

F.3 Sample First Request for Production of Documents

This is a sample form for demonstration purposes only, and must be adopted by a competent professional to meet the individual facts and local procedural rules. This request is based on discovery materials prepared by consumer law practitioners in three different cases.¹ It is intended to be adaptable for both loans and credit sales.

In most cases, a simplified first document request should be served as soon as practicable in the case. The request could ask for the loan file, documents that will be introduced into evidence, and any documents relating to any assignment of the loan or showing who actually owns the loan. Such a request will help refine claims and is relevant and unobjectionable.

[plaintiff]Plaintiff

[vs]

[defendant]Defendant

[action]Civ. No. _____

[endcaption]

INSTRUCTIONS

You are instructed to produce the originals of the following documents at [address] within thirty days after service of this request in accord with Fed. R. Civ. P. 34.

A. Please identify the source of each of the documents you produce and label them to correspond to the categories in this request.

B. If there are documents not currently in your possession, but which you can obtain from [other parties involved in the transaction, e.g., a loan broker, prior holder, or assignee] such additional documents are included in this request.

C. If your response to any requests herein is that the documents are not in your possession or custody, describe in detail the unsuccessful efforts you made to locate the records.

¹ This document request is based on a set prepared by David A. Searles, an attorney practicing consumer law in Philadelphia, and by Bankruptcy Judge Bruce Fox before he joined the bench, in a case involving dealer-arranged real estate-secured direct financing of a used car purchase; a set prepared by Attorney Diane Thompson of the Land of Lincoln Legal Assistance Foundation in East St. Louis, Illinois, in a mortgage loan case; and a set prepared by Attorney Irv Ackelsberg of Community Legal Services in Philadelphia in a mortgage loan case.

D. If your response to any requests herein is that the documents are not in your control, identify who has control and the location of the records, and provide any documents you have that contain all or part of the information contained in the requested document or category.

E. If any requested document was, but no longer is in your possession or subject to your control, or has been misplaced, destroyed or discarded, or otherwise disposed of, please so state, and for each such document provide:

- (1) Its date;
- (2) The identity of the person(s) who prepared the document;
- (3) The identity of all persons who participated in preparing the document, to whom the document was sent or who have otherwise seen the document;
- (4) The length of the document;
- (5) The subject matter of the document;
- (6) If misplaced, the last time and place it was seen and a description of efforts made to locate the document;
- (7) If disposed of, the date of and reason for disposal, the manner of disposition (e.g., destroyed, transferred to a third party), the reason for disposal, the identity of the person(s) who authorized disposal and the identity of the person who disposed of the document.

F. If you are declining to produce any document in whole or in part because of a claim of privilege, please: (a) identify the subject matter, the type (e.g., letter, memorandum), the date, and the author of the privileged communication or information, all persons that prepared or sent it, and all recipients or addressees; (b) identify each person to whom the contents of each such communication or item of information have heretofore been disclosed, orally or in writing; (c) state what privilege is claimed; and (d) state the basis upon which the privilege is claimed.

G. When a document exists as a computer database or spreadsheet file, Plaintiff requests that the file be copied to a disk in one of the following formats in descending order of preference: [Preferred Formats].

H. When a document exists in a computer disk as a word processing file, Plaintiff requests that the file be copied to a floppy disk in one of the following formats in descending order of preference: [Preferred Formats].

I. The Document Requests are to be considered continuing, and supplemental documents must be submitted by Defendant upon discovering or becoming aware of additional responsive documents.

J. If any paragraph of this request is believed to be ambiguous or unduly burdensome, please contact the undersigned and an effort will be made to remedy the problem.

DEFINITIONS

A. "Document" is used in the broadest possible sense and means, without limitation, any written, printed, typed, digitized, photostated, photographic, computerized, recorded, or otherwise reproduced communication or representation, whether comprised of letters, words, numbers, pictures, sounds or symbols, or any combination thereof. It includes the original and any nonidentical copies thereof, whether different from the originals by reason of any notation made on such copies or otherwise, and includes every document that is or has been in the possession, control, or custody of Defendant or of which Defendant has knowledge, whether originals or copies. It includes but is not limited to contracts, notes, memoranda, correspondence, diaries, desk or other calendars, statistics, letters, telegrams, minutes, business records, personal records, account statements, reports, studies, checks, receipts, bills, returns, charts, summaries, pamphlets, books, notations of any sort of conversations, written agreements, bulletins, printed matter, computer printouts, electronic mail, data compilations from which information can be obtained, teletypes, telefax, worksheets, logs, forms, bank statements, books of account, ledgers, or invoices, all drafts, alterations, modifications, changes and amendments of any of the foregoing, graphic or oral records or representations of any kind, including but not limited to tapes, cassettes, discs, recordings, computer memories, and other information that is recorded electronically, digitally, or by similar means.

