Westlaw Delivery Summary Report for THOMAS,JOSHUA LO

Date/Time of Request:	Friday, July 30, 2010 14:33 Central
Client Identifier:	JOSHUA THOMAS
Database:	NJPRAC
Lines:	5486
Documents:	22
Images:	0

New Jersey Practice Series TM

Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
1. Introduction and Historical Background

§ 1.1. The concept and function of security

West's Key Number Digest

West's Key Number Digest, Mortgages 1
West's Key Number Digest, Secured Transactions 2

Legal Encyclopedias

C.J.S., Mortgages §§ 2 to 6

C.J.S., Secured Transactions § 3

C.J.S., Secured Transactions § 7

C.J.S., Secured Transactions §§ 9 to 10

C.J.S., Secured Transactions § 22

C.J.S., Secured Transactions § 27

"Security" has been defined as "an obligation, pledge, mortgage, deposit, lien, etc., given by a debtor in order to make sure the payment or performance of his debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation."[1] The core of the security concept is contained in the concluding phrase of the definition—"a resource to be used in case of failure in the principal obligation."

"Security" has also been defined as "collateral given or pledged to guarantee the fulfillment of an obligation; esp., the assurance that a creditor will be repaid (usu. with interest) any money or credit extended to a debtor."[2]

"Security" comes from the term "secure" or "secured" whereby a creditor is protected by a pledge, mortgage, or other encumbrance of property that helps ensure financial soundness and confidence.[3]

From the standpoint of the obligee, security reduces the risk of loss should the obligor be unwilling or unable to perform his obligation. From the standpoint of the obligor, security enables the obligor to obtain credit on better terms than would otherwise be possible. Indeed, it is generally true that the economic power to borrow is dependent (other factors being equal) upon the legal power to give an attractive security to the lender.[4]

The term "security" is susceptible of numerous meanings depending upon the context in which it is used. Black's Law Dictionary enumerates and defines fifty four different kinds of security.[5] "Personal security," for example, is "an obligation for the repayment of a debt, evidenced by a pledge or note binding a natural person, as distinguished from property."[6] "Real security" is the "security of mortgages or other liens or encumbrances upon land."[7] A "mortgage-backed security" is a security backed by mortgages.[8] An "asset-backed security" is "a debt security (such as a bond) that is secured by assets that have been pooled and secured by the assets from the pool."[9] "Pass-through security" is defined as a "security that passes through payments from debtors to investors."[10] "Pass-through securities" are usually assembled and sold by private lenders in packages to investors. The private lender then deducts a service fee before passing the principal and interest payments to the investors.[11] "Collateral security" is "a security subordinate to and given in addition to a primary security, that is intended to guarantee the validity or convertibility of the primary security."[12]

A "security interest" is defined as a "property interest created by agreement or by operation of law to secure performance of an obligation (esp. repayment of a debt)."[13]

The "mortgage" or "mortgaged security" is used generally to denote the real estate given as security for the mortgage.

"Property security" is used when the obligee's security consists of some sort of right in or hold on a particular thing, whether it be land, a chattel, or an intangible.[14] The real estate "mortgage," which forms the subject matter of this book, is by far the most important device for utilizing real estate as "real" or "property" security, and the almost exclusive real property security device in New Jersey.

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] Black's Law Dictionary (Rev. 4th ed. 1968).

[FN2] Black's Law Dictionary 1358 (7th ed. 1999).

[FN3] Black's Law Dictionary 1358 (7th ed. 1999).

[FN4] See Durfee, Cas. Security 12.

[FN5] Black's Law Dictionary 1358 to 60 (7th ed. 1999).

[FN6] Black's Law Dictionary 1360 (7th ed. 1999).

[FN7] Black's Law Dictionary 1360 (7th ed. 1999).

[FN8] Black's Law Dictionary 1359 (7th ed. 1999).

[FN9] Black's Law Dictionary 1359 (7th ed. 1999).

[FN10] Black's Law Dictionary 1359 (7th ed. 1999).

[FN11] Black's Law Dictionary 1359 (7th ed. 1999). See §§ 2.2 and 11.9, infra.

[FN12] Black's Law Dictionary 1361 (7th ed. 1999).

[FN13] Black's Law Dictionary 1361 (7th ed. 1999).

[FN14] See Osborne, Cas. Property Security (2d ed. 1954), grouping real estate mortgages and the various personal property security devices under the heading, “Property Security.” The latter term was also used by Professor Durfee in his casebook—Durfee, Cas. Security 12.

29 NJPRAC § 1.1

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
1. Introduction and Historical Background

§ 1.2. English mortgage law to 1800

West's Key Number Digest

West's Key Number Digest, Mortgages 1
West's Key Number Digest, Mortgages 187.1 to 191

Legal Encyclopedias

C.J.S., Mortgages §§ 2 to 6

C.J.S., Mortgages § 288

C.J.S., Mortgages § 290

It has variously been asserted that the Anglo-American real estate mortgage is derived from the Germanic *wed*,[1] from one of the Roman security devices,[2] or from the Jewish mortgage.[3] For present purposes it is sufficient to state that the real estate mortgage as we know it today is a direct descendent of the Anglo-Norman *gage* (pledge) of land.[4] A “mortgage” is literally a “dead pledge.” The term “mortgage” was apparently used in Glanvil's time to distinguish gages where the rents and profits of the land were not applied to the debt, “mortgages,” from “vif gages” where the rents and profits were so applied.

The different forms of *gages* in use during the reign of Henry II (1154–89) are discussed in the famous treatise attributed to Ranulf de Glanvil.[5] During the succeeding three centuries there was much experimentation with new types of *gages*.[6] By the time Littleton wrote his *Treatise on Tenures* (c. 1475) other forms of the *gage* had been almost completely displaced by the feoffment subject to a condition (introduced by the words *proviso semper*) for defeasance of the feoffee's estate if the feoffor should pay the secured debt on its due date.[7] Livery of seisin was necessary to effect a mortgage by feoffment, and the feoffment was effective without a writing until enactment of the Statute of Frauds in 1676. “But, as trial by jury gradually supplanted battle and ordeal and compurgation, the evidentiary value of the written memorial became decisive, and before the end of the 15th century it was invariable or almost invariable practice to fortify the feoffment with a charter.”[8]

Originally the mortgagee seems to have obtained a determinable fee, with payment of the debt on the “law day” operating “automatically” to revest the fee simple in the mortgagor.[9] By Littleton's day, however, it was settled that the mortgagor must re-enter, after paying the debt, in order to recover his estate, and that the mortgagee took a fee upon condition subsequent.[10] When the words *proviso semper* were used without words of covenant to reconvey, they simply created a condition. But in many instances these words were followed by a covenant to reconvey on payment of the debt, in which case, according to Coke, the mortgagee's estate was subject to both a condition subsequent and a covenant to reconvey.[11]

One chapter of Littleton's *Treatise on Tenures* is devoted to “Estates upon Condition,” and ten of the sixty sections in this chapter deal with mortgages. It is clear from the structure of the chapter that the author did not regard the mortgage as a legal category distinct from other estates upon condition; “relations between mortgagor and mortgagee are governed by the same rules of law that govern, for example, a feoffment on condition that if the feoffor returns from his pilgrimage to Rome the feoffment shall be void.”[12] This was the tacit premise of the common law of mortgages from Littleton's time to the end of the eighteenth century. It had two unfortunate results: (1) the mortgagee's estate was considered the only legal estate in the land, with the mortgagor's right of entry a mere “chose in action”; (2) the proviso for re-entry was strictly construed so that failure to pay the debt on the “law day” brought about a forfeiture of the land, although the debt still remained unpaid and could be recovered from the mortgagor.[13] The harshness of this result is all the more remarkable because, in Glanvil's day, the *gagor* often had “something that is not very unlike an ‘equity of redemption’: that is to say, there are forms of gage which compel the creditor to go to court before he can become owner of the gaged thing, and the court will give the debtor a day for payment [after default].”[14] But by the time of Edward I (1272–1307) the law courts had ceased to recognize any right of redemption after default. By Littleton's day, forfeiture of the land by default was such a well-settled feature of the mortgage that he could say: “ … it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not; and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him forever, and so dead to him.”[15]

As might have been expected, the failure of the common law judges to distinguish the mortgage transaction from other conveyances upon condition and the harshness with which they enforced the terms of the mortgage upon default soon led mortgagors to seek relief in Chancery. As Holdsworth has succinctly put it, “equity was ready to interpose, either on the ground that payment had been prevented by the sharp practice of the mortgagee, or on the ground that the strict construction of the proviso might amount, in cases where payment had been delayed by accident, to the enforcement of a penalty, or possibly on the ground that it might be tantamount to the enforcement of a usurious contract. But, towards the end of the sixteenth and at the beginning of the seventeenth century, there was a further development. The Chancellor began to take the view that a mortgage was, after all, only a security for a debt; and that therefore the title to equitable relief did not depend upon the reason why the mortgagor had failed to redeem at the day, or upon the nature of the contract. It was enough that it was a mortgage transaction, intended to secure to the mortgagee a fixed sum and interest thereon, and, subject thereto, to leave the mortgagor substantially the owner of the property.”[16]

It seems clear that equitable relief from extreme hardship had become the established practice in Chancery as early as 1569, and by about 1625 redemption after default was allowed as a matter of course without any showing of special hardship.[17] But the Chancellor's intervention to permit the mortgagor to redeem after default seriously impaired the mortgagee's legal title. Even before redemption became a matter of course it must have become increasingly difficult for the mortgagee to market his legal title after default, since prospective purchasers might well anticipate a suit by the mortgagor to redeem on the ground of hardship.[18] When redemption became a matter of course, it was quickly recognized that it was unfair to disable the mortgagee for an indefinite period from dealing with the mortgaged land as his own, if he could not obtain payment from the mortgagor. At least as early as 1629, therefore, we find the Chancellor entering a decree foreclosing the mortgagor's "equity of redemption" unless he pays by a fixed date. Although the mortgagee alleged special equities as a basis for seeking foreclosure in the first reported case,[19] foreclosure, too, soon became a matter of course. Unless the mortgagor paid all principal and interest found to be due on the mortgage within such time as the court fixed for redemption, the right to redeem was forever barred and foreclosed by the decree and the mortgagee became the absolute owner of the mortgaged property in equity as well as at law.[20]

Once it became settled that the mortgagor had an equitable right to redeem after default, new concepts of the interests of mortgagor and mortgagee inevitably began to develop. If the mortgagor had a right to redeem after default and thus re-acquire his legal title to the land, it was natural for the Chancellor to begin thinking of the mortgagor "as owner in fee subject to the mortgagee's security."[21]

The new concept of the mortgagor's "equitable estate" was developed mainly in cases which dealt with the transfer of the interests of mortgagor and mortgagee.[22] Had the mortgagor's interest been regarded merely as an equitable right of re-entry, analogy with legal rights of re-entry would have led to the conclusion that the mortgagor's interest was a mere "chose in action" and therefore inalienable. But by treating the mortgagor's interest as an equitable estate the Chancellor was able to adopt as the "true" analogy the legal estate which the mortgagor had before he mortgaged his property. Hence the equitable estate was as freely transferable, by inter vivos conveyance or by devise, as the legal estate, and it devolved like the legal estate upon the death of the mortgagor intestate. Moreover, the mortgagor could effectively mortgage his land more than once if he had an equitable estate, the second and all junior mortgages being termed "equitable mortgages" since they were enforceable only in equity.

The mortgagee's security interest, on the other hand, came to be regarded by the Chancellor as personalty—an inseparable incident of the secured obligation. Hence, in equity, the assignment of the obligation carried with it the benefit of the security interest (including the right to foreclose) even if the mortgagee's "legal title" was not effectively transferred to the assignee. And if the mortgagee died intestate his equitable security interest passed to his administrator rather than to his heir. The heir, of course, took the legal estate, but he held it in trust for the benefit of the administrator (and the mortgagor), without any beneficial interest whatever.

Thus, as Durfee has pointed out,[23]

> Even the lawyer who most stoutly insists that ownership is in the mortgagee must somehow accommodate his doctrine to the facts of life. He finds accommodation in "equitable ownership," a masterpiece of juridical diplomacy that facilitates innovation by faithfully repeating the doctrine which in fact is being undermined. Attributing an "equitable estate" to mortgagor, we can go on talking of mortgagee's "legal estate" and if pressed we can say it's exactly the legal estate that Littleton knew. … As a by-product of this technique, it comes to pass that mortgagor's equitable interest acquires a distinct name, "the equity of redemption," but we never settle upon any one term to denote mortgagee's equitable interest. You can call it "lien" or "charge" or "security" or "encumbrance," for each of which there is precedent.

Logically, the concept of the mortgagor's interest as an equitable estate in land should have led the Chancellor to hold that the mortgagor's widow was entitled to dower. But her claim was denied on the basis of prior decisions against the widow of *cestui que trust,* despite logically inconsistent decisions that the mortgagor, if a woman, had "an equitable seizin" sufficient to give her husband a right of curtesy. The English rule as to dower was not changed until passage of the Dower Act of 1833.[24]

Even after the equitable doctrine of mortgages had reached full development, the English law courts clung to the view that, as between the parties, a mortgage was essentially what it purported to be, a conveyance in fee subject to defeasance. One consequence of this view was that the mortgagee, as owner in fee, was entitled to possession of the mortgaged land unless there was an agreement to the contrary. If the mortgagee agreed that the mortgagor should have possession for a definite period, the mortgagor became tenant for a term; but an agreement that the mortgagor should have possession until default, or any other agreement, express or implied, that the mortgagor might retain possession, created only a tenancy at will.[25] And when the mortgagor was left in possession without any agreement he was usually termed a tenant at will or at sufferance. However, he obviously was not a true tenant at will since he could be ousted without notice, was not entitled to emblements, and could execute a sublease without terminating his interest. He was equally obviously not a true tenant at sufferance since he did not hold over wrongfully and could not be held as a tenant from year to year at the mortgagee's election.[26]

The Chancellor never interfered directly with the mortgagee's legal right to possession, and thus perhaps failed to carry to its logical conclusion "the equitable conception of the mortgagor as owner subject only to the mortgagee's right of security."[27] As a practical matter, however, the Chancellor effectively limited the mortgagee's legal right to possession by making him account for all benefits received while in possession of the mortgaged land.[28] Prior to the Chancellor's intervention the mortgagee was not in any substantial sense accountable for the fruits of possession, although he was guilty of usury if he did not apply the profits he received prior to default upon the mortgage debt.[29] The earliest extant decrees for redemption (1596–97) require the mortgagee to account for rents and profits,[30] and the accounting became a standard feature of foreclosure suits as well as suits to redeem. Partly because of the burdensome, even hazardous, nature of the accounting,[31] and partly because of the widespread adoption of modes of conveyance that did not require livery of seizin[32] and revision of the usury laws to permit lenders to take interest,[33] it had become customary by the latter half of the seventeenth century to leave the mortgagor in possession except in unusual cases.[34]

Thus, by the end of the eighteenth century, although the English mortgagee still had a legal estate in the mortgaged land and the legal right to possession thereto, the mortgagor ordinarily had the actual possession prior to default, as well as a legal right to a reconveyance if he paid his debt on the "law day" and an equitable right to redeem and obtain a reconveyance if he could pay his debt after default and prior to foreclosure.

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] "Unless we err, the English law of gage, like the law of other Germanic countries, starts from the conception, in the Anglo-Saxon days of barter and self-help, that the *wed* or *vadium* delivered to the gagee is a provisional satisfaction, … a redeemable forfeit. The *res* and the claim are regarded as equivalent; and, should the gagor not redeem, the gagee must look exclusively to the *res* for satisfaction. The gagee has no personal action against the gagor; and the gagor, should he fail to redeem the *res*, has no right to the surplus, if the *res* be worth more than the amount of the gagee's claim." Hazeltine, The Gage of Land in Medieval England, 17 Harv.L.Rev. 549 (1904), reprinted in 3 Select Essays in Anglo-American Legal History 646, 647 (1909) [hereafter referred to as Hazeltine, Gage of Land].

[FN2] These were the *pignus*, the *hypotheca*, and the *antichresis*. As to the influence of Roman law on the English mortgage, see 3 Story, Eq.Jur. §§ 1048–1053 (14th ed. 1918); 1 Spence, Eq.Jur.Chancery

599 to 600 (1846); Turner, The Equity of Redemption 111–137 (1931). See also Antichresis, An Ancient Security Device—Revived, 13 Tulane L.Rev. 141 (1938).

[FN3] It has been said: "The notion of mortgaging and redemption seems to be of Jewish extraction and from the Jews to the Greeks and to the Romans." 5 Bacon, Abridgment of Mortgage Law 2 (6th ed. 1807); 1 Powell, Mortgages 1 (4th ed. 1799). The Bible refers to the practice of mortgaging. 5 Nehemiah 3:3.

[FN4] Littleton, Tenures § 332 quoted in Durfee, Cas. Security 11.

[FN5] "A Treatise on the Laws and Customs of England composed in the time of King Henry the Second while the honourable Ranulf Glanvil held the helm of justice" appeared about 1187, but there is considerable doubt as to the actual authorship. Glanvil became a justice of the Curia Regis assigned to the hearing of common pleas in 1178, and was later the King's Justiciar (the chief judicial officer of England).

[FN6] For discussion of the various types of gages in use during this period, see the following: Hazeltine, Gage of Land, 17 Harv.L.Rev. 549, 18 id. 36 (1904), reprinted in 3 Select Essays in Anglo-American Legal History 646 (1909); Holdsworth, Historical Introduction to the Land Law 70–71 (1927); Plucknett, Concise History of the Common Law 603–606 (5th ed. 1956); 2 Pollock & Maitland, History of English Law 117–24 (2d ed. 1899); 1 Glenn, Mortgages § 2; Osborne, Mortgages §§ 1–4; 4 Am.L.Prop. §§ 16.1–16.4; Walsh, Mortgages § 1.

[FN7] Professor Durfee reproduces in translation the proviso of a charter of feoffment executed as security for a debt in 1401, as follows: "if the within named (feoffer) or any other person in his name pays to the within named (feofee) or his attorney (a stated sum) of good and lawful money on the (stated date), from the thenceforth the within charter and livery of seisin shall lose all force; otherwise to remain in full force and vigor." Durfee, Cas. Security 7.

[FN8] Durfee, Cas. Security 8.

[FN9] See Hazeltine, General Preface to Turner, The Equity of Redemption xxxviii et seq. (1931). See also McMillan v. Richards, 9 Cal. 365, 70 Am.Dec. 655 (1858); Stevens v. Turlington, 186 N.C. 191, 119 S.E. 210, 32 A.L.R. 870 (1923).

[FN10] See Hargrave & Butler's Note to Co.Litt. § 332; Turner, The Equity of Redemption 18, 20–21 (1931); Osborne, Mortgages 9; 4 Am.L.Prop. 13; Walsh, Mortgages 4–5.

[FN11] See Walsh, Mortgages 5, citing Littleton, Tenures §§ 328–331; Co.Litt. 203b; Cromwell's Case, 2 Co.Rep. 69b, 76 Eng.Rep. 574 (1601). See also Hazeltine, General Preface to Turner, The Equity of Redemption xli–xlii (1931); Plucknett, Concise History of the Common Law 607 (5th ed. 1956).

[FN12] Durfee, Cas. Security 10. See generally 1 Glenn, Mortgages 6–10 (1943), on the effect of treating the mortgage simply as a feoffment subject to a condition.

[FN13] See opinion of Lord Haldane in Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd., [1914] A.C. 25, 35, and comment in Durfee Cas. Security 12 n. 11, that "His Lordship cited no authority, but he was surely right so far as concerned the case where the feoffer also gave a sealed promise to pay the debt.”

[FN14] 2 Pollock & Maitland, History of English Law 120 n. 2 (2d ed. 1899).

[FN15] Littleton, Tenures § 332, quoted in Durfee 11. In fact, however, the term “mortgage” seems to have been used in Glanvil's day not to indicate that the gagor forfeited his land by default, but to distinguish those gages where the rents and profits taken by the gagee in possession of the land were not applied to the debt from those gages (vif gages) where the rents and profits were so applied. In Glanvil's day, a forfeiture clause could be added to either type of gage. See 2 Pollock & Maitland, History of English Law 119–20 (2d ed. 1899); Hazeltine, Gage of Land; 17 Harv.L.Rev. 549, 553–55 (1904), reprinted in 3 Select Essays in Anglo-American Legal History 646, 650–52 (1909).

[FN16] Holdsworth, Historical Introduction to the Land Law 256 (1927). Cf. 1 Glenn, Mortgages 11–17.

[FN17] See Durfee, Cas. Security 16–20; Osborne, Mortgages § 6; 4 Am.L.Prop. § 16.6; Walsh, Mortgages 6–13. Chancellor Kent said: “[T]he case of mortgages is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law.” 4 Kent, Commentaries, on American Law 158 (14th ed. 1896). See generally 1 Spence, Eq.Jur.Chancery 601 to 04 (1846); Turner, The Equity of Redemption 16–42 (1931); Bordwell, Equity and the Law of Property, 20 Iowa L.Rev. 24, 28 (1934).

[FN18] “Moreover the fact that the mortgagee had sold the property to a purchaser without notice could not affect the mortgagor's rights—he was the owner, and, as the mortgagee merely held the property as a security for the debt, he could only convey it subject to the mortgagor's rights.” Holdsworth, Historical Introduction to the Land Law 257 (1927). See also Durfee, Cas. Security 21–22.

[FN19] The first reported case was How v. Vigures, 1 Ch.Rep. 32, 21 Eng.Rep. 499 (1692), discussed in Durfee, Cas. Security 22.

[FN20] See generally Durfee, Cas. Security 22–26; Osborne, Mortgages § 10; 4 Am.L.Prop. § 16.10. But see Osborne, Mortgages § 311, and 4 Am.L.Prop. § 16.178, both concluding that “strict foreclosure in England is unsatisfactory to mortgagees because it is slow, costly, and forecloses imperfectly.” See also 1 Stephen, Commentaries on the Laws of England 311 (21st ed. 1950), stating that “strict” foreclosure is “not a popular remedy and is only used in the last resort.” Sale under the mortgagee's statutory power is now the usual remedy for the mortgagor's default in England. Id. 312; Lawson, Introduction to the Law of Property 156 (1958).

[FN21] Walsh, Mortgages 16.

[FN22] The discussion which follows in the text above is drawn from the following sources: Durfee, Cas. Security 29–37; Holdsworth, Historical Introduction to the Land Law 257–61 (1927); Osborne, Mortgages § 7; 4 Am.L.Prop. § 16.7; Walsh, Mortgages 11–13.

[FN23] Durfee, Cas. Security 30.

[FN24] 3 & 4 Will. 4, c. 105. Dower and curtesy no longer exist in England and there is substituted in its place a new succession code based on the succession rules to personalty and which now applies to all types of property. The Administration of Estates Act, 1925, 15 Geo. 5, c. 23, § 45(c). Practically all American cases in jurisdictions where dower exists give dower in the equity of redemption even in the absence of any statute providing for dower in equitable estates.

See Durfee, Cas.Security 6465; 2 Jones, Mortgages § 823; 1 Glenn, Mortgages § 38; 2 id. § 301; 1 Walsh, Commentaries on Real Property § 96 (1947). When the right of dower is clearly subject to the mortgage; the issues are (1) whether the wife has a right to redeem from the mortgage; and (2) whether she is entitled to dower, even without redemption, as against the heirs or devisees of the mortgagor, or his grantee. Generally see Haskins, Dower in Mortgaged Property, 5 Miami L.Rev. 187 (1951).

[FN25] Osborne, Mortgages 10–11; 4 Am.L.Prop. 15; Walsh, Mortgages 15. As to the common law nature of the mortgagor's possession, see Turner, The Equity of Redemption 88–110 (1931). The Jewish *gage* of land in use in the 12th and 13th centuries allowed the debtor to remain in possession until default. It is conjectured in Osborne, Mortgages § 3, 4 Am.L.Prop. § 16.3, and 2 Pollock & Maitland, History of English Law 123 (2d ed. 1899), that had the Jews not been expelled from England in 1290, the law of mortgages would have developed more easily and simpler mortgages would have been adopted. It has also been shown that this type of gage had more influence on the common law mortgage than was once generally believed. Rabinowitz, The Common Law Mortgage and the Conditional Bond, 92 U.Pa.L.Rev. 179 (1943); Rabinowitz, The Story of Mortgage Law Retold, 94 U.Pa.L.Rev. 94 (1945). Jews were guided and influenced in mortgage transactions by the Talmud, which had been reduced to writing before the 6th Century. The Talmudic tractate, *Babia Mezi'a* (Middle Gate), fol. 65a–68a, pp. 394–97 (Sorcino trans. 1935), discussed mortgage transactions and the law applicable thereto, which is quite similar to that pertaining to the medieval Jewish gages in England.

[FN26] Osborne, Mortgages 10–11; 4 Am.L.Prop. 15–16; Walsh, Mortgages 16–17. In commenting on the "highly amusing series of quite impossible and conflicting theories as to the legal interest of the mortgagor in possession" resulting from the failure of the English law courts "to recognize the actualities of the mortgage relation," Walsh says: "The obvious thing, that under existing law the mortgagor was in possession as owner in fee subject to the mortgagee's security, that equity had in practical effect almost exclusive jurisdiction over mortgages, and that in cases of conflict the rule in equity prevailed over the conflicting legal rule through the *in personam* power of equity to compel the parties to do what justice and equity demands, seems to have been ignored. … the spectacle of men of understanding seriously regarding the owner of land in possession of it as a tenant at sufferance merely because he has mortgaged it to secure a loan is about as unreal and fantastic as anything to be found in respectable human thought." Walsh supra.

[FN27] Walsh, Mortgages 17. Apparently no attempt was ever made to enjoin a mortgagee's action for possession of the mortgaged premises prior to 1843. In Davies v. Williams, 7 Jurist 663 (1843), Shadwell, V. C., refused to issue such an injunction even though a suit to redeem was pending before him, saying, "It is new to me that a court of equity has, under such circumstances, interfered to prevent a mortgagee from pursuing his legal remedy in getting possession of the mortgaged premises." (Quoted in Durfee, Cas. Security 29.)

[FN28] Walsh, Mortgages 9, 17, 100–01.

[FN29] Durfee, Cas. Security 27, pointing out that "this branch of the law of usury was particularly ineffectual, peculiarly unenforceable. And even in substantive theory the profits taken by mortgagee after forfeiture he could pocket without committing usury, for they were the profits of his own land. The tail went with the hide." Durfee also points out that "One result was the practice, apparently common, of fixing an early maturity date with the expectation that default would ensue, whereupon the mortgagee could write his own ticket, absent equitable interference." Id. 28 n. 34.

[FN30] Id. 28.

[FN31] See id. 28; Maitland, Lectures on Equity 187 (2d ed. 1936); Osborne, Mortgages §§ 125, 164; 4 Am.L.Prop. 150, 183–84.

[FN32] These new modes of conveyance, made possible by the Statute of Uses, were the bargain and sale, the covenant to stand seized, and the lease and release. The latter became the usual mode of conveyance in England during the latter part of the 17th century. See Holdsworth, Historical Introduction to the Land Law 291–295 (1927).

Today the appropriate form of instrument for the absolute conveyance of a fee simple is a deed of grant. 1 Stephen, Commentaries on the Laws of England 542 (21st ed. 1950). See also Megarry & Wade, The Law of Real Property 606 (3d ed. 1966), giving a concise form for a deed (using "convey" as the operative word).

In 1925, in order to harmonize land and mortgage law with modern requirements and ideas, extensive land reforms were adopted in England, and among other changes the form of a real estate mortgage was altered. Law of Property Act, 1925, 15 Geo. 5, c. 20 § 85(1) provides that all legal mortgages shall be effected either (a) by a demise for a term of years absolutely, or (b) by a charge by deed expressed to be by way of legal mortgage (this form is shorter and less cumbersome than the demise form); and § 101(I)(i) of the Act also provides for a statutory power of sale. For discussion and forms, see Megarry & Wade, The Law of Real Property 886–89, 891–92, 896–98 (3d ed. 1966).

[FN33] The taking of interest at a rate not to exceed ten per cent per annum was made legal by 37 Henry 8 c. 9 (1545), because, as the act declared, "the statutes prohibiting interest altogether had so little force that little or no punishment ensued to the offenders." The Statute of Henry 8 was repealed seven years after its enactment, but was re-enacted by 13 Elizabeth 1 c. 8 (1571). The maximum rate was reduced to eight per cent by 21 James 1 c. 17 (1624), to six percent by 12 Charles 2 c. 13 (1660), and finally to five per cent by 12 Anne c. 16 (1713). Ryan, Usury and Usury Laws 45 (1924). All usury laws in England were repealed in 1854. 17 & 18 Vict. c. 90.

[FN34] See Durfee, Cas. Security 27, conceding that the causal relation of the three factors mentioned in the text above is not clear, but stating, "there can be no doubt the three together" resulted in the practice of leaving the mortgagor in possession until default, at least. See also Maitland, Lectures on Equity 187 (2d ed. 1936), Osborne, Mortgages 203–204, 285–286, 4 Am.L.Prop. 150–51, 183–84, and Walsh, Mortgages 14–15, all emphasizing the "strictness" of the accounting required of the mortgagee in possession. Osborne and Walsh both cite Turner, The Equity of Redemption 89–91 (1931), for the statement that it had become the customary practice to leave the mortgagor in possession by the time of the Restoration (1660). Presumably the mortgagee would rarely thereafter take possession even after default except when it seemed necessary in order to prevent waste by the mortgagor.

29 NJPRAC § 1.2

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
1. Introduction and Historical Background

§ 1.3. American developments—In general

West's Key Number Digest

West's Key Number Digest, Mortgages 1
West's Key Number Digest, Mortgages 187.1 to 191

Legal Encyclopedias

C.J.S., Mortgages §§ 2 to 6

C.J.S., Mortgages § 288

C.J.S., Mortgages § 290

The English law of mortgages as it existed in the latter part of the 18th century was received in the United States during the early years of the Republic, but departures from the English model began almost immediately. Of these departures, new procedures in foreclosure were probably of the greatest significance. Indeed, the development of new foreclosure procedures began before the Revolution, either because of the high cost of chancery foreclosure, or because of the unpopularity of chancery courts, or because in some of the colonies there was no such court.[1]

Late 17th and early 18th century innovations in Massachusetts[2] and Pennsylvania[3] had relatively little influence on the development of new foreclosure procedures elsewhere in the United States, but the New York legislation of 1774 designed to remove doubts concerning the effectiveness of sale under a power in the mortgage, without court proceedings,[4] was of major significance. Even more important was the recognition of judicial sale as a normal method of chancery foreclosure. Maryland provided by statute in 1785 that “in all cases of application to the chancellor to foreclose any mortgage, he shall have full power and authority … to order and direct that the mortgaged premises, or so much thereof as may be necessary to discharge the money due and costs, be sold for ready money (unless the plaintiff shall consent to a sale on credit) by a proper person to be appointed by the chancellor.”[5] About the same time foreclosure by judicial sale came into common use in other states without legislative aid.[6] In Tennessee, for example, a judicial foreclosure sale was decreed in 1805 with an opinion indicating that this practice was already well established:

> Consistently with the law as laid down in all the modern books, we cannot vest the title in the complainant. The land, or part of it, must be sold at public sale, and the money applied to the payment of the debt and interest. The property may be of much greater value than the debt and interest, and it would be most unjust to vest the whole of it in the plaintiff, when the mortgage was only intended to secure a debt; it would be equally unjust to decree the property in full satisfaction, for it may be of less value than the debt and interest.[7]

Foreclosure by equitable suit and judicial sale is available in all states by virtue of express legislation, or as an incident to the inherent equity jurisdiction of the courts, or both.[8] It is the customary procedure in at least twenty-one states,[9] while foreclosure by equitable suit without sale ("strict" foreclosure) is customary in two states.[10] Foreclosure by exercise of a power of sale is permitted in sixty percent of the jurisdictions. There are over 30 jurisdictions in which power of sale foreclosure is authorized and used.[11] Foreclosure by entry or writ of entry (supplemented in many cases by sale under a power) is common in New England but unknown elsewhere.[12]

Significant doctrinal development has also taken place in the United States since 1800. The conventional way to summarize this doctrinal development is to say that in some states the "common law view" of the mortgage as conveyance of "legal title" still prevails, while in other states the "equitable view" of the mortgage as a mere "lien" for security has been adopted. Some writers also distinguish a third group of states (usually said to include New Jersey) which are supposed to have adopted a theory of mortgages "intermediate" between the "title" and "lien" theories.[13] Generally, speaking, most of the states east of the Mississippi (with the exception of New York and South Carolina) are said to adhere to the "title" or "intermediate" theory, and most of the states west of the Mississippi are supposed to have adopted the "lien" theory.[14] Such categorization, however, is of doubtful value from a practical standpoint, since "judicial decisions on specific problems such as right to possession before default, foreclosure, dower, testamentary distribution or liability for real estate taxes, and a high degree of statutory regulation in both title and lien theory states has [sic] obscured most of the differences deducible from the opposing theories."[15]

The issue upon which the clearest line of division exists between "title" and "lien" states concerns the right to possession of the mortgaged premises. In "title" states the mortgagee, *qua* mortgagee, is entitled to possession as soon as the mortgage is executed.[16] In "lien" states, on the other hand, the mortgagee, *qua* mortgagee, has no right to possession of the mortgaged premises.[17] Indeed, the "lien" theory had its genesis in statutes and decisions limiting the mortgagee's right to possession of the mortgaged land.[18] But in practice the distinction between "title" and "lien" states with respect to the right to possession is not as clear as it is in theory. In "title" states an express provision in the mortgage or a collateral agreement giving the mortgagor the right to possession until default has uniformly been held effective to cut off the mortgagee's "legal" right to possession, and the courts in "title" states have been astute to find, from other provisions in the mortgage or from the circumstances of the case, an implied agreement that the mortgagor shall have possession until default even when there is no express agreement to that effect.[19] In "lien" states, on the other hand, the statutes prohibiting recovery of possession by the mortgagee frequently provide expressly that a contrary agreement between the parties shall be effective,[20] and the same result has been reached in several states without any express statutory provision to that effect.[21] And if the mortgagee actually goes into possession with the mortgagor's consent, or, even in many "lien" states, without such consent but under color of legal right, he becomes a "mortgagee in possession" entitled to remain in possession until the mortgage debt is paid.[22]

Several states (often termed "intermediate" states) have taken the position, either by decision or by statute, that the mortgagee, *qua* mortgagee, has no right to possession of the mortgaged premises prior to default, but that the mortgagee acquires a right to possession, *qua* mortgagee, when default occurs.[23] Although some of these states have been content to state the rule in terms of the right to possession, others, in an attempt to rationalize the rule, have said that until default the "legal title" is in the mortgagor.[24] No satisfactory reason is given for the involuntary transfer of the "legal title" upon default. It would seem preferable to inquire, not whether the metaphysical entity called "legal title" is in the mortgagor or the mortgagee at any particular time,[25] but whether it is desirable or undesirable to accord to the mortgagee, as a part of his security interest in the mortgaged property, the right to take possession at some time prior to foreclosure. If the question is posed in this fashion there is a good deal to be said in favor of permitting a mortgagee to take possession after his debtor has defaulted, and it is not surprising to find that in most states, whatever the theory of mortgages, the mortgagee can obtain possession after default either *qua* mortgagee or by virtue of an enforceable agreement giving him the right to possession upon default.

