

Attorney No. 44585

IN THE CIRCUIT COURT OF COOK COUNTY ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION

LINDA M. GAUDIE,

Plaintiff,

vs.

COUNTRYWIDE HOME LOANS, INC.;  
LANDSAFE APPRAISAL SERVICES;  
POTESTIVO APPRAISAL SERVICES,  
INC.; CRAIG JOHN POTESTIVO;  
MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC;  
and DOES 1-5,

Defendants.

2009LC003742  
CALENDAR ROOM W  
TIME 00:00  
Consumer Fraud

JURY DEMANDED

09 MAR 30 PM 2:26  
CLERK

COMPLAINT

INTRODUCTION

1. Plaintiff Linda M. Gaudie brings this action against a “subprime” mortgage lender and its agents and others to secure redress for fraud, deception and other predatory lending practices.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction under the Illinois Consumer Fraud Act, 815 ILCS § 505/2, and under common law. This Court has supplemental jurisdiction over plaintiff’s federal claims under 15 U.S.C. § 1601, *et seq.* (Truth in Lending Act (“TILA”)), and 15 U.S.C. § 1679b (Credit Repair Organizations Act (“CROA”)).

3. Defendants transact business in the District and are deemed to reside here.

PARTIES

4. Ms. Gaudie owns and resides in a home that she built located at 7911 Redondo Lane, Orland Park, Illinois, 60462.

5. Defendant Countrywide Home Loans, Inc. ("Countrywide") is, *inter alia*, a residential mortgage lender and loan servicer with its principal place of business at 4500 Park Granada Boulevard, Calabasas, California, 91302. It does business in Illinois. Its registered agent name and address are Prentice Hall Corporation, 33 North LaSalle Street, Chicago, IL, 60602.

6. Countrywide, in its capacity as a loan servicer, is named as a necessary party only.

7. Landsafe Appraisal Services, Inc. ("Landsafe"), is or was Countrywide's corporate unit for residential appraisals. It does business in Illinois. Its registered agent name and address are CT Corporation System, 208 S. LaSalle Street, Suite 814, Chicago, Illinois, 60604.

8. On information and belief, Countrywide and Landsafe are or were, at all relevant times, corporate affiliates under common control by the same corporate parent.

9. Potestivo Appraisal Services ("Potestivo") is or was, at all relevant times, an unincorporated, residential real estate appraiser that, on information and belief, has its principal place of business at 12010 S. Aero, #3, Plainfield, Illinois, 60544. It does business in Illinois.

10. Craig John Potestivo is or was the owner and sole proprietor of the business bearing his name. On information and belief, he resides at the same address.

11. Defendant Mortgage Electronic Registration Systems, Inc. ("MERS"), is a

Delaware corporation that does business in Illinois. It is engaged in the business of holding nominal legal title to mortgages. Its registered agent and office are CT Corporation System, 208 South LaSalle Street, 17<sup>th</sup> floor, Chicago, IL 60604. It is named as a necessary party only.

12. Does 1-5 are the current, actual owner(s) of plaintiff's loan, if different from Countrywide. Ownership of such loans is not a matter of public record and is subject to frequent change.

### **FACTS RELATING TO ALL COUNTS**

#### ***Fraud, Deception in the Inducement***

13. Prior to April, 2006, Ms. Gaudie decided to purchase land in order to build her own home. At that time, she was enrolled in a general contractor's course for owner-builders at Moraine Valley Community College in Palos Hills, Illinois.

14. In late March or early April, 2006, Tom Faille, who at that time was in charge of construction lending at Countrywide's Oakbrook office, made a presentation to plaintiff's class about construction financing program available from Countrywide.

15. If students applied for and obtained financing from Countrywide after hearing Faille, they would receive a refund from Countrywide in the amount of the course registration fee or \$369.00.

16. Faille presented detailed product information to the class about Countrywide's One Time Close Loan, referred to by Countrywide as "OTC." OTC consisted of construction and permanent financing made available by means of a single transaction with a single application, underwriting and closing process.

17. Portending plaintiff's injury, Countrywide's written marketing materials for the OTC program listed, as a benefit to the borrower, the feature that "Cost of project supported by Appraisal allows for higher loan approval."

18. Following Faille's presentation, Ms. Gaudie briefly discussed her plans with him. He indicated he could make her a construction loan and that she should follow up with him. He gave her his business card.

19. Other than meeting him briefly on this occasion, plaintiff saw Faille in person only one other time.

20. Faille was the only Countrywide representative with whom Gaudie had extensive contact.

21. Faille was, at all relevant times, an agent of Countrywide.

#### **Purchase Loan**

22. By late April, 2006, Ms. Gaudie had located a desirable property with a "tear-down" house standing on it. She then followed up with Faille to discuss obtaining purchase money financing from Countrywide.

23. Ms. Gaudie carefully inquired about the terms of such financing. At this time, she had perfect or near-perfect credit ratings.

24. On April 28, 2006, Faille represented to Ms. Gaudie that she would obtain a construction loan at the market rate of interest and that, upon completion of construction, she would have her choice of loan programs, all at market rate, for the permanent financing.

