

## Litigation Related to a Mortgage: Expert Witness Considerations

By Joffrey Long



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“We’ll need expert testimony on two of these points.”

In planning litigation strategy, you may identify the need for a mortgage\* expert witness.

Your careful selection of a qualified expert will likely assist the parties and the triers of fact in resolving the disputed matters. To find the right one, your search will have to cover these key areas:

- The most common types of mortgage related lawsuits, and what category your case falls into
- Common "types" of mortgage expert witnesses.
- Areas in which a mortgage expert witness may provide consultation or testimony

It is my intent that the information provided in this guide will assist you in your search for the right mortgage lending expert witness. If you would like a .PDF copy of the complete guide, you can download it [here](#) or by clicking the PDF icon in the right hand column.

*\* Although the term “mortgage” is used, the article relates primarily to real estate loans that are evidenced by promissory notes, and are secured by deeds of trust.*

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# Securing a mortgage expert witness:

## Types of real property lawsuits

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There are many types of lawsuits involving loans secured by real property; they often fall into one of six general themes:

### **1. The sub-prime (or other institutional type loan) borrower lawsuit:**

Here, the owner(s) of a dwelling, (usually their residence) obtained a refinance loan or loans, (or loan to purchase a property) and later determined they didn't understand, couldn't afford, or were otherwise unhappy with the loan terms or some part of the process.

Cases often involve loans taken out in 2007 or before, when "sub-prime" loans with easier qualification standards were widely available, often in much larger loan amounts due in part to the higher property values of that era.

Typical allegations in these cases are that the originator of the loan (who may have been a loan broker / arranger, or the actual lender who loaned the funds) misrepresented the terms of the loan to the borrower, failed to properly qualify the borrower for the loan, breached a fiduciary duty, engaged in an unfair practice or predatory lending, or in some

other way behaved so as to cause or contribute to the borrower's loss.

While "Institutional loans" made by banks, mortgage banking companies, or credit unions are referred to, this category of loan problems also impacts private money or non-institutional lenders, who are sometimes referred to as hard money lenders. (For the purpose of this article the term "private money," or "private money lender" will be used for hard money or other types of non-institutional loans or lenders.)

### **2. The commercial loan gone bad:**

In this case, again often involving loans originated in 2007 or before, (and with a surprising percentage originated in either 2006 or 2007) a commercial property owner or developer has obtained a loan, or often a series of loans from a commercial institution or private money lender.

Problems in these transactions often revolve around the manner in which the loans were originally set up or documented, claims that rates and terms were usurious, issues related to subsequent loans from the same provider, default penalties and default

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interest rates, advances or modifications, various lending and borrower entities, documentation, lien priority and matters related to title insurance coverage.

### **3. Private investor's loss of capital:**

Here, the lender, rather than the borrower, has a complaint. In these cases, private investors who have invested funds in private money loans are suing the providers/organizers of the loan investment(s), (who may be loan brokers, "pool or fund" managers, or others who accept funds from investors) the borrowers, or other parties to the transaction.

Issues revolve around the manner in which the funds were raised, duties of the provider to analyze and underwrite the loan, disclosure of risk, possible "self-dealing" and undisclosed conflicts of interest, violations of securities laws and failure to properly manage (service) the various aspects of the loan after origination.

### **4. Loan servicing, default and modification issues:**

Cases involve what occurred after a loan was originated, including issues about application of payments; the processing, denial, or granting of loan modifications; and foreclosure.

### **5. Issues relating to licensing requirements and practices, or usury:**

Not as common as some of the other cases, these often center on the licensing of the originating organization or individuals, and their ability to have legally made or arranged the financing at issue. A related topic is usury, where a dispute exists over whether or not a loan was usurious, or if an exemption from usury applied.

### **6. Loan fraud issues:**

Advanced technology and a down economy have contributed to increases in both the quantity and complexity of direct real estate and lending related fraud. Forged documents, false reports, "straw" buyers or borrowers, fraudulent entities, falsified income, credit and appraisal documentation, and "short sale" fraud or fraud related to lender-foreclosed property comprise just a partial list.

Having been defrauded and often unable to find or collect from the original perpetrator(s), parties often sue those that can be found and have assets or insurance coverage. These may include loan origination entities or officers, escrow holders or title insurers, appraisers, and loan or real estate brokerage firms.

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# Areas upon which a mortgage expert witness may consult or testify

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There are a number of situations where a mortgage\* expert witness may be asked to consult or testify. The following seven legal scenarios are the most common:

## **Structure of lending or brokerage entities and borrower relationships:**

Licensing of entities or individuals; compliance with licensing laws and regulations; types of relationships between borrowers and lenders or brokers; impact of relationships, licensing or entity structure on aspects of the loan transaction; agency and fiduciary relationships; matters related to funds held in trust.

## **Lender or broker conduct during the origination process:**

Matters relating to alleged predatory lending; unfair business practices; misrepresentation; the existence of or breach of fiduciary duty; procedures followed by loan originator in obtaining, qualifying, approving, documenting or closing the transaction; standard of care or duties of lenders or brokers in originating loans; borrower's ability to understand loan transaction and terms.

