

2378

2011-2012 Regular Sessions

I N A S S E M B L Y

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Introduced by M. of A. CLARK, HOOPER, ORTIZ, GABRYSZAK -- Multi-Sponsored by -- M. of A. BRENNAN, COLTON, COOK, GANTT, JACOBS, MAGEE, MAYERSOHN, MCENENY, MILLMAN, PERRY, SCARBOROUGH, TOWNS, WRIGHT -- read once and referred to the Committee on Banks

AN ACT to amend the banking law, the real property law, the real property actions and proceedings law, the general business law and the general obligations law, in relation to enacting the "Home Equity Fraud Act"

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Short title. This act shall be known and may be cited as
2 the "Home Equity Fraud Act".
3 S 2. Legislative findings. The legislature hereby finds that many
4 senior citizens and minority homeowners in New York have been targeted
5 by unethical home improvement contractors, mortgage companies, mortgage
6 brokers and finance companies who induce these homeowners into entering
7 into high cost high interest rate mortgage agreements which the homeowner
8 is often unable to afford with the intent of foreclosing on the home
9 and stripping the equity.
10 The legislature further finds that in order to entice people into
11 entering into these agreements they are promised refinancing of primary
12 mortgages, consolidation of loans and outstanding bills and are given
13 cash but often are not told or do not understand that they are securing
14 the loan with a mortgage lien on their home which will lead to foreclosure
15 in the event of default. Often these loans are documented with
16 false and misleading documentation provided by brokers which could easily
17 be determined to be false if checked by the lender. Despite prohibitions
18 contained in federal law many of these loans are based on equity
19 in the home and not on the borrower's ability to pay. Since many of
20 these homeowners live on a fixed income, they are unable to make the
21 required payments and end up losing their homes. This practice appears

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets [] is old law to be omitted.

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1 to be targeted in neighborhoods with a high concentration of senior and
2 minority residents.

3 The legislature further finds that it is in the best interest of the
4 citizens of this state that these unethical practices should be prohib-
5 ited by law and that unscrupulous individuals should be denied the abil-
6 ity to utilize the courts of this state to perpetrate these abuses upon
7 senior citizens and minority residents of this state and does therefore
8 enact this Home Equity Fraud Act in order to prevent predatory lending.

9 S 3. Subdivision 1 of section 595-a of the banking law is amended by
10 adding four new paragraphs (i), (j), (k) and (l) to read as follows:

11 (I) ENGAGING IN ANY ACTIVITY, TRANSACTION OR COURSE OF BUSINESS IN
12 CONNECTION WITH A HOME IMPROVEMENT CONTRACT AS DESCRIBED IN SECTION
13 SEVEN HUNDRED SEVENTY OF THE GENERAL BUSINESS LAW OTHER THAN WITH REGARD
14 TO PROVIDING SERVICES DIRECTLY CONNECTED WITH THE MAKING OF A MORTGAGE
15 LOAN PURSUANT TO THE PROVISIONS OF THIS ARTICLE, AND ONLY IF SUCH
16 SERVICES AND THE FEES PAID OR TO BE PAID IN CONNECTION THEREWITH ARE
17 FULLY DISCLOSED AND AGREED TO IN WRITING BY ALL PARTIES TO THE TRANS-
18 ACTION.

19 (J) CHARGING OR PAYING, EITHER DIRECTLY OR INDIRECTLY, A FEE IN EXCESS
20 OF THE GREATER OF FIVE HUNDRED DOLLARS OR THREE PERCENT OF THE MORTGAGE
21 LOAN FOR THE SERVICES RENDERED BY THE MORTGAGE BROKER.

22 (K) THE FAILURE OF A MORTGAGE BANKER OR EXEMPT ORGANIZATION TO ASSURE
23 THAT NO MORE THAN A TOTAL OF SIX PERCENT OF THE VALUE OF THE LOAN IS
24 CHARGED FOR ALL SERVICES RENDERED IN CONNECTION WITH QUALIFYING FOR AND
25 RECEIVING THE LOAN, PROVIDED THAT ANY FEES WHICH ARE REQUIRED TO BE PAID
26 TO ANY PUBLIC OFFICER FOR THE FILING, RECORDING OR RELEASING IN ANY
27 PUBLIC OFFICE OF A DOCUMENT SECURING THE LOAN AND THE COSTS OF ANY TITLE
28 INSURANCE OR THE FEES OF AN ATTORNEY VOLUNTARILY ENGAGED BY AND SOLELY
29 REPRESENTING THE INTERESTS OF THE BORROWER SHALL NOT BE INCLUDED WITHIN
30 THIS LIMIT.

