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## **TO AVOID ASSUMING FIDUCIARY DUTIES, MORTGAGE LENDERS SHOULD TAKE CARE TO AVOID ACTING AS MORTGAGE BROKERS**

"A mortgage broker has fiduciary duties to a borrower. A mortgage lender does not." A decision published on March 28, 2011 by the California Court of Appeals (2 Dist.) clarifies the differences between duties owed to a borrower by a mortgage broker and those owed by a mortgage lender. To avoid potential lawsuits for breach of fiduciary duty or negligence, mortgage lenders should take care not to assume the mantle a mortgage broker (e.g. soliciting lenders or negotiating loans with third party lenders on behalf of a borrowers for a fee).

In *Smith v. Home Loan Funding Inc.* (2011) 192 Cal.App. 1131, the California Court of Appeal affirms the lower court's award of damages based on breach of fiduciary duty and misrepresentation against a mortgage lender that acted as a broker. The Court found that Home Loan Funding, Inc., ("HLF") acted as a mortgage broker when its agent represented that he was a mortgage broker, would "shop" Smith's home equity loan to other lenders, and would secure the best loan available to Smith. In addition, the Court considered the fact that HLF conceded that it had placed some of its loans with brokers and that HLF's agent admitted that, during his employment, he had placed loans with other lenders. Under these circumstances, the Court of Appeal found that there was ample evidence to support the trial court's finding that HLF acted as a mortgage broker and had, therefore, assumed fiduciary duties to Smith, which HLF breached.

In response, HLF argued that it could not have acted as a mortgage broker when the loan documents identify HLF as the lender. The Court was not persuaded. "That HLF ultimately persuaded Smith to accept one of its loans, hardly negates that HLF undertook to act as Smith's broker. Instead, it is evidence of HLF's and Baden's self-dealing at the expense of Smith." The Court awarded damages based on the difference in interest between the loan made by HLF and the best loan that would have been available to Smith had HLF lived up to its fiduciary duties by shopping the loan.

This decision reaffirms the general rule that mortgage lenders typically owe no fiduciary

or other duties to borrowers. However, this general rules does not apply if the mortgage lender acts as a broker. In such circumstances, the lender/broker opens itself up to claims of breach of fiduciary duty and/or negligence.

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