



CIVIL REMEDIES IN FRAUD: Sellers, Escrow, Notaries & Title

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CIVIL REMEDIES IN FRAUD: SELLERS, ESCROW, NOTARIES & TITLE

COMMONLY USED CLAIMS

- Breach of Contract
- Violation of Statute (Private Right of Action)
- Negligence
- Fraud/Deceit/Breach of Fiduciary Duty
- Agency, Partnership, Conspiracy

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BREACH OF CONTRACT

- Contract
 - Written
 - Oral
 - Implied In Fact
 - Implied In Law (Quasi-Contract)
- Breach
- Lender's Own Performance
- Damages

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VIOLATION OF STATUTE

- Member of Protected Class of Victims
- Public Remedy vs. Private Right of Action
- Actual Injury
- Compliance With Procedural Requirements For Relief

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NEGLIGENCE

“Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.”

Cal. Civil Code §1714

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FRAUD/DECEIT/BREACH OF FIDUCIARY DUTY

California Civil Code §1709 defines
“fraudulent deceit” as follows:

“One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.”

California Civil Code §1710

Recognizes Four (4) Kinds of “Deceit,” Each Having Its Own Proof Requirements, But Each Authorizing The Imposition Of Legal Liability:

- Intentional Misrepresentation
- Negligent Misrepresentation
- Fraudulent Concealment/Suppression
- Promissory Fraud

INTENTIONAL MISREPRESENTATION

“The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.”

[Civil Code §1710(1)]

NEGLIGENT MISREPRESENTATION

“The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.”

[Civil Code §1710(2)]

FRAUDULENT CONCEALMENT/SUPPRESSION

“The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact.

[Civil Code §1710(3)]

PROMISSORY FRAUD

“A promise, made without any intention of performing it.”

[Civil Code §1710(4)]

Liability For Own Intentional Torts:

Even employees, agents, and representatives have personal liability for all misrepresentations of which they have personal knowledge or with respect to which they act with “reckless disregard” for the truth.

True Or False?

- Misrepresentations must be written to be fraudulent.
- Misrepresentations cannot be implied from conduct.
- Reckless misrepresentations made without intent to defraud are not actionable.
- Silence does not = fraud.

POSSIBLE SUBJECTS OF MISREPRESENTATION

- Identity and Eligibility of the Parties
- Elements Of The Transaction
- Validity of Documents and Instruments
 - Entity Validity, Financial Solvency, Insurance
 - Authority to Do Business, Applicable License
 - Entity Policies, Procedures, Personnel, Supervision
 - Other Contract Reps and Warranties

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AGENCY,
PARTNERSHIP,
CONSPIRACY

Agency: “An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.” (Cal.Civ. Code §2295)

Principal Liability: “...a principal is responsible to third parties for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.” (Cal.Civ. Code §2338)

Creation of Agency: “An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification.” (Cal.Civ. Code §2307)

Form of Authority: “An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing.” (Cal.Civ. Code §2309)

Ratification: “A ratification can be made...where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof.” (Cal.Civ. Code §2310)

General vs. special agency “An agent for a particular act or transaction is called a special agent. All others are general agents.” (Cal. Civ. Code §2297)

Measure of Authority: “An agent has such authority as the principal, actually or ostensibly, confers upon him. (Cal. Civ. Code §2315)

Ostensible Authority: “Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.” (Cal. Civ. Code §2317)

Partnership: “The association of two or more persons to carry on as co-owners of a business for profit forms [with certain limited exceptions] a partnership, whether or not the persons intend to form a partnership.” (Cal. Corp. Code §16202)

Partner As Agent: “Each partner is an agent of the partnership for the purpose of its business [with certain limited exceptions]. An act of a partner...binds the partnership... .” (Cal. Corp. Code §16301)

Joint and Several Liability: “...all partners [with certain limited exceptions] are liable, jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law. ...” (Cal. Corp. Code §16306)

“The elements of an action for Civil Conspiracy are the formation and operation of the conspiracy and damage resulting to Plaintiff from an act or acts done in furtherance of the common design... In such action, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the decree of his or her activity. (Doctors’ Co. v. Superior Court (1999))

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ESCROW/SETTLEMENT AGENT

- Breach of Contract
 - Written, oral, or implied?
 - Uniform Closing Instructions Project
- Violation of Statute
- Breach of Fiduciary Duty (arising from agency)
- Fraud/Deceit
- Agency, Partnership, Conspiracy
- Negligent Misrepresentation/Negligence

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TITLE COMPANY

- Breach of Contract
- Direct Fraud/Deceit
- Agency, Partnership, Conspiracy
- Closing Protection Letters (Insured)

ALTA Revised Forms (final 12/10/2006)

- Extends protection to lender's assignee and warehouse lender
- Covers negligence of issuing agent or approved attorney in handling funds or documents in addition to fraud or dishonesty, but limited to situations where fraud, dishonesty, or negligence relates to the status of the title or validity, enforcability and priority of the lien of the mortgage.

