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Case Note: Predatory Mortgage Litigation Comes to Oklahoma--Debt Collection, Mortgage Law, and Foreclosure

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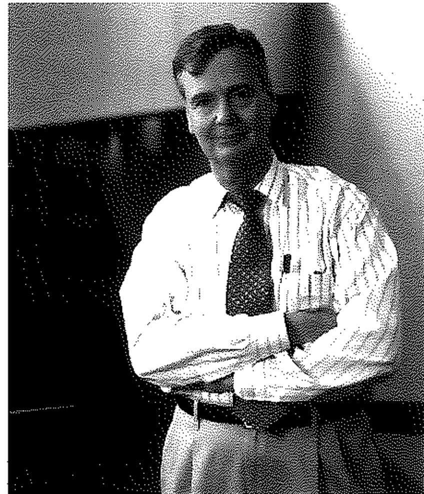
Case Note: Predatory Mortgage Litigation Comes to Oklahoma

By Alvin C. Harrell



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I. Introduction

In *Deutsche Bank, et al. v. Daniel*,[1] a *pro-se* litigant (Daniel) asserted common predatory lending theories to support tort and contracts claims arising out of a mortgage loan origination and foreclosure. As noted below at Part IV., these theories have been successful in some other cases. The resulting decisions of the Oklahoma trial and appellate courts in *Daniel*, essentially rejecting these theories, may illustrate some of the reasons why private mortgage credit remains relatively more available in this state than in some others.

II. Facts and History of the *Daniel* Case

On November 11, 2005 Daniel and co-borrower Diana Nelson (together, the borrowers) refinanced their home via a mortgage loan with Ameriquest Mortgage Co. The loan proceeds of $71,920 included a pay-off of the prior $42,408.65 first mortgage loan from OCWAN Federal Savings and nine credit card accounts, plus $9,873.48 in cash.

The Ameriquest mortgage note provided for amortized payments at 8.75 percent interest for three years and a variable rate thereafter. The loan documentation included not only the required notice of the right to rescind (with an expanded, seven-day rescission period), but additional informative disclosures not required by law (and written in plain language). Although Daniel contended that he did not sign this rescission form, it apparently contained both borrowers' signatures.

It can be noted at this point that the mortgaged property is located in an attractive, prosperous area of the Oklahoma City metro area (the suburb of Moore), that property values appeared to be rising rapidly at the time of this mortgage transaction, and that the increased mortgage amount (as compared to the prior loan) was quite reasonable in this context (and in relation to the value of the collateral). Similarly, the loan terms were consistent with common practices and risk assessments in comparable transactions, and were fully disclosed to the borrowers. Moreover, the borrowers received obvious financial benefits from the refinancing. In short, this loan did not have any apparent characteristics that might be associated with "predatory lending."[2]

The borrowers defaulted in January, 2006. The loan was sold to Deutsche Bank in February, 2006 and in June, 2006 Deutsche Bank began foreclosure. The borrowers counterclaimed, alleging violations of the federal Home Ownership and Equity Protection Act (HOEPA),[3] fraud and misrepresentation (of the costs, fees and interest rate), breach of an oral contract, negligence, and emotional distress. The trial court granted Deutsche Bank's motion for summary judgment, finding that the borrowers were aware of the loan terms prior to closing and "chose to borrow the money on those terms."[4] The trial court also noted that any prior oral representations were superseded by the subsequent written agreement.[5]

The judgment of the trial court was affirmed by the Oklahoma Court of Civil Appeals in December, 2007.[6] Daniel subsequently brought this separate action against Ameriquest, alleging causes of action similar to those previously asserted against Deutsche Bank. The trial court similarly granted Ameriquest's motion for summary judgment, and this appeal followed.

III. Issues in *Daniel*

The Oklahoma Court of Civil Appeals (the court) conducted a *de novo* review of the case, based on the issues of law presented by the granting of a motion for summary judgment on the basis of undisputed facts.[7] The court's opinion reviews in some detail the "basic elements" of a mortgage loan transaction "involving a commercial lender and a closing agent."[8]

In this respect the court's opinion is unusual, indicating a detail of analysis and an understanding of the loan origination process that are sometimes lacking in the case law on "predatory lending." This information may be helpful to other courts considering similar litigation.

