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# A DAY IN THE LIFE OF A RESIDENTIAL MORTGAGE DEFENDANT

HAROLD L. LEVINE\*

This article discusses the obstacles and problems that a residential foreclosure defendant in Illinois encounters in that process, and will demonstrate how the playing field is permanently tilted against such defendants. This article does not discuss in detail the causes or operation of predatory lending or the factors that lead borrowers to untimely default.<sup>1</sup> What follows is a brief overview.

The scope of the problem is vast. In 2001, there were 21,000 foreclosures in Cook County alone and the number increased in 2002.<sup>2</sup>

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1. There is extensive literature on the subject. See, e.g., Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV., 1255 (2002) (discussing predatory lending in its five common forms, analyzing home mortgage market segmentation and market failures, addressing lack of comprehensive federal or state predatory lending laws and suggesting suitability standard to subprime mortgage industry); Julia Patterson Forrester, *Mortgaging The American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing*, 69 TUL. L. REV., 373 (1994) (discussing federal promotion of home equity financing and suggesting elimination of tax deduction for home equity interest, elimination of state usury ceilings on home equity loans and amendment to bankruptcy laws to permit homeowners to modify home equity loans like other secured debt); Harold I. Levine, *A Primer On Defenses To Predatory Lending*, in ILLINOIS INSTITUTE OF CONTINUING LEGAL EDUCATION, 5 ILLINOIS REAL ESTATE LITIGATION § 5.37 (2002) (emphasizing patterns of lending abuse and focusing on federal statutory defenses to predatory lending).

2. Letter from Honorable Dorothy Kirie Kinnard to Cook County Mortgage Foreclosure Task Force, Aug. 28, 2002.

## I. PREDATORY LENDING

“Predatory Lending” has been described as a catalog of onerous lending practices often targeting vulnerable populations and resulting in devastating personal losses, including bankruptcy, and the loss of people’s home.<sup>3</sup> Predatory lending practices fall into six categories:

- a. Loans violating common loan underwriting norms to the detriment of borrowers;
- b. Loans resulting in no benefit to the borrower;
- c. Loan terms earning supranormal profits by their design;
- d. Loans involving fraud or deceptive practices;
- e. Loans involving other misleading nondisclosures that are nevertheless legal; and
- f. Loans requiring borrowers to waive meaningful legal redress.<sup>4</sup>

“Subprime lending” is lending that provides credit to borrowers with poor credit histories, including judgments, bankruptcies, and/or repossessions that make them a poor credit risk.<sup>5</sup> Subprime lending is not objectionable if done properly and legitimately.<sup>6</sup> But some lenders argue that it is necessary assert that the heightened risks to the lender justify the higher rates.<sup>7</sup> Greater rewards therefore accompany the heightened risk to the creditors. The problem is that studies have shown that the increase in foreclosures corresponds roughly to increase in originations of subprime loans.<sup>8</sup>

Subprime loans relate to many of the coercive lending practices. For example, the elderly, minorities, and low-income families, who are the primary targets of coercive lending practices as borrowers, are likely candidates for subprime loans.<sup>9</sup>

The quintessential predatory loan is a mortgage to a homeowner who cannot afford the monthly payments under any circumstances, and suffers bankruptcy or loses his or her home to foreclosure as a consequence.<sup>10</sup> These loans (known as asset-based loans) “are fundamentally repugnant because they violate widely

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3. Engel & McCoy, *supra* note 1, at 1260.

4. *Id.* at 1260-61.

5. Levine, *supra* note 1, § 5.11.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Engel & McCoy, *supra* note 1, at 1261.

shared beliefs about the acceptable outer limits of mortgage lending."<sup>11</sup>

The problems with subprime predatory loans have been well documented.<sup>12</sup> Between ten percent and thirty-five percent of subprime loans could be processed as conventional loans.<sup>13</sup> The interest rate on a conventional loan is seven to eight percent as compared to thirteen to fifteen percent on subprime loans.<sup>14</sup> This spread is easily the difference between success and foreclosure in terms of the payments.<sup>15</sup>

## II. THE HOME EQUITY LOAN, THE HOME AS AN ASSET IN PLAY

The home is no longer the bulwark of financial security. It becomes an asset in play when long term equity is sacrificed for short term goals, such as vacations, consumer goods and the like.

One of the leading causes of foreclosure is default under a home equity or consolidation type loan.<sup>16</sup> Stripped of all the bells and whistles, the ordinary home equity/consolidation loan is simply a second mortgage – “miss a few payments, lose the house.”<sup>17</sup> Consumers became half-smart within the last few years. They reasoned that it would be foolish to keep paying fourteen to nineteen percent on credit card bills when they could cut the rate in half by moving to home equity or consolidation loans.<sup>18</sup> There is one large difference in these loans besides rate. The home equity or consolidation loan is secured by the borrower’s residential real estate and is subject to foreclosure.<sup>19</sup> Overlooking this “detail” there has been a shift of almost thirty billion dollars from credit cards to home equity consolidation loans which means that increased amount of real estate or debt amount is now subject to foreclosure.<sup>20</sup> There are two serious problems here that lead to trouble. First, human nature being what it is, the consumer within six months to a year will be up to his or her original credit

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11. *Id.* at 1263.

12. John Hechinger, *Best Interests: How Big Lenders Sell a Pricier Refinancing to Poor Homeowners*, WALL ST. J., Dec. 7, 2001, at A1. See, e.g., Engel & McCoy, *supra*, note 1, at 1261 (noting that predatory loans comprise a subset of subprime loans).

13. Engel & McCoy, *supra* note 1, at 1264-1267.

14. *Id.* at 1264, n.20; Scott Leith & Jim Weiker, *High-Risk Lender*, GRAND RAPIDS PRESS, Dec. 20, 1998. As opposed to an interest rate of seven or eight percent for a conventional loan, the subprime lending rate ranges from thirteen to fifteen percent for home equity loans.

15. Scott Leith & Jim Weiker, *supra* note 14.

16. Forrester, *supra* note 1, at 381.

17. *Id.*

18. William J. Holstein, Personal Business; *The Home Equity Highway: Busy and Hazardous*, N.Y. TIMES, Dec. 23, 2001, § 3 at 10.

19. Forrester, *supra* note 1, at 373-84.

20. *Id.*

card limit and the property is still encumbered with a second mortgage.<sup>21</sup> The credit card borrower is in worse shape than before because the credit card debt that was previously unsecured is being amortized at high interest over a long period of time, greatly increasing the risk of foreclosure.<sup>22</sup> Second, while the original credit card debt would ordinarily be dischargeable in bankruptcy, under this scenario the debt may not be dischargeable.<sup>23</sup>

### III. ADVERTISING

Lenders need to disclose rudimentary facts about their product for consumers to make informed, proper buying decisions and to avoid default.<sup>24</sup> Potential customers are solicited by means of telemarketing, direct mail, home visits and television ads promising to consolidate bills, lower monthly payments or generate extra cash to pay off other debts.<sup>25</sup>

Under Home Equity Disclosure Rules, disclosures on home equity loans are required only if an advertisement states specific terms of the loan.<sup>26</sup> Thus, the rules free lenders of the obligation to disclose detrimental terms and obligations, provided that the advertisements fail to refer to particular terms or merely describe the terms in vague language.<sup>27</sup> Consequently, lenders will be tempted to avoid the disclosure triggering requirement by wording

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21. Holstein, *supra* note 18, at 10.

22. Hechinger, *supra* note 12.

23. Forrester, *supra* note 1, at 373-84.

24. Deborah Goldstein, Note, *Protecting Consumers From Predatory Lenders: Defining the Problem and Moving Toward Workable Solutions*, 35 HAR. C.R.-C.L. L. REV. 225, 244 (2000).

25. Holstein, *supra* note 18, at 10. Holstein states: .

In their marketing pushes, financial institutions make the loans sound alluring. A radio commercial from the Mortgage Warehouse, a finance company in Huntington, N.Y. promises to "put hundreds or thousands of extra dollars in your pocket." Signs at many Citibank branches proclaim: "There must be \$25,000 hidden in your house. We can help you find it." An Internet search for "home equity loans" or "consumer debt consolidation" shows hundreds of companies offering loans or credit lines.

The appeal is undeniable, particularly for anyone in danger of losing a job. Real estate values, on the whole, have remained strong despite increasing unemployment, recession and war. But if possible, it's far better to get a home equity loan before a layoff is announced at work, because most financial institutions look askance at lending to someone who is unemployed - and because the loan process may take three months.

*Id.*

26. Home Equity Disclosure and Substantive Rules, 54 Fed. Reg. 24670 at 24684. 12 C.F.R. § 226 (2001).

27. Samuel H. Levine, Maureen M. Over & Harold I. Levine, *Regulating Home Equity Loan Advertisements Applications and Agreements*, 2 LOY. CONSUMER L. REPORTERS, 4, 8 (1989).

their advertisements in a manner that avoids clear and succinct terms.<sup>28</sup>

Advertisements often cite home equity loans as loan consolidation programs whereby consumers can resolve credit problems.<sup>29</sup> Consumers are only informed how to spend the new loan money without indicating the complexity of the plan or the risks involved.<sup>30</sup> These advertisements allow lenders to sell a "remedy" to consumers before the consumers realize the problems with the remedy.<sup>31</sup> Consumers will more likely respond to an advertisement that answers "their credit card problems" than an advertisement that lists a home equity loan's specific terms.<sup>32</sup> Similarly, once a consumer is sold on the product, he or she is less likely to be dissuaded by the specific terms of the loan.<sup>33</sup>

Consumers do not recognize that the ordinary home equity loan is nothing more than a second mortgage with many unfavorable and dangerous clauses.<sup>34</sup> It is estimated that home equity loans have caused an estimated half of all home mortgage foreclosures in recent years.<sup>35</sup>

#### IV. SPECIAL PROBLEMS OF THE ELDERLY

This is an area where foreclosure law meets elder law. The elderly have special problems. Commonly, a lawyer encounters an elderly person who has (1) a great deal of equity in his or her home, perhaps \$50,000-200,000; (2) a very small mortgage balance, usually under \$25,000 or \$30,000; and (3) only social security as a method of payment.<sup>36</sup> Since ethical lenders are required to lend on the ability to repay and not on the value of the property,<sup>37</sup> the elderly are subject to losing homes with high equity or falling prey to a large variety of lending abuses. The elderly are also more at risk to aggressive marketing techniques.

