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Crime In The Suites
An Analysis of Current Issues in White Collar Defense

The Foreclosure Crisis: Don’t Believe Everything You Read

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Legal pressure is mounting against the firms involved in the nationwide foreclosure crisis. In the wake of reports that possibly fraudulent court documents were used to fast-track home foreclosures, a federal Financial Fraud Enforcement Task Force is investigating possible criminal violations committed by banks and mortgage companies.

We need to ask: What laws are available to prosecutors? After all, people can do plenty of things that are unethical, slipshod, or sleazy — but not criminal. After reviewing the deluge of news reports on this issue in the last few weeks, we strongly caution against rushing to judgment based solely on news accounts.

It turns out that prosecutors have a few options. First, federal prosecutors may pursue fraud charges if there is evidence of systematic action designed to improperly speed up the foreclosure process at the expense of the defaulting homeowners. Since there is no federal criminal law against mortgage fraud as such, federal prosecutors will probably look at the mail fraud, wire fraud, and bank fraud statutes. These laws prohibit schemes to defraud or obtain money or property by false or fraudulent representations and carry up to a 30-year prison term.

In cases of this sort, prosecutors must show that the companies intended to defraud someone and that the representation was material. They don’t have to show that the fraud was successful and actually harmed someone. It seems to us that some companies will be hard-pressed to argue that procedures like foreclosure mills and robo-signers weren’t designed to improperly speed up the foreclosure process. But it’s not clear that criminal acts were involved.

Prosecutors may also allege conspiracy to commit fraud, which requires proof of intent and agreement to commit the underlying offense. Prosecutors don’t need prove an explicit agreement. It’s enough if they can show that the conspirators knew or had reason to know of the conspiracy and that they would benefit from the success of the conspiracy. This can be proved by circumstantial evidence, or simply by one overt act by any of the conspirators to implement the agreement. Again, robo-signers admitted to signing thousands of documents per month. These numbers alone provide strong evidence that something was amiss. Reviewing a file can take from 20 to 60 minutes, yet bank employees signed off on hundreds of files per day and one employee admitted to finishing 10,000 documents a month.

Public companies such as JPMorgan and Bank of America may also face SEC investigations concerning their disclosures to investors about foreclosures and potential losses. But these would be civil cases, not criminal.

The attorneys general of all 50 states have also announced a coordinated investigation. State AGs may use laws against unfair and deceptive trade practices, typically used to protect consumers from false advertising, to prosecute fraudulent foreclosures. These are also civil cases, but they can hit hard. Defendants may be subject to civil penalties for each violation, which could amount to hundreds of millions of dollars, and required to pay restitution.

Federal and state officials should prosecute anyone found to have illegally seized homes, but they should do so based on the law and facts of each case, not in a rush to appease public opinion. We think this issue has captured the public imagination in part because of the election year. It is easy for politicians to express sympathy with people who lost their homes as a result of dubious procedures. But come mid-November, politicians will be less likely to be crying foul over this practice and it very well may be that these investigations will uncover nothing more than negligence in rushing otherwise legitimate foreclosures to finality.

Crime in the Suites is authored by the Ifrah Law Firm, a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

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