the proceeds from the sales and principal repayments of such mortgages. We generally retain servicing rights and may retain other interests when these loans are sold. The recognition of the amounts retained is a non-cash investing activity. See Note 22 —Supplemental Cash Flow Information in the financial statement section of this Report. In 2007, funds used to originate and purchase mortgage loans exceeded proceeds from the sales of mortgage loans by \$5.2 billion, which

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resulted in cash used by operating activities. In 2006, proceeds from the sales and principal repayments of mortgage loans exceeded funds used to originate and purchase mortgage loans by \$5.7 billion. This decrease in cash used by operations was offset by an \$11.4 billion increase in cash used to settle trading securities, which resulted in cash used by operating activities.

Net cash provided by investing activities was \$7.4 billion for 2007, compared to cash used by investing activities of \$14.3 billion for 2006. The increase in net cash provided by investing activities was attributable to a \$12.1 billion increase in net repayment of loans held for investment, combined with a \$21.6 billion decrease in securities purchased under agreements to resell, securities borrowed, and federal funds sold, partially offset by a \$12.2 billion increase in net additions to investments in other financial instruments.

Net cash provided by financing activities for 2007 totaled \$1.4 billion, compared to \$17.7 billion for 2006. The \$1.4 billion included drawing the full \$11.5 billion of available backup credit lines we obtained to provide liquidity as a result of disruptions in the commercial paper markets. During 2007, deposit liabilities increased \$4.6 billion, compared to an increase of \$16.1 billion in the prior period. In 2007, there was a \$39.7 billion decrease in cash provided by short-term borrowings, including securities sold under agreements to repurchase. Partially offsetting these decreases, long-term debt increased \$33.1 billion compared to an increase in long-term debt of \$0.6 billion in 2006, and during 2007, \$2 billion of preferred stock was issued.

Year Ended December 31, 2006 compared to 2005

Cash used by operating activities was \$3.1 billion for 2006, compared to \$11.2 billion for 2005. Cash used by operating activities includes the cash used for the origination and purchase of mortgage loans held for sale and the proceeds from the sales and principal repayments of such mortgages. In 2006, proceeds from the sales of mortgage loans exceeded funds used to originate and purchase mortgage loans by \$5.7 billion. This decrease in cash used by operations was offset by an \$11.4 billion increase in cash used to settle trading

securities, which resulted in cash used by operating activities. In 2005, funds used to originate and purchase mortgage loans exceeded proceeds from the sales of mortgage loans by \$11.2 billion, which resulted in cash used by operating activities.

Net cash used by investing activities was \$14.3 billion for 2006, compared to cash used by investing activities of \$42.3 billion for 2005. The decrease in net cash used in investing activities was attributable to a \$24.2 billion decrease in cash used to fund loans held for investment combined with a \$5.9 billion decrease in securities purchased under agreements to resell, securities borrowed, and federal funds sold.

Net cash provided by financing activities for 2006 totaled \$17.7 billion, compared to \$53.8 billion for 2005. The decrease in cash provided by financing activities was comprised of an \$18.6 billion net decrease in short-term borrowings, including securities sold under agreements to repurchase. Also contributing to the decline in net cash provided by financing activities was the amount of net additions to long-term debt. In 2005, long-term debt increased \$13.4 billion compared to an increase in long-term debt of \$0.6 billion in 2006.

Credit Risk Management

A significant risk for the Company is credit risk, which is the risk that a borrower will not repay the loan's balance as agreed and the risk that the proceeds from liquidation of the collateral securing the loan will not be adequate to repay the loan's balance. We also have credit risk that a counterparty will not perform in accordance with contractual terms and we will not realize uncollateralized gains that have been recorded. Credit risk arises in many of our business activities including lending activities, mortgage banking, securities trading activities and interest rate risk management activities. We balance the level of credit risk against our expected returns in determining the level of credit risk we retain.

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Management's Credit Committee, comprised of our Chief Risk Officer and other senior executives, has primary responsibility for setting strategies to achieve our credit risk goals and objectives. Those goals and objectives are documented in our Credit Policy.

Mortgage Credit Risk

Overview

In our mortgage lending activities, we manage our credit risk through credit policy, underwriting, quality control and surveillance activities as well as through use of credit enhancements, especially nonrecourse and limited recourse securitizations. We also employ proactive collection and loss mitigation efforts.

Loan Quality

Our credit policy establishes standards for the determination of acceptable credit risks. Those standards encompass borrower and collateral quality, underwriting guidelines and loan origination standards and procedures.

Borrower quality includes consideration of the borrower's credit and capacity to pay. We assess credit and capacity to pay through the use of credit scores, application of a mortgage scorecard, and manual or automated underwriting.

We evaluate collateral quality through the use of appraisals, property inspections and/or automated valuation models.

Underwriting guidelines facilitate the uniform application of underwriting standards to all borrowers regardless of race, religion or ethnic background. Uniformity in underwriting also provides a means for measuring and managing credit risk.

Our conventional conforming underwriting guidelines are based on the guidelines accepted by Fannie Mae and Freddie Mac. Our underwriting guidelines for FHA-insured and VA-guaranteed mortgage loans comply with guidelines established by the U.S. Department of Housing and Urban Development or the Veterans Administration.

Our underwriting guidelines for non-conforming Prime Mortgage Loans, Prime Home Equity Loans, and Nonprime Mortgage Loans have historically been designed so that these loans are salable in the secondary mortgage market. We developed these guidelines to meet the requirements of private investors, rating agencies and third-party credit enhancement providers. However, during the latter part of 2007, the combination of a weakening housing market and concern over certain industry-wide product offerings negatively impacted the expectations of future performance and the value investors assign to these mortgage loans and securities. Because of this, investor demand for non-agency mortgage-backed securities abruptly declined. Mortgage lenders, including Countrywide, responded by tightening their loan program and underwriting standards. Specifically, we have tightened our underwriting standards during 2007 to reduce the availability of loans to borrowers with lower credit scores, reduced documentation loans and loans on investor-owned properties and to reduce the maximum loan-to-value or combined loan-to-value ratio.

These standards and procedures include underwriter qualifications and authority levels, appraisal review requirements, fraud controls, funds disbursement controls, training of our employees and ongoing review of their work. We help to ensure that our origination standards are met by employing accomplished and seasoned management, underwriters and processors and through the extensive use of technology. We also employ proprietary underwriting systems in our loan origination process that improve the consistency of underwriting standards, assess collateral adequacy and help to prevent fraud, while at the same time increasing productivity.

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We supplement our loan origination standards and procedures with a post-funding quality control process. Our Quality Control Department is responsible for completing loan audits that may consist of a re-verification of loan documentation, an underwriting and appraisal review, and, if necessary, a fraud investigation. We also employ a pre-and post-funding proprietary loan performance evaluation system. This system helps to identify fraud and poor performance of individuals and business entities associated with the origination of our loans. The combination of this system and our audit results allows us to evaluate and measure adherence to prescribed underwriting guidelines and compliance with laws and regulations.

Lending Activities—Sale of Loans

A significant amount of the mortgage loans that we originate or purchase in our Mortgage Banking and Capital Markets Segments are sold into the secondary mortgage markets primarily in the form of securities, and to a lesser extent as whole loans. When we sell or securitize our loans we retain varying degrees of credit risk from the continuing investments and/or obligations we retain either in the form of credit-enhancing subordinated interests, corporate guarantees or representations and warranties issued when we sell or securitize loans and through the structure of certain of our securitizations.

Our Prime Mortgage Loans generally are sold on a non-recourse basis, while Prime Home Equity and Nonprime Mortgage Loans generally are sold with limited recourse for credit losses. Almost all of our loan sale transactions retain credit risk in the form of the representations and warranties we provide and that are customary for loan sales transactions.

Securitization

As described below, the degree to which we retain credit risk on loans that we sell through securitizations depends on the structure of the securitization. Our Prime Mortgage Loans generally are securitized on a non-recourse basis, while

Prime Home Equity and Nonprime Mortgage Loans generally are securitized with limited recourse for credit losses.

Conforming Conventional Loans

We generally pool conforming conventional loans into MBS guaranteed by Fannie Mae or Freddie Mac. Subject to certain representations and warranties we make, nearly all conventional loans securitized through Fannie Mae or Freddie Mac are sold on a non-recourse basis. We pay guarantee fees to these agencies to compensate them for their assumption of credit risk on the securitized loans.

FHA-Insured and VA-Guaranteed Loans

FHA-insured and VA-guaranteed mortgage loans are generally pooled into MBS guaranteed by the Government National Mortgage Association ("Ginnie Mae"). We are insured against foreclosure loss by the FHA or partially guaranteed against foreclosure loss by the VA. Fees charged by the FHA and VA for assuming such risks are paid directly by the borrower. We are exposed to credit losses on defaulted VA loans to the extent that the partial guarantee provided by the VA is inadequate to cover the total credit losses incurred. We pay guarantee fees to Ginnie Mae for Ginnie Mae's guarantee on its securities of timely payment of principal and interest. Ginnie Mae does not assume mortgage credit risk associated with the loans securitized under its program.

Non-conforming Conventional Prime Loans

Non-conforming conventional prime mortgage loans are generally pooled into "private-label" MBS. Such securitizations involve some form of credit enhancement such as senior/subordinated structures, including residual interests, overcollateralization or mortgage pool insurance. Securitizations that involve senior/subordinated structures contain securities that assume varying levels of credit risk.

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Holders of subordinated securities are compensated for the credit risk assumed through a higher yield. When we sell the subordinated securities created in connection with these securitizations we transfer the related credit risk subject to representations and warranties we make when the loans are securitized. When we retain the subordinated securities, generally the residual interests, we are in the first loss position; however, the recourse for credit losses is limited to the carrying value of the residual securities.

In some cases a portion of the retained residual interest is deposited into a net interest margin ("NIM") security, which enables us to sell some of the future residual cash flows and retain a smaller residual interest ("Back-end NIM

Residual"). The holder of the Back-end NIM Residual is in the first loss position; however, the recourse for credit losses is limited to the carrying value of the Back-end NIM residual.

Prime Home Equity Loans

Prime Home Equity Loans are generally pooled into private-label asset-backed securities. We generally securitize these loans with limited recourse for credit losses through retention of residual interests and other subordinated interests, such as transferor's interests. These securities generally contain credit enhancement in the form of over-collateralization and insurance provided by a third-party surety. In some cases, the securitizations also contain mortgage pool insurance or a limited corporate guarantee as a form of credit enhancement. As the holder of the residual interest we are in the first loss position. We are also exposed to additional losses in home equity securitization transactions that involve insurance issued by third party sureties when losses exceed specified levels or duration. When this condition, known as rapid amortization, occurs, the reimbursement we receive from the transfer of additional draws on the home equity loans becomes subordinated to the claims of all other parties to the securitization, including bondholders and the third party surety. This subordination has the effect of deferring reimbursement to us of the subsequent draws for an extended period and subjecting these subsequent draws to absorption of credit losses.

Nonprime Mortgage Loans

Nonprime Mortgage Loans are generally pooled into private-label asset-backed securities. We generally securitize these loans with limited recourse for credit losses through retention of residual interests. The holder of the residual interest is in the first loss position; however, the recourse for credit losses is limited to the carrying value of the residual interest. In some cases, such limited recourse securitizations have contained lender-paid mortgage insurance as a form of credit enhancement or a limited corporate guarantee from us. We also have pooled a portion of our Nonprime Mortgage Loans into securities guaranteed by Fannie Mae. In such cases, we have paid Fannie Mae a guarantee fee in exchange for Fannie Mae assuming a portion of the credit risk of the underlying loans.

In some cases a portion of the retained residual interest is deposited into a NIM security, which enables us to sell some of the future residual cash flows and retain a Back-end NIM Residual. The holder of the Back-end NIM Residual is in the first loss position; however, the recourse for credit losses is limited to the carrying value of the Back-end NIM Residual.

Subordinated Interests

Our exposure to credit losses related to subordinated interests is limited to the assets' carrying values plus the value of additional draws we may be required to subordinate if a rapid amortization

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event occurs in a securitization. We carry subordinated interests at their estimated fair values.

Representations and Warranties

When we sell a loan, we make various representations and warranties relating to, among other things, the following:

- our ownership of the loan**
- the validity of the lien securing the loan**
- the absence of delinquent taxes or liens against the property securing the loan**
- the effectiveness of title insurance on the property securing the loan**
- the process used in selecting the loans for inclusion in a transaction**
- the loan's compliance with any applicable loan criteria (e.g., loan balance limits, property type, delinquency status) established by the buyer**
- the loan's compliance with applicable local, state and federal laws.**

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The specific representations and warranties made by us depend on the nature of the transaction and the requirements of the buyer. Market conditions and credit-rating agency requirements may also affect representations and warranties and the other provisions we may agree to in loan sales. For example, in some transactions, such as sales of nonprime and second-lien loans, we may agree to repurchase a loan if a payment default occurs within a specified period of time (e.g., 30 days) after sale.

In the event of a breach of our representations and warranties, we may be required to either repurchase the mortgage loans with the identified defects or indemnify the investor or insurer. In such cases, we bear any subsequent credit loss on the mortgage loans. Our representations and warranties are generally not subject to stated limits. However, our contractual liability arises only when the representations and warranties are breached and generally only when a loss results from the breach. We attempt to limit our risk of incurring these losses by structuring our operations to ensure consistent production of quality mortgages and servicing those mortgages at levels that meet secondary mortgage market standards. We make significant investments in personnel and technology to ensure the quality of our mortgage loan production.

We estimate our liability for representations and warranties when we sell loans and update our estimate quarterly. Our provision for estimated losses arising from loan sales is recorded as an adjustment to gain on sale of loans and securities. Following is a summary of the activity in our liability for representations and warranties for the periods presented:

Years Ended December 31,			
	2007	2006	2005
(in thousands)			
Balance, beginning of year			
	\$ 152,031		\$ 187,443
Provisions for losses			
	66,413		290,463
Charge-offs		(84,994)	(87,795)
	(31,001)		
Balance, end of year			
	\$ 187,443	\$ 639,637	\$ 390,111

Banking Operations holds a substantial investment in pay-option ARM and payment advantage ARM loans (together referred to as "pay-option loans").

Pay-option ARM loans—have interest rates that adjust monthly and minimum required payments that adjust annually (subject to recast of the loan if minimum payments are made and deferred interest limits are reached). Annual payment adjustments are subject to a 71/2% maximum change. To ensure that contractual loan payments are adequate to repay a loan, the fully amortizing loan payment amount is re-established after either five or ten years and again every five years thereafter. These payment adjustments are not subject to the 71/2%

payment limit and may be substantial due to changes in interest rates and the addition of unpaid interest to the loans' balances.

• Payment advantage ARM loans—have interest rates that are fixed for an initial period of five years. Payments are subject to recast of the loan if minimum payments are made and deferred interest limits are reached. If interest deferrals cause the loan's principal balance to reach a certain maximum level within the first ten years of these loans, the payment is reset to the interest-only payment; then at the 10-year point, the fully amortizing payment is required.

The difference between the frequency of changes in the loans' interest rates and payments along with a limitation on changes in the minimum monthly payments to 7 1/2% per year can result in payments that are not sufficient to pay all of the monthly interest charges. Unpaid interest charges are added to the loan balance until the loan's balance increases to a specified limit, which is no more than

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115% of the original loan amount, at which time a new monthly payment amount adequate to repay the loan over its remaining contractual life is established.

References to pay-option loans in the following discussion include both pay-option and payment advantage loans. Assuming today's interest rates remain unchanged, most borrowers who consistently make the minimum required payment will have the contractual right to make less than the full interest payment for three to five years from the date of funding, at which time the loan balance limit will be reached and a new monthly payment amount will be required. Our borrowers' ability to defer portions of the interest accruing on their loans may expose us to increased credit risk. This is because when the required monthly payments for these loans eventually increase, borrowers may be less able to pay the increased amounts and may be more likely to default than a borrower with a loan whose initial payment provides for full amortization. Our exposure to this higher credit risk is increased by the amount of deferred interest that has been added to the principal balance.

We supplement our credit risk management practices relating to negatively amortizing ARM loans through a variety of methods, including active borrower communications both before and after funding, through our underwriting standards and through the purchase of mortgage insurance. Our underwriting standards include a requirement that the borrower meet secondary market debt-service ratio tests based on the borrower making the fully amortizing loan payment and assuming the loan's interest rate is fully indexed. (A fully indexed note rate equals the sum of the current index rate plus the margin applicable to

the loan.) However, most of the pay-option loans we hold were underwritten with stated or limited income documentation. We tightened our underwriting standards during 2007 to reduce the availability of reduced documentation loans and loans on investor-owned properties, and have reduced the maximum loan-to-value or combined loan-to-value ratio.

Following is a summary of negatively amortizing ARM loans held for investment by Banking Operations:

December 31,			
2007		2006	
(in thousands)			
Total Pay-Option loan portfolio	\$	28,423,750	\$ 32,732,581
Total principal balance of Pay-Option loans with accumulated negative amortization	\$	25,935,223	\$ 28,958,718
Accumulated negative amortization (from original loan balance)	\$	1,215,649	\$ 653,974
Unpaid principal balance of Pay-Option loans with supplemental mortgage insurance coverage	\$	18,374,251	\$ 5,729,532
Average original loan-to-value ratio(1)		76 %	75 %
Average original combined loan-to-value ratio(2)		79 %	78 %
Average original FICO score		717	718
Loans underwritten with low or no stated income documentation		81 %	81 %
Borrowers electing to make less than full interest payments			71 %
		77 %	
Loans delinquent 90 days or more(3)		5.36 %	0.63 %

(1)

The ratio of the amount of the loan that is secured by the property to the lower of the original appraised value or purchase price of the property.

(2)

The ratio of the amount of all loans secured by the property to the lower of the original appraised value or purchase price of the property.

- (3)
Based upon unpaid principal balance.

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The Company routinely forecasts its exposure to payment recast on negatively amortizing loans. The following assumptions were used to forecast this exposure as of December 31, 2007:

- 1)
18% Constant Prepayment Rate;
- 2)
Use of forward interest rate curves to estimate interest rates in future periods; and
- 3)
Loans that do not pay off completely are assumed to negatively amortize 100% of the time.

Using these assumptions as of December 31, 2007, pay-option loans that are expected to reset are shown in the following table:
Year Ended December 31,
Projected
Balance at
Recast or Payoff

(in thousands)		
2008	\$	62,069
2009		3,196,429
2010		6,031,077
Thereafter		4,907,038
Loans expected to repay before recast		11,023,048
		25,219,661
Loans serviced by others(1)		3,802,572
	\$	29,022,233

- (1)
We do not maintain the loan level detail necessary to project payoff dates and balances for loans serviced by others.

This analysis is limited in that it was performed at a particular point in time and is subject to the accuracy of various assumptions used, including prepayment speeds, interest rates and the percentage of loans that negatively amortize.

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Banking Operations' nonperforming assets (comprised of non-accrual loans and foreclosed assets) and the allowances for credit losses related to the Banking Operations' investment loan portfolio at year end are summarized as follows:

December 31,			
		2007	2006
Operations Assets	Amount	% of Banking	
	Amount	% of Banking	
Operations Assets			

(dollar amounts in thousands)

Nonaccrual loans:

Residential:

With third party credit enhancements(1)		\$	1,272,116
1.12 %	\$ 109,218	0.13 %	
Without third party credit enhancements			1,611,951
1.43 %	409,865	0.50 %	
Total residential		2,884,067 (2)	2.55 %
519,083	0.63 %		

Foreclosed real estate:

Residential	394,859	0.35 %	27,416
0.03 %			
Total nonperforming assets	\$ 3,278,926	2.90 %	
\$ 546,499	0.66 %		

Amount

% of
Nonaccrual
Loans

Amount

% of
Nonaccrual Loans

Allowances for credit losses:

Allowance for loan losses:

Allowance for loan losses, gross	\$ 2,141,247		
\$ 294,455			
Less: pool mortgage insurance receivable	(555,803		
) (65,763)			
Allowance for loan losses, net of pool mortgage insurance receivable			
1,585,444	54.97 %	228,692	44.06
%			
Liability for unfunded loan commitments	37,516		
1.30 %	8,104	1.56 %	
Total allowances for credit losses	\$ 1,622,960	56.27 %	
\$ 236,796	45.62 %		

Years Ended December 31,

	2007	2006				
	Amount		Annualized			
Net Charge-offs as % Average Investment Loans						
	Amount		Annualized			
Net Charge-offs as % Average Investment Loans						
Net charge-offs:						
Banking Operations			\$	460,438	0.63 %	\$
33,718	0.05 %					

(1)

Third party credit enhancements include borrower-paid mortgage insurance and pool insurance acquired by Banking Operations.

(2)

Includes \$278.5 million of recently modified loans which were not delinquent as of the date of modification but which were required to be accounted for as troubled debt restructurings as of December 31, 2007.

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The following table shows Banking Operations charge-offs by product:

	Years Ended December 31,			
	2007	2006	2005	
	(in thousands)			
Prime Home Equity		\$	344,290	\$ 26,797
\$ 5,604				
Prime Mortgage:				
Pay-option		83,709		2,788
Other	32,439		4,133	1,176
Total charge-offs		\$	460,438	\$ 33,718
\$ 6,780				

The increase in our nonperforming assets, the allowance for loan losses and charge-offs from the year-ago period was driven by the impact of a weakening housing market and significant tightening of available credit on delinquency and default trends during the current year as well as portfolio seasoning. We expect the level of nonperforming assets and credit losses to increase, both in absolute terms and as a percentage of our loan portfolio as current weakness in the housing market develops and as our loan portfolio continues to season.

Mortgage Warehouse Lending Advances

We hold a portfolio of commercial loans made to other mortgage lenders to finance their inventories pending sale to Countrywide and other lenders. Our portfolio of mortgage loan warehouse advances totaled \$0.9 billion and the average loan balance was \$8.3 million at December 31, 2007. These loans are underwritten by assessing the creditworthiness of the warehouse lending borrowers. This includes reviewing both borrower-provided financial information and publicly available credit rating information and press coverage, as well as understanding the borrowers' operational controls and product risk and assessments of collateral.

We monitor the length of time that advances are outstanding against specific residential loans and may require the borrower to pay off aged advances. We also monitor the fair value of our collateral to ensure that the level of collateral posted is adequate to repay our advance in the event of default by our borrower and we require our warehouse lending borrowers to post specified levels of cash collateral to supplement the mortgage loan collateral. We also regularly review updated financial information of borrowers, including pipeline and hedging positions. We recorded \$1.6 million of charge-offs related to this activity during 2007 and no charge-offs in 2006 and 2005. During 2007, we adjusted our advance rates and limited the collateral we advance funds against to that which we can sell into the presently disrupted secondary market in recognition of marketplace conditions.

Other Mortgage Loans Held for Investment

Our portfolio of other mortgage loans held for investment is in our Mortgage Banking Segment and includes loans we have repurchased—either to remedy a violation of a representation or warranty made in a loan sale, to minimize the cost of servicing a severely delinquent loan insured or partially guaranteed by the FHA or VA or in connection with a clean-up call (a clean-up call represents the repurchase of mortgage loans when the remaining outstanding balance of the mortgage loans falls to a level where the cost of servicing the loans becomes burdensome in relation to the benefits of servicing.)

Managing the interest rate risk related to IRLCs is complicated by the fact that the ultimate percentage of applications that close within the terms of the IRLC is beyond our control and is driven primarily by changes in mortgage rates in the marketplace. In general, the percentage of applications that ultimately close within the terms of the IRLC increases if mortgage rates rise and decreases if mortgage rates fall. This is due primarily to the relative attractiveness of current mortgage rates compared to the applicants' committed rates. The closing percentage is also influenced by the source and age of the applications, purpose for the loans (purchase or refinance) and the application approval rate. We have developed closing ratio estimates using historical experience that take into account all of these variables, as well as renegotiations of rate and point commitments that tend to occur when mortgage rates fall. Those closing ratios are used to estimate the aggregate balance of loans that we expect to fund within the terms of the IRLCs. Our closing ratio estimates are revised periodically.

To manage the price risk associated with IRLCs, we generally use a combination of net forward sales of MBS and put and call options on MBS, U.S. Treasury futures and Eurodollar futures. We generally enter into forward sales contracts of MBS in an amount equal to the portion of the IRLCs expected to close, assuming no change in mortgage rates. We acquire put and call options to protect against the variability of the rate of loan closings caused by changes in mortgage

rates. To manage the credit spread component of price risk associated with our IRLCs, we may enter into credit default swaps.

We manage the price risk related to our Mortgage Loan Inventory primarily by entering into forward sales of MBS and Eurodollar futures contracts. The value of these forward MBS sales and Eurodollar futures moves in the opposite direction of the value of the Mortgage Loan Inventory. To manage the credit spread component of price risk associated with our Mortgage Loan Inventory, we may enter into credit default swaps.

We manage the price risk related to our commercial mortgage loans using interest rate, total rate of return and credit default swaps.

We actively manage the risk profiles of our IRLCs and Mortgage Loan Inventory on a daily basis.

A more detailed description of the derivative instruments we use in our risk management activities related to the IRLCs and Mortgage Loan Inventory is presented below:

- Forward Sales of MBS: An obligation to sell MBS at a specified price on a specified date in the future. The value increases as mortgage rates rise.
- Forward Purchases of MBS: An obligation to buy MBS at a specified price on a specified date in the future. The value increases as mortgage rates fall.
- Call Options on MBS: A right to buy MBS at a specified price on a specified date in the future. The value increases as mortgage rates fall.
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Put Options on MBS: A right to sell MBS at a specified price on a specified date in the future. The value increases as mortgage rates rise.

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Call Options on U.S. Treasury Futures: A right to acquire a U.S. Treasury futures contract at a specified price on a specified date in the future. The value increases as the benchmark U.S. Treasury rate falls.

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Put Options on U.S. Treasury Futures: A right to sell a U.S. Treasury futures contract at a specified price on a specified date in the future. The value increases as the benchmark U.S. Treasury rate rises.

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Short Eurodollar Futures Contracts: The sale of a standardized exchange-traded contract that we do not own, the value of which is tied to spot Eurodollar rates at specified future dates. The value increases when Eurodollar rates rise.

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Credit Default Swaps: An agreement to purchase credit event protection based on a financial index or security in exchange for paying a fixed fee or premium over the term of the contract. For use in the risk management of commercial mortgage loans, the Company receives credit protection and pays a fixed fee or premium. The value of these contracts increases when the probability of the occurrence of a credit event rises.

Mortgage Servicing Rights (MSRs) and Retained Interests

Our MSRs and retained interests are generally subject to loss in value when mortgage rates decline. Declining mortgage rates normally precipitate increased mortgage refinancing activity to the

extent that the borrower is able to obtain a new loan. Increased refinancing activity reduces the life of the loans underlying the MSR and retained interests, thereby reducing their value. Reductions in the value of these assets impact earnings primarily through change in fair value and impairment charges. To moderate the effect on earnings caused by a rate-driven decline in fair value, we maintain a portfolio of financial instruments, including derivatives, which generally increase in aggregate value when interest rates decline (the "Servicing Hedge").

We use the following financial instruments in our Servicing Hedge:

- **Receiver Swaptions:** A right to enter a predetermined Interest Rate Swap at a future date where we receive the fixed rate and pay the floating rate. These contracts increase in value as rates fall.
- **Payor Swaptions:** A right to enter a predetermined Interest Rate Swap at a future date, where we pay the fixed rate and receive the floating rate. These contracts increase in value as rates rise.
- **Interest Rate Swaps:** A mutual agreement to exchange interest rate payments; one party paying a fixed rate and another paying a floating rate tied to a reference interest rate (e.g., U.S. Dollar LIBOR ("USD LIBOR")). For use in the Servicing Hedge, we generally receive the fixed rate and pay the floating rate. Such contracts increase in value as rates fall.
- **U.S. Treasury Futures:** An agreement to purchase a U.S. Treasury security at a specified price in the future. The value increases as the benchmark U.S. Treasury rate falls.
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Call Options on U.S. Treasury and Eurodollar futures: A right to acquire a U.S. Treasury or Eurodollar futures contract at a specified price on a specified date in the future. The value increases as the benchmark U.S. Treasury or Eurodollar rate falls.

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Mortgage Forward Rate Agreement: A mutual agreement to exchange a single cash flow at a forward settlement date, based on the basis point difference between the forward fixed rate and floating rate set equal to the 30-day forward current coupon mortgage rate, known as the Constant Mortgage Maturity index, on the settlement date. For use in the Servicing Hedge, we generally receive the fixed rate and pay the floating rate. Such contracts increase in value as the spread between the current coupon mortgage rate and the swap curve tightens, or when interest rates fall.

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Forward Sales of MBS: An obligation to sell MBS at a specified price on a specified date in the future. The value increases as mortgage rates rise.

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Forward Purchases of MBS: An obligation to buy MBS at a specified price on a specified date in the future. The value increases as mortgage rates fall.

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Put Options on U.S. Treasury and Eurodollar futures: A right to sell a U.S. Treasury or Eurodollar futures contract at a specified price on a specified date in the future. The value increases as the benchmark U.S. Treasury or Eurodollar rate rises.