Seniors are also at risk from children and family members who induce or force them against their will to convey the property to them. They then mortgage the property, taking the funds and leave the elderly parents tenants in a residence under foreclosure. This requires a labor intensive suit to set aside the deed and attempt to prove the lender had the degree of knowledge that

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28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Goldstein, *supra* note 24, at 244.

37. Forrester, *supra* note 1, at 1262.

would defeat its priority over the owners.<sup>38</sup>

## V. TARGETING

The number of Illinois borrowers that are targeted for foreclosure is relevant to this discussion. The scope and methodical organization of attacks on home equity by predators can best be understood if it assumes a local face. The Chicago Daily Law Bulletin publishes a daily list of the previous day's foreclosures by the lender's identity, the borrower's identity, and the address of property interest.<sup>39</sup> These daily listings contain between forty and eighty entries.<sup>40</sup>

If one visits the clerk of the Chancery Division on the eighth floor of the Daley Center in Chicago, one will find contractor representatives, agents of loan companies, and other with computer printouts of the prior days filings. All have come to examine these cases. The statutory mandated foreclosure complaint<sup>41</sup> will recite: (1) the amount of the original mortgage; (2) the current unpaid balances; (3) recorded second mortgages; and (4) possible interest of other judgment or lien creditors.<sup>42</sup> If the spread between the face amount of the mortgage and the balance foreclosed upon is such as to indicate favorable equity, and no onerous problems appear from this cursory examination, then this type of lender will visit or even call from the courthouse to have associates check out the site visually to get an idea of the appearance of the structure and its quality. If the building appears to be free of obvious defects and there is a comfortable spread between the face amount of the mortgage and the amount due as stated, the predatory lender will strike either by mail, telephone, or a personal call. The method can either be to suggest a loan to consolidate all debts, or to remodel.

This important commercial list is used in another way. Using the same Law Bulletin list, every person who is listed as a defendant in a foreclosure in the Law Bulletin can expect to receive an avalanche of mail solicitations from lenders, financial counselors, debt counselors, etc. In an informal survey conducted by the author, a party who was listed as a foreclosure defendant was asked to save every piece of mail received for thirty days after the defendant's name appeared in the Chicago Daily Law Bulletin

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38. Elderly consumers are more likely to be vulnerable to the aggressive marketing tactics because many of them are at home during the day when door-to-door salesman and telemarketers are more likely to call. Monroe Friedman, *Confidence Swindles of Older Consumers*, 26 J. CONSUMER AFF. 20 (1992).

39. CHI. DAILY L. BULL., Vol. 148, June 26, 2002, at 45.

40. *Id.*

41. 735 ILL. COMP. STAT. ANN. 5/15-1504 (2000).

42. *Id.*

as a result of a foreclosure. The subject received over forty pieces of such “vulture” mail, the effect of which would easily confuse and demoralize those borrowers who were under great stress anyway.

## VI. THE NATURE OF THE FORECLOSURE PROCESS

With the exception of defaulted HUD mortgages,<sup>43</sup> Illinois is a judicial foreclosure state.<sup>44</sup> This means that a foreclosure must be filed in the Chancery Division of the Circuit Court and title can only (with certain exceptions) be transferred by public sale.<sup>45</sup> The minimum length of time for an uncontested foreclosure – from filing to sale – cannot be less than seven months,<sup>46</sup> and a total time of nine to ten months is considered average, much to the chagrin of most mortgage lenders who criticize this period as being excessively long.<sup>47</sup> During this nine to ten month period, a receiver cannot be appointed nor can rent be charged,<sup>48</sup> and a borrower has ninety days from service to bring the loan current by paying the arrearage and reasonable attorney fees.<sup>49</sup> After an answer or responsive pleading is filed, the lender usually files a motion for summary judgment supported by an affidavit of prove-up.<sup>50</sup> Many of these affidavits may violate both the hearsay and the best evidence rules because frequently the affiant does not have the “familiarity with the amounts disbursed or collected,” which is required by the statutory summary judgment rules.<sup>51</sup> However, if

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43. See THE PUBLIC HEALTH AND WELFARE, 42 U.S.C. § 5309 (2002) (barring state receiving federal funds to discriminate based upon race).

44. 735 ILL. COMP. STAT. ANN. 5/15-1508 (2000).

45. Author’s personal experience.

46. 735 ILL. COMP. STAT. ANN. 5/15-1603(b) (2000).

47. Author’s personal experience.

48. 735 ILL. COMP. STAT. ANN. 5/15-1701(a) (2000).

49. 735 ILL. COMP. STAT. ANN. 5/15-1602 (2000).

50. Author’s personal experience.

51. It is clear that the affidavit of prove-up when properly challenged violates both the hearsay and best evidence rules. *Cole Taylor Bank v. Corrigan*, 595 N.E.2d 177, 181-82 (Ill. App. Ct. 1992). In *Corrigan*, the court said:

While the bank’s documents show that Lilek (bank’s loan officer) signed the original documents evidencing the loan and security agreement, the affidavit did not show his familiarity with the amounts disbursed or the amounts collected . . . He did not provide the documents upon which he relied when he made his conclusion that the current balance due was \$3,043,215.78. We note that under Supreme Court Rule 236 (admission of business records in evidence), it is the business record itself, not the testimony of a witness, who makes reference to the record, which is admissible. The bank did not lay the foundation necessary to overcome the original writing and hearsay rules. The conclusions within the affidavit were not admissible into evidence, and thus the affidavit did not comply with Rule 191(a)(134 Ill. 2d R. 191(a)).

*Id.* (internal citations omitted). See Levine, Mortgage Defense 101, Newsletter, Section on Real Property Law, Ill. State Bar Association, Vol. 48-



there is no specific objection, the affidavit is usually accepted by the Court.<sup>52</sup> Cook County foreclosure judges are extremely able, hardworking and, where there is a decent possibility of resolution, within the limitations of the law, will attempt to assist the borrower, when they perceive an obvious disadvantage or injustice. The sheer volume of cases (1,000 per judge) 17,000 in 2002, makes an individual approach difficult.<sup>53</sup> The legal aspects of responsive pleading in foreclosure are onerous,<sup>54</sup> and the burden of proof rapidly shifts to the defendant borrower.<sup>55</sup>

The defendant has the burden of proof as to any defense raised by it in the answer.<sup>56</sup> If a defendant files a counterclaim, the defendant has the burden of proof as if the defendant were a plaintiff.<sup>57</sup>

A lender is required only to introduce the mortgage and promissory note, at which time the burden of proof shifts to the borrower to prove any affirmative defenses.<sup>58</sup> If the defendant did not file a defense or if the answer failed to deny the facts of the complaint, then "sworn verification of the complaint or a separate affidavit" is sufficient evidence.<sup>59</sup> In order to present the case properly and overcome the burden of proof, the borrower must present specific affirmative defenses that must be specifically pleaded.

During the height of the lender liability crises, lenders and their strong lobby persuaded the Illinois legislature to pass the Credit Agreements Act.<sup>60</sup> The Act provides that a borrower cannot plead any extension or modification of a loan unless said extension or modification is in writing and signed by lender, and the doctrines of breach of contract equitable estoppel and fraud cannot be invoked without such a writing. This has been a potent obstacle to borrowers<sup>61</sup> since the statute has so far withstood all attacks.<sup>62</sup>

The sheer number of foreclosures leads to problems. There are several firms in Chicago who file several hundred foreclosures

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3, December 2002.

52. 735 ILL. COMP. STAT. ANN. 5/15-1506 (2000).

53. Letter from Honorable Dorothy Kirie Kinnard to Cook County Mortgage Foreclosure Task Force, August 28, 2002.

54. See 735 ILL. COMP. STAT. ANN. 5/15-1506 (2000) (explaining the steps that a defendant must take to respond to a complaint).

55. *Id.*

56. *Telpner v. Hogan*, 308 N.E.2d 7 (Ill. App. Ct. 1974); *Krueger v. Dorr*, 161 N.E.2d 433 (Ill. App. Ct. 1959).

57. *Rush v. Leader Indus. Inc.*, 531 N.E.2d 863, 865 (Ill. App. Ct., 1988).

58. *Rago v. Cosmopolitan Nat'l Bank*, 232 N.E.2d 88, 93 (Ill. App. Ct., 1967)

59. 735 ILL. COMP. STAT. ANN. 5/15-1506 (2000).

60. 815 ILL. COMP. STAT. ANN. 160/0.01 (2000).

61. Bruce Braubman, *Commercial Borrowers Beware*, CHI. B. REC., Sept. 2001, at 30-34.

62. *Id.*

a month. There is always pressure by plaintiff lenders to move the case through on an assembly-line basis.

