

LENDERS UPDATE™

ALT & ASSOCIATES NEWSLETTER

A COMPLIMENTARY SERVICE TO THE MORTGAGE LENDING INDUSTRY

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March 24, 2020

SPECIAL TO CLIENTS ONLY

COVID-19 THOUGHTS **FOR LENDERS AND BROKERS**

THE FOLLOWING IS NOT LEGAL ADVICE NOR A FULL DISCUSSION OF THE LAW. YOUR CONDUCT SHOULD BE BASED ON A FULL UNDERSTANDING OF RELAVANT LAW, THE UNIQUE FACTS INVOLVED IN YOUR SITUATION AND THE ADVICE OF A COMPETANT PROFESSIONAL. THE FOLLOWING DOES NOT CREATE AN ATTORNTY-CLIENT REALATIONSHIP BETWEEN THIS FIRM AND YOU OR YOUR COMPANY.

Most of the lenders and brokers in our industry are suffering a particular Covid-19 related problem (one of many). You have a loan somewhere between pre-approval and funding and you can't get an appraisal or a notary

to close a loan, or a lender to fund it. Maybe worse yet, you have an investor who has decided not to fund non-QM product.

What to do?

It obviously depends on your individual circumstances. With these circumstances in mind, we must filter these facts through several legal prisms; federal and state statutory and regulatory law and what we will call “textbook law” embracing issues such as general contract principles.

So let’s look at some general questions or issues.

I. FACTUAL ISSUES WHICH CONTROL WHAT STATUTES AND/OR REGULATIONS APPLY TO YOUR CIRCUMSTANCES:

- A. Are you operating as a broker, a retail lender and/or a lender who accepts broker business? Your duties and responsibilities will vary with the nature of the relationship with the borrower.**
- B. Status of the loan, whether it be in process, pre-approved, approved, loan application submitted to lender, or approved by lender but not funded.**
- C. Are you prevented, either as a broker or lender from fulfilling conditions required as a condition to approval of a loan? There are many examples; items such as obtaining a valuation of the property, notarizing documents, obtaining title insurance, etc.**

II. LEGAL ISSUES THAT APPLY AFTER A DETERMINATION OF THE FACTS:

- A. Is there a contract between your company and the potential borrower to provide a loan? Is there a rate lock? Do the laws of the state in**

which you are operating compel your company to fund the loan or honor the rate lock?

To address these types of issues we may look to the contract laws of the states. For example, a general contract law defense to the enforceability of a contract is the defense of impossibility of performance of that contract. This varies with the state, but to generalize, if something unexpected and unforeseen occurs which is not caused by a party to the contract, and that occurrence makes the contract commercially impractical then a party is forgiven from its non-performance.

B. Is there a statutory or regulatory requirement that you continue the loan to closing? In other words, assuming that you do not have a “textbook law” contractual obligation, is a regulator or court going to sanction you under a statute or regulation, for not closing the loan and/or honoring the lock? There are a number of issues, but these stand out:

- a. Has a rate lock been issued? Has a rate lock fee been charged? Are you a lender or a broker? Depending on the answers to these questions, a regulator or court could require you to maintain the rate lock beyond its normal date of expiration, if the loan is not closed within the lock’s original term.**
- b. The loan has reached the point in the application process where a Loan Estimate has been given. Can you provide a new LE if you maintain an open application but the rate eventually changes? Generally the occurrence of an “extraordinary event” is a “change of circumstance” and allows the delivery of a revised LE. Covid-19 seems to be the very definition of an extraordinary event.**

To state the obvious, these are difficult times. To also state the obvious, all lenders and brokers want to make loans, keep their doors open and do our share in keeping the economy moving forward. However, to do this, we have to be careful to gauge our responses to circumstances as they present themselves. We hope our discussion has provided an outline of some of the factual and legal issues needed to analyze and prepare a response to a loan application or loan which now, because of the effects of Covid-19, can't fund.

Please stay well and doing business.

ABOUT ALT & ASSOCIATES

Alt & Associates publishes the *Lenders Update* via e-mail as a complimentary service to our friends and clients in the financial industry throughout California and the United States. Over the past three decades, members of the firm have represented Institutional Lenders and Mortgage Bankers and Brokers in all aspects of their business operations. Legal counsel provided to the mortgage industry includes, but is not limited to:

- ✚ Regulatory and compliance assistance, both state and federal
- ✚ Operational assistance
- ✚ Transactional Agreements such as Correspondent and Broker Agreements
- ✚ Compensation Agreements
- ✚ Litigation representation

You may direct any questions or comments directly to:

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