These instruments are combined to manage the overall risk profile of the MSRs and retained interests. We actively manage our MSR and retained interests risk profile on a daily basis.

Securities Trading Activities

Within our Capital Markets operations, we maintain a trading portfolio of fixed-income securities, primarily MBS. We are exposed to price changes in our trading portfolio arising from interest rate changes during the period we hold the securities. To manage this risk, we use the following derivative instruments:

- **Forward Sales of To-Be-Announced ("TBA") MBS:** An obligation to sell agency pass-through MBS that have not yet been issued at a specified price on a specified date in the future. The value increases as mortgage rates rise.
- **Forward Purchases of TBA MBS:** An obligation to purchase agency pass-through MBS that have not yet been issued at a specified price on a specified date in the future. The value increases as mortgage rates fall.
- **Interest Rate Swaps:** A mutual agreement to exchange interest rate payments; one party paying a fixed rate and another paying a floating rate tied to a reference interest rate (e.g. USD LIBOR). For use in its trading portfolio risk management activities, the Company typically receives the floating rate and pays the fixed rate. Such contracts increase in value as rates rise.
- **Futures Contract:** A standardized exchange-traded contract, the value of which is tied to the spot Federal Funds or Eurodollar rates at specified future dates. The value of these contracts increases when Federal Funds or Eurodollar rates fall.
- **Total rate of return swaps:** An agreement to pay or receive the total return on a financial index or security in exchange for the

payment or receipt of a floating rate of interest over the term of the contract. For use in the risk management of the commercial mortgage portfolio, the Company pays the return on a published CMBS index and receives the floating rate of interest. The value of these contracts increases as the value of the index declines.

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Put Options on Federal Funds and Eurodollar futures Contract: A right to sell a Federal Funds or Eurodollar futures contract at a specified price on a specified date in the future. The value increases as the Federal Funds or Eurodollar rates rise.

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Call Options on Federal Funds and Eurodollar futures Contract: A right to acquire a Federal Funds or Eurodollar futures contract at a specified price on a specified date in the future. The value increases as the Federal Funds or Eurodollar rate falls.

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Short Futures Contract: A sale of a standardized exchange-traded contract that we do not own, the value of which is tied to spot Federal Funds or Eurodollar rates at specified future dates. The value of these contracts increases when Federal Funds or Eurodollar rates rise.

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Interest Rate Cap: A right to receive cash if a reference interest rate rises above a contractual strike rate. The reference interest rates used in the Company's interest rate caps include mortgage rates, U.S. Treasury rates, and USD LIBOR. The value increases as the reference rate rises.

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Payer Swaption: A right to enter a predetermined Interest Rate Swap at a future date where we receive the floating rate and pay the fixed rate. These contracts increase in value as rates rise.

- **Receiver Swaptions: A right to enter a predetermined Interest Rate Swap at a future date where we receive the fixed rate and pay the floating rate. These contracts increase in value as rates fall.**

- **Forward rate agreement: A mutual agreement to exchange a single cash flow at a forward settlement date, based on the difference between the forward fixed rate and floating rate set equal to the 30-day forward current coupon rate. For use in the risk management of the broker-dealer securities trading portfolio, the Company receives the floating rate and pays the fixed. Such contracts increase in value as rates rise.**

Long-term Debt and Deposit Liabilities

Management's objective in financing the activities of the Company is to ensure access to reliable and cost-effective funding from a variety of sources in order to meet the Company's financing requirements under various market conditions. These financing activities subject the Company to interest rate risk. Specifically, the Company is exposed to the risk that the interest expense it incurs on its long-term borrowings will change at a different speed than the income it earns on the assets financed by the long-term debt, contributing to variability of net interest income earnings. To address this risk, management seeks long-term debt structured to reprice in a manner similar to the assets it is financing. However, the Company may not be able to obtain access to borrowings structured to match the repricing characteristics of the assets being financed at optimal interest rates (i.e., cost). Management addresses this constraint, in part, by entering into interest rate and foreign currency swap agreements designed to modify the structure of its borrowings. These agreements have the effect of changing the structure of a debt agreement to one that approximates the repricing characteristics of the assets financed.

Impact of Changes in Interest Rates on the Net Value of the Company's Interest Rate-Sensitive Financial Instruments

We perform various sensitivity analyses that quantify the net financial impact of changes in interest rates on our interest rate-sensitive assets, liabilities and commitments. These analyses incorporate assumed changes in the interest rate environment, including selected hypothetical, instantaneous parallel shifts in the yield curve.

We employ various commonly used modeling techniques to value our financial instruments in connection with these sensitivity analyses. For mortgage loans, MBS, MBS forward contracts, collateralized mortgage obligations, interest-only securities and MSRs, we use option-adjusted spread models. The primary assumptions used in these models for the purpose of these sensitivity analyses are the prepayment speeds, risk-adjusted return requirements and implied market volatility of interest rates. For options and interest rate floors, we use an option-pricing model. The primary assumption used in this model is implied market volatility of interest rates. For retained interests, with the exception of interest-only securities, we use a zero volatility discounted cash flow model. The primary assumptions used in these models are prepayment rates, discount rates and credit losses.

Off-Balance Sheet Arrangements and Aggregate Contractual Obligations

Off-Balance Sheet Arrangements and Guarantees

In the ordinary course of our business we engage in financial transactions that are not reflected on our balance sheet. (See Note 2—Summary of Significant Accounting Policies in the financial statement section of this Report for a description of our consolidation policy.) Such transactions are structured to manage our interest rate, credit or liquidity risks, to diversify funding sources or to optimize our capital.

Most of our off-balance sheet arrangements relate to the securitization of mortgage loans. Our

mortgage loan securitizations are normally structured as sales in accordance with Statement of Financial Accounting Standards No. 140, Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities ("SFAS 140"), and involve the transfer of mortgage loans to qualifying special-purpose entities that are not subject to consolidation. In a securitization, an entity transferring the assets is able to sell those assets for cash. Special-purpose entities used in such securitizations obtain cash by issuing securities representing beneficial interests in the transferred assets to investors. In a securitization, we customarily provide representations and warranties with respect to, and we generally retain the right to service, the transferred mortgage loans.

We also generally have the right to repurchase mortgage loans from the special-purpose entity pursuant to a clean-up call, which is exercised when the costs exceed the benefits of servicing the remaining loans.

Our Prime Mortgage Loans generally are securitized on a non-recourse basis, while Prime Home Equity and Nonprime Loans generally are securitized with limited recourse for credit losses. During 2007, we securitized \$24.0 billion in Nonprime Mortgage and Prime Home Equity Loans with limited recourse for credit losses. Our exposure to credit losses related to our limited recourse securitization activities is limited to the carrying value of our subordinated interests, to losses that may arise from rapid amortization events that cause subsequent draws that we are contractually required to advance to be subordinated to all other interests in these securitizations and to the contractual limit of reimbursable losses under our corporate guarantees less the recorded liability for such guarantees.

During 2007, our off-balance sheet obligations relating to rapid amortization events contained in our home equity line-of-credit securitizations were triggered as a result of actual and anticipated loan losses relating to loans underlying these securitizations exceeding specified thresholds or durations. Normally, a rapid

amortization event is not expected to occur and is deemed remote. However, sudden deterioration in the housing market experienced in late 2007 resulted in it becoming probable that a rapid amortization event would occur. Because of these events, we recorded impairment losses of \$704.1 million related to estimated future draw obligations on the home equity securitizations that have

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entered or are expected to enter rapid amortization status. The available credit lines for the securitizations subject to or expected to be subject to a future draw obligation are approximately \$2.4 billion at December 31, 2007. However, due to the borrower's ability to pay down and redraw balances, a maximum obligation cannot be defined.

For a further discussion of our exposure to credit risk, see the section in this Report entitled Management's Discussion and Analysis of Financial Condition and Results of Operations—Credit Risk Management.

We do not believe there are any other off-balance sheet arrangements that have had, or are reasonably likely to have, a current or future material effect on our financial condition, results of operations, liquidity, capital expenditures or capital resources.

The sales proceeds and cash flows from our securitizations for 2007 and additional information with respect to securitization activities are included in the financial statements section of this Report Financial Statements—Note 3—Loan Sales.

Contractual Obligations

The following table summarizes our significant contractual obligations at December 31, 2007, with the exception of short-term borrowing arrangements and pension and post-retirement benefit plans.

Years	Note(1) More than 5 Years	Less than 1 Year Total	1-3 Years	3-5
(in thousands)				
Obligations:				
Notes payable	15	\$ 18,295,408	\$ 26,430,398	
\$	30,131,827	\$ 22,369,780	\$ 97,227,413	
Time deposits	13	\$ 30,264,577	\$ 2,351,423	
\$	672,742	\$ 1,526,355	\$ 34,815,097	

Operating leases	32	\$	228,241	\$	300,003
	\$ 113,645	\$	56,896	\$	698,785
Purchase obligations	—	\$	107,691	\$	
	22,546	\$	1,927	\$	—
				\$	132,164

(1)

See respective notes to the financial statements included in this Report.

As of December 31, 2007, the Company had undisbursed home equity lines of credit and construction loan commitments of \$9.1 billion and \$0.7 billion, respectively. As of December 31, 2007, outstanding commitments to fund mortgage loans totaled \$23.9 billion.

In connection with our underwriting activities, at December 31, 2007 we had commitments to purchase and sell new issues of securities aggregating \$1.1 billion and \$1.2 billion, respectively.

Prospective Trends

Outlook

We believe the current environment will provide significant continuing challenges for the financial services sector, including Countrywide. Specifically, in the near term, we have experienced and are likely to continue to experience:

- Continued pressure on housing values and mortgage origination volumes
- Increasing delinquencies and foreclosures
- Continued disruptions in the secondary mortgage and debt capital markets and
- More restrictive legislative and regulatory environments.

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As a result of these conditions, we are experiencing, among other things, the following:

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Higher credit losses on delinquent loans and subordinated interests

- **Reduced access to secondary mortgage and debt capital markets**
- **Increased cost of debt**
- **Lower loan production volumes and**
- **Lower margins on loans produced.**

In response to the current environment, Countrywide has made changes to tighten the underwriting guidelines for loan products offered and has adjusted loan pricing to reflect market conditions. The tightening of underwriting guidelines included reductions in the availability of reduced documentation loans and loans on investor-owned properties and in the maximum loan-to-value or combined loan-to-value ratio. The impact of these changes was most significant to Nonprime Mortgage, Prime Home Equity and non-conforming prime loans. Further reductions in the Company's funding volume could result. Additionally, during 2007, we transferred \$21.8 billion of Nonprime Mortgage, Prime Home Equity and non-conforming loans, after giving effect to a \$1.1 billion write-down, from our inventory of mortgage loans held for sale to our portfolio of loans held for investment. We expect to retain more loans in our portfolio of loans held for investment or to hold additional loan or security inventory until market conditions improve. We have also increased our loss mitigation efforts through proactive outreach to borrowers, partnering with non-profit home ownership counseling groups and increasing our staff dedicated to working with our borrowers to prevent or cure loan defaults. In an effort to ensure the adequacy of our funding liquidity, we continue to transition to more reliable funding sources, which may be more costly. We are also optimizing our organizational structure through, among other things, the integration of Countrywide Bank and Countrywide Home Loans.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

A loan is considered impaired when, based on current information and events, it is probable that the Company will be unable to collect the scheduled payments of principal or interest when due according to the contractual terms of the loan agreement. The Company's loan portfolio is comprised primarily of large groups of homogeneous loans made to consumers that are secured by

residential real estate. The Company does not evaluate individual homogenous loans for impairment. These loans are generally placed on nonaccrual status when they become 90 days delinquent. Loans in the Company's warehouse lending and commercial real estate lending portfolios are individually evaluated for impairment on a regular basis.

Once a loan is acquired and included in the Company's portfolio of loans held for investment, Countrywide assesses loan credit quality and estimates its allowance requirement based on whether the loan is individually evaluated or part of a pool of homogenous loans:

- Homogenous loans, such as mortgage loans, are evaluated based on the loan's present collection status—whether the loan is current, delinquent in 30 day increments, (i.e., current, 30, 60, 90) or in foreclosure or bankruptcy. Our estimate of the required allowance for these loans is developed by estimating both the rate of default of the loans and the amount of loss in the event of default. The rate of default is assigned to the loans based on their attributes (e.g., original loan-to-value, borrower credit score, documentation type, etc.) and collection status. The rate of default is based on analysis of migration of loans from each aging category to default over a twelve-month period. Loans more than 90 days or more past due are assigned a rate of default that measures the percentage of such loans that default over their lives as it is assumed that the condition causing the ultimate default currently exists. The default rate for the loan is then multiplied by an average loss rate for the type of loan.

- Warehouse lending and commercial real estate loans are individually evaluated both for borrower creditworthiness and for collateral quality. Credit quality is expressed in a Company-developed credit rating. The allowance for loans that are not identified as impaired is developed by applying credit loss factors applicable to the individual loans' assigned credit grades for unimpaired loans. The allowance for loans identified as impaired is based on an estimate of recoverability and value of the collateral securing the loans.

This evaluation is inherently subjective, as it requires estimates that are susceptible to significant revision as factors change or as more information becomes available.

Loans whose contractual terms have been restructured because the Company, for economic or other reasons related to the borrower's financial difficulties, grants a concession to the borrower that it would not otherwise consider are classified as troubled debt restructurings. Troubled debt restructurings may include changing repayment terms, reducing the stated interest rate, reducing the loan's principal balance or accrued interest, or extending the maturity date of the loan. Upon completion of a troubled debt restructuring, a valuation allowance is established to recognize the impairment of the loan.

The amount of the impairment valuation allowance is established based on whether the loan is collateral dependent and delinquent when the loan is modified:

- **Impairment valuation allowances relating to loans that are collateral dependent and delinquent when they are modified are established with reference to the difference between the loan's carrying value and the estimated fair value of the collateral securing the loan reduced by the cost to sell the collateral**

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COUNTRYWIDE FINANCIAL CORPORATION AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

- **Impairment valuation allowances relating to loans that are not collateral dependent or are collateral dependent but not delinquent when they are modified are established with reference to the difference between the loan's carrying value and the present value of**

the estimated cash flows of the loan under its modified terms discounted at the loan's effective interest rate.

Loan losses are charged against the allowance when management believes the loss is confirmed. We make an initial assessment of whether a charge-off is required on our mortgage loans no later than the 180th day of delinquency.

Trading Securities

Trading securities consist of securities purchased by the Company's broker-dealer subsidiary, along with associated derivative instruments used to manage the price risk of such securities. Trading securities are recorded at fair value on a trade date basis, and gains and losses, both realized and unrealized, are included in gain on sale of loans and securities in the consolidated statements of operations.

Investments in Other Financial Instruments

Investments in other financial instruments include mortgage-backed securities, obligations of U.S. Government-sponsored enterprises, municipal bonds, U.S. Treasury securities, derivative financial instruments and certain interests retained in securitization. The Company carries all of these assets at their estimated fair values. Realized gains and losses on sales of these assets are computed by the specific identification method and are recorded in earnings at the time of disposition. How the changes in fair value of the instruments are recognized is dependent on the accounting classification of the respective assets:

- Changes in the fair value of financial instruments accounted for as trading securities are recognized in current period earnings;

- All other instruments are accounted for as available-for-sale securities; therefore, unrealized gains or losses, net of deferred income taxes, are excluded from earnings and reported as a component of accumulated other comprehensive income, which is included in shareholders' equity. Unrealized losses that are other than temporary are recognized in earnings in the period that the other-than-temporary impairment is identified. Once impairment of retained interests classified as available-for-sale is charged to earnings, subsequent increases in value are recognized in earnings over the estimated remaining life of the investment through a higher effective yield.

Income on financial instruments retained in securitization is recorded as income from retained interests in the consolidated statements of operations. Income from all other financial instruments is recorded as interest income. Interest income and income from retained interests is accrued as earned. Unamortized premiums and unaccreted discounts are amortized and accrued to interest income or income from retained interests, as appropriate, as an adjustment of the instruments' yields using the interest method. Yields are estimated using market prepayment expectations for similar securities.

Securities Purchased Under Agreements to Resell, Securities Borrowed and Securities Sold Under Agreements to Repurchase

Transactions involving purchases of securities under agreements to resell, borrowing of securities or sales of securities under agreements to repurchase are recorded at their contractual amounts plus

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COUNTRYWIDE FINANCIAL CORPORATION AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

accrued interest and are accounted for as collateralized financings, except where the Company does not have an agreement to sell (or purchase) the same or substantially the same securities before maturity at a fixed or determinable price. Transactions that do not provide for the Company to sell (or purchase) substantially the same securities before maturity at a fixed or determinable price are accounted for as purchases and sales of securities.

Certain of the Company's securities lending arrangements include master netting agreements that entitle Countrywide and its counterparties to settle their positions "net." Where such arrangements are in place, and where the Company or its counterparty intends to settle its positions "net," the Company includes the net asset or liability in its balance sheet. Under master netting arrangements, \$9.0 billion and \$30.0 billion of securities purchased under agreements to resell and securities borrowed were offset against securities sold under agreements to repurchase at December 31, 2007 and 2006, respectively.

Deferred Acquisition Costs

The Company's insurance carrier subsidiary, Balboa Insurance Group ("Balboa"), incurs insurance policy acquisition costs that vary with and are directly related to acquisition of new insurance policies. These costs consist primarily of commissions, premium taxes and certain other underwriting costs. These costs are deferred and amortized as the related premiums are earned. Deferred acquisition costs are limited to amounts estimated to be recoverable

from the related premiums and anticipated investment income less anticipated losses, loss adjustment expenses and policy maintenance expenses. Deferred acquisition costs totaling \$130.8 million and \$109.9 million were included in other assets at December 31, 2007 and 2006, respectively. Amortization of policy acquisition costs totaling \$227.6 million, \$202.6 million and \$167.0 million was included in other operating expenses for the years ended December 31, 2007, 2006 and 2005, respectively.

Liability for Insurance Losses

For Balboa's property and casualty policies, the liability for losses and loss adjustment expenses consists of an accrual for the unpaid portion of estimated ultimate losses and loss adjustment expenses on claims reported through the end of the accounting period plus estimates, based on past experience, for the estimated losses and loss adjustment expenses relating to incidents incurred but not reported as of the balance sheet date.

For credit life and disability policies, liabilities are recorded for future claims, estimated based upon statutory standards, on all policies-in-force at the end of the period, as well as the present value of amounts not yet due on disability claims. The liability for policy and contract claims represents the estimated ultimate net cost of all reported and unreported claims incurred through the end of the period, except for the present value of amounts not yet due on disability claims, which are included in accounts payable and accrued liabilities.

The liability for insurance losses is established using statistical analyses and is subject to the effects of trends in claim severity and frequency and other factors. The estimate is continually reviewed and as adjustments to the liability become necessary, such adjustments are reflected in current period earnings.

For mortgage reinsurance, the liability for insured losses is accrued in proportion to the amount of revenue recognized based on management's assessment of the ultimate liability to be paid over the current and expected renewal period of the contracts. The remaining liability to be paid, along with reinsurance revenues to be earned, is estimated based on projected defaults, losses and prepayments.

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COUNTRYWIDE FINANCIAL CORPORATION AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

Collateral Pledged and Collateral Received

The Company reports assets it has pledged as collateral in secured borrowing and other arrangements when the secured party cannot sell or repledge the assets or the Company can substitute collateral or otherwise redeem it on short notice.

The Company generally does not report assets received as collateral in secured lending and other arrangements since the debtor typically has the right to redeem the collateral on short notice.

Premises and Equipment

Premises and equipment are stated at cost, less accumulated depreciation and amortization. Depreciation is provided in amounts sufficient to relate the cost of depreciable assets to operations over their estimated service lives using the straight-line method. Leasehold improvements are amortized over the lesser of the term of the lease or service life of the improvement using the straight-line method. Renovations and improvements that add utility or significantly extend the useful life of assets are capitalized. Repair and maintenance costs are expensed as incurred.

Capitalized Software Costs

Internal software development costs are capitalized to the extent of external direct costs of materials and services consumed and of salary costs relating to employees' time spent on the software project during the application development stage. Internally developed software is amortized over six to ten years using the straight-line method.

Capitalized software costs are evaluated for impairment annually or when changing circumstances indicate that amounts capitalized may be impaired. Impaired items are written down to their estimated fair values at the date of evaluation.

Loan Servicing Fees

Loan servicing fees and other remuneration are received by the Company for servicing residential mortgage loans. Loan servicing fees are recorded net of guarantee fees paid by the Company. Loan servicing fees are recognized as earned over the life of the loans in the servicing portfolio.

Income from Retained Interests

Income from retained interests represents the yield on interest-only securities, principal-only securities, residual interests and other financial instruments retained in securitization. Income on these investments is recognized using the interest method.

Insurance Premiums

Property and casualty and credit life and disability premiums are recognized over the term of the policies on a pro-rata basis for all policies except for certain of the lender-placed insurance and the guaranteed auto protection ("GAP") policies. Lender-placed insurance is obtained for the benefit of the lender when a borrower cancels or fails to renew insurance on a property securing a mortgage loan. GAP insurance provides coverage for leased automobiles' residual values to the lessors of the vehicles. For GAP insurance, revenue recognition is correlated to the exposure and accelerated over the life of the contract. For lender-placed insurance (except for policies placed on foreclosed real estate), premiums are "slowed," or recognized later in the life of the policy, due to high cancellation rates experienced early in the life of the policy. Mortgage reinsurance premiums are recognized as earned

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COUNTRYWIDE FINANCIAL CORPORATION AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

over the life of the policy. Prepaid premiums applicable to the unexpired term of policies-in-force are recorded as unearned premiums in accounts payable and accrued liabilities.

Note 3—Loan Sales

The Company routinely originates, purchases and sells mortgage loans into the secondary mortgage market. Prime mortgage loan sales are generally structured without recourse to the Company. However, the Company generally has limited recourse on the Prime Home Equity and Nonprime Mortgage Loans it securitizes, through retention of a subordinated interest, through its issuance of a corporate guarantee of losses up to a negotiated maximum amount or in the case of home equity securitizations, the obligation to fund subsequent draws with a subordinated repayment priority when a rapid amortization event occurs. Recourse retained in loan sales and securitization activities is discussed in Note 31 — Credit Losses Related to Securitized Loans. While the Company generally does not retain credit risk on the Prime Mortgage Loans it sells, it has potential

liability under representations and warranties it makes to purchasers and insurers of the loans.

With regard to loans held for sale, the Company is exposed to price risk from the time an IRLC is made to a mortgage applicant or financial intermediary to the time the resulting mortgage loan is sold. For loans held for investment, the Company is exposed to price risk from the time an IRLC is made to a financial intermediary to the time the loan is purchased. During these periods, the Company is exposed to losses if mortgage rates rise or investor yields increase, because the value of the IRLC or mortgage loan held for sale declines. To manage this price risk the Company uses derivatives.

The price risk management of IRLCs is complicated by the fact that the ultimate percentage of applications that close within the terms of the IRLC is variable. The probability that the loan will fund within the terms of the IRLC is affected by a number of factors, in particular any change in mortgage rates subsequent to the lock date. This probability generally increases if mortgage rates rise, and decreases if mortgage rates fall, due primarily to the relative attractiveness of current mortgage rates compared to the applicant's committed rate. The probability that a loan will fund within the terms of the IRLC is also influenced by the source and age of the application, purpose for the loan (purchase or refinance), and the application approval rate. The Company has developed closing ratio estimates, using historical experience that take into account all of these variables, as well as renegotiations of rate and point commitments that tend to occur when mortgage rates fall. Those closing ratio estimates are used to estimate the aggregate balance of loans that will fund within the terms of IRLCs.

To manage the price risk associated with the IRLCs, the Company generally uses a combination of net forward sales of MBS and put and call options on MBS, Treasury futures and Eurodollar futures. The Company generally makes forward sales of MBS in an amount equal to the portion of the IRLCs expected to close, assuming no change in mortgage rates. The Company acquires put and call options to protect against the variability of loan closings caused by changes in mortgage rates. To manage the credit spread component

of price risk associated with its IRLCs the Company may enter into credit default swaps.

The Company manages the price risk related to the Mortgage Loan Inventory primarily by entering into forward sales of MBS and Eurodollar futures. The value of these forward MBS sales and Eurodollar futures moves in opposite direction to the value of the Mortgage Loan Inventory. To manage the credit spread component of price risk associated with its Mortgage Loan Inventory, the Company may enter into credit default swaps or similar instruments. The Company actively manages the risk profiles of its IRLCs and Mortgage Loan Inventory on a daily basis.

The Company manages the price risk related to its commercial mortgage loans using interest rate swaps, total rate of return and credit default swaps.

The Company uses the following derivative instruments in its risk management activities related to the IRLCs and Mortgage Loan Inventory:

- **Forward Sales of MBS:** An obligation to sell MBS at a specified price on a specified date in the future. The value increases as mortgage rates rise.
- **Forward Purchases of MBS:** An obligation to buy MBS at a specified price on a specified date in the future. The value increases as mortgage rates fall.
- **Call Options on MBS:** A right to buy MBS at a specified price on a specified date in the future. The value increases as mortgage rates fall.
-

Put Options on MBS: A right to sell MBS at a specified price on a specified date in the future. The value increases as mortgage rates rise.

•

Call Options on U.S. Treasury Futures: A right to acquire a U.S. Treasury futures contract at a specified price in the future. The value increases as the benchmark U.S. Treasury rate falls.

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COUNTRYWIDE FINANCIAL CORPORATION AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

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Put Options on U.S. Treasury Futures: A right to sell a U.S. Treasury futures contract at a specified price on a specified date in the future. The value increases as the benchmark U.S. Treasury rate rises.

•

Short Eurodollar Futures Contracts: The sale of a standardized exchange-traded contract that we do not own, the value of which is tied to spot Eurodollar rates at specified future dates. The value increases when Eurodollar rates rise.

•

Credit Default Swaps: An agreement to purchase credit event protection based on a financial index or security in exchange for paying a fixed rate fee or premium over the term of the contract. For use in the risk management of commercial and residential mortgage loans, the Company receives credit protection and pays a fixed fee or premium. The value of these contracts increases when the probability of the occurrence of a credit event rises.

The Company uses the following financial instruments in its Servicing Hedge:

- **Receiver Swaptions:** A right to enter into a predetermined Interest Rate Swap at a future date where the Company receives the fixed rate and pays the floating rate. These contracts increase in value as rates fall.

- **Payor Swaptions:** A right to enter into a predetermined Interest Rate Swap at a future date, where the Company pays the fixed rate and receives the floating rate. These contracts increase in value as rates rise.

- **Interest Rate Swaps:** A mutual agreement to exchange interest rate payments; one party paying a fixed rate and another paying a floating rate tied to a reference interest rate (e.g., U.S. Dollar LIBOR ("USD LIBOR")). For use in the Servicing Hedge, the Company generally receives the fixed rate and pays the floating rate. Such contracts increase in value as rates fall.

- **U.S. Treasury Futures:** An agreement to purchase a U.S. Treasury security at a specified price in the future. The value increases as the benchmark U.S. Treasury rate falls.

- **Call Options on U.S. Treasury and Eurodollar Futures:** A right to acquire a U.S. Treasury or Eurodollar futures contract at a specified price in the future. The value increases as the benchmark U.S. Treasury or Eurodollar deposit rate falls.

- **Mortgage Forward Rate Agreement:** A mutual agreement to exchange a single cash flow at a forward settlement date, based on the difference between the forward fixed rate and floating rate set equal to the 30-day forward current coupon mortgage rate, known as the constant maturity index on the settlement date. For use in the

Servicing Hedge, the Company generally receives the fixed rate and pays the floating rate. Such contracts increase in value as the spread between the current coupon mortgage rate and the swap curve tightens, or when interest rates fall.

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Forward Sales of MBS: An obligation to sell MBS at a specified price on a specified date in the future. The value increases as mortgage rates rise.

-

Forward Purchases of MBS: An obligation to buy MBS at a specified price on a specified date in the future. The value increases as mortgage rates fall.

-

Put Options on U.S. Treasury and Eurodollar Futures: A right to sell a U.S. Treasury or Eurodollar futures contract at a specified price in the future. The value increases as the benchmark U.S. Treasury or Eurodollar deposit rate rises.

These instruments are combined to manage the overall risk portfolio of the MSRs and retained interests. The Company actively manages its MSRs and retained interests risk profile on a daily basis.

Risk Management Activities Related to the Broker-Dealer Securities Trading Portfolio

Description of Risk Management Activities

In connection with its broker-dealer activities, the Company maintains a trading portfolio of fixed-income securities, primarily MBS. The Company is exposed to price changes in its trading portfolio arising from interest rate changes during the period it holds the securities. To manage this risk, the Company utilizes the following derivative instruments:

-

Forward Sales of To-Be Announced ("TBA") MBS: An obligation to sell agency pass-through MBS that have not yet been issued on a specified price and at a specified date in the future. The value increases as mortgage rates rise.

- **Forward Purchases of TBA MBS:** An obligation to purchase agency pass-through MBS that have not yet been issued at a specified price on a specified date in the future. The value increases as mortgage rates fall.