25. Also on this occasion, Faille recommended a second mortgage and quoted plaintiff an interest rate of "8.0% adjusted with prime."

26. In addition, plaintiff told Faille that, before proceeding to purchase the property, she wanted to be sure that the asking price supported the market value of the land *without* the existing house. Faille had made it clear that, if it did not, plaintiff would be required to bring the difference to closing for the construction loan.

27. Faille told plaintiff he would check with an appraiser who was familiar with land values in the area to see if the land alone would hold the value of the asking price.

28. On information and belief, in late April or early May, 2006, Faille did make inquiry with an appraiser, though Faille never informed plaintiff of the name or employment affiliation of the person he consulted or which sources of information the appraiser checked. On information and belief, the appraiser was an employee or other agent of Countrywide and/or Landsafe.

29. Faille then represented to plaintiff that the land alone was worth the purchase price.

30. Based on this representation, plaintiff decided to proceed through the application process for purchase financing.

31. On information and belief, Faille's representation to plaintiff was false. Plaintiff was not aware at the time that the representation was false.

32. Faille and/or the appraiser made the false representation to Ms. Gaudie knowingly or negligently. They made it for the purpose of inducing Ms. Gaudie to proceed with both the purchase money transaction and the anticipated, subsequent loan transactions with Countrywide.

33. In May, 2006, Faille completed a loan application for plaintiff, filling it out as he spoke with her over the phone. On information and belief, Faille typed the information into data fields on a computerized loan application format.

34. At that time, plaintiff provided Faille with full and accurate information about her income, assets, education and employment. On information and belief, plaintiff also faxed to Faille her recent W-2 statements.

35. A few days later, plaintiff received a typed, completed, preliminary loan application in the mail from Countrywide. She read over it, noticing that it contained errors. She corrected the errors by hand and mailed the corrected application back to Countrywide. She had no reason to believe that Countrywide would not correct the errors.

36. On information and belief, the errors included, *inter alia*, information relating to: the amount of plaintiff's gross monthly income, a bonus payment that was expected but had not yet been received, and her length of employment.

37. Plaintiff never received and does not have a copy of the final loan application for any of her loans from Countrywide.

38. On information and belief, plaintiff provided information for a loan application only once – in May, 2006, in connection with the purchase of the property.

39. On information and belief, Faille later re-used this information on plaintiff's subsequent applications for construction financing, all of which he physically filled out.

40. On information and belief, Faille and Countrywide processed plaintiff's purchase money loan and her subsequent loans as "no doc" or "limited doc" loans, even though plaintiff received a regular paycheck twice monthly.

41. No doc loan programs were designed for individuals, especially small-business owners, with significant fluctuations in personal income. However, many sub-prime mortgage lenders, including Countrywide, widely abused this product as an effective vehicle for fraud; they exaggerated or fabricated borrower financial information in order to qualify unsuspecting borrowers for loans they could not afford. In 2007, the Federal Reserve Board implemented new regulations prohibiting no doc loans.

42. In May, 2006, Countrywide approved Ms. Gaudie for a purchase money loan, and plaintiff closed on the loan and the property. Countrywide financed the purchase price of \$314,900 for the property, consisting of the land and the house.

#### **Construction Loans**

43. After acquiring the land, Ms. Gaudie hired an architect to draw up blueprints and specifications (“specs”) for construction. Submission of the plans was a requirement for an application for the construction financing.

44. The blueprints and specs, as well as the construction budget, were completed by or before August 6, 2006.

45. On or about this date, plaintiff provided the completed blueprints, specs and budget to Faille and Countrywide for her application for OTC financing.

46. In September, 2006, Faille and Countrywide informed plaintiff that she qualified for an OTC loan.

47. Faille told Ms. Gaudie that she had been approved for a first mortgage loan in the amount of \$656,250. The amount would pay off the existing balance of the purchase money loan from Countrywide and provide some funds for construction.

48. On information and belief, this amount represented 80% of the appraised value of the land with the newly constructed house.

49. Faille also told plaintiff that, based on the project budget, additional financing was necessary. He said that a second mortgage, Home Equity Line of Credit ("HELOC") would also be available to plaintiff to cover additional costs.

50. At that time or shortly thereafter, Faille told plaintiff she had been approved for a HELOC in the amount of \$126,064.

51. On information and belief, this represented 20% of the appraised value of the property with the newly constructed house.

52. Faille told plaintiff that she would get the HELOC at the prime interest rate.

53. However, plaintiff never received any written, preliminary disclosures of the loan terms – such as a Good Faith Estimate, a TILA Statement and others – as required by federal law.

54. Nor did she ever receive any notice of change in loan terms for either loan, as required by Illinois law.

55. According to Faille, once construction was complete, the first-lien construction loan would convert to a permanent loan, while the HELOC would remain in place on the original loan terms.

56. However, Faille said, again, that plaintiff would have her choice of the type of permanent loan product at market rate. Faille also told plaintiff that both the first mortgage loan and the HELOC would convert to permanent financing, such that plaintiff would have a single loan and a single monthly payment.

