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Measure Opposed by Bankers' Group Would Allow Owners to Recover Attorney's Fees in Foreclosures

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Legislation that would give property owners, as well as lenders, attorney's fees if they prevail in a residential foreclosure action is "unnecessary and would create uncertainty in the foreclosure process" in New York, the Bankers Association is contending.

The measure, [A1239/S2614](#), by Assemblyman Rory I. Lancman, D-Queens, has passed both houses of the Legislature but has not yet been forwarded to Governor David A. Paterson. It was dubbed the Access to Justice in Lending Act by its sponsors.

The bill stipulates that whenever a covenant in a mortgage agreement on residential property allows lenders to recover attorney's fees in a foreclosure proceeding, the mortgage must also contain a reciprocal covenant allowing the borrower the same right if a foreclosure is unsuccessful.

Advocates of the measure say that covenants that favor lenders are routinely contained in residential mortgages.

The Bankers Association, which circulated [a memorandum against the proposal](#) to lawmakers and Mr. Paterson in late June, said the measure raises questions of both constitutionality and redundancy.

Article 1, Section 10 of the U.S. Constitution declares that "no state shall...pass any...law impairing the obligation of contracts," according to the bankers' group. The bankers argued that the legislation would constitute such an impairment.

In addition, the association contended that the most commonly asserted defenses by borrowers in foreclosure actions are violations of the Truth in Lending Act, [15 USC §1640](#), and the Fair Debt Collection Practices Act, [15 USC §1692k](#). Both of those

federal laws already provide for the payment of attorney's fees to prevailing parties, according to the trade group.

The association's objections were contained in a memo prepared by Wilson, Elser, Moskowitz, Edelman & Dicker, which lobbies in Albany for the group.

A spokeswoman from the Bankers Association said yesterday the group would have no comment on the bill past the objections in the memorandum.

Mr. Paterson's office does not comment on legislation that will reach him for approval or veto.

Mr. Lancman said his bill was patterned after a provision in §234 of the Real Property Law, which, since the mid-1960s has allowed tenants to recover attorney's fees if they successfully fight evictions, provided leases give the same right to landlords who prevail in eviction proceedings.

Mr. Lancman said the change would encourage more attorneys to represent defendants in foreclosure actions "because they [attorneys] can be confident, if successful, that they will be paid for their work."

With the economy still struggling and foreclosures common in many courts, Mr. Lancman said he hopes that attorneys specializing in foreclosure work stay in the field.

"We hope to be creating a private bar, just like there is a private bar of attorneys doing discrimination cases and other kinds of specialized work," Mr. Lancman said.

The assemblyman said the constitutional objections raised about his legislation by the bankers' group can be rebutted. The language against states impairing obligations of contracts has traditionally been applied where states have enacted laws unfairly negating debts where contracts require repayment.

Mr. Lancman said the new provision would cover all mortgages in existence when the law takes effect. He said the legality of such retroactive remedial application of legislation was upheld by the state Court of Appeals in [Matter of Duell v. Condon](#), 84 NY2d 773 (1995), when a similar question arose about the backward reach of Real Property Law §234.

The bill applies to foreclosures of residential properties consisting of one- to four-family units, or condominiums or cooperatives occupied by the borrower.

[Legal Services NYC](#) and the [Neighborhood Economic Development Advocacy Project](#) are urging enactment of the bill, which was sponsored in the Senate by Jeffrey Klein, D-Bronx.

Legal Services NYC maintained that the bill would expand legal representation for middle- and low-income New Yorkers facing foreclosure while removing the incentive for some mortgage issuers to go forward with foreclosure proceedings.

"The Act would create an incentive for lenders to resolve more cases early-on in the foreclosure process, before both sides incur significant legal fees and costs," the group said in a memo in support of the bill. "Indeed, this provision would provide a powerful incentive for lenders to negotiate a resolution with borrowers, who are behind on their payments before a foreclosure action is ever filed."

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