

## A Mortgage and Consumer Finance Law Update

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### Update on Changes to Washington's Financial Services Law

Although they may not have received as much press as their federal counterparts in Washington, D.C., the Washington Legislature has also been busy addressing the financial crisis. This past season, the Legislature passed several statutes that will impact the Washington financial services community to various degrees. What follows is a short synopsis of each of these laws. A recent interpretation by the Washington Department of Financial Institutions ("DFI") on the applicability of state law to loan modification activities is also included. Lane Powell's Mortgage and Consumer Finance attorneys are available to assist clients with interpreting these new laws and preparing and implementing needed compliance programs.

#### **SHB 2061: Public Depositories**

This Act was effective on **March 6, 2009**, and was passed to avert a collapse of Washington's Public Deposit Protection Program ("the Program"). By law, public funds may only be deposited in banks and thrifts that have been approved as public depositories by the Public Deposit Protection Commission ("the Commission"). To obtain approval, a financial institution must pledge securities as collateral to protect uninsured public funds on deposit in the depository. For the first 12 months as a public depository, a depository must pledge and segregate eligible securities of at least 10 percent of all uninsured public funds on deposit in the depository. If a public depository fails and the insurance and collateral are insufficient to reimburse all public depositors, the other public depositories are each assessed a proportionate share of the shortfall. After the failure of one public depository, other participating institutions found themselves facing very large assessments. The result was that many institutions acted to withdraw from the Program.

This Act gives the Commission "broad administrative discretion" in performing its general powers. This includes setting the maximum liability of public depositories. If a public depository is 100 percent collateralized by eligible collateral, the "maximum liability" of a public depository that has not incurred a loss may not exceed: 1) the 10 percent figure mentioned above or 2) 10 percent of the average balances of uninsured deposits in the depository's last four reports to the Commission. The definition of "maximum liability" does not limit the authority of the Commission to adjust the collateral requirements of public depositories.

The Act was successful. Not only did it prevent the collapse of the Program, many institutions that withdrew are now seeking to rejoin.

## **ESB 5810: Deeds of Trust Foreclosure**

Effective July 26, 2009, this Act makes both temporary and permanent changes to the Washington Deed of Trust Act. First, for owner-occupied residential mortgage loans made between January 1, 2003, and December 31, 2007, a beneficiary may not commence a non-judicial deed of trust foreclosure until 30 days after the beneficiary has contacted the borrower or has followed specified due diligence procedures in attempting to contact the borrower. In addition, the beneficiary must certify to having done so in the notice of default. Because this contact requirement is really designed to provide additional protection in the case of high-risk subprime loans, it is temporary and expires December 31, 2012.

The Act also provides that, before a trustee may record a notice of sale, the trustee must have proof that the beneficiary is the actual holder of the promissory note secured by the deed of trust. If the original promissory note is lost, the beneficiary may provide a copy of the note and a notarized statement declaring that the original note has been lost. The Act further requires that tenants in possession of non-owner occupied residential property at time of deed of trust foreclosure shall be given: 1) 90 days advance notice of the sale and 2) a 60-day advance notice to vacate. The new owner (landlord), by foreclosure, still has the option of negotiating a new lease with the tenant or offering to pay the tenant to vacate sooner. *Note: New federal law has extended this advance eviction notice requirement to 90 days in many cases. For more information, see <http://www.lanepowell.com/5588/helping-families-save-their-homes-act-of-2009/>.*

The failure of a borrower to enjoin a deed of trust sale under the Deed of Trust Act does not act as a waiver of the claim for actual damages for common law fraud or misrepresentation, conduct in violation of Title 19 RCW, and a failure of the trustee to materially comply with the Deed of Trust Act. However, a claim for actual damages must be brought within two years of the foreclosure's completion. Moreover, the surviving liability for actual damages does not affect the validity of the sale itself. The Act takes effect on **July 26, 2009**.

## **EHB 1311: Reverse Mortgages**

Effective **July 26, 2009**, EHB 1311 corrects an inadvertent error in legislation passed last year. Consumer Loan Act licensees will be permitted to make both FHA-approved and proprietary reverse mortgages. The Act grants the Washington DFI with the authority to regulate reverse mortgage lending. The Act also proscribes the terms on which licensees may make proprietary reverse mortgages. These terms include net worth requirements, fee limits, disclosure and counseling requirements. They also include restrictions on offering ancillary products and a requirement that all proprietary reverse mortgage programs be submitted to the DFI for approval prior to implementation.

## **SHB 1621: Consumer Loan Companies and SHB 1749: Mortgage Broker Practices**

The Federal Housing and Economic Reform Act of 2008 mandated state licensing of all mortgage loan originators (*i.e.*, individual loan officers) and the use of a nationwide state licensing system to facilitate the licensing process. The law provides that if a state does not act to implement the requirements, the federal government will step in and become the primary regulator of those licensees.