In New Jersey, however, the right of the mortgagee to obtain possession after default is now qualified. Pursuant to the 1994 New Jersey Supreme Court case of Chase v. Josephson,[26] a mortgagee, absent compliance with New Jersey's Anti-Eviction Act ("Act") cannot obtain possession against a residential tenant protected by the Act. Thus, where a residential tenant is in possession of all or a portion of the mortgaged premises in New Jersey, the mortgagee, if it seeks possession against the tenant, is relegated to a summary dispossess action in accordance with the Act or voluntary relinquishment of possession by the residential tenant (e.g., "cash for keys" or the like).[27]

In most of the "title" states, mortgage forms in common use expressly reserve to the mortgagor the right to possession until default, and the normal practice is to leave him in possession even in the absence of such a reservation. Moreover, as the late Professor Walsh has pointed out,

> It is now settled law in all of these states that the mortgagor, not the mortgagee, is the legal owner for purposes of attachment and execution, exactly as in New York and the other lien states. The widow of the mortgagor, not of the mortgagee, is entitled to dower in the mortgaged property. On the death of either party the land passes to the heir or devisee of the mortgagor subject to the mortgage as security, and the mortgage passes with the mortgage debt as personal property to the personal representative of the mortgagee. The states which continue to assert the common-law theory limit its application almost exclusively to the recovery of possession by the mortgagee in ejectment against third-party disseisors and against the mortgagor, and to assignments of mortgages, formal requirements of conveyances of land being necessary under the title theory of mortgages. It is now generally settled that the mortgagor may maintain ejectment or trespass against third persons, who are not permitted to set up the title of the mortgagee as a defense to such actions. It is usually stated that in the so-called "title theory" states the mortgagor is treated as owner at law as well as in equity in any case arising between either party to the mortgage and a third party, reserving the technical common-law doctrine of title to cases arising between the mortgagor and mortgagee or their successors, and the cases for the most part support this statement.[28]

There would appear to be no substantial differences in the standard forms of mortgage used in "title" and "lien" states based on the title-lien distinction, although local and regional differences certainly exist. It may well be, however, that the adoption of the "lien" theory has, in some jurisdictions, contributed to the practice of using "deeds of trust" or "security deeds" instead of ordinary mortgages. The use of such instruments in place of ordinary mortgages seems generally to reflect the desire of creditors to avoid troublesome (from their point of view) rules of mortgage law by casting the security transaction in a different form.[29] Thus, in Georgia, an ordinary mortgage does not give the mortgagee the right of possession but a "security deed" does, and hence the latter is the commoner form of security.[30] The "deed of trust" is preferred in at least ten jurisdictions[31] because it frees the creditor both from the ordinary requirements of foreclosure (since the theory is that the trustee in selling the property after default is not foreclosing the debtor's equity of redemption but is merely carrying out the terms of the trust) and from the usual statutory right to redeem from foreclosure sale. But, generally speaking, there is a tendency for legislatures and courts to abolish or minimize the differences between trust deed mortgages and ordinary mortgages insofar as they are used by individual (as opposed to corporate) mortgagors.[32]

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] See Durfee, Cas. Security 173.

[FN2] "Before the end of the 17th century, legislation in the province of Massachusetts Bay set up two novel procedures. (1) Mortgagee makes formal entry upon the land in the presence of witnesses, giving notice that he enters for the purpose of foreclosure, and foreclosure is the result unless redemption is made within three years. (2) The same result follows recovery of possession in a specialized form of the writ of entry (common law possessory action with statutory trimmings to fit it to the job of foreclosure) which has the advantage, as against entry without suit of settling conclusively the validity of the mortgage, the amount due, and some other issues." Durfee, Cas. Security 174, citing Acts and Resolves of the Province 356 (Act of 1698). The current Massachusetts statutes are Mass.Gen.Laws c. 244, §§ 1 to 10 (1932). Similar legislation is found in Hawaii, Maine, New Hampshire and Rhode Island. For a more extended discussion of foreclosure by entry or writ of entry, see 1 Glenn, Mortgages § 68; Osborne, Mortgages § 314; 4 Am.L.Prop. § 16.181; Walsh, Mortgages § 66; 10 Thompson, Real Prop. §§ 5131–5139 (1957 repl.). In Maine, there is foreclosure without taking possession, by publication or notice. Me.Rev.Stat.Ann. ch. 177, § 5 (1954); Osborne, Mortgages § 315; 4 Am.L.Prop. § 16.182.

[FN3] "Early in the 18th century, Pennsylvania legislation made a foreclosure proceeding out of scire facias, one of the extraordinary actions of the common law. The judgment finds the amount due, and the sheriff's sale under the execution has substantially the effect of a chancery foreclosure sale, something quite different from the effect of sheriff's sale under an ordinary money judgment—different and from the mortgagee's point of view, much better." Durfee, Cas. Security 174, citing 2 Stats. at Large 247 (Act of 1706). The statute is to be found in Pa.Stat.Ann. §§ 791 to 804 (Purdon's 1955). Scire facias was at one time at least the most common method of foreclosure in that state, although a note in 45 Dickinson L.Rev. (1940) states that it had been almost completely displaced by the speedier and less expensive action on the bond with judgment enforced by writ of fieri facias levied upon the property. In 1950 the statute relating to scire facias was suspended by rule of court, Pa.Rules of Civ.Proc. 1460, and mortgage foreclosure is now by action at law, Pa.Rules of Civ.Proc. 1141 to 1148. Scire facias is available in Delaware, Del.Code Ann. § 5061 (1953) (form of writ and simplified complaint may be found in Forms, 1p and 13 attached to Del.Sup.Ct. (Civ.) Rules); in Illinois, Ill.Rev.Stat. Ch. 95 §§ 18 to 22 (1959); and in Minnesota, Minn.Stat. § 581.12 (1957). But it has been little used in these states. It was formerly available in New Jersey, but it is no longer available here since the repeal of N.J.Rev.Stat.

(1937) 2:65-33 and -34 in 1952; see infra, § 27.7. See generally 1 Glenn, Mortgages § 76; Osborne, Mortgages § 316; 4 Am.L.Prop. § 16.183.

[FN4] Laws of the Colony of New York, 1774, Ch. 39, reprinted in 5 Colonial Laws N.Y. 687 (Lyon 1894)—also imposing restrictions on the exercise of powers of sale (sale at public auction after advertisement for six months). Early in the 19th century, Chancellor Lansing asserted that at the time of the act it was common practice to include powers of sale in mortgages and that "many estates were then held under such sales." He also stated: "This device appears of native growth, originating from the circumstances of this country, and, probably, principally from the disparity between the actual product and estimated value of real estate. This may have rendered necessary a more summary and less expensive mode of barring the equity of redemption, than that which had obtained through the medium of chancery, a desirable object." Bergen v. Bennett, 1 Cai.Cas. 1, 4 (N.Y.Ct. of Err.1804).

A parallel development took place in England, but as late as 1799 the effectiveness of sale under a power in barring the equity of redemption was still considered doubtful. See 1 Powell, Mortgages 13 ff. (1799). The earliest English decision holding the exercise of a power of sale effective to bar the equity of redemption appears to be Roberts v. Bozan, in a manuscript opinion by Lord Eldon in 1825. See 1 Glenn, Mortgages 612 n. 12; Osborne, Mortgages § 337 n. 6; 4 Am.L.Prop. 495 n. 9. See generally, on the history of powers of sale in mortgages, Maitland, Lectures on Equity 187–92 (2nd ed. 1936); 1 Glenn, Mortgages § 98.1; Osborne, Mortgages § 337; 4 Am.L.Prop. § 16.204; Walsh, Mortgages § 81. As to foreclosure by exercise of power of sale, see generally Osborne, Mortgages §§ 338–344; 4 Am.L.Prop. §§ 16.205–16.211; 3 Jones, Mortgages §§ 2285–2494.

In New York, sale by virtue of a power of sale in the mortgage is designated "Foreclosure by advertisement." N.Y. Real Prop.Law §§ 540 to 563; 15 Carmody-Wait, Cyc.N.Y.Practice c. 93 (1955).

[FN5] 2 Kilty, Laws of Maryland, Acts of 1785, Ch. 72, § 3, quoted in Durfee 175. Durfee notes that §§ 7 to 9 of the same chapter imposed regulations upon the conduct of the sale, and that "just a year earlier the legislature was still moving in the old groove, authorizing sale under peculiar conditions." Id. 175 n. 7. New Jersey did not legislatively authorize a judicial sale in all cases of chancery foreclosure until 1820. 1820 N.J. Laws, p. 99, § 8.

[FN6] See Durfee, Cas. Security 175 ("This development can't be dated with precision, but I venture the statement that in New York and Tennessee it came before the end of the 1700s."); Keigwin Cas. Mortgages 572 n. 1, stating that the practice was established at or shortly after the Revolutionary period (cited in Osborne, Mortgages 921 n. 28; 4 Am.L.Prop. 444 n. 2). The early New York cases are reviewed in Lansing v. Goelet, 9 Cow. 346 (N.Y.Ct. of Err.1827). For history of foreclosure and sale in New York, see Sutherland, Foreclosure and Sale—Some Suggestive Changes in New York Procedure, 22 Cornell L.Q. 216, 222–26 (1937).

[FN7] Hord v. James, 1 Tenn. 201 (1805), quoted in Durfee, Cas. Security 175, with the following comment: "The 'modern' books were not cited, and I can't find them." Id. 175 n. 8.

[FN8] Nelson & Whitman, 1 Real Estate Finance Law 580 3d. ed. 1993); Osborne, Mortgages § 318; 4 Am.L.Prop. § 16.185. See also 1 Glenn, Mortgages §§ 77–77.1.

[FN9] Nelson & Whitman, 1 Real Estate Finance Law 610 (3d. ed. 1993). These states are Arkansas, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Montana (advertisement and sale permitted), Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, South Carolina, Vermont and Wisconsin.

[FN10] Connecticut and Vermont. In Illinois, in a foreclosure action, if an agreement is entered into in open court by the owner of the property and the mortgagee, a decree is entered which vests the title in the mortgagee (akin to a strict foreclosure decree) without the necessity for sale and this precludes a deficiency judgment against the mortgagor. Ill.Rev.St. ch. 77 § 18d (1959). Other states may permit strict foreclosure in rare instances. Osborne, Mortgages §§ 312–313; 4 Am.L.Prop. §§ 16.179–16.180; 3 Jones, Mortgages §§ 1967, 1969, 1985; Hanna, Cas. Security 996 (3d ed. 1959); Tefft, The Myth of Strict Foreclosure, 4 U. of Chi.L.Rev. 577 (1937); Glenn, A Study in Strict Foreclosure, 29 Va.L.Rev. 519 (1943).

[FN11] These states include Alabama, Alaska, Arizona, California, Colorado, District of Columbia, Georgia, Guam, Hawaii, Idaho, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming. Nelson & Whitman, 1 Real Estate Finance Law 610 (3d. ed. 1993).

[FN12] As Osborne points out, "foreclosure by entry and continued possession, whether under legal process or by self-help, is strict foreclosure." Osborne, Mortgages 657; 4 Am.L.Prop. 439. But the term "strict foreclosure" is generally used to denote "the analogous method of strict foreclosure by equitable bill." Ibid.

"If a mortgage contains a power of sale, as ordinarily is the case [in Hawaii, Massachusetts, Maine, New Hampshire, and Rhode Island], entry for the purpose of foreclosure does not prevent the mortgagee foreclosing under the power. Indeed, it is common practice to make the required entry and recordation of memorandum or certificate before exercising the power in order to protect against possible defects in the foreclosure under the power of sale. And by the same token, a defective foreclosure by entry may be cured by a valid exercise of the power of sale." Ibid. In some of these states foreclosure by the exercise of a power of sale is recognized by statute. E.g., Hawaii Rev.Laws §§ 336-5 to 336-9 (1955); Mass.Ann.Laws ch. 244, §§ 14 to 17C. (1956); N.H.Rev.Stat.Ann. c. 479, § 25 (1955); R.I.Gen.Laws Ann. § 34:27-4 (1956). Foreclosure by action in equity is also permitted in some cases where special facts exist, thus where the owner of the mortgaged property is in the military service and is protected by the Soldiers and Sailors Civil Relief Act of 1940, as amended, 50 U.S.C.A. § 532(3), which permits no sale under a power of sale unless such sale is made by order of court and the sale approved by court. See Lynn Institution for Savings v. Taff, 314 Mass. 380, 50 N.E.2d 203 (1943).

[FN13] See, e.g., 1 Glenn, Mortgages §§ 28, 29, and 31; Osborne, Mortgages §§ 13–15; 4 Am.L.Prop. §§ 16.13–16.15.

[FN14] See Dunham, Mod.Real Est.Trans. 283 (2d ed. 1958); 1 Glenn, Mortgages 198; Walsh, Mortgages 23–24 (text and footnotes), 27; see also Durfee, Cas. Security 89–90.

[FN15] Dunham, Mod.Real Est.Trans. 355 (1st ed. 1952). See also Hanna, Cas. Security 661 n. 21 (3d ed. 1959) ("Particularly to be distrusted are deductions drawn without specific reference to authority in the specific state from the major premise that a state is a 'title' or 'lien' state."); McDougal, Book Review, 44 Yale L.J. 1278 (1935); Sturges and Clark, Legal Theory and Real Property Mortgages, 37 Yale L.J. 691 (1928). On the other side, see Osborne, Mortgages § 16; 4 Am.L.Prop. § 16.16.

[FN16] Osborne, Mortgages § 14; 4 Am.L.Prop. § 16.14.

[FN17] Id. § 15; 4 Am.L.Prop. § 16.15.

[FN18] Although a statute was enacted in South Carolina in 1791 providing that "no mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged, even after the time allotted for the payment of the money is elapsed, but the mortgagor shall be still deemed owner of the land" (Acts of 1791, p. 32; 5 Stats. at large 169, continued in force in almost identical language, S.C.Code (1952) § 45-51), New York was undoubtedly the leader in developing the "lien" theory. By 1826 New York court had taken the position that the mortgagee had no right to possession until default, since prior to default the mortgage was "a mere chattel, a security for money." Dickenson v. Jackson, 6 Cow. 147 (N.Y.Sup.Ct.1826). Then came the Revised Statutes of 1828, which provided (inter alia): "No action of ejectment shall hereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the mortgaged premises." 2 Rev.Stat. p. 312: Part III, Ch. V, Title I, § 57 (1828), now N.Y.Civ.Prac.Act § 991.

For an excellent discussion of the South Carolina and New York statutes, and the development of the "lien" theory in New York, see Durfee, Cas. Security, 43–53; 1 Glenn, Mortgages § 31.1; Lloyd, Mortgages—The Genesis of the Lien Theory, 32 Yale L.J. 233, 241 (1923). Cf. Osborne, Mortgages § 127; 4 Am.L.Prop. § 16.82; Walsh, Mortgages 21–25.

[FN19] See 1 Glenn, Mortgages 190 at n. 8, and cases cited; Osborne, Mortgages § 125 at nn. 14–15, and cases cited; 4 Am.L.Prop. 152, and cases cited; Walsh, Mortgages 91–92 at n. 5, and cases cited.

[FN20] See Ariz.Rev.Stat.Ann. § 33-703 (1956); Cal.Civ.Code Ann. § 2927 (West 1954); Ind.Ann.Stat. § 56-701 (1962); Iowa Code § 557.14 (1971); Kan.Gen.Stat.Ann. § 58-2301 (1972); Mont.Rev. Codes Ann. § 52.107 (1961); Neb.Rev.Stat. § 76-276 (1971); N.M.Stat.Ann. § 61-7-1 (1960); N.D.Century Code § 35-03-01.2 (1972); Ore.Rev.Stat. § 86.010 (1971); S.D.Code § 39.0209 (1939).

In Kansas, although the statute, permits an agreement giving the mortgagee the right to possession, it has been held that any agreement giving the mortgagee the right to possession during the statutory period for redemption after foreclosure is void. Capitol Bldg. & Loan Ass'n v. Ross, 134 Kan. 441, 7 P.2d 86 (1932). The North Dakota statute, provides that a mortgage shall not entitle the mortgagee to possession, "but after the execution of a mortgage, the mortgagor may agree to the change of possession without a new consideration."

A number of the statutes denying the mortgagee the right to possession do *not* expressly permit contrary agreements. See Colo.Rev.Stat.Ann. § 118-6-17 (1964); Fla.Stat. § 697.02 (1969); Idaho Code Ann. § 6-104 (1947); Mich.Comp.Laws Ann. § 600.2932, § 629.54 (1968); N.Y.Real Prop.Act & Proc.L. § 611 (McKinney 1963); S.C.Code § 45-51 (1962); Utah Code Ann. § 78-40-8 (1953); Wash.Rev.Code § 7.28.230 (1956); Wis.Stat. § 275.23 (1971). Minn.Stat.Ann. § 559.17 (Supp.1973), however, expressly validates an assignment by the mortgagor of rents and profits as added security for the debt, whether contained in the mortgage or in a separate instrument. In Michigan, assignments of rents and profits under trust mortgages are authorized by Mich.Comp.Laws Ann. §§ 554.211 to 554.213 (1967), and assignments of rents under leases on commercial or industrial property are authorized by Mich.Comp.Laws Ann. §§ 554.231 to 554.233 (1967). But an agreement giving the mortgagee the actual right to possession is probably not effective in Michigan. Such an agreement has been held ineffective in South Carolina, Minnesota, Oklahoma, and Washington. See Hall v. Hall, 41 S.C. 163, 167, 19 S.E. 305 (S.C.1894); Cullen v. Foote (Minnesota Loan & Trust Co.), 60 Minn. 6, 61 N.W. 818 (1895); Rives v. Mincks Hotel Co., 167 Okl. 500, 30 P.2d 911 (1934); Western Loan & Bldg. Co. v. Mifflin, 162 Wash. 33, 297 P. 743 (1931).

[FN21] A "contrary agreement" is apparently effective to give the mortgagee a right to possession in Kentucky, Texas, and Utah. See Newport & Cincinnati Bridge Co. v. Douglass, 75 Ky. 673, 705 (1877) (mortgagee no longer has "absolute right to possession" but may secure right to "rents, issues, and profits" by "express contract"); Duty v. Graham, 12 Tex. 427, 433 (1854) (mortgagor "should be entitled to possession, unless there were some special stipulation to the contrary"); Carlquist v. Coltharp, 67 Utah 514, 248 P. 481 (1926) ("mortgagor … is entitled to retain possession of the premises until the expiration of the time for redemption, unless the terms of the mortgage give the mortgagee the right of possession"). But cf. S.D.Comp.Laws § 44-8-7 (1967), which provides that, in the case of a mortgage on a homestead or adjacent property, any provision pledging, assigning, or transferring the right to possession or all or any part of the rental, crops, or proceeds of the property prior to expiration of the redemption period is "against public policy and unenforceable."

[FN22] See Osborne, Mortgages §§ 160–162; 4 Am.L.Prop. §§ 16.94–16.95; Walsh, Mortgages 97–100.

[FN23] Delaware, Illinois, Mississippi, Missouri, New Jersey, and Ohio have adopted this rule by decision (see Walsh, Mortgages 92 n. 6), and Massachusetts, by statute. See Mass.Gen.Laws c. 183, § 26 (1969). (Vermont formerly had a similar statute, originally enacted early in the 19th century but repealed in 1971.) But Massachusetts is still generally classified as a "title" state.

For discussion of the "intermediate" theory, see Osborne, Mortgages § 14; 4 Am.L.Prop. § 16.14. With respect to Massachusetts (and Vermont under former Vt.Stat.Ann. tit. 12, § 4772, repealed by 1971 NJ Sess. Law Serv. Ch 185, eff. Mar. 29, 1972), see 1 Glenn, Mortgages 190: "But it must be recognized that in those states the mortgagee's entry, whether for purposes of foreclosure or not, is by virtue of a confirmed 'title theory.' The entry does not serve to vest title in the mortgagee, for he already has it."

[FN24] See Kerr v. Lydecker, 51 Ohio St. 240, 248, 37 N.E. 267, 269, 23 L.R.A. 842 (1894), where the court said: "The mortgage being in equity, regarded as a mere security for the debt, the legal title to the mortgaged premises remains in the mortgagor as against all the world, except the mortgagee, and also against him until condition broken; but, after condition broken, the legal title, as between mortgagor and mortgagee, is vested in the mortgagee." This statement was quoted and applied in Bradfield v. Hale, 67 Ohio St. 316, 65 N.E. 1008 (1902). For other Ohio decisions, see Campbell, Cas. Mortgages 27 n. 3 (2d ed. 1939). It has been said, however, that Ohio, although catalogued as an intermediate theory state (like New Jersey), in reality conforms to the lien theory. See White, Ohio Theory of Mortgages, 3 U. of Cin.L.Rev. 405 (1929); Pugh, Some Peculiarities of the Ohio Law of Mortgages on Real Property, 4 U. of Cin.L.Rev. 297 (1930).

[FN25] Whether the mortgagee's security interest (i.e., the aggregate of rights, powers, privileges, and immunities which he possesses *qua* mortgagee with respect to the mortgaged premises) should be termed a “legal title” whenever he has the right to possession is a purely semantic question.

[FN26] Chase Manhattan Bank v. Josephson, 135 N.J. 209, 638 A.2d 1301 (1994).

[FN27] See generally infra, § 28.1.

[FN28] Walsh, Mortgages 25–26.

[FN29] See Durfee, Cas. Security 4–6; 39–40; Osborne, Mortgages §§ 17, 71; Hanna, Cas. Security 733–34 (3d ed. 1959).

[FN30] See 1 Glenn, Mortgages § 30; Powell, Actions for Land § 387 (1911). As to the form of the “security deed,” see Flick, Abstract and Title Practice § 1030 (1951); Modern Legal Forms § 5687.1 (1958).

[FN31] California, District of Columbia, Mississippi, Missouri, Nevada, North Carolina, Tennessee, Texas, Virginia and West Virginia. As to forms in these jurisdictions, see Flick, Abstract and Title Practice §§ 1021, 1028, 1054, 1055, 1060, 1065, 1079, 1081, 1084 and 1088 (1951). Also see, Modern Legal Forms: California § 5676.1; Colorado § 5678; District of Columbia § 5684; Illinois § 5693; Mississippi §§ 5717, 5718; Missouri § 5719; Montana § 5721.3; Oklahoma § 5735.1; Tennessee §§ 5743, 5743.1; Texas § 5744; Virginia §§ 5747, 5748; West Virginia §§ 5752, 5753; Wyoming § 5756.

[FN32] See, generally, 1 Glenn, Mortgages § 20; Osborne, Mortgages §§ 17, 70; 4 Am.L.Prop. §§ 16.17, 16.43; Bank of Italy Nat. Trust & Savings Ass'n v. Bentley, 217 Cal. 644, 20 P.2d 940 (1933), cert. den. 290 U.S. 659, 54 S.Ct. 74, 78 L.Ed. 571; Cormack & Irsfeld, Applications of the Distinction Between Mortgages and Trust Deeds in California, 26 Calif.L.Rev. 206, 207 (1938).

29 NJPRAC § 1.3

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
1. Introduction and Historical Background

§ 1.4. Development of mortgage law in New Jersey

West's Key Number Digest

West's Key Number Digest, Mortgages 1
West's Key Number Digest, Mortgages 320 to 590

Legal Encyclopedias

C.J.S., Mortgages §§ 2 to 6

C.J.S., Mortgages § 387

C.J.S., Mortgages § 391

C.J.S., Mortgages § 417

C.J.S., Mortgages § 473

C.J.S., Mortgages §§ 491 to 495

C.J.S., Mortgages § 497

C.J.S., Mortgages § 503

C.J.S., Mortgages §§ 505 to 508

C.J.S., Mortgages §§ 512 to 515

C.J.S., Mortgages § 518

C.J.S., Mortgages §§ 521 to 522

C.J.S., Mortgages § 524

C.J.S., Mortgages §§ 527 to 528

C.J.S., Mortgages §§ 531 to 536

C.J.S., Mortgages § 545

C.J.S., Mortgages §§ 551 to 559

C.J.S., Mortgages § 564

C.J.S., Mortgages §§ 568 to 579

C.J.S., Mortgages § 581

C.J.S., Mortgages § 602

C.J.S., Mortgages § 604

C.J.S., Mortgages § 606

C.J.S., Mortgages § 616

C.J.S., Mortgages §§ 619 to 621

C.J.S., Mortgages §§ 629 to 630

C.J.S., Mortgages §§ 633 to 634

C.J.S., Mortgages § 646

C.J.S., Mortgages §§ 652 to 659

C.J.S., Mortgages §§ 661 to 663

C.J.S., Mortgages § 677

C.J.S., Mortgages § 679

C.J.S., Mortgages §§ 689 to 691

C.J.S., Mortgages § 695

C.J.S., Mortgages §§ 700 to 703

C.J.S., Mortgages § 717

C.J.S., Mortgages §§ 720 to 721

C.J.S., Mortgages §§ 725 to 727

C.J.S., Mortgages §§ 736 to 738

C.J.S., Mortgages §§ 768 to 770

C.J.S., Mortgages § 772

C.J.S., Mortgages §§ 774 to 776

C.J.S., Mortgages § 789

C.J.S., Mortgages § 792

C.J.S., Mortgages §§ 799 to 853

C.J.S., Mortgages §§ 855 to 990

The jurisdiction and practice of the New Jersey Court of Chancery were derived wholly from the English Court. The practice of the English court was based upon the ordinances of Lord Bacon of 1620 and, as such, became the practice of the New Jersey Court of Chancery where not modified by legislation or by the New Jersey court itself. The Governor of New Jersey by ordinance of 1770 exercised the judicial powers of the Lord Chancellor of England with respect to the New Jersey Court of Chancery.[1]

The earliest case wherein the New Jersey courts undertook to modify the substantive law of mortgages as received from England appears to be Montgomery v. Bruere,[2] which has been deemed to establish the principle that "a widow is dowable of an equity of redemption in lands mortgaged by the husband before coverture." In the Montgomery case the old Supreme Court held to the contrary on the ground, *inter alia,* that the mortgagor was not seized "in law" during coverture; but Justice Southard, dissenting,[3] argued at length that the mortgagor should be deemed seized "in law" as well as "in equity." On writ of error the decision of the Supreme Court was reversed and—although it is impossible to be certain of the ground for reversal since the Court of Errors and Appeals furnished no written opinions—"it has always been understood that the opinion delivered by Justice Southard in … the Supreme Court, prevailed upon the writ of error,"[4] thus eliminating the anomalous distinction between dower and curtesy with respect to mortgaged land and bringing the law of New Jersey into line with that of New York and other states. The rule that there is dower in the equity of redemption is now well established in New Jersey and applies whether the husband acquired the land subject to the mortgage, or purchased the land and mortgaged it prior to marriage, or mortgaged the land after marriage with the wife joining in the mortgage.[5] In each case, of course, the wife's dower right is subject to the mortgage, and is extinguished by a proper foreclosure in which she is joined as a defendant. If the husband pays off the mortgage before or during foreclosure, or the equity of redemption is opened under N.J.S.A. 2A:50-4 (after judgment for a deficiency) and the husband redeems, the wife's dower right will attach to the land free of the mortgage.

The next step, and one of greater significance in modifying the English substantive law of mortgages, was taken by the Court of Errors and Appeals in Sanderson v. Price, at May Term, 1840. Although the case is unreported, a footnote appended to the dissenting opinion in a subsequent action between the same parties[6] makes the following assertion:

> (a) Although clearly against the common law rule, and contrary to the rule previously held in this state, the Court of Errors decided, in a case between the present parties, (Sanderson v. Den dem. Price, at May Term 1840) that ejectment will not lie by the mortgagee against the mortgagor until after default made.[7]

This new doctrine appears to have been recognized in Thompson v. Boyd,[8] although Sanderson v. Price was not cited, and it was stated without qualification in Shields v. Lozear,[9] where, however, Beasley, C.J., made statements as to the nature of a mortgage which, considered in the abstract, are difficult to reconcile.[10] A synthesis of the conflicting "legal" and "equitable" views as to the nature of a mortgage was later worked out in Kircher v. Schalk,[11] Woodside v. Adams,[12] and Blue v. Everett.[13]

In Kircher v. Schalk, the old Supreme Court held that a senior mortgagee could not replevy a fixture removed from the mortgaged premises by a junior mortgagee and sold to a third party. The senior mortgage was in default when the fixture was removed, but the senior mortgagee had neither taken possession of the premises nor begun any legal proceeding for the enforcement of his rights. Dixon, J., held that the senior mortgagee did not have the "general legal ownership" of the land even after default, and hence could not maintain replevin for the fixture. He said:

> … "The mortgage is regarded, not as a common law conveyance, on condition, but as a security for the debt, the legal estate being considered as subsisting only for that purpose." Shields v. Lozear, ….
>
> And there does not occur to me any use which, in a court of law, can be made of the legal estate of a mortgagee before foreclosure or entry, save the assertion and maintenance … of a right to the possession of the land, continuing until payment of the debt. For all other purposes, the mortgagor is the legal owner. The mortgagee cannot, therefore, … insist upon being legally entitled to a remedy, the enforcement of which pertains to the general legal ownership of the land.[14]

In Woodside v. Adams,[15] Depue, J., in a long dictum, concluded that the consequence of earlier decisions "is the separation, in legal contemplation, of the estate of the mortgagor from that of the mortgagee, and the recognition of an actual and distinct legal estate in each." He further stated that:

> The legal estate of the mortgagee, after breach of condition, has all the incidents of a common law title, for the purposes of ejectment; but its existence is … regarded as compatible with a legal estate at the same time, in the mortgagor. This legal estate of the mortgagor is capable of conveyance, mortgage, or sale under execution against him, at any time before his estate is divested by foreclosure. … The cases clearly recognize the equity of redemption of a mortgagor as a legal estate, and as such it must subsist until extinguished in the manner in which legal estates are by law extinguishable. Entry on the mortgaged premises does not work an extinguishment. It merely operates to transfer the possession to the mortgagee, with all the rights that actual possession confers, leaving the ultimate rights of the parties unaffected.[16]

In Blue v. Everett,[17] finally, the Court of Errors and Appeals made the sweeping statement that:

> Here the mortgage vests in the mortgagee no estate whatever in the land. It merely gives him a right of entry on breach of the condition …. Until such entry the mortgagor continues to be the legal owner of the land for all purposes.[18]

It would thus appear that New Jersey had, by the end of the nineteenth century, adopted the "lien" theory of the mortgage in substance, subject only to the qualification that the mortgagee, as mortgagee, is entitled to possession of the mortgaged property after default by the mortgagor. The present attitude of the New Jersey courts was perhaps best expressed by Justice Heher in Sears, Roebuck & Co. v. Camp,[19] as follows:

> While some of the early cases in this state subscribe to the English view, both as to the common law literalism and the equitable doctrine devised to relieve of its harshness, our courts, regarding more the essence than the form of the transaction, ultimately laid down the principle that the mortgage did not vest in the mortgagee an immediate estate in the lands, with the right of immediate possession, defeasible upon the payment of the mortgage money, but merely gave him a right of entry on breach of the condition, in which event his estate has all the incidents of a common law title, including the right of possession subject to the equity of redemption, and, meanwhile the mortgagor is treated as the owner of the lands for all purposes.[20]

The present New Jersey Supreme Court in Chase v. Josephson also summarized the rights of the mortgagor and mortgagee under New Jersey law as follows:

> The common law in New Jersey holds that a mortgagee is entitled to possession of mortgaged premises on default of the loan secured by the mortgage. [Citations omitted.] Except for that common-law entitlement, New Jersey follows a "lien" as opposed to a "title" theory of mortgages. Execution of the mortgage does not convey to the mortgagee title that is defeasible on payment of the secured debt, but rather confers on the mortgagee a lien on the property that secures the debt.[21]

The development in the United States of new methods of mortgage foreclosure has already been noted.

In New Jersey, chancery foreclosure without sale—now generally termed "strict" foreclosure—continued to be the usual equitable remedy of the mortgagee until 1820, a judicial sale being ordered "only in exceptional cases, as where there was an infant or absent party."[22] Legislation authorized a foreclosure by sale in all cases after 1820,[23] and this soon became the usual method of foreclosure, so much so that it is now, except for the "optional foreclosure procedure without sale"[24] pursuant to the Fair Foreclosure Act, effective on or after December 4, 1995, probably the only permissible method of foreclosing the mortgagor's equity of redemption.[25] By statute,[26] a foreclosure sale in New Jersey is permissive and not mandatory.

The validity of foreclosure by exercise of a private power of sale contained in the mortgage is well established under New Jersey common law[27] and never outlawed, although its validity today in New Jersey has been questioned.[28]

Despite pronouncements that judicial foreclosure with sale supplanted strict foreclosure because the former was more equitable,[29] it is clear from the author's research that foreclosure with sale became the almost exclusive method of judicial foreclosure in New Jersey after 1820 primarily because it gave mortgagees a more certain and universal remedy. The mortgagee's usual remedy for default under a mortgage prior to 1820 was ejectment at law not foreclosure in equity.[30]

Prior to the 1820 act[31] authorizing sales in all cases, foreclosure with sale was decreed by chancery for infant defendants and was also statutorily decreed under the 1772 and 1798 acts[32] for absent mortgagors who could not be served or refused to appear. The general Chancery Act of 1799 which provided *pro confesso* (default) relief against non-answering defendants was of little effect because the publication provisions against absent defendants were limited to cases where there were resident and nonresident defendants in the action and authorized service by publication only on nonresident defendants pursuant to a difficult out-of-state or country publication nearest to defendant's residence, which might not be known to the foreclosing mortgagee.[33]

Foreclosure with sale, however, under the 1820 act could be used against all classes of defendants, infants, absent defendants and the like. Furthermore, it was predictable and not subject to the discretionary redemption periods so prevalent under common law strict foreclosure, and, unlike common law strict foreclosure, vested legal title in the successful purchaser at the sale and the right to obtain possession thereby, making the remedy more suitable for the lien theory of mortgages which, as noted above, was adopted by New Jersey courts by the end of the nineteenth century.[34]

Common law strict mortgage foreclosure is still available in New Jersey in certain situations, mostly curative in nature, to extinguish junior interests, other than an ownership interest, inadvertently omitted from a prior conventional mortgage foreclosure and sale.[35]

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] Jones v. Davenport, 45 N.J.Eq. 77, 17 A. 570 (Ch.1889), reversed by 46 N.J.Eq. 237, 19 A. 22 (E. & A.1890). See also Koestler, History and Development of the Court of Chancery of New Jersey, 59 N.J.L.J. 17, 22 (1936); Brady and Rohm, 2 Special Proceedings in Chancery in N.J. 127–29 (Supp. 1946).

[FN2] Montgomery v. Bruere, 4 N.J.L. 260 (N.Y.Sup.Ct.1818), rev'd 5 N.J.L. 865 (E. & A.1820).

[FN3] 4 N.J.L. at 273–84.

[FN4] Nevius, J., in Thompson v. Boyd, 21 N.J.L. 58, 61 (Sup.Ct.1847), aff'd 22 N.J.L. 543 (E. & A.1849).

