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California lawmakers abandon homeowners facing foreclosure

Plaintiffs' attorneys can help desperate homeowners by persuading mortgage servicers to transform predatory loans into sustainable ones.

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As *Plaintiff Magazine* goes to press, our legislature is one week away from adjournment. It is also one week away from failing to do what most other state legislatures have done: enact laws to help prevent families from losing their homes through foreclosure. With nearly 500,000 California families expected to face foreclosure due to predatory lending, our state's mortgage crisis has created the hottest new practice area for plaintiffs' attorneys in California, soon to be the nation's hardest-hit state.

California lawmakers did manage to enact one bill, SB 223, which makes it illegal to influence appraisers to inflate the worth of a home. Nearly all appraisers work as independent contractors. They sometimes find themselves pressured to hit a specific target price so that a mortgage can go through. Failure to hit target prices can mean no repeat business from the lenders who hire them to appraise a property before extending a loan. While helpful, this bill amounts to using a tablespoon to stop a tsunami.

Missed opportunity

California missed an opportunity to help the 40 million people among us who speak a language other than English at home. California law already requires that certain contracts be translated into one of the five most prevalent languages after English, if the negotiation that leads to the contract was primarily conducted in that corresponding language (Civ. Code, § 1632.)

That's only fair: if merchants or homesellers hire bilingual staff to market their goods to customers who do not speak English, those same bilingual employees should be able to write down the basic terms of the purchase or lease in the language they have used to close the deal, before making the customer sign a legally binding contract written in English. That way, people with limited English proficiency who are promised one thing orally, then asked to sign a contract containing completely different terms, have a way to prove they were duped.

Imagine yourself buying property in South Korea, while only understanding English. Would you rely on what you were told in English, and then sign a contract in Korean, knowing you had no way to hold the seller accountable if the two versions did not match?

Maybe you wouldn't, but California lenders want to force people to do exactly that. They opposed AB 512, and lawmakers agreed to water it down repeatedly.

Now all that AB 512 requires is for lenders to fill out a two-page form in one of the five languages contained in Civil Code section 1632. The bill requires the state to create the form and translate it into each language. All that AB 512 requires of lenders and brokers is the 15 minutes of effort it will take to fill in key characteristics such as the length of the loan, the monthly cost, the interest rate, and whether it is fixed or adjustable. The contract itself will still be in

English: all AB 512 creates is a way for homebuyers to discourage fraud by holding lenders accountable for contracts that do not contain the terms they were promised orally.

In fact, the legislative analyst whose job it is to turn legalese into English so that busy lawmakers do not have to waste time doing their own translation, opined that such a document should be provided in English, so all homebuyers would benefit from one summary document that was user-friendly and that explained, in clear and non-technical words, the characteristics of the mortgage they were about to sign.

Too radical for California?

But somehow, lenders and brokers decided this was too radical for California. Better to have an equal opportunity to confuse all homebuyers at a closing with endless documents written in legalese, than to advantage non-English speakers with two pages that clearly explain the contract they are about to sign.

But perhaps most insulting was the industry groups' position that advocates were attempting to fix a problem that did not exist. Amazingly, their words spoke louder than the spate of stories in the San Jose Mercury News, the Los Angeles Times, and the Contra Costa Times, among others, that detailed examples of unscrupulous lenders using language to commit fraud. The bill's opponents persuaded lawmakers to ignore stories about California mortgage applicants who were promised sound, sustainable loans orally in their native tongue, and who were assured at their closing that the mortgage documents they signed in English contained the same terms.

Lenders also complained that AB 512 would create "an uneven playing field," because federally-regulated lenders would not have to follow such an onerous state law burden. State-regulated lenders would be stuck with a two-page form, while their federally-regulated counterparts would remain free to dupe homeowners who do not read English well enough to make sure the contract they are about to sign conforms with what they were promised orally.

Apparently California industry groups who opposed AB 512 were unable to imagine that a two-page form might give them a market advantage. Informed customers are less likely to sign up for loans they cannot afford and so are more likely to avoid foreclosure. Informed customers are also likely to tell their friends and families to use lenders and brokers who are willing to take 15 minutes to fill out a form in a language they can read. Somehow, the same lenders and brokers who saw fit to hire bilingual staff to market their loans to people who do not speak English are appalled at the notion of spending 15 minutes ensuring their customers understand what they are signing.

