CERTIFIED FORENSIC LOAN AUDITORS, LLC

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Forensic Audit Report

Prepared for:

Law office of Mike Man

Borrower(s): Joe Doe and Jan Doe

Property: 123 Any Street, Any Town IL 60447

SAMPLE AUDIT

October 8, 2010

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10/8/2010

Law of Office of Mike Man
444 N. Avenue
Anytown, IL 60657

Re: Forensic Audit for Mr. and Mrs. Joe Doe
Loan # 1st-7184, 2nd-71845 & Wells Fargo #8967

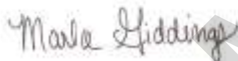
Dear Mike Man:

The loan transaction for the above-referenced borrower/property has been audited[1] for violations of the Truth in Lending Act [15 U.S.C. §1601] ("TILA"), Home Ownership Equity Protection Act [12 C.F.R. 226.32 *et seq.*] ("HOEPA"), the Real Estate Settlement Procedures Act [12 U.S.C. §2601] ("RESPA"), and to the extent applicable, violations of other state and federal laws discussed below.

This report was based exclusively on the documentation provided. It also required that we make reasonable assumptions respecting disclosures and certain loan terms that, if erroneous, may result in material differences between our findings and the loan's actual compliance with applicable regulatory requirements. While we believe that our assumptions provide a reasonable basis for the review 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.

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. We do not, in providing this report, accept or assume responsibility for any other purpose.

Sincerely,



Marla Giddings
Certified Senior Forensic Loan Auditor

CERTIFIED FORSENIC LOAN AUDITORS
13101 West Washington Blvd., Suite 140
Los Angeles CA 90066
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[1] Please note that a complete mortgage servicing audit (i.e., audit for RESPA and/or breach of contract violations for the entire servicing history of the loan) is not included in this audit; QWR recommended before such audit can be accomplished.

INTRODUCTION

Interested Parties:

ORIGINAL MORTGAGE LENDER/TABLE FUNDER:	ESCROW/TITLE:	MORTGAGE NOMINEE/BENEFICIARY:
Draper and Kramer Mortgage Corp. 100 W. 22nd Street, Ste 101 Lombard, IL 60148 2nd-Wells Fargo Servicing Center MAC B6955-01B P.O. Box 31557 Billings, MT 59107	First American Title Insurance Company 27775 Diehl Road Warrenville, Il 60555	MERS Mortgage Electronic Registration Systems, Inc. P.O. Box 2026 Flint, MI 48051
MORTGAGE BROKER:	**MORTGAGE TRUSTEE:**	**SECURITIZATION:**
Green Valley Mortgage, Inc.		Likely. See discussion below.

Documents Provided for Review:

1st	2nd	
X	X	Loan Application (Form 1003)
		Loan Commitment Letter MISSING
		Good Faith Estimate MISSING
X	X	Truth in Lending Disclosure Statement
X		(3-Day) Notice of Right to Cancel (may not find with purchase money loans) ONLY 1 COMPLETED COPY, 4 COPIES ARE REQUIRED
X		HUD-1 (or HUD-1A) Settlement Statement
X		Note (with riders or attachments) MISSING ON THE 2ND
X	X	Deed of Trust
		Underwriting and Transmittal Summary (Form 1008) MISSING
		Appraisal Report MISSING
X		RESPA servicing disclosure MISSING ON THE 2ND
		Hazard Insurance disclosure MISSING
		Credit score disclosure MISSING
		Lender's Closing Instructions MISSING
		Affiliated Business Arrangement Disclosure MISSING
N/A		I/O and/or Neg-Am disclosure
N/A		ARM disclosure

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REPORT SUMMARY

Total Potential TILA Violations (see p. 11): 8

Total Potential HOEPA Violations (see p. 13): 0

Total Potential RESPA Violations (see p. 14): 4

Total Predatory Lending Violations: (see p. 15): 7

CLAIM	CONCLUSION	DETAILS
Underwriting	**FAIL**	See p. 9.
TILA APR Tolerance Test	**FAIL**	See pp. 11-12.
TILA Finance Charge Test	**FAIL**	See pp. 11-12.
TILA Right of Rescission	**FAIL**	See pp. 11-12.
Predatory Indicators	**FAIL**	See p. 15.
Discrimination*	**POSSIBLE**	See discussion at p. 18.
		.
Fraud*	**FAIL**	See discussion at p. 19.
Other State/Common Law Claims*	**POSSIBLE**	See discussion at p. 19.

*(Probability of Violations Ratings: No Evidence or Possible)

Auditor's Summary:

The borrower's refinanced a loan they had for less than 1 year. They paid off the existing mortgage with a new 1st in the amount of $628,000.00 and 2nd in the amount of $67,500.00.

The first loan is a 30 year fixed loan. The interest rate is 7.125% with a monthly payment of $4,230.95 (P&I). The national average for a 30 year fixed rate for the week ending 07/14/2006 was 6.74%. Typically borrowers lock their loans in 30 prior to closing so that is why I went back to the history of that time. The monthly payment is $4,069.02. That is a difference of $161.93 per month and $58,294.80 over the life of the loan.

The second loan has a balloon payment of approximately $64,715.30 just after 5 years! The payment is $498.82. I am unable to determine the actual interest rate, but it is around 8.00%. The amortization for this loan is approximately 30 years. I was unable to come up with the same calculations as the Federal Truth in Lending, but I did get numbers close to it so I was able to make an approximation. This loan is HIGHLY PREDATORY due to the short term! The CLTV(Combined Loan to Value) is 88.60% and if the property depreciates slightly, then borrower's obligation becomes greater than the value. Typically when a balloon payment comes due, the borrower's would refinance again and pay off the balloon payment, but the borrower's could not do this if the property looses value and it

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becomes "underwater". Predatory Lending -Unfair Business Practices – Deceptive Business Acts -are all possible violations of this loan. I am not able to comment more on the 2nd due to the lack of documentation.

A copy of a Notice of Right to Cure Default dated 09/25/2008 from Wells Fargo Servicing Center is in the file. A Notice Required by the Fair Debt Collection Practices Act is also in the file.

Underwriting Standards:

I believe the income used to approve this loan was stated by the borrower. The lender used a stated income product for approval based on the value of the collateral used as the security for the loan. Typically, such credit is underwritten predominantly on the basis of the liquidation value of the collateral, without regard to the borrower's ability to service and repay the loan according to its terms absent resorting to that collateral. When a loan has been made based on the foreclosure value of the collateral, rather than on a determination that the borrower has the capacity to make the scheduled payments under the terms of the loan, based on the borrower's current and expected income, current obligations, employment status, and other relevant financial resources, the lender is effectively counting on its ability to seize the borrower's equity in the collateral to satisfy the obligation and to recover the typically high fees associated with such credit. Not surprisingly, such credits experience foreclosure rates higher than the norm.

Predatory Lending Indicators:

1.) Yield Spread Premium/Broker Premium. The broker received a Broker Premium of $5,024.00 from Draper and Kramer. To earn a Broker Premium the broker will increase the interest rate that the borrower will pay. It takes a borrower about three years to repay the Broker Premium. Once the three year repayment period has ended, the interest rate does not drop. Instead, the borrower continues to pay at the same interest rate and the lender reaps the benefits of the higher payment. Broker Premium significantly affects the borrower's payment and financial situation. Absent the presence of a separate fee agreement regarding Broker Premium and that the borrower agreed to pay such an excessive amount to the broker, and in evaluating the Broker Premium using the HUD 2 part test, it is the contention of the auditor that the broker and the lender have enjoyed the benefits of Unjust Enrichment as well as unearned fees under RESPA. 12 CFR sec. 226.4(a), 226.17, and 18(d) and (c) (1) (iii) Under the EOCA, a borrower is entitled to the same terms of credit issuance that another borrower of equal characteristics is entitled to.