## VII. SECURITIZATION

The defense of a holder in due course is endangered by the financing concept of securitization.<sup>63</sup> Lenders now routinely package loans and create securities from these bundled loans.<sup>64</sup> The process is called "securitization."<sup>65</sup> "The first step in the securitization process is for lenders to make loans to borrowers."<sup>66</sup> "The loans are then bundled and transferred to an entity" that passively holds loans.<sup>67</sup> This process adds value to the loans.<sup>68</sup> When loans are securitized, it is difficult for the individual borrower to point out the errors in his particular loan when it is bundled with several hundred others.<sup>69</sup> However, if a lender retains a loan in this portfolio, the borrower can raise the originator's unlawful actions as defense.<sup>70</sup> In Illinois, where there is a close connection between assignor and assignee of the loan, the burden of proof is on the holder if the borrower disputes the transaction.<sup>71</sup>

"Widespread securitization by government-sponsored entities," like Freddie Mac and the private sector began in the 1980s, and sixty percent of home mortgage loans were securitized by 1993.<sup>72</sup> It is now routine for lenders to originate loans and sell them on the secondary market, which provides a steady stream of capital to lend.<sup>73</sup>

Securitization makes deception possible because the various entities do not possess the same level of knowledge and have different risk assessments. Some of the parties, borrowers, brokers, lenders, securitizers, sometime withhold information from the other parties. Once loans are securitized under the holder in due course rule, borrowers typically cannot defend nonpayment on the grounds of defective work or fraud.<sup>74</sup>

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63. See Engel & McCoy, *supra* note 1, at 1273-74 (detailing securitization of loans).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. See Engel & McCoy, *supra* note 1, at 1272-73 (detailing the process of securitization).

70. *Id.*

71. See Christensen v. Ventura Constr., 440 N.E.2d 226, 229 (Ill. App. Ct. 1982) (explaining that favored status rests with holder).

72. Engel & McCoy, *supra* note 1, at 1273.

73. See Forrester, *supra* note 1, at 383-87, 399-400, & 498 (explaining how some lenders buy homes at a reduced rate and resell them).

74. Levine, *supra* note 1, § 5.13.

One of the reasons that subprime lenders have been free to engage in this aggressive marketing and that the financial markets have been willing to securitize the resulting loans, is because of the holder in due course doctrine. The buyers of these loans are virtually immune from the borrowers' suits alleging many of these forms of fraud. So long as the lender follows TILA and skirts the triggers for HOEPA, then the holder in due course doctrine reduces the possibility that the purchaser of the loans will lose any money based on those predatory practices. If enough borrowers sue the initial lender, then that lender can declare bankruptcy, leaving the borrowers with little resource for the fraud committed on them.<sup>75</sup>

This issue is particularly important in cases<sup>76</sup> against home improvement contractors who sell the contract to a lender at a steep discount and when misrepresentation, faulty repair and other defenses are raised, the lender claims it is a holder in due course.<sup>77</sup>

### VIII. PREEMPTION

The lenders' most favored defense is preemption. This is the process of avoiding state laws and ordinances that could offer a defense to a foreclosure by forcing all parties to deal with a complex set of Federal Laws that the lenders have mastered and can assert on a uniform national basis. These federal laws were enacted by the government under the impression that by preempting state laws, they could preserve the functioning of the home mortgage market and prevent state laws from interfering.<sup>78</sup>

In doing so, Congress also however eliminated significant consumer protections. How does this work in practice?<sup>79</sup> In

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75. See Engel & McCoy, *supra* note 1, at 1272-74 (explaining the development and solidification of securitization).

76. In an interesting development, the recent New York and Georgia Predatory lending laws clearly assert assignee liability. This has caused great concern in the lending industry since it attacks the basic protection of securitization against assigner liability. Subsequently, Standard & Poors announced "it would no longer give credit ratings to securitized trusts that buy any . . . loans from Georgia." See Diana B. Henriques & Jonathan Fuerbringer, *Bankers Opposing New State Curbs On Unfair Loans*, N.Y. TIMES, Feb. 14, 2003, at C1; Jonathan Fuerbringer, *Agencies to Continue to Rate Pools of New York Mortgages*, N.Y. Times, Mar. 1, 2003, at C4.

77. Levine, *supra* note 51.

78. See National Bank Act, 12 U.S.C. § 85 (2002) (setting rates of interest on loans, discount and purchases for states to follow); Forrester, *supra* note 1, at 399-400 (explaining the DIDMCA's many provisions preempting state law). The Depository Institutions Deregulation and Monetary Control Act ("DIDMCA") and the Alternative Mortgage Transactions Parity Act ("AMTPA") supercede state laws restricting alternative mortgage financing arrangement. Forrester, *supra* note 1, at 399-400.

79. See Forrester, *supra* note 1, at 399-400 (explaining the scope of the

Illinois, any claim or defense with the exception of perhaps consumer fraud or the Illinois Interest Act based on a State Statute or local ordinance is met with a withering barrage of motions claiming preemption. And they have for the most part been successful.

Further, attempts to attack predatory lending by instituting local ordinances or state statutes are met with vigorous resistance by lenders.<sup>80</sup> In a widely anticipated opinion, the Honorable Richard Siebel ruled at the trial court level that the Illinois Interest Act is precluded as a defense or counterclaim on the basis of preemption.<sup>81</sup> The Illinois Interest Act limits the amount of certain charges, including “points,” “service charge[s],” “discount[s],” and “commission[s],” for loans with an interest rate in excess of eight percent per annum that are secured by residential real estate to not more than three percent of the principal amount.<sup>82</sup> If a plaintiff’s actions were done “knowingly” as that term is used pursuant to the Illinois Interest Act, then the plaintiff’s statutory liability is not less than “twice the total of all interest, discounts, and charges determined by the loan contract. . . .”<sup>83</sup> The borrower is entitled to a setoff against all of the amounts that the plaintiff claims are due under the terms of the mortgage of not less than twice the total interest, discounts, or charges under the terms of the mortgage.<sup>84</sup>

Unlike many federal statutes, breach of the statutory formula under the Illinois Interest Act is easy to calculate and apply. If the Illinois Interest Act is not applicable, the Illinois borrower is left with the federal regulatory framework, common law claims of breach of fiduciary duty, common law fraudulent misrepresentation, breach of contract, *etc.*, each of which will be subject to detailed motions to dismiss based upon insufficient pleadings – the usual approach being that the pleading is not specific.<sup>85</sup>

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DIDMCA).

80. Ill. Assn. of Mortgage Brokers v. Office of Banks & Real Estate, No. 01C 5151. United States Dist., N. D. Ill E. Div. U.S. Ct. of App. 7th Cir., 02-1018.

81. Opinion of Judge Richard Seibel, June 9, 2001, in the Chancery Division Circuit Court of Cook County, consolidated case. Judge Seibel’s opinion is the subject of a pending appeal.

82. 815 ILL. COMP. STAT. ANN. 205/4.1a(f) (2000).

83. *Id.* § 205/6 .

84. *Id.*

85. *Smith v. Fidelity Consumer Disc. Co.*, 898 F.2d 907 (3d Cir. 1989); *Currie v. Diamond Mortgage Corp.*, 859 F.2d 1538 (7th Cir. 1988); *Gora v. Banc One Financial Services, Inc.*, 95 C 2542, 1995 LEXIS 15232, at \*1 (N.D. Ill. Oct. 11, 1995). In order to properly plead a claim for common law fraud, a plaintiff must allege facts in support of the following elements: (1) a misrepresentation of material fact; (2) knowledge or belief of its falsity; (3) intent to induce the other party to act; (4) justifiable reliance by a person

The federal preemption status has been criticized by several commentators.<sup>86</sup> In reality, it has the effect of undermining a number of helpful state and local reforms that are stronger than federal law on issues such as loan flipping, negative amortization, financing of points, balloon payments, etc.<sup>87</sup>

The "Ney" bill now pending in Congress is a further attempt to chip away state and local laws against predatory loans. The bill would eliminate existing assignee liability, legitimize, yield spread premiums, and prevent re-instatement of state law limitation on prepayment penalties, and late fees.<sup>88</sup>

#### IX. DEFENSE LAWYERS

In 2002, 17,000 foreclosure cases were filed in Cook County, Illinois. Based on the writer's discussions and personal observations there are less than fifty lawyers in Cook County who can properly defend these cases. This small number of lawyers defends on a frequent basis the entire range of foreclosure cases. Let me define what I believe to be competence for the defense bar. A competent foreclosure defense lawyer must know the entire Federal statutory framework, TILA, RESPA, HOEPA, ECOA, CRA, common law claims and defenses, and that lawyer must have the ability to raise and respond to motions to dismiss, motions for summary judgment and other pleadings including counterclaims, affirmative defenses, as well as know the Rules of Evidence and trial procedure.

After filing an answer, the defense lawyer who files an affirmative defense or counterclaim, will be met with a barrage of well crafted lender motions to dismiss.<sup>89</sup> These motions will usually involve working knowledge of three to six federal laws that the lender has argued and briefed before. There are lenders who file 200-300 cases a month in Cook County. A defense decision to engage at the pleading stage in serious motion and pleading practice can easily run 20-30 hours.

The average residential borrower does not have the money to present a defense, no matter how meritorious the claim. The

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entitled to rely on the representations; and (5) injury or damage resulting from such reliance. *Bd. of Educ. v. A, C & S, Inc.*, 546 N.E.2d 580, 591 (Ill. 1989). In addition, claims of fraud require a heightened level of specificity. *Id.* at 594. For this reason, Illinois has adopted the (minority) view that fraud cannot be based on representations as to future actions. *Id.*

86. Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N.C. L. REV. 293, 315 (1993). See also Henriques & Fuerbringer, *supra* note 76 (discussing the same).

87. *Id.*

88. Legislation introduced by Representative Bob Ney, Republican of Ohio, amending the Home Equity Protection Act of 1994. Kelly K. Spors, *Subprime Bill Aims To Mute State Laws*, WALL ST. J., February 14, 2003, at A4.

89. See cases cited *supra* note 85.

average borrower in default cannot afford to pay significant or even nominal attorneys' fees. He or she is basically dependent on pro-bono assistance.

One of the great failings in this area is the inability to educate Illinois lawyers to the fact that these federal and state statutes in many cases are fee generating if the borrower prevails. One thing is clear, this is an area where the knowledge and skill of the lawyer are critical to the result. Too often the lawyer is learning along with the client. There is no real defense bar or exchange of defense information.