The court then addressed the borrower's allegations that Ameriquest had engaged in "predatory" lending practices, including the charging of "high up-front costs and a high interest rate," in originating the loan.[9] The borrowers also alleged violations of HOEPA, and that the lender originated the loan knowing that the borrowers could not make the payments, so that the loan was "designed to fail."[10]

These allegations repeat those commonly being asserted around the country today in response to foreclosure actions, and possibly endorsed (at least in part) by recent Federal Reserve Board (FRB) regulations and other regulatory guidance (and sometimes state law and policy).[11] They also have contributed to the worldwide loss of confidence in the enforceability of American mortgage contracts, and the resultant withdrawal of private capital from U.S. mortgage markets (with a corresponding contraction of mortgage lending), a contraction that massive public funding has not yet been able to cure.[12]

To a significant extent, Oklahoma has not participated in these adverse trends so far; as a consequence, private mortgage funding remains more available here and the housing market has suffered less than elsewhere. But every day is a new day, and it is likely that creditors and investors are watching these developments closely to determine if it is still safe to engage in traditional mortgage lending in this state. There has been increased reason for concern about these issues, following a prior decision from a different Division of the Oklahoma Court of Appeals, in *Bankers Trust Co. v. Brown*.[13]

IV. The *Bankers Trust* Case

Like *Daniel*, the *Bankers Trust* case involved allegations of HOEPA violations[14] and predatory lending (the plaintiff in *Bankers Trust* also asserted "reverse redlining," which Daniel did not, as *Daniel* involved a prosperous suburb). The allegations in *Bankers Trust* included the usual laundry list of claims: negligence; fraud; negligent infliction of emotional distress; breach of the implied covenant of fair dealing; negligent misrepresentation; and that the loan was "ill-conceived" and involved "outlandish" charges.[15] Such allegations can be routinely asserted in almost any consumer litigation, and a court's response is a good indication of how the state's judiciary will handle such matters. In *Bankers Trust*, the trial court granted the creditors' motions to dismiss on grounds that these allegations do not state a cause of action

1. 80 Okla B.J. 722 (Okla. Ct. Civ. App. Mar. 28, 2009).

2. It should be noted, however, that "predatory lending" has proved notoriously difficult, even impossible, to define in a legally satisfactory manner. It often seems to lie in the eye of the beholder. Probably the best measure, at least in some states, is the list of prohibited practices, terms and conditions provided in the state's law. *See, e.g.*, *State Law Issues and Developments*, 61 Consumer Fin. L.Q. Rep. 640 (2007). However, many of these laws prohibit common and popular practices (*e.g.*, prepayment penalties, balloon payments, asset-based lending, low-documentation loans) that are beneficial to many borrowers. Some also impose vague "ability to pay" or "benefit to the borrower" restrictions (or a duty to act in the "best interests" of the borrower). As indicated by the cases discussed in this article, these vague provisions are an invitation to litigation in almost any mortgage loan, and create impediments to mortgage lending that probably are contributing to the mortgage crisis. Such vague standards are obviously unsuitable as a legal definition of predatory lending, if creditors are to be able to make in advance the distinctions that are necessary to prudent mortgage lending. *See, e.g.*, Bennet S. Koren, *Suitability and HOEPA*, 61 Consumer Fin. L.Q. Rep. 201 (2007). Moreover, in some states courts seem to have lost their way, holding apparently legal behavior to be "predatory." *See, e.g.*, Stephen F.J. Ornstein, Matthew S. Yoon, David A. Tallman, Richard B. Horn & John P. Holahan, *Massachusetts Sues Freemont*, 61 Consumer Fin. L.Q. Rep. 716 (2007). In these circumstances, one must be cautious in relying on traditional state law criteria for any such definition.

   It is likely that the resulting legal uncertainty is contributing to the decline of private mortgage funding that lies at the heart of the current housing, credit and economic crisis. *See, e.g.*, Donald C. Lampe, Fred H. Miller & Alvin C. Harrell, *Introduction to the 2008 Annual Survey of Consumer Financial Services Law*, 63 Bus. Law. 561 (2008); Alvin C. Harrell, Commentary, *The Subprime Lending Crisis—the Perfect Lending Storm?*, 61 Consumer Fin. L.Q. Rep. 626 (2007).

3. The Home Ownership and Equity Protection Act of 1994, Title I, Subtitle B of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160 (Sept. 24, 1994) (codified in the Truth in Lending Act, 15 U.S.C. §§ 1601-1667(c)). *See generally* David Smith, *High Cost Mortgages: The New Lender Liability*, 61 Consumer Fin. L.Q. Rep. 190 (2007); Eugene J. Kelley, Jr., John L. Ropiequet & Anna-Katrina S. Christakis, *An overview of HOEPA, Old and New*, 59 Consumer Fin. L.Q. Rep. 203 (2005); RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶ 6.09 (2000 & 2008 Supp.).

4. *Daniel*, 80 Okla. B.J. at 722, quoting the trial court.

