Summary of Key Provisions of Chapter 472 of the Laws of 2008

Governor Paterson's 2008 Program Bill #44 (S.8143-A/A.10817-A)
Enacted August 5, 2008

Provide by the NYS Consumer Protection Board
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Assisting Those Facing Foreclosure

The law requires lenders of 1-4 family owner occupied residential loans to send a pre-foreclosure notice to borrowers at least 90 days before foreclosure proceedings may be initiated.[1] This will encourage homeowners to seek assistance before foreclosure proceedings commence. The law requires lenders to list in the notice government-approved housing counselors serving the borrower's area so that those affected know where to turn for help. [2]

The statute establishes a mandatory settlement conference for foreclosure proceedings involving homeowners with certain subprime loans. For homeowners who cannot afford an attorney, the court, under certain circumstances, may appoint one. [3]

Under the law, plaintiffs in an action against a homeowner are required to make an affirmative allegation that they have standing to bring the foreclosure action and have complied with certain applicable laws as ownership of the mortgage and the note are sometimes uncertain, leading to questionable practices. [4]

The law includes provisions to address foreclosure rescue scams intended to take advantage of borrowers when they are most vulnerable. It prohibits upfront fees by foreclosure assistance consultants and requires a written contract from so-called "distressed property consultants."[5]

Avoid Another Crisis In The Future

The statute creates a new provision in the Banking Law establishing strong consumer protections and minimum underwriting standards for subprime loans.[6]

This law creates an ability-to-pay standard, requiring lenders to make a reasonable and good faith determination of the borrower's ability to repay a loan, including the principal, interest, taxes, insurance, assessments, points and fees. This is contained in the "duty of care" section of the law requiring brokers to act in the borrower's interest by presenting loans most appropriate for the borrower. [7]

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[1] See Real Property Actions and Proceedings Law §1304.
[2] *Id.*
[3] See Civil Practice Law & Rules § 3408.
[4] See Real Property Actions and Proceedings Law §1302 (1).
[5] See Real Property Actions and Proceedings Law §1303 (3).
[6] See Banking Law § 6 (g-m), § 590 (b).
[7] *Id.*

All mortgage brokers, servicing loans on residential property in New York, will be required to register with the Superintendent of the NYS Banking Department for further oversight.[8]

Mortgage fraud is classified as a crime under the Penal Law, making it easier for prosecutors to pursue cases. As the magnitude of the fraud increases, the criminal penalty escalates. For example, the program bill adds a new Article 187 to the Penal Law defining the crime of residential mortgage fraud and amends Criminal Procedure Law § 700.5(8)(b) to include residential mortgage fraud in the first, second, third and fourth degrees as predicate crimes in the crimes of enterprise corruption.[9] For example:

- A person is guilty of residential mortgage fraud in the fifth degree when he or she commits residential mortgage fraud. Residential mortgage fraud in the fifth degree is a class A misdemeanor which carries with it a fine fixed by the court, not to exceed $1000.
- A person is guilty of residential mortgage fraud in the fourth degree when he or she commits residential mortgage fraud and receives proceeds or any other funds in the aggregate in excess of one thousand dollars. Residential mortgage fraud in the fourth degree is a class E felony and carries with it the penalty of imprisonment set by the court, not exceeding 4 years.
- A person is guilty of residential mortgage fraud in the third degree when he or she commits residential mortgage fraud and receives proceeds or any other funds in the aggregate in excess of three thousand dollars. Residential mortgage fraud in the third degree is a class D felony and carries with it the penalty of imprisonment set by the court, not exceeding 7 years.
- A person is guilty of residential mortgage fraud in the second degree when he or she commits residential mortgage fraud and receives proceeds or any other funds in the aggregate in excess of fifty thousand dollars. Residential mortgage fraud in the second degree is a class C felony and carries with it the penalty of imprisonment set by the court, not exceeding 15 years.
- A person is guilty of residential mortgage fraud in the first degree when he or she commits residential mortgage fraud and receives proceeds or any other funds in the aggregate in excess of one million dollars. Residential mortgage fraud in the first degree is a class B felony and carries with it the penalty of imprisonment set by the court, not exceeding 25 years.

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[8] See Banking Law § 590.
[9] See Penal Law Article 187; Criminal Procedure Law § 700.5 (8) (b); Penal Law § 460.10 (1) (a).