

Winning Against Foreclosure

**Lenders are using foreclosures to steal us blind.
Uncover their game plan and learn how to win!**

BY

RICHARD MERRILL KAHN

<http://www.WinningAgainstForeclosure.com>



Forensic Professionals Group USA, Inc.

<http://www.FPG-USA.com>

**“Mortgage Analysis as part of a Credible Defense Against Foreclosure”
Serving all 50 States**

Winning Against Foreclosure

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EXPERIENCE

1973 through 1977: Richard Kahn began his professional career on Wall Street for Merrill Lynch. There he was involved with one of C.E.O. Donald Regan's projects, appointed in the capacity of National Real Estate Tax Shelter Product Manager of Merrill Lynch. (This is the same Mr. Regan who went on in 1981 to become the 66th United States Treasury Secretary in President Ronald Reagan's Administration.) While at Merrill Lynch, Mr. Kahn analyzed, structured and handled billions of dollars in mortgage backed securities and syndicated real estate investments across Merrill's base of six thousand account executives.

1978 through 1994: Mr. Kahn was C.E.O. and a founding partner of Affiliated Real Estate Analysts (AREA). At AREA, Mr. Kahn personally analyzed over one billion dollars of securitized mortgage backed securities, real estate transactions, mortgage financing, lender compliance analysis and forensic discovery.

1995 through 2005: Mr. Kahn was C.E.O. and a founding partner of Mallpark, Inc. Mallpark was a cutting edge internet and online presence provider specializing in secure protocols and merchant processing. At its peak, Mallpark provided services to over 500,000 individual online merchants.

1995 through 2008: Mr. Kahn was principal broker and partner of various real estate, mortgage brokerage and lending institutions. His

skills in real estate and mortgage analysis established a track record of hundreds of millions of dollars in business without one compliance violation, complaint or bad loan buy back.

2008 through Present: Mr. Kahn is C.E.O., and Founding partner of Forensic Professionals Group USA, Inc. (FPG-USA). He is co-creator and co-inventor of FPG-USA's patent pending online automated Lender Compliance Analysis and Forensic Lender Discovery systems. He is a working partner, a director and the supervising senior mortgage analyst. He is the qualifying witness on issuances in the process of submission into evidence in all Courts, in all States

Court Experience

Mr. Kahn has personally been involved in securitized mortgage backed securities, real estate, mortgage finance and taxation; analysis, reporting, litigation, negotiation and settlement. He has appeared in State and Federal courts including both civil process and Bankruptcy process. He has been deposed, interviewed, and questioned innumerable times. He has facilitated hundreds of millions of dollars in workouts with real estate syndicated partnerships, lenders, property owners, mortgage holders, borrowers and government agencies including the Internal Revenue Service and the Justice Department.

PROFESSIONAL LICENSES HELD

FL Correspondent Mortgage Lender Licensing 2004-2009

FL Mortgage Broker: Initial license 1995. Status: Current;

FL. Real Estate Broker Initial 1995. Status Current

NY Real Estate Broker Initial 1986 Status: Expired

Series 7 SEC NYSE NASD Securities Initial 1974. Last 1995

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I would especially like to thank my FPG-USA business partner and long time friend Paul Holzmann. Paul believed the topic was important and allowed me the time during four months to create it, encouraging me all the way. Most of all I'd like to thank Paul for his in-depth interest in all aspects of the book and the many long and challenging hours he spent editing the entire work from its original form to what is being published today. I handed Paul a 570 page author's first work. In cutting half of the book away, Paul has trimmed the fat and left only the meat.

I would also like to thank Erika Holzmann, Paul's lovely wife and Helen, his daughter for allowing Paul to spend many hours that would otherwise have been devoted to the family working on this book.

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Introduction

Burn me once shame on you, burn me twice, shame on me. Borrowers, attorneys fighting foreclosure, and others in the mix that did not do their homework, research and investigation, or hire experts to do this for them are losing the fight against foreclosure right now, today.

Even in the face of losing, they are saying they “get it”, when they simply don't.

One of the most frustrating things about this phenomenon is seeing experts speak on the news, on blogs, and television and profess their understanding of the problem and its solutions, when most really don't have a clue. This is evidenced by the fact that they do not offer the solutions to solve the problems and they do not teach people facing foreclosure from predatory lenders how to win.

Why are we not hearing the immediate solutions for the millions facing foreclosure being blasted from every roof top in the land? What are those solutions?

This book lays it out for you in black and white. Embarking on this journey of understanding will reveal it all for borrowers, attorneys, media, politicians, judges, government, and others to finally understand how we got here, what we are up against, and how to win the battle against the predatory lenders.

Part One

History and Background

The foreclosure debacle confronting borrowers today precipitated the Meltdown of 2008. This was caused by the securitization of predatory mortgage loans originated between the years 2000 and 2007 that were destined to default in mass.

Securitization begins with the pooling together of individual mortgages into billion dollar packages which are then marked up and sold to unwitting Wall Street investors.

The process involves the cooperation of non regulated mortgage lenders (hereafter “NRM Lenders”), Wall Street Investment Banking firms and International Banking firm Trustees representing the investors.

Capitalizing on many years of selling good loan securitization programs to investors, the NRM Lenders deceptively sold predatory loans designed to default, to unwitting borrowers as good loans

The NRM Lenders have created a plan to profit through foreclosure and capitalize on the public’s perception that the lender is losing money in this process. Surprisingly, the opposite is true; the NRM Lenders are winning extravagantly in the process. The losers are the borrower and the investor.

To understand this uncommon process one must go back to the time leading up to the Great Depression when the NRM Lenders of that day used the same tactics to cause the Great Depression. Franklin Roosevelt and his Congress fixed the problems and restricted these NRM Lenders from operating on Wall Street. This protected borrowers until November 1999 when Bill Clinton’s Republican Congress repealed the critical Banking Act of 1933 which had protected Americans since its passage, and opened the door to the Meltdown of 2008.

To fight foreclosure today is relatively easy if you look at the past. The intent of the following chapters is to help the reader build a new understanding of how the current situation came about, how to solve the problems, and how to prevent this type of situation from happening again and most importantly of all, provide a foundation of knowledge to initiate the process of winning against foreclosure.

Chapter 1

Our History of Predatory Lending

Thomas Jefferson warned us in 1802. "I believe that banking institutions are more dangerous to our liberties than standing armies. If the American people ever allow private banks to control the issue of their currency, first by inflation, then by deflation, the banks and corporations that will grow up around [the banks] will deprive the people of all property until their children wake-up homeless on the continent their fathers conquered."

As a result of the Mortgage Meltdown of 2008, borrowers, their attorneys, and loan modification professionals are now battling banks in courts around the country to try to prevent the homelessness that Jefferson predicted. Borrowers' attorneys are desperately seeking credible defenses against lenders, who talk about modifying loans, but are instead, barreling down the legal road to foreclosure.

This book is designed to help those attorneys and loan modification professionals assisting these borrowers. The sad fact is that many attorneys are new to this area of law and do not understand the enemy or the methods and processes necessary to beat them. They are Babes in the Wood. This book will show how to beat the non regulated mortgage (NRM) lenders who issued predatory loans to borrowers by using two simple weapons, Lender Compliance Analysis SM and Forensic Lender Discovery SM. These tools can also greatly assist in negotiating a loan modification and settlement from a position of strength.

Predatory Lending and Ruthless Profiteering is well documented in American history. Because of this, Congress has legislated and

protected borrowers against the wrongs of unfair, abusive, and deceptive lending.

Now Vs. Then

Let's take a look at history to see how the same general lender strategy, albeit with far less complexity, was used to similar ends by non regulated mortgage lenders in the Great Depression Era.

Nearly the same set of circumstances that we are experiencing today (Now) happened during that time (Then).

In Both Times:

1. The Non Regulated Mortgage (NRM) Lenders were at the core of the problems.
2. The same type of mortgage crisis and manipulated stock, bond, and securities markets occurred.
3. The same inside information was used to earn incredible fortunes by NRM Lenders who could reliably predict when the bottom would fall out of the stock and bond markets due to predictable toxic default of underlying mortgages.
4. The resulting consolidations among corporate giants was monumental and the profiteering immense. Big banks, giant investment houses, and monolithic (at one time in the past) corporations were sucked up, absorbed and repositioned in the frenzy.
5. The masses were told the same lies leading up to the crisis: Banks do not want to foreclose. Yet millions upon millions of people were made homeless because the banks *did* foreclose. An action that speaks louder than words.

Then:

1. There were billions of dollars raised, not trillions.
2. Borrowers did not have the same consumer welfare programs available now.

Now:

1. NRM Lenders and their co-conspirator Investment Banking partners sold sophisticated investment vehicles and stocks at the highest prices, only to buy them back a short time later for pennies on the dollar. Because of this, there were trillions of dollars raised globally for even more drastic profits.
2. Borrowers have consumer welfare programs. Although these may be a saving grace for some citizens, they are also an additional drain on taxpayer wallets and government coffers.

At the end of the Great Depression, Congress, under Franklin D. Roosevelt, passed the Banking Act of 1933 which stopped the NRM Lenders from teaming up with securities firms, thereby protecting borrowers. About half a century later, with the lessons learned in the Great Depression forgotten, the NRM Lenders began lobbying to get into the Securities business. Finally, in November 1999, the Banking Act of 1933 was repealed. This was outgoing President Bill Clinton's Republican Congress's gift to the incoming President George W. Bush's new administration. It was to be a legacy of financial disaster that would materialize itself in the meltdown of 2008.

