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Via email only (martha.l.walters@ojd.state.or.us)

The Honorable Martha Lee Walters
Oregon Supreme Court
Supreme Court Bldg
1163 State Street
Salem OR 97301

Re: Uniform Law Commission Home Foreclosure Procedures Act drafting committee (holder in due course issue)

Dear Justice Walters:

As you may know, for many years my office has represented defrauded Oregon home loan borrowers, who often are facing foreclosure. I did not communicate with you last year in advance of the drafting committee meeting because of the potential overlap between issues before the committee and the Brandrup and Niday cases then pending before the Oregon Supreme Court.

I apologize for writing so close to the upcoming committee meeting. I only learned earlier this week that the drafting committee is considering a proposal to either abrogate entirely, or substantially limit, the application of the holder in due course doctrine in connection with residential mortgage notes.

Based on my experience summarized below, I strongly encourage the abrogation of this doctrine. Its abrogation would give consumers who are defrauded in the financially largest transaction of their life the same protections that the FTC anti-holder rule gives them when they are defrauded in, say, purchasing an appliance for their home.

When a fraudulent loan remains with a solvent originating lender, my office has been able to obtain significant relief for clients. See Vasquez-Lopez v. Beneficial Oregon, Inc., 210 Or App 553 (2007). But in recent years, most loans are sold shortly after origination into a securitized trust or similar entity. Furthermore, many bad loans are made by entities that flourish when the housing market is hottest and collapse in the inevitable downtown. As a result, the holder in due course doctrine often creates insuperable barriers to the pursuit of remedies that could protect a defrauded borrower from foreclosure.

Bob and Marty Barney are illustrative. The Barneys were in their early 60s in 2006 when they attended an event for first time home buyers. Bob had never owned a home. Marty and her former husband had financed a home with a straight-forward California Veterans loan.

The Barneys told the mortgage broker who co-sponsored the event that the largest mortgage payment their income would enable them to make was around $1,000 a month including taxes and insurance. The mortgage broker said that this would allow them to purchase a home around $300,000, getting a mortgage on which they would make interest-only payments for five years, after which its terms would significantly adjust, i.e. a five-year ARM. The Barneys accepted the mortgage broker's advice that they could refinance on better terms before an loan adjustment in five years because they would be building equity as housing prices rose.

Ultimately, they found an attractive home in Milwaukie for $283,000. The mortgage broker told them that, if they made a 5% downpayment (which required them to liquidate Marty's IRA), they could finance the remainder with a monthly payment of $1,030, including taxes and insurance.

The catch was buried deep in the complex paperwork and was never disclosed to them. They were being sold a negative amortization loan, i.e., one in which the monthly payment did not pay the accrued interest in full. The interest alone was about $2,400 a month, more than twice what the Barneys could afford. Even in the rising housing market prior to the great rescission, their equity in their home was being eroded each month.

The Barneys took out their loan in January, 2007 and discovered they had been defrauded when they received payment coupons which revealed the true interest charges. They then tried without success to refinance or sell the home. By the time they found my office and spoke with me in August, 2007, the lender which originated the loan had filed for bankruptcy. The mortgage broker collapsed shortly thereafter and surrendered its license in November, 2007.

There is only one legal claim a borrower can assert against an assignee which is not subject to the holder in due course doctrine. This is for rescission under the Truth in Lending Act, since 15 USC §1641(c) expressly provides for assignee liability. But there is no right to rescind a loan to purchase a property, the kind of loan the Barneys had.[1]

Consequently, the only viable claim the Barneys had, which my office brought for

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[1] Even when there is a right to rescind, it expires three days after the loan is made, unless the required disclosures are not properly given. It is possible for a loan originator both to comply with the statutory disclosures and at the same time defraud the borrowers, so this is often not a remedy available for borrowers who have been defrauded while refinancing.

them, was against the mortgage broker's bonding company on the broker's statutorily-required $30,000 bond. Barney v. Accredited Surety & Casualty Co., Multnomah County Circuit Court Case No. 1001-00339. While that case settled quickly and favorably, the bond was smaller than the increase in the Barneys' loan balance due to the negative amortization. Accordingly, recovering on the bond only gave them the financial means to start over after they lost their home.

Had the Barneys been defrauded by an appliance salesperson when they purchased a washing machine for their home, the FTC anti-holder rule would have enabled them to assert that fraud as a defense to a collection suit brought by a subsequent assignee. Their inability to assert the same defense because they were defrauded in the financing of that home and their note was subsequently assigned creates an inconsistency in public policy which results in injustice.

Please let me know if I can be of further assistance in dealing with this issue or any other portion of the drafting subcommittee's work.

Sincerely,

/s/ Phil Goldsmith

Phil Goldsmith

PG:sd
cc: Alan White (via email only alan.white@law.cuny.edu)