## **Disclosure and documentation issues:**

Required documentation, disclosures and notices in loan transactions and their impact on the parties to the transaction; disclosures required under different licensing schemes; borrower or investor disclosures; in the case of consumer lending, documentation and practices related to RESPA, TILA, Section 32, FC 4970, and other laws.

## **Loan servicing, modification and foreclosure:**

Lender or servicer's conduct in servicing the loan; responding to or dealing with loan modification requests; dealing with delinquency or foreclosure; compliance with recently enacted California "dual track" foreclosure law.

## **Investors in trust deeds:**

For private, individual trust deed investors, matters related to investor suitability for the proposed investment; disclosures made to investors; investment provider's relationship to investors; standard of care for providers/

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organizers of trust deed investments in selecting, underwriting and closing trust deed loans, documentation of loans and documentation of investor's participation in loans; investor issues with servicing of the loan.

## **Institutional investors in trust deeds:**

Issues concerned with investor's relationship to originator or broker; conduct of investor and originator or broker during and after origination of loans; originator or broker/lender agreements; "buy-back" requests;

originator or broker representations and warranties.

## **Loan fraud:**

Matters concerning conduct of perpetrators of fraud; matters related to the relationships of various parties in the transaction; conduct of those parties, which may include escrow holders, title insurers, mortgage brokerage or lending companies and their loan officers, appraisers, real estate brokers and other parties involved in the sale or financing of property.

“ “ *As you will discover in the following pages, there are six types of professionals who focus on mortgage litigation issues. It is best to choose the expert who is most familiar with your specific legal situation, whether that be lending liability, mortgage fraud, or another scenario.*

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# Common types of mortgage expert witnesses

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There are six types of professionals that serve as a mortgage expert witness. Depending on the individual's experience and knowledge, a mortgage expert witness may specialize in one – or many – areas, including:

- Sub-prime mortgages
- Commercial hard money
- Mortgage fraud
- Private lending
- Lending liability

All of these professionals have pros and cons – so it's important to consider all factors before asking them to consult. The following information discusses information to consider about the different “types” of witnesses.

## **Banking Experts:**

Generally coming from a background of 30 to 40 years of employment at actual banks, these mortgage expert witnesses may have knowledge of loan origination and underwriting, banking procedures such as business loans, checking, savings and credit line procedures, governmental regulations applying to banking, and business banking issues. It's important to consider this expert's familiarity with cases originated by non-bank entities, such as mortgage brokers, California Finance Lenders, or non-

depository mortgage bankers.

Consideration must also be given to the possible need for testimony from an expert with direct, hands-on experience in transactions, as opposed to a primarily executive or managerial-level knowledge of the functions of lending.

## **Institutional Experts:**

Institutional expert witnesses often work or worked at large mortgage banking companies, banks, or credit unions. This type of expert will have worked for a number of years in the origination of institutional loans, with one or more of the types of institutions mentioned, or as a loan broker, brokering loans to those institutions. Some institutional experts may serve as a sub-prime mortgage expert witness.

## **Attorneys with Mortgage Experience:**

There are some attorneys who have experience in the mortgage business, but be certain to verify that their experience is in the specific area of litigation. For example, an expert in institutional lending may well not be appropriate as an expert in a case involving loans made or arranged with funds from private investor – instead, a private lending expert witness may be a

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## Common types of mortgage expert witnesses

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better choice. As with all experts, be sure to query the attorney as to when he or she was actually engaged in the mortgage industry, as practices and standards change over time.

### **Mortgage Scholars or Compliance Experts:**

Where these experts may be the most knowledgeable with respect to rules, regulations and requirements of lending, they often have little, if any actual experience originating loans. While they may be valuable in directing an attorney to specific regulations and laws, their views may be completely formed by the study of regulation and law, without the benefit of practical experience.

### **Independent Mortgage Broker / Lenders:**

These experts may operate or work for companies that both broker loans to institutional and private money lenders, and may also function as funding lenders, loaning their own funds. They may also function as loan servicers, collecting payments from borrowers on behalf of lenders. With this type of mortgage lending expert witnesses, it may be necessary to confirm their

understanding of applicable laws and regulations that affect lending practices, as they have often not had the benefit of the compliance training and supervision available at larger financial institutions. “Consumer Advocate” or “Lender Advocate” Experts: In some cases, these “lending liability” expert witnesses developed their interest in mortgage litigation because of their often strong feelings toward the rights of borrowers/ consumers or toward protecting the ability of lenders/brokers to operate their businesses. Where they offer to provide unbiased testimony, their objectivity could be challenged if they’ve produced a lot of strongly pro-consumer or pro-business writings that opposing counsel may be able to locate through a simple internet search, or if recent published writings of the expert are requested at time of deposition or testimony.

As with experts in other fields, what a mortgage expert witness won’t do may be as or more important as what they do, in their willingness to turn down cases they’re not truly qualified to opine on. Hopefully, prospective expert’s egos will allow them to give as much consideration to your hiring the right expert as they do in being retained in the matter.

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