

CONSUMER LAW: WINNING JUSTICE FOR CONSUMERS

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- I. Saving Homes From Predatory Lending: Void the Loan and Recovering Substantial Money Damages.
 - A. Warning Signs for Predatory Loan
 1. Aggressive marketing and solicitation.
 - a. Door to door.
 - b. Advertisements.
 - c. Phone Solicitation.
 - (1) Cold Calls – Telemarketing.
 - (2) Referrals.
 - d. Flipping.
 2. Inappropriate closing setting.
 3. Excessive Fees. Loans will inflate fees and include charges that are not bona fide. Fees may increase until they are well over 10% of the loan amount. Legitimate brokers charge around 1-3% in fees.
 4. High Interest Rates. State usury laws have been preempted by federal law in many areas, allowing subprime lenders to charge excessive interest rates. Some predatory loans contain interest rates well over 15% on thirty year mortgages.
 5. Appraisal Inflating Market Value of Home. Subprime lenders will contract with appraisers they know will inflate the market value of a home, permitting the lender or broker to artificially create a attractive loan to value ratio.
 6. Exploding ARM. Predatory lenders will attract borrowers with a “teaser” interest rate that is reasonable, but which is adjustable. The teaser rate will “explode,” many times as early as six months after closing, and go up to outrageous amounts.
 7. Balloon Payments. Many predatory loans contain oppressive balloon payments, included without the borrowers knowledge. Often the balloon payment will come due after the borrower has paid over significant amount of time (like fifteen years), and the amount will be very close to the amount distributed to third parties on the borrower’s behalf.

8. Yield Spread Premiums. Yield spread premiums are illegal kickbacks from a lender to a broker for getting a borrower to agree, unknowingly, to a higher interest rate.
9. Negative amortization.

B. Unscrupulous Practices.

1. Falsifying Loan Applications, Particularly Income Level and Security. Predatory lenders will falsify a borrower's income, or place security in the loan that does not exist. The aim is to create a more attractive application, and deliver credit above what the borrower is able to afford.
2. Fraudulent Appraisals. Fraudulent appraisals have two effects: (1) they lock a borrower into the abusive loan terms with that lender, with no ability to refinance at more reasonable terms, and (2) make the loan more attractive to securitize on the Secondary Market.
3. Bait and Switch Tactics. Predatory lenders will tell a borrower the loan will be on one set of terms, and then present different terms later. Interest rates, fixed or ARM, and term length are frequently the subject of bait and switch schemes.
4. Misrepresentations. Lenders will misrepresent various terms of the loan and the role of brokers. Many borrowers, some of which cannot read, do not recognize the misrepresentations imbedded in pages upon pages of loan documents.
5. Excessive Prepayment Penalties. The subprime market is very competitive. Predatory lenders want to keep their customers (victims), and excessive prepayment penalties are one way lenders ensure that borrowers must live out the life of their abusive loan and won't refinance on more favorable terms.
6. Flipping. One of the most abusive predatory lending practices is flipping. Borrowers will be persuaded into repeated, unwise loans, each one loaded with fees and charges and many times rolling unsecured credit card debt into home equity loans. Borrowers can increase their home equity debt from under \$10,000 to over \$100,000 in manner of years.
7. Abusive Collection Practices. Predatory lenders are abusive and relentless in collecting. They are accustomed to dealing with individuals who do not typically have the wherewithal or the resources to fight back. As a result, collection agents are abusive and harassing.

C. Five Steps to Voiding Mortgage Loans

1. Choosing the correct defendants.

a. Players in Predatory Lending Scheme.

- (1) Broker.
- (2) Appraiser.
- (3) Originating Lender.
- (4) Underwriter.
- (5) Holder
 - (a) Lender.
 - (b) Trustee for securitized trust.
- (6) Closing Agent.
- (7) Title Company.
- (8) Servicer.
- (9) Foreclosure trustee.

b. Establishing liability against the various parties.

- (1) Principal/Agency Relationship – Use course of dealing and any correspondent agreement, agreement to originate, pooling and servicing agreement (PSA) or equivalent contract document to establish brokers and originating lenders are originating loan pursuant to lender's requirements. See England v. MG Investments, 93 F. Supp. 2d 718, 723 (S.D.W. Va. 2000).
- (2) Joint Venture/Conspiracy – Alternatively, the PSA or correspondent agreement can be evidence of a joint business enterprise. See Short v. Wells Fargo Bnk. Minn., 401 F. Supp. 2d 549, 563-65 (S.D.W. Va. 2005).
- (3) Using failure in lender's underwriting and review function to show constructive knowledge of the fraud.
- (4) Presumption of holder/assignee liability holder of negotiable instruments subject to all claims and defenses arising out of the transaction.
 - (a) See W. Va. Code § 46A-2-101, -102.
 - (b) Burden of holder-in-due-course defense on lender.

