MORTGAGE Audits Online

Forensic and Securitization Hybrid Audit Report

Prepared For

Frannie Smith and Jim Jones
123 Bank Street
Hometown, NE 20772

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Information on the Loan and Mortgage

General	Amount of Principal	$わろ[illegible]うん♔う
	Loan Closing Date	Cтг ♔わ 200ん
	Loan Maturity Date	a Ц⇑дÐρ1, 203ん
	Term	30 Years
Promissory Note	Type of Note	Multistate Fixed Rate Note
	Initial Interest Rate	5.875% p.a.
	Loan Number	
Deed of Trust	MIN	1001337-0002391907-2
	Lien Priority	First

Information on the Securitization Trust

Issuing Entity	Structured Asset Securities Corp. Trust 2005-16
Title of the Offered Securities	Structured Asset Securities Corp. Mortgage Pass-Through Certificates, 2005-16
Sponsor and Seller	Lehman Brothers Holdings, Inc.
Originators	Lehman Brothers Bank, FSB and others
Depositor	Structured Asset Securities Corp.
Master Servicer	Aurora Loan Services, LLC
Trustee	The Bank of New York
Custodians	La Salle Bank, NA and US Bank, NA
LPMI Insurer	No specific insurer is named. The applicable provisions on insurance are found in the section Description of Mortgage and Other Insurance, page 84, Prospectus
Cut-off Date	August 1, 2005
Closing Date	On or about August 31, 2005

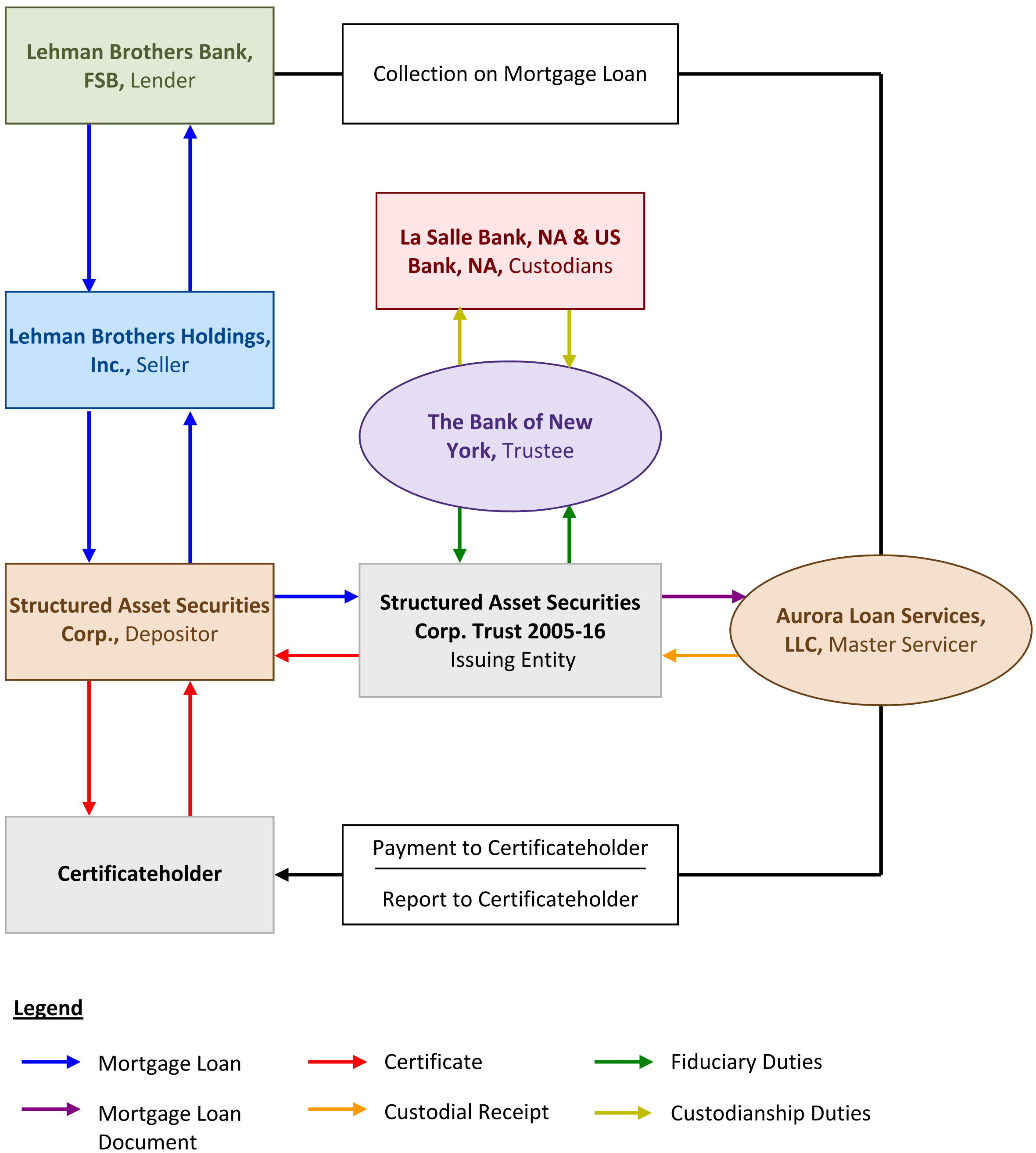
The Parties to the Transactions

The Loan and Mortgage

Borrower	Name	Frannie Smith
	Mailing Address	123 Bank Street Hometown, NE 20772
	Property Address	123 Bank Street Hometown, NE 20772
Co-Borrower	Name	Jim Jones
Lender	Name	Lehman Brothers Bank, FSB
	Mailing Address	18200 Von Karman #250 Irvine, CA 2612
Beneficiary	Name	Mortgage Electronic Registration Systems, Inc.
	Mailing Address	PO Box 2026 Flint, MI 48501
Mortgage Servicer	Name	Aurora Loan Services, LLC
	Mailing Address	PO Box 1706 Scottsbluff, NE 69363
Mortgage Trustee	Name	Chicago Title Insurance Co.
	Mailing Address	601 Riverside Avenue Jacksonville, FL 32204
Title Company	Name	Chicago Title Insurance Co.

The Securitization Trust

The following diagram illustrates, in simple theoretical terms, the flow of transactions in a typical securitization trust as they would have affected each party that has a role in it.



The foregoing diagram is not intended to show any differences between the typical flow of transactions and the actual, as the examiners have noted in their review of the documents presented. The latter is presented in the section titled “How the Parties Changed the Process of Securitization” which is the subject of the succeeding section.

How the Parties Changed the Process of Securitization

The examiners reviewed the documents presented and noted the following:

- The subject loan was granted on July 13, 2005. The Promissory Note names Lehman Brothers Bank, FSB as the originating lender.

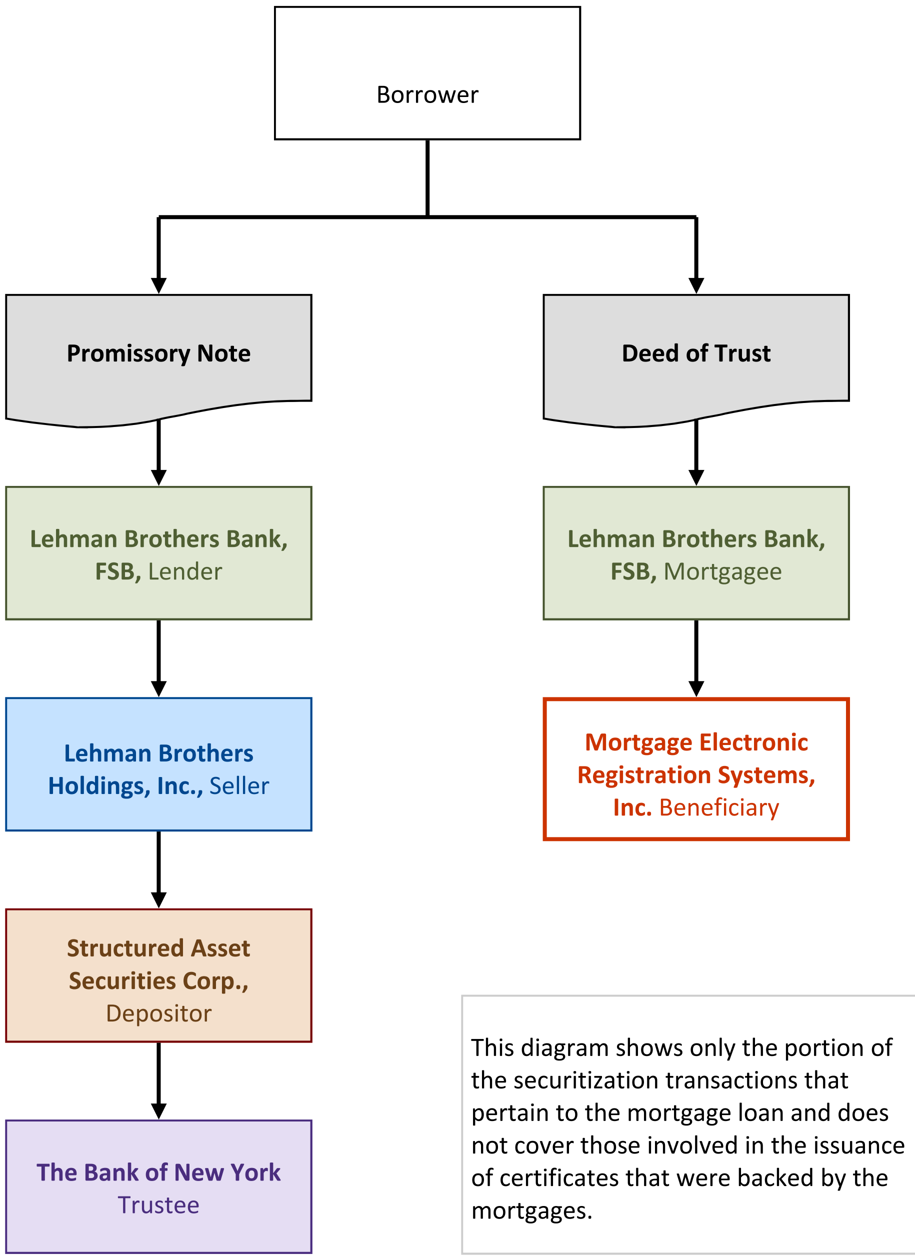
- The Deed of Trust securing the Note was executed on the same date. The mortgagee is the originating lender and the beneficiary is Mortgage Electronic Registration Systems, Inc., as nominee of the lender.

- A report on Mortgage Electronic Registration Systems, Inc. disclosed that this loan is being serviced by Aurora Loan Services, LLC, an affiliate of the lender, and that its investor is The Bank of New York Mellon, NA as trustee. These indicate that the subject loan could have been securitized into a trust in which Aurora Loan Services, LLC was the servicer or master servicer and The Bank of New York Mellon, NA, formerly known as The Bank of New York, was the trustee.

- A search of filings with the Securities and Exchange Commission by for securitization trusts established in the year 2005 indicates that the trust into which the subject loan could have been securitized into would be the Structured Asset Securities Corp. Trust 2005-16.

- Structured Asset Securities Corp. Trust 2005-16 was established under a Trust Agreement dated August 1, 2005 by and among Structured Asset Securities Corp. as depositor, Aurora Loan Services, LLC as master servicer, and The Bank of New York as trustee. Lehman Brothers Holdings, Inc. was the sponsor and seller of the said trust, while Lehman Brothers Bank, FSB was one of the originators.

Given these findings, the examiners have prepared the following diagram to illustrate how the lender and the parties to the securitization trust changed the typical process of securitization:



The transactions in this diagram are presented in chronological order:

Promissory Note		Deed of Trust	
Date	Particulars	Date	Particulars
July 13, 2005	Loan Granting Lehman Brothers Bank, FSB Originating Lender	July 13, 2005	Loan Granting Lehman Brothers Bank, FSB Mortgagee MERS, Beneficiary
August 31, 2005	Sale, Securitization Lehman Brothers Holdings, Inc. Securitization Seller		
August 31, 2005	Simultaneous Sale, Securitization Structured Asset Securities Corp., Securitization Depositor		
August 31, 2005	Assignment, Securitization The Bank of New York, trustee for Structured Asset Securities Corp. Trust 2005-16		

The Promissory Note and the Deed of Trust should be in the possession of The Bank of New York as trustee for the mentioned securitization trust, pursuant to Article I, Conveyance of Mortgage Loans, of the Mortgage Loan Sale and Assignment Agreement dated August 1, 2005. However, the Deed of Trust could be in the possession of Mortgage Electronic Registration Systems, Inc. It was created to eliminate the need for executing and recording the assignment of mortgages, with the idea that it would be the beneficiary on record (see separate Report on MERS).

Whether or not the Promissory Note bears the proper endorsements, and the Deed of Trust the proper assignments, could be ascertained only upon actual inspection of these documents.

Review of the process of securitization yielded the following information:

Structured Asset Securities Corp. Trust 2005-16 Prospectus Form 424B5, filed on September 1, 2005 refers to Structured Asset Securities Corp. as depositor, Lehman Brothers Holdings, Inc. as sponsor and seller, Lehman Brothers Bank, FSB as one of the originators, and Aurora Loan Services, LLC as master servicer. The link to the prospectus is provided herein.

http://www.secinfo.com/dsvrn.z5ej.htm

Structured Asset Securities Corp. Trust 2005-16 Annual Form 10-K for the year ended December 31, 2005 was filed on March 30, 2006 with the SEC. This document listed Aurora Loan Services, LLC as master servicer compliant with the servicing criteria for the asset-backed securities held by the trust. The link to the form 10-K is provided herein.

http://www.secinfo.com/d1Zmw4.vPk.htm

On January 30, 2006, Structured Asset Securities Corp., as depositor, filed Form 15-15D or Notice of Suspension of Duty to File Reports terminating registration of the noted investment vehicle. The approximate number of holders of record as of the certification or notice date was one. The link to the form 15-15D is provided herein.

http://www.secinfo.com/d1Zmw4.v49.htm

A complete list of SEC filings by Structured Asset Securities Corp. Trust 2005-16 is provided herewith.

Trust Agreement:

http://www.secinfo.com/d13f21.zNy.d.htm

Summary of events from the 424B5

Cut-Off Date – August 1, 2005

Closing Date – On or About August 31, 2005

Amount - $1,042,854,994 Approximate

The Foreclosure Process

Transactions pertaining to the process of foreclosing on the property that was mortgaged to secure the note on this loan are summarized as follows:

Promissory Note		Deed of Trust	
Date	Particulars	Date	Particulars
January 23, 2006	Loan Granting Wells Fargo Bank, NA Originating Lender	January 23, 2006	Loan Granting Wells Fargo Bank, NA Mortgagee and Beneficiary
May 30, 2006	Sale, Securitization Wells Fargo Bank, NA Securitization Sponsor	(Scheduled for) September 6, 2011	Notice of Sale Under Power HSBC Bank USA, NA, as Trustee Lender
May 30, 2006	Simultaneous Sale, Securitization Wells Fargo Asset Securities Corp., Securitization Depositor		
May 30, 2006	Assignment, Securitization HSBC Bank USA, NA, Trustee for Wells Fargo Home Equity Asset-Backed Securities 2006-1 Trust		

The foregoing transactions are more fully described as follows:

- The original Deed of Trust was executed on January 23, 2006. The lender, mortgagee, and beneficiary is Wells Fargo Bank, NA.

