

DEFENSES TO A MORTGAGE FORECLOSURE ACTION

The facts in each case will be different, so all I can do is point out legal issues for possible development.

The purpose of identifying legal issues for any specific subprime rate mortgagor (usually a family buying its first home) or other mortgage foreclosure defendant is to help the defendant and family decide what they can do, and when they can take such action.

Here are some important defensive issues to explore:

1. I would want to look at, as an attorney for a subprime-rate mortgagor (borrower) is all of the advertising and other information provided to you before you signed the mortgage papers. I would look for deceptive or fraudulent or untrue statements upon which the borrower relied.

2. I would also look to see if there are any guarantees or promises that were made which have not been fulfilled by the lender. It is important to consider any non-written statements made to the borrower by the lender or its agent prior to the signing of the mortgage papers (and receipt of the loan proceeds).

3. A defense of intentionally causing the borrower to be unable to fulfill the requirements of the loan, so that the lender (or its assignees) can take back the property and still go after the borrower for a huge percentage of the value of the property, which can be called a "kicker", a hidden asset for the lender which kicks in down the line, for the benefit of the lender and extreme detriment to the borrower. But there is seldom any disclosure about this kicker.

4. Lender's liability for making a loan to the borrower which the lender knew the borrower had no capacity to repay.

5. Review the federal and state statutes listed above, to see if any violations have taken place.

6. Selling the loan to "vultures" without any disclosure to the borrower that this was the intention of the originating lender. Who the "vultures" are needs to be based on various legal doctrines designed to protect borrowers from unlawful activity of the lenders.

7. Are there any technical requirements that the Plaintiff has not met, which should result in dismissal of the action? The first of these technical requirements is whether service of the summons and complaint, and/or the Notice of Lis Pendens, was served upon you properly. All too often service is not done properly.

8. If the property has been sold, was it sold after appropriate advertising or was the sale price reduced by a failure to advertise the sale properly?

9. Consider the legal doctrine and defense of "unjust enrichment".

10. Consider the legal doctrine and defense of "breach of the implied covenant of good faith and fair dealing".

11. Consider the legal doctrine and defense of "tortious destruction of the borrower's business" (if this is a business loan).

12. Look at the state laws relating to deceptive and fraudulent advertising, such as New York General Business Law Sections 349 (deceptive acts and practices) and 350 (false advertising; bait and switch advertising).

13. [California foreclosures:] Look at California laws: (i) California Unfair Practices Act, §§ 17000, et seq. [§ 17045] of the Business and Professions Code – Secret Rebates Injuring Competition]; (ii) California Consumer Legal Remedies Act, §§ 1770(a);

14. Don't forget to look at the various banking laws, state and federal, to see any other possible bases for liability, including any new legislation attempting to deal with the millions of new foreclosures that are going to be commenced starting in 2008.