- i) No close relationship
 - ii) No defects on fact of documents
 - c. Discovery necessary.
 - (1) Pooling and servicing agreement (PSA).
 - (2) Underwriting standards.
 - (3) Rate sheets.
 - (4) Agreements between parties.
 - (5) Other loans with same parties.
- 2. Common Law and Statutory Claims for Predatory Lending Conduct.
 - a. Broker liability.
 - (1) Breach of Fiduciary Duty. See Arnold v. United Companies Lending Corp, 511 S.E.2d 854, 864-65 (W. Va. 1998).
 - (2) Fraud.
 - (a) Misrepresentations.
 - (b) Conspiracy – Appraisal fraud.
 - (c) Yield spread premium (misrepresenting that the rate was lowest broker could obtain for borrower).
 - b. Common Law Claims and Defenses Arising Out of Loan Origination.
 - (1) Unconscionable contract.
 - (a) Common law
 - (b) Unconscionability is question of fact for jury. See Herrod v. First Republic Mortg. Corp., Inc., 625 S.E.2d 373, (W. Va. 2005) (Only when there are no factual disputes in existence can an unconscionability claim under West Virginia Code § 46A-2-121 be determined as a question of law based on the undisputed factual circumstances and resolved through summary judgment.”).
 - (2) Fraud – contract defense, actual and punitive damages
 - (a) Misrepresentation of fact.
 - (b) Suppression (e.g. non-delivery of documents).
 - (c) Expression of intention or promise to lower rate in the future (sign now and after one year . . .).

- (d) Document alteration.
 - (e) Appraisal fraud.
- (3) Unauthorized practice of law – broker, lender, closer, or document preparation company.
 - (4) Malpractice or negligence - closer.
 - (5) Breach of good faith and fair dealing
 - (6) Slander on Title – TXO Production Corp. v. Alliance Res. Corp., 509 U.S. 443(1993) (holding award of \$19,000 actual damages and \$10 million in punitive damages was justified), affirming TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870 (1992) (concerning backdating or adding a signature to a security instrument, altering a security instrument after signature).
 - (7) Violation of licensing statute as a tort.
 - (8) Common law of equity.
 - (a) Equity abhors a forfeiture
 - (b) Clean hands
 - (c) Statute of limitations does not apply to equitable relief. See e.g., Laurie v. Thomas, 294 S.E.2d 78, 79 (W. Va. 1982).
 - (9) Defective acknowledgment and improper benefit. See Robert W. Trumble, Trustee for the Chapter 7 Bankruptcy Estate v. GMAC Mortgage and Key Home Equity Services, 584 S.E.2d 922 (W. Va. 2003).
- c. Violations of federal law.
- (a) Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*
 - i) Failure to provide Right to Cancel
 - ii) Failure to provide accurate disclosures of APR and other loan terms
 - iii) Failure to honor Right to Cancel
 - (b) Home Ownership and Equity Protection Act (“*HOEPA*”), 15 U.S.C. §§ 1602aa, 1639, 1641(d) – regulation of certain high cost loans.

- (c) Equal Credit and Opportunity Act (“*ECOA*”), 15 U.S.C. § 1691 *et seq.* – failure to provide borrower with notice of adverse action within 30 days of application.

d. Claims Arising Out of Servicer Abuse.

- (1) What is a loan servicer? Servicer is the entity that has the right to collect payments from the borrower. Servicer may collect payments, accept a commission for the payments collection, and forward income to holder of the loan, or servicer may also be the holder of the loan. A holder of a loan may assign, or sell, the servicing rights of aq loan without authorization from the borrower, making the market for servicing rights anti-consumer friendly.

(2) Abusive Default Fees

- (a) Broker Price Opinions (“BPOs”) – realtor opinion as to market value of the home.
- (b) Appraisals – opinion as to market value of home by certified real estate appraiser.
- (c) Property Preservation/Inspection Fees – drive-by inspection of property ostensibly to ensure that the home is occupied and not in disrepair.
- (d) Attorney’s Fees – fees paid to counsel for foreclosure and bankruptcy.
- (e) Corporate Advances – catch-all category of fees that can encompass a wide-range of fees, including all fees listed above.

