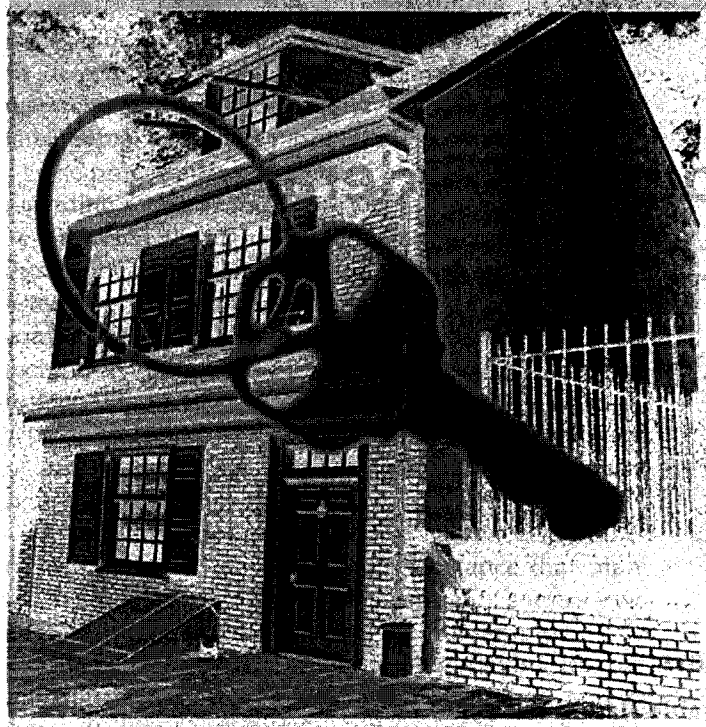
BY BRUCE J. BERGMAN



Predatory Lending for All

A lawyer preparing a mortgage for a client – something he does only once in a while – called one afternoon with a number of questions. When he mentioned an interest rate of 14%, I asked if he had considered the requirements of the new "Predatory Lending" statute. "No," he said, he was unfamiliar with those. The lawyer quickly reconsidered the task he had accepted for his client in order to avoid a close brush with malpractice.

This suggests that any lawyer who may ever prepare a mortgage should have an understanding of what the statute imposes. Then too, any attorney who represents a borrower, or will foreclose a mortgage or represent the purchaser (or insurer) of a title devolving through a foreclosure, should understand the role of the statute. Of all the laws passed year in and year out, relatively few will affect an attorney's day-to-day practice. "Predatory Lending," however, just might play a regular role; thus, the mission here is to demystify this obscurity – if possible.

First, the statute at issue: Chapter 626 of the Laws of New York, 2002, amends the Banking Law (primarily adding new § 6-*l*), the General Business Law (adding new § 771-a) and the Real Property Actions and Proceedings Law (RPAPL) (adding new § 1302). It is effective as of April 1, 2003, applying to any covered loan for which application is made after that date.

Of course the law does not apply to all loans, but it is vital to determine which loans can be affected; and the provisions are profoundly serious. There must be a "home loan" and, once within that category, the statute will control if the loan crosses the threshold of being considered a "high cost home loan."

According to the statute, a home loan (including an open-end credit plan, but other than a reverse mortgage) is one where:

- the principal does not exceed the lesser of the Fannie Mae conforming loan amount or $300,000; and
- the borrower is a natural person; and
- the debt was incurred primarily for personal, family or household purposes; and
- the mortgaged property is in New York and is a one- to four-family house occupied as the borrower's principal residence.

Such a loan becomes "high cost" when it crosses one or more of the following lines:

- if a first mortgage, the interest rate exceeds eight points above the yield of treasury securities with a comparable maturity; or
- if a subordinate mortgage, the interest rate equals or exceeds nine points above the yield of treasury securities with a comparable maturity; or
- total points and fees exceed 5% of the loan amount when the loan is $50,000 or more, or 6% of the loan amount when the loan is $50,000 or more and the loan is a purchase money loan guaranteed by the FHA or VA.

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If the loan spills over into predatory territory, what next? It depends upon one's perspective but, as mentioned, consequences are significant.

The major thrust of all this is imposition (by Banking Law § 6-*l*) of no fewer than 19 commandments relating to the mortgage, a compelling series of both do's and don'ts. Space prohibits listing all these, but the need to be aware of them if consummating a covered transaction is obvious and essential.

And the significance of the sundry mandates goes well beyond mere drafting of the mortgage documents. For example, if the mortgage is to be foreclosed, the new RPAPL §1302(1) requires the complaint to allege compliance with all the provisions of Banking Law §§ 595 and 6-*l*. Then, that allegation must be proved before judgment can be awarded. Violation of any provision of Banking Law § 6-*l* is specifically delineated as a defense to foreclosure (RPAPL § 1302(2)).

Penalties for violation of statute create unpredictable

Note that an assignee of the mortgage may find it difficult – or impossible – to determine this compliance with certainty. As trying as it may be for a closing party to glean statutory compliance, it may be even more troublesome for a title company invited to insure such a title. What really occurred at the inception of the loan to comply with the statute may either be unclear as a matter of fact or open to interpretation as a matter of law. (Read each mandate to confirm that you could be likewise perplexed!)

Burdens of drafting and compliance aside (although these are significant indeed), penalties for violation of the statute create unpredictable peril. Loan assaults in general almost invariably emanate from disgruntled borrowers. In this realm of predatory lending, though, enforcement can come from the attorney general, the superintendent of banking or *any* party to the loan. A lender's liability for violation includes not only actual damages (inclusive of consequential and incidental damages) but statutory damages as well, requiring forfeiture of all interest – earned or unearned – points, fees and closing costs. Added too is court discretion to grant injunctive, declaratory or other equitable relief.

Should violation be held intentional, the loan is deemed void and the lender must then disgorge all payments received. In a foreclosure situation, recission is available as a defense or counterclaim with no statute of limitations to bar its use.

Conclusion seems an opportune time to highlight an earlier point. Many statutes languish in obscurity, recondite exercises for those still wearing eyeshades and ensconced at tall desks. Not this law. ■