31 (L) CHARGING A FEE OR ANYTHING OF VALUE IN CONNECTION WITH THE REFI-
32 NANCING OF A MORTGAGE LOAN UNLESS SUCH REFINANCING IS FOR THE PURPOSE OF
33 REDUCING THE RATE ON THE MORTGAGE LOAN IN AN AMOUNT WHICH EXCEEDS THE
34 COST OF SUCH REFINANCE AND WHICH WILL ALLOW THE MORTGAGOR TO RECOVER THE
35 COST OF REFINANCING THE LOAN WITHIN TWO YEARS OF THE DATE OF SUCH REFI-
36 NANCE. THIS PROVISION SHALL NOT APPLY TO ANY ADDITIONAL PROCEEDS IN
37 EXCESS OF THE ORIGINAL LOAN RECEIVED BY A MORTGAGOR IN CONNECTION WITH
38 SUCH REFINANCING.

39 S 4. Paragraph (d) of subdivision 3 of section 595-a of the banking
40 law, as relettered by chapter 400 of the laws of 1993, is relettered
41 paragraph (e) and a new paragraph (d) is added to read as follows:

42 (D) EACH MORTGAGE BROKER, MORTGAGE BANKER AND EXEMPT ORGANIZATION
43 SHALL PROVIDE TO EACH APPLICANT FOR A MORTGAGE LOAN AT OR BEFORE THE
44 TIME OF APPLICATION, IN WRITING:

45 (1) A DISCLOSURE STATING WHETHER THE MORTGAGE LOAN WILL BE RETAINED BY
46 THE ORIGINAL LENDER OR SOLD AFTER CLOSING TO A THIRD PARTY AND IF IT IS
47 TO BE SOLD, THE NAME OF SUCH THIRD PARTY; AND

48 (2) A NOTICE GIVING THE APPLICANT THE RIGHT TO DESIGNATE A THIRD PARTY
49 TO RECEIVE COPIES OF ALL WRITTEN COMMUNICATIONS REGARDING THE LOAN AND
50 SETTING FORTH THE PROCEDURE FOR THE APPLICANT TO EXERCISE SUCH RIGHT.

51 IN THE EVENT THAT THE DISCLOSURE AND NOTICES REQUIRED BY THIS SECTION
52 ARE NOT MADE, THE MORTGAGE LOAN MADE AS A RESULT OF SUCH APPLICATION
53 SHALL NOT BE SOLD OR TRANSFERRED NOR ANY ACTION TAKEN TO ENFORCE THE
54 LENDER'S RIGHTS UNTIL THIRTY DAYS AFTER SUCH DISCLOSURES ARE MADE AND
55 ACKNOWLEDGED BY THE BORROWER.

1 S 5. Subdivision (d) of section 347 of the banking law, as amended by
2 chapter 22 of the laws of 1990, is amended and a new subdivision (e) is
3 added to read as follows:

4 (d) The licensee has engaged in the business of a sales finance compa-
5 ny and has done or failed to do any act, except the failure to pay the
6 fees required, which would be grounds for the suspension or revocation
7 of its license pursuant to section four hundred ninety-five of this
8 chapter were it required to obtain such a license[.];

9 (E) THE LICENSEE HAS ENGAGED IN ANY ACTIVITY, TRANSACTION OR COURSE OF
10 BUSINESS OR HAS PAID OR OBTAINED ANY MONEY OR OTHER THING OF VALUE IN
11 CONNECTION WITH A HOME IMPROVEMENT CONTRACT AS DEFINED IN SECTION SEVEN
12 HUNDRED SEVENTY OF THE GENERAL BUSINESS LAW WITHOUT FULLY DISCLOSING
13 SUCH ACTIVITY, TRANSACTION OR COURSE OF BUSINESS AND ANY FEES OR THING
14 OF VALUE PAID OR TO BE PAID IN CONNECTION THEREWITH AND WITHOUT HAVING
15 OBTAINED THE AGREEMENT IN WRITING FROM ALL PARTIES TO THE TRANSACTION.

