

Report: Legal Issues

New Statute a Potential Disaster for Mortgage Origination and Foreclosure

BY BRUCE J. BERGMAN, ESQ. | BERKMAN, HENOCH, PETERSON, PEDDY & FENCHEL, P.C.
USFN MEMBER (NY)



Is it conceivable that as of January 1, 2022, it *will* become impossible in New York to both issue a home loan

mortgage and foreclose upon it?

The odds are that it will happen because Bill 2502-A has passed both houses of the New York legislature and has been sent to the Governor for signature. One problem, though, is that the true effect of this new statute is not so obvious to most observers – one has to prosecute mortgage foreclosures regularly and with dedication to appreciate what these provisions actually mean and what they will do.

In short, the new law – an amendment to RPAPL § 1302 – imposes subprime and high-cost home loan constraints and prohibitions upon all home loans, even those not in the subprime or high cost category.

Current RPAPL § 1302

This section, entitled “Foreclosure of high-cost home loans and subprime home loans”, provides at subsection 1 that any com-

plaint in a foreclosure relating to a high-cost home loan or a subprime home loan must contain an affirmative allegation that at commencement the plaintiff is the owner and holder of the mortgage and note (or has been delegated that authority) and has complied with all the provisions of section 595-a of the Banking Law, related regulations, and section six-l or six-m of the Banking Law.

sure notice). The key consideration is that § 1302, as currently constituted, applies solely and specifically to high-cost home loans and subprime home loans. The considerable impositions of Banking Law section six-l or six-m, as the case may be, have never had any involvement with all other variety of residential or home loan mortgages – or commercial mortgages.

The new law – an amendment to RPAPL § 1302 – imposes subprime and high-cost home constraints and prohibitions upon all home loans, even those not in the subprime or high-cost category.

Subsection 2 states that it shall be a defense to a foreclosure of either a high-cost home loan or a subprime home loan that the terms of the subject loan or the actions of the lender violate any provision of six-l or six-m of the Banking Law (or RPAPL § 1304 which is the 90-day pre-foreclo-

The Danger of High-Cost and Subprime Home Loan Rules (Banking Law § six-l and six-m)

Most of these requirements have no relationship to the typical residential or home loan mortgage. These statutes require (among other directives)no application of

default interest, no fees if a loan is restructured or modified, determination of a borrower's ability to repay as a condition of the loan, a prohibition against the loan issuing without counseling with a delineation of counselors, no employment of prepayment penalties and a mandatory escrow for taxes and insurance (even though many creditworthy borrowers want to pay their own taxes).

Threat of Statute as Amended

The new version removes from the title "high-cost home loans and subprime home loans" and substitutes "certain residential mortgages". Subsection 1 accordingly provides that a foreclosure of a residential mortgage covering a one-to-four family dwelling must contain the same affirmative allegations as had applied to the statute before amendment. As to compliance with the provisions of Banking Law section six-l or six-m (which of course presently apply exclusively to high-cost home loans and subprime home loans) the statute adds as clarification application "for loans governed by those provisions". This is acceptable and not a problem.

The peril, however, comes in section 2. There, in stating what shall be a defense to an action to foreclose "a mortgage" (an exceptionally broad category), it removes, or neglects to include, the limiting words "for a high-cost home loan or a subprime home loan". It goes on to say that it will be a defense to foreclosure that the terms of the home loan or the actions of the lender violate any provision of six-l and six-m.

Conclusion

The previous review does not even mention the considerable

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confusion in the statute in the loose use of terms: residential mortgage, mortgage and home loan mortgage. It is impossible to determine with precision what the provisions actually refer to, although it is at least home loans with the possibility of being broader. In the end, though, if every home loan needed to adhere to subprime and high-cost loan dictates, it is reasonable to conclude that lenders would not make the loans. And if the loans were made (wildly remote though that is) because not adhering to all the mandates would be a defense to foreclosure, borrowers

will assert the defense in every case. Lenders will be further bogged down in litigating cases which have already become unmanageable.

More than serious trouble is in store for mortgage lenders and servicers in New York.

THE AUTHOR



Bruce J. Bergman, Esq.