- There was a scheduled foreclosure sale on September 6, 2011 according to an undated Notice of Sale. This document names the lender as HSBC Bank USA, NA as trustee for Wells Fargo Home Equity Asset-Backed Securities 2006-1 Trust (see attached document).

As has been previously noted, this loan was securitized into Wells Fargo Home Equity Asset-Backed Securities 2006-1 Trust. As a result, the Note and the Deed have been separated. Therefore, there is no ability to foreclose on the property until the Note and Deed of Trust are re-united.

CUSIP Information

CUSIP stands for Committee on Uniform Securities Identification Procedures. A CUSIP number identifies most securities, including: stocks of all registered U.S. and Canadian companies, and U.S. government and municipal bonds. The CUSIP system—owned by the American Bankers Association and operated by Standard & Poor's—facilitates the clearing and settlement process of securities.

The number consists of nine characters (including letters and numbers) that uniquely identify a company or issuer and the type of security.**

Capital Structure

Name	Currency	ID	Pools	Class Bal - Original	Class Bal - End
A-1	USD	9497EUAA5	Total Group	453,309,000	--
A-2	USD	9497EUAB3	Total Group	175,886,000	--
A-3	USD	9497EUAC1	Total Group	185,134,000	48,642,634
A-4	USD	9497EUAD9	Total Group	94,997,000	94,997,000
M-1	USD	9497EUAH0	Total Group	35,628,000	35,628,000
M-2	USD	9497EUAJ6	Total Group	31,242,000	31,242,000
M-3	USD	9497EUAK3	Total Group	18,088,000	18,088,000
M-4	USD	9497EUAL1	Total Group	17,540,000	17,540,000
M-5	USD	9497EUAM9	Total Group	15,895,000	15,895,000
M-6	USD	9497EUAN7	Total Group	14,800,000	14,800,000
M-7	USD	9497EUAP2	Total Group	14,251,000	9,475,431
M-8	USD	9497EUAQ0	Total Group	9,318,000	--
M-9	USD	9497EUAR8	Total Group	5,481,000	--
M-10	USD	9497EUAS6	Total Group	5,481,000	--
M-11	USD	9497EUAT4	Total Group	10,962,000	--
CE	USD	9497EUAU1	Total Group	8,222,330	0
P	USD	9497EUAV9	Total Group	0	0
LR	USD	--	Total Group	0	0
UR	USD	--	Total Group	0	0
R	USD	9497EUAE7	Total Group	50	0
R-C	USD	9497EUAF4	Total Group	100	0
R-X	USD	9497EUAG2	Total Group	50	0

** We have provided this information as a service to our clients. It is neither a legal interpretation nor statement of SEC policy. If you have questions concerning the meaning or application of a particular rule, please consult with an attorney who specializes in securities law.

Process Loans, Not Paperwork™

1 record matched your search:

MIN:	**1002326-0000007799-5**	Note Date:	**02/23/2007**	MIN Status:	**Active**
Servicer:	CitiMortgage, Inc. **O'Fallon, MO**			Phone:	**(800) 283-7918**

If you are a borrower on this loan, you can click here to enter additional information and display the Investor name.

MERS & Securitization

Mortgage Electronic Registration System (MERS) has been named the beneficiary for this loan. MERS was created to eliminate the need for the executing and recording of assignment of mortgages, with the idea that MERS would be the mortgagee of record. This would allow "MERS" to foreclose on the property, and at the same time, assist the lenders in avoiding the recording of the Assignments of Beneficiary on loans sold. This saved the lenders money in manpower and the costs of recording these notes. It was also designed to "shield" investors from liability as a result of lender misconduct regarding the process of mortgage lending.

MERS is simply an "artificial" entity designed to circumvent certain laws and other legal requirements dealing with mortgage loans. By designating certain member employees to be MERS corporate officers, MERS has created a situation whereby the foreclosing agency and MERS "designated officer" has a conflict of interest.

Since neither MERS nor the servicer have a beneficial interest in the note, nor do they receive the income from the payments, and since it is actually an employee of the servicer signing the Assignment in the name of MERS, the Assignment executed by the MERS employee is illegal. The actual owner of the note has not executed the Assignment to the new party. An assignment of a mortgage in the absences of the assignment and physical delivery of the note will result in a nullity.

It must also be noted that the lender or other holder of the note registers the loan on MERS. Thereafter, all sales or assignments of the mortgage loan are accomplished electronically under the MERS system. MERS never acquires actual physical possession of the mortgage note, nor do they acquire any beneficial interest in the Note.

The existence of MERS indicated numerous violations of Unfair and Deceptive Acts and Practices due to the conflicting nature and identity of the servicer and the beneficiary. Each of these practices were intentionally designed to mislead the borrower and benefit the lenders.

So the question becomes, is MERS the foreclosing party or the Servicer? Since the Servicer is the party initiating the foreclosure and they take the documents to their own employee who has also been designated as a "Corporate Officer of MERS", and who conveniently signs the document for MERS, aren't they the "foreclosing party"?

Is MERS the Beneficial Owner of the Note?

1. MERS is named as the beneficiary on the Deed of Trust and holds only legal title to the interest granted by Borrower in this Security Instrument...has the right: to exercise any or all of those interest, including, but not limited to, releasing and canceling this security instrument.
2. MERS has no actual possession of the Note, though they claim to hold the Note.
3. MERS receives no payments or income from the monthly payments. This money goes to the ultimate Investor. The Investor has the beneficial interest in the Note by reason of the Investor receiving the payments.
4. MERS agreement says that MERS shall at all time comply with the instructions of the holder of mortgage loan promissory notes. Additionally, it says "in the absence of contrary instructions from the beneficial owner, MER may rely on instructions from the servicer shown on the MERS system in accordance with these rules and the procedures with respect to transfers of beneficial ownership.
5. MERS has testified in Florida Courts that they are not the beneficial owner of the note.

Assignment of Beneficiary

MERS does not record the assignment of beneficiary as required by law, until the foreclosure process starts and the Notice of Default has been filed, and apparently, only when it appears that the borrower will not be able to reinstate the loan and then foreclosure is inevitable. It maintains itself as the beneficiary throughout the entire process up to foreclosure.

MERS has represented in Florida Courts that its sole purpose is as a system to track mortgages. It has stated that it does not do the entries itself, but the lenders and servicers do. When an Assignment of Beneficiary is executed, it is the member servicer or lender that goes to the website, downloads the necessary forms, completes the forms and then takes it to the designated "MERS officer" to sign.

MERS agreements state that MERS and the Member agree that: (i) the MERS System is not a vehicle for creating or transferring beneficial interest in mortgage loans, (ii) transfer of servicing interests reflecting on MERS System are sUbject to the consent of the beneficial owner.

Since neither MERS nor the servicer have a beneficial interest in the note, nor do they receive the income from the payments, and since it is actually an employee of the servicer signing the Assignment in the name of MERS, this begs the question:

Is the assignment executed by the MERS employee even legal, since the actual owner of the note has not executed the assignment to the new party?

A good indicator might be in *Sobel v Mutual Development, Inc,* 313 So 2d 77 (1st DCA Fla 1975). An assignment of a mortgage in the absence of the assignment and physical delivery of the note in question is a nullity.

Possession of the Note & Holder in Due Course

Possession of the Note is a key argument coming to the forefront. The foreclosing entity must prove possession and ownership of the original Note in order to foreclose. This comes to the forefront because it has been reported that upwards of 40% of the Notes are missing and cannot be found. MERS is once again involved in this.

In Judicial Foreclosure states, MERS foreclosure lawsuits often include a Lost, Missing, or Destroyed Affidavit. This affidavit "testifies" that the Note cannot be found, and that the Note prior to being lost was in the possession of MERS. This has become very problematic for MERS, since they have admitted in Courts that they do not own the Note or even hold the Note. If this is so, then MERS is likely filing fraudulent Affidavits.

When challenged, one defense that MERS uses to support its "legal standing" is that the servicer has possession of the Note and Deed. MERS, by the act of having its own "Officers" as employees of the servicer, entitles it to foreclose on behalf of the servicer and the beneficiary. When confronted with this defense, the response should be for the servicer to produce the note.

It must also be noted that the lender or other holder of the note registers the loan on MERS. Thereafter, all sales or assignments of the mortgage loan are accomplished electronically under the MERS system. MERS never acquires actual physical possession of the mortgage note, nor do they acquire any beneficial interest in the Note.

Securitization Process

Securitization is the name for the process by which the final investor for the loan ended up with the loan. It entailed the following:

1. Mortgage broker had client who needed a loan and delivered the loan package to the lender.

2. The lender approved the loan and funded it. This was usually through "warehouse" lines of credit. The lender hardly ever used their own money instead using the warehouse line that had been advanced to the lender by major Wall Street firms like J.P. Morgan.

3. The lender "sold" the loan to the Wall Street lender, earning from 2.5 - 8 points per loan. This entity is known also as the mortgage aggregator.

4. The loan, and thousands like it, are sold together to an investment banker.

5. Investment banker sells the loans to a securities banker.

6. Securities banker sells the loans to the final investors, as a Securitized Instrument, where a Trustee is named for the investors, and the Trustee will administer all

bookkeeping and disbursement of funds.

7. The issue with the securitization process is that when the Securitized Instrument was sold, it was split apart and sold in tranches, (in slices like a pie). There were few or no records kept of which notes went into which tranche. Nor were their records of how many investors bought into each particular tranche. Additionally, there were no assignments designed or signed in anticipation of establishing legal standing to foreclose.

8. The tranches were rated by Rating Agencies at the request of the Investment Bankers who paid the Rating Agencies.

9. When the tranches were created, each "slice" was given a rating, "AAA, AA, A, BBB, BB, etc. The ratings determined which tranche got "paid" first out of the monthly proceeds. If significant numbers of loans missed payments, or went into default, the AAA tranche would receive all money due, and this went on down the line. The bottom tranches with the most risk would receive the leftover money.

These were the first tranches to fail. Even if the defaulting loans were in the AAA tranche, the AAA tranche would still be paid and the lowest tranche would not. Wall Street, after the 2000 Dot.com crash, had large amounts of money sitting on the sidelines, looking for new investment opportunities. Returns on Investments were dismal, and investors were looking for new opportunities. Wall Street recognized that creating Special Investment Vehicles offered a new investment tool that could generate large commissions.

Other Pertinent Facts of Securitization

1. Wall Street created pooling agreements where they defined in the agreements the loans that they would accept for each investment vehicle. They executed agreements with the lenders and then immediately issued warehouse lines of credit to the lenders.

2. Lenders then let brokers know the loan parameters to meet the pooling agreement guidelines and the brokers went out and found the borrowers.

3. Wall Street took all the loans, packaged them up and sold them as bonds and other security instruments to other investors, i.e. Joes Pension, and paid off original investors or reissued new line of credit, and earned commissions on both ends.

4. The process was repeated time and again.

5. What we do know now is that in most cases, the reality is that the reported lender on the Deed of Trust was NOT the actual lender. The actual lender who lent the money was the Wall Street Investment Bank. They simply rented the license of the lender, so that they would not run afoul of banking regulations and/or avoid liability and tax issues. For all purposes, Wall Street was the true lender and there are arguments that suggest that Disclosures should have been required naming Wall Street as the lender.

Now it can be easier to understand how possession of the Note and ownership of the Note play a significant part. In most cases, it is unknown which tranche will contain any particular note. Nor will it be known how many investors, and who bought the individual tranches without significant and time-consuming investigation.

Hence, without the "True Owners" of the note stepping forward to demand foreclosure, any foreclosure that was securitized may be completely unlawful.

Assignee Liability

Assignee liability is another issue being contested. Under TILA and RESPA, if on the face of the loan documents it is evident that there are violations of the statutes, then assignees have a significant liability when they assume the loan. However, the question arises as to if assignee liability can be claimed when there are no violations on the face of the documents.

It is believed that MERS became the "beneficiary" for so many notes to address the Assignee Liability problem. By keeping MERS as the beneficiary, and avoiding the recording of assignments, it becomes more difficult to determine assignee liability and holder in due course issues.

This could offer "cover" for all the parties participating in the Securitization process, since no Assignments were recorded, and "proof of ownership" of the note could not be easily determined. The only way to determine ownership of the Notes would be to track the monthly payments made to the investors, determining which party received the monthly payment. This would be time consuming and likely only Discovery would prove the process necessary to get this information.

In *Cazares v Pacific Shore Funding, CD.* Cal. Jan 3, 2006, assignee that actively participated in original lender's act and dictated loan terms may be liable under UDAP.

The question then arises as to assignments further down the "chain of title". Under these circumstances, the UDAP codes can be utilized for attacking the lenders. Show fraud and other causes of action, then the contracts can be "voided or rescinded" common law and UDAP codes, especially CA B&P § 17200, and CA Civil Code §1689, which allows for contract rescission.

Borrower:	Frannie Smith and Jim Jones
Subject Property:	123 Bank Street Hometown, NE 20772
Origination Lender:	CitiMortgage 6310 Stevens Forest Road Columbia, MD 21046
Origination Loan Number:	18374900
MIN Number:	1002326-09800768-5
Loan Amount:	$315,387.98
Application Date:	01/24/2007
Closing Date:	02/23/2007
Funding Date:	02/23/2007
Sales Price:	$370,000.00
Appraised Value:	Not available; Zillow value $381,000 on 02/01/2007
Seller:	John and Susie Homemaker
Mortgage Broker:	Capital Mortgage Finance Corp. Same as lender
Interviewer:	Ellie May Thompson
Appraiser:	Capital Mortgage Finance Corp.
Closing Agent:	Gigantic Title Group, LLC 3158 Closing Street, Suite 100, Baltimore, MD 21037
Escrow Officer:	Carmen Sandiego
Escrow Number:	E0710080
Title Insurance:	Big Bad National Title Insurance Company
Cash Out Proceeds:	Cash to Borrower $5,234.00
Loan Summary:	98.74% LTV/CLTV Purchase Primary Residence, Single Family home

Message from the Auditor

This loan application has been audited for the purpose of determining violations of Truth in Lending Act [16 U.S.C. § 1601] (“TILA”), Home Ownership Equity Protection Act [12 C.F.R. 226.32 et seq.] (“HOEPA”), Real Estate Settlement Procedures Act [12 U.S.C. § 2601], and to the extent applicable, violations of other state and federal laws, certain predatory lending practices, and compliance issues.

As is standard practice for the process of forensic auditing, this report is based solely on the documentation provided by the borrower requesting our services. The borrower understands that we are required to make reasonable and industry knowledgeable assumptions as to provided disclosures, loan terms, and compliance dates that, if erroneous, may result in differences between our findings and the documents’ actual compliance with regulatory requirements.

The contents of this report are being provided with the understanding that we are not providing legal advice, nor do we have any relationship, contractual or otherwise, with anyone other than the recipient that provided the documentation to be audited. While we believe that our assumptions provide a reasonable basis for the review of results, we make no representations or warranties respecting the appropriateness of our assumptions, the completeness of the information considered, or the accuracy of the findings.

Summary of Violations

Underwriting Violations:

- [x] Incorrect PITI Used to Qualify Borrower
- [x] Excessive Debt to Income Ratio
- [x] Unreasonable Stated Income
- [x] Predatory Lending Practices
- [ ] Missing Good Faith Estimate and/or Truth in Lending Statement
- [x] Missing Documents

Compliance Violations:

- [ ] Federal TILA Violation: This loan failed the TILA APR Test because the disclosed APR is more than 1/8 of 1 percentage point above or below the APR as determined in accordance with the actuarial method.
  Calculated APR: 6.096 % Disclosed APR: 6.047 %

- [x] Federal TILA Violation: This loan failed the TILA finance charge test because the disclosed finance charge is understated by more than $100.
  Calculated Finance Charge:$ 381,820.59
  Disclosed Finance Charge: $ 379,282.42

- [ ] HOEPA/Section 32. This loan does not apply as application for loan was received before the effective date of October 1, 2009

- [ ] Federal TILA Violation: This loan failed the Right of Rescission date test.