The Chicago area, and Illinois in general, have an unusually strong network of pro-bono legal agencies. There are few places in the United States where there is such a depth of legal assistance. In Chicago, there are six agencies that handle most foreclosure defense.<sup>90</sup> Most have income and other requirements that reduces the help available. The Chief Judge of the Chancery Division estimates that seventy percent of foreclosures in Cook County are handled as defaults. Assuming that all seventy percent are properly classified as defaults (which is not the case) leaves at least 4,000-5,000 cases that need defense. The pro-bono agencies are also overwhelmed with non-foreclosure cases.

The pressures that lead to foreclosure and default are many. The legal system is slanted toward the lender, and legal assistance is difficult to obtain. This is a permanent imbalance. Lenders sue at wholesale, some law firms file over 200 cases a month in Cook, Lake and DuPage Counties, the great majority of which lead to foreclosure. Borrowers must defend at retail one case at a time in laborious, labor intensive litigation involving a variety of complex federal statutes.

Here, I depart from my pro-bono friends. Mortgage foreclosure is not appropriate for pro-se defense. It simply in many cases prolongs the misery.

## X. COUNSELING

The problem: The borrower is the subject of a lawsuit that has just been filed or is about to be filed. Even before the summons arrive, he or she is already reeling under a blizzard of unwanted "vulture mail." Where does he or she go for advice? This brings up the issue of counseling. The state of pre- and post-foreclosure counseling in Illinois, with a few notable exceptions, is dismal.<sup>91</sup>

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90. (1) Chicago Volunteer Legal Services; (2) Center for Disability and Elder Law; (3) Chicago Legal Clinic; (4) Legal Assistance Foundation of Chicago; (5) Spanish Coalition for Housing; and (6) CARPLS.

91. "[G]overnment sponsored credit counseling, whether mandatory or optional in nature, is virtually nonexistent. . . ." Engel & McCoy, *supra* note 1, at 1309.

There is a lack of effective mortgage delinquency counseling in Illinois at the pre-foreclosure stage. Only three states provide for pre-foreclosure counseling, New York,<sup>92</sup> Georgia<sup>93</sup> and North Carolina.<sup>94</sup> Government-sponsored credit counseling, whether it is mandatory in nature or optional, is virtually non-existent and consumer education programs are just in their infancy.<sup>95</sup> "Under federal law, credit counseling is mandatory only for reverse mortgages for older homeowners under the Home Equity Conversion Mortgage program administered by HUD."<sup>96</sup> There is no formal counseling apparatus in place in the conventional loan area. There is some assistance in the FHA/HUD area. As a result, there is a vacuum of information and guidance into which realtors, brokers, and even licensed attorneys operate. Prior to May 1, 1996, most counseling efforts were directed toward helping the borrower use the assignment programs under HUD.<sup>97</sup>

For example, competent counseling could have advised all HUD and FHA insured Borrowers in Illinois that a framework for a moratorium had been set up after the events of September 11, 2001.<sup>98</sup>

The assignment plan was cancelled by HUD in April.<sup>99</sup> The assignment plan was a vehicle where HUD brought the defaulting

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92. New York requires high cost lenders to advise borrowers that counseling is advisable, and provide a list of counselors, but it is not mandatory.

93. GA. CODE ANN. § 7-6A-2 (2002).

94. N.C. GEN. STAT. § 24 (1.1.E) (1994).

95. See PA. CONS. STAT. §1680.401c *et seq.* (2003), for additional special notice requirements for foreclosure upon a one- or two-family, owner-occupied residence that is the principal residence of the mortgagor. If Act 91 is applicable, the mortgagee may not accelerate the maturity of the mortgage obligation, commence a legal action to recover under that obligation, or take possession of any security of the mortgage debtor until notice in the prescribed form is given and a determination is made on the mortgagor's application for emergency homeowner assistance or the applicable time period has elapsed. This is a state equivalent to the Secretary of Housing and Urban Development's Remedial Assistance Program.

96. Engel & McCoy, *supra* note 1, at 1309.

97. HUD Mortgage Letter, 96-25 (May 8, 1996).

98. HUD Mortgage Letter, 2001-21 (Sept. 13, 2001). The language of the 9/11 moratorium provided:

Regardless of the progress of a pending foreclosure action, you must immediately stop foreclosure action against any borrower who contacts you and identifies themselves as an affected borrower. You may request supporting documents and use it to determine if the borrower meets HUD's criteria for an affected borrower. Once identified as an affected borrower, all foreclosure action must be stopped for the duration of the moratorium period.

*Id.* Just think how many thousands of Illinois borrowers could have benefited from the moratorium by writing a simple letter if they had any knowledge such relief were available.

99. See *supra* note 78.

loan from the investor, took its position and worked out a payment plan with the borrower.

In fact, after cancellation of the assignment program HUD issued mortgage letter 96-11 that states in part:

In accordance with 24 CFR 203.501, lenders must consider the comparative effects of their elective servicing actions, . . . expected to generate the smallest financial loss to the Department. Therefore, a successful servicing strategy considers each defaulted mortgage individually; and, based on the circumstances involved, executes a plan that will eliminate the default and prevent a foreclosure. Prompt action is almost always required to cure a default. It is, therefore, particularly important that lenders address a default immediately to prevent it from becoming more serious.<sup>100</sup>

In place of the assignment program, HUD rolled out Mortgage Letter 96-25<sup>101</sup> entitled "Loss Mitigation" that sets out ways for the borrower to come current or repair his situation. – such as Special Forbearance Mortgage Modification, Streamline refinancing, pre-foreclosure, deed in lieu of foreclosure. This package of relief was billed as "new loss mitigation" measures.<sup>102</sup> All of these options are at the sole discretion of the lender.

#### *A. Partial Claim Payment*

This program is designed for homeowners who suffered a temporary period of financial hardship that is now over. The borrower must be able to make the regular monthly mortgage payment to qualify for this program. Under this program, HUD pays the lender the amount owed to bring the loan current. The homeowner then begins making the regular monthly mortgage payment. HUD records another mortgage against the property for the amount that they paid the lender. The Partial Claim mortgage is paid when ownership of the house changes hands or the first mortgage is paid.

#### *B. Special Forbearance*

A special forbearance involves changing the monthly payment. It is similar to a repayment plan with one exception, there is no time limit on how long it can last. The borrower may qualify for it if the default was caused by an involuntary reduction in income or an increase in living expenses and there is a reasonable chance that the loan current can be reinstated under the plan.

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100. HUD Mortgage Letter, 96-11, (Feb. 23, 1996).

101. *See supra* note 78.

102. Alternatives to Foreclosure, Russell C. Wubicku, Presentation at Am. B. Assn., 1998 Ann. Meeting.



### C. *Streamline Refinance*

A streamline refinance can possibly lower the interest rate and reduce the monthly mortgage payment. What is streamlined about the process is the application and loan approval since the lender already has much of the needed information in their file to evaluate this option. It should be considered after a special forbearance and before a mortgage modification.

### D. *Mortgage Modifications*

Although a mortgage may be modified in many ways, the most common are: 1) a reduction of the interest rate or changing an adjustable rate to a fixed rate; 2) an extension of the term of the mortgage; or 3) by adding the arrearage to the principal balance.

### E. *Pre-Foreclosure Sale*

If certain criteria are met, HUD will approve a home sale even if more is owed on the loan than the house is worth. To qualify, the appraised value of the house must be at least seventy percent of the unpaid principal balance, the contract price must be at least ninety-five percent of the appraised value and the net proceeds to HUD must be at least eighty-seven percent of the appraised value. This is the most common workout option.

Many of these options require onerous paperwork. In abandoning the assignment program and adopting Mortgage Letter 96-25, HUD moved from being the friend of the borrower to cajoling lenders to take the smallest financial loss.<sup>103</sup> Rev. Bulletin 4330.1 specifically states "the decision to grant forbearance is at the discretion of the mortgagee."<sup>104</sup> Every decision in this area is at the lender's option, the borrower has no help from HUD against the lender.<sup>105</sup> The borrower is basically dependent on the kindness of strangers. But given the fact that lenders are frequently out of state, fewer and fewer in number with rigid rules, mechanically applied on a national basis, said kindness is difficult to obtain.

Section 169 of the Housing and Community Development Act provides that "[m]ortgagors who are one or more months behind in their mortgage payments must receive a list of HUD-approved counseling agencies in their state."<sup>106</sup>

The counseling requirement is a condition precedent to foreclosure.<sup>107</sup> The requirement is purportedly satisfied by sending

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103. HUD Housing Handbook, Administration of Insured Home Mortgages, 4330.1, ch.8-1.

104. *Id.*

105. *Id.*

106. *Id.* at ch. 8-2.

107. *Bankers Life v. Denton*, 458 N.E. 2d 203, 205 (Ill. App. Ct. 1983).

a print-out offering counseling to the borrower in HUD cases with the name of the nearest foreclosure counselor. There is no face-to-face requirement, given the deluge of papers received by the defaulting borrower it is hardly an effective way to get assistance for this most important personal crises.

Pursuant to authority granted by the Illinois General Assembly, the Commissioner of Banks and Real Estate (OBRE) enacted regulations that deal with the activities of residential mortgage lenders and mortgage brokers in the State of Illinois.<sup>108</sup> On May 17, 2001, the Illinois Commissioner on Banks & Real Estate (OBRE) enacted amended regulations that now impose certain conditions on lenders regarding the origination of "high risk home loans".<sup>109</sup> The Regulations detailed a Comprehensive Mortgage Awareness Program that included compulsory personal one-on-one counseling on high-risk loans prior to execution and other benefits to borrowers.