57. A couple days before closing, Ms. Gaudie received documents from Countrywide indicating that the *permanent*, first mortgage construction loan was going to be a three-year, interest-only, adjustable rate mortgage (“ARM”) with a starting rate of 6.375%. The rate would enter its adjustable phase in October, 2007, could increase by as much as 2.0% at that time, would adjust once every 12 months and could reach as high as 12.375% (See attached Exhibit A).

58. Although Countrywide earlier represented to plaintiff that, under the terms of the OTC program, she would choose a permanent financing program *after* construction was completed, Countrywide appeared to be requiring her to commit to all of the terms of permanent financing at the closing for the construction loan.

59. Simultaneously, plaintiff also received documents that indicated that the Annual Percentage Rate (“APR”) for the HELOC was going to be 12.5%, which was not prime but “prime plus four.”

60. Ms. Gaudie phoned Faille, who told her not to worry because she would still get the market rate on the first mortgage loan and her full choice of loan programs once the loans converted to a permanent loan. He told her that the documents had to be drawn in this manner in order for the loan to go through.

61. Faille also promised plaintiff that, if ultimately necessary to get her a lower rate, he (meaning Countrywide) would refinance both of plaintiff’s loans after conversion. Because she had excellent credit, Ms. Gaudie foresaw no obstacles to Faille keeping his promise.

62. In addition, by this time Ms. Gaudie had paid over \$16,000 out of her pocket to acquire the property and prepare for construction.

63. On or about October 12, 2006, Countrywide closed the first mortgage construction loan and the HELOC at Lawyer's Title in Tinley Park.

64. Closing was rushed. No one explained the documents presented to plaintiff for signature. Plaintiff was presented with two large stacks of documents to sign, one for each loan.

65. The following are true and accurate reproductions of documents plaintiff signed at closing for the first mortgage construction loan:

a. An Adjustable Rate Note with a Construction Loan Note Addendum, attached hereto as Exhibit A;

b. A Construction Loan Agreement with various exhibits, Exhibit B;

c. A mortgage with riders, Exhibit C;

d. A HUD-1 Settlement Statement, Exhibit D;

e. A Truth in Lending Disclosure Statement, Exhibit E;

66. Following are true and accurate reproductions of documents plaintiff signed at closing for the HELOC:

a. A Home Equity Credit Line Agreement, Exhibit F;

b. A HELOC Supplemental Agreement for Construction Loan, Exhibit G;

c. A mortgage, Exhibit H;

d. A single Notice of Right to Cancel form, Exhibit I;

67. However, Ms. Gaudie was not provided with copies of all of the closing documents she signed at closing, including but not limited to: preliminary and final loan

applications (for both loans) and a TILA Disclosure Statement and a HUD-1 Settlement Statement for the HELOC.

68. Ms. Gaudie requested copies of final loan applications from Countrywide prior to March, 2008, but Countrywide responded by sending her a copy of the appraisal report.

69. Plaintiff will obtain the missing documents during discovery and, based on what they contain, may seek leave to amend her complaint.

70. Shortly after closing in October, 2006, Ms. Gaudie began construction on her home. The existing house was demolished within a few weeks.

71. During the construction process, Countrywide erred in applying Ms. Gaudie's monthly payments. Instead of crediting the monthly payments she made to the interest accruing each month or to the interest reserve Countrywide had set up to cover interest payments made during the construction phase, Countrywide applied her payments to reduce the outstanding principal balance. Plaintiff discovered this when she was short on the last construction draw.

72. Countrywide's error had the effect of reducing by about \$16,000 the amount that plaintiff had available to her from the construction loan, forcing her to draw down on the higher-interest HELOC sooner.

73. Thus, Ms. Gaudie paid the higher, HELOC rate of interest on about \$16,000 when she should have paid the construction loan rate of interest on these funds.

74. In addition, due to compound interest, Ms. Gaudie ultimately paid more interest on the construction loan because her initial payments to interest were directed to principal, leaving the unpaid interest to accumulate.

75. Eventually, Countrywide credited the \$15,000 back to the construction loan from the HELOC, but it did not compensate plaintiff for the additional interest she paid due to its mistake.

76. Construction on Ms. Gaudie's new home was complete and the house was habitable by November or December, 2007.

### **Conversion Loan**

77. As construction neared completion, Countrywide's conversion department called plaintiff to offer her a "choice" of permanent loan products. However, Countrywide offered her a mere three options, and none was at market rate, as Faille had promised plaintiff.

78. Countrywide also informed plaintiff that it would only convert the first mortgage construction loan, leaving her to continue paying for the HELOC at 12.5% APR.

79. Dissatisfied, plaintiff approached other lenders for a better product and rate. Market rate was low at that time. Ms. Gaudie gained pre-approval with more than one other lender; however, each application was ultimately denied because, as Ms. Gaudie first began to learn at this time, Countrywide and/or Landsafe had drastically and fraudulently over-appraised the value of her newly constructed home, as set forth in detail below.