After winning repeal of the Banking Act in November 1999, the NRM Lenders exploded out of the gate in January 2000. They kept running until the Meltdown in 2008. They have now switched gears to foreclosure and are up and running again. Today, NRM Lenders have successfully mobilized their front line warriors, the National Servicing Platforms' Foreclosure Mill attorneys, to do battle against borrowers facing foreclosure.

Masses of attorneys are rallying to try to successfully represent the borrowers who are under attack. Unfortunately, far too many attorneys have only just recently entered this realm of foreclosure defense and have no real strategy to do battle against the NRM Lenders. The influx of non-seasoned attorneys into foreclosure defense may be attributed to a combination of issues. The dramatic rise in foreclosures triggered by the Meltdown of 2008, the slowdown of

real estate closings, and the drop in immigration¹ are just a few. There is no denying the massive need for foreclosure defense. It is the few, not the many, who have been doing bankruptcy and foreclosure defense for decades and have helped thousands of consumers. It is now time for the few to step up and help the many learn to fight foreclosure with proven methods to produce good long term loan modification settlements to save the home or sell it.

The NRM Lenders are counting on this new breed of foreclosure defense attorneys not being able to mount formidable defenses in time to save their clients. As the dust settles, the foreclosed properties are winding up owned by the NRM Lenders in REO (real estate owned) portfolios. The NRM Lenders are trickling these properties out slowly, so as not to flood the market. Over the coming years, this strategy is planned to produce phenomenal profits on the backs of the phenomenal losses suffered by borrowers in foreclosure.

Nothing in the new foreclosure defense attorneys' past careers has prepared them for this type of battle. It appears that the legal and court systems are playing right into the hands of the NRM Lenders, by thinking of these foreclosures as "traditional mortgages" gone bad, where a lender gives a loan, has risk in it, and services it (or uses third party loan servicing). They don't realize that in reality borrowers are losing their homes to predatory lenders who issued deceptive loans designed to default, strip the equity from the borrower, and deliver the homes in foreclosure to the lender who has already been paid in full on the mortgage and has no risk whatsoever in the loan itself. Miraculously, this is being done while the lender is profiting extraordinarily while in the process of crying wolf and claiming losses. The relative handful of judges and attorneys who do understand are making a difference. However, due to the sheer numbers of existing foreclosures and new foreclosures coming online every day, it is a drop in the bucket. While one or two borrowers are being saved, thousands upon thousands are losing their homes to foreclosure. The information this book offers is meant to join the existing effort to save borrowers and educate their attorneys and loan modification

¹ Immigration slows as downturn bites: study. Reuters Jan 14, 2009 by Tim Gaynor

professionals. Congress has empowered borrowers to fight foreclosure using consumer protection acts in existence today.

Consumer Protection Act violations and remedies are the Achilles Heel of the NRM Lenders.

Starting in the Great Depression, congress legislated massive consumer protections via numerous government agencies designed to fight against the unscrupulous predatory banks and investment securities firms. These consumer protections include The Truth in Lending Act (TILA) ; the Real Estate and Settlement Procedures Act (RESPA); the Home Ownership and Equity Protection Act (HOEPA); and finally, the Federal Trade Commission Act (FTC Act section 45) against Unfair and Deceptive Acts and Practices (UDAP) which also serves as a model for State consumer protection laws. Unfortunately, the single most important of these NRM Lender limiting actions was the Banking Act of 1933 which was repealed 1999.

This book will explain the two weapons (Lender Compliance AnalysisSM and Forensic Lender DiscoverySM), that can provide the necessary leverage to take advantage of the consumer protection acts mentioned above and exploit the NRM Lenders' Achilles Heels, in order to Win Against Foreclosure.

Chapter 2

National Mortgage Servicing Platforms

The borrower is not up against traditional lending, by any means. Many readers may not even be aware that the National Mortgage Servicing Platforms (NMSP) exist. This is somewhat remarkable considering the size and prevalence of their involvement supporting the NRM Lender operations and securitization.

On the surface, mortgage banking and securities operations include:

- Pooling mortgages together and selling them to investors
- the Wall Street investment banking aspect
- Managing the securities administration and investor's aspect
- Daily "performing" borrower loan servicing operations
- In house borrower and investor side legal departments
- Borrower default servicing collection departments
- Attorneys pursuing borrower foreclosure actions

There are additional players behind the NRM Lenders. These "behind the scenes" operations are more commonly referred to as "National Mortgage Servicing Platforms" (NMSP). They supply and control all the talent necessary for all of the NRM Lenders' needs, nicely stacked in comprehensive vertical corporations and their subsidiaries that broadly fall into three categories:

- Information Service Providers
- Default Solutions Service Providers
- Foreclosure mills

These giant National Mortgage Servicing Platforms are the “brains and brawn” behind the NRM Lending operations. They can:

- manage the origination side of pooling the mortgages
- facilitate all aspects of securitization
- package the product for Wall Street
- make sure the obligations to investors are met
- facilitate essential loan servicing operations
- facilitate the in house legal departments of servicing lenders
- perform default loan servicing and collections
- provide lender foreclosure legal services
- operate the lender’s REO (Real Estate Owned) side of the foreclosures

Considering the breadth and magnitude of these National Mortgage Servicing Platform operations, it’s quite impressive that they operate in the background, out of the public eye. It is not uncommon to find people in the industry that have no clue about the existence of the NMSP Operations. On the servicing lender side, loss mitigation personnel may not be aware of how the operations run within their own firm.

NRM Lender’s utilize powerful legal foreclosure mills. These foreclosure mills are actually independent law firms that have morphed into huge foreclosure case assembly lines pumping out several thousand new foreclosures a month. The foreclosure mills are judged by the Default Servicing Platforms that hand out new cases on the basis of speed in accomplishing foreclosure. The faster that the borrowers are brought to foreclosure, the more cases the foreclosure mill receives each month. This mass assembly line process has an inherent sloppiness factor due to handling gigantic amounts of new and existing case loads. Don’t imagine the hard working lawyer burning the midnight oil and toiling with a particular lender’s case day and night. Not even close. These attorneys and paralegals are working hard, but on colossal numbers of different foreclosure case files. They are deeply pitted against the borrowers in foreclosure. Many of the individual attorneys earn more working there than they would elsewhere, considering their experience. They open and shut their cases quickly and make fortunes in the process.

Chapter 3

The Entire Scheme Is Built On Predatory Loan Programs

Wall Street investment bankers were excited over the monumental win-win-win opportunity of bringing investors into high quality transactions that would pay huge commissions and fees to the account executives and investment firms, satisfy the NRM Lenders who were originating the loans and provide good loans to borrowers. The combination of above average predictable income, broad borrower bases, high Credit Ratings Agency (Standard & Poor's, Moody's and Fitch) ratings and strong capital appreciation from paying down mortgages over time, were an alluring combination.

Most exciting though, were the staggering trillions of investor dollar amounts out there for the taking. With typical transactions in the billion and half billion dollar range, the commissions and fees would also be staggering. In the 1970's and 1980's, large transactions were in the tens of millions and hundreds of millions. In the marketplace of the NRM Lenders running from 2000 to the Meltdown in 2008, single transaction amounts were in the billion dollar range!

One can only imagine how this made Wall Street salivate. All Wall Street had to do was supply the investors and investment banks as Trustees. That was easy. The NRM Lenders would provide the product, service, and support. Wall Street would do the selling, for which they would be paid handsomely. The Wall Street investment firms would also have the opportunity to earn vast sums from insider partnerships and co-ventures that would not be readily apparent, but

covered in the disclosures to protect all. These hidden areas are covered in detail in the diagram and key notes sections of this book.

The question of supply of mortgages to meet the demand was answered with "creative" predatory loan programs. The NRM Lenders would take care of the borrower side of the equation. The National Servicing Platforms would handle logistics between all parties.

The challenge for NRM Lenders was supplying enough mortgages for the loan pool demand. There were many trillions more investor dollars for high grade mortgage pools than there were high grade credit borrowers with residential mortgages. Sensible companies would sell only those credit grade borrower mortgages that fit the quality requirements. NRM Lenders could not pass up the trillions of dollars of investor pool monies available, so they created what for them was a better solution. New mortgage terms that would inspire everyone to refinance in what the borrowers believed were good mortgages but instead, turned out to be toxic predatory mortgages designed to default. The ruse would receive strong government backing. State government coffers would be enriched from the transfer and note taxes on each new mortgage transaction. The federal government would easily be lobbied with increased state tax revenue, because States would now seek less financial assistance from the Federal Government.

Wall Street investment firms were responsible for organizing the investor documentation and disclosures in compliance with Securities and Exchange Commission (SEC) disclosure rules. On average, typical investor documentation involved many hundreds and often over a thousand pages combined in each separate transaction. This meant tremendous fees to participating law firms, accounting firms, and interim parties.

On the investor side, the documentation strategy was simple. It would be crushing in its magnitude of small print and cross referenced legalese. Account executives would use relationships and reliance on trust and long term business strategies to instill confidence.

Wall Street relied on the previous years of sensible bank originated mortgage backed securitized transactions that didn't cause meltdowns.

This history would serve as an example of returns investors could look forward to. Banks had been successfully financing pools of properties in "real deals" for years. The problem was, those real deals often involved the investors owning the properties and actually being the borrowers. In that way, they could earn cash flows as well as earn equity over the years as the mortgages were paid off by the rents. The target of equity by the originators in those real deals typically came after the investors earned an agreed to percentage. For example, over a certain amount the originators earned 30% and the investors 70%.