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The lender placed borrower into a loan that had a significantly higher interest rate than what was qualified for. This was a result of paying a Broker Premium to the broker (which benefited the lender).

2.) Equity Stripping. The borrower paid off a loan the borrowers had for less than one year. Each time the borrowers refinance it strips the equity due to the fees and charges. The total closing costs for this loan was $7,588.48.

See Predatory Analysis for more comments.

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SUMMARY OF LOAN TERMS

The **essential loan terms** were found to be as follows:

Type of Loan:	Refinance
Loan Origination Date:	08/10/2006
Amount of Loans:	$628,000.00 / $67,500.00
Originating Lender:	Draper & Kramer Mortgage
Loan Broker:	Green Valley Mortgage Inc.
Current Servicer:	
Current Note Holder:	Likely Securitized
1st Note (ARM) Terms:	
Initial Fixed Rate:	7.125%
Term of Initial Rate:	30 Years
Initial Payment:	$4,230.95
Payment Feature:	30 Year Fixed
Index Measure:	N/A
Index Rate:	N/A
Margin:	N/A
Fully Indexed Rate:	N/A
Min/Max Rate:	N/A
TILA disclosed APR:	7.1990%
Total Closing Costs:	$7,588.48
Total "Points and Fees" %:	1.21%
Prepayment Penalty:	No
Unsecured Debt Paid off by Refinance:	0
Loan Origination Fees:	$2,355.00 (.375%)
Loan Discount Fees:	0
Total Broker Fees:	$8,029.00 (including Broker Premium of $5,024.00)
2nd Note (Fixed) Terms:	
Fixed Rate:	Payment of $498.82
Term of Loan:	5 years
Payment Feature:	Balloon in 5 years
TILA disclosed APR:	8.3317%
Total Closing Costs:	TBD

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FINANCIAL & UNDERWRITING ANALYSIS

Underwriting Standards

The purpose of an underwriter is to determine whether the borrowers can qualify for a loan and if the borrowers have the ability to repay the loan. This determination of the ability to repay a loan is based upon employment and income in large measure, which is proved by getting pay stubs, 1040's, W-2's and a Verification of Employment and Income on the borrowers.

If an underwriter has evaluated the loan properly, then there should be no question of the ability of the borrower to repay the loan. Debt ratios will have been evaluated, credit reviewed and a proper determination of risk made in relation to the loan amount. Approvals and denials would be made based upon a realistic likelihood of repayment.

Automated Underwriting Systems

The underwriter's role in approving loans has been delegated to a support role in the past decade. Automated Underwriting Systems became the normal approval method. An underwriter or even a loan officer would simply input the data and the Automated System would give an approval or denial. Any documents requested would be gathered and then loan documents drawn and signed.

The real issue with the automated systems is that they were not designed to be the "final word" in approval. The system approval was designed to be a guide, a preliminary approval and nothing more. After approval was received, the underwriter would then be expected to extensively review the file, closely examining the documents for final approval.

DISCUSSION: Borrower's financial status at the time of the loan is taken from the loan application. An analysis of borrower's financial status at the time of the loan reveals the following: **The following figures are based on the information from the Loan Application and have not been verified.**

Gross Monthly Income		Mortgage Payment (PITI & including the 2nd)	Other Monthly Debt	Total Monthly Debt	Debt-to-income ratio
$11,627.00		$4,855.41	$752.00	$5,607.41	48.23%
2ND Loan app $11,627.00		$4,872.98	$752.00	$5,624.98	48.38%
Personal tax returns $5078.24		$4,855.41	$752.00	$5,607.41	110.42%

CONCLUSION: **Normal underwriting practices include analysis for a 28/36% debt-to-income ratio. During 2003 to 2006, subprime lending involved higher DTI ratios, from**

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33/38% to 38/50%. Lender's underwriting standard for this loan far exceeded normal underwriting practices for normal and subprime loans. The borrower's provided personal tax returns of 2004 and 2005 for me to calculate the DTI ratios for when they refinanced the loan. Unfortunately, they did not give me copies of the corporate tax returns for 2004 and 2005, so the income I have above may not be correct if the corporation had a profit. Even without the tax returns the borrowers DTI ratio was extremely high. It is the fiduciary duty of the lender/broker not to put the borrowers in HARMS WAY and by approving this loan the lender/broker had put the borrower's in HARMS WAY!

I was unable to review the credit report, income/employment documentation to verify the debt/income ratios. The purpose of an underwriter is to determine whether the borrowers can qualify for a loan and if the borrowers have the ability to repay the loan. This determination of the ability to repay a loan is based upon employment and income in large measure, which is proved by getting pay stubs, 1040's, W-2's and a Verification of Employment and Income on the borrowers. If an underwriter has evaluated the loan properly, then there should be no question of the ability of the borrower to repay the loan. Debt ratios will have been evaluated, credit reviewed and a proper determination of risk made in relation to the loan amount. Approvals and denials would be made based upon a realistic likelihood of repayment.

Risk layering is the concept of borrowers having multiple elements of risk in any one loan. Risk would be greater as the different factors that lenders should be concerned about were found in each loan. The more layers of risk, the greater the likelihood of default. Layers of risk in this loan include….

Risk factors for the loan:

1. **Stated income**
2. **Equity Stripping**
3. **High Debt to income Ratios**
4. **Lack of due diligence in underwriting**
5. **Excess Fees/Charges**
6. **Yield Spread Premium/Broker Premium**
7. **High LTV**
8. **Balloon Payment**
9. **Less than adequate reserves verified**

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TRUTH IN LENDING ACT ANALYSIS

APPLICATION: The TILA applies because the transaction involves the extension of credit to a consumer for personal, family or household purposes that is subject to a finance charge and/or payable by written agreement in more than four installments. 15 U.S.C. §§ 1601-1666j.