80. As a result of Countrywide's over-appraisal and the pattern of deceptive conduct set forth above, plaintiff had no choice but to accept a conversion on the loan terms Countrywide offered.

81. Countrywide gave plaintiff an interest-only, adjustable rate mortgage ("ARM") with a starting rate of 6.375% (see attached Exhibit J).

82. Following are documents plaintiff signed in connection with the conversion of the first mortgage construction loan into permanent financing:

- a. A Modification of Note and Security Instrument, Exhibit J;
- b. A TILA Disclosure Statement, Exhibit K.

83. Countrywide did not provide plaintiff with any Notice of Right to Cancel forms in connection with the conversion loan or modification.

84. The modification was a new extension of credit for consumer purposes. It was not for initial construction. Construction was, by that time, complete and the home was habitable.

85. During the period January through March, 2008, Ms. Gaudie again attempted repeatedly to refinance but could not gain approval due to Countrywide's inflated appraisal, which resulted directly in the home being worth dramatically less than she now owed on it.

86. At that time, a refinance would have lowered Ms. Gaudie's monthly payment by \$800-1,000. Her credit and income were excellent. The real estate market in Orland Park at that time had not fallen precipitously. The only obstacle was Countrywide's fraudulent appraisal.

87. Ms. Gaudie also called Faille to follow up on his promise to refinance her, but he stopped returning her phone calls.

88. On information and belief, Countrywide is the current legal and beneficial owner of both of plaintiff's loans.

89. If Countrywide is not the current legal or beneficial owner, Does 1-5 are named as the current owners. Plaintiff will determine the identities of all owners and any others having any interest in plaintiff's loans through discovery.

90. On information and belief, Countrywide also services plaintiff's loans, and plaintiff has made payments to Countrywide.

91. As the nominee for plaintiff's mortgage loans, MERS claims certain interests in plaintiff's loans, including but not limited to the right to assign the mortgages and to file foreclosure actions.

### *Fraudulent Appraisal*

92. Throughout the application process for the construction loans, Faille stressed to Ms. Gaudie that the appraisal would be completely independent and that he and Countrywide could have no direct contact with the appraiser.

93. On or about August 6, 2006, Faille and Countrywide sent Ms. Gaudie's blueprints and specs to Landsafe, which then forwarded copies to Postestivo, who utilized them in his appraisal of Ms. Gaudie's property and construction plans.

94. In this prospective appraisal, Countrywide's task was to determine whether or not the property with the house "as completed" would support the loan amount needed to pay off the existing mortgage debt and provide sufficient construction funds.

95. The property was to be appraised as though the house to be constructed was complete and in new condition as of the appraisal date.

96. Prior to September 6, 2006, Faille, Countrywide and/or Landsafe ordered and arranged for an appraisal with Craig John Potestivo of Potestivo Appraisal Services, Inc.

97. At the time, Potestivo was an Illinois licensed appraiser. Potestivo's appraisal license expired September 30, 2007, and has not since been renewed.

98. Potestivo's appraisal indicates it was performed for "Landsafe/Countrywide" (Exhibit L); for purposes of performing the appraisal, Potestivo was Landsafe's and/or Countrywide's agent.

99. Additionally, Landsafe was Countrywide's agent for purposes of: hiring Potestivo to perform the appraisal, subsequently reviewing Potestivo's appraisal report and submitting this review with conclusions as to the validity of the report to Countrywide's underwriting department.

100. As the agent of Landsafe, Potestivo was also a sub-agent of Countrywide.

101. In the alternative, prior to September 6, 2006, Potestivo, Landsafe and Countrywide entered into a conspiracy to fraudulently inflate the market value of plaintiff's property with the new house, as set forth below.

102. On or about September 6, 2006, Potestivo prepared an appraisal report for "Landsafe/Countrywide" stating that the market value of the property, with the home as if newly constructed, was \$880,000. A copy of the appraisal report is attached as Exhibit L.

103. Potestivo inserted this value figure onto the appraisal report and signed it on September 6, 2006 before submitting the report to Faille, Countrywide and/or Land Safe.

104. This amount was significantly and artificially inflated relative to the market value of comparable homes in the area. It was inflated by at least \$250,000.

105. Countrywide's underwriting department subsequently underwrote plaintiff's loans to the fraudulent, \$880,000 appraised value stated in Potestivo's report and subsequently verified by Landsafe's own review of that report.

**Discovery/Fraudulent Concealment of Fraud**

106. Ms. Gaudie's causes of action for fraud and negligence accrued upon discovery of defendants' over-appraisal and any other fraud it committed in connection with her transactions.

107. It was not until many months after closing that plaintiff learned that Landsafe had some affiliation with Countrywide that may have compromised the independence and objectivity of its appraisal of her property.

108. In March, 2008, after plaintiff had been turned down for refinancing and had been begun to suspect appraisal fraud, she arranged for the performance of two retrospective appraisals of the property, each by a different appraiser. Both appraisals valued the property as of September 6, 2006.