- [ ] Federal RESPA Violation: This loan failed the Good Faith Estimate disclosure date test. Dates signed for initial documents do not comply with Federal RESPA CITE: 24CRF3500.17

- [ ] Prepayment Penalty – This loan contains a clause stating that if the mortgage is prepaid within a certain time, the borrower will be required to pay a penalty. Penalties are usually based on the percentage of the remaining balance or a number of months' interest. A failure in this area suggests that proper disclosures were not made.

- [ ] Balloon Payment- This lien contains a Balloon Payment or partial amortization. A balloon payment is a large payment due at the end of the amortization period, due to the fact that the entire loan amount is not amortized over the life of the loan. A failure in this area suggests that proper disclosures were not made.

- [x] This loan is serviced through MERS, which is contiguous with PSA (Pooling Service Agreements). This indicates the below mentioned loan as being securitized. Further detail of this would be exposed through an audit of the trustee and servicing pool. There are perhaps hundreds of derivative investor owners of shares underlying the above referenced trusts, which the undersigned is still in the process of discovery. This could take considerably more time to complete however; the above institutions, and each of them separately, are claiming ownership through various interlaced loan servicing, trustee, and management agreements, which provide them both assets and cash flow underlying the issuance of their respective securities.

Forensic Examination

Examiner Notes for File:

Credit scores:
Frannie Smith = 742
Jimbob Jones = 685
Primary Residence, Single family dwelling
Purchase value = $370,000.00

Ratios:
Front End: 27.70%
Back End: 44.48%

Zillow reports current value is $188,400.00 with a loss of $5,700 in the past month.
Earliest value was $145,000.00 on 10/01/2001.
Highest value was $358,000.00 on 07/01/2007.
Lowest value was same as earliest value.

PITI Used to Qualify Borrower:

It is noted that the lender's underwriter failed to follow generally accepted practices of underwriting by miscalculating the borrower's total expenses on housing.

To calculate the borrower's expenses, the underwriter used the incorrect monthly payment amount of $264.00 real estate tax and $80.00 hazard insurance. The correct values are $257.46 and $94.00 respectively. (Total PITI = $2,941.31)

Debt to Income Ratio:

The loan in question appears to be underwritten as Stated Income Stated Assets (SISA) by its origination lender. The following information is as stated on the loan application (1003).

Borrower's Primary Occupation: Clinical Nurse
Time at Current Occupation: 10 months
Monthly Income: $7,151.44 ($5,631.42 Base Income + $1,520.02 Other Income)
Co-Borrower's Primary Occupation: Technician
Time at Current Occupation: 1 year 10 months
Monthly Income: $2,625.6 ($1,666.60 Base Income + $959.00 Bonuses)
This income figure is within the salary guidelines provided by salary.com.
It is not clear what ratio was used to qualify the borrower, and no record is present in the file of Transmittal 1008.
P+I: $2,246.71
Hazard Insurance per HUD: $84.58
Real Estate Taxes per HUD: $227.46
Home Owner's Dues: $4.16
Mortgage Insurance: $145.18
PITI: $2,708.09
Usable verified income: $9,777.04
PITI/Income: **27.70% Housing Ratio**
Consumer Debt on Loan: $1,641.00
PITI+Consumer Debt on Loan: $4,349.09
PITI+Debt/Income: **44.48% Total Debt Burden Ratio**

The above Total DTI Ratio is 44.48%, which is above the 28/36 ratio as per guidelines. Considering the scenario, the borrower's DTI ratio exceeds the maximum allowed DTI ratio per customary guidelines for ALT-A and/or Sub prime lending. It is the responsibility of the lender's underwriter not only to follow guidelines noted by the lender, but also to ensure a thorough analysis of the borrower's income, liabilities, and credit reports in order to determine the borrower's ability to repay the loan.

The Auditor determines that the Debt to Income Ratio (DTI) for this loan was approximately 44.48%, which is above the traditional DTI ratio of 36%. The DTI ratio was calculated by dividing the borrower's gross monthly income into total debt payments, including the proposed mortgage. The DTI ratio is a key factor in assessing the borrower's ability to repay the loan. **We believe that this loan put the borrower in a position with a high probability of failure, and the lender failed in its responsibility to determine the borrower's true ability to repay this loan.**

Using the documentation provided in the file, it appears that this loan may have been processed as a Stated Income loan. This loan may have been approved based on the borrower's credit score and a belief that the property would continue to increase in value. It appears that no consideration of the borrower's realistic ability to repay this loan has been made.

Income Used to Qualify Borrower:

The opinion of the Auditor after revising all information is that the Stated Income provided and reflected on the Loan Application (1003) on file is an overstatement and that it misrepresents the actual income of borrowers.

A $9,777.04 per month is reflected as Stated Income on 1003.

A violation in this area suggests the lender's underwriter failed in his/her fiduciary responsibility to the origination lender, the investors/subsequent purchasers of this Note, and the underlying security instruments.

The prime responsibility of an underwriter is to assess the ability of the borrower to repay the proposed mortgage debt. Therefore, the underwriter must determine if and disclose whether the Stated Income on the Loan Application (1003) is reasonable for the job description of the borrower. In addition, an evaluation of the borrower's employment history, assets and credit profile is to be presented through information on the Loan Application (1003).

The lender's underwriter failed to follow standard and generally accepted underwriting practices by qualifying the borrowers based on stated income, and neglecting to determine whether or not this stated income was reasonable.

Predatory Lending Practices:

The following practices are widely identified as predatory:

- Fraudulent practices that conceal the facts of the borrower's obligation and/or income
- Steering a borrower to a high-cost loan when they could qualify for a lower-cost loan
- Making a loan that the borrower cannot afford to repay
- Making a loan to a borrower that provides no actual benefit for the borrower
- Flipping loans by inducing repeated refinancing, without benefit to the borrower, in order to generate fees

When a lender processes and approves a loan under a “Stated Income” program, employment verification is necessary, but income verification is not required. Therefore, it is the lender's responsibility to reasonably determine and evaluate the stated income.

The lender's underwriter failed to follow the standard and generally used practices of reasonably determining the borrower's income. Instead, the qualification was based strictly on the stated income of the borrower.

The occupation and reasonable income estimates could have been determined by using a website such as www.salary.com. The underwriter failed to use these and other tools to determine whether or not the borrower's stated income was overstated.

Good Faith Estimate and Truth in Lending Statement:

The Truth In Lending Act states that an initial disclosure is to be issued within three (03) working or business days from the receipt of the loan application. In addition, inclusions, exclusions, and applicable changes to the terms of loan or program must be provided within three (03) working or business days.

The Real Estate Settlement Practices Act (RESPA) of 1974 is a response by Congress to perceived abuses in the real estate settlement process. It is an attempt to protect consumer(s) from unnecessarily high settlement charges resulting from certain abuses.

RESPA's stated purpose is to bring about specific changes in the agreed or proposed settlement process for residential real estate. Results of this act are as follows.

- More accurate and effective advance disclosure of settlement costs to home buyers and to home sellers
- Removal of or elimination of kickbacks and/or referral fees that had a tendency to unnecessarily increase certain settlement service costs
- Reduced Amounts to home buyers to be placed in escrow accounts established to ensure the payment of real estate taxes and insurance fees
- Significant reformation and modernization of local land title record keeping (12 U.S.C.A § 2601)

The Real Estate Settlement Practices Act of 1974 is in governance and applies to any "federally related mortgage loan" (excluding loans for temporary financing such as a construction loan that is secured by a first or subordinate lien on residential property, including individual units of condominiums and cooperatives) 12 U.S.C.A. § 2602(1) (A). It also applies to any whole or partial loans by any lender with deposits or accounts that are insured by a federal agency and/or a lender that is regulated by the federal government 12 U.S.C.A. § 2602(1) (B) (i).

Missing Documents:

File is missing initial and final disclosure documents, including but not limited to:

Per RESPA (Real Estate Settlement Procedures Act - 12 USC 2601 et seq.)

Affiliated Business Arrangement Disclosure

Per ECOA (Equal Credit Opportunity Act - Reg B - 12 CFR 202):

Initial signed & dated Uniform Residential Loan Application (1003)

Per FCRA (Fair Credit Reporting Act - 15 USC 1681):

Disclosure of Credit Scores

Notice to Home Loan Applicant

As per both state and federal laws that are mandated for initial disclosures, we noted below that initial disclosure documentation was not found nor provided nor included in this file.

If the broker failed to deliver that initial disclosure to the borrower, and then it becomes incumbent for the lender to ensure and confirm that these disclosures were delivered to the borrower on time. If the lender failed to provide these disclosure documents to the borrower within three (03) working or business days for the original date of loan application, then the borrower must complete a sworn statement testifying to that effect.

OTHER CONSIDERATIONS
Duty of Lender and Broker

The duty of the broker is to deal with the consumer in good faith. If the broker had knowledge that the borrower would or had a likelihood of defaulting on this loan, the broker has a fiduciary duty to the borrower to NOT place him in that loan (in harms way).

Additionally, the broker has a contractual duty of good faith and fair dealings with the lender, which would be breached if he knowingly placed a loan with the lender, thus failing to disclose the material fact that the borrower will likely default or file bankruptcy.

The duty of the lender includes the responsibility, or due diligence, to determine if a consumer is being placed in a loan that is legal, properly disclosed, appropriate for the consumer given their financial circumstance, and affordable over the life of the loan if present financial positions hold steady.

If the lender is aware that the borrower would be better off with another type of loan that the lender offers, he has violated his duty to the consumer and such an act of deception would likely be considered fraud on the consumer and a predatory lending practice.

It is the opinion of the examiner that the lender may have violated their duty to the borrower by:

1. Placing the borrower(s) into their current loan product without regard for other products that might have suited the borrower(s) better.
2. Placing the borrower(s) into a loan whereby it was likely the borrowers would default or incur bankruptcy as a result of the loan, and it was reasonably foreseeable that such would occur.
3. Placing borrower(s) into a loan without bothering to verify employment or to verify income.
4. Placing the borrower(s) into a loan when the real estate market was in a free fall, and it was easy to foresee that such would continue, endangering the borrower's financial stake in the home.

Supporting Case Law

Am. Bankers' Ins. Co. v. Wells, 819 So. 2d 1196 (Miss. 2001)
Barrett v. Bank of Am. 229 Cal. Rptr. 16 (Ct. App. 1986)
Charleswell v. Chase Manhattan Bank, N.A., 308 F. Supp. 2d 545 D. V.I.2004)
Chedick v. Nash, 151 F. 3d 1077 (D.C. Cir. 1998)
Hilgeman v. Am. Mortg.Securities, Inc., 994 P. 2d 1030 (2000)
Choi v. Chase Manhatten Mortg. Co., 63 F. Supp. 2d 874 (N.D. Ill. 1999)

Citicorp. Mortg. Inc., v. Upton, 42 Conn. Supp. 302 (Conn. Super. 1992)
Farm Credit Servs. Of America v. Dougan, 2005 S.D. 94 (2005)
Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988)
In re Hart, 246 B.R. 709 (Bankr. D. Mass. 2000)
Whittingham v. Mortg. Elec. Registration Servs., 2007 WL 1362669(D.N.J. May 4, 2007)

Also, please see the Alternative Causes of Action at the end of this report. Additional or missing documents may be provided within 14 days of receipt of this audit report and the audit report will be updated to reflect any changes.

We have researched the subject of TILA violation from the lender to the borrower on "stated" loans to the best of our ability. If there is any further related case law or other support that you can share with us, please feel free to let us know and we will incorporate it.

We are continually striving to bring the best and most up to date audit to our customers.

Stated Loans and Lending Misconduct
The use of the "stated loan" has been the seed that led to a great deal of broker misconduct in the lending industry. The broker would find a borrower who had already found a home and would tell him that, with his actual income, he could not qualify for the loan needed to finance the purchase of the home. The broker would then tell the borrower that if they use a stated loan and misrepresent the numbers, then the borrower could qualify for a loan large enough to purchase the home he wants. The broker knew two things about the borrower. First, the broker knew that the borrower was not making as much as had been reported on the stated income loan application. Secondly, the broker knew that the borrower's debt to income ratio was well over the limits allowed by lending regulations. The broker knowingly put the borrower into a loan that he could not afford, and there was a large indication that the borrower would never be able to keep up with the payments. This raises a number of legal issues.

In terms of our forensic loan audits, we look at the borrower's actual W-2 and tax returns to determine their true debt to income (DTI) ratio at the time the loan was originated. We then compare that figure to the stated income on the actual loan application. If the two numbers do not match up, then the borrower can bring the following causes of action against the lender.

Breach of Fiduciary Duty
Traditionally, a credit transaction has been considered an arm's length transaction in which there has been no special duty read into the creditor-debtor relationship. Most courts, however, have held that the presence of certain factors in the creditor-debtor relationship may give rise to a fiduciary duty.

For example, a fiduciary relationship can arise when a party, generally a weaker party in the sense of the ability to protect itself, places trust and confidence in another. Such a "duty of confidence" arguably can arise if a lender acts in the role of advisor and knows or should have known the borrower trusted him. When such a relationship exists it creates a duty to disclose.

This duty of confidence arises in most creditor-lender relationships, but it occurs exponentially more in situations where the loan is a "stated loan." The borrower is the weaker party in the transaction due to his inability to negotiate many of the primary terms of the loan. The loan is being offered to the borrower in a take-it-or-leave-it fashion, in which the borrower has no ability to negotiate major terms such as APR or payment schedule. Also, in terms of legal strength, the lender will have an entire legal department at its disposal, where some borrowers will be unable to afford an attorney. Due to these disparities in negotiating power, the borrower puts his trust in the lender to advise him as to the best course of action. This creates a fiduciary relationship, which requires the lender to disclose all material information.

If established, the existence of a fiduciary duty gives rise to a duty of fair and honest disclosure of all facts that might be presumed to influence the consumer to act. (Barrett v. Bank of Am. 229 Cal. Rptr. 16 (Ct. App. 1986)) The lender must adhere to its duty to be fair and honest in its disclosures of all facts that might be presumed to influence the borrower's decision to accept the loan. In most cases, the lender will be using the "stated loan" to get the borrower into a loan that he otherwise could not afford. The lender knows the reason the borrower could not qualify for the needed loan based on his actual income is that there is a high probability of default. Thus, the borrower cannot afford the loan without the lender's help in misrepresenting the numbers. The lender has disclosed the fact that he is falsely representing the numbers to enable the borrowers to get into the home they want, however what he does not disclose is the fact that there is an extreme likelihood that the borrower will default on the loan. Thus the lender has breached their fiduciary duty to disclose those facts that would presumably influence the borrower. When there is a duty to disclose, failure to do so should give rise to a tort cause of action for nondisclosure, or the silence may be deemed a misrepresentation. Such claims can be used to invalidate the underlying mortgage transaction or to recover money damages to offset any delinquency.