Pass	Fail			
	X-Both	Notice of Right to Cancel (2 copies per borrower; filled out completely). 12 C.F.R. § 226.23(b). MISSING 3 COMPETED COPIES		
X-Both		TIL Disclosure Statement provided. 12 C.F.R. §§ 226.17, 226.18.		
X-Both		Payment Schedule correctly identified on TIL. 12 C.F.R. §§ 226.18(g), (h).		
	X-Both	Interest rate consistent and properly disclosed: Loan app-GFE-Commitment-TIL; variable rate. 12 CFR § 226.17-18. MISSING GFE AND COMMITMENT		
	X-Both	Delivered good faith estimates of disclosures (preliminary TILDS) within 3 days of loan application. 12 C.F.R. §§ 226.19(a). NO EVIDENCE IN FILE		
N/A		"Consumer Handbook on Adjustable Rate Mortgages" (CHARM) provided within 3 days of application. [Or equivalent disclosure - see 12 CFR § 226.19(b)].		
N/A		Interest-only payment feature adequately disclosed. 15 U.S.C. §§ 1638, 12 C.F.R. § 226.17-18.		
N/A		Negative-amortization payment feature adequately disclosed. 15 U.S.C. §§ 1638, 12 C.F.R. § 226.17-18.		
X-2nd	X-1st	Itemization of amount financed. 12 C.F.R. § 226.18(c).[RESPA-GFE may be substituted] NO EVIDENCE IN FILE		
	X-Both	Property/Hazard Insurance disclosure provided (choice by consumer). 12 C.F.R. § 226.4(d)(2). NO EVIDENCE IN FILE		
N/A		Prepayment Penalty disclosed. 12 C.F.R. § 226.18(k).		
X-1st	X-2nd	**APR Calculation** UNABLE TO CALCULATE 2ND DUE TO LACK OF DOCUMENTATION See Note 1 below for further discussion.	1ST Lien Result Disclosed: 7.1990% vs. Actual: 7.2430% Difference = .<.044% >	2ND Lien Result Disclosed: $8.3317 vs. Actual: Difference = .<. >
X-1st	X-2nd	**Finance Charge Calculation** UNABLE TO CALCULATE 2ND DUE TO LACK OF DOCUMENTATION See Note 2 below for further discussion.	1ST Lien Result Disclosed: $901,883.31 vs. Actual: $902,491.97 Difference = <$608.66>	2ND Lien Result Disclosed: $27,599.54 vs. Actual: Difference = <$>
	X-Both	All disclosures accurately reflect the legal obligation between the parties; 15 U.S.C. §§ 1638, 12 C.F.R. § 226.17(c).		

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Total Potential TILA Violations: 8

<u>FURTHER RECOMMENDATIONS</u>: None at this time.

<u>POTENTIAL REMEDIES FOR VIOLATIONS</u>: Where a material disclosure was not given or inaccurate (APR, finance charge, amount financed, payment schedule, or total of payments), or consumer was not provided with proper notice of right to cancel, the right of rescission is extended to 3 years. Statutory (up to $2000) and actual damages, as well as attorney's fees, may also be available for the violations noted.

<u>TILA NOTATIONS</u>

Under the Truth in Lending Act ("TILA"), <u>rescission rights arise when</u>: (1) the transaction is a consumer credit transaction; (2) in which a non-purchase lien or security interest is or will be placed; and (3) on the consumer's principal dwelling. In a rescindable transaction, each consumer must be given a copy of the TILA disclosure statement with all "material" information correctly disclosed and notice of a three-day right to rescind. If these material disclosures are not properly provided, <u>the three-day right to rescind is extended until one of the following events occurs</u>: (1) all materials disclosures are correctly given and a new three day notice of cancellation, (2) the expiration of three years after consummation of the transaction; (3) the transfer of all of the consumer's interest in the property; or (4) the sale of the property. All persons entitled to rescind under TILA must receive two copies of the rescission notice rights and one copy of the material disclosures at or before closing. <u>The notice of rescission must provide the following information</u>: (1) the retention or the acquisition of a security interest in the consumer's principal dwelling; (2) the consumer's right to rescind; (3) how to exercise the right to rescind with a form for that purpose, designating the address of the creditor's place of business; (4) the effects of rescission; and (5) the date the rescission period expires.

1. <u>Annual Percentage Rate Tolerances and Right of Rescission</u>

An APR deviation is a material violation permitting the <u>right of rescission</u> **<u>if</u>**: (a) it was a refinance, (b) within 3 years of the transaction, and (c) outside the tolerances set forth below.

12 CFR § 226.22(a)(2) provides: "As a general rule, the annual percentage rate shall be considered accurate **<u>if</u>** it is not more than <u>1/8 of 1 (.125%) percentage point</u> above or below the annual percentage rate determined in accordance with paragraph (a)(1) of this section." Under 12 CFR 226.22(a)(3): "In an irregular transaction, the annual percentage rate shall be considered accurate if it is not more than <u>1/4 of 1 (.25%) percentage point</u> above or below the annual percentage rate determined in accordance with paragraph (a)(1) of this section."

2. <u>Finance Charge Tolerances and Right of Rescission</u>

12 CFR § 226.18(d) requires the disclosure of the finance charge amount. For purposes of "mortgage loans," 12 CFR § 226.18(d)(1) provides: "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." Statutory and actual damages are available for this violation.

A finance charge deviation is a material violation permitting the <u>right of rescission</u> **<u>if</u>**: (a) it was a refinance, (b) within 3 years of the transaction, and (c) outside the tolerances set forth below.

12 CFR § 226.23(g) provides: "Tolerances for accuracy.--(1) <u>One-half of 1 percent tolerance</u>. Except as provided in paragraphs (g)(2) and (h)(2) of this section, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge: (i) is understated by no more than ½ of 1 percent of the face amount of the note or $100, whichever is greater; or (ii) is greater than the amount required to be disclosed. (2) <u>One percent tolerance</u>. In a refinancing of a residential mortgage transaction with a new creditor (other than a transaction covered by § 226.32), if there is no new advance and no consolidation of existing loans, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge: (i) is understated by no more than 1 percent of the face amount of the note or $100, whichever is greater; or (ii) is greater than the amount required to be disclosed."

15 U.S.C. §1635(i) also provides: "<u>Rescission Rights In Foreclosure</u>.--(2) Tolerance For Disclosures.--Notwithstanding section 106(f), and subject to the time period provided in subsection (f), for the purposes of exercising any rescission rights after the initiation of any judicial or non judicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if the amount disclosed as the finance charge does not vary from the actual finance charge by <u>more than $35</u> or is greater than the amount required to be disclosed under this title."

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HOEPA ANALYSIS

APPLICATION: Neither statute like applies as the estimated APR [~xx] would not exceed 8% over the comparable yield on Treasury securities [~10], nor do the "total points and fees" exceed 8% or 6%, respectively, of the loan amount.

Pass	Fail	
N/A		APR disclosed. 12 CFR 226.32(c)(2)
		3 days prior to closing, the APR and disclosure statement similar to the following: "You are not required to complete…" (HOEPA).
		3 days prior to closing, disclosure: "*CONSUMER CAUTION AND HOME OWNERSHIP COUNSELING NOTICE…".*
		disclosed the amount of the borrower's regular monthly payment. 12 CFR 226.32(c)(3).
		If variable, includes a statement that the interest rate and monthly payment may increase and the maximum payment that could be reached. 12 CFR 226.32(c)(4).
		No balloon payments prior to ten years. 12 CFR 226.32(d)(1)(i)-(iii).
		Disclosed amount of any balloon payment. 12 CFR 226.32(c)(3).
		No prepayment penalty after first 5 years, source of funds is not refinance by creditor, and consumers total monthly is no more than 50% of DTI. 12 CFR 226.32(d)(7).
		No increase in the interest rate in the event of default. 12 CFR 226.32(d)(4).
		No negative amortization. 12 CFR 226.32(d)(2).
		No refinance within one year. 12 CFR 226.34.
		No prepaid payments. 12 CFR 226.32(d)(3).
		Engaging in a pattern or practice of extending such credit to a borrower based on the borrower's collateral rather than considering the borrower's current and expected income, current obligations, and employment status to determine whether the borrower is able to make the scheduled payments to repay the obligation, is in violation of Section 129(h) of TILA, 15 U.S.C. § 1639(h), and see also, Regulation Z, 12 C.F.R. § 226.32.
		If refinance transaction, disclosed total amount borrowed and if the loan amount includes premiums or other charges for optional credit insurance or debt cancellation coverage, that fact shall be stated. 12 CFR 226.32 (c)(5).