5. *Id.*

6. Appeal No. 104,721. *See Daniel*, 80 Okla. B.J. at 723.

7. *Id.*

8. *Id.* The court's detailed description of the transaction is essentially a step-by-step outline of the modern mortgage loan origination process.

9. *Id.*

10. *Id.* at 724. Regarding HOEPA, *see supra* note 3.

11. *See, e.g.*, LaSalle Bank, N.A. v. Shearon, 2008 N.Y. Slip op. 28032 (Jan. 28, 2008), *noted at* Stephen F.J. Ornstein, Matthew S. Yoon & David A. Tallman, Case Note: *New York Anti-Predatory Lending Case*, 61 Consumer Fin. L.Q. Rep. 750 (2007); Stephen F.J. Ornstein, Matthew S. Yoon, David A. Tallman & John P. Holahan, *Final Rule Amending the Home Mortgage Provisions of Regulation Z, id.* at 392. The FRB change may help extend the credit crunch to states like Oklahoma that so far have largely avoided it.

12. *See, e.g.*, Lampe, Miller & Harrell, *supra* note 2; Donald C. Lampe, Fred H. Miller & Alvin C. Harrell, *Introduction to the 2009 Annual Survey of Consumer Financial Services Law*, 64 Bus. Law. 465 (2009). Apparently, the TARP-funded banks, government-owned enterprises such as Fannie Mae, and the FRB are expected to fund these transactions using taxpayers' money and other government resources, regardless of the risks and legal uncertainties. This is the new model of American finance: As traditional private lenders exit the credit markets due to an untenable legal and economic environment, government-supported alternatives are expected to fill the void. In effect, the Fannie Mae/Freddie Mac model is being expanded to cover the entire consumer credit market. It remains to be seen how well this will work. *See, e.g., id.*; Carrick Mollenkamp & Sara Schaefer Munoz, *HSBC Trims U.S. Consumer Unit*, Wall Str. J., Mar. 2, 2009, at C1; Mark Gongloff, *TALF and Ilk Won't*

   (Continued in next column)

   12. *(Continued from previous column)*

   Cure Economic Ills, Wall Str. J., Mar. 5, 2009, at C1; Review & Outlook, *Mugging Bank of America*, Wall Str. J., Jan 17-18, 2009; Associated Press, *Feds May Offer More Aid to GMAC*, Oklahoman, May 9, 2009, at 3B (noting that federal control of GMAC will allow it to become the Fannie Mae/Freddie Mac of auto finance).

13. 2005 OK CIV APP 1, 107 P.3d 609. *Bankers Trust* is discussed in *Daniel*, 80 Okla. B.J. at 724.

14. 15 U.S.C. § 1639(h) (making it a violation to engage in a pattern or practice of extending "high cost" HOEPA loans without regard for the consumer's ability to repay). *See also* Koren, *supra* note 2.

15. *Bankers Trust*, 107 P.3d at 611-612. As noted, these were essentially the same allegations as in *Daniel*, with the exception of "reverse redlining." As noted below, the meaning and legal significance of that term remains unclear.

in the context of an otherwise lawful, routine mortgage lending transaction.[16]

In *Bankers Trust*, the Oklahoma Court of Civil Appeals reversed in part and remanded, finding the borrower's allegations sufficient to state a cause of action. Interestingly, this court emphasized the borrower's allegations that the mortgaged property was in a "blighted area," and simultaneously concluded that the interest rate of 12.875 percent was "exorbitant," without any apparent recognition that these two facts explain each other (*i.e.,* the higher interest rate was a result of the risks inherent in lending on such collateral and is necessary to attract capital for the needs of those who reside in high-risk "blighted areas"; in this context and viewed in comparison to the alternatives available to such borrowers, that rate probably was not exorbitant at all). The *Bankers Trust* court also did not appear to recognize that its decision raised the legal risks of such lending, and thereby increased the risk premium that must be included in the interest rate charged in such transactions in order to attract the necessary capital, making matters even worse for such borrowers.

Bankers Trust is interesting precisely because it based its analysis on the kinds of vague and ambiguous concepts that make "predatory lending" so elusive as a legal standard. The court characterized the consumer's "primary assertion" as "reverse redlining"; it defined "redlining" as "the practice of denying the extension of credit to specific geographic areas due to the income, race, or ethnicity of its residents," and "reverse redlining" as "the practice of extending credit on unfair terms to those same communities."[17] The court then concluded that "reverse redlining" is prohibited under the HOEPA provision that bars the extension of high-cost HOEPA loans without due regard to the consumer's ability to pay.[18] For good measure, the court then stated that "exorbitant" interest rates can constitute predatory lending.[19]

Even in the context of appellate review of a motion to dismiss (necessarily based on claims, not facts),[20] there are several leaps of faith in this rationale. Even a *de novo* review of the plaintiff's claims must be conducted in consideration of the law. Reverse redlining and unfairness are amorphous concepts, and even as defined by the *Bankers Trust* court it should take more than an otherwise lawful 12.875 percent loan to a subprime borrower in a "blighted area" to support a claim of reverse redlining, much less predatory lending. The *Bankers Trust* court provided no clue as to what it considered unfair about such a transaction, other than its puzzling and conclusory comments about an "exorbitant" interest rate.