Unconscionability

The common law contract defense of unconscionability may be applicable, when either the mortgage terms are unreasonably favorable to the lender or certain aspects of the transaction render it unconscionable. (In re Maxwell, 281 B.R. 101 (Bankr. D. Mass. 2002); Hager v. American Gen. Fin. Inc., 37 F.Supp. 2d 778 (1999)) For example, a Connecticut court found a second mortgage contract to be unconscionable based on the facts that the defendant's financial situation made it apparent she could not reasonably expect to repay the mortgage. At the closing, the defendant was not represented by an attorney and was rushed the by plaintiff's attorney to sign the loan document. There was an absence of meaningful choice on the part of the defendant. In addition, the court found that the contract was substantively unconscionable, because it contained a large balloon payment that the borrower had no means of paying, and that the borrower had no reasonable opportunity to understand the terms of the contract. (Family Fin. Servc. V. Pencer, 677 A.2d 479, (Conn. Ct. App. 1996); Emigrant Mortg., Co., Inc., v. D'Angostino, 896 A.2d 814 (Conn. App. Ct. 2006))

If the broker knows that the borrower's financial situation is such that there is no reasonable way that he would ever be able to repay the loan, then the loan is unconscionable and invalid under contracts law. This is exactly what brokers were doing when they were making "stated loans" for borrowers, so that they could get into the houses they wanted, rather than the house they could afford.

Negligent Lending

Another argument for borrowers to raise is that the bank acted negligently in creating the "stated loan" because it was a loan that invited abuses. The bank knew or should have known that brokers would abuse "stated loans" in order to obtain larger commissions and more numerous clients. Borrowers seeking to assert tort claims based in negligence have met with mixed results. Whether styled as a claim for negligence or negligent servicing, courts have applied the same traditional four part test. (Hutchinson v. Delaware Sav. Bank F.S.B., 410 F. Supp.2d 374 (D.N.J. 2006)) In order, for a plaintiff to prevail in such an action, he must show:

1. a duty of care owed by the defendant to the plaintiff
2. breach of that duty by the defendant
3. injury to the plaintiff
4. the defendant's breach caused the plaintiff's injury

The first hurdle for plaintiffs, and often times the hardest to overcome, in asserting a cause of action based in negligence is establishing a duty of care owed by the servicer to the homeowner. Typically, the borrower-lender relationship is not one where any duty is recognized. In addition, some courts have even stated that the borrower-lender relationship is an adversarial one. (Jack v. City of Wichita, 23 Kan.App.2d 606, 614, 933 P.2d 787 (1997)) However, a duty can arise in some situations.

Generally, a breach of contract alone will not give rise to a duty of care. A contract can provide the basis for a tort claim only if a duty exists independently of the performance of the contract. Thus a negligence claim may be available when the law imposes some other duty of affirmative care. For example, a servicer's violation of the duty imposed by RESPA to respond to qualified written request can provide the basis for a negligence claim. (Rawlings v. Dovenmuehle Mortg. 64 F. Supp. 2d 1156, (M.D. Ala. 1999)) One court has found a duty of care in servicing loans "to maintain proper and accurate loan records and to discharge and fulfill the other incidents attendant to the maintenance, accounting and servicing of loan records." (Islam v. Option One Mortgage Corp., 432 F. Supp. 2d 181 (D. Mass. 2006))

More recently courts have begun to allow borrowers to bring claims of negligent lending, when the lender engages in a pattern of willful and negligent failure to perform even a rudimentary verification of the information submitted by borrowers. However, these cases are still being resolved. (Boykin v. CFS Enterprise, Inc., 2008 WL 4534400 (D.Kan.2008))

A second significant challenge for homeowners is demonstrating that the servicer's conduct was the proximate cause of their injuries. See Hutchinson. Proximate cause is the act that sets off a natural chain of events that produces the injury. However, an "unforeseeable" intervening cause may break the causal relationship. For example, at least one court has stated that numerous other negative credit items on the homeowner's credit report precluded a finding that the servicer's incorrect reporting of her account status caused her to be denied later refinancing.

The borrower will have to prove that he would not have been injured but for the lender's negligent lending practices, and that the harm the borrower incurred was foreseeable by the lender at the time the loan was made. The borrower has the difficult task of proving that, had the lender put him into a loan he could have afforded, then he would have made all the payments and successfully paid off the loan. Negligent lending is a difficult claim to make by the borrower. Historically, the courts have not been willing to allow claims of negligence against lenders. However, in the wake of the recent lending industry collapse, courts are beginning to allow these claims on a more frequent basis. A number of cases have been brought in the last 6 months that have yet to be resolved. The mere fact that borrowers are being allowed to bring these negligence cases to court shows that there is a willingness by judges to dig deeper into the lending practices of the banks to find violations.

Enforcement of Lost or Destroyed Instruments
The lending and real estate industry relies heavily upon paperwork and documentation. It is the nature of the industry to have stacks of paperwork and disclosures related to every loan and every piece of property. This is beneficial for everyone because, in theory, there is a record of every transaction that occurs and the specifics related to that transaction. However, the flip side to that is that when a document does go missing, it creates quite a legal headache.

One such piece of paperwork is the Deed of Trust or Mortgage. A Deed of Trust is the actual legal document that creates a financial interest in the title to real property, held by a trustee, who holds it as security for a loan. Without the Deed of Trust, there is no record that the borrower or lender has any financial interest in the real property, or that there was any security for the loan. Attorneys have begun to request that lender produce the Deed of Trust in conjunction with litigation. The thinking is, that if the lender cannot produce the note, then the agreement between lender and borrower is invalid and cannot be enforced. This is only partially true.

General law in the area of lost instruments is well settled for the most part. States vary in their exact wording and standard of proof, but overall the area of law is fairly static. The party seeking to recover upon a lost instrument, in most cases, is the lender since he is seeking to enforce the loan and exercise his right to foreclose. The lender then has the burden of proving the former existence, delivery, execution, theft or loss, and contents of the instrument. Thus, in proving up a lost or destroyed deed, the party seeking to do so carries a very high burden in setting forth the description of the property, the nature and extent of his or her interest therein, a description of his or her evidence of title, the date and contents of that evidence of title, and the name of person who executed the same. While some courts state that a party seeking enforcement of a lost promissory note must, by clear and convincing evidence, establish ownership of the instrument, an explanation for absence or loss of the instrument, and the terms of the instrument, others require entitlement to payment under a lost promissory note be proved by only a preponderance of the evidence.

It has also been said that the proof must be such as to leave no doubt, or no reasonable doubt. Further, it has been held that parole evidence should show by a preponderance of the evidence that a lost deed was properly executed with the formalities required by law; that proof must be more than a mere preponderance of the evidence; and, on the contrary, that proof that the defendant executed a lost note need not be by a preponderance of the evidence.

The lender who wishes to enforce the missing instrument must prove that it once existed in order to enforce it. If the lender cannot sufficiently prove the existence and terms of the missing instrument, then it is as if the instrument did not exist. However, this is highly unlikely. In most cases the lender will be able to prove to the court, through circumstantial evidence, the terms, execution, delivery, and consideration after showing that a proper but futile search has been made for the deed.

When a borrower or borrower’s attorney is met with such a position, several defenses should be considered. These “affirmative defenses” may take the form of or be asserted along the following lines, provided they are asserted in good faith:

1. Upon information and belief, the mortgage note has been paid in whole or in part by one or more undisclosed third party(ies) who, prior to or contemporaneously with the closing on the “loan,” paid the originating lender in exchange for certain unrecorded rights to the revenues arising out of the loan documents.

2. Upon information and belief and in connection with the matters the subject of paragraph “1” above, Plaintiff (foreclosing party) has no financial interest in the note or mortgage.

3. Upon information and belief, the original note was destroyed or was transferred to a structured investment vehicle which may be located offshore, which also has no interest in the note or mortgage or revenue there under.

4. Upon information and belief, the revenue stream deriving from the note and mortgage was eviscerated upon one or more assignments of the note and mortgage to third parties and parsing of obligations as part of the securitization process, some of whom were joined as co-obligors and co-obligees in connection with the closing.

5. To the extent that Plaintiff has been paid on the underlying obligation or has no legal interest therein or in the note or mortgage, or does not have lawful possession of the note or mortgage, Plaintiff's allegations of possession and capacity to institute foreclosure constitute a fraud upon the court.

6. Based upon one or more of the affirmative defenses set forth above, Defendant (borrower's name) is entitled to a release and satisfaction of the note and mortgage and dismissal of the foreclosure claim with prejudice.

This argument may still be somewhat beneficial to the borrowers because if the deed of trust is not produced, and circumstantial evidence is then used by the lender to prove the existence and terms of the Deed of Trust, then the borrower can also introduce his own circumstantial evidence as to terms. This could allow the borrower to focus on the terms that are most beneficial to them.

CURRENT STRATEGIES

1. Verify the Violation

It is important to make sure that the attorney has an accurate file from the borrower and nothing is lost or being intentionally held back. A forensic loan audit from us will highlight any violations made in the origination of the loan. First of all, the violations should be verified. The forensic loan audit relies on the documents given to the auditors. This means that the auditors only have the documentation that has been given to them by the client when performing an audit. While we do our best to make sure all documents have been received from the clients, sometimes clients have lost documents. If a page was not provided, then it will not be considered as part of the audit. This could cause our auditors to find a violation when, in reality, the page is just missing.

The attorney for the borrower should verify that lender's file and the borrower's file match. To do this, the attorney should send a qualified written request to the lender upon signing a new client, notifying him of the violation and requesting any documentation relating to the loan. This will allow the attorney to verify that there was a violation. For example, if the audit finds a HOEPA violation because the loan was a high cost loan and no HOEPA disclosures were made, then the attorney should send a qualified written request to the lender to determine if the lender has any documentation that the HOEPA disclosures were in fact made.

2. **Make it Cost Effective for the Lender to Give the Borrower a Loan Modification**

During the negotiations for the workout agreement, the attorney needs to seriously evaluate the strength of the case. Some violations are more severe than others. For example, a TILA violation will allow the borrower to rescind the loan, however, a minor RESPA violation may only grant the borrower $2,000 to $3,000 in statutory damages. This is important because it will determine what type of modifications the attorney and the borrower (client) are willing to accept. The forensic loan audit will greatly assist you in this evaluation by alerting both attorney and borrower(s) (client) to the frequency and severity of the violations.

The attorney needs to show the lender that it will be more cost effective to give the borrower(s) a loan modification than to foreclose on the property or to fight it in court and risk the loan ultimately being rescinded. This can be done by showing the lender all the costs that he will incur by holding onto the loan.

Some of these considerations are

- the cost of foreclosure on the home when the borrower(s) ultimately defaults on the loan
- carrying cost to maintain the home while the bank holds it awaiting auction (marketing, taxes, insurance, repairs, security)
- attorney fees to defend the cause of action should the case go to court,
- true overhead cost of the man hours the lender will dedicate to this case
- lender or Bank required reserves that may have to be met
- cost of defending against possible attack on foreclosure claim
- cost of negative impact on other holdings in the surrounding area (if bank has loaned in a concentrated area).

Each foreclosure could result in an additional 4% drop in value on surrounding homes. If the borrower raises all the different costs associated with the lender holding onto the house and the lender is still unwilling to give the borrower a modification, then the attorney and the borrower(s) (client) can then bring a lawsuit, enforcing their rights. The most significant right that the borrower has is the right to rescind the transaction.

3. Bringing a Cause of Action to the Courts

The right to rescission is powerful because it means that the borrower can tender the amount borrowed to the lender less any closing costs, fees, interest, payments made, or any other costs associated with the loan. This usually results in an amount much less than what was initially borrowed, and the borrower essentially obtains the loan for free.

The attorney has the option of enforcing Truth in Lending Act and other rescission rights in federal, district, state, or bankruptcy court. Of course, the relative advantages and disadvantages of federal court, state court, and bankruptcy court vary from jurisdiction to jurisdiction. The attorney will want to choose the court that fits his/her specific situation best. For example, an attorney will not want to file in bankruptcy court unless he/she is planning on including a bankruptcy factor into the workout agreement in same way.

Regardless of which court the attorney may choose to file in, the general approach will be the same. The attorney needs to present her case showing that the lender violated applicable lending regulations, thus allowing the borrower to rescind the loan. This forensic loan audit can be used throughout the trial process to highlight and emphasize violations made in the originating loan documents. Also we provide access to expert witnesses who are able to interpret the audit and testify in court as to the validity and accuracy of the audit.

If the attorney successfully brings a cause of action to the court, the attorney will be able to recover significant damages, depending on the actual violation made in the loan. The ultimate remedy is rescission, for reasons stated above. Other damages can include actual damages, statutory damages, attorney fees, and in some cases, punitive damages. Recently, some courts have also begun to award loan modifications in cases that equity is required for the loan to be enforceable, such as HELOCs and fixed rate Seconds.

The following portion of the audit checks the details of the borrower's file against Federal, State, and Local laws.

FORENSIC MORTGAGE AUDIT REPORT

This report contains the results of a forensic mortgage audit which is a detailed analysis of mortgage documents and disclosures related to a loan that has been funded. The primary objective of this forensic mortgage audit is to determine compliance with applicable federal statutes and regulations governing the residential mortgage industry. The audit is performed to also evaluate the accuracy of lender computations and other information included in those mortgage documents. A forensic mortgage audit can provide numerous benefits to borrowers. It can be a critical tool for mortgage loan modifications, short sale agreement negotiations or foreclosure defense litigation. This report is based on information provided directly by or on behalf of the borrower.

Specific analytical tests were used to determine compliance with various federal regulations including the Real Estate Settlement Procedures Act (RESPA), Truth in Lending Act (TILA), Home Ownership and Equity Protection Act (HOEPA) and Regulation Z. These tests included: a) the reverse engineering and calculation of all required TILA disclosure variables; b) a detailed analysis and review of all loan variables and features; c) an assessment of HOEPA and other disclosure requirements; d) analysis and correct computation of the rescission period; and e) a detailed examination of HUD-1 closing costs. A TILA payment schedule was also prepared with a detailed list of loan terms for informational purposes. For all

SUMMARY OF FINDINGS

Test/Disclosure	Audit Finding	Applicable Law	Result
Annual Percentage Rate	Understated by (0.049%)	TILA	PASS
Finance Charge	Understated by $2,538.77	TILA	VIOLATION
HOEPA/Section 32	NA	HOEPA	NA
Rescission Period	Not Required	TILA	PASS
Demand Feature	Disclosure Not Required	RESPA	PASS
Variable Rate	Disclosure Not Required	RESPA	PASS
Prepayment Penalty	Disclosure Not Required	RESPA	PASS
Balloon Payment	Disclosure Not Required	RESPA	PASS

IMPORTANT: If applicable, based on defense to foreclosure action and/or extended rescission rights.

NOTE: The APR is considered accurate if Finance Charge is within allowable tolerances.

FEES PAID BY OR ON BEHALF OF BORROWER

Total of origination, discount, lender, broker and yield spread premium fees.

Amount	Percentage of Loan Amount
$600.00	0.169%

TRUTH IN LENDING: LOAN VARIABLES

This table shows whether the variance, if any, between the lender's actual disclosed values and the correctly calculated Truth in Lending values exceed the amount allowed by law.

	Annual Percentage Rate	Finance Charge	Amount Financed	Total of Payments
Disclosed:	7.047%	$479,282.12	$348,870.97	$828,153.09
Calculated:	7.096%	$481,820.89	$348,914.92	$830,735.81
Variance:	(0.049%)	($2,538.77)	($43.95)	($2,582.72)
RESULT:	**PASS**	**FAIL**	**NA**	**NA**

TRUTH IN LENDING: LOAN FEATURES

This table shows whether any disclosures for certain loan features were provided by the lender as required by law. Note: NA indicates that a specific disclosure was not required but was provided by the lender.