B. The term "person" shall include a natural person, partnership, corporation, joint venture, association, or other group however organized.

C. The term "transaction," when used without qualification, means the transaction consummated by the Plaintiff [date and description].

REQUESTS TO PRODUCE

IMPORTANT: All questions containing the terms "document," "person," or "transaction" must be answered in accordance with the definitions of those terms contained in the attached instructions.

REQUESTS FOR PRODUCTION

1. All contracts, including modifications thereto, to which Plaintiff is a party, including any and all broker agreements.²

² In the alternative, this and the next five document requests can be replaced with a single request such as "All documents pertaining to the credit transaction underlying this action, including but not limited to the entire contents of the files and the inside and outside of the front and back of the file folders for this transaction, all documents signed by defendant, disclosures, applications, correspondence, work sheets, underwriting forms, file notations and any other document."

2. All documents relating or referring to Plaintiff, or which are indexed, filed or retrievable under Plaintiff's name or any number, symbol, designation or code (such as an account number or Social Security number) assigned to Plaintiff.
3. All disclosure statements given to Plaintiff and any other notices of Plaintiff's rights.
4. All credit applications from Plaintiff or relating or referring to Plaintiff's credit application.
5. Your complete file as to this transaction and Plaintiff's account, including the outside and inside of the front and back of your file folder for this credit transaction.
6. All ledger cards or ledger sheets or other documents reflecting payments, credits, late charges, other charges, and rebates posted to Plaintiff's account.³
7. Copies of all payments received from Plaintiff.
8. All correspondence, telephone log sheets, or other internal memoranda or notes concerning Plaintiff's account, or relating or referring to the account.
9. All correspondence, telephone log sheets, or other internal memoranda or notes concerning or reflecting communications with _____.⁴
10. All documents relating or referring to any fees, commissions or payments you received in connection with the loan transactions, including sale of insurance, from anyone other than Plaintiff.⁵
11. All documents reflecting, or relating or referring to, commissions and/or bonuses paid to any person in connection with this loan transaction, including sale of insurance.
12. Copies of both sides of the (i) bills and (ii) checks, wire transfers or other payment instruments for each disbursement in relation to the transaction, issued by anyone in connection with this transaction, including all compensation paid to brokers whether as part of closing or outside closing.

³ This and the next request will help determine the tender amount in a TILA rescission case, and the amount of enhanced damages in a HOEPA case. They are also relevant to a determination of the balance owing on the debt if the creditor has counterclaimed.

⁴ This request can be filled in to request correspondence with settlement service providers, home improvement contractors, brokers, or others involved in the transaction. These documents may help show that payments that were ostensibly made to third parties should actually be included in the finance charge, or in the points and fees for HOEPA purposes. They may also show that the creditor had such a close relationship with parties who acted fraudulently that it should be liable for their fraud.

⁵ The documents listed in this and the next four requests will help determine whether any of the components of the amount financed should actually have been included in the finance charge and whether they should have been included as points and fees for purposes of HOEPA.

13. All appraisal requests, appraisals of the property, invoices for appraisals, review appraisals, broker price opinions, or other valuations of the property, and proofs of payment for appraisals, and all documents relating or referring to any such appraisal or other valuation of the property.

14. Proof of payment to credit reporting services related to Plaintiff's closing.

15. If the current obligation resulted from a refinancing of an earlier obligation, all documents that relate or refer to the earlier obligation, including but not limited to: (a) the contract; (b) all disclosure statements; (c) the ledger sheet or other record, showing all payments, credits, late charges, other charges, and rebates; (d) documentation of the date, amount, and calculation of any rebates of finance charges, credit insurance, or other charges; (e) the mortgage or security agreement, if any; (f) all correspondence; (g) the calculation of the payoff amount.