In the new transactions, to gain equity, the originators would have to resort to more sinister means. The simple solution would put NRM Lender interests at opposite sides of the investors in securitized pools, but full disclosure would protect the actions. It would require issuing loans destined to foreclose on the borrower side, and being awarded the home in foreclosure through the loan servicer on the investor side. This could only be done by cross collateralizing the investor in such a way that the investors would think they were insured against losses. The NRM Lenders would allege that foreclosure costs far more than it does and is a far more burdensome process than it is, and rely on traditional lending interpretations to uphold those claims.

In reality, the foreclosure process was relatively inexpensive in comparison to the windfall profits of a home received free and clear in foreclosure because the original mortgage was paid in full by the investors from day one. Paperwork in the pooling and servicing agreements would provide that the servicers receive all payments owed from a foreclosure process.

The securitization process required pooling mortgages together. Therefore, the loan programs underlying the pools were of paramount importance. Unfortunately after the repeal of the Banking Act of 1933, the predatory non regulated mortgage lenders got back into the game. Their model was the same that was used by the Great Depression era banks in that it used extremely risky (to the borrower) loan products such as interest only loans to take in business. It also included foreclosure and stock market securities manipulation.

What could give the NRM Lenders the ability to attract borrowers to refinance and make purchases? Super low “teaser” interest rates promised for a predictable period that would fit into a marketing plan to capture all the mortgage origination over say, six years (2000 to 2006). These seemingly cheap mortgages would spur real estate purchases and fuel rising real estate values, as interest only loans did back in the Great Depression Era. This could not be avoided, so the NRM Lenders also had to create a plan to capture the financial benefits of that phenomenon. NRM Lenders would use the same strategy as their predecessor predatory lenders in the 1930's: Massive foreclosures.

The strategy required developing loan programs that were toxic in their very nature while seeming to be feasible. Here is an example:

To implement the plan of foreclosure, the super low teaser interest rates might not be enough to pay the interest only portion due each month. To allow this, the unpaid difference would be tacked onto the principal amount in a method called negative amortization. The plan would allow varying maximum increases in the principal from about 110% of the mortgage up to about 125% of the mortgage. This was called the “recast” rate. For instance, in a 125% plan, the low teaser rate could be paid in the form of a payment option, called a “minimum payment” until the mortgage increased to the recast rate of 125%, at which point the minimum payment option would no longer be available and only the fully amortizing rate based on the balance of years left on the mortgage could be paid. This recast caused mortgage payments to skyrocket overnight and triggered massive defaults by borrowers who could not make the payments.

To make matters much worse, when real estate values stopped appreciating, borrowers would not be able to refinance. The mortgage would then be “upside down” which is when the outstanding mortgage amount exceeds the value of the property. This exacerbated the problem for the borrowers because the homes would not qualify for refinance loans, which required some amount of borrower equity to be in place. Borrowers would not be able to afford the new payments and the properties could not be refinanced. Foreclosure would sweep the land. From the NRM Lender's point of view, that was perfect.

In public, the NRM Lenders would cry painfully that they were suffering due to foreclosures because people at large understood traditional banking. Everyone would believe the NRM Lenders were losing money. But in private, the NRM Lenders knew they would be paid in full within days of selling the mortgages to the investor at the beginning of the mortgage pool transaction. So, in reality, the NRM Lenders didn't have one thin dime of risk in the mortgages. By the time the general public and legal system figured out what was really happening it would be too late. NRM Lenders would own millions upon millions of American citizens' homes via foreclosure.

There was a lot riding on the terms the NRM Lenders needed to create in the new mortgages in order to accomplish their goals.

NRM Lenders developed products with program highlights such as:

- ARMs – Adjustable Rate Mortgages,
- Neg-Ams – Negatively Amortizing Mortgages,
- Adjusting
- Recasting

Borrowers had no idea that these seemingly fantastic new programs would turn borrowers into victims at a predictable point in time.

The NRM Lender plan also encompassed new underwriting phenomena to achieve more mortgage "product" to meet investor demand.

- No income No Asset
- Stated Income No Asset
- No Income Stated Asset
- Stated Income Stated Asset

The age old benchmarks of a successful loan transaction were set aside. Income, length of employment and savings would not be verified in the traditional sense. NRM Lenders instead would accept borrower income and asset verification that was stated or not checked at all.

NRM Lenders designed the payments based on a ridiculously low start rate such as one or two percent. This would mask the eight or nine

percent actually being charged to subprime borrowers, at least for a certain period of time. Call it two, three, or even five years; long enough to sell more products to Wall Street investors before the loans began defaulting in bulk. By adding unpaid interest each month to the outstanding principal balance in the form of negative amortization, the amount owed would quickly escalate and in most cases, the only viable option when the mortgage payment adjusted to the full nominal note rate was foreclosure. That fit perfectly into the NRM Lenders plan.

NRM Lenders had additional challenges. Even if they gave mortgages to everyone and anyone, there were still trillions upon trillions more dollars out there from investors. Since the window of opportunity was only going to be six or seven years, the problem of capturing all that money also required creating a new investment vehicle. These were labeled Collateralized Debt Obligations (CDOs). Through these CDOs, mortgages could be sold and resold many times. The problem would be transferring the note and mortgage. For this purpose the NRM Lenders created MERS, the Mortgage Electronic Registration System. This will be covered in detail in the chapter on MERS.

In the aftermath of the Meltdown of 2008, it has become painfully obvious that many borrowers did not understand the loan products they signed their names to. Additionally, in many instances, the underwriting standards proved so lax that loans were issued to borrowers who did not sign the documentation themselves, or were based on completely fictitious documentation entirely. The NRM Lenders didn't care. As soon as they originated the mortgages and sold them to investors, they were paid in full and more.

The entire scheme revolved around creating loan terms and programs that would satisfy the appearance of being in the best interest of the borrower when in fact, they were in the best interest of the NRM Lender. After making all the profit in the securitization process, the NRM Lenders would then affect their exit strategy of acquiring the properties in foreclosure. This separation would resolve the potential liability they faced from unhappy investors seeking to sue them in court. There were a number of critical mortgage terms at the root of the problem.

ARMs – Adjustable Rate Mortgages

This example will use simple numbers rounded off to the nearest \$100. By using an ARM that is fixed for a certain period (say 1, 2, 3 or 5 years for example), a borrower could lower the payment on a \$250,000 mortgage to around \$1,000 on a 5% Interest Only ARM; vs. \$1,800 at 8% fixed for 30 years. That's a big difference, especially when taxes and insurance are also added to the picture.

Minimum Payment Option ARMS

Using the above ARM example, with the minimum payment option touched on earlier in this chapter, the mortgage payment could be brought down even further. The \$250,000 mortgage at a 1% minimum payment would be \$800 vs. \$1,800. The difference is added each month to the mortgage principal amount under negative amortization.

Neg-Am – Negative Amortization

The nefarious Neg-Am feature can really attract borrowers with teaser rates as low as 1% to 1.5% principle and interest. See the example immediately above. Neg-Am loans are actually very simple to understand. Whatever amount is not paid under the regular interest rate calculation is added to the principal amount of the mortgage. In concert with the lower teaser rate, the principal amount of a \$300,000 mortgage could rise to between \$330,000 and \$375,000 in a few years time, or less.

Recast Limit

This is a limit to which principal in a neg-am mortgage can be added before the loan is recalculated. Recast is usually a percent expressed as 110%, 115%, 120% and 125%. This is how the rise in principle (above) is calculated. 110% represents the \$330,000 up to the 25% which represents the \$375,000.

Recast Adjustment

At the point the mortgage hit its maximum recast limit, the loan must be recalculated to a fixed rate mortgage at the fully indexed nominal note rate (for example 8% on a subprime loan) and the amortization, the period the loan was paid down to zero would be the years

remaining. In a thirty year mortgage that has been paid for three years, the amortization period would be twenty seven years.

Using simple round off math, look at the results of a neg-am loan recasting. For this example, use a 30 year loan of \$250,000 with a recast limit of 125%. The loan reaches its maximum limit after two or so years at the 1.5% start rate which provided a very affordable \$862 monthly payment. The new principal amount is \$312,500 and the fully indexed nominal note rate is 8%. The new payment is \$2300 fixed per month for 28 years. That's over a \$1,400 increase over the \$862 per month the borrower had been paying prior to the recast.

Additionally, loan refinances for borrowers in this position are nearly impossible unless the real estate market has climbed faster than the neg-am rate. An unlikely scenario, especially considering only 90% or less can be refinanced, not the full 100% that can be financed on a purchase.

Now enter recast deception to make things even worse.

Recast Deception

Recasting is an onerous event. Payments spike overnight and in most cases, refinancing is impossible. Without going into the mathematical calculations and complications, most recast deception occurs in the Truth in Lending Disclosure Payment Schedule. The lowest payment is projected to the limit of years allowed. So the borrower sees the lowest payment and also sees the longest number of years. The truth of the matter is that if calculations are performed based on a borrower making only minimum payments and the loan recasts before the projected recast period on the payment schedule, there is a critical violation of TILA. For example, the minimum payment shows \$1,000 per month for five years on the payment schedule. But if the minimum payment of \$1,000 is made every month and the loan recasts in three years, then this is deception according to TILA.