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COUNTRYWIDE FINANCIAL CORPORATION AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

- **Interest Rate Swaps:** A mutual agreement to exchange interest rate payments; one party paying a fixed rate and another paying a floating rate tied to a reference interest rate (e.g., USD LIBOR). For use in its trading portfolio risk management activities, the Company receives the floating rate and pays the fixed rate. Such contracts increase in value as rates rise.

- **Futures Contracts:** A standardized exchange-traded contract, the value of which is tied to the spot Federal Funds or Eurodollar rates at specified future dates. The value of these contracts increases when Federal Funds or Eurodollar rates fall.

- **Total rate of return swaps:** An agreement to pay or receive the total return on a financial index or security in exchange for the payment or receipt of a floating rate of interest over the term of the contract. For use in the risk management of the commercial mortgage portfolio, the Company pays the return on a published CMBS index

and receives the floating rate of interest. The value of these contracts increases as the value of the index declines.

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Put Options on Federal Funds and Eurodollar Futures

Contracts: A right to sell Federal Funds or Eurodollar futures contract at a specified price on a specified date in the future. The value increases as the Federal Funds or Eurodollar rate rise.

•

Call Options on Federal Funds and Eurodollar Futures

Contracts: A right to acquire Federal Funds or Eurodollar futures contract at a specified price on a specified date in the future. The value increases as the Federal Funds or Eurodollar rate falls.

•

Short Futures Contract: The sale of a standardized exchange-traded contract that we do not own, the value of which is tied to spot Federal Funds or Eurodollar rates at specified future dates. The value of these contracts increases when Federal Funds or Eurodollar rates rise.

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Interest Rate Cap: A right to receive cash if a reference interest rate rises above a contractual strike rate. The reference interest rates used in the Company's interest rate caps include mortgage rates, U.S. Treasury rates, and USD LIBOR. The value increases as the reference interest rate rises.

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Payer Swaptions: A right to enter a predetermined Interest Rate Swap at a future date where we receive the floating rate and pay the fixed rate. These contracts increase in value as rates rise.

•

Receiver Swaptions: A right to enter a predetermined Interest Rate Swap at a future date where we receive the fixed rate and pay the floating rate. These contracts increase in value as rates fall.

- **Forward rate agreement: A mutual agreement to exchange a single cash flow at a forward settlement date, based on the difference between the forward fixed rate and floating rate set equal to the 30-day forward current coupon rate. For use in the risk management of the broker-dealer securities trading portfolio, the Company receives the floating rate and pays the fixed. Such contracts increase in value as rates rise.**

The following describes the methods used by the Company in estimating fair values:

Mortgage Loans Held for Sale

The Company estimates the fair value of loans held for sale based on quoted market prices for securities backed by similar types of loans when quotes are available. If quoted market prices are not available, fair value is estimated based on other relevant factors, including dealer price quotations, prices available for similar instruments, and valuation models intended to approximate the amounts that would be received from a third party. We regularly compare the values developed from our valuation models to executed trades to assure that the valuations are reflective of actual sale prices. However, due to the illiquidity of the mortgage marketplace prevalent at December 31, 2007, which resulted in a lack of executed trades that could be used to assure that the valuations are reflective of fair value, it was necessary to look for alternative sources of value, including the whole loan purchase market for similar loans, and to apply more judgment to the valuations of non-conforming prime, home equity and nonprime loans, which represented approximately 44% of mortgage loans originated or purchased for resale excluding loans secured by commercial real estate at December 31, 2007.

Trading Securities

Fair value for U.S. Treasury and agency mortgage-backed securities is determined using quoted market prices. If quoted market

prices are not available, which is generally the case for other types of securities held in the trading portfolio, fair value is determined based on other relevant factors, including dealer price quotations, prices available for similar instruments, and valuation pricing models intended to approximate the amounts that would be received from or paid to a third party in settlement of the securities.

Securities Purchased Under Agreements to Resell, Securities Borrowed and Federal Funds Sold

These financial instruments are recorded at accreted cost. Fair value was determined by calculating the net present value of future cash flows of each contract. The discount rate used was the market rate that would be required to enter these same contracts at the balance sheet date. Fair value was considered to be equal to book value for some contracts, such as those with open or overnight maturities.

Loans Held for Investment

Fair value is estimated through the use of discounted cash flow valuation models. The key assumptions that are used in the valuation of loans held for investment include mortgage prepayment speeds, credit loss assumptions, the market participants' required return on equity, equity level and cost of funds. The Company has incorporated mortgage prepayment and credit loss assumptions, which include expectations of home price changes, in its valuation models that it believes other major market participants would consider in deriving the fair value of its loans held for investment. In order to reflect current uncertainties and illiquidity apparent in the secondary mortgage market, the required return on equity used in our valuation process at December 31, 2007 were higher than the returns demanded by market participants in the past. In order to reflect the significant disruption in mortgage financing markets, the Company used higher cost of funds assumptions than have been experienced in the past. Estimation of fair value of loans held for investment is inherently judgmental because there is limited trading of seasoned loan portfolios.

Warehouse lending advances and re-warehoused FHA-insured and VA-guaranteed loans are recorded at realizable value, which approximates fair value.

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COUNTRYWIDE FINANCIAL CORPORATION AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

Investments in Other Financial Instruments:

Principal-Only Securities

Fair value is estimated through the use of a proprietary, "static" (single rate path) discounted cash flow model. The Company has incorporated mortgage prepayment assumptions in its valuation that it believes other major market participants would consider in deriving the fair value of principal-only securities.

Interest-Only Securities

Fair value is estimated through the use of a proprietary, multiple rate path discounted cash flow model. The Company has incorporated mortgage prepayment assumptions in its valuation model that it believes other major market participants would consider in deriving the fair value of interest-only securities.

Interests Retained in Securitization

Fair value of retained interests, with the exception of interest-only securities and mortgage-backed securities, is estimated through the use of proprietary, "static" (single rate path) discounted cash flow models. The Company has incorporated mortgage prepayment and credit loss assumptions in its valuation models that it believes other major market participants would consider in deriving the fair value of its retained interests.

Mortgage-Backed Securities

Fair value for agency mortgage-backed securities is estimated using observable market prices. If observable market prices are not available, which is generally the case for non-agency mortgage-backed securities, fair value is determined based on other relevant factors, including dealer price quotations, prices available for similar instruments, and valuation pricing models intended to approximate the amounts that would be received from or paid to a third party in settlement of the securities.

Collateralized Mortgage Obligations

Fair value is estimated using valuation pricing models intended to approximate the amounts that would be received from or paid to a third party in settlement of the contracts.

U.S. Treasury Securities and Obligations of U.S. Government-Sponsored Enterprises

Fair value is estimated using quoted market prices.

Other Financial Instruments

Other financial instruments are primarily composed of tax-exempt municipal bonds, asset-backed securities and foreign government bonds. Fair value is estimated using quoted market prices.

Notes Payable

Fair value is estimated by discounting remaining payments using applicable current market rates which take into account changes in the Company's marketplace credit ratings.

COUNTRYWIDE FINANCIAL CORPORATION AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

Securities Sold Under Agreements to Repurchase and Federal Funds Purchased

Securities sold under agreements to repurchase are recorded at their accreted balances. Fair value was determined by calculating the net present value of future cash flows of each contract. The discount rate used was the market rate that would be required to enter these same contracts at the balance sheet date. Fair value was considered to be equal to book value for some contracts, such as those with open or overnight maturities.

Trading Securities Sold, Not Yet Purchased

Fair value is estimated using quoted market prices.

Deposit Liabilities

The fair value for the checking account and money market liabilities is equal to the amount payable on demand at the reporting date. (This value is also the carrying amount.) The fair value of certificates of deposit is estimated with a discounted cash flow calculation using interest rates currently being offered on similar accounts.

Corporate Guarantees

Fair value is estimated through the use of a proprietary model consisting of a loan-level frequency model estimated with survival analysis and a loan-level severity model estimated with multiple least square regressions. The modeling process incorporates the use of relevant risk factors.

Derivatives

Fair value is defined as the amount that the Company would receive or pay to terminate the contracts at the reporting date. Market or dealer quotes are available for many derivatives; otherwise, pricing or valuation models are applied using current market information to estimate fair value. The Company estimates the fair value of an IRLC based on the change in estimated fair value of the underlying mortgage loan and the probability that the mortgage loan will fund within the terms of the IRLC. The change in fair value of the underlying mortgage loan is measured from the date the IRLC is issued. At the time of issuance the estimated fair value of an IRLC is zero. Subsequent to issuance, the value of an IRLC can be either positive or negative depending on the change in value of the underlying mortgage loan. The Company generally estimates the fair value of the underlying loan based on quoted market prices for securities backed by similar types of loans. If quoted market prices are not available, fair value is estimated based on other relevant factors, including dealer price quotations, prices available for similar instruments, and valuation models intended to approximate the amounts that would be received from a third party. We regularly compare the values developed from our valuation models to executed trades to assure that the valuations are reflective of actual sale prices. However, due to the illiquidity of the mortgage marketplace prevalent at December 31, 2007, which resulted in a lack of executed trades that could be used to assure that the valuations are reflective of fair value, it was necessary to look for alternative sources of value, including the whole loan purchase market for similar loans, and to apply more judgment to the valuations of non-conforming prime, home equity and nonprime loans.

Commitments to Extend Credit

The fair value of commitments to extend credit represents the fair value of loan commitments related to loans that will be originated for investment. The fair value is based on observed market

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COUNTRYWIDE FINANCIAL CORPORATION AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

prices for loans of a similar type, coupon and maturity and the probability that the mortgage loan will fund within the terms of the loan commitment.

Servicing Compensation

As compensation for performance of servicing functions under its various loan servicing contracts, the Company is paid a monthly service fee that is generally expressed as a percentage of the current unpaid principal balance of the underlying loans. The loan servicing contracts generally specify a base service fee of between 0.125% and 0.50% per year of the unpaid balance of the loans. With regard to its servicing contracts with Fannie Mae, Freddie Mac and Ginnie Mae, the Company can effectively retain a larger net service fee principally through its methods of securitization. In general, the larger the net servicing fee retained, the smaller the net cash proceeds received upon securitization. Therefore, the decision to retain net service fees above the contractual minimum amounts is based on the Company's assessment of the underlying economics as well as its capital requirements. As of December 31, 2007, the weighted-average service fee, net of applicable guarantee fees, of the Company's portfolio of loans serviced for others was 0.35% per annum.

The Company is generally entitled to retain the interest earned on funds held pending remittance (or "float") related to its collection of mortgagor principal, interest, tax and insurance payments. The amount of float varies depending on the terms of the servicing contract and timing of receipt of payments from the mortgagors. The Company is generally entitled to various fees collected that are contractually associated with the mortgages, such as late charges, mortgage prepayment penalties and collateral reconveyance fees. The Company generally has the right to solicit the mortgagors for other products and services that it offers, such as insurance and second mortgage loans.

As part of its loan servicing responsibilities, the Company is required to advance funds to cover delinquent scheduled principal and interest payments to security holders, as well as to cover delinquent tax and insurance payments and other costs required to protect the investors' interest in the collateral

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COUNTRYWIDE FINANCIAL CORPORATION AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

securing the loans. The Company had \$4.0 billion and \$2.2 billion of such advances outstanding as of December 31, 2007 and 2006, respectively, which amounts were included in other assets at realizable value.

Borrower and Investor Custodial Accounts

As of December 31, 2007 and 2006, the Company managed \$19.2 billion and \$23.3 billion, respectively, of borrower and investor custodial cash accounts. These custodial accounts relate to the Company's mortgage servicing activities. Of these amounts, \$12.6 billion and \$15.7 billion, respectively, were deposited at the Bank, and included in the Company's deposit liabilities as custodial deposit accounts. The remaining balances were deposited with other depository institutions and are not recorded on the Company's balance sheets.

Note 31—Credit Losses Related to Securitized Loans

A significant amount of the mortgage loans originated by the Company were sold into the secondary mortgage market, primarily in the form of securities, and to a lesser extent as whole loans. In connection with its loan sales, the Company has potential liability under the representations and warranties made to purchasers and insurers of the loans. In the event of a breach of such representations and warranties, the Company may be required to either repurchase

the mortgage loans with the identified defects or indemnify the investor or insurer. In such cases, the Company bears any subsequent credit loss on the mortgage loans.

Following is a summary of the Company's liability for representations and warranties included in accounts payable and accrued liabilities for the periods presented:

Years Ended December 31,			
2007	2006	2005	
(in thousands)			
Balance, beginning of year		\$ 390,111	\$
187,443	\$ 152,031		
Provisions for losses		334,520	290,463
66,413			
Charge-offs	(84,994)	(87,795)	
(31,001)			
Balance, end of year	\$ 639,637	\$ 390,111	
\$ 187,443			

The Company generally sells its Prime Mortgage Loans on a non-recourse basis, either in the form of securities or whole loans. In addition, it may sell a portion of its Nonprime and Prime Home Equity Loans on a non-recourse basis in the form of whole loans.

Securitization

As described below, the degree to which we retain credit risk on loans that we sell through securitizations depends on the structure of the securitization. Our Prime Mortgage Loans generally are securitized on a non-recourse basis, while Prime Home Equity and

Nonprime Mortgage Loans generally are securitized with limited recourse for credit losses.

Conforming Conventional Loans

We generally pool conforming conventional loans into MBS guaranteed by Fannie Mae or Freddie Mac. Subject to certain representations and warranties we make, nearly all conventional loans securitized through Fannie Mae or Freddie Mac are sold on a non-recourse basis. The Company pays

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COUNTRYWIDE FINANCIAL CORPORATION AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

guarantee fees to these agencies to compensate them for their assumption of credit risk on securitized loans.

FHA-Insured and VA-Guaranteed Loans

FHA-insured and VA-guaranteed mortgage loans are generally pooled into MBS guaranteed by Ginnie Mae. The Company is insured against foreclosure loss by the FHA or partially guaranteed against foreclosure loss by the VA. Fees charged by the FHA and VA for assuming such risks are paid directly by the borrower. The Company is exposed to credit losses on defaulted VA loans to the extent that the partial guarantee provided by the VA is inadequate to cover the total credit losses incurred. The Company pays guarantee fees to Ginnie Mae for Ginnie Mae's guarantee on its securities of timely payment of principal and interest. Ginnie Mae does not assume mortgage credit risk associated with the loans securitized under its program.

Non-conforming Conventional Loans

Non-conforming conventional prime mortgage loans are generally pooled into "private-label" (non-agency) MBS. Such securitizations involve some form of credit enhancement such as senior/subordinated structures, including residual interests, overcollateralization or mortgage pool insurance. Securitizations that involve senior/subordinated structures contain securities that assume varying levels of credit risk. Holders of subordinated securities are compensated for the credit risk assumed through a higher yield. When we sell the subordinated securities created in connection with these securitizations we transfer the related credit risk subject to representations and warranties we make when the loans are securitized. When we retain the subordinated securities, generally the residual interests, we are in the first loss position; however, the recourse for credit losses is limited to the carrying value of the residual securities.

In some cases a portion of the retained residual interest is deposited into a net interest margin ("NIM") security, which enables us to sell some of the future residual cash flows and retain a smaller residual interest ("Back-end NIM Residual"). The holder of the Back-end NIM Residual is in the first loss position; however, the recourse for credit losses is limited to the carrying value of the Back-end NIM residual.

Prime Home Equity Loans

Prime Home Equity Loans are generally pooled into private-label asset-backed securities. The Company generally securitizes these loans with limited recourse for credit losses through retention of residual interests and other subordinated interests, such as transferor's interests. These securities generally contain credit enhancement in the form of over-collateralization and insurance provided by a third-party surety. In some cases, the securitizations also contain mortgage pool insurance or a limited corporate guarantee as a form of credit enhancement. As the holder of the residual interest Countrywide is in the first loss position. The Company is also exposed to additional losses in home equity securitization transactions that involve insurance issued by third

party sureties when losses exceed specified levels or duration. When this condition, known as rapid amortization, occurs, the reimbursement Countrywide receives from the sale of additional draws on the home equity loans becomes subordinated to the claims of all other parties to the securitization, including bondholders and the third party surety. This subordination has the effect of deferring reimbursement of the subsequent draws for an extended period and subjecting the subsequent draws to absorbing credit losses.

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COUNTRYWIDE FINANCIAL CORPORATION AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

Nonprime Mortgage Loans

Nonprime Mortgage Loans generally are pooled into private-label asset-backed securities. The Company generally securitizes these loans with limited recourse for credit losses through retention of residual interests. The holder of the residual interest is in the first loss position; however, the recourse for credit losses is limited to the carrying value of the residual interest. In some cases, such limited recourse securitizations have contained lender paid mortgage insurance as a form of credit enhancement or a limited corporate guarantee from Countrywide. The Company also has pooled a portion of Nonprime Mortgage Loans into securities guaranteed by Fannie Mae. In such cases, the Company has paid Fannie Mae a guarantee fee in exchange for Fannie Mae assuming the credit risk of the underlying loans.

In some cases a portion of the retained residual interest is deposited into a NIM security, which enables the Company to sell future residual cash flows and retain a smaller residual interest. The holder of the Back-end NIM Residual is in the first loss position; however, the recourse for credit losses is limited to the carrying value of the Back-end NIM residual.

The Company's exposure to credit losses related to subordinated interests is limited to the assets' carrying values plus the value of additional draws we may be required to subordinate if a rapid amortization event occurs in a securitization. We carry subordinated interests at their estimated fair values. The carrying values of our subordinated interests are as follows:

December 31,		
	2007	2006
(in thousands)		
Prime home equity residual securities		\$ 422,681
	\$ 1,506,109	
Subordinated mortgage-backed pass-through securities(1)		
	270,744	1,382
Nonprime residual and other related securities		293,048
	545,465	
Prime residual securities	20,557	12,756
	\$ 1,007,030	\$ 2,065,712
Corporate guarantees in excess of recorded liabilities		\$
	496,699	\$ 490,542

(1)

Included with mortgage-backed pass-through securities.

The carrying values of our subordinated interests take into account our estimates of losses to be absorbed by the subordinated interests.

The Company estimates its liability for impairment losses related to its future draw obligations and updates its estimate quarterly. The Company's provision for estimated losses arising from future draw obligations is recorded as a component of impairment of retained

interests. The accrued liability for impairment related to future expected funding obligations under a rapid amortization event was \$704.1 million as of December 31, 2007 and is included in accounts payable and accrued liabilities on our consolidated balance sheet. The available credit lines for the securitizations subject to or expected to be subject to a future draw obligation are approximately \$2.4 billion at December 31, 2007. However, due to the borrower's ability to pay down and redraw balances, a maximum obligation cannot be defined.

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COUNTRYWIDE FINANCIAL CORPORATION AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

The losses absorbed by our subordinated interests during the period are summarized as follows:

Years Ended December 31,			
	2007	2006	2005
	(in thousands)		
Prime home equity residual securities			\$ 896,020
	\$ 79,357	\$ 34,173	
Nonprime residuals and other related securities			380,380
	94,795	69,269	
Prime residual securities		6,695	57
	—		
	\$ 1,283,095	\$ 174,209	\$ 103,442

Note 32—Commitments and Contingencies

Legal Proceedings

Countrywide and certain subsidiaries are defendants in various legal proceedings involving matters generally incidental to their businesses.

In addition, lawsuits alleging claims for derivative relief on behalf of the Company and securities, retirement plan, and other class action suits have recently been brought against Countrywide, and certain of its current and former officers, directors and retirement plan administrators in either federal district court in Los Angeles, California, state superior court in Los Angeles or state court in Delaware. Among other things, these lawsuits allege breach of state law fiduciary duties and violation of the federal securities laws and the Employee Retirement Income Security Act of 1974 ("ERISA"). These cases allege, among other things, that Countrywide did not disclose complete and accurate information about its mortgage lending practices and financial condition. The shareholder derivative cases brought in federal court are brought on Countrywide's behalf and do not seek recovery of damages from the Company. Two consolidated cases alleging claims for derivative relief on behalf of the Company are also pending in federal district court in Delaware, and alleges, among other things, that certain Company proxy filings contain incorrect statements relating to the compensation of the Company's Chief Executive Officer.

Various class action lawsuits relating to our proposed merger with Bank of America have been filed in the state courts of California and Delaware on behalf of a proposed class of Countrywide shareholders against the Company, our directors and Bank of America. The class action lawsuits filed in state court in California have been removed to federal court in Los Angeles. These lawsuits allege that the Company's directors breached their fiduciary duties to the Company's shareholders by entering into the merger agreement with Bank of America and that Bank of America allegedly aided and abetted those alleged breaches. Similarly, the plaintiffs in the shareholder derivative lawsuits brought in California state and federal court recently have amended their complaints to add similar class action allegations relating to the proposed merger with Bank of America.

Although Management believes it has meritorious defenses to each of these actions and intends to defend them vigorously, it is difficult to predict the resulting outcome of these proceedings, particularly where investigations and proceedings are in early stages. Given the inherent difficulty in predicting the outcome of legal proceedings, Management cannot estimate losses or ranges of losses for legal proceedings where there is only a reasonable possibility that a loss may be incurred, such as those discussed in the two immediately preceding paragraphs. The Company provides for potential losses that may arise out of legal proceedings to the extent such losses are deemed probable and can be estimated. Although the ultimate outcome of the Company's legal proceedings discussed above cannot be

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COUNTRYWIDE FINANCIAL CORPORATION AND SUBSIDIARIES

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

ascertained at this time, Management believes that any resulting liability will not materially affect its consolidated financial position; such resolution, however, could be material to its operating results for a particular future period depending upon the outcome of the proceedings and the operating results for a particular period. This assessment is based, in part, on the existence of insurance coverage.

Commitments to Buy or Sell Mortgage-Backed Securities and Other Derivatives Contracts

In connection with its open commitments to buy or sell MBS and other derivative contracts, the Company may be required to maintain margin deposits. With respect to the MBS commitments, these requirements are generally greatest during periods of rapidly declining interest rates. With respect to other derivative contracts, margin requirements are generally greatest during periods of

increasing interest rates. Margin deposits placed by the Company at December 31, 2007, totaled \$1.2 billion.

Glossary

acceleration clause

A provision in a loan document stating that the entire amount of unpaid indebtedness owed to the lender may become immediately due and payable if the borrower defaults. A provision that allows the lender to demand the entire balance of the mortgage loan when the borrower fails to make some installment payments. **THIS DEMAND SHOULD BE MET WITH A TILA AUDIT AND A REPORT, TOGETHER WITH YOUR DEMAND THAT THEY WITHDRAW THE ACCELERATION LETTER BASED UPON FRAUD, MISREPRESENTATION, DECEPTIVE LENDING, NON-DISCLOSURE ETC.** The other thing about acceleration is whether the sender of the letter had any authority to do so. See CDO below. It is highly likely that the loan was assigned to a mortgage aggregator who sold a portfolio of perhaps a thousand loans to an investment banking house, that converted the portfolio into an entity that issued securities, and that the securities were wholesaled out to a seller of such securities and that the securities were sold to dozens, hundreds or even thousands of investors. **THESE INVESTORS PROBABLY DID GET PAID BY THE ISSUER OF THE SECURITIES, THE INVESTMENT BANKER, OR SOME INSURANCE COMPANY** (although they were probably not paid in full). The indenture to most of these securities provides that the issuer can use the proceeds of sale of the securities to pay interest and principal back to the investor. A classic Ponzi scheme but perhaps legal under our convoluted laws. Even if they were not paid, the entity that sent the acceleration letter probably did not perform due diligence to know for sure that the obligation had not been paid by some third party. Thus the acceleration letter can be challenged and should be challenged. So we have a situation where even if the actual borrower did not make the payments to mortgage servicing company, the actual owner(s) of the the mortgage and note did get paid at least in part. The acceleration letter probably states the amount the borrower allegedly didn't paid but does not give credit for the amounts actually paid to the investor who purchased the security that was backed by this mortgage and note. This vicarious payment might be a credit to the advantage of the borrower. SEE QUIET TITLE. SEE TEMPORARY INJUNCTION.

active tranche

A REMIC tranche that is currently paying principal payments to its owners. **TRANCHES ARE LEVELS OR STRIATIONS WITHIN A SECURITY OR OTHER INVESTMENT. IN THE MORTGAGE MELTDOWN DERIVATIVE SECURITIES WERE MADE INCREASINGLY COMPLEX WITH AS MANY AS 125 TRANCHES SO THAT INQUIRIES INTO THE TRUE VALUE, AND THE REAL RISK OF THE SECURITY, LOAN OR INVESTMENT COULD NEVER BE VERIFIED. THUS THIRD PARTIES WHO PURCHASED ASSET BACKED SECURITIES, CDO, CMO ETC. RELIED ON RATINGS FROM MOODY'S, FITCH AND OTHER COMPANIES WHOSE ANALYSTS WERE RECEIVING FREE FISHING TRIPS AND OTHERWISE "NEGOTIATING" RATINGS INSTEAD OF ARRIVING AT RATINGS THROUGH ANALYSIS AND DUE DILIGENCE. THE RATING AGENCIES ARE LIKELY TO BE THE TARGET OF LITIGATION BY THOSE UNFORTUNATE BUYERS OF THE ASSET BACKED SECURITIES DURING THE MORTGAGE MELTDOWN PERIOD.**

ADMINISTRATIVE REVIEW

One of two types of real estate appraisal reviews. Administrative reviews focus primarily on the underwriting issues addressed in the appraisal. These reviews, usually performed by the loan officer, approach the appraisal from a loan underwriting point of view. Typical issues addressed in an administrative review include: How comparable are the comparable properties used in the appraisal? How reasonable are income and expense projections? Is the capitalization rate appropriate?

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SET THE STANDARD OF PERFORMANCE FOR ANY LENDER, IT WAS SKIPPED DURING THE MORTGAGE MELTDOWN PERIOD OF 2001-2008 BECAUSE THE LENDER KNEW IT WAS SELLING OR ASSIGNING THE LOAN TO THIRD PARTIES AND THEREFORE DID CONSIDER THE RISK FACTORS OF THE LOAN BEFORE GRANTING IT. IT WAS HERE THAT THE TRADITIONAL RELATIONSHIP OF BORROWER AND LENDER, EACH HAVING A STAKE IN THE OUTCOME OF THE LOAN, WAS INTERRUPTED WITHOUT DISCLOSURE TO THE BORROWER WHICH IS A VIOLATION OF THE DISCLOSURE RULES UNDER TILA AND OTHER APPLICABLE STANDARDS.

See technical review.

SEE APPRAISAL.

adjustable-rate mortgage (ARM)

A loan for which the interest rate (coupon rate) is adjusted periodically to reflect changes in a previously selected index rate. ARMs may have caps and floors that limit the annual and/or the lifetime change in the coupon rate.

AGENCY PROBLEM:

The problem that results when deposits and loans are left to channels that serve as brokers or “bird-dogs” to offer bank services. This “problem” was a tool of lenders and investment bankers to maintain plausible deniability as to representations made before or at the loan closing and to cover misrepresentations, failure to disclose parties, remuneration and terms on the good faith estimate, misrepresentations of borrower’s income, misrepresentation of underwriting standards showing borrower’s ability to pay, etc. “Agency Problem” is not a meritorious defense of the lender, the mortgage broker, the appraiser, the investment banker, the mortgage aggregator, the special purpose vehicle/entity or the sellers of asset backed securities.

AFFIDAVIT

A written statement, usually given while under oath or in the presence of a notary. **THESE CAN BE CHALLENGED WHEN SUBMITTED AS PROOF OR AS INSTRUCTIONS REGARDING PAYMENTS ON THE MORTGAGE NOTE OR EVEN THE EXISTENCE OF THE MORTGAGE NOTE. YOU SHOULD ALWAYS DEMAND THE ORIGINAL NOTE AND MORTGAGE. IT PROBABLY EITHER DOESN'T EXIST OR HAS BEEN LOST. THE PERSON SIGNING THE AFFIDAVIT FROM THE LENDING INSTITUTION PROBABLY DIDN'T EVEN WORK THERE WHEN THE TRANSACTION WAS COMPLETED AND THEREFORE HAS NO PERSONAL KNOWLEDGE AND THEREFORE IS INCOMPETENT TO ATTEST THE TRUTH OF THE FACTS IN THE AFFIDAVIT. A TERM USED BY INSIDERS IN THE BANKING INDUSTRY TO DESCRIBE HOW HIDING THE ALLOCATION OF RISK INCREASES THE PROBABILITY OF DEFAULT.** When loan originators (whether they are in act mortgage brokers or are perceived as “lenders” by the borrower because of lack of disclosure as required under TILA) have the perception that they are at no risk in on the loan, they have no stake in the outcome of the loan. The Agency problem is shorthand for describing what happens when the originator has no stake in a borrower's continued solvency, to wit: all that is left is competing for fees, discontinuing industry standards like escrow accounts for taxes and insurance, scheming to increase the fees and hide them on the back end of loans, and inevitably degrade the average quality of all loans. The annual interest rate covering the interest and other costs. The Truth in Lending Act requires announcement of APR by lenders. **FREQUENTLY COMPUTED INCORRECTLY LEADING TO TILA CLAIMS.** A business organization that shares some aspect of common ownership or control with another business organization.

