IN HINDSIGHT - HOW CALIFORNIA COURTS COULD HAVE USED CIVIL CODE SECTION 1698(d) TO STEM CERTAIN ASPECTS OF THE HOUSING DEBACLE AND CURB HOMELESSNESS

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Section 1698 of the California Civil Code is a tool that could have been used by the courts to block certain unacceptable conduct that became pervasive in the mortgage lending sector.

Looking back based on the numerous calls that I received from homeowners, in many instances the root of the problem was that homeowners were being orally told (by the financial institutions) over the phone that their mortgages would be automatically and permanently modified without further action if the homeowners successfully completed the trial period plan, e.g. a 6 months trial period[1]. Many homeowners relied on these oral promises and statements to their detriment. What the homeowners did not know was that the application of the Statute of Frauds meant that modifications of their mortgage agreements had to be in writing.

The Statute of Frauds meant that financial institutions were later able to argue that the so called modifications that the homeowners claimed to exist did not exist and even if they did exist, could not be enforced given the absence of documents that evidenced the terms of the modifications alleged by the homeowners. With this defense, financial institutions were able to avoid liability and all responsibility emanating from their oral promises and statements. This meant that homeowners, who had relied on the oral promises that permanent loan modifications were in place, could be foreclosed on by financial institutions who then simply requested and insisted that the homeowners pay as a lump[2] sum the aggregate difference between what they paid under the alleged loan modification and what they should have paid pursuant to the existing and unmodified mortgage agreements, i.e. the original monthly unmodified mortgage payments. Essentially, financial institutions used the phone promises to create mortgage payment "defaults" that were then used to trigger the foreclosure process. This system went unchecked for some years adding to the notoriously high incidence of mortgage foreclosures and homelessness in California.

In hindsight the judicial system could have blocked this unfortunate development by using Civil Code s. 1698 (d) which states: "(a) A contract in writing may be modified by a contract in writing .... (d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts." This statutory provision could have been used by the courts to force the financial institutions to comply with their oral telephonic promises to homeowners so long as homeowners proved: (1) a pattern of such behavior by the actual financial institution in the lawsuit and (2) reasonable and foreseeable reliance on the oral promises by the homeowners' to their detriment.

CONCLUSION OF THE MATTER

An advantage of acknowledging a past mistake is that it creates an incentive to learn and thereby avoid a future repeat performance. This blog/article is an endeavor to create one such acknowledgment so that hopefully, in future, California Courts will intervene and protect homeowners and thereby block certain acts that aggravate homelessness.

[1] For example, see *Haritunian v Wells Fargo* - Superior Court, Case No. BC476137 - SECOND AMENDED COMPLAINT – Court of Appeal, Case No. B247250 – APPELLANT'S OPENING BRIEF.

[2] Homeowners strapped for cash were unable to pay these large sums that included not only the alleged mortgage default amounts but also other additional costs and fees. The irony being that by requesting a loan modification, a homeowner was in essence informing the lender of his/her financial vulnerability. Put another way, if a homeowner found paying the monthly mortgage challenging enough to seek a loan modification, such a homeowner was almost guaranteed to be unable to pay a larger lump sum demand thereby making a future foreclosure a certainty.