Only two problems cloud this scenario. On July 3, 2001, the Illinois Association of Mortgage Brokers filed suit in the District Court for the Northern District of Illinois, requesting that the OBRE be enjoined from enforcing its regulations that are preempted by the Parity Act.<sup>110</sup>

The District Court entered an order granting summary judgment for Defendant OBRE on all issues on December 4, 2001.<sup>111</sup> The Seventh Circuit reversed and remanded on the basis of preemption and sent the case back for a detailed analysis by section as to whether federal preemption applies.<sup>112</sup> However, the statute as it existed prior to amendment still provides substantial benefits.<sup>113</sup>

## XI. REMEDIES

This section does not purport to be a primer on foreclosure defense or a solution to predatory lending. It is an effort to describe and highlight unused and under-used resources to deal with the defense of foreclosure in Illinois. Borrowers in Illinois have an extremely difficult time litigating one-on-one with experienced lenders and need to expand their ability to defend these cases.

First to be considered is proactive action where the borrower finds himself in default because of the actions of third parties such as unscrupulous home improvement contractors or less than ethical loan brokers or real estate brokers. Second, this section

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108. 205 ILL. COMP. STAT. ANN. 635/4-1(g) (2000).

109. See *supra* note 90. [hereinafter "New Regulations"].

110. Ill. Assoc. of Mortgage Brokers, No. O1C 5151.

111. See Levine, *supra* note 1, § 5.9.3.

112. *Id.* § 5.

113. *Id.*

addresses the issue of mortgage brokers and their role in foreclosure. Finally, this section addresses the remedy available against real estate brokers who assist in predatory lending.

### A. Home Improvement Contractors

The use of a Home Improvement Contractor works in several ways. An unscrupulous lender can assume and operate under different roles once a property has caught his eye as ripe for some fraudulent practice. This party can proceed in the guise of the interested lender who will lend money to refinance that may lead to foreclosure. Many predatory loans begin with a homeowner seeking repair work.<sup>114</sup> The contractor might send the homeowner to a lender to finance the work. The contractor charges outrageous prices, does poor work, and is paid directly from the loan proceeds unless the statute prevents it.<sup>115</sup>

Consider the following situation: the contractor asks the homeowner to sign a document as a "completion statement" sometime during the work that the contractor claims is necessary for the bank. Often, such documents are deeds or trust deeds. The contractor will then proceed to a predatory lender and sell the document at a substantial discount. The homeowner risks a foreclosure, an uncompleted job, or both.<sup>116</sup>

Homeowners are deprived of contract rescission rights in many cases.<sup>117</sup> The homeowner might secure a cash contract stipulating that financing will be arranged.<sup>118</sup> After the rescission right period has expired, the lender redirects the contractor to a high-interest-rate mortgagor, asserting that it is a holder in due course.<sup>119</sup> Because the homeowner failed to give the lender notice of any defective or unfinished work, the lender can legitimately claim that it has no obligation to preserve the homeowner's rights to contact rescission.<sup>120</sup>

The home improvement contractor can be brought into the foreclosure litigation on a variety of conventional theories and the holder in due course can be approached as follows. Assume the lawyer is called upon to defend a foreclosure with these characteristics:

1. The owner had no idea that he or she was signing a mortgage and never intended to do so.

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114. *Id.*

115. *See* 15 U.S.C. § 1639(c)(1) (2000) (regarding payments directly to contractors).

116. *See* Levine, *supra* note 1, § 5.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

2. The contractor recorded the mortgage and quickly sold the paper to the lender for a substantial discount.
3. The work was substandard.
4. The lender tacked on its fees and costs and then foreclosed.
5. The lender claimed it was a holder in due course and the sub-standard work could not be set off against it.

This case can be defended as follows: First, take the lender's deposition to find out (a) the number of transaction between lender and builder, (b) how long the contractor held their contract, and (c) the discount rate. What one hopes to find is that the lender and contractor had a long relationship with a volume of cases and that there was a substantial discount. Then one may rely on *Christenson v. Ventura Construction*,<sup>121</sup> arguing that the close connection doctrine applied, which states that a purchaser cannot be a holder in due course if its relationship with the transferor is too intimate.<sup>122</sup> This shifts the burden of proof to plaintiff to prove that status.<sup>123</sup> The defendant then argues that plaintiff has failed to complete the work under the home repair contract, and that this was a precondition to recording the mortgage and requiring the defendant to commence payments.

In these situations, the Illinois law imposing liability on Home Improvement Contractors should be reviewed.<sup>124</sup> The problem with the existing statute is that there is no private right of action, which is a glaring oversight. Yet, a variety of common law third-party actions are available.

### B. Mortgage Brokers

Loan brokers operate as middlemen.<sup>125</sup> They solicit loans and place them with entities who have funds.<sup>126</sup> The use of loan brokers is sometimes harmful to borrowers.<sup>127</sup> First, the borrower pays their fee, which means it its usually capitalized over the life of the loan.<sup>128</sup> Secondly, the broker has no responsibility at all after the transaction closes.<sup>129</sup> If the refinance closes and the borrower defaults on his very first payment, the loan broker walks

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121. 440 N.E.2d 226 (Ill. App. Ct. 1982).

122. *Id.* at 229.

123. *Neboshek v. Berzani*, 191 N.E.2d 411, 414 (Ill. App. Ct. 1963).

124. 205 ILL. COMP. STAT. ANN. 635/1 *et seq.* (2000).

125. *Engel & McCoy*, *supra* note 1, at 1286-87.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

away fully paid.<sup>130</sup>

The mortgage broker industry estimates that loan brokers originate fifty percent of all home loans. This allows the mortgage lender to reduce expenses.<sup>131</sup> Illinois courts will recognize that a fiduciary relationship exists between the broker and the borrower and courts will require that the broker find the best deal for the borrower.<sup>132</sup> Often, however, brokers do not. The broker is paid at the closing, and if the borrower defaults on the very next payment, the broker could care less. The rate charged to a borrower is often increased to cover the broker's fee because the borrower pays it. An entire system of referral fees, rebates, and yield-spread premiums that further inflate the borrower's costs over the life of the loan is even more offensive.<sup>133</sup>

Loan brokers are a major cause of default because their conduct often does not reach the standard of a fiduciary or even minimal fairness. In fact, they have an incentive to deceive since lenders only compensate them for loans they approve.

Subprime borrowers, many of whom are cut-off from the conventional market, are unsophisticated and are unaware they can qualify for conventional loans and tend not to inquire further about the broker's explanations. Brokers can deceive lenders as to the borrowers true financial condition in the hope of getting commissions or yield spread premiums. Brokers can alter employment and income records to enhance a borrower's status.<sup>134</sup>

Loan brokers are a major cause of default in foreclosure. Brokers frequently quote monthly payments without disclosing taxes and insurance or use deceptive teaser rates. If one feels her client's default was caused by the actions of a loan broker, she should become aware of Illinois Residential Mortgage License Act,<sup>135</sup> which provides for licensing and regulation of mortgage lenders and brokers. The Regulations also require a written agreement between the broker and the client, and provide for attorney's fees in an action for breach. The Act requires for mortgage brokers to disclose their status as such, and provides for new predatory mortgage regulations (no private right of action).<sup>136</sup>

Both brokers and lenders have long taken the position that they are independent contractors and as such the loan broker could engage in the most egregious conduct without impacting the lender. Recent litigation suggests that the rigid wall between broker and lender is beginning to crack. Two companion cases

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130. *Id.*

131. *Id.* at 1286.

132. *Id.*

133. Levine, *supra* note 1, § 5.12.

134. Engel & McCoy, *supra* note 1, at 1286-87.

135. 205 ILL. COMP. STAT. ANN. 635/1 *et seq.* (2000).

136. *See id.*

were filed by the FTC under the Federal Trade Commission Act and the Illinois Consumer Fraud Act against OSI/Diamond, who held themselves out to be loan brokers, and Mercantile, who was a lender. The allegations of the Mercantile Complaint (the case against OSI Diamond is still pending) describe the loan broker-lender relationship as follows:

1. In March 1999, Diamond set up his own mortgage company, OSI Financial Services, Inc.
2. From at least March 31, 1999 until at least October 2000, Diamond continued referring the overwhelming majority of his OSI customers to Mercantile. Mercantile automatically approved and paid to OSI the broker fee, which was typically as high as 10% of the loan amount. From May 30, 1998 to August 31, 1999, Diamond also conducted the loan closings on behalf of Mercantile for over 100 Mercantile loans. Within a short time after closing a Mercantile loan, Mercantile's loan officers or Diamond often have re-contacted the customer and induced or attempted to induce the customer again to refinance their loans with Mercantile. With each refinancing, substantial points and fees have been charged and added to the loan balance, often resulting in continually higher loan amounts and/or monthly mortgage payments.
3. In many instances, Mercantile's loan officers and Diamond have misrepresented the terms and costs of the Mercantile loans.
4. Diamond doing business as OSI, acted as Mercantile's agent in both brokering and closing loans on behalf of Mercantile. For example, Diamond referred virtually every customer he procured to Mercantile from January 1998 to October 1999, and referred the vast majority of his customers to Mercantile from November 1999 to August 2000. For every loan transaction, Mercantile automatically approved Diamond's broker fee, typically 10% of the loan amount.
5. Ultimately, the case was resolved by way of a detailed consent judgment in paragraph XIV under "Monitoring Requirement."<sup>137</sup>

The Consent Judgment in *Mercantile*, stated *inter alia*:

IT IS FURTHER ORDERED that Defendants Mercantile, are enjoined from, directly or through any corporation, subsidiary, division, or other device:

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137. Fed. Trade Comm'n & State of Ill. Att. Gen. v. Mercantile, et al., No. 02C5079, U.S. Dist. Ct., N.D. Ill. E. Div..