109. The first retrospective appraisal concluded that the property was worth \$585,000 on that date.

110. The second retrospective appraisal, conducted entirely independently of the first, concluded that the property was worth \$620,000 on September 6, 2006.

111. Defendants' appraisal was not even within the acceptable range of professional tolerance or variation that could be imputed to subjective but disinterested judgments of value.

112. Ms. Gaudie did not discover and, through the exercise of reasonable diligence, could not have discovered, at the time of the loan transactions, the factual basis of her fraud and negligence claims.

113. Moreover, because defendants knowingly and actively concealed the fact that the appraisal was inflated, they kept Ms. Gaudie ignorant of the vital information essential to the pursuit of her claims, without any fault or lack of diligence on her part.

114. Despite the fact that defendants knew or should have known that the appraisal was biased and fraudulent, Faille assured Ms. Gaudie that the appraisal was completely independent and that he could have no contact with the appraiser.

115. The fact Countrywide's incentive system for appraising homes was not objective and that Countrywide and Landsafe had common ownership and control is information a reasonable borrower would have considered vital. The fact of common ownership or controlled was not shared with Ms. Gaudie.

116. In addition, Countrywide did not provide Ms. Gaudie with a complete set of copies of the closing documents she signed, including documents from which she could have discovered defendants' fraud.

117. Due to the inherent nature of defendants' wrongdoing, i.e., fraud and active conspiracy to commit fraud, defendants effectively concealed their fraudulent appraisal as set forth below, and Ms. Gaudie had no way of knowing or suspecting the fraud.

118. On information and belief, Landsafe and/or Countrywide contacted Potestivo between August 6 and September 6, 2006, and advised him of the appraised value result they needed (i.e., at least \$880,000) to justify a loan amount sufficient to cover the pay-off and the new construction. They needed an appraisal that supported an acceptable loan-to-value ratio for underwriting purposes.

119. Defendants agreed upon a value or a narrow range of value at that time and before Potestivo inspected the property, reviewed the blueprints and specs, and prepared the appraisal report.

120. Defendants wanted the construction loans to be approved, so they appraised the property to project cost rather than to the actual, fair market value.

121. Potestivo obliged defendants' request to appraise to the loan amount rather than to the actual property value in order to continue to receive a stream of business from Countrywide, Landsafe and/or Faille. On information and belief, a significant share of the volume of Potestivo's appraisal business in 2006 came from Countrywide, Landsafe and/or Faille.

122. Landsafe and Countrywide not only approved and conspired before Potestivo's appraisal report was prepared but also after it was completed.

123. On or after Potestivo completed the report on September 6, 2006, he forwarded it to Landsafe and/or Countrywide.

124. Prior to underwriting plaintiff's loans, Landsafe performed its own review of plaintiff's property with the as-completed house. It did so as part of its standardized appraisal review analysis prior to underwriting.

125. Specifically, on or about September 26, 2006, Hansel Dobbs of Landsafe issued an "OTC Value Opinion" that reviewed and analyzed the methods and results of Potestivo's appraisal report. Dobbs also reviewed the blueprints, specs and elevations for the house, in addition to several, supplemental sources of real estate data about the geographical area. A copy of Landsafe's OTC Value Opinion is attached hereto as Exhibit M.

126. Dobbs' review concluded that Potestivo's appraisal report was reasonable "within tolerance."

127. Curiously, Dobbs' review also lists, *before* the analysis of Potestivo's method and result, the purchase price of the land and the estimated construction costs, the total of which was the loan amount needing approval.

128. Indeed, on information and belief, the sum of the four components required for Countrywide's construction loan – payoff of the debt owed on the land, cost to build, 10% contingency construction reserve and interest reserve - equals Potestivo's appraised value almost exactly.

129. Faille, Countrywide and/or Landsafe then transmitted Potestivo's appraisal report to Countrywide's underwriting department, along with Dobb's OTC value opinion.

130. Based on these materials, Countrywide underwrote the loan to the appraised value of \$880,000, knowing that this amount was fraudulently inflated.

131. In the alternative, Countrywide was negligent in failing to discover that the appraised value was fraudulent. It should have known and discovered at the point of appraisal review or underwriting that the \$880,000 was fraudulent and inflated.

132. As the originating lender performing the underwriting and determining whether plaintiff qualified for the loans, Countrywide had a non-delegable duty to verify the accuracy of the appraised property value.

133. Countrywide had information at that time from which it knew or should have known or discovered appraisal fraud.

134. For instance, the OTC value opinion indicates that Potestivo had, in part, used as "comparables" ("comps") properties that were on the market to be sold but that had not yet actually been sold for any price, a choice which could easily inflate the valuation process.

135. Landsafe's review also points to other specific weaknesses with Potestivo's report (Exhibit M).

136. Further, Potestivo's appraisal report describes a walk-out basement. There is no walk-out basement in the plans and specs Ms. Gaudie submitted to Countrywide.

137. Further, on information and belief, following closing Countrywide performed another analysis of the appraisal, during an internal audit, to ensure that the appraised value was accurate and/or had been properly reviewed by Landsade and/or Countrywide's underwriting department.