16 S 6. Section 592-a of the banking law is amended by adding a new
17 subdivision 3 to read as follows:

18 3. ANY MORTGAGE BROKER REGISTERED UNDER THIS ARTICLE WHO IN ANY WAY
19 PLACES WITH OR OBTAINS A MORTGAGE LOAN FROM A MORTGAGE BANKER OR EXEMPT
20 ORGANIZATION REGISTERED UNDER THIS ARTICLE SHALL FOR ALL PURPOSES BE
21 DEEMED TO BE AN AGENT OF SUCH BANKER OR EXEMPT ORGANIZATION. ANY
22 ATTEMPT BY ANY PERSON TO VOID THIS PROVISION BY CONTRACT OR IN ANY OTHER
23 WAY SHALL BE VOID AS AGAINST PUBLIC POLICY.

24 S 7. The real property law is amended by adding a new section 254-e to
25 read as follows:

26 S 254-E. CERTAIN MORTGAGE PROVISIONS PROHIBITED. NO MORTGAGE ON A LOAN
27 SECURED PRIMARILY BY AN INTEREST IN REAL PROPERTY USED AS A PRIMARY
28 RESIDENCE BY THE MORTGAGOR AT THE TIME SUCH LOAN IS MADE SHALL CONTAIN
29 ANY PROVISION WHICH:

- 30 1. ALLOWS FOR A BALLOON PAYMENT; OR
31 2. ALLOWS FOR A PAYMENT SCHEDULE WITH REGULAR PERIODIC PAYMENTS THAT
32 CAUSE THE PRINCIPAL BALANCE TO INCREASE; OR
33 3. ALLOWS FOR A PROVISION STATING THAT THE INTEREST RATE OF THE LOAN
34 UNDERLYING THE MORTGAGE INCREASES AFTER DEFAULT.

35 S 8. The real property actions and proceedings law is amended by
36 adding a new section 1308 to read as follows:

37 S 1308. NOTICE TO MORTGAGOR OR OWNER. IN ALL FORECLOSURE ACTIONS THE
38 MORTGAGEE, UPON COMMENCEMENT OF A FORECLOSURE PROCEEDING, SHALL SERVE
39 THE MORTGAGOR AT THE SAME TIME AS SERVICE OF THE SUMMONS AND COMPLAINT,
40 A NOTICE IN THE FOLLOWING FORM:

41 "NOTICE TO MORTGAGOR OR OWNER:

42 YOU HAVE BEEN SERVED WITH A SUMMONS AND COMPLAINT IN A MORTGAGE FORE-
43 CLOSURE PROCEEDING. IF YOU FAIL TO RESPOND TO THESE IMPORTANT LEGAL
44 DOCUMENTS, YOU MAY LOSE YOUR HOME.

45 READ THIS CAREFULLY:

46 YOU MAY BE ABLE TO PREVENT YOUR HOME FROM BEING LOST IN A FORECLOSURE
47 ACTION.

48 STATE AND FEDERAL LAWS ALLOW YOU TO DEFEND FORECLOSURE PROCEEDINGS IN
49 CERTAIN CIRCUMSTANCES AND MAY ALLOW YOU TO PREVENT A FORECLOSURE ON YOUR
50 HOME. YOU MAY BE ABLE TO OFFER DEFENSES IN THIS FORECLOSURE PROCEEDING
51 UNDER THE FOLLOWING CIRCUMSTANCES:

52 1. IF YOU GAVE A MORTGAGE ON YOUR HOME AS THE RESULT OF A DOOR TO DOOR
53 TRANSACTION;

54 2. IF YOU GAVE A MORTGAGE ON YOUR HOME IN ORDER TO FINANCE A HOME
55 IMPROVEMENT CONTRACT;

1 3. IF YOU DID NOT UNDERSTAND THAT YOU WERE SIGNING A MORTGAGE OR WERE
2 UNAWARE THAT YOU HAD A MORTGAGE ON YOUR HOME;

3 4. IF YOU WERE ON PUBLIC ASSISTANCE AT THE TIME YOU GAVE A MORTGAGE ON
4 YOUR HOME, OR WERE RETIRED AND COLLECTING SOCIAL SECURITY OR SSI AND THE
5 PERSON WHO TOOK THE MORTGAGE ON YOUR HOME KNEW YOU HAD A FIXED INCOME;

6 5. IF YOU WERE ON A LIMITED FIXED INCOME AT THE TIME YOU GAVE THE
7 MORTGAGE ON YOUR HOME.

