FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Title News

The Mortgage Crisis

As this is currently being drafted at the end of June, the Congress is considering its most sweeping legislation to date regarding Foreclosures and the Mortgage Crisis, according to the New York Times. The bill in question passed by an overwhelming majority in the Senate on June 24, 2008. The President, however, has threatened to veto the legislation, claiming that it rewards irresponsible borrowers and lenders, so it remains to be seen whether any such bill will become a law.

We predicted in an earlier installment that nothing major is likely to happen in the Mortgage Crisis now as this is a presidential election year, and the political parties do not want to anger their bases. "The next big thing" will probably happen after the election, if the President vetoes the above-mentioned bill, so it behooves us to look at some of the current numbers regarding Foreclosures.

The New York Times reports, for example, that Foreclosure Actions are currently being filed at a rate of over 8,000 per day nationwide and that since March 2008, 400 people have been indicted for Mortgage Fraud. For the first time, the Times states, two Hedge Fund Managers at a major Brokerage House have been indicted for Fraud regarding funds invested in Sub-Prime Mortgages. Both were employees of Bear-Stearns, which is being taken over by J.P. Morgan Chase due to hundreds of millions of dollars in emergency loans provided by the Federal Reserve Bank.

With so many adjustable-rate mortgages to hit higher rates, however, Newsday reports that some states are taking action themselves. New York State, for example, is instituting a new Residential Foreclosure Program, under which the courts will notify homeowners of free legal and housing advice and give homeowners the chance to meet with lenders before the Foreclosure Action actually goes before a judge. Instead of being litigated, the conflict would hopefully be resolved by means of Alternative Dispute Resolution, in this case Mediation, which would not be legally binding on any party until the parties would in fact sign the Workout documents. This "ADR" would not be mediated by a judge, but by a court-appointed Referee who would be neutral

and whose decisions would have no legal effect apart from the Workout Agreement between the lender and borrower(s). According to Newsday, this pilot program will begin in Queens over this summer, and in Suffolk County in September.

New York's Numbers

Across New York State entirely, during only the first four months of 2008, that is from January 1st through May 2nd of this year, 38,807 Foreclosure Actions were filed in the courts. In 2007 statewide, 27,722 Foreclosure Actions were filed, whereas 19,586 Foreclosure Actions were filed in 2006. (The numbers for 2008 so far represent an estimate made by Newsday based on 85 percent of total filings in 14 of New York State's counties.)

Nassau County had 1,767 Foreclosures in 2006 and 2,840 Foreclosure Actions in 2007. For only the first four months of 2008, Nassau had 3,813 Foreclosure Actions – an increase of almost a thousand more than all of 2007 in a third of the time.

The situation in Suffolk County, however, seems to be worse than in Nassau County. There were 7,445 Foreclosure Actions filed in Suffolk County during only the first third of 2008. This is a sizable increase from 4,680 in Suffolk in 2007, and 2,860 in 2006.

The important thing to keep in mind is that "experts" say many ARM's have still to adjust to their higher interest rates, which will put even further pressure on borrowers and lenders. This Company saw many files with Notices of Pendency filed by banks in Foreclosure Actions this past spring. The stream of *Lis Pendens* which we see seems to have lessened, however, leaving us wondering if the above numbers are the peak of the Mortgage Crisis – or just its beginning.

The Home Equity Theft Prevention Act

Generally, if a Mortgage leads to litigation these days, it involves either what some call "Predatory Lending" or a violation of the Home Equity Theft Prevention Act, which became law in 2006 and can be found in section 595 of the Banking Law, section 265-a of the Real Property Law and section 1303 of the Real Property Actions and Proceedings Law. The Act applies where a natural person, as opposed to a business entity, attempts to sell his or her home in the context of a Mortgage or Tax Foreclosure or in the context of a Mortgage or Tax Default.

The Seller in such a situation is called the "Equity Seller" because of the Owner's Equity of Redemption, whereas the Buyer who oftentimes claims to bail out the Seller is referred to as the "Equity Buyer." A Purchase is exempt from the Act if:

1. The Buyer will use the property as a primary residence.
2. The Deed is from a Referee is pursuant to a Foreclosure Sale under RPAPL Article 13.

3. The sale of the property is authorized by statute.
4. The sale is pursuant to a court order or judgment.
5. The Buyer is a relative, such as spouse or child, of the Seller.
6. The Buyer is a not-for-profit housing organization or a public housing agency.
7. A subsequent Buyer has bought from a the Equity Buyer in good faith and for valuable consideration or is providing a Mortgage to the Equity Buyer and has no notice of the Equity Buyer's purchase from the Equity Seller.

The important thing about the Act to remember is that for contracts to which the Act applies, the Equity Seller has until the fifth day after the signing of the contract to cancel the transaction. Plus, during those five days, the Equity Buyer may not:

a. Induce the Equity Seller to execute or record any documents.
b. Record any documents.
c. Encumber the property.
d. Make any false or misleading statements or claims about "saving the house" without a good-faith basis for making such statements.

Further, an Equity Buyer must attach a 12-point-type Notice of Cancellation to the returned contract to the Equity Seller along with the signed Contract. Within 10 days of receiving this Notice of Cancellation, the Equity Buyer must return all documents and consideration received from the Equity Seller back to the Equity Seller.

If the Buyer violates these provisions, the Seller has two years from the recording of the Deed to cancel the conveyance. This is done by means of a suit to enforce rescission or cancel the contract if the Equity Seller has already given written Notice of Rescission to the Equity Buyer, returns any consideration received and records the Rescission Notice with the County Clerk.

If the Equity Purchaser has in turn conveyed the property to a subsequent genuine Purchaser for consideration, then the conveyance may not be rescinded, if the subsequent conveyance took place before the Rescission Notice was recorded. However, the subsequent Buyer must still enquire whether the Equity Seller is still in possession of the premises.

If an Equity Buyer is found in violation of the Act, a court may award the Equity Seller civil damages, attorney's fees and triple any actual damages as a penalty. An Equity Buyer who acts with the intent to defraud may be convicted of a Class A misdemeanor, fined up to $25,000 and actually imprisoned. And the Attorney General of New York State has the authority to investigate violations, issue subpoenas and seek restitution and fines.

The Title ramifications of the Act are that you will want your Title Company to do a thorough search as to all recorded documents and to find out whether an Equity Seller and Buyer have

complied with the Act when your client is the subsequent Buyer involving such a property. If such a case arises, it is important to read the pertinent sections of each of the three statutes cited above, as this Newsletter can at best give you only a general overview.

Here is a recent court decision regarding a violation of the Act: An elderly woman and her son conveyed title to their property (valued at about $400,000.00) in return for $25,000.00 in cash and assumption and prompt payoff of their Mortgage which had outstanding principal of about $62,000.00. These Equity Sellers remained in the premises, paid rent and retained an option to buy at the end of one year. The Equity Buyer, however, gave several Mortgages to institutional lenders in the interim without the Equity Sellers' knowledge. The Kings County Supreme Court not only voided the deed into the Equity Buyer, but also voided all Mortgages recorded after the Equity Sellers filed their *lis pendens.* The Mortgage given by the Equity Buyer to the bank which paid off the Equity Sellers' original Mortgage, however, which had been in Foreclosure, remained as a lien on the property. The court held that the Equity Buyer had not taken title in order to help the Equity Sellers, but in order to cheat them, and had made fraudulent statements to them. *Watson v. Melnikoff,* 19 Misc.3d 1130 (Kings Cty. Sup. 2008).

If you have any questions or comments, contact us at fsa@federalstandardabstract.com