138. Once again, Countrywide intentionally overlooked or negligently missed this opportunity to discover fraud.

139. By basing the construction loans on an inflated property value, defendants fraudulently or negligently represented to MS. Gaudie that she qualified for the loans and that the construction project was a sound investment.

140. Indeed, Landsafe's own review of Potestivo's appraisal states - on the assumption that plaintiff would seek to re-sell the property - that "the borrower should benefit from some entrepreneurial profit..." which apparently meant that "an EMV [estimated market value] higher than the combined site cost and construction contract price is acceptable."

141. Defendants' misrepresentations were material and fundamental to Ms. Gaudie's decision to proceed with the construction financing transactions.

142. Defendants' misrepresentations served to induce and did induce Ms. Gaudie to go through with the transactions.

143. Defendants knew or should have known, at the time they performed the appraisal and underwrote the loans, that, based upon the actual, fair market value of the land and the house as completed, Ms. Gaudie was not qualified for the loans and that the loans were not a sound investment for her.

144. But defendants faced an enticing commission and profitability structure. Ultimately, Faille, Countrywide and Landsafe made the false representations to plaintiff because

their compensation was tied to the closing of the loans and to the size of the loans. The larger the loan amount, the more profitable the transaction, i.e., the higher Faille's commissions and Countrywide's future interest-income.

145. Countrywide's income and profits would be realized whether it held sold the loans (after converting the construction loan to a permanent loan) or continued to hold them in portfolio. Faille's commissions were realized immediately, as were Countrywide's \$4,448.00 in closing fees (Exhibit D).

146. In 2006, Countrywide and Landsafe had a nationwide pattern and practice of committing this type of appraisal fraud and negligent underwriting (based on appraisals it knew or should have known were fraudulent) in residential mortgage transactions.

147. Largely as the result of this history, in-house or lender appraisal departments are now widely discredited because they are seen as biasing or corrupting the appraiser and the appraisal process in favor of doing the loan. Recent federal and state regulations now expressly require that appraisals be performed independently.

148. Due to Countrywide's fraudulent appraisal, Ms. Gaudie is now deep "underwater" or "upside down," meaning that she owes far more on her home than it is worth (today or in 2006).

149. This, in turn, has been made it impossible for her to refinance or sell, trapping her in an adjustable rate loan with a rising interest rate.

150. As a direct consequence, she is no longer able to afford the monthly payments, even though her income has stayed the same since she obtained the loans. (Ms. Gaudie is, however, placing into savings each month the maximum mortgage payment she can afford.)

151. Had plaintiff known that obtaining a construction loan depended on a fraudulent appraisal, she would never have taken out the financing to build her home.

152. Defendants knew and could foresee, at the time they appraised the property and approved the loans, that the combination of a dramatically inflated appraisal and an adjustable rate loan would precipitate delinquency, default and would put Ms. Gaudie at imminent risk of losing her home in foreclosure.

### **COUNT I – TRUTH IN LENDING ACT**

153. Plaintiffs incorporate paragraphs 1-152. This count is Countrywide, MERS and Does 1-5.

### **RIGHT TO RESCIND**

154. Because plaintiff's conversion transaction was secured by plaintiff's home, and was not entered into for purposes of the initial acquisition or construction of that home, it was subject to the right to cancel provided by 15 U.S.C. Sect. 1635 and 12 C.F.R. Sect. 226.23. Sect. 226.23 provides:

#### **(a) Consumer's right to rescind.**

**(1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section.[fn]47**

**(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.**

**(3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material**

disclosures,[fn]48 whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act. [15 U.S.C. §1635(f)]

(4) When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

(b) Notice of right to rescind. In a transaction subject to rescission, a creditor shall deliver 2 copies of the notice of the right to rescind to each consumer entitled to rescind. The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

(1) The retention or acquisition of a security interest in the consumer's principal dwelling.

(2) The consumer's right to rescind the transaction.

(3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(4) The effects of rescission, as described in paragraph (d) of this section.

(5) The date the rescission period expires. . . .

(f) Exempt transactions. The right to rescind does not apply to the following:

(1) A residential mortgage transaction [defined in 15 U.S.C. §1602(w) as one where a "security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling"].

(2) A credit plan in which a state agency is a creditor.

#### GROUNDS FOR RESCISSION

155. In connection with the permanent loan, Defendant failed to provide plaintiff with any federal Notice of Right to Cancel forms at anytime, in violation of 12 C.F.R. Sect. 226.23(b) above.