Total Potential HOEPA Violations: 0

POTENTIAL REMEDIES FOR VIOLATIONS: All TILA remedies, plus all finance charges and fees if "material" violation, pursuant to 15 U.S.C. §1640(a)(4).

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REAL ESTATE SETTLEMENT PROCEDURES ACT ANALYSIS

APPLICATION: The RESPA applies because lender regularly extends federally related mortgage loans aggregating more than $1 million per year, and intended for the purchase of a one- to four-family residential property. 12 U.S.C. §§ 2601-2617.

Pass	Fail	
X-1st	X-2nd	Informed borrower of intention to transfer the servicing of the loan and/or failed to inform the borrower of the actual transfer within fifteen (15) days before the effective date of the transfer. 24 C.F.R. § 3500.21. NO EVIDENCE IN FILE
X-Both		Did not require deposit of funds in escrow in excess of the statutorily permitted amounts. 24 C.F.R. § 3500.17.
N/A		Purchase Money: Provided the Special Information Booklet explaining the settlement costs within three (3) business days after consumer submitted loan application. 24 C.F.R. § 3500.6.
X-Both		No fees charged for preparation of the settlement statement, escrow account statement, and/or the TILA disclosure statement. 24 C.F.R. § 3500.12.
	X-Both	Disclosed all affiliated business arrangements. 24 C.F.R. § 3500.15. NO EVIDENCE IN FILE
X-2nd	X-1st	Did not give, provide or receive a hidden fee or thing of value for the referral of settlement business, including but not limited to, kickbacks, hidden referral fees, and/or yield spread premiums. 24 C.F.R. § 3500.14. BROKER PREMIUM
TBD		Properly and timely paid for property taxes, insurance and other charges for which Defendants are collecting within an escrow impound account; or other servicing violations. 24 C.F.R. § 3500.17.
X-Both		HUD-1 provided at closing (or 1 day before if requested) and accurate. 24 C.F.R. § 3500.8(b).
X-2nd	X-1st	No fees charged in excess of the reasonable value of goods provided and/or services rendered. SEE BELOW
N/A		Purchase Money: Seller did not impose use of particular service provider. 24 C.F.R. § 3500.16.

Total Potential RESPA Violations: 4

FURTHER RECOMMENDATIONS: QWR/discovery re mortgage servicing for potential servicing violations or breach of contract.

POTENTIAL REMEDIES FOR VIOLATIONS: Actual damages, statutory (up to $1000 if show pattern and practice), and treble damages for excessive portion of fees (below), plus attorney's fees and costs for violations noted.

The following are **suspect or excessive closing costs/fees** that may be actionable for treble damages pursuant to 12 U.S.C. §2607**: Brokers Premium $5,024.00, Funding Commitment Fee $649.00, Processing Fee $650.00.**

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PREDATORY LOAN INDICATORS

"Predatory lending" is a general term used to describe unfair, deceptive, or fraudulent practices of lenders during the loan origination process. Predatory lending is often a combination of several factors that can only be evaluated in the context of the overall lending transaction. Typically, no single factor can be relied upon to consider it a predatory loan.

A large number of agencies and consumer organizations recognize predatory lending, including, for example, the Department of Housing and Urban Development, Federal Deposit Insurance Corporation, National Consumer Law Center, California Department of Real Estate, Fannie Mae, National Association of Consumer Advocates, Association of Community Organizations for Reform Now, National Home Equity Mortgage Association, and Center for Responsible Lending.

The predatory lending factors present in the subject transaction were found to be as follows:

Pass	**Fail**	
		Solicitation for refinance.
	X	Mortgage broker and corresponding lender involved. BROKER PREMIUM
TBD		Borrower was a minority and/or the transaction was conducted in a foreign language.
	X	Loan-to-value ratio above 80%. CLTV 88.60%
	X	Debt-to-income ratio above 28/36%. 48.23%, 48.38%, 110.42%
X		Teaser rate involved.
X		Interest rate on 1st was more than 2 points above: 6.08% (2.77 margin) [average US 5/1 ARM rate] or 6.4% [average 30-year fixed]. (*source*: Freddie Mac 1/2003-12/2006)
	X	Excessive Closing Costs/Fees. $1,299.00
N/A		Prepayment Penalty.
N/A		Interest-Only Payments.
N/A		Negative Amortization Payments.
X		Broker Compensation >2% (including yield spread premium).
	X	Loan Flipping – refinance within 3 years of previous loan. PREVIOUS LOAN 2006
	X	Balloon Payments. FOR THE 2ND
X		Unsecured Debt Shifted to Secured (i.e., credit cards).
TBD		Unnecessary insurance and other products offered in closing.
X		Mandatory arbitration clause in Note.
TBD		Bait & Switch – e.g., borrower initially offered lower rate than final Note.
	X	Other unfair, deceptive, or fraudulent practices in transaction.

Total Predatory Indicators: 7

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PREDATORY LOAN ANALYSIS

Predatory Lending

The terms "abusive lending" or "predatory lending" are most frequently defined by reference to a variety of lending practices. Although it is generally necessary to consider the totality of the circumstances to assess whether a loan is predatory, ***a fundamental characteristic of predatory lending is the aggressive marketing of credit to prospective borrowers who simply cannot afford the credit on the terms being offered.***

While such disregard of basic principles of loan underwriting lies at the heart of predatory lending, a variety of other practices may also accompany the marketing of such credit.
Some Predatory Lending practices found in this loan:

Yield Spread Premium/Broker Premium
Does not plainly and prominently disclose on the good faith estimate of closing costs the size of any yield spread premium paid directly or indirectly, in whole or in part, to a mortgage loan officer.

Contractual Interference
By paying the broker a Par Premium or YSP to bring a loan to a lender, and the loan having an interest rate higher than what the borrower could have qualified for, the lender has engaged in a practice of interfering with the Fiduciary Duty of the broker to the borrower.

Excessive Fees and Rates
Requires borrowers to pay interest rates, fees and/or charges not justified by marketplace economics in place at the time the lien was originated.

Loan Flipping & Equity Stripping
Repeated refinancing of borrowers into loans that have no tangible benefit to the borrower. Can be the same lender or different ones. Loans and refinances whereby equity is removed from the home through repeated refinances, consolidation of short term debt into long term debt, negative amortization or interest only loans whereby payments are not reducing principle, high fees and interest rates. Eventually, borrower cannot refinance due to lack of equity.

High Debt Ratios
This is the practice of approving loans with high debt ratios, usually 50% or more, without determining the true ability of the borrower to repay the loan. Can often be seen with Prime borrowers approved through the Automated Underwriting Systems.

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High Loan to Value loans
Loans offered to a borrower having little or no equity in the home. Usually adjustable rate mortgages that the borrower will not be able to refinance out of when the rate adjusts due to lack of equity.

Fraudulently Caused to Execute Loan Documents
Adjustable rate mortgage loan was an inter-temporal transaction on which Plaintiffs had only qualified at the initial teaser fixed rate, and could not qualify for the loan once the interest rate terms changed in two years.