16. All documents that show, relate, or refer to the assignment or negotiation of the note, including any agreements between the assignor and assignee relating to the assignment of obligations. If there has been more than one assignment, please produce these documents for each assignment.⁶

17. All documents that show, relate, or refer to the assignment of the mortgage,⁷ including any agreements between the assignor and assignee relating to the assignment of obligations. If there has been more than one assignment, please produce these documents for each assignment.⁸

18. All powers of attorney or other documents on which the servicer or other entity may be relying to act on behalf of the loan originator, holder, or assignee of the note and/or mortgage and any documents which may refer or relate to such enabling documents.⁹

⁶ This request helps identify potential defendants, since an assignee is liable for rescission and, if the violations are apparent on the face of the transaction, is also liable for TILA damages. See Chs. 10, 12, *supra*. It is also useful for determining the scope of potential holder in due course defenses. If the document assigned was an installment sales contract rather than a note, the request should be revised accordingly.

⁷ The mortgage under most state law should follow the note. However, sometimes the note and mortgage are assigned separately. While the separate assignment of the mortgage may be a nullity under state law, it is possible that additional claims, sources of discovery, or defendants may be identified from the documents produced in response to this request.

⁸ This request is relevant only if the transaction included a mortgage.

⁹ Sometimes, the original lender may execute a power of attorney to the servicer at the time of the transaction. This document may permit the servicer to prepare assignments of the mortgage and endorsements of the note as an attorney-in-fact. These agency relationships may be important for TILA claims, Fair Debt Collection Practices Act claims, joint venture claims, or possible holder in due course defenses by the holder or servicer. For discussions of the holder-in-due-course doctrine and exceptions to its reach, see National Consumer Law Center, Mortgage Lending § 10.7 (2012); National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.7.2 (7th ed. 2008 and Supp.).

19. Each and every document that was transmitted to [the assignee] by [the assignor] in connection with the negotiation or assignment of the note or mortgage.¹⁰

20. All documents which constitute or reflect communications between you and public or private agencies that receive consumer complaints (such as an Attorney General's office, the Federal Trade Commission, a Better Business Bureau or newspaper column) relating to transactions since 1999.¹¹

21. Any administrative complaint or other documents showing, relating to, or referring to enforcement proceedings instituted against you or any other holder, assignee, or originator of this obligation from [date] to [date] regarding TILA.¹²

22. All agreements, solicitations, correspondence or other documents relating or referring the purchase of loans by [Assignee] from [Original Creditor or prior assignee], including loan purchase master agreements, solicitations, correspondence or other documents, whether relating to this loan or other loans.¹³

23. All documents that concern, refer, or relate to any instructions or policies to [Original Creditor's or broker's] agents or employees concerning its brokering of [type of obligation, e.g., residential mortgages].

24. All contracts between you and any of the other Defendants or [settlement service provider] in this action.¹⁴

25. All documents that relate or refer to any relationship, affiliation, or course of conduct between you and any of the other Defendants or [settlement service provider] in this action.

10 Whether the assignee is liable for TILA damages depends on whether the violations were apparent on the face of the "disclosure statement or other documents assigned" in a non-mortgage transaction or "the disclosure statement, any itemization of the amount financed, the note, or any other disclosure of disbursement" in a transaction secured by real property. See Ch. 12, *supra*. If the transaction involved an installment sales contract rather than a note, or did not involve a mortgage, the request should be revised accordingly.

11 This request is relevant to any claim of a bona fide error. It is also extremely important for establishing pattern and practice evidence.

12 Certain administrative actions can extend the three-year rescission period. See § 10.6.3.3.6, *supra*.

13 This and the next two document requests relate to assignee liability under HOEPA and TILA. They also may help show the assignee's liability for state law claims. If the current holder purchased the obligation from an intermediate assignee, the request should be revised to reflect that fact.

14 Affiliations among the defendants, or between a defendant and a settlement service provider, may help establish that certain closing costs count toward the HOEPA points and fees trigger. The documents showing contracts and other affiliations among the defendants that this and the next request seek may also help establish assignee liability under HOEPA by showing the assignee's opportunity to determine that the obligation was covered by HOEPA.

26. All documents that discuss or refer to your procedures for ensuring compliance with, and your actual compliance or lack of compliance with, the requirements of the Truth in Lending Act, including but not limited to documents that were used to check for compliance from [date] through [date].¹⁵

27. All manuals, memoranda, instructions, and other documents setting forth your policies, procedures or practices relating to [loan origination or purchase] of [type of obligation, e.g., residential mortgages].¹⁶

28. The underwriting guidelines and rate sheets that were in effect at the time of the loan transaction at issue in this case, and any written material, including definitions, memoranda, directives or other documents that explain, illustrate, apply, elucidate or pertain to those underwriting guidelines, including the rate sheet that was used to determine the interest rate Plaintiff would pay in this transaction or the “par” rate.¹⁷

29. All appraisal guidelines, appraisal watch lists or appraisal suspension lists maintained during the relevant period either by the Assignee or Original Creditor.