156. This violation is sufficient to confer on plaintiff the extended, three-year right to rescind the loan.

157. On December 22, 2008, plaintiff notified defendants that they are rescinding the HELOC (Exhibit N).

158. The loan has not been rescinded. In fact, Countrywide has refused to rescind the loan (Exhibit H).

159. Under 15 U.S.C. Sect. 1641(c), the right to rescind may be exercised against "any assignee," including Does 1-5.

160. The TILA violation is apparent on the face of the documents assigned to Does 1-5.

161. In addition, 15 U.S.C. Sect. 1635(g) provides:

**Additional relief**

**In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.**

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and against defendants for:

a. A judgment voiding plaintiff's mortgage, capable of recordation in the public records, and binding on defendants;

- b. Refund of all finance charges plaintiff has paid in connection with the loan, pursuant to the TILA rescission formula;
- c. Equitable relief, if necessary, including but not limited to adequate time in which to refinance and tender the non-rescindable balance, taking into account the deception and fraud by which plaintiff was lured and induced into the loan and the ultimate effect on plaintiff's credit;
- d. Statutory damages for failure to rescind;
- e. Attorney's fees, litigation expenses and costs; and
- f. Such other or further relief as the Court deems appropriate.

**COUNT II – CREDIT REPAIR ORGANIZATIONS ACT**

162. Plaintiff incorporates paragraphs 1 - 152. This claim is against all defendants, except MERS and DOES 1-5.

163. Defendants violated the Credit Repair Organizations Act ("CROA"), 15 U.S.C. Sect. 1679b, by fraudulently inflating and falsifying the appraised value of plaintiff's property, thereby making a false statement to a creditor about plaintiff's creditworthiness.

164. CROA §1679b provides:

**1679b. Prohibited practices**

**(a) In general. No person may--**

**(1) make any statement, or counsel or advise any consumer to make any statement, which is untrue or misleading (or which, upon the exercise of reasonable care, should be known by the credit repair organization, officer, employee, agent, or other person to be untrue or misleading) with respect to any consumer's credit worthiness, credit standing, or credit capacity to-- . . .**

**(B) any person--**

**(i) who has extended credit to the consumer; or**

**(ii) to whom the consumer has applied or is applying for an extension of credit . . . .**

165. CROA § 1679g provides:

**1679g. Civil liability**

**(a) Liability established. Any person who fails to comply with any provision of this title [15 USC §§1679 et seq.] with respect to any other person shall be liable to such person in an amount equal to the sum of the amounts determined under each of the following paragraphs:**

**(1) Actual damages. The greater of--**

**(A) the amount of any actual damage sustained by such person as a result of such failure . . . .**

**(2) Punitive damages.**

**(A) Individual actions. In the case of any action by an individual, such additional amount as the court may allow. . . .**

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and against defendants for:

- a. Compensatory, actual, punitive and other appropriate damages;
- b. Equitable relief;
- c. Attorney's fees, litigation costs; and
- d. Such other or further relief as the Court deems just.

**COUNT III - COMMON LAW FRAUD**

166. Plaintiff incorporates paragraphs 1 - 152. This claim is against Countrywide, Landsafe and Potestivo.

167. Defendants falsely inflated the appraised value of plaintiff's property and knowingly and intentionally approved loans to plaintiff based upon the false information, as set forth above.

168. Defendants knew that the appraised value was inflated and false or were reckless with respect to its truth or falsity.

169. Defendants intended for plaintiff to rely on and knew that she would rely on the inflated appraisal and defendants' ultimate representation that plaintiffs could afford the loans. In this manner, defendants sought to induce plaintiffs to take out the loans.

170. Defendants' representation that plaintiff's property appraised high enough to support the loan amounts were a material term and predicate of defendants' transaction with plaintiff.

171. Plaintiff did, in fact, rely on defendants' fraudulent misrepresentations. Plaintiff's reliance was reasonable and justified.

172. Plaintiff was injured thereby.

WHEREFORE, plaintiff requests that the Court enter judgment in her favor and against defendants for:

- a. Actual, compensatory and other appropriate damages;
- b. Punitive damages, equitable relief; and
- c. Such other relief as the Court deems appropriate.

**COUNT IV – ILLINOIS CONSUMER FRAUD ACT**

173. Plaintiff incorporates paragraphs 1-152. This claim is against all defendants, except MERS and Does 1-5.

174. In connection with the loan transactions detailed above, defendants violated §2 of the Illinois Consumer Fraud Act, 815 ILCS 505/2, by engaging unfair and/or deceptive acts and practices and conduct toward plaintiff.

175. Defendants violated the ICFA through a combination of one or more of the following practices: (a) prospective, oral misrepresentation of the loan terms (b) baiting plaintiff on one set of loan terms then switching her to another, worse set of loan terms; (c) making false statements about the value of the land relative to the purchase price of the property with the old house; (d) not providing written, preliminary disclosures for the construction loans from which plaintiff could see the proposed loan terms before committing herself further; (d) not providing plaintiff with any written notification of a change in loan terms for either loan; (d) fraudulently and dramatically inflating the appraised value of plaintiff's property with the newly constructed house; (e) misrepresenting to plaintiff, based on the false appraised value, that the loan-to-value ratio was proper, that she was approved for construction financing, and that she could afford to repay the loans; (f) misleading plaintiff about the structure and terms of the conversion or permanent financing; (g) not providing federal Notice of Right to Cancel forms in connection with the conversion to permanent financing; (h) knowingly engaging in improvident lending with respect to plaintiff; and (i) other practices set forth above.