8 ALSO, YOUR MORTGAGE DOCUMENTS MAY CONTAIN LANGUAGE STATING YOUR RIGHTS
9 UNDER THE CONTRACT IN CASES WHERE YOU ARE SUBJECT TO FORECLOSURE.

10 IF YOU THINK THAT YOU MAY HAVE A DEFENSE TO THIS FORECLOSURE PROCEED-
11 ING YOU MUST ACT PROMPTLY - FAILURE TO ANSWER THE ENCLOSED SUMMONS AND
12 COMPLAINT WILL ALLOW THE MORTGAGEE'S OR BANK'S ATTORNEYS TO ENTER A
13 DEFAULT JUDGMENT AGAINST YOU.

14 THE FRONT OF THE SUMMONS WILL TELL YOU HOW MANY DAYS YOU HAVE TO
15 ANSWER BEFORE THE MORTGAGEE OR BANK MAY ENTER A DEFAULT JUDGMENT AGAINST
16 YOU.

17 YOU MAY CONSULT AN ATTORNEY, INCLUDING LEGAL AID IF YOU QUALIFY. THE
18 LAW, (NEW YORK REAL PROPERTY ACTIONS AND PROCEEDINGS LAW ARTICLE 13)
19 PROVIDES DEFENSES FOR CERTAIN MORTGAGORS AND HOMEOWNERS.

20 THE PHONE NUMBERS AND OFFICE ADDRESSES FOR YOUR LOCAL LEGAL AID
21 OFFICES ARE CONTAINED IN YOUR TELEPHONE DIRECTORY. IF YOUR PHONE BOOK
22 HAS GOVERNMENT PAGES, THE PHONE NUMBER AND OFFICE ADDRESSES OF YOUR
23 LOCAL LEGAL AID OFFICES SHOULD BE LISTED THERE ALSO.

24 ONLY A QUALIFIED ATTORNEY CAN TELL YOU ALL OF YOUR RIGHTS IN THIS
25 PROCEEDING.

26 YOU MUST ACT PROMPTLY OR YOU MAY LOSE YOUR HOME."

27 S 9. The real property actions and proceedings law is amended by
28 adding a new section 1309 to read as follows:

29 S 1309. PLEADING REQUIRED. 1. ANY COMPLAINT SERVED IN A PROCEEDING
30 INITIATED PURSUANT TO THIS ARTICLE RELATING TO A MORTGAGE LOAN WHICH WAS
31 INITIATED BY A MORTGAGE BANKER OR EXEMPT ORGANIZATION REGISTERED PURSU-
32 ANT TO SECTION FIVE HUNDRED NINETY-ONE OF THE BANKING LAW MUST CONTAIN
33 AN AFFIRMATIVE ALLEGATION, WHICH ALLEGATION MUST BE PROVEN TO THE SATIS-
34 FACTION OF THE COURT, THAT SUCH MORTGAGE BANKER OR EXEMPT ORGANIZATION
35 HAS COMPLIED WITH ALL OF THE PROVISIONS OF SECTION FIVE HUNDRED NINETY-
36 FIVE-A OF THE BANKING LAW.