Upside Down

This is where the outstanding mortgage amount is more than the property is worth when closing costs and expenses to sell or refinance are factored in. For example, the \$250,000 mortgage referred to above that negatively amortizes to \$312,500 was originally taken on a property sold for \$317,000. Unfortunately, the market value has fallen and the home is now only worth \$250,000. The property is now, by definition, upside down. Refinance is impossible. Either the borrower pays the higher mortgage payment or the banks will foreclosure.

No pulse, no problem.

The NRM Lenders, like all lenders, developed ongoing programs to teach their loan officers and mortgage brokers how to sell what amounts to over a trillion dollars in loans. These same loan officers and brokers trained by the NRM Lenders were served up as those responsible for the abuses on borrowers. Whoever is to blame, the loans were accomplished. No income, no problem. No assets, no problem. No employer verification, no problem. No pulse, hmmm... okay we'll do it in someone else's name - no problem!

The method to lure borrowers to default on their mortgages was created. The NRM Lenders would capitalize on the window of opportunity before it closed and defaults started to pour in. With the plan set and viable, the NRM Lenders and their securities investment banking counterparts now had no time to waste. The rush to securitization was on.

Chapter 4

Manipulating Borrowers Trust for Gain

It is appropriate to touch on the borrowers' and brokers' trust being captured and then violated.

The NRM Lenders' strategy was extraordinarily simple. Send the mortgage brokers out with new loan programs designed to fail but advertised as being totally legitimate. Then, instead of protecting the brokers when the mortgages fail, hang them out to dry.

Lenders have always wanted to get the mortgage broker middleman out of the picture because the brokers drained off too much profit and they were always open to the greed of a quick buck. This would be the brokers' downfall.

Borrowers trusted the mortgage brokers. Borrowers never understood the hidden rebates lenders paid to the mortgage brokers in the form of yield spread premiums, par plus, and lender paid broker commission, etc. Borrowers didn't understand that these fees paid to brokers, were raised by increasing the interest rate on the loan. HUD settlement statements carried this small print disclosure outside of the regular column structure. Broker agreements did the same or couched the fees in percentages instead of raw numbers, or if raw numbers were provided, it was done in such a way that they could easily be passed over.

In reality, brokers never risk their own money. They represent the lender products for a commission. Borrowers can be charged commissions, which is normally the case in a brokered transaction.

When this is added to the hidden lender paid broker commissions, mortgage brokers could make four and five percentage points on a loan.

A three hundred thousand dollar loan could pay a mortgage broker fifteen thousand dollars per loan. Greed and the ability to play "disclosure sleight of hand" created the perfect formula for the brokers' demise. Finally, Lenders could be rid of the middleman that got in between their profits and the borrower. They finally accomplished this by laying all the blame or most of the blame at the feet of the mortgage brokers.

The laws of disclosure enable Lenders to avoid divulging their profits in a mortgage. Lenders hoped that the act of requiring disclosure by the brokers of fees earned for brokering, would move borrowers directly to lenders on whose Hud-1 settlement statements little or no brokerage fees were included. Disclosure of mortgage broker fees was originally optimistically thought by lenders to be an impediment to the mortgage brokers' success. This proved not to be the case at all. The government agency regulating settlement procedures and disclosure in this regard under RESPA is HUD, the U.S. Department of Housing and Urban Development. Why the disclosure of broker fees didn't discourage borrowers to use brokers is not fully understood. Perhaps the brokers were too charming or presented their own products in such a way that the borrower didn't mind paying the broker fee. In any event, mortgage brokers maintained a substantial piece of the mortgage loan origination business. This has stood as a thorn in the side of lenders who prefer not to pay middlemen to sell lender products to borrowers.

For the record, in this chapter, the term mortgage broker also includes loan officers.

The NRM Lenders had full control of the paperwork, the NRM Lenders promoted the toxic loan programs to the mortgage brokers with huge financial incentives to push these out to borrowers. The NRM Lenders' loan quality control (QC) checks and balances which were instituted and required to be performed at all levels, didn't simply fail. The NRM Lenders were happy to finance anything and

everything, as long as they could get the mortgages to sell and resell over and over again and then wind up with the property via foreclosure in the end.

Who could imagine that the NRM Lender could profit one million dollars on a two hundred fifty thousand dollar loan by selling the same loan over and over in the form of synthetic collateralized debt obligations, with little or no media attention? The question of why so much attention was generated toward the mortgage broker profit may be attributed to excellent NRM Lender media control. The mortgage brokers have been annihilated by the 2008 Meltdown while the NRM Lenders are stealing homes through toxic predatory mortgages made to unsuspecting borrowers. For the lending industry in general, the ancillary benefit of NRM Lenders finally assisting the home run of pushing mortgage brokers out of the picture, is a long awaited triumph for lenders. Pushing the dishonest malleable brokers out serves all, but historically the honest mortgage brokers have served borrowers over the years by shopping across many lenders for the best and most suitable products at the best terms and conditions.

Congress has empowered borrowers' and their attorneys to fight against the NRM Lender seeking to foreclose on predatory loans in violation of government agency rules and regulations. For those attorneys "in the know", simple forensic loan audits and discovery from credible third party evidence can be submitted into court as evidence with predictable violation remedies and results.

One of the problems to surmount is a lack of specific knowledge on this process, which is a target this book seeks to address. The other is on the borrower side, which manifests itself in the lack of trust of borrowers have for anyone they must pay a fee to. This is understandable given their recent experiences with mortgage brokers who sold them a toxic mortgage while getting paid handsomely for it. Hopefully this book will enlighten borrowers to the process required to win against foreclosure and provide a benchmark for the borrower to assess the skills of their attorney or loan modification professional.

It is difficult, if not impossible to evaluate an attorney's abilities and knowledge in this cutting edge business of foreclosure if one does not have a basic understanding of the real issues. Any borrower, who "thinks" they have the ability to go "pro se" (to defend themselves) against the savvy top flight NRM Lender law firms, is most likely committing legal suicide. If as the saying goes, "A man who is his own lawyer has a fool for his client", how much more so for the borrower who is not an expert at the rules of civil procedure and the due process of the law.

In this regard, a borrower reading this book can hopefully learn what to look for in an attorney they seek to hire to fight foreclosure. An attorney can enhance their legal strategy. Loan modification professionals can use the reporting of violations to work on an alternate track to resolution and settle a good term loan modification where one did not exist before. In this manner, the borrower and their advocates can be moving on a dual track of fighting foreclosure and trying to modify the loan.

Chapter 5

Evidence Vs. Hearsay

Understanding what evidence is and how to establish it is critical to the successful deployment of any legal strategy and warrants a brief discussion.

At the crux of the matter are the Rules of Evidence of State and Federal Courts. This is the way the courts and legal system require evidence to be submitted. Allegations, claims made by one party or another, can be submitted freely within the constraints of the Rules of Civil Procedure. However, allegations are not evidence.

Evidence is very powerful. Properly submitted evidence, with expert witness availability, under the rules of evidence can be motioned (requested) for judicial review. Having the judge review the evidence and draw conclusions, which may be acted upon, is a powerful tool.

The opposing side, in this case the NRM Lender, will try to avoid this from happening at all costs. Should this occur, their first line of defense will be to challenge the evidence.

To support the evidence, it is extremely important that the expert witness, if used, brings sufficient experience and knowledge to support the findings. This knowledge and experience, or lack thereof, will become evident during questioning from the judge and opposing parties in the hearing. Hearings can be conducted in person but are often conducted via conference call with the parties because Judges realize the financial restrictions of a borrower facing foreclosure. Judges and opposing counsel are not to be deceived or underestimated.

Assuming they can easily be fast talked or cajoled into accepting someone as an expert who is far from it, is a big mistake. When a judge expects to hear from an expert, the person claiming to be so must meet the judge's criteria or what is submitted as evidence may become merely hearsay instead of evidence, rendering the evidentiary findings and reporting basically worthless. In residential foreclosure, the acceptability of expert status under the Rules of Evidence is usually the at the judge's sole discretion. Extensive experience in the field is the general benchmark.

An example of a qualified expert witness would be a professional who has held some sort of securities licensing, some sort of real estate broker licensing, and some sort of mortgage lending licensing during their career. In obtaining this licensing, they will likely have produced some sort of evidence to their qualifications in addition to their educational achievements. They should also have real world transactional experience in these various fields to back up their academic credentials and they should be extremely well versed in the subjects they will be questioned on. Additionally, they should be part of the ongoing operations of a real estate mortgage analysis company with IRS tax returns supporting documentable sustained revenue in the field. This will help to prove that they have a track record of doing this type of work. Regardless of all of this, the judge will still have the final word on the acceptability of expert status.

Also, having substantial amounts of previous court experience across different courts is important. What use is an expert who has never testified in a court or had a deposition taken in relation to a case involving their mortgage analysis?

One cannot determine what an individual judge will accept as qualifying experience in their court. However access by the Judge to the one claiming to be a qualifying expert witness is critical. Mortgage compliance analysis reporting may simply be worthless if qualifying expert witness access is not provided under the Rules of Evidence of the Court in the case.

Judges "motioned" to conduct phone conference calls with the parties and the expert may agree to do so in foreclosure cases because judges understand and are sensitive to the financial situation of a borrower facing foreclosure and the expense of expert witnesses appearing in person.

The answer then to the question of "what is an expert in court?" seems to be based on the quality of the issuances and evidentiary findings, the resume of the expert, the availability of the expert to the court and the knowledge of the expert in response to the questioning. The attorney submits the reporting and credentials, then waits for a response or challenge of credibility and applicability and takes it from there.