[FN5] Harrison v. Eldridge, 7 N.J.L. 392 (Sup.Ct.1821); Woodhull v. Reid, 16 N.J.L. 128 (Sup.Ct.1837); Hartshorne v. Hartshorne, 2 N.J.Eq. 349 (Ch.1840); Yeo v. Mercereau, 18 N.J.L. 387 (Sup.Ct.1842); Thompson v. Boyd, 21 N.J.L. 58 (Sup.Ct.1847) aff'd 22 N.J.L. 543 (E. & A.1849) (mortgage before marriage); Hinchman v. Stiles, 9 N.J.Eq. 361 (Ch.1853); id. 9 N.J.Eq. 454 (Ch.1853); Opdyke v. Bartles, 11 N.J.Eq. 133 (Ch.1856); Chiswell v. Morris, 14 N.J.Eq. 101 (Ch.1861); Eldridge v. Eldridge, 14 N.J.Eq. 195 (Ch.1862); Brown v. Richards, 17 N.J.Eq. 32 (Ch.1864); Wait's Ex'r v. Savage, 15 A. 225 (Ch.1888); Burnet v. Burnet, 46 N.J.Eq. 144, 18 A. 374 (E. & A.1889) (applying law of New York); Merselis v. Van Riper, 55 N.J.Eq. 618, 38 A. 196 (Ch.1897); Campbell v. Campbell, 140 N.J.Eq. 144, 53 A.2d 630 (Ch.1947); Jaffe v. Zilinski, 14 N.J. 24, 100 A.2d 887 (1953) (dictum) noted 9 Rutgers L.Rev. 238; N.J.S.A. 3A:35-1.

[FN6] Sanderson v. Price, 21 N.J.L. 637 (E. & A.1846), reversing the Supreme Court by a vote of 6 to 4. The majority filed no written opinion. The dissent was written by Carpenter, J.

[FN7] 21 N.J.L. at 646, n. (a).

[FN8] Thompson v. Boyd, 21 N.J.L. 58, 61 (Sup.Ct.1847), aff'd 22 N.J.L. 543 (E. & A.1849).

[FN9] Shields v. Lozear, 34 N.J.L. 496, 3 Am.St.Rep. 256 (E. & A.1869). Accord: Hinck v. Cohn, 86 N.J.L. 615, 92 A. 378 (E. & A.1914); Stewart v. Fairchild-Baldwin Co., 91 N.J.Eq. 86, 108 A. 301 (E. & A.1919); Del-New Co. v. James, 111 N.J.L. 157, 167 A. 747 (Sup.Ct.1933); Steadfast Bldg. & Loan

Ass'n v. Ploski, 12 N.J.Misc. 96, 171 A. 147 (Cir.Ct.1934).

[FN10] See 34 N.J.L. at 501: "In this state, it was held by this court that the right to enter was postponed, and the possession was in the mortgagor, until the condition was broken by default in the payment of the mortgage money. Sanderson v. Den, ex dem. Price, 1 Zab [21 N.J.L.] 646, note. With this modification of the rights of the mortgagee, as to the postponement of ability to obtain the possession of the mortgaged premises, the nature of the mortgage as a conveyance remains as it was at common law. … "

Cf. Id. at 503: "In the United States, the prevailing doctrine in courts of law, as well as in courts of equity, is to consider the mortgage as merely ancillary to the debt, and to hold that the estate of the mortgagee is annihilated by the extinguishment of the debt secured by it, after the day of payment named in the condition. … In fact, the latter conclusion will necessarily follow, whenever the mortgage is regarded not as a common law conveyance on condition, but as a security for the debt, the legal estate being considered as subsisting only for that purpose. In this state this is the generally received aspect in which a mortgage is regarded, as a mere security for the debt."

[FN11] Kircher v. Schalk, 39 N.J.L. 335 (Sup.Ct.1877).

[FN12] Woodside v. Adams, 40 N.J.L. 417 (Sup.Ct.1878).

[FN13] Blue v. Everett, 56 N.J.Eq. 455, 39 A. 765 (E. & A.1897).

[FN14] 39 N.J.L. at 337.

[FN15] Woodside v. Adams, 40 N.J.L. 417 (Sup.Ct.1878).

[FN16] 40 N.J.L. at 422–23.

[FN17] Blue v. Everett, 56 N.J.Eq. 455, 39 A. 765 (E. & A.1897).

[FN18] 56 N.J.Eq. at 457, 39 A. at 766.

[FN19] Roebuck & Co. v. Camp, 124 N.J.Eq. 403, 1 A.2d 425, 118 A.L.R. 762 (E. & A.1938).

[FN20] Id. at 408, 1 A.2d at 428, 118 A.L.R. at 765. Accord: Vineland Savings & Loan Ass'n v. Felmey, 12 N.J.Super. 384, 391, 79 A.2d 714, 717 (Ch.Div.1950); Feldman v. Urban Commercial, Inc., 64 N.J.Super. 364, 373, 165 A.2d 854, 860 (Ch.Div.1960). A second mortgage was said at an early date to create a "lien" both at law and in equity. Turrell v. Jackson, 39 N.J.L. 329, 333 (Sup.Ct.1877).

Accord: City Federal Savings & Loan Association v. Jacobs, 188 N.J.Super. 482, 486, 457 A.2d 1211, 1213 (App.Div.1983); McCorristin v. Salmon Signs, 244 N.J.Super. 503, 582 A.2d 1271 (App.Div.1990).

[FN21] Chase Manhattan Bank v. Josephson, 135 N.J. 209, 217–18, 638 A.2d 1301, 1305 (1994).

[FN22] See U.S. Savings Bank v. Schnitzer, 118 N.J.Eq. 584, 180 A. 624 (Ch.1935). For more extended discussion, see infra, § 27.1.

[FN23] 1820 N.J. Laws, p. 99, § 8.

[FN24] N.J.S.A. 2A:50-63.

[FN25] See U. S. Savings Bank v. Schnitzer, 118 N.J.Eq. 584, 180 A. 624 (Ch.1935); Surety Bldg. & Loan Ass'n v. Risack, 118 N.J.Eq. 425, 179 A. 680 (Ch.1935), noted 22 Va.L.Rev. 227 (1935). Cf. Sears, Roebuck & Co. v. Camp, 124 N.J.Eq. 403, 409–10, 1 A.2d 425, 428, 118 A.L.R. 762, 766 (E. & A.1938), noted 17 Chi-Kent L.Rev. 91 (1938), 23 Minn.L.Rev. 388 (1939). Cf. Also Pettingill v. Hubbell, 53 N.J.Eq. 584, 32 A. 76 (Ch.1895).

[FN26] N.J.S.A. 2A:50-36 provides—“the superior court may order a sale of the mortgaged premises.” Illustrative of the fact that foreclosure with sale was never deemed to be the exclusive mode of foreclosure in New Jersey was The Chancery Act of 1915, 1915 N.J. Laws ch. 116, p. 201, which contained annexed practice forms designated as Schedule B. Form No. 2 of this schedule was a Bill to Foreclose which contained a prayer for strict foreclosure (para. 3) and an alternative prayer for foreclosure with sale (para. 4). This form of bill of complaint also appeared in the Rules of the former Court of Chancery until its abolition in 1948. The 1937 statutory revision, R.S. 2:65-27 now N.J.S.A. 2A:50-36, contained the language of our present statute—“the superior court may order a sale of the mortgaged premises”—which is final recognition of the fact that foreclosure with sale was not statutorily deemed to be the exclusive mode of foreclosure in New Jersey.

[FN27] Clark v. Condit, 21 N.J.Eq. 322 (Ch.1867); McFadden v. May's Landing & E. H. C. R. Co., 49 N.J.Eq. 176, 22 A. 932 (Ch.1881); Mansfield v. Kraus, 113 N.J.Eq. 259, 166 A. 304 (Ch.1933), aff'd Mansfield v. Hammond, 117 N.J.Eq. 509, 176 A. 354 (E. & A.1934).

[FN28] New Jersey's deficiency action statutes, N.J.S.A. 2A:50-2 et seq., require a “judicial sale.” (See N.J.S.A. 2A:50-2 reference to “the sale in the foreclosure proceeding.”) New Jersey's Fair Foreclosure Act, N.J.S.A. 2A:50-53 et seq., requires a judicial foreclosure. See infra, § 24.12. Most mortgage instruments in New Jersey guarantee the mortgagor a judicial foreclosure on default.

[FN29] “And so, in consonance with equity's treatment of a mortgage as essentially a security for the payment of the debt, foreclosure by judicial sale supplanted strict foreclosure as the more equitable mode of effectuating the mutual rights of the mortgagor and mortgagee. This is upon the theory that the mortgagor, in the case of a sale, receives ‘the full value of the property by the payment of the debt and receipt of the surplus.’ Jones on Mortgages, sec. 1994. It is now a statutory requirement where a bond and mortgage are given for the same debt. 3 Comp.Stat.1910, p. 3420 et seq.; Rev.Stat.1937, 2:65-1 et seq.” Sears, Roebuck & Co. v. Camp, 23 Backes 403, 124 N.J.Eq. 403, 409, 1 A.2d 425, 428, 118 A.L.R. 762 (E. & A.1938).

[FN30] Bigelow, A Chapter in Chancery, 59 N.J.L.J. 193, 197 (1936).

[FN31] 1820 N.J. Laws, pp. 99, § 8. See infra, § 28.1 for a history of the 1820 and present statute.

[FN32] “An Act for making Process in Courts effectual against Mortgagors who abscond and cannot be served therewith, or who refuse to appear.” Allinson's Laws pp. 373–75. The act was revived in 1782, Wilson's Laws 316, and reenacted in 1798, Pat. L. 303 (1799).

[FN33] Pat.L. 430, §§ 15 and 16 (1800). "An Act respecting the Court of Chancery" passed June 13, 1799. See also Weinstein, Foreclosure and Deficiency Actions in New Jersey, 118 N.J.L.J. Index Page 809, 834 (December 11, 1986).

[FN34] See generally Weinstein, Foreclosure and Deficiency Actions in New Jersey, 118 N.J.L.J. Index Page 809, 834 (December 11, 1986).

[FN35] For a discussion of the situations in which strict foreclosure may still be used in New Jersey, see infra, § 27.1.

29 NJPRAC § 1.4

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
1. Introduction and Historical Background

§ 1.5. New Jersey's Fair Foreclosure Act

West's Key Number Digest

West's Key Number Digest, Mortgages 320 to 590

Legal Encyclopedias

C.J.S., Mortgages §§ 2 to 6

C.J.S., Mortgages § 387

C.J.S., Mortgages § 391

C.J.S., Mortgages § 417

C.J.S., Mortgages § 473

C.J.S., Mortgages §§ 491 to 495

C.J.S., Mortgages § 497

C.J.S., Mortgages § 503

C.J.S., Mortgages §§ 505 to 508

C.J.S., Mortgages §§ 512 to 515

C.J.S., Mortgages § 518

C.J.S., Mortgages §§ 521 to 522

C.J.S., Mortgages § 524

C.J.S., Mortgages §§ 527 to 528

C.J.S., Mortgages §§ 531 to 536

C.J.S., Mortgages § 545

C.J.S., Mortgages §§ 551 to 559

C.J.S., Mortgages § 564

C.J.S., Mortgages §§ 568 to 579

C.J.S., Mortgages § 581

C.J.S., Mortgages § 602

C.J.S., Mortgages § 604

C.J.S., Mortgages § 606

C.J.S., Mortgages § 616

C.J.S., Mortgages §§ 619 to 621

C.J.S., Mortgages §§ 629 to 630

C.J.S., Mortgages §§ 633 to 634

C.J.S., Mortgages § 646

C.J.S., Mortgages §§ 652 to 659

C.J.S., Mortgages §§ 661 to 663

C.J.S., Mortgages § 677

C.J.S., Mortgages § 679

C.J.S., Mortgages §§ 689 to 691

C.J.S., Mortgages § 695

C.J.S., Mortgages §§ 700 to 703

C.J.S., Mortgages § 717

C.J.S., Mortgages §§ 720 to 721

C.J.S., Mortgages §§ 725 to 727

C.J.S., Mortgages §§ 736 to 738

C.J.S., Mortgages §§ 768 to 770

C.J.S., Mortgages § 772

C.J.S., Mortgages §§ 774 to 776

C.J.S., Mortgages § 789

C.J.S., Mortgages § 792

C.J.S., Mortgages §§ 799 to 853

C.J.S., Mortgages §§ 855 to 990

An important development in New Jersey's foreclosure process came on December 4, 1995, with the passage of the “Fair Foreclosure Act” (“Act”).[1]

The Act is fundamentally arrearages legislation, applying to “residential mortgages” as that term is defined by the Act, and giving the residential mortgage debtor the right to prevent acceleration by paying the arrearages on the property and to “cure” a residential mortgage default, once default has occurred, up until judgment, in a conventional foreclosure with sale, and until the redemption order under the optional foreclosure procedure without sale.[2] The Act also establishes uniform sheriff sale procedures for all foreclosure sales,[3] a uniform sheriff's deed,[4] an optional foreclosure procedure without sale (strict foreclosure),[5] a partial payment[6] provision that a “lender may accept, partial payment of any sum owing and due without either party waiving any rights” and other provisions.[7]

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] N.J.S.A. 2A:50-53 et seq. See infra, Chapter 24 for a detailed discussion of the Fair Foreclosure Act.

[FN2] N.J.S.A. 2A:50-58.

[FN3] N.J.S.A. 2A:50-64.

[FN4] N.J.S.A. 2A:50-64(a)(6).

[FN5] N.J.S.A. 2A:50-63.

[FN6] N.J.S.A. 2A:50-67.

[FN7] See infra, Chapter 24 for a detailed discussion of the Fair Foreclosure Act.

29 NJPRAC § 1.5

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
1. Introduction and Historical Background

§ 1.6. Optional foreclosure procedure (strict foreclosure)

West's Key Number Digest

West's Key Number Digest, Mortgages 384

Legal Encyclopedias

C.J.S., Mortgages §§ 2 to 6

New Jersey's Fair Foreclosure Act (“Act”) establishes a statutory strict mortgage foreclosure remedy called the “optional procedure without sale.”[1] The remedy, which is patterned after common law strict foreclosure, can be used against residential mortgage debtors by residential lenders governed by the Fair Foreclosure Act where there is “no equity” in the property as defined by the Act, or the property has been “abandoned,” or the residential mortgage debtor has given the residential mortgage lender a “deed in lieu of foreclosure.”

Upon the lender's utilization of the optional procedure without sale and entry of judgment, the debt secured by the foreclosed mortgage is deemed satisfied and the lender may not institute a deficiency action against the debtor.[2]

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] N.J.S.A. 2A:50-63. See generally infra, Chapter 34 for a detailed discussion of the Optional Procedure.

[FN2] N.J.S.A. 2A:50-63(m).

29 NJPRAC § 1.6

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
1. Introduction and Historical Background

§ 1.7. Limitation on foreclosing mortgagee's right to possession against residential tenant

West's Key Number Digest

West's Key Number Digest, Mortgages 191

Legal Encyclopedias

C.J.S., Mortgages §§ 2 to 6

With the New Jersey Supreme Court's ruling in Chase Manhattan Bank v. Josephson,[1] a mortgagee's historic common law right in New Jersey to possession after default is no longer unqualified. In accordance with the Chase ruling, a foreclosing mortgagee cannot seek possession against a “residential” tenant protected by New Jersey's Anti-Eviction Act[2] (the “Act”), absent compliance with the Act or voluntary relinquishment of possession by the residential tenant.

It makes no difference whether the tenancy or lease predates or post-dates the mortgage being foreclosed, or whether the tenancy or lease is entered into after commencement of foreclosure, or whether the mortgagee or third party acquires title by purchase at the foreclosure sale. The possession of a residential tenant cannot be disturbed by a mortgagee, or any one else for that matter, unless specific statutory grounds for removal exist under the Act.

The Chase ruling illogically gives residential tenants greater possessory rights in the mortgaged premises than the owners themselves—pursuant to which all rights of the tenants stem. Historically, in colonial times, foreclosure was primarily effectuated in New Jersey, not by chancery proceeding, but by twenty years possession of the mortgaged premises by the mortgagee after default.[3] Barring the equity of redemption of the mortgagor in this fashion is still possible.[4] The Chase decision, to the extent that it prevents possession by the mortgagee after default, impugns this historic, now statutory right. Moreover, the decision may impair a mortgagee's ability to protect[5] the mortgaged property and prevent waste where a residential tenant is in possession of all or a part of the mortgaged premises, or to sell the property should the mortgagee acquire title at the foreclosure sale.

The legislative questions raised by the draftsmanship of the Anti-Eviction Act coupled with many ambiguities in the Chase opinion itself, make this perhaps the most controversial decision in New Jersey's mortgage and foreclosure history.[6]

With respect to any foreclosure on a "federally-related" mortgage loan (RESPA 12 U.S.C.A. § 2602) or on "any dwelling" or "residential" real property, federal law,[7] effective May 20, 2009, protects bona fide tenants and provides that such tenants must receive 90-days notice prior to being evicted.

Further, bona fide tenants must be allowed to stay in the foreclosed property through the end of their leases, unless (1) the new owner wants to occupy the property as a personal residence; or (2) there is no lease (month to month), or there is a lease but state law allows the lease to be terminated at any time upon notice. Even with respect to tenants who may be evicted, the tenants must be given 90-days notice by the "immediate successor in interest" before they can be evicted.

These provisions, which expire December 31, 2012,[8] do not affect termination requirements under any Federal or State subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.

There are also protections for Section 8 tenants in case of foreclosure.[9]

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] Chase Manhattan Bank v. Josephson, 135 N.J. 209, 638 A.2d 1301 (1994).

[FN2] N.J.S.A. 2A:18-61.1 et seq.

[FN3] Bigelow, "A Chapter in Chancery," 59 N.J.L.J. 193 (1936).

[FN4] N.J.S.A. 2A:50-21.

[FN5] See Nelson & Whitman, 1 Real Estate Finance Law § 1.5 (3d ed. 1993) arguing that the right to possession is important to a mortgagee because it entails the right to protect the property against waste and the right to collect rents and profits.

[FN6] See §§ 21.1, 21.2 and 21.3, infra.

[FN7] Pub.L. 111-22, Div. A, Title VII, § 702, May 20, 2009, 123 Stat. 1660. See Note under 12 U.S.C.A. § 5220.

[FN8] See Note under 42 U.S.C.A. § 1437f.

[FN9] 42 U.S.C.A. § 1437f(o)(7)(C),(F).

29 NJPRAC § 1.7

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
2. Mortgage Lending: The Institutional Framework

§ 2.1. Mortgage originators; Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRRE)

West's Key Number Digest

West's Key Number Digest, Banks and Banking 1 to 21
West's Key Number Digest, Banks and Banking 86 to 101
West's Key Number Digest, Banks and Banking 176 to 187
West's Key Number Digest, Banks and Banking 235
West's Key Number Digest, Banks and Banking 269
West's Key Number Digest, Banks and Banking 290
West's Key Number Digest, Banks and Banking 302
West's Key Number Digest, Banks and Banking 310
West's Key Number Digest, Banks and Banking 505
West's Key Number Digest, Brokers 3
West's Key Number Digest, Consumer Credit 3.1
West's Key Number Digest, Consumer Credit 30
West's Key Number Digest, Mortgages 219 to 270

Legal Encyclopedias

C.J.S., Banks and Banking §§ 2 to 31

C.J.S., Banks and Banking §§ 230 to 238

C.J.S., Banks and Banking §§ 240 to 249

C.J.S., Banks and Banking § 318

C.J.S., Banks and Banking §§ 459 to 477

C.J.S., Banks and Banking §§ 485 to 490

C.J.S., Banks and Banking §§ 543 to 550

C.J.S., Banks and Banking § 601

C.J.S., Banks and Banking § 606

C.J.S., Banks and Banking §§ 625 to 626

C.J.S., Banks and Banking § 646

C.J.S., Banks and Banking §§ 663 to 664

C.J.S., Banks and Banking § 673

C.J.S., Banks and Banking §§ 676 to 687

C.J.S., Banks and Banking §§ 690 to 694

C.J.S., Banks and Banking § 696

C.J.S., Banks and Banking §§ 699 to 705

C.J.S., Banks and Banking §§ 708 to 717

C.J.S., Banks and Banking §§ 732 to 733

C.J.S., Banks and Banking §§ 747 to 748

C.J.S., Brokers §§ 14 to 24

C.J.S., Interest and Usury; Consumer Credit §§ 280 to 293

C.J.S., Interest and Usury; Consumer Credit § 306

C.J.S., Interest and Usury; Consumer Credit §§ 317 to 318

C.J.S., Mortgages §§ 2 to 6

C.J.S., Mortgages § 340

C.J.S., Mortgages § 346

C.J.S., Mortgages §§ 349 to 350

C.J.S., Mortgages § 352

C.J.S., Mortgages § 354

C.J.S., Mortgages § 366

C.J.S., Mortgages § 368

C.J.S., Mortgages § 371

C.J.S., Mortgages § 374

C.J.S., Mortgages § 376

C.J.S., Mortgages § 378

C.J.S., Mortgages § 380

C.J.S., Mortgages § 494

C.J.S., Mortgages §§ 566 to 567

A. *An Overview*

The mortgage lending business is now dominated by private institutional lenders. The most important of these are savings and loan associations, commercial banks, savings banks, and life insurance companies. Most of these lenders are engaged in the "origination" of mortgage loans—i.e., receiving loan applications from prospective borrowers, making the necessary appraisals of the real estate offered as security, making the necessary credit and employment checks, seeing that the necessary documents (bond or note, mortgage or trust deed, "truth in lending" statement, etc.) are prepared and properly executed, and disbursing the loan to the borrower. The institution originating a mortgage loan may continue to hold it in its investment portfolio, collecting the periodic payments from the borrower and using the income flow thus generated in connection with its normal business activities. Alternatively, the originating mortgage lender may "sell the loan"—i.e., sell and assign the bond or note and mortgage or trust deed—to another institution which will then (usually) hold the mortgage loan until it is paid off. Some lending institutions acquire mortgage loans for their investment portfolios both by origination and by purchase; some acquire their mortgage loans principally by origination; and at least one, the mortgage banking company, originates and sells mortgage loans but does not retain them in a permanent investment portfolio. As of 1986, about 61 percent of the mortgage debt in the United States was held by private institutional lenders.[1] The rest was held by federally-supported agencies (about 23 percent) and by miscellaneous lenders, including individuals.[2] The 61 percent held by private institutional lenders was divided as follows: savings and loan associations, 27 percent; commercial banks, 18 percent; savings banks, 7 percent; and life insurance companies, 8 percent.[3]

B. *Savings and Loan Associations*

Traditionally, the primary role of savings and loan associations was to collect savings for investment in residential mortgage loans. Thus savings and loan associations were the largest source of "conventional" (i.e., not federally insured or guaranteed) mortgage loans for both single-family and multi-family housing. (As recently as 1988, savings and loan associations originated 49 percent of all 1 to 4-family mortgage loans.[4]) Savings and loan associations traditionally retained most of the mortgage loans they originated in their own portfolios.

Prior to 1933, savings and loan associations (also known as building and loan associations) were state chartered. To meet a need created by the onset of the Great Depression, which produced default on 40 percent of the nation's mortgages and the failure of a large proportion of the nation's state chartered savings and loan associations, Congress authorized the establishment of federally chartered savings and loan associations. Since that time, probably a majority of the nation's savings and loan associations have been federally chartered, although the number of state chartered savings and loan associations has greatly increased since the end of the Second World War.

Organizationally, savings and loan associations fall into two categories: stock associations and mutual associations. Stock associations are owned by their stockholders and are controlled by boards of directors elected by the stockholders, like other business corporations. Mutual associations have no capital stock; their equity is owned by their depositors, who are "members" of the association and who elect its board of directors. All of a mutual association's net income after provision of necessary reserves, is available for payment of dividends to depositors. A stock association, on the other hand, must pay its depositors "interest" at the rate set by its board of directors, and may then pay out its net profits as dividends to its stockholders. Until May 31, 1980, all federally chartered savings and loan associations were required to be mutual in form. At the present time, federally chartered savings and loan associations as well as state chartered savings and loan associations may be organized in either the mutual or the stock form.[5]

The savings and loan industry has changed radically during the period beginning in 1980. During the 1970's, when the interest rates on savings and loan deposits were limited by the Federal Reserve's Regulation Q, rising interest rates on alternative investments caused a massive outflow of deposits from the savings and loan associations. In an effort to alleviate this problem (which also affected commercial and savings banks, since they were subject to Regulation Q), Congress enacted the Depository Institutions Deregulation and Monetary Control Act of 1980.[6] This Act phased out Regulation Q interest rate caps, raised federal insurance coverage on all types of deposits from $40,000 to $100,000, and substantially enlarged the investment powers of federally chartered savings and loan associations. Thus the Federal Home Loan Bank Board (then the regulator of federal associations) was authorized to "permit a loan-to value ratio in excess of 90 per centum" on single-family and multi-family mortgage loans under certain conditions. Federal associations were authorized to invest, without limit, in state securities, home improvement and manufactured home loans; to invest up to 20 percent of assets in commercial real estate mortgage loans, secured or unsecured consumer loans, commercial paper, and corporate debt securities; and to invest up to 5 percent of their assets in unsecured education loans, unsecured construction loans, and a variety of other unsecured loans.[7]

The Garn-St. Germain Depository Institutions Act of 1982[8] authorized federally chartered savings and loan associations to invest up to 10 percent of their assets in commercial or agricultural mortgage loans; to increase their consumer loans from 20 percent to 30 percent of their assets; to make educational loans without any limit; to increase their total amount of unsecured loans from 20 percent to 30 percent of their assets; and to invest up to 100 percent of their assets in state or municipal securities.[9] This federal initiative stimulated demands by the state chartered savings and loan associations for similar deregulatory action by state legislatures. Many of the state legislatures responded to this demand by granting state chartered savings and loan associations investment powers even greater than those granted to federally chartered associations by the Garn-St. Germain Act.

Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRRE")

The Congressional and state legislative actions summarized in the preceding paragraphs led to the rapid growth of savings and loan associations all over the United States—especially in California and Texas. But as a result of inexperience outside the residential mortgage loan business, poor management, outright fraud, and inadequate supervision by regulatory agencies—well chronicled in the press—many savings and loan associations—especially in California and Texas—suffered enormous operating losses resulting either in insolvency or substantial reductions in net worth. These losses have been so large as to overwhelm the financial resources of the Federal Savings and Loan Insurance Corporation, which insured deposits in most of the failed or failing savings and loan associations.[10] When President Bush took office in January, 1989, his first order of business was to propose legislation to "bail-out" the savings and loan industry. This proposed legislation, after lengthy consideration and some revision, was enacted in August, 1989, as the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRRE").[11] Although the Act affects depository institutions other than savings and loan associations, its principal impact is on the latter. FIRRE is too lengthy to summarize but, for present purposes, its principal features may be summarized as follows:

1. The Federal Home Loan Bank Board, formerly empowered to charter and regulate all federally chartered savings and loan associations and to supervise the twelve district Federal Home Loan Banks is abolished;[12] power to regulate federally chartered savings and loan associations is transferred to the Director of a new Office of Thrift Supervision,[13] and the power to supervise the Federal Home Loan Banks is transferred to a new Federal Housing Finance Board.[14]

2. The Federal Savings and Loan Insurance Corporation, which formerly insured deposits in federally chartered savings and loan associations, and was directly controlled by the Federal Home Loan Bank Board, is abolished.[15] Its insurance functions will be transferred to the Federal Deposit Insurance Corporation, which formerly insured only commercial bank and savings bank deposits but will now insure both such deposits and deposits in savings and loan associations.[16] The insurance fund for commercial and savings banks, to be called the Bank Insurance Fund, will be kept separate from the insurance fund for savings and loan associations, to be called the Savings Association Fund.[17]

3. Limits on the investment powers of federally chartered savings and loan associations are spelled out in detail, i.e., the limits of the power of the Director of the Office of Thrift Supervision to authorize various kinds of investment by regulation are specified.[18] In some cases, these powers are the same as those under the Home Owners' Loan Act of 1933, as amended; in other cases these powers are reduced.[19] Until the Director issues new regulations, the old regulations issued by the Federal Home Loan Bank Board remain in force, subject to the new specific limits imposed by the FIRRE Act.

4. The FIRRE Act adds a new § 28 to the Federal Deposit Insurance Act which provides (a) that a state chartered savings and loan association may not engage in any type of activity, or in any activity in a given amount, that is not permissible for a federally chartered association, with certain exceptions; (b) that no savings and loan association (federally or state chartered) may "acquire or retain any corporate security not of investment grade" (i.e., "junk bonds"), subject to certain exceptions.[20]

State chartered savings and loan associations are subject to regulation by both the Director of the Office of Thrift Supervision and the FDIC,[21] at the federal level, as well as by state regulatory agencies. In New Jersey, the state regulatory agency is the New Jersey Department of Banking, headed by the Commissioner of Banking.[22] The Commissioner must "visit and examine every State association at least once every 2 years, or oftener if deemed expedient," without any exception for associations formerly insured and examined by the FSLIC,[23] which will in the future be examined by the new federal Office of Thrift Supervision.

Federally chartered savings and loan associations and most state chartered savings and loan associations are subject to the Home Mortgage Loan Disclosure Act of 1975,[24] which requires disclosure of information necessary for a determination whether such associations are engaged in "red-lining" when they make mortgage loans in metropolitan statistical areas.[25] "Red-lining" is the practice, on the part of mortgage lending institutions, of refusing to make mortgage loans in designated portions of urban areas. The 1977 New Jersey "anti-redlining" statute[26] contains disclosure requirements similar to (but more extensive than) those in the 1975 federal statute and, in addition, expressly forbids "redlining" and provides penalties for violating the 1977 statute.

New Jersey regulations establishing procedures to be employed by the New Jersey commissioner of banking and other state administrative officials in enforcing provisions of the New Jersey antiredlining law were held in-valid as applied to national banks.[27]

A recently enacted New Jersey statute authorizes conversion of state-chartered savings and loan associations into state-chartered savings banks.[28]

C. *Savings Banks*

Until 1978 all savings banks were state chartered, since there was no provision for issuance of federal charters to savings banks. In 1978, however, Congress authorized the conversion of state chartered mutual savings banks into federally chartered banks;[29] and in 1982 the Garn-St. Germain Depository Institutions Act authorized issuance of *de novo* federal charters to savings banks.[30] Most savings banks are still state chartered, however; and a majority of savings banks are still located in the northeastern part of the United States, especially in New York and Massachusetts.

Until recently, savings banks were always organized in the mutual form. Currently, however, both federally chartered savings banks and, in some states (including New Jersey), state chartered savings banks may be organized in either the mutual or the stock form.[31]

In New Jersey, state chartered savings banks are governed by various provisions of the Banking Act of 1948, as amended,[32] which vests regulatory authority in the Department of Banking and Insurance, headed by the Commissioner of Banking and Insurance. Some state chartered savings banks (included New Jersey savings banks) are members of the Federal Home Loan Bank System,[33] which gives them access to the credit facilities of the system and now subjects them, as well as federally chartered savings banks, to regulation by the new Office of Thrift Supervision, which replaces the former Federal Home Loan Bank Board (now abolished).

The powers of federally chartered savings and loan associations and mutual savings banks are identical with respect to making either first or junior mortgage loans.[34] The powers of New Jersey chartered savings and loan associations and savings banks are identical with respect to making junior mortgage loans under the Secondary Mortgage Loan Act.[35]

New Jersey's savings banks are, of course, subject to the New Jersey “anti-redlining” statute of 1977[36] and, when they make “federally related” mortgage loans, to the federal Home Mortgage Disclosure Act of 1975.[37] Both of these “anti-redlining” statutes are discussed above in connection with regulation of savings and loan associations.

A recently enacted New Jersey statute authorizes conversion of state-chartered savings banks into state-chartered savings and loan associations.[38]

D. *Commercial Banks*

In recent years commercial banks, which have traditionally had much broader authority as to permissible loans and investments than either savings and loan associations or savings banks, have substantially increased their mortgage lending activities. Because of the nature of their liabilities—mainly demand rather than time deposits—commercial banks prior to 1960 limited themselves primarily to short-term investments rather than long-term investments such as mortgage loans. But the expansion of time deposits in the form of savings accounts and certificates of deposit, together with widespread trusteeship of pension funds, has allowed commercial banks to participate more significantly in the mortgage lending business. Commercial banks now invest heavily in non-residential mortgage loans and, nationwide, they are the second largest investors in mortgage loans on one-to four-family homes. Home mortgage loans by commercial banks are mostly “conventional” rather than federally insured or guaranteed. Commercial banks are also, nationwide, the major source of short-term construction loans, which are practically always secured by mortgages. Commercial banks originate many long-term mortgage loans for their own investment portfolios; they also originate many mortgage loans which are later sold and assigned to "secondary market" institutions, in which case the bank usually continues to "service" the mortgage (i.e., receives mortgage payments, keeps accounts, maintains escrow funds, pays real estate taxes and insurance from the escrow funds, etc.). And commercial banks supply a good deal of short-term credit to mortgage banking companies which, in turn, originate, sell, and "service" mortgage loans.

Commercial banks are invariably organized as capital stock companies. They may be chartered either by the state or the federal government.

The most complex system of regulation of financial institutions in the United States is undoubtedly that which covers commercial banks. Three federal agencies are directly involved in commercial bank regulation: the Comptroller of the Currency, a division of the Treasury Department; the Board of Governors of the Federal Reserve System, an independent agency created to supervise the twelve Federal Reserve Banks which serve as a source of credit for "member" commercial banks; and the Federal Deposit Insurance Corporation (FDIC), which insures depositors in commercial banks against loss. Commercial banks may be chartered either by the federal government or by the states. All federally chartered banks (called "national banks") are required to be members of the Federal Reserve System and to have their deposits insured by the FDIC.[39] State chartered banks, on the other hand, may affiliate with either the Federal Reserve System or the FDIC; they are not required by law to do so, although most of them have in fact obtained FDIC insurance coverage. Both the Federal Reserve Board and the FDIC regulate various aspects of their members' activities. At the same time, the Comptroller of the Currency and the state banking agencies regulate "national banks"[40] and state banks, respectively. In New Jersey, state chartered commercial banks are governed by various provisions of the Banking Act of 1948, as amended,[41] and are under the jurisdiction of the Department of Banking, headed by the Commissioner of Banking. Thus a state chartered bank may, in New Jersey, be subject to several regulatory agencies for various phases of its operations. However, state chartered banks, whether or not they are Federal Reserve members or FDIC-insured, are regulated only by state law in their mortgage lending activities. Even "national banks" are not wholly free from the influence of state banking laws and regulations; e.g., a "national bank" is authorized to establish branches only to the extent permitted by state banking laws.[42]

Under the National Bank Act, a national bank's mortgage business, whether conducted by the bank itself or through the bank's operating subsidiary—even if the subsidiary is state chartered entity such as a state chartered mortgage company—is subject to superintendence of the Office of the Comptroller (OCC), and not to the licensing, reporting, and visitorial regimes of the states in which the subsidiary operates.[42.01]

Prior to the Garn-St. Germain Depository Institutions Act of 1982,[43] national bank mortgage lending was subject to restrictions contained in the Federal Reserve Act.[44] The 1982 Act eliminated all statutory lending restrictions,[45] and the Office of the Comptroller of the Currency amended its regulations so as to leave national banks substantially free of real estate lending restrictions. Since 1981, state chartered New Jersey commercial banks have been free to make loans on the security of either first or junior mortgages on realty, subject to the same restrictions applicable to mortgage lending by savings banks and savings and loan associations, all of which are empowered to make "secondary mortgage loans"[46] as well as first mortgage loans.

New Jersey commercial banks, like state chartered savings and loan associations and commercial banks (as to "federally related" mortgage loans) are subject to the federal Home Mortgage Loan Disclosure Act of 1975,[

47] as well as the 1977 New Jersey "anti-redlining" act.[48]

E. *Life Insurance Companies*

Although life insurance companies are not "depository institutions" like savings and loan associations, savings banks, and commercial banks, they generate a steady and sizeable inflow of funds in the form of insurance premiums, which must be invested in order to produce the reserves necessary to pay insurance claims. Life insurance companies are generally authorized by applicable state statutes and regulations to invest in sale-leaseback transactions, leasehold mortgages, and other types of real estate transactions as well as traditional mortgage loans. When they do invest in traditional mortgages, they prefer large, long-term mortgages. The percentage of total mortgage loans in the United States held by life insurance companies has steadily declined in the last twenty years and now amounts to only 8 percent of the total mortgage debt held by private institutional lenders. Life insurance companies originate mortgage loans on nonresidential and multi-family residential developments, but rarely originate mortgage loans on one-to four-family homes. Life insurance companies also commit large sums for purchase of large blocks of mortgages originated by mortgage banking companies.