37 2. IN ANY ACTION BROUGHT UNDER THIS ARTICLE IN WHICH THE MORTGAGE TO
38 BE FORECLOSED AROSE FROM THE REFINANCING OF A PERSONAL RESIDENCE WHICH
39 WAS OWNED BY THE DEFENDANT FOR MORE THAN FIVE YEARS PRIOR TO THE DATE OF
40 SUCH MORTGAGE IT SHALL BE AN AFFIRMATIVE DEFENSE THAT: (A) AT THE TIME
41 OF THE LOAN ORIGINATION THE MORTGAGOR DID NOT HAVE THE FINANCIAL ABILITY
42 TO REPAY THE LOAN AND THAT THE FINANCIAL INSTITUTION KNEW OR SHOULD HAVE
43 KNOWN THAT THE MORTGAGOR WOULD NOT BE ABLE TO REPAY SUCH LOAN; (B) THE
44 MORTGAGE BROKER, MORTGAGE BANKER OR EXEMPT ORGANIZATION WHICH ORIGINATED
45 THE LOAN VIOLATED ANY PROVISION OF SECTION FIVE HUNDRED NINETY-FIVE-A OF
46 THE BANKING LAW; OR (C) THE MORTGAGE DOCUMENT CONTAINS A PROVISION
47 PROHIBITED BY SECTION TWO HUNDRED FIFTY-FOUR-E OF THE REAL PROPERTY LAW.
48 THE COURT MAY CONSIDER FACTORS INCLUDING BUT NOT LIMITED TO THE FACT
49 THAT THE MORTGAGOR WAS NOT EMPLOYED AND UNLIKELY TO OBTAIN FUTURE
50 EMPLOYMENT, THE FACT THAT THE MORTGAGOR WAS LIVING ON A FIXED INCOME OR
51 WAS THE RECIPIENT OF FEDERAL OR STATE ENTITLEMENT OF PUBLIC ASSISTANCE
52 OR THAT THE PAYMENTS REQUIRED BY SUCH MORTGAGE LOAN, TOGETHER WITH THE
53 PAYMENTS REQUIRED BY ANY OTHER LOAN SECURED BY THE PREMISES TO BE FORE-
54 CLOSED, WERE MORE THAN FIFTY PERCENT OF THE MORTGAGOR'S AFTER TAX MONTH-
55 LY INCOME AS OF THE DATE OF THE LOAN. FOR PURPOSES OF THIS SECTION, THE
56 TERM FINANCIAL INSTITUTION SHALL INCLUDE ANY BANKING ORGANIZATION, MORT-

1 GAGE BROKER, MORTGAGE BANKER OR LICENSED LENDERS INVOLVED IN THE ORIGI-
2 NATION OF THE MORTGAGE BEING FORECLOSED AND ANY ASSIGNEE OR SUCCESSOR OF
3 SUCH PERSON OR ENTITY. IN ANY ACTION BROUGHT UNDER THIS ARTICLE IN
4 WHICH ANY SUCH AFFIRMATIVE DEFENSE IS PROVEN TO THE SATISFACTION OF THE
5 FINDER OF FACT, THE COURT MAY AWARD REASONABLE ATTORNEY FEES TO THE
6 DEFENDANT.

7 S 10. Paragraph (h) of subdivision 1 of section 771 of the general
8 business law, as amended by chapter 32 of the laws of 1989, is amended
9 to read as follows:

10 (h) A notice to the owner that, in addition to any right otherwise to
11 revoke an offer, the owner may cancel the home improvement contract
12 until midnight of the [third] FIFTEENTH business day after the day on
13 which the owner has signed an agreement or offer to purchase relating to
14 such contract. Cancellation occurs when written notice of cancellation
15 is given to the home improvement contractor. Notice of cancellation, if
16 given by mail, shall be deemed given when deposited in a mailbox proper-
17 ly addressed and postage prepaid. Notice of cancellation shall be suffi-
18 cient if it indicates the intention of the owner not to be bound.
19 Notwithstanding the foregoing, this paragraph shall not apply to a tran-
20 saction in which the owner has initiated the contact and the home
21 improvement is needed to meet a bona fide emergency of the owner, and
22 the owner furnishes the home improvement contractor with a separate
23 dated and signed personal statement in the owner's handwriting describ-
24 ing the situation requiring immediate remedy and expressly acknowledging
25 and waiving the right to cancel the home improvement contract within
26 [three] FIFTEEN business days. For the purposes of this paragraph the
27 term "owner" shall mean an owner or any representative of an owner.