The reason entering mortgage analysis findings of violations and toxicity into evidence is so important is that it shifts the burden of proof to the lender. One of the critical benefits of a borrower's attorney submitting evidence into a case is that it removes the benefit of assumption that the lender has. Instead of the judge assuming the lender's points, issues, allegations, and assumptions are valid, the lender must now prove their side of the case against the evidence submitted.

In the case of Forensic Lender Discovery SM (FLD) (covered in depth in later chapters) or an equivalent service that seeks to find the toxicity in the securitized mortgage transaction to undermine the ability to foreclose as part of a credible legal defense, the findings and discovery requests are designed to shift the burden of proof onto the lender's shoulders. In foreclosure, the initial burden is on the borrower. When a credible third party mortgage analysis firm finds toxicity and compliance violations and these are accepted into court as evidence, the lender now has the burden of response to prove otherwise. When the initial reporting and discovery is done well, the lender finds them self in the position of divulging information that will be used against them in the case, or as the basis of further discovery of evidence that may be damning in court. When a lender's responsive evidence may ultimately be more damaging to the lender's case than they are willing to admit, the lender may want to avoid producing proper answers to discovery at all costs. This often causes the lender to come to the table

and settle in order to avoid disclosing harmful evidence. The settlement objective of the borrower's attorney has now been accomplished. The NRM Lender pushed into the position of choosing to avoid providing damning response knows the outcome in court can go very poorly for them. In essence, this forces the lender to consider making a good long term loan modification settlement, assuming that is the borrower's attorney's desired outcome. Lenders receiving discovery requests under court rules of civil procedure have a specified time to respond, for example 60 days. If they do not respond in that time, they may apply to the court for an extension with good reasons. Additional time may be involved in extensions. If the discovery is not returned within by ultimate time provided, the judge might take more aggressive steps and the case would move solidly to favor the borrower. The delaying process has a predictable time depending on the state and court rules of time frames to respond, but in the end, if the intention of the lender is not to respond because the discovery requests are too incriminating, then this time frame is an excellent window of opportunity to effect a good long term loan modification settlement to save or sell. It will not surprise attorneys to find that in many cases, settlements are actually made at the last minute of the last hour outside the doors to the court. If settlement is not reached within these timeframes, the lender may be held in contempt of the court order, a situation that lenders and their attorneys do not want to put themselves into. Judges are known to come down hard on parties that ignore their orders.

Once the credible mortgage analysis reporting is in hand, the power in these situations stems from understanding the Rules of Evidence. The State Rules of Evidence tend to be more or less similar to the Federal Rules, however, knowing the State's rules is critical.

To get an idea of what the rules of evidence provide for in submissions of evidence, here is an example from the State of Florida. These rules can be found online in the Florida Statutes ("FS") Evidence Code (Ch 90).

BEGIN CITING:

Matters may be noticed judicially on facts that are not subject to dispute because they are capable of accurate determination by resort to sources whose accuracy cannot be questioned. (FS 90.202(12)).

A court shall take judicial notice when a party requests it and: Gives each adverse party timely written notice of the request with proof filed with the court, to enable the adverse party to prepare to meet the request and respond (FS 90.203(1)), and furnishes the court with sufficient information to enable it to take judicial notice of the matter (FS 90.203(2)).

The evidence has to be relevant and tend to prove or disprove a material fact (FS 90.401).

All relevant evidence is admissible, except as provided by law (FS 90.402) it is not objectionable for the expert to provide an opinion on the ultimate issue if that opinion includes an ultimate issue to be decided by the "Trier" of fact [the Judge for those unfamiliar with this term - the author] (FS 90.703).

The expert does not have to provide voluminous writings initially to the court, and can summarize, as long as they make the data available for examination or copying or both by other parties at a reasonable time and place.(FS 90.956).

END CITING.

As stated before, if expert testimony is going to be used, the expert will have to qualify on his or her individual merits before the court and may be subject to the adverse parties' scrutiny, so the expert's resume and knowledge must be real and accountable.

Chapter 6

The Battleground is Court by Legal Process

The battlegrounds are in State and Federal courts across America. Each battle is on an individual mortgage for a specific borrower with a uniquely identifiable case. The Congressional legislative intent was to entitle the people and their advocates to fight their foreclosure battle using the Acts, Codes, Regulations, Statutes and Laws. Agencies also fight cases, for example: precedent setting cases where imminent consumer protection is needed, and cases where classes of individuals need protection.

The lender's strategy is simply to win by motion for Summary Judgment. It results in the judge making a determination without a jury or trial, to rule in favor of one side based on the evidence, or lack thereof, submitted into the case or the lack of response from the parties. Summary Judgment is the first wave of the battle in court.

The lender wants to eliminate any possibility of having to go through discovery, answer interrogatories, and provide admissions to allegations by the borrower's attorney or a mortgage analysis expert.

In order to win by Summary Judgment one side will attempt to prove that there are no material facts in opposition to the claims and therefore no issues to be tried. Summary Judgment is the most desirable goal to achieve in court. However, it is a very precarious target for a borrower in a foreclosure case to accomplish. The target for the borrower's attorney is to bring evidence that summary judgment is not appropriate. This is where credible mortgage analysis comes in.

The lender will attempt to persuade the court by making statements and supplying documentary evidence that there are no material facts. NRM Lender attorneys have been known to employ a practice of do anything, say anything, and provide anything to win summary judgment.

Mortgage analysis often finds misrepresentations and flaws in statements, affidavits, documents, and allegations presented when predatory lending is involved. But when a borrower's attorney does not assess mortgage compliance analysis of violations or toxicity and the lender's attorneys are not challenged with evidence to the contrary, or with meaningful pointed discovery and the lender wins in Summary Judgment, for all intents and purposes, the battle is over. The NRM Lender wins foreclosure.

The issue of whether a borrower's attorney can be held financially responsible for not assessing a borrower's position relative to mortgage compliance analysis is a topic of concern. No attorney wants to have a borrower come marching into their offices some time after losing a foreclosure case, with a malpractice attorney in tow, asking to see evidence of an Assessment or other proof that rudimentary research was done in the case, especially when a comprehensive assessment can be obtained in minutes at a nominal charge of less than \$100 (at the time of this writing). See www.fpg-usa.com. The malpractice attorney can do the same, and if the results turn violations or toxicity, the problem can become very serious indeed.

Either side can lose to Summary Judgment by not responding to court actions properly or within the time frames allotted as well as failing to persuade the judge that there are significant issues and material facts that prevent a finding of Summary Judgment.

Losing to summary judgment is cold, hard and brutal and in most instances, final. Vacating or overturning the ruling after the fact requires proving misrepresentation and fraud occurred. The reality of that, given the case was tried and these two determinate issues were not raised, or if raised were not proven, makes proving so after the fact a difficult, expensive process with little likelihood of success.

Forensics in that situation is expensive, time consuming and slow. Everything has to be performed manually.

After Summary Judgment, there comes an eviction and sale. Once the foreclosure sale is complete, the benefits of TILA evaporate. One of the criteria for consumer protection under TILA is that the consumer still owns the property.

Battling the foreclosure case to a successful outcome involves a strong borrower's attorney strategy. Lender attorneys have the edge coming into the case. They have a mortgage in default, with rights to foreclosure inherent in the contract. Therefore the burden rests on the borrower's attorney to prove otherwise. The borrower's attorney strategy is simple and straight forward. Speed is of the essence. Perform forensic loan analysis and discovery. Respond promptly by initial procedural response dates with pertinent issues of evidentiary findings introduced into evidence. This shifts the burden of proof to the lender and turns the tide of assumption away from the holder of the mortgage. Promptly perform initial discovery and file "pertinent" first requests for admissions, interrogatories, and documents. "Pertinent" meaning customized to catch the lender red handed if they respond honestly and fully. If the lender fails to respond to the requests, motion for an order from the Judge to perform. If they continue to not perform, move for dismissal with prejudice, meaning the case cannot come back to court. If the case is dismissed without prejudice, the lender can come back to court, starting the process from the beginning, but this time they will have to come with the discovery items clarified because they are going to get hit with that again right off the bat. Anything less may not be considered strategy at all.

A borrower's attorney, who believes simply moving a case sideways without the strategy just mentioned, is kidding themselves. Unfortunately their lack of skill and competence in this arena just prolongs the inevitable foreclosure.

Here are a few reasons why moving the case sideways is a bad idea:

1. A lender faced with a borrower on a refinance loan of a primary residence originated less than three years ago, has the

specter of extended right of rescission, meaning cancelling the loan. This book contains a whole chapter on this important borrower's device of congressionally legislated protection. Suffice it to say, cancelling the loan is very expensive and counterproductive to the NRM Lender. The three year mark is hard and fast. Once it is crossed, the remedy is no longer an option.

2. It often plays into lender's hands because their real estate owned divisions are jammed with properties that are being held back so as not to flood the real estate market all at once, and while the case is moving sideways, the borrower is paying for the upkeep instead of the lender.
3. It will cost the borrower much more in the long run due to accumulating debts, costs, and fees incurred from the lender over time. If and when a settlement is reached, these charges are often tacked on to the mortgage and either amortized over time or paid in a lump sum later in the life of the loan.
4. The lender moving on a dual track of foreclosure and entertaining loan modification is most often holding the "carrot" of modification out to take the borrower attorney's eye to keep them off the real target, foreclosure. An incorrect but naturally assumed philosophy, is that pressing hard legally against foreclosure may create a bad feeling and hamper loan modification settlement. Nothing could be more false. If the lender is not put in an untenable position in court with credible mortgage analysis findings of violations or toxicity, the chance of a good settlement in many cases, is simply lost. Here is why:

Lenders avoid settling and modifying loans despite what is being "said", for a few basic reasons. Unless the borrower's attorney puts the lender over a legal barrel, the lender motivations to foreclosure are simply too strong.

