

CHAPTER 472: NEW N.Y. MORTGAGE FORECLOSURE LEGISLATION

Chapter 472 of the Laws of 2008, signed into law on August 5, 2008, is complex legislation, imposing obligations on lenders making certain types of loans to natural persons on the security of one-to-four family dwellings.¹ It was enacted to "address the mortgage foreclosure crisis in the state by: (1) providing additional protections and foreclosure prevention opportunities for homeowners at risk of losing their homes; (2) strengthening the Banking Law to prevent similar crises from developing in the future; (3) establishing standards for lenders and mortgage brokers to prevent borrowers from being placed into unaffordable home loans; (4) registering and regulating mortgage loan servicers to enhance loan servicing standards in the state; and (5) defining the crime of residential mortgage fraud and establishing strict criminal penalties to deter those who may engage in such activity".²

There are severe penalties for non-compliance with certain requirements. Under subsection "3" of new Banking Law Section 6-m ("Subprime home loans"), "[a]ny provision in a subprime home loan that violates subdivision two ["Limitations and prohibited practices for subprime loans"] of this section shall be rendered void". Further, as to "subprime home loans", Banking Law Section 6-m(13) provides that "[i]n any action by a lender or assignee to enforce a loan against a borrower in default more than sixty days or in foreclosure, a borrower may assert as a defense, any violation of this section". In addition, under subsection "2" of amended Section 1302 of Real Property Actions and Proceedings Law ("RPAPL") ("Foreclosure of high-cost home loans and subprime home loans"), "[i]t shall be a defense to an action to foreclose a mortgage for a high-cost home loan or subprime home loan that the terms of the home loan or the actions of the lender violate any provision of section 6-l or 6-m of the Banking Law" or RPAPL Section 1304.³

This article identifies certain provisions of Chapter 472 which should be considered when certain loan title insurance policy endorsements are requested and when a mortgage covered by the legislation is being foreclosed.

NOTICES

Chapter Section 1 amends the "Help for Homeowners in Foreclosure" notice required by RPAPL Section 1303 ("Foreclosures; required notices") for a mortgage foreclosure commenced on and after February 1, 2007 on property improved by an owner-occupied one-to-four family dwelling.⁴ RPAPL Section 1303 requires the notice to be delivered to the mortgagor with the summons and complaint. The revised form of notice for actions commenced on or after September 1, 2008 is set forth in a footnote to this article.⁵

The notice is required to be on a separate page in bold, fourteen-point type printed on colored paper that is a color other than that of the paper on which the summons and complaint are printed, captioned, in bold, twenty-point type, "Help for Homeowners in Foreclosure".

Chapter Section 2 adds RPAPL Section 1304 ("Required prior notices"), effective September 1, 2008. The lender or mortgage loan servicer, when the loan is a "high-cost home loan" (as defined in Banking Law, Section 6-l), a "subprime home loan" or a "non-traditional home loan", as defined in Section 1304, is required to provide a notice to the borrower at least 90 days before commencing a legal action, such as a foreclosure. The text of the required notice, to be at least fourteen-point type, is set forth in a footnote to this article.⁶

The lender or mortgage loan servicer must send the RPAPL Section 1304 notice to the borrower by registered or certified mail and also by first-class mail to the last known address of the borrower. If the borrower resides at an address other than the mortgaged property, the notice is also to be sent to the mortgaged property. Notice is considered given on the date it is mailed.

The notice need only be provided once in a twelve month period "to the same borrower in connection with the same loan". However, the ninety day period "shall not apply, or shall cease to apply, if the borrower has filed an application for the adjustment of debts of the borrower or an order for relief from the payment of debts, or if the borrower no longer occupies the residence as the borrower's principal dwelling".

HIGH-COST HOME LOANS

A "high-cost home loan" is defined in Banking Law Section 6-l as "a home loan in which the terms of the loan exceed one or more of the thresholds as defined in paragraph (g) of this subdivision". To be a "high-cost home loan, a loan must therefore be a "home loan" and meet one or more of certain "thresholds".