A. Failing to take reasonable steps sufficient to monitor and ensure that all Defendants' officers, employees, and agents comply with Parts I-V of this Order. Reasonable steps shall include, but are not limited to, the following: (1) establishing a program to undertake routine monitoring of oral and written presentations and communications made by loan officers and agents to prospective borrowers; (2) establishing a procedure for receiving and responding to consumer complaints, including complaints relating to Mercantile employees and brokers; and (3) analyzing the number and nature of consumer complaints received by Mercantile regarding transactions in which each loan officer, agent, or broker is involved; *provided* that this Part does not authorize or require any Defendant to take any steps that violate any federal, state, or local laws;

B. Failing to investigate promptly and fully any consumer complaint received by any business to which this Part applies, and to notify the consumer of the resolution of the complaint and the reason therefore; and . . .

F. Records accurately reflecting the name, address, and telephone number of each employee, agent, broker or independent contractor of any Defendant, that person's job title or position, that date on which the person commenced work, and the date and reason for his or her termination, if applicable.<sup>138</sup>

The settlement agreement composes limited but definite duties on the lender to account for the actions of the loan broker. This is not an appellate decision, but it is undeniably an acknowledgement by a lender of certain responsibility for the actions of its independent loan broker where there is a history of multiple transactions. Thoughtful lawyers can certainly fashion an action against the lender especially where there are multiple transactions between the lender and its "independent broker," and it will be increasingly difficult to maintain that the broker and its lender have no obligations to each other or to the borrower. In commenting on this settlement the CHICAGO TRIBUNE stated:

The lender, Mercantile Mortgage Co. of Westerville, Ohio, agreed to settle the charges for a \$250,000 payment into a restitution fund to be administered by the FTC. The settlement also lets about 1,650 borrowers refinance their mortgages on favorable terms.

Until now, lenders shared in the profits on loans from their brokers, but "when it came time to share in the responsibility, lenders held up their hands and said, 'That wasn't us. We can't control them all.' Shea said.

The regulatory actions are part of a widespread battle by activists, lawmakers and regulators to stem the growth of predatory lending,

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138. *Id.*

a broad phrase for mortgage lenders who charge onerous fees and interest rates and frequently drive monthly payments so high that borrowers are forced into foreclosure.

This marks the first time a lender has been held responsible for the actions of one of its independent brokers.<sup>139</sup>

### C. Real Estate Brokers

There is a very effective method of relief against real estate brokers who assist in the predatory loan process and who are subject to the Real Estate Broker and Salesman Act. The Act proscribes several activities that can lead to discipline up to and including license revocation. The Act could be amended to add participation in a predatory loan, failing to act as a fiduciary or other broker offenses in this area relating to lending. However, considering the following proscribed acts under the Broker's and Salesman's Act, in the author's opinion the present Act is sufficient to include predatory real estate loan brokers without amendment.

What lawyers fail to realize is that a contractor who knowingly fails to comply with the Home Repair Act is in violation of the Illinois Consumer Fraud and Deceptive Practices Act that carries with it a potential claim for punitive damages and payment of attorneys' fees to the prevailing party.<sup>140</sup> The Act provides:

OBRE may refuse to issue or renew a license, may place on probation, suspend, or revoke any license, or may censure, reprimand or otherwise discipline or impose a civil fine not to exceed \$25,000 upon any licensee hereunder for any one or any combination of the following causes . . . :

(12) Engaging in dishonorable, unethical, or unprofessional conduct of character likely to deceive, defraud, or harm the public . . .

(16) Any other conduct, whether of the same or a different character from that specified in this Section, that constitutes dishonest dealing.<sup>141</sup>

These provisions should more than cover the loan broker client relationship.

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139. Mike Dorning & Melissa Allison, *Action targets broker and lender; FTC, state allege deception on home loan fees*, CHI. TRIB., July 19, 2002, at Business 3.

140. 815 ILL. COMP. STAT. ANN. 513/35 (2000). A contractor who knowingly fails to comply with the Home Repair Act is automatically in violation of the Illinois Consumer Fraud and Deceptive Practices Act which carries with it a claim for potential punitive damages and payment of attorneys' fees to the prevailing party. *Id.*

141. *Id.*



## XII. GOING UP THE FOOD CHAIN

Subprime lenders need vast amounts of capital to make loans, to securitize them, to sell them and to start the process again. They obtain much of these funds from money center banks. In the *First Alliance* case, a court allowed a borrower of a subprime lender to travel up the chain and state a cause of action against the money-center bank that financed the subprime lender.

The *First Alliance* case was an action consolidated in the United States District Court for the Central Division in California.<sup>142</sup> The action consolidated numerous cases filed by state attorneys general against Alliance and its owners for a variety of predatory practices.

First Alliance's customers generally were borrowers who would have had difficulty obtaining loans from conventional sources because of poor credit ratings or insufficient credit histories.

The loans, many of which were refinancings by homeowners who had developed significant equity in their homes, typically were secured by the borrowers' first mortgages. As of 1999, First Alliance or affiliated entities were licensed to operate in eighteen states and the District of Columbia and serviced nearly \$900 million in loans.<sup>143</sup>

These complaints alleged that First Alliance marketed its loans through a sophisticated campaign of telemarketing and direct mail solicitations. Consumers who visited First Alliance's loan offices in response to the solicitation were subjected to a lengthy sales presentation known as the "Track." According to these complaints, First Alliance's solicitations and the "Track" presentation misled consumers about the existence and amount of loan origination fees (commonly known as "points") and other fees that First Alliance charged which typically amounted to ten percent to twenty-five percent of the loan. Consumers also were allegedly misled about increases in the interest rate and the amount of monthly payments on adjustable rate mortgage (ARM) loans that the company offered. Additionally, the complaints alleged that First Alliance violated the federal Truth-in-Lending Act by failing to provide consumers obtaining ARM loans with a required booklet explaining how these loans worked.<sup>144</sup>

The actions alleged that Lehman, who supplied the financing to First Alliance, was liable for aiding and abetting in that it was

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142. The People of the State of California, the State of Arizona, the State of Florida, the Commonwealth of Massachusetts, the People of the State of Illinois, and the New York State Banking Department v. First Alliance Mortgage Company, et al., In re First Alliance Mortgage Company, et al., Debtor., Case No. SA CV 00-964 DOC (MLGx).

143. *Id.*

144. 225 ILL. COMP. STAT. ANN. 454/1-1, §20-20 (2000).

an active participant in the alleged fraud against First Alliance.<sup>145</sup> The case settled with a lengthy consent decree that did not release the claim against Lehman.<sup>146</sup>

Lehman filed a motion to dismiss in a California federal district court on the grounds it was not an active participant in the alleged fraud. The lower court denied the motion stating:

Lehman contends that it is not liable because it was not an active participant in the alleged fraud by First Alliance. Lehman cites *People v. Bestline Products, Inc.*, 132 Cal. Rptr. 767, 791 (Cal. Ct. App. 1976), for the proposition that a person must be actively participating in the fraudulent scheme in order to be liable as an aider and abetter. *Bestline*, however, does not stand for that proposition.<sup>147</sup>

The court held the individual officers liable not as aiders and abettors, but as co-conspirators.<sup>148</sup> With respect to aiding and abetting, the court stated that “anyone who knowingly aids and abets fraud or furnishes the means for its accomplishment is liable equally with those who actually make the misrepresentations.”<sup>149</sup>

The Lehman case should be watched carefully. The remarkable thing is that a money-center bank or major brokerage house has been sued by a borrower who went one further step up the food chain.<sup>150</sup> The trial against Lehman commenced in February, 2003, in Los Angeles.<sup>151</sup>

The concept of “aiding and abetting” by money center bank was bases for the denial of motion to dismiss in the Enron case and while that case involved securities, the concepts are not

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145. Official Joint Borrowers v. Lehman Bros., SA-CV 01-971.

146. Federal Trade Commission, Release: *Home Mortgage Lender Settles “Predatory Lending” Charges*, available at <http://www.ftc.gov/opa/2002/03/famco.htm> (last visited May 2, 2003).

147. *Id.*

148. *Id.*

149. *Id.*

150. E. Scott Reckard, *Taking on Lehman Over Ties to Lender*, L.A. TIMES, Feb. 10, 2003, at Business, part 3, 1. According to Reckard:

Lehman, one of Wall Street’s oldest institutions, provided a \$150-million credit line to First Alliance, bundled its loans for sale as securities and, the civil lawsuit contends, knew all along that the lender was so shot through with fraud that it had become a racketeering enterprise. In fact, the suit alleges, Lehman encouraged the deception, helping First Alliance extend its fraud across the nation.

The plaintiffs are seeking hundreds of millions of dollars in actual and punitive damages. They offered to settle the case for \$500 million, according to people familiar with the matter, but Lehman rejected the overture.

*Id.*

151. *Id.*

dissimilar.<sup>152</sup> If a money-center bank becomes a routine, necessary party to a predatory loan lawsuit, you can presume that the money-center bank will exercise much greater discretion.

### XIII. PREDATORY LENDERS MAKE FOR BAD BUSINESS

Money-center banks are extremely sensitive to the public perception of their involvement in predatory lending activities. Several major money centers have acquired subprime lenders and found them to be indigestible, as well as extremely damaging to their image.<sup>153</sup> Citicorp acquired Associates First Capital and found it had bought a Pandora's box of predatory loans.<sup>154</sup> In a similar way, Conseco acquired Green Tree with similar results.<sup>155</sup>

Citicorp acquired the subprime lender Associates First Capital, a lender who focused on people with poor credit histories.<sup>156</sup> When they finally looked over the merchandise, they found many loans in very poor shape.<sup>157</sup> In March 2001, when the Federal Trade Commission brought suit that accused Associates of engaging in deceptive marketing practice, it also named Citicorp.<sup>158</sup> These problems contributed to a thirty-eight percent slide in the price of the stock. In order to overcome the pre-acquisition practices, Citicorp entered into an extensive series of reforms as noted in a recent article:<sup>159</sup>

To counter the critics, Citigroup initiated a series of changes and took over the running of the Associates business. Associates' former chairman, Keith Hughes, joined Citigroup as a vice chairman and board member but left the company around the time that the FTC suit was filed in March of last year.

