

7271

I N S E N A T E

May 2, 2012

Introduced by Sen. DIAZ -- read twice and ordered printed, and when printed to be committed 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
22 to be targeted in neighborhoods with a high concentration of senior and
23 minority residents.
24 The legislature further finds that it is in the best interest of the
25 citizens of this state that these unethical practices should be prohibited
26 by law and that unscrupulous individuals should be denied the abil-

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

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ity to utilize the courts of this state to perpetrate these abuses upon senior citizens and minority residents of this state and does therefore enact this Home Equity Fraud Act in order to prevent predatory lending.

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

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

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

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

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

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

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

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

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

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

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

(d) The licensee has engaged in the business of a sales finance company and has done or failed to do any act, except the failure to pay the fees required, which would be grounds for the suspension or revocation

1 of its license pursuant to section four hundred ninety-five of this
2 chapter were it required to obtain such a license[.];

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

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

12 3. ANY MORTGAGE BROKER REGISTERED UNDER THIS ARTICLE WHO IN ANY WAY
13 PLACES WITH OR OBTAINS A MORTGAGE LOAN FROM A MORTGAGE BANKER OR EXEMPT
14 ORGANIZATION REGISTERED UNDER THIS ARTICLE SHALL FOR ALL PURPOSES BE
15 DEEMED TO BE AN AGENT OF SUCH BANKER OR EXEMPT ORGANIZATION. ANY
16 ATTEMPT BY ANY PERSON TO VOID THIS PROVISION BY CONTRACT OR IN ANY OTHER
17 WAY SHALL BE VOID AS AGAINST PUBLIC POLICY.

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

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

- 24 1. ALLOWS FOR A BALLOON PAYMENT; OR
- 25 2. ALLOWS FOR A PAYMENT SCHEDULE WITH REGULAR PERIODIC PAYMENTS THAT
- 26 CAUSE THE PRINCIPAL BALANCE TO INCREASE; OR
- 27 3. ALLOWS FOR A PROVISION STATING THAT THE INTEREST RATE OF THE LOAN
- 28 UNDERLYING THE MORTGAGE INCREASES AFTER DEFAULT.

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

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

35 "NOTICE TO MORTGAGOR OR OWNER:

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

39 READ THIS CAREFULLY:

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

42 STATE AND FEDERAL LAWS ALLOW YOU TO DEFEND FORECLOSURE PROCEEDINGS IN
43 CERTAIN CIRCUMSTANCES AND MAY ALLOW YOU TO PREVENT A FORECLOSURE ON YOUR
44 HOME. YOU MAY BE ABLE TO OFFER DEFENSES IN THIS FORECLOSURE PROCEEDING
45 UNDER THE FOLLOWING CIRCUMSTANCES:

- 46 1. IF YOU GAVE A MORTGAGE ON YOUR HOME AS THE RESULT OF A DOOR TO DOOR
- 47 TRANSACTION;
- 48 2. IF YOU GAVE A MORTGAGE ON YOUR HOME IN ORDER TO FINANCE A HOME
- 49 IMPROVEMENT CONTRACT;
- 50 3. IF YOU DID NOT UNDERSTAND THAT YOU WERE SIGNING A MORTGAGE OR WERE
- 51 UNAWARE THAT YOU HAD A MORTGAGE ON YOUR HOME;
- 52 4. IF YOU WERE ON PUBLIC ASSISTANCE AT THE TIME YOU GAVE A MORTGAGE ON
- 53 YOUR HOME, OR WERE RETIRED AND COLLECTING SOCIAL SECURITY OR SSI AND THE
- 54 PERSON WHO TOOK THE MORTGAGE ON YOUR HOME KNEW YOU HAD A FIXED INCOME;
- 55 5. IF YOU WERE ON A LIMITED FIXED INCOME AT THE TIME YOU GAVE THE
- 56 MORTGAGE ON YOUR HOME.

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

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

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

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

13 THE PHONE NUMBERS AND OFFICE ADDRESSES FOR YOUR LOCAL LEGAL AID
14 OFFICES ARE CONTAINED IN YOUR TELEPHONE DIRECTORY. IF YOUR PHONE BOOK
15 HAS GOVERNMENT PAGES, THE PHONE NUMBER AND OFFICE ADDRESSES OF YOUR
16 LOCAL LEGAL AID OFFICES SHOULD BE LISTED THERE ALSO.

17 ONLY A QUALIFIED ATTORNEY CAN TELL YOU ALL OF YOUR RIGHTS IN THIS
18 PROCEEDING.

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

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

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

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

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

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

22 S 11. The general business law is amended by adding a new section
23 771-b to read as follows:

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

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

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

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

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

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

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

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