	Demand	Variable Rate	Prepayment	Balloon
Disclosure Required:	NO	NO	NO	NO
Disclosure Provided:	NO	NO	NO	NO
RESULT:	**PASS**	**PASS**	**PASS**	**PASS**

HOEPA (Home Owner and Equity Protection Act)

This table shows whether any disclosures for certain "High-Cost" (Section 32) loans were provided as required by law.

	Rate-Based Test	Points & Fees Test
HOEPA Qualified:	NO	NO
Trigger Threshold:	NA	NA
Calculated:	NA	NA
RESULT:	**NA**	**NA**

RESCISSION PERIOD

This table shows whether the three-day rescission period ending date as listed in the Notice of Right to Cancel disclosure was correctly calculated as required by law.

Disclosed	Correct	Variance	Result
NA	NA	NA	**Not Required**

HUD-1 SETTLEMENT STATEMENT

This table shows the amount, in dollars and percentage of loan amount, of various specific closing costs paid directly by the borrower and/or lender.

	Origination	**Discount**	**Lender**	**Broker**	**Yield Spread Premium (YSP)**
Amount:	$0.00	$0.00	$600.00	$0.00	$0.00
Percent of Loan:	0.000%	0.000%	0.169%	0.000%	0.000%

LOAN PROFILE

This table lists the various features and characteristics that describe the profile of the loan, borrower and property.

Loan Type:	Fixed Rate	Interest Only (mos):	NO
Loan Purpose:	Purchase	Demand Feature:	NO
Loan Note Date:	2/23/2007	Balloon Payment (mos):	NO
Negative Amortization:	NO	Prepayment Penalty (mos):	NO
Loan-to-Value (LTV):	98.74%	Mortgage Insurance:	YES

BORROWER PROFILE

Gross Monthly Income:	$9,777.04	Debt-to-Income (DTI):	44.48%

PROPERTY PROFILE

Property Type:	Primary Residence	Property Value:	$360,000.00

MORTGAGE VARIABLES

This table lists all the variables describing this loan including loan amount, rate, term, initial payment, first payment due date and the factors that determine any possible future changes to the rates and/or payments.

Amount:	$355,453.00	Initial Increase Rate Limit:	NA
Initial Rate:	6.500%	Initial Decrease Rate Limit:	NA
Term (mos):	360	Periodic Increase Limit:	NA
Initial Payment:	$2,246.70	Periodic Decrease Limit:	NA
First Payment Date:	4/1/2007	Lifetime Maximum:	NA
Initial Rate Change Date:	NA	Lifetime Minimum:	NA
Periodic Rate Changes (mos):	NA	Initial Payment Change Date:	NA
Index:	NA	Periodic Payment Changes (mos):	NA
Margin:	NA	Payment Change Cap:	NA
Rounding:	NA	Maximum Loan Balance:	NA

TRUTH IN LENDING PAYMENT SCHEDULE

This table shows the correct Truth in Lending payment schedule, as required by law, that is based on the various loan variables contained in the mortgage note and other related mortgage documents.

Number of Payments	**Payment Amount**	**Date Beginning**
151	$2,391.88	4/1/2007
208	$2,246.70	11/1/2019
1	$2,248.33	3/1/2037

Addendum A

BRIEF DESCRIPTIONS OF REPORT SECTIONS

Summary of Findings:	Various tests and/or disclosures that were evaluated and audit finding, the applicable law and the result of the individual test or disclosure analysis.
Fees Paid by or on Behalf of Borrower:	Dollar amount and percentage, of any origination, discount, lender, broker or yield spread premium fees paid directly by or on behalf of the borrower.
Truth in Lending: Loan Variables:	Variance between the disclosed and correctly calculated amounts for the Annual Percentage Rate, Finance Charge, Amount Financed and Total of Payments.
Truth in Lending: Loan Features:	Required loan disclosures provided by the lender, demand feature, variable rate, prepayment and balloon payment.
HOEPA/Section 32:	Threshold tests for determining HOEPA compliance.
Rescission Period:	Correct calculation of the rescission period.
HUD-1 Settlement Statement:	Detailed breakdown of borrower fees and costs including origination, discount, lender, broker and yield spread premium.
Loan Profile:	Loan features including type and purpose, negative amortization, loan-to-value ratio, interest-only, balloon payment, prepayment penalty and mortgage insurance.
Borrower Profile:	Borrower's gross monthly income and debt-to-income (DTI) ratio.
Property Profile:	Property type and the property value as determined by appraised value and/or sales price.
Mortgage Variables:	Loan amount, rate, term, initial payment, rate and payment change dates and other ARM variables.
Truth in Lending Payment Schedule:	Correct payment schedule based on the loan note.

Addendum B

TRUTH IN LENDING ACT, REG. Z AND HOEPA/SECTION 32

The Truth in Lending Act (TILA), (15 USC 1601 et seq.), was enacted on Mary 29, 1968, as title I of the Consumer Credit Protection Act (Pub. L. 90-321). The TILA, implemented by Regulation Z (12 CFR 226), became effective July 1, 1969. The purpose of this regulation is to promote the informed use of consumer credit by requiring disclosures about its terms and cost. The regulation also gives consumers the right to cancel certain credit transactions that involve a lien on a consumer's principal dwelling, regulates certain credit card practices, and provides a means for fair and timely resolution of credit billing disputes. The regulation does not govern charges for consumer credit. The regulation requires a maximum interest rate to be stated in variable-rate contracts secured by the consumer's dwelling. It also imposes limitations on home-equity plans that are subject to the requirements of §226.5b and mortgages that are subject to the requirements of §226.32. The regulation prohibits certain acts or practices in connection with credit secured by a consumer's principal dwelling. The regulation also regulates certain practices of creditors who extend private education loans as defined in §226.46(b)(5). Following are selected details of certain sections of the act that apply to residential closed-end credit with terms greater than ten years and originated after September 30, 1995.

<u>Accuracy Tolerances §226.18(d) & §226.23(h)</u>
The disclosed Annual Percentage Rate (APR) on a closed-end transaction is accurate for Regular transactions (which include any single advance transaction with equal payment and equal payment periods, or an irregular first payment period and/or a first or later irregular payment), if it is within one-eighth of one percentage point of the APR calculated under Regulation Z (§226.22 (a)(2)), and for Irregular transactions (which include multiple advance transactions and other transaction not considered regular), if it is within one-quarter of one percentage point of the APR calculated under Regulation Z (§226.22(a)(3))

The disclosed Finance Charge is considered accurate if it does not vary from the actual finance charge by more than $100. §226.18(d)(i) and overstatements are not violations. §226.18(d)(1)(ii)

<u>Rescission Rights (Open-End and Closed-End Credit) §226.15 and §226.23</u>
TILA provides that for certain transactions secured by the consumer’s principal dwelling, a consumer has three business days after becoming obligated on the debt to rescind the transaction. The right of rescission allows consumer(s) time to reexamine their credit agreements and cost disclosures and to reconsider whether they want to place their homes at risk by offering it/them as security for the credit. Transactions exempt from the right of rescission include residential mortgage transactions (§226.2(a)(24)) and refinancings or consolidations with the original creditor where no "new money" is advanced.

If a transaction is rescindable, consumers must be given a notice explaining that the creditor has a security interest in the consumer's home, that the consumer may rescind, how the consumer may rescind, the effects of rescission, and the date the rescission period expires.

To rescind a transaction, a consumer must notify the creditor in writing by midnight of the third business day after the latest of three events: consummation of the transaction; delivery of material TILA disclosures, or receipt of the required notice of the right to rescind.

For purposes of rescission, business day means every calendar day except Sundays and the legal public holidays (§226.2(a)(6)). The term material disclosures is defined in §226.23(a)(3) to mean the required disclosures of the APR, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §226.32(c) and (d).

The creditor may not disburse any monies (except into an escrow account) and may not provide services or materials until the three-day rescission period has elapsed and the creditor is reasonably satisfied that the consumer has not rescinded. If the consumer rescinds the transaction, the creditor must refund all amounts paid by the consumer (even amounts disbursed to third parties) and terminate its security interest in the consumer's home.

A consumer may waive the three-day rescission period and receive immediate access to loan proceeds if the consumer has a "bona fide personal financial emergency." The consumer must give the creditor a signed and dated waiver statement that describes the emergency, specifically waives the right, and bears the signatures of all consumers entitled to rescind the transaction. The consumer provides the explanation for the bona fide personal financial emergency, but the creditor decides the sufficiency of the emergency.

If the required rescission notice or material TILA disclosures are not delivered or if they are inaccurate, the consumer's right to rescind may be extended from three days after becoming obligated on a loan to up to three years.

Rescission Rights after the Three Day Rescission Period

The disclosed finance charge is considered accurate as follows: The disclosed finance charge is considered accurate if it does not vary from the actual finance charge by more than one-half of one percent of the credit extended. §226.23(g)(1)(i); The disclosed finance charge is considered accurate if it does not vary from the actual finance charge by more than one percent of the credit extended for the initial and subsequent refinancing or residential mortgage transactions when the new loan is made at a different financial institution. (This excludes high cost mortgage loans subject to §226.32, transactions in which there are new advances, and new consolidations.) §226.32(g)(2)(i)

Rescission Rights in Foreclosures

In a foreclosure defense situation, the allowed variances are as follows: The disclosed finance charge is considered accurate if it does not vary from the actual finance charge by more than $35. §226.23(h)(2)(i); Overstatements of disclosed finance charge are not considered violations. §226.23(h)(2) (ii); the consumer can rescind if a mortgage broker fee is not included as a finance charge.§226.23(h)(1)(i)

Subpart D - Miscellaneous

If a creditor fails to comply with any requirements of the TILA, other than with the advertising provisions of chapter 3, it may be held liable to the consumer for: actual damage and the cost of any legal action together with reasonable attorney's fees in a successful action.

If it violates certain requirements of the TILA, the creditor also may be held liable for either of the following: in an individual action, twice the amount of the finance charge involved, but not less than $100 or more than $1,000. However, in an individual action relating to a closed-end credit transaction secured by real property or a dwelling, twice the amount of the finance charge involved, but not less than $200 or more than $2,000, or, in a class action, such amount as the court may allow. The total amount of recovery, however, cannot be more than $500,000 or one percent of the creditor's net worth, whichever is less.

Civil actions that may be brought against a creditor also may be maintained against any assignee of the creditor if the violation is apparent on the face of the disclosure statement or other documents assigned, except where the assignment was involuntary.

A creditor that fails to comply with TILA's requirements for high-cost mortgage loans may be held liable to the consumer for all finance charges and fees paid to the creditor. Any subsequent assignee is subject to all claims and defenses that the consumer could assert against the creditor, unless the assignee demonstrates that it could not reasonably have determined that the loan was subject to §226.32.

Criminal Liability §112: Anyone who willingly and knowingly fails to comply with any requirement of the TILA will be fined not more than $5,000 or imprisoned not more than one year, or both.

Administrative Actions §108: The TILA authorizes federal regulatory agencies to require financial institutions to make monetary and other adjustments to the consumers' accounts when the true finance charge or APR exceeds the disclosed finance charge or APR by more than a specified accuracy tolerance. That authorization extends to unintentional errors, including isolated violations (e.g., an error that occurred only once or errors, often without a common cause, that occurred infrequently and randomly).

Under certain circumstances, the TILA requires federal regulatory agencies to order financial institutions to reimburse consumers when understatement of the APR or finance charge involves: Patterns or practices of violations (e.g., errors that occurred, often with a common cause, consistently or frequently, reflecting a pattern with a specific type or types of consumer credit); Gross negligence; or Willful noncompliance intended to mislead the person to whom the credit was extended.

Any proceeding that may be brought by a regulatory agency against a creditor may be maintained against any assignee of the creditor if the violation is apparent on the face of the disclosure statement or other documents assigned, except where the assignment was involuntary. (§131)

Certain Closed-End Home Mortgages §226.32 (Section 32 Loans)

The requirements of this section apply to a consumer credit transaction secured by the consumer's principal dwelling, in which either: The APR at consummation will exceed by more than 8 percentage points for first-lien mortgage loans, or by more than 10 percentage points for subordinate-lien mortgage loans, the yield on Treasury securities having comparable periods of maturity to the loan's maturity (as of the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor); or The total points and fees (see definition below) payable by the consumer at or before loan closing will exceed the greater of eight percent of the total loan amount or $583 for the calendar year 2009. (This dollar amount is adjusted annually based on changes in the Consumer Price Index. See staff commentary to 32(a)(1)(ii) for a historical list of dollar amount adjustments.) (§226.32(a)(1)). Source: Portions excerpted from FDIC, Federal Reserve.

Summary of Applicable Laws and Other Information

Sec.3500.6 Special information booklet at time of loan application

(a) Lender to provide special information booklet. Subject to the exceptions set forth in this paragraph, the lender shall provide a copy of the special information booklet to a person from whom the lender receives, or for whom the lender prepares a written application for a federally related mortgage loan. When two or more persons apply together for a loan, the lender is in compliance if the lender provides a copy of the booklet to one of the persons applying.

(1) The lender shall provide the special information booklet by delivering it or placing it in the mail to the applicant not later than three business days (as that term is defined in 3500.2) after the application is received or prepared. However, if the lender denies the borrower's application or credit before the end of the three business day period, then the lender need not provide the booklet to the borrower. If a borrower uses a mortgage broker, the mortgage broker shall distribute the special information booklet and the lender need not do so.

(2) In the case of a federally related mortgage loan involving an open ended credit plan (as defined in 226.2(a)(20) of Regulation Z (12 CFR)) a lender or mortgage broker that provides the borrower with a copy of the brochure entitled "When Your Home is on the Line: What you should know about Home Equity lines of credit", or any successor brochure issued by the Board of Governors of the Federal Reserve System, is deemed to be in compliance with this section.

(3) In the catagories of transactions set forth at the end of this paragraph, the lender or mortgage broker does not have to provide the booklet to the borrower. Under the authority of section 19(a) of RESPA (12 U.S.C. 2617(a)), the secretary may choose to endorse the forms or booklets of other Federal agencies. In such an event, the requirements for delivery by lenders and the availability of the booklet or alternative materials for these transactions will be set forth in a Notice in the Federal Register. This paragraph shall apply to the following transactions:

- (i) Refinancing transactions;
- (ii) Closed end loans as defined in 12 CFR 226.2 (a) (10) of Regulation Z, when the lender takes a subordinate lien;
- (iii) Reverse mortgages; and
- (iv) Any other federally related mortgage loan whose purpose is not the purchase of a 1 to 4 family residence

(b) Revision. The secretary may, from time to time, revise the special information booklet by publishing a notice in the Federal Register.

(c) Reproduction. The special information booklet may be reproduced, in any form, provided that no change is made other than as provided under paragraph (d) of this section. The special information booklet may not be made a part of a larger document for purposes of distribution under RESPA and this section. Any color, size, and quality of paper, type of print, and method of reproduction may be used so long as the booklet is clearly legible.

(d) Permissible changes. (1) No changes to, deletions from, or additions to the special information booklet currently prescribed bhy the Secretary shall be made other than those specified in this paragraph (d) or any others approved in writing by the Secretary. A request of the Secretary for approval of any changes shall be submitted in writing to the address indicated in 3500.3, stating the reasons why the applicant believes such changes, deletions, or additions are necessary.

(2) The cover of the booklet may be in any form and may contain any drawings, pictures, or artwork, provided the words "settlement costs" are used in the title. Names, addresses, and telephone numbers of the lender, or other similar information, may appear on the cover, but not discussion of the matters covered in the booklet shall appear on the cover.

