Reprinted from the Mortgage Record Spring 2006

The Mortgage Record
The Official Publication of the Massachusetts Mortgage Bankers Association

Massachusetts Amends Predatory Regulations

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The Massachusetts Division of Banks has amended the regulations regarding Unfair and Deceptive Practices in Consumer Transactions. The regulations are found at 209 CMR 40.00 and became effective on Nov. 4, 2005. The amendments were required to implement the provisions of the 2004 Predatory Home Loan Practices Act which became effective on Nov. 7, 2004.

The amendments to the regulations expand their purpose to include prevention of "predatory home loan practices" under Massachusetts General Laws Chapter 183C. Certain definitions in the regulations were revised and new definitions were added, including definitions for "bona fide loan discount points," "broker," "conventional prepayment penalty," "lender," "high cost home loan" and "points and fees." Consistent with Chapter 183C, the regulations define "high cost home loan" as a consumer credit transaction secured by the borrower's principal dwelling, which meets either the "APR threshold" or the "points and fees threshold" as described in the regulations.

Prohibited practices in connection with high-cost home loans include certain balloon payments, default interest rates and prepayments penalties. Financing of points and fees is restricted under the regulations, as are demand features, modification and deferment fees, lender payments to home improvement contractors and mandatory arbitration clauses.

Under the previous regulations, borrowers of high-cost home loans were allowed to waive certain counseling requirements upon receipt from the lender of a disclosure recommending financial counseling and providing a list of approved counselors. The amended regulations make such counseling mandatory.

The amended regulations require lenders who make high-cost home loans to "reasonably believe" at the time that the loan was consummated that one or more borrowers will be able to make payments. The amended criteria for meeting the statutory presumption that the borrower will be able to make the payments is included in the amended regulations.

The amended regulations also contain provisions expanding and clarifying assignee liability. Those provisions should be carefully reviewed in connection with loan sales and assignments.

Consistent with Chapter 183C, the regulations now contain detailed provisions regarding the limited ability for the lender to cure violations of the Predatory Home Loan Practices Act. The regulations also provide that a violation of Chapter 183C constitutes a violation of Chapter 93A.

As recently reported in the general media, 16 sections of the USA Patriot Act, enacted in 2001, were scheduled to expire effective Dec. 31, 2005. In February 2006, an agreement was reached in Congress allowing for the reauthorization of all of the expiring sections of the act with minimal changes. Although mortgage brokers and lenders are subject to certain sections of the USA Patriot Act which impose obligations regarding customer identity and record-keeping, as well as certain reporting requirements with respect to transactional amounts, such sections were not scheduled to expire. The expiring sections generally applied to government surveillance and wiretapping restrictions.

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Court Case May Limit Recovery

In a recent opinion by the Supreme Judicial Court, the plaintiffs were denied relief under the Massachusetts Consumer Protection Act (Chapter 93A), where no injury had been found to have occurred. In *Hershenow v. Enterprise Rent-A-Car*, the plaintiffs claimed that various provisions of Enterprise's collision damage waiver failed to comply with the requirements of Mass. General Laws Chapter 90, section 32E ½, which regulates collective damage waivers in private passenger automobile rental agreements, and thus entitled them to damages under Chapter 93A. Although the plaintiffs acknowledged that their rental automobiles were not damaged during the rental period and therefore no claim was made under the collision damage waiver, they argued that Enterprise's violation of M.G.L. Chapter 90, section 32E ½ constituted a "per se" violation of Chapter 93A, and alternatively that Enterprise's collision damage waiver was "unfair and deceptive" within the meaning of Chapter 93A, irrespective of any other statutory violation.

In a 5-2 decision, the SJC, which transferred the case from the Appeals Court on its own initiative, held that because the collision damage waiver did not cause the plaintiffs to suffer any loss, they failed to satisfy the causation requirement of Chapter 93A's injury provision, and that a causal connection between a deceptive act and a loss to the consumer was required for any recovery under this statute. Among other things, Chapter 93A gives a consumer a private right of action for injuries or damages incurred by another person's unfair or deceptive trade practices or acts. Pursuant to 940 Code of Massachusetts Regulations, section 3.16, an act that fails to comply with existing consumer protection law triggers a violation of Chapter 93A. In *Hershenow*, the SJC discussed a distinction

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between finding that an act is per se deceptive under Chapter 93A through violation of a consumer protection law, and finding that such act is per se an injury under Chapter 93A.

Both the concurring and dissenting opinions to *Hershenow* disagree with the majority's efforts to distinguish *Hershenow* from an earlier Chapter 93A case, *Leardi v. Brown*, which suggested that violation of a consumer protection law automatically triggered a violation of Chapter 93A and its penalty provisions. In *Leardi v. Brown*, the tenant plaintiffs recovered damages for the defendant landlord's statutorily noncompliant lease provisions despite the tenants' concession that they had not read, and the landlord had never attempted to enforce, the offending provisions of the lease. The *Hershenow* decision may signal a change in the court's interpretation of Chapter 93A and terminate any recovery under Chapter 93A for plaintiffs with speculative injuries. Although no action was taken in the *Hershenow* case on the plaintiff's motion for class certification, this decision could have a significant impact on class action lawsuits based on violations of Chapter 93A, as well as an effect on defendants' decisions to settle such cases.

FACT Act Regs

The Federal Banking Agencies, including the OCC, the Federal Reserve Board, the FDIC, the OTS and the NCUA, recently published final rules which implement Section 411 of the Fair and Accurate Credit Transactions Act of 2003 (the FACT Act) and provide exceptions to the statute's general prohibition on creditors obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer's eligibility for credit. The final rules also create limited exceptions to permit affiliates to share medical information with each other without becoming consumer reporting agencies.

The final FACT Act rules provide specific examples of types of information routinely used in making credit determinations.

Under the final rules, in general, a creditor may obtain and use medical information pertaining to a consumer in order to determine the consumer's eligibility for credit, provided that:

- The information is of the type routinely used in making credit eligibility determinations, such as information relating to debts, expenses, income, benefits, assets, collateral or the purpose of the loan;
- The creditor uses the medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information in a credit transaction; and
- The creditor does not take the consumer's physical, mental or behavioral health, condition or history, type of treatment or prognosis into account as part of any such determination.

The final rules provide specific examples of types of information routinely used in making credit determinations. The final rules also provide specific exceptions for when a creditor may obtain and use medical information in connection with a credit eligibility determination, such as to determine whether the use of a power of attorney or legal representative is necessary and appropriate in a credit transaction when a person seeks to act as such on behalf of a consumer based on an asserted medical condition or event, to prevent or detect fraud, or to comply with applicable local, state or federal law requirements, among others.

The final rules are scheduled to take effect on April 1, 2006. ◆