With just days left in the legislative calendar, lawmakers decided to table AB 512 until next year. Instead, they embraced SB 385, which simply requires state regulators to apply federal guidance, designed to bring some semblance of sanity back into mortgage lending, to state-regulated financial institutions and persons licensed under the California Mortgage Lending Act. However, SB 385 does not ban the most harmful aspects of predatory loans, and does nothing to help current homeowners facing foreclosure.

Other states protect homeowners

While California was busy fending off meaningful solutions to our nation's subprime mortgage implosion, other states were acting to protect their residents from predatory loans by outlawing many of the most outrageous components of abusive mortgages.

In today's mortgage market, lenders make their profits at closing, and by selling mortgages as quickly as possible to Wall Street. They have no financial incentive to make sure an applicant can repay a loan, because by the time teaser rates reset and foreclosure results, someone else will own the debt. Instead, lenders have plenty of financial incentive to make as many loans as possible, regardless of ability to repay, and that's exactly why so many consumers were duped into abusive loans.

Ohio, Minnesota and Maine passed new laws this year that require lenders to condition a loan on an applicant's ability to repay it, taking into account what monthly payments will be *after* the temporary teaser rates expire. That requirement alone, had it been the law of the land, would have saved hundreds of thousands of borrowers from losing their homes.

The same three states also passed common-sense legislation to protect homeowners from equity stripping, by banning refinancing that does not have a "reasonable, net tangible benefit" to the borrower. This provision is designed to stop lenders from targeting seniors, who have worked all their lives to pay down their mortgage. For most senior homeowners, a home serves as an economic

reservoir that can be tapped to weather financial emergencies. Robbing seniors of equity amounts to not only stealing the proverbial savings stored under the mattress, but also taking the mattress along with the four walls that surround it.

Brokers prey on seniors, the unwary

For years now, legal aid attorneys throughout California have reported countless examples of brokers who prey on seniors by befriending them and persuading them to refinance, again and again. The costlier the loan, the bigger the broker fees. Just this week I heard about an 88-year-old woman who had been talked into refinancing 11 times in 12 years. In the most recent transaction, she had cashed out the last $17,000 of equity that remained, while her broker had received $70,000 in fees. Stripped of equity with which to refinance or sell her home, and unable to afford her mortgage once the teaser rates expired, she now faces foreclosure.

Prepayment penalties are another hallmark of abusive loans and appear almost exclusively on subprime loans. Such loans are marketed to people who either have weak credit scores, or are duped into subprime loans by unscrupulous brokers who want the higher broker fees available from subprime mortgages. Predatory lenders use hefty prepayment penalties to lock unwary customers into abusive mortgages for years, making it impossible for them to refinance into non-abusive mortgages. Earlier this year, Minnesota, North Carolina and Maine outlawed prepayment penalties attached to subprime loans. Somehow, the sky did not fall, and lenders continue to make loans in those states.

Today, most mortgages are secured through the use of largely unregulated brokers, who have a financial incentive to place customers in high cost and abusive loans. This year, Maine enacted legislation that requires brokers to disclose every penny they earn before an applicant signs a mortgage. Minnesota gave brokers a fiduciary duty to shop for the best loan for their customers – a duty that enables homebuyers to hold a broker accountable if the broker recommends an abusive mortgage simply to pocket a higher commission.

Ohio and North Carolina went further, specifying that brokers have a duty to find loans that are "reasonably advantageous" to their customers. North Carolina also requires brokers to disclose the cheapest fixed rate loan available from the same lender who is offering an adjustable rate mortgage. That way, consumers can judge for themselves whether the temporary, artificially low teaser rates are a bargain, or an invitation to join the hundreds of thousands of Americans facing foreclosure as soon as their teaser rates reset. Details and citations about the new state laws described in this column can be found at http://www.ncsl.org/programs/banking/predlend_intro.htm.