Among other changes, Citigroup now reviews foreclosures that are pending to ensure that the loan on which a borrower defaulted wasn't given on unfair terms. If it was, the foreclosure is suspended while the company negotiates an alternative with the borrower.

Citigroup also ended the most criticized practice: the sale of single

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152. Mark Newby, et al. v. Enron Corp., et al., Regents of the Univ. of Cal., et al., Individually and on behalf of all others similarly situated v. Kenneth L. Lay, et al., MDL-1446, Civil Action No. H-01-3624, 2003 U.S. Dist. LEXIS 1668, at \*67 (S.D. Tex., Houston Div. 2003).

153. Robert Julavits, *A Bet Subprime Sector's Out From Under Its Cloud*, AMERICAN BANKER, Nov. 15, 2002, at 1.

154. *Id.*

155. *Id.*

156. Paul Beckett, *Citigroup May Pay \$200 Million In FTC Predatory Lending Case*, WALL ST. J., Sept. 6, 2002, at A1.

157. *Id.*

158. *Id.*

159. *Id.* See also Engel & McCoy, *supra* note 1, at 2002 (noting that banks and thrifts are concerned about subprime lending practices causing damage to their reputations as community lending institutions).

premium credit insurance on real-estate loans. The insurance paid off the loan in the event of the borrower's death, unemployment or disability. But rather than payment a regular monthly premium, borrowers pay for the insurance coverage as part of the amount owed, raising the overall amount gathering interest. Moreover, borrowers also found themselves paying off the insurance long after the coverage that typically lasted five years, had ended.<sup>160</sup>

Conseco, found the purchase of Green Tree Financial equally indigestible. Conseco was the twenty-sixth largest insurance company in 2001.<sup>161</sup> Green Tree specialized in mobile home financings that were much riskier than the insurance loans Conseco made.<sup>162</sup>

As damaging as the acquisitions were to CitiBank and Conseco, the damage to Household International was far worse. Concern about its lending practices and about its borrowers ability to repay sent Household shares down thirty-five percent in 2002; and was a factor in a downward restatement of earnings of 386 million dollars.<sup>163</sup>

An article in the New York Times gives some particulars:

Sales practices are the focus of Acorn's two lawsuits, which are seeking certification as class actions. In one suit, Acorn obtained an important victory in June when a federal district judge in California denied Household's effort to exclude borrowers who had signed documents agreeing to settle disputes through arbitration. The other suit was filed in May, in Cook County, Illinois.

Household, which reported \$1.9 billion in profit last year, could be hurt significantly if the suits succeed. In March, the First Alliance Mortgage Company, a bankrupt subprime mortgage lender, agreed to pay \$60 million to settle a predatory lending case brought by the Federal Trade Commission involving 18,000 customers. Acorn's Illinois suit could be open to anyone who has taken out a secured loan from Household over the last three years. If 10 percent of Household's 3.2 million home-equity borrowers joined the suit and the payout was in line with the \$3,300 paid to each First Alliance customer, damages could approach \$1 billion.

Household has responded to critics by pledging a number of changes. Most recently, it said in February that it was going to limit points and fees to 5 percent of the mortgage.<sup>164</sup>

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160. Beckett, *supra* note 156.

161. Floyd Norris & Joseph Treaster, *Conseco Recovery Efforts Fail: A Bankruptcy Filing Is Possible*, N.Y. TIMES, Aug. 10, 2002, at C1.

162. *Id.*

163. Peter Eavis, *Challenges Ahead at Household International, Lender Hanging Tough as Lawsuits, Regulators and the Economy Threaten*, N.Y. TIMES, Aug. 12, 2002, at C2.

164. *Id.*

What is the lesson here for the defense lawyer? It is that lenders who cannot digest what they swallowed or are laboring under widely publicized class actions are far more disposed to resolve these matters and to avoid litigation. If counsel is aware of this problem and can skillfully point out these facts in the negotiation, the result could mean more favorable outcomes for consumer defendants.

#### XIV. COUNSELING AS A SOLUTION

The state of statutory counseling pre- and post-foreclosure in Illinois is almost non-existent. It started poorly and has stayed that way. When the IMFA (Illinois Mortgage Foreclosure Act) was passed, it reduced the redemption period among other provisions. To get the approval of the pro bono/borrower interests, a companion bill was also drafted, HB 3340, the Illinois Homeowners Mortgage Counseling Law, and Illinois Homeowners Emergency Assistance Law.<sup>165</sup> The law provided counseling and payment of arrearages up to three years in certain circumstances.<sup>166</sup> As so often happens in these matters, the lender-favorable bill passed and the borrower-favorable bill was defeated.

The OBRE amendments, mandating counseling in high risk situations such as HOEPA loans, are still in litigation after the remand by the Seventh Circuit.<sup>167</sup> The pending suit claims that the OBRE amendment merits passed by the State of Illinois violate the Parity Act.<sup>168</sup>

Both North Carolina and Georgia have statutes dealing with predatory lending.<sup>169</sup> These statutes provide that in high-risk cases, mandatory counseling is required.<sup>170</sup> The North Carolina statute is the oldest statute, in force since 2000.<sup>171</sup> In North Carolina, once a home is identified as or reaches a threshold and becomes a "high cost loan," numerous restrictions are triggered including a provision that the borrower must receive loan counseling to ensure awareness of the advisability of the loan.<sup>172</sup>

The Georgia Act is similar in that if the definition of a high

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165. H.B. 3340, 1986 Leg. 84th sess. (II 1987).

166. II. H.B. 3340.

167. See *Ill. Ass'n of Mortg. Brokers v. Office of Banking & Real Estate*, 308 F.3d 762, 768 (7th Cir. 2002) (vacating the district court's holding in 174 F.Supp.2d 815 (N.D. Ill. 2001)).

168. *Ill. Ass'n of Mortg. Brokers v. Office of Banking & Real Estate*, 174 F.Supp.2d 815, 821 (N.D. Ill. 2001).

169. N.C. GEN. STAT. Ch.24, Art. 1 (2003); GA. CODE ANN. Tit. 7, Ch.6A, § 5 (2003).

170. *Id.*

171. N.C. GEN. STAT. Ch.24, Art. 1 (2003).

172. *Id.*

cost home loan is reached, there is mandatory counseling.<sup>173</sup> The Georgia statute provides:

A creditor shall not make a high-costs home loan without first receiving certification from a counselor with a third-party nonprofit organization approved by the United States Department of Housing and Urban Development or the Georgia Housing and Finance Authority that the borrower has received counseling on the advisability of the loan transaction. No creditor, servicer, or its institution shall be required to contribute to the funding of any nonprofit organization that provides counseling required pursuant to this paragraph.<sup>174</sup>

Virtually non-existent, consumer education programs are just in their infancy. Under federal law, credit counseling is only mandatory for reverse mortgages for older homeowners under the Home Equity Conversion Mortgage program, operated by the Department of Housing and Urban Development. The Office of Bank and Real Estate has been criticized for not vigorously enforcing the original OBRE regulations not subject to the suit.<sup>175</sup>

#### XV. THE ROLE OF THE ATTORNEY

Borrowers rights are meaningless unless the Borrower knows, understands or can recognize their violation. These rights even if known and understood, are ineffective without competent counsel. This is an area (and here again I depart from many of my pro-bono friends), where pro-se or self-help alone usually prolongs the process.

The foreclosure defense has escaped most defendants and their counsel. Further, pleading in state courts has become very similar to Federal notice pleading, leaving the states a diminished set of common law causes of action, like fraud and breach of contract. The defense also requires competent knowledge of the Civil Practice Act and Supreme Court Rules, pleading, discovery and evidence. One case a year will not suffice. There are several solutions. First, those lawyers who deal with defense of foreclosure must begin to interchange information, forms, strategies. Second, a cadre of lawyers who really understand the foreclosure process must be developed. The best place to incubate and hatch them is at the law schools, law firm pro bono programs and neighborhood clinics. The paradox is that lawyers who fully understand the process are far more able to resolve cases without litigation and effectively represent their clients. There is far more

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173. GA. CODE ANN. Tit. 7, Ch.6A, § 5 (2003).

174. GA. CODE ANN. Tit. 7, Ch.6A, § 5 (2003).

175. Steve Daniels, *Activists, Regulators, in Lending Tussle; Two Sides Argue Over Enforcing Illinois Predatory Lending Law*, CRAIN'S, CHI. BUS, May 20, 2002, at 4.

to foreclosure defense than what is going to court; there are large areas for negotiations and resolution. The defense has one great asset, volume lenders run an assembly-line operation, any serious defense effort that threatens to delay them in litigation is to be avoided. The third aspect is to be aware of the fee generating aspects of mortgage foreclosure. Violations of Federal statutes frequently provide for attorneys fees and they are being awarded.

Lawyers must also develop relationships with local pro bono organizations and bar associations. Staff from each organization could build consumer protection teams, to offer services to clients that include both credit counseling and legal representation. Sharing resources and skills would enable each group to resolve individual cases more rapidly. Counselors could also receive legal training on how to spot potential illegal lending practices.