(3) Industry Standards for Default Fees

(a) FTC/Fairbanks Order

- i) All default fees must be (1) for services actually rendered; (2) reasonable for the services rendered; (3) expressly provided by the loan instruments; (4) not prohibited by law; and (5) clearly disclosed.
- ii) No fees for demand letters or other collection letters.
- iii) No property inspection fees unless (1) borrower is more than 45 days delinquent; (2)

borrower cannot be contacted within the past 30 days or the house is vacant; (3) and then only one inspection every 30 days.

- iv) No broker price opinions unless borrower is more than 63 days delinquent, and then only one BPO every 6 months.
- v) No attorney's fees unless (1) there is a foreclosure; (2) fees are reasonable and actually incurred; (3) lawyer has charged the fees; and (4) not otherwise prohibited by law.

(b) OTS Ocwen Supervisory Agreement

- i) No fees for notices of default or other collection letters.
- ii) No forbearance fees.
- iii) Reinstatement quotes/ pay-off quote fees must be actual and supportable fees. If fees are more than \$1000, consumer has right to file complaint with Ombudsman.

(4) Possible Claims.

- (a) Fair Debt Collection Practices Act. Servicer must obtain account after default, or else not covered by the Act. Misrepresentations or unconscionable debt collection practices prohibited by the Act.

*Note: Property inspections are sometimes used as debt collection device, and may violate FDCPA or state debt collection statutes prohibiting unconscionable debt collection and contacting a client who is known to be represented by counsel.

- (b) Violation of Bankruptcy Rules, Statutes, and Court Orders. Misrepresentations to the bankruptcy court regarding the amount a borrower must tender to reinstate may run afoul of bankruptcy provisions or orders. See, e.g., In re: Allen, No.2:03-BK-22889 (Bankr. S.D.W. Va. May 25, 2004) (attached).
- (c) Breach of Duty of Good Faith and Fair Dealing. Under Deed of Trust, borrower has an ultimate right to reinstatement, which is denied by the lender if it conditions reinstatement on the payment of abusive or

illegal debt collection fees.

- (d) Breach of Contract. Check language of Deed of Trust and Note to determine if the imposition of the fee is prohibited by the loan instruments.
 - (e) Conversion. The misapplication of a borrower's payments to abusive and unauthorized fees amounts to conversion.
 - (f) Equity Abhors a Forfeiture. Pursuing foreclosure and conditioning reinstatement on the payment of excessive fees violates the common law principle that equity abhors a forfeiture.
- e. Preemption. Certain claims may be preempted by federal law if the lender or servicer is regulated by the Office Thrift Savings (e.g., thrifts) and to a lesser extent Office of the Comptroller of Currency (e.g., national banks). Generally speaking, UDAP claims, common law claims, and debt collection claims are not preempted.

3. Use of Expert Testimony.

a. Expert testimony may be used to:

(1) Establish liability of parties for their own conduct.

(a) Origination

- i) Origination practices violate lending industry standards for prudent loan origination.
- ii) Loan was without net economic benefit to the borrower; or terms of the loan were inappropriate for borrower's economic circumstances.
- iii) Loan made without due regard for ability to pay.
- iv) Loan is inconsistent with lender's origination standards
- v) Closing conduct violates industry standards – lenders expect a real estate secured loan closing to be completed in a professional manner which allows the opportunity for the borrower to understand the basic terms of the transaction and make meaningful inquiry into

the loan terms

- (2) Relationship of the parties for agency claims.
 - (3) Appraisal.
 - (a) Improper appraisal review by lender.
 - (b) Retrospective appraisal indicating appraisal inflated market value of home to justify predatory loan.
 - (4) Damages.
- b. Legal Test
- (1) Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) Expert testimony only may be admitted into evidence if: (1) the expert is qualified to competently testify regarding the matters he or she intends to address; (2) the methodology by which the expert reaches his/her conclusions is sufficiently reliable; and (3) the testimony assists the trier of fact, through the application of scientific, technical or specialized expertise, to understand the evidence or to determine a fact in evidence.
 - (2) Kumbo Tire Corporation v. Carmichael, 526 U.S. 137 (1999) Reliable and relevant - the reasonableness of the expert's use of an approach together with his or her particular method of analyzing the data obtained to draw a conclusion regarding the specific matter to which the expert testimony is directly relevant.
4. Find Pattern and Practice Witnesses.
- a. W. Va. R. Evid. 404(b).
 - b. Access to information.
 - (1) Discovery. See Marks v. Global Mtg. Grp., 218 F.R.D. 492, 495-97 (S.D. W. Va. 2003).
 - (2) County Courthouses – Deeds of Trust records provide information to obtain pattern witnesses.
5. Do not undervalue the case and be prepared to go to trial.