AFFILIATE:

In the parsing of words to avoid liability for fraud,, non-disclosure, misrepresentations and the remedies of refunds, rebates, damages and rescission, the Defendants will resort to the “AGENCY PROBLEM” (see this Glossary). One of the ways to do that is to distance themselves from the key transactions which serve as book-ends of the **SINGLE TRANSACTION** that was fraudulent scheme that came to be known as the Mortgage Meltdown. One of the ways to distance themselves is to convince a Judge or Jury to consider all the other players as essentially unrelated to them. And one of the terms used to do this is to call their co-conspirators

affiliates, if other terms have already been unsuccessful in the proceedings. The fact remained that every player in the line of the mortgage meltdown transaction knew (or should have known) exactly what was going on --- inflated housing prices, inflated incomes, hidden terms (where the borrower would not qualify for the loan at the first reset in an adjustable rate mortgage), inflated and fraudulent securities ratings, misrepresentations of security (using the "revenue" of tranches of lower quality to make a tranche of "higher" quality look safer than it was, etc.) It was all part of the same transaction and everyone had to play their part in creating the appearance of legitimate transactions where there was only fraud, non-disclosure and an intent to intentionally mislead the borrower/investor and the capital investor. You can use the term affiliate or co-conspirator interchangeably.

allonge

A paper attached to negotiable instruments for signatures when there isn't enough room on the instruments themselves for the signatures.

AMBAC: Insures payments on upper tranches of SPVs If someone is claiming default in payments, and the payments were made to the holder in due course by an insurer of those payments, then it is the insurer that might have a claim against the borrower but it is probably unsecured --- and still subject to borrowers defenses and claims up to the amount that the insurer claims.

amendment

A revision to a document. A UCC financing statement can be amended by filing a designated amendment form, usually UCC-3.

amortization

(1) The process of making regular, periodic decreases in the book or carrying value of an asset. For example, when a bond is purchased at a price above 100, the difference between the purchase price and the par value, the premium, is amortized. Premiums are usually amortized in roughly equal amounts that completely eliminate the premium by the time that the bond has matured or by the call date, if applicable.

(2) Liquidation of a loan or security by means of periodic reductions. The principal amount of loans is amortized by the periodic, usually monthly, payment of a fraction of the principal calculated to repay the entire amount of principal due by the date of the last scheduled periodic payment. Amortization methods differ based upon the type of loan. Mortgage loans and securities usually have level payments of principal and interest. For such amortizations, the interest consumes most of the early payments and, therefore, principal amortization increases as the loan ages. Many business loans use a level amortization with roughly equal principal reductions from each periodic payment. The calculation of amortization, including rounding errors, or intentional manipulation of the numbers on a rate adjustment is ripe fruit for the litigation attorney: it spells relief for the borrower under TILA, RESPA and possibly RICO, common law fraud, breach of contract, and state unfair and deceptive practice statutes. When "lenders" (loan originators) ran out of qualified people to loan money to in 2003, they were under pressure to move the "inventory" of cash being generated by the sale of asset back securities. **NEGATIVE AMORTIZATION BECAME THE RULE RATHER THAN THE EXCEPTION. AND PEOPLE, SOME WITH PERFECT CREDIT SCORES, WERE CONVINCED TO TAKE NEW MORTGAGES UNDER FALSE PRETENSES AS TO COST AND AFFORDABILITY. UNDER NEGATIVE AMORTIZATION, PAYMENTS WERE SET AT LEVELS THAT APPEARED TO SAVE THE BORROWER MONEY, BUT WHICH DID NOT COVER ALL THE INTEREST OWED, NOR THE ANY PRINCIPAL, NOR THE INSURANCE, NOR THE TAXES. GROSS OVERCHARGES FOR FEES TO THE MORTGAGE BROKER WERE BURIED IN THE BACK END OF THE LOAN BUT PAID UP FRONT BY THE "LENDER." IN ADDITION, UNDISCLOSED YIELD-SPREAD PREMIUMS WERE ALSO PAID UP FRONT TO THE MORTGAGE BROKER IN EXCHANGE FOR GUIDING THE BORROWER INTO LOANS THAT WERE LESS FAVORABLE THAN WHAT THEY COULD HAVE RECEIVED THROUGH HONEST BROKERS AND LENDERS.** Thus people who either already had their homes paid off or almost paid off were placed in positions where the payments due, after adjustments, quickly moved beyond their **TOTAL INCOME**. Underwriting standards of the most basic nature were ignored in favor of electronic scoring and plausible deniability. See NINJA Loans

amortization period

For financial instruments, the time from the inception of a loan or investment instrument with scheduled principal repayments to the due date of the final contractually obligated principal repayment. For fixed assets, the period from the acquisition of a fixed asset to the date of the last periodic reduction (made to reflect depreciation) of the book value of that asset. (Assets may be depreciated until the book value is zero, but sometimes are only depreciated until the book value is reduced to an assumed salvage value.)

amortizing swap

An interest rate swap with a declining notional principal.

annual percentage rate (APR)

The total financing costs associated with a loan on an annualized basis, divided by the amount borrowed. As defined by Federal Reserve Regulation Z and the Truth-in-Lending Act, this is a precisely calculated measure of the cost of a loan. The Truth-in-Lending Act and Regulation Z have specific requirements covering both how to calculate and how to disclose APRs.

The inflated appraisals that run at the core of the mortgage meltdown context and crisis results in a number of claims against the lender, the appraiser, the mortgage broker, the real estate broker, the developer, and entities upline in the securitization process, plus the insurance companies carrying errors and omissions and other assurance on those participants.

Salient among these is the effect that the appraisal, known by those participants to have been inflated. Thus the borrower was taking a loss at closing without knowing it. This loss, while also considered damages if one is pleading fraud, produces a distortion of the annual percentage rate (APR) disclosure in the good faith estimate. Thus if the GFE states the APR at 6%, and the buyer loses \$100,000 like a new car buyer driving off the lot, the interest rate on a 30 year mortgage would be at least 3% at variance with the disclosed APR.

annual percentage yield (APY)

A precisely calculated measure of yield paid on a bank deposit account.

anticipated income doctrine of liquidity

An explanation of bank liquidity developed by Herbert Prochnow, in which the net cash flow of bank borrowers, rather than subsequent new borrowings, is seen as the true source of loan repayments. Accordingly, to the extent that loans are written with payment terms and maturities that reflect the borrower's cash flow stream, the cash flow to the bank from loan principal payments is the source of bank liquidity. See commercial loan theory of liquidity and shiftability theory of liquidity. **IN LITIGATION, OR EVEN ON DEMAND, THE ATTORNEY SHOULD REQUIRE COPIES OF ALL MEMORANDA, AGENDAS AND NOTICES OF MEETING BY ANY PERSONNEL OF THE LENDER WITH ANY THIRD PARTY OR ANY PARTY OR EXECUTIVE WITHIN THE FINANCIAL INSTITUTION. SOME OF THESE MEETINGS ARE RECORDED.**

anticipatory hedge

A hedge of a yet-to-be-acquired asset or liability.

appraisal appraisal-fraud-charges-not-investigated

CNN 2005 Reports Pressure on Appraisers --- "A train wreck waiting to happen."

A statement or estimate of the market value of tangible personal property or real estate. Under the federal appraisal regulations for real estate pledged to secure loans, the term "appraisal" refers to a statement of market value that meets the five specific standards. See complete appraisal, evaluation, and limited appraisal. **APPRAISAL IS A PROCESS RATHER AN EVENT: The process by which a licensed person gives an**

estimate of property value. Appraiser's usually have Errors and Omissions Insurance policies. It is highly likely that if you have been defrauded by inflated appraisals of "fair market value" you may have a claim against the appraiser as well as the lender who hired the appraiser. In most cases during the Mortgage Meltdown period, the appraiser is given the information ahead of time, so he/she knows what the purchase price is and what the loan amount is. If the appraiser wants continued employment, he/she has economic incentive/coercion to come up with a rationalization for stating the value of the property at an inflated amount in order for the loan to close and borrower to sign the papers at a closing, which is the condition precedent for many of the intermediaries to get paid. Improper behavior by an appraiser could mean civil, criminal and/or administrative sanctions (by filing a complaint with the state licensing board). **APPRAISAL FIRMS ARE LICENSED, USUALLY INSURED OR BONDED OR OTHERWISE HAVE FINANCIAL SECURITY. IF THEY FAIL TO USE DUE DILIGENCE IN REPORTING THE FAIR MARKET VALUE OF REAL PROPERTY, AS MOST DID DURING THE MORTGAGE MELTDOWN PERIOD OF 2001-2008, THEY MAYBE DISCIPLINED BY THEIR LICENSING BOARD, SUED FOR CIVIL LIABILITY, OR EVEN CRIMINALLY PROSECUTED IF A CRIME HAS OCCURRED.**

The inflated appraisals that run at the core of the mortgage meltdown context and crisis results in a number of claims against the lender, the appraiser, the mortgage broker, the real estate broker, the developer, and entities upline in the securitization process, plus the insurance companies carrying errors and omissions and other assurance on those participants.

Salient among these is the effect that the appraisal, known by those participants to have been inflated. Thus the borrower was taking a loss at closing without knowing it. This loss, while also considered damages if one is pleading fraud, produces a distortion of the annual percentage rate (APR) disclosure in the good faith estimate. Thus if the GFE states the APR at 6%, and the buyer loses \$100,000 like a new car buyer driving off the lot, the interest rate on a 30 year mortgage would be at least 3% at variance with the disclosed APR.

APPRAISAL REDUCTION EVENT: SEE REMIC

The Appraisal Reduction Event that appears in virtually all securitization events at some point is for the benefit of the CDO manager (Investment Banker). They make the announcement in accordance with their interpretation of FASB accounting rules that the security is being written down because of appraisal reductions. No such new appraisals have occurred. The announcement is made anyway because the indenture to the bond or certificate held by the investor says they can and they do --- because any money collected over that amount is "required" to be distributed under REMIC and since the Appraisal Reduction Event, the extra money can only go one place --- the investment bank (who has profited from its own order to issue a declaration of an appraisal reduction event). Thus REMIC provides that the certificate holder is to be treated as the real party in interest for purposes holding the note, someone else is apparently in charge of holding the mortgage but has no access to revenue flow or the note, and reductions in payments result from non-payment by all of the people downstream (not just the borrower), diversions, and Appraisal Reduction Events. A "default" by the borrower is thus insufficient to declare the loan in default because it is either being paid by third parties, as above or the borrower's payments have been incorrectly applied, along with others, to create the appearance of a default.

appraisal surplus

The difference between the historical cost and the appraised value of fixed assets.

APR

See annual percentage rate.

arbitrage CDO

A CDO whose purpose is to allow a money manager to expand assets under management and equity investors to achieve non-recourse leverage to CDO assets. There is no "arbitrage" in the classic sense of the word. Rather, equity holders hope to capture the difference between the after-default yield on the assets and the financing cost due debt tranches. See collateralized debt obligation (CDO).

asset-backed security (ABS)

A debt security collateralized by assets. Created from the securitization of any loans other than mortgage loans. (Securitized mortgage loans are called mortgage backed securities or collateralized mortgage obligations.) Typically, asset backed securities are created from consumer installment or credit card loans. Securitized commercial (non-consumer) obligations are typically called collateralized debt obligations or CDOs. CDOs are sometimes defined to be a subset of ABSs. ABSs may be structured in a variety of ways including simple "pass through" structures and complex, "multi-tranche" structures. The value that ABSs provide to investors is comprised of the cash flows due to the ABS holders from the underlying loans. ABS issues are typically structured so that the bankruptcy or insolvency of an underlying borrower does not impact the cash flow received by the security owner. See special purpose vehicle and waterfall.

asset sensitive

Describes an entity's position when an increase in interest rates will help the entity and a decrease in interest rates will hurt the entity. An entity is asset sensitive when the impact of the change in its assets is larger than the impact of the change in its liabilities after a change in prevailing interest rates. This occurs when either the timing or the amount of the rate changes for liabilities causes interest expense to change by more than the change in interest income. The impact of a change in prevailing interest rates may be measured in terms of the change in the value of assets and liabilities. In that case, an asset-sensitive entity's economic value of equity increases when prevailing rates rise or declines when prevailing rates fall. Alternatively, the impact of a change in prevailing rates may be measured in terms of the change in the interest income and expense for assets and liabilities. In that case, an asset-sensitive entity's earnings or net income increases when prevailing rates rise and declines when prevailing rates fall.

asset/liability management committee (ALCO)

A committee, usually comprising senior managers, responsible for managing assets and liabilities to maximize income and safety over the long run. In a financial institution, the ALCO is usually responsible for asset and liability distribution, asset and liability pricing, balance sheet size, funding, spread management, and interest rate sensitivity management. Usually used somewhat redundantly, as in ALCO committee.

asset/liability management (ALM)

Coordinated management of all of the financial risks inherent in the business conducted by a financial institution. The process of balancing the management of separate types of financial risk to achieve desired objectives while operating within predetermined, prudent risk limits. Accomplishing that task requires coordinated management of assets, liabilities, capital, and off-balance sheet positions. Therefore, in the broadest sense of the term, ALM is simply the harmonious management of cash, loans, investments, fixed assets, deposits, short-term borrowings, long-term borrowings, capital, and off-balance sheet commitments. However, in practice, the term is often used to refer to segments of that broader definition such as only interest rate risk management or only interest rate and liquidity risk management. See earnings at risk, market value at risk and market value of portfolio equity.

assets repriced before liabilities

A measure of the gap between the quantity of assets repricing and the quantity of liabilities repricing within a given period of time. A simple measure of a financial institution's exposure to beneficial or adverse consequences from changes in prevailing interest rates.

assignee

The party to whom an assignment is made.

assignment -- SEE SPECIAL PURPOSE VEHICLE, STRUCTURED INVESTMENT VEHICLE

SEE MISSING ASSIGNMENT --- Forgeries Frequently Involved as "shortcuts" pmioecwenreport

Transfer of any contractual agreement between two parties. One of the parties, the assignor, transfers its rights or obligations to another party, the assignee. If interests in assets of the assignor are assigned, the assignment transfers all or some of the rights of ownership to the assignee. If interests in obligations of the assignor are assigned, the assignor is totally or partially absolved from further performance. Lenders sometimes see leased property assigned from the original lessor to another party who then pledges them to the bank as collateral for a loan. For personal property collateral, a secured party may enter an assignment of its security interest into the public record by using a standard form called UCC-3. IT IS IN THE ASSIGNMENT PROCESS BETWEEN THE PURPORTED "LENDER" AND A MORTGAGE AGGREGATOR AND THE SUBSEQUENT SALE OR ASSIGNMENT TO AN INVESTMENT BANKER AND THE SUBSEQUENT BUNDLING OF LARGE PORTFOLIOS OF LOANS INTO THE OFFERING OF SECURITIES IN UNREGULATED MARKET FORMATS THAT THE PAPERWORK BROKE DOWN IN MANY INSTANCES. IT NOW APPEARS AS THOUGH THERE IS NO DATABASE NOR ANY CONVENIENT WAY TO DRAW A CONNECTION BETWEEN THE DOZENS, HUNDREDS OR EVEN THOUSANDS OF INVESTORS WHO HAVE THE COMPLETE OWNERSHIP OF THE MORTGAGE AND NOTE OR A PARTICULAR BORROWER. NEITHER THE BORROWER NOR THE INVESTORS HAVE BEEN INTRODUCED AND HAVE NEVER BEEN ACTUALLY DISCLOSED TO EACH OTHER. THUS ANY PARTY PURPORTING TO SPEAK FOR THE MORTGAGE HOLDER IS LIKELY TO LACK THE ASSIGNMENT DOCUMENTS THAT ACTUALLY IDENTIFY THE PARTICULAR PROPERTY AT HAND NOR THE POWERS THAT SHOULD HAVE BEEN RETAINED OR ASSIGNED THROUGH POWERS OF ATTORNEY THAT MIGHT OR MIGHT NOT HAVE BEEN VALID EVEN IF THEY HAD BEEN EXPECTED. IT IS FOR THIS REASON THAT MANY MORTGAGES IN THE MORTGAGE MELTDOWN PERIOD HAVE BEEN DE-LINKED FROM THEIR SECURITY INTEREST IN THE PROPERTY AND MANY NOTES HAVE BEEN FOREVER COMPROMISED --- BY VIRTUE OF INDENTURES, INSURANCE AND OTHER LIABILITIES OF THIRD PARTIES WHO IN THEIR FEEDING FRENZY ON OFFERING THIS EASY MONEY PROBABLY ASSUMED THE OBLIGATION TO PAY THE NOTE. SEE ASSET BACKED SECURITY

asymmetric behavior asymmetric information

Unbalanced behavior exhibited by financial instruments, the rates or values of which do not change in proportion to changes in market rates. For example, increases in the prime rate quickly reflect most or all of increases in prevailing interest rates, while decreases in the prime rate are slow to reflect decreases in prevailing interest rates. The insider's way of saying "we know and you don't." TILA, Common law and state unfair and deceptive practice laws are designed to minimize the effect of this practice. As between financial institutions a certain amount of asymmetric information is tolerated. At the closing between a lender and a borrower, however, the laws are specifically designed to force disclosure of all relevant facts. The relevance of this term in foreclosure defense is simple: if the borrower actually knew that he/she/they could not place reliance on the lender to review the value of the property, review the underwriting standards, perform due diligence and evaluate the likely outcome of the loan was misplaced because the lender was in fact already in the practice of assigning or selling the loan before the first payment was due, the borrower would be put on notice that the lender had no stake in the outcome and that the appraiser sent in by the lender might also have compromised his/her objectivity. If the borrower knew that the "lender" was actually acting acting as conduit or in substance as a mortgage broker seeking fees and only had an interest in getting his/her/their signature, the borrower would be more likely to seek other assistance or ask more probing questions. Predatory lending is fundamentally based upon asymmetric information and particularly effective when dealing with INTER-TEMPORAL TRANSACTIONS where the real information comes out months or years after the transaction is executed by the borrower with ARM resets, negative amortization, and outsize fees that were tacked on to the back of the loan. When the lenders ran out of regular people to loan money to they came under intense pressure from the investment banking arm of their business or the investment banking house with which they had formed an alliance, to move the "inventory" of cash generated by the Ponzi scheme selling of ASB's. They thus needed a target audience that was either undereducated and thus unsophisticated in finance or, even better, people that didn't speak English or read English. Afro-Americans and poor white Americans fit the bill for under-educated and unsophisticated and the burgeoning latin population fit the bill for non-English fluency.

attachment

A procedure established by Article 9 of the UCC. Creditors must comply with this procedure in order to obtain a security interest in property owned by a debtor. Alternatively or in addition, the process may be used to give the creditor a security interest in property owned by a guarantor or by another third party. Often, attachment alone is not sufficient to establish the priority of the creditor's interest relative to the interests of other creditors. See financing statements and perfection.

attorney's certificate of title

See title opinion.

automatic stay

An injunction that automatically becomes effective upon the filing of any bankruptcy proceeding. The stay precludes creditors from taking action against the debtor or the debtor's property. In Chapter 12 or 13 bankruptcy proceedings, the automatic stay also applies to co-obligors and guarantors.

back-end load

A form of sales charge imposed on investors by some mutual funds. These charges may be called back-end loads, deferred loads, deferred sales charges, contingent deferred sales charge (CDSC), or redemption fees. Regardless of the name, funds with deferred sales charges are simply one form of load funds. These funds offer investors the opportunity of paying a sales charge later rather than paying one at the time of purchase. The main advantage is that earnings from the investment in a deferred charge fund are paid on the full amount of the investor's principal. In contrast, earnings in a fund with an front-end load are only paid on the net amount of the investor's principal after the front-end charge is deducted. A second, potentially significant, advantage, is that deferred sales charges often decrease as the investor's holding period lengthens. In Foreclosure defense and offense, the significance is that there probably were fees generated that were either paid up front or which would be generated at a later time by virtue of the passage of time or the termination of the investment by reducing the asset value to zero or below zero. If the mortgage loan is a security under the rules of state and federal agencies (which we contend it is by virtue of its conversion from a straight contact loan deal to a security deal based upon the promise of a passive return) then the existence of any fees that were not disclosed at closing with either the "borrower" (the people who signed the mortgage and note) or the "investor" (the people who supplied the capital for the transaction) then the fair market value of the real property on one end of the scale, and the the ABS security on the other end of the scale were both negative, despite assurances to the contrary from the "ender", the appraiser, the mortgage broker, the real estate broker, the rating agency, and the investment banking firm that created the SPV that issued the securities to the "investors." In the case of the security aspect of the "loan" transaction with the "borrower" the individuals involved were NOT qualified investors, DID involve crossing state lines (sometimes without bothering to qualify to do business in the state where the loan originated, and therefore required to be offered a right to rescind in a proper REGISTERED prospectus that disclosed all the risks, in addition to the discLosures required under TILA and rights to rescission under TILA and RESPA procedures.

bad delivery

A delivery of securities that does not fulfill the requirements for good delivery. In the logistics of the foreclosure litigation, the questions are where is the mortgage, where is the note NOW?, Who NOW owns the security interest by assignment or otherwise? Who NOW owns the note signed by the borrower? Who is NOW entitled to payments from that note? Who else owes payments on that note because of a subsequent agreement with the real party in interest (probably the holder of the ABS, the investor)? Were the transfers of the note and mortgage and the parsing of the various provisions of the note and mortgage on or off record? Who has these documents? Here is the original note? It is our theme that the holder of the security instrument was dispossessed by his own agreement and for consideration of the right to enforce the security instrument and that right exists in a collection of investors or the SPV, which is not qualified to do business as a lender and not qualified to do business in the state of origination of the loan. Likewise it is our theme that the holder of the note, if there is a holder of the note and it wasn't lost or destroyed, was dispossessed of any right to payment on that note through the same procedure. Thus the way the transaction was handled, the obligation to pay by the "borrower" was amended to compensate for the greater assumption of risk of

inflated appraisals and overrated securities. This was not disclosed to the borrower who was intentionally misled into reasonably believing that he was entering into a standard loan transaction where the usual fiduciary duties, due diligence, underwriting standards and appraisals would be applied. Hence delivery of the required documents, constituting the ENTIRE transactions starting with the source of capital from the “investor” and the source of the legal signature on the “loan” papers, was never completed. The transaction, having never been completed, is void. Hence rescission would be redundant. Quiet Title (See Quiet Title in this Glossary and in Blog entries on front page), would appear to be the simplest remedy to rid the property of the note and the mortgage and provide a clear path for the “investor” and the “borrower” to recover refunds, rebates and damages, including punitive damages, attorney fees and costs, plus interest from the parties who participated in this feeding frenzy (directly or indirectly) and the insurance carriers for each of the parties (errors and omissions, malpractice etc.) See Bond Anticipation Note (BAN).

bailment for hire

A safekeeping agreement between a safekeeping institution and its customer. A contract whereby a third-party bank or other financial institution, for a fee, agrees to exercise ordinary care in protecting the securities held in safekeeping for its customers. See Bad Delivery. It appears as though physical control of tangible papers and documents were transferred, destroyed or lost, despite their value to the borrowers and investors.

balance sheet matching

The (discredited) process of "assigning" groups or quantities of liabilities to groups or quantities of assets. Sometimes described as the identification of "mini-banks" within the bank.

balloon loan

A loan for which the final payment, larger than all of the previous, regularly scheduled payments, is due in a lump sum before the loan is fully amortized. The final payment is called a balloon payment.

balloon mortgage

A mortgage loan with a balloon payment. Typically, the balloon payment is due 10 or 15 years after the loan is made.

balloon payment

A contractually required loan payment, almost always the final payment, that is larger than the other contractually required, periodic loan payments. Results from the fact that required, periodic loan payments are too small to fully amortize the loan balance by the maturity date.

BAN

See bond anticipation note.

beneficial owner

The party that receives all of the benefits or rights of an owner of a security even though the legal ownership of the security is recorded in the name of a broker or a bank in street name.

busted PAC

Planned amortization class tranches in collateralized mortgage obligations for which the companion or support tranche has been completely retired by larger than expected prepayments from the underlying mortgage loans. Because the companion or support tranche is no longer outstanding and can therefore no longer absorb future prepayments, the maturity of the PAC tranche(s) may be shorter than expected. See stressed PAC.

butterfly call spread

One of the more well known option trading strategies. A complex option trading strategy using puts and calls with different maturity dates and different strike prices. An option strategy designed to profit from stable or decreasing volatility.

buy/sellback

A form of secured, short-term investment in which a security is purchased with a simultaneous agreement to sell it back to the seller at a future date. The purchase and sales agreements are simultaneous but the settlement dates for the transactions are not. The purchase is a cash transaction while the return sale is a forward transaction since it occurs at a future date. A buy/sellback is very similar to a reverse repurchase agreement, except that in a buy/sellback the investor is compensated by the difference between the purchase price and sales price rather than by interest. Unlike a reverse repurchase agreement, a buy/sellback probably does not include a haircut or collateral margin. Furthermore, the buy/sellback may be treated differently in the event of the buyer's bankruptcy. Every transaction that is a buy/sellback from the buyer/lender's point of view is, by definition, a sell/buyback from the seller/borrower's point of view.

buyer in the ordinary course of business

A purchaser who buys inventory from a seller who is in the business of selling that type of inventory.

CMO: Collateralized Mortgage Obligation. This is a DERIVATIVE security which is normally purchased outside of normal regulatory rules to "qualified" investors consisting of high net worth individuals, corporations, government agencies and money management funds. It promises a return based upon a pool of hundreds of thousands of different mortgages and notes, spreading the risk of loss on defaults over a "diversified" portfolio. Frequently the terms of the security allow the seller of the security to use the proceeds to pay the interest or dividend on the investment. Typically the terms of the security provide for foreclosure of the underlying property in the event of default. The lender or mortgage servicing entity therefore has little or no authority to negotiate a "workout" on the default. The owner of the security is legally a necessary and indispensable party to any action on foreclosure or action contesting the sale, but must usually be named as "John Doe" because the actual owner of the security which is backed by a particular mortgage on a specific piece of property is unknown to the borrower and frequently unknown to the lender or mortgage servicer. Unlike the entities or persons who participated at the loan closing, "lender liability" for refunds of points, closing costs and interest paid and damages is unlikely to be awarded against the security owner who is more than likely a victim of the mortgage meltdown scheme, which was based upon false appraisals of value, safety and security from rating agencies and false assurances of insurance against losses. **A CLAIM AGAINST THE TRUSTEE WHO POSTS NOTICE OF SALE OR "LENDER" WHO FILES FOR JUDICIAL FORECLOSURE COULD INCLUDE THE ALLEGATION THAT THE TRUSTEE OR LENDER (A) HAS NO INTEREST LEFT IN THE PROPERTY AND THEREFORE LACKS LEGAL STANDING AND (B) HAS NO INDEPENDENT INFORMATION ON PAYMENTS, NOR DID THE PERSON WHO SIGNED THE NON-PAYMENT AFFIDAVIT OR CORRESPONDENCE HAVE ACTUAL KNOWLEDGE OF THE BORROWER'S PAYMENT HISTORY.** CDO'S (collateralized debt obligations) and CLO's (collateralized loan obligations) are terms sometimes used interchangeably but actually refer to larger categories of securities whose value derived from underlying credit card debt, school loans, auto loans etc.

CAMEL

An acronym for the institution composite rating system used by the federal regulators during a regulatory examination. The evaluation is based on Capital, Asset Quality, Management, Earnings and Liquidity. The significance of this to foreclosure defense and offensive claims for lender liability is that the CAMEL rating and report can be obtained through demand or discovery. In addition, the submissions by the financial institutions which understated liabilities and over-stated assets or the quality of loans may be further evidence of a continuous policy of fraud by the bank.

cap

An upper limit for a variable, such as the upper limit on the interest rate paid or received in a transaction. For example, an adjustable-rate mortgage may have a cap of 10 percent. In this case, the rate can adjust however the loan terms provide, without exceeding 10 percent. Also called a ceiling. Cap is often used with its

converse, a floor. A cap may be an embedded option, such as the cap on the rate for a floating rate loan, or a stand-alone option contract.

cap rate

An interest rate used in the process of capitalization.

Capacity

A lending and credit analysis term that describes a borrower's or applicant's ability to meet debt service obligations. See debt service coverage. This is a basic, if not THE basic foundation for underwriting a loan. During the mortgage meltdown period of 2001-2008 it became customary practice in the lending industry to disregard this issue entirely or partially. In many cases, the capacity of the borrower was dubious at best. In many cases the capacity of the borrower to service the loan was NEGATIVE either at the moment the loan was closed or shortly thereafter. Because of the agency problem (see AGENCY), the lender didn't care whether the loan could be serviced. They were only competing for collecting their fees as a conduit or in effect an unlicensed mortgage broker, which is a crime and violation of civil law in itself.

capital

(1) Usually refers to the total of the equity accounts in a firm. For a bank, the equity accounts are common and preferred stock, surplus, and undivided profits. For other corporations, equity accounts are common and preferred stock, surplus, and retained earnings. For bank capital, see tier 1 capital and tier 2 capital. In discovery, getting the notes and memoranda of internal accounting and finance people and outside auditors will reveal the lack of due diligence or the intentional disregard of negative information. (2) Sometimes used as a synonym for common stock, as in capital stock.