Such loan terms are customary, and likely necessary, if mortgage loans are to be extended in such areas.[21] If the *Bankers Trust* court was saying that such a transaction and allegations state a cause of action as a matter of law, then it is saying that virtually every subprime mortgage transaction can be deemed predatory until proven otherwise at trial in a court of law. Obviously this goes far beyond any currently applicable law, and effectively would mean the end of private subprime mortgage finance in the state. This would leave a large swath of homeowners (and aspiring homeowners) without access to mortgage credit (as indeed has happened in some states[22]).

If an otherwise lawful (and fully consensual) subprime loan can be successfully attacked in a routine foreclosure as predatory, purely by reason of a lawful and customary (and disclosed) interest rate, then few such transactions will be safe (or conducted). *Bankers Trust* seemingly allowed just that, *i.e.*, based on allegations that: (1) the property was in a "blighted area"; (2) the interest rate and charges were "exorbitant"; (3) the borrower could not repay; and (4) the loan was "designed to fail." These allegations were held to be sufficient to state a cause of action and defeat a motion to dismiss.[23]

As noted, broadly applied this would be enough to make almost any subprime mortgage loan untenable. To its credit, the *Bankers Trust* court limited its holding to HOEPA loans, based on the theory that the allegations stated a cause of action under HOEPA's "ability to pay" requirements. As noted, the consumer also alleged various state law causes of action including negligence, fraud, and breach of an implied covenant of fair dealing.[24] The Court of Appeals affirmed the trial court's grant of the creditors' motion to dismiss on these issues, concluding that they were not independent bases for a cause of action outside HOEPA.[25] Taken in this light, *Bankers Trust* mainly serves as a reminder that mortgage loans covered by HOEPA are legally hazardous. This explains again why most mainstream lenders studiously avoid making HOEPA-covered loans, and why new classes of subprime consumer borrowers are denied access to mainstream mortgage credit each time the scope of HOEPA is expanded.[26]

16. *Id.*

17. *Id.* at 612, quoting Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7, 20 (D. D.C. 2000) (in turn quoting United Cos. Lending Corp. v. Sargeant, 20 F. Supp.2d 192, 203 n. 5 (D. Mass. 1998)). Obviously, if the only legal standard is "unfairness," a cause of action could be stated as a defense in virtually any mortgage foreclosure, converting an otherwise routine lien enforcement procedure into potentially uneconomical litigation. It is not clear who would extend mortgage loans in such an environment. *But see supra* note 12.

18. *Bankers Trust*, 107 P.3d at 612, citing 15 U.S.C. §1639(h). The court's analysis was focused on the consumer's allegations, and does not describe much in the way of the creditor's arguments or responses. The court seemed to assume that HOEPA applied, but did not explain why. Either way, however, it is obviously a stretch to conclude that a general allegation of "unfairness" is sufficient to state a claim. At least, if this claim is premised on HOEPA, creditors can avoid the problem by avoiding HOEPA-covered loans. *But see* Ornstein, *et al., Final Rule Amending the Home Mortgage Provisions of Regulation Z, supra* note 11 (describing new FRB rules that extend HOEPA-like provisions to the vast majority of home mortgage loans).

19. *Bankers Trust*, 107 P.3d at 612, quoting *Hargraves*, 140 F. Supp. 2d at 20-21.

20. *See Bankers Trust*, 107 P. 3d at 611.

21. It should be noted that the consumer in *Bankers Trust* received over $40,000 cash in the transaction, representing a significant benefit to the borrower. *Id.* at 612, n.2. Moreover, the cost of this credit was well within applicable usury limits, and much lower than the consumer's likely alternatives, *e.g.*, credit card debt, used-car loans, pawn transactions, and unsecured consumer credit. If the judge thinks 12.875% is too high, perhaps he should check his own credit card rate.

22. *See, e.g.*, Lampe, Miller & Harrell, *supra* note 12.

23. *Bankers Trust*, 107 P.3d at 612.

24. *Id.* at 613-614.

25. *Id.*

26. *See, e.g.*, Ornstein, Yoon & Tallman, *Final Rule Amending the Home Mortgage Provisions of Regulation Z, supra* note 11.

