



Community Bankers Association of Illinois' "Q&A":

New Illinois Mortgage Foreclosure Grace Periods

Senate Bill 2513 (now Public Act 95-1047) provided the statutory framework necessary to implement the settlement agreement that will resolve the lawsuit brought by CBAI and our co-plaintiffs against the Blagojevich Administration. Our lawsuit, the legislation and the settlement agreement will result in reduced regulatory fee assessments and refunds that benefit state-chartered banks, savings banks and savings and loan associations. Senate Bill 2513 was amended last year at the direction of Illinois House Speaker Michael Madigan to also include mortgage foreclosure relief for mortgagors who seek "approved housing counseling" after becoming delinquent on their loan payments.

For the benefit of our members who might not be familiar with the mortgage foreclosure relief measures contained in the recently-enacted legislation, CBAI is offering the following "Q & A." If you have any additional questions or would like to obtain a copy of the relevant language in Public Act 95-1047, please feel free to contact CBAI General Counsel Jerry Cavanaugh by telephone (800-736-2224 from within Illinois) or e-mail (jerryc@cbai.com).

Question #1: Are the provisions of the new law currently in effect?

Answer: Yes. Public Act 95-1047 had an immediate effective date and took effect on April 6, 2009.

Question #2: Do the mortgage relief measures apply to all financial institutions, including federally-chartered banks and thrifts?

Answer: Yes. The mortgage relief measures are contained in a new Section 15-1502.5 of Illinois' Code of Civil Procedure. The Code of Civil Procedure governs access to the State courts and the procedures that mortgagees must follow in order to enforce their rights as lienholders. Those legal processes must be followed by *any* mortgagee that attempts to exercise its legal rights. There is no "federal preemption" that would grant national banks or federal savings and loan associations with an alternative to, or exemption from, the requirements of new Section 15-1502.5.

Question #3: Do the new requirements apply to any loan secured by real estate?

Answer: No. CBAI insisted that the new requirements be limited to residential real estate used as a principal residence. The provisions of new Section 15-1502.5 apply to foreclosure on a mortgage secured by *residential real estate*. The term “residential real estate” is defined elsewhere in the Code of Civil Procedure to include real property that is: (1) improved with a single family residence or with residential condominium units or a multiple dwelling structure containing single family units for six or fewer families living independently of each other; and (2) the residence (or at least one of the condominium or dwelling units) is occupied as a principal residence by the mortgagor, mortgagor’s spouse or mortgagor’s descendant (if the mortgagor is a trustee or an executor of an estate, then the property must be a principal residence of a beneficiary of the trust or estate or of the beneficiary’s spouse or descendant; if the mortgagor is a corporation, then the property must be a principal residence of persons owning collectively 50% or more of the voting stock of the corporation or by the spouse or descendant of such persons). The new requirements do not apply to commercial real estate or to real estate not occupied as a principal residence.

Also, the new law specifies that its requirements “shall not apply, or shall cease to apply, to residential real estate that is not occupied as a principal residence by the mortgagor.” This language, found in subsection (j) of new Section 15-1502.5, appears to be more narrow than the language referenced above in the definition of “residential real estate” (i.e., that the “principal residence” occupant could be the mortgagor’s spouse, mortgagor’s descendant, beneficiary of a land trust, etc.). However, it is unclear whether a court will interpret the narrower language in subsection (j) as prevailing over the more inclusive definition of “residential real estate.” CBAI advises that your bank consult with its own legal counsel for guidance if this conflicting language may become an issue with respect to a foreclosure on real property that is not occupied by the mortgagor himself/herself as his/her principal residence.

Question #4: What is the new “notice” requirement in the new mortgage foreclosure relief measures?

Answer: Under new Section 15-1502.5, a mortgagee cannot file a complaint for foreclosure in the State courts until the mortgagee has complied with a statutorily-mandated written notice requirement. The notice must be sent (regular U.S. mail is acceptable) to any mortgagor who is delinquent by more than 30 days. The specific requirements for the language in the notice can be seen [here](#). Essentially, the notice grants the mortgagor a 30-day grace period (referred to herein as the “Notice Grace Period”) to seek “approved housing counseling,” and the mortgagee cannot take any foreclosure action against the mortgagor during the Notice Grace Period.