176. Defendants profited from their fraud and deception.

177. Defendants were unjustly enriched by their conduct.

178. Defendants engaged in such conduct in the course of trade and commerce.

179. Defendants engaged in such conduct with the intent that plaintiff rely on their deception.

180. Defendants engaged in such conduct with the intent to injure plaintiff.

181. Plaintiff has been damaged as a result and continues to be damaged.

182. Defendants' conduct caused plaintiff's injury.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and against defendants for:

- a. Compensatory, actual, punitive and other appropriate damages;
- b. Equitable monetary relief;
- c. Attorney's fees, litigation expenses and costs; and
- d. Such other or further relief as the Court deems appropriate.

**COUNT V – CIVIL CONSPIRACY TO COMMIT FRAUD**

183. Plaintiff incorporates paragraphs 1-152. This claim is against all defendants, except MERS and Does 1-5.

184. Defendants combined and conspired with each other to unlawfully arrange for and produce a fraudulent, appraised value for plaintiff's property.

185. Defendants took concerted and overt actions in furtherance of the conspiracy to commit fraud. Defendants agreed upon a minimum value or range of value in advance of the appraisal being performed, and Countrywide approved the loans knowing that the actual market value of the home was far below \$880,000.

186. Defendants conspired - out of excessive concern for their fees, commissions and profits - to misrepresent, conceal, overlook and suppress the actual market value of plaintiff's property.

187. Plaintiff was damaged as a result.

188. Defendants' conspiracy caused plaintiff's damages.

WHEREFORE, plaintiff requests that the Court enter judgment against defendants for:

- a. Actual, compensatory and other appropriate damages;
- b. Punitive damages, equitable relief; and
- c. Such other or further relief as this Court deems appropriate.

**COUNT VI - NEGLIGENT MISREPRESENTATION**

189. Plaintiff incorporates paragraphs 1 - 152. This claim is against all defendants, except MERS and Does 1-5.

190. In the alternative, defendants negligently misrepresented the value of plaintiff's property or negligently overlooked the inflated appraisal as they underwrote the loan and, consequently, negligently represented to plaintiff that the property value would support the loan amount was proper.

191. Defendants negligently misrepresented to plaintiff that she could afford the loan when it processed, underwrote and approved the loans without verifying the accuracy of the appraisal report submitted by its agent, Potestivo.

192. Defendants made the misrepresentations detailed above in their business or professional capacities. All of the misrepresentations were made in a commercial setting and directly to plaintiff.

193. In making the misrepresentations, defendants breached their duty to plaintiff to accurately represent, describe and explain the terms of the loans and their duty not to make an improvident loan, thereby failing to take precautions against creating an unreasonable risk of injury from foreseen and foreseeable events -- such as plaintiff's actual inability to make

the repayments, the event of mortgage default, the destruction of plaintiff's credit, the loss of plaintiff's home in foreclosure, and other financial injuries to plaintiff.

194. As a result of defendants' negligent misrepresentations, plaintiff suffered damages and continues to suffer damages.

195. Defendants' negligent misrepresentations caused plaintiff's injuries.

196. Plaintiff justifiably relied on defendants' misrepresentations. Defendants knew or could contemplate or foresee that plaintiff would rely on their negligent misrepresentations.

197. Defendants' conduct was wanton and willful, reckless and malicious.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and against defendants for:

- a. actual and compensatory damages;
- b. the reasonable costs of repair;
- c. punitive damages;
- d. equitable relief other appropriate damages; and
- e. any other or further relief that the Court deems just.

#### **COUNT VII - BREACH OF CONTRACT**

198. Plaintiff brings this count against Countrywide, incorporating paragraphs 1 - 152 above.

199. The terms of the Note and Construction Agreement required Countrywide to credit plaintiff's monthly payments during the construction phase to the interest owed (or the interest reserve it had set up) and not to principal.

200. Defendants breached this obligation when they improperly applied plaintiff's interest-only payments during the construction period to the outstanding principal amount of the first mortgage construction loan.

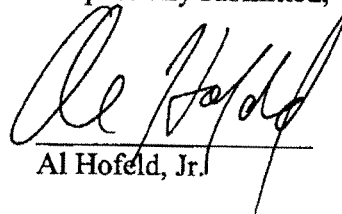
201. Plaintiff was damaged thereby, in the ways described above.

202. Countrywide's error caused plaintiff's damages.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and against defendants for:

- a. actual and compensatory damages;
- b. contract damages, including liquidated damages, if any;
- c. equitable relief other appropriate damages; and
- d. any other or further relief that the Court deems just.

Respectfully submitted,

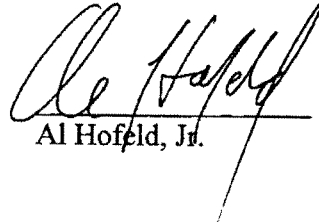


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**NOTICE OF LIEN**

Please be advised that we claim a lien upon any recovery herein for 1/3 or such amount as a court awards.



Al Hofeld, Jr.

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