Anti-discrimination laws unenforced

Unfortunately, lawmakers were not alone in siding with lenders over consumers. Regulators also abandoned California homeowners who were preyed upon by predatory lenders and brokers.

Both California's Fair Employment and Housing Act (Govt. Code §§ 12900 *et seq.*) and the federal Fair Housing (US Code Title 42, §§ 3601 *et seq.*) bar lenders and brokers from targeting people for abusive loans based on their race, gender, and national origin, among other characteristics. Both laws also require state and federal agencies to prosecute those who violate these anti-discrimination statutes.

For example, the federal Department of Justice is required to prosecute what is known as "pattern and practice" cases. Such cases involve concerted efforts to discriminate against entire classes of people based on their race, gender, or other protected status. Congress set aside this role for the Department of Justice, our nation's premier law enforcement agency, because it sought to eliminate exactly the type of abuses that are so prevalent in today's subprime mortgage market. Congress created pattern and practice prosecution to allow the Justice Department to address systemic discrimination that is difficult to reach via lawsuits that focus on individual cases.

Legal aid attorneys and fair housing advocates have complained for years about brokers who target female-headed households, people with limited English proficiency, and people of color: exactly the same populations that many banks refused to lend to in the days when lenders did not sell mortgages to Wall Street. The Department of Justice might have stemmed the nationwide targeting of vulnerable populations by discriminatory lenders with a few well-publicized enforcement actions. But it chose not to, and by so doing violated the very law Congress had charged it to enforce.

California regulators did no better. The California Department of Corporations, which is charged under state law to collect complaints about unscrupulous brokers, has never turned over the names of bad brokers for investigation and, where warranted, prosecution to 1) the Department of Fair Employment and Housing, which is charged with enforcing California's Fair Employment and Housing Act; 2) the Department of Housing and Urban Development, which is charged with enforcing the federal fair housing law; or 3) the federal Department of Justice, which was mandated by Congress to investigate and, where appropriate, prosecute "pattern and practice" cases.

In the face of our government's refusal to protect homeowners, the battle

to hold predatory brokers and lenders legally liable for their acts can only be waged by overworked legal aid attorneys and solo and small firm practitioners. Large firms often represent lenders, and hence cannot help individuals litigate against them.

What homeowners need most are attorneys who can review loan documents for violations of truth-in-lending and anti-discrimination laws. Consumers can use these laws to rescind predatory mortgages and recoup financial losses. Happily, lawmakers of yesteryear had the foresight to realize that people on the brink of foreclosure would likely lack the funds to hire lawyers, and so included attorneys fees and costs in the consumer and civil rights laws that protect homeowners from predatory lenders and brokers.

Opportunities for plaintiffs' attorneys

In northern California, opportunities abound for attorneys to attend free MCLE trainings to learn how to review loan documents and help consumers avoid losing their homes, all while earning a living. To learn about them, contact Shirley Hochhausen, a law professor at USF law school in San Francisco, at 415.982.1510. Ms. Hochhausen will offer her next training in early October, and can help attorneys find clients through her Fair Lending Consortium, which I described in last month's *Public Interest Forum*.

Housing and Economic Rights Advocates, located in Oakland, also helps plaintiffs' attorneys interested in learning about predatory lending law by offering help with litigation, co-counseling, and case referrals. HERA's website is www.heraca.org.

For those who prefer not to litigate, there are other ways to help. Plaintiffs' attorneys can help desperate homeowners save their homes by persuading mortgage servicers to transform predatory loans into sustainable ones. Others can write op-eds to influence lawmakers to vote their conscience instead of their pocketbooks, or simply join other advocates to strengthen their efficacy, lend fresh perspectives, and maximize their chances for success. Readers interested in learning about ways to help that do not involve litigation can contact the California Reinvestment Coalition through their website at www.calreinvest.org.

By educating ourselves, plaintiff's attorneys can join other advocates to create a different future than the one our lawmakers and regulators have abandoned us to face. By helping consumers hold bad lenders and brokers accountable, by insisting that our lawmakers return in January and champion people over campaign contributions, and by demanding that regulators enforce the law and prosecute those who have gone unpunished, we can make a difference.

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