- Legal exposure to the investors. What may be good for one class of investors is likely not good for another. The specter of

a class action lawsuit by the tranche slice investors who are hurt as the result of a loan modification that benefits other tranche slice holders in the mortgage pool can result in the Trustee being forced to sue the NRM Lender, enjoining all investors in the tranche slice that are being hurt with the loan modification settlement. This is a real threat to the NRM Lenders.

- Foreclosure yields profits to the lender even though a loan modification may be beneficial to the investors. In many cases the servicing lender has prior agreement from the investors to credit the lender back with losses or expenses in the process of default loan servicing and foreclosure. There may also be offsets to the investor of insurance proceeds they may have received on the defaulted loan. These and other aspects favor the servicing lender in many cases, walking away with the foreclosed property leaving little or nothing left for the investors.
- The physical burden of modifying a loan, in terms of staff and logistics, is daunting. Even under the best conditions it strains the corporation servicing the loan. In today's environment, with bankruptcies and failures of lender participants, the problem is made even worse. Add the complexity of the National Servicing Platforms, the necessity for the Trustee of the investor pool Trust and others involved required to sign off on loan modifications, the task is often a daunting process even for the Lender desiring to modify a loan.
- Bringing the issue of fighting a lost or stolen note claim and finding undisputable evidence that the loan was not properly transferred in accordance with the pooling and servicing agreement in a securitized loan brings additional problems. The lender may be faced with purchasing the loan back from the Trust as a matter of pre-agreement. When one loan is discovered to contain this flaw, the Trustee might cause other loans in the Trust to be evaluated. A lender faced with multiple loan buybacks at full initial mortgage loan amounts, on loans currently in default, can face huge financial losses. The fact

that this process could clear ownership issues for the foreclosing lender is no consolation. Lenders who have already been paid in full for selling a mortgage to the investor pool do not want to give that money back and have the privilege of foreclosing. They want the home gifted to them in foreclosure, even though they cannot establish rightful ownership.

Many states do not require court cases and legal actions for lenders to foreclose. In these states, the borrower has pre-agreed in the Deed of Trust, the mortgage document, to foreclosure without legal action.

This is the issue of judicial process vs. non-judicial process. To complicate matters of deploying legal strategy once mortgage analysis and discovery producing violations and toxicity has been performed, some states have a judicial process and others have a non-judicial process and some states have both.

Judicial process means that the borrower is served legal papers and given time to respond. In the non-judicial process the borrower is at a much greater risk. Understanding the critical aspect of process is paramount. Judicial or Non-Judicial Process? That is the question.

No one wants to get a knock at the door from the Sheriff with an eviction notice. Or, come home to find one posted on the front door. Worse yet, is to come home to find furniture and possessions on the sidewalk. This can happen without the borrower knowing in a non-judicial process where sheriff's service of an initial complaint is not a requirement. Many borrowers have stopped answering phone calls and reading mail as a self preservation technique against collection activities. While this is the wrong approach, it is commonly understood by lenders and government sponsored enterprises such as Fannie Mae who has issued collection guidelines that include a visit to the home, in an effort to protect borrowers from their own habit of avoiding calls and mail.

To make matters worse, some states practice both processes. It is very important to determine exactly what the particular state's process is for a given loan facing foreclosure. Because this is such a critical issue,

the following briefly describes the particulars of each process in greater detail.

In a Judicial process state the borrower will be well noticed. The borrower is served with court papers (a lis pendis, summons and complaint) and the case proceeds in court. A pending litigation notice (the lis pendis) is recorded so the public knows there are legal issues facing the property; the borrower is served with a complaint which they must answer in a prescribed time and fashion, and the case will be heard in court. The lender will likely allege there are no material issues to discuss and move for Summary Judgment. If Summary Judgment is awarded, the court will order a sheriff's auction sale where the property goes to the highest bidder and will be sold for cash or a big deposit and balance due in x days (ex: 30). The court will confirm the sale and a sheriff's deed will be issued and subsequently recorded with the county clerk. The highest bidder is now the owner of the property.

In a non-judicial process state the borrower must know the specific procedure under which they will receive notice in their state. There are several methods, none of which is as clear and decisive as in a judicial process state where the borrower is officially served. The notice may not require direct owner notification. It may simply require an ad in a publication. It may be a Notice of Default, a Notice of Sale, etc. Non-Judicial foreclosures are processed without court intervention. Therefore, it is critical that the borrower check their mail and take action when the Default Letter or Notice of Default arrives.

In non-judicial process the borrower may have to bring a lawsuit against the lender if the borrower wants to challenge the foreclosure. Otherwise, the home could simply be foreclosed by the lender properly posting, recording, and/or publishing a notice as required in the appropriate clause of the Deed of Trust or other appropriate mortgage document and then whenever the legal time limit for the borrower's state expires, a public auction is held, the highest bidder wins and becomes the owner subject to recording the deed. Cash or cash equivalent is typically paid at the auction or very soon after. This is the scenario where the Sheriff turns up and puts the borrower and their belongings on the curb or street.

Non-judicial foreclosure process may be used if the mortgage or deed of trust contains a "power of sale" clause that serves as the borrower's pre-authorization to sell the property to cover the debt in the case of the borrower's default. The power is usually given to the lender or their representative, usually called the Trustee.

Always consult the particular documentation and the State's rules. Seek professional counsel. To see how the process of non-judicial foreclosure under the power of sale clause works, here is an example from Nevada.

A copy of the notice of default with the election to sell is delivered to the borrower at their last known address. Notice is recorded in the county in which the property is located and this date is posted. Postings and advertisements are handled in the same manner as execution sales. The borrower has a specified time to respond (fifteen to thirty five days) based upon the original Deed of Trust, to cure with payment. The property owner may file Intent to Cure with the public Trustee's office at least fifteen days before the scheduled foreclosure sale day and pay the amount due prior to the sale date. The foreclosure sale will take place as specified. Lender attempts to claim deficiency judgment for the difference of the sale amount yielding less than the amount due, must be made within three months. Borrowers have no rights to redeem, meaning to recover the property by coming in after the foreclosure or tax sale and paying off the amount owed.

Defendant vs. Plaintiff

In addition to the complications of judicial vs. non-judicial process, many people mistakenly refer to borrowers facing foreclosure as the defendant, or as the plaintiff. It all depends on the process of the state in which the property is located. For example, in Florida, the borrower is usually the defendant in a residential mortgage foreclosure. Florida is a judicial process state. In California or Nevada for example, the borrower would be the Plaintiff under their non-judicial process residential foreclosure action rules.

In a judicial process state the borrower has been sued for foreclosure by the lender. This makes the lender the Plaintiff (the one who is

complaining and files a complaint). The borrower is the Defendant (defends against the complaint).

It is the reverse in a non-judicial process. The lender is provided the rights to foreclose in the loan documents and does so according to the prescribed process. When the borrower feels they have evidence or allegations to fight against the foreclosure in court, the borrower must become the Plaintiff and file a lawsuit by complaint against the lender who becomes the defendant.

Mortgage or a Deed of Trust (Trust Deed)?

Deed of Trust

Many people have difficulty in understanding a Deed of Trust. A loan is taken out and the actual title is held by an independent 3rd party (such as a title company) until the deed of trust is paid off in full, at which point they issue a satisfaction and the Original Title. In the event of a default, the Trustee holds the "power of sale" and files a Notice of Default or similar instrument under the judicial process rules required in the particular state that holds jurisdiction. In default, the trustee holding the title will likely bring in and substitute a different trustee (under the substitution clause) specialized in handling foreclosure.

There are 3 parties to the Trust Deed.

1. Beneficiary: The lender.
2. Trustor: The borrower (also called grantor).
3. Trustee: The 3rd party that holds legal title.

Some states call their deed of trust a "mortgage deed of trust" or "mortgage deed" or "security deed". If the word "deed" is used, it is usually a deed of trust situation. Check the particular documentation and seek professional advice.

Mortgage and Note

A mortgage serves as security for a debt. The note is a written promise to pay and includes specifics such as interest rate, payment time, etc. The original "blue ink" signature on that note insures it is

the one and only true original. A photocopy is worthless without material stipulations and conditions to the contrary.

The mortgage does not present the type of loan and repayment plan a borrower has. This is defined in the note. For example, the NOTE can be a Fixed Rate (FRM), an Adjustable Rate (ARM), an Interest Only (IO); and the amortization terms of the NOTE define the maturity and whether or not there is a balloon payment, prepayment, negative amortization on the mortgage, etc.

There are 2 parties to the Mortgage and Mortgage NOTE:

1. Mortgagor: Borrower
2. Mortgagee: Lender

Other important items to know in regards to a specific state:

The general "uncontested" time between a Notice of Default and a Foreclosure Sale can vary depending on the State the property is in. For example, as little as two (2) months in Texas, a fast foreclosure state, to New York where the process can take (10) ten months to a few years.