Despite this limitation on its application, *Bankers Trust* probably put a chill on subprime mortgage lending in Oklahoma, and in conjunction with concerns about the national developments noted above,[27] probably contributed to a local tightening of underwriting standards and an increase in subprime borrowing costs. It also raised questions about whether Oklahoma courts would apply the rationale of *Bankers Trust* more broadly, to embrace the trends in some other states away from the regular enforcement of mortgage loan contracts.[28] These questions made a follow-up case like *Daniel* likely if not inevitable.

Thus, *Daniel* may be an important case with broad implications, as an indication of the future direction of Oklahoma law on these issues.

V. The Appellate Analysis in *Daniel*

Daniel was similar to *Bankers Trust* in terms of the basic allegations,[29] except that (as noted above at Parts II. and IV.) in *Daniel* the mortgaged property was not located in a "blighted area," and therefore did not involve HOEPA-based allegations of "reverse redlining."[30] Interestingly, the *Daniel* court made one of the same kinds of errors as the *Bankers Trust* court did: It stated (without an underwriting analysis) that the interest rate of 8.75 percent in *Daniel* was "not exorbitant," while seeming to concede that the 12.875 percent rate in *Bankers Trust* was too high. This is fundamentally and obviously incorrect: As noted, the appropriateness of an interest rate depends on the risk profile of the transaction. Obviously, a mortgage loan to a subprime borrower secured by collateral in a "blighted area" will require a higher interest rate than one in a growing, affluent area where property values are rapidly increasing. There is not some magic number at which an interest rate becomes automatically exorbitant--it depends on the risk-reward ratio (an inherently subjective analysis that every borrower and lender must decide for himself or herself). The attempt of the *Daniel* court to distinguish *Bankers Trust* on this basis simply does not hold up (and if taken literally would effectively preclude lending in many older, inner city areas).

Thus, despite the lower interest rate and more prosperous location of the collateral in *Daniel*, that case must be regarded as presenting issues fundamentally similar to those in *Bankers Trust*.[31] As a result, in some ways *Daniel* presents a second look at *Bankers Trust*, and an opportunity to see whether or how far the *Bankers Trust* view might be extended in other cases, so as to establish Oklahoma law as to basic subprime lending matters.

Like *Bankers Trust*, the plaintiff in *Daniel* asserted a series of broad claims against the lender, for allegedly extreme and outrageous conduct, done intentionally or recklessly (*e.g.*, demanding money that Daniel did not owe) and thereby causing Daniel emotional distress.[32] These resemble the arguments in *Bankers Trust, i.e.*, that the interest rate was "exorbitant" and the loan was "designed to fail."[33] The *Daniel* court rejected these arguments, on the simple grounds that all sums were legally due as set forth in the loan documentation.[34] Daniel also asserted fraud and misrepresentation. The Court of Appeals rejected this on grounds that any prior oral representations were superseded by the loan documents.[35] The court noted that the loan terms were clearly set forth in these documents, and the borrowers agreed to them.[36]

Daniel also made an economic duress argument, essentially a claim of predatory lending practices that enticed him to enter into a loan transaction he could not repay.[37] This is a theory that has gained popularity in some quarters, and in view of *Bankers Trust* must have seemed viable to Daniel.[38] The *Daniel* court firmly rejected this argument, noting that economic duress is an established legal doctrine requiring threats or coercive conduct to exacerbate economic pressures.[39] There was no evidence of such coercion or threats in *Daniel*; indeed, the lender (Ameriquest) presented evidence that Daniel expressed satisfaction with the transaction and his treatment by Ameriquest.[40]

As noted, Daniel also alleged breach of a prior oral agreement by Ameriquest to extend credit on terms better than those contained in the final written loan documents. It may be noted that this basic issue has been settled for more than 300 years by the parole evidence rule,[41] and in any event the Court of Appeals held in *Daniel* that this issue was resolved in Daniel's prior litigation

27. *See, e.g.*, Lampe, Miller & Harrell, *supra* note 12.

28. *Id.*; *see also* Ornstein, Yoon, Tallman, Horn & Holahan, *Massachusetts Sues Freemont, supra* note 2.

29. The *Daniel* court expressly recognized this similarity. *See* 80 Okla. B.J. at 724.

30. It appears, based on the interest rates, that *Bankers Trust* involved a HOEPA-covered loan and *Daniel* did not. However, neither court fully explored this as a relevant factor in the analysis. Apparently, the *Bankers Trust* court assumed that HOEPA was applicable, as its analysis was founded on 15 U.S.C. § 1639(h). *See supra* note 14. And this factor was apparently absent in *Daniel*. Beyond this, however, the allegations in the cases were substantively similar.