Life insurance companies, like depository institutions, may be organized either as stock companies or as mutual companies. A majority are stock companies, but the mutual companies have more than half the assets of all American life insurance companies. Life insurance companies are regulated only by state agencies. In New Jersey, the regulatory agency is the Department of Banking and Insurance, headed by the Commissioner of Banking and Insurance.[49]

F. *Mortgage Banking Companies*

Mortgage banking companies (also simply called mortgage companies) were almost unknown prior to World War II. They developed in response to the need for intermediaries between some kinds of institutional mortgage lenders and home builders and buyers after World War II. The largest part of the business of mortgage companies has traditionally been the origination of FHA insured and VA guaranteed mortgage loans for sale to institutional lenders, especially life insurance companies. However, due to the recent growth of private mortgage insurance companies, mortgage companies are increasingly expanding their activities into the field of "conventional" mortgage loans. The mortgage origination business of mortgage companies is financed by their equity capital and by short-term loans from commercial banks. Commercial banks often supply short-term funds under a "warehousing" agreement whereby the mortgage company obtains a revolving line of credit from the bank and as individual mortgage loans are closed, the mortgage company pledges the mortgages as collateral security with the bank, which holds the mortgages for eventual sale and reassignment to long-term lenders. All the mortgages pledged (or "warehoused") with the bank stand as security for all short-term loans outstanding to the mortgage company at any given time. Mortgage companies generally "service" the mortgage loans they originate, after sale to a long-term mortgage lender. Mortgage companies typically solicit commitments from large institutional lenders, such as life insurance companies, to purchase large blocks of mortgages; they also make a good many land development and construction loans. Their income is derived from borrower fees, servicing fees, sales of mortgages, land development and construction loans, standby loan commitment fees, and the like.

In 1997, the "Mortgage Bankers and Brokers Act,"[50] enacted in 1981, was repealed and replaced with the "New Jersey Licensed Lenders Act."[51] On May 4, 2009, the "New Jersey Residential Mortgage Lending Act,"[52] was enacted, P.L.2009, c. 53, N.J.S.A. 17:11C-51 et seq., which repealed many of the sections of the "New Jersey Licensed Lenders Act,"[53] — effectively taking over the licensing and regulation of the business practices of residential mortgage lenders, brokers, and mortgage loan originators in New Jersey—and establishing comprehensive licensing and regulatory controls,[54] inter alia, for "residential mortgage lenders" and “residential mortgage brokers” *(*previously licensed as mortgage bankers, correspondent mortgage bankers and mortgage brokers*)*, and secondary lenders in the secondary mortgage loan business and mortgage loan originators (previously registered in this State as mortgage solicitors).

A state chartered mortgage banking company, if it is a subsidiary of a national bank, is subject to superintendence of the Office of the Comptroller (OCC), and not to the licensing, reporting, and visitorial regimes of the states in which the subsidiary operates.[59.01]

In Watters v. Wachovia Bank, N.A.,[59.02] Wachovia Bank N.A., a federally chartered bank, and its subsidiary, Wachovia Mortgage Corporation, a state-chartered mortgage company licensed to do business in Michigan, brought suit against the Commissioner of the Michigan Office of Insurance and Financial Services seeking relief from state registration and inspection requirements based on preemption of the National Bank Act. The U.S. Supreme Court affirmed the Sixth Circuit Court of Appeals and held that because Wachovia Mortgage Corporation was an operating subsidiary of a national bank, Michigan's registration and inspection requirements were preempted.

Federally chartered banks are subject to state laws of general application in their daily business to the extent that such laws do not conflict with the letter or the general purposes of the National Bank Act. States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers.

In 1984 the New Jersey Real Estate Commission ruled that a real estate broker who will be receiving a commission from the seller for negotiating the sale is not prohibited by N.J.S.A. 45:15-17(i) from also earning a fee for assisting the buyer in obtaining the necessary financing. N.J.S.A. 45:15-17(i)[60] prohibits “[c]ollecting a commission as a real estate broker in a transaction, when at the same time representing either party in a transaction in a different capacity for a consideration.”

The Commission's ruling was reversed by the Appellate Division in Mortgage Bankers Ass'n v. New Jersey Real Estate Comm'n,[61] holding that double compensation is prohibited even when the real estate broker is also licensed as a mortgage banker under the 1981 Act.

The Supreme Court reversed the Appellate Division's judgment and remanded the case “to both the Commissioner of Banking and the Real Estate Commission to hold joint hearings.”[62] This disposition was grounded (1) on the fact that “the record before the Commission in this case does not adequately reflect the wide variety of business arrangements through which licensed real estate brokers may participate in both a real estate sale and the mortgage transaction essential to its consummation”[63]; and (2) on the fact that “the Commissioner of Banking could address the very issues involved in this proceeding by issuing regulations pursuant to the Mortgage Bankers and Brokers Act.”[64] The Supreme Court also said, “It would indeed be anomalous for the Real Estate Commission and the Commissioner of Banking to act inconsistently” as to the issues raised by the case.[65]

G. “New Jersey Residential Mortgage Lending Act”

The “New Jersey Residential Mortgage Lending Act,”[66] effective May 4, 2009, supplanted the “New Jersey Licensed Lenders Act,”[66.01] (repealing many sections)[66.02] as to the licensing and regulation of the business practices of “residential mortgage lenders” and “residential mortgage brokers” *(*previously licensed as mortgage bankers, correspondent mortgage bankers and mortgage brokers*)*, and secondary lenders in the secondary mortgage loan business and mortgage loan originators (previously registered in this State as mortgage solicitors). See infra § 3.11.

The intent, in part, of the "New Jersey Residential Mortgage Lending Act," is to protect consumers seeking mortgage loans and to ensure that the mortgage lending industry operates without unfair, deceptive, and fraudulent practices by establishing, in coordination with the provisions of the federal "Secure and Fair Enforcement for Mortgage Licensing Act of 2008" (SAFE) and the Nationwide Mortgage Licensing System and Registry, a revised system of licensing, supervision and enforcement, and providing the Department of Banking and Insurance broad administrative authority to oversee the operation of the mortgage lending industry.[66.03]

GG. Market Rate Consumer Loan Act

The Market Rate Consumer Loan Act permits lenders (a banking institution as defined in N.J.S.A. 17:9A-1, a federally chartered savings bank, or an association as defined in N.J.S.A. 17:12B-5) to offer consumers variable interest rate closed-end loans and variable interest rate revolving credit plans. The lender must give the borrower the benefit of a decline in interest rates and has the option of taking advantage of an increase in interest rates. The lender is not required to offer revolving credit plans and closed-end consumer credit pursuant to the act. The lender may also extend credit in any other manner permitted by law. It contains many consumer protection provisions.[66.04]

The Appellate Division in Glukowsky v. Equity One, Inc.,[66.05] ruled that a "mortgage banker" under the New Jersey Licensed Lenders Act was not a "lender" within the meaning of the Market Rate Consumer Loan Act and therefore not subject to its prohibitions.

H. *Alternative Mortgage Transaction Parity Act[67]*

The purpose of the statute is to eliminate the discriminatory impact that state regulations have upon nonfederally chartered housing creditors and provide them with parity with federally chartered institutions by authorizing all housing creditors to make, purchase, and enforce alternative mortgage transactions[68] so long as the transactions are in conformity with the regulations issued by the federal agencies.[69]

The Parity Act expressly preempts state laws which prohibit alternative mortgage transactions, it provides—"[a]n alternative mortgage transaction may be made by a *housing creditor*[70] in accordance with this section, notwithstanding any State constitution, law or regulation."[71] However, in order to engage in alternative mortgage transactions and to reap the benefits of the Parity Act's preemption, state housing creditors must comply with the OTS's [Office of Thrift Supervision][72] regulations governing federal savings and loan associations.[73]

State banks may therefore follow the regulations of the Comptroller of the Currency, state credit unions may follow NCUA regulations and all other lenders, including savings and loan associations and mortgage bankers may lend under the rules of the Federal Home Loan Bank Board (now the Office of Thrift Supervision).[74]

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] G. Nelson & D. Whitman, Real Estate Finance Law 746 (2nd ed. 1985).

[FN2] Ibid.

[FN3] Id. at 747.

[FN4] Financial Institutions Reform, Recovery and Enforcement Act of 1989, Legislative History, 6 U.S.Code Cong. & Admin.News Sept. 1989, p. 87. The following brief summary of the history of savings and loan associations is drawn from the same source, pp. 88–97.

[FN5] 12 U.S.C.A. §§ 1462(d), 1464(a) and (b)(1)(A); N.J.S.A. 17:12B-5(1), (3), and 17:12B-244.

[FN6] 1980 Pub. L. No. 96-221, amending various parts of 12 U.S.C.A. ch. 12 (Home Owners' Loan Act of 1933).

[FN7] 12 U.S.C.A. § 1464(c)(1) and (2), as amended by 1980 Pub. L. No. 96-221.

[FN8] 1982 Pub. L. No. 97-320, amending various parts of the Home Owners' Loan Act of 1933, 12 U.S.C.A. ch. 12.

[FN9] 12 U.S.C.A. §§ 1464(c)(1), (2) and (3), as amended by 1982 Pub. L. No. 97-320.

[FN10] Financial Institutions Reform, Recovery and Enforcement Act of 1989, Legislative History, 6 U.S.Code Cong. & Admin.News Sept. 1989, pp. 93 to 103.

[FN11] 1989 Pub. L. No. 101-73, 103 Stat. 183 through 103 Stat. 553, amending, inter alia, the Federal Deposit Insurance Act, 12 U.S.C.A. §§ 1811 et seq.; the Home Owners' Loan Act of 1933, 12 U.S.C.A. §§ 1461 et seq.; and the Federal Home Loan Bank Act, 12 U.S.C.A. §§ 1421 et seq. Hereafter the 1989 Act will be referred to as the FIRRE Act.

[FN12] FIRRE Act § 401(a)(2) and § 703, 12 U.S.C.A. § 1437 note.

[FN13] FIRRE Act §§ 301, 307. Both sections are part of Title III, which largely rewrote the Home Owners Loan Act of 1933 and retitled it the "Home Owners' Loan Act."

[FN14] FIRRE Act § 702(a), amending § 2 of the Federal Home Loan Bank Act by adding new §§ 2A and 2B, 12 U.S.C.A. § 1422(a) and (b).

[FN15] FIRRE Act § 401(a)(1), 12 U.S.C.A. § 1437 note.

[FN16] FIRRE Act § 211, amending 12 U.S.C.A. § 1821(a).

[FN17] Ibid.

[FN18] FIRRE Act § 301, adding a new 12 U.S.C.A. § 1464.

[FN19] E.g., nonresidential real estate loans may not exceed 400 percent of an association's "capital." Unfortunately, it is not clear what "capital" means in this context. FIRRE Act § 301, defines three different kinds of "capital" requirements: (a) a 3 percent "leverage" limit; (b) a 1.5 percent "tangible capital" requirement; and (c) a "risk-based capital" requirement, which is not clearly defined.

[FN20] FIRRE Act § 222, adding a new § 28 to the Federal Deposit Insurance Act, 12 U.S.C.A. § 1831e.

[FN21] Supra note 19.

[FN22] N.J.S.A. 17:12B-1 et seq.

[FN23] N.J.S.A. 17:12B-172.

[FN24] 12 U.S.C.A. §§ 2801 et seq.

[FN25] 12 U.S.C.A. § 2804.

[FN26] N.J.S.A. 17:16F-1 et seq. An Act to prohibit discrimination in mortgage lending, and to require depository institutions to report certain information regarding mortgage loans to the Commissioner of Banking and to the public, and supplementing Title 17 of the Revised Statutes. 1977 N.J. Laws ch. 1.

[FN27] National State Bank, Elizabeth, N. J. v. Long, 469 F.Supp. 1068 (D.C.N.J.1979).

[FN28] 1991 N.J. Laws ch. 42, adding new N.J.S.A. 17:16M-1 et seq.

[FN29] 1978 Pub. L. No. 95-630, § 1202, amending 12 U.S.C.A. § 1464(a)(1).

[FN30] 1982 Pub. L. No. 97-320, further amending 12 U.S.C.A. § 1464(a). Under FIRRE § 301, amending 12 U.S.C.A. § 1462, "federal savings association" is defined so as to include both federally chartered savings associations and federally chartered savings banks.

[FN31] 12 U.S.C.A. § 1464(b); N.J.S.A. 17:9-7 to 17:9-17.

[FN32] N.J.S.A. 17:9A-1 et seq.

[FN33] 12 U.S.C.A. § 1464(a), as amended by FIRRE Act § 704, 1989 Pub. L. No. 101-73 makes any state chartered savings bank as well as any state chartered savings and loan association eligible for membership in the Federal Home Loan Bank System.

[FN34] 12 U.S.C.A. § 1464(d), as amended by FIRRE Act § 302. 12 U.S.C.A. § 1462, as amended FIRRE Act § 302, defines "federal savings association" so as to include both federally chartered savings and loan associations and federally chartered savings banks.

[FN35] N.J.S.A. 17:12B-5, 17:12B-155, 17:9A-1 and 17:9A-24.

[FN36] N.J.S.A. 17:16F-1 et seq.

[FN37] 12 U.S.C.A. §§ 2801 et seq.

[FN38] 1991 N.J. Laws ch. 42, adding new N.J.S.A. 17:16M-1 et seq.

[FN39] The Federal Reserve System legislation is contained in 12 U.S.C.A. §§ 221 et seq. The Federal Deposit Insurance Corporation legislation is contained in 12 U.S.C.A. §§ 1811 et seq.

[FN40] The National Bank legislation is contained in 12 U.S.C.A. §§ 21 et seq.

[FN41] N.J.S.A. 17:9A-1 et seq. Most of the provisions of the Banking Act apply to both commercial banks and savings banks.

[FN42] 12 U.S.C.A. § 36.

[FN42.01] Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 167 L. Ed. 2d 389 (U.S. 2007).

[FN43] 1982 Pub. L. No. 97-320.

[FN44] Former 12 U.S.C.A. § 371.

[FN45] 12 U.S.C.A. § 371, as amended by 1982 Pub. L. No. 97-320.

[FN46] For a discussion of secondary mortgage loans, see infra, § 3.11.

[FN47] 12 U.S.C.A. §§ 2801 et seq.

[FN48] N.J.S.A. 17:16F-1 et seq.

[FN49] N.J.S.A. 17:1-1 et seq. The substantive statutory provisions with respect to life insurance are collected in the Life and Health Insurance Code, N.J.S.A. 17B:1-1 et seq. Life insurance company investments are dealt with in N.J.S.A. 17B:20-1 to 17B:20-8.

[FN50] N.J.S.A. 17:11B-1 to 17:11B-20. Repealed by 1996 N.J. Laws ch. 157, Sec. 55, eff. July 1, 1997.

[FN51] N.J.S.A. 17:11C-1 et seq.

[FN52] N.J.S.A. 17:11C-51 et seq.

[FN53] Repealed under the "New Jersey Residential Mortgage Lending Act"—as of July 31, 2010—are: N.J.S.A. 17:11C-4-5 (exemptions), 17:11C-13-15 (bonds, tangible net worth, liquid asset requirements), 17:11C-20 (false misleading advertising), 17:11C-22-31 (prohibited acts, secondary mortgage loans, fees, interest rates etc.), 17:11C-45-48 (applicable mortgage loans, injunctions, violations), 17:11C-50 (continuation of existing licenses).

[FN54] N.J.S.A. 17:11C-51 et seq.

[FN59.01] Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 167 L. Ed. 2d 389 (U.S. 2007).

[FN59.02] Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 167 L. Ed. 2d 389 (U.S. 2007).

[FN60] N.J.S.A. 45:15-17(i) is part of a comprehensive statute regulating real estate brokers, salesmen and auctioneers, as well as real estate guaranty funds. N.J.S.A. 45:15-17, amended by 2001 NJ Sess. Law Serv. ch. 68.

[FN61] Mortgage Bankers Ass'n v. New Jersey Real Estate Comm'n, 200 N.J.Super. 584, 491 A.2d 1317 (App.Div.1985), reversed 102 N.J. 176, 506 A.2d 733 (1986). The opinion contains a good discussion of the role of the real estate broker in arranging mortgage financing for the buyer.

[FN62] Mortgage Bankers Ass'n of New Jersey v. New Jersey Real Estate Com'n, 102 N.J. 176, 506 A.2d 733 (1986).

[FN63] Id. at 191, 506 A.2d at 741. By implication, the court indicated that the record should have contained "facts describing the precise manner in which [real estate brokerage] companies affiliated through common ownership with licensed mortgage lenders operate, the nature and extent of the interrelation between the real estate brokerage company and the affiliated mortgage entity, and the impact of such enterprises upon the public served by them." Id. at 190, 506 A.2d at 740.

[FN64] Id. at 191 to 192, 506 A.2d at 741.

[FN65] Id. at 192, 506 A.2d at 741. The court noted, but did not express any opinion on, the argument that "the Appellate Division's decision, to the extent that it prohibits a mortgage lender affiliated with the seller's broker from issuing the mortgage loan to the buyer, is preempted by the Federal Real Estate Settlement and Procedures Act (RESPA), 12 U.S.C. 2607(c)(4)," which "expressly exempts from its provisions prohibiting the payment of 'kickbacks' and referral fees for settlement services a transaction in which a real estate broker directly or indirectly refers the mortgage loan transaction to an affiliated mortgage company, provided the required disclosure is made to the mortgagor."

[FN66] N.J.S.A. 17:11C-51 et seq.

[FN66.01] N.J.S.A. 17:11C-1 et seq.

[FN66.02] Repealed as of July 31, 2010 are: N.J.S.A. 17:11C-4-5, 17:11C-13-15, 17:11C-20, 17:11C-22-31, 17:11C-45-48 and 17:11C-50.

[FN66.03] N.J.S.A. 17:11C-52.

[FN66.04] See Statement under N.J.S.A. 17:3B-4.

[FN66.05] Glukowsky v. Equity One, Inc., 360 N.J.Super. 1, 9–10, 821 A.2d 485, 490 (App.Div.2003), rev'd on other grounds 180 N.J. 49, 848 A.2d 747 (2004).

[FN67] 12 U.S.C.A. §§ 3801 et seq.

[FN68] "Alternative mortgage" includes adjustable rate loans, renegotiable loans with balloon payments and loans: "involving any similar type of rate, method of determining return, term, repayment, or other variation not common to traditional fixed-rate, fixed term transactions, including without limitation, transactions that involve the sharing of equity or appteciation." 12 U.S.C.A. § 3802(1). See also 2 Nelson & Whitman, Real Estate Finance Law § 11.4 at 106 (3d ed.1993).

[FN69] 12 U.S.C.A. § 3801(b).

[FN70] 12 U.S.C.A. § 3802(2) provides:
the term "housing creditor" means—

(A) a depository institution, as defined in § 501(a)(2) of the Depository Institutions Deregulation and Monetary Control Act of 1980;

(B) a lender approved by the Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act [12 U.S.C.A. §§ 1701 et seq.];

(C) any person who regularly makes loans, credit sales, or advances secured by interests in properties referred to in paragraph (1); or

(D) any transferee of any of them.

A person is not a “housing creditor” with respect to a specific alternative mortgage transaction if, except for this chapter, in order to enter into that transaction, the person would be required to comply with licensing requirements imposed under State law, unless such person is licensed under applicable State law and such person remains, or becomes, subject to the applicable regulatory requirements and enforcement mechanisms provided by State law.

[FN71] 12 U.S.C.A. § 3803(c).

[FN72] The Office of Thrift Supervision is the successor agency to the Federal Home Loan Bank Board. It was created principally to supervise and regulate federal and state savings associations, banks and credit unions.

[FN73] 12 U.S.C.A. § 3803(a)(3). See Shinn v. Encore Mortg. Services, Inc., 96 F.Supp.2d 419, 423 (D.N.J.2000).

[FN74] See 2 Nelson & Whitman, Real Estate Finance Law § 11.4 at 106 (3d ed.1993).

29 NJPRAC § 2.1

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
2. Mortgage Lending: The Institutional Framework

§ 2.2. Federally sponsored mortgage market support agencies

West's Key Number Digest

West's Key Number Digest, Mortgages 235
West's Key Number Digest, United States 53(9)

Legal Encyclopedias

C.J.S., Mortgages §§ 2 to 6

Beginning in the 1930's, the federal government has created several agencies designed to facilitate the financing of residential housing construction and to provide a secondary market for mortgages originated by private mortgage lending institutions. These agencies now include the Federal Home Loan Banks, the Federal National Mortgage Association (FNMA or "Fannie Mae"), the Government National Mortgage Association (GNMA or "Ginnie Mae"), and the Federal Home Loan Mortgage Corporation (FHLMC or "Freddie Mac"). Each of these agencies will be discussed briefly in the remainder of this section.

A. *The Federal Home Loan Banks*

The Federal Home Loan Bank System, created in 1932, is designed to provide a central credit facility to supplement the resources of its member institutions—mainly savings and loan associations.[1] The System was modeled on the Federal Reserve System, and consists of twelve Federal Home Loan Banks, each operating within its own district. The major function of the Federal Home Loan Banks is to extend credit to their mortgage lending member institutions in the form of "advances" (i.e. loans) secured by mortgages originated by the borrower institutions. Member institutions may obtain either short-term or long-term advances from their district Federal Home Loan Banks. The former have maturities ranging up to one year and are typically made to cover unusually large savings deposit withdrawals from member institutions. Long-term advances may be for as much as ten years and are intended to allow member institutions to increase the volume of their mortgage lending. The Federal Home Loan Banks raise the funds with which to make advances to their member institutions from the sale of Federal Home Loan Bank stock to those institutions, from the retained earnings of the Banks, from the deposits of member institutions kept at the Banks, and from the sale in the capital markets of Bank debentures called "consolidated obligations." During the savings and loan crisis of the last half-dozen years, the resources of the Federal Home Loan Banks proved to be grossly inadequate to maintain the solvency of their member institutions. This crisis, as previously indicated, led to enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRRE Act).[2]

The 1989 FIRRE Act abolished the Federal Home Loan Bank Board (FHLBB) which previously supervised the Federal Home Loan Banks,[3] and created a new Federal Housing Finance Board to take over the supervisory functions of the FHLBB.[4] The 1989 FIRRE Act also amended the previously established criteria for membership in the Federal Home Loan Bank System and the previous legislative statement of the purposes for which advances may be made to member institutions and the restrictions on collateral to be required when advances are made.[5] Although it is too early to be sure just how the System will operate under the new Federal Housing Finance Board, it seems likely that the district Federal Home Loan Banks will—initially, at least—continue to operate much as they did when they were supervised by the former FHLBB.

B. *The Federal National Mortgage Association*

The Federal National Mortgage Association was established in 1938.[6] During its first decade, FNMA bought FHA-insured mortgages when funds for mortgage loans were scarce and sold mortgages when wartime conditions led to an abundance of loanable funds while investment outlets were restricted. In 1948, FNMA was authorized to buy VA-guaranteed mortgages as well as FHA-insured mortgages. During the next two decades FNMA also used its resources to support a variety of Federal housing programs.

The Housing and Urban Development Act of 1968[7] divided FNMA into two new corporate entities: (1) a new FNMA, which was converted into a private corporation designed to continue providing a secondary market for mortgages; and (2) the Government National Mortgage Association, established within the new Department of Housing and Urban Development (HUD), which took over the Federal housing support function of the old FNMA, along with certain management and liquidation functions in connection with the FHA mortgage-insurance program. The activities of GNMA will be discussed hereafter.

On September 7, 2008, the Federal National Mortgage Association (FNMA or Fannie Mae), along with the Federal Home Loan Mortgage Corporation (FHLMC or Freddie Mac) were taken over by the United States government and placed under the conservatorship of the Federal Housing Finance Agency (FHFA). The FHFA regulates Fannie Mae, Freddie Mac and the 12 Federal Home Loan Banks. Currently, there are no plans to liquidate FNMA.[7.01] This, to say the least, is a major governmental intervention in the private financial markets. FNMA was formerly privately owned, with the President of the United States appointing five of its eighteen directors and the Secretary of HUD with general regulatory authority over FNMA.[8] Within statutory guidelines, the Secretary formerly (1) set FNMA's debt ceiling and the ratio of debt to capital, (2) set the maximum rate for the cash dividends it may pay, and (3) approved the issuance of all stock, obligations, and other securities. The Secretary of the Treasury was also required to approve of all debt issues, including the terms and conditions of sale, to assure coordination with Treasury borrowing operations. FNMA obtains its funds from three sources: (1) the sale of common stock (including required purchases by mortgage lenders using FNMA services), (2) retained earnings on its mortgage portfolio, and (3) the issuance of debentures, subordinated capital debentures, short-term discount notes, and mortgage-backed bonds. Congress has given FNMA debentures and short-term discount notes (30 to 270 day maturities) “federal agency” status, which makes them “riskless” investments and makes them easily marketable.

The basic function of the FNMA is to maintain a secondary market for residential mortgages. It fulfills this function by buying and selling mortgages. In 1968, the FNMA adopted an “auction” or “free market” system for purchase of mortgages. At regular intervals, the FNMA announces the total volume of forward commitments it will make for purchase of mortgages, for delivery at the seller's option, within two distinct time periods in the future (four months or twelve months). In each action, prices at which the FNMA will commit itself to buy mortgages are determined by the lowest bids. When FNMA was "privatized" in 1968, it was only authorized to buy FHA insured and VA guaranteed mortgages, but in 1970 it was authorized to buy "conventional" mortgages. By 1976 FNMA was buying "conventional" mortgages at about four times the rate at which it bought government-insured mortgages. As late as 1983, however, about 40 percent of FNMA's portfolio still consisted of government-insured mortgages. FNMA has been active in buying mortgages on large apartment developments, nursing homes, hospitals, and mobile home parks as well as mortgages on one-and two-family dwellings.

The function of "servicing" mortgages sold to the FNMA is generally retained by the seller. All sellers must hold FNMA common stock equal in value to one-fourth of one percent of the unpaid principal amount of all mortgages sold or to be sold to FNMA. Sellers must also meet and maintain standards set by FNMA. All "servicers" of mortgages on one-to four-family dwellings must hold FNMA common stock equal to varying percentages of the unpaid principal amount of all mortgages they "service" for FNMA.

The FNMA also "pools" groups of mortgages and issues securities backed by these "pooled" mortgages and guaranteed by FNMA for sale to investors, such as life insurance companies and pension funds, to whom such securities tend to be more attractive as investments than the underlying mortgages. Prior to 1987, the "pool" securing an issue of FNMA mortgage backed securities consisted, on average, of forty mortgages with a value of $2.6 million. In 1987, however, FNMA began to issue securities backed by "jumbo pools" (also known as "Fannie Majors") consisting, on average, of 984 mortgages with a value of $61 million. These securities are generally similar to the mortgage-backed securities issued by GNMA which are described in the discussion of GNMA which follows: but the FNMA guaranty of payment, unlike the GNMA guaranty, does not carry with it the full faith and credit of the United States.[9]

C. *The Government National Mortgage Association*

As previously indicated, the Government National Mortgage Association (GNMA) was established in 1968 to assume responsibility for the "special assistance" and management and liquidation functions of the "old" FNMA. The GNMA is a wholly-owned corporate agency of the United States, operating as a division of HUD and controlled by the Secretary of HUD, who appoints GNMA officers and determines general GNMA policies.[10]

The "special assistance" functions of the GNMA are carried out exclusively for the account of the Federal Government with funds provided by the Treasury under authorization of Congress for the purchase of mortgages bearing below-market interest rates to support designated Federal housing programs. These programs include housing in Guam and Alaska, housing in disaster and urban renewal areas, housing under the so-called §§ 235 and 236 single and multifamily programs, housing for the elderly, housing for the armed forces, and moderate-income housing. Although private lending institutions originate the mortgages under such Federal housing programs, they do so with assurance that they can resell them at par to GNMA. Thus, looking at substance rather than form, GNMA's "special assistance" functions really constitute an indirect Federal housing loan program.[11]

The most important GNMA activity in recent years is a program in which it guarantees mortgage-backed securities issued by lending institutions, including savings and loan associations, savings banks, commercial banks, and mortgage bankers.[12] These securities are obligations of the issuer, "collateralized" (secured) by a pool of mortgages insured by FHA or FmHA (Farmers Home Administration), or guaranteed by the VA. The

GNMA guaranty of these securities pledges the full faith and credit of the United States. These securities are in registered form and are sold to and actively traded by investors. Although these securities are of several types, the most popular have been of the "fully modified pass-through" type, in which GNMA guarantees that holders of the securities will regularly receive their respective shares of the monthly principal and interest payments due on the underlying mortgages even if mortgage payments are delinquent.

The original GNMA guaranteed mortgage-backed securities program, now called GNMA I,[13] requires each mortgage pool to be created by a single mortgage originator and to consist of mortgages bearing the same interest rate and having approximately the same maturity. The mortgage pool is transferred to a bank or trust company, which acts as custodian. Most of the securities issued under GNMA I are backed by single-family home mortgages, although some are backed by multi-family housing mortgages or mobile home mortgages.

Beginning in 1983 a new GNMA program, called GNMA II was inaugurated.[14] GNMA II involves the guaranty of securities backed by very large ("jumbo") mortgage pools, each pool comprising "packages" of mortgages originated by many different lenders and bearing interest rates that may vary within a one percent range. A single custodian (originally Chemical Bank of New York) handles the issuance and transfer of the mortgaged backed securities, accounting, payments to investors, and income tax reporting and withholding. Each mortgage originator is responsible for marketing a share of the "jumbo" pool's securities proportional to that originator's contribution to the pool, but investors who buy securities acquire an interest in the entire pool. An investor receives a single monthly check covering principal and interest on his securities. The individual mortgage originators are responsible for "servicing" the underlying mortgages and remitting the monthly payments to the custodian.

Many of the securities issued and guaranteed under the GNMA I and II programs are bought by mortgage lenders, but a major share are bought by pension funds, trusts, profit-sharing plans, and other entities that rarely make direct mortgage loans. These securities are attractive to such entities because they carry monthly payments of principal and interest and require no effort on the part of the investor to satisfy themselves with respect to title, appraised value, credit-worthiness, and other factors as to which a direct investor would have to be concerned. Moreover, the GNMA guaranteed securities are very liquid and a secondary market for them is maintained by many investment banking companies. For all these reasons the GNMA I and II programs have attracted large amounts of new funds into the mortgage market. A large portion of currently originated FHA-insured home mortgage loans are funded through issuance of GNMA guaranteed securities.

D. *The Federal Home Loan Mortgage Corporation*

On September 7, 2008, the Federal Home Loan Mortgage Corporation (FHLMC or Freddie Mac), along with the Federal National Mortgage Association (FNMA or Fannie Mae), were taken over by the United States government and placed under the conservatorship of the Federal Housing Finance Agency (FHFA). The FHFA regulates Fannie Mae, Freddie Mac and the 12 Federal Home Loan Banks. Currently, there are no plans to liquidate FHLMC.[14.01] The FHLMC was created by the Emergency Home Finance Act of 1970[15] to provide a secondary market for conventional (not Federally insured or guaranteed) mortgages, a major portion of which were then originated by savings and loan associations. Although it was chartered as a private corporation, FHLMC was placed under the direct control of the Federal Home Loan Bank Board, whose three members were the directors of FHLMC.[16] FHLMC was originally financed by the issuance of non-voting common stock with a par value of $100 million to the twelve Federal Home Loan Banks. In 1984, FHLMC issued an additional $600 million worth of preferred stock to the Federal Home Loan Banks.

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989,[17] as previously indicated, abolished the Federal Home Loan Bank Board.[18] In addition, the Act abolished the original FHLMC and created in its place a new FHLMC.[19] The new FHLMC will be governed by a Board of Directors consisting of "18 persons, 5 of whom shall be appointed annually by the President of the United States and the remainder of whom shall be elected annually by the voting common stockholders."[20] The new FHLMC's common stock will be divided into (1) "nonvoting common stock, which shall be issued only to Federal home loan banks," and (2) "voting common stock, which shall be issued to such holders in the manner and amount, and subject to any limitations on concentration of ownership, as may be established by the corporation."[21] The Secretary of the Department of Housing and Urban Development is given "general regulatory power over the corporation and shall make such rules and regulations as shall be necessary and proper to ensure that the purposes of" the Act are accomplished, including "the goal of providing adequate housing for low-and moderate-income families, but with reasonable economic return to the corporation."[22]

From its creation in 1970, FHLMC was authorized to purchase both federally insured or guaranteed mortgages and conventional mortgages, but in practice FHLMC has specialized in the purchase of conventional mortgages—most of them originated by savings and loan associations, although FHLMC was authorized from its creation to purchase mortgages originated by commercial banks and savings banks as well as savings and loan associations and was authorized in 1979 to buy mortgages from mortgage banking companies. After building up a substantial mortgage portfolio during the period from 1970 to 1975, FHLMC began in 1975 to sell several kinds of mortgage-backed securities: (1) Participation Certificates, (2) Guaranteed Mortgage Certificates, and (3) Collateralized Mortgage Obligations. The Participation Certificates are unconditionally guaranteed by FHLMC and "pass through" monthly interest and principal payments as received from the mortgagors. Guaranteed Mortgage Obligations and Collateralized Mortgage Obligations, instead of "passing through" monthly payments, pay interest semi-annually and return a portion of the principal either annually (in the case of Guaranteed Mortgage Obligations) or in specific scheduled years (in the case of Collateralized Mortgage Obligations); both kinds of securities are guaranteed by FHLMC.[23]

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] See Federal Home Loan Bank Act, 12 U.S.C.A. § 1421. All the recent editions of U.S. League of Savings Associations, Savings and Loan Fact Book contain thorough discussions of the Federal Home Loan Bank System, and current financial data will be found in recent issues of the Federal Home Loan Bank Board Journal.

[FN2] 1989 Pub. L. No. 101-73, 103 Stat. 183 through 103 Stat. 553, amending numerous portions of Title 12 of the U.S. Code.

[FN3] FIRRE Act § 401(a)(2) and § 703, 12 U.S.C.A. § 1437 note.

[FN4] FIRRE Act § 702(a), amending § 2 of the Federal Home Loan Bank Act by adding new §§ 2A and 2B, 12 U.S.C.A. § 1422(a) and (b).

[FN5] FIRRE Act §§ 704, 714, amending 12 U.S.C.A. §§ 1422(a) and 1430(a).

[FN6] FNMA's original charter is contained in Title III of the National Housing Act, 48 Stat. 1246

(1934). The current FNMA legislation is contained in 12 U.S.C.A. §§ 1716b to 1719.

[FN7] Title VIII of the Housing and Urban Development Act of 1968, 82 Stat. 503, 536. The current legislation is contained in 12 U.S.C.A. §§ 1716 et seq. The complete legislative history can be found in “Federal National Mortgage Association Charter Act,” a booklet issued by the FNMA General Counsel's Office. Much of the following discussion of new FNMA's functions is drawn from G. Nelson & D. Whitman, Real Estate Finance Law 763 to 769 (2d ed.1985).

[FN7.01] Statement and announcement by Director James B. Lockhart III of the Federal Housing Finance Agency (FHFA) pursuant to statutory authority of the FHFA. See 12 U.S.C.A. § 4501 et seq.; § 4511 (establishment of FHFA with regulatory authority over FNMA and FHLMC). These sections are part of the “Federal Housing Finance Regulatory Reform Act,” 12 U.S.C.A. § 4501 et seq., which is Division A of the “Housing and Economic Recovery Act of 2008.”