28 S 11. The general business law is amended by adding a new section
29 771-b to read as follows:

30 S 771-B. RESPONSIBILITIES OF HOME IMPROVEMENT CONTRACTORS. 1. NO HOME
31 IMPROVEMENT CONTRACTOR SHALL ENGAGE IN ANY ACTIVITY, TRANSACTION OR
32 COURSE OF BUSINESS OR PAY OR RECEIVE ANY FEE, PAYMENT, MONEY OR OTHER
33 THING OF VALUE IN CONNECTION WITH THE FINANCING OF A HOME IMPROVEMENT
34 CONTRACT WITHOUT FULLY DISCLOSING SUCH ACTIVITY, TRANSACTION OR COURSE
35 OF BUSINESS AND ANY FEES, PAYMENT OR OTHER THING OF VALUE PAID OR TO BE
36 PAID IN CONNECTION THEREWITH AND WITHOUT HAVING OBTAINED THE AGREEMENT
37 IN WRITING FROM ALL PARTIES TO THE TRANSACTION TO SUCH ACTIVITY AND THE
38 PAYMENT THEREFOR.

39 2. IN ADDITION TO ANY RIGHT OTHERWISE TO REVOKE A HOME IMPROVEMENT
40 CONTRACT, THE BUYER MAY CANCEL SUCH CONTRACT UNTIL MIDNIGHT OF THE
41 FIFTEENTH DAY AFTER THE HOME IMPROVEMENT CONTRACT WAS SIGNED BY BOTH
42 PARTIES. CANCELLATION SHALL OCCUR WHEN WRITTEN NOTICE OF CANCELLATION IS
43 GIVEN TO THE HOME IMPROVEMENT CONTRACTOR. NOTICE OF CANCELLATION, IF
44 GIVEN BY MAIL, SHALL BE DEEMED GIVEN WHEN DEPOSITED IN A MAILBOX PROPER-
45 LY ADDRESSED AND POSTAGE PREPAID. NOTICE OF CANCELLATION NEED NOT TAKE
46 ANY PRESCRIBED FORM AND SHALL BE SUFFICIENT IF IT INDICATES THE INTEN-
47 TION OF THE SIGNATORY NOT TO BE BOUND. NOTWITHSTANDING THE FOREGOING,
48 THIS SUBDIVISION SHALL NOT APPLY TO A TRANSACTION IN WHICH THE OWNER HAS
49 INITIATED THE CONTACT AND THE HOME IMPROVEMENT IS NEEDED TO MEET A BONA
50 FIDE EMERGENCY OF THE OWNER, AND THE OWNER FURNISHES THE HOME IMPROVE-
51 MENT CONTRACTOR WITH A SEPARATE DATED AND SIGNED PERSONAL STATEMENT IN
52 THE OWNER'S HANDWRITING DESCRIBING THE SITUATION REQUIRING IMMEDIATE
53 REMEDY AND EXPRESSLY ACKNOWLEDGING AND WAIVING THE RIGHT TO CANCEL THE
54 HOME IMPROVEMENT CONTRACT WITHIN FIFTEEN BUSINESS DAYS. FOR THE PURPOSES
55 OF THIS SUBDIVISION THE TERM "OWNER" SHALL MEAN AN OWNER OR ANY REPRE-
56 SENTATIVE OF AN OWNER.

1 3. NO HOME IMPROVEMENT CONTRACT SHALL BE ENFORCEABLE UNLESS AT THE
2 TIME IT IS SIGNED BY THE HOMEOWNER, THE HOME IMPROVEMENT CONTRACTOR
3 SHALL FURNISH TO THE HOMEOWNER A NOTICE CONTAINING A STATEMENT IN
4 SUBSTANTIALLY THE FOLLOWING FORM:

5 YOU THE HOMEOWNER, MAY CANCEL THIS CONTRACT AT ANY TIME PRIOR TO
6 MIDNIGHT OF THE FIFTEENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT.
7 SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION.