Deception, Fraud, Unconscionable
Is marketed in a way that fails to fully disclose all material terms. Includes any terms or provisions which are unfair, fraudulent or unconscionable. Is marketed in whole or in part on the basis of fraud, exaggeration, misrepresentation or the concealment of a material fact. Includes interest only loans, adjustable rate loans, negative amortization and HOEPA loans.

Stated or No Income/No Assets
Is based on a loan application that is inappropriate for the borrower. For instance, the use of a stated-income loan application from an employed individual who has or can obtain pay stubs, W-2 forms and tax returns.

Lack of Due Diligence in Underwriting
Is underwritten without due diligence by the party originating the loan. No realistic means test for determining the ability to repay the loan. Lack of documentation of income or assets, job verification. Usually with Stated Income or No documentation loans, but can apply to full documentation loans.

Inappropriate Loan Programs
Is materially more expensive in terms of fees, charges and/or interest rates than alternative financing for which the borrower qualifies. Can include prime borrowers who are placed into subprime loans, negative or interest only loans. Loan terms whereby the borrower can never realistically repay the loan.

DISCUSSION: Summary of Underwriting Decision by Auditor

Examiner has reviewed the approval process of this loan. I find that the underwriting process was flawed in that it did not take into consideration the likelihood of inflated income on the loan application. No consideration of the ability of the borrower to repay this loan with a realistic means test has been made. This is especially true when the adjustment of the interest rate is taken into consideration. The borrowers signed a 4506-T Income Tax Disclosure form and an IRS form8821. These forms allows the lender to check the income of the borrowers. Failure to do so was a lack of due diligence on the part of the lender regarding underwriting standards and the ability to repay the loan, suggestive that they knew the income was overstated and if it came back as being overstated, the lender would have to declined the loan. (Other areas of applicability regarding the

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4506-T could be considered breach of the lenders contractual duty to conduct the transaction in good faith and through fair dealing; gross negligence, or breach of fiduciary duty as a licensed professional under their lending license if applicable.)

POTENTIAL ADDITIONAL CLAIMS ANALYSIS

(Probability of Violations Ratings: No Evidence or Possible)

Note: Federal laws may preempt certain state claims.

Equal Credit Opportunity Act (discrimination) – ***No Evidence***

The Equal Credit Opportunity Act provides at Sec. 202.1 – Authority, scope and purpose:

> (b) Purpose. The purpose of this regulation is to promote the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from a public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The regulation prohibits creditor practices that discriminate on the basis of any of these factors. The regulation also requires creditors to notify applicants of action taken on their applications; to report credit history in the names of both spouses on an account; to retain records of credit applications; to collect information about the applicant's race and other personal characteristics in applications for certain dwelling-related loans; and to provide applicants with copies of appraisal reports used in connection with credit transactions.

Additionally, at Sec. 202.4 – General Rule Prohibiting Discrimination:

> 1. Scope of section. The general rule stated in Sec. 202.4 covers all dealings, without exception, between an applicant and a creditor, whether or not addressed by other provisions of the regulation. Other sections of the regulation identify specific practices that the Board has decided are impermissible because they could result in credit discrimination on a basis prohibited by the act. The general rule covers, for example, application procedures, criteria used to evaluate creditworthiness, administration of accounts, and treatment of delinquent or slow accounts. Thus, whether or not specifically prohibited elsewhere in the regulation, a credit practice that treats applicants differently on a prohibited basis violates the law because it violates the general rule. Disparate treatment on a prohibited basis is illegal whether or not it results from a conscious intent to discriminate. Disparate treatment would be found, for example, where a creditor requires a minority applicant to provide greater documentation to obtain a loan than a similarly situated nonminority applicant. Disparate treatment also would be found where a creditor waives or relaxes credit standards for a nonminority applicant but not for a similarly situated minority applicant. Treating applicants differently on a prohibited basis is unlawful if the creditor lacks a legitimate nondiscriminatory reason for its action, or if the asserted reason is found to be a pretext for discrimination.

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DISCUSSION: No direct evidence of discrimination, but the loan terms offered by this lender may be less than favorable on the 2nd: recommend investigation into borrowers credit, income etc.

Fraud – ***Possible***

Liability for actual fraud is limited to acts committed by or with the connivance of a party to a contract with the intent to deceive another party to the contract and induce that party to enter into the contract provides that:

(a) A party to a contract may rescind the contract in the following cases:

(1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance or the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

DISCUSSION: It appears the lender approved the loan based on STATED income and no assets verification. The lender has a fiduciary responsibility to the borrower to perform their due diligence before extending credit. However, the lender did NOT perform their due diligence by confirming the borrower's ability to make his monthly payments over the lifetime of the loan. Recommend investigation into the loan programs presented to the borrower from the beginning of the transaction.

Fraud in the factum

Fraud in the Factum is a type of fraud where misrepresentation causes one to enter a transaction without accurately realizing the risks, duties, or obligations incurred. Black's Law Dictionary (2nd Pocket ed. 2001 pg. 293). This can be when the maker or drawer of a negotiable instrument, such as a promissory note or check, is induced to sign the instrument without a reasonable opportunity to learn of its fraudulent character or essential terms. Determination of whether an act constitutes fraud in the factum depends upon consideration of "all relevant factors." Fraud in the factum usually voids the instrument under state law and is a real defense against even an holder in due course.

Other State/Common Law Claims-See Below ***Possible***

Breach of Contract

Need to evaluate entire mortgage-servicing history for breach of contract – QWR RECOMMENDATION.

Breach of Implied Covenant of Good Faith and Fair Dealing

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The law provides that in every contract, there is an implied duty of good faith and fair dealing between the parties. This implied covenant imposes the requirement "that neither party will do anything, which will injure the right of the other to receive the benefits of the agreement."

Breach of Fiduciary Duty

In certain situations, courts have implicitly recognized imposing fiduciary duties on lenders based on policy grounds. For instance, a lender may be considered a fiduciary when it "takes control" of the borrower, or when "moral, social, personal, or domestic" relationships are shown to exist between the parties. (Cases cited in American Bar Association – Business Tort Litigation (2d Ed.) Further, when the lender undertakes to perform a task on behalf of the borrower, then it is likely that the lender has made itself a fiduciary for the borrower, based on the law of agency.
Often times, when a loan officer or mortgage broker is helping to arrange a loan for a borrower, that loan officer/mortgage broker is, in reality, acting as the agent for both the lender and borrower.

The fiduciary duty of the lender is a responsibility to perform their own diligence to determine if a customer is being placed in a loan that is legal, properly disclosed, is the best loan for the consumer given their financial circumstance and affordable over the life of the loan if present financial positions hold steady. If the lender knew or should have known that the Borrower has a likelihood of defaulting on this loan, he/she has a fiduciary duty to the borrower to not place them in that loan (in harm's way).

When a loan transaction occurs, any missteps in the loan transaction process can lead to dire consequences for the borrower. It is for this reason that the law should impose more liberally a fiduciary relationship between borrower and lender, especially in the residential home loan marketplace where the average borrower is not as sophisticated as the lender. If fiduciary relationships were more liberally imposed, we would likely see lenders implementing more safeguards before underwriting a loan.

If the lender is aware that the borrowers would be better off with another type of loan that the lender offers, they have violated their duty to the consumers and such act of deception would be likely be considered fraud on the consumer and predatory.

►Brokers owe a fiduciary duty to borrowers.