A "home loan" is defined in Banking Law Section 6-l (1)(e) as "a home loan, including an open-end credit plan, other than a reverse mortgage transaction, in which:

- (i) The principal balance of the loan does not exceed the conforming loan size limit for a comparable dwelling as established from time to time by the federal national mortgage association;
- (ii) The borrower is a natural person;
- (iii) The debt is incurred by the borrower for personal, family, or household purposes;

(iv) The loan is secured by a mortgage or deed of trust on real estate upon which there is located or there is to be located a structure intended principally for occupancy of from one to four families which is or will be occupied by the borrower as the borrower's principal dwelling; and

(v) The property is located in this state.

"Thresholds" is defined in Banking Law Section 6-l(1)(g) and includes alternative standards, one of which is, for example, "[f]or a first lien mortgage loan, the annual percentage rate of the home loan at consummation of the transaction exceeds eight percentage points over the yield on treasury securities having comparable periods of maturity to the loan maturity measured as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the lender..."

SUBPRIME HOME LOANS FOR RPAPL SECTION 1304

For purposes of RPAPL Section 1304, a "subprime home loan...means a home loan consummated between January 1, 2003 and September 1, 2008 in which the terms of the loan exceed the threshold as defined in paragraph (d) of this subdivision. A subprime home loan excludes a transaction to finance the initial construction of a dwelling, a temporary or 'bridge' loan with a term of twelve months or less, such a loan to purchase a new dwelling where the borrower plans to sell a current dwelling within twelve months, or a home equity line of credit".

RPAPL Section 1304(5)(b) defines "home loan" the same as in the definition of "home loan" in Banking Law, Section 6-l. RPAPL Section 1304 (5)(d) defines "threshold" in a manner similar to one of the standards contained in the definition of "thresholds" in Banking Law Section 6-l(1)(g).

NON-TRADITIONAL HOME LOANS

A "non-traditional home loan", defined in Section 1304(5)(e), is "a payment option adjustable rate mortgage, or an interest only loan consummated between January 1, 2003 and September 1, 2008".

As indicated above, under RPAPL Section 1302(2) "[i]t shall be a defense to an action to foreclose a mortgage for a high-cost home loan or subprime home loan that the terms of the home loan or the actions of the lender violate any provision of" RPAPL Section 1304. (Presumably this was intended to also encompass a non-traditional home loan).

NEGATIVE AMORTIZATION AND CHANGES IN INTEREST RATE

Chapter Section 5 adds new Banking Law Section 6-m ("Subprime home loans"), defining, and setting forth requirements for the making of, "subprime mortgage loans" consummated on and after September 1, 2008.⁷

A "subprime home loan" is defined in Section 6-m(1)(c), different from the definition of a "subprime home loan" for the notice required by RPAPL Section 1304.

"(c) A 'Subprime home loan' means a home loan in which the fully indexed annual percentage rate exceeds by more than one and three-quarters percentage points for a first-lien loan, or by more than three and three-quarters percentage points for a subordinate-lien loan, the average commitment rate for loans in the northeast region with a comparable duration to the duration of such home loan, as published by [Freddie Mac] in its weekly Mortgage Market Survey (PMMS) as posted in the week prior to the week when the lender receives a completed application. A subprime home loan excludes a transaction to finance the initial construction of a dwelling, a temporary or 'bridge' loan with a term of twelve months or less, such as a loan to purchase a new dwelling where the borrower plans to sell a current dwelling within twelve months, or a home equity line of credit".⁸

NO NEGATIVE AMORTIZATION

The Act amends the prohibition on "negative amortization" for "high-cost home loans" in Banking Law Section 6-l (2)(c) and adds a prohibition on negative amortization for "subprime home loans" in new Banking Law Section 6-m(2)(b).