The notice need only be sent by first class mail addressed to the mortgagor at the address of the residential real estate securing the mortgage.

Question #5: What happens if the mortgagor seeks the counseling contemplated by the new law?

Answer: If the mortgagor seeks approved housing counseling, the counselor has an obligation to notify the mortgagee in writing of that fact within the 30-day Notice Grace Period. If the mortgagee receives written notification from an approved counseling agency that the mortgagor is seeking counseling, then the mortgagee shall again grant an additional 30-day grace period (referred to herein as the “Counseling Grace Period”) from the date of the written notice from the counselor. No foreclosure action against the mortgagor can be initiated during the 30-day Counseling Grace Period. During this period, the mortgagor has the opportunity to work with the counselor to prepare a loan workout program that can be submitted to the mortgagee in an effort to avoid foreclosure.

Question #6: What is “approved housing counseling”?

Answer: The counseling required by the new law must come from a counseling agency approved by the United States Department of Housing and Urban Development. The mortgagor can obtain a list of such approved agencies from the Illinois Department of Financial & Professional Regulation. No cost related to the counselor’s services will be incurred by the mortgagee. The counseling must be conducted in-person by the counselor to the mortgagor; however, if the mortgagor is confined to his or her home due to medical conditions or lives at least 50 miles away from the nearest approved counseling agency then the counseling may be conducted via telephone.

Question #7: What happens if the mortgagor cannot secure the services of an “approved housing counselor” within the 30 days after receiving the notice from the mortgagee?

Answer: The law does not require the mortgagee to make accommodations for a mortgagor who has failed to make connections with an approved housing counselor. As stated in the Answer to Question #5, the obligation of a mortgagee to grant a 30-day Counseling Grace Period is dependent on the mortgagee receiving written notification from an approved counseling agency during the Notice Grace Period. If no such documentation from the approved counseling agency is received by the mortgagee, the mortgagee may proceed with a foreclosure action. It is possible, however, that a judge may grant some leniency to a mortgagor who has failed to secure approved housing counseling in the time frame required by the statute if the judge concludes that the mortgagor should receive some benefit of the doubt due to circumstances beyond the mortgagor’s control; such judicial leniency is not addressed in the new law, but judges have been known to exercise such discretion.

If a mortgagor obtains the services of an approved counseling agency but subsequently changes agencies, such a change does not entitle the mortgagor to a new or extended grace period.

Question #8: Is a mortgagee bound by a loan workout program presented by the mortgagor and his/her counselor?

Answer: No. The mortgagee is free to accept or reject the loan workout terms proposed by the mortgagor and counselor. The terms of any loan workout plan agreed upon must be expressed in writing and must be signed by both the mortgagor and mortgagee. If the mortgagee accepts the proposal, or agrees to a modified proposal, then the mortgagee will not pursue foreclosure *as long as the mortgagor continues to comply with the terms of the loan workout plan.*

Question #9: What will prevent a mortgagor from engaging in a series of continual delinquencies, counseling requests and grace periods to stall foreclosure?

Answer: Subsection (c) of new Section 15-1502.5 states that “the procedures and forbearances described in this Section apply only once per subject mortgage.”

Question #10: Can the requirements of this new law be avoided by using a “waiver” clause in the mortgage documents whereby the mortgagor waives his/her right to such notices and grace periods?

Answer: No. Subsection (h) of new Section 15-1502.5 prohibits waiver of these requirements.

Question #11: Can a financial institution be criticized by bank examiners for not aggressively pursuing collection on a “bad loan” while the financial institution is observing these new grace period requirements?

Answer: No. CBAI insisted on a provision in the new law clarifying that compliance with these requirements shall not be held against a financial institution when examiners analyze the credit collection practices of the financial institution. That provision was included in subsection (i) of new Section 15-1502.5.

Question #12: Do these new requirements terminate at some point in time, or will they continue to be in effect until they are amended or repealed at some unknown future time?

Answer: Public Act 95-1047 has a “sunset date” pursuant to which its provisions automatically terminate on April 6, 2011.