

# Documentation is the Best Defense

James Shields & Bart Higgins

Proper documentation management can make or break a legal defense. Ensure that you understand the documentation requirements that will protect you against possible litigation; and have a process in place to identify and gather this documentation swiftly.



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# LENDERS OFTEN GET CAUGHT IN THE CROSS-FIRE

## **At the height of the housing boom,**

the darlings of the mortgage industry were the companies who originated loans. Compliance and fraud issues were practically non-existent, because the flow of borrowers being matched to loans seemed never-ending.

## **Fast forward to present day.**

The housing market continues to drag down the economy despite the government's best efforts to prop it up. Companies and investors who purchased bundles of mortgages are still experiencing an unacceptable rate of defaults. These interested parties claim that warranties were breached or fraud was committed during the application and approval process, drawing the bulls-eye squarely on the mortgage loan originators.

## **How can mortgage loan originators protect their companies from being caught in the cross-fire?**

What can they do to respond to these legal attacks? While assembling an experienced and effective legal team is essential to surviving the litigious after-shocks of the recession, it is also vitally important that company executives understand the possible legal defenses available and the impact the suit may have on their business. Developing the best legal defenses start with assembling accurate documentation around which to formulate the arguments. Without documentation the best legal team in the world will have few legal defenses that will achieve positive results.



*The following information is provided as a general guideline and should not be taken as legal advice or counsel.*

# PROTECTING YOURSELF AGAINST POSSIBLE LITIGATION

Of utmost importance is having complete access to all the relevant documentation around the loan. Mortgage loan originators should have access to all of the underlying records, reports and documentation that support all of the original mortgages. Company personnel should have a process in place to identify and gather these documents for each loan in the event of a suit. Also look for any correspondence, notices or assignments that were received after the loan was sold, because those documents are critical to legal defense. Finally, it is critical to determine whether the company received a “Notice of Default” from the purchaser who is now suing.

**Have complete access to all related records, reports and documentation.**

“It is critical that the underlying documentation is in order,” said James D. Shields, Chief Executive Officer and Principal of Shields Legal Group, a full-service legal company that focuses on growing shareholder value with strategic advice on legal business matters. “Most of the legal defenses arising out of this situation are based on whether certain notices were received, and the definition of ‘Seller’ and ‘Purchaser’ in the Seller’s Guide.”

**Have a process in place to identify and gather these documents for each loan.**

The Seller’s Guide is a document that is agreed to by the mortgage loan originator and the purchaser when the original sale was made that defines the relationship between these two parties, and establishes the written requirements for timely notices.

**Review the Seller’s Guide to determine these requirements:**

**The definition of Buyer and Seller**

The **type of notice** required to be given under certain circumstances, and the **information required** in the notice.

For example, most Seller’s Guides require that notice be given if the loan is assigned to a third party, or if there is a claim for breach of warranty or fraud.

**When the notice should be given**



## PROPER DOCUMENTATION MANAGEMENT CAN MAKE OR BREAK A LEGAL DEFENSE

“At SLG, we work with lending institutions to ensure their documentation processes are efficient and secure,” said Shields. “Our legal experience and documentation methods have allowed our team to successfully defend against loan purchasers who no longer owned the Mortgage Note or Deed of Trust, because they no longer fit the definition of a ‘purchaser’ under the Seller’s Guide. In our most recent case, the Plaintiff (purchaser) dismissed the lawsuit because they were about to lose on Summary Judgment.”

If you fear one of these suits might be imminent, be sure that you have business processes in place...

If you fear one of these suits might be imminent, be sure that you have business processes in place for gathering the underlying documentation, identifying the parameters of the relationship between your company and the purchaser and confirming the notices received help pave the way to a successful litigation outcome. You know your business better than anyone (even your attorneys). By taking these steps, you will provide valuable information and assistance to your legal counsel and ensure that you have the best legal defense for your business.

Even during rough times, positive action can be taken to ensure a successful outcome.



# ABOUT THE AUTHORS



## JAMES D. SHIELDS

James D. Shields is a commercial, corporate and real estate attorney with more than 28 years of litigation experience, with a primary focus in complex commercial business litigation and representation of financial institutions and financial intermediaries. Mr. Shields is owner and principal of Shields Legal Group, a full-service legal company in Addison, Texas which provides strategic, legal business advice and case management.



## BART HIGGINS

Bart Higgins is a civil litigation attorney with Shields Legal Group. With over 20 years of experience at both trial and appellate levels in state and federal court, Mr. Higgins handles complex litigation matters with a focus on the development and implementation of a strategy that identifies the critical facts and action plan to generate the best results for the client. His clients have included individuals, small family-owned businesses, publicly traded Fortune 500 companies and commercial real estate, finance, manufacturing and construction companies.