31. As noted *id., Bankers Trust* was founded on "reverse redlining" allegations under HOEPA, 15 U.S.C. § 1639(h), a statute apparently inapplicable in *Daniel*. However, in *Daniel* the same basic allegations were asserted under the general rubric of "predatory lending." Thus, the two cases present many similar issues and arguments. *See also supra* note 29.

32. *Daniel*, 80 Okla. B.J. at 724.

33. *See supra* this text at note 23.

34. *See Daniel*, 80 Okla. B.J. at 724.

35. *Id.*

36. *Id. See also* Alston v. Regions Bank, N.A., 2009 WL 152142 (W.D. Tenn. Jan. 21, 2009) (same).

37. *Id.*

38. *See Bankers Trust*, 107 P.3d at 612 (as cited in *Daniel*). *See also supra* note 11.

39. *Daniel*, 80 Okla. B.J. at 724, citing Clinesmith v. Harrell, 992 P.2d 926, 928 (OK. Civ. App. 1999) [no relation to your author].

40. *Daniel*, 80 Okla. B.J. at 725. Such evidence was unusual and should be unnecessary in such cases. *See supra* note 38.

41. *See, e.g.*, LAURENCE P. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS § 98 (1965). This is subject to a number of exceptions, none of which appear to be relevant here. *See id.* §§ 99-101. Simpson cites only relatively recent authority, dating from the mid- to late-19th century. *See id.* at 195, n. 1. However, the rule dates from the earliest days of contract law. *See, e.g.*, J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 195-197 (1971) (the modern parol evidence rule traces its direct origin to the first English Statute of Frauds in 1674). In a broader sense the rule can be said to be a distant relative of contracts under seal from as early as 12th century England, and perhaps even the much earlier Roman *stipulatio*. *See, e.g.*, POLLACK & MAITLAND, THE HISTORY OF ENGLISH LAW 219-222 (1968); HANS JULIUS WOLFF, ROMAN LAW AN HISTORICAL INTRODUCTION 77 (1978).

with Deutsche Bank (and therefore the claim was barred under the doctrine of collateral estoppel).[42] The Court of Appeals noted that the trial court decision in *Deutsche Bank* expressly stated that the alleged oral agreement was an "*oral representation*...superseded by the subsequent written agreements."[43] The *Daniel* court also noted that the oral representations were indicated to be estimates subject to the lender's final approval, and that the loan closing documentation clearly stated that the promissory note contained all agreed terms.[44]

Daniel also alleged that Ameriquest breached its contract and was negligent in calculating the payoff of the borrowers' prior loan with OCWAN Federal Savings. The court noted that the payoff amount was calculated by OCWAN (not Ameriquest) and that Ameriquest forwarded the payoff in accordance with the closing instructions. Finally, Daniel asserted a question of fact as to whether he signed some of the loan documents, including the notice of right to cancel. The Court of Appeals noted the trial court's findings, indicating that the borrowers "had knowledge of their right to rescind," and that (in any event) the allegations on appeal were not based on that notice.[45]

The summary judgment in favor of Ameriquest was affirmed.[46]

VI. Conclusion

Despite some differences, *Daniel* is clearly a step back from the previous pronouncements in *Bankers Trust*. The relevant substantive issues in the two cases are similar, unless one is to distinguish the two cases by concluding that it is a predatory practice to adjust the interest rate upward to compensate for the increased risk of lending on collateral in a blighted area. Risk-based pricing is widely or even universally accepted, and is obviously essential to attract private capital; there is no evidence that these Oklahoma courts consciously intended to abrogate such standards. Absent direct articulation, any implications to the contrary in *Bankers Trust* and *Daniel* must be viewed as unintended and aberrational.

At least under state law, absent usury issues, the appropriate level of an interest rate is a pricing matter for consideration and negotiation by the parties. Even HOEPA does not overtly purport to change this, despite its ambiguous "suitability" requirement.[47] The idea that a court can discern, solely on the basis of the plaintiff's unsupported allegations, that an interest rate is "exorbitant," in order to state a cause of action, in the process ignoring the obvious risk factors that explain the transaction, would put virtually every home mortgage loan at risk.[48]

Taken to its illogical extreme, the *Bankers Trust* rationale provides a business necessity for redlining: If risk-based pricing (*e.g.*, 12.875 percent in a blighted area, an otherwise lawful rate significantly below the cost of the alternatives for many subprime borrowers) is effectively prohibited (by reason of being sufficient to state a cause of action for "predatory lending"), then no legitimate private lender can prudently lend in such an area. An inability to price for the risk in such an area mandates avoidance of such areas by lenders, on penalty of breaching management's fiduciary and other duties to shareholders and investors. This would be a disaster for the very consumers the *Bankers Trust* court presumably would like to protect.[49]

