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Fighting predatory lending: An exciting new practice area with statutory attorneys' fees

Right now, consumer attorneys are the only hope for those Californians stuck in predatory loans.



MICHELE MAGAR

Nearly 500,000 California homeowners will face foreclosure due to predatory mortgage lending in the subprime mortgage market. Many more Californians will be affected, as entire families are rendered homeless and neighborhoods become devastated by concentrations of foreclosed and abandoned properties.

The California legislature is doing little to stop this disaster, but plaintiffs' attorneys can help. Federal and state laws which offer statutory attorneys' fees enable attorneys to help desperate homeowners restructure abusive loans into sustainable ones, rescind predatory mortgages altogether, and battle foreclosure rescue scams. Homeowners will have to rely on consumer attorneys in small firms because big firms often represent lenders.

The subprime mortgage crisis

Today's subprime mortgage implosion is the product of greed and inadequate regulatory oversight of our nation's mortgage industry, particularly after the growth of the secondary market for mortgage loans. The secondary market allows unscrupulous lenders to offer mortgage products with no down payments and irresistibly low teaser rates that typically last for two or three years. After that, the rates periodically reset at dramatically higher levels, and most contain prepayment penalties to stop borrowers from refinancing into affordable mortgages.

Predatory lenders market these loans to people with weak credit scores and sell the loans to the secondary market within weeks, earning their profits from closing costs and sales to investors. Subprime mortgage lenders have no incentive to make sure borrowers have sufficient income to repay their loans after the artificially low interest rates lapse, because by then the loans will be owned by someone else. The recent boom in America's housing market masked the consequences of predatory mortgage

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lending, because borrowers were able to tap their rising equity to meet their mortgage payments, refinance, or sell their homes.

How plaintiff attorneys can help

Under the federal Truth In Lending Act (15 U.S.C. §§1601 *et seq.*), a homeowner may rescind a non-purchase loan secured by her primary residence (home equity and improvement loans and refi's) for up to three years if her lender did not adequately disclose the terms of the loan, or the right to cancel the loan for three business days after the closing. "Ninety percent of loan documents I see have blank three-day rescission notices or contain other TILA violations," said Dan Mulligan, a San Francisco attorney who specializes in helping homeowners fight abusive loans. "A simple TILA rescission claim demand letter takes about four to six months to resolve, while lawsuits take 9 to 15 months, depending on the court's backlog and how much of a fight the defense mounts."

"Sorting out winnable cases is not hard to do, but lawyers have to work on contingency or rely on statutory attorneys fees because typically clients have no money to pay up front to hire lawyers," said Shirley Hochhausen. Hochhausen teaches a predatory lending clinic at the University of San Francisco School of Law and is co-counseling 36 cases with private practitioners via the Fair Lending Consortium, a Bay area group she organized to develop predatory lending expertise among private attorneys.

Hochhausen works on Wednesdays at the Community Legal Services in East Palo Alto, and refers overflow clients to private attorneys in Santa Clara, San Mateo, San Francisco, Marin and Alameda Counties. Private attorneys can sign up for referrals and find out how to join the Fair Lending Consortium by contacting CLS at (650) 326-6440.

There are a handful of federal and state laws to master, and Mulligan and other practitioners recommend manuals published by the National Center for Consumer Law, available online at http://www.nclc.org/publications/manuals/index.shtml. The center also offers training, co-counsels cases, and its expert attorneys can be hired to consult and review loan documents.

"One way for attorneys to get familiar with this type of practice is to use our services for their first case or two, they can learn a lot in a short time and use it build a new practice area," says John Van Alst, an attorney in NCLC's Washington, D.C. office.

For attorneys who lack the resources to purchase manuals and hire consultants, Van Alst recommends co-counseling with legal aid attorneys. Most legal aid offices own the NCLC manuals, and are always in search of private attorneys to co-counsel cases both to increase the pool of attorneys available to help homeowners and also because federal regulations bar them from seeking attorneys fees. By co-counseling with private attorneys, legal aid lawyers can exert the same pressure to negotiate that private attorneys use: the persuasion of ever-increasing billable hours on statutory fee cases.

"It's a great opportunity for teamwork with legal aid attorneys, and many are offering free continuing legal education training to encourage the private bar to participate," said Van Alst. "If your local legal aid office doesn't do this work, you can find mentors and attorneys to co-counsel through the National Association of Consumer Attorneys." Local NACA attorneys with expertise in predatory mortgage lending can be found via a search engine at the organization's Web site: http://www.naca.net/ find-consumer-protection-attorneys.

In addition to using predatory lending laws, practitioners should also be looking for state and federal fair housing act violations. California's Fair Employment and Housing Act (Gov. Code §§12900 *et seq.*), is the strongest fair housing statute in the nation, and includes an explicit bar on practices which have a disproportionate adverse impact on protected classes. Aggressively targeting predatory loans to people with limited English proficiency, female-headed households, and racial minorities violates FEHA and gives rise to additional claims which also offer statutory attorneys fees.

"I had clients who were strawberry pickers and were sold a $720,000 home. They were told if they made payments for six months, their credit score would rise sufficiently to refinance into a less costly loan," said Mulligan.

William Purdy, a fair lending attorney in Soquel, has no doubt that predatory lenders are targeting people with limited English proficiency. "Why else would I have so many clients with Spanish surnames," he asks. "I've heard of day workers being solicited at Home Depot by people asking, 'Who wants to buy a house?'"

Purdy blames unscrupulous brokers for much of the problem, and says district attorneys prefer to focus on high profile crime and do not prosecute brokers despite the fact that brokers who mail or fax applications with inflated incomes and assets "are committing mail and wire fraud with the intent to deceive the lender into making a loan they would otherwise never make."

Greed and lax regulation make it impossible to police these practices, according to Purdy. "It's like handing out speeding tickets at the Indy 500 – just one transaction in a huge number is caught, and it becomes the cost of doing business.

"This will end only when people at the state and federal level feel it affecting their income, when scheduled salary increases for judges won't be possible because of falling tax revenues from plummeting property values. People who steal have an incredible ability to rationalize. Only when

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you see them with handcuffs on, and it's publicized, only then will it stop."

In the meantime, solo and small firm private attorneys are the only hope for the hundreds of thousands of Californians stuck in predatory loans, most of whom do not qualify for free legal assistance from legal aid providers.

According to Purdy, plaintiff attorneys can win much more than attorneys' fees by helping homeowners save their homes. "It's very gratifying; you can put your client in a place that's better than where they started. They feel vindicated, because their home is the most valuable thing they'll ever own. You can improve the quality of life in your own community by doing this work."


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