#### XVI. A MORATORIUM

The concept of a moratorium brings back recollection of the depression farmers fighting to save their land. It might come as a surprise to learn that Illinois borrowers have been affected by HUD moratoriums at least three times in the last four years. For example, on May 6, 1999, HUD agreed to stop all foreclosures of properties purchased from Easy Life Realty or Act Realtors for six months.<sup>176</sup> Easy Life had a long history of complaints from purchasers of fixer-up property bought from Easy Life. Then on August 15, 2000, out of the blue, HUD issued a ninety-day moratorium on both the initiation of foreclosure and suspended foreclosure for cases already in process in certain zip codes – parts of the metropolitan areas of New York, New York; Atlanta, Georgia; Chicago, Illinois; and Los Angeles, California<sup>177</sup> The ostensible reason as set out in the pre-amble to the HUD order stated “as part of the Secretary’s effort to review predatory lending practices as they relate to loan originations.” The real reason is probably one of the following: (a) an election year; (b) a huge pile-up of cases, taken in by HUD through the assignment program, which HUD was unable to process; or (c) adverse public and political response to disclosures of predatory loans.

#### XVII. RELIEF OPTIONS FOR BORROWERS AFFECTED BY THE EVENTS OF SEPTEMBER 11, 2001

Finally, as a result of September 11, 2001, HUD issued Mortgage 2001 Letter that is set out as follows:

This Mortgagee Letter is to advise you of actions taken by the

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176. HUD Letter May 6, 1999.

177. HUD Letter, August 15, 2000, to lenders servicing FHA mortgages in parts of the metropolitan areas of New York, NY; Georgia; Chicago, Illinois; Los Angeles, CA.

Department, and actions mortgagees must take, to provide relief to affected borrowers with an FHA-insured mortgage on their residence. Affected borrowers are those individuals who were passengers or crew on the four hijacked airliners (American Airlines 11 and 77, United Airlines 93 and 175), individuals employed on September 11, 2001, in or near the World Trade Center, or in the Pentagon, and individuals whose financial viability was affected by the aforesaid events of this day.<sup>178</sup>

The mortgage letter continued by providing a moratorium on foreclosures. HUD also recommended that late charges be waived and that borrowers refrain from reporting delinquencies.<sup>179</sup>

Recently, a moratorium has been declared by the U.S. Supreme Court recently not to be a taking.<sup>180</sup> For the egregious lender who is out of control, an application to HUD for a moratorium should be considered. In the Easy Life moratorium, the moratorium was limited to one party.

### XVIII. CONSUMER FRAUD

The Consumer Fraud Act has brought forth an enormous body of case law. Frequently, because of its fee shifting provisions, lawyers will plead the Act mechanically without fully understanding all the nuances.<sup>181</sup> The result is that when the inevitable motion to dismiss is filed by the lender, the borrower is hard pressed to maintain its Consumer Fraud Act count. There are two particular sections that may help borrowers in specific situations.

Many mortgages are made to Hispanics, Asians and others who do not speak English or do not understand the contemporary

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178. Relief Opinion For Borrowers Affected by the Events of September 11, 2001, HUD Mortgage Letter 2001-21 (Sept. 13, 2001).

179. *Id.*

A moratorium on foreclosure of any FHA-insured single-family mortgage in which an affected borrower, as defined in the paragraph above, is an owner-occupant of the property securing the mortgage, is in effect for a 90-day period from the date of this Mortgagee Letter. This moratorium applies to the initiation of foreclosure and to foreclosure already in process.

The Department strongly recommends that mortgagees waive all late charges for affected borrowers beginning with the September 2001 installment. Also, HUD strongly recommends that mortgages suspend the reporting of delinquencies of affected borrowers to credit bureaus, beginning with the September 2001 installment.

*Id.*

180. *Tahoe-Sierra Presentation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002).

181. Edward X. Clinton, *Corporate Corner: Recent Decisions Under the Illinois Consumer Fraud and Deceptive Practices Act*, DEPAUL BUS. L. J. 351, 361, (1995).



mortgage transaction. Section 2/N of the Consumer Fraud Act<sup>182</sup> provides:

Sec. 2N. Non-English language transaction.

(a) If (i) a person conducts, in a language other than English, a retail transaction or negotiations related to a retail transaction resulting in a written contract and (ii) the consumer used an interpreter other than the retailer or an employee of the retailer in conducting the transaction or negotiations, the retailer must have the consumer and the interpreter sign the following forms:

I, (name of consumer), used (name of interpreter) to act as my interpreter during this retail transaction or these negotiations. The obligations of the contract or other written agreement were explained to me in my native language by the interpreter. I understand the contract or other written agreement.<sup>183</sup>

Lenders take the position that a residential mortgage transaction is not a “retail transaction” or negotiation leading to a retail transaction, but this position does not withstand analysis.<sup>184</sup> First there is no question that the borrower is a consumer.<sup>185</sup> Secondly, the Act specifically excludes credit cards and real estate brokers unless they had “actual knowledge.”<sup>186</sup> Given its strong lobbying ability, if the real estate mortgage industry desired to exempt real estate mortgages as well as credit cards and real estate brokers, it could have easily done so. Given the overriding purpose of the Act, there should be a possible red flag to attorneys in every residential real estate transaction with a non-English speaking borrower.<sup>187</sup>

## XIX. TRIAGE

The volume of potentially abusive loans and the scarcity of defender resources, leads to the equivalent of triage in determining which cases should be litigated. Fortunately, lawyers, law schools, legal clinics and pro bono agencies are developing intake systems to review mortgage documents for obvious signs of fraud and abuse. Three points should be emphasized in this effort.

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182. 815 ILL. COMP. STAT. ANN. 505/2N (2000).

183. *Id.*

184. Steven W. Bender, *Consumer Protection for Latinos Overcoming Language Fraud & English Only in the Market Place*, AM. U. L. REV. 1027 (1996).

185. *See* Law Offices of William J. Stogsdill v. Cragin Federal Bank, 645 N.E.2d 564, 565 (Ill. App. Ct. 1995) (holding that a law office, though a business, was a consumer of banking services and stated a claim under the Act).

186. Levine, *supra* note 51.

187. 815 ILL. COMP. STAT. ANN. 503/10(a) (2000).

The impetus to review RESPA Statements, HUD-1-Settlement Statements, and other basic documents comes from HUD. The initiative was described as follows:

At the federal level, Housing Secretary Mel Martinez has declared war on closing-fee rip-offs, especially charges imposed where no actual services are rendered. In recent months, his agency has collected or caused refunds to be made of more than \$2 million from firms accused of real estate settlement overcharges or kickbacks. Federal investigators, however, have limited resources to check out the large number of allegations made about bogus fees around the country. Investigative resources can stretch much further, however, when consumers or others tip off state settlement practices.<sup>188</sup>

The same goes for a variety of other fees that have come under federal and state scrutiny, including marked-up credit report charges, appraisals, recordation fees, courier expenses, "processing" and administrative fees. Under federal law, home buyers and mortgage borrowers may not be charged fees for services not performed, nor may they be forced to pay "markups" on services where the lender or settlement agent performs nothing additional to justify the higher charge.

Home buyers and borrowers in 2003 have to be smarter. They have to know the law prohibits fees where little or no services are performed to correspond to the dollar amount demanded. They have to demand to see their HUD-1 settlement sheets at least a day in advance of the scheduled closing, go over every proposed charge and ask questions about anything that looks dubious. If you have evidence that a charge is bogus, contact state regulators or law enforcement authorities and tell them about it.

This process has been enhanced by unauthorized practice of law concepts. In an important Michigan case,<sup>189</sup> the court held that drafting of mortgage documents for which the bank charged a \$400.00 fee to the borrower constituted the unauthorized practice of law, even though it was incidental to the bank's business of providing mortgages.<sup>190</sup> This has caused a great deal of discomfort for mortgage lenders and is the basis of several law suits in Illinois against lenders and title companies.

The early examination of mortgage documents yields several benefits. First, many cases may be resolved before trial on the basis of such document reviews. Secondly, it prevents automatic default and prove-up because the lender has the burden of proof as to the amount owed, and when properly challenged must prove it

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188. Kenneth Harney, *Settlement May Signal Crackdown on Loan Fees*, CHI. TRIB., May 12, 2002, at 2.

189. *Dressel v. AmeriBank*, 635 N.W. 2d 328 (Mich. App. Ct. 2001).

190. *Id.* at 333.

up.<sup>191</sup>

Finally, the following excellent suggestion has been made by a leading defense attorney. The suggestion is that TILA Disclosure Statement and the HUD-1 should be attached to the Complaint for Foreclosure in Illinois. It could probably be done by an administrative order. Many claims relate to issues found in these two documents. Many other claims relate to the TILA Disclosure Statement and the HUD-1 or HUD-1A Settlement Sheet. These documents are required by law in connection with home loans forming the subject of mortgage foreclosure actions. If these documents were attached, it would make readily available both to defendants and to judges the most important documents related to a number of claims that can be raised by defendants. In cases where violations are apparent, it could greatly reduce the discovery burden that the defendant can ill afford and bring to the controversy issue much faster.

#### CONCLUSION

Residential foreclosure defendants face an uphill battle: Illinois laws are tilted against consumer defendants, complicated by predatory lending practices. Attorneys can help residential foreclosure defendants by keeping current on the statutes and trends in the case law, and by providing early counseling to potential mortgagees.

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191. Levine, *supra* note 51. In Illinois, a lender has the burden of proof on only three issues: ownership, execution and amount. As to these issues the lender must prove its case and has the burden of going forward. The trial in a mortgage foreclosure case is ordinarily governed by the same rules that are applicable in other chancery proceedings. A careful reading of *Farm Credit Bank of St. Louis v. Biethman*, 634 NE 1312, (Ill. App. Ct. 1994), sets forth the requirements for a *prima facie* case of foreclosure.

If one's client executed the note and one has no other substantive or affirmative defense, one response to the summary judgment could be to admit liability and ask that the lender prove up the amount due at an evidentiary hearing. In many cases, one will find out that in a contested prove-up on the amount due, which is the lender's burden, the lender (a) can't find any documents; (b) can't find the original or correct documents; or (c) is unable to justify all the deductions and charges on the RESPA Statement, HUD-1 or HUD1A, or TILA Disclosure Statement.