►Liability potential for lender may exist if borrower can prove either that: (1) a "special relationship or circumstance" existed, (2) the lender "directly ordered, authorized or participated in" the broker's tortious conduct, or (3) that broker acted as lender's agent for the transaction.

Unjust Enrichment

Unjust enrichment is a general equitable principle that no person should be allowed to profit at another's expense without making restitution for the reasonable value of any property, services, or other benefits that have been unfairly received and retained. The elements to prove this claim are threefold. First, the plaintiff must have provided the defendant with something of value while expecting compensation in return. Second, the defendant must have acknowledged, accepted, and benefited from whatever the plaintiff provided. Third, the plaintiff must show that it would be inequitable or unconscionable for the defendant to enjoy the benefit of the plaintiff's actions without paying for it.

Unconscionability

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The court has the power to refuse to enforce a contract or a clause in a contract that is unconscionable when made.

The common law contract defense of unconscionability could be applied to stop a foreclosure when either the mortgage terms are unreasonably favorable to the lender or certain aspects of the transaction render it unconscionable.[2]

Civil Conspiracy

A civil conspiracy or collusion is an agreement between two or more parties to deprive a third party of legal rights or deceive a third party to obtain an illegal objective.

If the lender had fully explained all the details of this loan to the borrowers and they had a complete understanding of the loan that was presented to them, it is highly unlikely they would have signed all the loan documents and taken this loan product.

OTHER CLAIMS & RECOMMENDED LEGAL RESEARCH

Note: Federal laws may preempt certain state claims.

Fair Debt Collection Practices Act (Fed. & State)

The FDCPA, 15 U.S.C. § 1692 et seq., a United States statute added in 1978 as Title VIII of the Consumer Credit Protection Act, broadly defines a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." The Act prohibits certain types of "abusive and deceptive" conduct when attempting to collect debts.

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.

[2] *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; and
- 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. *FamilyFin. Servc. V. Pencer*, 677 A.2d 479, (Conn. Ct. App. 1996); and *Emigrant Mortg., Co., Inc., v. D'Angostino*, 896 A.2d 814 (Conn. App. Ct. 2006).

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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 the Business and Professions Code as well as 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"?

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 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.

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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.

<u>Case Law</u>

In *Saxon vs. Hillery*, CA, Dec 2008, Contra Costa County Superior Court, an action by Saxon to foreclose on a property by lawsuit was dismissed due to lack of legal standing. This was because the Note and the Deed of Trust were "owned" by separate entities. The Court ruled that when the Note and Deed of Trust were separated, the enforceability of the Note was negated until rejoined. This can be an effective defense in foreclosure actions.

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.

<u>UCC Provisions</u>

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UCC 3-309. ENFORCEMENT OF LOST, DESTROYED, OR STOLEN INSTRUMENT. 9. ENFORCEMENT OF LOST, DESTROYED, OR STOLEN INSTRUMENT.

(a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument.

§ 3-301. PERSON ENTITLED TO ENFORCE INSTRUMENT.

"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a non-holder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3-309 or 3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

2. HOLDER IN DUE COURSE.

(a) Subject to subsection (c) and Section 3-106(d), "holder in due course" means the holder of an instrument if:

(2) the holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in Section 3-306, and (vi) without notice that any party has a defense or claim in recoupment described in Section 3-305(a).

§ 3-305. DEFENSES AND CLAIMS OF RECOUPMENT.

(a) Except as otherwise provided in this section, the right to enforce the obligation of a party to pay an instrument is subject to the following:

(1) a defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;

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(c) Except as stated in subsection (d), in an action to enforce the obligation of a party to pay the instrument, the obligor may not assert against the person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument (Section 3-306) of another person, but the other person's claim to the instrument may be asserted by the obligor if the other person is joined in the action and personally asserts the claim against the person entitled to enforce the instrument. An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument.

§ 3-305. TRANSFER OF INSTRUMENT: RIGHTS ACQUIRED BY TRANSFER

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

Case Law

Pacific Concrete F.C.U. V. Kauanoe, 62 Haw. 334, 614 P.2d 936 (1980),

GE Capital Hawaii, Inc. v. Yonenaka, 25 P.3d 807, 96 Hawaii 32, (Hawaii App 2001),

Fooks v. Norwich Housing Authority, 28 Conn. L. Rptr. 371, (Conn. Super.2000), and

Town of Brookfield v. Candlewood Shores Estates, Inc. 513 A.2d 1218, 201 Conn.1 (1986).

Solon v. Godbole, 163 Ill. App. 3d 845, 114 Ill. Dec. 890, 516 N. E.2d 1045 (3Dist. 1987).

Staff Mortgage. & Inv. Corp., 550 F.2d 1228 (9th Cir 1977). "Under the Uniform Commercial Code, the only notice sufficient to inform all interested parties that a security interest in instruments has been perfected is actual possession by the secured party, his agent or bailee.

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ARTICLE 3
PREDATORY LENDING DATABASE

(Source: P.A. 94-280, eff. 1-1-06.)

(765 ILCS 77/70)
Sec. 70. Predatory lending database program.
(a) As used in this Article:
"Adjustable rate mortgage" or "ARM" means a closed-end mortgage transaction

that allows adjustments of the loan interest rate during the first 3 years of the loan term.

"Borrower" means a person seeking a mortgage loan.

"Broker" means a "broker" or "loan broker", as defined in subsection (p) of Section 1-4 of the Residential Mortgage License Act of 1987.

"Closing agent" means an individual assigned by a title insurance company or a broker or originator to ensure that the execution of documents related to the closing of a real estate sale or the refinancing of a real estate loan and the disbursement of closing funds are in conformity with the instructions of the entity financing the transaction.

"Counseling" means in-person counseling provided by a counselor employed by a HUD-certified counseling agency to all borrowers, or documented telephone counseling where a hardship would be imposed on one or more borrowers. A hardship shall exist in instances in which the borrower is confined to his or her home due to medical conditions, as verified in writing by a physician, or the borrower resides 50 miles or more from the nearest participating HUD-certified housing counseling agency. In instances of telephone counseling, the borrower must supply all necessary documents to the counselor at least 72 hours prior to the scheduled telephone counseling session.

"Counselor" means a counselor employed by a HUD-certified housing counseling agency.

"Credit score" means a credit risk score as defined by the Fair Isaac Corporation, or its successor, and reported under such names as "BEACON", "EMPIRICA", and "FAIR ISAAC RISK SCORE" by one or more of the following credit reporting agencies or their successors: Equifax, Inc., Experian Information Solutions, Inc., and TransUnion LLC. If the borrower's credit report contains credit scores from 2 reporting agencies, then the broker or loan originator shall report the lower score. If the borrower's credit report contains credit scores from 3 reporting agencies, then the broker or loan originator shall report the middle score.

"Department" means the Department of Financial and Professional Regulation.

"Exempt person" means that term as it is defined in subsections (d)(1) and (d)(1.5) of Section 1-4 of the Residential Mortgage License Act of 1987.

"First-time homebuyer" means a borrower who has not held an ownership interest in residential property.

"HUD-certified counseling" or "counseling" means counseling given to a borrower by a counselor employed by a HUD-certified housing counseling agency.

"Interest only" means a closed-end loan that permits one or more payments of interest without any reduction of the principal balance of the loan, other than the first payment on the loan.