Is there a Right of Redemption Period and if so, what is it? The right of redemption period is the time after the property has been sold at auction, in which the borrower may legally buy back the property from whoever purchased it at auction.

Is there a right to a Deficiency Judgment? This gives the lender the right to chase the borrower for years to come. The deficiency is the total amount of money owed the Lender, minus the amount collected from the sale of the property.

To complicate matters, many states have both Mortgage and Deed of Trust instruments. It will depend upon the actual instrument the borrower has. Investigate the foreclosure procedures and rules in the state in question via reliable legal resources.

In a non-judicial process state, the evidentiary findings produced as a result of credible mortgage analysis are normally sent to the lender's

legal department with a legal letter advising of the imminent action if the case is not in court already. If the case is in court, the lender's attorney will be advised in the normal course of civil procedure. This, coupled with a borrower ready, willing, and able to settle on a loan modification, with some money in escrow for that purpose, may aid in negotiating a fast and satisfactory settlement. Otherwise, in the legal process of fighting foreclosure, costs will be borne by both parties including legal fees, court costs, and third party services such as compliance analysis and discovery.

Side Stepping Losing The Rights To Foreclose In Court

It is important to note that servicing lenders sell loans to side step losing the rights to foreclose in court.

What I mean by side step is the following. NRM Predatory lenders are known to use devious tactics to try to side step the courts when cases go against them. A case in point can be found in the Commonwealth Of Massachusetts, Plaintiff Vs. Fremont Investment & Loan, and Fremont General Corporation "Fremont"; dated March 2008, civil action 07-4373-BLS1; *the court was taken by surprise. The court admitted failing to anticipate that Fremont, in the face of a court ordered injunction preventing Fremont from foreclosing on some 2,200 homes without following strict notice to the MA Attorney General; would simply attempt to side step losing in court and transfer servicing rights to an entity that would simply pick up the forecloses as if nothing had happened.*

Eventually, Fremont was found to be predatory and the borrowers were protected by the court, but not without extensive and expensive litigation.

Fremont, being a perfect example of the predatory NRM Lender, was used to manipulating courts at will up until the State of Massachusetts case. Fremont argued that in restricting them like this, no servicing entity would assume the servicing rights. This argument wasn't accepted by the court, who essentially responded that they could sell the servicing but the restrictions on foreclosure proceedings must pass with the sale attached to the individual loans. The court was fooled

initially because Fremont alluded to going out of business. The court has since learned the lender's tactics of not divulging truthful information and included the knowledge obtained in the Courts' decision.

Fremont was caught red handed. The court found that they unfairly issued loans that borrowers couldn't afford and because of the terms, were not able to refinance. The court issued an injunction that unless the transfer of servicing included provisions to extend the protection against foreclosures, the court would simply prevent the deal from closing.

Then the Federal Deposit Insurance Company "FDIC" entered the fray. The FDIC found that Fremont was undercapitalized and failed to comply with capital provisions. Fremont had to either sell enough shares of the Bank to adequately capitalize or find and agree to being acquired by another bank.

If the FDIC took over Fremont, the pooling and servicing agreement's defaulted servicer provisions would automatically trigger and by law, the servicing rights would automatically be assigned to a third party that wasn't bound by the court ordered injunction thereby leaving the Massachusetts homeowners open to unrestricted foreclosure.

Fremont made some agreements and the Massachusetts court agreed not to enjoin Fremont from selling the loan servicing to another entity. In total there were some 2,200 loans originally covered in this lawsuit.

Chapter 7

Loan Modification: The Options to Save or Sell

Section I. Options to Save Your Home

1. Forbearance
2. Loan Modification-Restructuring
3. Partial Claim (for FHA and some Freddie Mac Investor Loans only)
4. Refinance
5. Reinstatement
6. Repayment Plan
7. VA Loan Modification/Refunding

Section II: Options to Sell Your Home

1. Assumption
2. Deed-In-Lieu
3. Pre-Foreclosure Sale
4. Sale
5. Short Sale

LOAN MODIFICATIONS: THE OPTIONS TO SAVE OR SELL²

If and when a loan modification settlement becomes a real and imminent possibility, it is important to know one's options.

Outside third party professional advice should be sought in every case from the outset, whether that is legal, accounting, real estate, lending or anything else that pertains. It is always important to get more than one opinion.

Borrowers can mix and match some of the alternatives. The object is for a long term solution that works. When a borrower is upside down on the mortgage a lowering of the principal amount of the loan to 80% or 90% of the current market value of the home is a good start. If the lender insists on using their own appraisal then the borrower should acquire three appraisals in total and select the middle appraisal amount to set the new modified loan to value.

The lender may agree to accept some escalating percentage of potential appreciation in market value over a period of some years to come, in exchange for lowering the principal amount of the loan. This is known as a SAM, Shared Appreciation Mortgage. It is also a government sponsored option and should be researched. Borrowers should be aware of other government sponsored options as they come out. The internet is an excellent up to the minute source of loan modification information.

Borrowers should beware of any loan with escalating mortgage interest rates that offer to settle the borrower's problem over a few years but result in the very same problem down the road. There are no guarantees that the real estate markets will reverse and that the appreciation will facilitate a permanent refinance sometime in the future with good terms.

² The content in the notated section of this chapter was taken with permission from Whale Mortgage, a Florida correspondent lender the author owned and operated for years. Whale Mortgage is no longer in business. Whale Mortgage had no complaints or violations against them on record and never had to buy back a mortgage.

Section I. Options to Save Your Home

If a borrower is currently employed and has sufficient income to make payments and carry his / her home expenses, or if the borrower is currently UN-employed but with a previously good payment record and with good prospects for employment in the near future, the borrower might have the following options:

1. Forbearance
2. Loan Modification-Restructuring
3. Partial Claim (for FHA and some Freddie Mac Investor Loans only)
4. Refinance
5. Reinstatement
6. Repayment Plan
7. VA Loan Modification/Refunding

1. Forbearance

The lender may allow the borrower to reduce or suspend payments for a short period of time and then agree to another option to bring the loan current. A forbearance option is often combined with a reinstatement when the borrower knows they will have enough money to bring the account current at a specific time. The money might come from a hiring bonus, investment, insurance settlement, or tax refund.

2. Loan Modification-Restructuring

(Available on all conventional loans, also on a very limited number of VA loans with lender and/or investor approval) (Called Recast for FHA)

A loan modification to an existing loan made by a lender/servicer in response to a borrower's long-term inability to repay the loan. Loan modifications typically involve a reduction in the interest rate on the loan, an extension of the length of the term of the loan, a different type of loan or any combination of the three. These will result in lower payments. A lender might be open to modifying a loan because the cost of doing so is less than the cost of default.

A loan modification agreement is different from a forbearance agreement. A forbearance agreement provides short-term relief for borrowers who have temporary financial problems, while a loan modification agreement is a long-term solution for borrowers who will never be able to repay an existing loan.

There are costs and fees associated with a modification that the borrower will be responsible for. All property taxes must be current or the borrower must be participating in an approved payment plan with the taxing authority to be eligible for a modification. Any additional liens or mortgagees must agree to be subordinate to the first mortgage. All requests are subject to the lender's approval.

3. Partial Claim (for FHA Loans and some Freddie Mac Investor loans)

A borrower may be eligible for a partial claim. The loan must be 120 to 365 days past due. A partial claim results in placing the past due payments into a subordinate mortgage (2nd mortgage) between the borrower and the Secretary of Housing Urban Development. The partial claim note will require the borrower to start making payments when they pay off the first mortgage. Working together with The Department of Housing and Urban Development (HUD), the lender will agree to help the borrower with a one-time payment from the FHA Insurance Fund. There is no interest. The partial claim can be for no more than 12 months of past due payments. The borrower will be required to sign a promissory note with HUD and they will place a lien on their property. This HUD loan is interest-free and will bring the account up to date immediately, but it is due when the borrower pays off the first loan or when the property is left or sold. The borrower will not be required to make monthly or periodic payments. The note is payable to HUD. Partial payments can be made but they must be by cashier's check or certified funds. There is a lifetime limitation of 12 monthly installments of PITI (Principal, Interest, Taxes and Insurance). The Partial Claim may be combined with another plan. In some cases, a special forbearance may be combined to give the home owner some additional options.

4. Refinance

In some instances, the borrower may be able to arrange new financing, but this will depend on their income, their credit report, the value of the home, the amount of their equity and their current financial position. It will be difficult to secure new financing with a default on the existing mortgage, but not impossible. A poor credit score may be outweighed with the following: Good equity in the property, a good reason why the borrower's credit is bad and solid evidence of how the current financial situation has changed. The last 12 months of credit history will be examined very closely.

5. Reinstatement

This is probably the least likely to occur, except in special circumstances where the borrower now has all the money to catch up completely, in a lump sum, including back payment and attorney fees. To become current, the payment must be made by a specific date. Because of the borrower's financial circumstances in the past, they may be facing a sizable amount of past-due fees, including back payments, late fees and legal expenses. If the borrower is able to promise a lump-sum to bring the payments to a current status by a specific date, the borrower may be eligible for a Reinstatement.

Many borrowers have retirement funds, credit cards or insurance policies that can provide the much-needed funds to stay secure in their home. Other borrowers will seek private loans from family or friends or co-workers.