(3) The special information booklet may be translated into languages other than English.

TILA Law

Regulation Z

Regulation Z (12 CFR 226) implements the Truth in Lending Act (TILA) (15 USC 1601 et seq), which was enacted in 1968 as Title I of the Consumer Credit Protection Act. Since its implementation, the regulation has been amended many times to incorporate changes to the TILA or to address changes in the consumer credit marketplace.

In the 1990's, Regulation Z was amended to implement the Home Ownership and Equity Protection Act of 1994, which imposed new disclosure requirements and substantive limitations on certain higher cost closed-end mortgage loans and included new disclosure requirements for reverse mortgage transactions.

The Truth in Lending Act is intended to ensure that credit terms are disclosed in a meaningful way so that consumers can compare credit terms more readily and more knowledgeably.

Determination of the Finance Charge and the APR

(A) The finance charge (226.4) is a measure of the cost of consumer credit represented in dollars and cents. Along with the APR disclosures, the disclosure of the finance charge is central to the uniform credit cost disclosure envisioned by the TILA. One of the more complex tasks under Regulation Z is determining whether a charge associated with an extension of credit must be included in or excluded from the disclosed finance charge. The finance charge initially includes any charge that is, or will be, connected with a specific loan. Charges imposed by third parties are finance charges if the institution requires use of the third party. Charges imposed by settlement or closing agents are finance charges if the institution requiresthe specific service that gave rise to the charge and the charge is not otherwise excluded.

(B) A prepaid finance charge (226.18 (b)) is any finance charge that (1) is paid separately to the financial institution or to a third party, in cash or by check, before or at closing, settlement, or consummation of a transaction or (2) is withheld from the proceeds of the credit at any time. Prepaid finance charges effectively reduce the amount of funds available for the consumer's use, usually before or at the time the transaction is consummated.

(C) For certain transactions consummated on or after September 30, 1995, the finance charge tolerances are as noted below:

   (1) Credit secured by real property or a dwelling, the disclosed finance charge is considered accurate if it does not vary from the actual finance charge by more than $100.00. Also, overstatments are not violations.

   (2) Rescission rights after the three-business-day rescission period, the disclosed finance charge is considered accurate if it does not vary from the actual finance charge by more than one-half of 1 percent of the credit extended.

   (3) Rescission rights in foreclosure, the disclosed finance charge is considered accurate if it does not vary from the actual finance charge by more than $35.00. Also, overstatements are not considered violations and the consumer is entitled to rescind if a mortgage broker fee is not included as a finance charge.

(D) Credit costs may vary depending on the interest rate, the amount of the loan and other charges, the timing and amounts of advances, and the repayment schedule (226.22). The Annual Percentage Rate (APR), which must be disclosed in nearly all consumer credit transactions, is designed to take into account all relevant factors and to provide a uniform measure for comparing the costs of various credit transactions.

(E) The APR is a measure of the total cost of credit, expressed as a nominal yearly rate. It relates the amount and timing of value received by the consumer to the amount and timing of payments made by the consumer. The disclosure of the APR is central to the uniform credit cost disclosure envisioned by the TILA.

(F) The disclosed annual percentage rate (APR) on a closed-end transaction is considered accurate if for regular transactions (including any single-advance transaction with equal payments and equal payment periods or transaction with an irregular first or last payment and/or an irregular first payment period), the APR is within one-eighth of 1 percentage point of the APR calculated under Regulation Z (section 226.23(a)(2)).

(G) If for irregular transactions (including multiple-advance transactions and other transactions not considered regular), the APR is within one-quarter of 1 percentage point of the APR calculated under Regulation Z (section 226.22(a)(3)).

(H) If for mortgage transactions, the APR is within one-eighth of 1 percentage point for regular transactions or one-quarter of 1 percentage point for irregular transactions and the rate results from the disclosed finance charge would be considered accurate under section 226.18(d)(1) or section 226.23(g) or (h) of Regulation Z (section 226.22(a)(4)).

Variable-Rate Loans (226.18(f))

If the terms of the legal obligation allow the financial institution, after consummation of the transaction, to increase the APR, the financial institution must furnish the consumer with certain information on variable rates. Some of the more transaction-specific variable-rate disclosure requirements under section 226.18:

(A) Disclosures for the variable-rate loans must cover the full term of the transaction and must be based on the terms in effec at the time of consummation.

(B) IF the variable-rate transaction includes either a seller buydown that is reflected in a contract or a consumer buydown, the disclosed APR should be a composite rate based on the lower rate for the buydown period and the rate that is the basis for the variable-rate feature for the remainder of the term.

(C) If the initial rate is not determined by the index or formula used to make later interest rate adjustments, as in a discounted APR must reflect a composite rate based on the initial rate for as long as it is applied and, for the remainder of the term, the index or formula at the time of consummation (that is, the fully indexed rate).

(D) If a loan contains a rate or payment cap that would prevent the initial rate, or payment at the time of the adjustment, from changing to the fully indexed rate, the effect of that rate or payment cap needs to be reflected in the disclosure.

(E) The index at consummation need not be used if the contract provides for a delay in implementation of changes in an index value. For example, the contract indicates that future rate changes are based on the index value in effect for some specified period, such as forty-five days before the change date. Instead, the financial institution may use any rate from the date of consummation back to the beginning of the specified period (for example, during the previous forty-five day period).

Special Rules for Certain Home Mortgage Transactions

The requirements of section 226.32 apply to a consumer credit transaction secured by the consumer's principal dwelling in which either:

(A) The APR at consummation will exceed by more than 8 percentage points for first-lien mortgage loans, or by more than 10 percentage points for subordinate-lien mortgage loans, the yield on Treasury securities having periods of maturity comparable to the loan's maturity (as of the 15th day of the month immediately preceeding the month in which the application of the extension of credit is received by the creditor).

(B) The total points and fees payable by the consumer at or before the loan closing will exceed the greater of 8 percent of the total loan amount or a dollar amount that is adjusted annually on the basis of changes in the consumer price index.

The following are exempt from section 226.32:

(A) Residential mortgage transactions (generally purchase money mortgages).

(B) Reverse mortgage transactions subject to section 226.33 of Regulation Z.

(C) Open-end credit plans subject to subpart B of the regulation.

TILA Law

Regulation B

Sec. 202.9 Notifications

(g) Disclosure of Credit Scores by Certain Mortgage Lenders

(1) In general, any person who makes or arranges loans and who uses consumer credit score, as defined in subsection (f), in connection with an application initiated or sought by a consumer for a closed end loan or the establishment of an open end loan for a consumer purpose that is secured b 1 to 4 units of residential real property (hearafter in this subsection referred to as the "lender") shall provide the following to the consumer as soon as reasonably practicable:

(A) Information Required under Subsection (f)

(i) In general, a copy of the information indentified in subsection (f) that was obtained from a consumer reporting agency or was developed and used by the user of the information.

(ii) Notice under subparagraph (D). In addition to the information provided to it by a third party that provided the credit score or scores, a lender is only required to provide the notice contained in subparagraph (D).

(B) Disclosures in Case of Automated Underwriting System

(i) In general, if a person that is subject to this subsection uses an automated underwriting system to underwrite a loan, that person may satisfy the obligation to provide a credit score by disclosing a credit score and associated key factors supplied by a consumer reporting agency.

(ii) Numerical credit score. However, if a numerical credit score is generated by an automated underwriting system used by an enterprise, and that score is disclosed to the person, the score shall be disclosed to the consumer consistent with subparagraph (C).

(iii) Enterprise defined. For purposes of this subparagraph, the term "enterprise" has the same meaning as in paragraph (6) of section 1303 if the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.

(C) Disclosures of credit scores not obtained from a consumer reporting agency.

A person that is subject to the provisions of this subsection and that uses a credit score other than a credit score provided by a consumer reporting agency, may satisfy the obligation to provide a credit score by disclosing a credit score and associated key factors supplied by a consumer reporting agency.

(D) Notice to home loan applicants. A copy of the following notice, which shall include the name, address, and telephone number of each consumer reporting agency providing a credit score that was used:

"Notice To The Home Loan Applicant"

"In connection with your application for a home loan, the lender must disclosed to you the score that a consumer reporting agency distributed to users and the lender used in connection with your home loan, and the key factors affecting your credit scores."

"The credit score is a computer generated summary calculated at the time of the request and based on information that a consumer reporting agency or lender has on file. The scores are based on data about your credit history and payment patterns. Credit scores are important because they are used to assist the lender in determining whether you will obtain a loan. They may also be used to determine what interest rate you may be offered on the mortgage. Credit scores can change over time, depending on your conduct, how your credit history and payment patterns change, and how credit scoring technologies change. Because the score is based on information in your credit history, it is very important that you review the credit-related information that is being furnished to make sure it is accurate. Credit records may vary from one company to another."

"If you have quesitons about your credit score or the credit information that is furnished to you, contact the consumer reporting agency at the address and telephone number provided with this notice, or contact the lender, if the lender developed or generated the credit score."

The consumer reporting agency plays no part in the decision to take any action on the loan application and is unable to provide you with specific reasons for the decision on a loan application.

"If you have quesitons concerning the terms of the loan, contact the lender."

(E) Actions not required under this subsection. This subsection shall not require any person to:

- (i) explain the information provided pursuant to subsection (f);
- (ii) disclose any information other than a credit score or key factors, as defined in subsection (f);
- (iii) disclose any credit score or related information obtained by the user after a loan has closed;
- (iv) provide more than one disclosure per loan transaction;
- (v) or provide the disclosure required by this subsection when another person has made the disclosure to the consumer for that loan transaction.

(F) No Obligation for Content

- (i) In general, the obligation of any person pursuant to this subsection shall be limited soley to providing a copy of the information that was received from the consumer reporting agency.
- (ii) Limit on liability. No person has liability under this subsection for the content of that information or for the omission or any information within the report provided by the consumer reporting agency.

(G) Person defined as excluding enterprise. As used in this subsection, the term "person" does not include an enterprise (as defined in paragraph (6) of section 1303 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992).

(2) Prohibition on Disclosure Clauses Null and Void

- (A) In general, any provision in a contract that prohibits the disclosure of a credit score by a person who makes or arranges loans or a consumer reporting agency is void.
- (B) No liability for disclosure under this subsection, a lender shall not have liability under any contractual provision for disclosure of a credit score pursuant to this subsection.

GLB Law (Gramm, Leach, Bliley Act)

Federal Trade Commission

Bureau of Consumer Protection

Division of Financial Practices

The Gramm-Leach-Bliley Act

Privacy of Consumer Financial Information

IV. Consumers and Customers

A. Consumers

Definition: A "consumer" is an individual who obtains or has obtained a financial product or service from a financial institution that is to be used primarily for personal, family, or household purposes, or that individual's legal representative.

Examples of Consumer Relationships:

* Applying for a loan
* Obtaining a cash from a foreign ATM, even if it ocurrs on a regular basis
* Cashing a check with a check-cashing company
* Arranging for a wire transfer

General Obligations to Consumers

Provide an initial (or "short-form") notice about the availability of the privacy policy if the financial institution shares information outside the permitted exceptions.

Provide an opt-out notice with the initial notice or separately prior to the financial institution sharing non-public personal information about them ot non-affiliated third parties.

Provide an opt-out notice with a "reasonable opportunity" to opt out before disclosing non-public personal information about them ot non-affiliated third parties, such as 30 days from the date the notice is mailed.

If a consumer elects to opt out of all or certain disclosures, a financial institution must honor the opt out direction as soon as is reasonably practicable after the opt out is received.

If you change your privacy practices such that the most recent privacy notice you provided to a consumer is no longer accurate (e.g. you disclose a new category of NPI to a new non-affliated third party outside of specific exceptions and those changes are not adequately described in your prior notice), you must provide new revised and opt out notices.

ALTERNATIVE CAUSES OF ACTION

Even if there may have not been any technical violations found in your loan through the audit process, there may still be a cause of action against the lender. There are a number of areas of law that address the predatory lending and unfair trade practices. The availability of these subsequent causes of action will depend greatly on the specific facts of your case.

Contractual Causes of Action

Breach of Contract

Borrower may claim that the Lender "breached its contractual obligations to Plaintiff, including, without limitation, those obligations created by the Note and Security Agreement and its oral agreement to make a residential mortgage loan as described on the Loan Application."

Breach of Oral Agreement - Campbell v. Machias, 865 F. Supp. 26 (D. Me. 1994).

Borrower may allege that when they applied for a loan, the lender's loan officer made certain statements and representations about the nature and character of the loan. For example she would be required to make a five-percent downpayment and security on the home but no security on her land. Borrowers can claim that, by accepting their loan application, the Lender offered her a loan in compliance with those representations. Borrower further contends that, when they accepted this offer, the parties entered into an oral agreement. Borrower argues that the Lender breached this oral agreement by failing to comply with the representations made but the loan officer.

It should be noted that an oral promise to enter into a home loan agreement, which usually extends over a number of years, would very likely present problems under most state's Statute of Frauds.

Translation of Contracts negotiated in language other than English - CA Civil Code § 1632(b)

CA Civil Code § 1632(b) states that any person engaged in trade or business who negotiates primarily in Spanish, Chinese, Tagalong, Vietnamese, or Korean, orally or in writing, in the course of entering into any of the following, shall deliver to the other party to the contract or agreement and prior to the execution thereof, a translation of the contract or agreement in the language in which the contract or agreement was negotiated, which includes a translation of every term and condition in that contract or agreement

A borrower, who negotiated the loan in a language other than English, must be provided with a copy of the agreement in the language in which you negotiated. This applies to disclosures required by Regulation M, Regulation Z, Truth in Lending Act, or any other disclosures promulgated by the Board of Governors of the Federal Reserve System

If the borrower is not provided a copy of the agreement in the language in which it was negotiated in then Cal. Civ. Code § 1632(k) states upon a failure to comply with the provision of this section, the person aggrieved may rescind the contract or agreement.

Tort Claims

Intentional Infliction of Emotional Distress - FDIC v. S. Prawer & Co., 829 F.Supp. 439, 449 (D.Me.1993)

Borrower may possibly make a claim of negligent and intentional infliction of emotional distress. This is only applicable in instances where the Lender has done something above and beyond the traditional notions of reasonableness. For example, a bank officer refusing to provide information, berating the borrower and calling them names in a loud voice in the middle of the bank office when a large number of people were present and could hear him. Another example of this would be the bank attempting to disrupt the borrower's relationship with their attorney and to intimidate them into halting their investigation by taking extreme actions, including filing false criminal charges against her for stealing the bank's file on the burrower's loan.

To succeed on a claim for intentional infliction of emotional distress a plaintiff must show that:

- The defendant acted intentionally, recklessly or was substantially certain that severe emotional distress would result from its conduct;
- The defendant's conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community;
- The defendant's conduct caused the plaintiff emotional distress; and
- Plaintiff's emotional distress was so severe that no person reasonably could be expected to endure it.

Negligent Infliction of Emotional Distress - Prawer, 829 F.Supp. 451.

The borrower may bring a claim of negligent infliction of emotional. A claim of negligent infliction of emotional distress requires a plaintiff to prove:

- The defendant acted negligently,
- That psychic injury was foreseeable given the nature of the defendant's conduct, and
- The plaintiff suffered severe emotional distress as a result of the defendant's negligence.

Fraud/Misrepresentation

The traditional elements of fraud are frequently more difficult to establish than a deception claim under an Unfair Deceptive Acts and Practices (UDAP) statute. However, in some instances fraud causes of action can be used quite effectively.

