



Neighborhood Economic Development Advocacy Project

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Foreclosure Prevention and Responsible Lending Act of 2008

Brief Summary of Key Provisions

Ninety-Day Pre-Foreclosure Notice

Lenders and mortgage loan servicers will be required to send homeowners with subprime and non-traditional home loans (as defined in the statute) a notice at least 90 days prior to the commencement of a legal action. This notice must advise the borrower to contact both the servicer, and a non-profit housing counselor (a list must be provided). If the 90 day notice is not provided, the borrower may raise this as a defense to the foreclosure action.

Mandatory Settlement Conferences

For residential foreclosure actions involving a subprime or nontraditional loan created between January 1, 2003 and September 1, 2008, the court must hold a mandatory settlement conference within sixty days after proof of service of the foreclosure action is filed with the county clerk. If the defendant appears *pro se* at the conference, the court may assign counsel.

For foreclosure actions filed before September 1, 2008, but where there is no final order of judgment, the defendant has a right to request a settlement conference. The courts must request that all foreclosing plaintiffs in this category identify whether the loan is subprime or nontraditional, and will then send a notice to the defendant. If requested, these conferences must be held as soon as practicable.

Substantive Regulation of New Subprime Home Loans (adds Banking Law § 6-m)

Prohibitions and regulations that extend to all subprime home loans (as defined in the statute) which close after September 1, 2008 include (but are not limited to):

- No prepayment penalties;
- No negative amortization;
- No loan flipping;
- No kickbacks or other payments to mortgage brokers for services not rendered, or not reasonably related to the value of good or services;
- No yield spread premiums that do not offset up front costs and are not properly disclosed;
- No refinancing of special mortgages; and
- No teaser rates with a duration of less than six months.

All lenders making subprime loans must verify that the borrower has the ability to repay the loan, taking into account escrow payments, current and expected income, credit history, current obligations, employment status and other financial resources apart from the home. If the loan is an adjustable rate mortgage (ARM), payment ability must be based on the monthly payment calculated at the fully indexed rate.

Borrowers are entitled to actual damages for violations of Banking Law § 6-m, and may also be awarded injunctive, declaratory and such other equitable relief the court deems appropriate.

Borrowers may raise violations of Banking Law 6-m as a defense to a foreclosure action, against the assignee, or purchaser, of the loan.

Restrictions on Mortgage Brokers

Under the new law, mortgage brokers must act in the borrower's interest, with reasonable skill, care and diligence and in good faith and with fair dealing. Brokers are prohibited from directly or indirectly accepting, giving or charging any undisclosed compensation, and must clearly disclose to the borrower within three days of the loan application all material information that could affect the borrower's ability to get the loan. Brokers must present borrowers with a range of potential appropriate loan products. Mortgage brokers and lenders are prohibited from improperly influencing or attempting to influence the appraisal process relating to a home loan.

Regulation of Mortgage Loan Servicers

Mortgage loan servicers must be registered with the Banking Superintendent, effective July 1, 2009. The Superintendent must set up registration procedures, and is authorized to promulgate regulations for servicers including requirements for disclosures to homeowners regarding interest rate resets; requirements regarding pay-off statement time frames for which servicers must apply payments; and requirements for servicers to file reports with the Banking Department. The right of the Superintendent to examine the business records of licensees, and related provisions regarding business practice, are extended to cover servicers.

Proof of Standing to Foreclose is Required

Foreclosure complaints filed on or after September 1, 2008 for subprime home loans must include an affirmative allegation that at the time the proceeding was commenced, the plaintiff was the owner and holder of the subject mortgage and note, or has authority to institute the foreclosure lawsuit.

New Crime of "Residential Mortgage Fraud"

"Residential mortgage fraud" becomes a new criminal action for fraudulent loans originated on or after November 1, 2008. The crime is committed by any person who prepares or provides materially false information for purposes of getting a loan, or in filing documents containing false information with a county clerk. Borrowers applying for a residential mortgage loan who intend to live in the property are exempted from the definition, unless they act as an accessory.

Requirements for "Distressed Property Consultants"

"Distressed property consultants" solicit homeowners in default and promise to help them with a work-out, or in responding to a complaint, or in otherwise negotiating with the lender. The definition does not include attorneys, lenders generally, and bona fide not-for-profits such as housing counseling and legal services agencies.

Effective September 1, 2008, there must be a written contract between the consultant and the homeowner that sets forth the nature of the service, compensation expected and contact information for the consultant. The homeowner has a right to cancel the contract within five days and must be given a notice of their right to rescind, along with referrals to non-profit and government agencies. Consultants are prohibited from receiving payment for services before the full completion of the services; from taking power of attorney from the homeowner; and from retaining original loan documents of the homeowner.