

Forensic Psychological/Psychiatric Evaluations in Mortgage Foreclosure Cases: A Legal & Clinical Perspective

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Forensic mental health professionals (FMHP's) are called to court to examine a multitude of issues, including competency to stand trial, insanity, sexual dangerousness and other criminal matters. On the civil side, they evaluate such forensic issues as testamentary capacity, workers' compensation, and emotional distress that may arise from personal injury, employment discrimination, and harassment, for example.

Specific to this article, this author will present a unique psycho-legal referral, addressing psychological/psychiatric injury claims that arise in mortgage foreclosure litigation. These claims arise in the context of actual damage claims asserted under the Truth in Lending Act "TILA" (15 U.S.C. § 1601 et seq.). The author will examine whether the lender's violation of the TILA can give rise or result in mental injury/impairment, and whether the violation can trigger a predisposed mental condition. The author will propose that FMHP's should conduct examinations similar to other civil forensic psychological/psychiatric evaluations such as in personal injury torts for emotional distress.

CIVIL FORENSIC PSYCHOLOGICAL EVALUATION

Forensic psychologists/psychiatrists are often requested to evaluate plaintiffs in civil litigation. Plaintiffs in civil claims generally complain that a defendant's act or omission resulted in a mental health impairment and/or emotional distress for which they believe they are entitled to monetary compensation.

These types of evaluations are very difficult for the expert witness as he must deal with evaluating an individual who is often motivated to look sick (mentally ill/impaired) in order to obtain compensation. Therefore, an assessment of malingering is essential to rule out any exaggeration of mental illness. A FMHP must also deal with the burden of evaluating a person much later than the injury occurred. Such a retrospective evaluation necessitates thorough collateral data collection and assessment of the person's baseline level of functioning.

The examination of a plaintiff's baseline level of functioning is critical to all civil psychological/psychiatric cases. With respect to the legal issue of causation, the expert witness must thoroughly evaluate the claimant's history of preexisting psychiatric disorder(s) or their predisposition to such disorders. Clinical/psychiatric causation is often multifaceted, and may be bio-psycho-social in nature. The law requires that the plaintiff prove that the incident and traumatic event caused the psychiatric symptoms directly or by accelerating or exacerbating an existing mental condition.

In addition to considering legal and proximate causation, the expert must also be aware of the plaintiff with "eggshell thin skull" in which a defendant is responsible for the result of their negligent act(s) independent of the vulnerability and preexisting injuries of the plaintiff. Simply, plaintiffs must be taken as they are found, even with a history of mental illness and poor coping mechanisms, for example.

Pursuant to civil forensic psychological evaluations, the expert witness must be equipped to render a clinical/forensic opinion based on the law rather than mere clinical terms of psychological injury. In the specific field of mortgage foreclosure, an expert witness may have to answer these same questions surrounding causation.

PSYCHOLOGICAL/ PSYCHIATRIC CLAIMS IN MORTGAGE FORECLOSURE CASES

While there seems to be a growth of mortgage foreclosures both in the U.S. and U.K., only recently have the effects of foreclosures been examined by public health professionals. Some research indicates that a mortgage foreclosure and threat of or actual repossession lead individuals to experience poor mental and physical health, psychological stress, the loss of the basic need of shelter, loss of safety, depression, grief, insecurity, uncertainty, lack of control, feelings of failure, and low self-esteem. Environmental stressors, including long-term stress and emotionally charged events, can impact a person's physical and mental health, especially when he lacks resources to deal with these events. In fact, one study revealed that most people who had their home foreclosed suffered from depression and this event made prior chronic conditions such as seizure disorders worse.

Mortgage foreclosures can be the outcome of the interaction of complex factors such as unemployment and job loss, illness, divorce, small business failure, and a lack of safety nets. Such repossession can be voluntary or compulsory in nature, the

latter more stressful, as this involves the lender bringing an action in court for repossession of the property following mortgage default. The uncertainty of where to live next, homelessness and other consequences can be trying.

