U.S. Attorney Asks Court to Reconsider Countrywide Loan Case

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By Jesse Eisinger, ProPublica August 7, 2016

Prosecutors are challenging an appeals court ruling that said the lending company could not be charged with fraud as long as its initial intentions were pure.

Preet Bharara is not giving up on bringing civil charges for “the Hustle.”

In an unusual move, the U.S. attorney for Manhattan's Southern District has asked a three-judge panel on the Second Circuit Court of Appeals to reconsider a ruling that overturned a verdict that foundCountrywide Home Loans and a bank executive liable for fraud. The company made billions of dollars of home loans that defaulted after the 2008 global meltdown.

The case arose from mortgages that Countrywide Home Loans sold to Fannie Mae and Freddie Mac, the government-backed mortgage giants. Back in the late-housing-bubble period, in 2007, Countrywide, then the largest mortgage provider in the country, rolled out a new program for processing mortgage applications.

The company called it the "high-speed swim lane," internally nicknamed "hustle." Countrywide, like most mortgage lenders, wrote mortgages for consumers and then immediately sold the loans to Wall Street banks or Fannie Mae and Freddie Mac, which bundled them and, in turn, sold them to investors. Countrywide's program dropped most of the conditions meant to insure that loans would be repaid. The company didn't tell Fannie or Freddie it had the loosened conditions, or that the loans no longer met their requirements.

In 2013, a jury found Countrywide, now owned by Bank of America, and a Bank of America executive liable for fraud.

But a three-judge panel of the Second Circuit overruled the jury, a puzzling decision that ProPublica and The New Yorker examined in May. The panel determined that while Countrywide had intentionally breached its contracts, it did not amount to fraud because the company had not planned to deceive its customers when it initially signed the contracts.

Bank of America's Winning Excuse: We Didn't Mean To

A federal appeals court overturned a $1.3 billion judgement against Bank of America, ruling that good intentions at the outset shield bankers from fines for subsequent fraud. **Read the story.**

In its new petition, the U.S. attorney's office takes square aim at that contention, noting that the company made new, false statements when it sold bundles of loans to Fannie, Freddie, and its other customers.

"The court overlooked a wealth of evidence presented at trial that defendants made fraudulent misrepresentations at the time each loan was sold, well after the contracts' execution and during the course of the performance of the contracts," prosecutors write, "Those errors warrant rehearing."

Bank of America declined to comment.

The prosecutors pointed out a variety of examples of contractual language that cover the sales of each mortgage at the time of the sales, not when the original contracts were written. The Fannie Mae contract language, for one, states that the warranties of loan quality "apply to each mortgage sold to us in its entirety … [and] are *made as of the date transfer is made to us*." [Emphasis in the petition]

If the panel declines to rehear the petition, the Southern District then could request that the entire court of appeals rehear the case.