Certificate of Sale

A document issued to the winning bidder at a foreclosure sale stating their rights to the property once the borrowers redemption period has expired. See Clear Title and Chain of Title.

CHAIN OF TITLE

An analysis of the transfers of title to a piece of property over the years. IT IS THIS ANALYSIS THAT PRESENTS THE CONCLUSION OF A LEGAL EXPERT IN TITLE EXAMINATION AS TO WHETHER CLEAR TITLE IS BEING OFFERED OR PASSED. The significance of this in the context of the Mortgage Meltdown is that in most cases, a proper analysis of the title records and the transactions that are actually known by at least some of the parties would disclose a possible claim by third parties to the property, the mortgage or the note.

CHAMPERTY AND MAINTENANCE:

An old legal doctrine which until the Mortgage Meltdown was largely irrelevant and unused. It is the act of a person or party without an interest in the subject matter that causes or supports litigation to be commenced and maintained. It includes payments of money. In the Mortgage Meltdown, it is being used to invalidate several transfers in anticipation of mortgage foreclosures, thus invalidating the foreclosure itself.

CLEAR TITLE

A title that is free of liens or legal questions as to ownership of the property. THIS IS AN IMPORTANT ISSUE IN ANY PROPOSED SALE OF RESIDENTIAL PROPERTY ENCUMBERED BY A SECURITIZED MORTGAGE. THE SALE OF THE PROPERTY IN A TRADITIONAL TRANSACTION OR BY SHORT-SALE OR FORECLOSURE AUCTION SALE PROBABLY INCLUDES A CLOUD ON TITLE. In fact, it is likely that if you sold property anytime in the past few years you paid off the old mortgage and received a Satisfaction of Mortgage from the "lender." However, if the Lender does not have clear title to the mortgage instruments, the execution of the Satisfaction of Mortgage, and even the Recording, may have dubious or no meaning inasmuch as the loan was transmitted up line and pledged to Buyers of Derivative Securities. The various instruments of transmittal combined with the "security" pledged to those investors probably conveys an interest in the mortgage and note to the investor, the investment banking firm, the SPV, the SIV, the mortgage aggregator or some other third party(ies). Hence clear title could not be conveyed in any sale. If the

“lender” accepted the full payment at a closing or partial payment (short-sale) and did not pass on the proceeds to the third parties that have an interest in the note and mortgage, the Buyer and the Seller of the property are exposed to potential litigation over title, liability on the note, and right to possession. See Cloud on Title.

CLOSING

This has different meanings in different states. In some states a real estate transaction is not consider "closed" until the documents record at the local recorders office. In others, the "closing" is a meeting where all of the documents are signed and money changes hands. It is important to distinguish between the two "closing" that occur at the time of each transaction in which real property is transferred from a Seller to a Buyer and money passes from the Buyer's Lender to the Seller, the appraiser, the mortgage broker, the sales agents, the title company etc. Failure to make this distinction has resulted in confusion in understanding the consequences of rescission. Title to the property changed hands only in the closing between Buyer and Seller. Rescission of the loan closing does NOT mean return of the property. Only a rescission of the real estate property closing between the Buyer and the Seller would mean a return of the property.

CLOSING COSTS

Closing costs are separated into what are called "non-recurring closing costs" and "pre-paid items." Non-recurring closing costs are any items which are paid just once as a result of buying the property or obtaining a loan. "Pre-pays" are items which recur over time, such as property taxes and homeowners insurance. A lender makes an attempt to estimate the amount of non-recurring closing costs and prepaid items on the Good Faith Estimate (GFE) which they must issue to the borrower within three days of receiving a home loan application. **IN THE CONTEXT OF THE THE MORTGAGE MELTDOWN, THE GFE IS EXTREMELY IMPORTANT.** Under the Truth in Lending Act all parties to the loan closing must be disclosed along with their compensation. In virtually every closing, there is no disclosure of the premium (usually 2.5% of the loan) paid to the “lender” for posing as the lender in place of an unregulated lending source, the rebates, bonuses, yield spread premiums, commission and kickbacks on the loans.

closing statement. While the rescission remedy under TILA says it does not apply to residential mortgages, it DOES apply to HELOC's and the right of rescission or cancellation resulting from fraud and non-disclosure is NOT limited to TILA and RESPA.

CLOUD ON TITLE

Any conditions revealed by a title search that adversely affect the title to real estate. Usually clouds on title cannot be removed except by deed, release, or court action. **IT IS FOR THIS REASON THAT ANY BUYER OF RESIDENTIAL REAL PROPERTY IN WHICH A SECURITIZED MORTGAGE WAS INVOLVED IS NOW PROBABLY REQUIRED TO FILE A QUIET TITLE ACTION IN COURT TO RESOLVE ALL ISSUES. IF YOU RECEIVED TITLE INSURANCE, THEN A CLAIM SHOULD BE MADE TO THE TITLE INSURANCE POLICY ISSUER REQUIRING THEM TO CLEAR TITLE. SEE CLEAR TITLE.**

COLLATERAL

In a home loan, the property is the collateral. The borrower risks losing the property if the loan is not repaid according to the terms of the mortgage or deed of trust. The issue raised in this Treatise is whether a securitized loan can EVER be paid or repaid to the proper party and therefore whether the loan can EVER be satisfied and therefore whether ANY party has the right or authority to foreclose, give notice of default, post a notice of sale, get a judgment ordering the sale, conduct an auction sale, issue a certificate of title, or evict the homeowner based upon the “default” in a loan that has already been paid and repaid to the nominal lender at closing as well as to other parties upstream, some of whom added to the revenue stream and the payments on the same mortgage that is alleged to be in default. In fact, the issue is whether the “loan closing” was in substance a mortgage transaction at all but rather, an undisclosed deception to issue negotiable instruments that would be sold to investors under additional pretenses.

collateralized debt obligation (CDO) - see Embedded Security for CDO1, CDO2, CDO3 etc.

(1) A multi-tranche security with credit risk exposure to corporations. A securitization of corporate obligations. CDOs can be securitizations or re-securitizations of commercial loans, corporate bonds, other types of ABSs, residential MBSs, commercial MBSs, and emerging market debt. CDOs may even be backed by other CDOs. Securitizations of corporate bonds are a type of CDO called a collateralized bond obligation or CBO. A synthetic CDO uses credit default swaps rather than actual corporate obligations to create a pool of credit exposure. Similar to the more familiar CMO, except that in a CDO the tiers or tranches are created with differing levels of credit quality. A CBO divides the credit risk of a pool of high yield bonds into different

classes that appeal to investors with different credit risk tolerances. The CDO structure creates at least one tier of investment-grade bonds. The contractual rules for the cash flow distributions in a CDO structure enable the senior tranches to receive high credit ratings by shifting risk to the equity tranche. See equity tranche, special purpose vehicle, and waterfall.(2) The term "CDO" may be used to refer to the special purpose entity, SPV, that holds the securitized assets.

CDOs vary in structure and underlying assets, but the basic principle is the same. Essentially a CDO is a corporate entity constructed to hold assets as collateral and to sell packages of cash flows to investors. A CDO is constructed as follows:

- A Special Purpose Vehicle (SPV) acquires a portfolio of credits. Common assets held include mortgage-backed securities, Commercial Real Estate (CRE) debt, and high-yield corporate loans.
- The SPV issues different classes of bonds and equity and the proceeds are used to purchase the portfolio of credits. The bonds and equity are entitled to the cash flows from the portfolio of credits, in accordance with the Priority of Payments set forth in the transaction documents. The senior notes are paid from the cash flows before the junior notes and equity notes. In this way, losses are first borne by the equity notes, next by the junior notes, and finally by the senior notes. In this way, the senior notes, junior notes, and equity notes offer distinctly different combinations of risk and return, while each reference the same portfolio of debt securities.

collateralized loan obligation (CLO)

A multi-tranche security secured by a pool of corporate loans. Similar to the more familiar CMO, except that in a CLO the tiers or tranches are created with differing levels of credit quality. The CLO structure creates at least one tier of investment-grade bonds, thus providing liquidity to a portfolio of junk bonds.

collateralized mortgage obligation (CMO)

A type of MBS created by dividing the rights to receive the principal and interest cash flows from an underlying pool of mortgages into separate classes or tiers. The tiers or classes are usually called tranches. In other words, it is a multiclass bond backed or collateralized by mortgage loans or mortgage pass-through securities. A given tranche is typically not redeemed until all bonds with earlier priority have been redeemed. By dividing the cash flows into one or more tranches with shorter terms, the risk resulting from the potential volatility from future changes in prevailing rates is shifted away from the shorter-term tranche or tranches and onto the longer-term tranches and the residual tranche.

COLLECTION

When a borrower falls behind, the lender contacts them in an effort to bring the loan current. The loan goes to "collection." As part of the collection effort, the lender must mail and record certain documents in case they are eventually required to foreclose on the property. The issue here of course is "who is the lender." If the loan has been transmitted, transferred, assigned and or pledged to one or more parties, (or hundreds of parties in the case of securitized transactions) and if the obligation has been commingled with the obligations of other parties (which happens in the pooling of loans and the sale of ABSs), then it is highly probable that the loan servicer has no authority beyond accepting payments, and it is possible they do not actually have that authority inasmuch as they may have received it from a party who had already sold the loan to yet another party. In fact, collection by the mortgage servicer might have been improper especially if there was a failure to transmit the entire payment to the ultimate investor. Note that in TILA a mortgage servicer is expressly excluded from being considered a party in interest and is therefore NOT authorized to foreclose or in any way present itself as a creditor of the "borrower." This is part of the reason this Treatise has repeatedly made the point that in any bankruptcy petition the alleged mortgage should be listed as a contingent liability with an unknown owner.

commingled funds

Money pooled for a common purpose. Often funds pooled for investments. See Quiet Title, Temporary Injunction.

COMMISSION: SEE CLOSING COSTS

Most salespeople earn commissions for the work that they do and there are many sales professionals involved in each transaction, including Realtors, loan officers, title representatives, attorneys, escrow representative, and representatives for pest companies, home warranty companies, home inspection companies, insurance agents, and more. The commissions are paid out of the charges paid by the seller or buyer in the purchase transaction. Realtors generally earn the largest commissions, followed by lenders, then the others.

Commodity Futures Trading Commission (CFTC)

The Federal agency that is responsible for regulating futures trading in the United States.

companion tranche

A specific tier or segment of REMIC security. A REMIC tranche that is structured to absorb a disproportionate amount of the volatility caused by variations in the prepayments of the underlying collateral. Companion tranches are created to be more volatile so that other tranches in the same REMIC, called PAC or TAC tranches, may have more stable cash flows. Hence the name companion. Also called support tranches. The significance in Foreclosure defense is that this is one of the devices used in the covenants or indentures of ASBs that assures payment to the holder of the security. Since the holder of the security is the "owner" of the mortgage and note, it is reasonable to assume that either the holder of the mortgage has been paid by a third party or that a third party assumed the liability.

compensating balance

A method of paying the bank for providing services.(1) In lending, compensating balances are minimum balances that the bank requires a borrower to maintain with the bank as partial compensation to the bank for the credit facility.(2) The amount of deposit balances necessary to offset the cost of deposit, cash management, or other bank services. Each period, usually monthly, the actual bank service charges applicable for the services used by the depositor are used to determine the level of balances to be left with the bank. Adjustments are made to reduce the deposit total for reserve requirements and float.

compilation statement

Financial statement put together for the client firm by a CPA that is entirely based upon data submitted to the CPA by the firm with no review, no testing, and no opinion expressed by the CPA.

COMPLETE APPRAISAL:

A term used in the Uniform Standards of Professional Appraisal Practice (USPAP) requirements for real estate appraisals. Synonymous with an appraisal as defined by the Federal appraisal regulations for real estate pledged to secure loans. A complete appraisal is a statement of market value that meets the five specific standards. A complete appraisal is conducted in conformity with USPAP rules and without invoking the departure provision in those rules. See appraisal, evaluation, and limited appraisal.

compliance risk

One of nine risks defined by the Office of the Comptroller of the Currency (OCC). The risk to earnings or capital arising from violations of or nonconformance with laws, rules, regulations, prescribed practices, or ethical standards. This risk is incorporated in the Federal Reserve definition of legal risk. Participants in the Mortgage Meltdown of 2001-2008 were virtually all out of compliance and upon filing of an administrative complaint to the OCC, could be prosecuted for violations.

conventional mortgage

A mortgage loan based solely upon the value of the mortgaged real estate and the creditworthiness of the borrower. A mortgage loan without insurance or guarantees from a government agency. The significance is that with securitization of the loans there is (a) insurance to the holder of the CLO (b) guarantees of payment from third parties and (c) in practice, guarantees from the Federal Government (witness the Federal Reserve bailout of Bear Stearns and the Federal Reserve policy of allowing investment bankers who are holding CLOs

to use those CLOs for loans at the Fed window). The securitized transactions thus converted the original transaction from a conventional loan to a complex consumer credit, insured, guaranteed, pooled security transaction falling far outside of the TILA exemption regarding residential home mortgages eligibility for rescission.

COSO

(1) The Committee of Sponsoring Organizations of the Treadway Commission. Formed in 1985 by five U.S. professional organizations to sponsor the National Commission on Fraudulent Financial Reporting. This was an independent, private sector initiative. The committee developed recommendations used by financial auditors, the SEC and regulators. (2) The name most commonly used to refer to guidelines for enterprise-wide risk management (ERM) called "Internal Control - Integrated Framework". These COSO guidelines now serve two purposes.

1. They are used by internal and external auditors to implement and evaluate a firm's financial controls. The 2002 Sarbanes-Oxley Act and similar legislation is a primary driver of this application.

2. Financial institutions are also using COSO guidelines for ERM in general but primarily for the identification and control of operations risk. The Basel II capital requirements and related rules issued by national banking regulators are a primary driver of this application.

Covenants

Restrictions on the activities of a debtor written into bank loan agreements or bond indenture agreements. Also called indenture covenants or protective covenants. Contractual terms of the loan or indenture agreement that prohibit the debtor from taking actions that might hurt the interests of the lenders or bondholders. Designed to protect the interests of creditors — often (but not limited to) unsecured creditors. Four common examples of covenants are prohibitions against: issuing new debt, paying dividends if certain minimum financial standards are not maintained, merging with another company, and selling corporate assets. You will find the covenants on the the sale of asset backed securities very interesting. For example, Countrywide has sold ABS instruments providing for an 8% return when the underlying assets were only producing half of that revenue. But the covenants allowed CW to use the proceeds from the sale of the ABS to pay the investor literally from the investor's own money. The rationale was the anticipation of ARM resets. But undisclosed was the fact that CW and its progeny and affiliates knew that many or most of the ARM resets would produce defaults. See SEC filing of Countrywide, Wells Fargo etc and read it all the way through on the annual report and other filings. You will find these offerings and the terms are startling once you unravel their meaning.

covered calls

A call option for which the owner of a security grants the buyer of the call option the right to purchase a security owned by the option seller. The opposite of naked calls. In theory, selling covered calls can be a hedging strategy. If investment prices fall, the investor's loss will be offset by the income from the covered call. (When prices fall, the call option is likely to expire unexercised because the call buyer can buy the security on the open market at a lower price.) On the other hand, if prices rise, the seller's gain is limited to the difference between the seller's book value and the option strike price (which in this case is probably less than the market price), but the seller also retains the proceeds of the option sale. For banks, regulatory restrictions as well as practical difficulties may restrict the suitability of covered calls as hedging tools. why is this here/ Because covered calls are part of the covenants of virtually every asset backed security, even if they are not specifically identified as such. And if all phases of the transaction starting with the origination of the loan through the sale of the asset backed security are considered as part of a single project, sale or transaction, then the impact on whether the obligation on the note shifted (along with the risk allocation) attached to the mortgage that was used at closing could be significant. It would create a class of debtors that are in effect co-borrowers. It also creates along with other covenants the logistics by which the owners of asset backed securities could be paid by means other than the payment on the note by the borrower. Thus the question becomes totally different in litigation: if the actual owner of the mortgage and note has been paid (or the person or entity to whom the payment was to be presented) then is the mortgage and note in default? If so, how? If the person or entity that is to receive payment is different than the person or entity that owns

the title to the mortgage lien, then on what terms may the owner of the mortgage lien foreclose, post notice of sale (in non-judicial sale states). Has the debt thus been converted from secured to unsecured? Has the debt been converted to something which is dischargeable in bankruptcy?

cram down

An informal name for a settlement or terms that a debtor forces creditors to accept. For example, a debtor in Chapter 11 bankruptcy proceedings can, subject to some restrictions, have a plan to resolve the bankruptcy approved by the court even though a creditor or a class of creditors objects.

credit default swaps

See credit swap.

credit derivative

Contractual arrangements that allow one party to transfer credit risk of a reference asset, which it may or may not own, to one or more counterparties. The first party may be called the "protection buyer", the "beneficiary" or the "originator". The counterparty or counterparties may be called the "protection seller" or the "guarantor". Credit derivatives are contracts for transferring risk - just like foreign exchange, commodity and interest rate risk derivatives. The only difference is the type of risk transferred. See total return swaps, credit default swaps, credit linked note and credit options for definitions of specific types of credit derivative instruments. Also see reference asset.

credit enhancement

A measure that alters the structure of a security in a way that reduces its credit risk. Credit enhancement may take the form of a letter of credit issued to back securities. For mortgage-backed and asset-backed securities, credit enhancement may take the form of arrangements to over-collateralize the security.

credit event

A term used in credit swap and some other credit related contracts. The specified credit event in each contract is defined by the parties to suit their particular needs. Typical specified credit events are bankruptcy, insolvency, credit rating downgrade or failure to make a required scheduled payment. Note that for a credit swap transaction, these events do not refer to occurrences or change impacting one of the contract counter parties. Instead they refer to events applicable to the underlying reference asset. The defined events must be well-defined and unambiguous.

credit history

A record of how a person has borrowed and repaid debts.

credit risk

The risk to earnings or capital from the potential that a borrower or counterparty will fail to perform on an obligation. Usually, but not always, the obligation in question is a requirement to make interest or principal payments. Sometimes called default risk, the failure to make required payments reduces the value of equity securities, debt securities, and loans. In the extreme, credit defaults eliminate all or almost all of the value in loans or securities. Adverse consequences from credit risk are not restricted to default, the ultimate manifestation of credit risk. In addition, asset owners can suffer from reductions in value resulting from either real or perceived declines in the obligor's financial strength.

Both the Office of the Comptroller of the Currency (OCC) and the Federal Reserve list credit risk as one of their defined risk types for risk-based examinations. Credit risk exposure is found in all activities in which success depends on the performance of a counterparty, issuer, or borrower. Credit risk arises any time a financial institution extends, commits, invests, or otherwise exposes its funds through actual or implied contractual agreements, whether reflected on or off the balance sheet.

credit scoring system

A statistical system used to determine whether or not to grant credit by assigning numerical scores to various characteristics related to creditworthiness.

credit spread options

See credit options.

credit swap

A type of credit derivative instrument. Swap contracts in which one party makes payments only if a specified credit event occurs. In a credit default swap, the protection seller agrees, for an upfront or periodic fee, to compensate the protection buyer upon the happening of the specified credit event. Credit default swaps are similar to a traditional financial guarantees but more flexible. It is more flexible because a credit swap need not be limited to compensation upon an actual default. The specified credit event in each swap is defined by the parties to suit their particular needs. Variations of the basic structure outlined in this definition are also used. Also known as default swaps or credit default swaps. See credit derivative, credit event and reference asset. The significance of this is that when investment banking firms created their SPV's they would create the illusion of assurance through purchasing a guarantee (credit default swap/derivative) against reductions, delinquency and defaults of the cash flow promised to investors who purchased the mortgage backed security (CMO/CDO/ABS). It was illusory because the "guarantee" (CDW) was purchased from another SPV from the same investment banker or the SPV of another investment banker, thus marrying two or more portfolios, each with slightly different terms, some of which conflicted with the terms of the other portfolio or tranches within the other portfolio. One of the reasons for the current crisis where much of the financial world is teetering on panic over a complete collapse, is that when push came to shove, firms like Bear Stearns, sold their guarantee in a CDW on over \$750 billion worth of deals, thus inextricably tying itself to the obviously poor quality of the over-rated loans on over-appraised homes to sell over-rated securities, to unwary investors who trusted the basic systems of independent evaluations, derivatives, hedge products and guarantees and assurance. I would estimate that the amount of CDW and other derivatives (securities deriving their value from some other derivative that derived its value from the predatory loan scheme of 2001-2008 to be in excess of \$20 trillion, which is around 20 times the public estimates of potential losses on Wall Street. Small wonder for the panic, the secrecy, the midnight meetings, and the tacit and direct agreements to prop up the securities markets so it looks like business as usual, while all these "smart" people try to figure a way out of the unprecedented mess they created. The indentures or terms of the CDW will refer to other agreements, securities and possibly insurance policies, ratings and appraisals that could be helpful in the discovery process of litigation against the "lender" to which I collectively refer as consisting of everyone except the borrower starting with the loan originator, the trustee is non-judicial sale states (who is usually covered by E&O insurance) through the mortgage aggregation system, the investment bankers, SPV's, CDW brokers, rating agencies etc.

credit watch

A warning issued by a credit rating agency alerting investors that the current rating is under review and may be upgraded or downgraded.

creditor

A party who is owed money by another party.

creditworthiness

A creditor's measure of a consumer's past and future ability and willingness to repay debts.

critical path

A sequence of those tasks (e.g., in payment processing) which must be completed before the next task can be started. Anything not on the critical path is something that can be done later without delaying an important step.

cross collateralization

Extension of the creditor's interest in property of the debtor so that collateral for one debt also serves as collateral for one or more other debts. In the world of the mortgage meltdown of 2001-2008, cross collateralization of derivative securities and underlying transactions from they derived their values became so complex as to be incapable of verification of value or risk by human hands or mind. This is why the transaction starting with the loan origination and ending with the sale of asset backed securities should be taken as a single transaction.

debt --- see CDO, ABS

Funds owed by a debtor to a creditor. Outstanding debt obligations are assets for creditors and liabilities for debtors. May or may not be covered by written agreements. See Asset Backed Security. The significance of the definition of a debt, being an asset on one balance sheet and a liability on another, is that the securitization process parsed the standard debtor-creditor relationship and its terms. These rights in turn were re-assigned to multiple third parties as described in the securitization process defined and explained in Garfield's Glossary. In the Mortgage Meltdown environment, the "debt" of the borrower in the refinance or purchase or real estate was parsed into multiple streams of revenue, each with a different obligor, guarantor, insurer, assurer, and subject to cross collateralized hedge products. The "asset" allegedly represented by the note and mortgage were parsed in similar fashion; in fact, these transactions came to be known as "off-balance sheet transactions" wherein the fees were recorded as income but the potential exposure to loss was not reported. Since the "lender" named at closing was (a) frequently not known until the day of closing and (b) never had its own resources at risk because of the presale or expectation of sale to a mortgage aggregator, it never reported the loan on its balance sheet --- because PAYMENT (see PAYMENT) was received by the "lender" from a third party before or contemporaneously with the loan transaction. Hence the actual mortgage loan was satisfied and paid in full, albeit not by the original borrower. The Payor received an assignment, which according to our investigation was restricted to the stream of revenue. No assignment appears in the County property records, hence neither the note nor the mortgage were legally assigned. With no proper assignment of the instruments, the "lender" was left with a right to enforce the note and mortgage, but no financial interest in the mortgage or note. Thus the "lender" is left with empty paper. The "assignee" receives nothing but a promise of revenue FROM THE "LENDER." The Mortgage secures the debt from the borrower, which is no longer due or payable. Hence the mortgage is unenforceable.

debt coverage

See debt service coverage.

debt security

Any financial instrument representing a creditor relationship between the issuer (the debtor) and the holder of the instrument (the creditor). This generally includes all U.S. Treasury securities, municipal securities, corporate bonds, convertible debt, commercial paper, and securitized debt instruments such as CMOs and REMICs. Debt securities are usually not defined to include option contracts, futures contracts, forward contracts, lease contracts, or nonsecuritized loans.

debt service

A term used to refer to the amount of principal and interest payments required by a borrower's loans or securities issued. Also used as a verb to describe making such payments.

debt service coverage ratio

A simple comparison of the cash available to make principal and interest payments to the bank or to bond holders with the amount of those required principal and interest payments. Debt service coverage is expressed as a ratio with the annual net income divided by the annual debt service requirement.

debt service coverage (DSC)

The margin by which all of a borrower's or bond issuer's required principal payments (not just those for the loan under consideration or just those for loans to one bank) are exceeded by the sum of the firm's cash flow plus all of the principal repayments and interest expense deducted in the process of calculating that cash flow.

debt sinking fund

See sinking fund. The fund created by over-collateralization in an SPV is in the nature of a sinking fund. The payments from the lower tranches in the SPV that "assure" payment also produce a fund, whether called "sinking" or not from which payments are made in the total transaction commencing with the contemporaneous closing with the borrower/investor and funds investor.

debt tranche

Tranches in a multi-class security that have seniority ranking, for repayment, ahead of equity tranches. See collateralized debt obligation (CDO), equity tranche and waterfall.

debt-to-worth ratio

The simplest way to measure leverage. Calculated by dividing total liabilities by total equity.

debtor

(1) A party who owes money or other performance to another party. Under the UCC, debtor includes the seller of accounts or chattel paper.

For the purposes of UCC provisions dealing with collateral, debtor also applies to the owner of collateral given as security for the debt of another.

For Purposes of the mortgage meltdown, ALL the participants in the chain of securitization and mortgage lending are co-debtors with the original buyers, together with other borrowers and third parties who have engaged in selling or buying credit default swaps involving portfolios in which some portion of the security instrument or promissory note executed by the borrower in a specific transaction which is the subject of a notice of sale or foreclosure action.

Decree

A judicial decision.

Deed

A signed document that shows ownership in property and allows the transfer ownership of property from one party to another.

Deed-in-lieu of Foreclosure

A voluntary transfer of title by the borrower to the mortgage company to avoid foreclosure action.

Deed of Trust

An instrument signed by a borrower, lender and trustee that conveys the legal title to real property as security for the repayment of a loan. The written instrument in place of mortgage in some states.

AS APPLIED THE CREATION OF THE TRUSTEE AND THE POWERS GRANTED TO THAT TRUSTEE (AND LATER APPLIED) PROBABLY VIOLATE THE DUE PROCESS REQUIREMENTS OF BOTH THE U.S. CONSTITUTION AND THE APPLICABLE STATE CONSTITUTION WHICH ORDINARILY ADOPT IDENTICAL OR NEARLY IDENTICAL LANGUAGE REGARDING DUE

PROCESS. THE ABILITY TO POST A SALE NOTICE, ESPECIALLY UNDER THE MORTGAGE MELTDOWN CONTEXT, PROBABLY ALSO VIOLATED THE FIDUCIARY OBLIGATION OF THE TRUSTEE GIVING RISE TO A CLAIM FOR DAMAGES FROM THE BORROWER, THAT IS ORDINARILY COVERED BY THE ERRORS AND OMISSIONS INSURANCE POLICY COVERING THE TRUSTEE. See Non-Judicial sale, Default, Asset Backed Security (ABS).

Default --- PRIMARY DEFENSES IN MORTGAGE FORECLOSURE ACTIONS AND BANKRUPTCY ACTIONS:

SEE APPRAISAL, SPECIAL PURPOSE VEHICLE (SPV), STRUCTURED INVESTMENT VEHICLE (SIV), ASSET BACKED SECURITY (ABS)

In a conventional mortgage transaction, a mortgage is in default when any of its terms are breached. While there are cases where the default consists of compromising the security (e.g. failure to insure -- favorite among predatory lenders who "force place" insurance at exorbitant rates without just cause), the most common default claimed is in the event that the borrower fails to make the payments as agreed to in the original promissory note.

In the Mortgage Meltdown context, the entire concept of default has been redefined by

- (1) disengagement of the borrower's obligations from the security instrument and note**
 - (2) substitution (novation) of parties with respect to all or part of the risk of default**
 - (3) substitution (novation) of parties with respect to the obligations and provisions of the security instrument (mortgage) and promise to pay (promissory note)**
 - (4) merger of mortgage obligations with other borrowers**
 - (5) addition of third parties responsibility to comply with mortgage terms, especially payment of revenue initiated in multiple mortgage notes and**
 - (6) a convex interrelationship between**
 - (a) the stated payee of the note who no longer has any interest in it**
 - (b) the possessor of the note who is most frequently unknown and cannot be found and therefore poses a threat of double liability for the obligations under the note and**
 - (c) cross guarantees and credit default swaps, synthetic collateralized asset obligations and other exotic equity and debt instruments, each of which promises the holder an incomplete interest in the original security instrument and the revenue flow starting with the alleged borrower and ending with various parties who receive said revenue, including but not limited to parties who are obligated to make payments for shortfalls of revenues.**
- It may fairly be argued that there is no claim for default without (1) ALL the real parties in interest being present to assert their claims, (2) a complete accounting for revenue flows related to a particular mortgage and note including payments from third parties, sinking funds, reserve funds from proceeds of sale of multiple ABS instruments referencing multiple portfolios of assets in which your particular mortgage and note may or may not be affiliated and (3) production of the ORIGINAL NOTE (probably intentionally destroyed because of markings on it or other tactical reasons or in the possession of an SIV in the Cayman Islands or other safe haven.**

In ALL cases, including recent ones in Ohio, New York, Maryland and others, it is apparent that the "lender" is either not the lender or upon challenge, cannot prove it is or ever was the lender. Wells Fargo definitely engaged in the practice of pre-selling loans upon execution of loan applications rather than assignment AFTER a loan had actually been created. In nearly all cases the Trustee or MERS or mortgage service operation has no knowledge of where the original note is, has no interest in the note or mortgage, and

has no knowledge of the identity, location or even a contact person who could provide information on the real parties in interest in a particular mortgage note.

