

August 16, 2010

Massachusetts Enacts New Law Governing Mortgage Foreclosures

On Saturday, August 7, 2010, Massachusetts Governor Deval Patrick signed into law a sweeping bill that affects the residential loan process from the origination of mortgage loans to the procedures to be used to foreclose on those mortgage loans. The law, titled "An Act Relative to Mortgage Foreclosures," Chapter 258 of the Acts of 2010 (the "Act"), will temporarily provide an extended and more regulated "cooling off" period prior to foreclosure, criminalize mortgage fraud on the part of both lenders and borrowers, prevent mortgage holders from evicting tenants in foreclosed rental properties without "just cause," and substantially tighten the regulations governing reverse mortgages. The Act also creates new tax exemptions for certain purchasers of foreclosed properties who intend to use the properties for affordable housing. Lenders and mortgage holders should carefully evaluate the statute in order to comply with the new obligations and to protect themselves from employee wrongdoing in the lending process.

New Restrictions on Residential Foreclosures

The most significant change in the Act reforms the procedures that lenders and mortgage holders must follow prior to foreclosing on a borrower's primary residence. The time period to cure a default before a foreclosure has been extended from the current 90 days to 150 days for mortgagors who are given notice after August 7, 2010, and the 150-day cooling-off period must be granted once every three years instead of every five years. The right-to-cure period can be reduced to 90 days if a creditor's representative with the power to modify the mortgage confers with the borrower in person or on the telephone and makes a good-faith effort to negotiate a commercially reasonable alternative to foreclosure. These new provisions are designed to give creditors and homeowners more time to negotiate and modify mortgages to avoid foreclosure, if possible. A borrower may affirmatively select the 150-day right-to-cure period instead of meeting with the creditor to negotiate an alternative to foreclosure. The Act also requires that several new disclosures be included in a Notice of Right to Cure a Default. The extended right-to-cure period is in effect until December 31, 2015.



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Evicting Tenants in a Foreclosed Building

A foreclosing mortgagee and/or subsequent owner of the foreclosed property will also face substantial new requirements if it wishes to evict rental tenants in a foreclosed building. In what is being described as the most comprehensive law to protect tenants in foreclosed buildings in the United States, the new law will allow lenders to evict such tenants only if there is “just cause” to do so, including but not limited to failure to pay rent after receiving written notice, using the unit for an illegal purpose, or other lease violations. If a foreclosing owner believes that the building’s rents are unreasonable and out of line with the market, it can bring a claim in state court to set a new use and occupancy rate. The new requirements do not prevent a building owner that is facing foreclosure from evicting tenants in order to sell the building to a third party before the foreclosure, however. Obviously, this provision will impact the potential purchasers at a foreclosure sale and will affect the foreclosing mortgagee’s desire to foreclose and own the property, as resale opportunities may be lessened. A vacant property is often more marketable than an occupied one, depending on the tenants occupying the premises.

Fraud in the Inception of a Mortgage

The law also imposes additional regulations on the mortgage lending process. Most notably, both lenders and borrowers now face criminal penalties if they make material statements that they know to be false or that they know contain material omissions, with the intent that the statements be relied upon by a mortgage lender, borrower, or other party to the process. The penalties include fines and a maximum of five years in state prison for each offense, but a party may be sentenced to up to 15 years in prison if it has demonstrated a “pattern of residential mortgage fraud,” where it is found guilty of fraud in the financing of three or more residential properties. If a defendant is convicted of a violation of this section as a result of the conduct or omission of its employee, the court will consider certain mitigating factors, including (1) that the employer established a written policy prohibiting such violations, (2) that the employer trained its employees in the policy and the consequences of violations, and (3) that the employer enforced the policy.

Reverse Mortgages

Finally, the new law establishes numerous regulations pertaining to reverse mortgages, including requiring a statement from the mortgagor that he or she affirmatively opts for a reverse mortgage and a written certification from a third-party counselor that the mortgagor has received counseling to determine the appropriateness of the loan transaction prior to entering into the reverse mortgage.

Many commentators are already finding fault with the Act, as lenders and mortgage holders struggle with how to comply with the relatively onerous requirements and question how the statute will be implemented and enforced. For now, the focus is on the intent of the law, which

Massachusetts officials describe as being to decrease both the number of abandoned residences and the number of people made homeless by the current economic condition. “Our goal is to get borrowers and lenders to the table to save those loans that can be saved,” said state Senator Susan C. Tucker, conceding that “we all agree that isn’t every mortgage.”

Bar Admissions: Massachusetts ^{MA} New Jersey ^{NJ}

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