
**Court Sustains Demurrer Finding Borrower Cannot Allege
Lender Caused Damage Where All Home Values Declined**



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We are several years past the burst of the housing bubble, and homeowner borrowers have launched assault after assault against lenders for their alleged participation in the housing bust and continuing decline in the housing market. While these legal battles rage on, the California Second District Court of Appeals issued a decision on August 24, 2011, making it more difficult for borrowers to allege claims against lenders.

In *Bank of America Corporation v. Superior Court of Los Angeles County*, the Second District Court of Appeal granted the lender defendants' petition for writ of mandate. In so doing, the Appellate Court concluded that the homeowner borrowers could not even allege, much less prevail upon, a cause of action for fraudulent concealment against a lender premised on alleged misrepresentations to investors in loan pools. The fraudulent concealment was allegedly to "bilk investors by selling collateralized mortgage pools at an inflated value, the demise of which led to a generalized decline in California residential property values." The Appellate Court held: (1) the lender defendants owed no duty to disclose to the borrowers their alleged intent to defraud third party investors, and (2) there was no nexus or logical connection between the alleged fraudulent concealment and the economic harm allegedly suffered.

By way of background, 246 plaintiffs obtained home loans and filed suit against the lender defendants for, among other things, a purported scheme to "systematically create false and inflated property appraisals throughout California" which were then used "to induce [p]laintiffs and other borrowers into ever-larger loans on increasingly risky terms." The lender defendants allegedly schemed to pool together these larger and riskier mortgages and sold the pools to investors at an inflated value. Plaintiffs alleged that lender defendants owed each borrower a duty to disclose that their respective mortgages were part of a fraudulent scheme that destroyed home values, thereby materially reducing the value of plaintiffs' properties.

The Court of Appeal rejected plaintiffs' arguments and concluded that "while [lender] had a duty to refrain from committing fraud, it had no independent duty to disclose to its borrowers its alleged intent to defraud its investors by selling them mortgage pools at inflated values." The Court further concluded that because all homeowners, including those who obtained their loans from [lender], or obtained their loans through another lender, or those who own their homes free and clear, have suffered a loss of home equity due to the generalized decline in home values, there was "no nexus" between the alleged fraudulent concealment and the economic harm borrowers suffered.

Putting aside the holding that a lender has no duty to disclose an intent to defraud, the importance of the case is the recognition that borrowers suffered no harm as a result of the lender's conduct, but rather from the housing bust itself. Accordingly, the ruling is important in all borrower litigation where there is an allegation that some misconduct on the part of the lender caused the borrower some economic damage. The Appellate Court recognized at the pleading stage that the damage was caused by the generalized housing bust, not the pooled loans. Because it was decided on demurrer, the case represents an important defense weapon to use against borrowers at the pleading stage before expensive litigation gets underway.