[FN8] The Secretary has authority, *inter alia,* to fix the aggregate annual dividends paid by FNMA, to approve increases in its total indebtedness and the issuance of particular debt or equity securities, to require that a reasonable portion of FNMA's mortgage purchases be related to the national goal of providing adequate housing for low and moderate income families, and to issue rules and regulations. 12 U.S.C.A. § 1723a(h).

[FN9] See Levin, Sculpting the Fannie Mae MBS, Mortgage Banking, Oct. 1987, at 47, cited in G. Nelson & D. Whitman, Real Estate Finance Law, 1989 Pocket Part p. 92 (addition to n. 12).

[FN10] See 12 U.S.C.A. § 1717(a)(2)(A).

[FN11] For details, see any current GNMA annual report.

[FN12] See 12 U.S.C.A. § 1721(g).

[FN13] See G. Nelson & D. Whitman, Real Estate Finance Law 770 to 771 (2d ed.1985).

[FN14] See id. at 771.

[FN14.01] Statement and announcement by Director James B. Lockhart III of the Federal Housing Finance Agency (FHFA) pursuant to statutory authority of the FHFA. See 12 U.S.C.A. § 4501 et seq.; § 4511 (establishment of FHFA with regulatory authority over FNMA and FHLMC). These sections are part of the “Federal Housing Finance Regulatory Reform Act,” 12 U.S.C. § 4501 et seq., which is Division A of the “Housing and Economic Recovery Act of 2008.”

[FN15] 12 U.S.C.A. § 1451. The mission of FHLMC is substantially the same as that of FNMA. Creation of FHLMC appears to have been the result of lobbying by the Federal Home Loan Bank Board and the Federal Home Loan Banks to persuade Congress to give them a “piece of the action” in the secondary mortgage market. Much of the discussion of FHMLC's activities is drawn from G. Nelson & D. Whitman, Real Estate Finance Law 765 to 769 (2d ed.1985).

[FN16] 12 U.S.C.A. § 1453(a).

[FN17] 1989 Pub. L. No. 101-73, 103 Stat. 183 through 103 Stat. 553, amending numerous portions of

Title 12 of the U.S. Code.

[FN18] FIRRE Act §§ 401(a)(2) and 703, 12 U.S.C.A. § 1437 note.

[FN19] FIRRE Act § 731(b), amending § 303(a) of the Federal Home Loan Mortgage Corporation Act, 12 U.S.C.A. § 1451(2)(a).

[FN20] Ibid.

[FN21] FIRRE Act § 731(d), amending § 304(a) of the Federal Home Loan Mortgage Corporation Act, 12 U.S.C.A. § 1453(a).

[FN22] FIRRE Act § 731(c), amending § 303 of the Federal Home Loan Mortgage Corporation Act, 12 U.S.C.A. § 1452.

[FN23] See G. Nelson & D. Whitman, Real Estate Finance Law pp. 767 to 768 (2d ed.1985).

29 NJPRAC § 2.2

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
2. Mortgage Lending: The Institutional Framework

§ 2.3. The New Jersey housing and mortgage finance agency

West's Key Number Digest

West's Key Number Digest, Mortgages 235
West's Key Number Digest, Mortgages 427(1)
West's Key Number Digest, States 45
West's Key Number Digest, States 67
West's Key Number Digest, States 124

Legal Encyclopedias

C.J.S., Mortgages §§ 2 to 6

C.J.S., States §§ 79 to 80

C.J.S., States § 82

C.J.S., States §§ 120 to 121

C.J.S., States §§ 136 to 138

C.J.S., States § 140

C.J.S., States § 225

The New Jersey Mortgage Finance Agency was originally established within the Department of Banking, as a "public body corporate and politic"[1] It was subsequently shifted to the Department of Community Affairs[2] and, pursuant to the "New Jersey Housing and Mortgage Finance Agency Law of 1983" ("act"),[3] consolidated with the New Jersey Housing Finance Agency[4] into a single agency known as the New Jersey Housing and Mortgage Finance Agency ("agency").[5]

The agency's powers are broad[6]; it is charged with assuring the availability for both rental housing and owner-occupied housing, permanent financing for new housing construction, the conversion of non-residential structures to housing rehabilitation and improvement of existing housing; to stimulate the construction, rehabilitation and improvement of adequate and affordable housing in the State; to enhance the productive capacity of the private sector in meeting the housing needs of the residents of the State; to assist in the revitalization of the State's urban areas; and to respond to changing housing demographic and economic circumstances by the development of innovative and flexible finance vehicles.[7]

The agency, in order to encourage the development, operation, maintenance, construction, improvement and rehabilitation of safe and adequate housing in the State, is hereby authorized and empowered to finance, by the making of eligible loans or otherwise, the construction, improvement or rehabilitation of housing projects[8] in the State.[9] A “housing sponsor” is defined by the act to mean “any person, partnership, corporation or association, whether organized as for profit or not for profit, to which the agency has made or proposes to make a loan, either directly or through an institutional lender, for a housing project.”[10] The terms and conditions for such loans are specified in the act.[11] The requirements for admission to a housing project are specifically set forth in the act.[12]

The agency is authorized inter alia “to make eligible loans”[13] “to make commitments to purchase, and to purchase, service and sell, eligible loans,”[14] to make loans to institutional lenders,[15] either to lend funds to mortgage lenders to enable the latter to make “eligible loans,” or to operate as a secondary mortgage market agency that will buy and sell mortgage loans already made by originators of mortgage loans.[16]

An “eligible” loan is a loan on property that is “primarily residential in character” and which may include single-family, multi-family and congregate or other single room occupancy housing, continuing-care retirement communities, mobile homes and nonhousing properties and facilities which enhance the livability of the residential property or area.[17]

The agency shall require as a condition of each loan to an institutional lender that the institutional lender thereafter proceed as promptly as practicable to make and disburse from the loan proceeds, eligible loans in an aggregate principal amount equal to the amount of the loan.[18] Compliance by any institutional lender with respect to the making of eligible loans may be enforced by decree of the Superior Court. The agency may also require agreement by any institutional lender, as a condition of the loan to the institutional lender, to the payment of penalties to the agency for violation by the institutional lender of any provision of this section.[19]

The agency requires as a condition of each purchase of eligible loans from a loan originator that the loan originator proceed as promptly as practicable to make and disburse from the proceeds eligible loans in an aggregate principal amount equal, as nearly as practicable, to the amount of the proceeds from the purchase by the agency of eligible loans, but these requirements shall not apply if the eligible loans so purchased were originated pursuant to a commitment or other arrangement with the agency.[20] The agency shall require the submission to it by each loan originator from which the agency has purchased eligible loans evidence satisfactory to the agency of the making of eligible loans or the application of the proceeds from the purchase of eligible loans in accordance with commitments with the agency for the origination of eligible loans by the loan originator.[21]

Foreclosure Against Housing Sponsor (Housing Project); Agency and Municipality to Be Made Parties; Limitation on Judgment and Sale; Qualification of Buyers; Other Judgments

In any foreclosure action involving a housing sponsor other than a foreclosure action instituted by the agency, the agency and the municipality in which any tax exemption or abatement is provided to the housing sponsor shall, in addition to other necessary parties, be made parties defendant. The agency and the municipality shall take all steps in the action necessary to protect the interest of the public therein, and no costs shall be awarded against the agency or the municipality.[22]

Subject to the terms of any applicable loan agreement, contract or other instrument entered into or obtained pursuant to N.J.S.A. 55:14K-7 (housing project loans) judgment of foreclosure in accordance with this section shall not be entered unless the court to which application therefor is made shall be satisfied that the interest of the lienholder or holders cannot be adequately secured or safeguarded except by the sale of the property; and in the proceeding the court shall be authorized to make an order increasing the rental or carrying charges to be charged for the housing accommodations in the housing project involved in the foreclosure, or appoint a member of the agency or any officer of the municipality in which any tax exemption or abatement with respect to the project is provided, as a receiver of the property, or grant such other and further relief as may be reasonable and proper; and in the event of a foreclosure or other judicial sale, the property shall be sold only to a housing sponsor which will manage, operate and maintain the project subject to the provisions of this act, unless the court finds that the interest and principal on the obligations secured by the lien which is the subject of foreclosure cannot be earned under the limitations imposed by the provisions of this act and that the proceeding was brought in good faith, in which event the property may be sold free of limitations imposed by this act or subject to such limitations as the court may deem advisable to protect the public interest.[23]

In the event of a judgment against any housing sponsor in any action not pertaining to the foreclosure of a mortgage, there shall be no sale of any of the real property included in any housing project hereunder of the housing sponsor except upon 120 days' written notice to the agency. Upon receipt of the notice the agency shall take those steps as in its judgment may be necessary to protect the rights of all parties.[24]

New Jersey Mortgage Assistance Bond Act

New Jersey is also engaged in the mortgage lending business under the New Jersey Mortgage Assistance Bond Act of 1976.[25] The purpose of this statute is to provide financial assistance in connection with the provision of new or rehabilitated housing for low and moderate income persons and for senior citizens.[26]

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] "New Jersey Mortgage Finance Agency Law." N.J.S.A. 17:1B-7 et seq., repealed by 1983 N.J. Laws ch. 530, § 48, effective Jan. 17, 1984.

[FN2] N.J.S.A 52:27D-117, 52:27D-118.

[FN3] N.J.S.A. 55:14K-1 et seq.

[FN4] N.J.S.A. 55:14J-4. , 55:14J-3 to 55:14J-19. Repealed by 1983 N.J. Laws ch. 530, § 48, eff. Jan. 17, 1984.

[FN5] N.J.S.A. 55:14K-4.

N.J.S.A. 55:14K-4(i) provides: "The agency [New Jersey Housing and Mortgage Finance Agency], is hereby established in, but not of, the Department of Community Affairs and constituted a body politic and corporate and an instrumentality exercising public and essential governmental functions, and the exercise by the agency of the powers conferred by this act shall be deemed and held to be an essential governmental function of the State."

[FN6] N.J.S.A. 55:14K-5 provides:

In order to carry out the purposes and provisions of this act, the agency, in addition to any powers granted to it elsewhere in this act, shall have the following powers:

a. To adopt bylaws for the regulation of its affairs and the conduct of its business; to adopt an official seal and alter the same at pleasure; to maintain an office at such place or places within the State as it may designate; to sue and be sued in its own name;

b. To conduct examinations and hearings and to hear testimony and take proof, under oath or affirmation, at public or private hearings, on any matter material for its information and necessary to carry out the provisions of this act;

c. To issue subpenas requiring the attendance of witnesses and the production of books and papers pertinent to any hearing before the agency, or before one or more of the members of the agency appointed by it to conduct a hearing;

d. To apply to any court, having territorial jurisdiction of the offense, to have punished for contempt any witness who refuses to obey a subpena, or who refuses to be sworn or affirmed to testify, or who is guilty of any contempt after summons to appear;

e. To acquire by purchase, gift, foreclosure or condemnation any real or personal property, or any interest therein, to enter into any lease of property and to hold, sell, assign, lease, encumber, mortgage or otherwise dispose of any real or personal property, or any interest therein, or mortgage lien interest owned by it or under its control, custody or in its possession and release or relinquish any right, title, claim, lien, interest, easement or demand however acquired, including any equity or right of redemption, in property foreclosed by it and to do any of the foregoing by public or private sale, with or without public bidding, notwithstanding the provisions of any other law;

f. To acquire, hold, use and dispose of its income revenues, funds and moneys;

g. To adopt rules and regulations expressly authorized by this act and such additional rules and regulations as shall be necessary or desirable to carry out the purposes of this act. The agency shall adopt regulations which provide for consultation with housing sponsors regarding the formulation of agency rules and regulations governing the operation of housing projects and which require the agency to consult with the affected housing sponsor prior to taking any and all specific proposed agency actions relating to the sponsor's housing project. The agency shall publish all rules and regulations and file them with the Secretary of State;

h. To borrow money or secure credit on a temporary, short-term, interim or long-term basis, and to issue negotiable bonds and to secure the payment thereof and to provide for the rights of the holders thereof;

i. To make and enter into and enforce all contracts and agreements necessary, convenient or desirable to the performance of its duties and the execution of its powers under this act, including contracts or agreements with qualified financial institutions for the servicing and processing of eligible loans owned by the agency;

j. To appoint and employ an executive director, who shall be the chief executive officer of the agency, and additional officers, who need not be members of the agency as the agency deems advisable, and to employ architects, engineers, attorneys, accountants, construction and financial experts and other employees and agents as may be necessary in its judgment and to determine their qualifications, terms of office, duties and compensation; and to promote and discharge such officers, employees and agents, all without regard to the provisions of Title 11 of the Revised Statutes, Civil Service;

k. To contract for and to receive and accept any gifts, grants, loans or contributions from any source, of money, property, labor or other things of value, to be held, used and applied to carry out the purposes of this act subject to the conditions upon which the grants and contributions may be made, including, but not limited to, gifts or grants from any department or agency of the United States or the State for payment of rent supplements to eligible families or for the payment in whole or in part of the interest expense for a housing project or for any other purpose consistent with this act;

l. To enter into agreements to pay annual sums in lieu of taxes to any political subdivision of the State with respect to any real property owned or operated directly by the agency;

m. To procure insurance against any loss in connection with its operations, property and other assets (including eligible loans) in the amounts and from the insurers it deems desirable;

n. To the extent permitted under its contract with the holders of bonds of the agency, to consent to any modification with respect to rate of interest, time and payment of any installment of principal or interest, security or any other terms of any loan to an institutional lender, eligible loan, loan commitment, contract or agreement of any kind to which the agency is a party;

o. To the extent permitted under its contract with the holders of bonds of the agency, to enter into contracts with any housing sponsor containing provisions enabling the housing sponsor to reduce the rental or carrying charges to persons unable to pay the regular schedule of charges where, by reason of other income or payment from the agency, any department or agency of the United States or the State, these reductions can be made without jeopardizing the economic stability of the housing project;

p. To make and collect the fees and charges it determines are reasonable;

q. To the extent permitted under its contract with the holders of bonds of the agency, to invest and reinvest any moneys of the agency not required for immediate use, including proceeds from the sale of any obligations of the agency, in obligations, securities or other investments as the agency deems prudent. All functions, powers and duties relating to the investment or reinvestment of these funds, including the purchase, sale or exchange of any investments or securities may, upon the request of the agency, be exercised and performed by the Director of the Division of Investment in the Department of the Treasury, in accordance with written directions of the agency signed by an authorized officer, without regard to any other law relating to investments by the Director of the Division of Investment;

r. To provide, contract or arrange for, where, by reason of the financing arrangement, review of the application and proposed construction of a project is required by or in behalf of any department or agency of the United States, consolidated processing of the application or supervision or, in the alternative, to delegate the processing in whole or in part to any such department or agency;

s. To make eligible loans, and to participate with any department, agency or authority of the United States or of any state thereof, this State, a municipality, or any banking institution, foundation, labor union, insurance company, trustee or fiduciary in an eligible loan, secured by a single participating mortgage, by separate mortgages or by other security agreements, the interest of each having equal priority as to lien in proportion to the amount of the loan so secured, but which need not be equal as to interest rate, time or rate of amortization or otherwise, and to undertake commitments to make such loans;

t. To assess from time to time the housing needs of any municipality which is experiencing housing shortages as a result of the authorization of casino gaming and to address those needs when planning its programs;

u. To sell any eligible loan made by the agency or any loan to an institutional lender owned by the agency, at public or private sale, with or without bidding, either singly or in groups, or in shares of loans or shares of groups of loans, issue securities, certificates or other evidence of ownership secured by such loans or groups of loans, sell the same to investors, arrange for the marketing of the same; and to deposit and invest the funds derived from such sales in any manner authorized by this act;

v. To make commitments to purchase, and to purchase, service and sell, eligible loans, pools of loans or securities based on loans, insured or issued by any department or agency of the United States, and to make loans directly upon the security of any such loans, pools of loans or securities;

w. To provide such advisory consultation, training and educational services as will assist in the planning, construction, rehabilitation and operation of housing including but not limited to assistance in community development and organization, home management and advisory services for residents and to encourage community organizations and local governments to assist in developing housing;

x. To encourage research in and demonstration projects to develop new and better techniques and methods for increasing the supply, types and financing of housing and housing projects in the State and to engage in these research and demonstration projects and to receive and accept contributions, grants or aid, from any source, public or private, including but not limited to the United States and the State, for carrying out this purpose;

y. To provide to housing sponsors, through eligible loans or otherwise, financing, refinancing or financial assistance for fully completed, as well as partially completed, projects which may or may not be occupied, if the projects meet all the requirements of this act, except that, prior to the making of the mortgage loans by the agency, said projects need not have complied with §§ 7a.(9) and 42 of this act; [FN1]

z. To encourage and stimulate cooperatives and other forms of housing with tenant participation;

aa. To promote innovative programs for home ownership, including but not limited to lease-purchase programs, employer-sponsored housing programs, and tenant cooperatives;

bb. To set aside and designate, out of the funds that are or may become available to it for the purpose of financing housing in this State pursuant to the terms of this act, certain sums or proportions thereof to be used for the financing of housing and home-ownership opportunities, including specifically lease-purchase arrangements, provided by employers to their employees through nonprofit or limited-dividend corporations or associations created by employers for that purpose; and to establish priority in funding, offer bonus fund allocations, and institute other incentives to encourage such employer-sponsored housing and home-ownership opportunities;

cc. Subject to any agreement with bondholders, to collect, enforce the collection of, and foreclose on any property or collateral securing its eligible loan or loans to institutional lenders and acquire or take possession of such property or collateral and sell the same at public or private sale, with or without bidding, and otherwise deal with such collateral as may be necessary to protect the interests of the agency therein;

dd. To administer and to enter into agreements to administer programs of the federal government or any other entity which are in furtherance of the purposes of this act;

ee. To do and perform any acts and things authorized by this act under, through, or by means of its officers, agents or employees or by contract with any person, firm or corporation; and

ff. To do any acts and things necessary or convenient to carry out the powers expressly granted in this act.

[FN7] N.J.S.A. 55:14K-2.

[FN8] N.J.S.A. 55:14K-3(h). " 'Housing project' or 'project' means any work or undertaking, other than a continuing-care community, whether new construction, improvement, rehabilitation, or acquisition of existing buildings or units which is designed for the primary purpose of providing multi-family rental housing or acquisition of sites for future multi-family rental housing."

[FN9] N.J.S.A. 55:14K-6.

[FN10] N.J.S.A. 55:14K-3(i).

[FN11] N.J.S.A. 55:14K-7.

[FN12] N.J.S.A. 55:14K-8(a). "Admission to housing projects constructed, improved or rehabilitated under this act shall be limited to families whose gross aggregate family income at the time of admission does not exceed six times the annual rental or carrying charges, including the value or cost to them of heat, light, water, sewerage, parking facilities and cooking fuel, of the dwellings that may be furnished to such families, or seven times those charges if there are three or more dependents."

[FN13] N.J.S.A. 55:14K-5(s).

[FN14] N.J.S.A. 55:14K-5(v), 55:14K-12.

[FN15] N.J.S.A. 55:14K-11.

[FN16] N.J.S.A. 55:14K-11, -12.

[FN17] "Eligible loan" means a loan, secured or unsecured, made for the purpose of financing the operation, maintenance, construction, acquisition, rehabilitation or improvement of property, or the acquisition of a direct or indirect interest in property, located in the State, which is or shall be: (1) primarily residential in character or (2) used or to be used to provide services to the residents of an area or project which is primarily residential in character. The agency shall adopt regulations defining the term "primarily residential in character," which may include single-family, multi-family and congregate or other single room occupancy housing, continuing-care retirement communities, mobile homes and non-housing properties and facilities which enhance the livability of the residential property or area; and specifying the types of residential services and facilities for which eligible loans may be made, which may include, but shall not be limited to, parking facilities, streets, sewers, utilities, and administrative, community, educational, welfare and recreational facilities, food, laundry, health and other services and commercial establishments and professional offices providing supplies and services enhancing the area. The term "loan" includes an obligation the return on which may vary with any appreciation in value of the property or interest in property financed with the proceeds of the loan, or a co-ventured instrument by which an institutional lender or the agency assumes an equity position in the property. Any undivided interest in an eligible loan shall qualify as an eligible loan. N.J.S.A. 55:14K-3(e).

[FN18] N.J.S.A. 55:14K-11(d).

[FN19] N.J.S.A. 55:14K-11(h).

[FN20] N.J.S.A. 55:14K-12(e).

[FN21] N.J.S.A. 55:14K-12(f).

[FN22] N.J.S.A. 55:14K-10(a).

[FN23] N.J.S.A. 55:14K-10(b).

[FN24] N.J.S.A. 55:14K-10(c).

[FN25] 1976 N.J. Laws ch. 94.

[FN26] N.J.S.A. 55:14J-42 creates a "Mortgage Assistance Account" in the Department of Community Affairs, consisting of "a. All moneys derived from the sale of the 'State Mortgage Assistance Bonds' and appropriated from the proceeds of such bond sales"; "b. Any moneys which the department shall receive in repayment of loans or advances from the Mortgage Assistance Account"; and "c. Any other moneys made available to the department from any source … which the commissioner shall allocate to the fund …." N.J.S.A. 55:14J-43 authorizes the Commissioner of the Department of Community Affairs to pay from the "mortgage assistance account" to the New Jersey Housing Finance Agency $6 billion "for deposit in one or more reserve funds to assist the New Jersey Housing Finance Agency to provide permanent financing for the developments financed or to be financed by it." N.J.S.A. 55:14J-46 authorizes the Commissioner "to utilize $3,000,000.00 from the Mortgage Assistance Account for the purpose of granting financial assistance, including interest subsidy assistance, for senior citizens and low or moderate income families and for qualified housing developments, including but not limited to those constructed, financed, or rehabilitated under Federal, other State, or locally aided low and moderate income programs, where such assistance is necessary to provide financial feasibility and stability." Such assistance may include "direct loans to qualified mortgagors" as well as direct loans for maintenance and operating subsidies, grants and loans to municipalities for urban homesteading, code enforcement, neighborhood preservation activities, or rehabilitation and direct sale of properties acquired through tax foreclosure or from HUD, "and grants and loans to residential property owners in viable urban neighborhoods threatened by the lack of private capital for mortgage loans and loans for rehabilitation." Ibid.

29 NJPRAC § 2.3

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
2. Mortgage Lending: The Institutional Framework

§ 2.4. The Prevention of Homelessness Act

West's Key Number Digest

West's Key Number Digest, Social Security and Public Welfare 4
West's Key Number Digest, Social Security and Public Welfare 5
West's Key Number Digest, Social Security and Public Welfare 9.5
West's Key Number Digest, States 67

Legal Encyclopedias

C.J.S., Social Security and Public Welfare §§ 6 to 7

C.J.S., Social Security and Public Welfare § 10

C.J.S., States §§ 120 to 121

C.J.S., States §§ 136 to 138

C.J.S., States § 140

The purpose of the "Prevention of Homelessness Act (1984)" ("act")[1] is to provide temporary rental or other housing assistance to persons who are homeless or in imminent danger of homelessness by reason of inability to pay rent or other housing costs, so that no person should suffer unnecessarily from cold or hunger, or be deprived of shelter. At the present time, many persons have been rendered homeless as a result of economic adversity, a severe shortage of affordable housing, and increased stress due to the complexity of daily living. It is both more economical and more socially desirable to place homeless people in suitable apartments, or to enable people to retain possession of their houses or apartments and thereby avoid homelessness, than to house them in hotel rooms or in other facilities intended for short-term occupancy.[2]

The Department of Community Affairs ("department") is the agency authorized to implement the act. The department is empowered to establish priorities of eligibility for temporary rental or other housing assistance among the various categories of persons needing assistance in obtaining or retaining housing, including, without limitation, persons subject to immediate eviction for nonpayment of rent, or foreclosure for nonpayment of mortgage installments or property taxes, when nonpayment is attributable to illness, unemployment, underemployment or any other failure of resources beyond the person's control[3]; shall establish standards of habitability applicable to any housing unit the rental for which is paid, in whole or in part, by temporary rental assistance payments from the authority[4]; and shall establish maximum lengths of terms of eligibility for temporary rental assistance and other temporary housing assistance, and varying levels of assistance, and shall be empowered to convert loans into grants when necessary to carry out the purposes of this act.[5]

By Executive Order No. 126, the Governor established in the Department of Community Affairs, the Interagency Council on Preventing and Reducing Homelessness.[5.01]

November 26, 2008
Governor
State of New Jersey Executive Order #126

Governor Jon S. Corzine WHEREAS, housing constitutes one of the basic needs of all families and individuals within the State of New Jersey, and safe and affordable housing creates a foundation for stable lives, secure families, and thriving communities; and WHEREAS, the State has among the costliest housing markets in the United States and average wages have failed to keep pace with the average cost of housing in the State for at least two decades, causing many individuals and families to spend increasing proportions of their income on housing and causing others to live in overcrowded, inaccessible, unsafe, or unsanitary conditions simply because they have no other option; and

WHEREAS, significant numbers of individuals and families in New Jersey, through illness, low wages, the loss of a job, divorce or family conflict, or struggles with mental health or substance abuse, lose their ability to earn a sufficient income or obtain adequate benefits to remain in their homes; and

WHEREAS, over the course of each year, thousands of individuals and families lose their housing and become homeless; and

WHEREAS, the multiple economic, social, physical, and emotional consequences of an episode of homelessness often exacerbate the factors that led to an individual's or family's loss of housing, thereby making it even more challenging for a single person or a family to regain housing and recreate a stable home; and

WHEREAS, multiple State agencies, commissions, and boards working in fields as diverse as housing, health care, employment, hunger, education, mental health and substance abuse treatment assist individuals and families to remain in their homes with a range of economic and social programs, and these agencies, commissions, and boards, as well as other organizations, also are charged with helping homeless individuals and families to obtain stable housing; and

WHEREAS, all these State agencies, commissions, and boards share the common goals of preventing and eliminating homelessness, especially chronic homelessness; and

WHEREAS, coordinating the work of these State entities will help to foster necessary system changes and maximize the impact of federal, State, and local governmental programs and nonprofit and voluntary efforts to help individuals and families remain in their homes and, if they become homeless, to speed their return to housing;

NOW, THEREFORE, I, JON S. CORZINE, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. There is hereby established in the Department of Community Affairs the Interagency Council on Preventing and Reducing Homelessness (the Council).

2. The Council shall be comprised as follows: (i) the Commissioners of the Department of Children and

Families, the Department of Community Affairs, the Department of Corrections, the Department of Education, the Department of Health and Senior Services, the Department of Human Services, and the Department of Labor and Workforce Development, the Executive Director of the New Jersey Housing and Mortgage Finance Agency, the Chairman of the State Parole Board, the Adjutant General of the Department of Military and Veterans Affairs, and a representative of the Office of the Governor, each of whom shall serve ex officio and may appoint a designee; and (ii) 14 public members appointed by the Governor as follows: a representative of county government, a representative of municipal government, two persons who are or recently were homeless, two representatives of the private sector, four representatives of non-profit agencies providing housing, social, behavioral health, or health-care services to homeless individuals or families, a representative of public housing authorities, an individual with academic expertise in homelessness issues, and two representatives from faith communities. In addition, the President of the Senate, the Speaker of the Assembly, the Senate Minority Leader, and the Assembly Minority Leader each may appoint a member of the Legislature to serve on the Council, and that member may appoint a designee.

3. The Commissioners of the Departments of Community Affairs (DCA) and Human Services (DHS) shall act as co-chairs of the Council.

4. The public members of the Council shall serve at the pleasure of the Governor and without compensation, except that members who are or recently were homeless may be reimbursed for reasonable expenses within funds available to DCA or DHS.

5. The Council shall meet on a regular basis, as determined by the co-chairs.

6. The Council shall:

a. Prepare a preliminary report to the Governor by or before December 31, 2009, containing findings and recommendations for preventing and reducing homelessness, ending chronic homelessness, and improving services to individuals and families who lose their housing, and additional reports as the Council may deem necessary;

b. Review data, activities, funding, and programs in areas including but not limited to housing, health care, employment, education, and mental health and substance abuse services that (i) help individuals and families at-risk of becoming homeless retain their housing and (ii) provide housing and other services for individuals and families who become homeless;

c. Identify statutory and regulatory impediments to the effective provision of services to homeless individuals and families and recommend changes to relevant laws, programs, and policies;

d. Review service delivery models and examine best practices to maximize the cost effectiveness of those models and their results; and

e. Examine and evaluate programs and activities to prevent, reduce, and end homelessness and to assist homeless families and individuals.

f. The Council shall organize and meet as soon as practicable after the appointment of a majority of its members.

g. Staffing for the Council shall be undertaken and coordinated by DCA and DHS. The Council shall seek information and advice, conduct hearings, and take testimony from individuals and families at-risk of losing their homes, or who have lost their housing; providers of housing or services to such persons; research organizations; and others to fulfill its duties.

h. The Council is authorized to call upon any department, division, office, or agency of State government to provide such information, resources, or other assistance deemed necessary to discharge its responsibilities under this Order. Each department, division, office, and agency of this State is hereby required, to the extent not inconsistent with law, to cooperate with the Council and to furnish it with such information, personnel, and assistance as is necessary to accomplish the purposes of this Order.

i. The Council shall operate until December 31, 2011. This period may be extended by Executive Order.

j. This Order shall take effect immediately. GIVEN, under my hand and seal this 26th day of November, Two Thousand and Eight, and of the Independence of the United States, the Two Hundred and Thirty-Third. /s/ Jon S. Corzine
Governor

Benefits under this program shall not be treated as income in determining eligibility requirements for other State programs or for New Jersey gross income tax purposes.[6]

A fund in the amount of $1,650,000.00 is established to implement the act. In addition, the department is authorized to apply up to $500,000.00 of Housing Demonstration Fund moneys for the purpose of providing loans and grants for the acquisition, construction, repair or rehabilitation of structures which are to be operated as shelters for homeless persons by one or more agencies designated for that purpose when it appears to the Commissioner of the Department of Community Affairs that assistance is necessary in order to permit an agency to provide sufficient accommodations for persons likely to be in need of shelter.[7]

New Jersey is also engaged in the mortgage lending business under the New Jersey Mortgage Assistance Bond Act of 1976.[8] The purpose is to provide financial assistance in connection with the provision of new or rehabilitated housing for low and moderate income persons and for senior citizens.[9]DEPARTMENT OF COMMUNITY AFFAIRS, DIVISION OF HOUSING RULESMONDAY, APRIL 7, 2008[FN]RULE ADOPTIONCOMMUNITY AFFAIRSDIVISION OF HOUSINGHOMELESSNESS PREVENTION PROGRAMAdopted New Rule: N.J.A.C. 5:41-1.3Adopted Amendments: N.J.A.C. 5:41-1.2, 2.1, 2.3, 2.4, 2.5, 2.6, and 3.1Authority: N.J.S.A. 52:27C-24 and 52:27D-280.Effective Date: April 7, 2008.Expiration Date: June 28, 2010.

5:41-1.2. Administration

(a) The Homelessness Prevention Program shall be administered by the Department of Community Affairs.

(b) Funds awarded under the Homelessness Prevention Program may be jointly administered by the Department of Community Affairs with other departments and agencies of the State, or non-profit organizations.

(c) In addition to the types of assistance provide herein, assistance may be provided to households via pilot programs administered in accordance with the Act, including, but not limited to, innovative projects or programs, and those that serve a unique population for limited period of time.

5:41-1.3. Waiver

Any party desiring a waiver or release from the express provisions of any of the rules in this chapter may submit a written request to the Homelessness Prevention Program. Waivers may be granted only by the Commissioner of the Department of Community Affairs under extraordinary circumstances, as long as such waiver would not contravene the provisions of the Act, and upon a finding that, in granting the waiver, the Commissioner will be promoting the statutory purposes of the Act.

SubChapter 2. PROGRAM ELIGIBILITY

5:41-2.1. Eligibility

(a) To be eligible for assistance under the Homelessness Prevention Program, a person or household must be either homeless or in imminent danger of losing their home as a result of eviction for non-payment of rent, or mortgage foreclosure, or some other cause which the Department of Community Affairs determines to be comparable.

1. A household shall be deemed homeless if the household involuntarily is without a place of residence for reasons beyond the household's control.
2. A household shall be deemed to be in imminent danger of homelessness if the household is unable to make rental or mortgage payments for reasons beyond the household's control and the household has been served with a summons and complaint for eviction or a notice of mortgage foreclosure, as the case may be.
3. “Mortgage foreclosure” shall include, without limitation, foreclosure for taxes or other municipal liens. In the case of a tax or other municipal lien foreclosure, a person shall be deemed to be in imminent danger of losing his home if he has been served in any legal manner with notice of foreclosure, including a notice of intent to foreclose in accordance with the Fair Foreclosure Act (N.J.S.A. 2A:50-53), the Tax Sale Law (N.J.S.A. 54:5-97.1), or any other notice that the Department determines to be comparable.

(b)–(c) (No change.)

(d) No person or household having a delinquent loan with the Program or which has caused the Program to forfeit a security deposit shall be eligible for additional assistance unless the Department of Community Affairs finds that the delinquency or forfeiture was due to a cause that was either beyond the control of the person or household receiving assistance, or constituted a violation of the rights of that person or household by another person, and that the cause of the delinquency or forfeiture is not likely to recur.

(e)–(g) (No change.)

(h) To be eligible for assistance, a person or household must have experienced an uncompensated loss of income or increase in expenses, for a limited period of time, that are necessarily incurred for the preservation of human life. Applicants must submit documentation verifying that one or more of the following caused the inability to pay housing costs:

1.–4. (No change.)

5. Substantial and permanent change in household composition; or
6. Any other condition which, in the judgment of the Department of Community Affairs, constitutes a severe hardship comparable in its effect to the causes listed in (h)1 through (h)5 above.

(i) Assistance to any person or household facing foreclosure as a result of mortgage or property tax arrearages shall be in the form of a loan, which shall be secured by a recorded mortgage.

1.–2. (No change.)

3. The total amount of any mortgage loan shall not exceed an amount equal to 600 percent (six times 100 percent) of the monthly applicable “Payment Standard” for the family size as defined for the Housing Choice Voucher Program for the region in which the property is located as determined in accordance with guidelines published annually by the United States Department of Housing and Urban Development.

5:41-2.3. Levels of assistance

(a) (No change.)

(b) Where there is any reasonable prospect of repayment, funds shall be advanced as a loan rather than as a grant, upon such terms as the Department of Community Affairs shall consider reasonable and appropriate in light of prevailing interest rates and the applicant's present and future ability to repay.

1. Loans shall be evidenced by a note and, if the applicant owns real property, secured by a mortgage. The form and content of the note and mortgage shall be prescribed by the Department of Community Affairs.

5:41-2.4. Period of assistance

(a) No person who has become eligible for permanent rental assistance under the Housing Choice Voucher Program of the United States Housing Act of 1937, 42 U.S.C. § 1437(f) (24 CFR §§ 982.01 et seq.) or for any subsidized housing, which the household can afford shall continue to receive assistance under the Homelessness Prevention Program once the permanent rental assistance or subsidized housing becomes available.

(b) No person shall continue to receive assistance under the Homelessness Prevention Program for more than six months, nor shall any person receive assistance to pay more than three months' rental arrears, unless the Department of Community Affairs finds there to be sufficient extenuating circumstances to justify an extension.

(c) A household shall be eligible for assistance under the Homelessness Prevention Program more than once only if the problem causing the situation is not chronic or repetitive in nature. Any assistance given after the first award shall be in the form of a loan.