People Trust & Saving Bank v. Humphrey, 451 N.E. 2d 1104 (Ind. Ct. App. 1983).

In this case, the consumers went to their own bank for a home construction loan. The bank promised them a "good loan" at a 9.5% rate. That was merely the initial rate. The permanent financing was actually a variable rate loan and included a clause that allowed the bank to demand full payment at their discretion. The court held that "when parties to a contract have prior understanding about the contract terms, and the party responsible for drafting the contract includes contrary terms and then allows the other party to sign it without informing him of the changes, the drafter's conduct is fraudulent." The court in Humphrey dismissed the lender's foreclosure, reformed the contract by deleting the demand and variable rate clauses, and awarded $1000 actual and $40,000 punitive damages.

Greene v. Gibraltar Mortgage Investment Corp, 488 F. Supp. 177 (D.D.C. 1980), 839 F.2d 680 (D.C. Cir. 1980).

This was another misrepresentation case. The court found the failure to disclose an unconscionably high broker fee and the lender's charging of interest on that fee to be a misrepresentation. The lender also falsely represented the loan amount and claimed to offer a market interest rate. Accordingly, the court voided the promissory note and deed of trust and permanently enjoined foreclosure proceedings.

Mahaffe v. Investors National Security, 747 P.2d 890 (Nev. 1987).

This case involved a common home improvement fraud. The borrowers were promised home insulation which would cut fuel consumption in half, the borrower's home would be used for promotional purposes, and the total cost would be $5300. work was begun before the 3 day cooling off period, but never completed; what was done was done improperly. The contractors induced the borrowers to sign a completion certificate despite the incomplete work by threatening them with "skyrocketing interest rates" and "troubles." The assignee tried to foreclose but the Nevada Supreme Court found the contract to be null and void because of the fraudulent inducement and failure of consideration on the contractor's part.

First Charter National Bank v. Ross, 29 Conn. App. 667, 617 A.2d 909 (1992).

Fraud may also be available as a defense when a borrower is tricked by a family member into signing mortgage documents. In this case a wife was allowed to assert fraud as a special defense to foreclosure action when her husband had given her loan documents to sign with the signature page on top, had discouraged her from looking at the documents, and had told her that the documents had nothing to do with their home. The court ruled that the defense of fraud was not barred by the general rule that a person has a duty to read what they sign and that notice of the content of signed documents is imputed. The court said the official rule does not apply when there is fraud and only applies if nothing is said to mislead the person signing. It should be noted, however, that some courts have refused to invalidate a mortgage when the fraud was committed by a party other than the lender and the lender was not involved in or aware of the fraud. Family First Fed. Sav. Bank v. De Vincentis, 284 N.J. Super. 503, 665 A.2d 1119 (1995).

Estoppel

When various and conflicting promises in the loan origination process were made by a lender, a court may find that the effect of some of the promises is to estop the lender from enforcing others. In First State Bank v. Phillips, 13 Ark. App. 157, 681 S.W.2d 408 (1984), the court held that a bank was estopped from enforcing a balloon payment clause in a note and dismissed the foreclosure.

The consumer in Phillips had assumed a mortgage extended by the bank to the person from whom the consumer bought the house. The mortgage indicated it would be fully paid with monthly payments. A separate promissory note provided that after a period of regular monthly payments, the balance of the note would be due in a single lump-sum balloon payment. The mortgage which the consumer saw did not contain the balloon payment. When the consumer talked to bank employees about assuming the mortgage, the balloon payment was not disclosed. In dismissing the foreclosure, the court found that the nondisclosure of the balloon payment forfeited the bank's right to enforce it.

Incompetence

Contracts entered into by persons who are deemed incompetent are generally voidable. Krasner v. Berk, 366 Mass. 464, 319 N.E.2d 897 (1974). This basic principle of contract law may be used to invalidate mortgage contracts made by persons who are too young to form a valid contract, or who suffer from temporary or permanent mental incapacity at the time the mortgage was made. A bankruptcy court in Massachusetts, for example, has allowed a debtor to put on evidence as to whether she was entitled to rescind a note and mortgage based on incompetence. In re Hall, 188 B.R. 476 (Bankr. D. Mass. 1995).

Unconscionability

The common law contract defense of unconscionability may be applied to stop a foreclosure, when either the mortgage terms are unreasonable favorable to the lender or certain aspects of the transaction render it unconscionable. In re Maxwell, 281 B.R. 101 (Bankr. D. Mass. 2002); Hager v. American Gen. Fin. Inc., 37 F.Supp. 2d 778 (1999). For example, a Connecticut court found a second mortgage contract to be unconscionable based on the facts that:

- The defendant had limited knowledge of English, was uneducated and did not read very well
- The defendant's financial situation made it apparent she could not reasonably expect to repay the mortgage
- At the closing, the defendant was not represented by an attorney and was rushed by plaintiff's attorney to sign the loan document
- The defendant was not informed until the last minute that, as a condition of credit, she was required to pay one year's interest in advance
- And there was an absence of meaningful choice on the part of the defendant.

In addition, the court found that the contract was substantively unconscionable, because it contained a large balloon payment that the borrower had no means of paying, and that the borrower had no reasonable opportunity to understand the terms of the contract. Family Fin. Servc. V. Pencer, 677 A.2d 479, (Conn. Ct. App. 1996); Emigrant Mortg., Co., Inc., v. D'Angostino, 896 A.2d 814 (Conn. App. Ct. 2006).

Invalid Security Instruments

If the mortgage (or the deed of trust) is not a legally enforceable instrument then there can be no valid foreclosure. In re Hudson, 642 S.E. 2d 485 (N.C. Ct. App. 2007). A deed or mortgage that is forged is presumptively invalid. Ex Parte Floyd, 796 So. 2d 303 (Ala. 2001). As a result, forgery of a mortgage is generally an absolute defense to foreclosure. Similarly, where a deed has been forged and the new title holder then encumbers the property, courts have held both the deed and the mortgages are null. Flagstar v. Gibbons, 367 Ark. 225 (2006).

The validity of security instruments in some community property states may require both spouses to execute instruments encumbering a homestead. For example, under Wisconsin law, a court found that a mortgage on a married couple's homestead that was not signed by both spouses was void as to both spouses, regardless of their respective ownership interests. In re Larson, 346 B.R. 486 (Bankr. E.D. Wis. 2006).

The failure to follow the formal requisites in acknowledging deeds and mortgages may also result in a void instrument. Many deed and mortgage fraud cases involve situations in which the person whom the notary certified as having appeared did not, in fact, appear. In re Fisher, 320 B.R. 52 (E.D. Pa. 2005). In fraudulent mortgage cases, borrowers are often instructed to sign a stack of documents that are then taken elsewhere for notarization. Goldone Credit Corp. v. Hardy, 503 So. 2d 1227 (Ala. Civ. App. 1987). Alternatively, improper notarization may result from the taking of an actual acknowledgment from an imposter, incompetent person, or over the telephone. Regardless, of the reason for the defective acknowledgment, practitioners should investigate whether such defects may render the instrument invalid.

Breach of Fiduciary Duty - Reid v. Key Bank, 821 F.2d 9, 18 (1st Cir. 1987).

Traditionally, a credit transaction has been considered an arm's length transaction in which there has been no special duty read into the creditor-debtor relationship. Most courts, however, have held that the presence of certain factors in the creditor-debtor relationship may give rise to a fiduciary duty.

Borrower can allege a cause of action for breach of fiduciary duty, if they can prove that they relied upon the lender's superior position and skills and placed their trust and confidence in the lender to act in a fair and reasonable manner for their best interests. For this to be a valid cause of action borrower must also show that they had a confidential relationship with the lender.

The essential element of a confidential relationship is there be actual placing of trust or confidence in fact, by one party in another and a great disparity of position and influence between the parties to the relation. Such a "duty of confidence" arguably can arise if a lender acts in the role of advisor and knows or should have known the borrower tested him. When such a relationship exists it creates a duty to disclose.   A plaintiff bears a heavy burden in establishing such a relation. A creditor-debtor relationship, by itself, does not create a fiduciary duty. Such a relationship may be created, however, by circumstances such as a "diminished emotional or physical capacity or of the letting down of all guards and bars that defines disparity of position in the context of a confidential relation."

If established, the existence of a fiduciary duty gives rise to a duty of fair and honest disclosure of all facts which might be presumed to influence the consumer to act. Barrett v. Bank of Am. 229 Cal. Rptr. 16 (Ct. App. 1986). When there is a duty to disclose, failure to do so should give rise to a tort cause of action for nondisclosure, or the silence may be deemed a misrepresentation. Such claims can be used to invalidate the underlying mortgage transaction or to recover money damages to offset any delinquency.

Duty to Maximize Net Present Value - CA Civil Code § 2923.6

The Legislature has found and declared that any duty servicers may have to maximize net present value under their pooling and servicing agreements, is owed to all parties in a loan pool, not to any particular parties, and that a servicer acts in the best interests of all parties if it agrees to or implements a loan modification or workout plan for which both of the following apply:

- The loan is in payment default or payment default is reasonably foreseeable
- Anticipated recovery under the loan modification or workout plan exceeds the anticipated recovery through foreclosure on a net present value basis

Special Circumstances for Elder Homeowners

Elder homeowners, are particularly vulnerable to, and often targets of, unfair lending practices. Many lived in their homes for decades, have paid down their mortgages, and have accumulated substantial equity in their homes. Elder homeowners may stand to lose their homes as a result of two types of misconduct: reverse mortgage abuse and exploitation by family members.

Reverse Mortgage Abuse

Reverse mortgages are rising debt loans made to elder homeowners which are secured by equity in the home. Repayment of a reverse mortgage loan is generally not required until certain events occur, such as the homeowner's death or sale of the home. Typically reverse mortgage loans are paid out to the homeowner in monthly installments. The amount of the monthly proceeds received by the homeowner is determined by the value of the home, the interest rate and other fees charged, the loan term, the amount of any initial lump sum disbursed to the homeowner, and the homeowner's age.

Reverse mortgages are subject to some additional disclosure requirements under the federal Truth in Lending Act, 15 U.S.C. § 1648; 12 C.F.R. § 226.33, such as payment disclosures which reflect that a single payment is due when one of the specified events occurs. A number of states have also enacted laws designed to protect against abuse in reverse mortgages. These protections include:

- Limits on Liability – limitation of the burrower's or the estate's liability to the lesser of the proceeds of the sale of the home or the amount of the debt, as well as prohibition of prepayment penalties. Mont. Code Ann. § 90-6-506(5); N.C. Gen. Stat. § 53-257(6).
- Disclosure Requirements – Full disclosure of costs, fees, and terms of reverse mortgages is required. Colo. Rev. Stat. § 11-38-109; 205 Ill. Comp. Stat. § 5.
- Protection from Default – Homeowners are protected from being considered in default for temporary absences from the home, such as a temporary stay in a nursing home. 205 Ill. Comp. Stat. § 5; Mont. Code Ann. § 11-38-107(2).
- Minimum Time Requirements Between Loan Maturity and Default – After the loan matures, as a result of either the death of the borrower or the borrower's default of an obligation under the contract, a reasonable time must be allowed for the borrower or the estate to arrange for repayment. N.C. Gen. Stat. § 53-268.
- Required Counseling – Counseling by a third party is a precondition to receipt of a reverse mortgage under many reverse mortgage programs and some state laws. Minn. Stat. § 47.58(8); Mont. Code Ann. § 90-5-503; N.C. Gen. Stat. § 53-270(6).

Exploitation by Family Members

Exploitation by family members can take many forms. For example, an elder parent trying to help younger son make a down payment on a new home, mortgages her home to lend the money to the son, which the son never repays and the mother is not able to pay, forcing a foreclosure. A child convinces elder parent to give the child ownership of the home, the child then mortgages the property to pay their own debts and defaults on the mortgage on the parent's property. An elder parent cosigns a loan for a child with bad credit, pledging their home as collateral. When the child fails to repay the loan, the bank threatens to foreclose on the parent's home.

If the borrower believes that there has been some elder homeowner abuse, they should consider the following questions.

- Does the elder homeowner have a cause of action against the relative for fraud, duress, or undue influence?
    - Is the elder willing to assert the claim
- Did the lender participate in the relative's fraud or did the lender acquiesce in the fraud?
- Did the transaction occur when the elder was incapacitated?
- Was there any forgery involved?

There is a growing trend that statutes provide for increased penalties when the fraud is targeted at elders. Arkansas, California, Florida, Georgia, Illinois, Iowa, Minnesota, Nevada, and Wisconsin already allow for such increased damages. Ark. Code Ann. § 4-

88-101; Cal. Bub. & Prof. Code § 17206; Cal. Civ. Code § 1750; Fla. Stat. § 501.2077; Ga. Code Ann. § 10-1-390; 815 Ill. Comp. Stat. § 505; Iowa Code § 714.16A; Minn. Stat. § 325F.71(b); Nev. Rev. Stat. § 598.0973; Wis. Stat. § 100.264.

Property Flipping

Property flipping scams typically involve speculators who buy dilapidated residential properties at low prices and resell them at huge markups to unsophisticated first –time home buyers. Often these flipping schemes are targeted at low or moderate-income racial minorities. Buyers are often persuaded to enter into purchase agreements only after the seller has promised to make necessary or agreed upon repairs to the property. When the closing date arrives, however, the seller has made few, if any, of the repairs. Once at the closing table, buyers are threatened with the loss of their earnest money deposit and the "opportunity to be a homeowner" if they do not complete the transaction.

The end result if that the buyer has purchased property in questionable condition and is saddled with a debt loan that exceeds the market value of the property. These homeowners will be unable to resell the home in an arms-length transaction because the mortgage indebtedness exceeds the fair market value of the property. Ultimately, the homeowner will loose their homes due to foreclosure sales because the home's condition is much worse than represented, promised repairs are not performed, and the consumer's mortgage payments may be higher than the consumer can afford.

Sellers, appraisers and mortgage brokers frequently conspire to mislead the buyer as to the property's market value, the condition of the property, and the mortgage financing terms. Commonly, fraudulent documents and bogus appraisals are used to secure a loan for the inflated purchase price. Lenders may also actively participate in the flipping scheme, particularly when the loans are insured by the federal government. M&T Mortg. Corp. v. Miller, 323 F. Supp. 2d 405 (E.D.N.Y. 2004). Actual damages in property flipping cases can be significant. Vaughn v. Consumer Home Mortg. 293 F. Supp. 2d 206 (E.D.N.Y. 2003). Generally, if the homebuyer has lost the home in a foreclosure, all monies spent by the homeowner, for moving in and out, for inspections, repairs, and all payments on the mortgage should be recoverable. Hoffman v. Stamper, 843 A.2d 153 (Md. Ct. Spec. App. 2003). If the homebuyer has been able to keep the home, actual damages may include monies spent on repairs, the difference between the appraised value and the actual value, and the excess mortgage payments, calculated based on the difference between the monthly payments assuming the true value of the home and the actual monthly payments using the inflated appraised valuations. Posner v. Davis, 395 N.E. 2d 133 (Ill. App. Ct. 1979). Where recoverable, a claim for emotional distress should also be developed.

