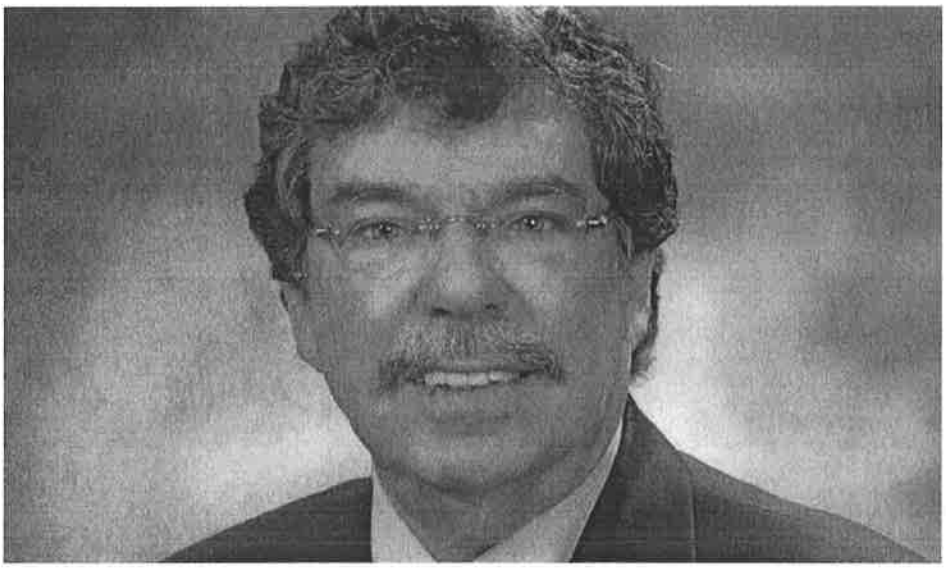
Passed Bill Threatens Home Loan Foreclosures

Bruce Bergman discusses why Bill 2502-A, which amends RPAPL §1302, appears to be an error and "will likely render impossible both the making of home loan mortgages and the foreclosure of such mortgages."

By **Bruce J. Bergman** | July 13, 2021



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Bill 2502-A, which amends RPAPL §1302, may very well have had benign intentions, but the end result will likely render impossible both the making of home loan mortgages and the foreclosure of such mortgages. While this may sound like hyperbole, a careful examination of the changes will provide an explanation.

In essence, the new law imposes subprime and high cost home loan constraints and prohibitions upon all home loans, even those not of in the subprime or high coast category.

To understand what may readily be perceived as arcane suggests brief review of what the statute provided before the amendment, the distinction between a residential mortgage and a home loan mortgage, and the statutory requirements of Banking Law sections six-l and m.

To become effective Jan. 1, 2022, this bill has passed both the Assembly and the Senate, awaiting the Governor's signature to become law.

Existing RPAPL §1302

This section, significantly entitled "Foreclosure of high-cost home loans and subprime home loans," provides at subsection 1 that any complaint in a foreclosure relating to a high-cost home loan or a subprime home loan must contain an affirmative allegation that at commencement the plaintiff is the owner and holder of the mortgage and note (or has been delegated that authority) and has complied with all the provisions of section 595-a of the Banking Law, related regulations, and section six-l or six-m of the Banking Law.

Subsection 2 states that it shall be a defense to a foreclosure of either a high-cost home loan or a subprime home loan that the terms of the subject loan or the actions of the lender violate any provision of six-l or six-m of the Banking Law (or RPAPL §1304 which is the 90-day pre-foreclosure notice). The key consideration is that §1302, as currently constituted, applies solely and specifically to high-cost home loans and subprime home loans. The considerable strictures of Banking Law section six-l or six-m, as the case may be, have their place, but appropriately have never had any involvement with all *other* variety of residential or home loan mortgages–or commercial mortgages.

Residential vs. Home Loan Mortgages

Residential real property, which could include a home loan, is a broader definition than a home loan. As found in RPAPL §1305(1)(a) it

> shall mean real property located in this state improved by any building or structure that is or may be used, in whole or in part as the home or residence of one or more persons, and shall include any building or structure used for both residential and commercial purposes.

Thus, it clearly covers mixed use properties and that then means commercial mortgages.

The definition of the narrower home loan, as found in RPAPL §1304(6)(a)(1), is one where the borrower is a natural person, the debt is incurred primarily for personal, family or household purposes, the security is a one-to-a four family dwelling or a condominium unit used, occupied or intended to be used or occupied wholly in part as the home or residence of one or more purposes or will be occupied by the borrower as a principal dwelling.

While these two types of loans are different, they are obviously oft-encountered, unlike high-cost and subprime loans.columns

High-Cost and Subprime Home Loans

Banking Law §six-l and six-m are essentially mirror images of each other, although containing extensive and different definitional sections explaining when they apply. Not surprisingly, to fully recognize the breadth and effect of the requirements of these statutes necessitates a full and careful reading. But it is immediately apparent that many of the impositions have no relationship to the typical residential or home loan mortgages. Aside from what would be incongruous mandated notices to the borrower declaring the nature of the loan as high-cost or subprime, the statutes require (among other directives) no application of default interest, no fees if a loan is restructured or modified, determination of a borrower's ability to repay as a condition of the loan, a prohibition against the loan issuing without counselling with a delineation of counselors, no employment of prepayment penalties and a mandatory escrow for taxes and insurance. While each of the mentioned prohibitions could be anathema to the "usual" loan, the case of the obligatory escrow merits further comment. It is commonplace that credit worthy borrowers who prefer to pay taxes on their own and avoid keeping on deposit with lenders the larger amount needed for escrow are given that right, thereby removing any escrow.

