

CONSUMER LENDING

The Need for Separate Borrower's Counsel



The media is full of news about the so-called mortgage/foreclosure crisis. Arguments have already been made that some of the borrowers did not understand the terms of the promissory note, mortgage and other documents, including truth-in-lender disclosures. Congress is being asked to implement a moratorium against foreclosures. I do not think it will be too long before actions begin being brought against the lenders and their legal counsel.

Normally, there is one attorney at a closing. That attorney usually represents the lender. The borrowers are not represented. At best, the attorney has split loyalties. There is an inherent conflict between representing the lender and the borrowers. It is uncertain that even a signed waiver from the borrowers would be sufficient to overcome this conflict. In order for a waiver to be effective, it must be with full consent. This means that prior to closing the borrowers would need to be made to understand the conflict and the ramifications of that conflict.

Many times borrowers are relying on mortgage brokers or real estate agents. Neither of these are usually attorneys and normally do not exclusively represent the borrowers. Neither can they legally provide legal advice.

Another problem relates to the fact that normally the loan documents are not even available until just before closing. Frequently, the closing attorney doesn't even have a chance to review the documents thoroughly prior to the closing. It is nearly impossible to explain documents and their implications when the documents are not even available until just before they are supposed to be signed. To make matters even worse, there is an expectation that the closing will only take about an hour, and the fees allowed to the closing attorney are based on that assumption. Therefore, there

is little time to explain anything. It becomes simply "sign here." Our experience shows us that often attorneys representing the lender have closings scheduled closely together in order to generate sufficient revenue by volume, because the legal fees are usually set quite low. It becomes impossible to properly explain everything at the closing.

With this atmosphere, it is quite likely that advocates for borrowers who are now in default and risking foreclosure will begin pointing to these matters as "abuses" and begin to redress the faults of the industry. Courts will be asked to provide equitable relief or stop a foreclosure as a matter of public policy. It is likely a lender will need to prove the borrower had a fair and reasonable opportunity to understand the transaction.

How can these issues be avoided in the future?

First, borrowers should be strongly recommended to have their own legal counsel.

Second, if the borrowers do not choose to have their own attorney, then they should meet with the closing attorney prior to the day of closing to fully discuss the terms of the loan and the risks of not having separate representation. Of course, this also means that commitment letters be available well in advance of closing.

Third, the draft loan documents need to be available well before closing so that legal counsel (whether closing counsel or an attorney representing the borrowers) can review the documents in advance with the borrowers in a less stressful situation with fewer time constraints than the day of closing.

The combination of these actions will better enable a lender to defend itself against claims that the borrowers were taken advantage of or that they did not really understand the terms of the loan. It may increase the cost of the financing for borrowers; but in the long run, there should be fewer foreclosures and litigation relating to borrowing and defaults.

Of course, the purchase and sale agreement financing contingencies also need to be altered to reflect the needs of buyers/borrowers, or the commitments to prove financing need to be delayed until the borrowers have been fully informed of the terms of the lending.

By, Dante J. Giammarco, Esq.

New circumstances require a new way of thinking and acting. These comments are designed to stimulate thought and considerations of the new realities. We at Visconti & Boren Ltd. endeavor to be proactive and innovative in problem solving.

We encourage you to discuss these matters with your legal counsel to determine the applicability of these thoughts to your business.

Dante J. Giammarco is a senior partner with the firm and practices in all areas of business, corporate and commercial law, including commercial transactions, business succession planning, land use, intellectual property and environmental law.



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