

LENDERS UPDATE™

A MONTHLY SERVICE TO THE MORTGAGE LENDING INDUSTRY

AN ALT & ASSOCIATES NEWSLETTER

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The purpose of the Lenders Update is to provide a “heads-up” of new legislation and regulations affecting the mortgage lending industry. We provide summaries of new matters so our readers can judge whether the subject impacts their operations. We recommend that our readers review the entire new statute, regulation or other material in detail where it is relevant to them. For convenience, the applicable matter can be easily identified in the summary, and, where possible, a link is provided.

The Update includes information available to Alt & Associates as of February 15, 2010.

COUNTRYWIDE PUSHES BACK

For the last several years this firm has been a strenuous advocate of pushing back against repurchase requests made by the major lenders such as Citi, Morgan Stanley, Chase and of course Countrywide/B of A (“Countrywide”). Obviously, not all repurchase requests involve the same issues but most are centered on one form or another of stated income loans.

Now, in a role reversal, Countrywide, at the end of last year, filed a law suit for declaratory relief against Mortgage Guaranty Insurance Corporation (“MGIC”). The basis of the law suit is that MGIC has denied and is continuing to deny mortgage insurance claims submitted by Countrywide. Countrywide’s arguments to support this position are arguments we have often made on behalf of our clients against repurchase requests from Countrywide as well as other lenders.

The Complaint alleges that MGIC agreed to insure residential loans and in the event of a borrower default, to pay a claim based on these defaulted loans. Countrywide argues in its Complaint that MGIC, over the years has worked very closely with Countrywide and fully understood its procedures and underwriting policies. However, with the advent of the crisis in

the mortgage industry and the wider crisis in the economy as a whole, Countrywide alleges that MGIC now is desperately attempting to deny coverage.

Countrywide asserts that MGIC's denial of coverage is based on several unsustainable positions summarized below. You may note that Countrywide's arguments are similar to those made by loan originators defending against repurchase requests:

- ✚ Countrywide alleges that MGIC can only require repurchase under the contract between the two companies when Countrywide or another party originating the loan (the "first party"), knowingly made or participated in the misrepresentation. Now MGIC's position, according to the Complaint, is that mere borrower misrepresentation is sufficient without proof of any first party involvement. If true, an obvious violation of the agreement between MGIC and Countrywide.
- ✚ MGIC has asserted borrower misrepresentation. Countrywide's position is that most of the evidence upon which the insurance denial is based, is second and third hand accounts of one sided, self serving and unsubstantiated hearsay and would not be admissible in court. Further, reliance on unauthenticated documents of questionable veracity such as tax and bankruptcy related documents have a built in downward bias. Information from Salary.com without facts specific to a particular borrower is not sufficient to prove misrepresentation.
- ✚ MGIC has denied coverage for stated income loans. Countrywide alleges that MGIC was fully aware that the borrowers income could not be verified "because the borrower's income was just stated and not verified, MGIC did not rely on the accuracy of the borrower's income in deciding to issue insurance". Therefore there was no reliance on the borrower's income in its decision to issue coverage.
- ✚ MGIC has denied coverage based on faulty appraisals. These claims, according to Countrywide, are based on review appraisals performed well after the loan origination. Countrywide's position is that these do not represent actual value of the real property but only the opinion of different appraisers. In addition, these review appraisers lack credibility, and the appraisals may violate the Uniform Standards for Professional Appraisers Practice.

We will keep you advised of this action filed by Countrywide in the City and County of San Francisco.

CALIFORNIA NEW FORECLOSURE BILL, SB X8

The California legislature is now in special session and is considering legislation which would seriously change the foreclosure law of the state. These are in addition to those changes just recently made by Senate Bill 1137. Because the legislature is in special session, this legislation could pass quickly and become effective very soon. We suggest that, if interested, you obtain a copy of this bill and let your legislators know your opinion.

Among many provisions, it will:

- Require notification to borrowers prior to filing a Notice of Default, of their rights and options and provide an application for a loan modification.
- The borrower must be notified as to whether a loan modification, if applied for, has been approved or denied, at least 15 days before filing a Notice of Default.
- A “Declaration of Compliance Borrower Contact” would be required to be recorded along with the Notice of Default reflecting compliance by the foreclosing party with pre-foreclosure requirements.
- This new Declaration would be required to be attached to the Notice of Default and be signed by the individual with personal knowledge of the facts.
- Failure to comply could result in significant damages and avoidance of any foreclosure sale.

The author of the bill is Senator Alan Corbett whose Capital office phone number is 916-651-4010.

ARE YIELD SPREAD PREMIUMS A RESPA VIOLATION?

For years, there has been ongoing questions as to whether Yield Spread Premiums (“YSPs”) are allowed under the Real Estate Settlement and Procedures Act (“RESPA”). We know that it is common practice for mortgage brokers to be compensated with YSPs and this practice has certainly tacitly, if not explicitly, been allowed.

However, at the same time there has been discussion as to whether RESPA is violated because Yield Spread Premiums represent a kick back violating its Section 8 anti-kickback provisions. Borrower Peter Sutton sued Countrywide Home Loans for repayment of a Yield Spread Premium alleging this very argument.

According to the Ninth Circuit Court of Appeals, RESPA does proscribe payment of kickbacks in association with mortgage lending. A payment by a lender to a mortgage broker would violate these provisions if they were solely in exchange for a referral of business. However, it would not be a violation if there was a reasonable relationship to services actually provided. The Eleventh Circuit concluded that the broker in fact performed actual services and that the compensation was reasonable in light of the “array” of services performed.

Obviously, this is good precedent for lenders and broker in the Ninth Circuit, which includes Florida, Georgia, and Alabama.

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who have requested this newsletter are on our mailing list. Should you have colleagues who wish to receive this complimentary service, please have them e-mail us at

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ALT & ASSOCIATES provides regulatory, compliance, operational advice and transactional assistance, as well as litigation representation, to the financial services industry. Over the past two decades, members of the firm have represented Institutional Lenders and Mortgage Bankers and Brokers in all aspects of their operations. If you have any questions please contact:

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