> ***Justice Gants:*** *"approval of loans bearing these four characteristics, in the absence of other liquid or easily liquidated assets or special circumstances, was unfair before and it is unfair today, even if we were too blind earlier to recognize its unfairness."*

Extracts: **Commonwealth of Massachusetts, Plaintiff v. Fremont Investment & Loan, and Fremont General Corporation, Defendants. NO. 07-4373-BLSI.**

"... a fundamental characteristic of predatory lending is the aggressive marketing of credit to prospective borrowers who simply cannot afford the credit on the terms being offered. Typically, such credit is underwritten predominantly on the basis of the liquidation value of the collateral, without regard to the borrower's ability to service and repay the loan according to its terms absent resorting to that collateral. ... the lender is effectively counting on its ability to seize the borrower's equity in the collateral to satisfy the obligation and to recover the typically high fees associated with such credit." (p.13)

"These customers, often relying on the advice of their mortgage broker generally understood that they would need to refinance the loan at or before the date the introductory rate ended so that they could continue to pay the low monthly payments provided by the so-called teaser rate and avoid the payment shock that would force them into foreclosure. However, what these customers often did not understand was that, if they had purchased a 100 percent financing mortgage, whether through a single loan or piggyback loans, they would only be eligible for refinancing if the fair market value of their property increased during those two or three years of the introductory rate because, if it fell, they would not be able to refinance their home for more than it was worth. For these borrowers, unless their income considerably increased, they would be doomed to default and foreclosure if the housing market fell (as, of course, it did)." (p.5)

"Consequently, for these borrowers who were eligible for the loan only because the teaser rate was used to calculate the debt-income ratio, the timing of refinancing was critical -they could not afford to pay the mortgage after payment shock set in but they would pay a substantial prepayment penalty if they refinanced during the introductory period. Consequently, these borrowers had little real discretion as to when to refinance; for all practical purposes, it was essential that they close on the refinanced loan right when the introductory rate ended. If they were unable to refinance during this brief window, they would be unable to afford the mortgage payments, which would place them in default, which would increase the amount needed to refinance, which would make it even harder to qualify for the refinancing." (p.6)

"The spirit of the Act is that a lender engages in predatory lending, which is an unfair act in violation of Chapter 93A, when it makes a loan charging either high points, fees, or interest to a borrower whom the lender reasonably believes will be unable to make the scheduled payments and will therefore face the likelihood of foreclosure. It is noteworthy that the issuance of such a loan is deemed to be unfair under Chapter 93A even if the lender provides fair and complete disclosure of the terms of the loan and the borrower is fully informed of the risks he faces in accepting the loan. The unfairness, therefore, does not rest in deception but in the equities between the parties. … The Legislature plainly deemed it predatory and, thus, unfair for a lender to make a high cost home loan, quickly reap the financial rewards from the high points, fees, or interest, and then collect the balance of the debt by foreclosing on the borrower when, as the lender reasonably should have foreseen, he cannot meet the scheduled payments. The Legislature, equally plainly, was disturbed by mortgage foreclosures of the borrower's principal dwelling, and thought it unfair for a lender to issue a mortgage loan that the lender reasonably believes will result in foreclosure of the borrower's home, even if the high cost of the loan fairly reflects the risk of the loan." (p.9)

"... this Court finds that it is within the penumbra of that concept of unfairness that a mortgage loan secured by the borrower's principal dwelling should be presumed to be structurally unfair if the loan possesses the four characteristics described above:

1. The loan is an ARM with an introductory period of three years or less;

2. The loan has an introductory or "teaser" rate for the initial period that is at least 3 percent lower than the fully indexed rate;

3. The borrower has a debt-to-income ratio that would have exceeded 50 percent if the lender's underwriters had measured the debt, not by the debt due under the teaser rate, but by the debt due under the fully indexed rate*; and

4. The loan-to-value ratio is 100 percent or the loan carries a substantial prepayment penalty or a prepayment penalty that extends beyond the introductory period. [*]" (p.11)

[*] “where the debt-to-income ratio would have exceeded 50 percent had Fremont's underwriters measured the debt, not by the debt due under the teaser rate, but by the debt that would be due at the "fully indexed rate," the lender reasonably should have recognized (in the absence of significant liquid or easily liquidated assets) that the borrower would not be able to meet the scheduled payments once the "teaser" rate expired at the close of the introductory period. Loans with these three characteristics, therefore, were doomed to foreclosure unless the borrower was able to refinance the loan at or around the close of the introductory period. If housing prices declined, however, refinancing was not reasonably likely for these loans if they bore a fourth characteristic - a loan-to-value ratio of 100 percent, a substantial prepayment penalty (that is, a prepayment penalty beyond the "conventional prepayment penalty," defined in the Act, G.L. c. 183C, $ 2) or a prepayment penalty that extended beyond the introductory period." (p.9)

"Consequently, for loans with these four characteristics, the lender reasonably should have recognized that, after the introductory period, the borrower would be unlikely to make the scheduled mortgage payments and the loan was doomed to foreclosure unless the fair market value of the property had increased, thereby enabling the borrower to refinance the loan and obtain a new "teaser" rate for the introductory period. Given the fluctuations in the housing market and the inherent uncertainties as to how that market will fluctuate over time, this Court finds that it is unfair for a lender to issue a home mortgage loan secured by the borrower's principal dwelling that the lender reasonably expects will fall into default once the introductory period ends unless the fair market value of the home has increased at the close of the introductory period. To issue a home mortgage loan whose success relies on the hope that the fair market value of the home will increase during the introductory period is as unfair as issuing a home mortgage loan whose success depends on the hope that the borrower's income will increase during that same period." (p.10)

Full Decision available at: www.MAAPL.info (Mass Alliance Against Predatory Lending)