Lions and Tigers and Bears, Oh My

By Gary M. Whaley, Esq.

Until recently, the closing attorney did not have to worry about wild things lurking at the closing table. The attorney was more concerned with the exceptions to title appearing on the public record and closing the transaction in accordance with the terms of the contract, and that is how it should be. A new twist has been added however, that many closing attorneys seem to believe do not affect their practice. This is the very time when the unknown predator can reach out and bite you.

A very real concern for the closing attorney should be any lender's closing instructions which state that the loan must not close if it is in violation of federal, state or local law. Therefore, the closing attorney should at a minimum be able to recognize potential problems in the structure of the terms of the loan. It would seem that the lender should not be able to pass its liability to the closing agent, but if the closing attorney represents the lender at the closing table, it may be arguable that the closing attorney committed malpractice by not advising the lender of it potentially running afoul of the predatory lending law.

The North Carolina State Bar has made it clear through a number of ethics opinions, that an attorney may limit his or her representation of a client by providing prior notice of such limited representation. (97 FEO 1, 98 FEO 8, RPC 40, RPC 41). The notice may state that the lender may be running afoul of the provisions of the predatory lending law, but it is unable to be determined at this time. Therefore, the closing attorney makes no representation with regard to the validity of the law as it relates to this loan and if allowed to proceed to closing, the closing instructions are hereby amended to reflect such permission to proceed with closing on the limited representation basis. An example of such a letter is included with this article.

In order for the closing attorney to be on the lookout for lions and tigers and bears, the closing attorney needs to know at a minimum the factors that might trigger a High Cost Home Loan that would potentially place the loan in violation of the statute. NCGS § 24-1-1.E. First, there is a prepayment penalty threshold. Loans that provide for a prepayment penalty more than thirty (30) months after closings are High Cost Home Loans. Also, loans that provide the charging of a prepayment penalty which exceeds more than 2% of the amount prepaid are also High Cost Home Loans. Second, loans where the annual percentage rate exceeds by more than ten (10) percent, the yield on treasury securities having a comparable period of maturity are High Cost Home Loans. Finally, loans with the total points and fees payable at or before closing exceeding five (5) percent of the total loan amount, if the total loan amount is $20,000 or more is a High Cost Home Loan. The total loan amount is determined by a calculation in accordance with section 226-32 of Title 12 of the Code of Federal Regulations, and certain items are not included in points and fees. NCGS § 24-1.1E (5)(6)(7).

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Once a loan falls into the classification of a High Cost Home Loan, there are certain limitations and restrictions that must be observed. Many commentators believe that these high cost home loans are impossible to administer and once a loan is classified as a high cost home loan it will be by its very nature a violation of the unfair and deceptive trade practices act.

There are other consumer protection provisions that were written into the predatory lending act. The financing of credit life, disability, unemployment, health and life insurance premiums is now prohibited. NCGS § 24-10.2(b) Encouraging default is prohibited NCGS § 24-10.2(d). There is an absolute prepayment penalty prohibition for first mortgage loans up to $150,000. NCGS § 24-1.1A(b)(1). However, the most asked question an attorney may get from a lender is how much money can the borrowers receive back from a refinance. The lender's concern is the statute's prohibition against "flipping." NCGS § 24-10.2(c). Flipping is the making of a consumer home loan to refinance an existing consumer home loan when the new loan does not have a "reasonable, tangible, net benefit". Therefore, there is no set answer to the lender's inquiry. There may be a variety of reasonable, tangible, net benefits to justify a borrower to receive cash back. This could be to finance an education, pay for a nursing home, or make repairs to one's home. However, there is no guidance at this point as to what will constitute a reasonable, tangible, net benefit.

With these tips, the closing attorney should be able to recognize when a loan begins to approach terms that may be in violation of North Carolina Law. At that point, it would be prudent for the attorney to notify the lender that limits his or her representation of the lender in the closing process. By doing so, the closing attorney can avoid being bit by any unwanted predators.

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