The "clearing and settlement" of "sale" or "assignments" of mortgages, notes, ABS instruments and collateral exotic derivatives whose value is derived from the original ABS of the SPV which received representations from an unidentified SIV (probably off-shore).

The abyss created in terms of identifying the actual owner of the mortgage and note was intentionally created to avoid liability for fraudulent representations on the sale of the derivative securities to investors. The borrower's signature on an application or closing documents was part of the single transaction process of the sale of ABS unregulated security instruments to qualified investors based upon fraudulent appraisals of (1) the underlying real property, (2) the financial condition of the "borrower" and (3) the securities offered to investors.

Thus the claim of "default" is by a party who has no standing to assert it, no knowledge to prove it, no possession of the original note, and no authority to pursue it. IT IS FOR THIS REASON THAT THE SCHEDULES FILED IN BANKRUPTCY SHOULD NEVER NAME THE ORIGINATING LENDER AS A SECURED CREDITOR FOR A LIQUIDATED AMOUNT. THE "LENDER" MAY BE EFFECTIVELY BLOCKED FROM GETTING RELIEF FROM STAY IF (A) THE SCHEDULES DO NOT SHOW THE CREDITOR AS A SECURED CREDITOR AND INSTEAD SHOW THE CREDITOR AS AS NOMINAL PARTY THAT MIGHT ASSERT A CLAIM FOR AN UNLIQUIDATED AMOUNT AND (B) THE SCHEDULES SHOULD SHOW JOHN DOE ET AL AS PERSONS, ENTITIES OR PARTIES THAT MIGHT ALSO EXPRESS AN INTEREST IN THE BORROWER'S BANKRUPTCY ESTATE FOR AN UNLIQUIDATED AMOUNT SUBJECT TO RESCISSION REMEDIES UNDER TILA, STATUTORY LAWS, COMMON LAW AND SECURITIES LAWS, AND SUBJECT TO REFUNDS, REBATES AND DAMAGES.

IT IS ALSO FOR THIS REASON THAT WE RECOMMEND THAT JOHN DOE BE SUED FOR QUIET TITLE AND SERVED BY PUBLICATION, NAMING ALL KNOWN PARTIES WHO WOULD EXPRESS AN INTEREST, NONE OF WHOM CAN PRODUCE A SINGLE ALLEGATION OR PIECE OF EVIDENCE SUPPORTING THEIR LEGAL STANDING OR LEGAL COMPETENCY AS WITNESSES.

Deficiency Judgment

A judgment against the borrower for the balance remaining after the property is sold at auction or foreclosure sale.

DERIVATIVE SECURITY:

A security which has no intrinsic value of its own, deriving its value instead by reference to an index (futures market), asset (assigned pool of loans, mortgages, notes etc.), or another derivative security. Derivative securities can be either simple or highly complex, with various levels of risk included at multiple levels, all of which are included in the total "value" or "price" of the security. In one case the number of levels (tranches, as they are called in the finance world) was 125. It took a modern computer with high capacity and memory, running for a full weekend to compute a price for that derivative security. Since a computer performed the work, and the computer operated according to algorithms programmed by technical programmers, many times, without documentation in the source code, and many times without the source code being available there is no method by which the resulting "value" or "price" can be verified or audited. Notwithstanding the impossibility of verification or auditing, Moody's, Fitch and other rating agencies pretended to perform due diligence and rate the securities, regardless of their complexity. Analysis and due diligence was replaced by negotiations, and fishing junkets where the analysts were treated to vacations and other perks from the "client" (the issuer of the security), while at the same time being pressured by management from the top to satisfy the needs of the "client" in order to build "market share" for the rating agency and thus increase profits for the rating agency. See Wall Street Journal and Bloomberg for details. Derivative securities directly affect the actual supply of "money" in the marketplace and therefore are a principal source of money supply. To date the amount of "money" represented by derivative securities exceeds five hundred (\$500,000,000,000) trillion dollars which is more than all government (fiat) currencies printed by all of the governments of the world. Thus the ability of central bankers has therefore been diminished to the point of being virtually irrelevant., as can be seen when the federal reserve decreases the over night ending rate between banks and

interest rates in the marketplace go up. This unprecedented scenario is directly tied to the fact that the Federal reserve, The U.S. treasury and the Bureau of Engraving and Printing have only a minority share of the money supply in the country since the introduction of derivatives in 1983, and that minority share is decreasing each month.

DISCOVERY - CIVIL PROCEDURE IN LITIGATION

The process of asking for and forcing the production of documentation, testimony, sworn answers to interrogatories, and access to physical space, computers, computer files (including meta-data), etc. In the Mortgage Meltdown context, the challenge is to prove the point that this was a fraudulent scheme, a Ponzi arrangement that was a financial pandemic. You get that information through discovery, but unless you know what you are looking for, you will merely come up with volumes of paper that do not, in and of themselves reveal all the points you need to make --- but they WILL lead to the discovery of admissible evidence (the gold standard of what is permitted in discovery) if you understand the scheme.

The nucleus of the scheme is the virtually unregulated creation of the Special Purpose Vehicle (SPV), which is a corporation formed by the investment banker to "own" certain rights to the loans and mortgages and perhaps other assets that were packaged for insertion into the SPV. The SPV issues securities and those securities are sold to investors with fake ratings and "assurances" and insurance that is falsely procured, but where the insurers or assurers were under common law, state law and/or federal law, required to perform their own due diligence, which they did not (in the mortgage meltdown). The proceeds of the sale of ABSs (CDO/CMO) go into the SPV.

The directors and officers of the SPV entity order the disbursement of those proceeds. (see INSURANCE in GARFIELD's GLOSSARY).

The recipients are a large undisclosed pack of feeding sharks all claiming plausible deniability as to inflated appraisals of the residential dwelling, the borrower's ability and willingness to pay, the underwriting standards applied (suspended because the lender was selling the risk rather than assuming it), and the inflated appraisal of the ABS (CDO/CMO) for all the same reasons --- direct financial incentives, coercion (give us the appraisal we want or we will never do business with you against and neither will anyone else) or even direct threats of challenges to professional licenses.

In order to get this information, you must find the name of the SPV, which is probably disclosed in filings with the SEC along with the auditor's opinion letter (see INSURANCE in GARFIELD's GLOSSARY). You might get lucky and find it just by asking. Then demand production of the articles of incorporation and the minutes, agreements, signed and correspondence between the SPV and third parties and between officers and directors of the SPV. The entire plan will be laid out for you as to that SPV and it might reveal, when you look at the actual insurance contracts, cross collateralization or guarantees between SPV's. Those cross agreements could be as simple as direct guarantees but will more likely take the form of hedge products like credit default swaps (You by mine and I'll by yours --- by express agreement, tacit agreement or collusion).

You will most likely find that once you perform a thorough analysis of the break-up ("Spreading") of the risk of loss, the actual cash income stream, the ownership of the note, the ownership of the security instrument (mortgage) and the ownership and source of payment for insurance and other contracts, that all roads converge on a single premise: this was a deal between the borrowers (collectively as co-borrowers) and the investors (collectively as co-investors). Everyone else was a middle man pretending to be NOT part of the transaction while they were collecting most of the proceeds, leaving the investor and the borrower hanging.

The simple mortgage on a home had been broken into many pieces (tranches --- See Special Purpose Vehicle (SPV)) each having characteristics of entities unto themselves. The term "borrower" was severed from the obligation to pay. The term "lender" was severed from the risk of loss and the right to payment from the borrower. The term "investor" was severed from the actual ownership of any asset, except one deriving its value from conditions existing between a myriad of third parties, but which nonetheless carried with it a right to receive payments from many different entities and people, the "borrower" being just one of many.

And there is no better place to start than with the insurance underwriting process --- getting copies of applications, investigations, analysis, correspondence etc. Combined with the filings with the SEC you are

likely to find virtual admissions of the entire premise and theme of this entire blog. I WOULD APPRECIATE YOU SENDING ME THE RESULTS OF YOUR ENDEAVORS.

Discovery: See Interrogatories, Request to Produce, Request for Admissions, Motion to Compel, Depositions

The process in litigation wherein one party obtains admissions and answers from the other party, copies of documents, media files, etc.

Early Amortization Event (EAE) --- SEE LOST OR DESTROYED NOTE

A type of credit “enhancement” used in asset backed securities. One or more triggers, defined in the asset backed security's documentation require the termination of revolving periods, controlled amortization periods and/or accumulation periods. Once triggered, the early amortization provision requires that the monthly principal payments be distributed to investors as they are received. This “enhancement” was in actuality a massive risk factor and contributed greatly to the Mortgage Meltdown period of 2001-2008. It also may have caused certain parties to be motivated to “lose” or “destroy” the original note. The most common trigger is a measure of how the portfolio yield net of charge-offs exceeds the base rate of servicing plus the investor coupon rate. Also called a pay-out event. Another event potentially within this category is the actual payoff of the mortgage. An analysis of the the concept of an EAE demonstrates several peculiarities and a possible explanation of the promissory note being lost or destroyed:

Given that an ABS is a derivative instrument and that traders in derivatives are comfortable with the value of these securities being “derived” by “reference” to something else, the traders are accustomed to examining not the actual “asset” or evidence of the asset (e.g. the note and mortgage) but rather a narrative describing the note and mortgage (which from 2003-2008 was, for the most part, at variance with the actual terms expressed in the note --- the the existence of the original physical note put the CDO a manager at risk of discovery of having misled, lied or withheld vital information (like actual cash flow based upon negative amortization versus the stated rate on the note or the elimination of escrow for taxes and insurance which degrades the safety of the an investment based upon that mortgage and note).

Hence, the traders in derivatives relied upon summaries or narratives that were not scrutinized by any securities agencies for compliance with disclosure requirements, the most important of which were the risks of the investment in an ABS. **THEY RELIED INSTEAD ON THE RATING “AGENCIES” (ACTUALLY PRIVATE COMPANIES THAT WERE THEMSELVES UNREGULATED BUT ASSUMING THE MANTLE OF PSEUDO-GOVERNMENTAL OBJECTIVITY).** And of course the rating agencies, by relying upon narratives prepared by CDO managers rather than examining the underlying documentation (the notes and mortgages) didn't see the original note or mortgage either, much less analyze, examine or otherwise perform the due diligence that constituted the condition precedent to issuing a rating of “investment grade” on any security. This failure was prompted by monetary incentives and negotiation between the “client” (the issuer of the securities being rated and the rating company (Moody's, Fitch etc.)

The actual projected charge-off rate was known to anyone who actually saw the loan application of the borrower, and the original note and mortgage. The narrated charge-off rate upon which the ABS derived its value was based upon the opinion of the CDO manager at the investment banking firm who had no expertise in appraising or underwriting loans. Nonetheless it is certainly an arguable position that the CDO manager knew or should have known that underwriting standards at the level of the nominal lender at closing had collapsed into a rubber stamp, since the nominal lender was in actuality playing the role of a conduit or mortgage broker. See Nominal Lender.

The structure of the SPV (see Special Purpose Vehicle) was a more formal replay of the pattern of misrepresenting the terms, risks and attributes of the note and mortgage. “Tranches” (see TRANCHE) were created within each SPV, wherein each tranche behaved more or less as separate entities providing protection to the tranche above and moving the brunt of the risk of total loss down lower and lower to the lowest tranche which in the parlance of the finance world is called “toxic waste.” (see Toxic Waste). ABS instruments were issued not on the entire SPV “portfolio” but on selected groupings of tranches within the SPV and further complicated by the trading of credit default swaps, the cross guarantees, assurances and liability of other SPVs, other individual SPV tranches, and other third parties, insurers and assurers.

Thus the EAE represented in reality an astonishing array and number of variables that could not be quantified or analyzed by purchasers of ABS instruments except on faith and confidence of the issuers, rating agencies and other parties or by performing their own due diligence (which is now proposed under new SEC rules as of the the date of this entry, June 24, 2008).

At the root of the EAE phenomenon was the conflict between the truth of what was actually presented to the borrower at closing of the loan transaction and what was represented up-line (in the securitization process) eventually to the purchasers of the ABS instruments that provided the capital to fund the alleged "loans" which are editorialized in these pages as securities in actuality that were issued by the nominal lender under false pretenses and without compliance with banking and securities laws, rules and regulations that applied.

DISTRIBUTION REPORT: SEE REMIC

The DISTRIBUTION REPORT requires by REMIC provides the information and filing data required to prove that the REMIC tranche is operating as a tranche and not as a business vehicle for additional profit. This document, once obtained, will show whether your mortgage should have been covered, whether you paid it or not, by payments to inferior tranches, whether from borrowers, the reserve pool, the over-collateralized pool from which pieces were sliced out for tranche funding, supplementation or substitution, or some third party. The Appraisal Reduction Event that appears in virtually all securitization events at some point is for the benefit of the CDO manager (Investment Banker). They make the announcement in accordance with their interpretation of FASB accounting rules that the security is being written down because of appraisal reductions. No such new appraisals have occurred. The announcement is made anyway because the indenture to the bond or certificate held by the investor says they can and they do --- because any money collected over that amount is "required" to be distributed under REMIC and since the Appraisal Reduction Event, the extra money can only go one place --- the investment bank (who has profited from its own order to issue a declaration of an appraisal reduction event). Thus REMIC provides that the certificate holder is to be treated as the real party in interest for purposes holding the note, someone else is apparently in charge of holding the mortgage but has no access to revenue flow or the note, and reductions in payments result from non-payment by all of the people downstream (not just the borrower), diversions, and Appraisal Reduction Events. A "default" by the borrower is thus insufficient to declare the loan in default because it is either being paid by third parties, as above or the borrower's payments have been incorrectly applied, along with others, to create the appearance of a default.

EMBEDDED LEVERAGE:

Essentially a lie that lay at the core of every ABS issued between 2003-2008, and probably most of the ABS instruments issued before that. It is the ultimate example in our financial history that if you start with an assumption you know is wrong, but will be hidden or accepted through specious argument, the rest of the logic proves the validity of what you are trying to sell. In the context of the mortgage meltdown and frankly most other derivative securities, the assumption that was employed was a permanent state of low defaults despite contrary evidence in plain sight. For a while the Federal Reserve was complicitous in this false assumption by covering up the impending defaults through various moves that increased "liquidity" meaning in this context enabling people to borrow their way out of anything. See Post on January 16, 2008: Mortgage Meltdown: Fed knew and Told Lenders 4-5 Years Ago.

Equitable Title

The present right to possession with the right to acquire legal title once a preceding condition has been met.

Equity

The value of real estate less the outstanding mortgages and debts pledged against the property.

Fair Market Value

The price a property would sell for on the open market.

Fee Simple

Common term used to indicate complete legal ownership of a property.

FHA

Federal Housing Administration under U.S. Department of Housing and Urban Development (HUD).

Foreclosure

The forced sale of property pledged as security for a debt that is in default.

Forgery: See Missing Note, Assignment

In the mortgage meltdown context, forgery means many things. First, there is the actual signing of documents by a person who is not the designated signatory. For example, when a mortgage broker signs the borrower's name or inserts or changes on the mortgage application as though the Borrower had done it. Second, there is the signing of the borrower's name with a "squiggle" on a blank promissory note by an agent or employee, which is very common. Third, as in the King's County Case in New York, there is the actual hiring of a person or entity to create fictitious or forged assignment and other documents. These intermediaries actually fraudulently present themselves as employees of multiple large lenders in order to provide a layer of plausible deniability to the people pulling strings. The signature is a "squiggle" so that nobody can tell at a glance who actually signed it. The printed name underneath can later disclaim any knowledge if the document is caught as a forgery. All of these relate to TILA claims, holder in due course etc. In point of fact, there are multiple parties clouding the title of the negotiable instruments used in the securitization process. This is part of the argument against the "fairness" position asserted by lenders in a court of equity. They will try to characterize your position as attempting to obtain a windfall. Your position, in actuality, is that you are protecting yourself or client against multiple unknown parties who are known to exist and who have better claims to ownership of the note and mortgage because they paid the money that funded the loan and received some sort of assignment, even if the assignment was bogus. comment-foreclosure-defense-production-of-note-does-not-mean-you-lose

Free & Clear
Ownership of property free of all indebtedness.

GAAP

See generally accepted accounting principles.

gains trading

The practice of purchasing securities and then selling those that subsequently appreciate in value while retaining as investment portfolio assets those that cannot be sold at a profit. Accounting and banking regulators have repeatedly and strongly criticized this practice. Rules related to the transfer of securities from trading portfolios to available-for-sale (AFS) or held-to-maturity (HTM) portfolios are specifically designed to prohibit gains trading.

gap

(1) As a measurement of exposure to interest rate risk, the amount of mismatch or imbalance between the quantity of an entity's assets and the quantity of its liabilities that reprice in a defined or selected time period. In a single time period, the net mismatch or imbalance may be called the interval gap. Over a series of consecutive time periods or buckets, the total net imbalance or mismatch may be called the cumulative gap. See rate-sensitive assets and rate-sensitive liabilities.

(2) One of the four components of interest rate risk. The component of interest rate risk arising from the mismatch defined above. Also called mismatch or repricing risk.

(3) As a measurement of liquidity risk, the amount of mismatch between the quantities of cash provided from decreases in liabilities and increases in assets and the quantities of cash used by increases in assets and decreases in liabilities in a defined or selected time period.

gap analysis

A technique or process for quantifying exposure to adverse consequences from changes in interest rates. A comparison of the total quantity of a financial institution's rate-sensitive assets (RSAs) and rate-sensitive liabilities (RSLs) for each of a number of different future time periods or buckets. Gap analysis is used to evaluate the potential effect of rate shocks on income over these time periods. See gap, rate-sensitive assets and rate-sensitive liabilities.

gapping

Mismatching assets and liabilities, usually by borrowing short and lending long.

GASB

See Government Accounting Standards Board.

generally accepted accounting principles (GAAP)

Accounting treatments that fully conform to established rules from the American Institute of Certified Public Accountants (AICPA). For all nongovernment entities in the United States, GAAP is primarily determined by the Financial Accounting Standards Board (FASB). For state and local government entities in the United States, GAAP is primarily determined by the Government Accounting Standards Board (GASB). Both FASB and GASB function under the auspices of the Financial Accounting Foundation (FAF), an independent, nonprofit foundation.

good faith estimate

A document that lenders are required by regulation to provide all applicants for covered real estate loans. This document discloses the anticipated expenses that the applicant(s) will have to pay if the covered transaction is approved and closed. It also discloses the participants in the loan transaction, their compensation and role. No GFE in a securitized "loan" transaction that we have seen has ever complied with the TILA requirements.

Government National Mortgage Association (GNMA)

A government-owned corporation that is part of the U.S. Department of Housing and Urban Development. GNMA provides its guarantee, backed by the full faith and credit of the United States Government, to certain mortgage-related securities. Informally but widely known as Ginnie Mae.

grace period

A time period, usually one or more months, during which the debtor may delay principal repayment without incurring a penalty.

GPM

See graduated payment mortgage.

graduated payment mortgage (GPM)

A mortgage in which the monthly payment of principal and interest begins at a low amount and progressively increases to a predetermined higher amount. Thereafter, the amount of the monthly payment remains constant for the remaining life of the loan. The interest rate is fixed for the entire period.

Gramm-Leach Bliley Act of 1999 (GLBA)

Major banking legislation designed to significantly enhance the powers and authority of financial institutions by allowing the formation of new financial holding companies. Financial holding companies are authorized to engage in: underwriting and selling insurance and securities, conducting both commercial and merchant banking, investing in and developing real estate and other "complimentary activities." The statute also restricts the disclosure of nonpublic customer information by financial institutions and provides the major financial regulators with increased authority.

grantor

A person, partnership or corporation that gives or conveys an interest in property. Often used to identify the creator of a trust.

guaranteed bonds

A type of corporate bond for which a corporation other than the issuing corporation guarantees the repayment of a bond issue. Usually, the guarantee is provided by the parent firm of the issuing corporation. In the mortgage meltdown context, the promissory note issued by the borrower AND the ABS bond issued by the SPV are guaranteed bonds, which is why we editorialize here that the “lender” is incapable of alleging legal standing, incapable of reporting a default, and that in most cases the ultimate recipient of the revenue flow received payment of all or part of the obligation reported in the notice of sale or the judicial foreclosure. The obligation to pay commences from multiple parties at the moment the transaction is closed on both ends (borrower and investor). See PAYMENT. Defense of Payment.

guaranty

An agreement by a person, partnership, or corporation (other than the borrower) to repay a bank loan if the borrower does not pay.

guidance line of credit

A line of credit approved by the bank, but not disclosed to the borrower until some specific event, usually a request for funding from the borrower. Also called an unadvised line.

Hazard Insurance

Insurance against the destruction of the property.

Holder in due course: See UCC Article 3

irregularities-in-recording-and-delays-in-recording-open-up-new-channels-of-attack-on-mortgages-and-notes

See question below for context. Much of this was written in response to blog comment/question. Over-appraisal and other fraudulent practices taints the note throughout the chain. So does non-disclosure of the real parties and the fees they were feeding on.

A term used by the Uniform Commercial Code (UCC) adopted by nearly all the states. The holder is just what it says --- the party that is holding the note physically. The holder is not necessarily the owner which is where holder in due course comes in. A holder in due course is a party who is holding the note without any taint of illegality, fraud, or conditions close to fraud.

The ONLY party who could possibly have an argument that they were holders in due course without notice are the owners of the ABS certificates. That of course presumes that some kind of effort at transfer was actually made. All filings with the SEC indicate that this is so and would be taken as the court under judicial notice as true. That being the case, if the holders in due course were paid, is there a default? The answer is no.

However the question you address is interesting because it goes straight to the heart of the matter. Is there any way in which we can determine whether the Certificate holders were paid. You posit an answer but we would need to dig pretty deep and take a lot of time unless we can move the burden of showing non-payment onto the Plaintiff. If the note is still outstanding there is a rebuttable presumption that it is unpaid. But here we have a note that isn't due in its entirety until 25+ years from now. And the only thing 'due' is monthly payments.

The contest becomes one of single transaction versus multiple transactions. Borrower wins if the securitization process is a single transaction with many subparts. 'Lender' wins if it is a series of independent (or not related enough) transactions. I believe we have the upper and because the money came from the investor, was paid to the Seller of the home and the borrower was supposed to pay the money back ultimately to the investor --- or the investor and other entities that joined in the party because the investor was charged 150% of the loan to buy it. This of course leads to questions like who is the real victim or whether there are

multiple victims. The other question is who was victimized more and did either victim bear any responsibility. In a court of equity, which this might come down to in state courts, the issues of unclean hands and fraudulent practices at the loan closing will bite everyone in the line and taint the title throughout the chain. Such a showing by the borrower would eliminate everyone as holders in due course.

The problem deepens when you examine the way the loan deals were parsed and included in multiple tranches, breaking apart the risk, and thus breaking part the note and mortgage rights into many pieces. The likelihood, as you correctly point out, is that SOME of the pieces were paid and some were not. Some of the investors were paid off completely and most were not. But which investors are related to what tranche in what SPV? And how many of them received payments and if so, how much?

These are questions that could be asked in discovery but the main thrust of my strategy is to use the presumptions extant in the Uniform Commercial Code and rules of evidence. Basically it all amounts to this: if you allege dirty hands and fraudulent practices at the loan closing or before it, which is often the case, in some states that is enough to force the Plaintiff to show he is a holder in due course. In order to satisfy that burden he would have to present documents and testimony showing that he is a holder in due course before the burden of proof would shift to the borrower to prove his defenses of fraud etc.

Other states allow for the pleading but also require citing some evidence (probably rising to the level of 'probable cause') that there was fraud. In this case, where the source of funds substituted multiple parties in between himself and the borrower, it is presumed the other way --- that there was fraud and that he must prove that he is a holder in due course. This is precisely why the MERS cases were thrown out, why similar mortgage servicer cases were thrown out, and why more will be thrown out. These intermediaries are accommodation parties and there is a whole history going back over a hundred years about what to do when these situations arise.

INSURANCE

A promise of compensation for specific potential future losses in exchange for a periodic payment. Insurance is designed to protect the financial well-being of an individual, company or other entity in the case of unexpected loss. Some forms of insurance are required by law, while others are optional. Agreeing to the terms of an insurance policy creates a contract between the insured and the insurer. In exchange for payments from the insured (called premiums), the insurer agrees to pay the policy holder a sum of money upon the occurrence of a specific event. In most cases, the policy holder pays part of the loss (called the deductible), and the insurer pays the rest. IN FORECLOSURE OFFENSE AND DEFENSE, YOU WILL FIND ERRORS AND OMISSIONS POLICIES COVERING THE OFFICERS AND DIRECTORS OF THE INVESTMENT BANKING FIRM, THE SPV THAT ISSUED THE ASBs, THE RATING AGENCY FOR THE ASB (CMO/ CDO), THE LENDER, THE MORTGAGE BROKER, THE REAL ESTATE AGENT, ETC. YOU WILL FIND MALPRACTICE INSURANCE FOR THE AUDITORS OF THE SAME ENTITIES WHICH RESULTED IN FALSE REPRESENTATIONS CONCERNING THE FINANCIAL CONDITION OF THE ENTITY. YOU WILL FIND LOSS COVERAGE FOR DELINQUENCY, DEFAULT OR NON-PAYMENT THAT MAY INURE TO THE BENEFIT OF THE BORROWER. By joining the borrower and the investor as victims in the fraudulent Ponzi scheme creating money supply with smoke and mirrors, it may be argued that the insurance premiums were paid by and equitably owned by the borrower and/or the investor.

INTER-TEMPORAL TRANSACTIONS:

Transactions in which the commencement of the terms at the execution of the deal contains terms, risks or provisions that differ from a later time. The significance of this insider term in the MORTGAGE MELTDOWN is a classic real story: the victim is a black man with a perfect (800) FICO score has lived in his house many years and has only 5% left to pay off on his mortgage. He is approached by carefully trained predatory salesman for subprime lender --- a lender that the victim had no need for because his credit, finances and personal reputation were excellent. Victim could therefore have qualified for any conventional loan on conventional terms. Victim does not know because it is not disclosed to him that he is being approached with a subprime lending program and that he qualifies for much better terms that are being offered to him --- nor that he would be better off NOT refinancing since he is so close to paying off his house. He is convinced to get a new mortgage for interest only payments set at 1% while another 9% accrues. \$20,000 in mortgage broker and yield spread premium rebates (kickbacks) are paid up front along with the

mortgage proceeds. Within a few months he starts getting notices of increases in his payments which eventually are larger than his entire income. Qualification of the loan by the "lender" was at the payment rate at 1% interest, not at the future rates that would be applied, for which his income would NOT qualify. Victim ends up with risk of foreclosure and blemished credit score. Happy ending. Legal aid stepped in and unwrapped the deal. Many borrowers are seduced into accepting these deals believing that the extra money they are getting out of the mortgage proceeds will help them indefinitely to make future payments. It is the lender's obligation to disclose that this is not the case, that the borrower's income does not cover the amount of future payments which the lender understands and the borrower does not (see asymmetric information).

Judicial Foreclosure

A foreclosure that is processed by a court action. Non_judicial sale is probably not the proper procedure where there are equitable and constructive holders in due course. Only Judicial Foreclosure would be available. Motions should be filed appropriately. This will force the "lender" to disclose and plead standing which can be easily challenged. california-statutes

LENDER:

READ THIS: A lender is not just the entity that actually "appeared" at closing. The true lender for the mortgage meltdown period is usually some larger investment banking firm or large bank that used a small "front" organization that essentially acted as a mortgage broker and mortgage aggregator before selling or assigning the mortgage before even the first payment was due. If that is the case, there were undisclosed parties to the "loan" transaction and undisclosed fees paid, all of which are TILA violations.