5:41-2.5. Priorities

(a) Inasmuch as all households that apply and are found eligible may not be able to receive assistance due to lack of funds, first consideration shall be given to those most vulnerable in the event of homelessness. Priorities for consideration for assistance among otherwise qualified applicants in the same applicant pool shall be assigned in the following order. However, no person shall be deemed to be entitled to assistance solely by virtue of being in one of the following categories.

1.–2. (No change.)

3. Victims of domestic violence (A referral from the Department of Children and Families, emergency shelter agency, county welfare agency, or other social agency shall be required.);

4. Households with children, which have broken up or face imminent breakup due to homelessness. (A recommendation from the Department of Children and Families, emergency shelter agency, county welfare agency or other social agency shall be required.);

5.–7. (No change.)

(b) (No change.)

5:41-2.6. Administrative hearings

(a) Any person aggrieved by any notice, order, action or decision of the Department of Community Affairs under this chapter may appeal that notice order, action or decision to the Office of Administrative Law for a hearing pursuant to the Administration Procedure Act, pursuant to et seq. and the Uniform Administrative Rules of Practice, N.J.A.C. 1:1.

(b) A request for a hearing must be made in writing within 15 days of the applicant's receipt of the notice or order complained of and must be sent to the Hearing Coordinator, Department of Community Affairs, PO Box 802, Trenton, New Jersey 08625-0802.

5:41-3.1. Compliance with H.U.D. Housing Quality Standards

(a) (No change.)

(b) The Department of Community Affairs may allow payment of rental assistance for a unit if the unit can be occupied without any imminent hazard to health or safety and the owner of the unit is proceeding in a reasonable manner to abate any violation of the H.U.D. Housing Quality Standards.

[FN] N.J. Reg. 1827(b)

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] N.J.S.A. 52:27D-280 et seq.

[FN2] N.J.S.A. 52:27D-281.

[FN3] N.J.S.A. 52:27D-282.

[FN4] N.J.S.A. 52:27D-285.

[FN5] N.J.S.A. 52:27D-287. Basic eligibility [Homelessness Prevention Program] is limited to: (a) single family owner/occupied dwellings with all those on the deed and mortgage occupying the house; (b) no more than one mortgage or lien encumbrance on the property; (c) no initiated or ongoing bankruptcy. Assistance will be in the form of a loan, and a lien will be placed on the property. The family must document the financial reason for nonpayment. At the time of the eligibility decision, the household must have and document sufficient income to support the household and repay the loan. There is a fee for the credit check and property search.

[FN5.01] 2008 New Jersey Executive Order 126.

[FN6] N.J.S.A. 52:27D-283.

[FN7] N.J.S.A. 52:27D-286.

[FN8] 1976 N.J. Laws ch. 94.

[FN9] N.J.S.A. 55:14J-42 creates a “Mortgage Assistance Account” in the Department of Community Affairs, consisting of “a. All moneys derived from the sale of the ‘State Mortgage Assistance Bonds’ and appropriated from the proceeds of such bond sales”; “b. Any moneys which the department shall receive in repayment of loans or advances from the Mortgage Assistance Account”; and “c. Any other moneys made available to the department from any source … which the commissioner shall allocate to the fund ….” N.J.S.A. 55:14J-43 authorizes the Commissioner of the Department of Community Affairs to pay from the “mortgage assistance account” to the New Jersey Housing Finance Agency $6 billion “for deposit in one or more reserve funds to assist the New Jersey Housing Finance Agency to provide permanent financing for the developments financed or to be financed by it.” N.J.S.A. 55:14J-46 authorizes the Commissioner “to utilize $3,000,000.00 from the Mortgage Assistance Account for the purpose of granting financial assistance, including interest subsidy assistance, for senior citizens and low or moderate income families and for qualified housing developments, including but not limited to those constructed, financed, or rehabilitated under Federal, other State, or locally aided low and moderate income programs, where such assistance is necessary to provide financial feasibility and stability.” Such assistance may include “direct loans to qualified mortgagors” as well as direct loans for maintenance and operating subsidies, grants and loans to municipalities for urban homesteading, code enforcement, neighborhood preservation activities, or rehabilitation and direct sale of properties acquired through tax foreclosure or from HUD, “and grants and loans to residential property owners in viable urban neighborhoods threatened by the lack of private capital for mortgage loans and loans for rehabilitation.” Ibid.

29 NJPRAC § 2.4

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
2. Mortgage Lending: The Institutional Framework

§ 2.5. New Jersey Home Ownership Security Act of 2002 ("Predatory Lending Law")

The "New Jersey Home Ownership Security Act of 2002"[1] ("act")—commonly known as the "Predatory Lending Law"—was enacted May 1, 2003. It becomes effective on the 210th day following enactment, and applies to home loans closed on or after that date, except a loan which is in existence on the effective date of the act and which meets the definition of home loan under the act is a home loan for purposes of section 4b (i.e., loan flipping). Section 14 (promulgation of regulations by the Commissioner of Banking and Insurance) takes effect immediately.[2]

The act is intended address the problem of abusive mortgage lending in New Jersey in which a loan is equity-based not income-based. The financing of points and fees in these loans provides immediate income to the originator and encourages repeated financing. The lender's ability to sell the loan reduces the incentive to ensure that the homeowner can afford the payments. The financing of high points and fees causes the loss of precious equity in each refinancing and often leads to foreclosure. The act is intended to encourage lending at reasonable rates with reasonable terms.[3]

Robert M. Jaworski in an article entitled "Predatory lending bill: Unintended consequences" has said—"Judging from what happened in Georgia, where a similar bill was enacted and became law Oct. 1, 2002, a good guess is the legislature here will find itself revisiting the bill sooner rather than later …. California-based Countrywide Home Loans and more than two dozen other lenders, stopped taking applications in Georgia for certain loans they felt exposed them to liability."[4] Georgia's law was recently revised.[5]

On July 25, 2001, the New Jersey Appellate Division decided a landmark case in the area of predatory lending, Associates Home Equity v. Troup,[6] in which the court held that the homeowners, Beatrice and Curtis Troup, African-Americans, among other things, (a) laid a foundation for a claim of reverse redlining by the original lender and the lender's assignee in violation of New Jersey's Law Against Discrimination (LAD), the federal Fair Housing Act (FHA) and Civil Rights Act (CRA), and were thereby entitled to additional discovery on this claim as a defense to foreclosure; and (b) were entitled to a jury trial on whether the acts of the original lender, the lender's assignee and foreclosing mortgagee and other defendants were unconscionable under New Jersey's Consumer Fraud Act (CFA).

The Department of Banking and Insurance, Division of Banking, adopted new Rules (N.J.A.C. 3:30)[6.01] effective August 21, 2006 regarding predatory lending.

A summary of the act is set forth below.

Definitions

"Borrower" is defined as any natural person obligated to repay the loan, including a coborrower, cosigner, or guarantor.[7]

"Creditor" means a person who extends consumer credit subject to a finance charge or is payable in a written agreement in more than four installments. It also includes any person brokering a home loan, (including any person who directly or indirectly solicits, places, or negotiates home loans for others or who closes home loans with funds provided by others) and which loans are thereafter assigned to the person providing funding. Creditor does not include an attorney providing legal services to the borrower, a person holding an insurance producer license for title insurance or a title insurance company (or any officer, director or employee) providing closing services for a home loan who is not also funding the home loan, is not an affiliate of the creditor or an assignee under section 6 of the act.[8]

"Home loan" is defined as "an extension of credit primarily for personal, family or household purposes" which is secured by a mortgage on a one to six family dwelling which is or will be occupied by a borrower as the borrower's principal dwelling or a security interest in a manufactured home which is or will be occupied by a borrower as the borrower's principal dwelling. Such term does not include rental property or second homes or manufactured homes when not secured in conjunction with the real property on which the manufactured home is located.[9]

The "covered home loan" category was deleted by virtue of 2004 N.J. Laws ch. 84, § 2, effective July 6, 2004.[10]

"High-cost home loan" means a home loan for which the principal amount does not exceed $350,000 to be adjusted annually in accordance with the Consumer Price Index and meets or exceeds one or more of the two thresholds under the act: the *rate threshold* or *total points and fees threshold*.[11]

"Rate threshold" means the annual percentage rate at the time the loan is consummated so that it is considered a "mortgage" under the federal "Home Ownership and Equity Protection Act of 1994" (15 U.S.C.A. § 1602(aa)), and the Federal Reserve Board regulations, including 12 C.F.R. § 226.32, without regard to whether the loan transaction may be a "residential mortgage transaction" under 12 C.F.R. § 226.2(a)(24).[12]

"Total points and fees threshold" means that the total points and fees payable by the borrower excluding either a conventional prepayment penalty[13] or up to two bona fide discount points[14] exceed: (a) 4.5% of the total loan amount if $40,000 or more; or (b) the lesser of 6% of the total loan amount or $1,000 if less than $20,000, and 6% if the amount is $20,000 or more but less than $40,000.[15]

"Points and fees" are defined in the footnote.[16]

Exclusions from "points and fees" are set forth in the footnote.[17]

"Total loan amount" means the principal of the loan minus those points and fees as defined in this section that are included in the principal amount of the loan. For open-end loans, the total loan amount shall be calculated using the total line of credit allowed under the home loan.[18]

Limitations and Prohibitions

The act prohibits a creditor making a home loan from financing, directly or indirectly, any credit life, disability, unemployment, property insurance, life or health insurance or payments for debt cancellation or suspension agreement or contract. Excepted, however, are insurance premiums or debt cancellation or suspension fees calculated and paid on a monthly basis.[19]

The prohibition against "flipping" was deleted by virtue of the 2004 amendment—2004 N.J. Laws ch. 84, § 3, effective July 6, 2004.[20]

No creditor, in connection with the planned closing of a home loan, may recommend or encourage default with respect to an existing or prior loan to be refinanced in whole or part by the new loan.[21]

A late payment fee for a home loan may not be in excess of 5% of the past due payment; may only be assessed for a payment past due for 15 days or more; only one fee per late payment may be charged; and each payment shall be treated as posted on the same date received. Also, no late fee may be collected unless the creditor notifies the borrower within 45 days after the payment was due that a late fee is being imposed. No late fee may be collected if the borrower disputes the fee and presents proof of payment within 45 days of the creditor's notice.[22]

No home loan may contain a provision permitting the creditor to accelerate the debt "in its sole discretion."[23] And no creditor may charge a fee for providing a pay-off statement to "any person" or a release on prepayment. Payoff balances must be provided within seven business days after request.[24]

A "high-cost home loan" may not: contain a scheduled payment that is more than twice as large as the average of earlier scheduled payments (not applicable where payment schedule is adjusted to seasonal or irregular income of the borrower);[25] provide for an increase in the principal loan amount because the regular periodic payments do not cover the full amount of interest;[26] contain a provision increasing the rate of interest after default (not applicable to a variable rate loan where the change in the interest rate is not triggered by default or acceleration of the indebtedness);[27] include terms where more than two periodic payments are consolidated and paid in advance from the loan proceeds to the borrower.[28] Any provision of a high costs loan agreement that requires a borrower to assert any claim or defense in a forum that is "less convenient, more costly, or more dilatory for the resolution of a dispute than a judicial forum established in this State" is unconscionable and void.[29]

A creditor cannot make a "high-cost home loan" unless the borrower is given a required notice under the statute, acknowledged and signed by the borrower not later than the time specified in the notice provision of 12 C.F.R. § 226.31(c) .[30] A creditor cannot make a "high-cost home loan" to a borrower *who finances points and fees* without first receiving a certification from a third-party nonprofit credit counselor, approved by the U.S. Department of Housing and Urban Development and the Department of Banking and Insurance, that the borrower has received counseling on the advisability of the loan or completing another substantial requirement developed by the department.[31]

A creditor with respect to a "high-cost home loan" cannot: pay a home improvement contractor from the proceeds of a high-cost home loan unless the instrument is payable to the borrower or jointly to the borrower or contractor, or at the borrower's election through a third party escrow agreement signed by the borrower, contractor and creditor prior to disbursement;[32] charge a borrower any fees or other charges to modify, renew, extend or amend the loan or defer payment under the loan;[33] or charge a borrower points and fees if the proceeds of the loan are used to refinance an existing high-cost home loan held by the same creditor as the note holder.[34]

A creditor making a "high-cost home loan" who has the right to foreclose must use the "judicial foreclosure procedures of this State" (if the property is located in this State).[35] No creditor, making a "high-cost home loan" shall directly or indirectly finance points and fees in excess of 2% of the total loan amount.[36]

Claims and Defenses; Liability

Claims and defenses against a person selling a manufactured home or home improvement contractor: if a home loan was made, arranged, or assigned by a person selling either a manufactured home, or home improvements to the dwelling of a borrower or was made by or through a creditor to whom the borrower was referred by that seller, the *borrower* may assert all affirmative claims and any defenses that the borrower may have against the *seller* or *home-improvement contractor* limited to amounts required to reduce or extinguish the borrower's liability under the home loan, plus the total amount paid by the borrower in connection with the transaction, plus amounts required to recover costs, including reasonable attorney's fees against the creditor, any assignee or holder, in any capacity.[37]

Purchaser or assignee of a high-cost home loan subject to borrower's claims against original creditor or broker: any person who purchases or is otherwise assigned a high-cost home loan shall be subject to all affirmative claims and any defenses with respect to the loan that the borrower could assert against the *original creditor* or *broker of the loan*; provided that this subsection shall not apply if the purchaser or assignee demonstrates, by a preponderance of the evidence, that a reasonable person exercising reasonable due diligence could not determine that the mortgage was a high-cost home loan. It shall be presumed that a purchaser or assignee has exercised such due diligence if the purchaser or assignee demonstrates by a preponderance of the evidence that it: (1) has in place at the time of the purchase or assignment of the loan, policies that expressly prohibit its purchase or acceptance of assignment of any high-cost home loan; (2) requires by contract that a seller or assignor of home loans to the purchaser or assignee represents and warrants to the purchaser or assignee that either (a) it will not sell or assign any high-cost home loan to the purchaser or assignee or (b) that the seller or assignor is a beneficiary of a representation and warranty from a previous seller or assignor to that effect; and (3) exercises reasonable due diligence at the time of purchase or assignment of home loans or within a reasonable period of time thereafter intended by the purchaser or assignee to prevent the purchaser or assignee from purchasing or taking assignment of any high-cost home loan.[38]

Borrower's rights against creditor, assignee or holder: a borrower acting only in an individual capacity may assert against the creditor or any subsequent holder or assignee of the home loan: (1) within six years of the closing of a *covered home loan*, a violation of this act in connection with the loan as an original action, or as a defense, claim or counterclaim after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan has become 60 days in default; and (2) at any time during the term of a *high-cost home loan* after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan has become 60 days in default, any defense, claim or counterclaim (but (1) and (2) are limited to amounts required to reduce or extinguish the borrower's liability under the home loan plus amounts required to recover costs including reasonable attorney's fees).[39]

Subterfuge; Dividing loan transaction. It is a violation of this act for any person, in bad faith, to attempt to avoid the application of this act by: (1) Dividing any loan transaction into separate parts; or (2) Any other such subterfuge, with the intent of evading the provisions of this act.[40]

Common law recoupment rights not limited: Nothing in section 6 shall be construed to limit the substantive rights, remedies or procedural rights, including, but not limited to, recoupment rights under the common law, available to a borrower against any creditor, assignee or holder under any other law. The limitations on assignee liability in subsection b. of section 6 shall not apply to the assignee liability in subsection a., c. and d. of this section.[41]

If the Department of Banking and Insurance determines that a person has violated the act, the Commissioner may impose a civil penalty of up to $10,000, suspend, revoke or refuse to renew any license issued by the Department, prohibit or permanently remove an individual responsible for violation from working in his present capacity or other capacities related to activities regulated by the Department, order a person to cease and desist from any violation and to make restitution for actual damages to borrowers, issue temporary emergent orders (subject to an application on two day's notice to vacate under the Administrative Procedure Act) and impose other appropriate conditions.[42]

The Commissioner may maintain an action for an injunction or other process to restrain and prevent a violation of the act.[43] A decision of the Commissioner shall be a final order and enforceable in a court of competent jurisdiction.[44]

The Commissioner shall conduct examinations and investigations and issue subpoenas to enforce this act with respect to a person licensed under New Jersey Licensed Lenders Act;[45] and shall examine any instrument, document, account, book record or file of a person originating or brokering a high-cost loan.[46]

Any violation of the act constitutes an unlawful practice under New Jersey's Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 et seq., and may seek damages either (a) under the CFA (N.J.S.A. 56:8-19)[47]—which provides for treble damages, actions by the Attorney General, reasonable attorneys' fees, filing fees and reasonable costs of suit; or (b) statutory damages under section 8b(1)(a)—damages equal to the finance charges agreed to in the home loan agreement, plus up to 10% of the amount financed.[48] Moreover, section 8b(1) provides that for *material* violations of the act statutory damages equal to the finance charges and up to 10% of the amount finances; *punitive damages* when the violation was *malicious or reckless*, and costs and reasonable attorneys' fees.[49] A borrower may also be granted injunctive, declaratory and equitable relief in an action to enforce compliance with the act.[50] The remedies provided in this section are not exclusive.[51]

Creditor's Good Faith Error Defense

A creditor in a home loan who, when acting in good faith, fails to comply with the provisions of this act, will not be deemed to have violated this section if the creditor establishes that either: (1) Within 45 days of the loan closing, the creditor has made appropriate restitution to the borrower, and appropriate adjustments are made to the loan; or (2) Within 90 days of the loan closing and prior to receiving any notice from the borrower of the compliance failure, and the compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid such errors, the borrower is notified of the compliance failure, appropriate restitution is made to the borrower, and appropriate adjustments are made to the loan.

Examples of bona fide errors include clerical, calculation, computer malfunction and programming, and printing errors. An error of legal judgment with respect to a person's obligations under this section is not a bona fide error.[52]

Mortgage brokers

Notwithstanding any provision of this act to the contrary, a mortgage broker shall be liable under the provisions of this act only for acts performed by the mortgage broker in the course of providing mortgage brokering services. However, a mortgage broker may be held liable for acts performed by the mortgage broker outside the scope of mortgage brokering services if the acts are related to the purchasing or the making of a home loan and are otherwise prohibited under this act.[53]

No regulation by municipality, county

No municipality, county or political subdivision thereof, shall enact an ordinance or resolution or promulgate any rules or regulations relating to this act. The provisions of any ordinance or resolution or rules or regulations of any municipality or county relative to abusive home loan lending practices are superseded by the provisions of this act.[54]

Rights, remedies, additional and cumulative

The rights, remedies, and prohibitions accorded by the provisions of this act are hereby declared to be in addition to and cumulative of any other right, remedy, or prohibition accorded by the common law or statutes of the United States or of this State, and nothing herein shall be construed to deny, abrogate, or impair any such common law or statutory right, remedy, or prohibition. Without limiting the foregoing, the rights, remedies and prohibitions accorded by the provisions of this act are hereby further declared to create no presumption[55] that any home loan or any term in a home loan is not unconscionable, whether or not the home loan or loan term, alone or in conjunction with other terms of the loan, violates the provisions of this act.[56]

Applicability of New Jersey law

The law of the state in which the property is located shall be applied to all transactions governed by this act regardless of where those transactions originated. This act shall apply to all loans made or entered into after the effective date of this act.[57]

NEW JERSEY INSURANCE BULLETINS AND RELATED MATERIALS BULLETINS

Bulletin 2003-15

July 25, 2003

TO: All Interested Parties

FROM: H. Robert Tillman

Acting Commissioner and Director—Division of Banking

DATE: July 25, 2003

RE: THE NEW JERSEY HOME OWNERSHIP SECURITY ACT OF 2002

The New Jersey Department of Banking and Insurance ('Department') is issuing this Bulletin in response to questions that have been raised about the New Jersey Home Ownership Security Act of 2002 (the 'Act') [2003 NJ Sess. Law Serv. ch. 64 (ASSEMBLY 75)] [FN1], N.J.S.A. 46:10B-22 et seq., signed into law on May 1, 2003. The Act addresses abusive lending practices, and is designed specifically to prevent the issuance of those high-cost loans that are harmful to consumers. This Bulletin provides guidance about the operation and enforcement of the Act in response to the various questions and issues raised by interested parties. The Department will issue additional guidance and participate in compliance workshops in order to help the industry to prepare prior to the Act's effective date, November 27, 2003, as deemed necessary and appropriate. This Bulletin is for guidance purposes only and is not intended to constitute a discussion of all aspects of the Act.

LIMITATIONS ON DAMAGES

QUESTION 1:

An issue was raised as to whether the limits on damages and other provisions related to assignee liability (N.J.S.A. 46:10B-27) apply when an individual chooses to seek damages under the New Jersey Consumer Fraud Act ('CFA') as authorized under N.J.S.A. 46:10B-29a against an assignee or holder pursuant to the liability provisions in N.J.S.A. 46:10B-27 for a violation of the Act. The limits on damages apply to any assignee liability arising under N.J.S.A. 46:10B-27 and thus apply in this situation. N.J.S.A. 46:10B-27 sets forth specific terms and conditions under which assignees may be held liable under the Act, notwithstanding any other laws to the contrary. N.J.S.A. 46:10B-29a states that a borrower may seek damages for a violation of the Act pursuant to Section 7 of the CFA (N.J.S.A. 56:8-19), or may seek damages through N.J.S.A. 46:10B-29b. Regardless of which alternative in N.J.S.A. 46:10B-29 the borrower chooses, whenever a borrower seeks liability against an assignee or holder pursuant to N.J.S.A. 46:10B-27, the limits and conditions set forth for assignee liability in N.J.S.A. 46:10B-27 apply to such assignee liability.

QUESTION 2:

Another question was raised concerning whether a borrower can recover damages under both N.J.S.A 46:10B-27a and 27c from one assignee. In limited situations, yes. N.J.S.A 46:10B-27a and 27c provide distinct remedies for different types of claims. Subject to the specified caps on damages and other limitations, section 27c allows a borrower to bring claims against an assignee that could be asserted against the original creditor. N.J.S.A. 46:10B-27a allows a borrower to bring claims against an assignee that could be asserted against the original seller of a manufactured home or home improvements, where the seller also had the requisite level of involvement in the loan transaction. In rare circumstances, therefore, a borrower may have multiple separate claims that can be brought under both N.J.S.A. 46:10B-27a and 46:10B-27c simultaneously in connection with the same loan transaction. In that case, the damage caps would apply to the respective claim made under that subsection. The general principle that there can be no double recovery for the same loss would still apply.

QUESTION 3:

A question was raised concerning the cap on damages that may potentially be imposed against an assignee who purchases home improvement or manufactured housing loans pursuant to N.J.S.A. 46:10B-27a. The inquirer wanted to know what is included in the phrase 'total amount paid by the borrower in connection with the transaction.' This phrase is part of the explicit limitation on damages against assignees that a borrower may obtain pursuant to that subsection. N.J.S.A. 46:10B-27a represents a ceiling, not a minimum. This phrase includes items paid by the borrower to the original creditor, including principal and interest. However, because this phrase involves the interplay between existing Federal and State law, the Department is still examining the issue. Nonetheless, this language is based upon the FTC Holder Rule, 16 C.F.R. § 433, which has been the subject of substantial guidance by the FTC and the courts for almost 30 years. This rule provides that:

> any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services … Recovery hereunder by the debtor SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR hereunder. (emphasis added).

The FTC Staff Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (41 FR 20022 (May 14, 1976)) further states:

> In other words, the consumer may assert, by way of claim or defense, a right not to pay all or part of the outstanding balance owed the creditor under the contract; but the consumer will not be entitled to receive from the creditor an affirmative recovery which exceeds the amounts of money the consumer has paid in.

Id. at 7.

CASHOUTS, JUNIOR LIENS, HOME IMPROVEMENT TYPE LOANS

QUESTION 4:

A question was also raised as to whether cash-out refinancing transactions and junior lien mortgage loans are subject to the provisions related to assignee liability for home improvement and manufactured housing loans under N.J.S.A. 46:10B-27. Cash-out and junior lien mortgage loans are not subject to this liability unless a home improvement contractor or manufactured home seller made the loan or was otherwise involved as specified in N.J.S.A. 46:10B-27a. This subsection provides that if a home improvement contractor or manufactured home seller arranges the loan, either directly or by means of a referral, the assignee or purchaser of such loans is subject to limited liability for any claims and defenses that a borrower may have against the seller or home-improvement contractor capped at a specified amount. The circumstances in which this provision apply are consistent with, and based upon, well-established law, most notably the Federal Trade Commission's Holder Rule promulgated in 1975. See 16 C.F.R. 433. See also the New Jersey Home Improvement Practices rules, N.J.A.C. 13:45A-16.2 et. seq. and the New Jersey Home Repair Financing Act, N.J.S.A. 17:16C-64.1 et seq. Moreover, the provision requires the requisite degree of involvement by a home improvement contractor or a manufactured home seller. Thus, the provision does not apply to the situation when a borrower refinances his or her own home without the involvement of a home repair contractor, and subsequently uses cash obtained in the process to pay for home repairs and/or improvements.

QUESTION 5:

A question was also raised as to how much involvement a home improvement contractor or manufactured home seller must have in arranging the home loan for the assignee liability in N.J.S.A. 46:10B-27a to be applied. The requisite level of involvement will be reached if the contractor or seller is sufficiently involved in making or otherwise participating in the home loan as consistent with the substantial guidance and precedent that underlies the FTC Holder Rule. See, e.g., the Staff Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses. 41 Fed. Reg. 20022 (May 14, 1976). For example, the circumstances in which a home improvement contractor will be determined to have ‘referred’ a borrower to a lender under N.J.S.A. 46:10B-27a, will include ‘those situations where a [home repair] seller, in the ordinary course of business, is sending his buyers to a particular loan outlet, or to particular outlets, for credit which is to be used in the sellers' establishment. In such circumstances, the seller is effectively arranging credit for his customers.’

QUESTION 6:

A question was raised concerning how an assignee or purchaser would be able to determine whether a loan is a home improvement or manufactured home loan with the requisite degree of involvement by a home improvement contractor or a manufactured home seller such that the terms of N.J.S.A. 46:10B-27 apply. Based on existing law, a home improvement or manufactured home loan with the requisite degree of third party involvement is required to include a prominent provision on the note itself identifying it as a loan to which a limited degree of assignee liability is attached. Under the Federal Trade Commission's Holder Rule, it is an unfair and deceptive trade practice for a seller of goods and services to ‘take or receive a consumer credit contract’, in this case a home loan, which fails to include a notice prescribed by the regulation regarding assignee liability. The rule also makes it an unfair and deceptive trade practice for a seller of goods and services to accept proceeds of a related loan where the seller referred the consumer to the creditor or is affiliated with the creditor, if the consumer credit contract fails to include a similar notice. 16 C.F.R. 433. New Jersey Home Improvement Practices Regulations mandate and similarly contain the federal mandate for such a prominent notice. See N.J.A.C. 13:45A-16.2(a)(13)(ii).

Assignees and purchasers should, therefore, be able to identify loans covered by N.J.S.A. 46:10B-27a in virtually all circumstances. It is possible, of course, that home improvement contractors and manufactured home sellers whose loans are covered by the FTC Holder Rule and the New Jersey Home Repair Financing Act may violate existing law and fail to include the requisite notice. With regard to this possibility, N.J.S.A. 46:10B-27a reinforces the obligations and measures that purchasers and assignees already take, or should take, to ensure that originators mandate compliance with existing federal and state law and do not ignore or inadvertently fail to follow the Holder Rule and state law requirements. See also Associates Home Equity Services, Inc. v. Beatrice Troup, 343 N.J.Super. 254, 778 A.2d 529 (2001) (when loan arranged by and in concert with home improvement contractor, lender cannot evade remedies available under the Holder Rule due to failure to include required notice provision). Assignees and purchasers have available mechanisms, including targeted inquiry prior to purchase, and representations and warranties as part of acquisition, to ensure loans being purchased or assigned are in compliance with federal and state law, including the requirements regarding notice under the FTC Holder Rule.

QUESTION 7:

A question was also raised concerning whether borrowers can assert class action claims under N.J.S.A. 46:10B-27a in connection with home improvement or manufactured home loans against creditors, assignees, or holders. N.J.S.A.46:10B-27a provides that the borrower may assert all affirmative claims against the creditor, any assignee or holder in any capacity. This provision does not restrict the ability of a borrower to raise class action claims. As a general matter, therefore, to the extent that a borrower has the ability to raise a claim by way of class action, this provision provides, subject to the limitation on damages set forth in the section, that a borrower may assert such claims in the same manner against an assignee or purchaser. This is consistent with existing rights and remedies under the FTC rules. The damages for each borrower in the class, however, will be limited to the amounts required to reduce or extinguish the borrower's liability under the loan, plus the total amount paid by the borrower in connection with the transaction, plus amounts required to recover costs, including reasonable attorney fees.

ESCROW PAYMENTS

QUESTION 8:

A question was also raised as to whether escrow payments for tax and insurance charges are included as ‘points and fees’ and therefore used in determining whether a mortgage loan constitutes a ‘covered’ loan or ‘high cost’ loan as defined in the Act. Escrow payments for future payments of taxes and insurance are not included in the definition of ‘points and fees’ under the Act. There may be confusion on this matter because the definition of ‘points and fees’ includes ‘all items’ listed in 15 U.S.C. 1605(a)(1) to (4), with specified exceptions, and includes ‘all charges listed in 15 U.S.C. 1605(e)’. It is noteworthy that the Act's reference to 15 U.S.C. 1605(e) in the definition of ‘points and fees’ references ‘charges’ rather than ‘items.’ Escrows for taxes and insurance are not ‘charges’ and thus are not included in this portion of the Act's definition of ‘points and fees.’ It should also be noted that actual escrow charges (i.e. when a lender charges a fee for maintaining an escrow) and other specified items are only excluded from the definition of ‘points and fees’ as long as the conditions of the exclusion are met. Under the Act, for an item or charge to be excluded from ‘points and fees’ it must be ‘reasonable,’ must be ‘paid to a person other than a creditor or an affiliate of the creditor or to the mortgage broker or an affiliate of the mortgage broker,’ and must meet the conditions set forth in 12 C.F.R. 226.4(c)(7) and 12 C.F.R. 226.4(d)(2).

ASSIGNEE SAFE HARBOR DUE DILIGENCE

QUESTION 9:

Questions were also raised as to whether an entity exercising ‘due diligence,’ to prevent it from purchasing or taking assignment of any high-cost home loan pursuant to N.J.S.A. 46:10B-27b(3), must review 100% of loans being purchased in order to gain the safe harbor under N.J.S.A. 46:10B-27b(3). The Department will not require such a review. The Department considered the concept of ‘reasonable due diligence’ as generally understood by courts, which is ‘what a reasonable person would have done in his situation given the same information.’ The Department is in the process of reviewing common banking and secondary market practices regarding due diligence review of mortgage pools, as well as similar due diligence in the securities context, and believes, based on the information it has obtained to date, that sampling is a standard accepted practice.

For example, to provide for quality control, secondary market participants, such as Fannie Mae, sample loan purchases to ensure conformance with general guidelines, including representations and warranties. This approach has been recommended in a recent advisory issued to give national banks guidance on ‘Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans.’ In its advisory, the Office of the Comptroller of the Currency (‘OCC’) described recommended practices for mitigating the risk of purchasing predatory loans, suggesting that banks conduct quality control review of appropriate loan documentation at the beginning of a third-party relationship, when a particular problem had been identified, and periodically through random sampling as a key recommendation. The OCC stated that such sampling ‘should be adequate to ensure that loans are being underwritten consistently with the bank's policies. Loan reviews also should be sufficient to protect against potential fraud in these transactions.’ See OCC Advisory Letter, AL 2003-3 (February 21, 2003).

Accordingly, for the vast majority of mortgage pools, loan-by-loan file review is not necessary for meeting the ‘reasonable due diligence’ requirement. In other contexts, courts have concluded ‘that the diligence conducted must be reasonable, not perfect.’ However, in some situations, such as when a pool is very small or an initial review has uncovered that the pool contains a number of high cost loans, then more extensive review may be required to meet the reasonableness requirement.

FLIPPING

QUESTION 10:

A question was raised whether the ‘flipping’ restriction (also known as the ‘reasonable tangible net benefit’ requirement) in N.J.S.A. 46:10B-25b applies to all home loans. Under the Act, the ‘flipping’ restriction applies when two requirements are met. First, the new loan must meet the definition of a covered loan. The definition of a covered loan includes high cost loans. Second, the refinance must occur within 60 months of the closing of the prior home loan. It should also be noted that the Act does not provide a safe harbor presumption for any home loan or refinancing that is not a covered or high cost loan. These non-covered and non-high cost loans are still subject to rules regarding unconscionability as well as any unlawful practices under the CFA. A violation of the flipping provision in the Act, however, requires that the two (2) prerequisites set forth above are first met.

QUESTION 11:

Another question was raised as to what factors a lender should consider in determining compliance with the reasonable tangible net benefit standard related to a refinancing into a covered loan within 60 months from the prior home loan. A ‘reasonable, tangible net benefit’ standard is inherently dependent on the totality of the facts and circumstances related to a specific transaction. While some loans may clearly provide a net benefit, others may require a closer review to determine whether a particular covered loan provides the requisite benefit to a borrower. In making this evaluation, lenders should look at a range of factors related to an individual borrower's circumstances. Examples of factors that could be relevant include, but are not limited to, the following:

* Terms of the new and old loan, including, but not limited to, note rate, amortization schedule, and balloon payment provisions, provided that costs associated with (and paid at or before closing of) the old loan, such as closing costs or points and fees other than prepayment penalties, are not normally relevant to the determination of flipping;
* Costs of the new loan, including points and fees charged on the new loan as well as other closing costs associated with the transaction as routinely disclosed on the closing statement;
* Loan-to-value ratio of the new loan compared to that associated with the outstanding balance on the existing home loan;
* Debt-to-income ratio of the borrower before and after the proposed transaction;
* In cases where economic benefits do not demonstrably indicate that a reasonable, tangible net benefit has occurred, a significant reason that explains the need for, and proposed use of, the loan proceeds; and
* Other benefits the borrower receives from the transaction.

While the Department will not mandate that lenders use a prescribed form for evaluating the economic or non-economic benefits of a particular covered loan, lenders are encouraged to maintain records in the loan file to demonstrate that they conducted an analysis of this standard in each covered refinancing transaction. It is the lender's responsibility to ensure that a borrower received a tangible net benefit, and an appropriate analysis reflected in documentation can be helpful in making sure that a lender satisfies that responsibility. As part of a lender's analysis, a lender may wish to obtain an explanation from the borrower regarding any non-economic benefits the borrower associates with the loan transaction.

Any questions about this Bulletin or the Act may be directed to the Director of the Division of Banking, Department of Banking and Insurance, 20 West State Street, P. O. Box 040, Trenton, New Jersey 08625-0040.

[FN1] Citation editorially supplied.

Bulletin 2003-30

November 18, 2003

TO: All Interested Parties

FROM: Holly C. Bakke

Commissioner of Insurance

DATE: November 18, 2003

RE: THE NEW JERSEY HOME OWNERSHIP SECURITY ACT OF 2002

The New Jersey Department of Banking and Insurance (‘Department’) is issuing this Bulletin as a supplement to Bulletin No. 03-15, issued July 24, 2003, in response to questions that have been raised about the New Jersey Home Ownership Security Act of 2002 (the ‘Act’), N.J.S.A. 46:10B-22 et seq., signed into law on May 1, 2003. The Act addresses certain abusive lending practices, and is designed specifically to prevent the issuance of those high-cost loans that are harmful to consumers. This Bulletin provides additional guidance about the operation and enforcement of the Act in response to the various questions and issues raised by interested parties. This Bulletin is for guidance purposes only and is not intended to constitute a discussion of all aspects of the Act. In the interest of consistency, the question numbering continues from Bulletin No. 03-15.

