LENDERS UPDATE™

A MONTHLY SERVICE TO THE MORTGAGE LENDING INDUSTRY

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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 try to provide brief summaries of new matters so our readers can judge whether the subject impacts their operations. We recommend that our readers review the entire new material in detail where it is relevant to them. For your convenience, the applicable statute, regulation, cases or website can be easily identified in the summary. Our Update includes information available to Alt & Associates as of June 17, 2008.

FEDERAL ISSUES

WHITE HOUSE SUSPENDS PROPERTY-FLIPPING RULE

In 2003, the FHA imposed a policy to deter property-flipping schemes in which borrowers were overcharged for foreclosures or other distressed properties. However, because of the current housing crisis, the Bush administration has suspended this rule to help facilitate the sale of foreclosed property. The FHA announced on **June 13, 2008**, that for one year it would no longer impose a 90 day waiting period before foreclosed properties could be sold and receive government backed loans. FHA Commissioner, Brian Montgomery stated that the "glut of foreclosed and abandoned homes harms neighborhoods …" and the suspended rule "will allow homebuyers to purchase homes in much greater numbers and ease the excess supply of unsold homes."

RESPA IS NOT A PRICE CONTROL STATUTE

In the past, five of the U.S. court of appeals circuits, the Second, Third, Fourth, Seventh, and Eighth have held that Section 8 of the Real Estate Settlement Procedures Act does not, in and of itself, govern excessive fees. It is not a price control statute. Now, the Eleventh circuit has joined this group in the case of Friedman v. Market Street Mortgage Corp., 05-13820 in a decision issued on March 20, 2008.

The Freidman's had argued that HUD's position in a 2001 Statement of Policy concluded that a settlement service provider could violate Section 8 if it charged a fee in excess of the reasonable value of goods, facilities or services provided. However, the Eleventh circuit, joining the other courts, explained that the court is not authorized to divide a charge into reasonable and unreasonable components. A fee is for the services rendered by the provider and received by the borrower. HUD's interpretation is overly broad and cannot be supported, at least in the opinion of the Eleventh circuit.

The court further continued by interpreting Section 8 as a statute to prevent abusive practices not as a statute to set broad ranging price controls. An amendment to RESPA proposed in 1973 by then Senator William Proxmire would have given HUD the ability to set maximum charges. However, Congress rejected the bill

The plaintiff only could have succeeded if, as the court stated, the plaintiff had alleged that no services were rendered in exchange for the settlement fee. Whether the fee is reasonable or not in these instances, is irrelevant.

GENERAL STATE ISSUES

FORECLOSURE RESCUE, LOAN MODIFICATION AND FORECLOSURE CONSULTANT COMPANIES CONTINUE TO ATTRACT INCREASED SCRUTINY AND REGULATION.

We have mentioned several times over the past months that more and more states are regulating companies engaged as foreclosure consultants or foreclosure rescue companies. To our knowledge, this trend started in California with the regulation of foreclosure consultants which are generally defined to be entities or persons who provide aid to borrowers once the foreclosure process has begun by a recording of a Notice of Default. There are now several other states in which these services are now regulated.

With the mortgage crises, these issues have become more complex in the last 12 months. Borrowers who now have loans which have adjusted or in other ways are no longer affordable, go on to companies such as foreclosure consultants to obtain help in modifying the terms of their loans. As we know, loan modification companies, or mortgage companies engaging in loan modifications, have become a burgeoning industry.

These companies are now receiving focused attention from state regulators and even such diverse groups as the Better Business Bureau here in California.

An example is the Washington Attorney General's office, which recently settled an action on behalf of approximately 200 Washington borrowers who had contracted with a company called Foreclosure Assistance Solutions, LLC to assist them in saving their homes from foreclosure. The Washington Attorney General's action was brought under the state's Consumer Protection Act, Credit Services Organization Act and Commercial Telephone Solicitation Act. The

solicitations of the company were found by the AG's office to be misleading and in some cases coercive.

As a further result of this investigation, the Attorney General introduced HB 2791, which passed and took effect on **June 12, 2008**. The statute is addressed to rescue schemes involving purchase of the distressed property with an agreement to sell or lease back the property to the homeowner. HB 2791 now provides certain requirements relative to disclosures and content of the written contract for the purchase and gives the homeowner a right of rescission within five days of execution. The statute also requires that the homeowner receive at least 82% of the difference between the mortgage and the fair market value if the home is sold to a third party.

This statute is reminiscent of California law regarding Home Equity Sales Contracts, which can be found in California Civil Code Section 1695 et. seq. which regulates the purchase of properties in foreclosure.

It also might be pointed out that, at least in California, purchasing a home with an agreement to sell it back to a borrower at some future date, may create what is known as an equitable mortgage. If this occurs, the ramifications to the purchaser of the property can be severe.

STATE ISSUES

OREGON

New Loan Originator Prohibition

Governor Kulongoski has signed Senate Bill 1064 into law in the state of Oregon. Provisions of this law expand the Department of Consumer and Business Services' enforcement powers over loan originators. It allows the Department to suspend loan originators because of dishonest or fraudulent practices. In addition, the Department will maintain a record of loan originators and the complaints filed against them.

In a somewhat separate matter, the statute requires an annual report to be filed with the Department by lenders concerning their annual lending activity. It appears at the moment that a report on 2007 data will be required and will be due no later than **August 30, 2008.** The Department of Consumer Business Services is preparing the form of this report which can be completed online. As of the date of publication of this Update, the form was not yet ready. Information concerning the statue and the report can be found at http://www.cbs.state.or.us/dfcs/ml/sb/1064.html

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