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national mortgage broker

THE OFFICIAL PUBLICATION OF THE NATIONAL ASSOCIATION OF MORTGAGE BROKERS

[www.nationalmortgagebroker.com](http://www.nationalmortgagebroker.com)

July 2008 • volume 24 number 7

## Spotting the Trends

Local vs. National Indicators



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# Mortgage FRAUD Claims

How mortgage brokers can legally protect themselves

**M**ortgage fraud is unlike other fraud crimes in that it is not associated with a specific federal statute. The federal government prosecutes mortgage fraud under existing statutes — wire fraud, mail fraud, bank fraud, conspiracy, tax evasion, and continuing financial crimes enterprise. However, these statutes do have one thing in common: they carry substantial prison-time upon conviction.

Black's Law Dictionary defines fraud as a "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." Fraud may be pursued by both a civil action and, where willful, by criminal prosecution.

More than 46,700 mortgage fraud cases were reported in 2007. What's more, in light of the recent foreclosure crisis and increased mortgage fraud, the Federal Bureau of Investigation (FBI) has segregated such investigations into two categories: fraud for profit and fraud for housing.

## The Case Against Industry Insider Fraud

Fraud for profit or industry insider fraud involves wrongdoing by anyone other than the borrower. It comprises more than half of all mortgage fraud prosecutions. According to the FBI, the following activities are red flags for mortgage fraud:

- Above-normal commissions and fees for typical services
- Inflated property appraisals
- Misrepresentations and false statements on loan applications
- Illegal property "flipping" — short-term investments and subsequent sales at artificially inflated prices to straw buyers
- Disguised refinances
- Straw Buyers and Nominee Loans
- Silent Second Mortgages

- Fictitious identities and identity theft
- No collateral Air Loans
- Foreclosure schemes

Mortgage brokers must prepare for their role in an investigation and learn a few strategic legal steps before and after a visit from law enforcement and regulatory officials.

## Some Practical Realities

As part of a criminal investigation, you will play the role of witness, subject or target.

The witness is used to bring investigators closer to the actual wrongdoer. While not being a suspect in the crime, the witness' role can be upgraded at anytime during the investigation.

The subject is a supporting character in a mortgage fraud investigation because of suspicious circumstances or association. Suspicion of mortgage fraud, guilt by association or even willful ignorance can make you a subject in an investigation.

The target holds the spotlight in a criminal investigation since criminal investigators know that gaining the cooperation of a target is often the key to unlocking and unraveling the mort-

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gage fraud case. As a target, you are more than suspicious, you are already linked to the criminal activity and, although it is never articulated, you are presumed guilty rather than innocent.

Your role in a mortgage fraud investigation is not set in stone. It can change at the whim of law enforcement investigators or the prosecution, both of which are rated on the number of guilty pleas and convictions obtained.

Law enforcement is authorized by law to use trickery, subterfuge and even deceit during the investigation. It is no coincidence that investigators conduct interviews in groups of two and often visit at odd hours such as early morning.

More resources are currently being dedicated to combating the mortgage fraud crisis. The Mortgage Bankers Association's 2008 Advocacy Agenda is seeking increased funding to help the FBI and Department of Justice in fighting mortgage fraud.

#### Know your rights

Mortgage brokers entwined in a mortgage fraud criminal investigation are wise to consider the following legal guidelines:

- Seek representation from an experienced criminal defense lawyer as soon as you become aware of the investigation, which may mean even before you are contacted by law enforcement.
- If investigators suggest or even expressly say that you are simply a witness that can help them piece the crime together, keep in mind that you may be a witness during the initial questioning, but a subject or target when the day is over.
- Don't give in to "manufactured" pressure or unenforceable promises that may come back to hurt you without legal representation.
- Know your Miranda rights ("You have the right to remain silent ... etc."). The Miranda warning is only

required to be given after you are arrested or taken into custody and before you are questioned or interrogated. Voluntary interviews do not require being preceded by any type of warning or advice of rights.

- Be aware that seemingly innocuous statements made during investigations can change form and later be used at trial as admissions against you. Statements should NEVER be made during a criminal investigation without the benefit of counsel. Cooperating on your own will not necessarily put you in the government's good graces.
- Investigators and prosecutors are looking to building their case and secure guilty pleas and convictions. While the government may appear to sympathize or empathize with your situation, it will not insulate you from further investigation or

prosecution that may result from seemingly harmless chit-chat.

- Remember that the burden of proof is on the prosecution to make the case and show that the alleged criminal activity took place—this is not your job nor is it your civic duty. Law enforcement officers are not empowered under the law to make promises or enforceable deals; they are investigators not prosecuting attorneys. Only prosecutors are authorized to negotiate plea bargains.

Lastly, while a plea agreement may be a good option under certain circumstances, leave it up to your criminal defense lawyer to determine if it is the right or best option for you.

*This article is for informational purposes only and does not constitute legal advice. Readers should not rely on it as such. No one should attempt to interpret or apply any law without the aid of an attorney.*

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