6. Repayment Plan

If the borrower has incurred a short term financial hardship and the loan is 62 days or more past due, the borrower may be able to get a written agreement to resume making regular payments and agree to add some amount of money (ex: a few hundred dollars) per month to bring the deficiency current or put some of the deficiency onto the back of the loan (or a combination of both), until the loan is caught up. There will be a specific period of time to bring the loan current. A repayment plan is accepted by all investors and is the most frequent method of curing a default. Realistically, a repayment plan does not go any longer than 24 months and with private Wall Street money does not extend past 12 months without approval. The borrower's financial

situation must be closely reviewed for this option to be considered. Borrowers must show they can afford this plan, to be eligible

7. VA Loan Modification/Refunding

(Available for VA loans only) (Needs at least 30 days to process)

A refunding is when the VA buys the loan from the lender. Refunding may give VA the flexibility to consider options to help the borrower save the home that the current lender either could not or would not consider. When the VA refunds a loan under 38 U.S.C. 36.4318, the delinquency is added to the principal balance and the loan is re-amortized. The new loan will be non-transferable without prior approval from the Secretary. If the borrower's interest rate was lowered and an assumption was approved, the interest rate will be adjusted back to the previous rate.

Section II: Options to Sell Your Home

Short Payoffs (Short Sale), Pre-foreclosure Sale, Compromise of Sale. If the borrower is unable to maintain the property and make the payments, the financial hardship is long term. The property is upside down, meaning the mortgage amount is higher than the market value of the property. Short payoffs avoid a default loss on the property. Lenders may accommodate a short payoff with a qualified buyer at the ready. Contact a tax advisor because there are tax ramifications and time limits associated with short payoffs. Some states allow lenders to seek deficiency judgments for the difference in sale amount and loan amounts that can allow continued collections on the borrower for years to come.

1. Assumption
2. Deed-In-Lieu
3. Pre-Foreclosure Sale
4. Sale
5. Short Sale

1. Assumption

A mortgage assumption permits a new qualified borrower to take over both the title to the property and the mortgage obligation from the current borrower if the borrower is behind in payments. An

enforceable "due-on-sale" clause is waived to allow the qualified buyer to assume the mortgage of the delinquent borrower

2. Deed-In-Lieu

As a last resort, the borrower "gives back" the property and the debt is forgiven. This will not save the home, but it is less damaging to the borrower's credit rating. The tax ramifications may be more appealing, especially if the home was purchased as an investment property. This option might sound like the easiest way out, but it has limitations: The borrower will usually have to try to sell the home for its fair market value for at least 90 days before the lender will consider this option. To be considered for this option, the borrower must complete a financial package and provide a copy of a recent active listing agreement. Also, there cannot be any claims or liens (ex: IRS or state tax liens) against the property other than the mortgage. In exchange for the deed-in-lieu, the lender may waive all deficiency judgment rights. The borrower may be asked to participate in a Short Payoff program before a deed-in-lieu of foreclosure is accepted.

This is a lender's last resort to helping a homeowner avoid foreclosure. The lender takes a property back and manages it until it is disposed, sold, and off the books. Lenders would rather do a short sale as a liquidation technique than Deed-In-Lieu.

When a property has substantial equity, it may make sense for the lender to take a property. Substantial equity might allow a lender to sell the property quickly.

Deed-In-Lieu allows a property owner to surrender the property back to the lender/investor/servicer and to be released of the mortgage obligations. This is only a last ditch effort and is taken only if it makes sense and the lender feels they can market the property faster.

Qualifications are that the property has been listed for sale and no reasonable offers even less than the BPO (Broker's Price Opinion) have been made. There must be a cost savings rather than going to an auction/sheriff sale

3. Pre-Foreclosure Sale

If the borrower can't sell the property for the full amount of the loan, the lender may accept less than the amount owed. Financial help may also be available to pay other lien holders and/or help towards some moving costs. The borrower may qualify if: The loan is at least 2 months delinquent; the borrower (or their real estate professional) can sell the house within 3 to 5 months; a new appraisal (obtained by the lender) shows that the value of the home meets the lender's program guidelines.

4. Sale

If the borrower can no longer afford the home, the lender will usually give the borrower a specific amount of time to find a purchaser and pay off the total amount owed. The borrower will be expected to use the services of a real estate professional who can aggressively market the property.

5. Short Sale

A short sale is the sale of a property at fair market value, when the lender and or insurer agree to accept the proceeds of the sale in satisfaction of the defaulted mortgage even though it is less than the amount owed.

Generally a short sale should be considered when the homeowner's financial hardships require that they sell their home, but faces problems selling because the value of the property has declined to less than the amount owed on their mortgage.

A short sale may be considered at any time prior to foreclosure if the alternative means a lender will incur greater losses through foreclosure and be forced to acquire the property.

In order to consider a short sale, a homeowner or real estate professional must submit a signed purchase contract and a HUD 1 settlement statement.

Once the purchase and sales agreement and the other documents needed are submitted the qualification process begins.

Pre-Qualification Process

The pre-qualification program can run 90 to 120 days prior to the actual short sale date. This time is used to list the property at fair market value to obtain a purchase and sale agreement. If a contract is received the loan will be submitted for a short sale.

There are numerous processes to handle during this phase. These include qualifying the borrower, qualifying the property, negotiating and obtaining a satisfactory approval letter, marking the property to market, working with realtors, buyers, etc.,

Short Sale Negotiations

The short sale negotiations begin once an offer is received. A signed contract is received by a potential buyer offering a price and sometimes with contingencies.

There are numerous processes to be handled during this phase. They include documentation required, analysis, validation, settlement terms, confirmation of intent, qualifying the buyer, negotiation and mediation with the lender, examination of lender documentation, conformity with the guidelines, putting foreclosure on hold and performing all the necessary functions to facilitate the closing.

One important point to remember about modifications if the borrower is facing foreclosure is THE COLLECTION ACTIVITY WILL CONTINUE WHILE NEGOTIATIONS ARE UNDER WAY. Do not fall into the lender's trap by not preparing to legally face foreclosure while negotiating any type of settlement. Many foreclosure disaster stories stem from making this mistake only to find out the home was lost in foreclosure by Summary Judgment.

Chapter 8

Special Tax Considerations for Investors

There are significant tax ramifications in the forgiveness of debt for investors. These are real concerns that need to be planned for and understood in advance of agreeing to a particular settlement. Speak to an accountant beforehand. Borrowers get a surprise when the bank sends them a 1099 of some sort with 'phantom income' reporting (income where no cash or tangible asset was received). The appropriate relief should be included in any settlement agreed to. Once it's over, it's over and the borrower does not want to be answering to Uncle Sam if not prepared.

Investors need to take special care in their workouts because what may seem like a reasonable settlement, even if it means signing a note to the lender, can backfire immensely when the IRS tax implications are factored in.

Some investors are clamoring to do short sales, meaning the lender agrees to accept less than the outstanding loan balance as a settlement to sell the property to a new buyer. The bank gets the bad debt off their books. The owner is out of the loan, or so it seems.

At the time of this writing, IRS Publication 544 is the pivotal document for determining the tax due on the amount "forgiven" in this type of transaction. Owners who live in the property do not get taxed on amounts forgiven because of recent changes in the tax law. The same protection is NOT available for investors. It is very difficult to trick the IRS (unlike many lenders) into believing the loan was for an

“owner occupied” property if, in actuality, it wasn’t. At the time of this writing, the test for owner occupancy is in IRS Publication 982.

The investor has two worries. 1) The lender releasing the Owner from ever coming back at them for a deficiency judgment if the lender realizes less in the sale than the mortgage amount and 2) IRS taxes.

A 1099A (for foreclosure) or a 1099C (for short sale) is going to be issued to the Owner and IRS taxes will apply to an investor. The basis of computing the amount owed is clear. The amount realized includes the FULL CANCELED DEBT, even if the fair market value of the property is less than the canceled debt.

Example: John paid for or built a house costing \$400,000. He put \$30,000 down and borrowed the remaining \$370,000 from a bank. The bank foreclosed or a short sale was done. The balance of the loan was \$360,000 and the property sold for \$260,000. The amount realized by John on the sale is \$100,000 for tax purposes, which is the debt canceled by the foreclosure or short sale. This is calculated by comparing the amount realized (\$260,000) with the adjusted basis (\$360,000).

The above example poses 2 issues:

1: Without written notice or laws in the state where the property was located stating otherwise, the bank can come after John for the \$100,000 difference. This is called a deficiency judgment, and

2: John will receive a 1099-C from the bank for \$100,000 which they will also report to the IRS. John will add \$100,000 to his ordinary income for the present tax year and have to pay income taxes on this at John's tax rate.

In a best case scenario above, John is going to pay a great deal more in taxes. If John is in the 30% tax bracket, he will be faced with paying an additional \$30,000 ($\$100,000 \times 30\%$) to the IRS.

Owners who fail to consider the potential future collection rights BEFORE they decide on settlement, especially the tax ramifications, may just be jumping from the frying pan into the fire.

John's problems may be compounded if he built his home at a time when the market was rising and his construction loan allowed him to borrow a percentage of the finished home's appraisal value. Here's why: Take the above example with this one twist: John built it for \$400,000 but when it was finished it was worth \$650,000 and he took a permanent loan using his same deposit of \$30,000, for \$620,000. Now John realizes \$620,000 owed minus the \$260,000 sale or a gain of \$360,000 and in the 30% tax bracket \$120,000 is owed the IRS.

It is important to consider all aspects of the borrower's situation prior to making decisions. The object is to rid the borrower of headaches. The borrower should seek professional advice, whether it is legal, accounting, real estate, lending, or other.