ATTORNEYS AND BORROWERS TAKE NOTE: DON'T TAKE THE BASICS FOR GRANTED.
EXAMPLE: WASHINGTON MUTUAL IS REPORTED TO HAVE NOT QUALIFIED TO DO BUSINESS IN THE STATE OF CALIFORNIA AND MAY HAVE REPEATED THAT MISTAKE IN OTHER STATES AS WELL. If they were not authorized to do business at the time of the transaction, it means that they had not registered with the secretary of state and paid their fees as a state corporation or other entity, or as a foreign corporation or other entity. In ALL states we have researched, the law is the same: The mortgage (or any other) transaction is unenforceable and the claims against the party transacting business without qualification **MAY NOT BE DEFENDED**. A simply quiet title action might end the entire affair. Likewise, the true lender might be the investment banker, the investor in a securitized asset backed security or the entity that was created by the investment banker in which bonds or shares of asset backed securities were sold. The "lender" would thus be defined by "substance over form" and probably doesn't qualify under the laws of the state in which the mortgage loan was originated, does not qualify as a securities transaction under the laws of the state in which the mortgage loan was originated, and probably doesn't qualify as a lender under the banking and finance laws of the state in which the mortgage loan was originated. In all of these cases the transaction is void or voidable. The lender may also have avoided "intangible taxes" in states like Florida, subjecting itself to multiple counts of criminal and civil liability, interest and penalties in addition to the taxes due.

Lien

A charge upon real or personal property for the satisfaction of a debt.

Legal Description

A formal description of real property so that one can locate it by reference to government surveys or approved recorded maps.

Lender

A person who lends money for temporary use on condition of repayment with interest (i.e., the bank, mortgage company, etc.).

Lis Pendens

A recorded notice of pending lawsuit.

LOST NOTE, DESTROYED NOTE: SEE EARLY AMORTIZATION EVENT, TOXIC WASTE, SECURITIZATION

In prior times, the possibility of a note being accidentally lost or destroyed was protected by statutes providing for proving the note and mortgage without the original. These statutes and rules of procedure are now being invoked by nominal lenders and assignees of nominal lenders to escape or navigate around a much deeper problem for them. It is the opinion of this editor that the original notes were not accidentally destroyed or lost. They were either intentionally destroyed or hidden in some trustee's vault in an off shore structured investment vehicle. The reason is simple: the terms of the note and mortgage do not match the narrative or representations of the parties in the securitization process culminating in the sale of ABS instruments. The nominal lender or assignee will claim that they did not lose or destroy the note and that might be true. That is why the SINGLE TRANSACTION theory must be invoked in foreclosure defense. Someone in the securitization process was responsible for the fact that between 40%-90% of the notes have vanished, whereas prior to the Mortgage Meltdown era the percentage of lost notes was less than 1/2 of one percent. Since the promissory note is a thing of value and in fact is considered "money" in many economic models, it is a challenge to come up with reasons why anyone would "rip up a ten dollar bill." The only reasonable answer is that if someone actually saw the \$10 bill they would know it wasn't a \$100 bill, which is what they thought it was when they bought a piece of paper that referred back to the fictional "\$100" bill. The effect of this destruction and the reasons for it add considerable weight to the argument that there is no longer any enforceable mortgage, that the rescission rights of the borrower have been deflected into an abyss for lack of a real party in interest, and that the SINGLE TRANSACTION theory is the only one that accounts for everything that went bad in the Mortgage Meltdown era. In the context of multiple assignments and parsing of the notes and mortgage in the securitization, the lost or destroyed note takes on a whole new meaning.

MERS- --- MORTGAGE ELECTRONIC REGISTRATION SYSTEM --- SEE MISSING ASSIGNMENT

mers-beneficial-interest-to-sue-cannot-exist-separately-from-other-beneficial-interests-in-the-note

memo-from-mers-to-lenders-follow-our-procedures-or-get-in-trouble-discovery-request-for-mers-procedures-pursuant-to-this-memo

A private intermediary service for lenders which is expanding its services. It is usually involved in now in foreclosures and creates the impression of a fool-proof system whose information cannot be questioned. The answer is "Garbage in, Garbage out." Entries are made by hand or imported from databases whose entries were done by hand. The brain behind the hands that entered the data knew nothing about the data. It is just another layer of disinformation spread by the mortgage lenders --- like the arbitration provision contained in credit cards that directs you, as a cardholder, to EXCLUSIVELY litigate your complaint by arbitration ONLY with an entity that is wholly owned and operated by the credit card companies. MERS does not qualify the transaction (loan closing) under state law, does not remove the requirements of TILA, RESPA < RCIO, common law fraud, securities violations etc.

MISSING ASSIGNMENT AND MISSING NOTES

mers-beneficial-interest-to-sue-cannot-exist-separately-from-other-beneficial-interests-in-the-note

SEE PERSONS AUTHORIZED TO ENFORCE

The Missing Assignment Dilemma

It is an all too familiar story. Lender A originates a note secured by a mortgage or deed of trust and sells it on the secondary market to Lender B. Lender B then sells the mortgage to Lender C who sells it to Lender D. In each case, the seller endorses the note, reflecting the transfer to the new buyer. However, while Lender A recorded an assignment to Lender B, and Lender C recorded an assignment to Lender D, Lender B failed to record an assignment to Lender C. When the note goes into default, Lender D sends the loan to its foreclosure attorney, a title check is made, and Lender D is advised that there is a problem. It is known as the "missing assignment" problem.

In the Mortgage Meltdown context, the problem goes much deeper inasmuch there was usually no endorsement of the note, and the instrument transmitted was a substitute or gorged document. This leads to the inevitable conclusion that the "lender" was paid in full by a third party who may now have some equitable or legal rights against the original borrower, subject to the borrower's right of rescission, claims for

refunds, rebates, damages, attorneys fees, costs and potentially punitive damages, as well as cancellation for usury.

In all but a handful of states, Lender B's failure to record the assignment causes havoc in the disposition of the mortgage. The failure to record places the interest claimed by Lender D as outside the chain of title; a legal nullity in most states. Lender D cannot sell, encumber, release or foreclose on the mortgage. In short, it is as if Lender D held no interest in the mortgage.

At first blush, it might seem that the missing assignment problem is an investor problem. Borrower's are successfully seizing on this mess and many are walking away with their homes free and clear of the mortgage encumbrance with at least one Judge in New York ordering the removal of all traces of the loan transaction from the public records.

The ownership of the loan rests with the investor, not the servicer. Unfortunately, Fannie, Freddie and nearly all major conduit servicing guidelines place responsibility for the proper assignment of mortgages on the servicer. Thus, by undertaking the servicing of a loan, the servicer is representing and warranting that the investor has proper title to the mortgage.

It is a large responsibility, made more overwhelming by the frenzy in the transfer of mortgage ownership and servicing rights. Caught in the rush, due diligence teams often overlook the very practical need to have a properly recorded chain of title. Moreover, title endorsements, which are available to protect lenders from just such occurrences, are seldom obtained.

The significance of this is that the "foreclosing party" is unable to answer one simple question: If you executed a satisfaction of mortgage upon payment in full of the mortgage note, would there still be third party claims out there that could be pressed for either foreclosure or collection on the note? If the answer is yes, then the results are simple --- no foreclosure is possible nor can they be allowed to pursue any collection without joining indispensable parties. Beyond that, if the answer is yes, the offensive maneuver of a Quiet Title action is likely to succeed.

MERS, the Mortgage Electronic Registration System, was in part created to solve this very problem. Under the MERS system, MERS becomes the mortgagee of record with one recorded assignment from the lender to MERS after the loan is originated and recorded in the public land records. From that time forward, all transfers of ownership or servicing rights are recorded by the MERS computer system (known as a boentry system) eliminating the need to record in the land records subsequent mortgage assignments.

MERS became operational ten years ago and it was thought that those lenders which properly use MERS would eliminate the missing assignment problem for new loans entering the MERS system. The Courts however have taken a simple approach which is that if the substance of the transaction was that MERS had no actual interest in the mortgage and no purchase or assignment took place, that the assignment or transmittal to MERS conveyed no rights of ownership nor any rights to foreclose or collect. Further, Courts have held that the re-assignment back to the lender might constitute champerty and maintenance if it is done purely for the purpose of foreclosing.

Generally, a servicer will discover a missing assignment problem at one of three stages: when a loan is sold, released or foreclosed. Servicers tackle missing assignment problems through a variety of means. Most often, the Lender which

failed to record an assignment of the mortgage is located and the assignment is obtained. Sometimes, a lawsuit is filed to obtain a judicial determination that the investor indeed owns the mortgage. Occasionally, a title company can be convinced to write around the problem if the title company is provided a copy of the endorsed note.

While there are a variety of avenues to resolve missing assignments, all take time, lots of time.

Freddie Mac has estimated that the third leading cause of delay in foreclosure is delay resulting from missing assignments. In an effort to minimize losses, both Fannie and Freddie have tightened foreclosure time frames to the point where any delay is too much delay. Moreover, these major investors have made it

very clear that penalties will be assessed for foreclosures outside the time frames. Because the resolution of the missing assignment problem is so time intensive, the missing assignment problem rose to a new level of concern for servicers and lenders.

To ensure timely foreclosures and avoid the delays inherent in missing assignments, Freddie Mac described the following best practice:

"When acquiring new servicing portfolios, address missing mortgage assignment problems and other loan documentation deficiencies through due diligence reviews. Maintain a database of information (contact names and telephone numbers) to help you locate representatives of prior servicers who may need to sign missing assignments. Have a dedicated staff member aggressively work missing assignments, payment disputes and other problems that may result in lengthy delays. Ask the title company if it will accept evidence of the original note endorsed to Freddie Mac instead of attempting to cure missing assignments."

In discovery during a lawsuit, you would want to ask if the party had any information regarding compliance with these guidelines and whether the guidelines were followed, thus tracking down people with real personal knowledge. In all probability the issue will never be resolved in discovery or at trial. Thus it is up to the attorney to argue that in the absence of such key information, an admission is created contrary to the interests of the lender, against whom the documents should be construed in all events (as the drafter).

Today, most major services have developed lists of contact persons if they locate a lender which has failed to record an assignment. Generally, these lists are maintained by a member of the foreclosure department.

The lists are seldom placed onto computer databases, and little is done to ensure the integrity of the lists. It is generally a hodgepodge of information passed down from clerk to clerk. The new foreclosure time frames and threat of penalties for failure to meet the time frames, requires a more industrious approach to missing assignments. Due diligence teams should be focused on the problem and

proper title company endorsements should be considered. In existing portfolios, notification of a missing assignment problem should trigger immediate action by the servicer; the problem must be corrected quickly or significant damages could accrue. Databases should be developed identifying the individuals who have the ability to execute assignments on behalf of seller. In the Mortgage Meltdown context no such databases were created and most of the people involved have been fired with whereabouts unknown presenting another opportunity to the borrower to claim foul, and that no payments can be due if the parties to whom those payments are due are unknown.

But all of this is still not enough. As is so often the case, the missing assignment needs to be signed by a party who the servicer does not know. Thus, in the example above, Lender D has no relationship with Lender B. In order to avoid penalties and ensure the timely foreclosure of the loan, Lender D must find Lender B as soon as possible.

To aid lenders in resolving this problem, there are various efforts within the industry to have created what is known as the Missing Assignment database; a web based database accessible from any web browser. The first efforts aimed at creating a database comprised of two separate databases; the Existing Company database and the Company No Longer In Existence database. The Existing Company databases holds the names and addresses of over 15 million U.S. businesses. By typing in the name of Lender B, a servicer can obtain Lender B's address and telephone number.

This assumes, of course, that Lender B still exists. If Lender B changed its name, was bought out or was taken over by the FDIC/RTC or some court, it would not be an existing company and thus would not show up on the database. Therefore, a second database was developed for lenders which are no longer in existence called the "Company No Longer In Existence" database. Searching this database returns the name of the company or entity now responsible for the defunct entity. Thus, if a servicer enters Directors Mortgage, the database returns Norwest Mortgage. Similarly, if a servicer enters the name of a defunct bank or savings and loan, the database returns the FDIC office now responsible for that entity.

What eventually occurred was an intentional obfuscation of the foot prints in the sand because (1) TILA violations known by all parties to have existed at closing particularly non-disclosure of parties and fees, (2) "assignments" improperly executed or even forged, (3) notes improperly transmitted for value to a third

party who most of the time was the undisclosed true lender and was not licensed or otherwise authorized to act as a lender, (4) use of forged notes and other instruments in blank or otherwise partially filled out, recorded some of the time in property records by attaching the fraudulent document to a document without meaning but which conforms to the requirements of recordation in the specific jurisdiction, (5) intentional misrepresentation by everyone to each other to create "plausible deniability" with only the borrower and the investor left out of the information loop, in which the terms of the notes and mortgages, the value of the property and the value of the securities was intentionally overstated and supported by fraudulent ratings and appraisals secured by improper and undisclosed payments and other financial incentives and coercion and other matters generally constituting a fairly simply simple model to defraud investors and borrowers, using a pattern of making the transactions increasingly obtuse and complex.

Mortgage

A written pledge of property that is used as security for the repayment of a loan.

MORTGAGE MELTDOWN:

An series of events (stemming from the 1983 introduction of derivative securities) created by a tacit cartel of investment bankers and other financial institutions in which borrowers were (approved) "loaned" money on purchase money mortgages based upon false appraisals in the context of contemporaneous securitized transactions where the investment capital was procured by fraud in unregulated security offerings to "qualified" investors, based upon false assurance, false ratings, false insurance backing, and false appraisals of underlying property, income of borrowers and many other factors. The logistics of this scam were revealed in pieces and have threatened the very existence of many financial institutions and the financial markets themselves. Indexes, such as LIBOR, were indirectly manipulated by U.S. financial institutions to hide the true facts. Despite a brief period in which certain arcane "auction markets" froze up (in places and events unknown to the public, business has resumed as usual. The lack of regulation from a responsible, accountable agency or group of agencies has spawned hundreds of lawsuits and millions of foreclosures, many producing counterclaims for far more than the original mortgage and note. No immediate fundamental change is in process in the regulatory scheme, hence it may be expected that the mortgage meltdown will replay in one form or another shortly.

NECESSARY AND INDISPENSABLE PARTIES: SEE SINGLE TRANSACTION

Parties without whose presence there can be proper adjudication of rights. In the Mortgage Meltdown context this would include all the participants in the chain of securitization up to and especially including the holders of certificates on asset backed securities. necessary-and-indispensable-parties

NINJA LOAN

NO INCOME, NO JOB, NO ASSETS: NO DOCUMENTS, NO VERIFICATION, NO REVIEW BY RISK ANALYSIS COMMITTEE.

NOMINAL LENDER: SEE LENDER, ASSET BACKED SECURITY (ABS), CDO, Early Amortization Event

mers-beneficial-interest-to-sue-cannot-exist-separately-from-other-beneficial-interests-in-the-note

SEE PERSON AUTHORIZED TO ENFORCE

A conduit or party acting as Mortgage Broker under false pretenses to the borrower giving the impression that it is has performed ordinary due diligence and applied ordinary underwriting standards to the approval of the loan, the appraisal, the borrower's qualifications and ability to pay and the fees at closing. The Nominal Lender is the party named on the mortgage as the mortgagee and named on the note secured by the mortgage as the payee. It is usually a front for some larger entity or financial institution. In virtually all cases from 2001-2008 the party so named on the closing documents was a Nominal Lender. The nominal lender abandoned virtually all underwriting standards and assessment of risk of loss or default because the nominal lender was not assuming those risks. In all cases, the nominal lender had already pre-sold the or assigned rights under the mortgage and note before execution of the underlying documents (mortgage and note) or

immediately after under the expectation and agreement, tacit or written, that the nominal lender would receive a fee or profit from closing the loan and that the actual funds would come from third parties involved in the securitization process eventually culminating in the issuance of ABS instruments. Thus the nominal lender lacks legal standing to pursue enforcement of the note or mortgage because the nominal lender has no financial interest in the note or the mortgage. It is equally true, however, that the claim under TILA, RESPA, RICO etc. might not be addressed to the correct party when the mortgage audit is completed and rendered with a proper request under RESPA for resolution. The nominal lender lacks legal authority to settle anything since it is no longer a holder in due course of the note or mortgage. In addition, the removal of the nominal lender from the actual underwriting and funding process probably extends the time for rescission indefinitely because the real parties in interest are never disclosed to the borrower. Similarly it is unlikely that the nominal lender has the authority to negotiate a settlement or even execute a satisfaction of mortgage, since it cannot return the original note (see Lost, Destroyed Note).

Non-judicial Foreclosure: procedure-from-non-judicial-to-judicial-and-removal-of-trustee

Non-judicial foreclosure is when a power of sale clause exists in a mortgage or deed of trust. A "power of sale" clause is the clause in a deed of trust or mortgage, in which the borrower pre-authorizes the sale of property to pay off the balance on a loan in the event of their default.

Notary

A public officer licensed by the state to attest to and certify the validity of signatures of others. A notary is often referred to as a notary public.

Notice of Sale: procedure-from-non-judicial-to-judicial-and-removal-of-trustee

A notice giving specific information about the loan in default and the proceedings about to take place. This notice must be recorded with the county where property is located and advertised as stated in the security document or as dictated by state law.

Ownership Interest: FROM FANNIE MAE: For mortgages we hold in our portfolio, our ownership interest is either 100 percent (called a whole mortgage) or a lesser percentage (called a participation pool mortgage). We generally do not distinguish between whole mortgages and participation interests when we discuss our requirements. On occasion, we may specify that a remittance to Fannie Mae or our reimbursement for a certain expense relates to "our share," meaning our percentage ownership (applied to the amount of the remittance or expense) for participation interests in mortgages. In other instances, when we state that a requirement applies to whole mortgages or participation pool mortgages, we are addressing only those mortgages held in our portfolio, unless we indicate that we also are addressing mortgages in MBS pools.

PAYMENT: SEE PERSONS AUTHORIZED TO ENFORCE

In the context of the mortgage meltdown experience, payment was converted from one source to many. See SPV (Structured Purpose Vehicle). This was necessary because of the the purpose of the SPV and the collateralized securities issued from it to investors --- the spreading of risk. It is therefore possible for an investor owning an ABS (Asset Backed Security) issued from an SPV to be paid in full without a single payment from any particular borrower. Thus the payment obligation on the note and mortgage at the loan closing was one of many options by which the obligation could be met. There is no doubt that efforts were made to make payments from the funds created in SPV's through sale of their CDO/CMOs, and that contribution from third parties in the securitized chain starting with the "lender" all the way through guarantees, buy-back obligations and cross collateralization and credit swap vehicles. It is for this reason, among others, that the loan closing was itself the sale of a security based upon an inflated asset appraisal to support an inflated security rating, in which the borrower and the investor in the ABS were "assured" of a passive return on their investment through ever-increasing housing prices. Thus the securitized chain consists of two securities at its base --- the "loan" and the ABS --- and a myriad of other derivative securities and hedge products together with insurance policies that guaranteed the quality of the underwriting process at the lender level and at the investment banking level.

Whether those who paid have any claims against any other obligors --- including but not limited to the borrower --- is unknown. But it is highly probable that those claims are unsecured and therefore dischargeable in bankruptcy. And it is highly probable that such claims are subject to offset, counterclaims and affirmative defenses based upon violations of TILA, RESPA, RICO, common law fraud and state unfair

and deceptive business or lending practices together with state and federal securities regulation at the lender underwriting level and at the investment banking underwriting level.

PERSON AUTHORIZED TO ENFORCE CLAIM ON NEGOTIABLE INSTRUMENT

mers-beneficial-interest-to-sue-cannot-exist-separately-from-other-beneficial-interests-in-the-note
UCC § 3-301. PERSON ENTITLED TO ENFORCE INSTRUMENT.

"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3-309 or 3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

In the case of securitization, every indorser, every party who accepts the indorser's transfer or attempted transfer of all or part of the note or all or part of the mortgage (DEED of Trust) acquires rights and obligations through operation of UCC law, and common law as they have potential or actual rights to the proceeds of the note and potential rights to enforcement of all or part of the mortgage. In addition, amongst the parties added to the chain of securitization are those identified as trustees, in addition to "depositors" and "servicers." The additional trustee on is face brings into question whether a substitution of trustee was intended on the note if not the mortgage. But the UCC says the mortgage follows the note. Thus if a new Trustee was intended by the party as to part or all of the loan transaction, the authority of the named Trustee on the Deed of Trust is diminished, especially where, as in this case, the Trustee knew of the existence of these transactions and at least was informed as to their content. By failing to inform the borrower, who is the Trustor, the named or nominal Trustee breached both his fiduciary duty to the borrower and his contractual duty to the borrower and the lender.

Personal Property

Property other than real property consisting of things temporary or movable.

Posting

To publish, announce or advertise by physically attaching a notice to an object.

Postponement

Postponement means to put off to a later time. In the case of a foreclosure sale, this is generally done by announcement at the original sale or by posting notices establishing the new date and time the foreclosure sale will take place.

QUIET TITLE:

In essence the reverse of a traditional foreclosure where the owner of the property forecloses the claim of the people against whom he has filed suit claiming the property free and clear of all encumbrances. The significance in foreclosure OFFENSE is that the loan has been assigned, sold and transferred multiple times and broken up into thousands of pieces along with many others that were intermingled in portfolios, sometimes with cross guarantees from one portfolio to another. This process started before the first payment was due on the mortgage loan and before the victim/borrower came to know the real facts of the loan withheld from him in an asymmetric information environment (see asymmetric information) in an inter-temporal transaction (see inter-temporal transaction). Thus the true owner, against whom rescission could be claimed became unknown to the victim/borrower. The quiet title action sues "John Doe" identified as all persons having an ownership interest in the mortgage lien on the subject property. The allegation is made that while the victim/borrower has been notified of a transaction, the victim/borrower, petitioner has not been advised of who the entities or people are who own this interest. And since there are TILA and other fraudulent violations, the victim/ borrower/petitioner wishes to rescind. Efforts to determine the true owners have led the Petitioner to determine that there may be thousands of entities or owners, none of whom have been disclosed to Petitioner despite attempts to secure said information (contained in the TILA report and demand). SERVICE OF PROCESS IS BY PUBLICATION. If the court demands that the mortgage servicing company be named as nominal Defendant or Respondent, the mortgage servicing company has only one job: to produce information and proof of ownership of the loan. It is doubtful that anyone, least of all the

mortgage servicing entity will be able to fulfill this condition. Thus the default judgment will be entered, the victim stops paying the mortgage, and has a recorded judgment relieving his property of any mortgage lien and offsetting the note with the refunds and damages payable to the victim, thus satisfying the entire principal of the note and awarding attorney fees to the victim/petitioner.

RATING AGENCY: rating-agency-rule-and-practices-review-by-sec <--- Manipulation of Appraisal

A Nationally Recognized Statistical Rating Organization (or "NRSRO") is a credit rating agency which issues credit ratings that the U.S. Securities and Exchange Commission (SEC) permits other financial firms to use for certain regulatory purposes.

The nine organizations currently designated as NRSROs are:

- Moody's Investor Service
- Standard & Poor's
- Fitch Ratings
- A. M. Best Company
- Dominion Bond Rating Service, Ltd
- Japan Credit Rating Agency, Ltd
- R&I, Inc.
- Egan-Jones Ratings Company
- LACE Financial

Ratings by NRSRO are used for a variety of regulatory purposes in the United States. In addition to net capital requirements (described in more detail below), the SEC permits certain bond issuers to use a shorter prospectus form when issuing bonds if the issuer is older, has issued bonds before, and has a credit rating above a certain level. SEC regulations also require that money market funds (mutual funds that mimic the safety and liquidity of a bank savings deposit, but without FDIC insurance) comprise only securities with a very high rating from an NRSRO. Likewise, insurance regulators use credit ratings from NRSROs to ascertain the strength of the reserves held by insurance companies.

Refinance

Paying off one mortgage loan by obtaining a new mortgage loan.

REMIC -REAL ESTATE MORTGAGE INVESTMENT CORPORATION

Created by Congress to Facilitate the securitization of home loan mortgages, it allows the Special Purpose Vehicle to be treated transparently for tax purposes under very discrete rules, violation of which results in 100% taxation. It is legal basis for asserting that the mortgage or note travelled upstream which can be proven by asking for the transmittal document, sending an interrogatory asking where such reports are kept, who has it and how do you describe it for the purpose of a Request for Production. The DISTRIBUTION REPORT requires by REMIC provides the information and filing data required to prove that the REMIC tranche is operating as a tranche and not as a business vehicle for additional profit. This document, once obtained, will show whether your mortgage should have been covered, whether you paid it or not, by payments to inferior tranches, whether from borrowers, the reserve pool, the over-collateralized pool from which pieces were sliced out for tranche funding, supplementation or substitution, or some third party. The Appraisal Reduction Event that appears in virtually all securitization events at some point is for the benefit of the CDO manager (Investment Banker). They make the announcement in accordance with their interpretation of FASB accounting rules that the security is being written down because of appraisal

reductions. No such new appraisals have occurred. The announcement is made anyway because the indenture to the bond or certificate held by the investor says they can and they do --- because any money collected over that amount is "required" to be distributed under REMIC and since the Appraisal Reduction Event, the extra money can only go one place --- the investment bank (who has profited from its own order to issue a declaration of an appraisal reduction event). Thus REMIC provides that the certificate holder is to be treated as the real party in interest for purposes holding the note, someone else is apparently in charge of holding the mortgage but has no access to revenue flow or the note, and reductions in payments result from non-payment by all of the people downstream (not just the borrower), diversions, and Appraisal Reduction Events. A "default" by the borrower is thus insufficient to declare the loan in default because it is either being paid by third parties, as above or the borrower's payments have been incorrectly applied, along with others, to create the appearance of a default.

RESCISSION: See TILA, RESPA, fraud, usury, etc.

The right to reverse the transaction. Ordinarily rescission involves giving back everything you received in exchange for getting back everything you gave. In this setting it means the right to get back ALL the interest, points, closing costs and attorney fees and other costs at or after closing that you incurred as a result of the transaction. Rescission rights exist under Federal Statutory Law (Truth in Lending Act - TILA, State Deceptive Business practice Acts, and at common law. Remember that rescission doesn't mean you give back the house. It doesn't even mean you have to give back the money to the lender against whom you are rescinding --- THAT obligation commences AFTER the lender admits to the rescission or it is otherwise decreed and then it is reduced by the refunds of points, interest, closing costs you paid plus damages and attorney fees you suffered as a result of the issues raised in this post. Rescission might not even mean you owe any money at all to the lender. It could mean that the mortgage lien is extinguished and so is the note. It could convert a secured debt, non-dischargeable in bankruptcy to an unsecured debt wholly dischargeable in bankruptcy. And unless the party coming into court or the auction as a "representative" of the lender can prove that they have received their instructions and authorization from a party who is authorized to give those instructions, then they lack authorization, they lack legal standing and they are probably committing a fraud on you, the court and everyone else.

It is the process of reversing a transaction in which each party gives back what it received to the extent possible. This does not mean the house goes to the lender. Rescission in a loan transaction does not directly involve the house. The direct transaction with the house is between buyer and seller. Rescission in a loan transaction involves giving back the money and cancellation of the mortgage note. Under TILA, rescission first cancels the note and mortgage, which makes the loan unsecured, and then requires the borrower to give back what he/she/they received, less refunds, rebates, damages, attorney fees etc.

The issue with rescission under TILA is that even if you exercise it perfectly to the letter of the law, you must do so to the wrong party --- i.e., the party who is not the holder in due course of the loan. And the true holder in due course is not disclosed or known. We can guess from researching, but we can't actually know. Thus the rescission letter one sends to a servicer or even "lender" is either completely ineffective or there is some theory that the "lender" would adopt that would make it effective and travel upstream to the undisclosed true lender. The ONLY way I know to make that happen is through some equitable application of agency; however no matter how creative the "lender(s)" get, the problem with rescission is the same as the problem with a foreclosure judgment, and subsequent sale, short sale, and satisfactions of mortgage. It is the problem of clear and marketable title, which cannot exist under the scenario applied by lenders since 2001. The fact remains that securitization created multiple parties all the way up to the the investors in mortgage backed securities and possibly beyond (equity or debt holders in the entities that made the investment in derivative mortgage backed securities). ALL of these people have some potential claim in equity to the security in the mortgage indenture. ALL of these people have some potential claim to the proceeds of the note. ANY one of these people could sue the borrower on either the note or mortgage. In fact, they could sue so in succession creating hundreds of lawsuits, all on the same note. And the mortgage aggregator, the CDO manager and investment banking firm along with its special purpose vehicle corporations might have claims. Thus clear title cannot be conveyed. Even the person who buys at auction sale may not be protected because of the break in chain of title. It is unavoidable: the indispensable parties were not there. If the lender joins them it must do so as Defendants because the only way the lender could convey clear title in a foreclosure judgment or sale, or even the execution of a satisfaction of mortgage, is by suing all the parties upline in the securitization process. To do so, would breach the agreements whereby they made their purported assignments in the first

place, which is aggravated in the extreme by the fact that only hand-written spotty records were kept in the securitization process, and substitute or forged documentation was used, sometimes before the loan was closed. Thus even finding the people to sue upstream is difficult if not impossible and the lender would not be given the John Doe option in my opinion, because they were the ones who directly participated in the securitization process. This is why I do not see a way out for the lender. It is why I believe that every mortgage executed starting in 2001 through the present, can be nullified. And there are other avenues to rescission, cancellation and treble damages.

Right of Redemption

A borrower's right to reacquire property lost due to a foreclosure. This right allows the owner to recover property lost to a foreclosure judgment, or sold after a foreclosure sale, within a certain period of time. The redemption period varies among the states.