8 S 12. The general obligations law is amended by adding a new section
9 5-336 to read as follows:

10 S 5-336. CERTAIN HOME EQUITY LOAN CONTRACTS; ENFORCEABILITY. 1. ANY
11 LOAN MADE IN VIOLATION OF SECTION FIVE HUNDRED NINETY-FIVE-A OF THE
12 BANKING LAW SHALL BE UNENFORCEABLE AND NO DEFAULT JUDGMENT SHALL BE
13 ENTERED IN ANY ACTION AS A RESULT OF THE ALLEGED DEFAULT OF THE DEFEND-
14 ANT TO MAKE PAYMENTS PURSUANT TO A LOAN AGREEMENT WHICH AROSE AS THE
15 RESULT OF THE REFINANCE OF A PERSONAL RESIDENCE OWNED BY THE DEFENDANT
16 WHETHER OR NOT SECURED BY A MORTGAGE UNLESS THE COURT MAKES AN AFFIRMA-
17 TIVE FINDING OF FACT IN WRITING THAT THE PROVISIONS OF SECTION FIVE
18 HUNDRED NINETY-FIVE-A OF THE BANKING LAW HAVE NOT BEEN VIOLATED.

19 2. IN ANY ACTION BROUGHT SEEKING ENFORCEMENT OF A LOAN AGREEMENT WHICH
20 AROSE FROM THE REFINANCING OF A PERSONAL RESIDENCE WHICH WAS OWNED BY
21 THE DEFENDANT FOR MORE THAN FIVE YEARS PRIOR TO THE DATE OF SUCH LOAN IT
22 SHALL BE AN AFFIRMATIVE DEFENSE THAT: (A) AT THE TIME OF THE LOAN ORIGI-
23 NATION THE BORROWER DID NOT HAVE THE FINANCIAL ABILITY TO REPAY THE LOAN
24 AND THAT THE FINANCIAL INSTITUTION KNEW OR SHOULD HAVE KNOWN THAT THE
25 BORROWER WOULD NOT BE ABLE TO REPAY SUCH LOAN; (B) THE MORTGAGE BROKER,
26 MORTGAGE BANKER OR EXEMPT ORGANIZATION WHICH ORIGINATED THE LOAN
27 VIOLATED ANY PROVISION OF SECTION FIVE HUNDRED NINETY-FIVE-A OF THE
28 BANKING LAW; OR (C) ANY MORTGAGE DOCUMENT SIGNED CONTEMPORANEOUSLY WITH
29 THE LOAN CONTAINS A PROVISION PROHIBITED BY SECTION TWO HUNDRED
30 FIFTY-FOUR-E OF THE REAL PROPERTY LAW. THE COURT MAY CONSIDER FACTORS
31 INCLUDING BUT NOT LIMITED TO THE FACT THAT THE MORTGAGOR WAS NOT
32 EMPLOYED AND UNLIKELY TO OBTAIN FUTURE EMPLOYMENT, THE FACT THAT THE
33 MORTGAGOR WAS LIVING ON A FIXED INCOME OR WAS THE RECIPIENT OF FEDERAL
34 OR STATE ENTITLEMENT OF PUBLIC ASSISTANCE OR THAT THE PAYMENTS REQUIRED
35 BY SUCH LOAN, TOGETHER WITH THE PAYMENTS REQUIRED BY ANY OTHER LOAN
36 SECURED BY THE PREMISES SECURING SUCH LOAN, WERE MORE THAN FIFTY PERCENT
37 OF THE BORROWER'S AFTER TAX MONTHLY INCOME AS OF THE DATE OF THE LOAN.
38 FOR PURPOSES OF THIS SECTION, THE TERM FINANCIAL INSTITUTION SHALL
39 INCLUDE ANY BANKING ORGANIZATION, MORTGAGE BROKER, MORTGAGE BANKER OR
40 LICENSED LENDER INVOLVED IN THE ORIGINATION OF THE LOAN FOR WHICH
41 ENFORCEMENT IS SOUGHT AND ANY ASSIGNEE OR SUCCESSOR OF SUCH PERSON OR
42 ENTITY. IN ANY SUCH ACTION IN WHICH SUCH AFFIRMATIVE DEFENSE IS PROVEN
43 TO THE SATISFACTION OF THE FINDER OF FACT, THE COURT MAY AWARD REASON-
44 ABLE ATTORNEY FEES TO THE DEFENDANT.

45 S 13. This act shall take effect on the first of October next succeed-
46 ing the date on which it shall have become a law; provided, however,
47 that any rules, regulations or actions necessary to implement the
48 provisions of this act on its effective date are immediately authorized
49 and directed to be promulgated, repealed or amended on or before such
50 effective date.