ASSIGNEE/PURCHASER SAFE HARBOR

QUESTION 12:

An issue was raised whether the Department would consider it sufficient to demonstrate ‘by a preponderance of the evidence, that a reasonable person exercising reasonable due diligence could not determine that a mortgage loan is a high-cost home loan’ under N.J.S.A. 46:10B-27b.

In determining whether an assignee or purchaser has satisfied this standard, the Department will review whether it has fulfilled the three-prong test delineated by N.J.S.A. 46:10B-27b. Specifically, the Department will consider a purchaser or assignee as having met the requirements of the provision if it:

(1) has in place at the time of the purchase or assignment of the loan, policies that expressly prohibit its purchase or acceptance of assignment of any high-cost home loan;

(2) requires by contract that a seller or assignor of home loans to the purchaser or assignee represents and warrants to the purchaser or assignee that either: (a) it will not sell or assign any high-cost home loan to the purchaser or assignee; or (b) that the seller or assignor is a beneficiary of a representation and warranty from a previous seller or assignor to that effect; and

(3) exercises reasonable due diligence at the time of purchase or assignment of a home loan, or within a reasonable period of time thereafter, intended by the purchaser or assignee to prevent the purchaser or assignee from purchasing

or taking assignment of any high-cost home loan.

QUESTION 13:

A question was raised regarding what role a third-party software package or internally developed computer program may properly take in efforts designed to meet the requirements of the law.

The Department believes that appropriately designed and utilized third party software packages or internally developed computer programs can serve as an important component in helping lenders meet the requirements of the statute. The Department expects that use of such software will expand the ability of lenders to determine which provisions of the law apply to the loans they originate by systematically tracking a much larger number of loans than could be done manually. The Department recognizes that software packages are available and used for determining compliance with the Truth In Lending Act and other lending laws and regulations. The Department understands that computer systems and software packages are now available that, when used effectively, can enable lenders to determine easily whether loans are home loans, covered loans, or high cost loans under the Act. These tools can also identify more quickly loans requiring particular attention, and reduce compliance costs.

It is important, however, to recognize that any software program relied upon must be calibrated and tested prior to use, periodically tested as part of the ongoing compliance review process, and used in a fair and reasonable manner. Even with the use of software, periodic manual oversight and monitoring is still expected to ensure that the software is used appropriately and performs adequately (e.g., data is inputted correctly), and to evaluate matters that may not be addressed by the software.

Of course, there is no requirement that a lender must use such computer systems, and the Department expects that a certain number will elect not to rely on them. Lenders are free to choose whatever mechanism is most appropriate for them. The Department's focus will be on ensuring that whatever policies, procedures, and mechanisms a lender chooses are appropriate for compliance with the law.

QUESTION 14:

A question was raised as to what the Department expects when a purchaser or assignee determines, as part of its initial review of loans in a pool, that there are high cost loans included in the pool, even though the entities selling or assigning the loans made representations that no such loans were included.

Consistent with the Department's response to Question 9 in DOBI Bulletin 03-15, in these circumstances, the Department expects that there will be a substantially upgraded review of the loan pool to evaluate such loans, the reliability of representations and warranties in place that there are no high-cost loans in the pool, and the extent to which there are other high cost loans in the pool. In addition, the Department expects that all appropriate steps will be undertaken to have such loans returned to the entity that sold or assigned them. The extent of this review depends upon a number of factors, including the overall size of the pool, the number of high-cost loans identified during the initial due diligence process and how extensive that initial process was, and the other procedures in place by originators to identify high-cost loans and exclude them from the loan pool.

COVERED LOANS

QUESTION 15:

A question was raised as to what the restrictions are regarding the small segment of subprime loans considered ‘covered’ loans under the Act. Under the Act, the category of ‘covered’ home loan describes a small set of subprime loans where the points and fees (as defined under the law and subject to certain exclusions described in the Act) exceed 4 percent of the total loan amount or 4.5 percent for loans under $40,000 or insured by the FHA or VA. Any high-cost home loan is also considered a ‘covered home loan.’

Restrictions that apply to all ‘home loans’ also apply to covered home loans.

These restrictions include the following:
(1) No financing of credit insurance;
(2) No encouraging of default;
(3) No charging of a late payment fee in excess of five percent of the amount of the payment due;
(4) No acceleration of the indebtedness at the sole discretion of creditor; and
(5) No charging for payoff information

In addition, the prohibition against the abusive practice of flipping contained in N.J.S.A. 46:10B-25b applies to covered loans. More specifically, N.J.S.A. 46:10B-25b provides that a ‘reasonable tangible net benefit’ standard must be met when all three of the following conditions occur: (1) the new loan is a ‘covered loan’ (2) it refinances an existing home loan, and (3) the existing home loan being refinanced was consummated within the prior 60 months. This means that the ‘reasonable tangible net benefit’ standard set forth in this provision will not apply to the following loans:
(1) A ‘covered loan’ used to purchase a home,
(2) A ‘covered loan’ used to refinance non-home loans,
(3) A ‘covered loan’ that refinances a home loan made more than 60 months prior to the new covered loan.

This also means that if the points and fees associated with the new refinance loan fall below the ‘covered’ loan thresholds, then the ‘reasonable tangible net benefit’ standard will not apply to the following loans, even when these loans refinance a home loan made within the 60 month period:
(1) A new loan (over $40,000) with points and fees of four percent or less;
(2) A new loan ($40,000 or less) with points and fees of 4.5 percent or less; and
(3) A new loan (FHA/VA) with points and fees of 4.5 percent or less.

In addition, see responses to Questions 10 and 11 in Bulletin No. 03-15 for further discussion of the flipping standard.

QUESTION 16:
Another question was raised as to whether the flipping rule applies to a home loan, made before the November 27, 2003 effective date of the Act, when applying the ‘prior 60 month’ condition to a covered refinance loan.

Although the effective date of the Act is November 27, 2003, the flipping rule applies to covered loans that refinance home loans consummated 60 months prior to the covered loan. This means that a covered loan closed on November 28, 2003 will be subject to the flipping rules if it refinances a home loan consummated on or after the equivalent date in the year of 1998.

QUESTION 17:
A question was raised that if a creditor concludes that the flipping rule will not apply to its refinance based on a determination that the prior loan was consummated more than 60 months prior to the refinance, what evidence should the creditor maintain in order to show that the prior loan was actually consummated outside of the 60 month period.

The Department expects that a copy of a mortgage, note, Title or HUD disclosure statement or similar document indicating the closing date of the prior loan, will be available for review. A personal statement taken from the borrower will not be considered sufficient evidence of the closing date.

HOME IMPROVEMENT/MANUFACTURED HOMES

QUESTION 18:

Several questions have been raised concerning particular aspects of N.J.S.A. 46:10B-27, which provides for limited assignee or purchaser liability in circumstances when there is the requisite degree of involvement by a home improvement contractor or manufactured home seller.

As stated in DOBI Bulletin 03-15, the Department understands that this provision is based upon the FTC Holder Rule and thus will rely upon that Rule, including the Staff Guidelines and other formal interpretations of it, in relevant areas. Therefore, for loans involving home repair contractors, the Department will apply this provision only to those loans which fall within the scope of the FTC Holder Rule, incorporating, for example, any requirement under the FTC Holder Rule involving how funds from the credit transaction are applied to the purchase of relevant goods and services. See, e.g., 16 C.F.R. 433.1(d). Further, the Department anticipates using the definition of 'seller' under the FTC Holder Rule, 16 C.F.R. 433, in determining who would qualify as a 'person selling either a manufactured home or home improvements' under that provision. 'Seller' as used in N.J.S.A. 46:10b-27 means the same as a 'seller' as defined under the FTC Holder Rule in 16 C.F.R. 433.1(j), that is 'a person who, in the ordinary course of business, sells or leases goods or services to consumers.'

This is also true, as noted in DOBI Bulletin 03-15, with regard to how much involvement a home improvement contractor or manufactured home seller must have in arranging the loan for the assignee liability in this provision to apply. Thus, consistent with the guidance under the FTC Holder Rule, the provision would not apply in a situation where a borrower arranges to refinance their home without the involvement of a home repair contractor or home improvement contractor. This is the case even when the borrower receives an amount of cash (whether incidental or not) in connection with the refinance, and applies the cash to home improvement expenditures. Consistent with the provision's clear language and as reflected in DOBI Bulletin 03-15, the Department understands that this provision applies even in circumstances when existing federal and state law is ignored and the required notice is not placed on the note. See DOBI Bulletin 03-15, Question 6. Regardless of how the FTC Holder Rule is interpreted in this regard, the Department will apply the provision accordingly.

QUESTION 19:

As set forth in the response to Question 3 in DOBI Bulletin 03-15, the amount of damages that may be imposed against an assignee who purchases home improvement or manufactured housing loans pursuant to N.J.S.A. 46:10B-27a is capped in a manner similar to that in the FTC Holder Rule, 16 C.F.R. 433. More specifically, the Act specifies that the amount is 'limited to amounts required to reduce or extinguish the borrower's liability under the home loan, plus the total amount paid by the borrower in connection with the transaction, plus amounts required to recover costs, including reasonable attorney's fees against the creditor, any assignee or holder, in any capacity.' A question was raised as to what is meant by 'the transaction' for the purpose of this section.

In this section, the term 'the transaction' refers to the credit transaction. Whether payments to the seller of a manufactured home or home improvement repair are included in the calculation of amounts paid depends upon the relationship between the seller and creditor and the structure of the transaction.

Where the consumer receives a loan from a creditor by way of a referral or arrangement through the seller of the goods and services, 'amounts paid in connection with the transaction,' means the amounts paid to the originating creditor and subsequent holders. Because payments made to the seller such as a down payment or trade-in were not part of the credit transaction, such payments are not considered ‘paid in connection with the transaction.’ However, where the seller makes and/or assigns the loan to a creditor, payments to the seller are part of the credit transaction, and as such, are included in the calculation of amounts ‘paid in connection with the transaction.’ In other words, where the seller also acts as the original creditor, down payments, deposits, periodic payments, late fees, and other payments to the seller are included in the calculation of the maximum amount a borrower may recover through a claim brought pursuant to N.J.S.A. 46:10B-27a.

QUESTION 20:

A question was also raised as to how a purchaser/assignee may determine whether a loan in a pool in which the borrower receives cash might constitute a home improvement loan subject to the limited liability for assignees and purchasers set forth in N.J.S.A. 46:10B-27a.

As the Department set forth in responses to Questions 4 and 5 of DOBI Bulletin 03-15, a loan in which a borrower receives cash is not a home improvement loan subject to the limited liability for assignees or purchasers unless a home improvement contractor made, arranged, or otherwise had the requisite degree of involvement in the origination of the loan. In response to Question 6, the Department explained how an assignee or purchaser would be able to determine whether a loan is a home improvement loan with the requisite degree of involvement by a home improvement contractor such that the terms of N.J.S.A 46:10B-27a apply. As a general matter, the Department notes that assignees or purchasers of home improvement loans have had limited assignee liability for almost thirty years pursuant to the FTC Holder Rule and thus this provision reinforces standards which do, or should, exist within the industry.

POSTING PAYMENTS

QUESTION 21:

The provision for posting a payment indicates that a creditor shall post such payment on the ‘date’ received. A question was raised how this will be applied considering: (1) some lenders and depositories may receive mail or overnight delivery every day including Saturday and Sunday, while processing payments only on banking days; and (2) many depositories have cutoff times during any given day that place transactions into the next banking day.

The financial industry commonly executes transactions based on a banking day cycle that includes a start time and a finish time. The end of the date is frequently a specific time in the afternoon, often after 2:00 or 3:00 p.m. For depository institutions, the Department will construe the word ‘date’ to mean ‘banking day.’ For other financial service providers, the Department will construe the word ‘date’ to mean any day that the provider is open for business provided that the payment is received before the close of business hours.

AUTHORITY OF DOBI REGULATORY BULLETINS

QUESTION 22:

A question was raised as to the basis for bulletins issued by the Department regarding the Act, and how reliable will they be in the event they are reviewed by the courts.

The Department is the regulatory body responsible for regulating and supervising the State banking and lending industry. This includes responsibility for licensing, examining, investigating, enforcing, and establishing rules governing this industry. The Act does not affect this responsibility. In addition, N.J.S.A. 46:10B-28 specifically provides for the Department to conduct examinations, investigations, and issue subpoenas and orders to enforce the Act. The Department may issue rules, bulletins, or orders to provide guidance to the industry. In circumstances such as the current one when a law does not provide for general authority to issue rules, the Department may issue bulletins to provide guidance to the industry of how the Department will enforce such a law. In preparing these bulletins, the Department has engaged in widespread consultation and research, reflecting its participation in at least three industry sponsored workshops, additional workshops at its own facilities, and conversations with numerous representatives of the industry and rating agencies regarding implementation and enforcement of the new law. The bulletins are also reviewed by the Office of the Attorney General before issuance.

LIMITATIONS ON DAMAGES FOR ASSIGNEES OR PURCHASERS

QUESTION 23:

A question was raised whether the limitations on liability for assignees or purchasers under N.J.S.A. 46:10B-27 apply even when a borrower pursues claims for different types of damages, such as compensatory or punitive damages.

The Department provided important information concerning the limitations on damages in response to Questions 1 and 2 of DOBI Bulletin 03-15. Consistent with the explanations set forth therein, the limits and conditions set forth for assignee liability in N.J.S.A. 46:10B-27 do not allow a borrower to circumvent the limits and conditions on assignee liability by seeking to obtain separate compensatory and punitive damages against the assignee pursuant to that provision. In any circumstances in which damages are sought against an assignee or purchaser pursuant to N.J.S.A. 46:10B-27, the limits and conditions on such liability apply.

LIST OF POINTS/FEES INCLUDED IN THRESHOLD CALCULATIONS

QUESTION 24:

A question was raised whether mortgage insurance premiums or private mortgage insurance premiums, commonly referred to as MIP or PMI, are included in the list of points and fees to be considered in the calculation to determine whether the points/fees thresholds are exceeded.

The Department does not consider MIP or PMI as included in the list of points and fees when determining whether the points and fees thresholds are exceeded. The term ‘points and fees’ is defined in N.J.S.A. 46:10B-24 to include all items listed in 15 U.S.C. 1605(a)(1) to (4).

There is no reference to premiums for such insurance indicated within these sections. In addition, section 1605(a)(5) refers to ‘premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.’ Since the Act specifically included sections 1605(a)(1) to (4) and did not include section 1605(a)(5), this type of insurance premium should not be included. It is also worth mentioning that section 1605(a)(4) includes a reference to ‘credit property insurance’ as a type of insurance financed by a creditor. The term credit property insurance is not considered to include MIP or PMI. The term is not a common term in New Jersey, and is not defined or referenced in any other New Jersey statute or regulation.

In other jurisdictions, the term is commonly known as insurance against loss of or damage to personal property covering a creditor's security interest in such property. One Florida statute defines the term as ‘a limited line of insurance providing coverage on personal property used as collateral for securing a loan or on personal property purchased under an installment sales agreement.’ A Missouri statute defines it as ‘insurance against loss of or damage to personal property, covering a creditor's security interest in such property, when such insurance is written as part of a loan or other credit transaction. MIP and PMI are premiums for insurance protecting the creditor against the obligor's default or other credit loss. The credit property insurance is not. For these reasons, the Department does not believe that MIP and PMI should be included in the points and fees calculation to determine whether a loan is a home loan, covered loan, or high cost loan.

Federal Announcements, News Releases and Related Material

Board of Governors of the Federal Reserve System (F.R.B.)

FINAL AMENDMENT TO REGULATION Z REGARDING HOEPA AND PREDATORY LENDING

January 2002

The Federal Reserve Board approved on December 12, 2001, and sent for publication to the Federal Register on December 14, 2001, a final rule that amends its regulations aimed at curbing predatory lending. Compliance with the amendments becomes mandatory on October 1, 2002.

The amendments to Regulation Z (Truth in Lending) broaden the scope of loans subject to the protections of the Home Ownership and Equity Protection Act (HOEPA) of 1994 by adjusting the price triggers that determine coverage under the act. The rate-based trigger is lowered by 2 percentage points for first-lien loans, and the fee-based trigger is revised to include the cost of optional insurance and similar debt protection products paid at closing. Certain acts and practices in connection with home-secured loans are prohibited, including a rule to restrict creditors from engaging in repeated refinancings of their own HOEPA loans over a short time period when the transactions are not in the borrower's interest.

HOEPA's prohibition against extending credit without regard to a consumer's repayment ability is strengthened by requiring creditors to document and verify income for HOEPA-covered loans.

Disclosures received by consumers before closing for HOEPA-covered loans would include the total amount of money borrowed and whether that amount includes the cost of optional credit insurance or similar products.

HOEPA was enacted in response to anecdotal evidence of predatory lending practices in the home equity lending market. HOEPA imposes additional disclosure requirements. It also imposes substantive limitations, such as restrictions on short-term balloon notes, on certain home equity loans with rates and fees above a certain percentage or amount.

HOEPA authorizes the Board to expand HOEPA's coverage and prohibit certain acts and practices in connection with mortgage lending generally. After holding public hearings on possible ways to curb predatory lending using its regulatory authority, the Board published proposed amendments in December 2000.

The term ‘predatory lending’ encompasses a variety of practices. Oftentimes homeowners in certain communities—particularly the elderly and minorities—are targeted with offers of high-cost, home-secured credit. The loans carry high up-front fees and may be based on the homeowners' equity in their homes, not their ability to make the scheduled payments. When homeowners have problems repaying the debt, they are often encouraged to refinance the loan. Frequently this leads to another high-fee loan that provides little or no economic benefit to the borrower.

2002 WL 104480 (F.R.B.)

Office of the Comptroller of the Currency (O.C.C.)

(NEWS RELEASE)

COMPTROLLER HAWKE URGES NEW APPROACH TO COMBATING PREDATORY LENDING

July 24, 2003

WASHINGTON—Comptroller of the Currency John D. Hawke, Jr. said today that many well-intentioned efforts to combat predatory lending may be having the unintended result of impeding the flow of credit to creditworthy subprime borrowers.

In the first 18 months following passage of a predatory lending law in North Carolina, he said, it appears that mortgage loan originations to mainstream subprime borrowers dropped 30 percent. By contrast, the same kinds of loans in neighboring states dropped by only 3 percent in the same period.

“It's no mystery why so many fewer subprime loans are being made—or will be made—in jurisdictions subject to anti-predatory statutes,” Mr. Hawke said. “Studies point to increased compliance costs, especially for banks operating in multiple jurisdictions, increased underwriting expenses, and legal liability issues that have persuaded subprime lenders to curtail that business or take it to places where no such laws exist.”

In addition, he noted that, “In Georgia, New York, and New Jersey, for example, where particularly stringent anti-predatory laws are in effect, both Fannie Mae and Freddie Mac have drastically reduced or even eliminated altogether their purchase of so-called ‘high cost’ and other real estate loans.”

Moreover, he added, the rating agencies have all adopted policies that make it very difficult to pool loans originating in Georgia, New York, or New Jersey unless the issuer provides costly credit enhancements and/or certifications that the pool contains no proscribed loans.

Mr. Hawke said state laws have generally failed because they take an “across-the-board, one-size-fits-all approach that punishes the good as well as the wrongdoers.”

There is widespread recognition—including affirmations by almost all state Attorneys General—that federally regulated financial institutions and their subsidiaries are not part of the problem. Yet most of these laws include such institutions, including those chartered under federal law, within their scope.

Mr. Hawke said a far more effective approach would be to focus on the abusive practitioners and let federal regulators bring to bear their formidable enforcement powers where they find abusive practices among the institutions they supervise.

The Comptroller said the OCC has put out the most comprehensive guidance produced by any of the federal banking agencies—and probably by any banking regulator—describing the kinds of abusive practices that will result in action by the OCC.

“In the past, we haven't hesitated to use our enforcement authority to combat unsafe, unsound, unfair, or deceptive practices,” Mr. Hawke said. “Indeed, OCC enforcement actions have resulted in restitution totaling hundreds of millions of dollars to consumers. And we have served notice that we will continue to do so in the area of predatory lending.” In addition to taking action against lenders that engage in unfair or deceptive marketing practices, the OCC has told banks that it is impermissible to make loans that cannot be repaid without recourse to the collateral—especially if that collateral is the borrower's home.

The Comptroller noted that it is widely acknowledged that predatory lending is a problem that exists almost exclusively outside the banking industry—among mortgage bankers or finance companies. Indeed, a recent court brief filed by a coalition of nearly two dozen state Attorneys General stressed that they had not found predatory lending practices at banks or bank subsidiaries.

"From this perspective, then, I think it can be understood why we believe that national bank preemption of the Georgia Fair Lending Act should not be viewed with alarm," he said, alluding to the possibility that Georgia's anti-predatory lending law might be found to be inapplicable to national banks.

George customers of national banks and their subsidiaries will enjoy the substantial protections afforded by the OCC's supervisory process, Mr. Hawke said.

"Our approach not only protects consumers where abusive practices are found, it also avoids the overbroad and unintended adverse effects of those one-size-fits-all laws—effects that, as we've seen, can be almost as harmful as the problem those laws were designed to address," he added.

Contact: Robert M. Garsson

(202) 874-5770

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] 2003 N.J. Laws ch. 64, § 1. N.J.S.A. 46:10B-22 to 46:10B-35.

[FN2] 2003 N.J. Laws ch. 64, § 15.

[FN3] 2003 N.J. Laws ch. 64, § 2.

[FN4] Jaworski, *Predatory lending bill: Unintended consequences*, 12 NJL 560 (March 24, 2003).

[FN5] Jaworski, *Predatory lending bill: Unintended consequences*, 12 NJL 560 (March 24, 2003).

[FN6] Associates Home Equity Services, Inc. v. Troup, 343 N.J.Super. 254, 778 A.2d 529 (App.Div.2001).

See § 32.11A (Supp)—"Predatory Lending Practices; Reverse Redlining; Violation of State and Federal Statutes; Third Party Claims."

[FN6.01] N.J.A.C. 3:30–1.1 Purpose. 3:30–1.2 Scope. 3:30–1.3 Definitions. 3:30–5.1 Posting payments received. AFFIRMATIVE CLAIMS AND DEFENSES 3:30–8.1 Loans in which sellers, including sellers of manufactured homes and home improvements, are involved. AFFIRMATIVE CLAIMS AND DEFENSES 3:30–8.2 Purchaser and assignee liability under N.J.S.A. 46:10B–27. ENFORCEMENT 3:30–9.1 Rights, remedies, prohibitions declared additional, cumulative. 39 N.J. Reg. No. 12.

[FN7] 2003 N.J. Laws ch. 64, § 3.

[FN8] 2003 N.J. Laws ch. 64, § 3.

[FN9] 2003 N.J. Laws ch. 64, § 3.

"Manufactured home" means a structure, transportable in one or more sections, which in the traveling mode is eight body feet or more in width or 40 body feet or more in length or, when erected on site is 320 or more square feet and which is built on a permanent chassis and designed to be used as a dwelling with a permanent foundation when erected on land secured in conjunction with the real property on which the manufactured home is located and connected to the required utilities and includes the plumbing, heating, air-conditioning and electrical systems contained therein; except that such term shall include any structure which meets all the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the Secretary of the United States Department of Housing and Urban Development and complies with the standards established under the federal National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5401 et seq. 2003 N.J. Laws ch. 64, § 3.

[FN10] The category "covered home loan" was deleted by 2004 N.J. Laws ch. 84, § 2. N.J.S.A. 46:10B–23d states in part: "The deletions of the covered home loan category and of the prohibition on flipping shall create no presumption that any home loan that has been refinanced is not unconscionable, and the deletions of the covered home loan category and of the prohibition on flipping shall create no presumption that any home loan that is refinanced does not constitute an unlawful practice under P.L.1960, c. 39 (C.56:8–1 et seq.)."

[FN11] 2003 N.J. Laws ch. 64, § 3.

[FN12] 2003 N.J. Laws ch. 64, § 3.

[FN13] "Conventional prepayment penalty" means any prepayment penalty or fee that may be collected or charged in a home loan, and that is authorized by law other than by this act, provided the home loan (1) does not have an annual percentage rate that exceeds the conventional mortgage rate by more than two percentage points; and (2) does not permit any prepayment fees or penalties that exceed two percent of the amount prepaid. 2003 N.J. Laws ch. 64, § 3.

[FN14] "Bona fide discount points" means loan discount points which are: (1) Knowingly paid by the borrower; (2) Paid for the express purpose of reducing and which result in a reduction of, the interest rate or time-price differential applicable to the loan (3) In fact reducing the interest rate or time-price differential applicable to the loan from an interest rate which does not exceed the conventional mortgage rate for a home loan secured by a first lien, by more than two percentage points, or for a home loan secured by a junior lien, by more than three and one half percentage points; and (4) Recouped within the first five years of the scheduled loan payments. Loan discount points will be considered to be recouped within the first five years of the scheduled loan payments if the reduction in the interest rate that is achieved by the payment of the loan discount points reduces the interest charged on the scheduled payments such that the borrower's dollar amount of savings in interest over the first five years is equal to or exceeds the dollar amount of loan discount points paid by the borrower. 2003 N.J. Laws ch. 64, § 3.

[FN15] 2003 N.J. Laws ch. 64, § 3. Amended by 2004 N.J. Laws ch. 84, § 2, eff. July 6, 2004.

[FN16] "Points and fees" mean: (1) All items listed in 15 U.S.C.A. § 1605(a)(1) to 1605(a)(4), (Truth in Lending) except interest or the time-price differential; (2) All charges listed in 15 U.S.C.A. § 1605(e); (3) All compensation paid directly or indirectly to a mortgage broker, including a broker that originates a loan in its own name in a table-funded transaction; (4) The cost of all premiums financed by the creditor, directly or indirectly for any credit life, credit disability, credit unemployment or credit property insurance, or any other life or health insurance, or any payments financed by the creditor directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums calculated and paid on a monthly basis shall not be considered financed by the creditor; (5) The maximum prepayment fees and penalties that may be charged or collected under the terms of the loan documents; (6) All prepayment fees or penalties that are incurred by the borrower if the loan refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor; and (7) For open-end loans, the points and fees are calculated by adding the total points and fees known at or before closing including the maximum prepayment penalties which may be charged or collected under the terms of the loan documents if prepayment penalties are authorized by law other than by this act, plus the minimum additional fees the borrower would be required to pay to draw down an amount equal to the total credit line. 2003 N.J. Laws ch. 64, § 3.

[FN17] Excluded from “points and fees” are: title insurance premiums and fees, charges and premiums paid to a person or entity holding an individual or organization insurance producer license in the line of title insurance or a title insurance company, as defined by subsection c. of section 1 of 1975 N.J. Laws ch. 106 (N.J.S.A. 17:46B-1); taxes, filing fees, and recording and other charges and fees paid or to be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest; and reasonable fees paid to a person other than a creditor or an affiliate of the creditor or to the mortgage broker or an affiliate of the mortgage broker for the following, provided that the conditions in 12 C.F.R. § 226.4(c)(7) are met: fees for tax payment services; fees for flood certification; fees for pest infestation and flood determinations; appraisal fees; fees for inspections performed prior to closing; fees for credit reports; fees for surveys; attorneys' fees; notary fees; escrow charges; and fire and flood insurance premiums, provided that the conditions in 12 C.F.R. § 226.4(d)(2) are met. 2003 N.J. Laws ch. 64, § 3.

[FN18] 2003 N.J. Laws ch. 64, § 3.

[FN19] 2003 N.J. Laws ch. 64, § 4a.

[FN20] The prohibition on flipping was deleted by virtue of 2004 N.J. Laws ch. 84, § 3. N.J.S.A. 46:10B–23d states in part: “The deletions of the covered home loan category and of the prohibition on flipping shall create no presumption that any home loan that has been refinanced is not unconscionable, and the deletions of the covered home loan category and of the prohibition on flipping shall create no presumption that any home loan that is refinanced does not constitute an unlawful practice under P.L.1960, c. 39 (C.56:8–1 et seq.).”

[FN21] 2003 N.J. Laws ch. 64, § 4c.

[FN22] 2003 N.J. Laws ch. 64, § 4d.

[FN23] 2003 N.J. Laws ch. 64, § 4e.

[FN24] 2003 N.J. Laws ch. 64, § 4f.

[FN25] 2003 N.J. Laws ch. 64, § 5a.

[FN26] 2003 N.J. Laws ch. 64, § 5b.

[FN27] 2003 N.J. Laws ch. 64, § 5c.

[FN28] 2003 N.J. Laws ch. 64, § 5d.

[FN29] 2003 N.J. Laws ch. 64, § 5e.

[FN30] 2003 N.J. Laws ch. 64, § 5f.

NOTICE TO BORROWER

YOU SHOULD BE AWARE THAT YOU MIGHT BE ABLE TO OBTAIN A LOAN AT A LOWER COST. YOU SHOULD SHOP AROUND AND COMPARE LOAN RATES AND FEES. MORTGAGE LOAN RATES AND CLOSING COSTS AND FEES VARY BASED ON MANY FACTORS, INCLUDING YOUR PARTICULAR CREDIT AND FINANCIAL CIRCUMSTANCES, YOUR EMPLOYMENT HISTORY, THE LOAN-TO-VALUE REQUESTED AND THE TYPE OF PROPERTY THAT WILL SECURE YOUR LOAN.

THE LOAN RATE AND FEES COULD ALSO VARY BASED ON WHICH CREDITOR OR BROKER YOU SELECT.

IF YOU ACCEPT THE TERMS OF THIS LOAN, THE CREDITOR WILL HAVE A MORTGAGE LIEN ON YOUR HOME. YOU COULD LOSE YOUR HOME AND ANY MONEY YOU PUT INTO IT IF YOU DO NOT MEET YOUR PAYMENT OBLIGATIONS UNDER THE LOAN.

YOU SHOULD CONSULT AN ATTORNEY-AT-LAW AND A QUALIFIED INDEPENDENT CREDIT COUNSELOR OR OTHER EXPERIENCED FINANCIAL ADVISOR REGARDING THE RATE, FEES AND PROVISIONS OF THIS MORTGAGE LOAN BEFORE YOU PROCEED. A LIST OF QUALIFIED COUNSELORS IS AVAILABLE BY CONTACTING THE NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE.

YOU ARE NOT REQUIRED TO COMPLETE THIS LOAN AGREEMENT MERELY BECAUSE YOU HAVE RECEIVED THIS DISCLOSURE OR HAVE SIGNED A LOAN APPLICATION.

REMEMBER, PROPERTY TAXES AND HOMEOWNER'S INSURANCE ARE YOUR RESPONSIBILITY. NOT ALL CREDITORS PROVIDE ESCROW SERVICES FOR THESE PAYMENTS. YOU SHOULD ASK YOUR CREDITOR ABOUT THESE SERVICES.

ALSO, YOUR PAYMENTS ON EXISTING DEBTS CONTRIBUTE TO YOUR CREDIT RATINGS. YOU SHOULD NOT ACCEPT ANY ADVICE TO IGNORE YOUR REGULAR PAYMENTS TO YOUR EXISTING CREDITORS.

[FN31] 2003 N.J. Laws ch. 64, § 5g.

[FN32] 2003 N.J. Laws ch. 64, § 5h.

[FN33] 2003 N.J. Laws ch. 64, § 5i.

[FN34] 2003 N.J. Laws ch. 64, § 5j.

[FN35] 2003 N.J. Laws ch. 64, § 5k.

[FN36] 2003 N.J. Laws ch. 64, § 5l.

[FN37] 2003 N.J. Laws ch. 64, § 6a.

[FN38] 2003 N.J. Laws ch. 64, § 6b.

[FN39] 2003 N.J. Laws ch. 64, § 6c.

[FN40] 2003 N.J. Laws ch. 64, § 6d.

[FN41] 2003 N.J. Laws ch. 64, § 6e.

[FN42] 2003 N.J. Laws ch. 64, § 7d.

[FN43] 2003 N.J. Laws ch. 64, § 7f.

[FN44] 2003 N.J. Laws ch. 64, § 7g.

[FN45] 2003 N.J. Laws ch. 64, § 7a.

[FN46] 2003 N.J. Laws ch. 64, § 7a.

[FN47] N.J.S.A. 56:8-19. Action or counterclaim by injured person; recovery of treble damages and costs

Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefor in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

[FN48] 2003 N.J. Laws ch. 64, § 8a, § 8b(1)(a). The following language was added to section 8a by virtue of the 2004 amendment 2004 N.J. Laws ch. 84, § 8a, eff. July 6, 2004: “(2) Notwithstanding any provision of P.L.2003, c. 64 (C.46:10B–22 et seq.) or other law to the contrary, any borrower who asserts any defense, claim or counterclaim pursuant to subsection c. of section 6 of P.L.2003, c. 64 (C.46:10B–27) may do so only in an individual capacity and may not assert that defense, claim or counterclaim in a class action.”

[FN49] 2003 N.J. Laws ch. 64, § 8b(1)(b), (c).

[FN50] 2003 N.J. Laws ch. 64, § 8b(2).

[FN51] 2003 N.J. Laws ch. 64, § 8b(3).

[FN52] 2003 N.J. Laws ch. 64, § 8c.

[FN53] 2003 N.J. Laws ch. 64, § 12.

[FN54] 2003 N.J. Laws ch. 64, § 13.

[FN55] By use of a double negative “no presumption” and “not unconscionable” in the following language—“the rights, remedies and prohibitions accorded by … the act are … declared to create *no presumption* that any home loan or any term in a home loan is *not unconscionable*”—it appears that the statute is saying that a presumption of unconscionability is not ruled out under the provisions of the act, even with respect to transactions not violative of the act.

[FN56] 2003 N.J. Laws ch. 64, § 9.

[FN57] 2003 N.J. Laws ch. 64, § 10.

29 NJPRAC § 2.5

END OF DOCUMENT

New Jersey Practice Series TM

Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
2. Mortgage Lending: The Institutional Framework

§ 2.6. Mortgage Forgiveness Debt Relief Act of 2007

The Mortgage Forgiveness Debt Relief Act of 2007 (P.L.110-142), enacted December 20, 2007, permits taxpayers to exclude income from the (a) discharge of a debt on their principal residence; (b) a debt reduction through mortgage restructuring; and (c) mortgage debt forgiven in connection with a foreclosure.

Ordinarily, if someone you owe a debt to cancels or forgives that debt, the canceled amount may be taxable.

Generally, the Act allows exclusion of income realized as a result of modification of the terms of the mortgage, or foreclosure on your principal residence.

The act applies to a qualified principal residence indebtedness, i.e., a forgiven or cancelled debt used to buy, build or substantially improve your principal residence, or to refinance a debt incurred for those purposes. The debt must be secured by the home. Pursuant to the act's extension under “The Housing and Economic Recovery Act of 2008,” the act's relief applies to a debt forgiven in calendar years 2007 through 2012. Up to $2 million of forgiven debt is eligible for this exclusion ($1 million if married filing separately).

The exclusion does not apply if the discharge is due to services performed for the lender or any other reason not directly related to a decline in the home's value or the taxpayer's financial condition.

The amount of debt forgiven must be reported on Form 982 and this form must be attached to your tax return.[1]

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] Information obtained from IRS bulletin “The Mortgage Forgiveness Debt Relief Act and Debt Cancellation” obtained online, last update May 19, 2009. More information can be obtained from Publication 4681, IR-2008-17.