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NOTARIES

---Issues:

- Licensed/Approved
- Void vs. Voidable
- Bond

---Remedies

- Violation of Statute (Private Right of Action)
- Direct Fraud
- Agency, Partnership, Conspiracy

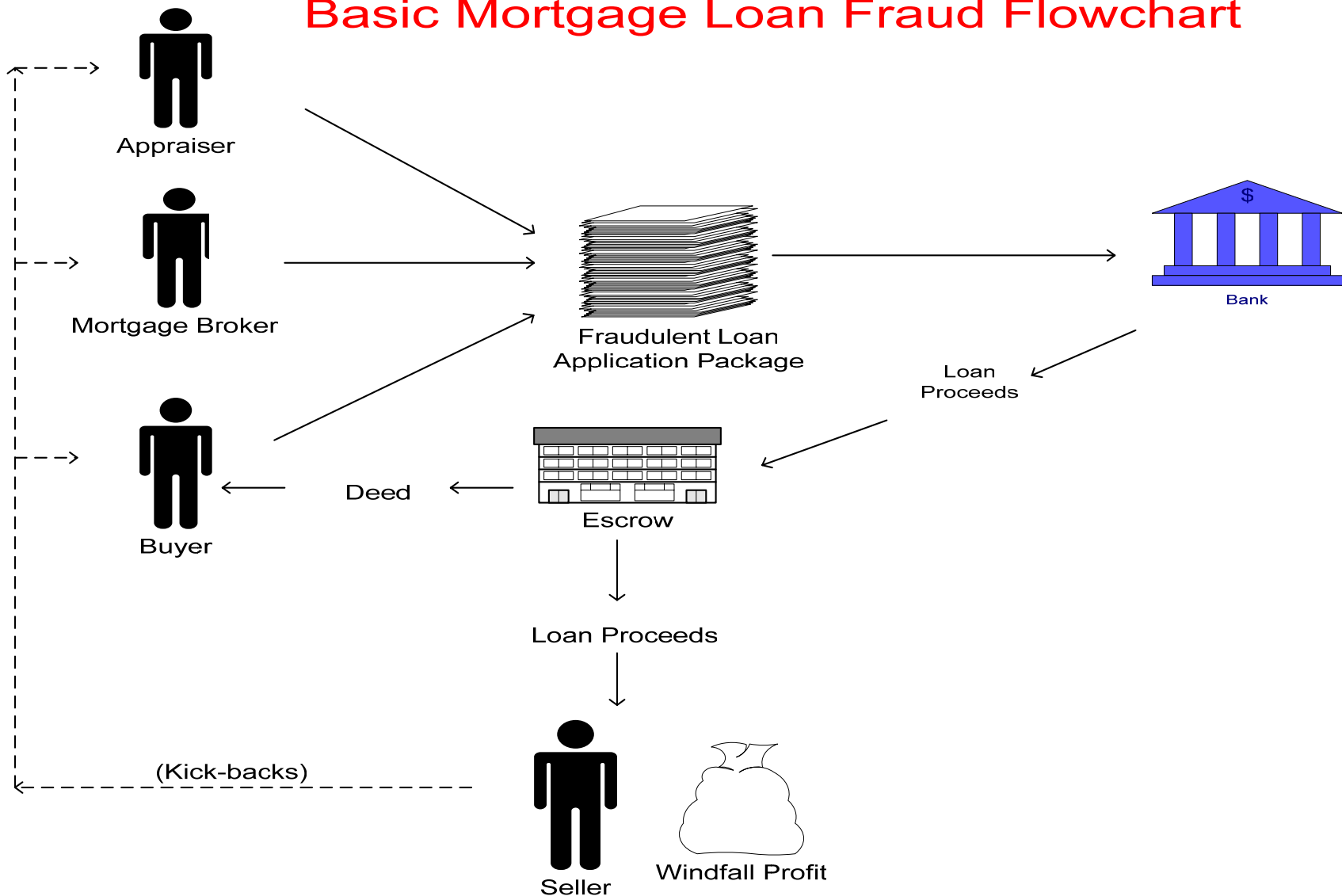
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SELLERS:

- Fraud/Deceit
- Agency, Partnership, Conspiracy
- Unjust Enrichment
- Fraudulent Transfer
- U.D.A.P. Statutes

Basic Mortgage Loan Fraud Flowchart



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MISCELLANEOUS

- U.D.A.P. STATUTES
- CRIMINAL RESTITUTION
- PRE-JUDGMENT WRITS OF ATTACHMENT
- CIVIL R.I.C.O.

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“Follow the money!”

---Kim Rumsey

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PFEIFER & REYNOLDS, LLP

Pfeifer & Reynolds, LLP is an “AV” rated law firm dedicated to providing exceptional representation to clients in the financial services industry, including lenders, brokers, investors, and related service providers.

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