Request for Notice

A recorded document requiring a trustee send a copy of a Notice of Default or Notice of Sale concerning a specific deed of trust in foreclosure to the person who filed the document.

Request to Produce: CIVIL PROCEDURE

A demand by one party in litigation that the other produce documents or things that are likely to result in the discovery of admissible evidence. SEE RESPA FORMS

RESPA: Real Estate Settlement Procedures Act: Federal Law

As explained on this blog TILA and RESPA go hand in hand, but they are not exclusive remedies. Violations by lender give you automatic choice to choose Federal Court venue. [respa_request_-_mike1-rev-1-neil](#)

ROOKER FELDMAN DOCTRINE: lance-v-dennis-on-rooker-feldman-doctrine

The Rooker-Feldman doctrine prevents the lower federal courts from exercising jurisdiction over cases brought by "state-court losers" challenging "state-court judgments rendered before the district court proceedings commenced." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U. S. 280, 284 (2005). In this case, the District Court dismissed plaintiffs' suit on the ground that they were in privity with a state-court loser.

SATISFACTION OF MORTGAGE: A KEY FACTOR IN THE STRATEGY AGAINST THE LENDER

When the borrower pays off the amount due on the note to the stated lender and the lender accepts it as full payment, the borrower is entitled to the recording of a satisfaction of mortgage, thus freeing his/her property from the encumbrance of the mortgage. When the Judgment of Foreclosure is entered or the Sale is held and title is transferred, the borrower would ordinarily assume the case is over. But that isn't the case in the mortgage meltdown environment:

(1) nobody who is bringing a foreclosure action could execute a satisfaction of mortgage. No judgment in foreclosure can be entered. Because they cannot assure the court or the borrower that some third party won't make the same claims on the same note and mortgage down the line claiming they are the holders in due course. They are called indispensable parties. And they are probably right. If the foreclosing party gets its way it is getting the money (from a third party) AND the property (from the homeowner) and a deficiency judgment against the borrower this leaves the borrower and the person who paid them for the mortgage with nothing and a windfall for people on the lender side even though the loan "failed." They are continuing their scheme to defraud arrogantly and out in the open. All they can do is OFFER (as Taylor Bean did in Florida in the allegations of their complaint) a settlement in which they indemnify the borrower against third party claims). The lenders know about the problem and it is what is keeping them up at night. I can't see any way out for them.

(2) because of the peculiar ways in which they handled the paperwork and using substitute forged documents in the conveyances with unauthorized signatures, the note has been paid in full and there is no liability owed from the borrower to the entity bringing the foreclosure action. The mystery third party mentioned above

might have some claim, but they would also be admitting that they were the true and undisclosed lender, that they paid undisclosed fees, and basically committed fraud in the transaction entitling the Borrower to (a) rescind and release the mortgage anyway and (b) set off any borrower liability on the notes for claims against lenders for refunds, rebate, interest, points, expenses, and damages and attorney fees not only in the third party action but for whatever was not recovered in the first foreclosure action which needed up (we hope) being dismissed with prejudice.

SECURITIZED TRANSACTION AND SECURITIZATION

The process of creating a financial instrument by combining other financial assets and then marketing them to investors. SEE MBS-MORTGAGE BACKED SECURITIES. May also be spelled as "securitisation."

See also: Mortgage Backed Security, Structured Finance

Securitization – This process has produced much of the growth in the bond market over the past ten years. In securitizations, assets such as mortgages and student loans are pooled together in Special Purpose Entities (SPEs) that are bankruptcy-remote and stripped of much of the credit and legal risk associated with the assets. These entities issue securities to investors, who then receive monthly payments from the assets in the pool. Investment banks play a key role in these securitizations, structuring them, performing due diligence on the underlying assets, and selling them to investors.

SECURITY:

See structured purpose vehicle, CDO, CMO, ABS

Definition 1

An investment instrument, other than an insurance policy or fixed annuity, issued by a corporation, government, or other organization which offers evidence of debt or equity. The official definition, from the Securities Exchange Act of 1934, is: "Any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited."

Definition 2

Property which is pledged as collateral for a loan.

Related Terms

cabinet security, convertible security, derivative security, droplock security, exchangeable security, graduated security, letter security, mortgage pass-through security, mortgage-backed security, negotiable security, registered security, stamped security, agency security, asset-backed security, CUSIP, digested security, distressed security

Short Sale

A sale where the lender will agree to accept less than the full amount of the mortgage. This allows you to sell the house to an investor or other buyer for a good price, while the lender recovers the bulk of the amount due without having to pursue foreclosure proceedings.

SPECIAL PURPOSE VEHICLE (SPV)

THE "ENTITY" CREATED BY THE INVESTMENT BANKING FIRM TO HOLD AN INTEREST IN THE CASH FLOW AND/OR OWNERSHIP OF THE NOTE AND/OR OWNERSHIP OF THE SECURITY INSTRUMENTS (BY ASSIGNMENT, WHICH ARE RARELY RECORDED IN PROPERTY RECORDS) AND/OR OWNERSHIP OF THE RISK OF LOSS. Also called Special Purpose Entity, because it could be a trust or any form of business organization. It is the SPV that is the "company" which "issues" securities for the purpose of selling those securities (stock, bonds etc.) to qualified investors. The typical "security" that has been issued during the mortgage meltdown is the mortgage backed security (MBS) and more specifically, the collateralized debt obligation (CDO) and more specifically the collateralized mortgage obligation. The terms CDO and CMO are frequently used interchangeably but CDO connotes a larger class of securities than CMO.

CMO/CDOs vary in structure and underlying assets, but the basic principle is the same. Essentially a CDO is a corporate or other legal entity (LLC, LLP, Trust etc.) constructed to hold assets as collateral and to sell packages of cash flows to investors. A CDO is constructed as follows:

- A Special Purpose Vehicle (SPV) acquires a portfolio of credits. Common assets held include mortgage-backed securities, Commercial Real Estate (CRE) debt, and high-yield corporate loans.
- The SPV issues different classes of bonds and equity and the proceeds are used to purchase the portfolio of credits. The bonds and equity are entitled to the cash flows from the portfolio of credits, in accordance with the Priority of Payments set forth in the transaction documents. The senior notes are paid from the cash flows before the junior notes and equity notes. In this way, losses are first borne by the equity notes, next by the junior notes, and finally by the senior notes. In this way, the senior notes, junior notes, and equity notes offer distinctly different combinations of risk and return, while each reference the same portfolio of debt securities. These levels of risk are called "tranches". A TYPICAL PROVISION OF THE CMO/CDO ISSUED BY THE SPV IS THAT THE PROCEEDS OF SALE CAN BE USED FOR PAYMENT OF THE PROMISED RETURN. THE SIGNIFICANCE OF THIS IN FORECLOSURE DEFENSE IS THAT THE PARTY TO WHOM PAYMENT IS TO BE MADE IS RECEIVING FUNDS FROM AN INTERMINGLING OF (A) THE FUND CREATED FROM THE SALE OF THE SPV SECURITIES (B) INCOME FROM THE LOWER TRANCHES (C) GUARANTEES OF THE SELLER OF THE SECURITIES, THE ORIGINATING LENDER (D) CLAIMS AGAINST THE SECURITY RATING AGENCY WHICH OFTEN RATED THE CMO/CDO ONLY IN ACCORDANCE WITH THE TOP TRANCHE WHICH MISSTATED THE RISK ASSOCIATED WITH THE ENTIRE SECURITY. THIS OVERSTATEMENT OF THE VALUE OF THE SECURITY IS IDENTICAL TO THE APPRAISER'S OVERSTATEMENT OF THE VALUE OF THE PROPERTY AND THE LENDER'S OVERSTATEMENT OF THE RISKS AND THEREFORE THE VALUE OF THE LOAN.
- In both cases (rating agency and appraiser) the public was deceived by intentional inflation of value. In both cases, there were specific financial incentives for the rating agency to overrate the security and for the appraiser to overvalue the property and for the lender to overrate the borrower's financial ability or willingness to pay in accordance with the terms of the note and mortgage. In neither case was the potential liability and the potential litigation over these inherently bad practices ever disclosed to either the borrower or the investor.

SQUIGGLE: SEE FORGERY, MISSING NOTE, ASSIGNMENT, KINGS COUNTY CASE

An S-curved mark purporting to be a signature.

Structured finance – This definition varies somewhat, but it typically refers to a set of complex bonds backed by payments from pooled assets, such as credit card debt and student loans, but most often mortgages (products of the securitization process described above). Investment banks slice and dice these securities offerings into segments called "tranches" that carry varying levels of risk based on the nature of the underlying asset or security, and are intended to appeal to different types of investors (ranging from hedge funds to pension funds). A full review of the various kinds of structured financial products is beyond the scope of this report, though collateralized debt obligations (CDOs) are the most widespread products.

STRUCTURED INVESTMENT VEHICLE (SIV)

A pool of investment assets that attempts to profit from credit spreads between short-term debt and long-term structured finance products such as asset-backed securities (ABS). **FREQUENTLY HELD OFF-SHORE IN THE CAYMAN ISLANDS OR OTHER "SAFE" HAVEN.** Funding for SIVs comes from the issuance of commercial paper that is continuously renewed or rolled over; the proceeds are then invested in longer maturity assets that have less liquidity but pay higher yields. The SIV earns profits on the spread between incoming cash flows (principal and interest payments on ABS) and the high-rated commercial paper that it issues. SIVs often employ great amounts of leverage to generate returns.

Also known as "conduits".

SIVs are less regulated than other investment pools, and are typically held off the balance sheet by large financial institutions such as commercial banks and investment houses. They gained much attention during the housing and subprime fallout of 2007; tens of billions in the value of off-balance sheet SIVs was written down as investors fled from subprime mortgage related assets.

Many investors were caught off guard by the losses because little is publicly known about the specifics of SIVs, including such basics as what assets are held and what regulations determine their actions. SIVs essentially allow their managing financial institutions to employ leverage in a way that the parent company would be unable to due to capital requirement regulations.

The legal issue in foreclosure defense is what rights these vehicles have to revenue flow from the notes issued in real estate loan transactions? They might share or actually replace the investor in ABS products. This puts in doubt whether there is any one party who has the knowledge and authority to enforce the note since the revenue sources are pooled and merged with multiple independent third parties including the borrower, whose obligation to pay may have been subject to novation or substitute of one or more third parties, co-borrowers, insurers, or assurers.

Subject To

The purchase of a property with an existing lien against the title without assuming any personal liability for the liens payment.

Synthetic Collateralized Debt Obligation: Who Paid for it and Who Benefits?

A form of collateralized debt obligation (CDO) that invests in credit default swaps (CDSs) or other non-cash assets to gain exposure to a portfolio of fixed income assets. Synthetic CDOs are typically divided into credit tranches based on the level of credit risk assumed. Initial investments into the CDO are made by the lower tranches, while the senior tranches may not have to make an initial investment. In foreclosure defense the issue might be that the collective "lender" (loan originator, mortgage broker, loan underwriter, loan aggregator, investment banker, SPV and their auditors, public and private) might have been too cute by half: these "synthetic" devices which are in essence derivatives on top of derivatives but with a personality of their own, may protect the borrower from losses occasioned by market conditions, in the same broad brush as they leverage and protect the investor positions in the loans. Thus the payment, it may be argued, was insured and assured. This would be particularly true if the borrower and the investor are joined in interest --- as having both been defrauded by the same apparatus using the same methods ---and where consideration from both of them paid for the synthetic collateralized security.

All tranches will receive periodic payments based on the cash flows from the credit default swaps. If a credit event occurs in the fixed income portfolio, the synthetic CDO and its investors become responsible for the losses, starting from the lowest rated tranches and working its way up.

Synthetic CDOs are a modern advance in structured finance that can offer extremely high yields to investors. However, investors can be on the hook for much more than their initial investments if several credit events occur in the reference portfolio.

Synthetic CDOs were first created in the late 1990s as a way for large holders of commercial loans to protect their balance sheets without actually selling the loans and potentially harming client relationships. They have become increasingly popular because they tend to have shorter life spans than cash flow CDOs and there is no

extended ramp-up period for earnings investment. Synthetic CDOs are also highly customizable between the underwriter and investors.

Subprime Mortgage Originator/Lender – Typically an independent (and largely unregulated) lender that does not take deposits, but rather raises money through the secondary market in order to make subprime loans (see above). These lenders pay mortgage brokers fees for the loans that they sign up homeowners for.

TARGETED AMORTIZATION CLASS TRANCHE (TAC):

Bonds created in scheduled-pay CMO structures. A TAC tranche is structured to avoid prepayment volatility. Each TAC has a designated target speed. When prepayments exceed the targeted speed, the excess cash flow is diverted to other tranches in the CMO. Unlike a planned amortization class (PAC) tranche, a TAC tranche is not protected from extension risk if prepayments are slower than expected. For this reason, TACs can be viewed as half PACs. TACs offer investors protection (but not immunity) from call risk but no protection from extension risk. THE MAKERS OF THE DERIVATIVE SECURITIES THAT WERE THE BACKBONE OF THE MORTGAGE MELTDOWN IS THAT THEY WERE TOO CUTE BY HALF: THEY INADVERTENTLY MADE IT IMPOSSIBLE TO DETERMINE WITH CERTAINTY WHETHER SOME PORTION OF YOUR MORTGAGE WAS PAID BY A THIRD PARTY WHICH MIGHT INCLUDE ANOTHER BORROWER, THE "RETAILER" WHO SOLD THE SECURITY, AN INSURER OF THE BOND, AN INSURER OF THE RATING AGENCY, THE RATING AGENCY, THE INVESTMENT BANKER, THE INSURER OF THE INVESTMENT BANKER, THE MORTGAGE AGGREGATOR, THE LENDER OR THE MORTGAGE BROKER. THE NUMBER OF POSSIBLE PAYERS IS INFINITE AS THE BEAR STEARNS COLLAPSE ILLUSTRATES --- I.E. IT COULD INCLUDE FINANCIAL INSTITUTIONS THAT AHD NOTHING TO DO WITH THE LOAN OR THE SALE OF THOSE PARTICULAR ASSET-BACKED SECURITIES AND EVEN THE UNITED STATES FEDERAL RESERVE OR THE UNITED STATES TREASURY DEPARTMENT. The significance of the various tranches is that there are a variety of means by which the holders of the securities get paid, only one of which is from the borrower of a particular amount of money under the terms of a particular mortgage lien on a particular piece of property securing a particular note. THUS IT MAYBE ARGUED, QUITE SUCCESSFULLY, THAT EVEN IF THE BORROWER DID NOT DIRECTLY PAY ON THE MORTGAGE, SOMEONE ELSE DID --- AND THEY PAID IT TO AT LEAST AN AUTHORIZED OR SOMEONE WITH APPARENT AUTHORITY TO ACCEPT THE PAYMENT THAT "DERIVED FROM" THE BORROWER'S SIGNATURE.

TECHNICAL REVIEW:

One of two types of real estate appraisal reviews. A technical review is a review performed by another appraiser. The primary purpose of the technical review is to determine whether or not the appraisal meets Uniform Standards of Professional Appraisal Practice requirements and whether the opinions and conclusions in the report are reasonable. Technical reviews ordinarily do not challenge the original appraiser's choice of comparables unless there is an obvious problem. See administrative review.

TEMPORARY INJUNCTION:

An order signed by a Judge based upon the filing of a petition stating grounds for an emergency or stating grounds why the status quo should be preserved or both. The granting of a TI or TRO (Temporary Restraining Order) is a step in the direction of winning. Combined with a quiet title action (see Quiet Title) it could be an effective tool to stop foreclosure, sale or even eviction.

TIER 1 CAPITAL AND TIER 2 CAPITAL

tier 1 capital

A regulatory definition of bank capital. Tier 1 capital consists of common shareholders' equity, perpetual preferred shareholders' equity with noncumulative dividends, retained earnings, and minority interests in the equity accounts of consolidated subsidiaries.

tier 2 capital

A regulatory definition of bank capital. Tier 2 capital consists of subordinated debt, intermediate-term preferred stock, cumulative and long-term preferred stock, and a portion of the bank's allowance for loan and lease losses. LENDERS MOVED THE LOANS OFF THEIR BALANCE SHEET HIDING THE CONTINGENT LIABILITY FOR A DEFAULT THAT THEY KNEW WAS CERTAIN TO OCCUR. THIS THEY ARE IN VIOLATION OF BASIC REGULATIONS GOVERNING THE MANAGEMENT OF BANKS. BY SELLING OR ASSIGNING THE LOANS AND MAKING IT APPEAR THAT THEY WERE NO LONGER AT RISK, THEY MADE THEMSELVES BELIEVE IT AND THEN REPORTED IT THAT WAY TO THE STATE, TO THE FEDERAL GOVERNMENT, TO THE INTERNATIONAL REPORTING AGENCIES, AND TO THE PUBLIC SHAREHOLDERS AND CUSTOMERS OF THE BANK. WERE IT NOT FOR THE THE FEATURE OF AVOIDING THE PROBLEMS OF OVER-EXUBERANT LENDING AND THE ATTENDANT AGENCY RISK (SEE AGENCY PROBLEM) --- BY REMOVING THE REQUIREMENT TO REPORT ITS EFFECT ON TIER 2 CAPITAL, THE BANK WAS FURTHER ABLE TO MAKE EVEN MORE LOANS THAT WERE EITHER KEPT "IN HOUSE" OR WHICH WERE ALSO SECURITIZED AND SOLD. THE BANK WAS THUS DOUBLE DIPPING BY LENDING OUT THE SAME CAPITAL TO MORE THAN ONE BORROWER --- A CLASSIC FRAUDULENT SCHEME WHICH WORKED IN PERFECT HARMONY WITH THE PONZI SCHEME ON THE SECURITY SIDE, TO WIT: PROCEEDS FROM SALE OF THE SECURITIES WERE ALLOWED TO BE USED FOR PAYMENT OF THE INTEREST OR RETURN ON THOSE SAME SECURITIES, WHICH MEANS THAT THE INVESTORS WERE PAYING THEMSELVES WITH THEIR OWN MONEY WITHOUT REGARD TO WHETHER THE BORROWER MADE PAYMENTS. IT IS THEREFORE POSSIBLE TO ARGUE THAT NO DEFAULT WAS POSSIBLE UNDER THE MORTGAGE AND LOAN.

THIRD PARTY PAYMENT: (Foreclosure Defense: "PAYMENT")

A basic defense to any foreclosure action or any action on a debt, whether evidenced by a note, security agreement or otherwise is PAYMENT. It is entirely possible and in fact probable that the ultimate party to whom payment was to be made actually received the payment from a third party, or a portion of the payment, or has a claim for the payment from a third party. This third party obligation, taking the entire transaction as one single transaction arises from the sale, assignment, aggregating, re-assignment, sale, or transfer to an investment banker or entity created by an investment banker and in turn sold to an investor in pieces as an asset backed security (ABS). Presumably the investor who purchased an asset backed security which was backed in small part by YOUR mortgage and note and the balance backed by (a) other mortgages and notes, and possibly other portfolios of obligations which may or may not have been mortgages and notes, (b) insurance from the rating agency, (c) insurance from an insurer against the risk of default, (d) insurance from the investment banker, (e) insurance from the mortgage broker, (f) insurance from the appraiser of the house, (g) insurance from the "lender", (h) lender liability for buy back or guarantee of payment and potentially other third party entities who did make payment or who will make payment curing the borrower's alleged default or nullifying the alleged default altogether. The transfer of risk allocation sought by securitization, cross indemnity agreements, guarantees, ratings, insurance and "buy-back arrangements, convert the payment allegedly due from borrower as part of a larger option Ponzi scheme. Using the Countrywide model which can be seen buried deep within their filings with the SEC, one can see that the proceeds of the sale of the ABS can be used to make the payments. Thus the fund is present for payment and controlled by the combined entities of the entire single transaction. A default by the borrower is actually therefore impossible under the scheme of securitization as it was implemented. The reality is that the underwriting standards for loaning money were dropped, along with even the escrow account for insurance and taxes in some cases, so that the loan would qualify for for closing at closing, even if it would later NOT qualify knowing the inflated value of the home, and the likelihood of increases in payments beyond the financial capacity of the borrower. The gap created between what the borrower could actually pay and what the loan terms demanded was made up by the "option" quality referred to above through insurance and other terms between the multiple players in the chain of title for the mortgage, note, risk of loss and right to payment (all of which was separated out into different entities, none of whom qualified as a lender or as an entity with a right to do business in the state where the property was situated or the state where the loan was originated (see LENDER).

TILA: Truth in Lending Act:

Federal Statutes providing for disclosure requirements identifying the parties, fees paid, terms of loan etc. Note that TILA specifically provides that servicer is NOT considered as owner of the obligation. Significance

in foreclosure is that in virtually all cases the real parties in interest were not disclosed, the premium fees and rebates were not disclosed in the securitization process, and the ability of the borrower to gain access to information identifying such parties was restricted. Thus a rescission letter sent to the "lender" could arguably be said to be directed to the wrong party. Further a satisfaction of mortgage based upon payment, short-sale etc., or even a judgment or sale in foreclosure could be nothing more than a cloud on title. The only cure to title defect appears to be the filing of a quiet title action. tila-snippets

Title

The instrument that is evidence of a person's right in real property (i.e., a deed).

title-company-sues-countrywide-exposing-deep-flaw-in-loan-closings

TOXIC WASTE: SEE SPV, ABS, SINGLE TRANSACTION

The lower tranche levels of an SPV (see Special Purpose Vehicle) whose main characteristic is to take whatever revenue or principal is paid on the high-risk debt obligations contained within that tranche and pay for any short-fall in higher tranches within the same SPV or through credit default swaps effecting other SPVs. It is difficult if not impossible to trace any specific mortgage or note to any specific one or more SPVs, tranches or other cross collateralization agreements and other instruments that distributed and parsed interests in individual loans in multiple parts to multiple parties and joined c-obligors at various levels before and during the securitization process (based upon the clearance procedures and record keeping of those involved in the SINGLE TRANSACTION).

TRUTH IN LENDING ACT (TILA):

A federal law which provides for closing procedures in every loan transaction and which provides for methods by which the borrower can obtain remedies to save the borrower's home from foreclosure, to recover points, interest and closing costs and to even rescind the loan transaction which would automatically extinguish the mortgage lien and eliminate liability on the mortgage note. First mortgage loans on residential property are stated as an exemption from rescission (see RESCISSION), but there are many ways in which this exemption is avoided, particularly in refinancing, or other situations where things were included in the mortgage loan amount that were in actuality NOT real estate but rather part of a consumer transaction. For example if landscaping by a third party or other items that were not appurtenances to the house in the purchase from the reseller or developer, this is a consumer transaction and the right of rescission would apply. In addition rights of rescission under state law and common law are not effected by the stated residential home mortgage exemption for first mortgages. TILA is normally enforced under the Real estate Settlement Procedures ACT (RESPA).

Trustee

A neutral party who advertises the foreclosure property for sale and conducts the auction to sell said property to the highest bidder. In non-judicial sale state, the Trustee is a "nominee" of the Lender who may post a Notice of Non-judicial Sale, thus placing the burden on the borrower to sue the Trustee as a nominal party and the "lender" which as discussed elsewhere in this Glossary (See SPV and CDW/CDS). The Trustee has no interest in the mortgage, no interest in the Note and no knowledge as to whether payments were made to the mortgage servicing company or the current holder of the note which changed within days after the loan closing with the borrower. The Trustee and the Loan Servicing Entity should be put on notice that you are pleading PAYMENT (see PAYMENT), you want the original note produced along with the register showing the payments made, and for them to produce authority with a valid assignment recorded in the property records or otherwise through competent evidence that the actual ultimate recipient of payments derived from this mortgage note, together with many others (i.e., the investor in the Asset backed security -ABS) showing ownership of the note, the original note, non-receipt of payments from borrower and/or third parties (including the mortgage service provider, the SPV pool reserve against shortfalls of income that were built into the structure of the SPV) and joining of the parties holding title to the security instrument (mortgage). Countrywide may NOT instruct the Trustee to sell the property because neither CW nor the Trustee has the note, the mortgage, or all the facts involving payment and potentially CW itself did not pay the people or entities that are now the actual possessors of the right to payment. In Discovery, one would want copies of instructions and affidavits provided to the Trustee, along with the name of the Trustee's E&O carrier. In many cases, particularly with Washington Mutual and other name brands, Countrywide is NOT and never was the lender. It is the loan servicer and has no authority to represent itself as the lender since it is not the

lender. If you see WM Specialty as the party to whom the loan was assigned after closing from an apparent lender that was fronting the transaction for Washington Mutual, the "WM" is their way of indexing the aggregators which function they kept in house before selling it off to Wall Street. If the SPV is a trust, a trustee directs its affairs and the same guidelines apply. By the time you get to confrontation over the loan, neither the Trustee, the loan servicing entity, nor the aggregator who received an assignment has any interest, ownership, control or authority over the note and mortgage, which is why it is so important that you demand proof of the original note and proof of ownership, control and authority.

Trustee Sale (Sheriff Sale) letter-of-objection-to-trustee-in-non-judicial-sale-states
An auction of real property conducted by a trustee. Also known as a Sheriff's Sale.

UCC - See Uniform Commercial Code.

UCC - 1 - See financing statements.

UCC - 3 See amendment, assignment, continuation, partial release, release and termination.

UCC - 4 - See lien search.

unadvised line

A line of credit that is approved by the bank but not disclosed to the borrower until some specific event, usually a request for funding from the borrower.

uncertificated

Legal term used (especially in UCC Article 8) as an adjective to describe stocks, bonds, other investments, and certificates of deposit held in nonmaterial form as electronic computer entries. Ownership of these instruments is usually evidenced by a receipt or confirmation.

uncovered - See naked.

underlying or underlier

An option or a future is a right or a commitment to buy or sell something at a future date. The underlying is the financial instrument that may or must be bought or sold in each option or futures contract. FAS 133, as amended by FAS 149, defines an underlying to be a specified interest rate, security price, commodity price, foreign exchange rate, index of prices or rates, or other variable (including the occurrence or nonoccurrence of a specified event such as a scheduled payment under a contract). An underlying may be a price or rate of an asset or liability but not the asset or liability itself.

underwriter

The investment bank, commercial bank, or brokerage firm that works with an issuer to sell a new issue. Issuers may select underwriters by obtaining bids or on a negotiated basis. Potential underwriters may form groups called underwriting syndicates to bid collectively.

underwriting -- SEE APPRAISAL FRAUD, AND CNN 2005 ARTICLE PREDICTING MASSIVE FORECLOSURES

national-consumer-law-center-warning-to-federal-reserve-in-2006-thorough-discussion-of-improper-practices-although-not-complete

The name used to describe the process of analyzing and structuring a proposed loan. Good underwriting is the most important aspect of secured lending. Outside of banking, the term primarily refers to the purchase of risk.

Uniform Commercial Code (UCC)

A compilation of laws relating to commercial contracts involving personal property. The code does not address real property. In addition, a few types of personal property are also excluded. While the UCC has been adopted by all 50 states, there are differences among the versions adopted in each state. Secured lenders tend to focus on UCC Article 2A covering leases, Article 8 covering securities, and Article 9 covering all other personal property collateral.

Uniform Standards of Professional Appraisal Practice (USPAP)

Appraisal requirements published by the Appraisal Foundation. Prior to 1994, USPAP rules were included as an appendix to the Uniform Real Estate Appraisal Rule published by the four federal financial institution regulators. Since 1994, USPAP rules are referenced in the bank regulations but not provided in any form. Comments published with the 1994 amendments to the bank regulations indicate that readers are expected to assume that all references to USPAP in the regulations are references to the most current version of USPAP then available.

unlimited guaranty

A guaranty agreement that does not include any provisions restricting the amount of debt guaranteed. USPAP - See Uniform Standards of Professional Appraisal Practice.

Upset Bid

A recorded bid placed after a foreclosure sale has ended that is higher than the highest bid received at the actual foreclosure sale.

usury laws

State and Federal laws establishing maximum allowable interest rates that may be charged on specified types of credit extensions to specified types of borrowers.

Writ

An order or mandatory process in writing issued in the name of a court or judicial officer commanding the person to whom it is directed to perform or refrain from performing a specified act.

Z tranche:

A CMO tranche. With the exception of jump Z tranches, owners of the Z tranche receive no cash flow from underlying mortgage collateral until the other tranches are retired. During the period when other tranches are still outstanding, the owners of the Z tranche receive credit for periodic interest. Those credits increase the face value of the tranche but are not paid to the owners. The Z bond may be, but does not have to be, the last tranche in a CMO structure that is retired. Sometimes called an accretion bond or an accrual bond.

TESTIMONIAL AND COMMENTS

If you liked the workshop, tell us what you liked and how you think you benefitted:

How could we make the workshop better?

What did you like or dislike about the workbook?

What did you like or dislike about the visual presentation?

What did you like or dislike about the presentation of Neil Garfield?

What did you like or dislike about the presentation of Brad Keiser?

Were the facilities sufficient to meet your needs?

Overall did the workshop meet or exceed your expectations?

Overall did the workshop disappoint you?

Would you recommend that others attend this workshop?

Would you be willing to accept referrals from us for foreclosure defense?