This is a problem exacerbated by cases like *Bankers Trust*, and the *Daniel* decision appropriately backs away from the *Bankers Trust* view, except possibly to the extent that *Daniel* reinforces *Bankers Trust* by distinguishing rather than directly rejecting it. As noted, there are differences between the cases, including the role of HOEPA. Still, the two cases are obviously similar, in legally relevant ways, and the conclusion is inescapable that (on the state law issues, at least) *Daniel* is intended to clarify the record on some of the important issues muddled in *Bankers Trust*.

Daniel confirms the basic tenets of contract and mortgage law,[50] including the parole evidence rule and the basic enforceability of private agreements. By citing with approval the trial court's emphasis that the borrowers "chose to borrow money on those terms,"[51] the Court of Appeals made clear that it was reaffirming the traditional legal basis for resolving such cases. These principles are not popular everywhere, and are being sorely tested by the waves of foreclosures in many states, but obviously are essential to attract private funding to mortgage transactions. It is the withdrawal of this funding (and its replacement by a reliance on federal programs) that marks the current credit and housing crisis. Cases such as *Daniel* are one reason why Oklahoma has not suffered as badly as many other states.

In the end, however, one is left with the fact that *Bankers Trust* was founded on HOEPA, while *Daniel* was not. As noted,[52] another lesson from these cases is the extent of the risk posed to any lender who dares to make a HOEPA-covered loan. Moreover, a similar risk has now been extended to almost the entire mortgage market, by reason of the new FRB Regulation Z provisions covering "higher-priced mortgage loans."[53] If this permits courts to broadly replicate the *Bankers Trust* analysis in every such foreclosure, the availability of private subprime mortgage credit will be even more severely curtailed. Cases like *Daniel,* while helpful, may not be enough to avoid this problem.

One may argue that Daniel would have done better if he had not proceeded *pro se*, and one can only hope that good lawyering would play a constructive role. But the *Daniel* court squarely faced issues that have led courts astray in other cases, and opted for decisions consistent with established rules of law. That is no small feat in today's superheated political and economic climate. Unfortunately, whether that will continue to be enough in our emerging legal environment remains to be seen.

42. *Daniel*, 80 Okla. B.J. at 725 (citing: Tit. 15 Okla. Stat. § 137, and Benham v. Plotner, 795 P.2d 510 (Okla. 1990)).

43. *Id.* (emphasis in original).

44. *Id.*, again citing Tit. 15 Okla. Stat. § 137 (a codification of the parol evidence rule).

45. *Daniel*, 80 Okla. B.J. at 725.

46. *Id.*

47. *See, e.g., supra* this text and notes 2 and 14; allegations to the contrary in these cases illustrate the obvious problems identified in Bennet S. Koren, *Suitability and HOEPA*, 61 Consumer Fin. L.Q. Rep. 201 (2007).

48. Among other things, it renders the usury statute and TILA disclosures superfluous. *But see infra* this text at notes 52-53.

49. At least in terms of the availability of private credit. As noted, we seem to be moving toward a substitution of federal funding programs in place of traditional private sources of mortgage credit. *See supra* note 12. It remains unclear how well this will work. *See, e.g.*, Mark Gongloff, Ahead of the Tape, *Banks, Not Fed, Will Prove Key to Credit Flow*, Wall Str. J., Mar. 10, 2009, at C1 ("[The FRB's] huge balance sheet doesn't necessarily (Continued in next column)

49. (Continued from previous column)

mean loans will flow; there is little evidence it has loosened long-term credit much so far."); Mark Gongloff, *TALF and Ilk Won't Cure Economic Ills*, *supra* note 12; There is ample room for skepticism on this point. *Id*. Given this uncertainly, and the obvious fragility of the credit system and economy, there seem obvious reasons for legislators, regulators and judges to be cautious with respect to actions likely to further constrain private sources of consumer credit.

50. Contrary to developments in some states. *See, e.g.*, Stephen F.J. Ornstein, Matthew S. Yoon, David A. Tallman, Richard B. Horn & John P. Holahan, *Massechusetts Sues Fremont*, 61 Consumer Fin. L.Q. Rep. 716 (2007).

51. *See supra* notes 4 and 36.

52. *See supra* this text at notes 24-26.

53. *See, e.g.*, Ornstein, Yoon, Tallman & Holahan, *Final Rule Amending the Home Mortgage Provisions of Regulation Z*, *supra* note 11; Koren, *supra* note 46. As noted, it is possible that some state and federal policy-makers intend to displace private capital in favor of a federally-funded alternative. *See supra* notes 2 and 12. It remains to be seen how effective such efforts will be. *Id.*

The FHA Home Affordable...