The intensity of the stress and the individual's coping resources are elements to consider when evaluating such a claim. Research indicates that this sense of loss of home can be compared to the loss of a loved one and cause one to feel fearful, helpless, isolated, depressed, resentful, and angry. Further consequences include a change in social status, shame, and embarrassment leading to social isolation, deficits in social status and identity, damaged personal and family relationships, diminished quality of life, and halted future aspirations.

WHAT DOES THE LAW SAY?

When litigating a mortgage foreclosure case, a borrower's attorney may raise defenses under the Truth in Lending Act "TILA" (15 U.S.C. § 1601). While it appears as though mortgage foreclosure and repossession can deleteriously affect one's mental and physical health, the law remains unsettled as to whether a borrower can be compensated for emotional distress stemming from a lender's violation of Truth and Lending law. There is little case law and legal authority relevant to this specific issue and some case law addresses different fact patterns and legislation. Further, some argue that losing a home through foreclosure, and even the repossession of this property, does not lend itself to a psychological/psychiatric injury. More specifically, there may be a question by some legal experts whether such an event, albeit traumatic for some, can be the proximate or legal cause of a major mental disorder.

When considering claims of mental and emotional distress, obviously, there needs to be facts establishing such a claim. A plaintiff must connect his alleged emotional pain and suffering to the TILA violation. For example, harassing phone calls by a bank, offensive to some, may lack as facts establishing such a claim. Specific to TILA violations, the district court in *Butler v. Sterling*, App. LEXIS 6419, held that "nothing in the plain language of section 1640(a) (1) precludes awarding consequential damages, including damages for severe emotional distress. Given the policy of construing TILA in favor of the consumer, compensation for "actual damages" could certainly encompass psychic trauma with accompanying physical manifestations in extreme cases." The court went on to address that several federal courts have concluded that violations of the Fair Credit Reporting Act (15 U.S.C. § 1681o) may recognize consequential damages, including emotional distress for extreme cases. As can be seen, the law in this area is not well established and developed, and courts are relying on holdings in other cases arising under similar consumer legislation.

EVALUATING EMOTIONAL DISTRESS IN A FORECLOSURE/REPOSSESSION CLAIM

A forensic mental health professional must evaluate a mortgage foreclosure claim as he would any other tort for emotional distress. The expert witness has several tasks including:

- 1) assessing the baseline state of the psychological functioning of the party before the harm occurred, which necessitates a thorough evaluation of collateral data and prior mental health records if applicable;
- 2) assessing for malingering of psychopathology and/or cognitive functioning;
- 3) examining the nature and extent of the emotional distress that was caused by the alleged violator's actions towards the injured party;
- 4) examining the nature and extent of any of the person's psychological impairment or injuries (one must not conclude that a party in fact has any mental impairment);
- 5) examining the psychological cause of the impairment(s);
- 6) assessing the nature of psychological/psychiatric intervention that will assist in returning the injured party to his previous level of functioning.

Again, the expert witness must be mindful of the attorney's need to have the expert render an opinion as to whether the party has suffered an injury, and the extent of that injury. The expert should be able to render an opinion as to the probable source or causal/etiological factors leading to the person's injuries. A jury must hear such an opinion as to a causal connection between the injury and a defendant's responsibility before they assign liability.

When dealing with an eggshell thin skull party, the expert must be aware that psychiatric disorders are multifaceted in nature and predisposing symptoms/disorders often come together during a stressful event to produce a disorder. For example, research has indicated that psychosocial factors including life events and environmental stress more often precede first rather than subsequent episodes of mood disorders. Moreover, if it is revealed that the individual had a pre-injury vulnerability such that he would have eventually developed a similar kind of emotional problem even if the accident had not occurred, then he may fail in this aspect of his claim or may recover damages only to the extent that the trauma worsened his condition. Therefore, it is of critical importance when determining causation that the expert witness compare the alleged injured party's pre-accident functioning to his mental state after the injury.

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