The Statute as Amended

The new version removes from the title "high-cost home loans and subprime home loans" and substitutes "certain residential mortgages." Subsection 1 accordingly provides that a foreclosure of a residential mortgage covering a one-to-four family dwelling must contain the same affirmative allegations as had applied to the statute before amendment. As to compliance with the provisions of Banking Law section six-l or six-m (which of course presently apply exclusively to high-cost home loans and subprime home loans) the statute adds as clarification application "for loans governed by those provisions."

This is acceptable and not a problem. After comment had been submitted exposing the danger of extending six-l and m the Legislature was careful to limit the requirements of six-l and six-m only to the loans those sections were designed to address. Accordingly, all the amendment really does is require in a usual foreclosure (again residential and home loan) recitation in the complaint that the plaintiff is the owner and holder of the note and mortgage (or has been delegated authority). This would be plead in any event, a complaint without such an allegation likely would not state a cause of action, and requiring that the allegation appear in a complaint is not burden upon anyone. Therefore, the amendment to subsection 1 is unremarkable.

The problem, however, comes in section 2. There, in stating what shall be a defense to an action to foreclose "a mortgage" (an exceptionally broad category), it removes, or neglects to include the limiting words "for a high-cost home loan or a subprime home loan." It goes on the say that it will be a defense to foreclosure that the terms of the *home loan* or the actions of the lender violate any provision of six-l and six-m.

It is here where it appears the mistake was made. Subsection 1 applied to residential mortgages. Subsection 2, in contradictory fashion, applies to any mortgage, but then uses the term home loans. So, it is not at all clear what loans are intended for inclusion. This creates room for the argument that the provisions of six-l and six-m will apply to *any* mortgage origination and *any* mortgage foreclosure. There is certainly no need for such a contradiction to exist.

Even if it is somehow determined that the subsection is actually confined to home loans, an encompassing enough definition by itself, the imposition of six-l and six-m upon home loans can be mildly stated as disastrous. In subsection 1 the drafters were careful to confine the high-cost and subprime home loan dictates to those categories alone. Such saving and clarifying language, however, does *not* appear in subsection 2. That means, on the face of the language, that six-l and six-m *will* apply, at least to home loans (and possibly any mortgage loan).

In examining the restrictions as to the high-cost and subprime categories it should be pointedly discernable that lenders do not and could not make the normal loan or foreclose the normal loan encumbered with such afflictions. This is the heart of the matter.

Memorandum in Support of Legislation

If the bill as constituted ever needed judicial interpretation, which is a certainty, reference to the supporting memorandum is standard. While that document offers some help, it also continues the disarray.

Under the heading "Title of Bill," it recites initially that the amendment is "in relation to foreclosure of residential mortgages covering one-to-four family dwellings. Since a one-to-four family dwelling is alone not a home loan, unless it meets the definitional parameters, these words muddle the new statute's application to home loans. Adding "residential" in front is odd because a one-to-four family dwelling is inherently residential. So this offers no lucidity.

The short section entitled "Summary of Provisions of bnv Bill" manages to both clarify and confuse. It states the requirement for foreclosing plaintiffs to plead ownership of the note and mortgage applicable to all homeowners (good, that should mean home loans) instead of the limitation of subprime and high cost home loans (accurate so far). Continuing, though, it says that the law ensures the availability of RPAPL §1302 defenses to all homeowners without limitation to subprime and high cost home loans. If 1302 defenses mean pleading compliance that plaintiff owns the mortgage and had complied as well with RPAPL §1304 it is correct. But if it intends to invoke six-l and m to all homeowners it is assuredly not what subdivision 1 provides.

In observing that subsection 2 sets the effective date of the statute, suggests that the memorandum predates some changes to statute. But it hardly serves to banish the uncertainty because that is not what the current subsection 2 directs.

Finally there is a section headed "Justification" which elucidates, but only to a limited degree. The first two paragraphs are devoted to the perceived concern that foreclosing lenders may lack standing to initiate foreclosures. Requiring the pleading of the note and mortgage ownership and making that a defense is clearly addressed to that goal.

Alas, the final paragraph then repeats the portion of the summary to the effect that all homeowners can avail themselves of the "statutory defenses."

But are those of ownership of the note and mortgage or six-l and m? It doesn't say. So in the end, no rescue is afforded by the memorandum.

Conclusion

Because the Legislature was (correctly) so precise in limiting subsection 1 to the high-cost and subprime categories, it makes no sense to remove that limitation in the companion subsection 2. It creates a confusing and anomalous statute at best and also manifestly makes mortgage lending an impossibility in this state. That implies an error rather than an intention. Indeed, it would be problematic to defend or rationalize this as a volitional act.

The statute appears to be an error. Regardless of the motivation, it can readily be corrected so that the two subsections harmonize. The bill should not be signed until that change is made. Lack of attention to this detail portends catastrophe to mortgage loans and mortgage foreclosures in the Empire State.

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