"Lender" means that term as it is defined in subsection (g) of Section 1-4 of the Residential Mortgage License Act of 1987.

"Licensee" means that term as it is defined in subsection (e) of Section 1-4 of the Residential Mortgage License Act of 1987.

"Mortgage loan" means that term as it is defined in subsection (f) of Section 1-4 of the Residential Mortgage License Act of 1987.

"Negative amortization" means an amortization method under which the outstanding balance may increase at any time over the course of the loan because the regular periodic payment does not cover the full amount of interest due.

"Originator" means a "loan originator" as defined in subsection (hh) of Section 1-4 of the Residential Mortgage License Act of 1987, except an exempt person.

"Points and fees" has the meaning ascribed to that term in Section 10 of the High Risk Home Loan Act.

"Prepayment penalty" means a charge imposed by a lender under a mortgage note or rider when the loan is paid before the expiration of the term of the loan.

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"Refinancing" means a loan secured by the borrower's or borrowers' primary residence where the proceeds are not used as purchase money for the residence.

"Title insurance company" means any domestic company organized under the laws of this State for the purpose of conducting the business of guaranteeing or insuring titles to real estate and any title insurance company organized under the laws of another State, the District of Columbia, or a foreign government and authorized to transact the business of guaranteeing or insuring titles to real estate in this State.

(a-5) A predatory lending database program shall be established within Cook County. The program shall be administered in accordance with this Article. The inception date of the program shall be July 1, 2008. A predatory lending database program shall be expanded to include Kane, Peoria, and Will counties. The inception date of the expansion of the program as it applies to Kane, Peoria, and Will counties shall be July 1, 2010. Until the inception date, none of the duties, obligations, contingencies, or consequences of or from the program shall be imposed. The program shall apply to all mortgage applications that are governed by this Article and that are made or taken on or after the inception of the program.

(b) The database created under this program shall be maintained and administered by the Department. The database shall be designed to allow brokers, originators, counselors, title insurance companies, and closing agents to submit information to the database online. The database shall not be designed to allow those entities to retrieve information from the database, except as otherwise provided in this Article. Information submitted by the broker or originator to the Department may be used to populate the online form submitted by a counselor, title insurance company, or closing agent.

(c) Within 10 days after taking a mortgage application, the broker or originator for any mortgage on residential property within the program area must submit to the predatory lending database all of the information required under Section 72 and any other information required by the Department by rule. Within 7 days after receipt of the information, the Department shall compare that information to the housing counseling standards in Section 73 and issue to the borrower and the broker or originator a determination of whether counseling is recommended for the borrower. The borrower may not waive counseling. If at any time after submitting the information required under Section 72 the broker or originator (i) changes the terms of the loan or (ii) issues a new commitment to the borrower, then, within 5 days thereafter, the broker or originator shall re-submit all of the information required under Section 72 and, within 4 days after receipt of the information re-submitted by the broker or originator, the Department shall compare that information to the housing counseling standards in Section 73 and shall issue to the borrower and the broker or originator a new determination of whether re-counseling is recommended for the borrower based on the information re-submitted by the broker or originator. The Department shall require re-counseling if the loan terms have been modified to meet another counseling standard in Section 73, or if the broker has increased the interest rate by more than 200 basis points.

(d) If the Department recommends counseling for the borrower under subsection (c), then the Department shall notify the borrower of all participating HUD-certified counseling agencies located within the State and direct the borrower to interview with a counselor associated with one of those agencies. Within 10 days after receipt of the notice of HUD-certified counseling agencies, the borrower shall select one of those agencies and shall engage in an interview with a counselor associated with that agency. Within 7 days after interviewing the borrower, the counselor must submit to the predatory lending database all of the information required under Section 74 and any other information required by the

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Department by rule. Reasonable and customary costs not to exceed $300 associated with counseling provided under the program shall be paid by the broker or originator. The Department shall annually calculate to the nearest dollar an adjusted rate for inflation. A counselor shall not recommend or suggest that a borrower contact any specific mortgage origination company, financial institution, or entity that deals in mortgage finance to obtain a loan, another quote, or for any other reason related to the specific mortgage transaction; however, a counselor may suggest that the borrower seek an opinion or a quote from another mortgage origination company, financial institution, or entity that deals in mortgage finance. A counselor or housing counseling agency that in good faith provides counseling shall not be liable to a broker or originator or borrower for civil damages, except for willful or wanton misconduct on the part of the counselor in providing the counseling.

(e) The broker or originator and the borrower may not take any legally binding action concerning the loan transaction until the later of the following:
(1) the Department issues a determination not to recommend HUD-certified counseling for the borrower in accordance with subsection (c); or
(2) the Department issues a determination that HUD-certified counseling is recommended for the borrower and the counselor submits all required information to the data base accordance with subsection (d).

(f) Within 10 days after closing, the title insurance company or closing agent must submit to the predatory lending database all of the information required under Section 76 and any other information required by the Department by rule.

(g) The title insurance company or closing agent shall attach to the mortgage a certificate of compliance with the requirements of this Article, as generated by the database. If the title insurance company or closing agent fails to attach the certificate of compliance, then the mortgage is not recordable. In addition, if any lis pendens for a residential mortgage foreclosure is recorded on the property within the program area, a certificate of service must be simultaneously recorded that affirms that a copy of the lis pendens was filed with the Department. If the certificate of service is not recorded, then the lis pendens pertaining to the residential mortgage foreclosure in question is not recordable and is of no force and effect.

(h) All information provided to the predatory lending database under the program is confidential and is not subject to disclosure under the Freedom of Information Act, except as otherwise provided in this Article. Information or documents obtained by employees of the Department in the course of maintaining and administering the predatory lending database are deemed confidential. Employees are prohibited from making disclosure of such confidential information or documents. Any request for production of information from the predatory lending database, whether by subpoena, notice, or any other source, shall be referred to the Department of Financial and Professional Regulation. Any borrower may authorize in writing the release of database information. The Department may use the information in the database without the consent of the borrower: (i) for the purposes of administering and enforcing the program; (ii) to provide relevant information to a counselor providing counseling to a borrower under the program; or (iii) to the appropriate law enforcement agency or the applicable administrative agency if the database information demonstrates criminal, fraudulent, or otherwise illegal activity.

(i) Nothing in this Article is intended to prevent a borrower from making his or her own decision as to whether to proceed with a transaction.

(j) Any person who violates any provision of this Article commits an unlawful practice within the meaning of the Consumer Fraud and Deceptive Business

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Practices Act.

(k) During the existence of the program, the Department shall submit semi-annual reports to the Governor and to the General Assembly by May 1 and November 1 of each year detailing its findings regarding the program. The report shall include, by county, at least the following information for each reporting period:

(1) the number of loans registered with the program;

(2) the number of borrowers receiving counseling;

(3) the number of loans closed;

(4) the number of loans requiring counseling for each of the standards set forth in Section 73;

(5) the number of loans requiring counseling where the mortgage originator changed the loan terms subsequent to counseling;

(6) the number of licensed mortgage brokers and loan originators entering information into the database;

(7) the number of investigations based on information obtained from the database, including the number of licensees fined, the number of licenses suspended, and the number of licenses revoked;

(8) a summary of the types of non-traditional mortgage products being offered; and

(9) a summary of how the Department is actively utilizing the program to combat mortgage fraud.

