LENDERS UPDATE™

A MONTHLY SERVICE TO THE MORTGAGE LENDING INDUSTRY

AN ALT & ASSOCIATES NEWSLETTER

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June 2010

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 June 3, 2010.

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CHANGES TO REFERAL PRACTICES UNDER RESPA

On Thursday, June 3rd the US Department of Housing and Urban Development published a notice seeking comment as to how it might strengthen and clarify the Real Estate Settlement and Procedures Act's prohibition against the required use of an affiliated settlement service provider. For those of you who do not have access to the Federal Register, this can be found by going to www.hud.gov and then to Press Room and then Press Releases, June 3, 2010. Contact information as to how to submit comments can be found at that point.

RESPA provides that it is a violation if a consumer is required to use a particular mortgage lender, title company or other settlement service provider that is affiliated with another business in their mortgage transaction. The issue, as framed by HUD, is whether a consumer who avails itself of a discount or other incentive offered by a settlement service provider, "required to use" this service? Until a rule becomes effective, we will not go into great detail.

However, briefly, HUD states that its goal is to protect home buyers against high settlement costs which could occur if incentives or disincentives limit competition in shopping for settlement services. HUD is seeking comment from knowledgeable professionals in the industry as to how it might address this problem.

In its press release, HUD cites the example of a home builder who offers discounts or incentives such as upgrades, if the home buyer uses the developer's or builder's affiliated mortgage lender. The result in some situations, according to HUD, precludes them from shopping and does not represent true discounts resulting in home buyers paying higher, and in some cases, much higher, settlement costs.

HUD seeks comments in six areas:

1. **Proposed revisions to the definition of "required use" to reach abusive incentive schemes but not beneficial discounts.**
2. **The effect of loan commitments and the impact on home buyer's use of such commitments from lenders.**
3. **The impact of incentives and true discounts given to home buyers. Are these discounts built into the cost of the home?**
4. **State experience preventing abuses such as steering**
5. **The impact of one stop shopping**
6. **The relationship between the incentives to use an affiliate settlement service provider and disincentives or penalties for using a nonaffiliated settlement service provider.**

The HUD Notice sets out a September 1st cut off for submission of comments or information.

A CALIFORNIA COURT CLARIFIES THE NEW FORECLOSURE RULES

On June 2nd the Court of Appeals of the State of California, Fourth Appellate District, in the case of Terry Mabry, et al vs. the Superior Court of Orange County, respondent Aurora Loan Services, et al, Real Parties in Interest published its opinion in Superior Court No. 30-2009-003090696 clarifying Civil Code Section 2923.5. As of the date of preparation of this Lenders Update, while the opinion has been filed, there is no further cite to this case.

CC 2923.5 generally requires that a lender contact the borrower in person or by phone to access the borrower's financial situation and explore options to prevent foreclosure. This contact must occur before a notice of default may be filed. There is however, as pointed out by the Court, nothing that requires the lender to rewrite or modify the loan.

The Court states and answers several questions. We have found that sometimes summarizing Court opinions may be misleading so we are providing the exact questions and answers as set forth by the Court.

Excerpt from the opinion filed in Superior Court No. 30-2009-0030-0696

A) *May section 2923.5 be enforced by a private right of action?* Yes. Otherwise the statute would be a dead letter.

(B) *Must a borrower tender the full amount of the mortgage indebtedness due as a prerequisite to bringing an action under section 2923.5?* No. To hold otherwise would defeat the purpose of the statute.

(C) *Is section 2923.5 preempted by federal law?* No -- but, we must emphasize, it is not preempted because the remedy for noncompliance is a simple postponement of the foreclosure sale, nothing more.

(D) *What is the extent of a private right of action under section 2923.5?* To repeat: The right of action is limited to obtaining a postponement of an impending foreclosure to permit the lender to comply with section 2923.5.

(E) *Must the declaration required of the lender by section 2923.5, subdivision (b) be under penalty of perjury?* No. Such a requirement is not only *not* in the statute, but would be at odds with the way the statute is written.

(F) *Does a declaration in a notice of default that tracks the language of section 2923.5, subdivision (b) comply with the statute, even though such language does not on its face delineate precisely which one of the three categories set forth in the declaration applies to the particular case at hand?* Yes. There is no indication that the Legislature wanted to saddle lenders with the need to "custom draft" the statement required by the statute in notices of default.

(G) *If a lender did not comply with section 2923.5 and a foreclosure sale has already been held, does that noncompliance affect the title to the foreclosed property obtained by the families or investors who may have bought the property at the foreclosure sale?* No. The Legislature did nothing to affect the rule regarding foreclosure sales as final.

Our monthly Lenders Update is published via e-mail as a complimentary service to our friends and clients in the financial industry throughout California and the United States. Only those persons 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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