SHB 1621 amends the Washington Consumer Loan Act to require the licensing of mortgage loan originators and requires that Washington participate in licensing through a state run system called the Nationwide Mortgage Licensing System and Registry (“NMLSR”). *These new requirements apply even to employees of Consumer Loan Act licensees.* Licensees must submit fingerprints through the NMLSR for criminal history background checks to the FBI. There are also education requirements for pre-licensing, a requirement for national and state testing, and a minimum eight hour continuing education requirement. In a related measure, SHB 1749 amends the Washington Mortgage Broker Practices Act to require that loan originators working for and with mortgage brokers also register with the NMLSR. The licensing and registration requirements become effective **July 1, 2010**.

## **SSB 5531: Consumer Protection Act**

The Legislature made two significant changes to the Washington Consumer Protection Act (“CPA”). The CPA prohibits unfair or deceptive practices in trade or commerce. Violations of the Act may be enforced by private parties, the state, counties, municipalities and all political subdivisions of the state. Currently, the CPA allows a prevailing plaintiff to recover: 1) the actual damages sustained; 2) the costs of the suit; and 3) reasonable attorney's fees. Additionally, a court has the discretion to award additional damages in the amount of up to three times the actual damages sustained by the plaintiff. These treble damages are limited to \$10,000 in Superior Court and \$75,000 in District Court. For causes of action accruing on or after July 26, 2009, the CPA will provide that in a lawsuit for a CPA violation, the District and Superior Courts have the discretion to award up to \$25,000 in discretionary treble damages.

Washington courts have long held that, to state a claim under the CPA, private parties must show that the Act complained of adversely impacts the public interest. SSB 5531 provides a statutory standard for what constitutes an impact on public interest. In a private action claiming a CPA violation, a claimant may establish that the act or practice is injurious to the public interest because it: 1) violates a statute that incorporates the CPA; 2) violates a statute that contains a specific legislative declaration of the statute’s impact on the public interest; or 3) injures, could have injured or can still injure other persons.

## **SB 5164: Collection Practices of Payday Lenders and ESHB 1709: Small Loan Default Risk**

SB 5164 is effective **July 26, 2009** and prohibits certain payday loan collection practices. More specifically, the lender may not visit to the borrower's place of employment (unless invited), impersonate a law enforcement officer or make statements to suggest that they are affiliated with any other governmental official. The Act also prohibits harassing, intimidating, abusive or embarrassing communication with a borrower. Collection activity will be presumed to be harassing if the lender communicates with the borrower more than three times a week, communicates with the borrower at their place of employment more than once a week, communicates at the borrower's residence between the hours of 9:00 p.m. and 7:30 a.m. or communicates with someone other than the borrower.

ESHB 1709 is effective **January 1, 2010**, and will significantly change the terms on which payday loans may be made in the state of Washington. The minimum term of a loan is the borrower's next paycheck unless that is less than seven days. If it is less than seven days, the minimum term is the date of the next following pay date. A borrower may not take out more than \$700 in small loans at any time from *all lenders* or borrow more than 30 percent of the borrower's gross monthly income, whichever is less.

Payday lenders will also be prohibited from making a small loan to a borrower if making the loan would result in a borrower receiving more than eight small loans from all licensees in any 12 month period. The existing payment plan will also be eliminated and replaced with a new installment plan. In addition, the lender must inform the borrower that if the borrower cannot repay a loan when the loan is due, then the borrower may convert the small loan to an installment plan.

The Washington DFI will establish a database in which all small loans must be registered to ensure that licensees will be able to comply with the new limitations. The Director must also collect and submit the payday lending activity information to the Legislature. The DFI has also started the process of drafting implementing regulations.

## **HB 1166: Linked Deposit Program Loans**

The Act, which becomes effective on **July 26, 2009**, authorizes Community Development Financial Institutions (“CDFI’s”) to participate in the state’s linked deposit program. A CDFI is a specialized financial institution certified by the U.S. Department of the Treasury to make loans for community development purposes. Under the Linked Deposit Program, Washington State certified minority-owned and women-owned businesses can receive reduced rate loans from CDFIs. The Washington State Treasury Department can use up to \$190 million of surplus funds that are deposited as certificates of deposit in institutions that make loans under the program. The state forfeits some of the interest on the deposits on the condition that the CDFI uses the savings to make the reduced rate loans.

## **SSB 5468: Nonprofit Housing Organizations**

Effective **July 26, 2009**, this Act amends the Consumer Loan Act to exempt certain non-profit housing organizations from its coverage. To qualify for the exemption, the organization must make loans under certain federal and state funded housing programs.

## **SSB 5723: Small Business Assistance**

The new law provides that contributions to local or statewide business assistance organizations must be considered in assessing the bank's performance in meeting community credit needs. It takes effect on **July 26, 2009**.

## **Washington DFI Interpretative Statement**

According to the Washington DFI, persons (individuals or entities) communicating directly with borrowers and collecting information from them about possible loan modifications must be licensed under the Consumer Loan Act or the Mortgage Broker Practices Act unless they are otherwise exempt from licensing. In addition, those operating as mortgage brokers must obtain fee agreements with the borrowers if they are collecting a fee in advance of services. The fees must generally be limited to \$750 for hardship counseling and \$750 for actual negotiation of the modification. In addition, the modification must result in a tangible net benefit to the borrower. The borrower must also be informed about the availability of the U.S. Department of Housing and Urban Development's counseling services.

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