30. Any and all documents concerning reviews of [appraiser] in the case or review of appraisals performed by [appraiser] in the case, whether in this transaction or another transaction.¹⁸

31. All guidelines, manuals, memoranda regarding supervision or internal monitoring of brokers, brokered loans, or the performance of individual brokers, including broker watch lists or broker suspension lists or other similar documents however denominated.¹⁹

15 This and the next request are relevant to any claim by the creditor that the TILA violation resulted from a bona fide error. The documents may also help establish assignee liability by showing what documents the loan originator provided to the assignee. In a HOEPA case these documents may help show that the assignee knew, or could have ascertained through due diligence, that the transaction was covered by HOEPA.

16 This document may bear on whether the defendant can claim a bona fide error. This and the next three requests also may help show whether the originator engaged in a pattern or practice of lending without regard to the consumer’s repayment ability, which is a violation if the transaction is covered by HOEPA.

17 This request is relevant if a yield spread premium was charged and the consumer is trying to show that it should count as points and fees for purposes of HOEPA. See § 9.9.3.4, *supra*. It is also relevant in HOEPA cases to show whether the defendant made the loan without regard to the borrower’s repayment ability.

18 Documents showing that the lender knew the appraiser was overstating the value can turn an appraisal fee into a finance charge as well as bolster fraud and consumer fraud or joint venture claims.

19 This question and the following are only relevant where there is a broker involved in the loan.

32. Any and all documents, however denominated, concerning [broker in the case], whether master contracts, broker monitoring, broker watch list, correspondence, telephone logs, internal memoranda and the performance of loans originated by the broker.

33. Any and all documents relating to any sampling of the loan pool containing the instant note or other documents reflecting the performance of loans grouped with this loan or originated by the same broker or creditor.

34. Any and all documents pertaining to or relating or referring to Assignee's decision to purchase or not purchase HOEPA (Section 32) loans or to the structuring of loans so as not to trigger Section 32.²⁰

35. If a third-party investor holds any interest in the obligation underlying this action, or if this obligation has been or is part of a pool of obligations that have been securitized, all prospectuses, pooling and servicing agreements or reports concerning that loan pool, including documents which describe the investment and those that describe the performance of the loans in such pool, and all documents relating or referring to same.²¹

36. Your most current annual report.

37. All documents relating or referring to any powers of attorney on which the servicer or other entity may be relying to act on behalf of the loan originator, holder, or assignee of the note and/or mortgage.²²

38. All insurance policies that may afford coverage with respect to the matters complained of, together with all correspondence accepting or declining coverage or reserving rights with respect thereto.²³

39. All documents setting forth your document destruction and retention policies, and all documents that relate or refer to same.

20 This request should only be made if the loan is a HOEPA loan.

21 This and the next request are relevant to HOEPA loans. The documents produced may show whether the holder of the obligation claims that it does not purchase HOEPA loans, and may also show what "due diligence" it claims to perform on the loans it purchases.

22 Sometimes, the original lender may execute a power of attorney to the servicer at the time of the transaction. This document may permit the servicer to prepare assignments of the mortgage and endorsements of the note as an attorney-in-fact. This issue may be worth exploring because the note holder may not have acquired holder-in-due-course status if the endorsement occurred after either a default on the payments or an assertion of defenses or both. For discussions of the holder-in-due-course doctrine and exceptions to its reach, see National Consumer Law Center, Mortgage Lending § 10.7 (2012); National Consumer Law Center, Unfair and Deceptive Acts and Practices § 11.7.2 (7th ed. 2008 and Supp.).

23 The current version of Fed. R. Civ. P. 26(a)(D) requires disclosure of any insurance policies as part of the initial disclosures that parties must make in most types of cases unless otherwise stipulated or ordered.

40. Any return of certified or registered mail indicating Plaintiff's receipt of any documents or letters whatsoever.

41. All documents given by Defendant routinely to all persons to whom it extends credit.

42. All documents you may introduce into evidence in this case.

43. All other documents relating or referring to the transaction or Plaintiff's account with you.

44. All documents referred to in the interrogatories and in the answers thereto and not previously produced.