(Source: P.A. 95-691, eff. 6-1-08; 96-328, eff. 8-11-09; 96-856, eff. 12-31-09.)

(765 ILCS 77/72)

Sec. 72. Originator; required information. As part of the predatory lending database program, the broker or originator must submit all of the following information for inclusion in the predatory lending database for each loan for which the originator takes an application:

(1) The borrower's name, address, social security number or taxpayer identification number, date of birth, and income and expense information contained in the mortgage application.

(2) The address, permanent index number, and a description of the collateral and information about the loan or loans being applied for and the loan terms, including the amount of the loan, the rate and whether the rate is fixed or adjustable, amortization or loan period terms, and any other material terms.

(3) The borrower's credit score at the time of application.

(4) Information about the originator and the company the originator works for, including the originator's license number and address, fees being charged, whether the fees are being charged as points up front, the yield spread premium payable outside closing, and other charges made or remuneration required by the broker or originator or its affiliates or the broker's or originator's employer or its affiliates for the mortgage loans.

(5) Information about affiliated or third party service providers, including the names and addresses of appraisers, title insurance companies, closing agents, attorneys, and realtors who are involved with the transaction and the broker or originator and any moneys received from the broker or originator in connection with the transaction.

(6) All information indicated on the Good Faith Estimate and Truth in Lending statement disclosures given to the borrower by the broker or originator.

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(7) Annual real estate taxes for the property, together with any assessments payable in connection with the property to be secured by the collateral and the proposed monthly principal and interest charge of all loans to be taken by the borrower and secured by the property of the borrower.

(8) Information concerning how the broker or originator obtained the client and the name of its referral source, if any.

(9) Information concerning the notices provided by the broker or originator to the borrower as required by law and the date those notices were given.

(10) Information concerning whether a sale and leaseback is contemplated and the names of the lessor and lessee, seller, and purchaser.

(11) Any and all financing by the borrower for the subject property within 12 months prior to the date of application.

(12) Loan information, including interest rate, term, purchase price, down Payment , and closing costs.

(13) Whether the buyer is a first-time homebuyer or refinancing a primary residence.

(14) Whether the loan permits interest only payments.

(15) Whether the loan may result in negative amortization.

(16) Whether the total points and fees payable by the borrowers at or before closing will exceed 5%.

(17) Whether the loan includes a prepayment penalty,

and, if so, the terms of the penalty.

(18) Whether the loan is an ARM.

(Source: P.A. 94-280, eff. 1-1-06; 95-691, eff. 6-1-08.)

(765 ILCS 77/73)

Sec. 73. Standards for counseling. A borrower or borrowers subject to this Article shall be recommended for counseling if, after reviewing the information in the predatory lending database submitted under Section 72, the Department finds the borrower or borrowers are all first-time homebuyers or refinancing a primary residence and the loan is a mortgage that includes one or more of the following:

(1) the loan permits interest only payments;

(2) the loan may result in negative amortization;

(3) the total points and fees payable by the borrower at or before closing will exceed 5%;

(4) the loan includes a prepayment penalty; or

(5) the loan is an ARM.

(Source: P.A. 95-691, eff. 6-1-08.)

(765 ILCS 77/74)

Sec. 74. Counselor; required information. As part of the predatory lending database program, a counselor must submit all of the following information for inclusion in the predatory lending database:

(1) The information called for in items (1), (6), (9), (11), (12), (13), (14), (15), (16), (17), and (18) of Section 72.

(2) Any information from the borrower that confirms or contradicts the information called for under item (1) of this Section.

(3) The name of the counselor and address of the HUD-certifed housing counseling agency that employs the counselor.

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(4) Information pertaining to the borrower's monthly expenses that assists the counselor in determining whether the borrower can afford the loans or loans for which the borrower is applying.

(5) A list of the disclosures furnished to the borrower, as seen and reviewed by the counselor, and a comparison of that list to all disclosures required by law.

(6) Whether the borrower provided tax returns to the broker or originator or to the counselor, and, if so, who prepared the tax returns.

(7) A statement of the recommendations of the counselor that indicates the counselor's response to each of the following statements:

(A) The loan should not be approved due to indicia of fraud.

(B) The loan should be approved; no material problems noted.

(C) The borrower cannot afford the loan.

(D) The borrower does not understand the transaction.

(E) The borrower does not understand the costs associated with the transaction.

(F) The borrower's monthly income and expenses have been reviewed and disclosed.

(G) The rate of the loan is above market rate.

(H) The borrower should seek a competitive bid from another broker or originator.

(I) There are discrepancies between the borrower's verbal understanding and the originator's completed form.

(J) The borrower is precipitously close to not being able to afford the loan.

(K) The borrower understands the true cost of debt consolidation and the need for credit card discipline.

(L) The information that the borrower provided the originator has been amended by the originator.

(Source: P.A. 94-280, eff. 1-1-06; 95-691, eff. 6-1-08.)

(765 ILCS 77/76)

Sec. 76. Title insurance company or closing agent; required information. As part of the predatory lending database pilot program, a title insurance company or closing agent must submit all of the following information for inclusion in the predatory lending database:

(1) The borrower's name, address, social security number or taxpayer identification number, date of birth, and income and expense information contained in the mortgage application.

(2) The address, permanent index number, and a description of the collateral and information about the loan or loans being applied for and the loan terms, including the amount of the loan, the rate and whether the rate is fixed or adjustable, amortization or loan period terms, and any other material terms.

(3) Annual real estate taxes for the property, together with any assessments payable in connection with the property to be secured by the collateral and the proposed monthly principal and interest charge of all loans to be taken by the borrower and secured by the property of the borrower as well as any required escrows and the amounts paid monthly for those escrows.

(4) All itemizations and descriptions set forth in the RESPA settlement statement including items to be disbursed, payable outside closing "POC" items noted on the statement, and a list of payees and the amounts of their checks.

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(5) The name and license number of the title insurance company or closing agent together with the name of the agent actually conducting the closing.

(6) The names and addresses of all originators, brokers, appraisers, sales persons, attorneys, and surveyors that are present at the closing.

(7) The date of closing, a detailed list of all notices provided to the borrower at closing and the date of those notices, and all information indicated on the Truth in Lending statement and Good Faith Estimate disclosures.

(Source: P.A. 94-280, eff. 1-1-06.)

(765 ILCS 77/78)

Sec. 78. Exemption. Borrowers applying for reverse mortgage financing of residential real estate including under programs regulated by the Federal Housing Authority (FHA) that require HUD-certified counseling are exempt from the program and may submit a HUD counseling certificate to comply with the program.

(Source: P.A. 95-691, eff. 6-1-08.)

(765 ILCS 77/80)

Sec. 80. Predatory Lending Database Program Fund. The Predatory Lending Database Program Fund is created as a special fund in the State treasury. Subject to appropriation, moneys in the Fund shall be appropriated to the Illinois Housing Development Authority for the purpose of making grants for HUD-certified counseling agencies participating in the Predatory Lending Database Program to assist with implementation and development of the Predatory Lending Database Program.

(Source: P.A. 95-707, eff. 1-11-08.)

(765 ILCS 77/Art. 4 heading)

ARTICLE 4
EFFECTIVE DATE

(Source: P.A. 94-280, eff. 1-1-06.)

(765 ILCS 77/99)

Sec. 99. This Act takes effect on October 1, 1994.

(Source: P.A. 88-111.)

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