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FHA-HAMP and qualify under the program, the mortgagee must utilize the FHA loss mitigation actions using that priority order.[3] ML 23 took effect on August 15, 2009, and FHA-HAMP is a permanent addition to the current FHA loss mitigation home retention options as of that date.

II. Program Guidelines

A. General Requirements and Trial Modification Period

The FHA-HAMP is available to all FHA-approved mortgagees that are servicing FHA-insured owner-occupied single family mortgages (one-to-four units) that are currently in default.[4] Note that the property securing the loan must be the borrower's primary *and only* residence. However, unlike Federal-HAMP, there is no net present value test (NPV) required for each mortgage loan to determine eligibility. In order to be eligible, the existing FHA-insured loan must be at least one-year seasoned, meaning that the first payment due date must be at least twelve months in the past, and at least four full mortgage payments must have been paid by the borrower. Also, the FHA requires that the mortgagor check the HUD Limited Denial of Participation and General Services Administration exclusion lists for all borrowers. Note that a Credit Alert Interactive Voice Response System (CAIVRS) review is not required.

Under the FHA-HAMP, there are no loan-to-value (LTV) or credit score minimum requirements. A credit report is used but will only be used to verify recurring debts of the borrower.[5] Further, all FHA-HAMP loans are made without an appraisal. The FHA-HAMP new monthly principal and interest payment must be lower than the payment under the unmodified FHA loan. Further, all other liens on the property must be subordinated to maintain the first lien priority of the FHA-HAMP mortgage.

Similar to the Federal-HAMP, the FHA-HAMP also requires a three-month trial modification program. The borrower must make the first three consecutive payments on time before the FHA-HAMP can be finalized. The servicer must obtain detailed financial information from the borrower in order to process the FHA-HAMP, and the borrower (and any co-borrower, as applicable) must execute a hardship affidavit attesting to and describing the hardship that caused the need for the loan modification.[6] The borrower may provide his or her financial information via a telephone interview or by sending in written documentation. In all cases, the servicer must independently verify the financial information by obtaining a credit report, and any other forms of verification the servicer deems appropriate. Finally, the financial analysis, hardship affidavit, and documentation supporting the decision to provide partial claim relief must be maintained in the mortgagee's claim review file.

B. Debt-to-Income Ratios

In order to complete the modification, the borrower's front-end debt-to-income ratio (FDTI) must be as close as possible to, but not less than, thirty-one percent. FDTI is the ratio of principal, interest, taxes, and insurance (PITI) to monthly gross income (MGI).[7] The back-end debt-to-income ratio (BDTI) must not exceed fifty-five percent. The BDTI is the ration of the borrower's total recurring monthly debts (such as PITI, payments on all installments debts, monthly payments on all junior liens, alimony, car lease payments, aggregate negative net rental income from all investment properties owned, and monthly mortgage payments for second homes) to the borrower's MGI.

The mortgagee must pull the credit report to validate monthly installment, revolving debt, and secondary mortgage debt, and must also consider information obtained from the borrower orally or in writing concerning incremental monthly obligations. Note that subordinate liens are not included in the FDTI, but they are included in the BDTI. Finally, lenders must escrow the borrower's taxes and insurance payments on FHA-HAMP loans, and may not require that the borrower contribute cash to complete the FHA-HAMP.

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3. The mortgagee must evaluate the borrower for loss mitigation programs utilizing this order: (1) FHA Special Forbearance; (2) Loan Modification; (3) Partial Claims; and (4) FHA-HAMP.

4. "Default" is defined as one payment past due more than 30 days. For default calculation purposes, all months are determined to have 30 days. For example, a mortgage due for the July payment is in default on August 1. Note that a mortgage will be ineligible for the FHA-HAMP if it is more than 12 full mortgage payments past due, or if the borrower has intentionally defaulted on his or her mortgage.

5. Note that the lender must cover the costs of the credit report. Further, all late fees must be waived and cannot be capitalized.

6. The document that is to be used to detail the hardship is *available at:* https://www.hmpadmin.com/portal/docs/hamp_borrower/hamphardshipaffidavit.pdf.

7. MGI is defined to mean the amount before any payroll deductions including wages and salaries, overtime pay, commissions, fees, tips, bonuses, housing allowances, other compensation for personal services, social security payments (including social security received by adults on behalf of minors or by minors intended for their own support), annuities, insurance policies, retirement funds, pensions, disability or death benefits, unemployment benefits, rental income, and other income.