

Trend Report: Development Issues Our Clients Are Talking About

Update on Predatory Lending Database Act

Effective July 1, 2010, the predatory lending database pilot program, which has been in effect in Cook County since July 1, 2008, has been expanded to Kane, Peoria and Will Counties. Therefore, the Act now applies to all mortgages recorded in these three counties for loans originated after June 30, 2010, and to all mortgages recorded in Cook County for loans originated after June 30, 2008.

As we reported in an earlier edition of Development News, the predatory lending database program was established by the Illinois Predatory Lending Database Act, 765 ILCS, sections 77/70 through 77/80. For loans that are not exempt, the Act requires the broker or other originator to submit specified information about the borrower and the transaction to the database. If the information discloses certain conditions about either the borrower or the transaction, the Act requires that the borrower receive counseling from a HUD certified counselor and that the counselor submit further information to the database before the loan can proceed. The certification requirement applies generally to first time home buyers and refinancings with certain characteristics that are secured by residential properties with four or fewer units. Therefore, most commercial mortgage loans will be exempt, but even for exempt transactions the Act requires that the "closer" (typically the title insurer) enter information about the property into the database and obtain an exemption certificate, which then must be attached to the mortgage for it to be recorded. For properties in the four counties in which the Act is now in effect, title insurance companies will now include in their commitments an exception for compliance with the Act, and also will offer to lenders a loan policy endorsement that provides affirmative coverage as to compliance.

Attorneys providing opinions in loan transactions should be aware that, under the provisions of the Act, a mortgage on property in one of the effected counties is not in recordable form unless it has attached to it either a certificate of compliance or a certificate of exemption generated by the database. Therefore, for property in those counties, the typical borrower's counsel's opinion, that the mortgage is in a proper form for recording, cannot be given unless counsel is satisfied that the exemption (or compliance) certificate is attached. Because the certificate typically is obtained by the title insurer or other closing agent as part of the recording process, which often occurs after closing and the delivery of opinions, counsel may need to include an assumption that the certificate will be attached at the time of recording. In our experience, Illinois lenders who are familiar with the Act generally are willing to accept such an assumption, but lenders located outside of Illinois may need an explanation of the Act before accepting it. Freeborn & Peters has closed numerous loans on properties in the counties affected by the Act, and we are available to consult with clients about its effect on lending transactions of all types.

"Caveat Renter"

Landlords across the nation are desperately attempting to place paying tenants in retail centers. Even with reduced rents, a tenant that pays for center expenses (including the mortgage) is a good tenant. That sense of desperation, however, may cause a landlord to make a mistake. For example, many landlords ask tenants and potential guarantors for "statements of net worth" or some other form of financial documentation that demonstrates an ability to honor the lease obligations. Many of the statements we have reviewed, however, either lack detail or contain potentially misleading information, including: unaudited (versus audited) financial statements; net worth statements which overstate assets (e.g. the value of many homes has decreased materially) and understate liabilities (e.g. the potential tenant or guarantor is contingently liable for debt). An independent source of confirmation such as a Dun & Bradstreet report can be extremely helpful, and while not as thorough, a simple Internet search of the potential tenant often turns up information that the potential tenant never disclosed. With such great potential for confusion, perhaps the catch phrase of the new leasing era should be "caveat renter."

Amendments to the Title Insurance Act Affect Closing Protection Letters

In an attempt to strengthen the closing process for the benefit of consumers and lenders, the State of Illinois has enacted legislation that amends the Title Insurance Act (215 ILCS 155/ et al.) to require

the issuance of Closing Protection Letters. Sometimes referred to as an "insured closing letter" the Closing Protection Letter is a document issued by title insurance underwriters that sets forth an underwriter's responsibility for negligence, fraud and errors in closings performed by agents and approved attorneys. The Closing Protection Letter indemnifies the indemnitee against loss or damage arising from a breach of certain fiduciary duties owed by the closing agent to the parties to the transaction. It was determined that this document is necessary because the agency/principal relationship between an underwriter and a policy issuing agent or approved attorney is limited to the issuance of a policy and does not extend to escrow functions. Accordingly, effective January 1, 2011, the Title Insurance Act provides that Closing Protection Letters must be issued to Lenders, Borrowers, Buyers and Sellers for all residential real estate transactions, and non-residential transactions under \$2,000,000*.

Additionally, the Illinois Department of Financial Institutions has also proposed amendments to the Illinois Administrative Code (50 Ill. Adm. Code 8100.2402) that set the following guidelines for minimum charges for Closing Protection Letters:

1. A charge of no less than \$25 to all Buyers receiving a Closing Protection Letter in conjunction with a Resale transaction
2. A charge of no less than \$50 to all Sellers receiving a Closing Protection Letter in conjunction with a Resale transaction
3. A charge of no less than \$25 to each Lender receiving a Closing Protection Letter in conjunction with a Resale or Refinance transaction
4. A charge of no less than \$50 to all Borrowers receiving a Closing Protection Letter on a Refinance transaction.

*"Buyer", "Seller" and "Borrower" are considered a single party to the transaction regardless of the number of people or entities making up the Buyer, Seller, or Borrower.

Andrew Mooney Named Interim Head of the New Department of Housing and Economic Development

Mayor Richard M. Daley has appointed Andrew J. Mooney as interim head of the City of Chicago's new Department of Housing and Economic Development.

Mr. Mooney currently serves as the Executive Director of the Chicago Office of the Local Initiatives Support Corporation (LISC/Chicago) and is also the Managing Director of the National Institute for Comprehensive Community Development. He will begin work at the City on December 1, 2010.

The new department will be formed through the consolidation of the City's Department of Community Development and the Department of Zoning and Land Use Planning as of January 1, 2011. Its aim is to align the housing, economic development, zoning and land use planning functions within the City. The City believes that by having all such functions housed under one roof, the new department will provide a more coordinated and comprehensive approach to development in the neighborhoods.

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