Appraiser Liability

While sellers are obvious defendants in property flipping schemes, appraisers, with whom consumers may have has little contact, are essential to the scam. Bird v. Delacruz, 411 F. Supp. 2d 891 (S.D. Ohio 2005). An inflated appraisal is the linchpin of these transactions. United States v. Owens, 301 F.3d 521 (6th Cir. 2002). As a result, advocates should carefully examine the appraisal and investigate the appraiser in these cases. Inflated values are typically achieved by misrepresenting the condition of the property or by comparing sales that are not really comparable. Appraisals in sub-prime transactions may be inflated over 1000% above the actual fair market value in order to create a loan to value ratio of between 60% and 75% to satisfy the underwriting requirements of the lender and secondary market. Federal Housing Administration appraisals typically are inflated by 30% to 50% because FHA-insured loans are made at close to 100% of the appraised value.

There can be little question that the preparation of a falsified appraisal is misrepresentation that will support a fraud claim and falls within the scope of most state UDAP statutes. UDAP claims may be particularly promising since in most states the consumer does not have to show reliance, privity of contracts is unnecessary, and nondisclosure is just as actionable as affirmative deception.

Appraisers may also be liable for fraudulent concealment, civil conspiracy and civil RICO violations, and violations of state licensing laws. Adcock v. Brakegate, Ltd., 164 Ill. 2d 54, 645 N.E.2d 888 (1994).

Lender Liability

While the ultimate holder of the mortgage loan may stand to lose in these property flipping schemes (except to the extent the loan is federally insured), loan originators can stand to make significant profits on these transactions. As a result, lenders may also engage in fraudulent conduct in documenting and underwriting the loan. Consumer Prot. Div. v. Morgan, 874 A. 2d 919 (Md. 2005). Credit applications and down payments also are routinely falsified in both "sub-prime" and FHA-insured transactions. For example, in M&T Mortgage Corporations v. Miller, the plaintiffs alleged that the lender falsified and inflated their income level on the loan application to deceive HUD and FHA into believing that the loan was affordable. In another recent case, a loan officer assisted the seller to evade HUD requirements and then actively participate in defrauding the consumer. Hoffman v. Stamper, 385 Md. 1, 867 A.2d 276 (2005). Even where lenders do not participate in the scheme, lenders have often been indifferent to the incidence of property flipping in their portfolios.

In addition to fraud, conspiracy, UDAP, and civil RICO claims, advocates should investigate potential claims for reverse redlining under federal discrimination laws and claims under the federal False Claims Act in cases where the lender or holder submits an insurance claim.

Liability of Other Parties

In addition to the seller, appraiser and lender, other parties may be liable for their participation in a flipping scheme. For example, building contractors what were hired to perform renovations, but who either did not do the work or misrepresented the extent of the work have been implicated. Polonetsky v. Better Homes Depot, Inc., 97 N.Y. 2d 46 (2001). Consumers have also sufficiently pleaded claims against mortgage brokers, closing attorneys, property inspectors, and title companies.

Anti-Flipping Regulations

In an attempt to curb the increasing number of property flipping schemes, the FHA recently implemented property flipping guidelines. These guidelines seek to hold lenders accountable for the quality of appraisals on properties secured by FHA-insured mortgages. The final rule requires that:

- Only owners of record can sell properties that will be financed using FHA-insured mortgages (the transaction may not involve any sale or assignment of the sales contract);
- Any re-sale of a property may not occur 90 or fewer days from the last sale to be eligible for FHA financing;
- For re-sale of a property may not occur 91-180 days where the new sales price exceeds the previous sales price by 100%, FHA will require additional documentation validating the property's value. 24 C.F.R. § 203.37a.

The 90 day no flip prohibition is waived when the sellers of the property are:

- HUD itself, disposing of property in it's REP portfolio;
- Sales of properties that were acquired by the seller through inheritance;
- Fannie Mae, Freddie Mac or other federally chartered financial institutions are disposing of REP;
- Local or state housing agencies;
- Nonprofit organizations that have previous approvals to purchase HUD REP properties at a discount; and
- Properties located in a presidentially declared disaster area, provided FHA has issued an announcement of eligibility.

In addition to the specific limitation set forth in the regulation, the rules provide flexibility for FHA to examine and require additional evidence for appraised value when properties are resold within 12 months. 24 C.F.R. § 203.37a.

Injunction Restricting Foreclosure of Abusive ARM Subprime Loans

Disclaimer: The law in this section is only controlling precedent in Massachusetts. However, it may be used as persuasive precedent in other jurisdictions. Courts are beginning to hear this and similar arguments in light of the current housing market situation.

The case of Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733 (2008). was recently decided. In this case the court found that a loan was presumptively unfair if it met certain characteristics. The court allowed the borrower to obtain a preliminary injunction against the lender to stop a foreclosure sale once they made a sufficient showing of evidence to prove that all 4 of the characteristics were present in their loan.

The court held that a borrower can obtain a preliminary injunction if the mortgage loan was presumptively unfair. A mortgage loan will be deemed to be presumptively unfair if it contains four characteristics. These four characteristics must be shown through evidence in order for the judge to grant the preliminary injunction.

- Adjustable rates with an introductory period of three years or less;
- A teaser rate at least 3% lower than the fully indexed rate;
- The borrower has a debt to income ratio that would exceed 50% if the debt were measured under the fully indexed rate (and not the teaser rate); and
- The loan to value ratio of the loan is 100% *or* the loan carries a substantial prepayment penalty *or* the loan carries a prepayment penalty that extends beyond the introductory rate period.

If all four of these characteristics are in a loan, the borrower will be able to stop any foreclosure action that the lender attempts to initiate.

The court held that the lender knew or should have known that loans with the four characteristics were doomed to foreclose if housing prices declined. Therefore making these loans likely amounted to an unfair practice prohibited by the state UDAP statute, even without evidence of deception or concealment.

It is not clear how far this argument can be taken and what happens once the foreclosure sale is injoined, but if nothing else, the preliminary injunction can halt a foreclosure sale and allow the borrower a chance for their case to be heard against the lender.

may be required under paragraph (f) of this section, § 226.19, or § 226.20.

(f) *Early disclosures.* If disclosures required by this subpart are given before the date of consummation of a transaction and a subsequent event makes them inaccurate, the creditor shall disclose before consummation:[39]

(1) Any changed term unless the term was based on an estimate in accordance with § 226.17(c)(2) and was labelled an estimate;

(2) All changed terms, if the annual percentage rate at the time of consummation varies from the annual percentage rate disclosed earlier by more than ⅛ of 1 percentage point in a regular transaction, or more than ¼ of 1 percentage point in an irregular transaction, as defined in § 226.22(a).

(g) *Mail or telephone orders—delay in disclosures.* If a creditor receives a purchase order or a request for an extension of credit by mail, telephone, or facsimile machine without face-to-face or direct telephone solicitation, the creditor may delay the disclosures until the due date of the first payment, if the following information for representative amounts or ranges of credit is made available in written form or in electronic form to the consumer or to the public before the actual purchase order or request:

(1) The cash price or the principal loan amount.

(2) The total sale price.

(3) The finance charge.

(4) The annual percentage rate, and if the rate may increase after consummation, the following disclosures:

(i) The circumstances under which the rate may increase.

(ii) Any limitations on the increase.

(iii) The effect of an increase.

(5) The terms of repayment.

(h) *Series of sales—delay in disclosures.* If a credit sale is one of a series made under an agreement providing that subsequent sales may be added to an outstanding balance, the creditor may delay the required disclosures until the due date of the first payment for the current sale, if the following two conditions are met:

(1) The consumer has approved in writing the annual percentage rate or rates, the range of balances to which they apply, and the method of treating any unearned finance charge on an existing balance.

(2) The creditor retains no security interest in any property after the creditor has received payments equal to the cash price and any finance charge attributable to the sale of that property. For purposes of this provision, in the case of items purchased on different dates, the first purchased is deemed the first item paid for; in the case of items purchased on the same date, the lowest priced is deemed the first item paid for.

(i) *Interim student credit extensions.* For each transaction involving an interim credit extension under a student credit program, the creditor need not make the following disclosures: the finance charge under § 226.18(d), the payment schedule under § 226.18(g), the total of payments under § 226.18(h), or the total sale price under § 226.18(j).

[Reg. Z, 46 FR 20892, Apr. 7, 1981, as amended at 52 FR 48670, Dec. 24, 1987; 61 FR 49246, Sept. 19, 1996; 66 FR 17338, Mar. 30, 2001; 67 FR 16982, Apr. 9, 2002; 72 FR 63474, Nov. 9, 2007]

§ 226.18 Content of disclosures.

For each transaction, the creditor shall disclose the following information as applicable:

(a) *Creditor.* The identity of the creditor making the disclosures.

(b) *Amount financed.* The *amount financed,* using that term, and a brief description such as *the amount of credit provided to you or on your behalf.* The amount financed is calculated by:

(1) Determining the principal loan amount or the cash price (subtracting any downpayment);

(2) Adding any other amounts that are financed by the creditor and are not part of the finance charge; and

(3) Subtracting any prepaid finance charge.

(c) *Itemization of amount financed.* (1) A separate written itemization of the amount financed, including:[40]

[39] For certain residential mortgage transactions, § 226.19(a)(2) permits redisclosure no later than consummation or settlement, whichever is later.

[40] Good faith estimates of settlement costs provided for transactions subject to the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*) may be substituted for the disclosures required by paragraph (c) of this section.

(i) The amount of any proceeds distributed directly to the consumer.

(ii) The amount credited to the consumer's account with the creditor.

(iii) Any amounts paid to other persons by the creditor on the consumer's behalf. The creditor shall identify those persons.[41]

(iv) The prepaid finance charge.

(2) The creditor need not comply with paragraph (c)(1) of this section if the creditor provides a statement that the consumer has the right to receive a written itemization of the amount financed, together with a space for the consumer to indicate whether it is desired, and the consumer does not request it.

(d) *Finance charge.* The *finance charge,* using that term, and a brief description such as "the dollar amount the credit will cost you."

(1) *Mortgage loans.* In a transaction secured by real property or a dwelling, the disclosed finance charge and other disclosures affected by the disclosed finance charge (including the amount financed and the annual percentage rate) shall be treated as accurate if the amount disclosed as the finance charge:

(i) Is understated by no more than $100; or

(ii) Is greater than the amount required to be disclosed.

(2) *Other credit.* In any other transaction, the amount disclosed as the finance charge shall be treated as accurate if, in a transaction involving an amount financed of $1,000 or less, it is not more than $5 above or below the amount required to be disclosed; or, in a transaction involving an amount financed of more than $1,000, it is not more than $10 above or below the amount required to be disclosed.

(e) *Annual percentage rate.* The *annual percentage rate,* using that term, and a brief description such as "the cost of your credit as a yearly rate."[42]

(f) *Variable rate.* (1) If the annual percentage rate may increase after consummation in a transaction not secured by the consumer's principal dwelling or in a transaction secured by the consumer's principal dwelling with a term of one year or less, the following disclosures:[43]

(i) The circumstances under which the rate may increase.

(ii) Any limitations on the increase.

(iii) The effect of an increase.

(iv) An example of the payment terms that would result from an increase.

(2) If the annual percentage rate may increase after consummation in a transaction secured by the consumer's principal dwelling with a term greater than one year, the following disclosures:

(i) The fact that the transaction contains a variable-rate feature.

(ii) A statement that variable-rate disclosures have been provided earlier.

(g) *Payment schedule.* The number, amounts, and timing of payments scheduled to repay the obligation.

(1) In a demand obligation with no alternate maturity date, the creditor may comply with this paragraph by disclosing the due dates or payment periods of any scheduled interest payments for the first year.

(2) In a transaction in which a series of payments varies because a finance charge is applied to the unpaid principal balance, the creditor may comply with this paragraph by disclosing the following information:

(i) The dollar amounts of the largest and smallest payments in the series.

(ii) A reference to the variations in the other payments in the series.

(h) *Total of payments.* The *total of payments,* using that term, and a descriptive explanation such as "the amount

[41] The following payees may be described using generic or other general terms and need not be further identified: public officials or government agencies, credit reporting agencies, appraisers, and insurance companies.

[42] For any transaction involving a finance charge of $5 or less on an amount financed of $75 or less, or a finance charge of $7.50 or less on an amount financed of more than $75, the creditor need not disclose the annual percentage rate.

[43] Information provided in accordance with §§226.18(f)(2) and 226.19(b) may be substituted for the disclosures required by paragraph (f)(1) of this section.

you will have paid when you have made all scheduled payments.'' [44]

(i) *Demand feature.* If the obligation has a demand feature, that fact shall be disclosed. When the disclosures are based on an assumed maturity of 1 year as provided in §226.17(c)(5), that fact shall also be disclosed.

(j) *Total sale price.* In a credit sale, the *total sale price,* using that term, and a descriptive explanation (including the amount of any downpayment) such as ''the total price of your purchase on credit, including your downpayment of $____.'' The total sale price is the sum of the cash price, the items described in paragraph (b)(2), and the finance charge disclosed under paragraph (d) of this section.

(k) *Prepayment.* (1) When an obligation includes a finance charge computed from time to time by application of a rate to the unpaid principal balance, a statement indicating whether or not a penalty may be imposed if the obligation is prepaid in full.

(2) When an obligation includes a finance charge other than the finance charge described in paragraph (k)(1) of this section, a statement indicating whether or not the consumer is entitled to a rebate of any finance charge if the obligation is prepaid in full.

(l) *Late payment.* Any dollar or percentage charge that may be imposed before maturity due to a late payment, other than a deferral or extension charge.

(m) *Security interest.* The fact that the creditor has or will acquire a security interest in the property purchased as part of the transaction, or in other property identified by item or type.

(n) *Insurance and debt cancellation.* The items required by §226.4(d) in order to exclude certain insurance premiums and debt cancellation fees from the finance charge.

(o) *Certain security interest charges.* The disclosures required by §226.4(e) in order to exclude from the finance charge certain fees prescribed by law or certain premiums for insurance in lieu of perfecting a security interest.

[44] In any transaction involving a single payment, the creditor need not disclose the total of payments.

(p) *Contract reference.* A statement that the consumer should refer to the appropriate contract document for information about nonpayment, default, the right to accelerate the maturity of the obligation, and prepayment rebates and penalties. At the creditor's option, the statement may also include a reference to the contract for further information about security interests and, in a residential mortgage transaction, about the creditor's policy regarding assumption of the obligation.

(q) *Assumption policy.* In a residential mortgage transaction, a statement whether or not a subsequent purchaser of the dwelling from the consumer may be permitted to assume the remaining obligation on its original terms.

(r) *Required deposit.* If the creditor requires the consumer to maintain a deposit as a condition of the specific transaction, a statement that the annual percentage rate does not reflect the effect of the required deposit.[45]

[46 FR 20892, Apr. 7, 1981; 46 FR 29246, June 1, 1981, as amended at 52 FR 48670, Dec. 24, 1987; 61 FR 49246, Sept. 19, 1996]

§ 226.19 Certain residential mortgage and variable-rate transactions.

(a) *Residential mortgage transactions subject to RESPA*—(1) *Time of disclosures.* In a residential mortgage transaction subject to the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*) the creditor shall make good faith estimates of the disclosures required by §226.18 before consummation, or shall deliver or place them in the mail not later than three business days after the creditor receives the consumer's written application, whichever is earlier.

(2) *Redisclosure required.* If the annual percentage rate at the time of consummation varies from the annual percentage rate disclosed earlier by more than ⅛ of 1 percentage point in a regular transaction or more than ¼ of 1 percentage point in an irregular transaction, as defined in §226.22, the creditor shall disclose all the changed

[45] A required deposit need not include, for example: (1) An escrow account for items such as taxes, insurance or repairs; (2) a deposit that earns not less than 5 percent per year; or (3) payments under a Morris Plan.