"No negative amortization. No high-cost home loan [subprime home loan] may contain a payment schedule with regular periodic payments that cause [or may cause] the principal balance to increase. A loan is considered to have such a schedule if the borrower is given the option to make regular periodic payments that cause the principal balance to increase, even if the borrower is also given the option to make regular periodic payments that do not cause the principal balance to increase. This paragraph shall not prohibit negative amortization as a result of a temporary forbearance sought by a borrower".

Title Insurance Rate Service Association, Inc. ("TIRSA") loan title insurance policy endorsement 6.2 (Variable Rate Mortgage-Negative Amortization) insures a mortgage lender, in part, against loss or damage sustained by the insured mortgagee by reason of "the invalidity or unenforceability of the lien of the insured mortgage resulting from the provisions therein which provide for...the addition of unpaid interest to the principal balance of the loan". To issue this loan policy endorsement, a title insurer or its agent should verify that the loan being secured is not a "high-cost home loan" or a "subprime home loan".

CHANGES IN INTEREST RATE

The Act adds a prohibition on "teaser rates" for "high-cost home loans in new Banking Law Section 6-l (2)(v) and for "subprime home loans" in new Banking Law Section 6-m(2)(q).

"No teaser rates. No lender or mortgage broker shall make or arrange a high-cost home loan which has an initial or introductory rate with a duration of less than six months".

Banking Law Section 6-m(2)(c) prohibiting certain increases in a loan's interest rate reads as follows:

"2(c) No increased interest rate. No subprime home loan may contain a provision which increases the interest rate after default. This provision shall not apply to interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan documents; provided that the change in the interest rate is not triggered by the event of default or the acceleration of the indebtedness".

This text is substantially the same in Banking Law Section 6-l (2)(d) for "high-cost home loans", which has been in effect since April 1, 2003.

TIRSA Endorsement 6 ("Variable Rate Mortgage Endorsement"), TIRSA Variable Rate Mortgage Endorsement – Fixed Rate Conversion), and TIRSA Endorsement - Fannie Mae Balloon Mortgage are loan policy endorsements including insurance that a change in the loan's interest rate will not impair the validity or enforceability of the lien of the mortgage being insured or the priority of the lien of the mortgage as security for the unpaid principal balance together with interest at the changed rate. When any of these TIRSA endorsements are requested in connection with the insuring of a mortgage (other than a reverse mortgage) made by a natural person on land improved or to be improved a one-to-four family dwelling occupied or to be occupied by the borrower, a title insurer or its agent should confirm the absence of a "teaser rate" and that a change in the interest rate will not be triggered by an event of default or the acceleration of the indebtedness, if the loan is a "high-cost home loan" or a "subprime home loan".

ACTION TO FORECLOSE

Note should also be made of Chapter Section 17, amending RPAPL Section 1302 ("Foreclosure of high-cost home loans") to change the requirements of that Section and to extend its application to "subprime home loans". The amended Section applies to foreclosures of "subprime home loans" and "high-cost home loans" commenced on and after September 1, 2008. Amended Section 1302 reads as follows:

"Section 1302. Foreclosure of high-cost home loans and subprime home loans.

1. Any complaint served in a proceeding initiated pursuant to this article relating to a high-cost home loan or a subprime home loan, as such terms are defined in section 6-l and 6-m of the banking law, respectively, must contain an affirmative allegation that at the time the proceeding is commenced, the plaintiff (a) is the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note; and (b) has complied with all of the provisions of Banking Law Section 595-a ["Regulation of mortgage brokers, mortgage bankers and exempt organizations"], and any rules and regulations promulgated thereunder, Section 6-l ["High-cost home loans"] or 6-m ["Subprime home loans"] of the Banking Law, and Section 1304 ["Required prior notices"] of this article".

CONCLUSION

This new legislation presents challenges to lenders and their counsel, and to title insurers and their agents.