29 NJPRAC § 2.6

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
2. Mortgage Lending: The Institutional Framework

§ 2.7. Economic Stimulus Act of 2008

The Economic Stimulus Act of 2008 (Pub. L. 110-185, 122, Stat. 613) was enacted February 13, 2008 and is intended to boost the economy of the United States, fight off a recession and help economic conditions. The act primarily provides "tax rebates" to low and middle income taxpayers, tax incentives for business investment, and increases the limits on mortgages qualified for purchase by Fannie Mae and Freddie Mac.

The total cost of this bill was projected at $152 billion for 2008.[1]

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] Information obtained from wikipedia.org/wiki/Economic_Stimulus_Act_of_2008.

29 NJPRAC § 2.7

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
2. Mortgage Lending: The Institutional Framework

§ 2.8. The Housing and Economic Recovery Act of 2008

The Housing and Economic Recovery Act of 2008 (Pub.L. 110-289, 122 Stat. 2654),[1] signed into law by President Bush on July 30, 2008, resulted from the financial crisis of 2008 in the United States and elsewhere and focuses mainly on the subprime mortgage crisis. Essentially, it is an umbrella act comprising several individual acts: (1) the Federal Housing Finance Regulatory Reform Act of 2008; (2) HOPE for Homeowners Act of 2008; (3) the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE); (4) the FHA Modernization Act of 2008; (5) the Mortgage Disclosure Improvement Act; and (6) the Housing Assistance Tax Act of 2008, 26 U.S.C.A. § 1.

The Federal Housing Finance Regulatory Reform Act of 2008,[2] part of Division A of The Housing and Economic Recovery Act of 2008, establishes a single regulator, the Federal Housing Finance Agency (FHFA) out of the Federal Housing Finance Board (FHFB) and Office of Federal Housing Enterprise Oversight (OFHEO), for government-sponsored enterprises (GSEs) in the home mortgage market. These are privately owned, Congressionally chartered financial institutions created to increase the availability of mortgage credit in the United States. The FHFA now regulates the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Federal Home Loan Banks (FHLBs).

On September 7, 2008, the FHFA director, James B. Lockhart III, pursuant to powers granted under the act, placed Fannie Mae and Freddie Mac under the conservatorship of the FHFA.

The HOPE for Homeowners Act of 2008,[3] part of Division A of the Housing and Economic Recovery Act of 2008, authorizes the Federal Housing Administration to guarantee up to $300 billion in new 30-year fixed rate mortgages for subprime borrowers if lenders write-down the principal owed under their mortgages to 90 percent of the current appraisal value of the property. Participation in this program is voluntary for lenders.

The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE),[4] part of Division A of the Housing and Economic Recovery Act of 2008, requires all states to have a loan originator licensing and registration system in place by August 1, 2009 or August 1, 2010 for legislatures meeting biennially). A state can participate in the Nationwide Mortgage Licensing System (NMLS), a registry operated jointly by the Conference of State Bank Supervisors/American Association of Residential Mortgage Regulators (CSBS/AARMR).

New Jersey has implemented SAFE pursuant to The “New Jersey Residential Mortgage Lending Act”, N.J.S.A. 17:11C-51 et seq., effective May 4, 2009, which supplants the "New Jersey Licensed Lenders Act," N.J.S.A. 17:11C-1 et seq., with respect to residential mortgage lenders, brokers and mortgage loan originators required to be licensed in New Jersey. See infra § 3.11.

SAFE is intended to provide uniform licensing standards nationwide, as these licensing standards have been non-uniform in the past. It is also designed to create a comprehensive licensing database so that all loan originators will be known and unethical or otherwise unsuitable originators can be kept out of the industry. The national licensing system will enable government and consumers to track loan originators. All loan originators registered in the national database will have a Unique Identifier number.

The FHA Modernization Act of 2008,[5] part of Division B of the Housing and Economic Recovery Act of 2008, increases the FHA loan limit from 95 percent to 110 percent of an area median home price up to 150 percent of the GSE (government-sponsored enterprises) conforming loan limit, or $625,000 as of January 1, 2009. The act requires a down payment of at least 3.5 percent for any FHA loan, places a 12-month moratorium on HUD implementation of risk-based premiums, and prohibits seller-financed down payments but allows down payment assistance from family members.

The Mortgage Disclosure Improvement Act (MDIA)[6] is effective on July 30, 2009. MDIA amends the Truth in Lending Act (TILA)—the final TILA rule, however, is effective October 1, 2009 while MDIA is effective October 1, 2009. (See infra § 32.11B.) Additionally, MDIA regulates early disclosure requirements and enlarges others.

Under MDIA, prior to the issuance of early disclosures, collection fees from a mortgage applicant are limited to a reasonable credit report fee. As to early disclosures, the issuance of the initial Truth in Lending Statement (TIL) now extends to "any extension of credit secured by the dwelling of a consumer." The timing, 3 business days from the application, remains unchanged.

As to early and subsequent disclosures with respect to any extension of credit secured by the dwelling of a consumer, the disclosures must contain a clear notice stating "You are not required to complete this agreement merely because you have received these disclosures or signed a loan application."

The MDIA requires a seven business day waiting period prior to consummation, with the period being measured from the mailing or delivery or of the TIL Statement to the consumer. "Business day" includes all calendar days except Sundays and legal holidays.

Creditors are required to re-disclose the TIL Statement to a consumer three business days prior to consummation when the APR is out of tolerance under TILA.

For time share transactions, while early disclosure requirements apply the seven-day and three-day waiting periods are not applicable. Further, applicable time periods for early disclosures run from the consumer's receipt of the application or before credit is extended. Subsequent changes, however, to terms (not tolerance) can be disclosed no later than consummation.

The seven day and three day waiting periods with respect to the TIL Statement disclosure can be shortened or waived if the extension of credit is necessary to meet a bona fide personal financial emergency. The waiver is no longer effective, if subsequent to the waiver the TIL Statement is out of tolerance. If the TIL Statement is re-disclosed, any new waiver must be requested. A pre-printed form cannot be used for this purpose. A signed, dated written statement from each applicable consumer must be executed detailing the specific emergency and specifies that request for waiver of the waiting period.

The foregoing MDIA requirements are effective for all loan applications received on or after July 30, 2009. Home equity lines of credit are unaffected.

The Housing Assistance Tax Act of 2008,[7] part of Division C of The Housing and Economic Recovery Act of 2008, contains a first-time home buyer refundable tax credit—up to $7,500—for purchases on or after April 9, 2008 but before July 1, 2009 equal to 10 percent of the purchase price of the principal residence. The act phases out the credit for taxpayers with incomes over $75,000 (or $150,000 for joint returns), requires taxpayers receiving the credit to repay it over 15 years in equal installments through a surcharge on the taxpayers' annual income tax, and provides emergency assistance for the redevelopment of abandoned and foreclosed homes.

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] 12 U.S.C.A. § 4501 et seq.

[FN2] 12 U.S.C.A. § 4501 et seq.

[FN3] Pub.L 110-289, Div. A, Title IV, § 1401, July 30, 2008, 122 Stat. 2800, provides that: “This title [enacting 12 U.S.C.A. § 1715z-23, and 15 U.S.C.A. § 1639a, and amending 12 U.S.C.A. § 1708] may be cited as the ‘HOPE for Homeowners Act of 2008’.”

[FN4] Pub.L. 110-289, Div. A, Title V, § 1501, June 30, 20008, 122 Stat. 2810, provided that: “This title [enacting this chapter, 12 U.S.C.A. § 1501 et seq.] may be cited as the ‘Secure and Fair Enforcement for Mortgage Licensing Act of 2008’ or ‘S.A.F.E. Mortgage Licensing Act of 2008’.”

[FN5] Pub.L. 110-289, Div. B, Title I, § 2101, July 30, 2008, 122 Stat. 2830, provided that: “This title [enacting 12 U.S.C.A. §§ 1706f and 1715z-24, amending 12 U.S.C.A. §§ 1701x, 1703, 1707 to 1709, 1711, 1715y, 1715z-12, 1715z-13, 1715z-20, and 1735c, and 18 U.S.C.A. § 1014, repealing 12 U.S.C.A. §§ 1715m, 1715z-2, and 1715z-10, enacting provisions set out as notes under 12 U.S.C.A. §§ 1701, 1701x, 1703, 1709, and 1710, and amending provisions set out as a note under 42 U.S.C.A. § 12712] may be cited as the ‘FHA Modernization Act of 2008’.”

[FN6] Pub.L. 110-289, Div. B. Title V, § 2501, July 30, 2008, 122 Stat. 2855, provided that: “This title [amending 12 U.S.C.A. §§ 24, 338a and 15 U.S.C.A. §§ 1638, 1640, and enacting provisions set out as a note under 15 U.S.C.A. § 1638] may be cited as the ‘Mortgage Disclosure Improvement Act of 2008’.”

[FN7] 26 U.S.C.A. § 1, §§ 3000 et seq.

29 NJPRAC § 2.8

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
2. Mortgage Lending: The Institutional Framework

§ 2.9. Emergency Economic Stabilization Act of 2008 ("Bailout Bill")

The Emergency Economic Stabilization Act of 2008 (the act)[1] (P.L. 110-343), commonly called the bailout bill of the financial system in the United states, was enacted on October 3, 2008 in response to the subprime mortgage crisis and global financial of 2008. It authorizes the Secretary of the Treasury to spend up to seven hundred billion dollars to purchase distressed assets, particularly mortgage-backed securities, and make capital injections into banks, both foreign and domestic. banks are included in the bailout.

The act permits the Federal Reserve to pay banks a high interest rate on their deposits held for reserve purposes. The Federal Reserve will pay this increased interest on both reserve and excess reserve balances.

The act authorizes the Treasury Secretary to establish the Troubled Assets Relief Program (TARP) to purchase troubled assets from financial institutions. It creates the Office of Financial Stability in the Treasury Department to run the program in consultation the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, and the Secretary of Housing and Urban Development. Seven hundred billion dollars is authorized for the program.

If the Treasury purchases assets from a company under the program, and also receives an equity or debt position in the company, the company cannot offer incentives to senior executives that encourage "unnecessary and excessive risks" and prohibits a golden parachute to a senior executive as long as the Treasury holds an equity or debt position. Executive salaries are unaffected. These prohibitions are not retroactive.

The act creates the Financial Stability Oversight Board to review and make recommendations regarding the Treasury's actions and a Congressional Oversight Panel to report their findings to Congress every 30 days. The Comptroller General is required to monitor performance of the program and report his findings to Congress is established every 60 days.

The act establishes a Special Inspector General for the Troubled Asset Relief Program, appointed by the President and confirmed by the Senate to monitor, audit and investigate the Treasury's administration of the program and report findings to Congress every quarter.

The amount of FDIC deposit insurance provided is increased from $100,000 to $250,000 until December

31, 2009.

The act also makes changes to the tax law and permits qualified financial institutions to take losses on FNMA and FHLMC preferred stock against ordinary income rather than capital gains; establishes limitations on the deductibility of executive compensation by participating corporations; the Mortgage Forgiveness Debt Relief Act of 2007 is extended to debts forgiven through the year 2012; and extends the Research & Development Tax Credit to December 31, 2009 and increases the percentage of the Alternative Simplified Credit.

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] (Pub.L. 110-343, Div. A, § 2, Oct. 3, 2008, 122 Stat. 12 U.S.C.A. § 5201 et seq.

29 NJPRAC § 2.9

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
2. Mortgage Lending: The Institutional Framework

§ 2.10. American Recovery and Reinvestment Act of 2009 ("Stimulus Bill")

The American Recovery and Reinvestment Act of 2009 (Pub.L. 111-5) is an economic stimulus package signed into law by President Barack Obama on February 17, 2009. It is intended to provide a stimulus to the U.S. economy in light of the economic recession. The act's provisions total $787 billion. They include federal tax relief, an increase in unemployment benefits and social welfare matters, and domestic spending for education, health care, infrastructure, and the energy sector.

Tax relief totals $288 billion under the act, $237 billion for tax relief for individuals and $51 billion for companies. Healthcare totals $147.7 billion; education $90.9 billion; and aid to low income workers, unemployed and retirees (including job training) $82.5 billion.

Infrastructure investment totals $80.9 billion; Core investments (roads, bridges, railways, sewers, other transportation) $51.2 billion; Investment into government facilities and vehicle fleets $29.5 billion; supplemental investments $15 billion; energy $61.3 billion; housing $12.7 billion; scientific research $8.9 billion; other items $18.1 billion.[1]

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] Information obtained from wikipedia.org/.../American_Recovery_and_Reinvestment_Act_of_2009.

29 NJPRAC § 2.10

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
2. Mortgage Lending: The Institutional Framework

§ 2.11. "Helping Families Save Their Homes Act of 2009"

The "Helping Families Save Their Homes Act of 2009," PL 111-22 (S 896),[1] was signed into law by President Obama on May 20, 2009. A primary purpose of the original bill was to permit bankruptcy judges to modify mortgages on primary residences (the "cram down" provision). This controversial provision, however, which failed to garner majority support in the Senate, was not part of the final version of the bill when it was passed.

The act does many things: It amends the Hope for Homeowner's Program; it provides a safe harbor from liability to mortgage servicers inter alia who engage in loan modifications; extends through 2013 the temporary increase in deposit insurance coverage for both the FDIC Deposit Insurance Fund and the National Credit Union Administration (NCUA) Share Insurance Fund to $250,000 (currently scheduled to expire on December 31, 2009; provides an increase in borrowing authority to the FDIC ($100 billion) and the NCUA ($6 billion, temporarily $30 billion); includes provisions to ensure that predatory lending persons are not allowed to participate in the FHA home mortgage insurance program; permits the Rural Housing Service (RHS) to better engage in foreclosure prevention by utilizing "partial claims" of up to 30%, loss mitigation where loans face "imminent default," and "assignment" of loan authority to facilitate modifications; establishes protections for renters living in foreclosed homes by allowing bona fide tenants to remain in their residences under their leases after foreclosure except when the successor in interest or subsequent purchaser will occupy the unit as a primary residence and in this instance requiring a 90-day notice to vacate; provides that any creditor who purchases or is assigned a mortgage loan must notify the borrower in writing within 30 days; increases aid to homeless Americans; and creates a Mortgage Fraud task Force.

As to the HOPE for Homeowners Program, the amendments place the Secretary of HUD in charge of the program and permit reduction of excessive fee levels (e.g., upfront fee from 3% to "up to 3%," and annual fee from 1.5% to "up to 1.5%" (b) provide greater incentives for mortgage servicers (including payments and limitation of liability) to engage in modifications, and (c) reduce administrative burdens to loan underwriters by requiring conformity to FHA single family procedures and standards as much as possible.

See generally 12 U.S.C.A. § 1715z-23.

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] Pub.L. 111-22, Div. A, § 1(a), May 20, 2009, 123 Stat. 1632, provided that: “This division [Pub.L. 111-22, Div. A, Titles I to VIII, §§ 1 to 801, May 20, 2009, 123 Stat. 1632, enacting 12 U.S.C.A. §§ 1715z-25, 1735f-10, 1790e, 5220a, and 5231a, amending 12 U.S.C.A. §§ 1708, 1710, 1715u, 1715z-20, 1715z-23, 1735f-14, 1782, 1783, 1817, 1823, 1824, 5221, 5225, 5226, 5233, and 5241, 15 U.S.C.A. §§ 1639a, 1640, and 1641, 31 U.S.C. A. §§ 714, 38 U.S.A. § 3703, and 42 U.S.C.A. §§ 1437f, and 1472, redesignating 12 U.S.C.A. § 1715z-24, and 15 U.S.C.A. § 1639a, repealing 12 U.S.C.A. § 1735f-10, enacting provisions set out as notes under 12 U.S.C.A. §§ 1708, 1715u, 5201, and 5220, 15 U.S.C.A. § 1639a, 38 U.S.C.A. § 3703, and 42 U.S.C.A. §§ 1437f, 1472, and 5301, and amending provisions set out in a note under 42 U.S.C.A. § 5301] may be cited as the ‘Helping Families Save Their Homes Act of 2009’.”

29 NJPRAC § 2.11

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
2. Mortgage Lending: The Institutional Framework

§ 2.12. Lawyers performing loan or mortgage modification services for homeowners; prohibition on fee-sharing, performing loan modification services for for-profit mortgage modification company—Opinions 716; 45

New Jersey lawyers performing loan or mortgage modification services for homeowners must be aware of two recent Ethics and Unauthorized Practice Opinions—Opinion 716 and 45—which underscore the prohibition on feesharing and prohibition on performing loan modification services for, for-profit mortgage modification programs.

See infra Vol. 30, § 30.2 ("Ethical Considerations") for a copy of these opinions.

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

29 NJPRAC § 2.12

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
2. Mortgage Lending: The Institutional Framework

§ 2.13. Mortgage modification/loss mitigation—Federal and state programs

The programs set forth below are not intended to be an exclusive enumeration. All lenders, public and private, engage in foreclosure prevention, mortgage modification and loss mitigation procedures. There are numerous private companies and nonprofit organizations which provide foreclosure guidance and legal services.

A. Federal Housing Administration (FHA), Veterans Administration (VA) and Rural Housing Service (RHS) (formerly Farmers' Home Administration)

The FHA[1] and VA[2] have stand alone modification and loss mitigation programs. See infra § 23.10. For mortgages insured by the United States Rural Housing Service (formerly the "Farmers' Home Administration" or "FmHA"), a borrower may be entitled to enter into a foreclosure avoidance agreement. The U.S. Rural Housing Service can be contacted at (800) 793-8861. If the mortgage papers or closing documents refer to the USRDA, FmHA (United States Department of Agriculture — Rural Development Administration ("USDA-RDA") formerly known as the Farmers' Home Administration ("FmHA")), or "section 502 Single-Family Housing Program," the mortgage is probably insured by the USDA/RDA which also offers payment moratoriums, Delinquency Workout Agreements ("DWA's"), and protective advances to assist program beneficiaries.

With respect to FHA and RHS insured mortgages, the "Helping Families Save Their Homes Act of 2009" amends 12 U.S.C.A. § 1715u and 42 U.S.C.A. § 1472 (§ 502 of Farm Housing Act) respectively to require mortgagees to engage in loss mitigation actions for loans in default or imminent default and to provide an alternative to foreclosure (including special forbearance, loan modification, pre-foreclosure sale, support for borrower housing counseling, subordinate lien resolution, borrower incentives, and deeds in lieu of foreclosure); authorizes payment of "partial claims" of up to 30% to allow reductions in debt service levels affordable to the homeowner; and gives both entities authority to facilitate loan modifications through "assignment" of loans and payment of insurance benefits, thereby reducing loss mitigation disincentives for servicers.

B. Hope for Homeowners (Federal)

The HOPE for Homeowners Act of 2008,[3] 12 U.S.C.A. § 1715z-23, is part of The Housing and Economic Recovery Act of 2008 and authorizes the FHA to guarantee up to $300 billion in new 30-year fixed rate mortgages for qualified borrowers if lenders write-down the principal balances on their mortgages to 90 percent of the current appraisal value of the property. Participation in the program is voluntary for lenders.

"Hope for Homeowners" was expected to help as many as 400,000 people, but in its first two weeks it helped just 42 homeowners. The U.S. Department of Housing and Urban Development estimated earlier this month the plan could help 19,600 people by the end of 2009. An agency spokesman said it was too early to judge the program because it takes time for loans to be processed.[4]

The “HOPE for Homeowners” Program is now an integral component of “Making Homes Affordable” (see below).

C. Hope Now

HOPE NOW is an alliance between HUD approved counseling agents, mortgage companies, investors and other mortgage market participants providing free foreclosure prevention assistance.

The Streamlined Modification Program (SMP) and the Early Workout Program expired in March of 2009. The Hope Hotline is 888-995-HOPE.

D. Making Homes Affordable (Federal)

Refinancing—Home Affordable Modification Program (HAMP)

A homeowner to qualify (a) must have a one- to four-unit home; (b) owned or guaranteed by Fannie Mae of Freddie Mac; (c) must be current your mortgage payments (not more than 30 days late on mortgage payments within the last 12 months); and (d) the amount owed on the first mortgage is about the same or less than the current value of your house (but eligibility may extend to homeowners if the mortgage does not exceed 125% of the current market value of the home).

See makinghomeaffordable.gov/ For guidelines see www.treas.gov/press/releases/reports/guidelines_summary.pdf.

Modification

For a homeowner to qualify (a) your home must be your primary residence; (b) the amount you owe on your first mortgage must equal to or less than $729,750; (c) you must have trouble paying your mortgage because of an increase in your mortgage payment, a reduction in income or you have suffered a hardship; (d) you obtained your current mortgage prior to January 1, 2009; and (e) your payment on your first mortgage (including principal, interest, taxes, insurance and homeowner's association dues, if applicable) is more than 31% of your current gross income.

See makinghomeaffordable.gov/ For guidelines see www.treas.gov/press/releases/reports/guidelines_summary.pdf.

Second Lien Program

“The Second Lien Program announced today will work in tandem with first lien modifications offered under the Home Affordable Modification Program to deliver a comprehensive affordability solution for struggling borrowers … Under the Second Lien Program, when a Home Affordable Modification is initiated on a first lien, servicers participating in the Second Lien Program will automatically reduce payments on the associated second lien according to a pre-set protocol. Alternatively, servicers will have the option to extinguish the second lien in return for a lump sum payment under a pre-set formula determined by Treasury, allowing servicers to target principal extinguishment to the borrowers where extinguishment is most appropriate.”[5]

Home Price Decline Protection

"This initiative provides lenders additional incentives for modifications where home price declines have been most severe and lenders fear these declines may persist. These incentives will encourage servicers to undertake more modifications by assuring that incremental investor losses will be partially offset.

"To encourage the modification of more mortgages and enable more families to keep their homes, the Administration, building on insights pioneered by Chairman Bair and the FDIC, has developed an innovative payment that provides compensation based on recent home price declines, structured as a simple cash payment on every eligible loan. Home Price Decline Protection (HPDP) incentives are designed to address investor concerns that recent home price declines may persist. Together the incentive payments on all modified homes will help cover the incremental collateral loss on those modifications that do not succeed. HPDP payments will be linked to the rate of recent home price decline in a local housing market, as well as the average cost of a home in that market."[6]

Incentives and Foreclosure Alternatives Program

"For eligible borrowers unable to retain their homes through a Home Affordable Modification, MHA will provide incentives to borrowers, servicers and investors to encourage short sales and deeds-in-lieu. Both allow families and servicers to avoid the costly foreclosure process, and to minimize the negative impact of foreclosures on borrowers, financial institutions and communities."[7]

E. Save New Jersey Homes Act of 2008 (New Jersey)

The "Save New Jersey Homes Act of 2008, N.J.S.A. 46:10B-36 et seq., requires creditors holding certain adjustable rate mortgages to provide a "three year extension period"—during which the introductory rate cannot change and foreclosure proceedings are suspended—to eligible residential borrowers who are obligated to repay introductory rate mortgage loans and whose interest rates are about to reset.

The act is intended to address an economic crisis resulting from the resetting of mortgage rates from low introductory rates to higher, variable rates.

It requires a creditor filing a complaint under the "Fair Foreclosure Act" on a high risk mortgage loan, to grant the borrower a six month period of forbearance to pursue a loan workout, loan modification, refinancing, or other alternative through mediation sponsored by the Administrative Office of the Courts, N.J.S.A. 46:10B-50 .

See infra Chapter 29B.

F. Mortgage Stabilization and Relief Act (New Jersey)

Mortgage Stabilization Program

Under the Mortgage Stabilization Program, N.J.S.A. 55:14K-84 to -87, the New Jersey Housing and Mortgage Finance Agency is authorized to offer non-amortizing (no monthly payment) second mortgages—not to exceed $25,000—to promote the refinancing of "covered mortgages," a first mortgage in imminent danger of foreclosure.

For a homeowner to receive program assistance, a lender must agree to refinance a covered mortgage into a new first mortgage with an amount that is less than the appraised value of the property and which results in an "affordable mortgage payment," a payment equal to 33 percent of the homeowner's monthly gross income or the applicable percentage required for loan insurance, principal, interest, tax and insurance determined using traditional underwriting standards.

The act directs the agency to provide assistance in the form of a non-amortizing (no monthly payment) second mortgage loan, not to exceed $25,000, equal to one-half of the “difference” between the new first mortgage amount and the appraised value of the property. The other half of the difference is to be secured by a mortgage loan held by a lender, termed a “mortgage lender loan.”

The act requires both second mortgage loans (i.e., the program loan and the mortgage lender loan) to have an interest rate and terms identical to the new first mortgage loan and makes both equal in priority (i.e., second in priority to the new first mortgage).

See infra Chapter 29C.

Housing assistance and Recovery Program

The “Housing Assistance and Recovery Program,” N.J.S.A. 55:14K-88 to -93, authorizes the New Jersey Housing and Mortgage Finance Agency to provide financial support to sponsors (i.e., certain nonprofit and public entities) to execute “lease-purchase agreements” with homeowners meeting certain income requirements who face “imminent danger” of foreclosure. The lease-purchase agreements will enable homeowners to stay in their homes while paying affordable rent until they can buy back the property. Eligible properties under the program include one, two or three-family dwellings which are used as the homeowner's household's primary residence.

Lease-purchase agreements executed using program funds may not exceed 36 months; must permit the homeowner and household members to remain in the property for an affordable rent (i.e., no more than 33 percent of the household's gross monthly income); and must include the terms and conditions pursuant to which the sponsor will convey the property back to the homeowner or other member of the household. The price at which the homeowner buys back the property cannot exceed the sponsor's purchase price plus maintenance costs.

See infra Chapter 29C.

G. New Jersey Housing and Mortgage Finance Agency

Mortgage Assistance Program

The Mortgage Assistance Program provides temporary financial assistance, up to $20,000, to income-eligible homeowners who wish to remain in their homes but are in imminent danger of foreclosure due to short-term financial problems beyond their control. To see if you qualify, contact a counseling agency in the county in which you live. A list of agencies can be found on pages 3 and 4 of the Foreclosure Fast Facts sheet.

See www.state.nj.us/dca/hmfa/foreclosureprevention_resources.pdf.

Mortgage Assistance Pilot (MAP) Program

The New Jersey Housing and Mortgage Finance Agency has developed the Mortgage Assistance Pilot (MAP) program to provide temporary financial assistance to income-eligible homeowners who wish to remain in their homes but are in imminent danger of foreclosure due to short-term financial problems beyond their control. See www.state.nj.us/dobi/njhope/ and www.state.nj.us/dca/hmfa/foreclosureprevention_resources.pdf.

The New Jersey Homeownership Preservation Effort (NJ HOPE)

The New Jersey Homeownership Preservation Effort (NJ HOPE) is a voluntary public/private alliance of government agencies, not-for-profit organizations, and financial institutions committed to enhancing home ownership preservation by raising consumer awareness of available mortgage products and funding, providing increased access to credit and loan counseling for those who need it, and providing temporary assistance to consumers who are in immediate danger of foreclosure.

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

[FN1] 24 C.F.R. § 203.342 (mortgage modification); 24 C.F.R. § 203.350 (assignment of mortgage); 24 C.F.R. § 203.355 (acquisition of property; 24 C.F.R. § 203.412 payment for foreclosure alternatives); 24 C.F.R. § 203.501 (loss mitigation). See infra § 23.10.

[FN2] 38 C.F.R. § 36.4306a. Lenders' Handbook, VA Pamphlet No. 26-6.

[FN3] Pub.L 110-289, Div. A, Title IV, § 1401, July 30, 2008, 122 Stat. 2800.

[FN4] See “U.S. Steps Up Help for Homeowners,” by Damian Paletta, Jessica Holzer and Ruth Simon, Wall Street Journal, Nov. 12, 2008.

[FN5] Information obtained online from www.treasury.gov/press/releases/tg108.htm. April 28, 2009, TG-108. Press Room, U.S. Department of Treasury. Obtained online. “Obama Administration Announces New Details on Making Home Affordable Program, Parallel Second Lien Program to Help Homeowners Achieve Greater Affordability, Integration of Hope for Homeowners to Help Underwater Borrowers Regain Equity in their Homes.”

[FN6] Information obtained online from “Making Homes Affordable,” July 7, 2009. www.treas.gov/.../05142009FactSheet-MakingHomesAffordable.pdf.

[FN7] Information obtained online from “Making Homes Affordable,” July 7, 2009. www.treas.gov/.../05142009FactSheet-MakingHomesAffordable.pdf.

29 NJPRAC § 2.13

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
2. Mortgage Lending: The Institutional Framework

§ 2.14. Servicers—Modification/loss mitigation authority; safe harbor

The "Helping Families Save Their Homes Act of 2009" amends the Truth in Lending Act, 15 U.S.C.A. § 1639a, to authorize servicers to (a) modify mortgage loans and engage in other loss mitigation activities consistent with Secretary of the Treasury guidelines issued under the Emergency Economic Stabilization Act of 2008; (b) refinance mortgage loans under the Hope for Homeowners program; and (c) providing a safe harbor for servicers engaging in these activities.

This amendment applies to residential loans originated before the "Helping Families Save Their Homes Act of 2009," May 20, 2009, and includes mortgages held in securitization or other investment vehicles. It recognizes that that the servicer owes a duty to investors or other parties to maximize the net present value of such mortgages, that duty is be deemed to have satisfied if, before December 31, 2012, the servicer implements a qualified loss mitigation plan that meets the criteria set forth in the amendment: (a) default has occurred, is imminent, or is reasonably foreseeable, as defined by Secretary of the Treasury guidelines; (b) the mortgagor occupies the mortgaged property as his or her principal residence; and (c) the servicer reasonably determined, consistent with the aforesaid guidelines that the application of such qualified loss mitigation plan to a mortgage or class of mortgages will likely provide an anticipated recovery on the outstanding principal mortgage debt that will exceed the anticipated recovery through foreclosures.

A "qualified loss mitigation plan" means "(A) a residential loan modification, workout, or other loss mitigation plan, including to the extent that the Secretary of the Treasury determines appropriate, a loan sale, real property disposition, trial modification, pre-foreclosure sale, and deed in lieu of foreclosure, that is described or authorized in guidelines issued by the Secretary of the Treasury or his designee under the Emergency Economic Stabilization Act of 2008; and "(B) a refinancing of a mortgage under the Hope for Homeowners program."

A servicer deemed to be acting in the best interests of all investors or other parties under the statute is not liable to any party who is owed a duty under subsection (a)(1) of the statute, and shall not be subject to any injunction, stay, or other equitable relief to such party, based solely upon the implementation by the servicer of a qualified loss mitigation plan.

The qualified loss mitigation plan guidelines issued by the Secretary of the Treasury under the Emergency Economic Stabilization Act of 2008 constitute standard industry practice for purposes of all Federal and State laws.

Further, any person, including a trustee, issuer, and loan originator, is not liable for monetary damages or be subject to an injunction, stay, or other equitable relief, based solely upon the cooperation of such person with a servicer when such cooperation is necessary for the servicer to implement a qualified loss mitigation plan that meets the requirements of the statute.

A servicer engaging in qualified loss mitigation plans under this statute must regularly report to the Secretary of the Treasury.

The safe harbor provision set forth in the statute shall not affect the liability of a servicer or other person referenced in the statute for actual fraud in the origination or servicing of a loan or in the implementation of a qualified loss mitigation plan, or for the violation of a State or Federal law, including laws regulating the origination of mortgage loans, commonly referred to as predatory lending laws.

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

29 NJPRAC § 2.14

END OF DOCUMENT

New Jersey Practice Series TM
Current through the 2009-2010 pocket parts, issued in October 2009

Law Of Mortgages

Myron C. Weinstein[a0]

Chapter
2. Mortgage Lending: The Institutional Framework

§ 2.15. Fraud Enforcement and Recovery Act (FERA)

The Fraud Enforcement and Recovery Act or FERA (the act) was enacted on May 20, 2009.

The stated purpose of the act is—"[t]o improve enforcement of mortgage fraud, securities fraud, securities and commodities fraud, financial institution fraud, and other frauds related to Federal assistance and relief programs, for the recovery of funds lost to these frauds, and for other purposes."

In terms of this treatise, the act amends 18 U.S.C.A. § 20 of the federal criminal code to include in the definition of "financial institution" a mortgage lending business or any person or entity that makes, in whole or in part, a federally related mortgage loan.

"Mortgage lending business" is defined as an organization that finances or refinances any debt secured by an interest in real estate, including private mortgage companies and their subsidiaries, and whose activities affect interstate or foreign commerce, 18 U.S.C.A. § 27.

These changes effectively expand the definition of "financial institution" to include businesses that are not directly regulated or insured by the federal government. These changes then will apply federal anti-fraud laws to currently unregulated institutions and private mortgage businesses—responsible for half of the residential mortgage market in the country—in the same way they apply to federally insured and regulated banks and institutions.

The act amends the "False Statements in Mortgage Applications" section of 18 U.S.C.A. § 1014 to include false statements by mortgage brokers and agents of mortgage lending businesses or any person or entity that makes in whole or in part a federally related mortgage loan, such as willfully overvaluing a property in order to influence any action by a mortgage-lending business. The act, then, extends the prohibition against making willfully false statements in a mortgage application to such employees, agents and persons.

The act amends 18 U.S.C.A. § 1031(a) to expand the prohibition against defrauding the federal government to fraudulent activities involving the Troubled Asset Relief Program (TARP) or a federal economic stimulus, recovery, or rescue plan.

The act expands securities fraud provisions to cover fraud involving options and futures in commodities, 18 U.S.C.A. § 1348.

The act importantly amends the definition of "money laundering" by providing that "proceeds" in the definition means "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity," 18 U.S.C.A. § 1956(c).

This change is in response to the decision in *United States v. Santos*, in which the U.S. Supreme Court held that the word "proceeds" in the money laundering statutes meant the "profits" obtained from an illegal activity, and not the "gross receipts" from the activity.

Section 3 of the act authorizes additional funding to combat mortgage fraud, securities and commodities fraud, and other frauds involving federal economic assistance. Appropriations are authorized for the Attorney General, Federal Bureau of Investigation, United States Attorneys, Department of Justice, civil, criminal and tax divisions, Postal Inspection Service, the Inspector General for the Department of Housing and Urban Development, United States Secret Service, Securities and Exchange Commission and the Inspector General of the Securities and Exchange Commission.

Section 4 amends the civil False Claims Act, 31 U.S.C.A. § 3729 to expand liability under the Act for making false or fraudulent claims to the federal government; and for presenting a false or fraudulent claim for payment or approval. A "claim" is defined inter alia as any request for money or property that is presented to a representative of the United States or to a "contractor, grantee or other recipient if the money or property is to be spent or used on the government's behalf or to advance a Government program or interest." Under FERA the claim does not have to be presented to a government employee. Liability can attach to a claim presented to a contractor or grantee so long as the money claimed "is to be spent or used on the government's behalf or to advance a Government program or interest." Further, the government does not have to be in possession of the funds, nor does there need to be specific intent to defraud the government.

The act also amends provisions of the False Claims Act regarding intervention by the federal government in civil actions for false claims (31 U.S.C.A. § 3137(b), sharing of information by the Attorney General with a claimant (31 U.S.C.A. § 3133), retaliatory relief (31 U.S.C.A. § 3130(h), and service upon state or local authorities in sealed cases (31 U.S.C.A. § 3132).

Section 5 establishes the Financial Crisis Inquiry Commission to examine inter alia the causes of the current U.S. financial and economic crisis, specifically taking into account fraud and abuse in the financial sector, including fraud and abuse towards consumers in the mortgage sector.

[FNa0] Of The New Jersey Bar, Former Chief, Office Of Foreclosure.

29 NJPRAC § 2.15

END OF DOCUMENT