**10.07 PREDATORY LENDING**

The plaintiff claims that the defendant[s] committed an unfair or deceptive act or practice in the way [it] [they] made or enforced the loan to the plaintiff. To decide whether the defendant[s] committed an unfair or deceptive act or practice, you should consider these factors:

1. Whether the loan was made with knowledge that there was no reasonable probability that the plaintiff would be able to repay it;

2. Whether the loan was made with knowledge that the plaintiff would not receive any substantial benefit from the loan;

3. Whether the plaintiff was charged excessive brokers’ fees, closing agent fees, and other charges for services which showed a gross disparity between the cost of [the defendant’s] [the defendants’] services and the cost of mortgage services readily obtainable in the marketplace;

4. Whether the defendant[s] took advantage of the plaintiff’s inability to protect [his][her] own interests by reason of [his][her] age, physical or mental infirmities, ignorance, illiteracy, inability to understand the language of the agreement, or lack of sophistication.

5. Whether there was substantial disparity in bargaining power between the plaintiff and defendant[s].

6. Whether the process of presenting the loan documents to the plaintiff was unfairly confusing or deceptive.

All of these factors need not be met in order for you to find the defendant[s] committed an unfair or deceptive act or practice.

Comment

This instruction is patterned after a predatory mortgage lending instruction found in the National Consumer Law Center (“NCLC”) Manual on Deceptive and Unfair Trade Practices, Fifth Edition, at appendix G.2. No Alaska case has addressed the elements of a predatory lending claim. Until recently, it was unclear whether a “loan” fell within the definition of “goods or services” for purposes of Alaska’s Consumer Protection Act, AS 45.50.471. Recent amendments to the Act clarify that loans secured by a person’s residence are covered by the Act. *See* AS 45.50.561(a)(9). Thus, most predatory lending claims can be brought under AS 45.50.471(a) or one or more of the provisions of AS 45.50.471(b). Still, this instruction provides the jury with information specific to predatory lending practices. Some examples of typical predatory lending conduct include:

1. Repeated solicitation of existing borrowers to enter into new loan agreements notwithstanding prior refusals;

2. Changing refinance terms at the last minute;

3. Misleading the borrower about the benefits of refinancing by comparing monthly payments on loans with greatly different repayment periods without disclosing the extra costs associated with a longer term loan;

4. Failing to clearly disclose that regular loan payments are “interest only” and the associated terms and conditions which usually include a balloon payment of the entire principal at the end of the loan term;

5. Sending unsolicited “draft loans” or “live checks” to entice consumers to enter a lending relationship by depositing the check or draft;

6. “Upselling” borrowers to larger loans and/or loans secured by their homes by refinancing smaller, unsecured personal loans;

7. Using deceptive and high-pressure sales tactics to keep borrowers from reading or understanding the loan agreements.

As a result of these tactics, plaintiffs typically allege that a lender falsely represented that customers could save money by consolidating debts; that they could pay off current debts with a home equity loan for the same amount when in fact the new loan contains undisclosed costs and fees; or that insurance, interest rates, or other terms were not adequately disclosed. The Home Ownership and Equity Protection Act (“HOPEA”), which is part of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601, provides special protections for consumers in certain non-purchase, high-cost loans secured by their homes. Under TILA, lenders are required to disclose all charges associated with the loan, *see* 15 U.S.C. § 1601 *et* *seq.,* and in the case of nondisclosure of such information, TILA provides a federal cause of action against creditors who engage in such “predatory lending tactics.” *See* [*Cooper v. First Gov't Mortgage and Investors Corp.,* 238 F.Supp.2d 50, 55 (D.D.C. 2002)](http://web2.westlaw.com/find/default.wl?DB=4637&SerialNum=2002720598&FindType=Y&ReferencePositionType=S&ReferencePosition=55&AP=&mt=Alaska&fn=_top&sv=Split&utid=%7bFF918973-4C1F-43D1-9185-3451B879F9D3%7d&vr=2.0&rs=WLW5.09).

This instruction captures the primary factors that courts have considered when evaluating predatory lending claims under state and federal statutes. It can be used in conjunction with 10.01A or 10.01B when predatory lending is alleged.