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ENDNOTES:

- 1. Senate Bill 8143-A, posted at <http://assembly.state.ny.us/leg/?bn=S08143>. The State Assembly's Companion Bill is 10817-A.**
- 2. From State Senator Hugh T. Farley's (44th Senate District) "Introducer's Memorandum In Support" of Senate Bill 8143-A.**
- 3.] Penalties for violating the requirements of Banking Law Section 6-l, in its subsections 10) and (11), have been in effect since April 1, 2003.**
- 4. This notice was first required by Chapter 308 of the Laws of 2006, effective February 1, 2007, which Chapter included the "Home Equity Theft Prevention Act".**

5. HELP FOR HOMEOWNERS IN FORECLOSURE

New York State Law requires that we send you this notice about the foreclosure process. Please read it carefully.

Summons and Complaint

You are in danger of losing your home. If you fail to respond to the summons and complaint in this foreclosure action, you may lose your home. Please read the summons and complaint carefully. You should immediately contact an attorney or your local legal aid office to obtain advice on how to protect yourself.

Sources of Information and Assistance

The State encourages you to become informed about your options in foreclosure. In addition to seeking assistance from an attorney or legal aid office, there are government agencies and non-profit organizations that you may contact for information about possible options, including trying to work with your lender during this process.

To locate an entity near you, you may call the toll-free helpline maintained by the New York State Banking Department at _____ [enter number] or visit the Department's website at _____ [enter web address].

Foreclosure rescue scams

Be careful of people who approach you with offers to "save" your home. There are individuals who watch for notice of foreclosure actions in order to unfairly profit from a homeowner's distress. You should be extremely careful about any such promises and any suggestions that you pay them a fee or sign over your deed. State law requires anyone offering such services for profit to enter into a contract which fully describes the services they will perform and fees they will charge, and which prohibits them from taking any money from you until they have completed all such promised services.

RPAPL Section 1303 provides that "(t)he banking department shall post on its website or otherwise make available the name and contact information of government agencies or non-profit organizations that may be contacted for information about the foreclosure process, including maintaining a toll-free help-line to disseminate the information required by this Section". The Banking Department is to provide the telephone number and the website to be included in the notice.

6. YOU COULD LOSE YOUR HOME. PLEASE READ THE FOLLOWING NOTICE CAREFULLY

As of _____, your home loan is ___ days in default. Under New York State Law, we are required to send you this notice to inform you that you are at risk of losing your home. You can cure this default by making the payment of _____ dollars by _____.

If you are experiencing financial difficulty, you should know that there are several options available to you that may help you keep your home. Attached to this notice is a list of government approved housing counseling agencies in your area which provide free or very low-cost counseling. You should consider contacting one of these agencies immediately. These agencies specialize in helping homeowners who are facing financial difficulty. Housing counselors can help you assess your financial condition and work with us to explore the possibility of modifying your loan, establishing an easier payment plan for you, or even working out a period of loan forbearance. If you wish, you may also contact us directly at _____ and ask to discuss possible options.

While we cannot assure you that a mutually agreeable resolution is possible, we encourage you to take immediate steps to try to achieve a resolution. The longer you wait, the fewer options you may have.

If this matter is not resolved within 90 days from the date this notice was mailed, we may commence legal action against you (or sooner if you cease to live in the dwelling as your primary residence).

If you need further information, please call the New York State Banking Department's toll free helpline at 1-877-BANK-NYS (1-877-226-5697) or visit the Department's website at <http://www.banking.state.ny.us>.

RPAPL Section 1304(2) provides that "(t)he notice shall contain a list of at least five United States department of housing and urban development approved housing counseling agencies, or other housing counseling agencies as designated by the division of housing and community renewal, that serve the region where the borrower resides. The list shall include the counseling agencies' last known addresses and telephone numbers. The banking department and/or the division of housing and community renewal shall make available a listing, by region, of such agencies which the lender or mortgage loan servicer may use to meet the requirements of this section".

7. Chapter Section 4 adds requirements for "high-cost home loans" to Banking Law Section 6-l.

8. The definition in Section 6-m (1)(d) of a "home loan" is the same as in Banking Law Section 6-l (1)(e), above, for a "home loan" in connection with a "high-cost home loan".